[HOUSE OF LORDS.]

H. L. (E.)* 1925 April 3.

ROBERTS . . . . . APPELLANT;

AND

HOPWOOD AND OTHERS . . . . . RESPONDENTS.

Local Government—Borough, District and Town Councils—Excessive Payments to Employees—Disallowance and Surcharge by District Auditor—Discretion of Council—Duty of Auditor—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 62—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 247, *sub-s.* 7.

By s. 62 of the Metropolis Management Act, 1855, a metropolitan borough council, as the successors of the Board of Works, "shall . . . . employ . . . . such . . . . servants as may be necessary, and may allow to such . . . . servants . . . . such . . . . wages as (the Council) may think fit."

By s. 247, sub-s. 7, of the Public Health Act, 1875, as applied to the accounts of metropolitan borough councils, the district auditor "shall disallow any item of account contrary to law, and surcharge the same on the person making or authorising the making of the illegal payment."

In the year ending March 31, 1922, a metropolitan borough council, as in the previous year, paid to its lowest grade of workers, whether men or women, a minimum wage of 4*l.* per week, notwithstanding that the cost of living had fallen during that year from 176 per cent. to 82 per cent. above the pre-war level, the borough council being of opinion that 4*l.* was the least wage which a local authority ought as a model employer to pay for adult labour. The district auditor found that these payments were not wages but gratuities to the employees, and were contrary to law, and, starting with the pre-war rate of wages paid by the council, added on a bonus proportionate to the increase in the cost of living and a further 1*l.* by way of margin, and disallowed the excess over that sum and surcharged the same upon the councillors responsible for the payments:—

Held (1.), that the discretion conferred upon the council by the statute must be exercised reasonably, and that the fixing by the council of an arbitrary sum for wages without regard to existing labour conditions was not an exercise of that discretion; (2.) that an expenditure upon a lawful object might be so excessive as to be unlawful, and that to the extent by which the amount exceeded legality the auditor was bound to disallow it and surcharge the excess upon the persons responsible.

Held, therefore, that the disallowance and surcharge were rightly made.

Decision of the Court of Appeal [1924] 2 K. B. 695 reversed.

APPEAL from an order of the Court of Appeal (1) reversing an order of the Divisional Court. (2)

* *Present:* LORD BUCKMASTER, LORD ATKINSON, LORD SUMNER, LORD WRENBURY, and LORD CARSON.

(1) [1924] 2 K. B. 695. (2) [1924] 1 K. B. 514.

The question to be determined was whether the appellant as district auditor was entitled to disallow and surcharge upon the respondents, aldermen and councillors of the metropolitan borough of Poplar, a sum of 5000*l.* in respect of certain payments made by the council to their workpeople as being contrary to law.

The facts are fully stated in the report before the Court of Appeal and sufficiently appear from the opinion of Lord Buckmaster.

The respondents having obtained a rule nisi for a writ of certiorari addressed to the appellant with a view to quashing the appellant's certificate of disallowance and surcharge, the Divisional Court (Lord Hewart C.J., Sankey and Salter J.J.) discharged the rule, but their decision was reversed by the Court of Appeal, by a majority (Scrutton and Atkin L.JJ.; Bankes L.J. dissenting), and the rule was made absolute.

1925. Feb. 24, 27; March 2. *Macmillan K.C.* and *Sir John Lithiby* for the appellant. The question whether the disallowance and surcharge complained of by the respondents have been rightly made turns, first, upon the powers of the district auditor in auditing the borough accounts and, secondly, upon the powers of the council in regard to the remuneration of their servants. The powers of the auditor are derived from sub-s. 7 of s. 247 of the Public Health Act, 1875, as applied to the accounts of metropolitan borough councils, which imposes upon the district auditor a duty to "disallow every item of account contrary to law and surcharge the same" on the persons responsible for "the illegal payment"; and the powers of the council from s. 62 of the Metropolis Management Act, 1855, as applied to metropolitan borough councils, which empowers the council to allow such wages to their servants as they "may think fit." Under sub-s. 7 of s. 247 of the Public Health Act, 1875, the district auditor has to consider every item of account and to determine the legality not merely of the object but of the quantum. To the extent to which any item of expenditure upon a legitimate object exceeds what is legitimate he must disallow

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that item. It is objected that in the absence of mala fides —and mala fides is not suggested—the discretion of the council cannot be called in question by the auditor. But a district auditor has a larger duty than, say, the auditor of a limited company, whose function is to see that the items appearing in the balance sheet correspond with the vouchers. It is part of his duty to protect the borough funds against improper expenditure and to determine whether any particular item of expenditure is unreasonable in the sense of being "contrary to law." "Contrary to law" includes the whole ambit of proper administration. Then, as to the discretion conferred upon the council by s. 62 of the Metropolitan Management Act, 1855: Is that an absolute discretion? The view which has prevailed is that where a discretion is confided to a public body having public duties to discharge then, if something is done which is unreasonable, that is not a proper exercise of the discretion. All the circumstances relevant to the exercise of the discretion must be taken into consideration. The discretion conferred upon the council is not an uncontrolled discretion, but must be exercised reasonably. The standard of reason is implicit in all the powers entrusted to a public body of this kind. It is objected that the auditor has no power to deal with extravagance or exorbitancy, and this argument is based upon the history of the poor law legislation. By the Poor Rate Act, 1810, justices in petty sessions were authorized to examine into the matter of the poor law accounts and to disallow all such charges as they should deem to be unfounded and to reduce such as they should deem to be exorbitant. By the Poor Law Amendment Act, 1834, a different system was adopted, but it was held that the power of the justices under the earlier Act had not been superseded: *Reg.* v. *Earl of Dartmouth.* (1) Then by the Poor Law Amendment Act, 1844, extended powers were given to auditors and the audit was made for the first time an effective engine for the examination of the poor law accounts and for the protection of the ratepayers; but the

(1) (1844) 5 Q. B. 878.

word "exorbitancy" disappears, and the argument is that the language of the Act of 1844 is narrower than that of the Act of 1810. That is not a reasonable or probable construction to put upon an Act which clothed the poor law auditor with powers which he had never before possessed, and there is no ground for the objection. The leading authority on this branch of the law is the decision of Palles C.B. upon the corresponding Irish statutes in *Rex (King-Kerr)* v. *Newell.* (1) In the Irish code, as in the English, the word "exorbitancy" had dropped out, and the learned judge disposes of the argument founded on its omission by saying that the word was omitted because it was tautologous and redundant. He dealt with the payments in question in that case under the head of illegality and treated as illegal any sum which was unreasonable. That case decides first that the auditor may disallow a sum in part, and secondly that any excess above what is reasonable is illegal. [Counsel also referred to *Rex* v. *Roberts* (2) and *Reg. (Inglis)* v. *Drury.* (3)] By s. 4 of the London Government Act, 1899, the new metropolitan councils have had transferred to them the powers of their predecessors under various Acts, which the latter had adopted, such for example as the Baths and Washhouses Acts of 1846 and 1878 and the Burial Act of 1852, in each of which the power to pay salaries and wages is expressed in the following words: "may appoint reasonable salaries, wages and allowances." Is it to be said that the Council are to have an uncontrolled discretion as to the payment of wages to their employees in these departments? The result of the respondents' contention must lead to confusion and inconsistency. The auditor is not objecting to the payment of high wages as such, but he maintains that the payments made are beyond any conceivable reasonable standard and are therefore contrary to law. The question is one of degree, which is always embarrassing, but these wages may be fairly described as so clearly excessive that the matter has passed out of the

(1) [1903] 2 I. R. 335. (2) [1908] 1 K. B. 407, 418.
(3) [1898] 2 I. R. 527n.

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region of debatable ground. The auditor is not saying that any particular standard constitutes an absolute standard to which the authority must conform, and it is for that reason that he has superadded to the cost of living standard and the trades union awards standard 1*l.* per week to provide for possible variations in local labour conditions, and having allowed that wide margin he has treated the excess as not being an exercise of the discretion vested in the Council. In fact he treats these payments as gratuities. Though the various standards which have been referred to are not binding on the council they are nevertheless useful as affording the best evidence of what is a reasonable remuneration. Where a discretion is reposed in a public body the ambit of discretion must be regulated to some extent by the subject matter: *Brown* v. *Dean* (1); *Hick* v. *Raymond & Reid* (2); *Sharp* v. *Wakefield* (3); *Reg.* v. *St. Pancras Vestry* (4); *Kruse* v. *Johnson.* (5) The defence is that the council should be a model employer, and that that justifies them in paying an arbitrary sum to their adult employees without regard to existing labour conditions. That is not an exercise of their statutory power, which in fact amounts to no more than if nothing had been said about wages at all. The council may employ servants, and must pay them according to some reasonable standard, though they are at liberty to take local conditions into account.

Sir John Simon K.C. and *Croom-Johnson* (with them *Arthur Henderson*) for the respondents.

The test of the auditor's jurisdiction in sub-s. 7 of s. 247 is whether the item is contrary to law and not whether the auditor regards it as unreasonable or extravagant. The language is not apt to suggest that the auditor is to tax any particular item, as in the case of a solicitor's bill. Contrast the language of s. 247, sub-s. 7, and s. 249. It is conceded that quantum may be conceivably a subject for the auditor's consideration, but only where the item is so

(1) [1910] A. C. 373, 375.
(2) [1893] A. C. 22, 29.
(3) [1891] A. C. 173, 179.
(4) (1890) 24 Q. B. D. 371, 375-6.
(5) [1898] 2 Q. B. 91, 99.

large that no local authority could in the exercise of its discretion possibly have arrived at any such figure. Adding 20*s.* to the sum allowed does not alter the question. No surcharge can stand unless the payment is illegal. By s. 62 of the Metropolis Management Act, 1855, the borough council may pay such wages as it may think fit. The test, therefore, is not the test of a reasonable judgment exercised by a reasonable auditor or a reasonable Court. Exorbitance or extravagance, in the sense of paying beyond what a reasonable man thinks necessary or inevitable, is not the test. The audit confers no power to order an increase of wages in the case of a policy of cheeseparing or undue economy. The auditor has nothing to do with the fact that a local authority takes what may be called either an unduly narrow view or an unduly generous view. Until the point is reached that the payment is an illegal payment there is no opportunity for the district auditor to intervene. The normal case of illegality is where the object to which the money is being devoted is illegal. Another case is where, the object being legal, the necessary formalities have not been observed. For example, under the Local Government Act, if the local authority makes a contract for more than 50*l.*, the contract must be made under seal. But in this case, if the disallowance is to be upheld it must be because the payment is so vast that on a fair examination any tribunal must say that this is not a payment of wages at all, but is a pure gift. This surcharge can only be justified, if at all, on the ground that the outlay is so entirely out of proportion to the necessities of the case that some part of it is illegal. If these payments can be disallowed it would seem to follow that, the borough council having made a contract to employ a workman at that rate, the contract could not be enforced. On the facts, this House ought not to arrive at the conclusion that these payments were so gross that no local authority, whatever its policy might be, could make them if it was content to act within its statutory discretion. To the local authority is entrusted a very wide ambit of discretion, and it is for the authority

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itself to determine the amount of the wages to be paid to its employees. It is not a true proposition to say that the local authority is bound not to pay more than the amount for which the labour can be obtained in the market. The local authority has always paid a minimum wage which is fair and reasonable, and does not intend to fluctuate from day to day by reason of external circumstances.

Macmillan K.C. replied.

The House took time for consideration.

1925. April 3. LORD BUCKMASTER. My Lords, the appellant in this case is the district auditor originally appointed by the Local Government Board (now represented by the Minister of Health) for the purpose of auditing year by year the accounts of the metropolitan borough councils. In the performance of this duty he has surcharged the respondents, who are certain aldermen and councillors of the Poplar Borough Council, with the sum of 5000*l.* for the year between April 1, 1921, and April 1, 1922. The question on this Appeal is whether that surcharge has been lawfully made.

Before considering the facts it would be well to examine the powers with which the district auditor is invested. These are to be found in s. 247 of the Public Health Act of 1875, a section rendered applicable to the accounts of the metropolitan borough councils by s. 14 of the London Government Act of 1899 and s. 71 of the Local Government Act of 1888. Sub-sect. 7 of s. 247 contains the directions imposing upon the auditor the duty of making disallowances and surcharges. It is in the following words: "Any auditor acting in pursuance of this section shall disallow every item of account contrary to law, and surcharge the same on the person making or authorising the making of the illegal payment, and shall charge against any person accounting the amount of any deficiency or loss incurred by the negligence or misconduct of that person, or of any sum which ought to have been but is not brought into account by that person, and shall in every such case certify the amount due from such person, and on

application by any party aggrieved shall state in writing the reasons for his decision in respect of such disallowance or surcharge, and also of any allowance which he may have made." It is to be observed that this sub-section consists of two branches; the first deals with the disallowance of every item contrary to law and surcharging the sum as therein provided, and the second with the deficiency or loss incurred by negligence or misconduct which is to be charged against the person who is accounting. It is suggested that this latter provision is really applicable to the officers or assistants of any local authority whose accounts, by s 250 of the Public Health Act, are also to be audited by the auditors. It is quite possible that this is the true explanation of the different branches of the sub-section, but its determination is unnecessary in the present case, because it is not alleged that there has been negligence or misconduct in any person. It is said that the amounts disallowed are contrary to law, and that the making of them constituted the making of an illegal payment, so that it is the first branch of the section alone with which this Appeal is concerned. As it was at one time contended that the power to disallow an item by the auditor did not include the power of disallowing part of the expenditure in respect of any heading of expense, but merely a striking out of the item if, from the nature of the object, it was outside the powers of the council and consequently illegal, it is well to state that in my opinion there is no foundation for such an argument. An item in an account is not merely a heading; it includes both the object and the payment, and, while the object may be lawful, the expenditure in respect of it may be so excessive as to be unlawful, and to the extent by which the amount exceeds legality it is the duty of the district auditor to disallow it and surcharge the sum on the person responsible for its being made. It is that which the district auditor contends he has done in the present case. The power of revising the decision of the auditor is to be found in sub-s. 8, which enables a person aggrieved to apply for a writ of certiorari to remove the disallowance to the King's Bench Division, where the whole matter is subject to revision. This

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is the course that has been adopted. An order nisi was obtained on June 26, 1923, calling upon the district auditor to show cause why a writ should not issue against him, and upon the rule being heard the Divisional Court, on November 21, 1923, dismissed the order calling upon the district auditor to show cause, and this decision was reversed by the Court of Appeal, Bankes L.J. dissenting from the other members of the Court.

The relevant facts which induced the district auditor to make the surcharges in question are as follows :—

During the years 1920 and 1921 the ordinary rates of wages, whether measured by taking as a standard wages for the same work paid immediately before the war and adding thereto the percentage representing the increased cost of living, or by taking the amounts fixed by the Joint Industrial Councils' award as the proper sum to be added to the pre-war wage, showed violent oscillations. Nor did these two standards always vary together. Towards the end of 1920, when the cost of living was falling, the Joint Industrial Councils' award was at its maximum, but subject to this qualification the two lines did on the whole rise and fall in harmony. The three classes of wages in respect of which the surcharges have been made were women (Grade A), general labourers, and men to whom the trade union scale for masons and paviors applied. So far as the women were concerned they were paid throughout from April 1, 1920, to April 1, 1923, at a level weekly wage of 80*s.*, the pre-war wage being 23*s.* 6*d.*, brought up by considering the added increased cost of living to 54*s.* 6*d.* on April 1, 1921, and descending to 43*s.* on April 1, 1922. The Joint Industrial Councils' award gave for the month of April, 1921, 69*s.* 6*d.*; for May, June and July, 62*s.* 6*d.*; for August, September and October 57*s.* 6*d.*, from which level it descended by steps to 51*s.* 6*d.* on April 1, 1922, and continued to descend to April, 1923.

I do not propose to examine in similar detail the wages for the general labourers, the masons and paviors, for this reason : that if those wages stood alone, the amount of the surcharge in respect of them would not be very great and would be

almost wholly applicable to the last two months. The district auditor, in determining the line above which he regards the payments as illegal, has taken the pre-war rate, increased it by the cost of living and added to that a sum of 20*s.* a week by way of margin. It is, of course, easy to find fault with any definite standard so ascertained; why it should not be a little lower or a little higher, and by what means it was fixed at the exact sum assessed can always give rise to controversy, but regarding, as I do, the duty of the auditor to declare unjustifiable payments to be illegal and to surcharge the excess, it follows that some line must be drawn, as the extent of the illegality can only be measured by taking it at above a particular standard. If the powers of the district council are limited to the payment of fair and even full wages, measured not actually in but by reference to the terms of standard rates fixed either by trade unions or by joint councils, there could, I think, be little objection to what the auditor has done, but the real difficulty in the present case lies in determining what is the limit of discretionary power given to the district council with regard to payment of wages. Now those powers are to be found in s. 62 of the Metropolis Management Act of 1855, which runs as follows: "The Metropolitan Board of Works, and (subject to the provisions herein contained) the board of works for every district under this Act, and the vestry of every parish mentioned in Schedule (A.) to this Act, shall respectively appoint or employ, or continue for the purposes of this Act, and may remove at pleasure, such clerks, treasurers, and surveyors, and such other officers and servants as may be necessary, and may allow to such clerks, treasurers, surveyors, officers, and servants respectively such salaries and wages as the board or vestry may think fit."

The power there conferred is to appoint for the purposes of the Act such servants as may be necessary and to pay these servants such wages as the council may think fit. It is to be noticed that there is not in this section a qualification often found in other sections conferring upon local authorities power to pay wages, such as to pay reasonable wages, which

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is found in the Baths and Washhouses Act of 1846, and again in the Burials Act of 1852. I mention these two Acts for this reason, that the powers that they confer are capable of being adopted by any borough council, though they are not, until adopted, expressly conferred by the Local Government Act of 1899. The confusion that these different definitions of the powers creates is made obvious when it is considered that were the Acts once adopted, servants might be appointed to perform in respect of the powers thereby conferred services identical with those performed under the powers that are expressly conferred by the Act of 1899 itself, and unless the word "reasonable" be introduced into the operative s. 62 or struck out from the sections of the adopted Acts two different standards of payment would apply to the same work. It is impossible to accept a conclusion so fantastic, and it follows that either the two phrases mean the same thing or that one must give way to the other.

In my opinion the right way to construe it is to take s. 62 as the dominant section and to assume that if the other Acts are adopted under the Act of 1899, the general powers of s. 62 apply, and servants appointed to discharge these new duties are really appointed for the purpose of the Act within the meaning of s. 62, and that consequently the general rule applicable is that the council shall pay such wages as they may think fit, the discretion as to the reasonable nature of the wages being with them. The discretion thus imposed is a very wide one, and I agree with the principle enunciated by Lord Russell in the case of *Kruse* v *Johnson* (1), that when such a discretion is conferred upon a local authority the Court ought to show great reluctance before they attempt to determine how, in their opinion, the discretion ought to be exercised.

Turning to what the borough council have done, the reason for their action is to be found in the affidavit sworn by Mr. Scurr, Mr. Key, Mr. Lansbury and Mr. Sumner. In para. 6 of that affidavit they make the following statement: "The council and its predecessors the district board of works have

(1) [1898] 2 Q. B. 91, 99.

always paid such a minimum wage to its employees as they have believed to be fair and reasonable without being bound by any particular external method of fixing wages, whether ascertainable by Trade Union rate, cost of living, payments by other local or national authorities or otherwise." And if the matter ended there it would be my opinion that a decision so reached could not be impeached until it were shown that it was not bona fide, and absence of bona fides is not alleged in the present proceedings. Para. 9, however, of the same affidavit puts the matter in a different form. It is there said: "9. . . . . The Council did not and does not take the view that wages paid should be exclusively related to the cost of living. They have from time to time carefully considered the question of the wages and are of the opinion, as a matter of policy, that a public authority should be a model employer and that a minimum rate of 4*l.* is the least wage which ought to be paid to an adult having regard to the efficiency of their workpeople, the duty of a public authority both to the ratepayers and to its employees, the purchasing power of the wages and other considerations which are relevant to their decisions as to wages."

Now it appears that on August 31, 1921, a resolution was passed by the borough council to the effect that no reduction of wage or bonus should be made during the ensuing four months, and this was acted upon for the following twelve months. It was, I think, well within their power to fix wages for a reasonable time in advance, and there are cogent reasons why this should be done, but that decision should be made in relation to existing facts, which they appear to have ignored. In August, 1921, the cost of living had been continuously falling since November of the previous year, and it continued to fall, so that it is difficult to understand how, if the cost of living was taken into account in fixing the wages for adult workers at a minimum basis of 4*l.*, the sharp decline in this important factor should have been wholly disregarded by the borough council. But the affidavit contains another statement, which I think is most serious for the council's case. It states that 4*l.* a week was to be the minimum wage for

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adult labour, that is without the least regard to what that labour might be. It standardised men and women not according to the duties they performed, but according to the fact that they were adults. It is this that leads me to think that their action cannot be supported, and that in fact they have not determined the payment as wages, for they have eliminated the consideration both of the work to be done and of the purchasing power of the sums paid, which they themselves appear to regard as a relevant though not the dominant factor. Had they stated that they determined as a borough council to pay the same wage for the same work without regard to the sex or condition of the person who performed it, I should have found it difficult to say that that was not a proper exercise of their discretion. It was indeed argued that that is what they did, but I find it impossible to extract that from the statement contained in the affidavit. It appears to me, for the reasons I have given, that they cannot have brought into account the considerations which they say influenced them, and that they did not base their decision upon the ground that the reward for work is the value of the work reasonably and even generously measured, but that they took an arbitrary principle and fixed an arbitrary sum, which was not a real exercise of the discretion imposed upon them by the statute.

It is for these reasons that I think the Appeal should succeed.

LORD ATKINSON. My Lords, the questions to be determined in this Appeal are first, whether certain payments of sums of money, purporting to be payments of wages, made by the council of the metropolitan borough of Poplar (called for convenience "the council") to its workpeople during the year ending March 31, 1922, were, upon the evidence in the case, "contrary to law" within the meaning of the seventh sub-section of s. 247 of the Public Health Act, 1875, and secondly, whether the appellant, the district auditor, whose district includes the metropolitan borough of Poplar, was entitled to disallow and surcharge upon the respondents, aldermen and councillors of the council (hereinafter called

"the respondents"), the sum of 5000*l.* in respect of these payments.

The decision of these questions involves the consideration of first, whether it is the duty of a district auditor to consider the reasonableness of the charges and payments appearing in the account of local authorities, and also whether he has power to disallow unreasonable charges and payments, or whether his duty in dealing with any payment purporting ex facie to have been made for an authorized purpose is confined to merely vouching the payment of the sum appearing to have been expended, without questioning the reasonableness of the amount; and second, the question as to the scope of the discretion vested by Parliament in the metropolitan borough councils in connection with the payment of salaries and wages.

One must start upon these inquiries with a clear appreciation of the fact that in this case the servants to whom these challenged payments were made were of the lowest grade of labour. That is not disputed.

In the year 1914—i.e., before the war—the auditor states in his affidavit, that there was not in that year any striking variation in the scale of wages adopted by the councils of the several metropolitan boroughs for the several grades of their employees; that the scales of wages paid in 1914 by this council were not the highest, but compared with those of other councils were somewhat above the average; that the minimum wage for the lowest grade of labour in Poplar borough in that year was 30*s.* weekly for men and 22*s.* 6*d.* weekly for women. These facts are not disputed. The answer the respondents give to them will be found in para. 8 of their case. It runs thus: "For a long time prior to the war the Council had maintained a minimum wages limit of 30*s.* per week. Payments to these amounts were, prior to 1914, treated at the audit as involving a proper exercise by the Council of the discretion vested in them." The vanity of appearing as model employers of labour had not then, apparently, taken possession of the council, nor had the council become such ardent feminists as to bring

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about, at the expense of the ratepayers whose money they administered, sex equality in the labour market. The auditor states in his affidavit that various increases were made by the council in the years between 1914 and 1920, that on April 30, 1920, the minimum wage for the lowest grade of labour was 64*s*. weekly for men and 49*s*. 9*d*. weekly for women. And, according to the statements contained in this same paragraph, a resolution was then passed fixing the minimum rate of wages at 80*s*. per week for both men and women, or an increase of 16*s*. per week in the case of men and 30*s*. 3*d*. in that of women. Thus suddenly did female labour of the lowest grade appear to have increased in value. The auditor, in the sixth paragraph of his affidavit, states that he uses the words "cost of living" as meaning the cost of living determined by the Ministry of Labour and published weekly in the Labour Gazette of that Ministry; that in the year 1920–21 this cost of living had risen to 176 per cent. beyond what it was in the year 1914, and that though in the year 1921–22 the cost of living had decreased to only 82 per cent. over what it was in 1914, the minimum rate of wages for men and women at 80*s*. remained unchanged.

It is but right and natural that the rate of wages should rise if the cost of living rises, because this tends directly to keep the purchasing power of the labourer's wage at what it was before the cost of living increased. The principle apparently adopted by the council, however, is that wages should rise if the cost of living rises, but should never go down if the cost of living goes down.

As I understood Sir John Simon, he did not contend ultimately that the council could properly or legally fix the salaries or wages of their employees at an excessively high rate. He apparently thought that this would be an unjust and unlawful exercise of their discretion, and from the last few lines of the judgment of Scrutton L.J. he was apparently of the same opinion. Moreover, Scrutton L.J. thought that the sums fixed by the council in this case while near the line of excess did not actually reach it. In order, however, to determine in such a case as this what is the line of excess,

one must first determine what is the line of moderation in such matters, the datum line—as it may be styled—beyond which excess begins. Scrutton L.J. apparently took the Whitley Council or cost of living rates as this datum line. That is the meaning, it would appear to me, of the following passage in his judgment running thus (1): "I then ask myself whether the wages paid in the year April, 1921—April, 1922, are so far in excess of Whitley Council or cost of living rates that I can find that there is an excess over any reasonable amount that could be fixed by the discretion of a representative assembly."

I entirely concur with the conclusion expressed by Bankes L.J. in the following passage of his able and well-reasoned judgment. After referring to the speech of Mr. George Lansbury and the affidavits of the Mayor of Poplar and others pled in support of the rule, he said (2): "The arguments there set out are of such a general and vague character that the question which the Court has to decide cannot be disposed of without a closer investigation of the facts. In the absence of precise and detailed information as to the grounds on which the Council acted their action must, in my opinion, be judged by its results. The results according to the finding of the district auditor are that the payments made in many instances were far in excess of those necessary to obtain the services required and to maintain a high standard of efficiency, and were thus in reality gifts to their employees in addition to remuneration for their services. If this finding is justified upon the evidence it establishes, in my opinion, the making of payments contrary to law. It must be borne in mind what the payments are for. They are payments for wages; that is to say, the price which the employer pays the employee for his or her services. Of recent years the tendency has everywhere been to standardize wages by either fixing the actual rate to be paid or by fixing minimum rates. In some cases the Legislature has stepped in to bring about this result. In most cases it has been due to the action of organized labour or associations consisting of employers and

(1) [1924] 2 K. B. 721. (2) [1924] 2 K. B. 711.

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employed. The result has been to create in relation to labour what, in relation to commodities, is recognized as a market price."

He then proceeds to show that the market price may vary according to local conditions, but that for any well-recognized form of labour it is ascertainable and can be ascertained. But the council, according to the affidavit of Mr. John Scurr, disregarded all external matters such as these as aids to arrive at a conclusion as to what was the so-called market wage for which the services required by the council could be procured, and what excess beyond that, if any, was reasonable.

In the sixth paragraph of Mr. Scurr's affidavit he states that "the Council have always paid such a minimum wage as they have believed to be fair and reasonable without being bound by any particular external method of fixing wages, whether by trade union rates, cost of living, payments of other local or national authorities or otherwise." Nobody has contended that the council should be bound by any of these things, but it is only what justice and common sense demand that, when dealing with funds contributed by the whole body of the ratepayers, they should take each and every one of these enumerated things into consideration in order to help them to determine what was a fair, just and reasonable wage to pay their employees for the services the latter rendered. The council would, in my view, fail in their duty if, in administering funds which did not belong to their members alone, they put aside all these aids to the ascertainment of what was just and reasonable remuneration to give for the services rendered to them, and allowed themselves to be guided in preference by some eccentric principles of socialistic philanthropy, or by a feminist ambition to secure the equality of the sexes in the matter of wages in the world of labour.

In para. 9 of Mr. Scurr's affidavit he is good enough to disclose what the council did take into consideration in fixing the minimum rate of wages to be paid to their employees. He said that they had from time to time considered the question of wages, and were of opinion that a public authority

should be a model employer, and that a minimum rate of 4*l.* per week (i.e., 208*l.* per annum) is the least wage which ought to be paid to an adult, having regard to the efficiency of their workpeople; the duty of a public authority both to the ratepayers and to its employees; the purchasing power of the wages, and other considerations which are relevant to their decision as to wages. He is not good enough to mention what are those other considerations. There is no provision relative to the nature of the work to be done by the women, or their fitness for it. The minimum wage was to be the same as that of men, however different the nature of the work.

This system of procedure might possibly be admirably philanthropic, if the funds of the council at the time they were thus administered belonged to the existing members of that body. These members would then be generous at their own expense. The evidence does not disclose what sum the rates of the district amounted to, or what portion of that gross sum was paid by the persons who were members of the council since, say, the month of March, 1920; but it may safely be assumed, I should think, that these members did not, at any time, pay the whole of the rates then collected. The council then, at all times since the year 1914, may safely be assumed to have been dealing with funds a portion of which—possibly the larger portion of which—was contributed by ratepayers who were not, and are not members of the council. The indulgence of philanthropic enthusiasm at the expense of persons other than the philanthropists is an entirely different thing from the indulgence of it at the expense of the philanthropists themselves. The former wears quite a different aspect from the latter, and may bear a different legal as well as moral character. A body charged with the administration for definite purposes of funds contributed in whole or in part by persons other than the members of that body, owes, in my view, a duty to those latter persons to conduct that administration in a fairly businesslike manner with reasonable care, skill and caution, and with a due and alert regard to the interest of those contributors who are

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not members of the body. Towards these latter persons the body stands somewhat in the position of trustees or managers of the property of others.

This duty is, I think, a legal duty as well as a moral one, and acts done in flagrant violation of it should, in my view, be properly held to have been done "contrary to law" within the meaning of sub-s. 7 of s. 247 of the Public Health Act of 1875. To make an act contrary to law it is not necessary that it should be prohibited by some legal enactment such as a statute or a by-law or the like. Many things are contrary to law though not prohibited by any statute, such for instance as the purchase by a trustee from his cestui que trust of part of the trust property, the purchase by an agent from his principal of the latter's property without full disclosure of who the purchaser really is, and what are the particulars of the purchase. The torts which are at law covered by the legal maxim "Sic utere tuo ut alienum non laedas," are in many instances not prohibited by statutes, yet they are illegal and actionable at law.

At the meeting on May 31, 1923, at which a large number of ratepayers attended and objected to the allowance of such large sums for wages, it was apparently put forward that the council were only responsible to their constituents; that the scale of wages had been before the electors at the election in the previous November, and also at two recent bye-elections, and had been approved of by them; that the council should do their duty towards these electors, and not their duty towards the large ratepayers who lived outside the district and were not "in" (i.e., parties to, I presume) this matter at all. A gentleman named L. W. Key, one of the applicants in the present suit, appears from the auditor's affidavit to have put the council's case pithily and plainly in the following few words: "We do not say we have no discretion, but we say a mandate from the electorate was not to be despised." These observations do not appear to have been disapproved of by any of the members of the council present. I assume, of course, that the gentleman expressed honestly what he felt and believed. It was strongly pressed in argument that

the auditor believed the council acted bona fide; but what in this connection do the words "bona fide" mean? Do they mean, as apparently this gentleman thought, that no matter how excessive or illegal their scale of wages might be, they were bound to put it into force because their constituents gave them a mandate so to do, or again, do the words mean that as the payment of wages was a subject with which they had legally power to deal, the amount of their funds which they devoted to that purpose was their own concern which no auditor had jurisdiction to revise, or in reference to which he could surcharge anything? The whole system of audit to which the Legislature has subjected every municipal corporation or council is a most emphatic protest against such opinions as these. The words of sub-s. 7 of s. 247 of the Public Health Act of 1875, rationally construed, show that the auditor, in order to perform his task, has necessarily jurisdiction to inquire into the legality of every payment, and to disallow and surcharge payments of money on every item of account. He may disallow it if it be excessive, and therefore illegal contrary to law, or if the excess be severable from the remainder of the payment he may disallow and surcharge this excess and allow the remainder of the payment. All these points have been decided by that able and distinguished judge Palles C.B. in *Rex.* (*King-Kerr*) v. *Newell* (1), and see *Reg.* (*Inglis*) v. *Drury* (2), approved of by him in *Reg.* (*King-Kerr*) v. *Newell*: see also *Reg.* (*Duckett*) v. *Calvert* (3); and by O'Brien C.J. in his judgment in *Reg.* (*Bridgeman*) v. *Drury* (4). If the business of the auditor was merely to vouch the payment of the money paid in discharge of items ex facie legal, the audit would afford no protection whatever against the squandering of public funds.

The London Government Act of 1899, by sub-s. 1 of its fourth section, transfers to the borough councils all the powers and duties theretofore belonging to the elective vestries and district boards situate within the districts of the newly created councils. It is under this provision that s. 62 of the Metropolis

(1) [1903] 2 I. R. 335.
(2) [1898] 2 I. R. 527n.
(3) [1898] 2 I. R. 511, 525.
(4) [1894] 2 I. R. 489.

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Management Act of 1855 becomes applicable to metropolitan district councils. This section enacts that the boards of works for every district under the Act, and the vestry of every parish mentioned in Schedule A attached to the Act, are empowered to appoint or employ or continue for the purposes of the Act, or remove at pleasure such clerks, treasurers or surveyors or other officers and servants as may be necessary, and may allow to such clerks, treasurers, surveyors and such other officers and servants respectively such salaries and wages as the board or vestry may think fit. Upon these words "think fit" much argument has turned. By s. 247 of the same Act of 1855, all the Acts of Parliament in force in any parish or place, so far as they are inconsistent with this Act, are repealed as regards such parish or place notwithstanding any provision of the Act containing, and transferring respectively to vestries of parishes, and transferring to district boards any duties, powers or authorities now vested in vestries, commissioners or other bodies. The section is not very clearly worded, but I assume it was intended by it to delete, and that it did in effect delete, from the first five of the statutes mentioned on p. 13 of the appellant's case, the controlling word "reasonable" wherever it occurs in the sections providing for the appointment of employees or the grant or payment of salaries, wages or allowances, on the ground that these statutes are earlier in date than the Act of 1855, are inconsistent with this latter Act, and are therefore repealed. The question remains, however, how are the several statutes of a later date than 1855 containing provisions as to the reasonableness of the payment of salaries, wages and allowances similar to those of the repealed statutes to be construed?

Sect. 247 of the Act of 1855 cannot affect them, and unless the words "may think fit" used in s. 62 are equivalent to the words "may think reasonably fitting," the most absurd results must follow. For instance, if one takes the Baths and Washhouses Act of 1846, the paying body must now only pay such salaries as they may think fit, but the authority under the Baths and Washhouses Act of 1878, the duties of

their employees being somewhat similar, must pay to these latter reasonable salaries, wages and allowances.

These statutes later in date than the Act of 1855 are eight in number, and cover almost the entire field of local administration. Three, or at most four, of them dispense with the controlling word "reasonable"—namely, the Education Act, 1870, the Public Health Act, 1875, which apparently substitutes in reference to the remuneration of clerks and treasurers the control of the Local Government Board for the word "reasonable," and the Public Libraries Act, 1892, which by s. 15 provides that the governing body may appoint salaried officers and servants, but does not impose any control or suggest any measure. In such a case I think it would have to be taken in law that the remuneration should be reasonable. And the Local Government Parish Councils Act by its seventeenth section enacts that their clerk, where there is no assistant overseer, is to receive such remuneration as the parish council may think fit.

But as wages are remuneration for services, the words "think fit" must, I think, be construed to mean "as the employer shall think fitting and proper" for the services rendered. It cannot, in my view, mean that the employer, especially an employer dealing with moneys not entirely his own, may pay to his employee wages of any amount he pleases. Still less does it mean that he can pay gratuities or gifts to his employees disguised under the name of wages. The only rational way by which harmony of administration can be introduced into the various departments of Local Government covered by s. 62 of the Act of 1855, and by the several more recent statutes aforesaid, is by holding that in each and every case the payment of all salaries and wages must be "reasonable." I see no difficulty in so construing the words of s. 62.

I entirely concur with Bankes L.J. and think his judgment sound and convincing. I do not think it necessary to comment on those maps or grades which show the rise of women's wages. It is enough to say that their wages, having been raised from 23*s.* 6*d.* to 80*s.* per week, are kept at that figure

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through the years 1921, 1922 and 1923, though the bonus corresponding to the extra cost of living, and the bonus of the Joint Industrial Councils Award after April 1, 1921, rapidly declined.

What is a reasonable wage at any time must depend, of course, on the circumstances which then exist in the labour market. I do not say there must be any cheeseparing or that the datum line, as I have called it, must never be exceeded to any extent, or that employees may not be generously treated. But it does not appear to me that there is any rational proportion between the rates of wages at which the labour of these women is paid and the rates at which they would be reasonably remunerated for their services to the council.

I concur with the auditor in thinking that what has been given to the women as wages is really to a great extent gifts and gratuities disguised as wages, and is therefore illegal. The council have evidently been betrayed into the course they have followed by taking into consideration the several matters mentioned in Mr. Scurr's affidavit, which they ought not properly to have taken into their consideration at all, and consequently did not properly exercise the discretion placed in them, but acted contrary to law : see *Reg.* v. *Adamson* (1) ; *Reg.* v. *St. Pancras Vestry* (2) ; *Rex* v. *Board of Education.* (3)

I think the appeal succeeds.

LORD SUMNER. My Lords, the legal problem, which this appeal raises, is how to adjust the relation between s. 247, and especially its sub-s. 7, of the Public Health Act, 1875, and s. 62 of the Metropolis Management Act, 1855. Under the former section, by sub-s. 1, " the accounts and expenditure " of such a borough council as that of Poplar " shall be audited once in every year by the auditor of accounts relating to the relief of the poor "—who in this case is the appellant—and, by sub-s. 7, the auditor " shall disallow every item of

(1) (1875) 1 Q. B. D. 201. (2) 24 Q. B. D. 371.
(3) [1910] 2 K. B. 165, 179.

account contrary to law, and surcharge the same on the person making or authorising the making of the illegal payment."

Pausing here, I point out that both sub-sections are unqualified and are imperative. The accounts, that is all of them, shall be examined and audited, and the auditor shall disallow every item of account contrary to law. I reject the suggestion that the only accounting party liable to be surcharged is either some borough official or is the borough council itself. Furthermore I put aside as absurd the contention that "item" means only the name of the object of the expenditure and is exclusive of its amount. The effect would be, that the auditor could not examine at all into the prices paid for goods purchased. Extravagant expenditure on permitted objects would receive an absolute charter of immunity, and a statutory body, strictly tied up in one dimension, would be free to move to infinity in another. At this point, therefore, we find an enactment, which binds the council to submit to the auditor's examination all their expenditure and binds him to examine the whole and every part of it in order to test its legality, and to disallow any and every expenditure found to be contrary to law.

Passing now to s. 62 of the Metropolis Management Act, 1855, the respondents found themselves upon its final words, "such salaries and wages as the board or vestry may think fit," and contend that, in effect, they remove the amount of wages paid beyond the scope of effective criticism. The council may pay in good faith what wages they please. It is not said that they can pay, if they please, unreasonable wages, but that, for all purposes, what they please is what is reasonable. Their reason is substituted as the test of reasonableness for that of the auditor or of the Courts of law. All the same the result is that expenditure, which is in fact wholly unreasonable, is on this view not contrary to law, if the council bona fide choose to incur it. This is a pure paradox. Now the section is mandatory; it imposes an obligation to employ, and by implication that involves a power to do what employment involves—namely, to pay

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wages. If this had been left to implication, the wages would have to be reasonable in amount and their amount would be examinable. Do the express words of the power to pay negative this? If they do, it is only as to the rates of wages. All the other terms of the employment must be examinable, such as hours worked and holidays enjoyed on full pay, for these in part measure the quid pro quo, which the servant gives for his wages. Nothing is expressed which can leave these matters absolutely to the council, and, if they are improvidently agreed to, the council may be involved in examinable and disallowable expenditure. With the wages themselves it is said to be a different matter. This may be so. It depends on the sound construction of the section; but, if so, the result would be a legislative oddity.

My Lords, the section imposes a duty coupled with a power. In the case of an actor, who is the creation of the law, it is from some provision of that law, express or implied, statutory or otherwise, that each and every power lawfully used must somehow be derived. In the case of a section conferring a statutory power on one person there is no necessity to read into it an intention to limit a statutory power conferred on some other person, nor is there any need to imply an exemption of the exercise of the power, which the section itself gives, from subsequent review under powers to that effect given by another and, in this case, a later Act. Language may, of course, have been employed of a scope so wide as to lead to this result, but prima facie empowering words have had their due effect and are spent, when the power has been effectually conferred.

My Lords, the two sections of these two separate Acts have to be read together, and I fail to see what difficulty there is in doing so as follows. Sect. 62 of 1855 tells the council that they must employ servants, who will have to receive wages, and it tells them that they need not seek further authority for the amount to be paid, but by virtue of the section itself may pay the wages on their own authority to such amount as they think fit. The effect is that such payments will not be ultra vires. The employee may receive

them without being under any liability to refund, if their amount should afterwards be challenged, and the council's treasurer may pay on the council's instructions without fear of being personally liable for applying the council's funds in excess of their power to direct him to pay. Such a provision is in place in s. 62, but there its operation ceases. Another Act then begins to operate. At the end of the year all the council's accounts have by law to be examined by the auditor. They have settled with their employees, but they are accountable employers still, for they administer public funds, which have been raised by levying rates, and they must give an account of their stewardship. It is because the money paid is now beyond recall that the councillors themselves may be surcharged. This is for practical purposes the crux of the situation. If the statutory consequences had been merely that the councillors would be told not to do it again, very little would ever have been heard of this kind of argument, but extravagant disbursements would go unchecked. I see no antinomy between a present statutory power to pay an amount fixed by the employer, since immediate action is necessary, and a future statutory liability to be brought to account afterwards for any error in paying that amount in breach of the law.

The respondents conceded that for wages fixed mala fide no exemption from review could be claimed and that the mere magnitude of the wages paid, relatively to the wages for which the same service was procurable, might be enough in itself to establish bad faith. This admission, I am sure, was rightly made, but it leads to two conclusions. Firstly, the final words of the section are not absolute, but are subject to an implied qualification of good faith—"as the board may bona fide think fit." Is the implication of good faith all? That is a qualification drawn from the general legal doctrine, that persons who hold public office have a legal responsibility towards those whom they represent—not merely towards those who vote for them—to the discharge of which they must honestly apply their minds. Bona fide here cannot simply mean that they are not making a profit

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out of their office or acting in it from private spite, nor is bona fide a short way of saying that the council has acted within the ambit of its powers and therefore not contrary to law. It must mean that they are giving their minds to the comprehension and their wills to the discharge of their duty towards that public, whose money and local business they administer.

The purpose, however, of the whole audit is to ensure wise and prudent administration and to recover for the council's funds money that should not have been taken out of them. If, having examined the expenditure and found clear proof of bad faith, which admittedly would open the account, the auditor further found that the councillors' evil minds had missed their mark, and the expenditure itself was right, then the expenditure itself would not be "contrary to law" and could not be disallowed. Bad faith admittedly vitiates the council's purported exercise of its discretion, but the auditor is not confined to asking, if the discretion, such as it may be, has been honestly exercised. He has to restrain expenditure within proper limits. His mission is to inquire if there is any excess over what is reasonable. I do not find any words limiting his functions merely to the case of bad faith, or obliging him to leave the ratepayers unprotected from the effects on their pockets of honest stupidity or unpractical idealism. The breach in the words "as they may think fit," which the admitted implication as to bad faith makes, is wide enough to make the necessary implication one both of honesty and of reasonableness. It might be otherwise, if the express words were to be read as absolute and unqualified, but if they are to be read as subject to some qualification, I think that qualification must be derived from the purpose of the statutory audit, which is the protection of the ratepayers' pockets and not the immunity of spend-thrift administration. Next, in the case and for the purpose assumed, the auditor, when he reviews the accounts, is entitled and bound to use his own judgment as to the wages that would be reasonable under the circumstances. He must do so, in order to measure from that datum the excess of the

wages paid, and to decide if the excess is so great as to evidence mala fides. So it will be also with the Courts of law on appeal. If in the case of bad faith the auditor is capable of finding a reasonable amount and is bound to proceed to do so, I find no words in the section which, on a sound construction, preclude him from doing the same thing when good faith is present, and I think that in both cases the reasonableness of the amounts is a subject for his review.

Though there is not much direct authority on this question, I find none that does not bear out this view of the legislation. As to the duties of an auditor Lord Russell C.J. says in *Thomas* v. *Devonport Corporation* (1): "An auditor is not only entitled, but . . . . bound . . . . to see that there are not amongst the payments . . . . payments which are not authorized by the duty of the authority, or contrary to the duty of the authority, or in any other way illegal or improper." This is under the Municipal Corporations Act, and Farwell L.J. cites it as equally applicable to an auditor under the Public Health Act, and he observes: *Rex* v. *Roberts* (2): "The auditor does not claim, nor could he (in my opinion) properly claim, to exercise any control over questions of policy; but he does claim the right to check and challenge all items of administration. It is not easy to draw the line between policy and administration, or to give a definition except by way of example, but in my opinion the establishment of a works committee would be a question of policy into which the auditor could not go, but the payment of abnormally high wages to the workmen employed by such committee would be a matter of administration." I think these passages excellently illustrate the distinction that must be drawn in such administrative matters. One of the ways in which a payment may be illegal, is, as Lord Russell C.J. says, that it is not within the authority or not in accordance with the duty of the council. By questions of policy I understand Farwell L.J. to mean such matters as the necessity for a urinal and the choice of its position, provided no public or private nuisance is created: *Biddulph* v. *Vestry of St. George*,

(1) [1900] 1 K. B. 16, 21. (2) [1908] 1 K. B. 407, 435.

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Hanover Square (1); *Mason* v. *Wallasey Local Board* (2); and *Vernon* v. *Vestry of St. James, Westminster* (3); and similar questions of policy. The word, however, is policy, not politics, and I can find nothing in the Acts empowering bodies, to which the Metropolis Management Act, 1855, applies, which authorizes them to be guided by their personal opinions on political, economic or social questions in administering the funds which they derive from levying rates. Stirling J. in *Lewis* v. *Weston-super-Mare Local Board* (4) quotes as applicable to the case before him Lord Cranworth's observations in *Stockton and Darlington Ry. Co.* v. *Brown* (5): "when the Legislature authorizes railway directors to take, for the purposes of their undertaking, any lands specially described in their Act, it constitutes them the sole judges as to whether they will or will not take those lands: provided only that they take them bona fide with the object of using them for the purposes authorized by the Legislature, and not for any sinister or collateral purpose," and the learned judge adds: "the principle stated . . . . may even more readily be applied where the powers are vested in a public corporation charged with the performance of important public duties and acting for the benefit of the whole community." To my mind a council acts for a collateral purpose, if it fixes by standards of its own on social grounds a minimum wage for all adults, and is not in so doing acting for the benefit of the whole community.

Much was said at the Bar about the wide discretion conferred by the Local Government Acts on local authorities. In a sense this is true, but the meaning of the term needs careful examination. What has been said in cases, which lie outside the provisions as to audit altogether, is not necessarily applicable to matters, which are concerned with the expenditure of public money. There are many matters, which the Courts are indisposed to question. Though they are the ultimate judges of what is lawful and what is unlawful to

(1) (1863) 33 L. J. (Ch.) 411.
(2) (1876) 58 J. P. 477.
(3) (1880) 16 Ch. D. 449.
(4) (1888) 40 Ch. D. 55, 62.
(5) (1860) 9 H. L. C. 246, 256.

borough councils, they often accept the decisions of the local authority simply because they are themselves ill equipped to weigh the merits of one solution of a practical question as against another. This, however, is not a recognition of the absolute character of the local authority's discretion, but of the limits within which it is practicable to question it. There is nothing about a borough council that corresponds to autonomy. It has great responsibilities, but the limits of its powers and of its independence are such as the law, mostly statutory, may have laid down, and there is no presumption against the accountability of the authority. Everything depends on the construction of the sections applicable. In the present case, I think that the auditor was entitled to inquire into all the items of expenditure in question, to ask whether in incurring them the council had been guided by aims and objects not open to them or had disregarded considerations by which they should have been guided, and to the extent to which they had in consequence exceeded a reasonable expenditure, it was his duty to disallow the items.

The material facts are as follows: The year under review is 1921–1922, and in that year both men and women in Grade A, which, it seems, is the lowest grade, received a wage of 4*l.* a week. There are two tests by which these payments can be criticised. One is the rise or fall in the cost of living, according to the index figures published monthly by the Ministry of Labour in the Labour Gazette, the other is the publication every three months of the rates of wages fixed for various grades of workpeople by the Joint Industrial Council for local authorities' employees in the London district. Neither has any binding authority over the Poplar Council, and no doubt exception can be taken to both. The first is based on careful and extensive statistical inquiries, and has been widely relied on for many years past. The second represents what numbers of employers and employees have been content to pay and to take, following the agreed opinion of representatives on both sides assembled for the purpose. The respondents have not criticised any of

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these figures in detail, or pointed out any errors in them, or put forward any preferable materials. They say simply that they did not think fit to adopt them.

The rate in question—4*l.* a week—was fixed in May, 1920, for Grade A, and in the case of women this was a rise of rather over 30*s.* per week. During five months in 1920–1921, and one in 1921–1922, the men's wages in this grade would have been 4*s.* to 7*s.* 6*d.* higher, if the awards of the Joint Industrial Council had been acted on, and for three months in the former year the cost of living figures had risen above the uniform wage of 4*l.* For women the wage of 4*l.* was never less than 15*s.* above the cost of living figures, and 10*s.* above the Joint Industrial Council's awards. From about the middle of 1920–1921 a fall in the cost of living figures set in, and from the end of the first month in 1921–1922 a fall in the Joint Industrial Council's figures also, and both continued to fall steadily and without any material setback throughout the remainder of the period under review.

The council did not fail to observe this fall, but took it into consideration, and in August, 1921, passed a resolution that wages or bonuses of the council's workmen in all departments be not reduced during the ensuing four months. The anticipatory character of this resolution is significant. It shows how little the respondents proposed to be guided by anything that could be called the market rate of wages. In fact, no reduction had taken place down to the end of the year under review. Under the operation of this general resolution the wages of Grade B (general labourers), which had previously followed and fallen with the awards for the building trade union, a higher class of award than that applicable to Grade B, no longer followed any awards downwards, but remained "stabilised," as it is called, at 80*s.* 6*d.* per week. Thus, as regards Grade B men, for eight months of the year under review, as regards Grade A men for eleven, and as regards Grade A women for the whole year, the council advisedly cut loose from both these modes of fixing fluctuating wages.

Their reason the respondents give as follows: "The council did not and does not take the view that wages paid should be exclusively related to the cost of living. They have from time to time carefully considered the question of the wages and are of the opinion as a matter of policy that a public authority should be a model employer and that a minimum rate of 4*l.* is the least wage which ought to be paid to an adult having regard to the efficiency of their workpeople, the duty of a public authority both to the ratepayers and to its employees, the purchasing power of the wages and other considerations which are relevant to their decision as to wages."

From this carefully considered answer I think it is plain that the respondents have deliberately decided not to be guided by ordinary economic (and economical) considerations. The first sentence above quoted means that, when the cost of living passes 4*l.* a week, the rate of wages paid will follow it upwards, but, however it may fall, the 4*l.* rate will be stabilised and will stand. There is nothing definite about the statement that a public authority should be a model employer. To whom is it to be a model? If to other public authorities, the council's resolution is vox clamantis in deserto, for other authorities, with rare exceptions, turn a deaf ear to it. If to other private employers, the example of the council is necessarily thrown away on concerns, which must make both ends meet and have not the ratepayers' purse to draw on. Whatever "having regard to the efficiency of their workpeople" may mean, it is not proved or suggested that the workpeople employed in Poplar are in any way exceptional in their powers of work, or that the cost of maintaining a workman's efficiency is higher in Poplar than elsewhere. The one definite thing is that the respondents contend that no adult employee should in any circumstances have less than 4*l.* a week, whether young or old, male or female, married or single, skilled or unskilled. It is not shown that the women's work is the same as, or is comparable with, the men's, or that the women inter se or the men inter se are engaged in equivalent tasks. I express no opinion as to the

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merits of this view, that the dignity of adult labour requires at least a 4*l.* wage, nor has the honesty of those who entertain it been questioned, but I think it is plain that such a course, whether it be ideal or social or political or all three, forms no part of the conduct, as ordinarily understood, of such practical enterprises as borough councils are by statute authorized to engage in. No authority and no statutory provision was cited to your Lordships, which enables a borough council to give practical effect, at the ratepayers' expense, to such an abstract resolution, nor am I for my own part aware of any. I am, therefore, of opinion that on their own showing the respondents have exercised such discretion as the Metropolis Management Act gives to the council in the matter of wages upon principles which are not open to the council, and for objects which are beyond their powers. Their exercise of those powers was examinable by the auditor, and on the above grounds the excess expenditure was liable to be disallowed by him as contrary to law. As to the amount of surcharge little was urged on your Lordships outside the contention that the whole question of the amount of wages to be paid was one for the council alone. The auditor, who had not challenged the wages paid in 1920–21, when it was possible to suppose that they had been fixed with some reference to the cost of living and the current awards, was moved to object to them in 1921–22, when he found that, in the face of an established and rapid decline both in the cost of living and in the amounts awarded, these wages continued to be paid without change. I think he was justified in challenging them in the second year, and that the explanations now given show that his surcharge was right. He caused elaborate calculations to be made, based on a very liberal margin for discretion in the respondents' favour, and only surcharged the excess, and even that excess he reduced to a round figure of 5000*l.*, the amount now surcharged. This is no arbitrary amount or penal sum, and the respondents have been treated by him in this regard with every indulgence. I see no reason to dispute his figures, and am of opinion that the order of the Divisional Court was right and that it ought to be restored.

LORD WRENBURY. My Lords, the metropolitan borough of Poplar is a statutory body in whom is vested a statutory discretion expressed by the following words in the Metropolis Management Act, 1855, s. 62. They "shall respectively appoint or employ, or continue for the purposes of this Act, and may remove at pleasure, such clerks, treasurers, and surveyors, and such other officers and servants as may be necessary, and may allow to such clerks, treasurers, surveyors, officers, and servants respectively such salaries and wages as the board or vestry may think fit."

The council of the borough during the year in review paid certain wages to their employees. The question in the appeal is not whether they had a discretion as to the wages they should pay—they certainly had; it is not whether in the exercise of that discretion, if exercised within the statutory limits and upon legitimate grounds, they are to be controlled by the Court or by this House—they certainly are not. It is not alleged that the council acted mala fide, neither is it alleged that they were guilty of negligence or misconduct. The question is as to what were the limits of their statutory discretion—whether they exceeded those limits and whether they acted wholly upon grounds which they were entitled to regard.

The accounts of the borough council are by statute to be audited by a statutory auditor. His powers and duties are defined by s. 247 of the Public Health Act, 1875. By s. 247, sub-s. 7, it is enacted that: "Any auditor acting in pursuance of this section shall disallow every item of account contrary to law, and surcharge the same on the person making or authorizing the making of the illegal payment, and shall charge against any person accounting the amount of any deficiency or loss incurred by the negligence or misconduct of that person, or of any sum which ought to have been but is not brought into account by that person. . . . ."

The statutory auditor in this case surcharged a sum of 5000*l.* upon certain named members of the council. The Divisional Court were of opinion that the surcharge was right.

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The Court of Appeal by a majority reversed that decision. The statutory auditor appeals.

For the decision of the appeal the first and essential step is to ascertain with exactness what are the limits of the statutory discretion. This turns upon the exact meaning of the words in s. 62 of the Act of 1855: "Such salaries and wages as [they] may think fit." I proceed to examine these words and to state what is, in my opinion, their exact meaning, with a view to ascertaining the limits of the statutory discretion.

The cardinal word upon which emphasis is principally to be laid is the word "wages." Wages are the pecuniary return for services rendered. To determine the proper or true amount which in a given state of facts has been paid or is payable for services rendered is far from easy. It can never be determined with exactness. It is impossible to name in any particular case an amount which if diminished by 1*s.* a week would be too small, and if increased by 1*s.* a week would be too large. But it is possible to name an amount which would certainly be too large—as, for instance, if a charwoman were paid 2*l.* a day. Using my best endeavour to state the matter in general terms, I express it thus:—

Wages in a particular service are such sum as a reasonable person, guiding himself by an investigation of the current rate in fact found to be paid in the particular industry, and acting upon the principle that efficient service is better commanded by paying an efficient wage, would find to be the proper sum. The figure to be sought is not the lowest figure at which the service could be obtained, nor is it the highest figure which a generous employer might, upon grounds of philanthropy or generosity, pay out of his own pocket. It is a figure which is not to be based upon or increased by motives of philanthropy nor even of generosity stripped of commercial considerations. It is such figure as is the reasonable pecuniary equivalent of the service rendered. Anything beyond this is not wages. It is an addition to wages, and is a gratuity. The authority is to pay not such sum but such wages as they think fit.

I pass from the word "wages" to the words "as [they] may think fit." We have heard argument upon the question whether these words are or are not to be understood as if the word "reasonable" or "reasonably" were inserted, so that the sentence would run "as they reasonably think fit" or "such reasonable wages as they may think fit." Is the verb "think" equivalent to "reasonably think"? My Lords, to my mind there is no difference in the meaning, whether the word "reasonably" or "reasonable" is in or out. I do not myself rely upon the fact that in the Adoptive Acts (for instance, in the Baths and Washhouses Act, 1846) the word "reasonable" is found in the connection "reasonable salaries, wages and allowances" and is not found in the Act of 1855, which is by later legislation made applicable to this borough council. It is difficult to suppose that the Council would have to maintain a different standard as regards reasonable conduct in determining the wages of a man employed under the Baths and Washhouses Act and that of a man employed under some other Act. But if it is the fact that either the statute which does or the statute which does not contain the word "reasonable" must give way to the other, it is not obvious which is the statute which is to give way. I rest my opinion upon higher grounds. A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so—he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by use of his reason, ascertain and follow the course which reason directs. He must act reasonably.

Thirdly and lastly, I point to the word "fit." That word means, I think, "fitting" or "suitable." The words "as they think fit" do not mean "as they choose." The measure is not the volition of the person vested with the discretion, it is the suitability or adequacy or fitness of the amount in the reasonable judgment of the person vested with the discretion.

My Lords, I pass on to apply the above principles to the

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facts of this case. In the year 1920–21 the auditor found that the council had adopted a rate of 4*l.* a week as the minimum rate payable both to men and women in the lowest grades of labour. In that year he made no surcharge, but accepted (startling as it may seem) the view that the council had not exceeded the limits of their discretion in paying 4*l.* a week, say, to a charwoman for the class of work in which she is employed.

For the year 1921–22 he made, on June 6, 1923, a certificate of disallowance and surcharge to the amount of 5000*l.* on the ground that to that extent at least the wage charges were unnecessary and unreasonable and therefore items contrary to law.

He arrived at the surcharge of 5000*l.* in the following way: He found that the wage payments ranging upwards from 4*l.* a week were still being maintained in the year 1921–22, notwithstanding that the cost of living had fallen from 176 per cent. in the earlier period to 82 per cent. in the latter period over the cost of living in the year 1914. He found that the wage payments made in the year 1921–22 exceeded by about 17,000*l.* the amount of wages that would have been paid if the agreed wages of the awards made by the Joint Industrial Council had been followed. On May 18, 1923, he had written to Mr. C. W. Key that he adjourned his audit to May 31, and that he would then hear any representations that might be made on the matter of the audit or would consider any representations that might be made to him in writing. At the adjourned audit he heard the parties, gave effect to some of their contentions, reduced the figure of 17,000*l.* to 5000*l.*, and on June 6 certified as above stated a surcharge of 5000*l.* on the ground that the council had made payments far in excess of those necessary to obtain the services required and to maintain a high standard of efficiency and which were thus in reality gifts to their employees in addition to remuneration for their services.

The principle upon which the auditor proceeded was as follows: He started as a basis with the wage current at a past date before the war. For the moment he assumed that

that wage was a fair wage at that date For any error in that respect, allowance was made as presently mentioned. He then took the cost of living, acting upon the principle that if 20*s.* in the year under review was required to purchase commodities which at the date of the basic wage could have been purchased for 10*s.*, the basic wage must be multiplied by two to reproduce in the year of review the basic wage of the past date. He also took as an assistance and guide the bonuses allowed by the Joint Industrial Council's awards. He then arrived at a figure, and to that figure added 20*s.* a week to cover and make allowance for any error by way of insufficiency that might be lurking behind the amount of the estimate. Anything beyond this he regarded as a gift, and made his surcharge on the ground that it was contrary to law for the council to make gifts.

My Lords, the principles upon which the auditor acted are, in my opinion, sound principles.

He further found that, on August 31, 1921, the council had passed a resolution to the effect that no reduction of wage or bonus should be made during the ensuing four months and that this was acted upon for twelve months. He regarded this as not a legitimate exercise of the council's powers. "It disregarded," he says, "very important reductions which had already taken place in the cost of living and in the trade union and other awards and during the period of its operation further important reductions were likely to occur and did in fact occur." In this, again, I think the auditor was right.

The auditor has not proceeded upon the footing that he was bound to trace and state every separate case of overpayment of wage; he has not certified that A. B. was overpaid 5*s.* in this named week and 10*s.* in that named week and so on. He was not, I think, bound to do so. It would be practically impossible to deal with the matter in that way. He has taken the wages bill as a whole and has certified that a round sum of 5000*l.* (which may well be much below the mark) is a sum which at least has been paid in excess of the sum which would result from a proper and legitimate exercise of the statutory discretion. If he is right in that, as I think

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he is, it follows that the excess payment is within s. 247, sub-s. 7, of the Act of 1875 contrary to law, and in discharge of his statutory duty he was bound to surcharge the amount.

I do not find it necessary to say more than a word upon the argument as to the words "item of account" in s. 247, sub-s. 7. Item of account is not the same as head of account. The wage bill is no doubt a head of account—but every item of weekly payment to each employee is an item of account. If a man's wages were charged for eight weeks and he had been employed only five weeks, the wages for three weeks would be items of account which ought to be disallowed.

My Lords, for the reasons which I have given I think that the three judges in the Divisional Court were right; that Bankes L.J. was right, that Scrutton L.J. would have been right if he had correctly applied to the facts some of the principles which he had stated, and that this Appeal succeeds.

LORD CARSON. My Lords, in the course of the arguments in this case, and indeed afterwards, I felt inclined to concur with the opinion of Scrutton L.J. in the Court of Appeal, which he shortly summarises in the following passage: (1) "I come to the conclusion that for that year, and I limit my conclusions to that year, though the figures are near the line where interference should take place, I cannot find they have reached it. The question is not whether I should have sanctioned these wages; I probably should not: nor whether the auditor or the Whitley Council would have sanctioned these wages; it is for the Poplar Borough Council to fix these wages, which are not to be interfered with unless they are so excessive as to pass the reasonable limits of discretion in a representative body." I can find nothing in the reasoning of the Lord Justice which is at variance with the propositions as I understand them which your Lordships have laid down.

I was also impressed by the judgment of Atkin L.J., where he said, as regards the principle on which limitation should be based on the words of the Metropolis Management

(1) [1924] 2 K. B. 721.

Act of 1855—namely (1), "The answer, I think, is to be found in the restriction that the council must act in good faith. They must determine the amount of wages as wages in an existing industrial system; they must not fix the amount as a dole or as a bribe, or with any object other than that of fairly remunerating the servant," and then he added: "In this case bad faith is not alleged by the auditor or found by the Divisional Court. Indeed, it is stated in the judgment below that it is admitted that the council exercised their discretion honestly." Upon further consideration I do not feel confident that these conclusions can be supported. As regards the question of the exorbitant or excessive nature of the payments made, it seems to me that that is not the only question which we have to determine to see whether the rates paid "are" (to quote Scrutton L.J.) "near the line where interference should take place." As Lord Buckmaster has pointed out, in the joint affidavit of members of the borough council, para. 9, it is stated as follows: "The council did not and does not take the view that wages paid should exclusively relate to the cost of living. They have, from time to time, carefully considered the question of the wages and are of opinion, as a matter of policy, that a public authority should be a model employer and that a minimum rate of 4*l.* is the least wage which ought to be paid to an adult having regard to the efficiency of their workpeople," etc.

That paragraph appears to show that they were acting upon a policy which claimed entirely to disregard the sharp decline in the cost of living and the nature of the labour that had to be paid for. That being so, I find a difficulty in supporting the conclusions arrived at by Scrutton L.J., as I think that not merely the excessive wages paid, but the reasons on which the council claimed to assess them, have to be taken into consideration if we are to deal with the realities of the problem. As regards the reasons already referred to of Atkin L.J., I am inclined to think, upon further consideration, that the admission that bad faith is not alleged

(1) [1924] 2 K. B. 725.

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and that the council exercised their discretion honestly has been misapplied. I do not myself know what these expressions are meant to cover, but, having regard to the statements made in para. 14 of the affidavit of the auditor that the council, in the exercise of their statutory powers, had not paid due regard to the interests of the ratepayers, whose funds they administered, had imposed unreasonable charges upon these funds and made payments which were far in excess of those necessary to obtain the services of those required and to maintain a high standard of efficiency, and which were thus in reality gifts to their employees in addition to remuneration for their services, I find it difficult to come to a conclusion that the admissions referred to meant anything more than that the council honestly thought they were entitled to take the course they did, and in my opinion it was open to the auditor, upon coming to the conclusions as stated in his affidavit, to draw the inference that the council were not engaged in merely fixing a rate of wages, but were affected by considerations which could not be held to come within the ambit of the discretion entrusted to them.

My Lords, having regard to the great unanimity as to principles which has prevailed in all the judgments, both in the Court of first instance and the Court of Appeal, and in the judgments just delivered by your Lordships, with which I in the main agree, I do not find it possible, notwithstanding the doubts I have felt, to dissent from the opinion expressed by the noble Lord on the Woolsack.

Order of the Court of Appeal reversed and order of the King's Bench Division restored. The respondents to pay the costs in the Courts below and also the costs of the appeal to this House. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, April 3, 1925.

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