Some Problems of Public Law

II.

It is out of the question for us to review in detail the rules of Continental jurisprudence as regards the responsibility of State departments and officers. I should like, however, to notice a leading doctrine which held the field in most States of Western and Central Europe for many centuries, namely, the doctrine of the Fiscus—the civil personality of the State.

Right from Roman times Continental law has been moving on different lines from the English; the liability of the State for infringement of its duties is recognized as far as transactions of a civil nature are concerned, while, on the other hand, any complaint affecting governmental functions and interests is rigidly excluded from the interference of the ordinary law courts. The system may be described as the watertight compartment arrangement: the State appears in two distinct aspects—that of a civil corporation and that of a public authority. In this shape the doctrine could be admitted by the most absolutistic government.

In one of the Imperial rescripts dealing with the subject in the Code of Justinian, Hadrian forbade the arbitrary increase of rents of lease-hold tenants farming plots on the fiscal estates: the procurators should conform to custom and fairness because by equitable treatment of the tenantry they would attract agriculturists, while oppressive and arbitrary rule would scatter them away. This is the keynote of the policy which lay at the basis of the fiscal institution: it is in the interest of the Crown that in its transactions with individuals it should not subject them to a law less favourable than that obtaining between private persons.

Many centuries later the enlightened despots of the XVIIIth century Europe practised the same principle.

1 Digest of Justinian, De jure fisci, XLIX, 14, 3, 6.
Let me remind you of the celebrated case of the Miller of Potsdam. His mill had been injured because King Frederick the Great of Prussia had ordered a pond to be made in the royal estate of Sans Souci and the water of a stream feeding the mill had been diverted towards that pond. When the aggrieved miller claimed compensation, the local court of Potsdam refused to give him satisfaction because the obnoxious works had been carried on for the benefit of the royal estate. Frederick II intervened personally, quashed the decision and administered a violent rebuke to the judges for failing to distinguish between the private affairs and the public dignity of the King.

The dividing line is not easy to trace, however, and modern German and French courts have found it necessary to admit that certain acts of public administration produce consequences of a civil nature and have, therefore, to be treated as if they were cases under private law. What is to happen, for instance, if a man-of-war damages a merchant vessel through some accident or error of navigation? A case in point occurred in a German port in 1899 (?). The court of first instance actually decided that unless adequate compensation for the loss to the owner of the merchantman were paid, the gunboat should be taken over by them and could, eventually, be sold. The High Court in Leipzig confirmed the decision as to compensation to be paid by the Admiralty, but explained that a vessel of war could not be treated as property at private law and could not be seized as a security.2

Another instructive case was tried before a Belgian court in 1902. A law had been passed authorizing the government to hold manoeuvres in order to exercise army units in marches and sham fights, as a preparation to actual warfare. In the course of such field manoeuvres the troops destroyed the crops and otherwise damaged private property in certain areas. Claims for compensation were refused by the court at the time on the ground that the instruction of the army was a matter of public utility which outweighed considerations derived from private rights and interests. However, Belgian judges have recently altered their point of view and are ready to admit that the liability of public bodies to compensate for infringement of private rights has to be recognized in spite of the fact that in discharging the duty of compensating for wrongs the State has to assume economic burdens.3 On the whole, it has not been found

2 I Gierke, Deutsches Privatrecht, p. 469.
3 Arrêt du 15-20 Novembre, 1922.
possible to carry out the watertight compartment theory to its ultimate conclusions... The interdependence of the private and the public aspects of the State is being realized more and more in Continental jurisprudence.

On the other hand it is impossible to maintain much longer the equity of a solution which interposes the political prerogative of the State as a shield to protect departments and institutions from liability for the consequences of their mistakes and of the mischievous acts of their agents. If these harmful consequences may arise from misuse of power, or from error, or from negligence, they have to be subjected to adequate scrutiny and ought to result in adequate compensation. In most cases it would fall to the State to provide such compensation.4

Significant lessons may be derived from a comparison between the English and the French methods in dealing with these duties. The English method may be characterized as administrative self-government controlled by the courts. Originally the various functions of administration, regulation of local police, labour and wages, management of roads, and sanitary measures were mainly in the hands of justices of the peace, acting singly or in quarter sessions, while supervision as to legality was exercised by the Court of King's Bench, by orders to hear and determine (mandamus) or orders to bring up a case for examination as to due process of law (certiorari). In the period of democratic reform beginning in 1832 the most important functions of administration gradually passed into the hands of departmental bodies—the various boards, commissions and ministries. The relation of the supervisory courts to the administrative boards remained, however, substantially the same as before in respect of local and regional bodies—the right to order determination and the right to examine the legality of procedure as to competence, form and statutory requirements. The self-government latitude has been substantially transferred to these boards.

The French system does not consist in a superimposition of an upper judicial story on the lower administrative one, but in the separation between powers acting side by side—the administrative power culminating in the presidency of the republic, spreading its

4 Haurion, Précis de droit constitutionnel, p. 579:

In France, where a suit against a functionary fails the suit against an Administrative Department succeeds. It is often successful in cases in which an English judge could not give a decision against the Administrative Department, as the latter's responsibility is not admitted in principle.
ramifications to the prefects of departments and the mayors of communes, and including administrative courts of its own, and the judicial, rising from the courts of first instance for civil and criminal cases, and culminating in the central Court of Error, the Cour de Cassation. Legality of administrative action is to be maintained not by reference to ordinary courts, but by claims and complaints addressed to administrative councils, the Conseils de Préfecture and eventually the Conseil d’Etat. These supervisory bodies are characterized by a combination of legal and administrative attributions and their personnel consists of an approximately equal number of jurists specially trained in public law and of civil service men called off from actual administration.

One may say in a general way, that in England the line of separation between the administration and the judiciary runs horizontally from side to side, while in France it runs vertically from top to bottom.

The contrast is a striking one and it could not fail to produce marked effects in the jurisprudence and practice of the two systems. But I should like to utter a warning against a natural bent of English-speaking students to regard the French droit administratif as an expression of bureaucratic absolutism. Such a description might have been applied to it with some truth in the epoch of the Napoleonic Empire and of monarchial restoration, but it has ceased to apply under the sway of the third Republic.5

As a matter of fact, the jurisdiction of the Council of State since the eighties is characterized by a strict and jealous supervision of the work of administrative institutions and officers.6

It may be said, on the whole, that for the last fifty years we have to deal in France, as well as in England, with systems under the rule of law, although this rule is understood and applied in different ways. Let us attend to the effects of this contrast. To begin with, we have already seen that in England officers are made personally responsible for misuse of authority, mistakes or negligence. In France it is the institution of the department which is primarily liable for the wrong exercise of authority by its agents. There are cases, of course, where the agent is personally responsible if his

6 This transition from arbitrary government to administrative legality may be illustrated by a comparison between two cases—one of 1861, the other of 1880, both concerned with repressive measures against the Press. Cases of Duc d’Aumale and Dufeuille.
wrong action is obviously prompted by brutality or personal malice. When a police officer in the course of evicting a Jesuit as a member of a prohibited congregation assaulted him, he was successfully sued by the sufferer before an ordinary Court of Justice. But whenever the wrong cannot be traced distinctly to such personal motives, the aggrieved party claims damages in redress from the institution or department on behalf of which the officer acted.

A case arose in 1874 which is regarded to some extent as a leading one. The sale of tobacco is in France, as you know, a State monopoly. A child was passing in front of a tobacco store at the moment when some employees pushed a van out of the store. The child was knocked down and had a thigh broken. The father sued the administration, and it was found that the accident was undoubtedly due to the negligence of the employees who had not ascertained whether somebody was not coming. It was held, therefore, that the plaintiff, M. Blanco, had the right to claim damages from the administration.

Complaints as to excess of power or illegal undue assumption of powers are, of course, very numerous, but the treatment of these questions need not detain us: they are solved on similar lines under both systems of law. This is not the case as regards error against rules concerning due process of law.

The situation in England is affected in every direction by the fact that the modern bureaucratic departments have succeeded to local self-governing bodies with mixed administrative and legal attributions, and that the control of the High Courts is still exercised mainly by writs of mandamus and certiorari, i. e., from the point of view of an outside jurisdiction, avoiding as much as possible interference with the freedom of action of administrative bodies. The matter is so important that I beg leave to report three cases illustrative of the practice of various departments. The earlier views entertained by judges in respect of the quasi-judicial functions of govern-

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7 Case Ronconnieres.
8 Blanco c. Min. Des Finances. 8 Mai 1874. Dall. 1875. 3. 54.
"Whereas it appears from the police report that the daughter of the demandant, aged two and a half years, was crossing the public street in front of a tobacco warehouse, when she was thrown down by a truck pushed from the interior of the shop by employees of the administration, who had not first assured themselves that no one was in the way, and that her leg was injured so that amputation became necessary, and that the blame for the accident rests upon the said employees: that therefore M. Blanco is justified in maintaining that the state is responsible for their deed and that the minister of finance has wrongly rejected the demand for compensation." (Italics mine.)
ment boards may be indicated by the following remarks of Field, J., in Parsons v. Lakenheath School Board:

"We must recollect that we are dealing with a new judicial body called a 'Department,' and it is not expected, I suppose, that they are to proceed in matters of this kind with all the ordinary forms of judicial proceedings. They certainly ought to proceed with the substance of a judicial proceeding, and that substance should be, I should think, a hearing by some competent and proper officer . . . hearing any evidence in the presence of both parties, and then, after deliberation, coming to a final decision. Although this body is called the 'Education Department,' they have been entrusted with judicial duties, and should, I think, perform those duties in the ordinary judicial way."

In the course of the rapid growth of bureaucratic institutions the courts relaxed their hold and restricted their interference to the issue of writs of mandamus in cases of denial of action by administrative institutions and of the writ of certiorari in cases of infringement of statutory rules. On the other hand they conceded the greatest latitude of action to administrative bodies as to their methods of procedure.

Thirty years after the Lakenheath School Board case Wright, J., made the following pronouncement in an Irish case, Rex v. Local Government Board:

"Rules 18 and 19 provide for the hearing of appeals by the Local Government Board; they clearly do not contemplate a hearing in the ordinary sense of the word, the attendance of the applicant, or the examination of witnesses. The Local Government Board in making these orders may be, and I assume are, making a judicial determination; but the Board is not a Court, with a Court list, and public sittings, publicly notified. They are a great central controlling body, and to apply to them the same tests and same considerations as would be properly applied to an ordinary judicial tribunal, seems to me completely to mistake their true position and functions."

The two previously existing systems of elementary schools were brought under the supervision of the Board of Education. There arose a kind of united system which left voluntary schools in a way to manage their own buildings and religious instruction, but allowed them to draw on the Education Authorities for the maintenance of teachers on the condition of the efficiency of the schools. The Local Education Authority of the West Riding of Yorkshire refused to pay salaries to teachers in a voluntary school at the same rate as it

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10 [1911] 2 I. R. 331, 347.
paid the teachers in provided national schools. The Board of Education, on receiving a complaint, directed an inquiry and then gave their decision on the strength of the inquiry. The case came eventually before the House of Lords.11 This body disallowed the allegation that there was defect in form as to the department going against the report of its own inspector. The leading judgment was delivered by Lord Loreburn, then Lord Chancellor, and read in part:

"Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view. Provided this is done, there is no appeal from the determination of the Board under Section 7, sub-section 3, of this Act. The Board has, of course, no jurisdiction to decide abstract questions of law, but only to determine actual concrete differences that may arise, and as they arise, between the managers and the Local Education Authority. The Board is in the nature of the arbitral tribunal, and a Court of law has no jurisdiction to hear appeals from the determination, either upon law or upon fact."12 (Italics mine.)

I must refer to yet another case—particularly remarkable on account of the division of opinion among leading judges—Arlidge v. Local Government Board.13 Mr. Arlidge was the owner of certain houses in Hampstead, which were declared by the local sanitary

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12 Board of Education v. Rice (1911) 27 T. L. R. 378, 381.
inspector to be unfit for human habitation. Under the Housing and Town Planning Act of 1909 the Local Authority ordered these houses to be destroyed, and in accordance with the same Act Arlidge appealed to the Local Government Board. The Board, on receiving his supplication, notified him that it would be considered, sent an inspector, made a public inquiry on the spot and came to the conclusion that the houses were indeed unfit for habitation and must be pulled down. Thereupon Arlidge brought an action first in the King's Bench and then in the Court of Appeal, stating that the Local Government Board had deprived him of his right as a citizen by deciding on the strength of a report made by an inspector whom he (the plaintiff) had not seen, so that he had not had an opportunity of defending his right and of contradicting these reports. When the case came up to the Court of Appeal two judges, Lord Justice Vaughan Williams and Lord Justice Buckley, decided that Arlidge had been deprived of fundamental rights and that the procedure followed by the Board amounted to a denial of "natural justice." Hamilton, L. J., the present Lord Sumner, dissented, contending, as in the case of Rice v. Board of Education that the Local Government Board was free to follow its own methods in arriving at its decisions. The House of Lords,—Lord Haldane formulating the principal opinion,—agreed with the dissenting judge of the Court of Appeal. The final decision was that the 1909 Act had given the Local Government Board a power, judicial in substance, but at the same time had left great latitude to the Board in regard to the choice of its methods.

Apart from the problems of pure legality in the domain of administration, important questions arise as to the possibility of judicial control as regards the substance of administrative action.

English Courts consider that if no mandamus can be sent, a certiorari will not lie on the allegation of wrong conclusion; in substance the decision of an administrative authority will not be challenged. The only thing that is supervised by the Courts is that the administrative authority shall observe the forms and act within its competence.

A case illustrating this point is Rex v. Bird and Others, which arose out of the refusal of the licensing justices to grant a license to

14 Supra, n. 13.
15 Supra, n. 11.
16 Supra, n. 13.
17 (1890) 62 J. P. 309.
deal in game to a company recently formed out of an old business licensed to sell beer and wine. The justices of the peace refusing to state a special case, a *mandamus* was applied for and refused. Wright, J., said, *inter alia*:

"When I turn to the affidavit, I find that they have exercised their discretion though they may have based that decision on an erroneous view of the law... We cannot interfere unless we are satisfied that the justices have determined contrary to the manifest general principles of justice, or were influenced in their decision by bribery or bias or something of that description. That would be so even if they have exercised their discretion wrongly, not only as regarding the facts but also as regarding the law by erroneously interpreting the meaning of the section of the Act in question."  

(Right mine.)

It need hardly be said that the French administrative courts are, for good and for evil, far more inquisitive and interfering in regard to the doings of the Civil Service personnel. This is especially noticeable in cases in which officials appeal in justification of their actions to administrative discretion. President Goodnow has aptly characterized it in his work on comparative administrative law:

"Nearly all of the expressions of the will of the state which are to be carried out in their details and executed by the administration cause a conflict at times between the conception by the administration of what the public welfare demands and the conception by the individual of the sphere of private rights guaranteed to him by the law. If the administration had in such cases the power of perfectly discretionary and uncontrolled action, it is to be feared that individual rights would be violated. For the administration has back of it the entire force of the government. Of course it is the purpose of all administrative legislation to reduce as far as possible the realm of administrative discretion, to lay down limits within which the administration must move. But it is impossible to do this with such precision as efficiently to protect individual rights. The discretion of the administration cannot be completely taken away by legislation without causing its usefulness to be seriously impaired. Large discretion must be given to the administration in all states by the legislative authority, so large that some means of controlling the administration must be devised if private rights are to be maintained."  

In France the Conseil d'Etat goes very far into the examination of substantive reasons in the use of administrative discretion. Characteristic examples are presented by its practice in the application of the laws regulating the relations between Church and State. The

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19 2 Goodnow, Comparative Administrative Law, p. 136.
mayor of Saint-Florent in 1904 prohibited processions and religious demonstrations; he did this on the strength of the law of April 5, 1884, empowering mayors to control by appropriate regulations all that concerns the safety and convenience of traffic, as well as good order and public peace, and of the law of December 9, 1905, ordering that religious processions should be governed by the provisions of the law of 1884. The mayor had also power to prohibit religious demonstrations. A priest was charged with infringing the mayor's decree by carrying the *viaticum* to a sick person, with the usual ritual. The case came before the Conseil d'Etat, first on formal grounds, and then for a decision of the principle on which the mayor's decree was based. What the law had in view were processions of the Catholic cult which, in case of a difference of political views, could lead to civil war. The Conseil d'Etat went into the motives of the law and refused to regard the carrying of the *viaticum* as a public procession in the sense which the legislators had in view. They considered the decree an unnecessary check on the freedom of the cult. For the mayor had, in the exercise of the power conferred on him, to conform with article 1 of the law of 1905, which safeguarded the free exercise of the religious cults within the limits imposed in the public interest; local traditions could, therefore, be infringed only in so far as this was strictly necessary to maintain public order. The Conseil declared that no consideration based on the necessity to maintain order on the public road could be pleaded to forbid carrying the *viaticum* in circumstances sanctioned by local habits and traditions. It may be said that the French administrative courts are attempting to watch not only over the external application of the law but over its exercise in accordance with its guiding principles—its spirit. They are in a position to make the attempt, because they are provided with a

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20 "The Council of State . . . whereas it belongs to the competence of a mayor, by virtue of dispositions of . . . to regulate ceremonies, processions, and public forms of worship, it is his duty in the fulfilment of this mission to conform to article I of the last law (on the subject), that of December 9th, 1905, which guarantees freedom of worship under such restrictions only as are made in the interests of public order; and he ought not to do violence to local tradition, except in so far as may be strictly necessary for the maintenance of order.

Whereas then, by virtue of the dispositions mentioned above, it came within the competence of the mayor of S. F. to prohibit processions and religious manifestations within the territory of the commune, as he did in his decree of November 24th, 1904, yet no motive based upon the necessity of maintaining order on a public highway could have been invoked to justify him in prohibiting the carrying of the *viaticum* in conditions made sacred by usage and local tradition."
complete personnel trained in administrative work, whereas English courts are essentially juridical in their constitution.

In summing up the substantial points of our comparative survey, we may, I think, lay stress on the following points:

1. As regards compensation for damages, the notions at present obtaining in English jurisprudence ought to be supplemented by the extension of the right to claims, indicated in dominion legislation.

2. The immense development of the administrative functions of the state in its police or welfare and its educational and economic policy render necessary a corresponding development of administrative jurisdiction instead of the irregular methods of quasi judicial boards.

3. The final supervision of legality, interpretation and application of laws ought to remain in the hands of the high courts of justice in conformity with the standards of independence, impartiality and authority set by the Anglo-American judicial system.

4. The treatment of cases in public law could be made more effective by the establishment of mixed tribunals composed of experts in administration presided over by judges with wide powers of juridical control.

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