BRITISH PUBLIC UTILITIES AND NATIONAL DEVELOPMENT

CHAPTER I

THE SETTING

NATIONAL PUBLIC UTILITIES AND POST-WAR REORGANIZATION

One of the most significant developments of the last decade in Great Britain has been the creation of monopolies to deal with vital fields of national expansion, such as broadcasting and electrical power. The public utility idea has been widely discussed, and some are now beginning to talk about "the public utility principle in industry" as a means of economic recovery. Parliament has spent many days discussing various forms of public utility control. Conservatives, Liberals, and Socialists have been able to agree that Parliament should bestow special privileges and obligations upon certain essential enterprises, and that they should be dealt with as national problems. Railway transport and the Post Office communication services have been given serious reconsideration since the war, while electricity development, broadcasting, national road transportation, and London passenger traffic have been brought within the ambit of public service undertakings which are of nation-wide importance. The further extension of public control over economic services seems to be a foregone conclusion.

The rapid extension of national public services marks a revolution in British thought and life. Traditionally, Parliament has assumed as little responsibility as possible for the development of the country's industry and commerce. With the relative decline of Britain's position in world trade during the post-war years, the home market has

increased in importance. Attention has therefore been focussed upon the necessity of utilizing the country's resources to the best advantage. At the same time the constructive proposals of economists like Henry Clay and G. D. H. Cole have had a pervasive influence upon the leaders of British thought. National planning of basic industries is favored by many of the leading economists. The engineering profession has also played an important part in emphasizing the necessity of large-scale organization and scientific technique as a remedy for the policy of "drift." A well-known engineer stated recently that the reorganization of industry on the basis of the public utility concept might be said to have begun about 1924 and that "the final stages in that revolution may, in a short period of years, bring this country to a position in world development higher than that which it has enjoyed in its previous history."

The extension of public utilities has also been influenced indirectly by the policies of foreign countries. The development of cartels and mixed enterprises on the Continent, the merger movement in the United States, and the creation of State trusts in other countries have forced home upon the British the futility of attempting to maintain small competitive enterprises. Increased world competition and shrinking markets, combined with chronic unemployment, have caused British leaders to undertake an intensive and realistic analysis of industrial organization. The fruits have begun to appear.

The Conservatives and the Liberals regard public utilities as a convenient and necessary compromise between the *laissez-faire* of the old order and the program of national Socialism advocated by the Labor party. Being opposed to the direct management of economic services by the State, the two former hope to obtain the advantages of monopoly without relinquishing all of the prerogatives connected with private enterprise. Moreover, public service undertakings have been favored because they usually add to the number of gilt-

edged investments available—the highest desideratum in recent troubled years. The Conservative party, age-old champion of non-interference by the State, now sponsors rationalization of monopoly services under private management but subject to nominal public restrictions. Some say this is individualism in a new guise. Conservatives are usually sceptical of large-scale planning but believe that each problem should be solved as it arises. The Liberal and the Labor parties have more faith in comprehensive long-term programs, and each party has outlined its respective industrial program in party publications.[1] Granting the necessity of rationalization, the Liberals propose more rigid regulation, the support of municipal public utilities, and the creation of public trusts for public utility undertakings. The Labor party goes further and advocates the nationalization and State management of the most vital financial and industrial undertakings affecting the life of the entire nation.

The Socialist sees in public utility development the creation of monopolies, the elimination of the speculation motive, and the curtailment of the dictatorial power of the employer. The conversion of public service enterprises into State trusts is not a long step. Already, as the Liberal party has pointed out, public utility services "must comprise at least two-thirds of what may be called the large-scale undertakings of the country," and they represent a capital in the neighborhood of £4,000,000,000.[2]

The common thread in all party programs is the acceptance of large-scale monopolies under public control as the necessary step in future reconstruction. The principal differences of opinion arise over the nature and degree of public control. A variety of public service enterprises have been created, but they may be divided generally into the

[1] The Liberal party's program is set forth in *Britain's Industrial Future* and the Labor party's plan may be found in *Labour and the Nation* and later conference proceedings.

[2] *Britain's Industrial Future*, 74, London, 1928.

statutory company under regulatory control, the Department of State as a public commercial undertaking, and the public utility trust—the latest form of public service organization.

Our task is to analyze the contribution to the national welfare of the existing public utilities. This will involve a study of the efficiency of each of the services and the relative merits of the three types of organization. The effectiveness of public control in passing on to the consumer the benefits of monopoly will naturally be one of the principal criteria. The advantages enjoyed by the employee in the several forms of public utility enterprise will be another consideration worthy of careful attention. Comparisons are difficult, hazardous, and in some cases impossible, but the effort is justifiable. British public service undertakings are in a formative stage. A variety of experiments have already been made and others are likely to be tried before the process of reorganization has been completed. A mariner always takes bearings. But before we go further on a partially charted sea we need to consider what is meant by public utilities in Great Britain.

THE BRITISH PUBLIC UTILITY CONCEPT

The term "public utility" is just coming into common usage in Great Britain, but the concept is very old. Long before Sir Matthew Hale referred judicially to different types of business which he said were affected with a public interest, Parliament had recognized the necessity of treating certain undertakings as special cases requiring regulation.[1]

However, unlike the United States, until recently there had been little effort by British writers to develop a systematic theory regarding the circumstances under which State intervention might be expected, and the consequences

[1] W. H. Hamilton, "Affectation with public interest," (1930) 39 *Yale Law Journ.*, 1089; B. P. McAllister, "Lord Hale and business affected with a public interest," (1930) 43 *Harvard Law Rev.*, 759; and Herman Finer, "State activity before Adam Smith," (1932) 10 *Public Administration*, 157.

thereof.[1] The same observation applies, in lesser degree, to the question of the operation and control of public utilities. As A. L. Dakyns has stated, the law and practice relative to public utilities have been largely neglected by English universities. Outside of a few courses offered in the newer universities, public utility problems seldom receive serious independent examination. The literature relating to public utilities may be characterized as fragmentary.

The setting of British public utilities is markedly different from that in America. This, as we shall see, largely explains the difference in emphasis in the two countries. However, it does appear that British public utility regulation has not been a popular subject of university research because it has been a sort of "No Man's Land" between law, government, and economics. Recent emphasis upon the field has come principally from the Public Administration group, and in particular from the Institute of Public Administration.

The failure of the British to stress the public utility concept has not been without its advantages, if one considers social control of industry a desirable end. In America the public utility concept has had the effect of creating two fairly distinct categories of business: the private and the public. In England there has been no such clear-cut division. Governmental supervision has been merely a matter of degree. Practically every business is subject to public interference in certain respects. Furthermore, there is no judicial obstacle in the way of extending the degree of regulation whenever Parliament desires. The English view does not differ materially from the realistic concept of Justices Holmes and Brandeis, who have consistently insisted that specific

[1] The principal discusssions relative to the legal and theoretical side of public utilities are these: F. N. Keen, *The Law Relating to Public Service Undertakings*, London, 1925; Herbert Morrison, *Socialization and Transport*, London, 1933; A. C. Pigou, *The Economics of Welfare*, ch. xxi, London, 1929; F. C. Benham, "Economic significance of public utilities," (1931) 11 *Economica*, 426; the best single discussion will be found in a symposium of twelve papers entitled, "The administration of public utilities," (1926) 4 *Pub. Admin.*, 287–430.

industries do not become liable to control because of inherent, self-evident differences which set them apart from other enterprises, but rather because the legislatures establish more complete regulations over businesses which the voters fear will injure their interests if public regulation is not sufficiently exercised.

The principal reason that public utility doctrine has been emphasized more in the United States than in Great Britain is to be discovered in the American system of judicial supremacy as contrasted with the English regime of Parliamentary omnicompetence.[1] Categories of black and white are the handiwork of the American judiciary. Parliament has not needed to define a public utility because it is unnecessary to satisfy the courts that certain conditions must exist before public intervention in private business can take place. For example, the regulation of theatre ticket brokerage and private labor exchanges[2] would be clearly within Parliament's right. Parliament can establish any degree of control which seems best, and the question of satisfying the "business affected with a public interest" category could not arise later by judicial review.

To most readers all of this is already well understood. Comparison has been resorted to merely to elucidate the principal characteristics of the British constitutional setting, which may be postulated as follows: Any private enterprise becomes a public utility whenever Parliament chooses to designate it as such or when the degree of regulation has reached the point where public opinion, acting through Parliament, regards the undertaking as peculiarly a public service. The present legal position of road passenger transport undertakings illustrates this transition very clearly. The courts cannot, and do not, seek to set limits to

[1] Charles G. Haines, *The American Doctrine of Judicial Supremacy*, revised edition, Berkeley, 1932.

[2] The former regulation was held to violate the requirements of "due process of law" in Tyson *v.* Banton, (1927) 273 U.S. 418, and the latter law suffered the same fate in the case of Ribnik *v.* McBride, (1928) 277 U.S. 350.

what Parliament may do. Hence the term "public utility" is a concept of Parliamentary and common usage, and not a legal rule.

After this preliminary discussion, a certain number of definitions may be attempted, because these will further illustrate the various facets of the approach. "A public utility," states R. G. Hawtrey, "may be defined as a service in which a tendency to a local monopoly necessitates the intervention of a public authority to defend the interests of the consumer." A former official of the Board of Trade defines a public utility as "any undertaking that meets the needs or convenience of a considerable section of the public, and that places the undertakers in a position justifying the imposition of control in return for monopolistic or other special privileges."[1] This may be called the "political" view. As recently as 1810 an English court, following the reasoning of Sir Matthew Hale in 1670, asserted the following rule: Where private property has been devoted to a public use its owner has no right to exploit its scarcity value to the detriment of those who use it. He may withdraw his property from the use of the public altogether; otherwise he must fix reasonable rates of charge for it or submit to be controlled to the extent of the interest which has been created in it.[2] This dictum may be called the "judicial view." An "economic" interpretation may also be distinguished. The economist's task, according to some writers, is to tell us the results which are likely to be produced if regulation is not forthcoming, but not when or how such undertakings should be controlled.

The orientation which best suits the writer's need may be called the "public" view. Sir Henry Bunbury, a recognized authority on public utilities, said to the members of the Institute of Public Administration, "I will not spend

[1] Garnham Roper, "The principles of regulation," (1926) 4 *Pub. Admin.*, 287. Roper's article and appendix provide a good background for British public utilities.

[2] Allnutt *v.* Ingles, (1810) 104 *Engl. Repts.*, 206.

any time in trying to define what is meant by a public utility service because the application of that term is no doubt familiar to all of you. But I propose as typical examples railways, tramways, supplies of electrical energy, postal services, telegraphs, and telephones."[1]

Americans may have some hesitance about classifying the Post Office as a public utility, but it appears entirely justifiable to be so regarded. British writers do so consistently. For example, Keen states, "The Post Office and the telegraphic, telephonic, and wireless systems must clearly be classed as public service undertakings." Any agency, either private or public, which operates the telegraph and telephone services of a country may properly be considered a public utility. To be sure, the Post Office presents a somewhat distinctive problem of control, but its fundamental problems of organization and management are comparable to those encountered by public service undertakings generally.

Some of the principal differences between the Post Office and other public utilities will appear in an analysis of the forms of public service enterprise and how they are created by governmental action.

THE FORMS OF PUBLIC UTILITY ENTERPRISE

At the very outset of an effort to analyze the problems of administration and control of British public utilities, it is desirable to explain the several types of parties by whom utilities may be organized and conducted. This is not as simple as it might seem. As A. L. Dakyns concludes, "What is lacking is anything approaching a sytematic study of the different agencies of public control which . . . have emerged amid the welter of private business." Parliament has never aimed at consistency as between one type of service and another, nor have the law courts been called upon to attempt

[1] "The elements of rate-fixing for public utilities," (1925) 3 *Pub. Admin.*, 47.

it. This has been regarded by most British writers as a salutary factor. It probably is, because it may be said tentatively that different forms of business require different types of organization and control. However, Dakyns shows great discernment when he protests, "If the hall-mark of most British public utilities is the grant to the undertakers of a special privilege, a local monopoly or the right of 'eminent domain,' it would be rash to assert that such a grant is the *raison d'être* of parliamentary or governmental control. For public control has emerged slowly and late in the history of the privileged bodies. . . . It seems to have spread by a process of trial and error in which each case for control has had to be separately considered and separately fought for against the opposition of vested interests." These are significant words and they exactly explain the circumstances under which the several forms of public utility undertaking have evolved.

British public utilities may be divided conveniently into the following five classes, namely, the public authority (public ownership and operation); the private company operating under a limited monopoly; the public utility trust; "mixed" undertakings composed of private and public capital; and the private individual.

The mixed enterprise and the personal concession may be dismissed with brief reference, because the former development is in a very formative stage in Great Britain, while the latter type of public utility is no longer of much importance. Ferries are probably the only survival of the parliamentary concession granted to the individual person. On the other hand, mixed undertakings may some day assume a position of great importance, judging from Continental experience. A mixed enterprise is a public utility in which the invested capital and the actual management are jointly contributed by a private company and a governmental body. In Europe the most important public utilities, including electricity, water and gas supply, are frequently

controlled by mixed undertakings. In Great Britain, however, the only examples of the mixed undertaking are the Southampton Harbor Board, the Manchester Ship Canal, and Sheffield local transport.[1] These developments were primarily the result of fortuitous circumstances, rather than the product of a definite theory such as is found in Europe.

The three forms of public utility organization which will receive attention, therefore, are the statutory company under regulatory control, the public authority undertaking, and the public utility trust. Before going into detail, it may be suggestive to point out how the services under consideration in this book fit into the suggested category. The Post Office is a public authority undertaking, the railway companies are limited companies, and the Central Electricity Board and the British Broadcasting Corporation are public utility trusts. Several other explanatory examples will be provided in the more detailed explanation which will follow.

The administration and control of the British Post Office with special reference to the telegraph and telephone services, forms the subject-matter of chapters iv and v. A generalization regarding the constitutional position of the department will suffice at this juncture. The Post Office is one of the ordinary Departments of State in the British central administration and as such it is subject to direct Ministerial responsibility to Parliament and to Treasury control. This relationship has raised an issue which has been brought very much to the fore in recent years; it is the theme which should be kept in mind throughout the discussion of the British postal services. Can a commercial service such as the Post Office be made to operate efficiently under parliamentary control; if not, what alternative is there? Again, can commercial efficiency be obtained

[1] Sir William Hart, "Mixed undertakings," (1932) 10 *Pub. Admin.*, 138–156; the author has discussed the European development in "Les entreprises mixtes," (1931) 20 *National Municipal Review*, 638.

under Civil Service regulations? The Post Office is only one example of the public authority type of utility organization. In the same category should be included the commercial undertakings of the municipalities, the most prominent among which are water, gas, transport, and electricity services.

The second group of public utilities, the limited companies, constitute by far the most numerous class of public service enterprises in Great Britain, because water, gas, tramway, and railroad companies are typical examples. It is important that we should see how these corporate bodies come into existence.

THE CREATION OF PUBLIC SERVICE UNDERTAKINGS

All power to establish public utility undertakings belongs to Parliament. This is the cardinal theory, but in actual practice Parliament has delegated important duties to Ministers. The powers of British public utilities are derived from several forms of authorizing action, namely the Special Act of Parliament, General Acts, the Order in Council, Provisional Orders, and Special Orders. In the last two cases Parliament must later confirm the action of the government department.

The Special Act of Parliament is frequently referred to as Private Bill procedure. Briefly, it consists of hearings before a select committee of the Houses of Parliament. The procedure is in the manner and the spirit of a law court. If the application and specifications of the entrepreneurs are reported favorably, the confirming of the Order by Parliament is ordinarily just a formality. Private bill legislation performs the double function of conferring a franchise and of laying down regulatory standards. This is the principal method of creating a public utility.

There are certain cases in which the general law authorizes the carrying on of public service undertakings without

the necessity of special sanction: this is made possible by General Acts. An instance of the General Act is the power given to municipalities by the Public Health Act, 1875, to establish water and gas undertakings for the supply of their own districts where there is no company or other body empowered and willing to give the same service. The London Transport Board, the Central Electricity Board, and the Port of London Authority were created by the application of General Acts to the particular case. Clauses Acts have also played an important part in the creation of public utility enterprises. Clauses Acts are merely General Acts in a particular form. By means of them, large groups of sections, which used to be repeated in much the same form in Act after Act, can now be adopted and applied *en bloc*, subject to any variations necessary to meet particular cases.

The Order in Council is, *inter alia*, a procedure whereby companies are formed by Royal Charter. It is an exercise of the Royal Prerogative. The Privy Council authorizes the incorporation, on the advice of the Minister and after the Cabinet has approved the principles. Until the creation of the British Broadcasting Corporation in 1927 this means of forming public utilities had not been utilized for many years.

The Provisional Order is an increasingly popular means of securing public utility privileges. It has become, to a considerable extent, a substitute for Private Bill procedure. The company or the public authority will go to the appropriate central government department, usually the Ministry of Transport, the Ministry of Health, or the Board of Trade, where after hearings, evidence, and investigation, the powers are either granted or refused. The proceedings are usually held in the field rather than at Whitehall. The responsible Minister's action is later confirmed by an Act of Parliament, but this has become in practice simply a matter of course. The administrative control of Whitehall is unquestionably

the most effective form of regulation over the older utilities such as water and tramway undertakings.

The remaining avenue of utility development is known as the Special Orders procedure. It is similar to the Provisional Order, except that it is a special administrative procedure employed primarily by gas and electricity companies. In the case of electricity Parliament provided that Special Orders should be made by the Electricity Commissioners and confirmed by the Ministry of Transport in all cases which, prior to the Electricity (Supply) Act of 1919, would have been considered by Provisional Order procedure or by action of Parliament. Parliament retained the right to reconsider these Special Orders, but in fact it never does so.

In the matter of regulating public utilities, as well as in other important respects, Parliament has been forced to delegate broad powers of control to the Administration.[1] Parliament does not have the time or the competence to do otherwise. The private Bill procedure is still extremely important, but even in that case the higher administrative officials are almost invariably called upon to undertake an independent investigation of the case, to make recommendations, and to give evidence. It is not an exaggeration to say that the applicants have little chance of success before a Private Bill committee if the departmental report has been unfavorable.

The central government virtually monopolizes the field so far as the creation and regulation of public service companies is concerned, leaving British municipalities less control over local utilities than they have over most other matters. This circumscription of local freedom applies to the municipality's desire to undertake new forms of

[1] One of the best treatments of the subject will be found in an article by W. Ivor Jennings, "The report on Ministers' powers," (1932) 10 *Pub. Admin.*, 333. The article contains a detailed bibliography. See also William A. Robson, *Justice and Administrative Law*, chaps. iii, vi, London, 1928.

commercial service itself, as well as to regulative powers over private companies. Local authorities are on the same footing as private undertakers so far as parliamentary requirements relating to new enterprises and additional powers are concerned. The central government's control of the trading functions of local authorities appears to be growing increasingly unpopular, especially in communities where the Labor party holds power. Professor Hormell accurately describes the situation when he says that "on the whole municipal ownership and operation have proved successful. . . . Many of the leading Conservatives who oppose national socialism consider municipal socialism to be merely good business."

Having considered the creation and empowering of public utility companies, we may return to some typical examples of the earliest and most numerous type of public service undertaking, namely, the limited company operating under a limited monopoly. The best examples of these, aside from the railways, are the water, tramway, and gas companies. Reference to these at this point will help to make our consideration of the principal public utility services more complete.

THE REGULATION OF PUBLIC SERVICE UNDERTAKINGS

Water Supply

The most important means of empowering and regulating water companies consists of detailed Acts of Parliament, both general and special, which have been passed since 1847.[1] Due to the clarity of the law, the long experience

[1] The more important of these provisions are included in the Waterworks Clauses Acts, 1847 and 1863, the Water Companies (Regulation of Powers) Act, 1887, the Gas and Water Works Facilities Acts, 1870 and 1873, and the Public Health Acts of 1875 and later dates. Keen analyses all of the Acts prior to 1925 in chapter ix of his book. The most important legislation of recent years consists of the Water Undertakings (Modification of Charges) Act, 1921, and the Reservoirs (Safety Provisions) Act, 1930.

with problems of water supply and the relatively moderate returns to be expected from the business, the problems of administration are not particularly difficult. Furthermore, as in America, a large percentage of water systems are publicly owned.

The Public Health Act, 1875 (Sect. 51), empowers any urban authority to provide its district or any part thereof, and any rural authority to provide its district or any contributory place therein, with a supply of water for public and private purposes. As a result of this and supplementary provisions the water supply is publicly owned in virtually all of the boroughs, in roughly two-thirds of the county boroughs, and in about half of the urban districts. The Liberal Industrial Inquiry reported in 1928 that 977 out of 1,236 water systems in England and Wales were owned by public authorities. In 1902 the water supply of metropolitan London was transferred from private companies to the Metropolitan Water Board, a public utility trust form of organization. The number of such boards is not less than fourteen, representing an aggregate capital of £69,730,000. The Act of 1875 further provided for the compulsory taking of land and the acquisition of existing private companies, subject either to arbitration or to a provisional order confirmed by Act of Parliament. The majority of cases have been settled by agreement. The national policy relative to water supply has been made clear, because "it has been for many years the settled policy of Parliament not to withhold its sanction to applications from urban authorities seeking control of the water supply in their districts."[1]

So far as existing private companies are concerned, the enforcement of the provisions of law is entrusted to the Ministry of Health. The authority for making Provisional Orders was originally the Board of Trade's, but it was transferred to the Minister of Health by an Order in Council made in November 1920. As regards water supply, the

[1] (1932) *Municipal Year Book*, 1027.

purposes for which a Provisional Order may be made are defined as follows:

"To construct or to maintain and continue waterworks and works connected therewith, or to supply water in any district within which there is not an existing company, corporation, body of commissioners, or person empowered by Act of Parliament to construct such works and to supply water;

"To raise additional capital necessary for any of the purposes aforesaid;

"To enable two or more companies or persons duly authorized to supply water in any district or in adjoining districts to enter into agreements jointly to furnish such supply, or to amalgamate their undertakings;

"To authorize two or more companies or persons supplying water in any district or in adjoining districts to supply water, and to enter into agreements jointly to furnish such supply, and to amalgamate their undertakings."

The municipality exercises certain limited forms of control over statutory companies, these being applicable to gas and tramway companies as well. In case of a new private enterprise the consent of the local authority must be obtained (subject to the Minister's authority to dispense with it). In times past the local corporations have been able to limit or to prevent entirely the private company's use of eminent domain, notably in the case of the National Telephone Company. Finally, permission must be obtained to tear up streets and lay mains.[1]

In recent years there has been a marked tendency for Parliament to put the water supply into the hands of ad hoc bodies representing large areas, the members of said boards being elected indirectly by the constituent local authorities. In 1932 there were thirty-three Joint Water Boards in existence. The proposed establishment of regional committees points in the same direction. In order to bring about the most advantageous exploitation of the nation's water resources, a permanent advisory body has been created,

[1] Michael and Will, *The Law Relating to Gas and Water Companies*, 2 vols., London, 1924–25, particularly chapter v, vol. ii, which deals with powers of local authorities with reference to water supply.

entitled the Ministry of Health Advisory Committee on Water Supply.

Water Companies: Rate Determination

As a rule, questions regarding water rates are decided by reference to very specific provisions contained in general or special Acts of Parliament. The basis of later special Acts has been Section 68 of the Waterworks Clauses Act of 1847 which provides that water rates shall be payable according to the annual value of the tenement supplied with water. If any dispute arises as to such value, the Act continues, it is to be determined by two justices. When the provision regarding "annual value" became incorporated in special Acts a good deal of litigation arose as to the meaning of the term. In the leading case of Dobbs *v.* Grand Junction Waterworks Company,[1] the House of Lords (reversing the Court of Appeal) held that "annual value" means "rateable" (local taxation) value. By the Water Rate Definition Act of 1885 it was provided that the "annual value" should be the rateable value as settled from time to time by the local authority. "Now, under the Acts of the Metropolitan Water Board, rateable value has been made the basis for the charging of the rate for domestic purposes throughout the whole area of jurisdiction of the Board."[2] The usual practice now followed in special Acts is to avoid ambiguity by describing the assessment on which the maximum percentages are to be calculated either as "rateable value" or as "gross estimated rental."

The Waterworks Clauses Act (Sects. 75-83) deals with the profit to be derived by water companies. Briefly, it is provided that profits to be divided in any one year are not to exceed 10 per cent on the paid-up capital of the undertaking, but this may be exceeded when a past dividend has fallen short of the allowable return. Excess profits may be invested in government securities until such time as the re-

[1] (1883) 9 *App. Cas.*, 49.

[2] Keen, op. cit., 155.

serve fund amounts to one-tenth of the capital. The reserve fund may be used for only two purposes: either to meet a deficiency which occurs at any time in the amount of dividable profits or to meet any extraordinary claim or demand which may arise. The propriety of such claim must be certified by two justices. If in any year it is alleged by two or more water ratepayers that profits have been earned in excess of the aforesaid provisions, the Court of Quarter Sessions is given power to hear the complaint. The court may order any such rate reduction as seems reasonable.

This procedure brings out the traditional British method of rate regulation, with suggestions which may be of possible interest to American readers. However, the situation just described has been modified somewhat by later special Acts. The modern practice is to insert a clause defining the maximum charges the company may make for domestic supply, and commonly also a maximum price per thousand gallons for meter supplies. In practice the rate of return has not usually reached the 10 per cent allowed by law. As a general rule the maximum of 10 per cent is allowed on only the original capital, later issues being limited to 7 per cent or less. At the present time the estimated average return to private companies is around 6 per cent.[1] This is due in part to the fact that recent special Acts have fixed the maximum rate at 7 per cent, and also in large part to powers given to the Minister of Health by the Water Undertakings (Modification of Charges) Act of 1921. This Act provides for price complaints to the Minister from customers or from municipalities. If it appears to the Minister that the costs of carrying on the undertaking have substantially altered, the Minister may make an amending order revising the powers of charging, so that the revised maximum charges shall not in any case, however, be less than the statutory maximum charges applicable on August 4, 1914. This Act has since been supple-

[1] From a memorandum supplied by the Ministry of Health, October 27, 1932.

mented by the Water Orders Procedure Rules of 1926. In the case of public utilities which are run by municipal corporations or other public bodies, the profits are restricted by limiting the amount which can be used in relief of local taxation. The growth of administrative authority has brought about more effective regulation and more elastic rate-making.

Gas Companies

Many of the things that have been said about water supply apply to gas undertakings[1] as well. In some cases the two services are dealt with in the same Act. Hence our primary purpose should be to point out the differences in the technique of regulation.

"The privately owned gas enterprises," Professor Hormell has concluded, "enjoy a more secure position than that of the other important utility enterprises." It is true that municipal trading has not entered this field as rapidly as certain others, but nevertheless over 40 per cent of the country's gas undertakings are now publicly owned. A considerable part of the investment in private undertakings is in the form of large combines such as the Gas, Light, and Coke Company of London. At the present time 317 public authority undertakings represent an investment of £62,650,000, as compared with 465 private companies involving an invested capital of £109,336,000. However, "in no case can a municipal supply be started to compete with that of a company exercising statutory powers." The purchase of a private gas supply by a municipality must be brought about by agreement between the parties. Nevertheless, it may be said to be a general principle of British public utility control that when rival schemes are submitted to Parliament by a local authority and by

[1] Gas supply is regulated by the Gas Works Clauses Acts, 1847 and 1871, the Sale of Gas Act, 1859, the Gas and Water Works Facilities Acts, 1870 and 1873, certain sections of the Public Health Act, 1875, the Gas Regulation Act, 1920, and the Gas Undertakings Act, 1929.

a body trading for profit, preference is almost always given to the former.

"It must be borne in mind," writes Keen, "that the manufacture of gas is a business which, if not carefully regulated, may give rise to serious nuisance in the locality in which it is carried on." The Board of Trade has been given important powers which the Ministry of Health does not have, namely the authority to issue Special Orders. The Gas Regulation Act, 1920 (Sect. 10), which deals with Special Orders, is so important that its provisions are here set forth.[1]

The principal duty of the gas officials appointed by the Board of Trade is to maintain the proper quality of gas according to the price to be charged. "In very recent years,"

[1] (*a*) empower any undertakers to obtain a supply of gas in bulk from any source, whether situated within or without their authorized limits of supply:

(*b*) empower any undertakers to give a separate supply of gas for industrial purposes within their authorized limits of supply:

(*c*) authorize any local authority, which may be authorized to supply gas within their district, to supply gas outside the district in any area which is not supplied with gas by any other undertakers, or which is within the area of supply of any undertakers whose undertaking has been acquired by such local authority:

(*d*) authorize arrangements for the purchase by agreement, joint working, or amalgamation of undertakings, including necessary provisions with regard to the capital of the combined undertakings, the vesting of the property and rights of the purchased or amalgamated undertakings, and other necessary incidents and consequences of purchase, amalgamation, or joint working:

(*e*) authorize the establishment of superannuation, pension, and other like funds:

(*f*) authorize the raising of capital or the borrowing of money for any of the purposes aforesaid:

(*g*) make provision for the purchase or redemption (out of revenue or otherwise) and cancellation of debentures, debenture stock, mortgages or bonds, or of obsolete or unproductive capital, or capital not represented by available assets:

(*h*) modify or amend the provisions of any special Act or other provision relating to the undertaking affected by the special order as may be necessary to provide for the proper and efficient conduct of the undertaking;

(*i*) make such supplemental and consequential provisions as appear necessary to give full effect to the order.

Points (*h*) and (*i*) deserve particular notice. For comment, see the 1921–22 *Municipal Year Book*.

states Keen, "it has become usual not to require the undertakers to conform to a fixed standard of calorific value and charge for the actual quantity of gas supplied, but to allow them to declare from time to time the calorific standard they will adopt, and then to charge for the number of units of heating value in the gas supplied." This alteration was brought about by the Act of 1920, which changed the standard of regulation from costs and profits to "therms," i.e. the amount of heat absorbed in raising the temperature of 1,000 gallons of water 10 degrees Fahrenheit. This has entailed periodic testing by local gas examiners, who are appointed by the local authorities concerned. Where no provision has been made for local examiners there is no enforcement whatever. The central government has not assumed the primary responsibility for enforcement. However, when local inspection officers do discover that the company's standard has fallen below the agreement, the case is reported to three Gas Referees, who are appointed by the Board of Trade. A final appeal may be made, but rarely is, to the Chief Gas Examiner, who is also appointed by the Board of Trade. Both the Gas Referees and the Chief Gas Examiner are appointed for a short term and are therefore not part of the permanent personnel of the department. The Act of 1920 (Sect. 6) provides for specific penalties and fines for the violation of agreements. Any order of the Chief Gas Examiner relative to calorific value, purity, pressure, or composition of gas is held to be conclusive evidence of the liability of the undertakers. The Gas Undertakings Act, 1929, supplemented the provisions of the 1920 Act.

The method of regulating prices differs between private and public undertakings. Since 1875 private companies have been placed under a system wherein the price is regulated according to a sliding scale of price and dividend, but local authorities are usually dealt with by the imposition of a maximum price. The sliding scale provides that dividends may increase beyond a standard figure in proportion

to the reduction in the price of gas below a fixed standard price. Conversely, prices may rise if dividends fall. The sliding scale principle is supposed to be a stimulus to more efficient management. Under this plan dividends vary from 5 to 10 per cent. Since the legislation of 1920 the Board of Trade may permit the maximum price per therm and the maximum dividend to be raised if it can be shown that there has been an increase in the cost of coal or of some other factor.

As a result of the Statutory Gas Companies Act of 1925, it has been provided that gas companies may undertake electricity supply as well. Despite misgivings to the contrary, gas undertakings appear to have held their own so far in competition with electricity supply. It is quite generally agreed, though, that the consumer's interests are not as well protected in the case of gas supply as they are in water company or tramway regulation. This criticism is based, in large part, upon the fact that regulation of gas supply is not nation-wide or standardized. Some of the principal defects of gas regulation have recently been considered by the Joint Committee on Gas Undertakings, which reported in 1932. At the present time some of the obsolete statutory restrictions on gas companies, financial and otherwise, are in the process of removal, but there is no doubt that they have seriously hampered the development of the companies in competition with electricity.

Tramway Undertakings

A brief discussion of local transportation systems will round off our consideration of some of the older public utilities, and it will also reveal additional characteristics of the framework of public regulation.

The great majority of British tramway undertakings, although in most cases they were begun by private enterprise, are owned by public authorities. In 1930 municipal corporations owned 160 out of 217 tramway systems in England and

Wales.[1] This represented a capital outlay of £82,000,000 or approximately 80 per cent of the net investment in tramways and other forms of local transportation. In 1931 these municipal transport systems contributed £172,976 in relief of local rates.

Local transport administration, both public and private, is subject to the control of the Ministry of Transport. This important department of the central government was established by the Ministry of Transport Act, 1919, which transferred from other departments all powers and duties relating to railways, light railways, and tramways, canals, waterways, inland navigation, roads, bridges, ferries, and "vehicles and traffic thereon." This grouping of responsibilities is a model of functional reorganization. Among his numerous powers, the Minister of Transport may connect existing services, provide "through runs," and even undertake new services himself if existing enterprises are unwilling to do so .

We shall be concerned with these and with additional powers of the Ministry of Transport in our discussion, shortly to follow, of the London Transport problem and in the next chapter, which deals with national transportation.

The powers and obligations of the tramway undertakers in England and Wales are derived from the Tramways Act, 1870, the Light Railways Acts, 1869 and 1912, and Provisional Orders granted under these and later Acts. The Minister of Transport is the sanctioning authority for the raising of loans by a local authority operating tramways, and this enables him to call for accounts and to scrutinize plans more easily than in the case of companies; the powers which he exercises are the same in other cases, i.e. relative

[1] (1932) *Municipal Year Book*, 755. The latest and most important information relating to municipal transport will be found in the *Final Report, Royal Commission on Transport*, "The coordination and development of transport," 96–109, Cmd. 3751, 1931. This report is a valuable source of information on transport utilities generally.

to safety, granting of leases, laying out mains, approval of bye-laws and so forth.

The municipality is able to exercise control at several points over private companies desiring to operate local transportation services. When a private company applies for a franchise to establish a new service, the consent of the municipal corporation must be obtained, unless the lines run into two or more districts. In this case the company will not be compelled to obtain the consent of a local authority which controls a third or less of the projected line. Most of the local authority's jurisdiction is derived from its responsibility as Road Authority. The principal ancillary powers thus obtained, in addition to the limited veto which has been mentioned, are the following, namely, control of the breaking up and replacement of roads; usually, authority to approve plans of construction; removal of a tramway not being worked; expropriation of a private company after twenty-one years or purchase sooner by agreement (subject to approval by the Minister of Transport); and power to make bye-laws relative to speed and other details of operation.

As regards profits, the situation is much the same as in the case of water supply, that is, early Acts usually permitted a return of 10 per cent, but later provisions have ordinarily stipulated 7 per cent or less.

In recent years local authorities have been confronted with the necessity of supplementing their tramway lines with omnibus and trackless trolley services, or else face ruinous competition from other quarters. The margin of profit has been small. The average fare on municipally-owned tramways is only 1·35d. Systems which have not kept pace with the development of improved transportation have suffered losses. But in most cases the necessary obsolescence is being frankly faced. The Royal Commission on Transport, 1930, concluded that "tramways, if not an obsolete form of transport, are at all events in a state of obsolescence, and cause much unnecessary congestion and consider-

able unnecessary danger to the public. The commission therefore recommended that (*a*) no additional tramways should be constructed, and (*b*) that, though no definite time limit can be laid down, they should gradually disappear and give place to other forms of transport." In 1931 ten tramway systems were not being operated at all. Many municipalities are changing to railless methods of traction; in 1931 trackless trolley undertakings were being operated by twenty-one municipalities and by two companies. "Municipal motors" is a slogan heard in all parts of the country. Bus routes are either being established as "feeders" to the tramways, or, in some cases, complete motor bus routes have been introduced.

The British citizen unquestionably gets more local transportation for his money than passengers in almost any other country.

With the exception of the four great railway undertakings, most of the public utility companies, such as the water, gas, and tramway companies just described, are local in character. What has been said about local public utility undertakings will not exactly delineate, in all respects, the principles according to which companies operating on a national scale are regulated. Variety is one of the principal features of British public utility control; new problems have required varying forms of regulation. But the general features of regulation exercised over company and local authority undertakings will give one a fair idea of the general law and practice relative to monopoly privileges, the process of incorporation, the extension of public ownership and operation, the administrative control of Whitehall, and the methods of rate regulation. The valuation of public utility properties for rate and expropriation purposes will be discussed shortly, and other principles of public utility regulation, such as equality of treatment, service requirements, and safety provisions will be illustrated in later chapters.

THE PUBLIC UTILITY TRUST

So far we have dealt with two of the three types of public utility organization, namely the public authority and the private statutory company. The remaining form of public service enterprise is the public utility trust, or, as it is sometimes called, the ad hoc public board. This creation of recent years has been received with great enthusiasm in powerful quarters. The public utility trust has been called the ideal form of public utility undertaking. As we have already suggested, its proponents claim that the public utility trust, as represented by the Central Electricity Board, the British Broadcasting Corporation, or the Port of London Authority, is the effective instrument which will bring about a successful compromise between *laissez-faire* and socialism. At this juncture it seems desirable that a setting for the C.E.B. and the B.B.C. should be created. The general features of the public utility trust will be explained, followed by two examples of the plan, namely the P.L.A. and the London Passenger Transport Board.

"The best method of conducting large undertakings owned by the Government and run in the public interest" (according to the Liberal viewpoint,[1]) "is by means of an ad hoc Public Board analogous to a Joint Stock Company, in which the capital is owned and the directors are appointed by the State." Professor Ramsay Muir prefers to call this type of undertaking a "Public Trust." Parliament creates it, defines the principles of its conduct, stipulates the methods of choosing directors, exercises ultimate control over its actions by means of the right to revise the terms of the Act under which the Public Trust was created, but the management is wholly independent regarding internal operations.[2] Although this general analysis applies to the three major examples of existing public trusts, namely the P.L.A., the

[1] *Britain's Industrial Future*, 457.
[2] Ramsay Muir, *Politics and Progress*, 49, London, 1923.

C.E.B., and the B.B.C., it is difficult to generalize too much because each of the undertakings differs in certain respects from the other two.

Lord Wolmer, who states that the public utility authority is "the modern conception of dealing with monopoly," brings out additional characteristics of the ad hoc authority. The three existing boards, i.e. the P.L.A., the C.E.B., and the B.B.C., he says, have the following features in common: "Each of them is a perpetual corporation, having a common seal, capable of owning property, and of suing and being sued. Their status is different from that of a joint stock company; different again from that of a Minister of the Crown or a Department of State. Each of them is, within the limitations originally imposed, master in its own house. The limitations are precise and impose considerable restrictions upon their operations."[1]

It may help to bring out the essential characteristics of the public utility trust by comparing it with the private concern. The public trust is a special form of legal creation; its directors are appointed by the Government, by local authorities, or in certain cases by the users of the service; the undertaking is a legal monopoly; the stockholders are all creditors of and not partners in the undertaking; and the amount and disposition of its earnings are strictly limited by statutory provision. The public utility trust is non-profit-making. The principal respect in which it differs from a government department, on the other hand, is in the absence of continuous ministerial control over its operations.

The P.L.A. was the first important example of the public utility trust, and its creation established a precedent for later adaptations of the same principle.

The Port of London Authority

The P.L.A. was established by Parliament in 1908, after the port had been administered under five different forms

[1] *Post Office Reform*, 277, London, 1932.

of organization.[1] About 40 per cent of the total trade of Great Britain passes through this single port. It is the largest and oldest of sixty ad hoc bodies which administer harbors and docks.[2]

According to the Act of 1908, the duties of the P.L.A. are "to take into consideration the state of the river and the accommodation and facilities in the Port of London, and . . . to take such step as they may consider necessary for the improvement thereof." Amendments to the Act of 1908 were later added, and all of the legislation was finally unified by an Act of 1920. It is specifically provided, among other things, that the Authority may carry on dock undertakings, load, unload, and warehouse goods, construct wharves, locks, etc., and any necessary buildings in connection therewith, and generally control the organization and equipment of the Port. In case of the dispute with traders over charges or other matters a complaint may be taken to the Minister of Transport.

The Board consists of from twenty-eight to thirty members, who are either elected or appointed. Eighteen directors are elected (under regulations made by the Ministry of Transport) from the various interests represented at the Port. Seventeen of these elective members are selected by traders paying dues, and one is chosen to represent wharfingers. Payers of dues are given from one to fifty votes, according to the amount of dues paid. Owners of river craft receive from one to ten votes, depending upon the number of vessels they possess. It may readily be seen where the final power is vested.

[1] Sir Joseph G. Broodbank, "The appropriate type of public authority," (1926) 4 *Pub. Admin.*, 309–317; also, the *History of the Port of London*, London, 1921, by the same author.

[2] Out of 177 Harbor undertakings, 10 are worked by government departments, 43 by local authorities, and 60 by ad hoc authorities not trading for profit. The twenty largest out of the last-named category have an aggregate capital of about £100,000,000. *Britain's Industrial Future*, 68. The control of harbors and docks was investigated by the Royal Commission on Transport, 1930, and their report and recommendations are found in *Final Report*, 1931, op. cit., 125–135.

Ten members are appointed by the following bodies:

The Admiralty, one member.
The Ministry of Transport, two members.
The London County Council, four members.
The Corporation of the City of London, two members.
Trinity House, two members.

The Act stipulates that one each of the representatives of the Ministry of Transport and of the London County Council should represent labor and be appointed after consultation with labor organizations.

In addition to these twenty-eight members, the Board may appoint the Chairman and Vice-Chairman from without its own membership. At the present time the Chairman is so appointed. The term of office of all members is three years, but they are subject to reelection or reappointment. Salaries may be paid to the Chairman, Vice-Chairman, and Chairman of Committees, but in practice the Chairman is usually the only one who is remunerated.

Most of the Board's work is done through committees, which are appointed by and report to the Board. The most important one is the Dock and Warehouse Committee, which is primarily responsible for operating the docks. The committee system results in a great deal of devolution. The Chairman is supposed to bring about the necessary coordination.

The financial responsibilities of the P.L.A. are impressive.[1] The Authority took over the stock of the companies it superseded and issued its own in exchange. It has power to borrow for approved purposes up to £43,000,000 and to obtain temporary advances up to £1,000,000, or, with the approval of the Minister of Transport, up to £2,000,000. Its outstanding liabilities are in the neighborhood of £35,000,000. The retirement of the bonds is brought about by a sinking

[1] The following data will be found in the *Annual Report of the P.L.A.*, March 1931; (1932) *Municipal Year Book*, 359, 1089; and *Royal Commission on Transport, Final Report*, 1931, op. cit., 128–131.

fund arrangement, and if receipts in any year are insufficient the Minister of Transport may order additional dues to be collected. In 1928 the trade handled by the Port of London amounted to £693,000,000. The net tonnage arriving and leaving through the Port during the year was 55·4 million tons, and of this 60 per cent used docks belonging to the Authority. In 1931 the expenditure aggregated £6,279,036, including provision for sinking fund and interest requirements. Maximum charging powers were provided in the Special Act creating the P.L.A., but since the war the Minister of Transport has been given power to vary the statutory charges. The minimum rate of return on P.L.A. stock is 3 per cent and the maximum is 5 per cent. This limit cannot be exceeded, and any additional surplus cannot be paid out as profits.

A former member of the Board of the P.L.A. concluded after seventeen years of service that although the Authority has "adequately fulfilled the intention of Parliament that it should improve the Port, . . . it is slow in action and administration, whilst traders feel the oppressiveness of dues and charges which have increased considerably. These drawbacks cannot be attributed to inefficiency on the part of the personnel of the Authority. They were inevitable in the nature of things and were foreseen."

The principal defect is said to be that the P.L.A. is a mixed administrative and commercial body, at one and the same time regulating the interests of many others and also managing its own docks and interests. However, it should be recorded that very few disputes have been taken to the Ministry of Transport, which is an alleged indication of general satisfaction. The consensus of opinion holds that the contingency of using this power has been an important factor in obtaining justice from the Board.

The best authority on the subject comes to the conclusion that "The merits of public institutions as such cannot be judged by the transactions of a few years, and I would urge

the careful weighing of all the circumstances before the constitution and powers of the P.L.A. are taken as the model of a public utility undertaking."[1]

Although the P.L.A. furnished the example, the structure and operation of the B.B.C. and of the C.E.B. differ from each other and from the former in several important respects. The latest public trust which has been created, namely the London Passenger Transport Board, reveals even more striking variations, indicating the high degree of flexibility which is possible under the public board form of utility organization. Considerable importance is attached to the problem of solving London's transport difficulties, not only because the largest city in the world suffers so acutely from traffic congestion, but also because the solution may indicate the manner in which future problems of public control may be resolved.

The London Passenger Transport Problem

The London passenger transport scheme was adopted by Parliament in 1933, after alternative plans of solving London's traffic problem had been strenuously contested for many years.[2] No other large city in the world is said to possess such a ramified transport system as London, and no other city has had to cope with more difficult problems of traffic control. The reasons for this are easily understood. London has developed without a plan, haphazardly, resulting in narrow, tortuous streets. As a result of the increasing public preference for motor transportation, London's congestion problem has become as much a question of roads as of conveyances. Moreover, in late years there has been a phenomenal growth of population around London's periphery. Over nine million people, almost one-fifth of the population of the country, live within a twenty-five mile radius of Charing

[1] Broodbank, op. cit., 4 *Pub. Admin.*, 314.

[2] 23 Geo. 5, chap. 14; Herbert Morrison, *Socialization and Transport*, London, 1933.

Cross. This is the most important fact that might be mentioned because it underlies every problem of transportation and of communication. Moreover, the circle of population is being constantly extended. The center of London is thinning out, numerous housing estates have been established on the outskirts, and inadequate transportation alone will check the tendency of people to go further into the country. It is no exaggeration to say that adequate cheap transportation has become as necessary to the Londoner as a satisfactory water supply.

The problem has been too large for existing governmental subdivisions. The area of the London County Council is 117 square miles and the effective area of London traffic is approximately 1,800 square miles. Proposals have been made to create a Greater London, but the idea has not made much headway. Within this area there existed in the neighborhood of ninety transport services, a few large and many small, which had to be considered in bringing about coordination. Competition has resulted in inconvenience and delay to passengers, over-expansion in certain cases, cut-throat competition, and financial timidity due to future uncertainties. Because of the uneconomic competition the underground has been unable to raise new capital for extensions, without a government guarantee, although extensions are admittedly necessary. It costs £800,000 to £1,000,000 per mile to build tubes. As G. J. Ponsonby has concluded in *London's Transport Problem*, "The simple fact that a proper development of London's transport system requires the growth of all facilities, and that if any one link in the chain falls short of requirements the whole will suffer, is self-evident."

The transport services which entered into the new combine consist of tramways, main-line railways, Underground railways, and omnibus systems. In 1929 the transport facilities of Greater London accounted for 4,000,000,000 passenger journeys, or an average of 1⅓ journey per head of the population per day. The gross receipts from the suburban

traffic, of the four main-line railway companies total about £10,000,000 a year, or about one-sixth of the total passenger receipts of the four amalgamated railway companies. The railways' interests have been taken care of by a traffic pooling arrangement. Over 80 per cent of the tramways were owned by public authorities, representing an investment of £18,000,000. All except one of the underground companies and practically all of the principal omnibus routes were owned by the same interests, the London Underground group. Permission to pool the resources of the omnibuses and the tubes was obtained during the war. "They were potential competitors, but when that consent was given, for the first year the tubes kept the omnibuses going. Afterwards, the conditions of traffic changed. The motor omnibus was introduced and from that time until now the omnibuses of London have kept the tubes alive. The omnibuses contribute no less than £500,000, a year," it was pointed out in the House of Commons. This illustrates the close relationship between all forms of transport. All of the transportation facilities involved in the combine, exclusive of the railways, reach the staggering total of £100,000,000.

The recent history of the proposal to unify London's traffic resources really began in 1924. Since that time animosity between interested parties has been almost constantly aflame over the issue. In 1924 the London Traffic Act gave the Minister of Transport power to limit the number of omnibuses plying for hire on certain streets. This helped the tramways, and also improved the conditions of labor. The Road Traffic Act of 1930 provided further restrictions leading towards monopoly. The creation of the London Traffic Advisory Committee, prior to this, brought into being an expert body which held extensive hearings and worked out plans of coordination. In 1928 and 1929 private bills were introduced which would have coordinated London transport under a joint unified management controlled by the principal combines. These were killed by a Labor-

Liberal coalition at the third reading. The Liberal party favored municipal ownership and operation and the Labor party advocated national control under a public board.

In 1931 the Labor party introduced a bill providing for the complete amalgamation of existing transport services under a board of five members appointed by and responsible to the Minister of Transport. Security holders were to be given stock in the new undertaking, but with no option of demanding cash instead. The bill passed the second reading and emerged successfully from the joint committee stage[1] with only the Metropolitan Railway interests dissatisfied. Then there was a change of government.

All three political parties favored coordination, but disagreed upon the nature of the control which should be established. The Conservative party's objections to Labor's bill were couched in the following terms:

> "This House, whilst again willing to consider any sound scheme for the coordination of London traffic, declines to give a Second Reading to a bill which provides for the nationalization of London passenger transport; deprives local authorities of control in respect of their various undertakings; takes the property of private owners out of their control; gives them no option of sale; vests in the Minister of Transport bureaucratic powers; and constitutes him, and not a judicial tribunal, the court of appeal in such important matters as the provision or withdrawal of traffic services and facilities."

When Parliament met in the fall of 1932, the National Government secured permission from the House to bring up Labor's Transport Bill at the next session, at which time only the final reading was to be allowed.

The Act which was finally passed differed in only one important respect from the Labor Government's bill. The alteration related to public control. It has been provided that the Minister of Transport shall set up a body to be called "Appointing Trustees," to whom will be entrusted,

[1] The most illuminating discussion of the bill occurred at this stage. See particularly the introductory and concluding speeches of Mr. Wilfrid Greene, Select Committee on the London Passenger Transport Bill, *Proceedings*, May 12, May 13, and July 17, 1931. Stationery Office publication.

instead of to the Minister, the crucial duty of electing the Board. The Appointing Trustees will consist of the Chairman of the London County Council, a representative of the London Advisory Committee, the Chairman of the London Clearing Bankers, the President of the Institute of Chartered Accountants, and the President of the Law Society. Unlike the original bill, neither the appointing officials nor the operating board are responsible to the Minister of Transport. Disputes regarding service and rates will be taken to the Railway Rates Tribunal, a quasi-judicial body.

A rebellious Conservative summarized his objections to the bill by pointing out that the system of indirect appointment has twice removed the managing officials from the searchlight of public criticism and control. The Board will not be responsible to Parliament nor to the people in the London traffic area, acting through their representatives. Herbert Morrison, who as Minister of Transport fathered the original bill, has concluded that

> "This method will, of course, destroy all public accountability. The Minister will not be responsible, and questions in Parliament will be futile. The press or the public at large can grumble, but each of the Appointing Trustees can feel quite impersonal about it because, after all, the Trustees will be responsible as a whole, and not individually. Criticism against an individual Trustee will probably meet with the answer: 'Well, you must remember that I was not the only Trustee, and one cannot always get one's own way.' The device seems almost to invite backstairs influence . . ."[1]

On the other hand, the appointment of Lord Ashfield and Mr. Pick, the successful Underground executives, as the chief operating officials of the new combine, has caused reassurance.

All three political parties have, at one time or another, advocated the public utility trust. However, it is difficult to generalize, because there has been so much difference of opinion among individual members of all the parties. The Conservative party has not only approved the principle, but

[1] *Socialization and Transport*, 161, 162.

has been responsible for the creation of the Metropolitan Water Board, the C.E.B., and the B.B.C. Conservatives often argue that the public utility trust will protect investors from the arbitrariness of future governments and safeguard commercial management. The Liberal party has declared that the public trust constitutes the ideal form of public utility control; and it was responsible for the creation of the P.L.A. Liberals discover in the public utility trust a reconciliation of public ownership with efficiency of performance and enterprise. Prominent members of the Labor party hold that the public utility trust is preferable to any existing method of operating public commercial undertakings. Within recent months, however, many members of the party have expressed scepticism regarding some aspects of the development—particularly those relating to the adequacy of labor representation and the sufficiency of public control. The public utility trust may be a step toward socialism, they say, but the form of control leaves much to be desired in the interval.

PUBLIC UTILITY VALUATION

One of the questions which has created a great deal of difficulty in connection with the purchase of the London transport facilities is the price which should be paid, in other words, what constitutes the proper value of the existing services. This issue is a very important one because since the 1870's a large percentage of private utility companies have been acquired by public authorities, either by negotiation or by expropriation. The right to expropriate a public utility company is an important form of public control.

The circumstances surrounding the forced sale of a public utility property, viz. the price which must be paid and the upkeep and modernity of the plant, are determining factors in the ultimate success or failure of public commercial undertakings. There have been many striking examples of this

truth in Great Britain. For example, in the course of the debate on the London Passenger Transport Bill, a member stated that he hoped the Government would "not allow this great enterprise of London traffic to be weighed down as the London Water Board was, and as the Port of London Authority has been all its life, by immensely exaggerated capital charges." An official of the Board of Trade, who has been in close touch with the public acquisition of privately-owned utilities, stated to the writer that in several instances in which it had been provided that the local authority might take over the undertaking at the end of twenty-one years, the private owners refused to make replacements due to deterioration during the last several years of the life of the company, with the result that the municipality "found a pile of junk on its hands."

In the United States one finds a vast amount of material relating to the valuation of public utilities for rate-making and dividend-earning purposes. "A fair return on a fair value" is a common maxim. The British have spared themselves endless disputes regarding the proper theory of valuation underlying the rate-base.[1] Where it has been provided that a maximum rate of interest may be paid upon an investment, the amount referred to is invariably the face value of the outstanding securities. The law regarding the theory of valuation applicable to purchase is also well settled. Each Act defines the basis of valuation, leaving no room for dispute except on questions of fact. Certainty relative to valuation theory is one of the principal reasons that public utility issues do not occupy a more important place in British discussion.

The basis of valuation in Great Britain has been laid down by Parliament in a large number of cases extending over many years. Therefore the courts have had relatively few valuation controversies before them, and the rule to be

[1] Sir Henry Bunbury, "The economic regulation of public utilities," (1926) 4 *Pub. Admin.*, 208.

applied has never been seriously in doubt. This may be shown by characteristic statutory provisions and by court decisions.

According to Section 43 of the Tramways Act of 1870, "Promoters shall sell to them (local authorities) their undertaking . . . upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking or any compensation for compulsory sale or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials, and plant of the promoters . . . said value to be in case of difference determined by an engineer or other person nominated by the Board of Trade." When this provision came before the courts it was held that value includes "all real and movable property belonging to the 'promoters' necessary for conducting the tramway traffic and all proprietary rights attaching thereto . . . as successfully constructed and in complete working condition, after deduction of a proper sum for depreciation; but not of the rights of user, such rights being conferred upon the 'promoters' of the undertaking for the time being by the statute itself and not by the vendors."[1] From the above quotation it may be

[1] Edinburgh Street Tramways Co. *v.* Edinburgh (Lord Provost), London Street Tramways *v.* London County Council, 63 L.J., Q.B., 769. In determining what constitutes the "then value" it has been held, where disagreement has arisen before arbitrators, that parliamentary costs and expenses incurred in obtaining the right to construct and work the undertaking may be included, but costs incurred when the company opposed applications for powers by rival companies cannot be allowed. Manchester Carriage & Tramways Co. *v.* Ashton-under-Lyne Corp., 68 J.P., 576. The entrepreneur may include engineers' fees, subject to depreciation, but the cost of raising the capital must be disallowed. Oldham, Ashton & Hyde Electric Tramway and Ashton Corp., *In re*, 90 L.J., K.B., 828; (1921) 3 K.B., 511. On the results of this rule, see Vesey Knox, "Economic effects of the Tramways Act of 1870," (1901) 11 *Economic Journal*, 493. In evidence submitted to the Royal Commission on Transport, 1930, it was contended that "faced with the possibility of purchase at a comparatively early date, a company cannot develop its undertaking as it should; that the uncertainty of the future is accentuated in consequence of the option of the local authority to exercise their right of purchase recurring every seven years; and that the provisions of the Act have had the effect of preventing the development of the systems and have militated against the modernization of rolling-stock and the adoption of improved methods by the tramway companies." The companies suggested that the

seen why the British rule of valuation is frequently compared to the "prudent investment" theory of Mr. Justice Brandeis.[1]

The theory of present value less depreciation is well expressed in Section 2 of the Electric Lighting Act of 1882, where it is stated that "the value of lands, buildings, works, materials and plant shall be deemed to be their fair market value at the time of purchase, due regard being had to the nature, then condition, . . . repair thereof, and to the circumstances that they are in such a position as to be ready for immediate working, and to the suitability of the same for the purpose of the undertaking." In actual practice, however, the results in certain cases have been hard to distinguish from the reproduction cost theory.

The advantages of the British practice with regard to valuation are at once apparent. Its principal virtue is definiteness, resulting in certainty for all parties. Although not subject to the extreme fluctuations of the "reproduction cost" theory, it does permit consideration of the changes which have occurred in the general index level. On the other hand, as regards "original cost"[2] it emphasizes depreciation and successful management. True, it imposes a great deal of power upon arbitrators and engineers, but this is to be preferred to judicial logic. The simplicity and fairness of the valuation procedure have gone a long way to keep British public utilities, and the courts, out of the political arena. Nevertheless, the system is by no means free from defects, as we shall have occasion to point out later.

tenure provisions of the Act of 1870 should be repealed, and that a period of, say, forty-two years should be given to existing undertakers to allow them to develop and modernize their systems, the local authority being given an option in the first instance to purchase the undertaking if it so desires. *Final Report*, op. cit., 100.

[1] This theory was first advocated by Mr. Justice Brandeis in the case of Southwestern Bell Telephone Co. *v.* Public Service Comm., (1923) 262 U.S. 276.

[2] For an analysis of the conflicting theories referred to, see E. C. Goddard, "The evolution of cost of reproduction as the rate base," 41 *Harvard Law Rev.*, 564 (March, 1928), and J. C. Bonbright, "The economic merits of original cost and reproduction cost," Ibid., 593.

So far a great deal of our analysis of the outlines of British public utilities has dealt with the law of the subject, both as developed by Parliament and by the courts. As a concluding consideration, it appears desirable to analyze the position of British public utilities in the framework of the central administration. True, we have already referred to some of the functions of the Ministry of Health, the Board of Trade, and the Ministry of Transport, but further explanation is necessary as a background for further discussion.

PUBLIC UTILITY CONTROL BY WHITEHALL

Like other countries with a monarchical-parliamentary tradition, Great Britain has not looked with favor upon delegated supervision. It is a striking fact that outside of the United States so-called "independent commissions" are almost unknown. Whereas the United States has created scores of regulatory tribunals, in Great Britain the only tribunals of this nature are the Railway and Canal Commission, the Railway Rates Tribunal, the Electricity Commission, and the Traffic Commissions. In France, Germany, Switzerland, Sweden, Norway, and in certain other countries, advisory committees which assist the responsible Ministers may be found, but the independent quasi-judicial commission is conspicuous by its absence. Its lack of vogue in other countries is sufficient reason for Americans to examine the underlying assumptions of their own regulatory methods with great care, and to view the alternative devices of other leading countries with open-minded interest.

One reason for not finding a greater variety of administrative forms among the regulatory mechanisms of other countries is found in the greater extent to which municipalization and nationalization of essential economic services have occurred. For example, it is estimated that in Great Britain almost two-thirds and in Germany around three-fourths of the electric power industry is owned by public

bodies. The point is that the administrative aspects of regulatory control have shrunk in importance as the administrative problem of management has gained headway.

In Great Britain during recent years there has been a definite struggle to revive the effectiveness of regulation. Realizing that non-regulation of monopoly services would not be tolerated and that greater socialization has gained numerous adherents, those with conservative inclinations have devoted unprecedented labor to effect a compromise, namely the improvement of the form and variety of regulation.

A casual analysis of the result will indicate that the independent commission has not been favored. This may not necessarily prove that the railway tribunals have been tried and are found wanting. Later analysis will attempt to throw light upon that question. But it is a fact that when new machinery was needed for the public control of radio broadcasting, the national development of electricity supply, the expansion of the Port of London, and the unification of the London transport system, an operating rather than a regulatory instrumentality, namely the Public Utility Trust, was evolved. The general features of this significant new development have already received attention. It remains to suggest the bearing of the public board development upon the general problem of administrative organization and control.

In the first place, its effect is to bring about decentralization, to remove the utility from direct governmental control. In this the public utility trust may be compared to the railway tribunals. Moreover, the responsibility for protecting the consumer's interest is imposed upon political officials who already have their immediate departments and their special work to occupy the major portion of their time. The nominal ministerial jurisdiction over the C.E.B. is exercised by the Minister of Transport, while the Postmaster-General acts in a general supervisory capacity toward the B.B.C. Theirs is an ex-officio duty.

There is no direct, continuous control. Hence both with respect to Ministerial responsibility for policy and execution, the public utility board development runs counter to the traditions of the British administrative system. This need not be taken as a condemnation of it.

The traditional theory may be stated as follows. Since the Government is responsible to Parliament, all regulation in the public interest must be performed by the head of one of the Departments of State in order that he may be made answerable to Parliament for what he does. Hence, for the most part and until recently, administrative regulation in Great Britain and on the Continent has been left to the Ministers who are concerned with industrial and commercial affairs, not to the detached tribunals or boards.

In Great Britain the departments most concerned with public utility matters are the Post Office, the Ministry of Health, the Board of Trade, and the Ministry of Transport. Only two of these, namely the Post Office and the Ministry of Transport, will appear prominently in the balance of the book. In chapters ii, iii, vi, and vii, where the railways and electricity are considered, the Ministry of Transport will be found to possess a certain degree of relationship with the railway tribunals and with the electricity authorities. In chapters iv and v the Post Office will be seen administering vital public services according to the traditional method, namely as a Department of State. Finally, in chapter viii the Postmaster-General's relation to the B.B.C. will again raise the question of ministerial supervision over public boards. The remaining chapter will deal with any general observations or conclusions which may be hazarded as a consequence of the study.

SUMMARY

In the period since the war, public utilities have assumed a position of great importance, particularly as a result of

national developments in the fields of electricity, broadcasting, national transport, and telephone administration. There has been a tendency for action to outstrip policy, so rapidly have new problems of public utility organization and control arisen. Moreover, British public utilities have emerged from a *laissez-faire* industrial background, and not until recent years has the term "public utility" been applied to regulated monopolies. Parliament may grant any powers or impose any restrictions it pleases upon public service undertakings, and, unlike the United States, the courts will not attempt to modify or nullify the legislature's control. Legislative supremacy has resulted in three important differences between public utility control in Great Britain and in the United States: in the first place, the public utility concept and the category of undertakings which may be called public utilities are not as clearly defined in Great Britain as in the United States, where the law has been developed primarily by the courts; secondly, due to the fact that greater elasticity has been possible in Great Britain, a wider variety of forms and of methods of public control over public service undertakings has resulted; finally, responsible government in Great Britain has made it traditional for Parliamentary Ministers, rather than for independent regulatory tribunals as in the United States, to exercise primary control over public utilities. American public service commissions are a "fourth department" of government, whereas the principle of responsibility in the British system has made it natural that the British railway commissions (the nearest approach to American public utility commissions) should be drawn closely to the judiciary. Regulation has shrunk relatively in importance as municipally-owned public utilities have increased in number and variety. It has been possible for municipalities to expropriate privately-owned utilities on a "prudent investment" basis, but in many cases the cost of reproducing the enterprise seems to have been paid.

The greater variety of organization and control of public utilities makes a study of British developments extremely interesting and suggestive. Three types of public service enterprise have been distinguished: the statutory company under regulatory control is illustrated by the national railways, or by the water, gas, and local transport undertakings; the British Post Office, which administers a large number of vital services, among them the telegraph and telephone systems, is in a class by itself: it is a department of the central government and one of the oldest public service undertakings in the country; the third and newest public utility development has been called the public utility trust, and great interest has been aroused in this form of large-scale enterprise by the creation of the Central Electricity Board, the British Broadcasting Corporation, the London Passenger Transport Board, the Port of London Authority, and the Metropolitan Water Board.

These developments represent the efforts of the British to adjust a strongly individualistic economic structure to the requirements of a socialized age. The most vital public issues are at stake: the choice between competition and cooperation, *laissez-faire* and planning, investors' profits and increased returns to labor and consumers, commercial management versus socialized administration. Intelligent citizens are speculating as to whether the public utility developments of recent years represent the deep trenches of vested interests or the first furrows of Social Democracy.