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PROTECTION FROM POWER UNDER ENGLISH LAW

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Protection from Power under English Law

BY

LORD MACDERMOTT

Lord Chief Justice of Northern Ireland.

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THE Hamlyn Trust came into existence under the will of the late Miss Emma Warburton Hamlyn, of Torquay, who died in 1941, aged 80. She came of an old and well-known Devon family. Her father, William Bussell Hamlyn, practised in Torquay as a solicitor for many years. She was a woman of dominant character, intelligent and cultured, well versed in literature, music and art, and a lover of her country. She inherited a taste for law, and studied the subject. She travelled frequently on the Continent and about the Mediterranean and gathered impressions of comparative jurisprudence and ethnology.

Miss Hamlyn bequeathed the residue of her estate in terms which were thought vague. The matter was taken to the Chancery Division of the High Court, which on November 29, 1948, approved a scheme for the administration of the Trust. Paragraph 3 of the Scheme is as follows:—

> "The object of this charity is the furtherance by lectures or otherwise among the Common People of the United Kingdom of Great Britain and Northern Ireland of the knowledge of the Comparative Jurisprudence and the Ethnology of the chief European countries, including the United Kingdom, and the circumstances of the growth of such jurisprudence to the intent that the Common People of the United Kingdom may realise the privileges which in law and custom they enjoy in comparison with other European

Peoples and realising and appreciating such privileges may recognise the responsibilities and obligations attaching to them."

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The ninth series of lectures was delivered by the Right Hon. Lord MacDermott, at the Queen's University of Belfast in November, 1957.

JOHN MURRAY,
Chairman of the Trustees.

November, 1957.

INTRODUCTORY

Chapter 1

INTRODUCTORY

Power is a word of such wide meaning, and so freely used in relation to so many different things, that it would be hopeless to attempt any close or exact definition of the subject of these Lectures. All I can do by way of introduction at this early stage is to describe my purpose in general terms and then to state my reasons for thinking that, however vague and nebulous it may seem, Protection from Power is today a topic of much practical importance, particularly for those—the ordinary men and women of this Kingdom —in whose interest the Hamlyn Trust was founded.

It would, of course, be idle to suggest that the law should protect the citizen from all power. Whatever effect it may have on those who wield it, power does not necessarily corrupt those who are subject to it, and we must bear in mind that the law with which we are now concerned depends on the power of the State for its enforcement and would have little protective value without it. I therefore leave to one side the kind of power that we may fairly regard as benevolent or that we cannot afford to dispense with in a free but ordered community. Nor do I wish to trace the various concepts, such as the doctrine of equitable fraud, by which English law has sought to promote fair dealing between man and man, or those procedures, such as *habeas corpus*, which protect the citizen when his essential rights are assailed by

others, be those others weak or strong. The law must protect the wronged against those whom it recognises as wrongdoers, but wrongdoing is not necessarily an abuse of power unless one uses the word "power" in the narrow sense of connoting a capacity to do some injurious thing. It is not my intention to pursue that limited aspect of the subject. What I am principally concerned with are those concentrations or regions of power which, by their weight or their nature, conduce to the oppression of the individual. How and to what extent does the law react towards power of that order? How far does it succour those upon whom such power bears? Is it the law's function to keep a fair balance between those who have and those who are subject to such power? And, if so, does the law discharge that function?

It goes without saying that those who hold the reins of government should be vitally concerned in these questions. But what reason is there for thinking that the same questions, and the sort of power round which they cluster, are also of first importance for the ordinary citizen? He has the vote, but his responsibilities are relatively small. Why should he trouble himself with something difficult about which he alone can do little? The answer to this, as I see it, is twofold. In the first place the time has arrived when, in his own interests no less than in those of the nation, the ordinary citizen must become better versed in the purpose and the development of the law that rules him. And secondly, his efforts in this direction will avail him little if he neglects the problem of the control of power; for it is on the understanding of

that problem more than on the amenities and frills of better living that his liberties and those of his posterity will eventually depend. In the final analysis, the common weal requires that knowledge and political power should go together; and political power is now pouring into our ordinary citizen's hands. This is happening at a critical time in our affairs and in circumstances that confront the country with certain facts and issues to which I must now refer.

It is still true that most British people take the legal system under which they live, move and have their being very much for granted. They respect and support it, yet they are not curious about its structure or how it works. They look on the law as something that keeps the unruly in place and provides the popular press with a lot of its news, and they have no great thirst, so far, for a fuller knowledge.

When life was simpler and the individual had room to manage his own concerns without the constant danger of impinging on the rights of others or of contravening the regulations of some Government Department or public body, this attitude may have been sensible enough. As a nation we are not given to wearing ourselves down with premature anxieties or the acquisition of unnecessary knowledge, and this trait may, on occasion, have enabled us to husband our energies and endure to the end. But today the situation is so different that the habit of looking askance at the law has nothing left to commend it. New ideas, new discoveries, the aftermath of two world wars, have all conspired to revolutionise the pattern of our society, and since each new social experiment has its own legal framework and produces

its own quota of new rights and duties, the law has become woven into our lives as never before. In such matters, for example, as taxation, planning, the licensing or regulation of occupations, education and the other social services, the law now touches and affects the prosperity and happiness of ourselves and our children in a manner and to an extent that has no peacetime parallel. It is not my desire to complain of the changes that have thus cascaded upon us. I expect history will find many of them good and most of them politically inevitable. But some day history may also find—perhaps because we have been indifferent or have let ourselves be distracted by the fret of other problems—that, at a time of rapid growth and change, we allowed our laws to develop on wrong lines and so as to imperil the health and strength of the whole body politic. Any reasonable person would, I think, be slow to reach such a finding at present; but fundamental requirements are easily obscured by the mounting strains and stresses of modern life, and we can more easily avoid that verdict in the future if we recognise the danger of it now.

To do that we must do more than study what our laws are. What we need, above all, is to ponder the essentials that they should seek to nourish and promote. At present the world is sharply divided on this question, and to consider it in any detail would be to travel well beyond the scope of these Lectures; but it will be a convenient approach to my subject and one which may help to maintain a proper perspective, if I refer in outline to several outstanding considerations that should govern our laws and their

making. An extensive list would be controversial and I shall confine myself to three fundamental items.

(1) The law, in its substance and procedure, should be such as to preserve public order effectually. This is a first task. Its due discharge will not necessarily keep the country virtuous or prevent its decline, but internal peace and security are essential if the members of this or any other community are to have a proper opportunity of defending themselves and of fostering that capacity to cohere and to develop their institutions without which a country cannot attain its full stature. What is required for this purpose is a reasonably certain body of positive, enforceable law. I venture this platitude because the current international situation has produced much confusion as to the nature of the law that binds a people together. Many nowadays seem to think that a stable world government may be built on a foundation of expediency and power politics and that the same sort of mixture should serve our national requirements. At a time when the Assembly of the United Nations can be regarded by some as a court of justice, others may be pardoned for failing to grasp that our personal liberties as citizens of this Kingdom depend on a very different conception of what law is, on the kind of law that lays down its standards of conduct and enforces them fairly against those who transgress.

(2) The law should also enshrine the "rule of law." This is the badge of a free people. The full significance of the expression is hard to catch accurately in words: but it stands for equality (or at least a very high degree of equality) before the law, for the independence of the courts, for the absence of arbitrary

government and for established sources of law. It prefers the individual to the State and suffers whenever the normal freedoms and liberties of the former are curtailed without just cause.

(3) The law, as a whole, should stand for what is morally superior. Its purposes and consequences should contain a substantial element of what is fair and just and of good report. As the law must, in general, be uniform if it is to rule all, it cannot be invariably fair and just to the individual; and what is of good report is often very much a matter of opinion. We should not expect a vigorous community to think alike about all the purposes of the law any more than we expect all the parties to a suit to be pleased with the decision of the court. In this Kingdom, however, I believe it is true to say that when everything that is contentious and debatable is taken out of the way, there remains a remarkably wide and firm unanimity as to what is fair and just and good. If the law is to advance the best interests of those whom it serves it cannot afford to ignore this powerful body of basic public opinion. If it does and the divergence becomes marked, the law falls out of respect, standards decline and the rule of law grows vulnerable. But if, on the other hand, the law continues to reflect this basic common view, standards should tend to rise and the nation should want to reach forward.

To guard the future an eye must be kept on all three of these considerations; but it is, I think, of importance that particular attention should be given to the need to maintain the moral strength of our law which is what item (3) really comes to. If the law

is ineffectual to keep the peace the defect will soon be manifest; and the present international situation, with its sharply opposed ideologies, makes it likely that for some considerable time any obvious attack upon the rule of law will provoke early comment and resistance. But when one comes to item (3) a significant falling away might easily escape detection. The danger here is insidious and retrogression may readily be ascribed to wrong causes.

How, then, is the ordinary citizen to find out whether our law is departing from what he would want it to be in terms of what is fair and just and good? There is no easy way of doing this and we must beware of building too much on single instances. It is strange, for example, that in the Homicide Act, 1957, a statute addressed to a great moral issue, we should find the poisoner spared and the man who shoots, in circumstances which just fail to reduce his crime to manslaughter, condemned to death. That is disturbing, but, in itself, it falls far short of justifying the conclusion that Parliament is now only concerned with considerations of expediency. We can, however, get somewhere by taking soundings at a number of different points, and what I wish to do in the course of these Lectures is to take some such soundings in the vital region of Protection from Power. There we come very near the heart of the matter and there we may find much to inform us respecting the social and political health of the community to which we belong.

My soundings must be limited, for it would be impossible to cover anything like the whole field in the time at my disposal. What I propose is to examine this question in two stages according to the nature

of the relationships involved. The first stage will be concerned with relationships between subject and State, and there I shall discuss the power of prosecution and then the power to prejudice the individual in the realm of civil rights. The second stage will be concerned with special relationships between subjects or groups of subjects, and in it I shall consider such matters as the power of wealth, status, monopoly and restrictive association and, what maybe raises the biggest problem of all, the power of numbers.

THE POWER OF PROSECUTION

Chapter 2

THE POWER OF PROSECUTION

The discovery and punishment of crime are functions which produce a dramatic preponderance of power on the part of the State. Against the wealth and resources of the prosecution the accused stands relatively poor and alone and, far more often than not, his case and its personal problems arouse little general interest or concern. In such circumstances the urge to get at the truth and to convict the guilty which excites most prosecutors may be armed with a great variety of weapons. The choice of these is important for it cannot but throw light on the nature of the system to which it belongs, on the extent to which that system recognizes the dignity and worth of man, and on the place it accords to the rule of law. At one extreme, the infliction of pain, the denial of the most elementary rights and the application of all kinds of indirect pressure are still, as they have been for ages, the chosen instruments. At the other stands the established procedure of English criminal law under which the rights of an accused person, before and during trial, are probably better defined and more scrupulously respected than under any other system.

The development and extent of the protection thus given by English law invite attention to two topics which have no obvious interconnection, but which, in their conjoint effect, have exercised a powerful influence on the quality of our penal code. They are—

(1) the attitude of the courts to torture and confession, and (2) the office of the Attorney-General. In speaking of each I shall have to start in the past for it is only by so doing that we can hope to detect the persistent strength of the views and traditions that have combined to curb and regulate the power of prosecution under English law.

Shall he be Made to Speak?

Before and after the Norman Conquest one of the common ways of deciding the guilt or innocence of a person charged with what we call a crime was trial by ordeal—a ceremonial appeal to the supernatural usually carried out under clerical supervision.

The principal Anglo-Saxon ordeals appear to have been four in number, and a brief indication of their nature will help us to appreciate the magnitude of the task that confronted those who had to find a better way of doing justice. In the ordeal of hot iron the accused had to carry a hot iron in his hand for nine steps. His hand was then bound up. If, when uncovered on the third day, it festered he was guilty; if healthy he was innocent. The ordeal of hot water seems to have been conducted on rather similar lines. The ordeal of cold water, however, was quite a different matter. The accused was thrown into water. If he floated he was guilty; if he sank he was innocent. This ordeal came to be associated with trials for witchcraft and explains the expression "swimming a witch." The ordeal of the morsel consisted in giving the accused a piece of bread or cheese, one ounce in weight, which was adjured to stick in his throat if he was guilty. If it did, he was; if it went

down, he was innocent. I have never been able to get a clear picture of how these ordeals worked in practice. They sound as though calculated to secure convictions, but by the thirteenth century the number of acquittals had become farcically large.[1] Ordeal by battle came with the Normans and had a wider use than the Anglo-Saxon ordeals; but though not formally abolished till 1819, it became virtually obsolete as a mode of trial during the thirteenth century.

At the Lateran Council of 1215 the Church condemned trial by ordeal, and after that most of the old methods of ascertaining the Divine will fell rapidly into disuse in England. When this happened no adequate alternative had been devised and for a time the royal judges had to fill the gap as best they could in the exercise of what appears to have been a very wide discretion. This was a crucial period in the evolution of our criminal law for one solution of the difficulty, which might well have become general, would have been for the judges themselves to decide the issues of fact and settle the guilt or innocence of the accused. Had that occurred our criminal procedure might have developed on inquisitorial lines, with the court interrogating the accused and seeking to elicit the facts, instead of remaining, as it has to this day, accusatory in character, with the court holding the scales between the accused on the one hand and his accusers on the other and reaching a conclusion on the material placed before it. There are good features in both these procedures, but the inquisitorial system which spread widely over the continent

[1] Holdsworth: *History of English Law*, 7th ed., Vol. I, 311.

of Europe, gained such efficacy as it had at a high price. It brought the court into the arena and away from an attitude of aloof impartiality; it tended to identify the court and the prosecution so as to enhance the powers of the latter; and it encouraged the use of torture as an aid to proof. The accusatory process is less likely to develop these defects, but its adoption in England was, in the beginning, a haphazard affair and largely due to the emergence of a new form of trial rather than to any deliberate effort to steer clear of the perils of a judicial inquisition. After the abolition of the ordeals and an era of much uncertainty, the issues of fact began to be submitted to a jury, not the accusing jury which afterwards became the grand jury, but the forerunner of what was later to be known as the petty jury. This new form of trial eventually established the accusatory system on an enduring basis. There were still to be prosecuting judges, the presumption of innocence had yet to gain its present strength, and centuries were to pass before the rights of an accused person approximated to what they are today; but the judges had not to find the verdict and could discharge their function without supporting, or seeming to support, the case for the Crown.

The accusatory trial, however, did not necessarily preclude a resort to judicial torture as part of the process of investigation. It certainly seems to have reduced the danger of this, but in an age which, by our standards, was not easily moved by human suffering and in which the stability of the State constantly called for stern measures we cannot say that trial by jury and its procedural consequences made

torture, the worst abuse of the power to prosecute, impossible or even unlikely. Indeed, it so happened that at a very early stage in its development the new form of trial raised a procedural problem which was only resolved by the introduction of torture as part of the process of the court. Today, we are inclined to think of the advent of trial by jury as clearly a step in the right direction, but in the thirteenth century it appeared so doubtful a way of finding the Divine will, as the ordeals were supposed to do, that it was generally regarded as wrong, or perhaps as unfair, that the accused should be tried in this new-fangled manner without his consent. He was therefore asked if he would be tried, as the phrase ran, "By God and your Country" and if he refused or said nothing his trial could not proceed. The way out of this impasse was to subject the prisoner to "peine forte et dure," an act of torture which, if not authorised, appears to have been encouraged by a statute passed in 1275.[2] No doubt there were local variations in the nature of the grim proceedings, but what usually happened was that the prisoner was taken out and tied flat on his back on a frame where he was kept without food and under a pile of weights until he consented to his trial or was pressed or starved to death. Many a prisoner chose death for his family's sake; for if certain of conviction, which in those days often meant a forfeiture of land and chattels as well as execution, a considerate prisoner would prefer to die untried and, therefore, unconvicted. This abhorrent practice was used as late as

[2] 3 Edw. 1, c. 12.

1726 [3] and was only abolished by Parliament in 1772 [4] when standing "mute of malice" was made the equivalent of a plea of guilty. Then, in 1827 [5] the law became as it is today. A plea of not guilty must be entered in such case and the trial thereupon proceeds in the usual manner. One cannot but wonder that one or other of these simple devices was not enacted earlier. It may be that the man who refused to be tried was commonly regarded as guilty and worthy of punishment, or it may simply be that reform in our criminal law has sprung less from compassion for the individuals concerned than from a change of public opinion respecting the standards of conduct to be observed by society in the treatment of its members.

Now the fact that the royal judges administering the common law of the realm, countenanced and practised "peine forte et dure" for so long may well arouse the suspicion that if they used torture to induce the trial they would not be slow to countenance torture as a way of facilitating the proof of guilt by confession. But this did not happen and, despite the harshness of the times and the notorious prevalence of torture abroad, the common law courts of England, the courts of the royal judges, never accepted torture as a lawful part of the judicial accusatory processes which they administered, except for this very limited purpose of procuring a plea. The laws of Henry I had laid down that a confession

[3] Carter, *History of English Legal Institutions*, 4th ed., 214.
[4] 12 Geo. 3, c. 20.
[5] 7 & 8 Geo. 4, c. 28; Ireland, 9 Geo. 4, c. 54.

extorted by fear or fraud was invalid [6] and that seems to have remained a strong and popular sentiment. Though the Church was later to drift away from its high principles in this regard, its influence in England against judicial torture seems to have been weighty throughout the thirteenth and fourteenth centuries when trial by jury was becoming an established procedure. Most of the judges, no doubt, shared these current views, and as the royal prerogative gained strength they were protected from the temptation to be cruel in the interests of the State by the growing authority of the King's Council and the emergence of the Court of Star Chamber.

That these institutions did much to secure public safety and to curb the mighty in their attempts to flout the law cannot be denied; but in discharging these tasks they exercised an arbitrary power which lacked the restraining influence that a firm code of procedure might have given.[7] They interrogated prisoners charged before them as well as prisoners who had been or were about to be tried in the common law courts and they regularly used the rack and other instruments of torture to make accused persons talk —and sometimes witnesses as well. The interests of the State or the importance of the inquiry were

[6] Hen. I, V, 16.

[7] "The history of liberty has largely been the history of observance of procedural safeguards," *per* Frankfurter J. in *McNabb* v. *U.S.* (1943) 318 U.S. 332, 347, a case of murder. The lack of a procedural code noted above finds an echo in the proceedings of the Un-American Activities Committee of the U.S. Senate of which the late Senator McCarthy was chairman.

held to justify such measures, and if the law did not sanction them, the royal prerogative could.

Whether the common law ever did allow torture was a question which had not always got a clear answer and as late as 1613, in the *Countess of Shrewsbury's Case*,[8] Coke (then Chief Justice of the Court of Common Pleas) declares that the nobility are not subject to torture in a context which suggests that the lower orders were not so fortunate. But, however that may be, the attitude of the law was settled finally and in a manner that must have reflected the preponderance of legal opinion over a long period, in *Felton's Case*[9] in 1628. Felton had murdered the Duke of Buckingham and on arrest had freely admitted the crime. He was then—that is prior to his trial in the King's Bench—brought before the Council where he was urged to confess who had incited him to the murder. He denied that anyone had done so and the report then continues in a passage which deserves to be recalled—

> "Dr. Laud, bishop of London," it runs, " being then at the council-table, told him if he would not confess, he must go to the rack, Felton replied, if it must be so he could not tell whom he might nominate in the extremity of torture, and if what he should say then must go for truth, he could not tell whether his lordship (meaning the bishop of London) or which of their lordships he might name, for torture might draw unexpected things

[8] 12 Co.Rep. 94
[9] Howell's *State Trials*, Vol. 3, 367.

from him: after this he was asked no more questions, but sent back to prison." [10]

The Council then debated whether the law of the land would justify putting Felton to the rack and the King, who was present, directed that before any such thing should be done the advice of the judges should be taken. On November 13 the King formally asked the judges whether by the law Felton might not be racked " and whether there were any law against it," for, said the King, " if it might be done by law, he would not use his prerogative in this point." On the next day all the judges assembled at Serjeants' Inn in Fleet Street and agreed unanimously that Felton ought not to be tortured by the rack " for no such punishment is known or allowed by our law."

Torture seems to have been used after that in several cases, but in 1641 [11] the Court of Star Chamber was abolished by statute and torture as a means of obtaining confessions or information disappeared with it. The Royal Courts remained true to the views of the judges in *Felton's Case* and the evolution of the law respecting confessions and the treatment of accused persons in custody continued without any major setback until our criminal procedure reached its present state, with the prisoner enjoying a high degree of protection from the power of the prosecution and

[10] When writing this chapter I had forgotten that in his *Freedom under the Law*, the First Series of the Hamlyn Lectures, Lord Justice Denning (as he then was) had also quoted much of this report. I have, however, let the citation stand, for Felton's reply was courageous as well as shrewd and may have helped to give the judges the opportunity which they took so promptly.

[11] 16 Car. 1, c. 10.

the judges exercising an exceptional degree of control over the proceedings and the admissibility of evidence offered against the accused.

Today if a confession is to be used against an accused person it must be free and voluntary and the onus of showing that it is so is on the prosecution. This rule goes back to the seventeenth century [12] and is stated in its modern form by Lord Sumner in *Ibrahim* v. *R.*[13] thus:—

> "... no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority."

When the voluntary nature of a statement is challenged the modern practice is that the jury is directed to retire and evidence is then heard for the prosecution and afterwards for the defence, the accused himself being permitted to give evidence on the point if he so wishes and the justice of the case makes that a desirable course.[14] The judge then rules upon the admissibility of the challenged statement and the jury is recalled. If the statement is rejected the jury do not hear it and it falls out of the case. If the statement is admitted, the defence may go into the circumstances of its making once again so that the jury may be in a position to decide what weight they should attach to it.[15]

[12] 2 Hale's *Pleas of the Crown* (Serjeant Wilson's ed.) 284.
[13] [1914] A.C. 599 at 609. [14] *R.* v. *Cowell*, 27 Cr.App.R. 191.
[15] *R.* v. *Murray* [1951] 1 K.B. 391; 34 Cr.App.R. 203.

The courts have found more difficulty in dealing with statements made voluntarily by persons in answer to questions put by police officers and the judgment delivered by Lord Sumner in *Ibrahim* v. *R.* shows how confusing the decisions had become on this subject. In 1912 the judges approved a series of rules, which have since been extended, for the guidance of the police respecting the interrogation of suspects. These "Judges' Rules" are not rules of law, but a statement obtained in disregard of them is generally, though not necessarily, rejected by the judge in the exercise of his discretion. This exemplifies the undoubted power of the judge in a criminal trial to reject evidence adduced against a prisoner on the ground that, although admissible in law, it would be unfair to let it in.

There are those who think that in according the accused the substantial measure of protection which I have just described, the law has gone too far and has not heeded sufficiently the interests of the community. The accused is now a competent, though not a compellable, witness at his trial and some may think that, at any rate after a prima facie case has been made against him, he should have to submit to interrogation. This is a point on which opinions may legitimately differ, but for my own part I feel that in the long run such a change would serve no useful purpose. It would encourage prevarication and would undermine the presumption of innocence without any corresponding advantage. Juries can draw their own conclusions when an accused person elects not to give evidence in his own behalf, and provided the prosecution is conducted, as it ought to be, not only fairly

but competently, I believe the public interest would gain nothing worth while by calling upon him to speak.

That, however, is by the way. What matters at the moment is not whether our criminal procedure might be improved so as to be more certain of producing a finding of guilty in cases where that was the right verdict, but whether it maintains a fair and proper balance between the parties by preventing an abuse of power on the part of the prosecution. My conclusion is that it does so and that this is as true today as it has been in the past. Further, I think we may say with confidence that the history of this branch of our law shows that the manner and extent of the protection which it gives against the power of the prosecution have sprung, not from extraneous causes or sentimental considerations, but rather from a persistent body of public opinion which, throughout the centuries, has in some instinctive way realised that the abuse of power is a contagious disease and that the liberties of all must suffer by the oppression of some.

It is also important to note one particular consequence of the development we have been discussing. The control of the situation passed long ago from the prosecution (for many purposes now, in practice, the police) to the judiciary, and there it still remains. If that state of affairs were now proposed for the first time, say in a Bill before Parliament, one can imagine the arguments that might be voiced against it. It would probably be said to stultify the efforts of the police in their own province and to place the efficiency of criminal justice at the mercy of those who had no

training in the investigation of offences. There would, of course, be the utmost difficulty in accomplishing at one quick step, either in this or any other field, what has only been achieved after centuries of growth. But it is nonetheless worth remarking that in point of fact our criminal procedure does not appear to have suffered by reason of judicial control. The police may have their occasional disappointments, but the truth seems to be that police efficiency, which depends on the co-operation of the public more than on anything else, has been helped and not hindered by committing the authoritative last word to the judges.

The Attorney-General and the Executive

The power to prosecute may be abused in ways which have nothing to say to the procuring of evidence and the procedure at the trial. If it is important that the accused should be protected while he is a prisoner, it is also of importance—(a) that the executive should not be free to prosecute or refrain from prosecuting in order to serve its political ends, and (b) that prosecutions which are vexatious or without evidence capable of supporting them or against the public interest, should be stopped as early as possible. If it is wrong that accused persons should be unfairly treated in connection with their trial, it is also wrong that those against whom no proper case can be made should be subjected to the distress and expense which a prosecution may entail.

It is in the discharge of what are now the firmly established traditions and functions of his office that the Attorney-General protects the subject from both

these dangers.[16] I shall consider them in turn, commencing with the protection afforded against the power of the executive.

Before and during the thirteenth century the King's Attorney was, to use lay terms, the lawyer engaged to do the King's law business, and his appointment was commonly limited to a particular subject-matter, a particular court or a particular district. Gradually, however, the scope of the appointments grew wider and the King's Attorneys became fewer in number and greater in prestige until, in 1461, we find that there is but one Attorney and that (apparently for the first time) he is styled the Attorney-General.[17] The office is now one of mounting importance. A deputy, later to be known as the Solicitor-General, makes his appearance and the Attorney finds himself in the company of the judges when His Majesty or the Lords desire assistance on some point of law. In addition to advising the Crown and representing the royal interest in the courts, the Attorney and Solicitor are at this time becoming active assistants in the business of the House of Lords, and from the beginning of the sixteenth century they are summoned to attend its deliberations by writs of attendance, a practice which endures to this day though it has long since lost its original significance.

Throughout the sixteenth century the office of the Attorney-General continued to advance in power and

[16] Comparatively little appears to have been written on the office of the Attorney-General, but a valuable account, to which I am much indebted, will be found in Chap. 8 of Professor Keeton's biography of Lord Robson, *A Liberal Attorney-General*.

[17] His name was John Herbert.

authority, with that of the Solicitor-General following in its wake at a respectful but fairly constant distance. During this period the Attorney-General drew steadily ahead of that important, but now extinct, order of lawyers known as the King's Serjeants. His influence increased as theirs decreased. He could initiate legal proceedings, criminal and civil, on behalf of the Crown, his power to stop at least some forms of penal proceedings—a subject on which I shall have more to say later—had gained recognition,[18] and he had got to the point of having claims on the Lord Chancellorship. The seventeenth century saw both offices reach a status which is akin to that of modern times, though the standards and traditions which now prevail had still to be attained. The Attorney-General becomes the acknowledged leader of the Bar and the Government's chief adviser in legal affairs. He can still conduct a private practice,[19] but his duties on behalf of the Crown, though lucrative, have become onerous. He manages the King's causes, both criminal and civil, and appears personally in those of outstanding importance. He plays a part in framing legislation and is increasingly involved in matters of policy. But, most important of all, he becomes in this century a House of Commons man. That might have been thought a simple step, for in 1566 the Commons had decided that the Solicitor-General could sit as a member notwithstanding that his office brought with it a writ of attendance to the Lords. In 1614, however, when Sir Francis Bacon, already a member of the Commons, was appointed Attorney-General the

[18] 4 Co.Inst. 20.
[19] This right was taken away in England in 1895.

question was vigorously canvassed and settled for the time being on the odd basis that Bacon should sit but that no Attorney would be allowed to do so in the future. This ruling was followed until 1673 when Francis North, afterwards Lord Guilford, was appointed Attorney-General and took his seat in the Commons. No objection was offered to this and none seems to have been raised thereafter.

In retrospect it is easy enough to see that this strange development whereby the Law Officers (as they might by now be called) changed from being servants of the Upper House to becoming members of the House of Commons, made possible the present constitutional practice by which the executive is, in large measure, precluded from setting the criminal law in motion. But the introduction of the Law Officers into the House of Commons was not directed to this end and must be ascribed entirely to considerations of political convenience and expediency. That the subject should be protected from the executive in this respect is a doctrine of relatively modern growth which would have raised little stir when Mr. Attorney and Mr. Solicitor first sat together as elected Members of Parliament. At that time and for long thereafter they were, first and foremost, the King's officers, the agents of the Crown, often harsh and oppressive in the performance of their duties and commonly regarded with much disfavour and suspicion. Nevertheless, their place in Parliament gave them a standing and a position which, as ideas broadened and the art of government developed, were to afford a unique opportunity of controlling the power to prosecute at the centre and in a manner calculated to avoid conflict

between the judicial and executive functions of the State. During the last two hundred years that opportunity gradually expanded and was slowly turned to account. It is not a dramatic story and I shall not attempt to trace it: instead, I must come to its results in the present and to those salient features of the Attorney-General's office which bear upon the subject under discussion.

The functions of the Attorney-General in England are multifarious. Apart from some miscellaneous responsibilities which are difficult to classify, his major official activities may be grouped as follows.

(1) He is the chief advocate and legal adviser of the Crown, and of the numerous departments of State. This, of course, does not mean that he deals with all or even the bulk of this class of work personally. Most of the departments have their own legal staffs, but matters of exceptional difficulty or importance will go to the Law Officers and be dealt with by one or other or both of them as they may arrange. The Attorney-General is also called upon to advise on the legal implications of Government proposals and he is at liberty to tender such advice without waiting to be asked for it. This advisory work has no limits. Almost anything may become important in the course of Parliamentary government and the spice of variety is seldom lacking in this corner of the Attorney-General's domain. It is an exacting and responsible duty, this, for the opinions of the Law Officers, though accorded no special authority by the courts, are generally accepted by the Administration and may have widespread and important repercussions. But if they have, the public will seldom know anything

of it, for the present constitutional practice is not to publish or rest upon contemporary opinions. If, for example, a member of the Government is being criticised for not taking a certain course of action, he is not allowed to say that he wanted to do so but that the Attorney-General would not let him.

(2) He *is* a member of the Administration. This virtually means that, save in exceptional circumstances, he must be a member of the House of Commons and responsible to it for the due exercise of his ministerial duties. It also means, again save in exceptional circumstances, that he will be a party man and given to party politics, with plenty to do, both in the House and in committee, in promoting Government measures—usually, but by no means always, those of a legal or semi-legal nature.

(3) He represents the public interest where public rights are at stake and there is no one else charged with the duty of protecting them. There are no bounds to this important function, but the abatement of a public nuisance, the vindication of a public right of way and the enforcement and regulation of charitable trusts may be cited as examples.

(4) The Attorney-General is responsible for the enforcement of the criminal law in a just and proper manner.

Of the functions I have enumerated this last touches most directly upon the subject in hand; but all are relevant because their diversity raises obvious risks of conflict and it has largely been the effort made to avoid these risks that has produced the high standards of independence and objectivity with which the Law

Officers are now expected to discharge their duties to the general public.

In England it is perhaps not as accurate to describe the Attorney-General as the public prosecutor as it would be to say so of the Lord Advocate for Scotland or the Attorney-General for Northern Ireland. In England there is a Director of Public Prosecutions, a whole-time official who acts under the Prosecution of Offences Acts, 1879 to 1908. But the Director is subject to the superintendence and direction of the Attorney-General and the latter's responsibility for the due administration of the criminal law, though mostly borne, as it were, at one remove, is clear and unquestioned. Who, then, has the ultimate control? Is it the Government of which the Attorney-General is a member or the Attorney-General? Can the Government tell the Attorney-General whom to prosecute? And, wherever the decision may lie, what determines it? Is evidence of the commission of an offence by the person to be charged enough? Or have other matters to be taken into account? In this country these may seem rather academic questions. But they are vital to a free people and we have only to look abroad to realise their fundamental importance. Here, the answers are now clear, though they were not always so. With some, relatively minor, exceptions the executive must leave the initiation of criminal proceedings by the Crown to the Attorney-General and those for whom he is responsible. The days are gone when a subservient Attorney could be told whom to lay by the heels or whom to spare. He must now maintain a complete independence in this difficult and sometimes delicate sphere, and if he fails to do so,

the remedy lies in his dismissal or that of the Administration.

This segregation of powers applies as clearly to calling off prosecutions as to starting them, and is today so well settled and respected that no Government wishing to remain in office is likely to ignore it. It springs from a widespread feeling that the administration of the law, and particularly of the criminal law, ought to be altogether above party politics. That feeling had grown steadily during this century and it was strong enough in 1924 to give the allegations made against the first Labour Government, respecting what came to be called the *Campbell* case, an importance that brought that Government down. Sir Patrick Hastings was then Attorney-General and the suggestion was made that, having sanctioned the prosecution, under the Incitement to Mutiny Act, 1797, of a Mr. Campbell, acting editor of the *Workers' Weekly*, he had the prosecution withdrawn at the behest of the Cabinet. Sir Patrick vigorously denied this suggestion [20] and his version of the facts has since been widely accepted. For present purposes, however, it is not the facts that matter. The significance of the episode lies in the way it focused attention on the relationship between the executive and the Law Officers and gave the prevailing view the force of an established rule of the Constitution. The present-day practice and the responsibility that it casts upon the Law Officers have recently been described by another Labour Attorney-General, Sir Hartley Shawcross, in a passage which records a notable achievement in the

[20] See his *Autobiography*, 237 *et seq.*

art of government and which, I trust, will long remain firmly attached to the traditions of this great office. It reads:—

> "But whilst participation in party politics, and, of course, a share in the collective responsibility of the Government for action that is taken, are normally incidental to the office of Attorney-General, it remains the clearest rule that in the discharge of his legal and discretionary duties the Attorney-General is completely divorced from party political considerations and from any kind of political control." [21]

The considerations which weigh with the Attorney-General in deciding whether or not to prosecute go beyond the existence of evidence proving the commission of the offence in question. He must also regard wider issues, such as the effect of a prosecution on the public interest and any special circumstances which may have a bearing on the justice or rightness of a decision one way or the other. In all this he must exercise his own judgment and his own discretion, but he is entitled to inform himself of the relevant facts and probable consequences and, in doing so, to seek from his ministerial colleagues such help as they can give him. This sort of consultation may sound a delicate business, but once the underlying rule is accepted, the line separating the functions of the consulting ministers can be easily drawn and maintained in the right place. Mr. Attorney, for example, should never ask or be told whether or not he should

[21] Address delivered on February 18, 1953, at the Law Society's Hall, Chancery Lane (p. 12).

prosecute. But he can ask and be told with perfect propriety what effect a prosecution would have on the common weal.

The independence of the Law Officers has proved a workable as well as a valuable tradition and should remain, as I believe it now is, immune from any sort of governmental influence, whether direct or indirect. But, as a matter of prudence, the relationship with the executive calls for understanding and care in the avoidance of difficult situations, and the present practice not to make Law Officers members of the Cabinet must, I think, commend itself as a step in the right direction. The relationship with the House of Commons also calls for circumspection. It is difficult to find any sound ground for the view that the Law Officers should be free from Parliamentary comment and criticism respecting the discharge of their functions. As members of the Government they are responsible to Parliament, and their very independence of the executive regarding the enforcement of the criminal law means that, in that important field at least, they must answer for themselves. Yet it is clear that the right of members to question and censure the Law Officers has to be exercised with restraint and discretion if the due administration of criminal justice is not to suffer. Perhaps the greatest danger lies in the possibility of creating an appearance of political pressure, and any action which would tend to that or to making either of the Law Officers a centre of party controversy can only be justified by the existence of some grave and exceptional situation.

Nolle Prosequi

I come next to the other form of protection which the Attorney-General can give and which lies in his power to stop criminal cases after they have begun. In this connection it is now only necessary to mention two kinds of criminal proceedings—those which are sped before a judge and jury on a bill of indictment and those which are dealt with by a magistrate, usually at petty sessions.

As already indicated, the Attorney-General seems to have had the right to stay certain forms of prosecution in the sixteenth century, but his power to stop proceedings on indictment does not appear to have been recognised before the reign of Charles II.[22] From then on the right is clear. It is exercised by the Attorney-General intimating his unwillingness to prosecute by entering, as it is called, a *nolle prosequi.* The decision to do so is only taken if there is good ground for the view that the prosecution should not continue. The accused may apply to the Attorney-General to enter a *nolle prosequi* but the step is usually taken at the instance of the prosecution or by the Attorney-General of his own motion. It can be taken in private as well as public prosecutions and at any stage of the proceedings after the indictment has been signed or found and before the sentence or judgment of the court is pronounced. It does not amount to an acquittal [22] and is no bar to subsequent proceedings for the same offence, though in practice it is almost always an end of the case. If the Attorney-General is asked by an accused person to enter a *nolle*

[22] *Goddard* v. *Smith*, 6 Mod. 261.

prosequi he may consider the application formally and call for evidence before reaching a decision. He cannot be compelled to stop the proceedings, but he can be ordered by the court to consider the application if he has not done so.

In summary cases the situation is different. Proceedings of this type cannot be stopped by a *nolle prosequi*. The charge cannot be withdrawn unless by leave of the court. But in practice the Attorney-General should experience little difficulty in obtaining such leave in public prosecutions—*i.e.*, where the prosecutor is acting on behalf of the Crown—if there are grounds for not going on. And in the case of a private prosecution he can, in England, always instruct the Director of Public Prosecutions to take over the charge and then apply for leave to withdraw.

It may be thought strange that the right of the Attorney-General to intervene and stop a prosecution is not as absolute in the case of summary proceedings as in the case of prosecutions on indictment, which are usually concerned with graver offences. But that marks the illogic of our system rather than any practical defect and does not, so far as I am aware, afford a real ground for complaint. It is interesting to note that in the case of Madame Nina Ponomareva, the Russian woman athlete who was charged with shoplifting in London in August, 1956, the considerable furore which arose was not due to the Attorney-General being unable, of himself, to call the prosecution off—in fact he decided against applying for leave to withdraw—but to the feeling in some quarters that the *Government* should have intervened to end the proceedings. It came as a surprise to many

Russians and other foreigners (as well as to some British subjects) that the Government were not free to do this and the Foreign Office felt it incumbent to issue a statement on the point. This statement [23] records that Mr. Nutting, then Minister of State for Foreign Affairs, had informed the Soviet Chargé d'Affaires—

> " that the Soviet representations, and in particular the request that the charge should be dropped, had been carefully considered but could not be met. He [Mr. Nutting] emphasized that the fundamental principle underlying the administration of British justice was the entire independence of the judiciary. The matter was in the hands of the court. Neither the charge nor the warrant for the arrest of Mme. Ponomareva could be withdrawn without the leave of the court."

Mr. Nutting naturally stressed the independence of the judiciary. Whether he also informed the Chargé d'Affaires of the independence of the Attorney-General does not appear from *The Times* report, but when issuing its statement the Foreign Office was obviously alive to the importance of leaving no doubt on that matter for *The Times* concludes by saying—

> " It was emphasized yesterday that in exercising his powers in relation to criminal proceedings the Attorney-General is in no sense an agent of the Government."

So far, my references have been to the Law Officers of

[23] *The Times*, September 28, 1956.

England. Their responsibility respecting the enforcement of the criminal law does not extend to Scotland or Northern Ireland and in each of those jurisdictions the system evolved for discharging this function does not follow the English pattern exactly. In Scotland the Lord Advocate and the Solicitor-General for Scotland are the responsible officers and both are normally members of the House of Commons at Westminster and of the Government of the United Kingdom. In Northern Ireland there is but one Law Officer, the Attorney-General, who is a member of the Northern Ireland Administration and has, so far, always had a seat in the House of Commons at Stormont. But there is nothing in the Constitution to prevent him sitting in the Senate instead or, indeed, to require him to be a member of either Chamber unless he holds the rank of Minister [24]; and as being a Minister means being a member of the Northern Ireland Executive Committee or Cabinet,[25] the Attorney-General has not, to date, been accorded that rank. The view of Lord Craigavon, the first Prime Minister of Northern Ireland, was that the Attorney-General's independence of the executive would be better understood and more easily maintained if he were not a Cabinet member; and this view has been acted upon since.

There is no official corresponding to the Director of Public Prosecutions in either Scotland or Northern Ireland and the Law Officers in both those countries are more intimately concerned with the day to day management and direction of criminal prosecutions

[24] s. 8 (4) Government of Ireland Act, 1920.
[25] *Ibid.*, s. 8 (5).

than are the Law Officers in England. The organisation for the prosecution of offences also differs and there are variations of procedure as well. But none of these differences is now of moment. They leave untouched the essential qualities of the office that I have endeavoured to describe and it is, I believe, correct to say that in all parts of the United Kingdom the Law Officers enjoy the same degree of independence and are subject to the same exacting standards in the exercise of their duties respecting the power of prosecution.

And here I would digress for a moment to notice a point which has no direct bearing on the exercise of that power, but which may affect, and perhaps increasingly, the discharge of the Law Officers' functions in other directions. The Crown has many facets and the interest of one may conflict with the interest of others. In some cases this has been got over by the Attorney-General representing one such interest and the Solicitor-General another.[26] But this expedient will not always meet the situation, particularly in cases where the public interest may stand opposed to the claims of a Department of State. With the spread of governmental power which has characterised the present era, this sort of problem could well become more common and acute than it is; and it might even be a wholesome thing if it did. How, then, are the divergent interests to be represented if the issue is such that the Attorney-General and Solicitor-General cannot properly be in opposite camps? There being only one Law Officer in Northern Ireland this difficulty

[26] See Robertson, *Civil Proceedings By and Against the Crown*, 15–16, and the cases there cited.

is more obvious there and provision has been made to meet it to a limited extent by an Order in Council which enables the Governor of Northern Ireland to appoint some other person to act instead of the Attorney-General in relation to any matters which are not for the time being within the powers of the Government of Northern Ireland.[27] So far as I can ascertain that power has not been exercised; but with suitable modification it might form a convenient precedent should the public interest call for the establishment of an office or the appointment of an officer to contend for that interest against the claims of the State.

Summary

The principal conclusions I would draw from these soundings are—(1) that in this particular field, protection from power has been regarded for centuries as something which it is the function of the law of this Realm to secure; (2) that, though progress towards this end has been haphazard and productive of its share of the anomalies which festoon our constitutional institutions, it has been sustained throughout by a deeply rooted and growing community feeling that power should be used temperately and that Authority must be just and fair in dealing with those in its grip; and (3) that, by and large, the individual subject is today protected as effectively as ever against the abuse of this power—and that in spite of a phenomenal increase in crime since the Second World War.

In the end, of course, everything turns on the

[27] Art. 2 (2) of the Supreme Court of Judicature (Northern Ireland) Order, 1921 (S.R. & O. 1921, No. 1802).

training, character and capacity of those who, between them, administer our criminal law, be they judges, Law Officers, members of the legal professions, policemen, officials or gaolers. If personal standards fall, the best of systems cannot prevent a decline. The way of maintaining those standards is a tempting subject, but it is outside my present assignment save for one important factor—the influence of a rich and mature legal tradition. I do not refer to that love of precedent which reduces responsibility and eases decision, and which is by no means restricted to lawyers, but to the tradition of the spirit of the law, the tradition distilled from the talk, the example, the sense of truth and justice and duty of the generations, the tradition that comes as a legacy to the novice and informs him, in due course and better than lectures or books, of what he must strive to attain.

The power of prosecution has a dramatic setting, and the manner in which it is exercised is such as to draw public attention to shortcomings and abuses. It remains to consider whether the law affords as satisfactory a shield against those other less dramatic and less noticed forms of power to which I must now come.

THE POWER OF PARLIAMENT

Chapter 3

THE POWER OF PARLIAMENT

The power of the State respecting civil rights covers a much wider field than that of the criminal law and concerns, directly or indirectly, a far greater proportion of the population. It enlarges as the functions of the State increase, and its expansion seems likely to continue. Indeed, this field of power is now of such a size and embraces such a diversity of matters that any attempt at a comprehensive survey would be out of place in these Lectures, not only for lack of time but also because of the technical nature of many of the questions involved. Much has already been written on this subject and I must confine myself to some general observations on the dangers and trends apparent in two of its aspects—the legislative, to which I turn now, and the executive with which I shall deal later.

The doctrine of the sovereignty of Parliament is today as firmly established in this Kingdom as any constitutional doctrine can be. I refer, of course, to the Imperial Parliament at Westminster. The Parliament of Northern Ireland at Stormont is not a sovereign but a subordinate Parliament. Its legislative power is limited by its constituent statutes [1] and its legislation is subject to the paramount authority of the

[1] The Government of Ireland Act, 1920; the Northern Ireland (Miscellaneous Provisions) Acts of 1928, 1932 and 1945; the Northern Ireland Act, 1947; the Ireland Act, 1949; and the Northern Ireland Act, 1955. Further powers are given incidentally in many other statutes.

Imperial Parliament.[2] Its enactments may therefore be declared void by the courts if they are *ultra vires* and can, in any event, be overridden at Westminster. These limitations leave the operative legislation of Stormont as effectual for most purposes as that of a sovereign Parliament, but I mention them because they serve to emphasise, by way of contrast, the great power which has come to be vested in the Imperial Parliament. There are no enforceable checks or safeguards to limit the range of its statutes or to restrict their results. If, to take what is at the moment a fanciful example, a measure was there enacted which deprived of civic rights all those who professed a particular religious faith or were members of a trade union or would not accept the principle of the "closed shop," its victims could claim no relief in the courts or anywhere else short of the ballot-box, and even that might be placed out of reach by legislation designed for the purpose. There is no fundamental rule to which Parliament must conform, and until there is the law cannot offer any effective protection against an actual abuse of parliamentary power. Some day, perhaps, the courts, or even Parliament itself, may discover and proclaim a superior principle or set of principles which the legislative process must respect. But there is no present sign of such a development and, so far as I can discern, no body of opinion wanting a change in that direction.[3]

[2] The Government of Ireland Act, 1920, s. 6.

[3] The courts of this Kingdom have not been called upon to define or set bounds to the attributes of parliamentary sovereignty. Whether or not those attributes include a power to control legislative procedure in the future is at present academic and undecided. S. 1 (2) of the Ireland Act, 1949, for example,

The supremacy of Parliament has, of course, many advantages. It gives our constitution the flexibility needed to meet changing conditions and, rather paradoxically, it seems to have helped in keeping the law-making power sensitive to public opinion and the will of the electorate. Its absolute nature and its popularity may explain why, since Lord Hewart wrote *The New Despotism* in 1929, the attention given to such matters as delegated legislation and ministerial powers has centred mainly on the activities of the executive and the civil service. Despite a constant clamour for government intervention in many different spheres, bureaucracy remains the favourite target for attack. This may be a wholesome national habit and salutary for administrators, but the fact is that many of the criticisms advanced relate to powers and duties that Parliament has created or to conduct that it has sanctioned. There is nothing, of course, in that to excuse the misuse of statutory powers or yet to suggest that ministers and their departments should not be clothed with adequate authority for the effectual discharge of their functions. But the source of most State power is now statutory and before turning to the activities of the executive it will be convenient to notice certain types of power-giving legislation that by their nature have a special tendency to work to the prejudice of the subject. It must be borne in

affirms "that in no event will Northern Ireland . . . cease to be part . . . of the United Kingdom without the consent of the Parliament of Northern Ireland." That could be repealed tomorrow, but *quaere*, if the subsection had continued "And no person shall at any time present any bill or take any other step in either of the Houses of Parliament for the purpose of repealing this subsection or altering it or its effect in any way."

mind that sometimes such a tendency may have to be accepted if the purpose of the legislation is to be attained. The common good can, on occasion, necessitate instances of individual hardship, and I am not to be taken as expressing a view on the merits or expediency of such examples from the Statute-book as I may cite for the purposes of illustration. The object is to show how Parliament can open the door to abuse. Whether, in any given case, it was justified in taking the risk of that is another matter and outside the bounds of this discussion. I cannot hope to classify exhaustively the types of legislation to which I have referred, but the following four categories should suffice to show the need for vigilance if the opportunities for a misuse of power are to be kept at a minimum.

(1) *Enactments which enable a Minister, Department of State or other public authority to prejudice the individual in his status, liberty, property or livelihood by the exercise of an unfettered discretion.*

The danger here is apparent. The power, no matter how conscientiously it may in fact be exercised, is arbitrary in nature and can be readily abused. No objective standard is laid down to control it and, save in exceptional cases, the courts are powerless to interfere with what purports to be done under it. Thus, in the British Nationality Act, 1948, which confers wide powers upon the Secretary of State respecting nationality and citizenship, we find section 25 saying—" The Secretary of State may in such cases as he thinks fit, on the application of any person with respect to whose citizenship of the United Kingdom

and Colonies a doubt exists, whether on a question of fact or of law, certify that that person is a citizen of the United Kingdom and Colonies . . ." And then section 26 adds this—" The Secretary of State . . . shall not be required to assign any reason for the grant or refusal of any application under this Act the decision on which is at his discretion; and the decision of the Secretary of State . . . on any such application shall not be subject to appeal to or review in any court."

Those whose difficulties are resolved by a certificate under section 25 may find this—as I am sure it was meant to be—a highly convenient and satisfactory procedure, but those to whom a certificate is refused may be pardoned for wondering why, at any rate in so far as their status depends on some matter of law, they should not be able to have such refusal reviewed by the courts.[4]

Another example will be found in the Safeguarding of Employment Act (Northern Ireland), 1947. This Act was passed to safeguard the interests of Northern Ireland workers by restricting the employment in Northern Ireland of other persons. Under section 2 a person who is not a Northern Ireland worker, and is not exempted from the restrictions of the Act, is prohibited from becoming employed in Northern Ireland unless authorised by a permit issued by the Ministry of Labour and National Insurance. Section 3 (1) provides that for the purposes of section 2 " the

[4] It may be that a person refused a certificate under s. 25 has still a right to bring a plenary suit against the Crown for a declaration of citizenship. I express no view on that, but if such a right exists it must, for many, be a poor substitute for a direct, inexpensive appeal from the refusal.

Ministry may, subject to and in accordance with the provisions of this section, grant permits in such form as the Ministry thinks proper and for such periods as the Ministry specifies therein." Subsection (2) of section 3 enacts that a permit granted thereunder may authorise the employment of the person named therein in a specified capacity or generally, or by a specified employer or at a specified place, or by a specified employer at a specified place. Subsection (3) provides that "a permit granted under this section may be renewed at any time for such period as the Ministry thinks fit." And subsection (4) gives power to the Ministry to revoke a permit whenever it "considers" that the circumstances which justified its grant or renewal have changed.

There can be no doubt that this Act is directed to a very difficult and important problem; and it must be remembered, moreover, that the Parliament of Northern Ireland has no power to restrict immigration. As already indicated, I do not comment upon the expediency of this measure, nor is it my present object to criticise the manner in which it has been administered. But it is a good example of the type of legislation under consideration. The Ministry's discretion to grant or revoke a permit depends entirely on the view it may take of any particular application. The statute does not specify any matters which the Ministry must take into account. There is no provision for appeal and the decision is anonymous in the sense that it may be made by any officer of the Ministry entitled to act on its behalf. Though it does not deal directly with the issue of permits, section 5 of this Act is also worth noting. It reads—"Proceedings

for an offence under this Act shall not be instituted except by or with the consent of the Ministry or by an officer authorised in that behalf by special or general directions of the Ministry." This provision does more than cap the Ministry's drastic powers by enabling it alone to determine what contraventions may lead to prosecution. It also precludes the Attorney-General from deciding on his own responsibility, as would ordinarily be his right, whether, in a particular instance, there should be a prosecution. Whatever the merits of this section may be, they can only exist in time of peace as an exception to the general rule that the power to control prosecution should not lie with the executive.

The type of legislation within this first category is potentially dangerous not merely because of what may be done under it and of the difficulty of redressing any grievances that may result from an abuse of the power it confers. It also tends to breed resentment, misunderstanding and a sense of injustice. As the by-products of power on a wide scale these states of mind may, in some degree, be unavoidable; but they must be kept in check if the relationship between government and governed is to stay wholesome and become the source of strength which it ought to be.

(2) *Enactments which commit the function of deciding justiciable disputes to the Minister, Department of State or public authority concerned therein, without adequate safeguards.*

The obvious danger here is that of making a man judge of his own cause, but it may well go further.

While a department may, by special staffing or training, do much to acquire competence in the handling of justiciable issues, this sort of qualification cannot be expected as a matter of course, and the good administrator is not necessarily a good judge. With every desire to get at the truth, he is, perhaps, too accustomed to finding it in files; and on points of law he is inclined to be over-addicted to precedent and to take what the Law Officers said about something similar years before as making an end of the matter. And again, the individual who crosses swords with a department may fear more than bias; he may fear that political considerations will intrude, or that the ruling he seeks will be rejected on account of the administrative inconvenience or disturbance it would cause. These fears, in any given case, may be groundless, but they are natural and they invest ministerial adjudication with an unfortunate atmosphere of suspicion which a conscientious and painstaking officialdom cannot always dispel.

The scope of this category depends on the word "justiciable" and before going further I must try to convey what I mean by that word in this context. Disputes between a department and a subject may involve a judicial decision or a purely administrative decision or a decision which is neither wholly judicial nor wholly administrative. A judicial decision implies the presentation of their case by the parties to the dispute, the ascertainment of the relevant facts and of the relevant law and a decision which is reached by applying the relevant law to the relevant findings of fact. The dispute which is settled by that sort of

decision is clearly within the class I have labelled "justiciable."

In their Report published in 1932 [5] the Committee on Ministers' Powers recommended that the judicial decision should normally be entrusted to the ordinary courts of law. There has been little controversy about that view and Parliament is not at present disposed to do much in the way of conferring purely judicial functions upon the executive. But the Committee recognised that exceptional circumstances might warrant departure from what should be the normal practice, and no hard and fast rule is desirable if the public interest is to be served as fully as possible. In Northern Ireland, for example, the valuation of tenements and hereditaments for rating and other purposes has been, for over a century, the function of an official of the central government, the Commissioner of Valuation. A person aggrieved by the Commissioner's ruling has a statutory right of appeal to *him*, and from his decision there is a further appeal to quarter sessions and, ultimately, an appeal on a point of law to the Court of Appeal. Now, the appeal to the Commissioner involves, beyond question, a judicial decision on his part. But the appeal to him has proved a convenient procedure; it gives an opportunity for revision on further consideration without expense to the appellant, and its abolition would, I believe, cause general regret. It must be noted, however, that the safeguards are ample. The appeal to quarter sessions leaves all issues of fact and law open, and the final appeal promotes a uniform application of legal principles.

[5] Cmd. 4060.

Purely administrative decisions stand clearly apart from judicial decisions. In the former, the Minister, or his department or some official therein, acts throughout in a discretionary manner which usually reflects or implements some matter of policy. For such decisions the Minister concerned is directly answerable to Parliament, and the powers under which they are made are well outside the category I am now discussing. The courts cannot be answerable to Parliament without losing their independence, and issues which raise any *substantial* question of policy are therefore best kept away from them, whether they are the ordinary courts or special, independent, tribunals.

But in between the judicial and the administrative decision, and exhibiting some of the characteristics of each, is what the Committee on Ministers' Powers (following the terminology of their terms of reference) called the quasi-judicial decision. This connotes a dispute and the ascertainment of the facts and circumstances material to it; but the decision is not, as in the case of a judicial decision, simply a matter of applying the law to the facts. It involves the exercise of ministerial discretion. As the Committee put it in their Report [6]—". . . the Minister . . . has to make up his mind whether he will or will not take administrative action and if so what action. His ultimate decision is 'quasi-judicial,' and not judicial, because it is governed, not by a statutory direction

[6] *Ibid.*, 74. I am indebted to the Controller of H.M. Stationery Office for permission to quote from this Report and from other material referred to in these Lectures of which the copyright belongs to the Crown.

to him to apply the law of the land to the facts and act accordingly, but by a statutory permission to use his discretion after he has ascertained the facts and to be guided by considerations of public policy. This option would not be open to him if he were exercising a purely judicial function."

Because of this distinction the Committee drew a fairly sharp line between judicial and quasi-judicial functions in some of their recommendations; they regarded the latter function as primarily administrative and were against any right of appeal from acts done in exercise of it.[7] But from the point of view of protection from power it is, I think, unsatisfactory to keep these two functions entirely separate and distinct. The difficulty in the way of doing so is twofold. First, as Dr. Robson points out in his *Justice and Administrative Law*,[8] the dividing line is by no means sharp and clear; the judicial function may involve a discretionary decision just as the administrative function may, on occasion, become in essence judicial. And, secondly, the quasi-judicial function covers an extremely wide zone of decision, ranging from what is all but judicial to what is all but administrative. As the prefix "quasi" might warn us, a satisfactory formula for settling what is essentially judicial and what is essentially administrative within this vast realm has yet to be discovered. But, in practice, it is clear enough that the dangers of the legislation I am considering go well beyond the purely judicial function. The Statute-book, for instance, abounds in provisions whereby the doing of

[7] Report, 109.
[8] 3rd ed. (1951) 444 *et seq.*

something which would otherwise be perfectly lawful requires the licence or consent of a Government Department. Sometimes the requisite permission follows on the fulfilment of specific statutory conditions. Sometimes it is left so as to depend to some extent on ministerial discretion. In theory one decision may be judicial and the other quasi-judicial, but for the applicant whose livelihood or proprietary rights are at stake what matters is that his case should be *heard* and determined on the merits. The truth is that the existence of a ministerial discretion need not import any question of policy which is worthy of the name. The policy element may be negligible and amount to little more than the policy of doing what the policy of the statute requires or, though going further than that, it may not be the subject of challenge at all. In either event the danger of embroiling a court or special tribunal in some conflict of policy seems sufficiently remote to be ignored; and in point of fact an appeal can lie from a quasi-judicial act to an ordinary court without causing difficulty or embarrassment and with the judge exercising the discretion vested in a department.[9]

I therefore include in "justiciable" those quasi-judicial disputes which by their nature and in their effect upon the parties ought to be regarded as predominantly judicial in character. An example of what I would place in this category may be found

[9] See s. 2 of the Milk Act (Northern Ireland), 1950, which gives the Ministry of Agriculture a discretionary power to revoke or suspend a licence for the production and sale or distribution of milk on certain grounds and provides for an appeal to quarter sessions against such revocation or suspension.

in the statutes for the superannuation of civil servants. This code, which is comprised in the Superannuation Acts, 1834 to 1949, contains elaborate provisions as to the computation of superannuation allowances and the conditions to which they are subject. But it also provides that the grant of an allowance remains within the discretion of the Treasury.[10] In law it is open to the Treasury to refuse an allowance or to grant one of less value than that authorised by the Acts and their decision is therefore quasi-judicial. But for all practical purposes it is a judicial decision and should be reached, in case of dispute, in a manner which recognises that to be its real nature.

As will by now be apparent, there is no clear, infallible test that I can offer for identifying the quasi-judical function which ought to be treated as judicial rather than administrative. But short of that, and only as a rough practical guide, it may I think be said that, in general, the function should rank for present purposes as judicial if (a) the decision, if adverse to the subject concerned, will prejudice him substantially, and (b) the nature of the dispute is such as to make it fair and reasonable that he should be heard before the decision is made.

There is no easy way open to Parliament of avoiding this category, altogether and for ever, by a legislative practice to the effect that the settlement of what I have termed a justiciable dispute should never be made a ministerial function. Our affairs are too diverse and complicated to permit of so absolute a regulation. One can only hope this type of legislation will be infrequent and that, whenever enacted,

[10] See s. 30 of the Superannuation Act, 1834.

such adequate safeguards as are requisite will be provided. I shall have a word to add about safeguards generally when I have concluded my list of categories.

(3) *Enactments which delegate the legislative power in terms that enable a Minister or Department of State to prejudice the individual in his status, liberty, property or livelihood.*

The dangers of this type of legislation include those noted in the two previous categories as enlarged by the considerations, (a) that the method of ministerial enactment lacks the deliberative and critical scrutiny normally afforded by the parliamentary process, and (b) that, whenever a branch of the executive is given some new function to discharge, the temptation is for it to use its powers widely in order to reduce the burden and difficulties of administration.

I need not pause to describe or classify the various forms which delegated legislation may take. The subject is dealt with at length in the Report of the Committee on Ministers' Powers [11] and that of the Select Committee on Delegated Legislation published in 1953, and little more need be said of it here.

Both these Reports stress the essential difference between Acts of Parliament and delegated legislation. This difference is described in paragraph 6 of the Select Committee's Report as follows—" The legality of an Act of Parliament cannot be challenged in or by the Courts of Law, but the question whether subordinate legislation is within the power delegated by Parliament

[11] *Ibid.* 16 *et seq.*

can be and is challenged in and by the Courts of Law." It will also be recalled that the terms of reference of the Committee on Ministers' Powers spoke of safeguards to secure ". . . the constitutional principles of the sovereignty of Parliament and the supremacy of the law." Each of these Reports and the extensive literature on the subject show that much anxious consideration has been given by Parliamentarians and others to ways and means of controlling the manner in which both the power of delegation and the delegated power are exercised. But when all is said and done, the point of most importance in relation to the perils of the category I am now describing flows from the simple fact that in a sovereign Parliament there are no limits to the powers that may be conferred by way of delegation. The Minister who is the recipient of such powers may find himself enabled to legislate, not merely for a specified time or in respect of a circumscribed subject-matter, but at large throughout his sphere or maybe beyond it, and even to the point of modifying Acts of Parliament including the statute whence his powers are derived. The provision which allows of this extensive modifying power is commonly called a Henry VIII clause [12] and its dangers are so obvious that the Committee on Minister's Powers recommended that it should never be used except to bring an Act into operation, and should cease to be effective after the lapse of a year.[13] Further, Parliament may, if it thinks fit, take

[12] The Committee ascribe this nickname to the fact that Henry VIII "is regarded popularly as the impersonation of executive autocracy."

[13] Report, 65.

away the jurisdiction of the courts to say whether or not the delegated power has been duly exercised. This sometimes involves the construction of the enabling statute [14] and that, normally, will be within the province of the courts. But, here again, there is nothing to prevent Parliament from removing this jurisdiction also if it so chooses, for while the function of interpretation must lie somewhere, Parliament can place it in the hands of the executive or elsewhere at its pleasure.

Apart from quite exceptional cases, it is right to say that the Reports referred to frown upon this sort of interference with the judicial power and, so far as I am aware, there is little support for such interference to be found in current opinion. But it would be a grave mistake to think of the principles of the sovereignty of Parliament and the supremacy of the law as sharing the same foundation. Parliament has the last word and can fashion the law and its processes as and when it wants.

Therein lies the chief danger of delegated legislation and the need for a constant vigilance. Whatever the precautions, whatever the present anxiety to keep this power in bounds, it may always break out under the pressure of political events. And it can be added that modern conditions have produced two aggravating factors. In the first place, it must be accepted that, whatever its dangers, the system of delegating legislative power has come to stay, at any rate so long as the pressure on parliamentary time continues

[14] See, for example, *Minister of Health* v. *The King* (*on the prosecution of Yaffe*) [1931] A.C. 494.

as it is and legislation remains as technical and complex as it has come to be; and secondly, though not increasing [15] at the moment, the volume of sublegislation is now such that the best of regulatory and supervisory procedures cannot be expected to detect and arrest all that merits rejection.

(4) *Enactments which result in burdens and injustices that Parliament has not intended.*

This category is probably best described as a chapter of accidents. But it is worth notice for two reasons: its victims may not be sufficiently numerous or have enough political weight to procure the rectification needed; and the executive may, on occasion, prefer to retain what is defective on economic or other grounds of convenience.

One of the causes of such legislation may be haste or inexperience. The Compensation (Defence) Act, 1939, must, I think, rank as an example of this. It was passed on September 1 of that year to provide for compensation in respect of property taken by the Crown in the exercise of its emergency powers. I am sure those who voted for this measure were as anxious that it should operate fairly as they were that it should enable none to profit out of the war that was then upon us. But in practice it often worked out—at any rate as respects the acquisition of land—very harshly and unfairly indeed. For example, if A, a garage proprietor, had his premises requisitioned he would be entitled, under section 2 (1) (*a*), to a payment for his land and buildings equal to the rent

[15] See the article by Sir Cecil Carr, Q.C. on "Parliamentary Control of Delegated Legislation" in *Public Law* (Autumn 1956) p. 200.

that a tenant would give who undertook to bear the cost of repairs and other expenses necessary to maintain the letting value. But A could get nothing for his loss of goodwill though he might see the business he had built up over the years pass down the road to a trade rival; and when he came to claim for the damage done during the period of the Crown's possession, section 2 (1) (*b*) would forbid account being taken of fair wear and tear. One result of the stringent provisions of this Act was that the Tribunal appointed by it to settle disputes as to the payment of compensation thereunder had comparatively little to do, the reason being that the Treasury tempered the wind to some extent by permitting more generous payments than the Tribunal had power to award. It is true an emergency in time of war may necessitate exceptional and even extra-statutory procedures, but the Act of 1939 is still on the Statute-book and the provisions I have referred to are still part of it.

Another cause that contributes to this category is the continued use of legislation which is obsolete in the sense that the circumstances relevant to its provisions have changed radically since its enactment. It is difficult to assess the size of this class, but it exists and I take as an example section 20 of the Superannuation Act, 1834. This section provides that where a civil servant who has retired on pension is re-employed in the public service his pension must abate or cease, as the case may be, so that it and the new salary together shall not exceed the old salary. There may be room for argument as to whether the policy of that requirement was ever sound, but in an era of financial stability it can be

understood. During the present inflationary period, however, the situation is altogether different, and as the cost of living has risen the Treasury have sanctioned additions or supplements to the remuneration of civil servants in order to offset this mounting burden. But the dead hand of section 20 reaches out to keep the officer re-employed at less than his former salary from benefiting by these aid-to-living increments in many cases, though he too has to suffer from rising prices like everyone else and though, by section 6 of the Act of 1834, the legislature has professed anxiety concerning ". . . the inadequacy of his private fortune to maintain his station in life." If he takes the increase his pension is diminished according to the result. Indeed, the net effect may occasionally be a reduction of the total emoluments; but there, at least, officialdom relents for a Treasury concession (as it is called) provides that the officer concerned may, if he chooses, refuse the increase and hold to his existing rate.

No doubt 1834 is a long time ago and departments cannot be expected to keep the statutes they administer always up to date so long as Parliament has little time to spare for revision. Still, this particular hardship is well known [16] and section 20 of the Act of 1834 forms part of a code that has been frequently revised.

A further contribution to this category flows from the fact that Parliament may mean one thing and say another. The rules of English law for the interpretation of statutes do not permit of a factual inquiry into

[16] It was the subject of a sharp difference of opinion in the Report of the Royal Commission on the Civil Service published in 1955. Cmd. 9613.

what our legislators intended. Under some other systems one may look to see what was said while the measure in question was being debated, but here the meaning of a statute is a matter of law and has to be ascertained as such. The fundamental rule, which is much the same for Acts of Parliament as for other written instruments, was thus stated by Lord Blackburn in *River Wear Commissioners* v. *Adamson* [17]— "But it is to be borne in mind that the office of the judges is not to legislate, but to declare the expressed intention of the legislature, even if that intention appears to the court injudicious; and I believe that it is not disputed that what Lord Wensleydale used to call the golden rule is right, *viz.*, that we are to take the whole statute together, and construe it all together, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the court that the intention could not have been to use them in their ordinary signification, and to justify the court in putting on them some other signification, which, though less proper, is one which the court thinks the words will bear."

This method of ascertaining the intention of Parliament has its critics, but I can think of no alternative which promises greater certainty or fewer difficulties. Yet it cannot always reveal the actual intention and where it fails to do so the reason will generally be found in one or other of two situations. In the first the text is obscure or ambiguous and search must be made for some general intendment or other clue to

[17] [1877] 2 A.C. 743 at 764.

the true meaning. When this process produces a state of near equilibrium between the rival meanings, that which bears least harshly on the subject will usually be preferred, but when it gives a clear answer the result, whether harsh or not, must be accepted, though the obscurity which has caused all the trouble may, in fact, be due to an unsuccessful effort to say something different. In this way the subject can be saddled with obligations which it is reasonable to think he was never actually meant to bear and these may be onerous to a degree, particularly in the complicated field of fiscal legislation.[18] In the second situation the text is not ambiguous or obscure, but what it says conflicts with some established principle of conduct or concept of law in such a manner as to raise the question whether the legislature could have meant its words to have their literal effect. Every instance of this sort of problem will have its own special considerations and one cannot argue conclusively from the circumstances of one case to those of another, but the trend of authority seems at present to favour the literal interpretation. Thus in *Smith* v. *East Elloe Rural District Council* [19] the House of Lords held, by a majority, that an enactment [20] providing that ". . . a compulsory purchase order . . . shall not . . . be questioned in any legal proceedings whatsoever . . ." prohibited the validity of such an order

[18] See *I. R. C.* v. *Bladnock Distillery Co., Ltd. and others* [1948] 1 All E.R. 616, for the possible effect on perfectly innocent people of the drastic and retroactive provisions of s. 24 of the Finance Act, 1943.

[19] [1956] A.C. 736.

[20] Acquisition of Land (Authorization Procedure) Act, 1946, Sched. I. Part IV, Para. 16.

being challenged even on the ground that it had been made or confirmed in bad faith. Parliament, here, was taken to have meant what it had said in the plain words I have quoted. Whether in point of fact it intended such a result was not the test and must remain a matter of speculation. But the view that it had no such intention in fact is open on the reasoning of the decision and was thus expressed by Lord Somervell of Harrow in his dissenting opinion [21]—"In other words," he says, speaking of the view which prevailed, "Parliament, without ever using words which would suggest that fraud was being dealt with, has deprived a victim of fraud of all right of resort to the courts, while leaving the victim of a bona fide breach of a regulation with such a right. If Parliament has done this it could only be by inadvertence."

It is hard to say whether or not the types of legislation which fall within the category under consideration produce any very extensive crop of ill-consequences or injuriously affect large numbers of people. But the harmful consequences of parliamentary power, no matter how inadvertent, cannot be measured merely by a counting of heads, and if the rights of individuals or small groups are treated carelessly or cavalierly at the seat of supreme power their protection at lower levels may not appear as important a duty as it should.

Protection from Parliamentary Power

From what has been said it follows that safeguards against the dangers of the types of legislation I have

[21] [1956] A.C. 736 at 772.

just enumerated must be sought in Parliament itself and in the creation of a body of informed and responsible opinion capable of promoting a sound tradition in all that pertains to this difficult subject. There is, I think, little doubt that Parliament is now more sensitive than it was to the importance of keeping an alert watch on its legislative standards, and for that much credit must be given not only to members of Parliament and officials but also to those who have written or reported on this and kindred questions. In a changing world, however, there can be no rigid or stereotyped code of practice for the control of power in a sovereign legislature. The canvas is too wide and the scene too kaleidoscopic for that. Reliance must be placed rather on keeping the problem a topic of perennial discussion with every seeming instance of abuse openly and critically examined, and on the adoption, from time to time, of such procedures as experience may prove to be of value in avoiding or reducing the dangers involved.

So far as the last of the categories I have mentioned is concerned, better drafting, the publishing of information on contemporary situations and the practice of circulating explanatory memoranda on bills, have all helped to reduce the risk of divergence between what a statute says and what it was meant to say; and it would probably be right to add that the ground gained in this way has not been entirely lost by reason of the increasing demands which the legislative programme and his constituency together make upon the House of Commons member of today. But there is room for further effort to ensure the coincidence of

the actual and the expressed intention. Many interpretative difficulties of well-known types could be avoided by a simple declaration of intention in the text. The courts, for example, are sometimes left to decide whether a particular provision applies to the Crown by searching for material on which to base an inference one way or the other, when all the trouble, expense and doubt which such a process may cause could be prevented by saying either "This section shall bind the Crown" or the reverse. Another instance of the same sort of avoidable difficulty is to be found in statutes which create some new obligation with a penalty attached for its enforcement. Has a person injured by a breach of such obligation a right of action for damages, or is the statutory penalty all that can be exacted? The cases which deal with that question and find the answer by implication are legion and have led to many fine distinctions and doubts that could have been readily obviated by a plain statement of intention. No one can foresee all the difficulties of statutory interpretation that may arise, but more could, I think, be done to reduce the commoner forms of obscurity. As Lord du Parcq once observed—"To a person unversed in the science or art of legislation it may well seem strange that Parliament has not by now made it a rule to state explicitly what its intention is in a matter which is often of no little importance, instead of leaving it to the courts to discover, by a careful examination and analysis of what is expressly said, what that intention may be supposed probably to be." [22]

[22] *Cutler* v. *Wandsworth Stadium, Ltd.* [1949] A.C. 398, 410.

Again, the fuller use of preamble and recitals to convey the underlying intendment of an enactment, or the mischief to which it is directed, would ease the task of the legislator as well as that of the court. The ideal situation may be one in which the enacting parts speak clearly for themselves; but language at its best is an imperfect vehicle, and nothing that will serve to make the intended meaning clear beyond question should be lightly rejected. Drafting is an onerous and highly skilled task, and only those who have essayed it can appreciate how hard it often is to express exactly in words what is clearly in mind. The draftsman is usually his own severest critic, but when it comes to judging his own work he labours under the great disadvantage of knowing—at any rate where he has been adequately instructed—what he wanted to convey; and, in addition, he may not always be in a position to realise what issues are likely to be raised by the impact of his draft on the existing law. In a realm of such difficulty and, let me hasten to add, of such achievement, it may seem presumptuous to suggest a further step in the technique of drafting. Yet I cannot but think that much might be gained, in appropriate cases, by trying out the text of a new measure, before publication, on a small panel kept for the purpose, whose essential qualifications would be intellectual competence, a substantial background of practical legal experience and a complete ignorance of all departmental instructions for the draft set before them. Such clause-tasters ought to be expensive, but if they reduced the ambiguities of legislation appreciably, as I believe they could, they would be well worth their money.

Legislation which works with unintentional harshness because it is obsolete, or because its consequences escaped notice through some inadvertence or misapprehension, presents a very different problem. Parliament has little time for second thoughts, and a reform which calls for the amendment of what is safely on the Statute-book has special difficulties to surmount. But if it were incumbent on all departments to report periodically to a Parliamentary Committee upon instances of this kind arising on the statutes they administer, a means of measuring the problem would come into being which might eventually lead to some acceptable procedure for dealing with it.

Turning to the delegation of legislative power, the parliamentary safeguards thought desirable by the Committee on Minister's Powers and those actually adopted in practice by the House of Commons will be found discussed in much detail in the Reports I have already mentioned. This is too technical a subject to permit of any close scrutiny here and I must rest content with a very general reference to the steps now taken at Westminster to guard against the perils of this particular form of power.

Broadly speaking, the controls employed are founded on three principles. In the first place delegated legislation which is of general importance should be duly published and brought to notice. This is now provided for in Great Britain by the Statutory Instruments Act, 1946, and in Northern Ireland by the Rules Publication Act (Northern Ireland), 1925. Secondly, Parliament should know promptly how its delegated powers are being exercised so as to enable it to scrutinise and, if thought fit, to annul what

has been done. This is usually provided for by the enabling Act directing one or other of several "laying" procedures to be adopted. Of these procedures the most common are (a) that in which the sublegislation is laid before Parliament with immediate effect but subject to annulment, and (b) that in which the sublegislation is so laid in draft but requires an affirmative resolution before coming into operation. And thirdly, the parliamentary scrutiny of sublegislation should not be left to the initiative of individual members but should be entrusted to a committee appointed for the purpose.

The Committee on Ministers' Powers wanted such a body to scrutinise every bill containing any provision giving legislative powers to a Minister; but this recommendation was not adopted and the sessional Scrutiny Committee which has been appointed in the House of Commons since 1944 is concerned only with sublegislation. It cannot report upon the merits of what is done in exercise of the delegated powers. Its duty is to consider whether the special attention of the House should be drawn to a statutory instrument or draft on certain grounds. These grounds are itemised by the Select Committee [23] and they reflect so clearly not only the principal dangers of delegated legislation but Parliament's present awareness of those dangers, that it will not be a waste of time to set them out. They are as follows—(i) that the instrument or draft imposes a charge; (ii) that it excludes challenge in the courts; (iii) that it purports (without specific authority in the parent Act), to have retrospective

[23] Report, para. 47.

effect; (iv) that there has been unjustifiable delay in publication or laying before Parliament or in sending a notification to Mr. Speaker when the instrument comes into operation before it has been laid; (v) that its form or purport calls for elucidation; or (vi) that it appears to make some unusual or unexpected use of the powers conferred by the statute under which it was made.

In the House of Lords a "Special Orders Committee" is constituted at the beginning of every session. This Committee is older than the Scrutiny Committee of the House of Commons for it was first set up in 1925, but its functions are somewhat narrower. It is concerned only with orders which require the direct approval of the House before becoming effective or continuing in force. It does not report on the expediency of an order and, in general, its responsibilities are confined to expressing an opinion on whether the order raises important questions of policy or principle, on how far it is founded on precedent, and on whether it calls for further enquiry before approval or may be accepted by the House without special attention.

The dangers bred of the legislation which is the subject of the first two categories I have mentioned—that which confers an unfettered ministerial discretion capable of injuring the individual and that which commits justiciable disputes to a Minister—cannot be guarded against by any device of universal application. Here, too, the diversity and complexity of the responsibilities of government must be accepted as precluding a rigid pattern of protection; and, particularly in the sphere of ministerial discretion, it has always to be

remembered that a system of safeguards which enfeebles the administrative function or lowers the standards of administrative conduct will be dearly bought. But while Parliament must therefore be left to consider for each empowering statute the nature and extent of the protective provisions it should contain, the importance of keeping the various forms of protection available for adoption under discussion and assessment can scarcely be overstated. I shall comment on but two of these forms of protection, leaving out of account, for the present, those supervisory safeguards which exist to correct error and are normally vested in the courts.

The safeguard to which I give pride of place because of its fundamental character and its wide applicability lies in the practice of hearing both sides before reaching a decision which is enshrined in the maxim "*audi alteram partem.*" In the determination of what I have called justiciable disputes this principle is a matter of natural justice and should be respected as a matter of course; but it need not be confined to that category and the oftener it is found feasible to invoke it before arriving at what are substantially administrative decisions, the better. Almost as important as the principle itself is the manner in which it is put into practice. Written representations have their place and in certain circumstances nothing else may be required; but, generally speaking, an oral hearing, if practicable, will yield better results. Where facts are in issue or a sense of injustice prevails, paper is usually a second-best way to the truth and a solution; while if the disputants are able to meet in a patient and courteous atmosphere the outcome is

more likely not only to be fair but to be accepted as such.

It is hard to detect a trend in legislation over a short period, but my impression is that the Statute-book shows an increasing awareness of the importance of "*audi alteram partem.*" This principle is brought into play in the British Nationality Act, 1948,[24] to which I have referred earlier, and another example (relating to a very different subject-matter) will be found, in the statutes for the same year, in section 44 (1) of the Agriculture (Scotland) Act, 1948, which empowers the Secretary of State to authorise the killing of deer "after affording to the occupier and the owner of the land and any other person appearing to the Secretary of State to have an interest an opportunity of making representations . . . whether in writing or on being heard by a person appointed by the Secretary of State. . . ."

Like most vital principles, *audi alteram partem* does not thrive on lip service; but, properly applied, its value in controlling the departmental use of power, in supporting the rule of law, and in strengthening the bond between the State and its members can hardly be exaggerated. In Austria it pervades practically the whole field of administrative procedure, and in the free world generally its importance is now widely recognised.[25] In this Kingdom the principle is so

[24] See ss. 20 and 21.

[25] This is borne out by the material submitted to the 1956 First International Congress of Comparative Law at Barcelona when the subject was discussed. I am indebted to Professor F. H. Lawson for his kindness in letting me have sight of much of this material.

much in keeping with common law traditions and prevailing standards that, if Parliament and the executive were to use it more widely, the response of the community would, I believe, prove increasingly co-operative and fruitful.

The other safeguard to which I would refer consists of a statutory right of appeal from the ministerial decision.[26] In relation to certain justiciable disputes this form of protection is well-known and has been provided by Parliament. Sometimes the appeal lies to the ordinary courts, and sometimes to special tribunals; sometimes it is an appeal at large and sometimes only on a point of law. What has been done does not follow any very orderly or logical system. At the present stage of administrative development it is not, perhaps, of first importance that it should. What is important is that, whenever power to decide justiciable disputes is conferred on the executive, Parliament should only exclude an appeal for good reason and, where an appeal is allowed, should strive, in so far as it is practicable to do so, to provide a simple and inexpensive procedure for its settlement by an independent judicial body.

[26] As I am dealing here with ministerial power I do not include in the term "ministerial decision" the decision of an independent statutory tribunal, even though appointed by the Minister. In the recent Report (Cmnd. 218) of the Committee on Administrative Tribunals and Enquiries (referred to later as the Franks Committee) such tribunals are regarded as part of the machinery of adjudication and *not* as part of the machinery of administration (para. 40). The Report contains recommendations for the strengthening of these tribunals and for appeals therefrom, the Committee's conclusion on the latter subject being "that in general the appropriate appeal structure is a general appeal from a tribunal of first instance to an appellate tribunal, followed by an appeal to the courts on points of law" (para. 126).

The Committee on Ministers' Powers were of opinion that appeals on issues of fact were generally undesirable [27] and should only be provided for "very exceptionally." But if the primary object of safeguards is to ensure justice for the individual, the factual situation cannot be relegated to a place of minor importance. The sense of injustice that rankles deepest does not usually spring from a legal ruling. The ordinary citizen may regard the law as an ass or as a mystery beyond his ken, but for the most part he accepts it as applying to everyone and not as something aimed at himself. What he cannot readily understand or forgive is a failure to get at the facts and circumstances of his case, particularly where he feels that there is a bias in favour of the official standpoint or, worst of all, that there has been no real effort to see things from his point of view.

Whatever the composition of the appellate tribunal, an appeal on an issue of law of any substance should be able to find its way to the Supreme Court, if only to provide for the building up of an authoritative body of decision. This should not be allowed to bring about a restriction of the right of appeal on grounds of expense. If a real question of law fairly arises in the discharge of a statutory function committed to the executive, there seems no good reason why the cost of resolving it, whatever the result, should not be borne directly by the public purse. At present only the affluent or the very poor can dispute a substantial and debatable point of law with the Crown without the fear of what may happen if the Crown

[27] Report, 108.

wins. Such a fear should probably not be allowed to encumber the judicial process at all; at any rate it should not be a factor in the sort of appeal I have been considering.

Administrative acts affecting the subject and lying outside the field of justiciable disputes may well involve an issue of law—as, for example, the interpretation of the empowering enactment—and provision should be made, where possible, for the settlement of such issues in a cheap and expeditious manner by the Supreme Court. But beyond that, and apart from such extension of the supervisory jurisdiction of the courts as may be desirable, a wide right of appeal from administrative decisions seems at present impracticable if the doctrine of ministerial responsibility to Parliament and the structure of executive government in this country are not to be radically altered. That the control of executive discretion is possible—or, perhaps, I should say can become possible—has been shown by Professor Hamson in his studies on the Conseil d'Etat of France [28]; but that most interesting institution is a creature of growth and tradition and we cannot hope to transplant it with success. That, however, is far from saying that the United Kingdom does not need something of what the Conseil d'Etat has achieved, something of what Professor Hamson, speaking of the public administration, describes as ". . . a standard of what may be called decent or appropriate executive behaviour." [29] In their integrity and general competence our professional administrators deservedly rank high; but in many

[28] See particularly the sixth series of these Lectures on *Executive Discretion and Judicial Control.*

[29] *Ibid.* 214.

matters they are not free agents; and, apart from that, the best in a good service will go farther and do more if there is some means whereby the essence of its quality can be gathered and carried forward for future use. I do not therefore decry the British public service or the calibre of its servants when I express the view that we do need an authoritative yardstick or standard of executive behaviour and may come to need it more. Yet, if we are to meet this need we cannot be precipitate or expect results overnight. "The business," as Professor Hamson says,[30] "is to find—that native growing-point from which may come this desired result." Any first step in this direction calls for caution, but a start might be made by establishing a body composed of a number of distinguished administrators and experienced lawyers, to which an executive department could, at the discretion of its Minister, refer an administrative problem, involving the rights, welfare or livelihood of the subject, for guidance or decision. This Administrative Council, as I may call it, would have to be of the highest quality and completely independent in order to gain prestige and command the widest confidence and respect; and to keep it in being for a trial period it might be necessary at first to invest it with other cognate functions, such as the hearing of administrative appeals of a specialised nature. If made use of by the executive—and most departments have troublesome cases on which they would welcome assistance—it might develop a jurisdiction and tradition of its own. If it failed, the experiment should have lessons to teach of considerable value.

[30] *Ibid.* 215.

THE POWER OF THE EXECUTIVE

CHAPTER 4

THE POWER OF THE EXECUTIVE

I PASS now to the executive and the control of its powers. Here we come back to the protection of the law, for the executive is not above the law and what it does must be done in the due exercise of the powers conferred by law upon it. Parliament, as we have seen, can make the law favour the executive; and, apart altogether from what Parliament has enacted, the Crown in its various manifestations has certain rights under the law which are not shared by ordinary people. But, whatever the law is, the executive remains subject to it and to the ordinary courts that administer it. Where the ordinary courts cannot intervene it is because of the law and not because the executive (as in France and elsewhere) is out of their reach.

THE SUPERVISORY JURISDICTION OF THE COURTS

Broadly speaking, the courts will investigate and give relief in respect of acts of the executive which are shown to be bad in law or to have been done without or in excess of authority, or in bad faith, or because of irrelevant or extraneous considerations; but they will not revise decisions lawfully taken or interfere by substituting one view of the merits for another. That is, as it were, a bird's eye view of the general situation. There are, of course, enactments which provide expressly for some form of revision or appeal in the particular field to which they relate, just

as there are enactments which, as we have seen, oust the jurisdiction of the courts either completely or partially. Moreover, Parliament has created many administrative tribunals for the purpose of adjudicating between the executive and the subject on differences arising under particular statutes and statutory schemes. These tribunals may be constituted by the departments involved, but they act outside rather than within the departments; they are meant to be independent bodies and they generally have the advantages of cheapness, speed, accessibility and a specialised knowledge of the subjects committed to them. The Franks Report [1] considers they have come to stay, and there can be no doubt that they now play an important part in holding the balance between subject and State. My present concern, however, is not with special procedures or special tribunals, but with what may be regarded as the normal supervisory jurisdiction of the ordinary courts of law.

To come closer to an understanding of that jurisdiction it is necessary to distinguish between two different kinds of executive decision. As respects that which is truly administrative, the executive is generally immune from the control of the courts provided what has been done has been duly authorised by law. But where the decision is judicial or dependent on some proceeding of a judicial nature, the position is different. To gain immunity there, it is not enough that there was power to make the decision; there must also have been a due regard for what the law requires

[1] 1957 Cmnd. 218.

in the discharge of the judicial function. This requirement is not concerned with the technicalities of procedure or evidence, but rather with the principles of what is known as "natural justice." The foremost of these principles are that a man should not be a judge in his own cause, and that no party ought to be condemned unheard—*audi alteram partem* again. To these the Committee on Ministers' Powers were inclined to add a third, namely, that the reasons for a decision should be given to the parties [2]; and they also considered that the refusal to publish the report of an inspector appointed to hold a public inquiry, provided for by Parliament as a means of guidance to the Minister in his decision, might possibly be contrary to natural justice. The publishing of such reports is often desirable and I cannot but think that if it became the general practice to do so the embarrassment to the executive would be much less than anticipated.[3] But to say that a refusal to publish offends against natural justice is to give the phrase an alien complexity that might defeat its usefulness as a rallying point for what, to reasonable people, is just and right beyond question. And that suggests two further observations on this subject. The categories of natural justice are not closed; they may alter slowly, but they must always be capable of reflecting changed circumstances and prevailing standards. And, secondly, they include, whatever else may be debateable, the requirement that the hearing, no matter how informal, should not only take place but be conducted

[2] Report, 80.

[3] The Franks Committee (Lord Silkin, a former Minister, dissenting) have declared, in favour of publication. Report, 73.

fairly and sincerely. If, for example, at a meeting to determine the facts relevant to an issue under investigation, one of the parties is, without good reason, denied the opportunity of questioning the witnesses put against him or of producing a material and available witness of his own, no one could say that the dictates of natural justice had been observed.[4]

There is relatively little difficulty about the extremities of this supervisory jurisdiction. It is as clearly sound that a Minister should not have to answer to the ordinary courts for the purely administrative and duly authorised decision in respect of which he is already answerable to Parliament as it is that the exercise of his judicial functions should be subject to the scrutiny of the courts. But where does the administrative end and the judicial begin? The problem here is one of demarcation and the courts are still in the process of working it out. The difficulties encountered derive mainly from the constitutional importance of maintaining, not an absolute, but a substantial separation of the judicial and executive powers. They also involve, in some degree, the procedure available to those who would challenge the acts of the executive in the courts, and before I return to this problem it will be convenient to refer, necessarily briefly and anything but exhaustively, to some of the means whereby the control of the courts is maintained.

[4] See in this connection the facts in *R.* v. *Metropolitan Police Commissioner* [1953] 2 All E.R. 717, which are of interest though the decision did not turn on them.

The Prerogative Remedies

For all practical purposes, the court of first instance in this connection is the High Court, both in England and Northern Ireland, and its supervisory jurisdiction is generally exercised in proceedings for certain prerogative remedies or else in the course of ordinary litigation. The prerogative remedies are those granted by the writ of *habeas corpus* and the orders [5] of *mandamus*, *prohibition* and *certiorari*. These remedies are the instruments of an ancient jurisdiction designed to protect the liberty of the subject and to supervise the proceedings of inferior courts, such as courts of summary jurisdiction and quarter sessions.

Habeas corpus is the historic and efficacious remedy in all cases of wrongful restraint of personal liberty. It is no respecter of persons and is freely available against the executive. "It is a writ of such a sovereign and transcendent authority that no privilege of person or place can stand against it." [6] Perhaps more than any other legal remedy anywhere, it has served to secure for the liberty of the subject a degree of respect which, without removing the need for vigilance, makes that aspect of protection from power no longer a matter of immediate concern.

Mandamus is, in substance, a direction to a person or inferior court to do a specific thing which pertains to his or its office and is a matter of public duty. This is a remedy of wide scope, but while it is available against a public official charged by law with some

[5] In Northern Ireland the writs of mandamus, prohibition and certiorari still issue, but the nature of the jurisdiction is the same.

[6] Wilmot, 88.

particular duty to others, it is not available against the Crown or against the servants or agents of the Crown acting on its behalf. As the law stands it cannot, therefore, be regarded as an appropriate form of protection against the power of the executive as such. Professor Wade has made the interesting suggestion[7] that the courts might adapt *mandamus* so as to make it available against those officials "who are not concerned with sovereign powers of the State, but with the powers which it has assumed to fulfil public needs in the social and economic sphere. . . ." Such a development would certainly help to meet the objection that the Crown should not have two wills about fundamental matters, and the absence of any constitutional upheaval following the passing of the Crown Proceedings Act in 1947 encourages the view that this suggestion could be taken a fair distance without embroiling the courts in matters of policy. But though fruit may come of it, I doubt if the harvest is likely to be large. The courts are instinctively reluctant to make orders which they may not be able to enforce or to enter upon issues that are politically contentious, and both these dangers could follow upon any deep intrusion by way of *mandamus* into the sphere of social or economic government. Moreover, it must be remembered that, in this sphere particularly, statutory duties may be imposed in clear terms on the executive which can only be properly discharged if Parliament continues to vote sufficient funds to cover the necessary expenditure.[8]

[7] (1947) 63 L.Q.R. 164, 170.

[8] See, for example, s. 1 of the National Health Act, 1946; and s. 1 of the Health Services Act (Northern Ireland), 1948.

Originally, *prohibition* was aimed at forbidding inferior courts to continue proceedings in excess of jurisdiction, while *certiorari* required the records of proceedings or orders of inferior courts to be brought up so that (amongst other purposes) the decision in question might be quashed if found defective on certain grounds which included want of jurisdiction, bias by interest, a failure to observe the rules of natural justice and error of law apparent on the face of the record. Both these remedies have been brought by the courts into the realm of administrative law, and there the value of *certiorari* is so much the greater that I need say little more of *prohibition* except to add that its use in this field is generally determined by the time at which the aid of the courts is sought. If the decision has not then been reached, *prohibition* is the proper procedure; but once it is given the appropriate remedy is *certiorari.*

One practical difficulty in the way of applying *certiorari* to administrative decisions arose by reason of the fact that decisions of that kind may not be the subject of any formal record and may, indeed, not be evidenced in writing at all. Such a situation, however, will not now be enough to hold off *certiorari.* The courts may direct the Minister or department concerned to state and transmit its decision or otherwise to complete the "record," [9] and it is well settled that *certiorari* will extend to quash decisions which, though made with jurisdiction, reveal on the face of the documents constituting the "record" some error

[9] *R.* v. *Northumberland Compensation Tribunal* [1952] 1 K.B. 338, 352.

of law on which the conclusion depends. This is a valuable part of the High Court's supervisory function, but if reasons for the impugned decision are not given it would appear that they cannot be compelled on *certiorari*, and on that account a full use of this remedy may be impossible if those responsible for the decision in question do not wish to co-operate. This defect is bound up with the history of *certiorari* and so far the courts have not succeeded in removing it; but if it is right that administrative decisions of a judicial nature should have their reasoning communicated to the parties, there appears to be no sound ground why the High Court should not be given a discretionary power in *certiorari* proceedings to call, not only for the challenged decision, but for the reasons on which it was based.

What is Judicial?

And now I must advert to an important but, as I think, a most unfortunate limitation in the use of this prerogative remedy. As with *prohibition*—and for the same historical reasons—the scope of *certiorari* is confined to acts of a judicial nature and does not embrace the purely administrative decision. *Certiorari* started as a means of correcting certain usurpations or abuses of judicial power and though, as we have seen, it has spread into the administrative sphere, it has never got away from its connection with the judicial function. But it is clear that in its application to the executive it extends beyond what is strictly judicial to include what is quasi-judicial as well. Here we come back to the problem of demarcation and the

difficulty of knowing what does and what does not constitute the judicial element that will permit of challenge by *certiorari*. There is no simple solution of this difficulty, but for a decision to be judicial in the wide sense that is relevant to *certiorari* there must be a person or body bound to act in a judicial manner when settling or investigating some issue material to the decision in question. The traditional formalities of the administration of justice may be entirely absent. As Scrutton L.J. once said in the Court of Appeal [10]—when speaking of what bodies are subject to *certiorari*—"It is not necessary that it should be a court in the sense in which this court is a court; it is enough if it is exercising, after hearing evidence, judicial functions in the sense that it has to decide on evidence between a proposal and an opposition . . . ."

Yet if the dividing line between what is and what is not subject to *certiorari* is hard to find, it is at least possible to point to several factors that will not, of themselves, suffice to clothe the decision under consideration with the necessary judicial character. Thus, where the act in question is quasi-judicial rather than judicial, a failure to act judicially which is confined to the purely administrative aspect and does not affect or colour the whole of the hybrid function will not come within reach of *certiorari*.[11] Nor will it be enough that the decision, to be good at all, must be based on the existence of reasonable grounds of belief, for such a condition need not involve a process

[10] *R.* v. *London County Council* [1931] 2 K.B. 215, 233.

[11] See *Johnson & Co. (Builders), Ltd.* v. *Minister of Health* [1947] 2 All E.R. 395; and *Franklin* v. *Minister of Town and Country Planning* [1948] A.C. 87.

of adjudication.[12] And, again, it seems that the fact that the issue to be decided is one of grave consequence—as when the livelihood of an individual may be taken away by the refusal or revocation of a licence —will be irrelevant if the power of decision is granted in terms appropriate to make it, on their true construction, a matter of administrative discretion. The courts have not been over-anxious to imply an obligation to respect the *audi alteram partem* principle on the strength of the possible consequences of the decision.

In *R.* v. *Metropolitan Police Commissioner,*[13] for example, the power in question was contained in paragraph 30 (1) of the London Cab Order, 1934, which read—"A cab-driver's licence shall be liable to revocation or suspension by the Commissioner of Police if he is satisfied, by reason of any circumstances arising or coming to his knowledge after the licence was granted, that the licensee is not a fit person to hold such a licence." This was held by a divisional court to create an administrative and not a judicial or quasi-judicial function and *certiorari* was therefore refused. In *Nakkuda Ali* v. *Jayaratne* [14] the Judicial Committee of the Privy Council had to consider, in proceedings analogous to *certiorari,* the nature of the action of the Controller of Textiles in Ceylon in cancelling the appellant's textile licence under a regulation which authorised that to be done "where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer."

[12] *Nakkuda Ali* v. *Jayaratne* [1951] A.C. 66.
[13] [1953] 2 All E.R. 717.
[14] [1951] A.C. 66,

The Judicial Committee held (1) that these words imposed a condition that there must in fact exist such reasonable grounds, known to the Controller, before he could validly exercise the power of cancellation, and (2) that, nevertheless, the Controller, in doing as he did, was taking executive action and was not acting judicially or quasi-judicially. As Lord Radcliffe said [15]—"Can one not act reasonably without acting judicially? It is not difficult to think of circumstances in which the Controller might, in any ordinary sense of the words, have reasonable grounds of belief without having ever confronted the licence holder with the information which is the source of his belief. It is a long step in the argument to say that because a man is enjoined that he must not take action unless he has reasonable ground for believing something he can only arrive at that belief by a course of conduct analogous to the judicial process." It is the second limb of this important decision that is immediately in point, but the first, though not touching directly upon the nature of a judicial function, has a very considerable bearing on the general supervisory jurisdiction of the courts in cases where the act of the executive is impeached on the ground that the conditions annexed to the power under which it purports to have been done have not been fulfilled. In the well-known case of *Liversidge* v. *Anderson* [16] the plaintiff, who had been detained during the last war by the Home Secretary under regulation 18B of the Defence (General) Regulations, brought an action for damages

[15] *Ibid.* 77.
[16] [1942] A.C. 206.

for false imprisonment. The power exercised by the Home Secretary was subject to this condition—"If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations . . . ." The House of Lords had to decide between two possible constructions of these words. Did they mean (as the plaintiff contended) "If the Secretary of State has in fact reasonable cause to believe and does believe . . ." or (as the Crown said) "If the Secretary of State, acting on what he thinks is reasonable cause, believes . . ." ? The majority of their Lordships, Lord Atkin vigorously dissenting, held that, in the context of the Regulations, the latter was the correct meaning, and the plaintiff lost his case. This decision certainly added greatly to the emergency powers of the executive, and it may have had more weight than it should in other contexts; but on that, at any rate, the *Nakkuda Ali* case has restored a sense of perspective by reminding us that this form of expression is capable of an objective interpretation and that, in the words of Lord Radcliffe,[17] "it would be a very unfortunate thing if the decision of *Liversidge's* case came to be regarded as laying down any general rule as to the construction of such phrases . . . ."

These cases may strike the layman as based on fine distinctions. But fine distinctions cannot always be avoided in applying the same language to different situations, and I think the real lesson of the decisions is to emphasise how important it is that Parliament should speak with the utmost clarity in arming the executive with any drastic power. If the awful choice

[17] *Ibid.* 76.

had to be made, it would be far better to go the length of resorting to footnotes to explain the text or to say that such-and-such a case shall not apply, than to leave the individual legislator or the general public under any doubt or misapprehension as to what is intended in the framing of important legislation.

Audi Alteram Partem

That an administrative decision substantially affecting the welfare, property, status or livelihood of the individal should not be subject to the jurisdiction of the courts may well cause concern. But the responsibilities of government cover such a vast field that it is impossible to generalise on this topic or to lay down any rule which would go as far as saying that where the issue is of such a grave nature the executive can never have the last word. Unless the courts are to undertake the running of the country it is certainly impracticable to suggest that they should be empowered to review every decision of this kind which has been duly made in the administrative exercise of a statutory discretion. Short of this, the remedy here lies, at any rate in the first instance, with Parliament. In some cases, as I have mentioned earlier, a right of appeal to an independent tribunal could be given, and whether that right were given or not, it should be feasible, in many instances, to make the power in question conditional upon the observance of the *audi alteram partem* principle. The statutory incorporation of that principle *at that stage* would have two important results. It would reduce the likelihood of an unjust decision and it would go far

to supply the judicial element which would allow the courts to investigate cases in which the principle had not been properly observed.

The Remedies of Ordinary Litigation

In *Liversidge's* case the issue arose in the course of a common form of litigation, and I must now leave the prerogative remedies to consider how the executive can be controlled by the courts in the exercise of their ordinary jurisdiction. This control may be exercised as the result of some plea advanced by way of defence; it is, for example, open to a defendant to challenge any order or executive act on the strength of which he is sued and to show, if he can, that such order or act is invalid according to law. And apart from incidental relief of this kind, the courts can entertain suits by subjects against the Crown and give relief on grounds which are not open under the prerogative procedures I have mentioned. The most important remedy of this kind is a declaration of rights which a plaintiff can now obtain in the High Court irrespective of any other form of relief. This remedy has certain important advantages compared with *certiorari* and *prohibition*. It is not confined to acts of a judicial character and can therefore deal with those of an entirely administrative nature which are bad in law for lack of authority or some other reason. More can also be done in a suit for a declaration to ascertain facts known only to the other side, and so to reveal the true situation, than is possible in the case of the prerogative procedures. And, not least, the declaration being a statement of rights, without order or

direction for translating them into practice, the courts are not hampered by considerations of enforceability or conflict and are correspondingly freer to examine the issues fully and to reach a conclusion against the executive if that is warranted. There are, naturally, disadvantages. Unlike the prerogative procedures, which are relatively expeditious and cheap, a claim for a declaration usually means a plenary suit—in common parlance, a full-blown High Court action—involving greater expense and more protracted proceedings; and then, of course, it must be recognised that, being what it is, the declaration is not an apt way of dealing with parties who are not prepared to honour and give effect to it. It is, moreover, a discretionary remedy which the courts have been inclined to use sparingly and will not use at all for the settlement of hypothetical questions. But its usefulness is increasing and the courts have recently shown that they will not hesitate to grant a declaration if the justice of the case so requires.[18]

Another form of relief against the executive which may now be obtained in an ordinary suit is a judgment for damages. This is a valuable means of controlling power, but it raises a somewhat vexed subject, namely, the scope of the duties owed by the executive to the subject and I shall defer its consideration until I come to speak of the immunities of the Crown.

Procedural Reform

The Committee on Ministers' powers thought that, in

[18] See *Barnard* v. *National Dock Labour Board* [1953] 2 Q.B. 18; and *Vine* v. *National Dock Labour Board* [1957] 2 W.L.R. 106.

its procedure, the supervisory jurisdiction of the High Court was "too expensive and in certain respects archaic, cumbrous and too inelastic." [19] This comment is still in point, but if reform is to yield the best results it should not be confined strictly to procedure. As a first step those limitations in the scope of the prerogative remedies, that are historical attachments rather than anything else, might be removed. For example, *prohibition* and *certiorari* could well be extended to administrative acts and decisions which are not of a judicial nature, so that, there too, what is wrong in law or done without authority could be quashed in a summary manner. Or, again, the High Court might be empowered, in the exercise of its prerogative jurisdiction, to direct the Minister or department concerned to state the reasons for a decision whenever these do not appear on the exhibited documents. After that a process of simplification and assimilation might be brought to bear on the machinery of resort to the courts so that the moving party could, by a simple summary procedure, obtain whatever appropriate relief the court had power and thought fit to give, be it to quash, to forbid or to make a declaration of rights. One must remember here, on the one hand, that change for the sake of change or the adoption of new labels for old will accomplish little, and, on the other, that an apt and practical procedure is more than half the battle if the rule of law is to function effectively. There will always be a place for the plenary suit with its pleadings, interlocutory applications and trial, but

[19] Report, 99.

much can be done satisfactorily by summary methods, and the limitations of affidavit evidence may often be removed by the court giving leave to cross-examine deponents or admitting oral testimony. The problem of expense remains, though the more that can be done summarily the smaller it should be. A solution based on inadequate remuneration for essential work in a sphere which frequently calls for skill of a high order is likely to defeat its own ends. A more hopeful approach is to be found in the elimination of unnecessary steps and documentation, in delegating certain parts of the supervisory jurisdiction to the county courts and in the adoption of a principle I have touched on earlier, namely, that the costs of the subject should be borne by the Crown, irrespective of the result, if the dispute settles some question of general importance or if the conduct of the Minister or department was such as to make the challenge a reasonable and proper one in all the circumstances.

If the supervisory jurisdiction of the High Court comes to be overhauled on these or other lines it would, I think, be unfortunate, if the inferior courts—such as courts of summary jurisdiction and quarter sessions—in respect of which the jurisdiction originated were left out of account or dealt with separately. The underlying principles are the same, and to have two supervisory codes instead of one might lead in time to a divergence of treatment that could end with the executive having a law of its own and being no longer subject to the law of the land. For much the same reason, if some such body as that I have called the Administrative Council ever came into being and grew to have a jurisdiction of its own it might be

desirable that it should be linked with the High Court —perhaps as part of an Administrative Division— so as to ensure that no conflict developed between the standards of conduct recognised by the administrative and supervisory jurisdictions. That, however, is rather far away for pursuit now. The immediate objective must be to see that the law maintains an effective control of the executive and that it does so in a manner calculated to keep a fair balance between the power of the State and the liberties of the subject; the sort of balance that will promote good administration and yet preserve the essential freedoms; the balance that demands a process of patient and perpetual adjustment; the balance that the art of democratic government must go on achieving if it is to survive.

The Immunities of the Crown

The power of the State arises not only from the acts and decisions that can be done and taken in its name but also, in a negative way, from the immunities that it enjoys under the law. These are not as formidable as they were and it would, I think, be an exaggeration to say that they now constitute a grave or widespread threat to the rights of the individual. But they are still an important source of power and this, and the fact that their comparatively recent abatement manifests a trend which is worth noting, will justify a reference to two outstanding examples.

The first lies in the right of the Crown, in civil proceedings, to withhold, or cause to be withheld, any documents or oral evidence the production or giving of which would be contrary to the public interest.

This is commonly described as "Crown privilege"; but in a sense it is really part of the law of evidence, though in England and Northern Ireland it is the Minister concerned and not the judge who decides the question of public interest. This right, while procedural, is of high constitutional importance, for, as Lord Simon observed in *Duncan* v. *Cammell Laird & Co., Ltd.*[20]—". . . it involves a claim by the executive to restrict the material which might otherwise be available for the tribunal which is trying the case . . . and without it, in some cases, equal justice may be prejudiced." The privilege may be claimed in suits between private parties or in suits by or against the Crown. In the latter, the Crown, until ten years ago, also enjoyed an immunity from liability to make discovery of documents and to answer interrogatories. By section 28 of the Crown Proceedings Act, 1947, this particular immunity has been taken away, but the section expressly preserves the right of Crown privilege already described and also makes it clear that even the existence of a document may not be disclosed if a Minister of the Crown thinks it would be injurious to the public interest to do so.

Crown privilege arises in respect of two kinds of documents. With the first, disclosure is resisted on the ground that the contents of the particular document are such that it would be contrary to the public interest to make them known. A good instance of this first category is provided by the case of *Duncan* v. *Cammell Laird & Co., Ltd.* which I have just mentioned. The claims to which that decision related

[20] [1942] A.C. 624, 629.

were for compensation for the deaths of some of those who were lost on June 1, 1939, when the submarine *Thetis* sank during her submergence tests in Liverpool Bay. In the course of the proceedings the defendant company, the builders, were directed by the Admiralty to refuse production of certain documents relating to the construction of the vessel on the ground, subsequently verified by the affidavit of the First Lord of the Admiralty, that it would be injurious to the public interest that any of these documents should be disclosed to any person. The House of Lords decided that an objection so taken was conclusive and should be upheld in a court of law. In delivering the opinion of the House Lord Simon, while making it clear that the effective decision should be that of the Minister concerned, thought fit to indicate some of the grounds which would not afford adequate justification for objecting to production. "It is not," he said, and he was speaking of Crown privilege generally, "a sufficient ground that the documents are 'State documents' or 'official' or are marked 'confidential.' It would not be a good ground that, if they were produced, the consequences might involve the department or the Government in parliamentary discussion or in public criticism, or might necessitate the attendance as witnesses or otherwise of officials who have pressing duties elsewhere. Neither would it be a good ground that production might tend to expose a want of efficiency in the administration or tend to lay the department open to claims for compensation. In a word, it is not enough that the Minister of the department does not want to have the documents produced." The particular kind of Crown

privilege claimed in the *Thetis* case has not given rise to much controversy, and within that category the right to decide between the requirements of justice in a specific suit and the interest of the public at large has generally been regarded as properly vested in the executive. There is no direct way of enforcing respect for the views expressed in the passage I have just cited. The Minister is simply trusted to do his duty and to do it conscientiously.

The other kind of document in respect of which a claim of Crown privilege can arise is the document that falls within a class of documents which is withheld from production as a matter of public interest. Here the document of which production is sought may in itself contain nothing in the least likely to injure the public interest and the claim of privilege is made simply on the basis that the production of that sort of document would interfere with the proper functioning of the public service. The ruling of the House of Lords in the *Thetis* case covers this second category of documents as well as the first, and in both the real issue has to be decided by the Minister and accepted by the judge.

Now it is quite plain that the public interest can be very seriously prejudiced by the publication of documents in either of these categories. In the first, the nature of the danger will usually be direct and obvious to the informed. In the second, the danger may be less obvious and more remote but just as real, nevertheless, for those who have the responsibility of seeing that the public service remains efficient and on a sound footing. Suppose, for example, that in the course of cross-examination a police officer is

asked to state, or to produce some document showing, the source of the information which led him, in the course of his duty, to keep a watch on certain premises. If there was no need to think beyond the instant case compliance with such a request might be quite innocuous, but in that sort of situation the responsible authority cannot properly take so narrow a view. If the officer were bound to answer that sort of question or to produce that sort of document, the ultimate and undoubted effect would be to discourage informants and to make the protection of the public very much more difficult than it is.

But while this second category of documents can contain much that is best not revealed, the effect of production on the public interest may often be very indefinite and largely a matter of opinion. The result of this and of the decision in the *Thetis* case has been to raise considerable controversy and a demand that, in cases within this category, the ruling as to production should be made not by the Minister concerned but by the judge. This question was the subject of a considered statement by the Lord Chancellor, Lord Kilmuir, in the House of Lords on June 6, 1956, in the course of which he said—"The reason why the law sanctions the claiming of Crown privilege on 'class' ground is the need to secure freedom and candour of communication with and within the public service, so that Government decisions can be taken on the best advice and with the fullest information. In order to secure this it is necessary that the class of documents to which privilege applies should be clearly settled, so that the person giving advice or

information should know that he is doing so in confidence." [21]

Two main criticisms are advanced against the present state of the law respecting this second category—the class category—of documents. First of all, it is pointed out that it makes a Minister a judge in his own cause. And secondly, there are those who, challenging the general applicability of the Lord Chancellor's reasoning, contend that much within the class of which he speaks would not be affected at all by the possibility of subsequent publication. Communications, they say, do not need to be confidential in order to be candid, and if an assurance of secrecy makes for sound advice it also makes such advice easier to ignore. In his statement Lord Kilmuir recognised that what I have called the second category of documents was wider than it need be to protect the public interest and his approach was " to narrow the class as much as possible by excluding from it those categories of documents which appear to be particularly relevant to litigation and for which the highest degree of confidentiality is not required in the public interest." Following on that he announced the Government's decision not to claim privilege for certain types of documents including the reports of employees, eye-witnesses and officials relating to road and other accidents involving Government employees and accidents on Government premises, which result in action being taken against a Government Department; medical records kept by departments in respect of civilian employees; medical reports relating to

[21] Hansard H.L., Vol. 197, Col. 742.

service personnel where the Crown or the doctor employed by the Crown is being sued for negligence; and medical and other documents in the possession of the Crown which are relevant to the defence in criminal proceedings.

This is a valuable concession and its importance lies not only in that but in the fact that it demonstrates an official recognition of the problem and an anxiety to reduce it. In the nature of things, however, it cannot be the last word on the subject, if only because changing conditions may add to the classes within this category which can be revealed without prejudicing the community. If a satisfactory permanent solution is to be found one must look to something other than a series of concessions added, from time to time, to an existing list. Apart from the fact that a list may require revision as circumstances alter, the concessions may come too late and may eventually develop into a maze of complicated rules and fine distinctions. On the other hand, the solution that would leave the question of production to the judge is fraught with difficulties that are hardly less formidable. Though most departments tend instinctively to keep a close grip on their files, the Minister is normally far better placed than the judge to know what the repercussions and consequences of production are likely to be both in the field under investigation in the instant case and in other regions as well. How is the judge to attain the same degree of knowledge and understanding? He can hardly start a private inquiry of his own, and the issue cannot be sped before him for determination in the ordinary way without courting the risks that the Minister is trying to avoid. On the whole, I think

the balance of advantage lies in keeping the decision from becoming entirely a function of the courts. But to leave it entirely with the Minister will do nothing to dispel the atmosphere of bias which can so readily attach to executive action or assist him in what may be a most anxious and perplexing task. Whether concession lists are kept on foot or not, the Minister might well be given the right, exercisable at his discretion, of referring a request for production of a document in this second category to a body with power to obtain such information as it needed and to consider and decide the matter. This is a function that might be committed to a body such as the Administrative Council I have mentioned earlier or, failing it, to a special body consisting, say, of a member of the Court of Appeal and an experienced administrator, no longer in the public service. If such a body decided on production that would bind the Minister, but if it decided against production or could not agree, the Minister would be free to act as he thought right. On account of its confidential nature such a procedure could, with propriety, be kept informal and private in character and therefore inexpensive. It would be anything but a complete answer to the problem, but it could help to remove the appearance and possibility of bias and in course of time it might lead to something better.

Liability in Tort

Perhaps the most important of all the immunities of the Crown in modern times has been its immunity from actions of tort, *i.e.*, actions for wrongs, such as

the breach of a duty to take reasonable care. Before the passing of the Crown Proceedings Act, 1947, the Crown could be sued in contract and for the recovery of property if the special and somewhat cumbersome procedure by Petition of Right were followed. But in tort, with one or two statutory exceptions,[22] the maxim "The King can do no wrong" held absolute sway. No claim could be made against the Crown on the ground that it had committed a tort or was vicariously liable for a tort committed by its servant or agent. The injured person could only sue the actual wrong-doer and hope that the Crown would foot the bill if the suit succeeded. That the Crown would do so became more likely as its immunity became more obviously anomalous, but the situation remained unsatisfactory. There was no certainty about the attitude of the Crown, the identity of those primarily responsible was sometimes difficult to establish and the courts discouraged efforts to surmount such obstacles by the use of fictions.[23]

The Act of 1947 transformed this situation completely. The Petition of Right procedure was abolished and, for the first time, the Crown was made subject to liability in tort over a wide and important field. With certain exceptions which I shall not pause to detail,[24] the Act by section 2 (1) makes the Crown liable in respect of (a) torts committed by its servants

[22] See s. 460 of the Merchant Shipping Act, 1894, and s. 26 (1) of the Ministry of Transport Act, 1919.

[23] *Adams* v. *Naylor* [1946] A.C. 543; and *Royster* v. *Cavey* [1947] K.B. 204.

[24] Some of these, as for example, those dealing with liability in connection with postal packets and the acts or omissions of members of the armed forces, have considerable practical importance.

or agents; (b) any breach of the duties which a master owes at common law to those in his employment; and (c) any breach of duty attaching at common law to the ownership, occupation, possession or control of property. There is, however, an important proviso to this subsection which I shall note now as I must refer to it later. It enacts that no proceedings shall lie against the Crown under head (a) "in respect of any act or omission of a servant or agent of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or agent or his estate."

The Act of 1947 has, on the whole, worked smoothly, and the important changes it brought about have caused little serious embarrassment to the executive. But if it has gone far to meet the difficulties and needs of litigants, the Act has not as yet given the courts much opportunity for settling the general nature of the duties owed by the executive to the subject outside the realm of contract. Before it came into operation, the wide immunity of the Crown had prevented exploration in this field, and the liability in tort which the Act has now created is imposed in terms that necessarily curtail the scope of judicial inquiry. If the Act had simply provided that the Crown would henceforth be liable in tort as if it were a private person, it would have been open to the courts to consider what duties were owed by the executive to the subject in order to settle whether, in a given case, the latter could recover compensation for the breach of a duty, such as the duty to take reasonable care,

that gives a cause of action in tort. On that hypothesis, for example, the courts, on a claim by A for damages against the Ministry of X for negligently delaying the issue of a licence to A whereby he suffered loss in his trading, might possibly have held the Ministry liable on the ground that, irrespective of the identity or duty of the individual officials concerned, the *Ministry* was under a duty to exercise reasonable skill and care in dealing with applications for such licences. The Act, however, precludes that sort of investigation. As matters stand—and it is here that the proviso to section 2 comes into the picture—A has to show that, apart from the Act altogether, his loss was due to the negligence of some official of the Ministry who would have been personally liable if he had been sued. And so the issue which the courts may have to examine in cases of this sort is not as to the duty of the Ministry but as to the duty of the Ministry's official, and that may sometimes be a very different matter indeed. The official owes a duty to the Crown. But does he owe a duty to the subject as well? In some cases he clearly does. The driver of the Ministry's van is liable if by his negligence on the highway while travelling on official business he runs down and injures A. But is the official who goes off for his summer holidays, carelessly leaving A's licence papers hidden away and unattended to, also under a double duty of this sort so that he, and therefore the Crown, will be liable to answer for his lack of care?

A duty of that kind to the subject has still to be authoritatively established. If and when it is, the law will provide a remedy for official carelessness

causing loss which could benefit the State as well as the subject, and do much, into the bargain, to put a brake on the ancient habit of "passing the buck." At present the executive enjoys a considerable *de facto* immunity in the way it does its business and attends to the requirements of those who must come to it. In part this may be due to the size and impersonal atmosphere of the modern department which tends to induce a sense of awe and patient acceptance in many ordinary people. That it also derives to some extent from the uncertainties that presently prevail respecting the executive's duty to the subject cannot, I think, be doubted. It is difficult to forecast how this situation will eventually be resolved or how far the courts are likely to go in the absence of further legislation. But the marked increase in State-and-citizen transactions leaves room for the acknowledgment of duties on either side, and it seems reasonable to suppose that a wholesome balance between the demands of freedom and good government must mean that the individual's obligations to the State will not multiply without some countervailing addition in its obligations towards him.

Summary

To summarise this necessarily piecemeal and incomplete survey of the power of the State in relation to civil rights is to run the risk of appearing to simplify what, on any view, is a subject of great range and complexity. But, that warning given, the general trend of events and some at least of the steps needed to maintain a just relationship between the State and

its citizens may be gathered and noted briefly under three heads.

First, the power of the State is increasing. Even without the stimulus of external pressure this process seems unlikely to reach its zenith for some time. The impact of this on the liberties of the individual means that his need for protection under the law will continue to call for anxious and unremitting attention.

Secondly, an awareness of the dangers of this situation has also been growing and is now probably more widespread than ever before. In Parliament, despite the volume of legislative business, a fairly sharp watch is kept for the more obvious encroachments on private rights and, as we have seen, a procedure has been set up for the detection of abuses in the exercise of the powers of legislation conferred upon Ministers. Moreover, for those who can avail themselves of it, the Parliamentary Question remains one of the most valuable safeguards yet devised against the abuse of governmental power.

As respects the executive, the need to keep a better balance between the rights of the citizen and those of the State has already been recognised, at any rate in some degree, by Parliament; and the courts, within the limits imposed by law and a reluctance to meddle in what look like administrative questions, have not been slow to correct error and declare rights. But there is, I believe, a deepening feeling in many quarters that the relationship between the courts and the executive requires to be overhauled and re-set so that the supremacy of the law may prevail in a manner

better calculated to promote a more even administration of justice on the one hand and the art and practice of sound administration on the other.

If such are the trends, they are salutary and encouraging and have, it would seem, a fair chance of founding a stable tradition of the highest constitutional importance. But what this fair chance is defies closer assessment, for—probably more than on anything else—it depends in large measure upon the ability of the principal political parties to continue to share (even if they do not admit the soft impeachment) a good deal of common ground respecting the values and virtues and pattern of living that have, so far, formed the national bond.

And thirdly, this growing awareness and trend of thought should not be left to evaporate. It should be nourished and kept alert by a sustained effort to improve the present situation and to experiment, if necessary, for that purpose. What the immediate programme should be is a question likely to provoke many conflicting answers, but if I had to choose three items as a first instalment I think I would vote for: (i) the procedural and jurisdictional modifications regulating the control of the executive by the courts which I have suggested earlier [25]; (ii) the general adoption of the principle *audi alteram partem* in administrative decisions involving the property, livelihood or welfare of the individual to a substantial degree; and (iii) the experimental setting up of an Administrative Council or like body to help in the formation of administrative standards and the application of such standards to matters in dispute.

[25] See pp. 96–97.

THE POWER OF WEALTH AND THE POWER OF STATUS

CHAPTER 5

THE POWER OF WEALTH AND THE POWER OF STATUS

TURNING, as I now must, from the power of the State to power in other hands, one cannot but sense a change of atmosphere and emphasis. Instead of being predominantly political, the relevant motives are predominantly economic or commercial, and the underlying ambitions are concerned rather more with personal success and, I think it would be fair to add, with power for power's sake. But perhaps the greatest change of all lies in the difficulty of locating and assessing the sort of power that calls for some degree of control in the interests of the community. In the case of parliamentary government the sources of power stand revealed and can be watched closely enough to make it relatively easy to detect grave shortcomings or abuses. Questions can be asked, statistics can be gathered, and the expenditure of every department ascertained and examined, often in considerable detail. But leave the domain of government for the outside world and what is readily available for identifying and measuring the consequences of power becomes comparatively scant. This, no doubt, is to be expected in a free society, for the aims and interests of such a society must greatly exceed those of its government in number and diversity, while the rights and liberties of private life can hardly fail to obscure the shape and significance of some, at least, of the power that lies in private hands. There are, of course, forms of that

power to which this generalisation does not apply. The power of the press, for example, is a subject in itself, with plenty of relevant information to hand and its problems, no matter how debatable, as easily recognisable as those of the power of the executive. But, by and large, the power with which I am now dealing cannot be put into neat parcels, labelled according to source and effect, and I therefore make no apology for the fact that the categories or aspects I have selected for consideration in this chapter and the next are inter-related and rather uncertain in their scope. What matters is the danger that may lurk in them and the attitude of the law regarding it.

The Power of Wealth

I take first the power that comes of wealth; that is to say, of comparative wealth, of having more than most; more property or more rights capable of being turned into property. This is a form of power as old as human history. The man with greater flocks, more slaves, more land or more money has always had some degree of power not enjoyed by his poorer neighbours. In this Kingdom the trend, as wealth becomes more evenly distributed through the medium of taxation, has been for this power to lie less with wealthy individuals and more with the bigger joint stock companies; and now we may add to the latter the great public service corporations, like the National Coal Board, the British Transport Commission and the Air Corporations, that have become such a feature of our national economy during the last two decades but cannot very well be regarded as Departments of State.

Whether they make a habit of running at a profit

or not, these corporations have extensive resources and the power of great wealth. Their capacity to use or abuse this power naturally depends on the kind of constitution and the rights with which Parliament has endowed them. That is too large a topic for discussion here, but it may be noted in passing that, although subject to varying degrees of government control, these corporations act, in general, as independent bodies and not as agents or servants of the Crown.[1] They are, moreover, usually liable to the ordinary rules and processes of the law. The trend, perhaps, is to make this clearer. Thus, in the Air Corporations Act, 1949, we find section 7 (2) declaring that no provision of the Act conferring any power or imposing any duty upon what are now the British Overseas Airways Corporation and the British European Airways Corporation, authorises these bodies to disregard " any rule of law, whether having effect by virtue of any enactment or otherwise." The pattern, however, varies considerably and in the Iron and Steel Act, 1949, which established the Iron and Steel Corporation of Great Britain, a similar provision (section 2 (6)) was followed by a declaration (in section 3 (1)) of the general *duty* of the Corporation under three heads (including a duty not to show undue preference or to exercise unfair discrimination), and then (in section 3 (2)) by an enactment that " nothing in this section shall be construed as imposing on the Corporation, either directly or indirectly, any

[1] A useful summary of the nationalised industries and their public corporations will be found in Professor L. A. Sheridan's article in *The British Commonwealth: The Development of its Laws and Constitutions*, Vol. I, *The United Kingdom*, 372 *et seq.*

form of duty or liability enforceable by proceedings before any court." That Act has now been repealed and, so far as I am aware, nothing quite like the passage just cited has appeared since on the Statute-book; but the instance is a salutary reminder of what can be done to divorce power from judicial control and to create duties which are not really obligations.

The power of which I am now speaking can, of course, be accentuated by statutory provision, for the legislature sometimes finds it expedient to confer valuable privileges and immunities on interests and bodies which are wealthy in the sense described. Today, however, this sort of super-added power seldom betokens a concession to wealth as such and, for present purposes, I can leave it out of account. What, then, is the essence of the power we are discussing, the power of wealth in itself? It must be acknowledged at once that much of this power is necessary and benevolent; necessary, because it supplies the means of production and makes possible new enterprises and better standards of living; and benevolent because it falls upon the just as well as the unjust and nurtures a legion of good causes and enlightened relationships. To many this particular species of power brings a heightened sense of social duty together with the means of translating it into practice. Financial stringency sometimes acts the other way so as to engender a lack of consideration, and it is not without significance that the best employers are now often to be found in the ranks of the great trading corporations. The fact remains, however, that wealth in a free society naturally tends to bring the wealthy the lion's share of what is most needed or most prized,

be it raw materials for the trader or food, medical attention, a superior education or the vindication of one's rights by the courts. That, I think, is what constitutes the core and substance of this power. How far it should be controlled in the interests of the community at large is a matter of current political controversy on which I cannot enter. But that some degree of regulation is necessary and proper finds general acceptance and explains the advent of the Welfare State and its establishment on what appears to be a firm basis. The legal structure of that basis has been predominantly statutory for the common law never carried the maxim that equality is equity to any great lengths. Yet, whatever the effect of its early preoccupations with rights of property may have been, the common law did much eventually to sustain the view that wealth was no passport to privilege. How firmly and widely that view came to be held is perhaps best shown by the manner in which the British people have accepted and made effective the strict rationing of essential commodities in times of war and scarcity. The slogan "Fair shares all round" did more than encourage the community to endure the hardships and restrictions of a rationing system. It became the expression of a political ideal which played its part in preparing the way for the social revolution which we have all witnessed.

That process has gone so far that the power of wealth in itself may be regarded by some as sufficiently controlled to call for little more in the way of comment. But the law still has problems to face in this connection and I propose now to look briefly at one of these, partly because of its fundamental nature

and partly on account of the efforts that have been made to meet it. I refer to the accessibility of the courts for those who would assert or defend their rights.

In theory the courts are open to all. With very few exceptions, the subject is free to prosecute his claim or conduct his defence in person and without professional assistance. The ordinary layman needs help to bring his case to court and is reluctant to move without such help. But in practice the position is quite different. He does not know what the law is and has no experience to guide him as to what he should say or do. The result in most cases is that he prefers not to go to court unless he can get a lawyer to act for him; and that means a solicitor and, in the High Court, generally at least one barrister as well. This is where the problem starts. If the would-be litigant is not a man of means he is faced at the outset with two financial obstacles. He will have to find the money to pay his lawyers; and if he loses his suit the probability is that he will have to pay his opponent's costs as well since, under the English system, costs usually follow the event—that is, go to the winner—on the theory that the successful party should be indemnified in respect of costs, up to a reasonable standard, by the party who has lost. That theory is not generally accepted in the United States and some other jurisdictions, but it seems firmly established in this Kingdom and is, I think, unlikely to be abandoned as a contribution to the reduction of the problem under consideration. These obstacles are a formidable and, without help, often an insurmountable hazard for those who are not affluent.

Assuming no "frills" and that only necessary expenditure is incurred—such as would be allowed on what lawyers call a "party and party" taxation—there are few High Court actions involving witnesses that will not cost each side at least £160, and that figure could easily be much greater.[2] In the lower courts costs are less, but in England and Northern Ireland their jurisdiction is limited and the High Court is still the appropriate forum for most substantial claims.[3]

This situation is not, of course, due to wealth. It is due to the fact that the administration of justice, here as elsewhere, calls for the skilled services of the lawyer, and that the legal professions of this country are free and independent, with each of their members entitled to a proper reward for his work from the client who retains him and whose legitimate interests he must serve wholeheartedly. Yet, if the power of wealth does not cause this situation it is certainly enlarged by it. The affluent person may not like the financial risks of litigation, but the cost will not deter him from putting his case before the court, as plaintiff or defendant, if that is what he wants to do. His advantage is therefore two-fold: the courts are much more accessible to him because of his wealth; and, whenever his opponent is poor, he is in a better position to drive a hard bargain or score an easy

[2] This is based on Northern Ireland taxation practice as of July, 1957. The corresponding figure for England would, I gather, be similar. In both jurisdictions applications for increased fees were pending at the time mentioned.

[3] In contract and tort the jurisdictional ceiling in suits commenced in the County Court is £400 in England and £300 in Northern Ireland. In England, but not in Northern Ireland, the limit may be removed by consent.

victory by the mere threat of taking or defending proceedings. For example, the small man, particularly if he has a family to clothe and feed, will sell his patent rights cheaply if the alternative is an expensive action for infringement against some rich corporation; and the average taxpayer will sooner pay what the Commissioners of Inland Revenue demand if the only other choice is to run the gauntlet of the courts on some unsettled point of law. Needless to say, the poor litigant does not always have to face a dilemma of this kind. In practice he frequently gets help to litigate, and the wealthy are often anything but harsh or unscrupulous in the promotion or protection of their own interests. The paradox, however, remains. Justice is no respecter of persons, but the machinery of justice favours those who have the money or the friends to take them to court.

Though this has long been recognised as a grave reflection on our legal system, a satisfactory and complete solution has yet to be found. To make a State service of the legal professions cannot be regarded as a practical means of achieving this. Such a step would provoke a vigorous opposition in and also outside the legal world, with some fearing that it would jeopardise the confidential relationship of lawyer and client and the best traditions of the law, and others seeing in it an end of professional independence leading, ultimately, to a subservient judiciary and the decline of the rule of law. I need not pause to weigh these fears, but it will not be amiss to assert that, whatever else may be said of them, lawyers as a class stand for a free society and have a better understanding than most of its essential requirements.

If a solution of the problem is not to be found in a State service, it is no less clear that it is not to be found in a dispensation that will provoke litigation and open the courts to all and sundry. For centuries English law has wisely recognised that lawsuits can become vexatious and contrary to the public interest when the litigious spirit is over-encouraged, and in the ancient misdemeanours of maintenance and champerty we find the basis of the protection which the law affords against the abuse of process in the civil courts. Maintenance is the supporting or assisting of one of the parties to a suit by a person who has no interest or other lawful reason for his interference,[4] and champerty is the type of maintenance one gets when the maintainer is acting as such in consideration of being promised a share in the fruits or subject-matter of the action. Maintenance and champertous agreements are not only invalid and unenforceable: they are illegal, and their present relevance lies in the bearing they have on the help which a solicitor can give with propriety to an impecunious client. It is, of course, illegal for a solicitor, acting for such a person, to institute proceedings which he knows are ill-founded for the purpose of forcing a payment, or to stipulate for a part of what is recovered as the price of his professional assistance. Furthermore, section 65 of the Solicitors Act, 1957—which in this respect re-enacts what has been the law since 1870 [5]—provides, in effect, that an agreement whereby a solicitor retained to

[4] See *Martell & Ors.* v. *Consett Iron Co., Ltd.* [1955] Ch. 363, on the question of what will justify aiding a party.

[5] See s. 11 of the Solicitors Act, 1870, which applied to Ireland as well as England and Wales.

prosecute a suit stipulates for payment only in the event of success shall be invalid. But it seems clear that agreements to charge no costs or only out-of-pocket expenses are unobjectionable,[6] and it may be that this section does not necessarily render every stipulation that comes within it illegal as an act of maintenance or champerty. Its implications have not been fully explored and I am not in a position to speak with authority concerning the professional attitude, throughout the Kingdom, to the matters with which it deals. In Northern Ireland, however, the solicitor who acts in good faith for a poor person, in the justice of whose cause he has reason to believe, and who proceeds on the understanding that he will exact nothing, or nothing much, in the way of a fee from his client should the suit fail, is not regarded as acting unprofessionally. This attitude has its dangers, for it admits of abuse; but it caters for those who might otherwise have to go without the assistance of the courts and to that extent may be said to aid the due administration of justice.

The Provision of Legal Assistance

And now I must leave the difficulties and turn to what is more germane to my subject, that is, to what has been done to meet this problem of accessibility. I need not touch upon the provision of legal assistance in criminal cases, which is very general today, nor yet upon the early attempts that were made to provide help for poor persons who had some worthy cause to

[6] See *Jennings* v. *Johnson* (1873) L.R. 8 C.P. 425, and Cordery, *Law Relating to Solicitors* (4th ed.), 342.

prosecute or defend. For some time before 1944 the adequacy of the existing facilities had been a cause of concern and in that year the Lord Chancellor, Viscount Simon, committed the subject, in relation to England and Wales, to a Committee of which Lord Rushcliffe was chairman. This committee reported unanimously in 1945 and had the distinction of seeing most of its recommendations promptly accepted and given statutory effect by the Legal Aid and Advice Act, 1949. This measure and the regulations made thereunder necessarily enter upon many matters of detail which do not call for notice here. But the main features of the scheme are important; they reflect a general anxiety to tackle the problem of accessibility and are framed in a manner which assumes—rightly as events have proved—a high degree of professional co-operation. A brief answer to four questions will perhaps be the simplest way of noting the salient points of this interesting experiment.

Who are the beneficiaries? To qualify for legal aid an applicant has (a) to show a good prima facie case that it would be reasonable to support with such aid, (b) to have a disposable income which, after certain deductions and allowances, does not exceed £420 a year, and (c) to be prepared to contribute towards his costs such sum as may be fixed. If the applicant has a disposable capital of more than £500 legal aid may be refused if it appears he can afford to proceed without it. If his application succeeds he is granted a certificate by a certifying committee. During the year 1955–56, the number of applications was just short of 40,000 and the number of certificates granted was

approximately 22,000. No contribution was called for in some 36 per cent. of the certified cases; in 52 per cent. contributions ranged from under £10 to under £100, and in 12 per cent. the contribution was assessed at over £100.

What aid can be given? The Act of 1949 makes provision for legal aid in respect of legal advice and in civil proceedings before most of the ordinary courts of justice, including the House of Lords and the Privy Council; but, so far, the provisions relating to legal advice have not been brought into force and the only courts to which the Act has been applied are the Supreme Court (including the High Court and the Court of Appeal) and, since 1955, the county courts and certain local courts.[7] This means that legal aid is not yet available in the top and bottom tiers of our court system, the House of Lords and, of more practical importance in this connection, the courts of summary jurisdiction. With a few exceptions of no great moment, most kinds of proceedings are included, and the aid given covers the services of solicitor and counsel, the cost of witnesses, the preparation of documents and such other expenses as the litigation may entail. Of the various kinds of suit aided, matrimonial causes accounted for just over 77 per cent. of the total cases for 1954–55 and 1955–56.

How is the scheme administered? Not by a Government Department or local authorities, but by the Law Society, with the assistance of a staff and a series of

[7] S.I. 1955, No. 1775 (C. 14).

Area and Local Committees which cover the country and are manned by practising barristers and solicitors. The administration is thus in the hands of the professions concerned—a feature which has received general support and appears to have justified itself.

How is the cost met? The Act of 1949 provides for the establishment by the Law Society of a Legal Aid Fund into which receipts are paid and out of which the expenses of the scheme are found. The principal items of receipts and disbursements with the figures for 1955–1956, rounded off to the nearest £1,000, are as follows [8]:—

Receipts:

Parliamentary grant	£1,375,000
Contributions from assisted persons	£672,000
Costs recovered by assisted persons ...	£755,000
Damages and other moneys recovered on behalf of assisted persons ...	£1,846,000

Disbursements:

Administration expenses	£473,000
Expenditure on assisted persons' cases	£2,078,000
Refunds to assisted persons of contributions and damages and other moneys recovered on their behalf ...	£2,089,000

That legal aid has done much to meet the problem of accessibility within the limits imposed by the Act of 1949, as at present applied, cannot be doubted. The returns for the last two years indicate that of the cases assisted about 78 per cent. were successful,

[8] For the complete figures see the accounts in the Law Society's "Sixth Report on the Operation and Finance of the Act."

about 14 per cent. were unsuccessful and about 8 per cent. were settled with costs or damages or both. These figures are a tribute to the work of the certifying committees and justify the view that the need has been a real one. How far the problem extends beyond reach of what can be done under the Act, and how wise it would be to meet that untouched part merely by enlarging the present monetary limitations are questions that I prefer to leave to those with an intimate experience of the working of the Act. But it is safe to say that some need must exist beyond what could now be met were the Act applied in its entirety. Indeed, it may be argued with much reason that the person who needs help most, at any rate as a plaintiff, is not the person, with little or nothing to lose, who would qualify for legal aid, but the person, at present some distance outside that category, who owns his house or has managed to save something and who would stand to lose everything or nearly everything if his suit failed and he had to pay his opponent's costs. Moreover, such a person and, for that matter, any unassisted person who finds himself at law with an assisted person may suffer positively from the consequences of the Act. An unsuccessful assisted person may be made liable to pay his opponent such sum for costs as is reasonable having regard to all the circumstances, including "the means of all the parties." But if, as must happen, the assisted person cannot pay, the successful litigant who, presumably, would not have been sued at all had there been no legal aid, will have to bear his own costs. That seems less than fair and a strong case can be made for allowing such costs, subject to the discretion of

the court, out of the public purse. This would require an amendment of the scheme, but if the certifying committees maintain their present standards, the expense involved should not be prohibitive.

How best to make the courts accessible to people who are not poor enough to get effective aid at present is, as I have indicated, a matter for those who have made a close study of the scheme, and I shall therefore say no more about it except to suggest that the question may need to be approached from more than one direction, and that there is something to be said for the view that litigation could be made cheaper if it were made simpler. As the late Lord Cooper once said—

> "I sometimes wonder whether we lawyers should not take a leaf out of the book of the motor manufacturers. It is no use in these days offering a hand-made Rolls Royce to a motoring public which wants a mass-produced article. That is a parable of what we judges are doing in the Supreme Courts of this country—trying to sell to the public what at its best is a magnificent article, on which infinite care is lavished and which inevitably consumes in its production a great deal of time and of money, time and money which are well spent if the quality of the article is to be maintained. But do our customers really want that? Can our impoverished nation any longer afford the luxury article? May we not be forced to make do with something much less ambitious in order to satisfy the demand for justice which will be swift and cheap?" [9]

[9] *Journal of Society of Public Teachers of Law* (N.S.), 1953, Vol. II, 99.

Now I am certain that the last thing Lord Cooper wanted to see was the dispensing of a shoddy justice. No one wants that for anybody, but it would be as great a mistake to assume that the absence of an elaborate procedure must produce second-rate results as it would be to assume that the existence of such a procedure guarantees the highest quality of justice. Before a competent tribunal, nourished in a sound tradition, much can be done and done well in a summary and relatively informal fashion. The Irish Civil Bill courts (which still function in Northern Ireland), the court of the Industrial Assurance Commissioner, the Special Commissioners of Income Tax when hearing appeals, furnish examples of what can be accomplished in this way without pleadings or interlocutories or a costly representation. There are, of course, certain types of High Court proceedings which this kind of simplification might not suit. Actions for fraud, defamation, the infringement of patent rights and (in certain cases) actions to secure a declaration of rights may, for instance, demand a more deliberate procedure, with the issues closely defined and knit before the hearing. But for the common run of cases, such as those relating to negligence in the factory or on the highway or to the recovery of land, some of the preliminaries seem unnecessary and some, like the exchange of detailed pleadings, often prove themselves a waste of time and money as the real bone of contention emerges at the trial. Much of the litigation of today is of that ordinary sort, presenting issues which are familiar and very much the same whatever the size or value of the claim, and which really need nothing more formal or

elaborate in their staging than they would have in the county court. Lawyers as a body are slow to depart from the settled way of things and a change in this direction would not be easy to bring about; but if it could be achieved more people would be able to go to court and the taxpayer would be better off in the end.

In Scotland legal aid is provided under the Legal Aid and Solicitors (Scotland) Act, 1949, on lines similar to those followed in England and Wales. There is no corresponding scheme in force in Northern Ireland. The situation there is by no means identical with that obtaining in Great Britain. A large proportion of the population would look askance at subsidising divorce proceedings out of public funds and, so far, the need for legal aid has not obtruded itself very obviously. But the need may be there and, as the Minister of Home Affairs has recently decided to appoint a committee to explore the whole matter, I shall express no view on that question now or on how, if the need exists, it could best be met.

The difficulties and the future of legal aid are, however, by the way. What matters beyond all else in a study of power is that the passing of the Acts of 1949 and, no less, the manner of their administration, show a full recognition of the problem of accessibility, and manifest a determined effort on the part of the community to attack and reduce that problem.

The Power of Status

While the power of wealth tends to pass from individual to corporate hands, the power of status, that is

to say, the power that attaches to the rights and privileges of a recognised class of society, seems to be moving from the older and smaller groupings to those that are newer and larger. This, no doubt, reflects the changes that have taken place in the sources of political power and also, of course, the fact that power is bound to fall away where vitality wanes with the passing of time. Yet that is far from being the whole story of the changes which have occurred. The pioneer and the reformer have seldom had political power or the course of nature in their favour when the struggle started. Vision, endurance, the things of the spirit, have been their weapons, and none but the cynic would deny a similar equipment to many of those who, through the generations, have striven against the dangers and the injustices of power as they came to recognise and understand them.

That, with the need to say something of a relationship to which I must return later, leads me to take as an illustration of the power of status, the power that resides in employers as a class. This, even yet, is a formidable power, touching as it must at many points on the livelihood and welfare of those who are employed. But, compared with the situation at the beginning of the nineteenth century, it is now a controlled thing, held in check at many points by the law and kept in balance by the rising might of organised labour. The change since 1800 has been, on any view, astounding. Beginning before the great Reform Act of 1832, it showed a stirring of the national conscience against evils and conditions that had been intensified by the industrial revolution; and the political power of a widening franchise which eventually hastened the

process was itself the consequence, rather than the cause, of that leaven of liberal ideas which gradually subdued the doctrine of *laissez-faire* and sought to balance rights with duties and duties with rights. The story of this ferment is long and involved, and I cannot attempt to trace it even in outline. Its results appear in the statute book and, later, in the decisions of the courts, and all I may now do is to glance in turn at these two sources of law in order to note some of the features that help to mark the nature and extent of this remarkable transformation.

Though collective bargaining is now tending to dwarf the significance of individual agreement, and though the present century has seen statutory machinery provided for the fixing of minimum wages in many trades, the basis of the employer and employee relationship is still contractual and its law is very much the same for both sides. But in 1800 there was relatively little in the way of freely negotiated contracts of service. In that year several statutes [10] (part of a series that went back to the great shortage of labour following the Black Death of 1349) still provided for the settling of wage rates by Justices of the Peace, fixed hours of work and obliged workmen to work for those who required them. And by another statute, then in force,[11] Justices of the Peace were empowered to decide disputes between masters and workmen arising out of their contracts of service in a manner which sounds strange today. If a master were found guilty of some breach he might be ordered to pay an amount

[10] The Statute of Apprentices, 5 Eliz. 1, c. 4, was the best known of these.

[11] 20 Geo. 2, c. 19.

for wages, or the workman might be discharged from his service; but a breach on the part of the workman could be punished by imprisonment as well as by a reduction in wages. These penal consequences were largely removed in 1867 [12] but only disappeared completely when the Employers and Workmen Act of 1875 became law.

Another change of far-reaching importance can be seen in the attitude of Parliament respecting combinations to promote trade interests. These had been forbidden in regard to certain trades by a number of statutes going back as far as the fourteenth century, but in 1800 a stringent Act [13] of general application took the matter further. Amongst other things, it declared illegal all combinations for raising wages, altering the hours of work, decreasing the quantity of work or prevailing on others to quit work, and it provided for the punishment of contraventions by imprisonment. This led to considerable turmoil, and by an Act of 1824 [14] not only were all the Combination Acts repealed, including the provisions against combinations contained in the Act of 1800, but masters as well as men were declared exempt from punishment, both under the common and the statute law, for entering into combinations to further their trade interests. Some had thought that combinations would disappear along with the Combination Acts, but this proved not to be so. On the contrary, new combinations sprang up in numbers over the country and the Government, alarmed at the course of events, moved

[12] 30 & 31 Vict. c. 141.
[13] 39 & 40 Geo. 3, c. 106.
[14] 5 Geo. 4, c. 95.

the following year to substitute what it regarded as a less dangerous measure. This, however, was contested so vigorously that it ended in a form [15] very like its predecessor, with all the earlier Acts still repealed. But one important change was made. Liability under the common law was reimposed (save as respects wage rates and hours of work) and, as agreements in restraint of trade were illegal at common law, members of the trade unions, as they might now be called, remained liable to prosecution for conspiracy and had no legal means of preserving or recovering their joint property. This uneasy state of affairs lasted until the passing of the Trade Union Act, 1871, which enacted that the purposes of a trade union should not, by reason of being in restraint of trade, render any member liable to criminal prosecution or any agreement or trust void or voidable, and further provided that any trade union which followed a simple registration procedure should have certain rights and privileges in respect of its property and otherwise. This Act of 1871 may well be described as the charter of trade unionism. Though, as we shall see, the legislature had further privileges to bestow, it was that Act which gave the unions the basis of their present status and did more than all else to prepare the way for a transfer of power from master to man.

Another feature of the legislation for the period under review was the determined and successful attempt made to suppress the truck system—that is, the system whereby the services of the workman were obtained by the master in exchange for goods. This

[15] 6 Geo. 4, c. 129.

was done by the Truck Acts, 1831 to 1896. The mischief of this system had been recognised long before the nineteenth century and perhaps the best way of describing it, and the nature of the remedy, is to quote from an Act of 1464 [16] which was passed to regulate cloth-making and to protect those who worked for the cloth-makers of that day. This is how the material passage runs—

> "Whereas before this time in the occupations of cloth-making, the labourers thereof have been driven to take a great part of their wages in pins, girdles, and other unprofitable wares, under such price that it did not extend to the extent of their lawful wages . . . it is ordained and established . . . that every man and woman being cloth-makers, from the said Feast of St. Peter, shall pay to the carders, spinsters and all such other labourers, in any part of the said trade, lawful money for all their lawful wages . . . ."

The earlier Acts had many loopholes and were often evaded, a favourite device for this purpose being to stipulate that the workman should spend his wages at a store or shop owned by the employer, where the prices were often kept well above the ordinary level. The Acts of 1831 to 1896 struck effectively at such devices and ensured that the full amount of wages due should be paid in current coin of the realm, subject only to a very limited range of deductions of a reasonable and provident nature.

Many of the changes in the master and servant relationship during this period were caused by the

[16] 4 Edw. 4, c. 1.

pressure of economic conditions and cannot always be ascribed to a desire to improve the workman's lot. For example, the move away from the statutory regulation of wages and labour was a consequence of the industrial revolution and the introduction of the factory system, and was opposed by the early unions who were reluctant to face the dangers of a free labour market. But, viewed in retrospect, there is no difficulty in detecting a growing humanitarianism throughout the last century and a half, and nowhere is this better evidenced than in the steps taken by Parliament to improve working conditions and the welfare of workers in factories, mines and other workplaces. Today the Factories Act, 1937,[17] and the regulations made under it impose a wide range of duties and responsibilities upon factory occupiers which are designed to ensure proper standards of cleanliness, ventilation and sanitation, the fencing of dangerous machinery and the taking of many other precautions for the safety and health of the workers. The hours and conditions of labour for women and young persons are the subject of special provision and no child of compulsory school age may now be employed in any factory.

In 1800 this sort of statutory protection did not exist, working conditions were often appalling, and children were employed in large numbers for long hours. Parliament made a start on the problem with the passing of an Act in 1802 [18] which applied to woollen and cotton mills and factories and provided, amongst

[17] The corresponding statute for Northern Ireland is the Factories Act (Northern Ireland), 1938.
[18] 42 Geo. 3, c. 73.

other things, for the cleaning and ventilation of the premises, the instruction of apprentices and, be it noted, that such apprentices should not be employed at night or for more than twelve hours a day (from 6 a.m. to 9 p.m. exclusive of meal times) or sleep more than two in a bed! Other statutes followed dealing with different trades, and in 1833 [19] an Act was passed which applied to factories generally and got the length of prohibiting the employment of children under nine except in silk mills. This statute owed much to the exertions of that remarkable man Lord Ashley, afterwards Lord Shaftesbury. It introduced for the first time a system of factory inspection by government inspectors and was the beginning of a series of general enactments which gradually raised the standards required for health and safety and culminated in the Act of 1937.

Conditions in the nation's coal mines are now regulated by the Coal Mines Act, 1911, and the orders and regulations made under it. The contrast in this field of labour between the present position and that prevailing in the early part of the nineteenth century is even more striking than in the case of the factories. Until the first Mines Act was passed in 1842 [20] there had been no statutory regulation of this industry worthy of the name, and conditions were so bad underground that it is difficult to comprehend them today. The workings were frequently ill-constructed, dangerous and foul, and children of both sexes from the age of five or six were employed for long hours as "apprentices" to butty-colliers, as they were called,

[19] 3 & 4 Wm. 4, c. 103.
[20] 5 & 6 Vict. c. 99.

who contracted for raising the coal and used these unfortunate children because they had little or nothing to pay them. It was Lord Ashley who introduced the Act of 1842 in the Commons. His speech on that occasion is worth reading for at least three reasons. It gives us a vivid glimpse of the evil he was then warring against; it portrays a classic instance of the abuse of power; and it recalls what the mind and spirit of one man did to succour his fellow-men and take them forward to better things.

In matters concerning the duty of a master respecting the safety and welfare of his servants the courts were slow off the mark, and when the light came it was, as we shall see, from Scotland. So far as I am aware the first reported English case on the subject is *Priestly* v. *Fowler*,[21] which was decided in 1837. There the plaintiff, a servant of the defendant, was riding, in the course of his employment, on his master's van. The van was overloaded to the defendant's knowledge and broke down, throwing the plaintiff to the ground and breaking his thigh. For this injury the plaintiff got judgment for £100 at the Lincolnshire Summer Assizes in 1836. On appeal the verdict was set aside in the Exchequer for the reasons stated in the judgment of Lord Abinger. I must come back to this judgment later: what is material at the moment is that it treats the servant's claim that his master had not used due care as a novel plea. Lord Abinger, indeed, says of the master that he is "no doubt, bound to provide for the safety of his servant in the course of his employment, to the best of his

[21] 3 M. & W. 1.

judgment, information and belief" but the judgment contains no clear statement of principle for the determination of the master's liability. Two years later, however, the Court of Session in Scotland had to consider in *Sword* v. *Cameron* [22] the case of a workman who got injured in a quarry during blasting operations because he was not given a sufficient warning to get out of harm's way. The court held that the workman's master was liable because he had failed in his duty to provide a proper system of work. Other Scottish decisions [23] followed which emphasised the master's duty to take reasonable precautions for the safety of his workmen and this broad concept was readily accepted south of the Border as entirely conformable to the law of England. In the House of Lords, in 1891, in the case of *Smith* v. *Baker & Sons* [24] Lord Herschell states the rule in general terms thus:—

> "It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk."

I must not linger over the refinements and instances which mark the application of the principle thus enunciated and are to be found in a host of subsequent decisions. It remains the basis of the employer's common law liability. It imposes not an absolute

[22] (1839) 1 Dunl. (Ct. of Sess.) 493.
[23] See, in particular, *Paterson* v. *Wallace & Co.* (1854) 1 Macq. 748; and *Brydon* v. *Stewart* (1855) 2 Macq. 30.
[24] [1891] A.C. 325, 362.

but a qualified obligation—the obligation to exercise due care, to conform to a standard of conduct that is reasonable in all the circumstances of the case and has regard not only to the risk of injury but to the consequences of injury for the individual workman of which the employer knows or ought to know.[25] This test of a lack of reasonable care, or negligence, naturally depends to some extent on the outlook of the adjudicating tribunal, be it a judge alone or judge and jury. But, by and large, it has proved a satisfactory and wholesome criterion, well suited to relationships such as that of master and man, which have everything to gain from its underlying requirements of consideration and good neighbourhood.

It must not be thought that this standard of responsibility was laid on employers by a process of steady development or that it represents the high-water-mark of a workman's rights. It had to get rid of two serious blemishes before it attained its present shape, and the kind of protection it affords has, as we shall see, been substantially augmented by the courts and Parliament.

The first of the blemishes may be said to reflect the *laissez-faire* attitude. In general, those who voluntarily accept a risk with full understanding of it cannot complain if what constitutes the risk happens. As lawyers say, *volenti non fit injuria*. And that is what they did say, and say for a time with some success, to workmen who were injured because of a risk due to their employer's negligence but which they had come to know of and appreciate before they were hurt. They

[25] *Paris* v. *Stepney Borough Council* [1951] A.C. 367.

chose to work on despite the danger and must therefore be taken, it was said, to have voluntarily accepted it. This was a hard plea, for the ordinary workman is not always free to leave his bread and butter as soon as he knows of a danger which his employer ought to avert, and he may well be willing to risk injury without intending to absolve his employer from the consequences. The point eventually reached the House of Lords in 1891 in the case of *Smith* v. *Baker & Sons* which I have already mentioned, and was there decided in favour of the workman by a majority of their Lordships. The question was one of fact but, as Lord Watson pointed out, it was not whether the workman "voluntarily and rashly exposed himself to injury, but whether he agreed that, if injury should befall him, the risk was to be his and not his masters." [26]

The second blemish was the doctrine of common employment. Well before *Priestly* v. *Fowler* was decided in 1837 a master's liability to those not in his service for the wrongful acts of those who were had been generally recognised. In *Priestly* v. *Fowler* Lord Abinger was so apprehensive as to what might happen if the master's vicarious liability was extended to make him responsible to one servant for the negligence of another that he refused to countenance such an extension, and his view was subsequently affirmed by the House of Lords in 1858 as the law of both England and Scotland, in two Scottish appeals.[27] From then on, so far as the courts were concerned,

[26] [1891] A.C. 325, 355.
[27] *Bartonshill Coal Co.* v. *Reid*, 3 Macq. 266, and *Bartonshill Coal Co.* v. *McGuire*, 3 Macq. 300.

a workman in common employment with another could not recover against his employer if injured by the negligence of that other in the course of the employment. This doctrine of common employment left the workman without any effective redress in many cases and the courts came to regard it as a harsh and unfortunate rule of law—an attitude which led to some fine and ingenious distinctions. The rule operated, for example, between the crews of trams,[28] though not between the crews of buses,[29] belonging to the same undertaking. But the courts could not free themselves from the doctrine and it remained in force until, after much judicial denunciation, it was abolished by Parliament in 1948.[30] Yet, however unfair in its lifetime and unlamented in its death, the doctrine eventually contributed to giving the workman something additional to the rights it had held from him for so long. The hardship it caused was undoubtedly a factor in the passing of the Workmen's Compensation Act, 1897, under which, and the Acts that subsequently replaced it, a workman, disabled by accident arising out of and in the course of his employment, became entitled to weekly payments from his employer irrespective of whether or not the latter was at fault; but the workman could not get such payments and damages at common law as well and had to choose between these remedies. When the doctrine of common employment was abolished the Workmen's

[28] *Miller* v. *Glasgow Corporation* [1947] A.C. 368.
[29] *Glasgow Corporation* v. *Bruce* [1948] A.C. 79.
[30] s. 1 of the Law Reform Act, 1948. In Northern Ireland the corresponding enactment is s. 1 of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1948.

Compensation Acts had been repealed and for the compensation under them certain State industrial benefits had been substituted. Parliament had then to settle whether the workman could get such benefits from the State and damages against his employer as well. The statutes ending the doctrine solved this problem by a compromise, providing that any loss of earnings or profits which the employer might have to pay by way of damages was to be reduced by one half the value of such State benefits as had accrued or would accrue to the workman for five years after his cause of action against his employer arose. Thus, the workman who is injured by his master's negligence, whether personal or vicarious, is now generally entitled to receive from all sources more than the damages he can prove.

One further advantage which the workman now enjoys may be mentioned in conclusion. The Factories Acts and the Coal Mines Act, together with the sub-legislation made under the powers they confer, often place the employer under a strict or absolute duty to take certain precautions or achieve certain results in the interests of the workman's safety and health. The sanctions laid down by the Acts to enforce these obligations are penal and contraventions can easily occur without any negligence on the part of the employer.[31] In the absence of negligence can the workman recover against his employer if injured because of a breach of such a statutory duty? This question was settled in favour of the workman in

[31] A good instance of this will be found in *Galashiels Gas Co., Ltd.* v. *O'Donnell* [1949] A.C. 275.

1898 by the Court of Appeal in *Groves* v. *Wimbourne*.[32] Though, prima facie, a provision for penalties will be some indication that the legislature did not intend to confer a right of action for damages, the court, in that case, took the view that the intention of the relevant enactment (the Factory and Workshop Act, 1878) was to confer benefits on workmen as a class and not to restrict the consequences of a breach of the duties imposed so as to preclude the injured workman from suing for damages.

This brief summary shows how far the legal pendulum has swung, in one relationship, towards a balance of power. It cannot be claimed that, in its momentum and extent, this reaction is typical in the sense that the power of status has been curbed elsewhere in like manner, any more than it can be said that legal aid is typical of the efforts made to neutralise or control the privileges of wealth in other directions. The instances I have been discussing cannot, therefore, be made the basis for any sweeping generalisation. But, viewing them in conjunction with the trends that have been noted earlier, it would, I think, be safe to deduce that the temper of the British people leans, perhaps increasingly, against one section of the community holding much in the way of power over others, and that once such a situation is fully realised—a process which may take time—support for some practical means of control will not be lacking or half-hearted.

[32] [1898] 2 Q.B. 402.

THE POWER OF MONOPOLY AND RESTRICTIVE ASSOCIATION

CHAPTER 6

THE POWER OF MONOPOLY AND RESTRICTIVE ASSOCIATION

POWER in the sphere of trade has long been recognised as a potential source of danger to the community and its members; but, under the pressure of changing conditions, such protection as the law has afforded against it has varied considerably in both character and efficacy. The conflicting interests and influences alter so often, and at times work so obscurely, that the regulation and control of this form of power is a subject of exceptional difficulty and complexity. Yet, for the ordinary citizen, the nature of the danger—at any rate in its cruder and more direct aspects—is reasonably plain and generally understood. Prices may rise, with consequent want, when the control of supplies falls into a single hand; employment may fail as competitors are eliminated; and the small trader may be crushed out of a living by the rival who has grown big enough to undersell him or powerful enough to see that he gets nothing to sell.

The normal path to trading power is to reduce competition as far as practicable and to get rid of it altogether if possible. The most obvious way of doing this is to acquire a monopoly in the particular field concerned. The simplest type of monopoly was that granted by the Sovereign to a subject by letters patent. That sort of exclusive grant was very common under the Tudors and a good example will be found in *Darcy* v.

Allein,[1] a decision of the King's Bench in 1602, towards the end of Elizabeth I's reign. There the Queen had purported to confer on the grantee, *inter alia*, the sole right of making playing cards within the Realm for a period of years, and the court held this contrary to the common law and void. Though it is not quite clear how far the judges had been prepared to go in withstanding these royal grants before this, it is plain that the practice of making them was arousing an increasing opposition, and eventually, in 1623, Parliament passed the Statute of Monopolies [2] which declared that—

> "All monopolies and all commissions, grants, licences, charters and letters patent heretofore made or granted or hereafter to be made or granted to any person or persons . . . of, or for the sole buying, selling, making, working or using any thing within this Realm . . . are altogether contrary to the laws of this Realm, and so are and shall be utterly void and of none effect, and in no wise to be put into use or execution."

This statute provided for certain exceptions and of these the best known is that which now forms the basis of our patent law and which related to grants for fourteen years or less of the "sole working or making of any manner of new manufactures within this Realm, to the true and first inventor or inventors of such manufactures which others at the time of making such . . . grants shall not use . . . ."

The Act of 1623 did not end all royal monopolies, which still had their attractions as a convenient means

[1] 11 Co.Rep. 84b.
[2] 21 Jac. 1, c. 3.

of raising money without resort to Parliament; but during the next century this use—or abuse—of the prerogative fell away and the public interest became more and more involved with practices of a monopolistic or restrictive kind which were imposed by traders themselves and had nothing to do with the Crown. These practices took various forms according to the trading situation and the strength of the interests concerned. Successful merchants might, by cornering a particular commodity or by putting their rivals out of business, secure for themselves a monopoly in fact; or those merchants whose advantage lay in the same quarter might arrive at some agreement or understanding whereby their trading would be restricted for their mutual benefit as, for example, by price-fixing arrangements. Whatever the details, this sort of thing is, fundamentally, almost as old as trading itself and Parliament, particularly in the reign of Edward VI, had repeatedly endeavoured to protect the public against it by prohibitions and penalties. Thus in 1548 we find an Act [3] providing for the punishment of sellers of victuals who "not contented with moderate and reasonable gain . . . have conspired and covenanted together to sell their victuals at unreasonable prices." The considerable body of statute law of which this is an instance sought to protect the common weal by imposing a whole series of restrictions upon freedom of trade. By the latter half of the eighteenth century these restrictions had come to be regarded as themselves a cause of high prices and, generally, as doing more harm than good, and Parliament then embarked

[3] 2 Edw. 6, c. 15.

on a policy of repeal which continued until, by the middle of the nineteenth century, the United Kingdom had virtually no legislation directed against monopolies or restrictive association on the part of traders. That state of affairs was to continue for over a century. Trade was free from its statutory shackles and as trade was the lifeblood of the nation the freer it was the better for all. This was the new theory, but the changes it helped to foster began to cast doubts upon its validity. The expansion of commerce produced a corresponding development in the two principal methods of attaining commercial power. Trading concerns, under the control of a single group or person, grew large and then vast in a manner which gave them dominance and a virtual monopoly in their own field. Or, associating themselves with other independent undertakings, they entered into pacts or submitted to regulatory devices with a view to advancing their mutual interests, as by maintaining price levels, preventing competition or controlling the supply of raw materials. These methods—monopoly and restrictive association—are capable of taking many forms and their purposes, together with the constant changing of trading conditions, tend to produce complex and enlarging structures that gain economic power as they expand. The result need not be injurious to the public interest: it may in fact confer substantial benefits, as by keeping prices stable or ensuring better standards of quality than would be possible in a state of cut-throat competition. Some trades, indeed, seem to gravitate almost naturally to a monopolistic position. But altruism is not a common commercial virtue and there is abundant scope for the exploitation of the

needs of the public in both the methods mentioned. In the United States this danger has been recognised and attacked by a series of Federal statutes starting with the Sherman Act of 1890 and sometimes referred to as the anti-trust laws; but in the United Kingdom the situation, as we have seen, was left to the care of the common law for over a century—an epoch which, as we shall find, only began to end in 1948.

Broadly speaking, the attitude of the common law has been to favour freedom of trading and to frown upon restraints. It disliked monopolies and for long regarded general stipulations in restraint of trade as prima facie contrary to public policy. But in the latter part of the nineteenth century the courts began to take a wider view of restrictive agreements, and since the decision of the House of Lords in 1894 in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.*[4] the common law rule has been that a contract in restraint of trade will be enforceable if, though only if, it is (a) reasonable as between the parties, and (b) consistent with the interests of the public.[5] The "unruly horse" of public policy is therefore still a test, but in fact the courts have left the nature of that test very much at large, and their decisions, often directed to issues raised by contracts of service and turning for the most part on the position and circumstances of the contracting parties, have done little to safeguard or define the public interest. Whatever the reason, there has been a conspicuous absence of litigation on behalf of the public to condemn agreements and

[4] [1894] A.C. 535.

[5] *Per* Lord Birkenhead L.C. in *McEllistrim* v. *Ballymacelligott Co-operative Society* [1919] A.C. 548, 562.

practices which are prejudicial to it. The cause for this is not easily determined. The difficulty of ascertaining the facts of trade restraint from without, and the fact that the Law Officers have not had the time or the means or any traditional urge to initiate such litigation may afford a partial explanation. So may the circumstance that the tort of actionable conspiracy has not developed on lines apt to give such protection. Provided no unlawful means are used, a combination aimed at advancing or defending the trade interests of those combining, even by harsh and discriminatory methods, will give no cause of action to those who are injured as a natural consequence of the combination.[6] In the decisions founding this doctrine the interests of the community at large are not emphasised and there is little attempt to draw on the analogy of the public nuisance cases which recognise the individual's right to sue in respect of a public nuisance if it has caused him damage. In this connection, however, it must be remembered that traders in association may constitute a trade union since the statutory definition of that term [7] includes ". . . any combination . . . for imposing restrictive measures on the conduct of any trade or business . . ."; and that where that is the position section 3 of the Trade Union Act, 1871, will apply to prevent the purposes of such association being unlawful " by reason merely that they are in restraint

[6] *Mogul Steamship Co.* v. *McGregor, Gow & Co.* [1892] A.C. 25. See also *Sorrell* v. *Smith* [1925] A.C. 700, and *Crofter Hand Woven Harris Tweed Co.* v. *Veitch* [1942] A.C. 435.

[7] s. 16 of the Trade Union Act Amendment Act, 1876.

of trade" so as to render any agreement void or voidable.

This situation and the continued growth of monopolistic concerns and restrictive practices led to the passing of the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948. The general purpose of this important statute was, to quote from the title, "to make provision for inquiry into the existence and effects of, and for dealing with mischiefs resulting from, . . . any conditions of monopoly or restriction . . . prevailing as respects the supply of, or the application of any process to, goods . . . or as respects exports." The Act set up what is now known as the Monopolies Commission and their principal function is to report concerning such matters as, under the Act, the Board of Trade may refer to them. Usually the reference relates to a particular trade or industry, and the Commission have so far reported on some fifteen of such references; but under section 15 the Board of Trade has power to require the Commission to submit a report "on the general effect on the public interest of practices of a specified class" which are within the ambit of the Act. At the end of 1952 the Board exercised this power in relation to a wide range of restrictive practices, including agreements or arrangements whether legally enforceable or not, and in May, 1955, the Commission delivered their Report [8] on this reference, dealing at length with various forms of discriminatory trade practices. This important document led to the passing of the Restrictive Trade Practices Act, 1956. That Act and the Act of 1948,

[8] Cmd. 9504.

as modified by it, are, as one might expect from the nature of their subject-matter, complicated measures which defy any attempt to expound them fully and, at the same time, briefly. But they constitute, in conjunction, the first determined effort that has been made to meet and control, *in the public interest* and throughout the United Kingdom, the modern power of monopoly and restrictive association. For that reason I cannot leave this branch of my subject without a short description of each of these epoch making statutes, though those who want further details and the greater accuracy that details bring must be left to consult the actual text.

The Act of 1948 establishes an investigatory process. It does not provide for adjudication and the Monopolies Commission are in no sense a court of law. Their function, as already indicated, is to inquire and report, and Parliament has given them substantial powers to help get at the truth. The particular matter to be investigated is determined by the Board of Trade. It must relate to the supply, processing or export of a specified description of goods respecting which the Board think that certain conditions mentioned in the Act may prevail. Originally, these statutory conditions covered restrictive practices as well as monopolistic situations, but the effect of the Act of 1956 has been to reduce the scope of the conditions by excluding therefrom those restrictive practices which fall within the purview of the later Act. Stated broadly, the Act of 1948 now deals with monopolies while the Act of 1956 deals with restrictive agreements. In point of fact, the Monopolies Commission can still be asked to inquire into certain restrictive practices;

but, for present purposes, their main function may be taken as the investigation of monopolies, or "monopolies of scale" as they are sometimes called. The statutory conditions do not call for the existence of a literal monopoly, that is to say, a state of affairs in which some single interest dominates a particular field of trade completely. In relation to supply they are deemed to prevail if one-third of all the goods of the description in question which are supplied in the United Kingdom, or in any substantial part thereof, are supplied by or to one person or group; and there are similar provisions respecting the processing of goods and exports.

How, then, does the Act of 1948 work when the Board of Trade have decided that there seems to be a case for referring a monopoly of that kind, respecting some specific commodity, for investigation by the Commission? The Board may be content to ask for a report on the facts—particularly as to whether the conditions thought to prevail do prevail; or they may require the Commission to go further and to report whether the conditions in question or the acts of the parties concerned "operate or may be expected to operate against the public interest."[9] The reference made, it then becomes the duty of the Commission to inquire carefully into the matters referred to them and, in due course, to render a reasoned report with definite conclusions on the questions submitted. They must survey the general position so as to facilitate "a proper understanding of the matter"[10]; and if they are not limited to the facts and they find that the

[9] s. 6 (1).
[10] s. 7 (1).

statutory conditions prevail and that they or the conduct of the parties "operate or may be expected to operate against the public interest" it becomes their duty to consider what ministerial or other action should be taken to remedy or prevent the mischiefs revealed and, if they think fit, to make recommendations as to such action in their report.[11]

That the tasks thus committed to the Commission call for skill and patience of a high order is apparent, and it would be unreasonable to expect quick results or a large output. The facts may be hard to get at and much probing and unravelling of complicated situations may have to be done before just conclusions can be reached. But it is in the words "the public interest"—the most important expression in the whole statute—that the greatest difficulty will often be found. The Act does not define this expression, but section 14 provides that in determining what may operate against the public interest all relevant matters are to be taken into account and "amongst other things, regard shall be had to the need, consistently with the general economic position of the United Kingdom" to achieve four objectives, which are then stated and may be summarised thus—(a) the provision of what will best meet the requirements of home and overseas markets by the most efficient and economical means; (b) the organisation of industry and trade so as to increase efficiency and encourage new enterprise; (c) the best use of men, materials and industrial capacity in the United Kingdom; and (d) technical improvements and better

[11] s. 7 (2).

markets. It will be noted that these aims are national rather than sectional in nature, but how far they may help to settle where the public interest lies in any given case will only emerge after a much fuller experience of both Acts. They certainly crystallise considerations to be regarded, but they do not exhaust what is relevant and the weight to be given to each remains a matter for the Commission.

Unless the reference to the Commission has been limited to the facts, the Board of Trade must (with certain exceptions relating to the public interest, trade secrets and exports) lay the Commission's report before both Houses of Parliament. Whatever remedial measures are desirable may then follow as the result of negotiation with the interests involved. But if the situation is not met in this way, section 10 of the Act empowers the Minister or Department concerned (referred to in the Act as a competent authority) to make an order for the purpose of remedying or preventing any mischief that may result from the conditions or the acts of the parties which the Commission, or the House of Commons, have held may operate against the public interest. Breaches of an order made under this power, though not punishable under the criminal law, may be enforced by civil proceedings for an injunction or other appropriate relief.[12] So far, only one order [13]—an order relating to dental goods—has been made; but the existence of the power should suffice, in a fair proportion of cases, to induce remedial action by agreement.

As already observed, the Monopolies Commission

[12] s. 11.
[13] S.I. (1951) No. 1200.

cannot be expected to act quickly or on anything like an extended front. It is also to be noted that their tasks are assigned by the executive and that it is the executive which is responsible for acting upon the information or recommendations contained in the Commission's reports. In theory this does not seem necessary or desirable, but at the present stage of development it may be doubted whether a practical alternative exists. Another question—and one which can only be settled in the light of future experience—is whether the powers conferred by section 10 on the competent authorities are a sufficient sanction to ensure compliance on the part of the more powerful monopolistic organisations. These powers seem designed rather to curb restrictive practices than to reform the bodies or unified groups whose monopolistic power is mainly due to sheer weight and size. Differing from the law of the United States in this respect, the Act of 1948 affords no positive means of breaking up or reducing these commercial kingdoms and it has still to be seen how far it will succeed in resolving this particular problem.

The Act of 1956, though supplementary to the earlier statute, presents a marked contrast in its mode of operation. Its principal object is to remove from commercial life the restrictive trade agreement that is contrary to public policy, and the process it invokes to this end is, at its crucial stages, judicial and not administrative. While in points of detail this Act reflects the complexity that its subject-matter can so easily assume, its general framework is simple enough. The agreements at which it is aimed have to be brought to light and registered. They are then submitted to

a court established for the purpose whose duty it is to declare whether or not any restrictions accepted by the registered agreements are contrary to the public interest. If it finds they are, the Act makes the relative agreements void in respect of such restrictions, which thereupon cease to have force or effect.

Coming a little closer to the mechanism of the Act, the first thing to notice is that it casts its net widely. Subject to several exceptions, it provides [14] for the registration of—" any agreement between two or more persons carrying on business within the United Kingdom in the production or supply of goods, or in the application to goods of any process of manufacture " under which restrictions are accepted by two or more parties in respect of certain matters. These matters are set out in the statute in five paragraphs which relate to—(a) the prices to be charged, (b) the other terms and conditions of supply, acquisition or processing, (c) the quantities or descriptions of goods to be produced, supplied or acquired, (d) the processes of manufacture and the goods to be processed, and (e) the persons or classes of persons to be dealt with, or the areas or places in or from which goods are to be supplied, acquired or processed. The word " agreement " is made to include any agreement or arrangement whether intended to be legally enforceable or not, and provision is made whereby it may also extend to agreements or recommendations made by trade associations as if agreed to by all the members thereof. The exceptions are interesting, but save possibly for that which excludes agreements between companies

[14] s. 6.

that are members of the same connected group,[15] they do not seem to reduce the broad sweep of these provisions appreciably and I cannot pause to discuss them in this brief survey.

The duty of compiling and maintaining the register of agreements is placed on an officer called the Registrar of Restrictive Trading Agreements. It is the Registrar who, in the ordinary course, will bring the registered agreements before the Restrictive Practices Court that is constituted by the Act. This is a United Kingdom court and it may sit at any convenient place in Great Britain or Northern Ireland. The full Court consists of five judges, drawn from the superior courts of England, Scotland and Northern Ireland, and ten other members appointed on the recommendation of the Lord Chancellor as persons qualified by virtue of their knowledge of and experience in industry, commerce or public affairs. Ordinarily, the Court will sit with a presiding judge and at least two other members. As already indicated, its main function will be to adjudicate upon the registered agreements and to hold whether or not their trade restrictions are contrary to the public interest. The Act of 1956 deals with this issue in a different manner from that adopted in the Act of 1948. A restriction accepted under a registered agreement " shall be deemed to be contrary to the public interest " unless the Court is satisfied (a) of the existence of any one or more of seven specified circumstances, *and* (b) that the restriction is not unreasonable having regard to the balance between the specified circumstances and any detriment to the public, or to

[15] See s. 6 (8) and s. 36 (1).

persons of certain classes who are not parties to the agreement, that may result from the operation of the restriction.[16] The specified circumstances are an important feature of the legislation because they afford some indication of what Parliament regards as being, prima facie at any rate, in the public interest, and also because they seem likely to confront the Court with issues which, however factual in appearance, must often involve a close regard for prevailing economic and social conditions. These circumstances are described in the Act with a careful particularity which it would be out of place to repeat at length here, but they may be summarised, if not exhaustively, at least sufficiently to indicate their general nature as follows:

(1) The circumstance that the restriction is reasonably necessary for the protection of the public from injury to persons or premises.

(2) The circumstance that the removal of the restriction would deny other substantial benefits to members of the public.

(3) The circumstance that the restriction is reasonably necessary as protection against some would-be monopolist in the same trade.

(4) The circumstance that the restriction is reasonably necessary to enable the parties to the agreement to get fair terms from some powerful interest outside it.

(5) The circumstance that the removal of the restriction would be likely to cause unemployment.

[16] s. 21.

(6) The circumstance that the removal of the restriction would be likely to cause a substantial reduction in exports. And

(7) The circumstance that the restriction is reasonably required for the maintenance of some other restriction accepted by the parties which the court has found not to be contrary to the public interest.

Much has already been done in the considerable task of compiling the register of restrictive agreements [17] and the Court seems likely to commence the hearing of cases in 1958. It is difficult to forecast how effective the Act of 1956 is going to prove in controlling the sort of power to which it is mainly directed. It has been said that a number of restrictive agreements have already been cancelled or amended so as to avoid the need for registration and the scrutiny of the Court, as well as the publicity, which registration would entail; and if this is so it is significant. On the other hand, the whole mechanism of the protection provided by the Act hinges on the existence of some form of agreement between two or more persons, and this may encourage interests that want to avoid the consequences of registration to maintain restrictions of value to them by a unification of control which would have no consensual basis. The exception in favour of inter-connected companies, to which I have already referred, suggests that Parliament may have taken the view that what escaped in this way would fall within the monopoly provisions of the Act of 1948. That may be so, but

[17] The number of agreements registered up to August 31, 1957, was 1,237.

whether those provisions are such as to cope effectually with this possibility has yet to be demonstrated.

It is no easier to predict how the interesting and novel jurisdiction which has thus been committed to a court of law will develop. Such matters as the place of precedent, the concept of reasonableness in this new setting, and the authority of existing decisions will have to await the determinations of the Court. Two points can, however, be made with some confidence. The first is that the Act of 1956 affords the process of adjudication an opportunity of playing a more decisive part in the sphere of economic conflicts and relationships than it has had before. And the second lies in this, that the success of the experiment and the hope that it may result in the promotion of just dealing and increased prosperity depend, in no small degree, upon ordinary people having a fair notion of what is on foot and of the nature of the function which the new Court has been created to discharge. It is that which must be my excuse for referring at some length to what many will regard as a technical subject. Our happiness, our pockets and even our lives seem to be affected increasingly by issues which are swathed in technicalities: yet the issues themselves would often turn out understandable and challenging enough if we could unwrap them and see what they really are. An informed and understanding public opinion is itself a protection from power, but as such it must wilt and wane if we are put off by technicalities and do not strive to expose the true issues.

I cannot leave the Act of 1956 without mention of what it has done to avoid the abuse of power in another important but relatively narrow field, namely, the

enforcement of stipulations as to resale prices. This, too, is a subject with ramifications of a complicated kind and I can only touch on its simpler aspects. A producer of goods, particularly of branded articles, may have good reason for binding those whom he supplies only to resell at prices in accordance with agreed conditions. If such conditions were broken the producer was often without any effective remedy at law. He could not sue the person to whom the goods were resold and, if he sued the person he had supplied, not only might he have difficulty in proving or recovering his loss, but his action might simply result in his customer getting his goods from some other producer. This sort of situation led to collective agreements between suppliers of similar or kindred commodities whereby powerful economic pressure could be brought to bear on those who had broken their resale agreements, as by withholding supplies or making them subject to unfavourable conditions. In this way a system of sanctions by fining offenders or placing them on stop-lists grew up and these were frequently imposed by private trade courts. The drastic powers thus created were not always in the public interest or exercised justly, but the common law offered little redress. The Act of 1956 deals with the problem without raising any test of public interest as it does in respect of restrictive agreements. Most of the objectionable collective agreements are prohibited,[18] as are agreements for the recovery of penalties or the conduct of domestic proceedings in connection therewith. The Act does not, however, affect the individual

[18] s. 24.

supplier's right to sell subject to a condition respecting the price on resale and it provides a new means of enforcing such a condition by enabling the supplier to proceed against any person who subsequently acquires the goods, with notice of the condition, as if he had been a party to the sale.[19]

It remains to observe that the restrictive trade practices with which the Act of 1956 is concerned relate to goods and that the Act does not apply to services, apart from the construction of buildings and other works by contractors.[20] It is confined in its impact to what may be described as the employers' side of commerce and industry and does not touch upon the sphere of labour. To that sphere I must now come for it too presents a formidable problem of power, a problem that, in its economic, social and political implications, raises questions of outstanding importance for the entire community.

[19] s. 25. For an instance, see *County Laboratories, Ltd.* v. *J. Mindel, Ltd.* [1957] 1 All E.R. 806.
[20] s. 36 (2).

THE POWER OF NUMBERS

Chapter 7

THE POWER OF NUMBERS

When we speak of the power of numbers we mean more than numerical strength. A multitude that is nothing else may, with its divided counsels and lack of corporate will, be weakness itself. But endow it with a common purpose and all is changed; and add leadership and organisation, and what has been of small account may become an instrument of great power and compelling influence. In civil affairs this form of power is likely to reach its zenith where there is universal suffrage and democratic conditions prevail as in this Kingdom; and there it is best exemplified by the trade union movement amongst employees.

As we have seen earlier, the Trade Union Act of 1871 gave trade unions a legal status and went far to remove the taint of criminality and illegality from their usual purposes and many of their activities. This statute gave the movement a basis from which to develop, and its history thereafter may be described fairly accurately in retrospect as one of continuous growth and increasing prestige, with the law turning more and more in its favour as Parliament removes first one obstacle and then another from its path. This process of emancipation from a state of bare toleration to one of exceptional privilege is a long story and I have only time to notice some of the steps on the way to the movement's present position of power. This, I am afraid, means referring to another series of

statutory provisions, but there is no way out of that if we are to understand what has happened.

The Conspiracy and Protection of Property Act, 1875, added an immunity in relation to conduct connected with disputes. Section 3 thereof enacted that an agreement between two or more to do any act "*in contemplation or furtherance of a trade dispute*" should not be indictable as a conspiracy if such act would not be criminal when committed by one person. This section did not affect conspiracies punishable by statute or the law relating to riot, unlawful assembly, breach of the peace, sedition or any offence against either Sovereign or State; and section 7—also still in force except for a minor amendment—made it an offence for any person to use violence or intimidation or several other specified forms of annoyance—such as besetting and following—"with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing." These provisions for the maintenance of order and the avoidance of excesses left the immunity conferred by section 3 one of importance. Apart from anything else it made the strike, that is, the concerted cessation of work, a safe industrial weapon from the point of view of the criminal law in all but exceptional cases.

At the beginning of the present century, however, it became clear that trade unions could still, in the course of union activities, render themselves liable under the civil law in a manner and to an extent which might embarrass and even cripple them financially. This was the result of the decision, in 1901, of the House of Lords in the well-known case of

Taff Vale Ry. v. *Amalgamated Society of Railway Servants.*[1] There, the railway claimed an injunction and other relief against the society, which was a registered trade union, in respect of unlawful picketing during a strike that occurred in August, 1900, and the question arose whether such a union could be sued in its registered name for torts or wrongs committed by its officials. The decision was that, although not an incorporated body, it could be so sued. In the course of the argument the legal nature of a registered union was much canvassed, but the decision was rested, as a matter of implication, on the intention of the relevant legislation and amounted to a refusal to hold that trade unions had been put "above the law" by Parliament. The view that prevailed as to the real issue and the answer to it appear from the following passage in Lord Macnaghten's speech—"Has the legislature," he asks, "authorised the creation of numerous bodies of men capable of owning great wealth and of acting by agents with absolutely no responsibility for the wrongs they may do to other persons by the use of that wealth and the employment of those agents? In my opinion, Parliament has done nothing of the kind."[2] The immediate effect of this decision was that the society had to find some £23,000 for damages out of its funds. The ultimate effect had a far-reaching and enduring importance. The liability in tort which was thus established was regarded as likely to jeopardise the future of the movement and the unions started to work for an amendment of the

[1] [1901] A.C. 426.
[2] [1901] A.C. 438.

law by Parliament. This did much to advance the formation of the Labour Party, and when the Liberals gained power in 1906 there were thirty Labour members in the new House of Commons. They had not long to wait for the relief they sought. Passed in that same year, the Trade Disputes Act, 1906, removed the dangers of the *Taff Vale* decision in a direct and drastic manner. Section 4 simply provided that an action against a trade union, or against any of its members and officials on behalf of themselves and the other members, in respect of any tortious action alleged to have been committed by or on behalf of the union, should not be entertained by any court. This section went well beyond what was required to nullify the effect of the *Taff Vale* case. Though it does not confer immunity on an official or member who is sued in a personal and not a representative capacity, it protects the union and its funds throughout the whole field of tort and is not confined to acts done in contemplation or furtherance of a trade dispute. In short, it put trade unionism in the same privileged position which the Crown enjoyed until ten years ago in respect of wrongful acts committed on its behalf.

The Act of 1906 conferred several other immunities which deserve mention. Section 1 added a paragraph to section 3 of the Conspiracy and Protection of Property Act of 1875 which had the effect of extending that enactment to civil suits by providing that if an act done pursuant to an agreement or combination by two or more was done in contemplation or furtherance of a trade dispute it should not be actionable unless it would be so without any such agreement or combination. And then, by section 2, what is called

" peaceful picketing " was allowed and attendance at or near a dwelling or workplace was declared lawful if it was only for the purpose " of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working." Whatever benefits that section may bestow, it certainly does not make it any easier for the police to preserve the peace when tension is high and tempers are frayed.

Section 3 affords further protection in respect of acts done in contemplation or furtherance of a trade dispute. This section, which seems to have been aimed at settling some of the uncertainties raised by a series of decisions of which that of the House of Lords in *Quinn* v. *Leathem* [3]—sometimes referred to as the *Lisburn Butcher's* case—is the best known, goes the length of providing that an act done in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces the breach of a contract of service or interferes with the trade, business or employment of some other person or with the right of some other person to dispose of his capital or his labour as he wills. Like section 1, this section protects the individual rather than the union, which can always rely on section 4 to defeat claims founded on tort. But it is a wide provision and can be used to cover acts which are done outside the trade or employment involved and which must inevitably cause loss or hardship to interests that have no part in the dispute.

It will have been noted that much, though by no

[3] [1901] A.C. 495.

means all, of the protection from legal process afforded by the statutes I have mentioned turns on the words "trade dispute." This expression is defined in section 5 of the Act of 1906 in terms that are relevant to any broad assessment of trade union power and I must come back to it later. Meantime, it will be convenient to conclude this summary of the statutory position with a reference to two further enactments.

The first of these, the Trade Union Act, 1913, had a profound effect on the political power of the unions. The emergence of the Labour Party and the feeling that the courts were against them had led many unionists to pin their hopes on Parliament and parliamentary representation. This meant money, and some unions formed funds by collecting from their members for political purposes. One of the unions to do this was the Amalgamated Society of Railway Servants and its right to do so was challenged by a member, Mr. Osborne, the secretary of its Walthamstow branch, who objected to a new rule made by the union for the establishment of a fund to maintain parliamentary representation in the House of Commons and to provide for the payment of elected candidates who were to be subject to the Labour Party whip. This rule, Mr. Osborne argued, was invalid because it was outside the purposes or objects of a trade union as expressed in, or to be implied from, the definition contained in section 16 of the Trade Union Act, 1876.[4] This contention failed at first instance, but it prevailed in the

[4] This definition runs thus: "The term 'trade union' means any combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or

Court of Appeal and also in the House of Lords.[5] The result was a grave blow to the plans and aspirations of the leaders of the movement and the Act of 1913 was passed to get rid of the consequences of the decision. This it did by enacting, in effect, that as long as a union's principal objects were statutory—that is, were objects mentioned in the definition—it could have other objects and still be a trade union for the purposes of the Trade Union Acts. It also provided that political objects must be approved on a ballot of members before payments out of union funds could be applied in their furtherance, that such payments should be made out of a separate fund called the political fund, and that certain safeguards should be observed for the protection of members who did not want to contribute towards the political objects. The way was now open, so far as the law was concerned, for a full participation in parliamentary politics and the development of a party allegiance. Many unions availed themselves of this new power. The political importance of the movement rapidly increased and substantial political funds were raised by levies which (in due accordance with the Act of 1913) became payable by members who did not give notice of their objection to contribute thereto.

Then, in 1926, the Trade Union Congress called out certain of its affiliated unions in support of claims

for imposing restrictive conditions on the conduct of any trade or business, whether such combination would or would not, if the principal Act had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade."

[5] *Amalgamated Society of Railway Servants* v. *Osborne* [1910] A.C. 87.

made by the miners and a widespread stoppage occurred which has since been known as the General Strike. This is not the place to discuss either the reasons for or the legal issues raised by that unique and unfortunate episode. Its relevance, at the moment, lies in the public alarm it engendered and in the statutes which were passed to prevent or reduce the possibility of a recurrence. The Act applicable to Great Britain was the Trade Disputes and Trade Unions Act, 1927. This piece of legislation is no longer law, but a reference to some of its provisions is desirable if only to indicate what the chief perils of trade union power were then thought to be by the government of the day. It declared any strike illegal that had any object other than the furtherance of a trade dispute "within the trade or industry in which the strikers are engaged," or that was designed or calculated to coerce the government either directly or by inflicting hardship upon the community. It provided for the punishment of those taking part in such illegal strikes and for the protection of those refusing to do so. It strengthened the law as to intimidation, and enacted that only members who had given notice of willingness to do so should be required to contribute to their union's political fund—this was "contracting in" instead of the previous "contracting out." It restricted the organisations to which civil servants might belong, declared it unlawful for any local or other public authority to stipulate that its employees should be or should not be members of a union and made it an offence for any person employed by such an authority to break his contract of service knowing or having reasonable cause to believe that

the probable consequence would be "to cause injury or danger or grave inconvenience to the community." A corresponding measure was passed by the Parliament of Northern Ireland in the same year and is still in force. But when the Labour Party returned to power at Westminster in 1945 the Imperial Act of 1927 was repealed and the previous position restored by the Trade Disputes and Trade Unions Act, 1946.

How relatively powerful, then, has trade unionism become as the result of its victories in Parliament and its achievements in the industrial sphere? In any attempt to assess the present position justly and with a sense of proportion several considerations must be kept in mind. To begin with, a balanced conclusion should take account of the circumstance that union power looms rather larger in the public eye than the power of capital because its methods are usually more obvious and easier for people to understand. Everyone knows of a big strike and can realise the immediate consequences, but only a few know of the big merger or are able to appreciate its implications. Again, it must be remembered that, in an era of collective bargaining, the unions have come to discharge an essential function in the working of our industrial system, and that part, at least, of their power is absorbed in maintaining that system in a state of comparative equilibrium. Sixty years ago, the assertion of such a function would have been a matter of controversy. Today it finds general acceptance and few Royal Commissions charged with the investigation of some subject concerning trade or the life of the community at large will be thought complete unless trade unionism is represented. That in itself is a sign

of the times which should serve to dispel any lingering vestige of the old notion that the typical trade union official was a man opposed to the rule of law and perhaps a revolutionary to boot. Like any other section of society trade unionism has its quota of those who are narrow or ambitious or greedy of authority; but the strains and stresses of two world wars and much else besides have shown that the average British unionist can be as responsible and as loyal a citizen as anyone else.

Yet when all is said and allowed for, the power of the unions is now of a magnitude to invite attention and cause concern. The changes in their statutory position which I have already outlined have added greatly to their capacity to intervene in industrial affairs. For all practical purposes, strike action has been freed from the sanctions of the civil as well as the criminal law and the unions and their funds have been placed beyond the ordinary consequences of wrong-doing. In numbers alone the strength of the movement is apparent. At the end of 1955 the registered unions of employees in Great Britain had a membership of 8,517,000 [6]—about double that for 1925—and the figure has since risen. The trend has been for the largest unions to absorb a bigger percentage of the total membership and some of the leading unions have shown a very rapid rate of growth.[7] In 1955 the

[6] The figures quoted are taken from the Report of the Chief Registrar of Friendly Societies for 1955.

[7] *e.g.*,

Amalgamated Engineering Union—
Membership—
1925 234,000
1955 953,000

number of members in employees' unions (registered and unregistered) having political funds was 7,854,000 and of these 6,907,000 contributed to such funds the total sum of £551,000. There was a general election that year and expenditure from the political funds aggregated £638,000 and left a balance in hand at the end of the year of £906,000.

As mentioned previously, the scope of the words "trade dispute" has added power by conferring a wide immunity on officials and others acting on behalf of unions. This is partly due to the broad terms of section 5 (3) of the Act of 1906, which defines the expression as meaning—

> "any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of the employment, or with the conditions of labour, of any person, and the expression 'workmen' means all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises; . . ."

To be a "trade dispute" the dispute must be more than a mere personal quarrel. "It must be something fairly definite and of real substance." [8] Whether it exists or not is a question of fact; but the parties to it

Transport and General Workers Union—
Membership—
1925 376,000
1955 1,329,000
Electrical Trades Union—
Membership—
1925 29,000
1955 224,000

[8] *Per* Lord Loreburn in *Conway* v. *Wade* [1909] A.C. 506, 510.

need not be in any contractual relationship. They may all be workmen either in the same or different employments. The definition does not embrace a dispute between employers, but it does include a dispute between one employer and the workmen of another, and it would seem that a difference between an employer and a trade union may be a trade dispute within the statute. As Lord Wright once said: "It would be strangely out of date to hold, as was argued, that a trade union cannot act on behalf of its members in a trade dispute, or that a difference between a trade union acting for its members and the employer cannot be a trade dispute."[9] It is also to be noted that the definition refers to the subject-matter of dispute in a most comprehensive manner and so as to include events which need not necessarily have any prejudicial effect upon the terms or conditions of employment of the workmen concerned, as, for example, the employment of a non-unionist or a foreign refugee. Moreover, the effect of the definition is magnified by the manner in which the statutes use it to confer the protection they afford. What is saved from the restraint of legal process is not merely the act done in "furtherance" of a trade dispute but the act done in "contemplation" of such a dispute, and, in addition to this, it seems clear that the acts thus protected are not confined to the acts of parties to the dispute,[10] or to acts that are "official" in the sense that they are authorised by a trade union.

[9] *National Association of Local Government Officers* v. *Bolton Corporation* [1943] A.C. 166, 189. See also *Dallimore* v. *Williams* (1912) 29 T.L.R. 67.

[10] *Conway* v. *Wade* [1909] A.C. 506, 512.

Two further observations may be made respecting this definition which are relevant to it as a statutory ingredient of the kind of power under discussion. In the first place, given favourable conditions, nothing is easier than to induce a trade dispute. If either side of industry wants to do that, it does not need to await a state of unrest or dissatisfaction or the outcome of inquiry. In practice all it has to do is to make an industrial demand which it knows will not be accepted. I do not suggest that such conduct can never be justified or that it is indulged in freely, but the fact remains that the protection Parliament offers to those who would engage in industrial conflict can be obtained with comparative ease. And secondly, if a trade dispute in fact exists it will attract that protection however improper or malicious the motives that have provoked it may be. If such motives can be proved —often an extremely difficult thing to do—they may be highly relevant to the question whether there is a trade dispute. But if the existence of one must be accepted, the fact that it has been begotten by some ulterior motive such as spite or the creation of political pressure will not affect the enjoyment of the statutory immunity.

The present and future consequences of the mounting power of trade unionism cannot be measured or estimated with any attempt at accuracy: but, as respects the political sphere, the public interest and the rights of the individual, it is plain that the effect has been increasingly significant and is likely to continue so.

In the political sphere the importance and influence of the movement have grown rapidly and the change

back to " contracting out " in 1946 has been followed by a substantial increase in its political funds. As matters stand, the support of a parliamentary party seems unlikely to give place to any policy of exercising control over Parliament from without. Such a policy has recently been abjured by Sir Thomas Williamson, in his Presidential address to the Trade Union Congress, in terms which respect the constitutional position without casting any doubt on the strength of the unions to do otherwise. " As a movement," he said, " we renounce any challenge to the sovereignty of Parliament. If we dislike a Government—and I am certain we have no affection for this one—we resist the temptation to dislodge it by industrial action. In a democracy trade unionists, like all other citizens, have political rights. But we cannot and ought not to claim political privileges because we are trade unionists." [11] No doubt that last sentence echoes the mind of responsible unionism, but legal privileges, such as those already claimed and gained, mean power and power of a kind that cannot but have its political temptations for an organised popular movement.

The power of the unions and also of unionists (for much industrial action is unofficial) to prejudice the public interest by calling strikes and maintaining restrictive practices has been demonstrated on many occasions and has undoubtedly inflicted much economic damage upon the nation. The blame for this cannot be fairly allocated without inquiry into the rights and wrongs of each contributing event, but the situation itself poses the question—could the law do

[11] *The Times*, September, 3, 1957.

more to protect the public interest, with a fair regard for the other interests involved? The law could hardly do less towards this end than it now does, yet to attempt to refasten all or most of the shackles that legislation has knocked off would be out of the question. It would be politically impossible; it would create ill will in a sphere where good personal relations and an understanding co-operation can work wonders; it would ignore the great changes that have come about in social and industrial conditions; and it may be doubted whether even extensive repeals would find the common law in any shape to deal with the resulting situation.

If, then, the law is to do more than it does to protect the public interest, two things seem reasonably certain. The changes will have to come from Parliament; and they will have to be concerned with the curbing or preventing of abuses rather than with the suppression of what is now an accepted institution. Nor can the law be expected to promote industrial peace and prosperity by itself. Many restrictive practices in workshop and factory, for example, are such as to defy regulation by law and can only be dealt with effectively by free negotiation based on an objective examination of consequences and a mutual willingness to look beyond tomorrow.

And any attempt to abolish the strike completely by force of law would be no less futile. Subject to some important qualifications, and only as an instrument of last resort, it is itself a protection from power of another kind—a factor which is demonstrated not so clearly by the successful strike as by the difficulty which individuals or small groups who, for

various reasons, have no means of bringing collective pressure to their aid, can still experience in getting their real grievances put right. Moreover, the enforcement of a general prohibition by the ordinary processes of the criminal law would create more problems than it would solve. Where identification offers no obstacle, the criminal courts can deal with limited numbers, such as strike leaders and strike committees and those responsible as individuals for acts of violence or intimidation; but they cannot deal with masses of men, and methods whereby a few defendants are selected to answer for the offences of the many tend to an arbitrary discrimination and bring the administration of justice into disrepute. During the late war an Order [12] was made for Great Britain under the Defence Regulations whereby strikes were prohibited unless—(a) the dispute had been reported to the Minister of Labour and National Service so that he might refer it for settlement by the National Arbitration Tribunal or otherwise, (b) twenty-one days had elapsed since such report, and (c) the dispute had not been referred during that time for settlement by the Minister. In the emergency that existed this was a useful measure; but contraventions were penal, the difficulties of enforcement were confirmed by experience, and in 1951 the Order was revoked by a further Order [13] which set up the Industrial Disputes Tribunal and abstained from any attempt to invoke the criminal law.[14]

[12] S.R. & O., 1940, No. 1305.
[13] S.I. 1951, No. 1376.
[14] An Order similar to S.R. & O., 1940, No. 1305, was made by the Ministry of Labour for Northern Ireland. This Order (S.R. & O., 1940, No. 1508) is still in force and the National

This particular problem of enforcement can raise its head in the absence of any general prohibition of strike action. Should it become desirable in the public interest or as a matter of national safety to prohibit a particular strike or a particular category of strikes, the same problem will present itself. But what should the sanction be? That it must, on such an hypothesis, be effective goes without saying. And the practical way of ensuring effectiveness would seem to be to make the union, whose members went on strike, responsible as an entity and to provide for the payment of fines out of its funds. This suggestion would not work where no unionists were involved, but that would now be a rare event; it also fails to distinguish between official and unofficial strikes: but to draw such a distinction would be to put a premium on irresponsible action and, eventually, to undermine union authority.

What, then, can be done to protect the public interest by the process of law? That some statutory regulation of union power is now desirable in order to achieve this end will be conceded by many. But trade unionism has been drawn so far into the arena of party politics that the prospect of obtaining a substantial measure of agreement on the steps to be taken seems at present remote. Yet, whatever the difficulties, the question is of sufficient moment to deserve the close attention of all sections of the community, and, not least, of the unions who should stand to gain in stature and in the usefulness of their contribution to the common weal if a satisfactory answer can be found.

Arbitration Tribunal for Northern Ireland still functions thereunder. The penal provisions of the Order have not been revoked but there have been no prosecutions since 1945.

To stop there and say no more at this crucial point would be to heed the counsels of despair, and I therefore venture several suggestions for consideration with no comment as to their present feasibility except to say that they seem practicable from the legal point of view. With the warning that they only touch on part of a very big problem I would enumerate them as follows—

(i) The prohibition of strikes which by their nature or timing are likely to imperil public safety or cause grave public hardship. This contemplates stoppages of a strictly limited class in which the public interest is clearly paramount. The statutory provision could specify a list of activities in relation to which the prohibition would apply automatically, or it could be left to the appropriate Minister to have the provision brought into operation as respects specified events or establishments by Order in Council. In a highly organised community such as ours the paralysing effect of certain forms of strike action can be very great. A concerted stoppage throughout the nation's electricity generating stations, for example, could cause enormous losses in the course of a single day. If that sort of thing is not to be tolerated, it seems reasonable and proper that the law should declare its illegality and its consequences. True, such a stoppage may never happen,[15] but it is more likely not to happen if the law can do something effective about it.

(ii) The discouragement of lightning strikes by making the immunities from civil action conferred by

[15] It did happen in Northern Ireland on March 14, 1956, when simultaneous strike action was taken at all the generating stations to enforce a claim for higher rates of pay.

the Act of 1906 inapplicable to acts done in the course of a strike started without due notice or before the lapse of a specified statutory period. This would help to prevent hasty action and to check unofficial stoppages.

(iii) The statutory immunities from civil action at present enjoyed by persons acting in contemplation or furtherance of a trade dispute might be made inapplicable to acts done out of spite or for some improper motive. By their very nature such acts tend to aggravate the dispute and to hinder reconciliation.

(iv) The repeal of the immunity in respect of tort enjoyed by trade unions under section 4 of the Act of 1906. This immunity has served an understandable purpose. It succoured the movement at a critical time, but that has passed and today there seems no cogent reason why the unions, in their strength, should continue to hold such a privileged position. As we have seen, the workman is now freer than ever to take action against his employer for negligence and other torts, and it is common knowledge that such actions are often supported out of union funds. There is nothing to complain of in that: but it marks a stage in the growth and power of the movement at which this particular immunity becomes hard to defend.

Lastly, I come to the impact of union power upon the individual. Here, the law is by no means powerless. A breach of union rules may be restrained by injunction at the suit of a member, and the right to recover damages for such a breach in certain circumstances has now been established.[16] The recent case

[16] *Bonsor* v. *Musicians' Union* [1956] A.C. 104.

of *Huntley* v. *Thornton* [17] also affirms the right to relief of a member who has suffered from a conspiracy of fellow unionists to injure him in his trade, where the acts complained of are not done in furtherance of a trade dispute or legitimate trade interests. There remains, however, a wide field ranging from the expulsion [18] which is unjust though legal (in the sense that it cannot be successfully challenged in the courts) to the economic and social pressures that unions can bring to bear, in which the individual has no adequate protection from the law. Time will not permit me to explore this branch of the subject as its importance merits. Instead, I must confine myself to the individual workman and the vexed question of the "closed shop."

The underlying principle of the closed shop is that the workers in a particular establishment or industry must be, or become, trade union members. This principle is not observed everywhere in the United Kingdom, but it has for long been warmly advocated by many union leaders and is now enforced in many districts and trades. It is put into practice in various ways, with the employer's attitude ranging from one of full co-operation to one in which he lets the union have its way without binding himself to the principle or being prepared to dismiss a worker merely because he is not a unionist. Whatever its form, the closed shop is a symptom of power. It generally involves some degree of economic coercion and constitutes part

[17] [1957] 1 W.L.R. 321.
[18] See "The Right to Work" by Professor Dennis Lloyd in *Current Legal Problems*, Vol. 10 (1957), p. 36.

of a very large subject—compulsory trade unionism—which raises important issues not only for the community at large, but also for a movement founded, as was trade unionism, on the basis of voluntary association. I must, however, limit myself to one aspect of this broad problem—the effect on the individual workman—and as a preliminary to that a word on the law's attitude to the closed shop is desirable.

An agreement to enforce the closed shop principle will not be actionable at the suit of those suffering damage because of it, if the object of the agreement is to further the trade interests of the parties to it. This is an application of the ruling of the House of Lords in the *Mogul Steamship Co.'s* case,[19] and an illustration will be found in *Reynolds* v. *Shipping Federation, Ltd.*,[20] a decision of Sargant J. who described the nature of the closed shop in his judgment as follows—"For many years past," he said, "no one has questioned the right of a trade union to insist, if they are strong enough to do so, under penalty of a strike, that an employer or a group of employers shall employ none but members of the trade union. And the result of any such effective combination of workmen has, of course, been to impose on the other workmen in the trade the necessity of joining the union as a condition of obtaining employment."[21] Adherence to the principle may therefore involve a trial of strength, but it is a trial with which the law has nothing to do, provided it is conducted in an orderly manner. As we have seen, the Act of 1906 defined the expression "trade dispute" so as to

[19] [1892] A.C. 25.
[20] [1924] 1 Ch. 28
[21] *Ibid.*, 39.

include a dispute "connected with the employment or non-employment . . . of any person" and this suffices to confer the statutory immunities, already discussed, in respect of acts done to prevent the employment or secure the dismissal of a non-unionist. The power to create a closed shop, being economic in character, is subject, of course, to economic conditions such as the state of the labour market and the availability of other employment; but of legal restraints there are virtually none.

In the days of the old craft unions membership might fairly be regarded as the badge of competence for the job, just as membership of a University or one of the Inns of Court, *when the examiners have been satisfied*, may now mark the attainment of a professional standard imposed in the public interest. But by and large and with some exceptions—for there are still craft unions—that is not the motive behind the enforcement of the closed shop principle at present. Few of the powerful unions of today are craft unions, in the sense in which I have used the term, and the dominant idea behind the closed shop is not to maintain a standard of competence, even if that may sometimes be the result, but to promote union solidarity. From the point of view of the unionist this is understandable. The union has fought for and gained better working conditions: why should the non-unionist have the benefit of these and yet stand aloof from the movement? But does that justify more than persuasion? Does it justify the relentless use of economic pressure which drives the non-unionist to choose between membership and the loss of his livelihood? The law cares little for these considerations.

It will protect the non-unionist in his person and reputation; it will protect his home and chattels. It will punish the thief who steals his week's wages; but it will not raise a finger to keep him from being bundled out of the job—perhaps the only job—he can do, even though the result for a whole family may be a life of hardship and public assistance. There is nothing fanciful in this. It happens. AB is a skilled craftsman earning a good wage. He is not a unionist, perhaps because he does not "hold with" unions and is obstinate or because of religious convictions. His fellow workers are unionists and it is decided to make the establishment a closed shop. AB refuses to join and a strike is called. The employer is sympathetic but cannot afford a stoppage and has to terminate AB's service. AB cannot get another job in the district in which he has settled and is rearing his family, for his skill is only in demand there in closed shops. He must either move to another place where the closed shop principle is not observed, or let his training and skill go and start afresh in some new occupation—or surrender. Now AB may be obdurate or misguided, but is it right in a free country that he should be put in such a position? I would feel happier about the regulation of power, particularly in its newer forms, if the signs of a general uneasiness about the plight of such as AB were more obvious. It would, however, be rash to assume that the public conscience is not troubled. Deep feeling is often inarticulate and protest is difficult for many. I suppose AB's sin is that he does not conform, in his private judgment and conscience, with the views that prevail where power lies. That is an ancient type of transgression. Statutes

like the Test Acts of the seventeenth century punished it severely. Their repeal did Parliament credit but they left a scar which is still upon us.

The closed shop principle, too, may leave a scar, and one which trade unionism would be better without. But what is the remedy? It is one thing to repeal a series of penal statutes and quite another to uproot an established practice in the intricate field of labour relations. Appropriate legislation could certainly reduce the problem in some directions, but the likelihood of parliamentary intervention in the foreseeable future seems remote. Perhaps the most that can be hoped for, as matters stand, is a complete reassessment by the movement of its relationship to the individual, conducted with a respect for lawful nonconformity and the inalienable right of personal judgment which that respect acknowledges.

It is a long cry to 1871 and trade unionism in this Kingdom is now firmly enough established to embark upon an objective inquiry directed to that important issue as well as to the others I have mentioned earlier. Signs are not lacking that for many union leaders the power of unionism is coming to be looked on less as a weapon and more as a responsibility. Whether that attitude will spread and prevail depends on many imponderables; but the time seems to be approaching when the movement will have to choose between, on the one hand, questing for further power and, on the other, finding its place and its freedom in the principle of voluntary association under the law.

Conclusion

The difficulty of making a full survey of the subject

of these Lectures, which I noted at the beginning, will now be more apparent. But we have, I think, got far enough to conclude that some measure of protection from power, in the sense in which I have used the term, is generally accepted today as being within the province of the law. We have seen that reflected in our criminal procedure, in our constitutional practice, and in the statute-book. We have seen something of what has been accomplished in the discharge of this function, and something of what remains to be done. And we have also seen that the proper measure of protection necessitates the holding of a just balance between power and liberty.

But what is the criterion of a *just* balance? And where is the assurance that that all-important word will hold its savour and continue to enshrine those standards of fairness and goodness and truth that it has gathered throughout our long history? An answer, but only a partial answer, to those questions may be found in the device, already mentioned, of a superior law, such as the Constitution of the United States of America, which entrenches what are regarded as the fundamental rights and liberties that the law must protect. In this Kingdom we have kept away from that device, and Parliament's jurisdiction to legislate is unlimited. On what then do we depend for an enduring just balance On something, surely, that is not law at all; on something that resides neither in institutions nor past achievements, but in the hearts of individual people, in the common, cognate, virtues of courage, kindliness and honesty, in the lustre of the spirit, in the faith and vision that nourishes and upholds all else. We are perhaps too shy about this

ultimate rampart. Lawyers like to call the vision the Law of Nature, but I think they still more often mean the Law of God.