A SKELETON IN THE CUPBOARD; MASTER AND SERVANT LEGISLATION AND THE INDUSTRIAL TORTS IN TASMANIA

by

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Legislation governing the relation of master and servant is almost as old as the relation itself. In England it was the struggle towards something akin to a contractual position as servant and away from a status as serf which, together with the effects of the Black Death, led to the *Statutes of Labourers* in 1349 and 1351.[1] These statutes were designed to enforce service at rates of hiring that existed prior to the Black Death and provided that if a labourer or servant left his service before the time agreed upon, he would be punished by imprisonment.

Since then there have been many enactments which have extended both the range of offences which could be committed and the types of employees affected. The most important ones were the *Statute of Apprentices* 1563 and the *Master and Servant Acts* passed in 1747, 1766 and 1823.[2] They all had two things in common however: the first was that breaches of contracts of employment were treated as criminal offences often with severe penalties and secondly, they all revealed, in varying degrees, bias in favour of employers of labour.

In Australia, all States passed similar legislation in the nineteenth century beginning with New South Wales in 1823.[3] The first *Tasmanian (Van Diemen's Land) Act* appeared in 1840 and was replaced in 1852, 1854 and 1856.[4]

It is proposed here to examine the main provisions of the infamous *Van Diemen's Land Act* of 1854 which has been acknowledged to be a draconian enactment even for a colony with a high percentage of ex-

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1 23 Ed. III st. 1, (1349); 25 Ed. III st. 2. (1351).

2 5 Eliz. I, c. 4 (1563); 20 Geo. II, c. 19 (1747); 6 Geo. III, c. 25 (1766); 4 Geo. IV, c. 34 1823).

3 N.S.W.: *Masters and Servants Act* 1828 (9 Geo. IV No. 9) and *Apprentices Act* 1828 (9 Geo. IV No. 8); Queensland: *Masters and Servants Act* 1861 (25 Vict. No. 11); South Australia: *Masters and Servants Act* 1841 (5 Vict. No. 10); Victoria: *Master and Servants Act* 1853 (16 Vict. No. 6).

4 *Apprentices and Servants Act* 1840 (4 Vict. No. 12); *Servants and Apprentices Act* 1852 (16 Vict. No. 23); *Master and Servant Act* 1854 (18 Vict. No. 18); *Master and Servant Act* 1856 (19 Vict. No. 28).

convicts in its free labour force.[5] Its implementation, with periods of imprisonment accompanied by hard labour and solitary confinement for employees guilty of breaches of contract, led to an organised working class movement for reform which was eventually successful in the shape of the *Master and Servant Act* 1856 (Tas.). This Act, with some amendment, is still in existence and although often forgotten and rarely used, it will be shown to have some significance today in providing the unlawful element for the economic or industrial torts of conspiracy, intimidation and inducing a breach of contract.

The Master and Servant Act, 1854

Within a few weeks of consenting to the Bill, the Lieutenant Governor, Sir William Denison, made it known in a letter to the Chief Police Magistrate that the *Master and Servant Act* 1854 should be administered with great caution so that no injustice would be done where a light punishment would be sufficient. In particular it was requested that all Police Magistrates should inflict the full period of solitary confinement only in extreme cases.[6] The maximum period of solitary confinement was 30 days, but a sentence of up to 3 months imprisonment with hard labour could be given for employee offences such as absence from service without leave or misconduct relating to service in any of its numerous forms.[7]

The width of the offence of misconduct was one of the main employee complaints against the Act and meant that an employee's liberty was enjoyed more or less at the whim of his employer. Negligence, carelessness, insolence and other trivial forms of misconduct which were mere breaches of contract could result not only in imprisonment with hard labour and solitary confinement but also forfeiture of any wages due. This possibility in turn provided an inducement to unprincipled employers to prefer petty and even groundless charges just before wages were due to be paid. Moreover, the Act authorised a magistrate to order the return of a servant after his imprisonment to his former master to complete the period of employment.[8] When wages became due once again the same false charge could result in the same order. In this way it was possible to keep a man in almost perpetual servitude at no cost for a servant was unable to get his contract discharged, the remedy being available only to the complainant.[9]

Female servants were ostensibly treated with more leniency in being fined a maximum of £20. But the size of the fine was such that it was, in most cases, not capable of being paid especially when coupled with

5 T. A. Coghlan, *Labour and Industry in Australia* (1918) Vol. 2, at p. 772.
6 Letter to Chief Police Magistrate dated 26th October 1854, Colonial Secretary's Correspondence, Vol. 261, 10654, Archives Office of Tasmania.
7 Ss. 6, 7 and 8.
8 S. 11.
9 S. 12.

an order for forfeiture of wages, and the result of non-payment of the fine was a period of imprisonment in solitary confinement for up to 14 days.[10]

Another serious criticism of the Act lay in its uneven distribution of penalties. Imprisonment with hard labour and solitary confinement with forfeiture of wages for employee offences were not fairly balanced by a mere fine for misconduct by employers. Even non-payment of the fine by an employer convicted of ill-treating his servant resulted in distress and sale rather than imprisonment.[11]

The same bias was shown in the procedures adopted. With regard to the more serious employee offences such as abusive language, insubordination, assaults and drunkenness, no summons or warrant was required;[12] in all other cases of offences by employees a magistrate could issue a warrant or summons at his discretion.[13] On the other hand, where a complaint was made against an employer, the only procedure was by way of summons[14] and, while the complaint was being made, the servant could himself be charged with being absent without his master's leave.

The heavy penalties described above were inflicted on 'free' servants by only one magistrate whereas at that time two were required to authorise solitary confinement for the worst convicts. The official reason for permitting one justice to exercise jurisdiction was that it was often difficult to get two magistrates to try master and servant cases, particularly in country districts, and this had previously caused a denial of justice in some instances.[15] There were, however, many examples in the U.K. of the abuse and ignorance of magistrates sitting alone, sometimes in private houses, trying master and servant cases and these abuses were not likely to be any the less in Van Diemen's Land.[16]

The existence of section 16 empowering a magistrate to sentence a convicted employee to a maximum of 30 days solitary confinement is difficult to justify. Never before had a clause authorising solitary confinement appeared in master and servant legislation, certainly not in the English Acts, and not even in the earlier New South Wales enactment of 1828 when a much higher proportion of the employees to which it applied were ex-convicts. There can be little doubt that the infliction of solitary confinement in addition to long periods of hard labour for minor breaches of contract marked a low point in the treatment of 'free' men as dangerous criminals.

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10 S. 17.
11 S. 21.
12 S. 9.
13 S. 13.
14 S. 18.
15 Governor's Despatch, 20th November 1854. Archives Office of Tasmania.
16 For examples in the U.K., see Daphne Simon's essay, 'Master and Servant' in *Democracy and the Labour Movement* (1954), at p. 171.

One of the most surprising aspects of this clause was the fact that it was viewed by the Government as necessary for the benefit of the employee. According to Denison it was designed to protect convicted servants sentenced to hard labour by shielding them from indiscriminate association with vicious characters in prison.[17] The effect of up to 30 days solitary confinement in small cells on the minds and bodies of employees guilty of breaches of contract was not considered as outweighing this supposed benefit. When the bill first appeared in the Legislative Council no limit to the number of days which could be ordered to be spent in solitary confinement was indicated but, fortunately, it was amended at the committee stage and the Government was saved from being responsible for an even grosser act of intolerance and oppression.[18]

The 1854 Act also contained a section which made it an offence for any person to 'knowingly hire, employ, retain, harbour, conceal or entertain' any employee before his contractual term was completed.[19] This provision was not a novel one for it had appeared in the *V.D.L.* Acts of 1840 and 1852, and in the 1828 N.S.W. legislation.[20] The section constituted a restatement in criminal form of the civil action for enticing a servant from his master and the original English legislation would seem to be the Statutes of Labourers on which the civil action has been argued to rest.

Like the civil action, the *V.D.L.* statutory offence did not require the enticer to have actually employed the servant; a mere 'receiving' or 'entertaining' was sufficient. The offence also covered situations which would have given rise to a civil action for 'harbouring' a servant, i.e. where a person, after notice, continued to employ or receive another man's servant although at the time he first hired or received the servant he did not know he was already employed and had not enticed him away.

The terminology of the section, however, was so wide that it was capable of being applied where no action at common law would ever have been contemplated. It is difficult to escape from the conclusion that a servant who, without his master's permission, went home to see his sick father for a few minutes during his working hours, exposed his relative to a penalty for receiving or entertaining him in the house, quite apart from any penalties which the servant himself might suffer for this action under other sections of the Act. In this example it would not be easy for the master to point to ensuing damage if the servant concerned made up his work later in the day and no action would therefore lie at

17 Governor's Despatch, 20th November 1854, Archives Office of Tasmania.
18 *Courier* 26th March 1855.
19 S. 30.
20 *Apprentices and Servants Act* 1840 (*V.D.L.*) s. 8, *Servant and Apprentices Act* 1852 (*V.D.L.*) s. 10, *Masters and Servants Act* 1828 (N.S.W.) s. 2.

common law against the relative, even assuming a court would accept this as 'knowingly receiving or entertaining'. Yet under the V.D.L. legislation he was liable to be fined up to £50.

Unlike the civil action, with its insistence on loss to the master measured by damages, the rationale of the wider criminal offence is more difficult to determine. Like the *Statutes of Labourers*, it can probably be ascribed to a general acute shortage of labour in 1854 giving rise to strong fears by *V.D.L.* employers of losing their labour to another employer who was prepared to pay more. Coupled with this was the notion of treating servants who absented themselves from work without excuse as criminals, with the result that a person who then employed them or otherwise gave them protection was in turn penalised as a protector of criminals.

As with many other sections of the 1854 Act, this provision was not a popular one and was once described as 'a violation of the great and fundamental principles of British liberty as embodied in Magna Charta inasmuch as it renders any and every free servant unconvicted of crime, whether fleeting from outrage or otherwise, an outcast in a strange land'.[21]

Movement for Reform of 1854 Act

It would not be entirely accurate to state that a wave of working class unrest swept the community as a result of the 1854 legislation, but slowly and perceptibly, as the details of more and more cases of harsh injustice became known, there grew a feeling of mutual resistance and anger among a large section of the workforce in the colony particularly in and around Hobart. At first this expressed itself in the form of letters to the press, but by March 1855 the first of a number of working class meetings was held at which a committee was set up to get the Act repealed.[22] The second meeting, held in May 1855, was supposedly to consider the report of the committee and to decide what action to take.[23] Fortunately for their cause, an important election to the Legislative Council was to take place later that month[24] and a considerable number of 'influential gentlemen' in the colony had suddenly taken an interest in master and servant law reform with the result that it was agreed that a petition would be presented to the Legislative Council.[25] The Committee of Working Men was also successful in securing an interview with the new Governor, Sir Henry Fox-Young, who intimated that he

21 Petition to the Legislative Council presented in July 1855, Paper No. 8, Votes, Proceedings and Papers of the Legislative Council, Vol. 5, 1855, Archives Office of Tasmania.

22 *Courier* 26th March 1855.

23 *Ibid.*, 3rd May 1855.

24 One of three elected members for Hobart on the Legislative Council had resigned. John Lord, supported by the Committee of Working Men, was elected to the vacant seat. See *Mercury* 20th April 1855 and 11th May 1855.

25 *Courier* 26th May 1855.

would forward a special message to the Legislative Council recommending early consideration of the matter and new legislation in place of the 1854 Act.

After outlining their main grievances the petitioners to the Legislative Council concluded by making four requests.[26] In the first place, they sought returns showing the number of servants, male and female, committed under the Act to various prisons in the colony together with the terms of their engagement, their length of servitude, the nature of their offences, the various periods of their imprisonment whether solitary or otherwise, the amount of fines inflicted and whether or not they had been paid, as well as the amount of wages forfeited. Secondly, for purposes of comparison, they sought returns showing the number of employers against whom complaints had been made together with the nature of such complaints, the number of convictions, the amount of fines inflicted, and whether or not they had been paid. Thirdly, they sought the appointment of a committee of the Council to receive evidence as to the injurious tendency of the provisions of the Act and the need for its repeal or, at the very least, for its modification so as to place the law on a more equitable footing. Finally, as a result of the evidence given to this committee, the petitioners required Council to pass the necessary legislation to 'remedy the great social wrong inflicted on the labouring portion of the population of this Colony by the mistaken legislation of the last session of the Council, guarantee alike to all classes the invaluable blessings of freedom, and thus lay a sound and solid basis on which to build the future prosperity and greatness of Tasmania'.[27]

At first it looked as though the first three requests were unnecessary because Council accepted the need for new legislation and a Bill was introduced in July 1855 to repeal the 1854 legislation and replace it with provisions which were much fairer. Most of the specific criticisms of the previous Act were dealt with and, in general terms, it is safe to say that had the Bill been passed, master and servant law in Tasmania would have been far advanced of that in N.S.W. and the U.K. in its equal treatment of both sides.[28]

However, instead of proceeding to its second reading, the whole question of master and servant reform was referred to a Select Committee of the Legislative Council in August and was lost on the prorogation of Council in September, 1855. It was not until December that another Select Committee was appointed and a new Act passed in February 1856.[29]

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26 Petition to the Legislative Council, *op. cit.*

27 *Ibid.*

28 For a comment on the Bill of July 1855, see *Courier* 28th July 1855.

29 *Master and Servant Act* 1856.

The 1854 Act had, of course, continued to be implemented throughout these months of delay. One of the most effective and damning pieces of information concerning it was contained in a document entitled 'Masters and Servants Law: Return of Convictions',[30] tabled by the Colonial Secretary in December 1855 in response to a request made in July. As the Committee of the Working Classes probably hoped, a glance at its pages revealed the enormity of the injustice perpetrated by magistrates through the agency of the 1854 legislation. Although it had taken five months to appear it proved to be the final spur to a much needed reform.

The return covers something like a year's operation of the Act but was disappointing in being limited to a description of the nature of the offences and punishments awarded. Thus, although it showed the number of servants committed to gaols or houses of correction, the nature of their offences, the various periods of their imprisonment, solitary or otherwise, and the amount of fines inflicted, it did not indicate the terms of engagement of those convicted including their length of service; nor did it show whether or not fines had actually been paid or, in every case, the amount of wages forfeited. More importantly the return did not indicate separately for purposes of comparison the number of employees against whom complaints had been made, the nature of such complaints, the number of convictions, the amount of fines inflicted, and whether or not those fines had been paid.

The total number of cases dealt with by the return was 592, of which only 64 concerned complaints against employers, with 4 convictions recorded against third parties for harbouring. Thus, about 90% of all convictions under the Act were for offences committed by employees.

Although only 39 cases are recorded in which the maximum of 3 months imprisonment was given with or without hard labour, solitary confinement or additional burdens such as forfeiture of wages, a fairly high percentage of cases resulted in sentences of from 1 to 3 months imprisonment. In one instance a servant convicted of 'general misconduct' received 3 months imprisonment with hard labour and forfeited his wages; in another, the sentence was 3 months imprisonment with 14 days solitary confinement for 'refusing to fulfil his contract'. In two other cases involving 'absence from service', the maximum 3 months imprisonment with hard labour was given, together with the maximum 30 days solitary confinement.

Immorality as a form of misconduct was treated very harshly. A female servant convicted of 'misconduct in having a man in bed with her upon her master's premises' was sentenced to 3 months imprisonment with hard labour and forfeiture of all wages due. Assuming this

30 Paper No. 20, Votes, Proceedings and Papers of the Legislative Council, Vol. 6, 1855, Archives Office of Tasmania.

was part of a course of conduct her male friend did not escape, for there is an almost identical conviction recorded against a male servant for having a female sleeping in his room on his master's premises.

These are some of the worst examples; instances of a more lenient approach are to be seen in the form of mere admonishments or reprimands for such activities as being absent from service, being drunk and creating a disturbance on the master's premises, disobeying orders and refusing to perform work. Of numerous cases where forfeiture of wages was ordered and where the amount was recorded, there was one where a man forfeited the substantial sum of £10 for 'repeated absence, getting drunk, and neglecting his work'; in another £3 was forfeited after a conviction for 'misconduct in allowing a waste of a number of potatoes'.

The number of identifiable employer offences was, not surprisingly, very small. They comprised 'non-payment of wages', 'ill treatment of a servant and using obscene language', 'ill usage of an apprentice' and 'neglecting to pay wages and not giving sufficient rations'. The number of cases was 64 and by far the largest category was neglect or failure to pay wages which accounted for 59 of these. In marked contrast to the severity of the magistrates' administration of a harsh Act against employees, their attitude towards employers was full of self restraint. In 49 cases the only result of a successful prosecution was that the defendant was ordered to pay the amount of wages due. Despite the power to order a master to pay compensation of up to £5, in only 4 instances was this done, and in only one was the sum awarded more than £1. Of the remaining 6 cases, 3 were dismissed and 3 were determined by an order to pay wages due plus costs of the case.

The same biased attitude is to be seen in the remarkable 5 cases of employer misconduct other than non-payment of wages, 2 involving failure or neglect to provide sufficient food and 3 where there was ill-treatment and use of obscene language. Although the Act provided for up to £20 to be awarded as compensation,[31] in only two cases was any compensation given at all and then only in the paltry sums of £5 and £1. All that was achieved by the remaining 3 employees (2 servants and an apprentice) in prosecuting was cancellation of the agreement or indenture, except that in one instance a master was also ordered to pay costs. It is difficult to believe that employers of labour in *V.D.L.* were as virtuous as these figures would seem to indicate.

Of the 4 convictions for enticing or harbouring where there was the possibility of a £50 fine, 1 was reprimanded and ordered to pay costs, 1 was simply fined (£1) and 2 were fined £1 and £5 respectively and, in addition, ordered to pay costs. Despite the width of the harbouring section[32] it does not appear that it was used to any great extent for a

31 S. 19.
32 S. 30.

number of possible reasons: firstly, the difficulty of obtaining evidence where two of the parties (the absconding servant and his second master) were happy with the arrangement; secondly, a reluctance to prosecute a fellow employer especially when the servant concerned could be punished for his absence and made to return to his first master under other sections of the Act and finally, the fact that unemployment had increased since the Act was passed in October 1854 and replacement labour was easier to obtain.

Although the successful reform of the 1854 Act can be attributed more to its emergence as an issue in key elections[33] rather than to any general concern among employers that the Act was too oppressive, or to an admiration for the way in which working class leaders had conducted themselves in their cause, it must be acknowledged that there were a number of other factors which also played a part in creating a climate favourable to reform.

Probably the most important of these was the very different economic situation which prevailed in *V.D.L.* towards the end of 1854 and throughout 1855. The enactment of exacting measures in 1854 was largely a reaction to various intense pressures[34] in the labour market causing an acute shortage of labour and high wages. Not surprisingly, as soon as these pressures eased a more flexible attitude to labour was possible. Even as the master and servant Bill was receiving its first reading in August 1854 it was becoming apparent that the tide of economic activity was changing and with it the relations between employer and employed. For example, it was reported by the Immigration Agent that for a skilled workman 12 shillings a day was the usual wage during the first nine

33 The election of Lord to the vacant Hobart seat on the Legislative Council, caused by the resignation of Dunn (reported in the *Mercury* 11th May 1855), was not the only election about this time in which master and servant law reform played an important part. The *Extension Act,* to increase the number of members on the Legislative Council from 24 to 33, had been passed in the last week of October 1854 and the number of elective seats for Hobart rose from 2 to 3. Arthur Perry, who was elected as the third member for Hobart in April 1855 and Dr. Crooke, who won the second Buckingham seat created under the *Extension Act,* were both active in getting the 1854 Act repealed, as was R. Q. Kermode, M.L.C. for Campbell Town. (See the report of those attending a working class meeting on 1st May 1855 in the *Courier* 3rd May 1855). After the *Constitution Act* 1854 was passed (a few days after the *Extension Act*) providing for an elected lower and upper house it became important for prospective candidates to maintain popular support, and master and servant law reform continued to interest some of the more influential gentlemen in the colony, particularly those who were already members of the Legislative Council and who hoped to be elected to the House of Assembly under the new Constitution. It is not therefore surprising that the 1854 master and servant legislation was repealed by the *Master and Servant Act* 1856, passed in February, immediately before the elections in the spring of 1856.

34 The cessation of transportation, news of which was received in the colony in April 1853; the exodus of men to the Victorian goldfields; the rejection by the British Government in September 1853 of the Legislative Council's immigration proposals; the urgent need on the part of Tasmanian employers to supply the lucrative goldfield markets with produce.

months of the year and only 8 shillings a day during the last three.[35] Unemployment was also more common in contrast to the relative scarcity of labour during the previous two years.

The main cause of this turnabout was the unsettled state of the goldfields in Victoria which had previously contributed to the labour shortage in *V.D.L.* by drawing off a large number of the most enterprising labourers, and were now seen to be less attractive. The rate of departures from the island was thus substantially reduced and considerable numbers of men returned. The generally unsettled state of that colony also contributed to a decline in demand for goods produced by *V.D.L.* and this in turn inevitably led to a decline in demand for labour. This trend continued throughout 1855 and, although it was better in country districts, there was considerable unemployment in Hobart.

The passing of a new Act in early February 1856 marked an improvement in relations between masters and men in the Colony and, although the new legislation was still in many respects as stringent as that being fought so strenuously by unionists at this time in England, it was nevertheless a welcome relief from the constraints of the previous one. Only one thought might have detracted from the satisfaction of those four or five working men who had so successfully handled the campaign for reform, that had the reform not been delayed in the Legislative Council far more would have been gained, for many sensible and fair provisions of the first Bill of July 1855 did not find their way into the Act of 1856.

The Master and Servant Act 1856

In general terms this statute retained the framework of the 1854 legislation. A servant's refusal to commence in his master's service, his absence or refusal to fulfil that service, his disobedience of any lawful command, or any other misconduct, constituted offences for which he could be punished.[36] Nothing was done in 1856 to define more precisely what constituted 'other misconduct' and in this regard the abuses connected with the earlier legislation remained. In other respects the 1856 Act was somewhat less severe. Two justices were necessary to convict in all cases and the maximum penalty on employees was a £10 fine rather than a lengthy period of imprisonment with hard labour and solitary confinement.

Forfeiture of the whole or part of a convicted servant's wages at the magistrates' discretion was retained, however, as an alternative or additional punishment to a fine. It was therefore still possible for a master to complain of a trivial act of misconduct and avoid paying

35 Coghlan, *op. cit.*
36 Ss. 8, 9 and 10.

wages just as they were due. Apprentices and labourers[37] were similarly treated.

Imprisonment of employees remained either for non-payment of a fine[38] or for the more serious employee offences of using profane or obscene language, assault, violent conduct and drunkenness.[39] However, this only applied to adult male employees since female servants and apprentices and male servants and apprentices under the age of sixteen could not be imprisoned.[40]

For male employees arrest without warrant was also retained in cases of profane or obscene language, assault etc.,[41] and so was arrest by warrant as an alternative to a summons for ordinary breaches of con-

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37 The 1856 Act deals separately with offences by servants, labourers and apprentices and each category is defined in s. 1. The term 'Labourer' extends to 'Artificers, Mechanics, Tradesmen, Manufacturers, Journeymen, Handicraftsmen, Farm Workmen and Labourers of every Class or Description whatsoever'.
The term 'servant' covers 'all Persons so as aforesaid comprehended under the term "Labourer" and also all Grooms, Coachmen, Shepherds, Herdsmen, Working Overseers, Storemen, Porters, Gardeners and also all menial, domestic, farming and other servants of every Class or Description whatsoever'.
It is clear from these definitions, despite first appearances, that the draftsmen were not attempting the foolish task of distinguishing a contract of service from a contract for the performance of work simply by classifying occupations. If this had been so, the statement that 'the term "Servant" shall extend to and include all Persons so as aforesaid comprehended under the term "Labourers' " would make nonsense of the distinction. What was really intended by this statement was that those employees who pursued the occupations mentioned in the definition of "labourer" could also pursue those occupations as "servants". In other words, a labourer was to be distinguished from a servant not by the nature of his *occupation* but by the nature of his *contract*. The word "labourer" was thus synonymous with the more modern expression "independent contractor".'
Although it was therefore realised that, ultimately, the distinction between a labourer and a servant lay in the nature of his contract it was still thought necessary to attempt some sort of classification of the main occupations in *V.D.L.* This was, however, entirely unnecessary and very confusing (see *Ruse* v. *Erdmann* (1884), *Mercury* 9th July 1884). No doubt the category into which particular occupations were placed was merely a statement of what was generally true at the time. Most fencers, sawyers, splitters etc. did contract for the performance of certain work as independent contractors or labourers, and most grooms, shepherds, storemen, porters etc. probably contracted as servants. But there was no way that comprehensive definitions incorporating a workable distinction could be drafted on the basis of these occupations. The difficulty of distinguishing a contract of service from a contract for services was as real in 1856 as it is today but at least under the *Master and Servant Act* nothing turned on the distinction since the Act created the same offences and imposed the same penalties in both cases.
N.B. Section 1 also defined an apprentice as a 'Person, of any Age, bound by Deed to serve as an Apprentice or Servant in any Trade, Business, Occupation, or Capacity whatsoever, and upon whose binding out no larger sum than Fifty Pounds shall have been paid'.

38 S. 21 (with hard labour for up to 1 month and/or solitary confinement for a maximum period of 1 week).

39 Ss. 11 and 12 (with hard labour for up to 3 months or a maximum fine of £20).

40 S. 23.

41 S. 11.

tract.[42] Employers, on the other hand, could only be brought before the magistrates by summons for such offences as non-payment of wages, using abusive, profane or obscene language, refusal or neglect to provide sufficient and wholesome food or any other 'ill-treatment'.[43] Moreover, a convicted employer was only liable to compensate his employee for the injury and was not punished simply because he had broken his contract. Where the injury was negligible, for example, where abusive language was used, this was reflected in the amount of compensation to be paid by an employer, but, where the situation was reversed, an employee faced the prospect of imprisonment with hard labour or payment of a fine not linked to the injury suffered by his employer. If an employer could show loss or injury he could recover compensation from the fine or forfeited wages of his employee under section 18, but there was nothing to prevent the amount of the fine or forfeited wages from exceeding the loss to the employer. Indeed, the section authorised magistrates to pay 'any part of the penalty or sum forfeited' as well as 'the whole' of it to injured employers.

If a convicted master did not pay compensation he could be imprisoned and this equal treatment of both sides was certainly an improvement on the 1854 position. A difficulty arose, however, because an exception was made where the failure to pay was a failure to pay wages awarded by the court,[44] with the result that in the majority of cases brought by employees i.e. for recovery of wages, there appeared to be no effective sanction. In *Re Brittain* (1886)[45] a master was imprisoned by magistrates for non-payment of wages after insufficient effects were found to satisfy a distress warrant. The Supreme Court of Tasmania ruled, however, that although magistrates could issue a distress warrant under the *Magistrates Summary Procedure Act* 1856[46] and could imprison for non-payment of penalties under section 21 of the *Master and Servant Act*, 1856, imprisonment for non-payment of wages was not possible because section 21 specifically excluded it.

Later, a different view was expressed by the Supreme Court in *Henrichsen* v. *Page* (1898)[47] on similar facts. Clark J., with the concurrence of Dodds C.J., pointed out that section 23 of the *Master and Servant Act* provided that, subject to the provisions of that Act, the *Magistrates Summary Procedure Act* would apply to the enforcement of all penalties and sums of money ordered to be paid under the master and servant legislation. The effect of section 21 was only to make 'special and distinct provision in regard to default in payment of any penalty or sum of money other than wages'. It was held, therefore, that imprisonment

42 S. 15.
43 Ss. 19 and 20.
44 S. 21.
45 *Mercury*, 17th March 1886.
46 S. 20.
47 (1898) N. & S. vol. 1, 85.

for non-payment of wages was within the jurisdiction of the magistrates. *Re Brittain* was not mentioned except in the headnote.[48]

One of the most obnoxious aspects of the 1854 legislation was the procedure whereby a servant or apprentice could continually be forced back to serve a callous master after a period of absence or imprisonment.[49] This situation was exacerbated, firstly, by the fact that a servant was made to return and complete his service when he was discovered perhaps many years later, and secondly, because a defendant servant was not entitled to apply to the convicting magistrate to have his contract of service discharged, so that if his master wanted him back there was no alternative but for him to return.

In this area the 1856 Act made some important amendments. An absentee servant could only be made to return where he was found within 12 months, in which case magistrates were empowered to discharge the contract of service at the request of either side.[50] An absentee servant who had been detected within the year was therefore still punished for his act of misconduct but was able, though not entitled, to have his contract discharged, thus preventing the incessant punishment permitted previously.

Although it is true to say that some of the most glaring injustices of the 1854 legislation were corrected in 1856, making it a more lenient one for employees, certain entirely new clauses were included which were indicative of a continuing policy of fairly rigid control over the employment relationship by the legislature. A servant was required to obtain a certificate of discharge from his master on the termination of his contract of service. If the master refused he could be fined up to £20 and, in the event of a refusal without reasonable cause, a magistrate was authorised to grant the discharge. The servant was then bound to produce the certificate on entering into new service, and any master who contracted with him without taking the certificate could be fined £5, half of which went to any informer involved. The only exceptions were where a servant had been previously employed for less than a fortnight, in which case there was no obligation on the previous employer to give a certificate, and where a person entered into service for the first time in the colony. A penalty of up to £20 was also provided for giving false certificates or false discharges.[51] This rather one-sided system of regulating employment remained in Tasmania until 1882.[52]

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48 For a similar problem on the English master and servant legislation of 1823 (4 Geo. IV, c. 34) see *Wiles* v. *Cooper* (1835) 111 E.R. 513.

49 *Supra.*

50 S. 13.

51 Ss. 31, 32 and 33. The certification scheme can be traced back to the Elizabethan *Statute of Apprentices* 1563 and also embodied some aspects of a late eighteenth century Act *'for preventing the Counterfeiting of Certificates of the Characters of Servants'* (1792).

52 It was repealed by the *Master and Servant Act* 1882 (46 Vict. No. 18), s. 3.

In many other respects the 1856 Act was simply a rehash of the 1854 legislation. A month's warning was necessary to determine an indefinite service unless otherwise expressly agreed;[53] wages were payable quarterly unless otherwise agreed;[54] magistrates could remand employees arrested by warrant for up to seven days unless they gave sufficient surety;[55] with one small exception no right of appeal was given;[56] *certiorori* was taken away;[57] the offence of enticing or harbouring remained in exactly the same terms;[58] seduction of female apprentices and servants under age was dealt with in the same way;[59] and those sections of the 1854 Act directed specifically to contractual problems connected with immigration also reappeared in the same form.[60]

Comparison of the 1856 Act with existing English legislation

In 1856 the Tasmanian employee was, on the whole, in a more favourable situation than that which prevailed in Britain at that time where the 1747, 1766 and 1823 Acts, particularly the last-mentioned one, controlled contracts of service and apprenticeship.[61]

Like the 1856 Act, the 1823 legislation punished the vague offence of misconduct as well as absence from service, neglect and other more specific acts constituting breach of contract including failure to enter into service, although the English statute only made this an offence where the contract was written and signed.[62] Arrest in England was usually by warrant although since *Jervis's Act* in 1848[63] magistrates had the option of issuing a summons, whereas in Tasmania the emphasis was placed on procedure by way of summons unless a warrant was proved to be necessary, and then only in the case of male employees. Moreover, two magistrates were necessary to convict in the Colony as against one in England. Punishment in the mother country was almost as severe as that under the oppressive 1854 Act in Van Diemen's Land, namely, imprisonment with hard labour for up to three months or by abatement of wages in whole or in part, with the alternative in either case of discharge from service.

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53 S. 6. In 1882, s. 2 of the *Master and Servant Act* replaced this inflexible rule so that where a contract was of indefinite duration the period of notice was related to the intervals at which wages were payable i.e. a week's notice where wages were payable weekly, a fortnight's notice where they were payable fortnightly, and a month in any other case.

54 S. 7.

55 S. 17. This was repealed by s. 3 of the *Master and Servant Act* 1884 (48 Vict. No. 36).

56 The exception was contained in s. 34 (enticing or harbouring).

57 S. 25.

58 S. 34.

59 S. 35.

60 Ss. 26-30.

61 *Op. cit.*

62 S. 3.

63 11 and 12 Vict. c. 43. Although in Scotland arrest was still by warrant in every case. S. & B. Webb, *The History of Trade Unionism* (1894) 250, at n. 1.

The English servant also continued to be plagued by the fact that after serving a term of imprisonment for his offence he could be required to return to his master to serve out the remainder of his term and, if he refused, there was no end to the power of commitment.[64] In Tasmania, on the other hand, it has been shown that a considerable improvement was effected in 1856, at least in the light of the previous master and servant legislation. It is doubtful, however, whether the 1856 enactment placed the Tasmanian employee in any more favourable a position than his English counterpart. Under the 1823 Act a workman could only be committed again and again where a magistrate refused to exercise his discretion to discharge his contract as an alternative to other penalties. The same would appear to be true in Tasmania because, although the defendant employee was permitted to request discharge, there was nothing in the Act to suggest that justices were bound to grant the request in every case. And, to the extent that discharge was an additional rather than alternative discretionary remedy he was in a rather worse position.

The 1856 Act has inevitably been altered over the years, but it is remarkable that its core provisions making criminal offences of employer and employee breaches of contract still remain. One or two

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64 See Lord Ellenborough in *R.* v. *Barton-upon-Irwell* (1814) 2 M. & Sel, 329, at pp. 331-332, where he said: '[i]t would be clearly against the policy of the law if the servant by his own act of delinquency should have the power of dissolving the contract. The imprisonment of the servant was so far from being a cessation of the service, that perhaps his labour might have been required of him by the master even while he was in prison'.

Lord Ellenborough was dealing with a servant convicted by magistrates for misconduct under the 1747 Act (20 Geo. II, c. 19). A case directly on the 1823 Act is *Unwin* v. *Clarke* (1866) 1 L.R. Q.B. 417 (decided just before the *Master and Servant Act 1867* was passed), in which a workman who had entered into a contract of service for two years was convicted of absence from work under 4 Geo. IV, c. 3, s. 3. He was imprisoned for twenty-one days with hard labour and his wages were abated for that period. After being released from prison he refused to return to his master to complete his term and, when brought before the magistrates a second time, argued that there was no power in them to commit twice for the same offence. On a case stated, the Court of Queen's Bench held that the contract continued notwithstanding the servant's failure to return after imprisonment and he was therefore guilty of a fresh offence for which he could again be convicted. Blackburn J. at p. 423 stated, 'I think there is great force in the argument ... that the contract is not at an end by reason of the non-exercise by the justices of the power which they have under the statute to discharge the servant from his contract ... I think it would be hard upon the master when he engages a servant for three years if the servant could, by being once punished for his breach of contract, get rid of it, and so by his wrongful act the master should lose his service for the rest of the time'.

This case illustrates the disastrous tug-of-war between two basic principles: the binding nature of agreements for their full term and the maxim that no-one should be punished for the same offence twice, which existed in master and servant cases because the master and servant legislation brought them within the sanctions of the criminal law and, in addition, gave a master the benefits of his civil bargain. When the *English Conspiracy and Protection of Property Act* 1875 removed the criminal law from this area such clashes of principle were no longer possible.

important amendments were made in 1882 and 1884,[65] but this was the Tasmanian Government's only response in almost thirty years.

The same period in the U.K. had seen much more achieved in the way of reform. In 1867, after the report of a Select Committee had been published,[66] a new *Master and Servant Act*[67] was passed which, generally speaking, gained for British employees much the same benefits as had existed in Tasmania since 1856, although considerably less than had been anticipated by trade unionists in the U.K. In ordinary cases of misconduct by masters or servants two justices were authorised to abate the whole or a part of wages due or to order the contract to be performed (a power not given to Tasmanian magistrates), or to discharge the contract (not a new power for they already possessed it under the 1823 Act). Other alternatives available were to make an order for damages or, where pecuniary compensation would not meet the circumstances of the case, to impose a fine of up to £20 which was recoverable by distress and sale and, ultimately, imprisonment.[68] In cases of aggravated misconduct, misdemeanour or ill-treatment or where there was injury to person or property, the penalty was imprisonment for up to three months with hard labour.[69]

A similar punishment was provided by the *Tasmanian Act* 1856,[70] although the types of conduct specified would not necessarily have amounted to aggravated misconduct under the British legislation, for example, swearing. But, as trade union leaders and others in the U.K. quickly realized, the decision as to whether an 'aggravated' or an 'ordinary' misdemeanour had been committed was left entirely to the justices and there was no reason to suppose from past experience that swearing, for example, would not be dealt with as an aggravated misconduct.

It should be noted, however, that the 1867 Statute dealt with aggravated ill-treatment of servants by masters in the same way, and should be contrasted with the colonial Act which only applied to employees, employers incurring no more than a maximum of £30 in damages for equivalent offences.[71] The British Act was also more egalitarian in requiring a summons to be issued in all cases, whereas in Tasmania it

65 *Master and Servant Act* 1882 and *Master and Servant Act* 1884. For a concise, though not completely accurate, summary of the position immediately after 1884, see A. H. Davis, *A Lawyer's Letters: A Popular Guide to the Common Law and Principal Statutes of Tasmania* (1886), pp. 14-23.

66 The Committee was first appointed in May 1865 and reported in July 1866. Its terms of reference were 'to inquire into the State of the Law as regards Contracts of Service between Master and Servant and as to the expediency of amending the same'.

67 30 and 31 Vict. c. 141 (1867).

68 S. 9.

69 S. 14.

70 S. 11.

71 S. 20.

was not until 1884[72] that the procedure for employees charged with ordinary misconduct was by way of summons in every case.[73]

The proponents of reform in the U.K. were completely dissatisfied with what they saw as the half-hearted measures of the 1867 legislation but the set-back was a spur to improved organisation by trade union leaders. A Royal Commission was set up, in March 1874, and reported on master and servant law in July of that year. Its recommendations became the *Employers and Workmen Act* 1975[74] 'a change of nomenclature', said the Webbs, 'which expressed a fundamental revolution in the law'.[75] The law relating to master and servant was finally assimilated into the law of contract and both parties were, at least in theory, made equal parties to a civil contract when imprisonment for a breach of contract was abolished, except in limited cases under the *Conspiracy and Protection of Property Act* 1875[76] where the breach had the effect of depriving people of gas or water supplies or involved a danger to life or serious injury to property.[77]

In the face of these momentous developments in the history of U.K. trade unionism and the law of employment, the Tasmanian Government remained committed to the 1856 *Master and Servant Act* and only relatively minor amendments were made in the 1880s.[78] No organised pressure groups existed which were capable of securing its repeal, since an organisation of trade unions did not come into existence in the State until 1882[79] and, in any case, unions were more concerned at that time to ensure that equivalents of the English *Trade Union Act* 1871-76 which *inter alia,* gave protection to trade union property and provided a system of registration, and the *Conspiracy and Protection of Property Act* 1875, were passed in Tasmania.[80]

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72 *Master and Servant Act* 1884, ss. 2 and 3.

73 But arrest without warrant for abusive or obscene language, assaults, drunkenness etc., under the *Master and Servant Act* 1856, was retained in Tasmania until 1934 (*Statute Law Revision Act*).

74 38 and 39 Vict. c. 90 (1875).

75 S. & B. Webb, *op. cit.* at p. 291.

76 38 and 39 Vict. c. 86, (1875) ss. 4 and 5.

77 After 1871 the drive for repeal of the *Master and Servant Act* 1867 was really secondary to the main aim of trade unionists: to get the *Criminal Law Amendment Act* 1871 repealed in order to protect union members from prosecutions for criminal conspiracy. This was achieved by the *Conspiracy and Protection of Property Act* 1875 on the recommendation of the same Royal Commission which had investigated master and servant law.

78 Although a Tasmanian Conspiracy and Protection Act, similar to the British one, was enacted in 1889.

79 J. H. Portus, *The Development of Australian Trade Union Law* (1958), at p. 91, quoting T. A. Coghlan, *Labour and Industry in Australia* (1918), vol. 3, at p. 231. There appears to have been some form of organisation, however, as early as 1848 (see J. T. Sutcliffe, *A History of Trade Unionism in Australia* (1967), at p. 34), although The Tasmanian Trades Hall Council was not formed until 1883.

80 Both were successful in 1889.

With the growth of organised labour in the State and the concessions made to unions by the *Conspiracy and Protection of Property Act* 1889, it is ironical that the *Master and Servant Act* was retained, since the protection afforded by the former to unionists who collectively went on strike could be completely undermined by prosecuting individuals under the latter for the breaches of contract usually involved in their strike action. This was, of course, fully realised in the U.K. and, consequently, the English *Conspiracy and Protection of Property Act* 1875, expressly repealed the 1867 master and servant legislation. The point was also not lost on the Tasmanian Government which, in enacting the 1889 Act, refrained from repealing the 1856 statute.

The importance of this simple but very effective prosecution against a striking employee was illustrated during the great maritime, mining and shearing strikes of the early 1890s. Among the legal weapons used in N.S.W. and Queensland to eventually bring down the unions were master and servant Acts similar to that in Tasmania,[81] as well as prosecutions for conspiracy in the absence of any legislation corresponding to the English *Conspiracy and Protection of Property Act* in those States. There was, however, a consistent approach on the part of the legislatures in N.S.W. and Queensland in not enacting a *Conspiracy and Protection of Property Act* while retaining the *Master and Servant Act*, which was not the case in Tasmania.

An historic consequence of the unionists' disillusionment with the head-on confrontation approach to industrial disputes was, ultimately, the general acceptance of some system of conciliation and arbitration at both State and federal levels. In Tasmania, in 1910, this took the modified form of a wages board for each trade where decisions were based on agreement rather than arbitration. The opportunity was then ripe to repeal the *Master and Servant Act*, but it was not taken and the Act remained untouched on the statute book until 1934 when, by virtue of the *Statute Law Revision Act* and later proclamations thereby authorised, a number of amendments were made to it, including the deletion of any reference to hard labour and solitary confinement as punishments additional to imprisonment.

These amendments still did not touch the main provisions of the 1856 Act and, consequently, it is true to say that, with one exception[82] all the offences which existed in 1856 are alive and well nearly one hundred and twenty years later. In 1894, a generation after the abolition of the last English master and servant legislation, the Webbs remarked, 'it is difficult in these days when equality of treatment before the law has

81 It is extraordinary that master and servant legislation, which treated the two sides so unequally where there was a breach of contract, should have been resorted to by employers whose slogan throughout the campaign was 'freedom of contract'.

82 Offences in connection with the servants' certificates scheme in ss. 31-33, repealed by the *Master and Servant Act* 1882.

become an axiom, to understand how the flagrant injustice of the old Master and Servant Acts seemed justifiable even to a middle-class Parliament'.[83] Yet Tasmania continues to cling to its Master and Servant Act like an old friend more than eighty years after this statement was made.

The analogy is perhaps an unfortunate one because, in the first place, the Act has never been a friend to Tasmanian employees, particularly in its younger days when it was very much like its predecessors, a 'biting little imp'[84] and secondly, it would probably be more accurate to describe the Act as an old forgotten friend in having lain idle and neglected for so long. It is for this reason that, despite its poor record in the nineteenth century, most Australian writers on industrial law today discuss the Master and Servant Acts as so much history,[85] or do not bother to mention them at all.[86] The reason most often given is that when a strike occurs it is far more likely that appropriate action would be taken by an employer under state or federal systems of conciliation and arbitration or under laws which apply specifically to strikes rather than a prosecution under the *Master and Servant Act*. This has certainly been the case in the past with one or two exceptions,[87] but there are indications now that employers, thwarted by their inability to take what they regard as effective action against striking employees and their unions, particularly at the federal level, are turning away from possible courses of action open to them by the federal and state machinery for settling disputes and are consulting their lawyers for new remedies.

Similarly, it has been argued in the past that employers in Australia would never need to turn to the ordinary courts for civil actions in tort against striking employees because the paths to the various industrial tribunals are so well-trodden and well-known. In the U.K., because these highly regulated systems of conciliation and arbitration do not exist, the torts of civil conspiracy, intimidation, and inducing a breach of contract have been honed, by fairly regular use against employees and unions, into weapons of considerable accuracy by the English courts, particularly during the 1960s.[88] Their effectiveness makes them an

83 S. & B. Webb, *op. cit.* at p. 249.

84 As described by Henry Hollis, one of the Committee of Working Men set up in 1855 to secure the repeal of the 1854 Act. See *Courier*, 3rd May 1855.

85 *E.g.*, Portus, *op. cit.*, at p. 93; E. I. Sykes, *Strike Law in Australia* (1960), at p. 70.

86 *E.g.*, E. I. Sykes and H. J. Glasbeek, *Labour Law in Australia* (1972).

87 In a few cases employers have attempted to preserve their rights under the master and servant Acts against encroachments by awards. See 31 C.A.R. 728 (*Pastoral Award*); 219 C.A.R. 735 (*Metal Trades Award*); *Ex parte McLean* (1930) 43 C.L.R. 472.

88 Protection was given to a certain extent by the *Trade Disputes Act* 1906, but the Act was circumvented by holding that no trade dispute existed and this happened frequently during the 1960s when the courts followed a very narrow interpretation of these words, *e.g. Emerald Construction Co. Ltd.* v. *Lowthian* [1966] 1 W.L.R. 691; *Torquay Hotel Co. Ltd.* v. *Cousins* [1969] 2 Ch. 106; *Stratford & Son Ltd.* v. *Lindley* [1965] A.C. 269.

attractive proposition to Australian employers and there are signs that this is beginning to be appreciated.[89]

It is therefore likely that the awakened interest of employers in solutions outside those provided by the conciliation and arbitration systems will also lead them in due course back to the *Master and Servant Act* for prosecutions against striking employees who are in breach of contract, although it is fair to say that it is unlikely that the Act would be used again for its original purpose of punishing misconduct and absence by individual employees not necessarily participating in a strike.[90]

Criminal conspiracy

There is, however, possibly a second way in which the *Master and Servant Act* could be used with more devastating effect against striking employees. The Tasmanian *Conspiracy and Protection of Property Act* 1889, protects persons acting in combination in furtherance of a trade dispute against prosecution for criminal conspiracy providing the act would not be punishable as a crime if done by one person.[91] At first sight, therefore, it appears that, if striking employees are in breach of their contracts and these breaches are criminal offences under the *Master and Servant Act* capable of being committed by individuals, the employees can be prosecuted for conspiracy and the 1889 Act cannot be invoked for their protection. If the strike were in connection with matters dealt with by an Industrial Board award the statutory penalties[92] could be imposed, but the prosecution for conspiracy would appear to be a possible alternative.

Fortunately for employees in Tasmania this possibility cannot be entirely supported on closer inspection. 'Crime' is defined by section 2 (4) of the *Conspiracy and Protection of Property Act* so as to include only

89 *E.g., Woolley* v. *Dunford* (1972) S.A.S.R. 243; *Adriatic Terrazzo and Foundations Pty. Ltd.* v. *Robinson et al* (1973) 4 S.A.S.R. 294, discussed in J. H. Portus, 'Civil Law and the Settlement of Disputes', *Jo. Ind. Rel.* (1973) Vol. 15, No. 3, 281; *Davies* v. *Nyland* (1974) 10 S.A.S.R. 76. For a more recent Tasmanian example where injunctions were granted to prevent the defendant from inducing breaches of contract, see the *Rolph Cases*: *Tasmanian Television* v. *Rolph*; *Nettlefolds Ltd. & Others* v. *Rolph and the Tasmanian Branch of the Transport Workers Union of Australia* (1975) (Unreported), and the comment by A. P. Davidson in *Univ. of Tas. L.R.* (1975) 5, 80.

90 But it should be noted that the Act has been applied in this way on isolated occasions. See Portus, *op. cit.*, at p. 93, where he records that in 1955, an employee absenting himself without lawful excuse, was fined £10 and £6 costs, and ordered to pay his employer £14 as compensation.

91 The Act thereby removed any liability that might have existed for conspiracy to injure constituted by the mere fact of combination with the aim of inflicting economic injury, while retaining the narrower form of conspiracy which required those acting in combination to have committed an independently unlawful act before they could be convicted. The unlawful element in the narrower form was provided before 1889 by stretching the concepts of intimidation and coercion to cover the actions of union officials in bringing men out on strike, but by s. 6 of the *Conspiracy and Protection of Property Act* 1889 (Tas.) intimidation and coercion were impliedly limited to situations involving a breach of the peace.

92 *Industrial Relations Act* 1975 (Tas.), s. 49.

summary offences punishable by imprisonment and, although this was so before 1856, the *Master and Servant Act* in that year provided for a fine and forfeiture for ordinary breaches of contract in sections 8, 9 and 10 and these sections have remained unaltered. Technically, therefore, no 'crime' is committed by striking employees for the purposes of the *Conspiracy and Protection of Property Act* and they are protected by its provisions, although still open to prosecution for offences under relevant sections of the *Master and Servant Act.*

In only two sections of the latter is imprisonment still a possible punishment namely, sections 11 and 12 dealing with certain aggravated employee offences such as swearing, assault, violence, being drunk or being 'disorderly'. Thus, where one of these offences occurs in the course of a strike, there is a 'crime' and a prosecution for criminal conspiracy could be brought. It should be noted, however, that this result could be achieved in many cases without the assistance of the *Master and Servant Act* because imprisonment is provided for these offences under ordinary criminal law, i.e., not specifically in connection with breaches of contracts of employment.

It is not therefore in the field of criminal conspiracy that the existence of the *Master and Servant Act* constitutes a special threat to employees who strike in Tasmania but, as will be seen, in relation to the actions for civil conspiracy, intimidation and inducing a breach of contract.

Civil conspiracy and other industrial torts

After the *Conspiracy and Protection of Property Act* had prevented prosecutions for criminal conspiracy to injure and had lessened the possibility of criminal conspiracy involving an unlawful act by redefining what was meant by intimidation and coercion, the courts developed the two forms of conspiracy as civil actions where damage could be shown. In England this development was halted for civil conspiracy to injure by the *Trade Disputes Act* 1906 which, providing there was a trade dispute, erected a statutory barrier in section 1 similar to that created by the *Conspiracy and Protection of Property Act* for criminal conspiracy to injure. The result was that no action could be brought against union officials for civil conspiracy to injure where there was a trade dispute; where there was no trade dispute the action would only succeed in the absence of 'malice' as explained in the well-known *Crofter Case* (1942).[93] The narrow form of civil conspiracy by unlawful means remained as a possible action against union officials only where there was no trade dispute or where the unlawful act was actionable by an individual. But if strikers and officials steered clear of committing independently unlawful acts there was nothing to fear. The act of going on strike or threatening to strike, without more, could not result in a successful conspiracy action against them.

93 *Crofter Hand Woven Harris Tweed Co. Ltd.* v. *Veitch* [1942] A.C. 435.

This situation was dramatically altered, however, by the decision in *Rookes* v. *Barnard* (1964)[94] where the Law Lords 'discovered' the tort of 'intimidation' which was previously thought to be limited to criminal law as a threat to do an unlawful act. It was held that a threat to strike was, in the circumstances, a threat to break individual contracts of service which was a threat to do an unlawful act. This intimidation, in turn, provided the unlawful means for the action in conspiracy and, since the tort was capable of being committed by an individual, the protection of section 1 of the *Trade Disputes Act* 1906 was lost.[95]

What so enraged many unionists and commentators[96] was the fact that the Law Lords accepted not merely that tortious intimidation could constitute the independently unlawful act for civil conspiracy, but that in doing so they held that the breach of contract itself was illegal. This meant that an action was possible for conspiracy to break a contract, something unknown to English lawyers at that time except possibly in a limited category of cases involving criminal breaches of contract where there was a risk of danger to life, or of serious injury to property etc. under the *Conspiracy and Protection Act* 1875. But in Tasmania, as in other States which have retained their *Master and Servant Acts*, the extraordinary decision in *Rookes* v. *Barnard* is completely irrelevant in this respect, because whenever an independently unlawful act is needed to prove that a tort has been committed by striking workers, as in conspiracy (other than conspiracy to injure), intimidation (if there is a threat to strike) or indirectly inducing a breach of contract (if strikers make it impossible for a customer of the employer to fulfil his contract by persuading the customer's employees to go on strike), the *Master and Servant Act* is there to assist an employer, since a strike necessarily involves absence from work and this is a criminal offence under the Act.[97]

Moreover, in Tasmania no equivalent to the English *Trade Disputes Act* 1906 has been enacted and, consequently, unions as well as union officials may be sued.

For Tasmanian employers the main advantage of the Act is that it creates a straightforward criminal offence and would be likely to succeed in court where arguments based on the *Rookes* v. *Barnard* reasoning might fail. This would be particularly important in the light of the decision in *Williams* v. *Hursey* (1959)[98] where the Tasmanian trial

94 [1964] A.C. 1129.

95 The immediate effect of this decision was negated by the *Trade Disputes Act* 1965 (U.K.), but its implications are still causing difficulties.

96 See, *e.g.*, Wedderburn, *The Worker and The Law* (1971) 2nd ed., at p. 372.

97 S. 8 makes it an offence for a servant to 'absent himself from his master's service before the lawful termination thereof', so that where notice of a strike is given sufficient to lawfully terminate the individual contracts of service, no offences are committed. There would also seem to be no breaches of contract at common law in such a situation. See *Morgan* v. *Fry* [1968] 3 All E.R. 452.

98 (1959) 103 C.L.R. 30.

judge and a majority of the High Court held that the unlawful element for conspiracy was established by breaches of the *Stevedoring Industry Act* 1956 (Cth.) rather than because a number of torts had been committed. It would therefore be uncertain, to say the least, whether the extension of the necessary illegal act to torts and breaches of contract would be accepted by the Tasmanian Supreme Court or by the High Court but, ironically, a breach of contract in the guise of a criminal offence under the *Master and Servant Act* would not raise the same problems.

A civil action by an employer for conspiracy is also possible in Tasmania where the independently unlawful act is provided by section 49 of the *Industrial Relations Act* 1975 (Tas.) which makes it an offence for any union, union official or employee to 'counsel, take part in, support or assist directly or indirectly, any strike on account of any matter for which provision is made in an award'. This undoubtedly constitutes an additional hazard for strikers who, besides being heavily fined under the section,[99] could be liable to pay damages to an employer. But if such an action did find its way into the Tasmanian courts, an offence under the *Master and Servant Act* would almost certainly be preferred as the principal means of providing the necessary unlawful element because, in the first place, its effectiveness is not limited to situations where a strike has occurred 'on account of any matter for which provision is made in an award'; and secondly, there is no need to establish that a 'strike' has occurred. This can sometimes be a difficult exercise in view of the uncertainties involved in legally defining a strike[100] and the absence of any definition in the *Industrial Relations Act*.

On the other hand, all that needs to be proved under the *Master and Servant Act* is that the employee refused or neglected to perform his work or was absent from work 'before the lawful termination thereof'.[101] Thus where no strike exists because no demands are being made as, for example, where a number of key workers acting together decide to take a week off from work in order to watch Tasmania play the M.C.C. and thereby bring production in a factory to a halt, no civil action for conspiracy is possible if reliance is placed on section 49 of the *Industrial Relations Act*; but such an action would have every chance of being successful if offences under the *Master and Servant Act* were argued.

Where at least one of the persons procuring a strike in connection with a Tasmanian industrial award is a union official having no contract to break with the employer, it might be thought that if the employer wishes to include the official as one of the defendants in an action for

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99 $5,000 for an organisation, $200 for an individual.

100 See Sykes, *Strike Law in Australia* (1960), pp. 41-62. A strike is defined as 'a cessation of work in combination for the purpose of making demands'.

101 S. 8.

conspiracy he will in every case be bound to rely on the *Industrial Relations Act* for the unlawful element, rather than on the *Master and Servant Act*. A look at *Rookes* v. *Barnard* is sufficient to dispel the idea, however, since one of the defendants there was in fact a full time trade union official, yet he was still held liable in conspiracy on the grounds that the unlawful act (threatening a breach of contract) need not be capable of being committed by all the defendants so long as at least one of the conspirators was guilty of it.

The same arguments apply *a fortiori* to strikes in respect of matters governed by a federal award in the State because there is no general prohibition of strikes in the *Australian Conciliation and Arbitration Act* (1904-76). In the absence of a 'bans' clause in an award and, given the fact that awards do not generally create an obligation to work (this must come from the contract of service), the required unlawful element for tortious liability could not be drawn from a breach of a federal award in the event of a strike. However, it would seem that the independent illegality could come from a breach of the federal Act itself, particularly from section 138 which prohibits individual union officials from inciting others to boycott an award.

It is also likely that in many cases it would be more convenient and advantageous for an employer to argue on the *Master and Servant Act* in order to establish the unlawful element rather than sue each individual employee for the breach, with a smaller total amount of damages as a result of the application of different principles of assessment in contract and tort. Moreover, there is the additional consideration that an action for breach of contract cannot be taken against any full-time union officials concerned for they do not have contracts with the employer at whom the strike is aimed.

Conclusion

It is submitted that it is absolutely essential for the security of employees and unionists in the State that the *Master and Servant Act* 1856 be repealed because of the growing likelihood that prosecutions under it will be renewed, and because of the central role it can play in civil actions against strikers simply by being on the statute book. Only then can the long and often fearful history of master and servant legislation in Tasmania be brought to a satisfactory conclusion.[102]

102 A Bill to amend the *Industrial Relations Act* 1975 and to repeal the *Master and Servant Act* 1856 is now before the House of Assembly.