

Trade Union Legislation

By

A Labour Advocate

## FOREWORD

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I AM indebted to the courtesy of the publishers of the SERVANT OF INDIA for permission to reproduce in this form, four articles contributed by me to that paper in April, 1921. They contain an exposition, as far as possible, in the *ipssis-sima verba* of recognised authorities on the subject, of the principles of the English Act, on whose lines legislation is recommended in India. The reader will thus find, put together here, materials which are not ordinarily very easy of access, and this publication does not pretend to any other merit. I do hope, however, that it will be instrumental, in however humble a way, in exciting interest in this important problem, and also in eliciting some constructive suggestions regarding the form which trade union legislation should take in this country. For any such suggestions which might kindly be addressed C/o the Editor, the SERVANT OF INDIA, POONA, the writer will be very thankful.

A LABOUR ADVOCATE.

# TRADE UNION LEGISLATION.

## I.—PAST HISTORY.

NOW that Government fully realise the need of legislation giving facilities for the organisation of labour and affording to it a measure of protection, it behoves those who are interested in labour to formulate constructive proposals which will secure the end in view without inflicting any injury upon the other classes of the community. The model which Mr. Joshi suggested, *viz.* the Trade Disputes Act of England, is, in the view of Government, open to objection. It is necessary that the knowledge of the provisions of that Act should be widely diffused, so that a general discussion of the merits of that Act and any other rival plans that may be suggested will be possible. I propose in these columns to explain the provisions of the Trade Disputes Act and attempt an answer to the objections usually urged against them. But before I do so, I must give a brief history of the trade union legislation in England, and I do so below, mostly in the words of the authorities concerned on the subject.

### COMBINATION LAWS.

In their early days trade unions had to struggle against the ban of common law and repressive statutes. They were organisations which interfered with the perfect freedom of relationship between employers and employed and the free course of

trade, and they were regarded in common law as criminal conspiracies on the ground that their very object was the restraint of trade. Conspiracy in law means combination to violate the rights of another, and the fact that its object is to violate a right constitutes it a criminal act and makes it subject to a claim for damages on the part of the person whose right has been violated by the act so committed. The common law was thus described by Mr. Justice Groce in 1796 :—

“In many cases the agreement to do a certain thing has been considered as the subject of an indictment for a conspiracy, though the same act, if done separately by each individual, without any agreement among themselves would not have been illegal as in the case of journeymen conspiring to raise their wages ; each may insist upon raising his wages if he can ; but, if several meet for the same purpose, it is illegal, and the parties may be indicted for a conspiracy.”

In addition to the common law doctrine of conspiracy, the Combination Acts of 1799 and 1800 expressly prohibited any sort of combination of workmen. The law was freely used to checkmate strikes and to ward off the demands of labour for better conditions. In 1824, the various statutes were repealed and ✓ the common law on the subject of conspiracy was so far modified that combinations for the purpose of raising wages or limiting hours of labour were no longer criminally punishable. Reaction followed upon this and various outrages were committed which were attributed to the relaxation of the combination laws. The following year therefore another law was passed repealing the Act of 1824, but it nevertheless allowed combinations to exist for the

purpose of raising wages and shortening hours of labour.

The Act of 1825, while abolishing the Combination Laws, made violence to person or property, or threats or intimidation, or molestation or obstruction, with a view to interfere with masters or servants, a criminal offence. It was at first thought that these forbidden acts were physical or mechanical acts, but by construction they were held to include the act of persuading in a peaceable manner. Accordingly, in order to meet this objection, a declaration was made in the Act of 1859 giving to labour organisations the right to exercise the faculty of persuasion. It provided that no person should by reason merely of his endeavouring peaceably, and in a reasonable manner, and without threats and intimidation, direct or indirect, to persuade, be deemed guilty of molestation or obstruction within the meaning of the Act of 1825, or should, therefore, be subject to prosecution or indictment for conspiracy. Still doubts arose upon the construction of the Act and hence the Criminal Law Amendment Act of 1871 was passed, which repealed both the previous enactments and provided that certain specific things should be offences :

"1. Use violence to any person or any property. 2. Threaten or intimidate any person in such a manner as would justify a justice of the peace, on complaint made to him, to bind over the person so threatening or intimidating to keep the peace. 3. Molest or obstruct any person in manner defined by this section with a view to coerce such person."

Thus the molestation or obstruction must be done with the view to coercion—that is, interfering with

the free will of another. And then we have a definition of what molestation is :—

"1. If he persistently follow such person about from place to place. 2. If he hide any tools, clothes or other property, owned or used by such person, or deprive him of or hinder him in the use thereof. 3. If he watch or beset the house or other place where such person resides or works, or carries on business, or happens to be, on the approach to such house or place, or if with two or more other persons to follow such person in a disorderly manner in or through any street or road;"

but the whole thing is with a view to coercion.

#### CONSPIRACY.

As to conspiracy, the Act provided that—

"No person shall be liable to any punishment for conspiring to do any act on the ground that such act restrains or tends to restrain the free course of trade, unless such act is one of the acts specified in this section, and is done with the object of coercing as herein before mentioned."

This Act therefore sought to abolish the doctrine of conspiracy and define what acts connected with trade disputes were criminal and what were not. But later decisions of the court revealed the fact that trades unions were not completely free from the law of conspiracy. Baron Pollock is reported to have directed the jury that if several workmen combined not to work with a particular person and refused to work for an employer unless he dismissed that workman, that would amount to a conspiracy at common law. This point was put beyond doubt in the Conspiracy and Protection of Property Act of 1875. In moving this Bill in the House of Lords, the Lord Chancellor said: "Under the existing law (of 1871), if one man broke his contract that would not be a crime,

while if—say 50—broke their contract that at common law would be regarded as a conspiracy. Under this Bill it would not be a conspiracy.” The third section of the Act provided :

“ That an agreement or combination of two or more persons to do, or to procure to be done, any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy, if such act as aforesaid, when committed by one person, would not be punishable as a crime.”

#### CIVIL DISABILITIES.

Thus the law of conspiracy was completely swept away in its criminal aspects, but the law had “seldom, if ever, been applied for the purpose or criminal prosecutions, its applications having been limited to the enforcement of certain civil disabilities, which grievously affected the interests of trades unions”\*. Being tainted with illegality, these unions were unable to protect themselves against the dishonesty of their officers or to enter into any binding contract. The Friendly Societies Act of 1855, which was the first attempt to relieve trades unions of some of their disabilities, had a clause giving societies “not being illegal” the benefit of certain remedies against defaulting or dishonest servants. But a judgment was delivered in 1866 declaring that the trades unions could not prosecute an official who had embezzled funds, for the reason that those funds might have been applied for the purpose of maintaining strikes. An Act was therefore passed in 1870 empowering trades unions with

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\* Mr. Bruce, the Home Secretary, in the House of Commons, February 14, 1871.

the summary means of proceeding against their defaulting officers. Still several other grievances remained. These bodies could enter into no binding contract with any third person. Their Secretary could not recover at law the salary which might be due to him for his services; nor could the union maintain an action against their banker for money deposited on their account; while, if they rented premises for the purposes of their society, in case of dispute with their landlord, they were without any remedy at law. All these disabilities were removed by the Trades Union Act of 1871.

The Home Secretary, in introducing the Bill, explained (and the explanation is very important as will appear in the sequel) :

“The Bill did not propose to legalise what might be called primary contracts—such as agreements not to work or not to employ—and no person will be entitled to sue for benefits to which he is entitled, under a contract with a trade union. If such contracts were enforceable, our courts of equity might be called upon to enjoin masters against opening their works, or workmen from going to work, or discontinuing a strike; whilst our county courts would have to make decrees for contributions to strikes, or to enforce penalties from workmen who had felt it their duty to resume employment. It was not proposed to place trades unions, therefore, in all respects on the same footing as friendly societies.”

This point arises in connexion with the Trade Disputes Bill of 1906, and it is noteworthy that Mr. Frederic Harrison who served as a labour representative on the Royal Commission and wrote the Minority Report on whose recommendations the Bill was based concurred with the above view. The Commission asked themselves this question: is a



law required "by which trades unions would be enabled to sue and to be sued by members, to recover their contributions or fines, and be made liable to members for the benefits assured?" and answered it thus:

"We are inclined to believe that the time has not yet come, if it ever comes for any such statute. . . . We are far from seeing any certainty that such an act is even ultimately desirable. Trades unions are essentially clubs and not trading companies, and we think that the degree of regulation possible in the case of the latter is not possible in the case of the former. All questions of crime apart, the objects at which they aim, the rights which they claim, and the liabilities which they incur are for the most part, it seems to us, such that courts of law should neither enforce, nor modify nor annul. They should rest entirely on consent."

#### REGISTRATION.

The Act also enabled trades unions to register themselves. The Commission's recommendation was that the registration of these societies should be made compulsory and that their rules and accounts should be made public; but, under the Act, registration is optional. Unions which elect to do so are given many privileges, such as the right to hold property in the name of trustees, to hold their officers to account, etc. The obligations of registry relate principally to the making of annual reports to the Government, the filing of copies of their rules, etc.

The Act of 1875 which provided that conspiracy in relation to trade disputes should not be regarded as a criminal offence was generally thought to have abrogated the law of conspiracy, but it was held by

judges that all that it did was to take away the criminal character of the offence of conspiracy, but to leave it in all respects subject to civil action as an offence. Therefore, even after 1875, the law of conspiracy still prevailed, though it was no longer to be enforced in criminal, but only in civil, courts. It was finally extinguished by the Trade Disputes Act of 1906, which was based in its civil aspect on the principle established by the Act of 1875 in its criminal aspect. The latter Act declared that the character of an act committed by a trade union within the purview of the criminal law should depend on the consideration whether it was criminal or not, assuming it to be the act of an individual. The Act of 1906 declared, in regard to the applications of the civil law, that the act shall be right or wrong, shall be lawful or unlawful, according as it would be lawful or unlawful, judged on the assumption that it has been committed by an individual and not by a combination. It enacted (Section 1) that :

“ An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be act actionable.”

And further ( Section 3 ) :

“ An act done by a person in contemplation or furtherance of a trade union shall not be actionable on the ground only that it induces some other person to commit a breach of contract of employment, or that it is an interference with the trade, business or employment of some other person to dispose of his capital or labour as he wills.”

Another important change made by the Act of 1906 was that the principle of the non-suability

of trades unions was clearly established. Till the Taff Vale case arose in 1901 it was supposed that for wrongs committed in strikes only the individual wrong-doers could be made responsible. But the decision in this case showed that a trades union could be sued in tort for acts done by its agents and that its funds might be rendered liable to damages that might be awarded. This judgment was annulled by the provision in the Act (Section 4) that:

“ An action against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union, shall not be entertained by any court.”

The law of picketing contained in the 1875 Act was also amplified by the new Act, conferring upon trades unions the right of persuasion. It was provided (Section) 2 that:—

“ It shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union or of an individual employer or firm in contemplation or furtherance of a trade dispute to attend at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working.”

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## II—FIRST THREE SECTIONS.

*Conspiracy.*—The purpose of section 1 of the Trade Disputes Act which made an amendment in the law of conspiracy was thus described by the Attorney-General: "It meant that an action for conspiracy should not lie where there was a simultaneous breach of contract on the part of a number of men. Where there was a breach of contract on the part of men in contemplation or in the course of a trade dispute, there was invariably a simultaneous act; and if labour acted together and in the course of acting together there was a breach of the contract of service, there were all the elements of an action for conspiracy at common law. There was a combination to break a contract, and therefore undoubtedly an action for conspiracy would lie. The object of the clause was not to allow such an action to be brought, because, in the view of the Government, it would be oppressive. They did not free men from responsibility, who, in the course of a trade dispute, left their work without serving out the whole of their notice. They remained responsible under their contracts and their ordinary liabilities were not removed. What the Government said was that it was not their policy as part of legislation of this class to make these men as a body subject to an action for conspiracy where the act committed was not tortious *per se*." This relaxation or abolition of the law of conspiracy applied, it must be remembered, to employers as well as to labourers. If workpeople resorted to boycott, the employers answered by a blacklist. In South Wales the min-

ers struck work after giving due notice, but when they sought work elsewhere, it appeared that all the coal-owners had come to an understanding that not a single man employed by the colliery where the strike had occurred should be taken into employment at any other colliery. That happened frequently. Only these conspiracies, being brought about secretly by the telegraph or the telephone, cannot be brought home to the employers, while the labourers need a great amount of publicity to achieve the results which they aim at. Nor is it easy to prove the injury inflicted by the employers. The best remedy therefore is to abrogate the law of conspiracy altogether, so that both the employer and the employed may be left free to fight out their battles on a footing of equality.

*Picketing.*—The picketing section does nothing more than restore the right of peaceful persuasion which was secured by the Act of 1859, but on which afterwards a doubt was cast by the decisions of the courts. Frequently, men were employed under false representations, and when an attempt was made to put the real facts before them with a view to dissuading them from entering service, the person making such an attempt was restrained by an injunction, as having committed an illegal act. Unless the right to persuade could be freely exercised, it is impossible to bring about a strike. As the Attorney-General said, the right of peaceful persuasion "is an essential part of the right to strike. How is it possible to conduct a strike unless you can persuade your fellows to join you? How is it possible successfully to conduct a strike unless you

may persuade men who are introduced from a distance not to interfere between the strikers and their employer? The right to persuade those who would naturally join and swell your ranks, and the right to dissuade those who are brought in with a view to prevent the success of a strike, is absolutely essential for the effective conduct of an operation of that kind." Section 2 of the Trade Disputes Act merely conferred this right.

*Breach of Contract.*—The part of section 3 which relates to inducements for a breach of contract did not introduce any change in the then existing law, but, as was explained by Mr. Rufus Isaacs (now Lord Reading), was merely declaratory of the law. All it said was that merely to induce a person to break a contract of employment was not actionable. To make it actionable, the inducement must be malicious, which meant either without just cause or with an indirect motive. Malice was the essential element in such cases, *i. e.* there must be the intentional doing of a wrongful act without just cause or excuse. Where this element was lacking, it would be justifiable in trade disputes as in other matters to induce a person to break a contract. Mr. Isaacs instanced a man whose daughter was engaged to be married—a promise which was a contract at common law. "Suppose after the promise of marriage the father came to the conclusion that it would be undesirable that his daughter should marry the man. There was no ground in law, nothing had happened which would justify a breach of contract in the ordinary sense, but nevertheless there were circumstances which plainly indicated to the

father that it was desirable that his daughter should not marry this man to whom she was engaged under a valid contract at common law, and he induced her to break the contract which she had made to marry the man." Thereupon an action could be brought by the man against the father for having unlawfully induced his daughter to break the contract. And "if the jury came to the conclusion that he acted honestly under a sense of duty, (Mr. Isaacs did not believe) an action could be maintained. That was an instance of inducing a person to break a contract, but it was an instance of doing it not maliciously." Mr. Clement Edwards gave further examples. "It constantly happened that a client went to a solicitor and pointed out that he had entered into a contract which to the solicitor might appear to be rather an unconscionable one. In consequence of the advice of the solicitor the client broke the contract, and stood the racket for the breach, but no one had ever suggested that the solicitor was also liable for damages for inducing the breach. Or there was the case of a man who entered into a contract to go out to work for three or five years on the West Coast of Africa. His health broke down and he came home and consulted a doctor. The doctor advised him on the ground of health to sacrifice everything, and to throw up his employment in West Africa. There was a breach of contract there for which the man was responsible, but no one had suggested that the doctor should also be liable in damages for the breach. And why? Because it was held in all these cases that there was just cause and excuse on the part of the person advising or

inducing the breach. That was exactly the position which, it was understood, prevailed in regard to the trade union official, the expert adviser of the men. Because he was an expert in the matter of industrial conditions and in the matter of economic relations the duty was placed upon him to advise. In giving that advice he should be as immune as any other expert adviser. It was not a new principle they were laying down. They were asking that the principle should apply as to just cause and excuse for interference to the trade unionists on whom was placed the duty of advising, and that they should be placed in the category of those who could plead just cause and excuse." It must be understood that the Act gives no protection to the man who actually breaks his contract. The employer has the usual remedy against him of an action for damages, from which the actual breaker of the contract is not exempt. The section only provides that no one who induces another to commit a breach of contract is liable to a third party for that breach.

The second part of the section relating to "interference" provided that it should not be unlawful for one body of workmen to refuse to work with another body of workmen or even with a single workman for reasons which in their judgment were sufficient. Union men, for instance, have a perfect right to refuse to work with men who are not members of the trade union. The section really made no change in the existing law; it was because the law had been subjected to doubt that this provision was inserted.

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### III.—FOURTH SECTION: NON-SUABILITY.

Criticism is mainly concentrated on section 4 of the Trade Disputes Act, which puts trade unions "in the position of being peculiarly privileged corporations, allowed to commit wrongful actions in the prosecution of a trade dispute without thereby becoming liable for damages."\* The privileged position which these organisations occupy in law is, however, justified by their peculiar character. The Act of 1871 which legalised trade unions recognised that they were not corporate bodies and could not be made liable to actions for their so-called corporate acts. In this connexion I would remind the reader of the extract which was quoted in the first article from the Minority Report of the Labour Commission of 1867, which led to that enactment. The Commission recommended that no law was required enabling trade unions to sue and be sued. "The objects at which they aim, the rights which they claim and the liabilities which they incur are for the most part, it seems to us (the Report said), such that courts of law should neither enforce, nor modify, nor annul. They should rest entirely on consent." The Home Secretary emphasised these restrictions both on the powers and the liabilities of trade unions in moving the Bill, as I have already shown. For thirty years trade unions enjoyed this immunity without question. Even if in theory an action could be brought against them, it had to be brought against every individual member and the interest of each man in the union funds had to be specified, which it

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\* "The Making of Modern England," by Gilbert Slater.

was impossible to do. But an amendment made in 1863 in the law of judicature enabled trade unions to be sued in representative action and their funds made liable for any damages in which they might be cast. In other words, trade unions, though not incorporated in law, and not endowed with the privileges of incorporation, could be saddled with liabilities attaching to corporate organisations. In the Taff Vale case the House of Lords decided that the fact of registration made a trade union suable in respect of wrongful conduct in the name of the organisation which was placed on the register and held its funds answerable for damages.

#### PARTIAL IMMUNITY.

Now, the injustice involved in this judgment is patent. Trade unions are bodies of an exceedingly loose organisation. Their ramifications are manifold, they employ a large number of officials whose authority is often difficult to define. These officials are mostly volunteer workers who give their spare hours to the work of the unions, and the unions have no effective control over them. To hold the funds of a union, representing the hard-earned savings of the working classes and contributed largely for the purpose of making provision against misfortune, liable to meet claims for the wrongful conduct of some officials or agents connected with some one of the numerous branches is grossly unjust. And it became the duty of Parliament to remove the considerable practical injustice caused by applying to trade unions the law of agency which is totally inapplicable to organisations of this kind. By this legal doctrine agency is implied from conduct and

is not attributable to any express authorisation. The Government at first proposed to protect trade unions from a too rigorous administration of this doctrine by relieving them from any responsibility for any action which was not expressly authorised by their governing body. Since our object is to devise a suitable remedy, and not merely to examine the provisions of the Trade Disputes Act, it would be useful to set out the original proposals of the Government in full,\* which I do below in the words of the Attorney-General, Sir John Walton :—

We propose so to define the law of agency in its application to these unions that no act can be made the foundation of a claim for redress from union funds unless it is perfectly clear that that act was authorised by the governing body of the union. That is the first step we propose to take. We propose that the union shall appoint an executive committee, which shall have the right of conducting all operations which may bring them into collision either with their employers or with the outside public; and we propose to provide that the unions shall not

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\*The clause in the Government's original Bill, conferring partial immunity on trade unions, ran as follows :—

"Where a committee of a trade union constituted as hereinafter mentioned has been appointed to conduct on behalf of the union a trade dispute, an action whereby it is sought to charge the fund of the union with damages in respect of any tortious act committed in contemplation or furtherance of the trade dispute shall not lie, unless the act was committed by the committee or by some other person acting under their authority :

"Provided that a person shall not be deemed to have acted under the authority of the committee if the act was an act of one of a class of acts expressly prohibited by a resolution of the committee, or the committee by resolution expressly repudiate the act as soon as it is brought to their knowledge."

be bound, and their property shall not be bound, by an act unless it be the act of the executive itself—which, I take it, would mean the act of that body by resolution formally passed—or unless it be the act of some person whom they have authorised to bind them by the conduct which is impugned. That is not enough, because it may be said that the principal is liable for the acts of an agent, and that the agent is acting within the sphere of his authority, even although he may violate his instructions. We do not propose that that principle of law should apply to these cases. In the second place we propose to provide that the executive, in appointing an agent, may prescribe the acts which that agent is not permitted to do, may indicate exactly what is the sphere and scope of his duties and may restrict him to that sphere in such a way that if the conduct impugned is a violation of those instructions, then the union shall not be bound by it. There is still a third consideration. You may have a self-constituted agent who takes some action on behalf of and in the interests of the union; he may say he has the authority of the union; it may be that neither of the safeguards I have indicated would apply. We have, therefore, put a provision in the Bill that if the executive, when knowledge of that conduct is brought to them, repudiate the act and indicate their disapproval of it, they shall not be bound by it. You thus have a code of safety. First, the constitution of the committee which shall conduct these operations, and by whom alone the acts may be committed for which the union is responsible. In the second place, they have the power of limiting the authority of the agents whom they may appoint, and in the third place they have the right of repudiation in regard to acts of which they disapprove. I think that this is wise, and constitutes a pretty effective defence of these unions against attack. As I have said, these provisions involve some alteration of the general law. There is the rule by which the principal is made liable for acts which involve the violation of the instructions given to his agent, provided those acts are done on his behalf and in his interests. It is difficult

perhaps, to say conclusively what is the true foundation of that doctrine. The best reason I can give is that, inasmuch as profit often attends acts not in themselves authorised, and which involve a violation of instructions, a correlative liability should attach to them. That law is certainly a part of the law of the land; yet in our view it is a principle which ought not to apply in relation to trade unions.

The Attorney-General also quoted a precedent—the 1903 Act of New South Wales. The relevant provision in this enactment runs as follows:—

No trade union or industrial union or association of employers shall be liable to any suit or action, nor shall the funds of such union or association be in any way chargeable in respect of any act or word, done, spoken, or written, during or in connection with an industrial dispute by any agent, if it be proved that such agent acted:—(1) contrary to instructions *bona fide* given by or (2) without the knowledge of the governing body of such union or association, and that the union or association has *bona fide* and by all reasonable means repudiated the acts or words complained of at the earliest opportunity and with reasonable publicity.

Even this proposal giving partial immunity to trade unions involves a change in the ordinary law of the land, exempting one special class from liabilities to which other classes are subject, but the very nature of the organisation of trade unions requires such special legislation in their behalf if they are at all to do the work expected of them. I may here add that even Mr. Balfour, the Leader of the Opposition, was quite agreeable to this proposal, though he opposed the alternative proposal which was eventually adopted. He said ( Aug. 3, 1906 ) : “ If all that was asked for by the unions was that their funds should not be liable unless there was moral

responsibility—not technical, but real responsibility—brought home to the unions, then he would be heart and soul with them.”

#### COMPLETE IMMUNITY.

The actual enactment of 1906, however, gave a more complete immunity and is frequently criticised, and was indeed criticised by the Attorney-General himself, as “creating a privilege for the proletariat and giving a sort of benefit of clergy to trade unions analogous to the benefit of clergy which was formerly enjoyed and which created an immunity against actions in favour of certain sections of the population.” Before considering this objection in detail, I must make it plain that this section creating a privilege is applicable to the organisations of employers as well as to the organisations of labourers. The objection therefore really is, that the Act gives to trade unions and employers’ associations a greater privilege than the limited liability of business corporations. “The liability is not merely limited, it is removed *in toto*. Even though a union may be responsible for acts of violence, it cannot be sued for the damage it caused. Our [American] courts hold the members of labour unions to the unlimited law of partnerships; in England they are not liable at all. The position given in England to trade unions and employers’ associations violates that concept, fundamental in law, that he who is responsible for a wrong must answer therefor.” Such is the criticism passed by the most sympathetic of writers\* on

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\* John R. Commons, LL. D., and John B. Andrews, Fh. D., in “Principles of Labour Legislation.” (Harper’s Citizen’s Series.)

this subject. But the extent of this objection must be clearly understood. "Exemption of trade unions and employers' associations from actions in tort does not mean that the wrongs they commit are allowed to go unpunished. The union members who are guilty of acts of violence can be held therefor, both criminally and in tort; but the members who have not been direct participants in the wrongdoing cannot be held civilly liable as principals," and trade union funds cannot be rendered answerable for damages although the wrongful act may have been committed on the express authorisation of the union. This objection may be allowed,\* and from the theoretical point of view it does not seem slight, but it largely disappears when the practical effect of such legislation is considered. In discarding their original proposal for giving a limited exemption to trade unions in favour of a more far-reaching one and making such exemption bi-lateral (i. e. extending it

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\*In regard to this, however, it must be borne in mind that the Trade Disputes Act confers upon trade unions no privileges which do not belong equally to all voluntary associations, resting entirely upon personal consent. When the Bill was under discussion in Parliament, Mr. Clement Edwards, M. P., wrote in the *Nineteenth Century and After* (vol. LX, p. 389): "The Act would simply put trade unions, in regard to the law of torts, in precisely the same position as that now occupied by all other non-corporate societies, such as social, athletic, and political clubs, political associations, and so forth. The Cobden Club and the Tariff Reform League, the Liberal Federation and the Central Conservative Association are not suable as such, though they libel or slander or otherwise tortiously wrong their opponents to any extent. The individual or individuals committing the tortious wrong are alone amenable to the law."

to masters as well as to men), the Government were guided by the consideration, as Mr. Asquith (then Chancellor of the Exchequer) explained, "that there was less risk of actual legislation on disputed questions going to the Courts of law, passing from one stage of appeal to another, and involving loss of temper, money, and time, by adopting the perfectly simple and common-sense method embodied in the alternative clause, than if they were to lay down in regard to industrial combinations a new code of the law of agency." After all it must be remembered that the Act of 1906 merely restored to the trade unions the status they enjoyed previous to the Taff Vale decision. For thirty years after the passage of the 1871 Act they were practically exempt from actions in tort, and no evil consequences had happened during the period. Whatever apprehensions may have been felt when the Trade Disputes Act was passed, no practical hardship is experienced as a result of removing trade unions from the operation of agency law. An objection is frequently urged that the Act destroys the sense of responsibility of the union officials. The answer is: "As a curb upon union violence, it is doubtless much more effective vigorously to prosecute those who commit the violence than to take away the property of entirely innocent members."

#### ALTERNATIVE OF INCORPORATION CONSIDERED.

The only other conceivable method of redressing the injustice involved in putting trade unions under the liabilities of incorporate bodies would be to confer upon them the privileges of incorporation as well. They must be entitled, then, to bring actions



to enforce contracts between a union and each of its members. The consequences this would lead to were thus described by the Solicitor-General, Sir W. Robson ( House of Commons, April 26, 1906 ) :—

I think we may say that a trade union is entitled to make a contract with its members, that those members shall not return to work in a strike except with the consent of the majority of the union, expressed, it may be, through their legal and executive body. At present that contract, although legal, is not enforceable by law. Under Section 4 of the Trade Union Act of 1871 that contract is expressly made non-enforceable, because it was the intention of the statesmen of those days that trade unions should not be treated as incorporate bodies, and therefore they made these contracts non-enforceable. But, following out our supposition that trade unions are to be treated with absolute equality and that they are to be incorporate bodies, that contract will become enforceable in courts of law, not merely by actions for damages for its breach, but also by way of injunction in restraint of breach. A trade union would be able, would be entitled, then to go, and to go with a very good case, to the Court of Chancery and ask that injunctions should be issued against certain of its workmen who, in breach of their contract with the union, proposed to go back to work. . . . The trade unions having got these injunctions, what follows? Imagine the case of some great strike with, it may be, hundreds or thousands of workmen, under pressure of starvation, desiring to return to work. They have been forbidden by law. We hear a great deal about watching and besetting and picketing. That would become an obsolete controversy then, because the trade union would be entitled to go before the court and demand to receive the aid of the law, and there pickets would be the police and, if need be, perhaps the military.

That is not the only consequence. A striking feature of the recent decisions that have brought about this Bill is the development of the law with regard to procuring brea-

ches of contracts. Workmen have been severely punished whenever it can be proved—I was going to say alleged—that they have procured a breach of any contract between an employer and his workmen. That is an illegal act, which at once brings all combinations within the meshes of the existing law of conspiracy. But when trade unions are incorporated and their contracts with their members are placed under the sanctity of the law relating to contracts, it will, of course, be a wrongful act on the part of an employer to bring about any breach of contract between the union and its members, and the employer will be the subject of injunction if, in such a case, he tries to lure the men away from the solemn and secret contract they have made with their fellows.

It is inconceivable that the employers would acquiesce in these consequences of incorporation. Since trade unions cannot be given the privileges which properly belong to incorporated bodies, they must be relieved also from the obligations attaching to them. There is thus no escape from this position. The exemption from liability for tortious acts, however, is conferred by the Act equally upon labourers' and employers' organisations, and the real check, as Messrs. Commons and Andrews say, upon abuse of power by unions is the like power of employers.

In conclusion, I will only remark that Sir Thomas Holland was not quite fair in quoting from Lord Askwith in the Legislative Assembly. He quoted the adverse remarks, but stopped short at the point where Lord Askwith considerably qualified the meaning of the previous observations. Immediately following on this passage which Sir Thomas read to the Assembly occurs the following significant sentence which also, in fairness, he should have quoted :

" My own opinion is that many of the complaints against it ( the Trade Disputes Act ) are not based on good grounds and that it has not been so harmful as many suppose."

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#### IV.—PRACTICAL EXPERIENCE.

I HAVE given in the two preceding articles an exposition of the provisions of the Trade Disputes Act and defended them against the attacks which are usually made on them. Each individual objection could be separately answered and has, I hope, been satisfactorily answered in the portions that have gone so far. But I would particularly appeal to the actual experience obtained in the past of labour legislation. Anyone who goes through the vast literature that exists on the subject cannot but be impressed by one fact—that whenever any law was passed in the interest of labour, there was great exultation among the labour ranks and a corresponding alarm was aroused among the employers and yet, after a few years' experience of the law, the excessive hopes of the men were invariably found to have been moderated and the fears of the masters nearly dispelled. That is the uniform experience the student of trade unions comes up against in his researches into this subject, which shows conclusively that the privileges given to labour, if they can be so called, are not without countervailing obligations and are not always at the cost of the employer. At every step in the evolution of trade

union legislation we meet with this fact. It will not be amiss to give a few illustrations. First, see how the complete abrogation of the law of conspiracy was received on both sides and what is the universal opinion about it now.

"The right of workmen to do in combination that which they might do legally as individuals, feared by the employers at the time of the passage of the Act and hailed by the workmen as placing a powerful weapon in their hands, has in practice not been either so dangerous or as beneficial as was imagined at the time. That men can strike, either as individuals or in combination, and do other things in combination which would have been illegal under previous laws, does not apparently cause the employers much concern. So long as the men go on strike and do not by intimidation or violence prevent other men from taking their places, employers feel able to cope with the situation."

Now take the judgment of the House of Lords in the case of *Allen v. Flood*, which was regarded by the workmen as a sweeping victory won by them. The principle secured by this case is: where an act is lawful in itself the motive with which it is done is immaterial. To induce a master to discharge a servant, if the discharge does not involve a breach of contract, or to induce a person not to employ a servant, though done maliciously, and resulting in injury to the servant, does not give him any cause of action. By this judgment the workmen

Considered that their position had been immensely strengthened and that by being legally permitted to hold over an employer the threat of a strike, unless men obnoxious to them were discharged, they had a powerful weapon in their hands which could not fail to be effective! But the employers were not show to perceive that the decision also put a weapon into their hands, which as

used by them might become equally effective. If the law permitted officials or members of trade unions to threaten non-unionists or others with loss of employment or to threaten employers with suspension of work unless they discharged objectionable men, so also employers could legally refuse to employ members of a trade union in case of molestation of non-unionists by their fellow-workmen. In other words both threats to strike and threats to lock out had been legalised, and the threat might be converted into an act without subjecting the doer of the act to civil or criminal prosecution.

The same is the case of the Trade Union Act of 1875. When passed, it was welcomed by the labouring classes as a charter of liberties and was in fact described by Justice Cave as "the charter of the working man," and was regarded by the employers with the utmost alarm. The event however has proved that neither the hopes nor the fears have been realised. *"The law which the employers dreaded twenty-five years ago they would not to-day repeal had they the power. This is not the opinion of a single employer."* Mr. A. Maurice Low says in the Washington "Bulletin of the Department of Labour" (No. 33, March 1901):—"Perhaps the answer to the question as to the effect of the law on the relations between capital and labour can be best given in the words of two men, one entitled to speak as the representative of federated capital, the other as the representative of federated labour. The representative of capital said:—

We are satisfied with the law. We should not change it if we could, except to make clearer the definition of intimidation and coercion. Before the law came into effect we were harassed by picketing and besetting and it was extremely difficult to secure a conviction. Now, we are

far less troubled by those forms of violence, and when it becomes necessary to appeal to the protection of the law it is quickly given us and where the case is a just one we can rely on securing a conviction. But there is another reason why we think the law is a good thing and why it is mutually advantageous, both to capital and labour. Prior to 1875 the relations between masters and men were vague, indefinite, barbaric, archaic. The men were denied the right to improve their condition to obtain an increase of wages, to reduce their hours of labour; I mean, they were denied the right to attempt to do these things by peaceful means, a right which certainly belonged to them. These restrictions have been removed. We are often, I admit, dictated to by trade unions, often severe and burdensome restrictions are imposed upon us in the conduct of our business; still I concede that the men have a right to try and obtain an amelioration of their condition provided they do not resort to illegal methods. Nor can it be denied that what we now recognize as legitimate was in the old days regarded as illegal; prosecutions were frequently instituted on frivolous grounds. The law has removed this cause of complaint. It has brought the relations between capital and labour into greater harmony.

From the standpoint of the representative of labour the following :—

Speaking broadly, I have no hesitation in saying that the relations between capital and labour are better to-day than they were 25 years ago. I do not attribute all of this improvement to the passage of the law of 1875. I attribute part of that improvement to the law of that year, part to the better understanding which now exists between employer and employed, to the recognition that both have equal rights, to the recognition that both are mutually dependent on each other, that nothing can be to the advantage of the one without being to the advantage of the other and, conversely, if one side is dissatisfied the other is sure to be, with the result that

the consequences are injurious to both. Referring more directly to the law of 1875, its advantages to labour have been these: It has permitted us to do in combination what we were permitted to do as individuals, but which we were prohibited from doing in association before that law came into effect; it has more particularly established our rights; it has given us certain privileges and restrictions, and at the same time laid equal privileges and restrictions upon employers; it has made us feel that we are not in a class by ourselves but stand equal in the eye of the law with other men, which has had the effect of removing much of the bitterness, much of the feeling of injustice and inequality which formerly existed between capital and labour. The law is not to be regarded as perfect. It has not quite fulfilled all of our expectations. The courts, in the opinion of labour have been too prone to construe the law in favour of capital. Some of the convictions under section 7 we regard as unwarranted by the law and the facts. The decision in *Allen v. Flood* was a great victory for us, but the limitation of the power to picket, the restrictions which are imposed upon us, the restraint under which we are held, the fact that we can only do certain negative things, and have no power to act affirmatively have weakened instead of strengthened us when we are engaged in a conflict with capital. We should like to see the law amended; its amendment has often been discussed by us, but I am frank to say I do not see any prospect of the law being modified to make it more acceptable to the workmen. Still if the question were put to a vote, if we were asked whether we would have the law repealed or let it stand as it now is, faulty although we know it to be, I have no hesitation in saying that a majority of the intelligent workmen of Great Britain would vote in favour of the law being retained on the statute book."

The opinion held by competent judges of the Trade Disputes Act is not dissimilar. Lord Askwith observes: "This Act is now regarded as a charter

of liberty by some trade unionists, and is denounced as a charter of license by some employers. It is neither the one nor the other." The law is thus not unduly strained either on the side of labour, or on the side of capital. What the law really does is "to allow both sides a free hand for a fair fight," and to this no one should object. I have attempted to show above that there is nothing unjust in the incidence of the trade union law, but even if it be held that, in the abstract, labour is placed in a peculiarly privileged position in its conflict with capital, practical experience shows that this position has resulted in the good of the whole industrial community, capital as well as labour. This point was well brought out by the Solicitor-General in speaking on the Trade Disputes Act. He said:—

If trade unions have been more privileged here, which I deny, than they have been in other countries, then their privileges have had a most beneficent effect. The record of England in respect of industrial disorder is marvellous. I remember when I was Recorder for New Castle, a great industrial district, having within my jurisdiction 250,000 people, that over 20,000 men connected with the engineering trades were on strike for about six months. I need not ask the House to try to consider what that meant in prolonged suffering and struggle and hardship to the men and their families. It meant scores of thousands of human beings placed in the direst straits for the means of their subsistence. I held two sessions during the period. In the first session there was no case at all connected with this strike. In the second session, at the end of the Strike, I had before me one prisoner only whose offence had nothing whatever to do with the industrial conflict that had been going on. I thought it must be surely that cases concerned with the strike had been dealt with by the magistrates without reference to



sessions, but I was informed that there had been only one, and that a very doubtful case, as to which one of the magistrates who adjudicated on it told me that they had serious doubts about the propriety of punishing the defendant. That was the only case in that great struggle throughout a period of six months and with merely 100,000 people involved. As Englishmen we are entitled to be proud of that. I do not think that in France, Germany, or any other country in Europe or in America is such an experience as that possible. I therefore do not share the fears that are so generally expressed as to what will happen if the immunity from action which trade unions have so long enjoyed should be continued."

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## ADDENDUM.

### AMERICAN COMMISSION'S REPORT.

IN the United States a Commission was appointed in 1912 to enquire into industrial relations. It issued its report in August, 1915. The Commission consisted of nine members, the general public, employers and organised labour having an equal number of representatives on it. All the six representatives of the general public and organised labour on this Commission combined to recommend the enactment in U. S. A. of a law on the lines of the English Trade Disputes Act. The following is taken from the Monthly Review of the Bureau of Labour Statistics (November, 1915):—

"Concluding that the general effect of the decision of American courts has been to restrict the activities of labour organizations and deprive them of their most

effective weapons, the boycott and the power of picketing, while on the other hand the weapons of the employer, namely, the power of arbitrary discharge, of blacklisting, and of bringing in strikebreakers, have been maintained and legislative attempts to restrict the employers' powers have generally been declared unconstitutional by the courts; and that an additional weapon has been placed in the hands of the employers by many courts in the form of sweeping injunctions, which render punishable acts which would otherwise be legal, and also result in effect in depriving the workers of the right to jury trial, the recommendation is made—

1. That Congress and the States enact legislation embodying the principles contained in the British Trade Disputes Act of 1906."

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