1934

Industrial Combinations and the Law in the Eighteenth Century

W.S. Holdsworth

MINNESOTA LAW REVIEW

Journal of the State Bar Association

VOLUME XVIII MARCH, 1934 No. 4

INDUSTRIAL COMBINATIONS AND THE LAW IN THE EIGHTEENTH CENTURY†

BY W. S. HOLDSWORTH*

FROM the middle of the fourteenth century onwards there is authority for the principle that all persons ought to be allowed to carry on their trades freely, subject only to any restrictions or regulations which might be imposed by the common law or by statute law. The law, it was said, gave to every man the right to carry on his trade as he pleased, free from arbitrary restrictions not recognised by law, whether those restrictions were imposed by the illegal actions of officials of the local or central government, or by the lawless acts of rivals in trade. This general principle of the common law was quite consistent with the recognition of the need for much legal regulation of many aspects of trade in the interests of the state. And, since the state considered that it was to its interest to impose many restrictions in order to secure the honest manufacture of goods, skill in the workman, fair prices, fair wages,[1] and many other restrictions in order to promote foreign trade,[2] this general principle of the common law tended to be comparatively unimportant in practice, as compared with the detailed regulations made by the legislature. Occasionally, indeed, it emerges. It emerged, for instance, at the end of Elizabeth's reign, when the indignation aroused by wholesale grants of monopolies caused the Queen to leave the validity of

*Vinerian Professor of English Law in the University of Oxford; Fellow of All Souls College, Oxford.

†A lecture delivered to the Holdsworth Club in the Faculty of Law of Birmingham University on November 10, 1933.

[1] 2 Holdsworth, History of English Law, 3rd ed., 468-9; 4 ibid. 318-19; 6 ibid. 346-9.

[2] 2 Holdsworth, History of English Law, 3rd ed., 471-2; 4 ibid. 326 sqq.; 6 ibid. 323 sqq.

those grants to be determined by the common law.[3] But, though the principle was always present to the minds of lawyers and statesmen, and though it is assumed as a premise by the legislature,[4] it was too vague and general a principle to emerge very frequently in the courts.

At the end of the seventeenth and in the eighteenth centuries, it was brought into somewhat greater prominence, first by the growth of the capitalistic organization of trade, and secondly by the decadence or abolition of many of the old restrictions on the freedom of trade, and particularly of the rules which regulated prices and wages. These two allied phenomena led to the growth of combinations of masters and men in particular trades, which were formed to regulate such matters as prices, wages, and hours of work; and there is no doubt that this general principle of the common law led the lawyers to assert the illegality of these combinations and their activities. But in the eighteenth century this general principle was again overshadowed by statutes which, in pursuance of the general policy of the state to maintain some regulation of trade in the interests both of masters and men, penalized these combinations in the particular trades in which they had made their appearance.[5] It was not till the last year of the eighteenth and the first year of the nineteenth century that the growing predominance of the capitalistic organization of trade, and the increase in the number of these combinations owing to the repeal or disuse of older laws passed in the interests of the workmen, induced Parliament to pass the first general acts, against combinations, first of men and then of masters.[6] It was not till later in the nineteenth century, and after the growing influence of the doctrine of laissez faire preached by the economists had led to the repeal of this legislation against combinations,[7] that any real stress was laid upon this general principle of the common law. And then, since it proved to be too vague to be satisfactory, it was soon overshadowed by new legislation which has created the modern law as to combinations and Trade Unions of masters and men.

Those are the conditions in which the law as to combinations of masters and men grew up. I shall consider its development

[3]4 Holdsworth, History of English Law, 3rd ed., 345-9.
[4]Below n. 55.
[5]Below p. 382.
[6]39 George II, ch. 87; 39, 40 George III, ch. 106; below p. 385-386.
[7]5 George IV, ch. 95; 6 George IV, ch. 129.

in the eighteenth century under the following three heads: (1) the general theory of the common law and its application to these combinations; (2) the growth of combinations of masters and men and their statutory regulation; (3) the social and economic effects of this statutory regulation of combinations of masters and men.

(1) THE GENERAL THEORY OF THE COMMON LAW AND ITS APPLICATION TO COMBINATIONS OF MASTERS AND MEN.

"At common law," says Sir William Erle,[8] "every person has individually, and the public also have collectively, a right to require that the course of trade should be kept free from unreasonable obstruction." But this freedom allowed to every man engaged in trade "is compatible with countless restraints imposed by law for the benefit of his fellow subjects individually, or of the public generally, or of himself. The right to this freedom for the capitalist and the working man is part of the right to property and personal security, and is subject to analogous restraints."[9]

This general theory of the common law that all persons ought to be allowed to carry on their trades freely, subject to any restrictions or regulations which might be imposed by the law, can be traced back to a very early period in our legal history.[10] The principle that trade should be free from arbitrary restraints is implied in the clauses of Magna Carta which relate to the liberty of the subject,[11] and to trade;[12] and the medieval judges favoured the principle, just as they favoured the principle of freedom of alienation,[13] because they were hostile to all arbitrary restrictions on per-

[8]The Law Relating to Trade Unions 6; Sir William Erle had been Chief Justice of the Common Pleas; after his retirement he was made chairman of the Commission on Trade Unions which was appointed in 1867; the book was originally written as a memorandum to guide his colleagues on that commission.

[9]Erle, The Law Relating to Trade Unions 44.

[10]Erle, The Law Relating to Trade Unions 10.

[11]Coke, commenting on sec. 29 of Magna Carta (sec. 39 in the Charter of 1215) which provides that no man is to be disseised of his "liberties," gives as an instance of its infringement, a case where the Merchant Taylors Company had tried by an ordinance to infringe this principle of freedom of trade, Coke, Second Instit. 47.

[12]Sec. 30—as to foreign merchants.

[13]3 Holdsworth, History of English Law, 3rd ed., 85; Coke, commenting on the rule that conditions restricting freedom of alienation are void, says that such a condition is "against trade and traffique and bargaining and contracting between man and man," Coke, Littleton 223a.

sonal liberty,[14] or rights of property,[15] for which no legal justification could be shown. In fact, from the medieval period onwards, this general theory that trade ought to be free can be traced in judicial decisions and dicta; it has, at different periods, given rise to rules and doctrines intended to safeguard it; and, since the acts of combinations of masters and men are generally more dangerous to it than the acts of individuals, the chief, though not the only, means adopted by the common law to safeguard it has been an application of the law of conspiracy.

If we look at the number and character of the medieval statutes which attempted to realize the moral ideal aimed at by the Legislature—honest manufacture, a just price, a fair wage, a reasonable profit,[16] it would seem at first sight to be difficult to maintain that the common law favoured freedom of trade. But it is not really difficult to maintain this thesis if we remember that, as Sir William Erle pointed out,[17] the freedom which the common lawyers favoured was freedom from arbitrary restraints not sanctioned by the law, whether those restraints were imposed by the voluntary acts of contracting parties, or were imposed by persons acting without legal authority. In Henry V's reign, Hull, J., was prepared to treat a contract for a very moderate restraint of trade not merely as an illegal contract, but as a criminal offence.[18] In one of the Books of Assizes a case is reported in which a Lombard, who tried to enhance the price of merchandize by spreading false reports, was convicted and fined.[19] In another of the Books of Assizes, amongst the matters as to which enquiry was to be made by an inquest of office held by the court of King's Bench were the misdeeds of forestallers of victuals, and of merchants who "by covin and combination between themselves set, from year to year, a certain price on wool for sale in the country, so that none of them will buy or bid more than others in the purchase of wool, beyond the fixed price which they themselves have ordained, to the great impoverishment of the people."[20] In Edward

[14]2 Holdsworth, History of English Law, 3rd ed. 562; 5 ibid. 348.
[15]Fortescue, De Laudibus ch. 36; Coke, Second Instit. 63.
[16]2 Holdsworth, History of English Law, 3rd ed. 467.
[17]Above p. 371.
[18]Year Book, 2 Henry V Pasch. pl. 26.
[19]43 Ass. pl. 38.
[20]"Item des marchants que per covin et alliance entre eux d'an en an mettent certein prise sur leins que sont a vendre en pais, issint que nul d'eux achateront ne passeront auters en l'achate de leins oustre le certein prise qu'eux, mesmes ont ordeign, a grand enpoverishment de people" etc. 27 Ass. pl. 44 (p. 139).

III's reign the grant to one Peachey of the sole right to sell wine in London was treated as an illegal grant, and his conduct in acting under it was made one of the articles of his impeachment.[21] Coke commented upon and emphasized all these medieval authorities;[22] and in this, as in other branches of legal doctrine, passed on this medieval principle into the modern common law.

In the sixteenth and seventeenth centuries the crime of conspiracy was enlarged and generalized by the combined efforts of the Star Chamber and the court of King's Bench.[23] It was extended to apply not only to all combinations to do acts which amounted to a crime or a tort, but also to acts which were regarded as illegal because they were contrary to public policy.[24] It is clear from the discussions in the common law courts as to the validity of monopolies, which arose at the beginning of the seventeenth century,[25] that the common law held firmly to the view that restrictions on the freedom of trade were contrary to public policy, illegal unless they could be justified by a valid local custom, or by some recognised principle of the common law; and it is clear from the judgment of Parker, C. J., in the case of *Mitchel v. Reynolds*[26] that, at the beginning of the eighteenth century, the courts held exactly the same view. Involuntary restrictions on the freedom of trade were illegal, because they were contrary to public policy, unless they could be justified by a valid local custom or by the common law;[27] and voluntary restrictions on the freedom of trade, that is contracts in restraint of trade, were likewise illegal because contrary to public policy,[28] unless it could be proved that they were reasonable as between the parties to them[29] and not detrimental to the public.[30] In these circumstances it was inevitable that the courts should hold that combinations of masters which were entered into in order to force down wages or force up prices, or combinations of

[21] 2 Rotuli Parliamentorum 328.

[22] The Poulterers Case, (1610) 9 Co. Rep. 55b, 56b; the Case of Monopolies, (1602) 11 Co. Rep. 84b, 87a, 88a-b; cf. the argument of Coke, which was accepted by the court, in the case of Davenant v. Hurdis, (1598) Moore, K. B. 576, 579-80.

[23] 8 Holdsworth, History of English Law 378-9.

[24] 8 Holdsworth, History of English Law 381-2.

[25] 4 Holdsworth, History of English Law 349-53.

[26] (1711) 1 P. Wms. 181.

[27] (1711) 1 P. Wms. 181, 188-9.

[28] (1711) 1 P. Wms. 181, 192—"all contracts where there is a bare restraint of trade and no more, must be void."

[29] (1711) 1 P. Wms. 181, 186, 191-2, 193.

[30] (1711) 1 P Wms. 181, 190.

men which were entered into in order to force up wages or diminish the length of the working day, were indictable conspiracies. These combinations attempted to effect their objects by the pressure of numbers, and so infringed the liberty of masters and men to make what contracts they pleased. The case of *R. v. Starling*[31] was a case in which a combination of masters, to wit the brewers, to so conduct their trade that the king's revenue was impoverished, was held to be a criminal conspiracy, either on the ground that it was a conspiracy to raise prices, or on the ground that it was designed to bring pressure to bear on the government.[32] The case of *R. v. Cambridge Journeymen-Tailors*[33] was a case in which a combination of men to refuse to work for less than a certain sum per day was held to be an indictable conspiracy at common law, so that the indictment need not conclude contra formam statuti.[34] It was only if a combination was entered into to effect some purpose permitted by law that it could be regarded as lawful. Thus a combination to take legal proceedings to enforce a law which imposed restrictions on the freedom of trade was lawful,[35] and

[31](1663) 1 Lev. 125, 1 Sid. 174, 1 Keb. 650.

[32]The latter ground was the ground on which the court relied mainly, (1664) 1 Sid. 174; and cf. the account of this case given in the argument in R. v. Thorp, (1697) 5 Mod. 218, 224, Carth. 384, 1 Com. 27, Comb. 456, Holt, K. B. 333 and in 1 Lev. 126; the former ground is hinted at in the report in 1 Keb. 650, where it is said that "the very conspiracy to raise the price of pepper is punishable, or of any other merchandize."

[33](1721) 8 Mod. 10.

[34]"The omission in not concluding this indictment contra formam statuti is not material, because it is for a conspiracy, which is an offence at common law. It is true, the indictment sets forth, that the defendants refused to work under such rates, which were more than enjoined by the statute . . . ; but yet these words will not bring the offence . . . to be within that statute, because it is not the denial to work except for more wages than is allowed by the statute, but it is for a conspiracy to raise their wages for which these defendants are indicted," 8 Mod. 12; apart from the statutes, the only ground upon which a conspiracy to raise wages could be indictable was that such a conspiracy interfered with the freedom of trade; Wright, Law of Criminal Conspiracies 55, says that "it is easy to understand how the established practice that indictments for conspiracy do not conclude contra formam statuti even when they are founded on statutes may have led to the impression that the criminality was independent of the statutes;" but surely it is more natural to suppose that the established practice was founded on the law that conspiracies of this sort were illegal at common law because they interfered with the freedom of trade; and this was the opinion of Crompton, J., in Hilton v. Eckersley, (1855) 6 E. & B. 47, 53, 24 L. J. Q. B. 353, 25 L. T. O. S. 214, 20 J. P. 4, 1 Jur. N. S. 874, 3 C. L. R. 1415; affd. (1856) 6 E. & B. 66, cited below n. 42.

[35]"No one seems to have questioned the legality of the 1811-13 outburst of combinations to prosecute masters who had not served an apprenticeship, or who were employing unapprenticed workmen," Webb, History

also a combination to petition the King and Parliament to enforce or to alter the law.[36]

In the eighteenth century the principle that a combination of masters or men which interfered with the freedom of trade was a criminal conspiracy harmonized well with the trend of economic thought which favoured the removal of restraints on the conduct of industry. In the middle of that century there had been considerable disturbance in the cotton trade.[37] Thousands had left work and had entered into combinations to raise wages. They had appointed a committee, established boxes and appointed stewards in every township to collect money to support weavers who had been ordered to strike, and had been guilty of assaulting and abusing weavers who refused to strike. Lord Mansfield at the autumn assizes at Lancaster in 1758

"adapted his charge to the grand jury to the occasion, and strongly urged to the jury the necessity of suppressing all such combinations and conspiracies on any pretence whatsoever; gave them an account of all the attempts of the like nature that had been made at different times and in different parts of the kingdom, and told them that an active and vigilant execution of the laws in being, had always been sufficient to suppress such attempts."

He issued a warrant for the arrest of nineteen stewards appointed by the committee, and it was recommended that prosecutions should be instituted against others. In 1783, in the case of *The King v. Eccles and Others*,[38] it was held that a conspiracy to prevent a man carrying on his trade was a criminal offence. In 1796, in the case of *The King v. Mawbey*,[39] Grose, J., said obiter that, though an individual workman might insist on a rise in wages, "if several meet for the same purpose it is illegal, and the parties may be indicted for a conspiracy."[40] In 1855, in the case of *Hilton v. Eckersley*,[41] Crompton, J., said that all combinations which fettered

of Trade Unionism 66; combinations for this object were only trying to enforce the law.

[36]For instances of combinations to petition the Privy Council and Parliament, which were assumed to be legal, see Webb, History of Trade Unionism 65-6.

[37]Daniels, The Early English Cotton Industry 45-6.

[38](1783) 1 Leach 274, 3 Dougl. K. B. 337—Lord Mansfield, C. J., said at p. 339, "The conspiracy is to prevent Booth from working, the consequence is poverty," and he refused the motion in arrest of judgment.

[39](1796) 6 Durn. & East 619.

[40](1796) 6 Durn. & East 619, 636.

[41](1855) 6 E. & B. 47, 24 L. J. Q. B. 353, 25 L. T. O. S. 214, 20 J. P. 4, 1 Jur. N. S. 874, 3 C. L. R. 1415; affd. (1856) 6 E. & B. 66.

the free action of masters and men were "illegal and indictable at common law."[42]

But in 1855 it had become impossible to lay down the law quite as broadly as this, since it had been enacted in 1825[43] that the act of combining to raise or lower wages, or to affect hours of labour, was no longer to be a criminal offence. Therefore it was not true to say that all combinations of masters or men which fettered their freedom of action were indictable conspiracies. For this reason, in the case of *Hilton v. Eckersley*,[44] Lord Campbell, C. J., and the court of Exchequer Chamber held that, though the agreements entered into by members of those combinations were void, because, being in restraint of trade, they were contrary to public policy, their members had not committed illegal acts of such a kind that their commission in combination amounted to a conspiracy;[45] and this view of the law has been approved by the House of Lords.[46] But it should be observed that Lord Campbell, C. J., the court of Exchequer Chamber, and the House of Lords have all adhered to the historic principle that trade ought to be free from all restraints not sanctioned by law, and that therefore agreements which attempt to impose those restraints are void because they are contrary to public policy.

This change in the attitude of the common law is an intelligible change having regard to the changes which had taken place in economic ideas and in the statute law relating to combinations.

[42]"I think that combinations like that disclosed in the pleadings in this case [a combination of masters] were illegal and indictable at common law, as tending directly to impede and interfere with the free course of trade and manufacture. The precedents of indictments for combinations of two or more persons to raise wages, and for other offences of this nature, which were all framed on the common law and not under any of the statutes on the subject, sufficiently show what the common law was in this respect. . . . Combinations of this nature, whether on the part of workmen to increase, or of masters to lower, wages were equally illegal." (1855) 6 E. and B. 47, 53, 24 L. J. Q. B. 353, 25 L. T. O. S. 214, 20 J. P. 4, 1 Jur. N. S. 874, 3 C. L. R. 1415; affd. (1856) 6 E. & B. 66.

[43]6 George IV, ch. 129.

[44](1855) 6 E. & B. 47, 24 L. J. Q. B. 353, 25 L. T. O. S. 214, 20 J. P. 4, 1 Jur. N. S. 874, 3 C. L. R. 1415; affd. (1856) 6 E. & B. 66.

[45]Alderson, B., delivering the judgment of the Exchequer Chamber, after holding that the contracts entered into by the combine were void, because they were in restraint of trade, said at p. 75, "we do not mean to say that they are illegal in the sense of being criminal and punishable. The case does not require us: and we think we ought not to express any opinion on that point."

[46]Mogul Steamship Co. v. McGregor, Gow & Co., [1892] A. C. 25, 39, 61 L. J. Q. B. 295, 66 L. T. 1, 56 J. P. 101, 40 W. R. 337, 8 T. L. R. 182, 7 Asp. M. L. C. 120.

When *Hilton v. Eckersley* was decided, freedom of contract was supposed to be the panacea for all social ills, and the maintenance of that freedom was even said to be paramount public policy.[47] The legislature had freed from criminal taint certain combinations to affect wages and other conditions of labour, and had repealed the older statutes which made particular combinations criminal. In these circumstances, it is not surprising to find that eminent lawyers should have denied that the formation of a combination of masters or men which interfered with the freedom of trade had ever been a criminal conspiracy at common law, and have maintained that the formation of these combinations only amounted to a criminal conspiracy if they had been made illegal by statute. This was the view of R. S. Wright (afterwards Wright, J.) in his very able book on Criminal Conspiracies,[48] and of Stephen, J.[49] But it was not the view of Sir William Erle. He maintained, as we have seen, that the common law recognised the principle of the freedom of trade subject only to restraints imposed by the law.[50] It followed that combinations entered into with the intention of depriving persons of that freedom were indictable conspiracies at common law. The gist of his argument is contained in the following passages from his book.[51]

"Every person has a right under the law, as between him and his fellow subjects, to full freedom in disposing of his own labour or his own capital according to his will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others. Every act causing an obstruction to another in the exercise of the right comprised within this description—done, not in the exercise of the actor's own right, but for the purpose of obstruction—would, if damage should be caused thereby to the party obstructed, be a violation of this prohibition; and the violation of this prohibition by a single person is a wrong, to be

[47]Per Jessel M. R. in Printing Co. v. Sampson, (1875) L. R. 19 Eq. 462, 465, 44 L. J. Ch. 705, 32 L. T. 354, 23 W. R. 463; for some remarks upon this dictum see 8 Holdsworth, History of English Law, 3rd ed., 56.

[48]Wright, Criminal Conspiracies 51-56; he says at p. 56 that "there is not sufficient authority for concluding that before the 18th century there was supposed to be any rule of common law that combinations for controlling masters or workmen were criminal, except when the combination was for some purpose punishable under a statute expressly directed against such combinations, or were for conduct punishable independently of combination."

[49]3 Stephen, History of Criminal Law 209-10, 223-4.

[50]Above p. 371.

[51]Erle, The Law Relating to Trade Unions 12.

remedied either by action or by indictment, as the case may be. It is equally a wrong whether it be done by one or by many—subject to this observation, that a combination of many to do a wrong, in a matter where the public has an interest, is a substantive offence of conspiracy. It is equally a wrong, whether the obstruction be by means of an act unlawful in itself, on the part of the party obstructing, or by means of an act not otherwise unlawful."

In my opinion the authorities prove that historically this is the correct view of the attitude of the common law.

Sir William Erle admits that numerous statutes were passed at different periods to restrain combinations to raise or lower wages; and he says very truly that "while they were in force they tended to prevent a resort to the common law remedy for conspiracy."[52] On the other hand, Stephen was inclined to infer from the existence of these statutes that "until they were passed the conduct which they punish was not criminal."[53] In my opinion this is not a true inference from their existence for the following reason: When all aspects of trade were carefully regulated by the legislature, in order to ensure fair wages, fair prices, and good quality in the manufactured article, it is clear that any attempt to vary the provisions made by the legislature by a combination of masters or men was an illegal act, and that therefore a combination of persons to effect these objects was a criminal conspiracy.[54] The statutes passed by the legislature show that that principle was constantly present to its mind.[55] But the statutes by which the

[52]Erle, The Law Relating to Trade Unions 37.

[53]3 Stephen, History of Criminal Law 210.

[54]Above p. 372.

[55]Thus the preamble to 12 George I, ch. 34 presupposes the existence of this principle; it runs, "Whereas great numbers of weavers . . . have lately formed themselves into unlawful clubs and societies and have presumed contrary to law to enter into combinations and make by-laws or orders;" there is a similar preamble to 36 George III, ch. 111 which deals with combinations of workmen employed in the manufacture of paper; the same assumption is made in the preamble to the general combination Act of 1799, 39 George III, ch. 81; it runs, "Whereas great numbers of journeymen manufacturers and workmen in various parts of this kingdom, have, by unlawful meetings and combinations, endeavoured to obtain advance of their wages, and to effectuate other illegal purposes; and the laws at present in force against such unlawful conduct have been found to be inadequate to the suppression thereof, whereby it is become necessary that more effectual provision should be made against such unlawful combinations;" these preambles assume that these combinations are unlawful, and the preamble to 39 George III, ch. 81 does not say that the statutes referred to have made these combinations illegal—it assumes that they have been passed to enforce an existing rule.

legislature attempted to effect these objects were, as a general rule, statutes which dealt in detail with the regulation of particular trades. They attempted to remedy abuses which had appeared in the conduct of some particular trade; and the prohibitions which they enact against combinations in that trade are merely a part of the various provisions which they make for its regulation.[56] For instance, a statute of Edward VI's reign, which penalized combinations of producers to raise the price of victuals, penalized also combinations of workmen to raise their wages.[57] Similarly, the eighteenth century statutes, which were directed against combinations of men,[58] were statutes which dealt with particular trades; and the clauses directed against combinations were part of a larger scheme for the regulation of the particular trade.[59] I think, therefore, that these statutes, and also the later more general statutes as to combinations, presuppose, as Sir William Erle suggests, the general principle of the common law that trade ought to be free from restraints unless those restraints had been imposed by law; and that they enforce that principle, first in the case of particular trades, and later in the case of all trades, because it appeared that its enforcement was necessary by reason of the prevalence of combinations to raise or lower wages or to alter hours of labour, which infringed it.

During the course of the eighteenth century, many of the old rules directed to securing fair wages, fair prices, and good quality in the manufactured article were rapidly becoming decadent. More and more industry was coming to be organized on a capitalistic basis; and the capitalists were demanding to be freed from obsolete restrictions. Wages were coming to be regulated simply by the law of supply and demand. It is not surprising, therefore, that, as this new organization of industry gained ground, and as the old regulations which protected the workman decayed, combinations of these workmen should be formed in order to compel employers to concede that fair wage which the older legislation had endeavoured to compel them to give. Nor is it surprising that combinations of employers should also be formed to regulate

[56]Below p. 382-384.

[57]2, 3 Edward VI, ch. 15.

[58]Before the statute of 1800, 39, 40 George III, ch. 106, no eighteenth century statute contained a clause directed against combinations of masters, below p. 387.

[59]Below p. 382-383.

prices, and to resist the demands of their workmen. It was these new conditions which produced the rise of the modern trade unions and combinations of masters on the one hand, and, on the other hand, the enactment of more general and more stringent laws against these combinations of masters and men, which were attempting to regulate wages and hours of work. These general combination laws, which were passed in the last year of the eighteenth and the first year of the nineteenth century,[60] did to a large extent render unnecessary recourse to the common law principle that trade ought to be free. It was not till these and the earlier statutes against combinations were repealed, and replaced by the new legislation of 1824[61] and 1825,[62] that it was necessary to appeal to it. But, when the appeal was made to this principle, it was called upon to operate in an environment wholly different to that in which it had originated. It had originated at a time when the conduct of all branches of trade was carefully regulated in order to safeguard the interests of masters, of men, and of the state. It was now called upon to settle the disputes which arose under a system of industry wholly organized on a capitalistic system, and dominated by the prevailing economic theory of laissez faire. It is not surprising that it failed under these new conditions to settle satisfactorily the relations of capital and labour, and that it was superseded by a wholly new series of statutory regulations which begin in 1871.[63]

But, though for very different reasons, at different periods in our legal history, the principle of the common law that trade ought to be free has been overshadowed by statutory limitations and exemptions, it would be a mistake to suppose that it can be neglected. To some extent in the medieval period,[64] and to a large extent in the sixteenth and seventeenth centuries,[65] it helped to prevent the imposition upon traders of arbitrary restraints for which no legal authority could be shown. In the eighteenth and early nineteenth centuries it supplied the background of prin-

[60]39 George III, ch. 81 dealt with combinations of men only; it was replaced by 39, 40 George III, ch. 106; sec. 17 of the latter act penalized combinations of masters to reduce wages, to alter hours of labour, or to increase the quantity of work.

[61]5 George IV, ch. 95.

[62]6 George IV, ch. 129.

[63]3 Stephen, History of Criminal Law 222-227.

[64]Above p. 371-373.

[65]Above p. 373.

ciple which inspired the legislation against combinations of masters and men.[66] Later in the nineteenth century it helped to remedy some of the worst consequences of that permission to combine which the legislature had, under the influence of the classical economists, granted without adequate consideration, and without any real understanding of the nature of the social and economic problems to which the new conditions of industry had given rise.

But we must turn back to the eighteenth century, and examine the causes of the growth of these combinations of masters and men, and the manner in which they were dealt with by the legislature, during the period of transition through which the organization of industry was passing in that century. We shall see that it is to this century of transition that we must look for the beginnings of the conditions in which the modern law as to these combinations originated.

(2) The Growth of Combinations of Masters and Men and Their Statutory Regulation

Combinations of masters and men in particular trades originate naturally, and are naturally suspect both by the public at large and by the government; for, as Adam Smith says,[67] "people of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." He added that it was impossible to prevent such meetings by law; and gave wise counsel when he said that "though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary." Unfortunately this wise counsel was not followed. The growth of the capitalistic organization of industry and of the factory system, the partial application which was made by the legislature of Adam Smith's own theories as to the beneficial effect of unrestricted liberty, and the dangers to life and property and public order which were caused by the activities of combinations of men, produced legislation which succeeded indeed in impeding the growth and activities of those combinations, but not in putting an end to them, because the policy pursued by the legisla-

[66] Above p. 373-375.

[67] 1 Smith, Wealth of Nations (Cannan's Ed.) 130.

ture had had the effect of rendering them necessary to the workmen.

During the eighteenth century many combinations of masters and men in different trades were formed—though less was heard of combinations of masters than of men.[68] All were illegal at common law as criminal conspiracies—as Lord Kenyon, C. J., pointed out in the case of *R. v. Hammond and Webb*.[69] But though both combinations of masters and men were treated in the same way by the common law, they were treated very differently by the statute law. During the eighteenth century a series of statutes were passed to suppress combinations of men in different trades.

In 1720 combinations of journeymen tailors in London "for advancing their wages or for lessening their usual hours of work" were declared to be illegal and punishable with imprisonment.[70] Other provisions of the Act fixed the hours of work and rates of wages,[71] provided for the recovery of these wages by summary proceedings before justices of the peace,[72] gave power to Quarter Sessions to alter the rate of wages and hours of work,[73] and prescribed penalties for masters who gave a workman higher wages than those fixed by the act.[74] In 1725 combinations of wool combers and weavers, of combers of jersey and wool, of frame-worker knitters and makers of stockings, were declared to be illegal, and punishable with imprisonment for a period not exceeding three months.[75] Other clauses of the act provided penalties for spoiling work,[76] quitting work in breach of contract,[77] and

[68]For a combination of the coal owners of the Tyne and Wear as to the employment of men in 1765 see Hammond, The Skilled Labourer 13; for an agreement between these owners as to the output of the Northumberland coal mines known as the Newcastle Vend see ibid 24-5; 1 Smith, Wealth of Nations (Cannan's Ed.) 68-9 explains why little was heard of these combinations of masters; see also 3 Lipson, Economic History of England 396, n. 4.

[69](1799) 2 Esp. 719, 720.

[70]7 George I St. 1, ch. 13, sec. 1.

[71]Sec. 2; further provisions were made by 8 George III, ch. 17, secs. 1, 4, 6.

[72]Sec. 4.

[73]Sec. 5.

[74]Sec. 7; more stringent provisions were made by 8 George III, ch. 17, secs. 2 and 7.

[75]12 George I, ch. 34, secs. 1 and 8; for the history of the tumults which preceded the act, and led to its enactment, see 3 Lipson, Economic History of England 392-5.

[76]Sec. 2.

[77]Sec. 2.

assaulting or threatening masters.[78] Justices of the peace were given power to enforce the payment of wages,[79] and payment of wages by way of truck was prohibited.[80] In 1749 the provisions of the act of 1725 as to the combinations of the workmen mentioned in that act were extended to a number of other industries.[81] The Act also contained provisions dealing with various abuses and frauds committed by workmen in these industries.[82] In 1773 provision was made for the regulation of the wages of persons employed in the weaving of silk.[83] Masters or workmen who asked or took more or less wages than those fixed were made liable, the masters to a fine of £50, and the workmen to a fine of 40/- or to imprisonment if the fine were not paid.[84] The same penalties were provided for workmen who entered into combinations to raise wages, and who, for this purpose, persuaded workmen to quit their employers, or who assembled in any numbers beyond ten in order to frame or deliver petitions as to wages, except petitions to Quarter Sessions.[85] Another clause of the Act prohibited silk weavers from having in their service more than two apprentices.[86] In 1777 combinations of journeymen hatters were penalized,[87] together with various other offences such as spoiling goods or quitting work in breach of contract.[88] The act also provided that a master must employ one journeyman hatter for every apprentice which he took, provided that a sufficient number of journeymen hatters who had served as apprentices were available.[89] In 1796 combinations of persons employed in the manufacture of paper were prohibited.[90] The act also made regulations as to hours of work.[91]

[78]Sec. 6.
[79]Sec. 3.
[80]Sec. 4.
[81]22 George II, ch. 27, sec. 12; the industries to which the act of 1725 was extended were: journeymen dyers, journeymen hot pressers, all persons employed in the wool manufacture, journeymen servants workmen and labourers employed in the making of felts or hats, and in the manufactures of silk, mohair, furs, hemp, flax, linen, cotton, fustian, iron and leather, or any manufactures made up of those materials.
[82]Secs. 1, 2, 7.
[83]13 George III, ch. 68.
[84]Secs. 2 and 3.
[85]Sec. 3; this would seem to show that combinations to present petitions to the King or to Parliament were regarded as legal, above p. 374-375.
[86]Sec. 7.
[87]17 George III, ch. 55, secs. 3 and 4.
[88]Sec. 3.
[89]Sec. 2.
[90]36 George III, ch. 111, secs. 1, 2, 4, 5.
[91]Sec. 3.

It should be observed that all these Acts which penalize combinations of men differ, as the Webbs have pointed out,[92] from the later general combination Acts of 1799 and 1800. They were passed primarily to regulate industry; and the clauses dealing with combinations were incidental to this main purpose, which, as we have seen, is contained in the other clauses which all these acts contain.

"It was assumed to be the business of Parliament and the law courts to regulate the conditions of labour; and combinations could, no more than individuals, be permitted to interfere in disputes for which a legal remedy was provided. The object primarily aimed at by the statutes was not the prohibition of combinations, but the fixing of wages, the prevention of embezzlement or damage, the enforcement of the contract of service, and the proper arrangements for apprenticeship."[93]

But, in spite of these statutes, combinations of men became more frequent and more permanent as the eighteenth century progressed.[94] The reason was that, under the influence of the capitalistic organization of industry, of the rise of the factory system, and of the new economic doctrines which condemned the old regulations of and restrictions on the conduct of industry, Parliament was gradually ceasing to regulate the relations of masters and men.[95] The repeal in 1757 of the act passed in 1756, which provided for the settlement of the wages of weavers by the justices of the peace, shows that Parliament was exchanging "its policy of medieval protection for one of administrative nihilism."[96] Therefore the workers were left to shift for themselves. They were obliged to combine in self-defence, so that Parliament had done exactly what Adam Smith had said that it ought not to do;[97] it had rendered these combinations necessary. The result was that they became so numerous and powerful that it was quite impossible to suppress them. The men began to form permanent trade unions, and the masters naturally formed combinations to resist their demands.[98] These trade unions and combinations

[92]Webb, History of Trade Unionism 65.

[93]Webb, History of Trade Unionism 65.

[94]"The laws against combinations were powerless to check the development of trade unionism. . . . In spite of common law and statute law trade unionism persisted throughout the eighteenth century, and bequeathed its traditions to the unions of the nineteenth century," 3 Lipson, Economic History of England 396-7.

[95]3 Lipson, Economic History of England 386-7.

[96]Webb, History of Trade Unionism 51.

[97]Above p. 381.

[98]For an instance of a union of masters which originated in this way,

tended to give a solidarity to the aims of the working classes, to accentuate the division into the two separate classes of masters and men which the new industrial organization was creating, and to embitter their relations.[99]

All the reasons which had induced the legislature to forbid combinations of men in particular trades applied with greater force to the formation of the larger and more permanent trade unions which the policy of laissez faire adopted by Parliament had rendered inevitable. And those reasons were reinforced by the fear that these trade unions were inspired by French revolutionary principles.[100] These were the causes which led to the passing of the first general combination Act in 1799,[101] and they account for the character of its provisions.

The history of the enactment of this statute is as follows: In April, 1799, the master mill wrights addressed a petition to the House of Commons, which complained of a dangerous combination amongst their men, and of the inadequacy of the existing laws to suppress its activities, and asked for legislation. A bill was introduced and passed the House of Commons, but it was dropped in the Lords, because a more comprehensive bill dealing with all combinations had been introduced by Pitt. This bill, which was modelled on the Act of 1796 dealing with combinations in the paper trade,[102] became law only twenty-four days after its introduction in the House of Commons.[103] In outline its provisions were as follows:

All contracts made between workmen for obtaining an advance of wages, or decreasing their hours of work, or the quantity of their work, were declared to be illegal;[104] and the formation of such a contract was made a criminal offence punishable with imprisonment.[105] It was also made a criminal offence for members of such a combination to induce others not to take employment, or to leave their employment, or to hinder masters from hiring what workmen they pleased.[106] Attendance at, or inducing others

see 3 Lipson, Economic History of England 408.

[99]Hammond, The Town Labourer 8-9; cf. Webb, History of Trade Unionism 41-2, 46-7.

[100]Hammond, The Town Labourer 93-4.

[101]39 George II, ch. 81.

[102]36 George III, ch. 111; above p. 383.

[103]Hammond, The Town Labourer 115-124; Webb, History of Trade Unionism 69-70.

[104]39 George III, ch. 81, sec. 1.

[105]Sec. 2.

[106]Sec. 3.

to attend at, meetings held for the purpose of entering into or maintaining these combinations; or subscribing to, or collecting money from workmen or others for the furtherance of, these combinations; were also made criminal offences.[107] Contributions made for any of the purposes prohibited by the act were to be divided amongst the subscribers within three months; and, if not so divided, they were to be forfeited.[108] Treasurers and others who had these monies in their hands were compelled to answer on oath to any information preferred against them either in a court of equity or by the attorney-general.[109] Offenders against the act could be compelled to give evidence; but if so compelled they were not to be liable to any of the penalties of the Act.[110] Appeals from a conviction could be made to Quarter Sessions;[111] but its decision was final,[112] and the proceedings were not to be removed into the King's Bench by writ of certiorari.[113] Existing legislation as to combinations of manufacturers or journeymen or workmen, as to the powers of the justices to settle disputes between masters and men, and to settle rates of wages, was not to be affected by the act;[114] nor was the act to empower masters to employ men contrary to the provisions of any existing act.[115]

In the following year many petitions protesting against the Act were presented from all parts of the country. Consequently the whole question was reconsidered;[116] and the result of this reconsideration was the Act of 1800,[117] which repealed the act of 1799. The main provisions of the act of 1799 were re-enacted; but there were some important amendments which were due to the numerous petitions which had been presented against it.[118] Offenders were to be tried, not by a single justice, but by two

[107]Secs. 4 and 5.
[108]Sec. 6.
[109]Sec. 7.
[110]Sec. 9.
[111]Sec. 13.
[112]Sec. 14.
[113]Sec.13.
[114]Sec. 15.
[115]Sec. 16.
[116]Hammond, The Town Labourer 125-6; Webb, History of Trade Unionism 70-71.
[117]39, 40 George III, ch. 106.
[118]Stephen is not quite accurate when he says, 3 History of Criminal Law, 206-7, that "there was hardly any substantial difference between the two acts."

justices;[119] and justices who were masters in the particular trade in reference to which an offence was alleged to be committed, were disabled from acting.[120] Combinations between masters or other persons for reducing wages, altering hours of work, or increasing the quantity of work were made offences;[121] and provision was made for settling disputes between masters and men by arbitration.[122] On the other hand, it was provided that, though masters must not employ workmen contrary to any existing Acts, a justice of the peace could license such employment if the workmen in any trade refused to work for reasonable wages,[123] and in certain other events set out in the act.[124]

These acts are, as we have seen, very different in their character from the earlier combination acts which applied to particular trades. The prohibition of combinations is not part of a general scheme for the regulation of particular industries. It is a general prohibition; and so far was it from being part of a scheme for the regulation of industry, that the need for this general prohibition was caused by the repeal or decadence of the old regulations, and the failure of Parliament to put any new regulations in their place.[125] In fact these acts show that Parliament had wholly failed to appreciate the reasons for the rise of those large and permanent combinations of men.[126] Though this legislation, like the earlier legislation, impeded the growth and hampered the activities of these combinations, it did not succeed in suppressing them, and it did succeed in embittering the relations of masters and men. We shall now see that the main reason why Parliament wholly failed to regulate satisfactorily these relations was the influence of the predominant economic doctrine of laissez faire, which the masters had deduced from Adam Smith's teaching. That influence prevented Parliament from appreciating the fact that, in addition to the merely negative policy of repealing the old regula-

[119]Sec. 5.
[120]Sec. 16.
[121]Sec. 17.
[122]Sec. 18.
[123]Sec. 15.
[124]A refusal "to work for any particular person or persons, or to work with any particular persons," or if the workmen "by refusing to work for any cause whatsoever, or by misconducting themselves when employed to work, in any manner impede or obstruct the ordinary course of any manufacture, trade or business, or endeavour to injure the person or persons carrying on the same."
[125]Above p. 384.
[126]Above p. 381-382.

tions, a positive policy was needed which would have adapted the spirit of those old regulations to the new industrial conditions.

(3). The Social and Economic Effects of This Statutory Regulation of Combinations of Masters and Men.

During the greater part of the eighteenth century the legislature had not abandoned the attempt to settle on an equitable basis the relations of masters and men. But, with the spread of the capitalistic organization of industry, and with the growing prevalence of the factory system, the economic theory that the state should interfere as little as possible with industrial relations had gathered force. This theory was expressed in classic form in Adam Smith's book,[127] and his statement gave it enormous impetus. As interpreted by the manufacturers, who controlled the legislature, it taught that all the old regulations which governed the relations of masters and men should be abolished; that the manufacturers should be left to conduct their business as they pleased; and that any attempt to regulate wages was not only ill advised, but as impossible of success as an attempt to alter one of nature's physical laws.[128] The surrender of the legislature to these views was not only a refusal to attempt to adjust the relations of masters and men on equitable terms. It was also in effect a refusal to attempt to solve the social and economic problems which the industrial revolution was bringing in its train. This refusal, though it enabled the manufacturers to accumulate wealth, had some very evil social and economic effects.

In the first place, it tended to convince the working classes that appeals to the courts and to Parliament were useless. It was not till the proceedings which they took in the courts to enforce the old laws directed to securing a living wage and fair industrial conditions had failed,[129] it was not till the petitions which

[127] 2 Smith, Wealth of Nations (Cannan's Ed.) 184-5.

[128] "The political economists, in many instances at least, wrote as if an attempt to alter the rate of wages by combinations of workmen was like an attempt to alter the weight of the air by tampering with barometers. It was said that the price of labour depended like the price of other commodities, solely upon supply and demand, and that it could not be altered artificially," 3 Stephen, History of Criminal Law 211.

[129] For those appeals to the courts see Webb, History of Trade Unionism 57-60; thus in 1802 the weavers in the West of England combined with the Yorkshire weavers to appoint an attorney to prosecute employers who infringed the laws relating to their trade—"the result was that Parliament hastily passed an act, 43 George III, ch. 136, suspending these statutes

they presented to Parliament to secure the same objects had been rejected,[130] that the workmen were driven to take other means to remedy their grievances. The failure of their appeals to the courts and to Parliament caused their combinations to gather size and strength, and to demand, not the enforcement of the old laws, but radical and even revolutionary reforms. Thus, the refusal of the courts and Parliament to act tended to sap that law abiding instinct, which had been a marked characteristic of the English people during the seventeenth and eighteenth centuries;[131] for that refusal meant the abandonment of any attempt to submit the relations of masters and men to any effective legal control. The result was that disputes between masters and men were withdrawn from the arbitrament of the law, and left to be decided by the effective forces at the disposal of the contending parties. The fact that it was possible in 1906 to pass a statute which perpetrated the enormous injustice of freeing trade unions of masters or men from liability for torts [132] is, I think, due primarily to the prevalent laissez faire doctrines, which induced Parliament, at the end of the eighteenth and the beginning of the nineteenth centuries, to refuse to set up any legal machinery for the equitable adjustment of industrial disputes.

Secondly, and consequently, a new antagonism between the employing class and the workmen sprang up. Capital and labour began to regard one another as enemies. Class war was fomented.[133] This was particularly dangerous at a time when the new democratic theories were gathering strength. Adam Smith had remarked that "the inhabitants of a town, being collected into one place, can easily combine together;"[134] and there is no doubt that it was the population of Paris and other French towns, which

in order to put a stop to the prosecutions," ibid. 57; similarly prosecutions were instituted for infringements of the apprenticeship statutes, ibid. 59; cf. 3 Cunningham, Industry and Commerce 635-6.

[130]See Webb, History of Trade Unionism 52, 53-4, 56-7, 60-61; 3 Cunningham, Industry and Commerce 635-638, 658-660.

[131]Thus 3 Cunningham, Industry and Commerce 638, speaking of the rejection of the petitions of the weavers against the repeal of the wage clauses of 5 Elizabeth ch. 4, secs. 11, 12, 31, says, "it is important to observe that in this agitation the weavers were maintaining a strictly conservative attitude; they asked to have the law of the land put in execution, and they could not but be deeply incensed at the line taken, both by the legislature and by the magistrates who were charged with the administration of the law."

[132]6 Edward VII ch. 47, sec. 4 (1)—Trade Disputes Act, 1906.

[133]Webb, History of Trade Unionism 73-4.

[134]1 Smith, Wealth of Nations (Cannan's Ed.) 127.

was the moving force behind those democratic theories with which the success of the French Revolution was infecting Europe. In England the growth of old towns and the rise of new urban districts, which the industrial revolution was rapidly creating, made for the spread of democratic theories and the revolutionary proposals which came in their train.

Thirdly, the laissez faire attitude which Parliament took up at the bidding of the economists not only prevented a fair settlement of the claims of capital and labour under the new industrial conditions, it made Parliament indifferent to the growth of the enormous social evils, which its refusal to regulate the consequences of the industrial revolution was causing. The growth of old towns and the rise of new urban centres were creating new problems of public health and public education, which the unreformed Parliament disregarded,[135] partly no doubt because the eighteenth century machinery of local and central government was unequal to dealing with the new problems, but mainly because it considered that the laissez faire policy, which they were being taught to consider to be the orthodox attitude in economic questions, was also the orthodox attitude in all other allied social questions.

For all these reasons the treatment by the statesmen of the eighteenth century of these industrial problems, and more especially their treatment by the statesmen of the late eighteenth and early nineteenth centuries who had fallen under the spell of the classical economists, left a legacy of troublesome problems to their successors. The complexity of those problems has been aggravated rather than solved by the increase in the power of the democratic elements in the constitution.

[135] 3 Cunningham, Industry and Commerce 628-9, 807.