NOTES

[The Parliament of Great Britain, in response to popular expression, has undertaken what might well be termed a peaceful revolution: the nationalization of large areas of British industry. To date, the Bank of England and the gas, electricity, transport, cable and wireless, aviation, and coal industries have been nationalized; at present writing the nationalization of the steel industry, though not yet effected, seems imminent.

[These facts are well known to the American public; the techniques by which the process has taken place have been emphasized to a much lesser degree. In the Notes which follow, the REVIEW has sought to explore the various statutes which have effected the transfer. Manifestly, any undertaking so comprehensive and detailed, with attendant social and political consequences and implications cannot adequately be treated within a comparatively few pages. The Notes therefore have concentrated on only three aspects of the statutes: compensation for the former owners; administration; and labor relations. The merits of the British program are neither assumed nor denied. Nationalization is a fait accompli. Only techniques, problems which are created by these techniques, and possible consequences of the statutes are treated.—Ed.]

British Nationalization of Industry—Compensation to Owners of Expropriated Property

Comprehensive expropriation of entire groups of enterprises, accomplished by the British nationalization statutes, constitutes a new step in the English law of compulsory purchase and poses novel problems of payment to owners. The detailed procedures established for the assessment and satisfaction of compensation seem of interest (1) in their relationship to existing rules of compensation for compulsory purchase, and (2) as reflecting the particular problems involved in paying for such large-scale transfers of assets.

Of the questions embraced by the rules of compulsory purchase, the measurement of the amount owed and the method of settlement will be dealt with herein. As regards each of these, difficulties posed by the unprecedented size of the acquisitions, current economic uncertainty, and the complex organization and poor condition of certain of the industries, made the application of accepted principles of compensation largely

1. Gas Act, 1948, 11 & 12 Geo. VI, c. 67; Electricity Act, 1947, 10 & 11 Geo. VI, c. 54; Transport Act, 1947, 10 & 11 Geo. VI, c. 49; Cable and Wireless Act, 1946, 9 & 10 Geo. VI, c. 82; Civil Aviation Act, 1946, 9 & 10 Geo. VI, c. 70; Coal Industry Nationalisation [Collieries] Act, 1946, 9 & 10 Geo. VI, c. 59; Bank of England Act, 1946, 9 & 10 Geo. VI, c. 27. These acts are cited hereinafter by short-title and section number only.

2. Compulsory purchase is the British term for what is referred to in American law as eminent domain. The former expression will be used to indicate both.

3. E. g., Boom Co. v. Patterson, 98 U. S. 403 (1878); Acquisition of Land (Assessment of Compensation) Act, 1919, 9 & 10 Geo. V, c. 57, § 2; Comment, 26 Tex. L. Rev. 199 (1947).


5. Perhaps the largest compulsory purchase made prior to the Collieries Act was the acquisition in 1938 of all unworked coal in Great Britain, having a total value of £66,450,000. Coal Act, 1938, 1 & 2 Geo. VI, c. 52, § 6. Compensation for the coal industry amounted to more than £164,000,000, for the rail industry, to more than £1,065,000,000. 431 H. C. DEB. 1617-1618 (5th ser. 1946); London Times, Aug. 2, 1946, p. 4, col. 5.

6. See, e. g., the speech of the Prime Minister introducing the nationalization program at an opening session of Parliament. 413 H. C. DEB. 105 (5th ser. 1945).

7. See, e. g., Cmd. No. 6610 at 30 (1945); 432 H. C. DEB. 1406-1410 (5th ser. 1947).

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impractical. Although English law contains no constitutional prohibition against confiscation,\(^8\) the legislative history of the relevant statutes indicates that their compensation provisions were intended as a proper balance between public necessity and the rights of individual owners.\(^9\) Hence, consideration of why particular measures were applied to particular industries and of respects in which they seem an adequate or inadequate basis for fair exchange, should assist in an understanding of the problems of compensation at a national level.

Measurement of compensation in compulsory purchase may be divided into three steps: (1) the selection of a standard of evaluation;\(^10\) (2) the application of the standard, i.e., the segregation of the assets to be valued, and the choice of the factors which properly indicate value under the standard;\(^11\) and (3) the admission or exclusion of additional payments for consequential damages.\(^12\)

**STANDARDS AND THEIR APPLICATION**

A constitutional standard governs the calculation of compensation in the United States; in England an owner is entitled only to what is accorded him by statute.\(^13\) Yet the law of both countries, in a substantial majority of instances, requires as a standard of value the price that the property would bring in a voluntary sale on the open market.\(^14\) In the application of this standard, the evaluation of condemned public utilities—the closest parallel to nationalization—is especially problematic since market value in such cases involves an estimate of “going-concern” value.\(^15\) In dealing with such transfers, English courts have used the capitalization of “maintainable revenue,” as a formula for application. This arrives at market value by first determining the average annual net earnings which the enterprise has previously realized, and can reasonably be expected to maintain, and then calculating the capital figure which would produce such...
earnings at the rate of return on investments ascribable to this business.\textsuperscript{16} American courts, rejecting any attempt to capitalize earnings, either realized or prospective, as too speculative,\textsuperscript{17} determine plant value and going-concern value separately.\textsuperscript{18} The latter, a value attributable to an operation beyond the worth of its physical holdings by virtue of its character as a functioning and profitable unit, seems scarcely less speculative. Evidence of past and prospective earnings seems necessarily admissible;\textsuperscript{19} and these cannot be correctly related to the amount sought without some estimated capitalization, adjusted to account for business conditions.\textsuperscript{20} Ultimately, going-concern value turns upon a reasonable judgment, considerate of all factors which affect the price that any purchaser would pay.\textsuperscript{21} It should be noted, further, that the final compensation does not follow on mere addition of plant and going-concern values, but emerges as a "composite estimate" of the worth of the whole, based upon contemplation of the contributing elements.\textsuperscript{22}

That the exigencies of the nationalization program should dictate deviation from established standards is not surprising. The resultant variations in the compensation schemes are significant, and can be most effectively analyzed comparatively.

\textit{Market Value.}—In certain areas, the nationalization program has retained the usual standard of market value. The Collieries Act affected a large industry of complex structure, involving numerous independent enterprises of sharply varied size and solvency, many of which conducted additional operations considerably removed from coal production.\textsuperscript{23} Compensation was to be the amount that a willing buyer would pay a willing seller for the transferred assets.\textsuperscript{24} It could be expected that this standard would require long and complicated arbitration;\textsuperscript{25} yet its selection was not deference to precedent, since the earlier Bank Act had provided an example of abandonment of the standard of market value. However, since the standard of the Bank Act gave as compensation an income equal to the total income paid by outstanding securities,\textsuperscript{26} its adoption was not

\begin{itemize}
\item \textsuperscript{16} Re Belfast Corp. and Cavehill and Whitewell Tramway Co., 45 Ir. L. T. 231 (K. B. 1911). For a discussion of problems involved in the net maintainable revenue formula, see 151 \textit{The Economist} 223 (1946).
\item \textsuperscript{17} National Waterworks Co. v. Kansas City, 62 Fed. 853 (8th Cir. 1894); Kennebec Water District v. Waterville, 97 Me. 185, 54 Atl. 6 (1902).
\item \textsuperscript{18} Baxter Springs v. Bilger's Estate, 110 Kan. 409, 204 Pac. 678 (1922); Mifflin Bridge Co. v. Juniata County, 144 Pa. 365, 22 Atl. 896 (1891).
\item \textsuperscript{19} Newburyport Water Co. v. Newburyport, 168 Mass. 541, 47 N. E. 533 (1897).
\item \textsuperscript{20} Re Los Angeles, P. U. R. \textsuperscript{[1929C]} 389, 399 (Cal. Railroad Comm'n).
\item \textsuperscript{21} Re Chippewa Falls, P. U. R. \textsuperscript{[1927A]} 545, 558 (Wis. Railroad Comm'n 1926).
\item \textsuperscript{22} E. g., San Francisco v. Pacific Gas & Electric Co., P. U. R. \textsuperscript{[1929E]} 529, 537 (Cal. Railroad Comm'n); cases cited note 18 \textit{supra}.
\item \textsuperscript{23} See, for comments on the complexity and size of the coal industry, 418 H. C. Desb. 702-703 (5th ser. 1946); Gilbert, \textit{The Nationalization of Coal}, 11 Convoy. & Prop. 99-100 (1946); London Times, Dec. 19, 1945, p. 9, col. 1. Examples of non-colliery operations can be found in Collieries Act, 1st Schedule, §§ 14 (farms and farming equipment), 15 (manufactured-fuel plants), 19 (brickworks).
\item \textsuperscript{24} Collieries Act §§ 10(3), 13(4). The mine owners and the government agreed, prior to the passage of the Act, on the standard to be adopted in measuring value. Their agreement is embodied in Cmd. No. 6716 (1945), which is incorporated into the Collieries Act by § 10(3).
\item \textsuperscript{25} Extended arbitration and delayed compensation had already been experienced. Compensation for the nationalization of unworked coal (see note 5 \textit{supra}) was not settled for eight years. London Times, July 17, 1946, p. 4, col. 3.
\item \textsuperscript{26} Bank Act § 1(2). For the terms under which the Bank of England was acquired, see note 58 \textit{infra} and text.
\end{itemize}
feasible. The coal industry was not, as was the Bank, a sound undertaking of assured future returns. Further, a large proportion of the industry's assets were not purchased; hence, such a measure of compensation would have resulted in overpayment, or would have involved intricate calculations to apportion the total industrial income between transferred and untransferred assets. For the same reason, compensation based on the market value of securities, as was offered in subsequent statutes, was inadvisable.

The Cable and Wireless Act applied to the nationalization of a single concern a standard identical to that in the Collieries Act. The company was secure and of good prospects, holding a long franchise at a guaranteed income of four per cent. Since the maintainable revenue formula was used, the market value of such an organization was relatively easy to ascertain. On the other hand, its security did not warrant compensation so favorable as that given the Bank of England; since payments for all nationalization purchases were made in low-yield government securities, an income basis would have required a capital outlay greatly exceeding the face value of the securities thus replaced.

The Electricity Act provided that market value be paid for non-statutory undertakings, i.e., electric companies whose existences were not based on statutory licenses. Although not expressly stated, a similar standard appears to have been required by the Transport Act for trucking companies. In each instance, the compensation was more favorable than that accorded elsewhere in the same statute. With regard to electric companies, it seems likely that the government was willing to pay more for a non-statutory than a statutory undertaking, since the latter's right to do business depends on government permission. Trucking companies may have been accorded more favorable terms than railroads and other

28. Those assets not sufficiently related to colliery activity were not expropriated. Collieries Act §§ 5-7; see note 23 supra.
29. Gas Act §§ 25, 30; Electricity Act §§ 20, 25; Transport Act §§ 16, 17(1). For a discussion of compensation under these acts, see note 67 infra and text.
32. See note 103 infra and text. The compensation securities, referred to as "government stock" by the nationalization statutes, are equivalent to certain types of government bonds in the United States. Where possible, this Note has sought to avoid confusion by use of the word "securities."
33. To replace the £27,400,000 of outstanding Cable and Wireless stock with three per cent government bonds (approximately the rate of interest carried by the compensation securities) so as to give an equal income, would have required a capital expenditure of £35,920,000. Bank stock worth £14,553,000 cost the government £58,212,000 in three per cent securities. The Bank however was an unimpeachable investment, whereas Cable and Wireless was subject to considerable foreign competition. 423 H. C. DEB. 209-211 (5th ser. 1946); Minutes of Proceedings of the Select Committee on the Bank of England Bill 1 (1945); 2 CLAPHAM, HISTORY OF THE BANK OF ENGLAND 425 (1944); 149 THE ECONOMIST 686 (1945).
34. Electricity Act § 48(6).
36. Other activities given less favorable compensation were: Electricity Act § 20 (statutory companies); Transport Act § 16 (rail and canal).
37. E.g., the termination of the licenses of certain statutory electric companies is authorized by Electric Lighting Act, 1882, 45 & 46 Vict., c. 56, §§ 2, 3. Note that in the United States even a terminable franchise is compensable property. Monongahela Navigation Co. v. United States, 148 U. S. 312 (1893).
transport facilities because, as successful competitors of the latter, they were generally in better financial condition and enjoyed more promising futures.  

As has been indicated, the application of the market value standard presents particular difficulty when productive business is involved. Certain of the methods adopted under nationalization significantly reflect the added problems of application to an entire industry.

The procedure established by the Collieries Act for the segregation and valuation of transferable colliery assets indicates complexities which prompted abandonment of this standard in subsequent statutes. The varied character of the assets necessitated two separate valuations: a "value for subsidiary purposes"; and a "coal industry value." The former contemplated assets not closely related to coal mining and was assessed for each company by district valuation boards; the latter contemplated assets which had been considered in making district wage ascertaining under an earlier minimum wage statute. These ascertaining provided a convenient record of colliery assets, on the basis of which a special tribunal calculated "coal industry value" for the entire industry. The resultant "global sum" was apportioned to districts by a central valuation board, and thereafter to companies by the district boards. Thus, compensation was made for the value of the industry, not for the total value of all the individual undertakings. Since the government assumed control of the entire industry, it may have seemed reasonable that it should pay for it on that basis; it was unwilling to pay the bonus for superior competitive position that would have been due were individual purchases made. The result, however, seems unfair to the owners. Since market value reflects earning power, the global sum was reduced by the inclusion of unprofitable concerns in the calculation. Efficient companies received their proper relative share in the compensation, but a lesser absolute amount than they would have been paid under individual evaluation. Then, since the global sum was to undergo two subsequent apportionments by different tribunals before final settlement, there was a decided possibility that final distribution would be made on different terms than the initial calculation. If so, certain individual owners would suffer a relative, as well as an absolute loss. In addition, it would seem that rather than expediting ultimate payment as its proponents argued, this method may, by adding two steps, actually delay it.

39. Collieries Act §§ 10(2) (b), 10(5) (b), 13(1).
40. Collieries Act § 10(2). District wage ascertaining were made pursuant to Coal Mines Minimum Wage Act, 1912, 2 & 3 GEO. V, c. 2. See 418 H. C. Deb. 710 (5th ser. 1946).
41. This term was applied to the amount which was to be calculated as the "coal industry value" of the entire industry. See 418 H. C. Deb. 806 (5th ser. 1946).
43. Global compensation had been used earlier in the nationalization of unworked coal. In that case, however, no going-concern value was involved. Coal Act, 1938, 1 & 2 GEO. VI, c. 32, § 6. See 418 H. C. Deb. 791-792 (5th ser. 1946).
44. See 418 H. C. Deb. 793-794 (5th ser. 1946); 150 THE ECONOMIST 312 (1946).
46. The global sum was calculated in less than two months. London Times, June 17, 1946, p. 4, col. 6, Aug. 2, 1946, p. 4, col. 5. The remaining stages may not be completed for some years. See 418 H. C. Deb. 794 (5th ser. 1946); note 25 supra.
With respect to the formula to be applied in evaluation of the transferred assets, the Collieries and Cable and Wireless acts provided that market value be measured by the capitalization of net maintainable revenue. Such an approach seems more adaptable to assessing compensation for entire industries than the American process of separately calculating plant and going-concern values, since it somewhat narrows the area of investigation and may be more expeditiously computed. In effect, it obviates the monumental task of an industry-wide evaluation of physical property.

Yet it is scarcely a mathematical calculation: the tribunal must estimate how much of the total revenue was earned by the transferred assets, what can properly be taken as average revenue, what the prospects of its future maintenance are, and what rate of capitalization is applicable to the industry at that time. However, the argument of American courts that predictions as to maintenance of earnings are overly speculative has less weight when the evaluation has such scope; total industry income is more likely to remain constant than is that of a single undertaking. Fluctuations in the latter are in many cases primarily due to intra-industry competition, by which the former would not be materially affected.

Market value for trucking companies was ascertained by separate assessments of physical asset value and "cessation of business damages"—the latter being a means of expressing going-concern value. It is interesting to note the similarity of this formula to that employed in American cases; its adoption may have resulted from recognition that maintainable revenue does not fairly apply to the valuation of a new and growing business. However, going-concern value for trucking companies was limited to a maximum of five times the net annual profit, probably an undervaluation with respect to the more efficient and prosperous firms; in this regard the provision reflects the fact that this was a national, not an individual purchase, for which compensation was to be restricted according to an arbitrary estimate of total industry value to the purchaser.

47. Cable and Wireless Act § 2(2); Collieries Act §§ 10(3) [referring to CMD. No. 6716 (1945)], 13(4).
49. This problem arises only where part of an industry's assets are taken. See Re Chatterly Whitfield Collieries, Ltd., [1948] 2 All Eng. 593, 597 (C. A.).
50. CMD. No. 6716, Annex II (1945) shows the pre-war earnings figures to be used as a basis for compensation. These vary from a surplus of £27,380,000 in 1923 to deficit of £9,990,000 in 1928.
51. The speculative nature of an estimate as to future earnings and proper capitalization rate has been the principal ground for the rejection of this method of calculation in American courts. See ORGEL, op. cit. supra note 10, at 713-714.
53. See note 38 supra. Since maintainable revenue is based on past earnings, its use would not provide a true valuation of a young and healthy industry. See 151 THE ECONOMIST 223 (1946).
54. Transport Act § 47(3).
55. The limitation was urgently challenged. See 431 H. C. DEB. 1789-1790, 1822 (5th ser. 1946). Another method of applying the market value standard appears in provisions for agreement between the parties to the compulsory transfer. See British Overseas Airways Act, 1939, 2 & 3 Geo. VI, c. 61, 3d Schedule. It is interesting to note that the Australian statute which nationalized banks in 1947 provided for such agreements. However, it also empowered the government to appoint new managers for the banks to be acquired and the new managers were authorized to conduct the negotiations. This was held unconstitutional. Bank of New South Wales v. Commonwealth, 22 Aust. L. J. 191, 195, 201, 202, 204 (High Ct. Aug. 11, 1948).
Replacement Cost.—The Transport Act, in providing for the purchase of railroad cars owned by non-transport industries, established a uniform schedule of prices representing the present cost of a similar car minus a certain depreciation. Although this may have proven harsh to companies whose transport facilities had a going-concern value as part of their systems, the government, acquiring only the separate vehicles, was justified in paying no more than their individual worth. This is consistent with a generally accepted principle that the proper standard of evaluation in compulsory purchase is not value to the owner, but the value that the expropriated items would bring on the open market. In this respect, replacement cost is not a departure from market value. However, it is to be noted that the application of the standard here was accomplished without arbitration as to the proper criteria of value.

Outstanding Securities.—Among the statutes which abandoned market value as a standard the Bank Act is singular, giving Bank shareholders, as compensation, enough government bonds to bring an annual income equivalent to that received in dividends from Bank holdings. This measure was peculiarly applicable to the purchase of such an organization, since the acquisition was less of physical assets with a going-concern value than of capital rights in an institution controlling the financial structure of an entire nation. Market value would seem an inappropriate concept. Since it was an eminently sound structure, such favorable terms were not an unreasonable burden for the government to assume. There was but one class of security holders, so that no preferred holdings were prejudiced by giving all an equally assured income. This standard, it is true, denied the owners such share in accumulated reserves as would normally be received in the event of the liquidation or sale of a business. However, since the purchaser was also the largest customer, it may have been felt that no premium, beyond that which was accorded by the dividend basis of compensation, should be paid for profits that resulted from government business. Also, the Bank's nature as a public service corporation without the power to terminate its activities, meant that security holders had no expectation of sharing in reserves through liquidation and, it was maintained, the fact that the return on Bank holdings had been constant for twenty-three years should have dispelled any belief that the reserves would be distributed in increased dividends. It would seem that the above arguments are applicable primarily to a concern of governmental functions. While it may be concluded from this that a private business

56. Transport Act § 30.
57. See Orgel, op. cit. supra note 10, at 50.
58. Bank Act § 1(2).
60. Capital stock of the Bank of England stood at £14,553,000 from 1816 until it was nationalized. It had unfailingly returned a twelve per cent annual dividend for twenty-three years. Id. at 1-3.
61. See 149 The Economist 567 (1945).
63. Id. at 12; 2 Clapham, op. cit. supra note 33, at 425.
64. See Minutes of Proceedings of the Select Committee on the Bank of England Bill 7, 8 (1945).
65. See id. at 10, 14, 18; 415 H. C. Deb. 48-49 (5th ser. 1945).
66. See 150 The Economist 227 (1946).
should be compensated so as to include an allowance for reserves, it should be remembered that such beneficent terms of compensation as were applied here could scarcely be given except to a concern with the security of a governmental undertaking.

With the exception of purchases of trucking companies and non-statutory electric companies, the Transport Act, Electricity Act, and, most recently, the Gas Act provided that each shareholder in rail, electric, and gas undertakings be paid an amount in government bonds equivalent to the stock market value of his holdings, according to average daily quotations computed for certain periods prior to the passage of the acts.

Railroads, as a result of their undeveloped and depreciated condition and the increased competition from road transport, were considered to have a low market value. The government argued, therefore, that this less favorable standard could justifiably be used, since determination of market value would require extended, costly arbitration and yet might well arrive at lower compensation. Compensation on an income basis was entirely unreasonable since, in many instances, it would replace a contingent, risky security with a guaranteed equivalent income and would involve a capital expenditure out of all proportion to the worth of the assets acquired. Although simple and expeditious, the standard chosen failed in several respects to meet the requirements of "fair compensation." In the specific case, the condition of the railroads was due in large measure to wartime service under a government rental agreement that absorbed much of their earnings. More broadly, fluctuating stock prices are, in any one period, unacceptable as indices of the actual worth of property, especially because of their susceptibility to influences which have no effect on the value of physical assets. Quotations on any day or even on a series of days result from only a few transactions relative to the number of outstanding securities; and the majority of such transactions are generally conducted in the more speculative securities. Almost inevitably, stock

67. Gas Act §§ 25, 30; Electricity Act §§ 20, 25; Transport Act §§ 16, 17(1).
68. The government summarized the rail industry as a "poor bag of physical assets." 431 H. C. Deb. 1809 (5th ser. 1946).
69. 431 H. C. Deb. 1653, 1819-1820 (5th ser. 1946).
70. See, e.g., 431 H. C. Deb. 1702 (5th ser. 1946); 151 The Economist 837 (1946).
71. As indicated in note 33 supra, to acquire £14,553,000 of Bank stock required £58,212,000 in three per cent government securities. An equivalent difference in capital value would have been entirely unjustified in the purchase of rail undertakings. 431 H. C. Deb. 1818-1819 (5th ser. 1946).
72. Proponents of the nationalization measures maintained that "fair compensation" was their objective. See 447 H. C. Deb. 231-232 (5th ser. 1948); 432 H. C. Deb. 1417 (5th ser. 1947); 431 H. C. Deb. 1627, 1690, 1822 (5th ser. 1946); 149 The Economist 274 (1945).
73. The rental agreements under which the railroads were operated in wartime appear in: Railways Agreement (Powers) Act, 1940, 4 & 5 Geo. VI, c. 5; S. R. & O., 1941, No. 2074; S. R. & O., 1939, No. 1197. See 431 H. C. Deb. 1620-1621, 1828 (5th ser. 1946); 151 The Economist 1008 (1946).
74. 431 H. C. Deb. 1646, 1794-1795 (5th ser. 1946); London Times, May 7, 1947, p. 10, col. 1. Remarkings on the inappropriateness of stock market quotations as an indication of the asset value of a concern, it has been pointed out that "loaded dice sometimes fall fairly." 151 The Economist 837 (1946).
75. During the period Nov. 1 to Nov. 8, 1946, on which dates quotations were taken as the basis for compensation under Transport Act § 17, an average of 780 transactions of unknown size were recorded daily as against £900,000,000 in outstanding rail securities held in 1,000,000 separate accounts. 151 The Economist 836 (1946). Note that this standard of compensation was rejected during the debate on the British Overseas Airways Act, 1939, 2 & 3 Geo. VI, c. 61, because it was not representative of the actual value of the enterprise to be purchased. 349 H. C. Deb. 1839-1840 (5th ser. 1939).
quotations would be depressed by imminent nationalization. Finally, stock quotations would be lower in the case of companies which had devoted recent profits to expansion rather than to dividends; thus, the owners of such progressive concerns lose not only the added compensation that would have resulted had such dividends been paid out, but also the value of the improvements to which such expenditures were applied. Since the result of this would be to deter expansion by other industries fearing nationalization, it seems impolitic as well as unfair.

In application, this standard eliminates the difficulties of segregation and evaluation presented by the basis adopted previously under the Collieries and Cable and Wireless acts. However, the acts based quotation values on dates chosen by the purchaser, giving owners no right to present arguments as to quotations more representative of the true worth of their holdings. This appears to be a disproportionate emphasis on speed and simplicity. Even though objectively and fairly applied by the purchaser, it has a stamp of confiscation inconsistent with the principles of compulsory purchase.

Although such a standard may have been justified by the condition of the railroads, similar argument could not be made respecting the electric and gas industries, both of which were efficient and prosperous. Thus the only ground for adherence to the security value basis of compensation seems to be reluctance further to undergo the complex and protracted arbitration involved in an ascertainment of the market value of an industry. The repudiation of market value in the later statutes was not, therefore, a result of conditions peculiar to the industry acquired, but of problems inherent in all industrial purchases. The conclusion may be drawn that market value has been abandoned as a standard for nationalization.

Purchases From Local Authorities.—Under the Gas, Electricity, and Transport acts local governments were given as compensation for the loss of their undertakings an amount equal to the unpaid debts attributable to them. The theory was that the public was both owner and purchaser, and hence need pay nothing for the value of the assets acquired. This presented certain difficulties. Assuming that the objectives of nationalization are coordination, uniform prices, and the elimination of competition within the industry, it would seem that the fact that one local undertaking was purchased for a lesser sum than another would not be reflected in lower rates in the area of the former. If so, then a community which

76. See 431 H. C. Deb. 1646, 1795 (5th ser. 1946).
77. See 432 H. C. Deb. 1433-1434 (5th ser. 1947); 431 H. C. Deb. 1796 (5th ser. 1946); 152 The Economist 109 (1947).
78. This was argued by the opposition. See 431 H. C. Deb. 1792-1793 (5th ser. 1946).
80. This conclusion finds support in the legislative background of the later acts. E.g., 447 H. C. Deb. 231-232 (5th ser. 1948) (Gas Act); 432 H. C. Deb. 1415 (5th ser. 1947) (Electricity Act).
81. Gas Act § 28(2); Electricity Act §§ 22(2), 22(3); Transport Act §§ 25(4), 25(5).
82. See 432 H. C. Deb. 1414 (5th ser. 1947); 431 H. C. Deb. 1823 (5th ser. 1946).
83. This seems a valid assumption. It is the basis of an opposition argument in the Transport Bill debates. See 431 H. C. Deb. 1675-1677 (5th ser. 1946).
84. However, there is an implication, in the debates on the Electricity Bill, that consumers whose local service was appropriated would receive the advantage, in lower rates, of any savings resulting to the government from the debt basis of compensation. See 432 H. C. Deb. 1415 (5th ser. 1947).
paid high rates to hasten amortization of its debt, lost the advantage that would have accrued to its rate payers in the form of lower rates, and, if the enterprise was competitive, the economic advantage to the municipality.85

**ADDITIONAL COMPENSATION FOR CONSEQUENTIAL LOSSES**

Consequential losses to owners resulting from the compulsory purchase of their property fall into two categories: (1) losses incidental to the taking; and (2) severance losses, *i.e.*, the reduction in value of remaining property.86 Examples of the former are costs of removing unpurchased assets and loss of good will. American cases, absent a statutory requirement, have generally refused to award such damages.87 English courts, on the other hand, admit them unless forbidden by statute.88 Examples of the latter occur when part of a business or a tract of land is taken, leaving the remainder with less value than it had as a portion of the whole. American courts have allowed such damages, provided there was adequate physical connection before severance. In the case of commercial undertakings, mere functional relationship was not enough.89 The English rule is similar, except that functional relationship has been held adequate to warrant severance damages.90 Additional allowances under nationalization were in some respects more generous, and in others more limited than under existing rules.

**Severance Damages.**—Under the Collieries Act the only severance damages given for the appropriation of the mines of a company were compensation for the increased overhead resulting from reduced volume of business.91 It can be seen that a railroad or a steel company deprived of a captive mine might suffer little increased overhead, but considerable added expense and loss of value to its remaining property, which under this section would remain uncompensated.92 It is likely that this is less than would be given under the English requirement of mere functional relationship, but more than under the American rule of physical dependence. The Transport Act gave similar compensation where a trucking business was acquired from a concern which conducted other operations as well.93 In certain cases, the Transport Act appropriated only a

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86. See McCormick, DAMAGES 535-542 (1935).
91. Collieries Act § 17. Payments were limited to the increased overhead for five years after the transfer date.
92. Examples may be found in London Times, April 1, 1946, p. 8, col. 6; 149 THE ECONOMIST 945-946 (1945).
93. Transport Act § 47(4). Payments were limited to five years of increased overhead.
proportion of the assets of a trucking company.  

Where this occurred, severance damages were awarded in a specified amount per vehicle-capacity taken.  

Where a utility undertaking operated other services in addition to the supply of electricity it was paid, under the Electricity Act, as damages for the severance of its electricity business, a specified amount per unit of business acquired.  

Here again, such severance would be compensable under the British rule, although the limitations fixed on the total amount may have resulted in underpayment to some.

**Capital Outlay.**—It has been suggested that failure to compensate for improvements too new to have added to the earnings of an undertaking, unwisely discourages long-term expansion by industries anticipating nationalization. Neither maintainable revenue, based on past earnings, nor stock market value, based on past dividends, properly accounts for such improvements. This defect is supplied by the Collieries Act, and, although only for local authorities, by the Electricity Act, both of which restore to the owners capital devoted to recent expansion. Any reassurance such provisions may have given, however, was negatived by the neglect of such considerations in the Gas and Transport acts, and in the other sections of the Electricity Act.

**Interim Income.**—The Collieries Act authorized payment to each undertaking of an amount equal to one-half its former annual income for a period between the transfer of its assets and final compensation. Such payments were limited to two years, although it was generally recognized that settlement would not be completed within such a time. This limitation was apparently designed to discourage protraction of arbitration proceedings. The other statutes omit such a provision. Where the compensation involved merely an exchange of securities, payments were not delayed sufficiently to warrant interim compensation. No reason appears for the omission where statutes call for the calculation of market value—presumably none of the transfers under this standard were expected to entail the same lengthy arbitration as followed the Collieries Act.

**Modes of Payment**

American case law has held that the only constitutional method of paying for condemned property is by cash. In England, prior to nationalization, cash was more frequently used, although not constit-
tionally required.\textsuperscript{101} Cash payments were considered impractical for nationalization both because of the difficulty of raising the requisite amounts and because of the unsettling effect on the money market of its appearance in such large quantities.\textsuperscript{102} Thus the major items in each of the statutes were paid in low interest bonds.\textsuperscript{103} Although perhaps the only solution, this method was prejudicial, in certain respects, to the capital and income holdings of those paid.

In considering the effect of such compensation, it is well to note that certain of the payees differed in different statutes. Collieries compensation was paid to the companies, since, in many cases they remained in existence to operate other interests.\textsuperscript{104} Cable and Wireless compensation was paid to nine holding companies as sole shareholders of the Cable and Wireless operating company.\textsuperscript{105} In other instances, however, where the entire assets of the undertakings were transferred, compensation was effected by a direct exchange with security holders.\textsuperscript{106}

\textbf{Effect on Capital.—}With the exception of certain cash payments\textsuperscript{107} and the Bank Act which required payments of securities based on income,\textsuperscript{108} all compensation was settled by exchanging for the amount owed an equivalent capital value of government securities. Excepting the Gas Act,\textsuperscript{109} the valuation of such securities was at the discretion of the Treasury, guided only by the requirement that due regard be had to the prices of other government securities on the date of issue.\textsuperscript{110} Such a provision seems to grant the purchaser an objectionable and unnecessary freedom to name his own terms.\textsuperscript{111} The requirements of the Gas Act were similar. However, the prices which guided the valuation of the compensation securities were those of similar securities on the date of transfer of the assets. Were there a time lag between transfer and issue, transfferees may have found that anticipation of large sales of such securities, 

\begin{itemize}
\item \textsuperscript{102} See 418 H. C. Deb. 809 (5th ser. 1946) ; 150 \textit{The Economist} 499 (1946). It has been suggested that since the effect of large cash payments in nationalization is that owners receive compensation in an inflated currency actually worth less than the assets sold, a cash basis of compensation is unfair. See Bank of New South Wales v. Commonwealth, 22 Aust. L. J. 191, 202 (High Ct. Aug. 11, 1948).
\item \textsuperscript{103} Gas Act § 25(1) ; Electricity Act §§ 20(1), 25(3) ; Transport Act §§ 16(3), 32(1), 48(3), 89(2) ; Cable and Wireless Act § 1(2) ; Collieries Act § 21 ; Bank Act § 1(2).
\item \textsuperscript{104} Collieries Act § 21.
\item \textsuperscript{105} Cable and Wireless Act § 2(4). For a description of the Cable and Wireless holding company organization, see 150 \textit{The Economist} 1014 (1946) ; 149 \textit{The Economist} 686 (1945).
\item \textsuperscript{106} Gas Act § 25(1) ; Electricity Act § 20(1) ; Transport Act § 16(3).
\item \textsuperscript{107} E. g., Electricity Act § 48(6) (non-statutory undertakings) ; Transport Act §§ 25(4) (payments to local authorities), 32(1) (certain payments for privately owned railroad cars) ; Collieries Act § 22(2)(a) (interim income payments).
\item \textsuperscript{108} See note 58 \textit{supra} and text.
\item \textsuperscript{109} Gas Act § 25.
\item \textsuperscript{110} See note 103 \textit{supra}.
\item \textsuperscript{111} The provision aroused much unfavorable comment. See, e.g., London Times, Nov. 19, 1946, p. 9, col. 1, April 29, 1946, p. 9, col. 1, Jan. 28, 1946, p. 2, col. 1; 150 \textit{The Economist} 128 (1946).
caused by their low yield, had forced the market price below that at which the valuations were made.\textsuperscript{112}

As suggested, numerous sales of compensation securities by holders who wished to reinvest at more nearly their former income could be expected. Capital loss to those receiving government securities might thus be severe, since not only might such securities decrease in value, but the price of high-dividend shares would go up, both in consequence of the increased demand for them and because the amount available for purchase would be reduced by the number taken up through nationalization. Possible means to maintain capital value of compensation securities would be self-defeating: negotiability could be restricted, which would preserve capital value but prevent its more profitable use; maintenance by a cash guarantee or short redemption date would be tantamount to the cash payments that were sought to be avoided. Efforts in this direction were made only in the Collieries Act,\textsuperscript{113} which forbade transfer of compensation securities unless the company was to be dissolved or money was needed for government-approved expansion. Many objected to this "blocked-stock" provision as an undue invasion of individual rights, which may explain the absence of such provisions in subsequent statutes.\textsuperscript{114} The restriction, however, accomplished certain desirable alternative objectives: there was a limitation put upon sales of compensation securities; where securities were sold, the vendors were either companies encouraged by the restrictions to expand their remaining business, or companies which, left with no assets other than the government bonds, hastened to wind up their affairs.\textsuperscript{115}

\textit{Effect on Income.}—The government bonds given in payment were only briefly described in the nationalization statutes. Those provided for by the Cable and Wireless, Collieries, and Bank acts were to be issued by the Treasury and charged against the general credit of the government;\textsuperscript{116} those provided for by the Gas, Electricity, and Transport acts were to be issued by the body which assumed control of the particular industry, and charged against it. The Treasury, however, guaranteed these securities as well.\textsuperscript{117}

The bonds were a typical, gilt-edged, non-terminating investment in the government, irredeemable until a considerable time after issue.\textsuperscript{118} With the exception of the Bank Act,\textsuperscript{119} the statutes made no provision as to the interest to be paid by these securities. The government, however, was following a policy of depressing the interest rates on gilt-edged investments, and consistent with this, the compensation securities could be ex-
pected to bear from three to 2½ per cent interest.\textsuperscript{120} Thus, in many cases the individual transferees of government securities underwent drastic income reductions.\textsuperscript{121} While the purchaser could not be expected to guarantee risky, high-dividend shares their equivalent income, yet it would not seem that the added security justified the fifty per cent loss that some holders suffered.\textsuperscript{122} Those investors who preferred risky, high incomes were forced to accept security or undergo considerable capital loss.

**Summary**

Compulsory purchase precedents have the same ultimate goal as that controlling nationalization compensation measures—to express, in payment, an accurate equilibration between the rights of owners and the needs of the public. Different ingredient difficulties in each situation postulate the differing legal results that appear in the statutes under consideration. Nationalization is industry-wide. Hence a government may not justifiably assume a debt disproportionate to the capabilities of the entire industry. Prior acquisitions have generally been singular, and attention could therefore be paid to individual earning capacity. Nationalization valuation is intractable and endless; yet the vast amounts involved require prompt settlement to prevent severe dislocation of the national economy. Individual assessments have been shorter and simpler, and—since concerned with lesser amounts—not so urgent. Consideration of these elements premises, on the one hand, the conclusion that for the usual compulsory purchase, market value best expresses the desirable balance. It is a result of compromise and represents the sum that, under ordinary circumstances, the owner should receive and the purchaser pay.

In the extraordinary circumstances of nationalization, on the other hand, lies the divergence from former principles. It is not necessarily market value that best reaches the equation sought. If, for example, arbitration appears highly complicated and the industry of doubtful finances, a proper balance of the interests may require a shift to some less favorable standard, such as the stock market value of outstanding securities. Thus also with methods of payment; under certain circumstances cash payments may be so burdensome to the purchaser, and so injurious to the economy, that a credit medium is entirely justified.

The novel and varied measures adopted in making compensation for nationalization may be said to represent legislative decisions as to what extent the public interest justifies less (or more) advantageous terms of payment than might have been accorded under former principles. How successful the statutes have been in equating the rights of the parties is conjecture; criticism herein of the various provisions is intended less to indicate failure than to emphasize the problems involved. It must be remembered that in estimating the "fairness" of compensation there must not be an identification of fairness with some absolute idea of what owners

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\textsuperscript{120} 153 The Economist 578 (1947) discusses the interest rates on "Transport Stock," i.e., securities issued as compensation by the Transport Commission. For a comment on the government's "cheap money" policy, see 153 id. at 25.

\textsuperscript{121} Transport owners suffered an over-all income reduction of £18,804,669, or about forty per cent. Since this was distributed among both high and low paying securities, it can be seen that for some this constituted a loss of well over one-half of their former income. See 431 H. C. Deb. 1798 (5th ser. 1946).

\textsuperscript{122} This was the argument made by the opposition. See 431 H. C. Deb. 1798-1799 (5th ser. 1946). The government insisted that the added security counterbalanced the loss. See 431 H. C. Deb. 1810-1812, 1821-1822 (5th ser. 1946).
are entitled to receive for their property under all conditions. Rather it should be considered whether the legislature, in coming to its conclusion, gave the proper importance to each of the relevant factors. *Fair* is perhaps an unfelicitous sobriquet—it is capable of many interpretations. Nationalization is a drastic step in a nation which has reached Britain's stature under a system of private enterprise. It seems inevitable that some should suffer in the transition. If *fair* is to be used in evaluating the success of nationalization compensation, the basis of reference should be a consideration of whether, in view of the particular problems besetting nationalization of that particular industry, adequate account has been taken of each of the conflicting factors.

F. R. D., Jr.

The Role of the Public Corporation in British Nationalized Industry

To date the Bank of England and six commercial industries have been nationalized.¹ The administrative instrument chosen for the control of these industries is the public corporation. This Note will be devoted to an analysis of that instrument as circumscribed by the statutes creating the nationalized industries.²

The Corporation as a Public Instrument

Contrary to common supposition, public corporations are not a recent development. In England as far back as the seventeenth century numerous statutory local bodies were set up to supply community services.³ In the United States, the corporate form was early adapted to the public function in the case of the Bank of North America, created in 1781 by the Continental Congress.⁴ After the adoption of the Federal Constitution the first Bank of the United States⁵ and, following within twenty-five years, the second Bank of the United States⁶ were created, both through the use of the corporate device. It was in a suit involving the latter bank, *McCulloch v. Maryland,*⁷ that Chief Justice Marshall upheld Congress' power to create corporations for the purpose of carrying out the legislative power granted by the Constitution. In Europe and South America the public corporation has been an important instrument of governmental activity;⁸ it has even been adopted by Soviet Russia as part of its state-

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¹. Gas Act, 1948, 11 & 12 Geo. VI, c. 67; Electricity Act, 1947, 10 & 11 Geo. VI, c. 54; Transport Act, 1947, 10 & 11 Geo. VI, c. 49; Cable and Wireless Act, 1946, 9 & 10 Geo. VI, c. 82; Civil Aviation Act, 1946, 9 & 10 Geo. VI, c. 70; Coal Industry Nationalisation [Collieries] Act, 1946, 9 & 10 Geo. VI, c. 59; Bank of England Act, 1946, 9 & 10 Geo. VI, c. 27. These acts are cited hereinafter by short-title and section number only.
². The broad nature of English constitutional law and the supreme authority of Parliament preclude what in the United States would be a vast field of examination.
³. Among these were improvement commissions, courts on sewers, and turnpike trusts. Carpenter, *Recent Developments in Public Enterprise,* 45 *The Secretary* 182 (1948).
⁴. Act of December 31, 1781, 7 J. of Cong. 197.
⁵. 1 Stat. 191 (1791).
⁶. 3 Stat. 266 (1816).
⁷. 4 Wheat. 316 (U. S. 1819).
controlled economic system. Never before, however, has the public corporation to the extent it now has in England, entered the economic life of a nation committed to freedom of enterprise.

While corporations responsible to public authority have been adopted by diverse social and legal systems, their structure and characteristics have varied according to the climate in which they have been created. Common to all, however, has been the objective sought in choosing the public corporation as an administrative instrument of governmental function rather than vesting that function in a government department. That objective is flexibility and independence of management—recognition that the public corporation represents the most convenient means of achieving principles of private business efficiency in the field of public enterprise. More specifically in the British experience, the complex and technological nature of the undertakings involved, the need for managerial boldness and, most of all, the desire to escape from the political interference resulting from direct responsibility of government departments determined the choice of the instrument. The end is public ownership with public accountability but with the freedom and elasticity of a private corporation. It may also be conjectured that the British public was more willing to accept a break from private ownership when it was clothed in a form familiar to them. Not to be overlooked either is the attractiveness to the private businessman of the corporate form, an effective foil to the inertia of departmental bureaucracy.

The degree to which these objectives have been achieved can be ascertained only by a close analysis of the statutes. Before undertaking a detailed discussion there are general characteristics of the public corporations which may be briefly listed.

(a) Each corporation is a body corporate with perpetual succession, a common seal and power to hold land without license in mortmain. And each is an independent personality.

(b) There are no shares and no shareholders in the public corporation. The people of the nation acting through the government exercise the rights of shareholders and, it is anticipated, will receive shareholders' benefits in the form of more efficient services at less cost.

(c) The administration of each corporation is vested in a board appointed by the appropriate minister. There is no requirement that members of the board represent any specific interests. They must, however, be chosen from among persons who have had wide experience and shown capacity in industrial, commercial or financial matters, in administration, or in the organization of workers.


11. Compare the United States Reconstruction Finance Corporation which, as originally constituted, had succession for a period of ten years from the date of the Act. 47 STAT. 6 (1932).

12. Gas Act § 5(1); Electricity Act § 3(1); Transport Act, 1st Schedule; Aviation Act, 1st Schedule; Collieries Act § 2(1).

13. In the gas industry, the nation is divided into areas administered by area boards responsible to the senior board. Gas Act §§ 1, 2. Each facet of the transport industry is administered by executives responsible to the senior commission. Transport Act §§ 1, 5.

14. The Board of the Port of London Authority consists of representatives of the directly interested industries. Port of London Authority (Consolidation) Act, 1920, 10 & 11 Geo. V, c. lxxii.
(d) Each corporation is responsible to the government but only indirectly in that the responsibility passes through the competent minister to Parliament.\(^{15}\)

(e) The capital of the corporation is provided either by assets taken over from formerly private industries and capitalized by the issue of interest bearing bonds\(^ {16}\) or, in the case of industries not acquiring the assets of heretofore private industries, i.e., the new airways corporations, by the issue of bonds and the receipt of Exchequer grants.\(^ {17}\)

(f) Finally, the corporations have dual functions. They are commercial undertakings dedicated to paying their own way\(^ {18}\) but also, being publicly owned they are instruments of national policy playing a major role in the planning of the mixed economy of Great Britain.\(^ {19}\)

**Autonomy Versus Control**

Parliament calling upon experience which has taught that successful operation of a business enterprise by a government requires a vehicle of management that is flexible and free in its day-to-day activity from interference by the executive or legislature but which must be accountable to the public, has created public corporations to administer the nationalized industries. The proper balance of autonomy and public control as exercised by the competent minister and other branches of the government presents a complex problem. The primary purpose of exercising control is the formulation of long-range programs to develop each industry so that the greatest benefit to the national interest may be realized. Beyond that, the administrative freedom for which the public corporation is established demands that interference be minimized. It is along this line that criticism may be directed at certain provisions of the statutes as being inconsistent with that requirement.

**Control of Board Membership.**—In the matter of appointing members to each of the boards appears the first possibility of excessive outside interference. In each instance, appointment is by the competent minister.\(^ {20}\) The method itself is satisfactory in that it is at this point that Parliamentary control through criticism of the minister will impinge on the composition of the corporate boards. Such control is necessary in that the boards are delegated broad discretion in implementing national policy.\(^ {21}\) Nonetheless, the minister's power of appointment should be diluted if excessive interference by him is to be avoided. Dilution of appointing

\(^{15}\) In the United States the corporation is directly responsible to Congress, Congress being analogous to a board of directors. The directors of the corporation function only as managers. Lilienthal & Marquis, *Government Business Enterprise*, 54 Harv. L. Rev. 545, 570 (1941).

\(^{16}\) The American term, *bond*, will be used throughout this Note although the acts employ the British equivalent, *stock*.

\(^{17}\) The grants are given to finance the initial period of operation. They may be extended only until the financial year expiring April 1, 1956. Aviation Act §§ 11, 12.

\(^{18}\) The corporations are to be self-supporting on an average of good and bad years. Transport Act § 3(4); Collieries Act § 1(4)(c).

\(^{19}\) See Friedmann, *supra* note 9, at 236.

\(^{20}\) Gas Act §§ 5(2)(a), 5(4)(a); Electricity Act §§ 3(2)(a), 3(3)(a); Transport Act § 1(2); Aviation Act § 1(3); Collieries Act §§ 2(3), 4(2).

\(^{21}\) The powers given to the Coal Board for example, by § 1 of the Act are almost unlimited. It is inevitable that such broad discretion in a basic industry will impinge on national policy.
powers can be achieved by such devices as fixed tenure, staggered terms, and clearly defined grounds for dismissal. The Bank Act incorporates all the above devices while the other acts give the ministers full power over the tenure of members of the boards. The desired independence of the boards cannot be achieved where members of the boards are not assured fixed tenure by statutory provision. But, on the other hand, the principle of fixed tenure should not be pressed too far. The boards are instruments of national policy. Hence conflicts between the policy of the boards and government policy must be avoided. In the event of a change in government a conflict would be imminent, and the new government should not be hampered by an unsympathetic group of boards should it desire to effect a change in policy. Parliament in delegating to the ministers broad latitude in respect to appointments made sure that the political attitude of the boards would be in accord with that of the government in power. Whether the power will be abused depends on the ministers' restraint and Parliamentary criticism.

Direction of Policy.—A more delicate problem concerns the degree to which the appropriate minister on his own motion or Parliament through the competent minister may direct the policy of the boards. Again, administrative freedom demands a minimization of such control. On the other hand, the public corporations cannot each exist in vacuo; the actions of each must be coordinated with the others' and their overall policy integrated with that of the existing government. To this end, each act contains a general directions clause: "The Minister may, after consultation with the board, give to the board directions of a general character as to the exercise and performance by the board of their functions in relation to matters appearing to the Minister to affect the national interest, and the board shall give effect to any such directions." The wording of the provision suggests that the minister has complete power of direction. A degree of control is essential; the minister must be satisfied that the policy of the corporation conforms to the general government policy for which Parliament may hold him answerable. That the minister was given such broad discretion, that is to say, that "matters appearing to the Minister to affect the national interest" were not specifically delineated, is but a recognition of the impossibility of foreseeing every contingency or circumstance in which it would be necessary or desirable for the minister to give directions to the board. Generally, these would relate to the framing of major programs and not to their detailed execu-

22. Bank Act, 2d Schedule.

23. Gas Act § 5(8); Electricity Act § 3(7); Transport Act § 1(3); Aviation Act, 1st Schedule; Collieries Act § 2(7). However, a standard practice may develop by ministerial regulation. See S. R. & O., 1946, No. 1094, regulating appointment to the Coal Board in pursuance of § 2(7) of the Collieries Act.

24. To a certain extent this possibility is circumscribed by provisions requiring the board to give effect to directions of a general character from the minister. E.g., Collieries Act § 3(1).

25. Gas Act § 7(1); Electricity Act § 5(1); Transport Act § 4(1); Aviation Act § 4; Collieries Act § 3(1).

26. Mr. Eden referring to the directions clause of the Coal Act said: "What in the world could be wider than that? What does not appear to the Minister to affect the national interest? Almost any conceivable subject concerning the industry could be covered by that." 418 H. C. Deb. 721 (5th ser. 1946).

27. 418 H. C. Deb. 707 (5th ser. 1946).

28. Ibid.
The ministers themselves have emphasized that it is not their intention to interfere in the day-to-day operations of the boards. Nevertheless, as the provision now stands, the only limitation on the minister's power of interference is his own integrity. It is surprising that the autonomy sought by the corporate device should be guaranteed by so ephemeral a check.

Annual Reports and Audits.—The intent of the statutes is to remove the routine administration of the boards from the meticulous supervision exercised over government departments by Parliament. But Parliament has properly not seen fit to depend solely on liaison through the minister for information upon which to evaluate the performance of the corporations. To this end, the acts nationalizing the five major industries require that each board shall make an annual report and audit to the minister who shall lay a copy of each before Parliament. These reports are designed to form the basis for a debate in Parliament, and through directions to the minister Parliament's sovereignty is exercised. One grave flaw appears in these provisions. The report submitted to the minister may be inadequate fully to inform Parliament in that although the provision requires the inclusion of directions given by the minister to the board during the year, the minister may direct the board to withhold any direction from the report if in his opinion it is in the national interest to do so. In this respect Parliament has delegated its sovereignty to too great a degree. The corporate board is responsible to the minister who in turn is accountable to Parliament and that being so, the minister should be fully accountable; it is anomalous that the minister should himself determine the extent to which his directions to the board shall be disclosed to Parliament, his master. If in any event secrecy is necessary Parliament should be able to provide it.

Financial Structure.—Consistent with the desire to establish autonomous corporations, financing of the corporations through government subscription to their bonds was properly denied. Government ownership of the corporations' capital would entail excessive Parliamentary or ministerial control of the corporations' financial structures. Equally, it is patent that a public corporation could have no private shareholders. The inducement normally extended to shareholders, of the right to participate in the control of the industry, is gone, but in its place is the security of return on investment, noted below. The method then of future financ-

29. Ibid.
30. 422 H. C. Deb. 968 (5th ser. 1946); 418 H. C. Deb. 968 (5th ser. 1946); 418 H. C. Deb. 807 (5th ser. 1946). The Postmaster General expressed the same sentiment in respect to his responsibilities to the British Broadcasting Corporation. 219 H. C. Deb. 2489 (5th ser. 1928).
31. A concrete check is seen in §§ 2(5), 2(6) of the Aviation Act. The minister is given authority to limit the powers of the corporation as he thinks desirable in the public interest, but any order to that effect must be laid before Parliament which can annul it within forty days.
32. 422 H. C. Deb. 604 (5th ser. 1946).
33. Gas Act § 10; Electricity Act § 8; Transport Act § 4(7); Collieries Act § 54.
34. Gas Act § 50; Electricity Act § 46; Transport Act § 94; Aviation Act § 21; Collieries Act § 31.
35. Gas Act § 10(5); Electricity Act § 8(2); Transport Act § 4(7); Aviation Act § 22(3); Collieries Act § 54(2).
36. Secrecy would be justified in the interest of national defense or where it would be undesirable to make information accessible to foreign competitors.
37. GORDON, THE PUBLIC CORPORATIONS IN GREAT BRITAIN 337 (1938).
ing chosen by the acts was to have the corporations finance themselves by selling in the open market interest bearing bonds whose issue entails no shareholder control. In the case of Cable and Wireless, the Coal Board, and the Bank of England the bonds are government bonds, i.e., bonds whose principal and interest are charged against the Consolidated Fund of the United Kingdom out of which payment is made without being subject to annual debate and vote in Parliament. In the case of the other corporations, the bonds are issued by the board itself. Each of these acts, however, provides that the Treasury "may guarantee, in such manner and on such conditions as they think fit, the redemption or repayment of, and the payment of any interest on, any stock issued," and that any sums required for fulfilling a guarantee shall be charged to the Consolidated Fund. It is submitted that both types of provisions, government bonds and Treasury guarantees, are methods of relieving the governing boards of the worry of creating too rigid a capital structure which would threaten the continued stability of undertakings faced with variable market conditions. In each of the industries, the likelihood of fluctuations in revenue might well lead the board to hesitate to commit itself to inescapable capital charges. Through the devices of government bonds and Treasury guarantees, much of the risk is passed to the state itself by creating a form of insurance for investors. Lower borrowing rates will result which in turn will reduce the overhead of the corporations to such an extent as greatly to reduce the risk to them. In most instances, the issue, redemption, transfer, and other dealings with the bonds of the corporations will be governed by regulations made by the minister with the approval of the Treasury. Further, the corporations may raise temporary loans only with the consent of the Treasury and the Treasury may guarantee such loans on any condition it thinks fit. These factors coupled with the device of Treasury guarantees of bonds must not be used as tools whereby the Treasury acts as self-appointed guardian over the finances of the corporations. Adequate safe-

38. These bonds are in addition to those of like nature already issued as compensation for the acquisition of property. See Note, British Nationalization of Industry—Compensation to Owners of Expropriated Property, 97 U. of Pa. L. Rev. 520, 530 et seq. (1949). As to the airways corporations, see note 17 supra and text.

39. Cable and Wireless Act §§ 1(2)(a), 1(3); Collieries Act §§ 32, 33; Bank Act § 1(1)(b), 1st Schedule § 1.

40. Friedmann, supra note 9, at 250.

41. Gas Act § 42; Electricity Act § 39; Transport Act § 89; Aviation Act § 8.

42. Gas Act § 45; Electricity Act § 42; Transport Act § 90; Aviation Act § 9. Note that in the gas industry the Board may also establish its own guarantee fund for the same purposes. Gas Act § 46.

43. Gas Act § 45; Electricity Act § 42; Transport Act § 90; Aviation Act § 9.

44. Not all the risk is passed. Treasury guarantees, if taken advantage of through a default by the corporations, must be repaid. Gas Act § 45(2); Electricity Act § 42(2); Transport Act § 90(2); Aviation Act § 9(3).

45. The Chancellor of the Exchequer estimated that because of the elimination of risk, bondholders of the Transport Commission would accept an income of £22,750,000 as against £40,000,000 paid to security holders under private ownership. 431 H. C. Deb. 1810-1811 (5th ser. 1946).

46. Gas Act § 43(2); Electricity Act § 40(2); Transport Act § 89(3); Aviation Act § 8(3).

47. Gas Act § 42(1); Electricity Act § 39(1); Aviation Act § 7(1). The Transport Commission may borrow without Treasury consent, but the amount outstanding in respect to temporary loans may not exceed £25,000,000. Transport Act § 88(1).

48. See note 42 supra and text.
guards over the corporations' financial structure are present. The public nature of the corporations is in itself a protection against faulty financing. Each act also limits the total borrowing power of the corporation. And further there are the provisions for auditing and accounting reports which are to be laid before Parliament annually, a recognition that in the absence of competition the most effective method of protecting public interest is through the medium of publicity. In light of these safeguards, at least until a default occurs, the corporations should be allowed free control over their finances, and the Treasury should not utilize the methods available to it to interfere.

**LEGAL STATUS**

The broad question of the juridical nature of the corporations presents countless problems. Insofar as Parliament has specified their incidents as respects particular legal relations, it is apparent that the corporations are to be treated substantially as private concerns.

Common to all acts is a provision relative to the payment of taxes or other charges: "Nothing in this Act shall be deemed to exempt the Commission from liability for any tax, duty, rate, levy or other charge whatsoever, whether general or local." Other provisions impose full liability upon the corporations in actions, proceedings, and prosecutions.

Consistent with the private character of the corporations, the boards are removed from the Public Authorities Protection Act which provides that no action shall be commenced against a public authority more than twelve months after the cause of action accrued. In this respect, however, a privilege has been granted in that the normal six-year period of limitations in actions of contract and tort has been reduced to three years.

On the other hand, the corporations have been granted certain privileges and powers consistent with their public character. Already noted is the limited privilege of a shorter period of limitations. More prominent are powers of compulsory acquisition of land provided for in four of the statutes. Finally, each corporation has the power for a limited period to disclaim agreements made by the undertakings prior to nationalization where the board considers such agreements to have been unreasonable or imprudent. This power is part of the machinery designed to facilitate the transfer of the undertaking from private to public ownership.

49. Gas Act § 42(3); Electricity Act § 39(3); Transport Act § 88(2); Aviation Act § 10; Collieries Act § 26.

50. See note 34 supra. The audit is by a private company, it being felt that government accounting methods were not sufficiently flexible. 422 H. C. Des. 1938 et seq. (5th ser. 1946).

51. Gas Act § 13; Electricity Act § 11; Transport Act § 10; Aviation Act § 6; Collieries Act § 47.

52. Aviation Act § 6(2); Collieries Act § 49(4).

53. Gas Act § 14(1); Electricity Act § 12(1); Transport Act § 11(1); Collieries Act § 49(1).


55. As set by the Limitations Act, 1939, 2 & 3 Geo. VI, c. 21.

56. Gas Act § 14(2); Electricity Act § 12(2); Transport Act § 11(2); Collieries Act § 49(2).

57. Gas Act § 11(1); Electricity Act § 9(1); Transport Act § 8(1); Aviation Act § 26(1).

58. Gas Act § 22(1); Electricity Act § 18(1); Transport Act § 15; Collieries Act § 7(2). In the Gas, Electricity, and Collieries acts, however, provision is made for arbitration.
limitation of this power to those agreements made prior to the transfer is a feature distinguishing the corporation from government departments in that the latter have the permanent power unilaterally to terminate a contract. However, it is to be noted that under the minister's power to give general directions, where both contracting parties are public corporations, similar orders from each minister can effect any variation or cancellation of the contract. But, where one party to the agreement is a private individual, variation or cancellation can be achieved only by agreement as between two private persons.

To the extent that Parliament has not defined the characteristics of the corporations, it will be for the courts to determine them. The term corporation, itself, may be misleading. Because of the nature of the nationalized industries, principles drawn from the common law of private corporations may not be reliable; each legal problem, as it arises, must be considered in relation to the nature of the corporations rather than on the basis of an inquiry whether Parliament has created a "corporation." The public nature of the corporations should not be construed as authorizing any disregard of private interests unless sanctioned by the statutes; protection of the individual will be achieved through normal procedure; ordinary courts will be competent to deal with ordinary actions of tort and contract. As yet there has been no question as to the application of ultra vires principles to the statutory capacity of the corporations, but it has been suggested that the public corporations should be subject to ultra vires rules governing public authorities.

It is submitted that the reasons advanced to support this contention are slim. Further, it is more reasonable and desirable for the courts to adopt a firm attitude in regarding the corporations as commercial beings than to inject into the commercial field, concepts applicable to public authorities. Thus as respects ultra vires the nationalized corporations should be treated as other corporations with the possible exception that because of the public nature of the corporations operating for public benefit there would be no need for strict construction of their powers.

**Protection of Consumer Interests**

The ultimate protection of the consumer who deals with the public corporations is the responsibility of Parliament. The link through the minister responsible for each corporation does not establish sufficient contact between the consuming public and the corporation. The liaison between the public in general or groups that are particularly interested in a given industry has been tightened by the creation of advisory or consultative councils whose purpose is to give independent advice to the ministers. The councils represent an intelligent and necessary departure

59. Among the standard conditions of British government contracts is a "break" clause granting the government authority to determine the contract subject to reasonable indemnification and limited resort to arbitration. Friedmann, supra note 9, at 233 n. 32.

60. Id. at 377, 379 et seq.

61. Only in the Transport Act is there reference to any of the administrative hierarchy as "public authorities." And there, the reference is to the executives who are subordinate to the Commission. See note 13 supra.


63. The unlimited scope of the "power" clauses indicates that Parliament intended little interference from the courts.

64. Gas Act § 9; Electricity Act § 7; Transport Act § 6; Aviation Act § 36; Collieries Act § 4.
from the past method of theoretical control through political pressures upon Parliament. The characteristics of the councils vary. In all cases however, the minister appoints the members of the councils but in no instance does he have a free hand in determining the composition of the councils. Typically, in the case of the coal industry the minister must consult "with such bodies representative of the interests concerned as the Minister sees fit" and further, he is obligated to "have particular regard to nominations made to him by the said bodies representative of the interests concerned." Although the provision is elliptical, it is intended as a guarantee that no favoritism will be granted any particular consumer interest, an especially important protection in that there is no clause in any act requiring price impartiality.

The function of the councils is to advise and report to the minister on matters on which they are declared to be competent by statutory provision. Each council is to make an annual report to the minister, and the minister shall lay the report before each House of Parliament. In this manner, Parliamentary pressure will encourage the minister seriously to consider recommendations of the councils. But in no event is the minister bound to follow suggestions given; he may accept or reject their advice. This is consistent with the intention that the boards shall carry on as free from outside interference as possible. In addition it would be inconceivable to give the councils power to require the ministers to carry out their advice as this would be giving them power without responsibility.

**Summary**

The over-all structure of the public corporations cannot be criticized. The purpose of public control was to make possible a long term view in the interest of the nation of the development within a specified industry. The nationalized industries, however, are business enterprises that can be most efficiently carried on by the government through an agency which possesses a high degree of autonomy and flexibility. The general structure of the boards as created by the statutes is entirely compatible with these objectives.

The successful operation of the corporate device depends upon the qualities which account for its high potential of efficiency being exercised as free from outside control as is consistent with the corporations' public nature. Criticism may be directed at provisions in conflict with this desired freedom of action. The relationship to the corporation of the minister in the question of appointment and of the minister and Parliament in the matter of giving directions has not been clearly defined, leaving room for emasculating control of the corporations from without. The same danger of outside control by the Treasury of each corporation's financial program is inherent in the financial provisions of the statutes. These powers of in-

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65. Gas Act § 9(2); Electricity Act § 7(2); Transport Act § 6(4); Aviation Act § 36(1); Collieries Act § 4(2). See 422 H. C. Deb. 1570 (5th ser. 1946).


67. Although the Gas Consultative Council and the Air Transport Advisory Council are the only councils specifically given jurisdiction over rates [Gas Act §§ 9(4); Aviation Act §§ 36(2), 36(3)], it is apparent that a primary function of all the councils will be the protection of various classes of consumers from price discriminations.

68. Gas Act § 9(4); Electricity Act § 7(4); Transport Act § 6(7); Aviation Act §§ 36(2), 36(3); Collieries Act § 4(3).

69. Gas Act §§ 10(4), 10(5); Electricity Act §§ 8(4), 8(5); Transport Act § 6(9); Aviation Act § 36(9); Collieries Act § 4(8).
Interference must be treated as residuary powers to be exercised with the utmost restraint in special circumstances, leaving to the corporations internal control of their functionings.

However, the corporations are public institutions and must be held accountable as such. To this end, provision has properly been made for a periodic appraisal by Parliament of the corporations' achievements. Immediate and continuing contact with consumers through the consultative councils has been provided to impress upon the corporations a constant awareness of public requirements. These are adequate instruments for intelligent and fair evaluation and control only if viewed through dispassionate eyes. If political factors are allowed consideration, any examination will be destructive rather than helpful.

C. E. I.

Industrial Nationalization and Industrial Relations in Great Britain

The initial political success of the British Labor Party came in 1900 when the Party elected two of its candidates to the House of Commons. The Party flourished despite judicial antagonism, and in the 1945 elections seated a majority of the House of Commons for the first time in its history. Throughout the intervening half-century the varied elements of the Party—trade unionists, Fabian Socialists, and Syndicalists alike—had insisted upon an industrial nationalization program as one of the planks of the Party platform. The Party therefore assumed that its overwhelming victory in the 1945 elections indicated a popular demand for its program, and the size of its Parliamentary majority made the attainment a relatively easy political task.

1. The Labor Party was founded in 1900 as the Labor Representation Committee, adopting its present name in 1906. A partial list of histories of the Party includes, Blanchard, An Outline of the British Labor Movement (1929); Cole, A Short History of the British Working Class Movement (1927). The earlier phases of trade unionism may be found in Beatrice & Sidney Webb, History of Trade Unionism (1920); Industrial Democracy (1920).

2. Two labor leaders were elected to the House of Commons in 1874, but the Labor Party's first success as a political party came in 1900 with the election of Keir Hardie and Richard Bell.

3. See Osborne v. Amalgamated Society of Railway Servants, [1910] A. C. 87 (furtherance of political ends is not a legal objective of trade unions). Other famous anti-labor decisions include Hornby v. Close, L. R. 2 Q. B. 153 (1867) (trade union, one of whose principal objects is to support men on strike, is unlawful as in restraint of trade); Temperton v. Russell, [1893] 1 Q. B. 715 (actionable to persuade men not to return to work); Taff Vale Judgment, [1901] A. C. 426 (union liable for acts of agents); Quinn v. Leatham, [1901] A. C. 495 (two persons who induce a strike are liable where one might not be). Treatises on British trade union law include Hedges & Winterton, The Legal History of Trade Unionism (1930); Slesser & Baker, Trade Union Law (1927).

4. The Labor Party governments of 1924 and 1929 were not majority governments and, from labor's viewpoint, were disappointingly ineffective. See Marquand, Organized Labour in Four Continents 164-172 (1939).

It is the purpose of this Note to examine those provisions of the nationalization statutes which pertain to industrial relations. Particular emphasis is placed on the methods by which the legislation strives to maintain the delicate balance between workers and managing boards. Although no attempt is made to treat the entire field of British labor relations, those aspects which affect the nationalized industries are discussed; the role and new functions of the trade union in a nationalized industry are analyzed.

The Proposed Basis of Industrial Relations: Collective Bargaining

From the viewpoint of industrial relations, no more varied industries could have been nationalized than those chosen. For example, one of the prime reasons for government ownership in the coal industry was the need for better worker-management relations, while the smoothly-operating procedures and lack of industrial strife in the gas industry were models for other industries to follow. Yet in all the industries affected, the same approach to industrial relations has been adopted by the legislation: the setting up of machinery for collective bargaining between the unions and the respective boards. The collective bargain, marked by voluntary agreement and conformance, is the nexus between workers and management.

The Party of the First Part: The Board.—The sections of the statutes pertaining to the composition of the managing boards indicate clearly that those who advocated "worker control of industry" did not prevail. Instead, the statutes provide that the board be composed of members having experience in "industrial, commercial, or financial matters, administration of the organisation of workers." Thus there is no mandate that trade unions or workers be represented on the board, which is to be composed of independent experts. The syndicalist philosophy of worker control has given way to the parliamentary control espoused by the Fabian Socialists.

6. This was emphasized by the famous Reid Report, CMD. No. 6610 at 118 (1945).
7. CMD. No. 6699 at 27 (1945); 447 H. C. DEB. 243, 298, 408 (5th ser. 1948). Electricity also had a good labor relations history. 432 H. C. DEB. 1420, 1453 (5th ser. 1947).
8. Gas Act, 1948, 11 & 12 Geo. VI, c. 67, § 57; Electricity Act, 1947, 10 & 11 Geo. VI, c. 54, § 53; Transport Act, 1947, 10 & 11 Geo. VI, c. 49, § 95; Civil Aviation Act, 1947, 9 & 10 Geo. VI, c. 70, § 19; Coal Industry Nationalisation [Collieries] Act, 1946, 9 & 10 Geo. VI, c. 59, § 46. These acts are cited hereinafter by short-title and section number only.
9. Gas Act § 5(4); Electricity Act §§ 3(2) (a), 3(3) (a); Transport Act § 1(2); Aviation Act § 1(2); Collieries Act § 2(3); Bank of England Act, 1946, 9 & 10 Geo. VI, c. 27, § 2(2).
10. Dahl, supra note 5, passim. The problem of worker control has by no means been solved to the satisfaction of all. Complaints have come from the unions that there is only one union man on the Road Transport Executive. 448 H. C. DEB. 16 (5th ser. 1948). On the other hand, Sir Charles Reid, Chairman of the National Coal Board, resigned because of too much worker interference. 154 THE ECONOMIST 847 (1948). See also 150 THE ECONOMIST 832 (1946).
11. See note 8 supra. There is no such enumeration of categories in either the Aviation Act or the Bank Act. One of the directors of the bank is a trade union leader, however. See Bopp, Nationalization of Bank of England and Bank of France, 8 J. or Pol. 308 (1946).
12. The reasons for the present triumph of Fabianism are expounded by an old-time socialist in Cole, The National Coal Board, 17 POL. Q. 310, 313-316 (1947).
So long as the Labor Party remains in power, the members appointed by the appropriate minister will, in all probability, be sympathetic toward the demands of the employees. Certainly the statutory provisions as to the securing of safety, health, and welfare of the workers should influence the boards to be more amenable to workers' demands than were private employers. Further, even if the board wishes to adopt a contrary attitude, it must follow the general directions of the minister, so that the policy concerning broad labor issues will be determined by a Labor Party cabinet member. Obviously there is no guarantee that the Labor Party will remain in power, and whereas the removal powers of the minister are not quite so broad as his appointment powers, a change of personnel of the boards is not unlikely on the election of a new Parliament and the consequent creation of a cabinet of different social convictions. The statutory provisions for the boards' personnel, therefore, will be an important factor in determining the incidence of labor disputes due to conflict between boards and workers.

The Party of the Second Part: The Proper Union.—The selection of the proper representative of the workers presents the board with an immediate problem. The relevant statutory language (with minor variations in the different statutes) states:

Except so far as they are satisfied that adequate machinery exists for the purposes of achieving this section, it shall be the duty of the Board to seek consultation with any organisation appearing to them to be appropriate [for setting up negotiation machinery].

The onus of selecting the union is directly on the board, and consequently the avoidance of jurisdictional disputes is the board's, and only the board's responsibility. The lack of a standard by which the board was to choose and the fact that the choice was the board's alone were cause for concern

13. It is the stated policy of the various acts to secure the safety, health, and welfare of the employees. Gas Act § 1(7); Electricity Act § 1(6); Collieries Act § 1(4)(a).

14. Gas Act § 7(1); Electricity Act § 5(1); Transport Act § 4(1); Aviation Act § 4; Collieries Act § 3(1), all of which state that the minister may give directions of a general nature in matters affecting the public interest and that the board "shall give effect to any such directions." (Emphasis added.) See Note, The Role of the Public Corporation in British Nationalized Industry, 97 U. of Pa. L. Rev. 534, 537 (1949).

15. See id. at 536.

16. There is a plethora of literature on the British trade union and trade union movement. The most recent study is Barou, British Trade Unions (1947).

17. Clearly the workers are not to be considered civil servants or government employees. 419 H. C. Den. 266-268 (5th ser. 1946).

18. Of interest is the fact that the original coal bill contained no clause requiring collective bargaining. It is not clear whether this was a deliberate omission or inadvertent. Possibly it was based on the conviction that the Board would be such a model employer that there was no need for such requirement. See 423 H. C. Den. 78 (5th ser. 1946); 149 The Economist 899 (1945).

19. The difference in language appears to have no significance. The Collieries Act omits the exception of adequate existing machinery and states that the Board is to "enter into" consultation. The Collieries Act also sets a standard for union recognition. See note 22 infra.

20. Compare United States procedure under which an independent government tribunal, the National Labor Relations Board, has the task of determining the proper bargaining agent. The problem of union recognition caused 1.7 per cent of the work stoppages in Great Britain in 1947. 56 Min. of Lab. Gaz. 163 (1948).
in Parliament, but no satisfactory substitute could be found.\textsuperscript{22} This is characteristic of the legislative intent to leave the management of the industry with the board, with a minimum of Parliamentary interference.\textsuperscript{23}

Settlements of the jurisdictional disputes which have occurred in the nationalized industries have ranged from recognition of both unions involved\textsuperscript{24} to reference to an arbitration tribunal.\textsuperscript{25} It does not follow that such disputes will not reappear, since the statutory language does not render the machinery permanent.\textsuperscript{26} Thus the board will be able to exert coercion on union leaders by the threat of recognition of another union, while on the other hand, the union members may threaten to form or join another union if the present leaders cannot obtain their demands. In the past, the Trades Unions Congress\textsuperscript{27} has settled various jurisdictional disputes by its machinery, and it is conceivable that the boards will avail themselves of this machinery.\textsuperscript{28}

The degree of organization varied throughout the industries prior to nationalization;\textsuperscript{29} however, even in an industry as highly organized as coal there has been jurisdictional trouble.\textsuperscript{30} One solution of the jurisdictional problem is the closed shop, until recently not a normal union demand in Great Britain,\textsuperscript{31} although such a demand would not be an illegal term of employment.\textsuperscript{32} Great opposition to such a requirement for employment in a nationalized industry would probably

\begin{itemize}
  \item \textsuperscript{22} See 439 H. C. Deb. 457-466 (5th ser. 1947); 432 H. C. Deb. 1649 (5th ser. 1947).
  \item \textsuperscript{23} The government has consistently refused to assist in the selection of the union.
  \item \textsuperscript{24} 447 H. C. Deb. 1922 (5th ser. 1948); 432 H. C. Deb. 1649-50 (5th ser. 1947).
  \item \textsuperscript{25} The National Coal Board compromised such a dispute by negotiating with both the National Union of Mineworkers and the Clerical and Administrative Workers Union when the dispute could not otherwise be settled. London Times, Dec. 11, 1947, p. 3, col. 2.
  \item \textsuperscript{26} A court of inquiry recommended that there should be no separate recognition of winding men, but that the National Union of Mineworkers should make better provision for their representation. 56 MIN. OF LAB. GAZ. 43 (1948).
  \item \textsuperscript{27} The duty of the board is to enter into consultations with organizations of workers appearing to them to be appropriate. When the organization no longer appears to be appropriate, there would seem to be no reason why the board could not consult with a new "appropriate" organization.
  \item \textsuperscript{28} The Trades Union Congress is the central labor organization, a unified counterpart of the American Federation of Labor and the Congress of Industrial Organizations. In January, 1947, of 8,714,000 union members, 7,540,397 were members of the 187 unions affiliated with the Trades Union Congress. 55 MIN. OF LAB. GAZ. 290 (1947). For a description of the activities of the Congress, see BAROU, \textit{op. cit. supra} note 16, at 42; RICHARDSON, \textit{INDUSTRIAL RELATIONS IN GREAT BRITAIN} 59 (1933).
  \item \textsuperscript{29} BAROU, \textit{op. cit. supra} note 16, at 46. The National Coal Board has already availed itself of this machinery in deciding who was to be given facilities to organize the staff members. NATIONAL COAL BOARD, \textit{ANNUAL REPORT OF STATEMENTS AND ACCOUNTS FOR 1946} [hereinafter ANN. REP.] 16 (1948).
  \item \textsuperscript{30} Thus, 82 per cent of the workers in coal mining were organized, 58 per cent in water transport, 16 per cent in banking. BAROU, \textit{op. cit. supra} note 16, at 248-249.
  \item \textsuperscript{31} See notes 24, 25 supra.
  \item \textsuperscript{32} 4 LAB. AND IND. IN BRITAIN 160 (1946).
  \item The closed shop would possibly have been prohibited in a nationalized industry by the Trade Disputes and Trade Unions Act, 1927, 17 & 18 GEO. V, c. 22, § 6 (1), but the Act was repealed in 1946. Trade Disputes and Trade Unions Act, 1946, 9 & 10 GEO. VI, c. 52. Even prior to its repeal, the Act had been liberally interpreted. See London Passenger Transport Board v. Moscrop, [1942] A. C. 332 passim. See also 430 H. C. Deb. 696-762 (5th ser. 1946); 427 H. C. Deb. 630-708 (5th ser. 1946). Compare § 8(a) (3) of the Labor-Management Relations Act of 1947, 61 STAT. 140, 29 U. S. C. § 158(a) (3) (Supp. 1948), prohibiting the closed shop in the United States.
arise, but the question of whether the boards will grant such a demand will depend in large part upon the frequency of unofficial, wildcat, strikes and the degree to which the unions can maintain discipline in industries where union membership is not a condition for employment.

The implications of jurisdictional disputes are far-reaching. In a private-enterprise economy union leaders feel it necessary to press management closely in order to represent their membership properly and to retain the support of their members. Such conflicts should be out of place in a nationalized economy where the emphasis is to be on cooperation and not on conflict. Since jurisdictional disputes are a manifestation of worker dissatisfaction with union leadership, and this is in turn indicative of dissatisfaction with conditions of employment, then to the extent that jurisdictional disputes appear, the industrial relations program of the nationalized industries will have been unsuccessful.

The Status of the Agreement.—Parliament has determined that the labor relations problems of each industry are for the boards and workers of that industry and not a subject for legislative action. The pertinent statutory provisions require the board to seek consultation with the proper unions—

... with a view to the conclusion between the Board and the organisation of such agreements as appear to the parties to be desirable with respect to the establishment and maintenance of machinery for (a) the settlement by negotiation of terms and conditions of employment for persons employed by the board, with provision for reference to arbitration in default of such settlement in such cases as may be determined by or under the agreements. It is readily seen that no substantive terms or conditions of employment are determined by this provision. There is a duty on the board only to "seek consultation" with a view to setting up machinery for negotiations, with arbitration in cases only where these agreements so provide. A literal interpretation of this clause means that there is no duty to provide for arbitration at all since it is only for cases determined "by or under" the agreements. But since the normal arbitration clause of collective bargaining contracts in Great Britain has a wide scope, there is little probability of litigation arising out of the refusal of one of the parties to include a certain portion of the collective bargaining area under the arbitration clause. Further, under normal conditions the decision of the arbitrator is not binding so that this "requirement" seems to be only a recommendation.

33. See the debates in the House of Commons, note 32 supra. See also 431 H. C. Deb. 1647 (5th ser. 1946); 430 H. C. Deb. 733, 759 (5th ser. 1946).
34. See note 8 supra.
36. INDUSTRIAL RELATIONS HANDBOOK 18 (1944); BEATRICE & SIDNEY WEBB, INDUSTRIAL DEMOCRACY 222 (1902). The Industrial Courts Act, 1919, 9 & 10 Geo. V, c. 69, creating a court to inquire into and arbitrate labor disputes, did not provide that the decisions of the court should be binding. See § 3(3). See also Richardson, op. cit. supra note 27, at 132; Report 67; Survey 48.
37. Compare Transport Act § 97 which sets up machinery for the determination of rates of pay and hours and conditions of service of police forces, and expressly states that the arbitrator has power to give binding decisions. This section seems to be based on a previous method of police force negotiations. See Railways Act, 1921, 11 & 12 Geo. V, c. 55, § 67(2).
With the repeal of the Trade Disputes and Trade Unions Act, 1927, the extant labor legislation is the Trade Disputes Act, 1906. Prior to the original Act of 1871 a trade union's contracts were void inasmuch as the principal purposes of the union were in restraint of trade at common law. By freeing the unions from criminal and civil liability the Act of 1871 enabled unions to enter into contracts. But these contracts did not become enforceable since Section 4 of the Act states that no agreement between trade unions is directly enforceable in a court of law. By definition an association of employees or employers is a trade union. Ever since the initiation of the collective bargaining concept the majority and most important of the agreements have been “collective agreements,” i.e., between associations of employers and unions; “shop agreements” between a union and a single employer have been comparatively rare. Thus the majority of collective bargaining contracts have been legally unenforceable. Conversely, and paradoxically, the less important “shop agreement” appears enforceable.

This anomaly may be of legal significance when an industry is nationalized. For now the bargaining on the employer's side is carried on by a single employer, the board, whereas before it was carried on by an association of employers. It will require some straining of language to fulfill the desire to keep the employees in the same legal status as they held under private ownership.

38. 17 & 18 Geo. V, c. 22, repealed May 22, 1946, by the Trade Disputes and Trade Unions Act, 1946, 9 & 10 Geo. VI, c. 52.
39. 6 Edw. VII, c. 47, as amended, Trade Union Act, 1913, 2 & 3 Geo. V, c. 30. This legislation amended the original Trade Union Act, 1871, 34 & 35 Vict., c. 31.
41. Trade Union Act, 1871, 34 & 35 Vict., c. 31, §2.
42. Id. §3.
45. INDUSTRIAL RELATIONS HANDBOOK 22 (1944); Tillyard & Robson, The Enforcement of the Collective Bargain in the United Kingdom, 48 Econ. J. 15, 48 (1938).
46. Labor has long demanded that the agreement be made enforceable as against the employer. See 52 INT'L LAB. REV. 561 (1945).
47. See Robson, The Future of Trade Union Law, 1 Pol. Q. 86, 89 (1930); Tillyard & Robson, supra note 45, at 15.
48. However, Transport Act §96 provides that the negotiation procedures set forth in the collective bargaining agreements may amend earlier legislation (Railways Act, 1921, 11 & 12 Geo. V, c. 55, §§ 62-66; London Passenger Transport Act, 1933, 23 Geo. V, c. 14, Part VI). If the agreements under §95 are unenforceable the paradoxical result of a voluntary unenforceable agreement amending a statute will be achieved.

One possible conceptual “solution” to the problem of enforceability and the desire not to change the status of these employees is to consider the various subsidiary branches of the boards, e.g., the area boards, the executives, the separate aviation corporations, as independent employers; thus the parent board could be considered an association of employers.

A letter from the Labor Counsel of the British Electricity Authority, Sept. 9, 1948, states that it is “almost inconceivable” that agreements made under the direction of Parliament would be unenforceable. The same letter, however, states that there has never been any attempt to avoid an arbitrator's award in that industry.
Any discussion of legal sanctions must be considered against the background of a half-century in which the parties to labor disputes in Great Britain have preferred to settle their differences privately and without judicial intervention. Furthermore, it is difficult to dissociate the present emergency conditions and controls from the long-range position of labor in a nationalized industry. For example, inasmuch as the ultimate sanctions in any collective bargaining agreement are the strike and the lockout, the present no-strike, no-lockout provisions of the Conditions of Employment and National Arbitration Order of 1940 seem to render nugatory the collective bargaining provisions of the acts. Yet it is the intent of the government that this prohibition is to be temporary and to interfere with the normal processes of collective bargaining to a minimum so that any discussion of sanctions must include both the temporary sanctions and those available after the present emergency has passed.

During the Transition.—Compulsory arbitration and its concomitant, government regulation of industrial relations, had been foreign to industries which were well organized before the war, but in 1940 in order to insure industrial peace the government, after consultation with unions and management, promulgated the Conditions of Employment and National Arbitration Order creating the National Arbitration Tribunal as a final arbiter. In 1945 the Order was renewed, again with the consent of unions and management, for another five years. The Tribunal was

51. S. R. & O., 1940, No. 1305, as amended, S. R. & O., 1941, No. 1884, S. R. & O., 1942, No. 1073. S. R. & O., 1944, No. 461, provided for five years' imprisonment or a fine for inciting a strike or lockout in essential industries. This Order was revoked by S. R. & O., 1945, No. 504. As to the efficacy of such sanctions: "You might as well try to bring down a rocket bomb with a pea shooter as try to stop a strike by the processes of the criminal law." Address by Sir Hartley Shawcross, Attorney-General, 419 H. C. DEB. 200 (5th ser. 1946).
52. The Order itself is only conditional. It prohibits strikes if not referred to the minister for arbitration within twenty-one days after the strike has been reported to him. Further, the minister must refer the dispute to the machinery set up by the collective agreement if such machinery exists. The National Arbitration Tribunal is to be used only as a last resort.
53. Frey, supra note 50, at 273-274.
54. The forerunner of modern compulsory arbitration legislation was the Spitalfields Weavers Act, 1773, 13 Geo. III, c. 68, which empowered justices of the peace to fix wages for silk-weavers. During World War I there was compulsory arbitration for the munitions industry. See note 83 infra. For industries which were not well organized, trade boards were set up for the determination of wages. See SELLS, BRITISH WAGES BOARDS (1939). These boards have now been replaced by wages councils. Wages Councils Act, 1945, 8 & 9 Geo. VI, c. 17. See Stokes, Administration of Tribunals, 24 PUB. ADMIN. 156, 162 (1946). A brief history of modern arbitration legislation can be found in Aronson, British Industrial Arbitration, 2 ARB. J. (N. s.) 161 (1947).
55. See notes 51, 52 supra.
56. For a description of the Tribunal and its mode of operation, see Ross, Industrial Relations in Great Britain, 58 LAW Q. 184, 188 (1942). An extremely able and erudite analysis of the legal effect of its orders can be found in Kahn-Freund, Collective Agreements Under War Legislation, 6 MOD. L. REV. 112, 125 et seq. (1943). For statistics on the number of cases handled, see Flexner, Arbitration of Labor Disputes in Great Britain, 1 IND. & LAB. REL. REV. 421, 423 (1948).
57. Wages Councils Act, 1945, 8 & 9 Geo. VI, c. 17.
eminently successful, and there were no official strikes during the war.\textsuperscript{58}
The decision of the Tribunal in a dispute over terms of employment becomes an implied term of employees' contracts throughout that industry.\textsuperscript{59}
Thus, in the sense of government regulation of terms of employment, every industry has been potentially nationalized during this period. This concept, the legalizing of the "normative effect" of the collective agreement, \textit{i.e.}, the making of the terms of one collective bargaining agreement the conditions of employment throughout the industry, is one which has been increasingly utilized in British industrial relations.\textsuperscript{60}

As part of the same general order, the government took control over the direction of workers to jobs.\textsuperscript{61} After hostilities ceased, workers grew restive and the controls were removed from all industries except coal, agriculture, and construction.\textsuperscript{62} But direction of workers to needed occupations by persuasion, attractiveness of job, and exhortation proved ineffective, and in 1947 the government was forced to reinstate the controls in modified form.\textsuperscript{63}

As a result of the extension of these wartime controls, there exist today rigid controls over the freedom of workers, both as to their ability to change location and to bargain as they stand. These controls exist for private and nationalized industry alike. To date, they have caused relatively little difficulty,\textsuperscript{64} but this must be considered in light of the emergency nature of the period. Unless there is a change in present and traditional attitudes, labor and management alike will insist that the controls be removed when it is felt that the emergency has passed.

\textbf{The Long-range Problem.—}Labor has insisted and government has guaranteed that employees will retain their right to strike.\textsuperscript{65} The converse,\textsuperscript{58} The record of the Tribunal was not unblemished, however. In June, 1947, 140,000 working days were lost due to dissatisfaction over its awards. 56 MIN. OF LAB. GAZ. 163 (1948). See 154 THE ECONOMIST 579 (1948) for details of a strike after the dispute had been submitted to the Tribunal.


60. See Kahn-Freund, \textit{Collective Agreements Under War Legislation}, 6 MOD. L. REV. 112 (1943). Compare Aviation Act §41(1) which states that if an independent air company hires people not covered by statute, collective bargaining, or industrial council, such employees must have the same conditions as the employees of the three nationalized corporations (whose conditions are determined by collective bargaining). The government will not prosecute the private corporations, but the initial action must be taken by the employees. 453 H. C. DEB. 1169 (5th ser. 1948). The Coal Board, in licensing the operation of those small mines which may be excluded from government control by the Board, provided that all agreements in the nationalized mines regulating wages and conditions of employment and the settlement of disputes should be binding on the operators of the small mines. ANN. REP. 11.


62. 53 MIN. OF LAB. GAZ. 47 (1945).


64. The extent of labor strife after the recent war was much less than after the last one. From August, 1945 to the end of 1946, 3,750,000 working days were lost in disputes. In the corresponding period after World War I, 39,500,000 working days were lost. 5 LAB. AND IND. IN BRITAIN 200 (1947).

65. 5 id. at 75; Witte, \textit{Experience with Strike Legislation Abroad}, 248 ANNALS 138, 140 (1946).
the right of the boards to lockout, seems unlikely to be exercised. Under normal circumstances, the legal sanctions available to the board will depend upon the enforceability of the collective bargaining agreement and the actual terms of the agreement. Further, the resistance of the board to a strike will depend largely upon the gravity of the strike, the Parliamentary temper, and the responsiveness of the board to that temper. Bankruptcy, one fear of private management, can be only a remote possibility and a negligible coercive force.

The Electricity Authority in setting up machinery for negotiations, provided for arbitration by the Industrial Court, such decision to be binding on the union, the employees, and the Board. If the union strikes in violation of this provision and the contract is held enforceable, the Board conceivably can sue the union or the individual workers for breach of contract, although it cannot sue the union in tort for inducing a breach of contract. The use of the injunction has been so rare in British labor disputes that it is doubtful if it will appear at this late date.

Deliberate violations of the existing agreements by the boards seem improbable, so that unions will not be concerned with the problem of exerting pressure in the forms of strikes or threats of strikes in order to force the boards to live up to their agreements; but unions, if they continue their present attitudes and functions, will be concerned with the problem of exerting economic pressure on the boards to obtain new demands. If a strike becomes too serious, the government (as distinguished from the board) can make use of the Emergency Powers Act, taking action which is tantamount to a declaration of martial law. An interesting manifestation of the legislative protection of the rights of labor is the provision of this Act that to strike or to persuade others to strike cannot be made an offense by virtue of the emergency. Further, there are special statutory weapons in the electricity and gas industries, providing that the willful and malicious breach of an employment contract, where the result is likely to create grave danger to the community, is a criminal offense.

AN INDEX OF FAILURE: THE UNOFFICIAL STRIKE

Although the emergency no-strike order has been effective in preventing official strikes, work stoppages in the form of unofficial, wildcat, strikes have not been uncommon. Since productivity figures remain

66. The Industrial Courts Act, 1919, 9 & 10 Geo. V, c. 69, created a court to investigate labor disputes. This court has power only to recommend solutions, and its decisions are not binding on the parties.

67. Section 20 of the three agreements between the British Electricity Authority and the three operating unions, March 31, 1948. 56 Min. of Lab. Gaz. 158 (1948). The Coal Board agreement also provided that the decision in a dispute whether reached by negotiations or arbitration was to be binding. Ann. Ref. 13-14. For details of this agreement see note 87 infra.

68. See text at notes 38-48 supra.

69. See text at note 81 infra.


72. Id. §2(1). The statute was called into play during the dock strike of 1946. Immediately after the declaration of the emergency, but prior to any direct governmental action, the strikers returned to work.


74. See note 64 supra.

75. In 1947, an estimated 620,000 workers took part in 1,721 strikes, losing 2,398,000 working days. 56 Min. of Lab. Gaz. 163 (1948).
inconclusive,\textsuperscript{76} one of the better yardsticks of the success of the industrial relations program is the incidence and duration of the unofficial strike. By this measure nationalization has as yet made little contribution toward industrial peace.\textsuperscript{77}

The demarcation between official and unofficial strikes is often difficult to draw. In the United States there has been a growing tendency to impose liability for unofficial strikes on the union whose members are striking.\textsuperscript{78} In Great Britain, where the institution of unionism has been so firmly established that there appears to be no desire on the part of management to weaken the existing union,\textsuperscript{79} such a tendency is not discernible.\textsuperscript{80}

However, the Coal Board has on several occasions sued the individual strikers for breach of their employment contracts.\textsuperscript{81} Such suits show the use of relatively severe measures to break the strike, the resort to the courts for enforcement of individual employment contracts, and the refusal or inability of the Board to place responsibility upon the union for the actions of large portions of its membership.

Other than the weapons available to management, there remain of course the governmental sanctions mentioned above.\textsuperscript{82} These measures are as applicable to unofficial as official strikes, but their effectiveness is doubtful. In World War I, strikes were prohibited in the munitions industry only,\textsuperscript{83} yet there was no proportional difference in work stoppages in this industry from the rest of industry where strikes were not prohibited.\textsuperscript{84} Since the prohibition was universal in the past war, no such comparative data are available. It is clear, however, that the prohibition did not eliminate the strike from the industrial scene.

The solution of the problem of the unofficial strike will not rest with the courts or with the government in its sovereign capacity. It is apparent that in an industry such as coal, where labor disputes have been

\textsuperscript{76} E. g., in coal, output per man-shift for the end of 1947 was 1.11 tons as compared with the 1938 average of 1.14 tons. But the trend was upward, for in the same period of 1946 output had been 1.05 tons. \textit{6 Lab. and Ind. in Britain} 8 (1948). Productivity in coal, however, is probably primarily dependent upon improved machinery which workers have opposed in the past. \textit{Cmd. No. 6610} at 4 (1945).

\textsuperscript{77} The Coal Board assumed control January 1, 1947. In 1946, 216,000 workers took part in 1,329 strikes, losing 422,000 working days. In 1947, 307,900 workers took part in 1,053 stoppages, losing 912,000 working days. \textit{56 Min. of Lab. Gaz.} 163 (1948).

\textsuperscript{78} Sections 301(b), 301(e), Labor-Management Relations Act of 1947, 61 \textit{Stat.} 155, 29 U. S. C. § 185 (Supp. 1948). See Note, 96 \textit{U. of Pa. L. Rev.} 85, 99 (1947). Logically this position is difficult to justify. The payment of damages by a union which presumably was too weak in the first place to maintain discipline over its members can serve only to weaken the union further, lessening its disciplinary power in consequence.

\textsuperscript{79} Witte, \textit{supra} note 65, at 141.

\textsuperscript{80} The government expressly refused to introduce legislation making unions liable for unofficial strikes. 414 H. C. \textit{Deb.} 2202 (5th ser. 1945).


\textsuperscript{82} See text at notes 49-73 \textit{supra}.

\textsuperscript{83} Munitions of War Act, 1915, 5 & 6 Geo. V, c. 54, § 2.

\textsuperscript{84} \textit{Clay, The Problem of Industrial Relations} 208 (1929). As to the general ineffectiveness of anti-strike legislation, see \textit{Settlement of Labor Disputes in Seven Foreign Countries}, 63 \textit{Mon. Lab. Rev.} 224 (1946).
a part of the culture of the miners, fines or government intervention will not prevent strikes or produce coal when the miners refuse to work. The present disappointment over the failure of nationalization to act as a panacea for all labor troubles is a natural result of the over-optimism of the socialists.

In large part these unofficial strikes have arisen from dissatisfaction with the procedures of dispute settlement—dissatisfaction due to improper representation or undue delay. Upon nationalization it was necessary to retain practically all the lower management levels so that the change in ownership was scarcely manifested to the men in the pits who were under the supervision of those men who had been their supervisors under private ownership. However, the Board and the unions have been attempting to speed up the existing machinery and, significantly, have been developing new procedures for consultation between workers and management with the greatest emphasis on the lowest, or pit, level.

The solution of disputes in their incipiency, the grievance procedure, is the heart of the collective bargaining agreement, and the establishment of swift procedures for the solution of individual and group grievances at the lowest level is essential. As the size of the bargaining unit increases, it becomes more and more difficult for the parties to see that these lower levels are properly represented. The methods by which the boards handle this problem and the results obtained merit close observation by advocates of industry-wide collective bargaining in the United States.

**The Secondary Voice of Labor**

Labor is not limited in its voice in the management of industry to the collective bargaining procedures. Nor is the board relieved of all its obligations merely by conforming to its agreements. For although the boards are expected to be model employers, certain statutory duties are placed on them to insure this result. Detailed pension provisions are set forth. Officers who suffer loss of employment because of nationalization are to be compensated. The boards must take steps to advance the skill and efficiency of their employees and their equipment. In addition they must set up machinery for discussions of matters of mutual interest

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86. See, e.g., the claims in the debates on the coal bill. 418 H. C. Deb. 708, 712-715, 971-972 (5th ser. 1946).
87. Any issue arising between the workers and the management is discussed between the men and the colliery official concerned. If no agreement is reached, the matter is discussed at a “pit” meeting which must be held within five days. Next comes a meeting of the District Disputes Committee, consisting of union and divisional board representatives, within fourteen days. Finally, the dispute, if still unsettled, is referred to an umpire. Ann. Rep. 14. See also 6 Lab. and Ind. in Britain 125 (1948); London Times, Oct. 23, 1947, p. 5, col. 6; 153 The Economist 468 (1947); 149 The Economist 120 (1945).
88. See Golden & Ruttenberg, Dynamics of Industrial Democracy 83-118 (1942); Sellemian, Labor Relations and Human Relations 77 (1947). In one instance 6,000 miners struck for fourteen days because of faulty grievance procedure. London Times, Oct. 30, 1947, p. 4, col. 5.
90. Gas Act § 58; Electricity Act § 54; Transport Act §§ 98, 99; Aviation Act § 20; Collieries Act §§ 40, 41.
91. Gas Act § 60; Electricity Act § 55; Transport Act § 101; Aviation Act § 42.
92. Gas Act § 4(1); Electricity Act § 2(2); Transport Act § 2(2) (b); Collieries Act § 11(2) (f).
to the boards and employees, including matters concerning the efficiency of the boards' services. The generality of such a clause leaves the settlement of the scope of the discussions up to the machinery, and it is conceivable that no area of the boards' activities will be excluded from the discussions. Although no statutory duties requiring the boards to heed such recommendations were created, these provisions for consultation were the subject of much Parliamentary debate as to the exact wording of the scope of the discussions, so that it is obvious that the legislature intended the boards to consider the suggestions seriously. And it is the expressed intent of the boards to do so.

The machinery which has been created has followed the pattern of joint industrial councils, which are a form roughly equivalent to the industry committees created by the Fair Labor Standards Act in the United States. The effectiveness of this machinery, the degree of consideration which the boards give to the recommendations, and the extent of actual employee participation in the management of the industry should indicate to some degree the practicability of greater worker control of industry.

Organized labor has been granted another voice in the management of industry—as a consumer. Each act provides for the creation of advisory councils to represent the public in advising the board. Here again one of the categories from which the members of the councils are to be selected is that of those "experienced in the organisation of workers." But due to the necessarily low proportion of workers on these councils, it is doubtful whether such representation is of real significance.

THE NEW FUNCTION OF A TRADE UNION

In a private-enterprise economy, one of the factors which determine the effect of work stoppages upon the community is the extent to which goods and services can be replaced at the same cost to the community. The degree of substitution depends in turn upon the presence of competitive elements in the industry which can make up the unsatisfied demand. If it is assumed that a strike temporarily removes from competition a given producer, then as the number of competitors in an industry decreases, the possibility of replacement is diminished and the loss to the community, in the sense of unsatisfied wants, increases. The economic

93. Gas Act § 57(1) (b); Electricity Act § 53(1) (b); Transport Act § 95(1) (b); Aviation Act § 19(1) (b); Collieries Act § 46(b).
95. Addresses by Lord Citrine, Chairman of British Electricity Authority: at conference of Authority, Divisional Controllers, and Area Boards, April 9, 1948; at inaugural meeting of conciliation machinery, April 29, 1948.
96. This was based on the recommendations of the Whitley Committee in 1916. See INDUSTRIAL RELATIONS HANDBOOK 23-25 (1944); SURVEY 294. For details of the formation of the councils in the coal industry, see ANN. REP. 16.
98. Gas Act § 9(2) (b); Electricity Act § 7; Transport Act §§ 6, 66(3); Aviation Act § 36.
99. E., the Electricity Authority provides for a Consultative Council of twenty to thirty persons, not less than half of whom shall be nominated by local authorities, the remainder to be appointed after consultation with organizations representing agriculture, commerce, industry, labor, and the general interest.
100. This analysis ignores the loss to the community in the form of waste—loss of labor and productive facilities whether directly or indirectly (secondary boycotts).
problem of strikes within the frame of reference of capitalism, therefore, reaches its zenith when there is no competition, i.e., under monopoly conditions. The tendency in the United States, the protagonist of capitalism, has been to curtail the right to strike in these monopoly industries.\textsuperscript{101} This tendency is a denial of the fundamental bases of collective bargaining, and compulsory arbitration, the most popular substitute for the right to strike, is a contradiction in terms.\textsuperscript{102} Yet the right of any group to withhold the requirements of the majority in a democracy is at best questionable. The problem of the right to strike in "essential industries" is, in miniature, the philosophical problem of western civilization: the problem of freedom versus order.

Although the life of the community is not in jeopardy because of curtailment of production, the United States has limited the right to strike.\textsuperscript{103} The nationalization of an industry, per se, removes all competitive factors so that replacement of goods and services by competitive forces is impossible. It thus seems anomalous that Great Britain with its imperative need for production still maintains that the right to strike in nationalized industries remains.\textsuperscript{104} But the retention of the right to strike in Great Britain is consistent with the political philosophy of government abstention from regulation of the individual, further exemplified by the refusal to regulate wages by statute.\textsuperscript{105} That this philosophy is substantially due to political exigencies seems obvious, but the fact remains that its application will determine in large part the success of the present program.\textsuperscript{106}

The retention of the right to strike in Great Britain may take one of several courses. It can be a real weapon in the unions’ armory and utilized as in a private-enterprise economy. However, one, if not the only, motive for production in a private-enterprise economy has been presumably eliminated by nationalization: production for profit. Thus the managers of the industry are no longer concerned with obtaining the maximum profit and should be proportionally less resistant to workers’ demands. But if "production for use" has replaced production for profit, it would seem clear that a union should be limited in its wage demands. The fixing of the price of the goods and services is left substantially to the discretion of the boards,\textsuperscript{107} but it is the duty of the boards to supply goods and services so as best to further the public interest in all respects.\textsuperscript{108} If a demanded increase in wages would raise the prices of the product to an extent not commensurate with the public interest, then the exertion of economic pressure by the unions would be a denial of the purposes of


\textsuperscript{102} See Frey, supra note 50, at 272.

\textsuperscript{103} See note 101 supra.

\textsuperscript{104} See note 65 supra and text. If, as is claimed by capitalist economists, the capitalistic economy is the most flexible and resilient to shocks, this anomaly is accentuated.

\textsuperscript{105} Cmd. No. 7321 (1948), quoted in 56 MIN. OF LAB. GAZ. 40 (1948).

\textsuperscript{106} And, to the extent that the industries are nationalized on the advent of a Conservative government, the success of the Conservative program, since that party has stated that it will maintain the present nationalization program although it will go no further. N. Y. Times, Oct. 3, 1947, p. 1, col. 3.


\textsuperscript{108} See, e. g., Coal Act §1(1)(c) ; ANN. REP. 1.
the socialists. A union which insists upon wage increases beyond this point of "reasonableness" can obtain them only at the expense of other workers, and no longer at the previously assumed expense of the capitalists, as in the private-enterprise economy.

The retention of the right to strike could also serve as a second-guess device of the government whereby it permits the union to strike once and then, strengthened by public reaction against the consequences of the strike, prohibits further strikes in the industry. A policy which allows the use of the strike weapon only once is, in effect, equivalent to allowing no use at all.

Or, the retention of the right to strike can become a right which is never exercised, a nominal right which withers away from disuse.

It is the last course for which the government is hoping and responsible trade union leaders are striving. If these leaders are successful and the right to strike becomes a non-operating right, it is apparent that the traditional function of trade unions—the exertion of economic pressure upon employers—will become obsolete.

What then will be the new function of the trade union? At its weakest it could become a mere advisory body whose opinions are accorded little weight. This would be equivalent to a return to the era before effective union organization—with one difference: the management of the industry is delegated not to those who have the interests of a relatively few owners or their own self-perpetuation or financial aggrandizement at heart, but to those who are to serve the public interest and who are to be devoted to the welfare of the workers. While this is a consummation devoutly to be wish'd, it is doubtful if British workers and unions will be satisfied with the passive role of relying upon the uncertainties of individual nobility and political fortunes to assure their ends.

At the other end, the union could become one of the strong partners in the cooperative management of the industry. This could be accomplished through the present forms of negotiation and consultation; through the introduction of new forms which give the union negotiators more power in final determinations; through the appointment of more union men as managers. Because of the traditional strength of unions and the political nature of the composition of the government, it is to be anticipated that the new trade union will be a powerful, although not necessarily dominant, force in the management of these industries, no matter what form the actual transition may take.

It is submitted, however, that this control by unions will come about only if their responsibilities to the public are fully realized; that a discussion of union rights and privileges in the future is a mere academic exercise if unions do not measure up to the confidence which has been

109. BEVERIDGE, FULL EMPLOYMENT IN A FREE SOCIETY 198-201 (1945).
110. Address by Charles Dukes, President of Trades Union Congress, at 78th Annual Session of the Congress (1946), quoted in 55 INT'L LAB. REV. 152 (1947). See also address by George Woodcock, Assistant General Secretary of Trades Union Congress, 5 LAB. AND IND. IN BRITAIN 123 (1947).
111. See the remarks of the delegation of Iron and Steel Trades Confederation on their return from a visit to Soviet Russia: "The functions and activities of the trade union may differ to some extent in a Socialist state from what they are in a capitalist state, but never, in our view, to the point that seems to be accepted in the Soviet trade unions—that the workers' principal interests can safely be left to a workers' government which must necessarily and at all times have the interests of the workers at heart. Our faith in the perfection of human beings, and particularly Governments, has not yet reached that dizzy height." 149 THE ECONOMIST 748 (1945).
placed in them by the existing legislation. The essence of the management of a nationalized industry is the public interest. If this consideration is minimized or overlooked by unions, the industrial relations aspect of nationalization must necessarily revert to the pre-existing conflicts between workers and management. If the outcome of these conflicts is lack of production, or high prices, the consequences of public disappointment with the program conceivably could take the form of return of the industries to private ownership, or the prohibition of traditional unionism and worker freedom. Thus, the role of the trade union in the nationalized industry will be determined substantially by the attitudes and activities of the unions themselves.

**Summary**

The most significant characteristic of the labor relations provisions of the nationalization legislation of Great Britain is the attempted retention of the philosophy of individual freedom. Emphasis is placed on improvement of existing collective bargaining procedures, but the cornerstone of the program is free collective bargaining.

The management of the industries is delegated to boards of experts whose trade union membership is optional with the appointing minister. Although labor is represented on the boards and on various consultative committees, it is quite clear that the legislation has not adopted the theory of worker control of industry.

The determination of terms and conditions of employment has been left to collective bargaining machinery to be established by the boards and unions selected by the boards, this latter requirement placing the problem of proper union jurisdiction upon the boards. Therefore, collective bargaining in Great Britain has been on an industry-wide basis, and because of the language of the Act of 1871, the agreements have been legally unenforceable and the good faith of the parties has been the primary sanction for enforcement. Nationalization and the fusion of associations of employers into one employer, by strict statutory construction, may make these agreements legally enforceable.

During the present emergency period labor and management have given up their ultimate sanctions, the strike and the lockout. Compulsory arbitration has been adopted when the normal collective bargaining procedures break down. During this period while compulsory arbitration is in effect, the index of success of the industrial relations programs of the nationalized industries will be the frequency of the unofficial strike. To date nationalization appears to have had little effect on the incidence or severity of this type of work stoppage.

The present no-strike, no-lockout order is to be only temporary and upon its expiration it is planned to restore these sanctions to private and nationalized industry alike. This legislative intent, to retain in a socialistic framework the weapons employed in a private-enterprise framework, raises the basic problem of the socialists: the retention of individual freedom in a planned economy. Presumably the strike will be an anachronism, but the formal renunciation or prohibition of the weapon will require a reorientation of the average union member and a realization by trade union leaders of their new responsibilities.

Assuming that the program of Great Britain, nationalization, is still not acceptable to the majority of Americans, in at least one respect British experience will present an object lesson: it is not possible for labor to
enter the political field without assuming responsibilities for its objectives. The assumption of these responsibilities will entail the relinquishing of hard-won labor weapons. The problem which American labor will have to solve, and for which British experience will provide precedents, is the balancing of a political program with the retention of traditional trade union practices.

M. L. S.