requesting delivery within a stated time. The car was not delivered within the time stipulated by the notice, and the defendant repudiated the agreement. DENNING, L.J., made these observations when considering the question of waiver. He said:

> "Whether it be called waiver or forbearance on his part, or an agreed variation or substituted performance does not matter. It is a kind of estoppel. He made, in effect, a promise not to insist on his strict legal rights. That promise was intended to be acted on, and was in fact acted on. He cannot afterwards go back on it."

In the present case I have come to the conclusion that there was no reasonable notice given by the defendant but if the conversation is held to be a proper notice then the defendant by his conduct is estopped from going back on it.

The next question is whether the plaintiff was guilty of insubordination, abusive and disrespectful conduct such as to justify his summary dismissal by the defendant. The plaintiff appears to be petulant in his temper and manner but his conduct over the last twenty-four years could hardly have been disobedient and disrespectful seeing that he rose from a junior clerk to the highest paid employee of the firm.

Rightly or wrongly, within the last year or so of his employment, he laboured under the impression that the defendant was desirous of getting rid of him in order to avoid giving him a gratuity, which it is admitted, the defendant was morally obliged to do. In this state of mind every action of the defendant was magnified by the plaintiff and interpreted as one directed at provoking the plaintiff to retaliate by insolence and thus giving the defendant the opportunity it is alleged he was seeking to dismiss the plaintiff summarily for misconduct. It is in this setting that both parties on August 27, 1965, lost their tempers, and in the heat of passion used words which I have no doubt they must now both regret. No man is completely above losing his temper although some exercise more restraint than others by virtue of their native tendencies. I was referred to the case of *Edwards* v. *Levy* (7), an action for wrongful dismissal of a musical critic against the proprietor of the *Daily Telegraph*, in which it was held that mere angry expressions which neither support a plea of justification nor of rescission by mutual assent and that an isolated instance of neglect or insolence would be no ground of dismissal, at all events unless the insolence were such as to be incompatible with the continuance of the employment. I am in entire agreement with this view but every enquiry must depend on its particular circumstances as circumstances vary from one case to another. It seems to me that the main question in the instant case is whether this single act of insolence and bad temper on the part of the plaintiff is sufficient ground for his summary dismissal. I find as a fact that the plaintiff was provoked by the insulting words used to him by his employer and this contributed largely to his outburst of regrettable language after a good and harmonious relationship between the parties for twenty-four years. In *Jupiter General Insce. Co., Ltd.* v. *Shroff (Ardeshir Bomanji)* (8), ([1937] 3 All E.R. 67, at p. 73) LORD MAUGHAM said:

> "Their Lordships recognise that the immediate dismissal of an employee is a strong measure, and they have anxiously considered the evidence with a view to determine the question whether the trial judge was right in his finding that the respondent was guilty of gross negligence, which, coupled with his conduct at the interview of Dec. 21, was sufficient to justify his dismissal. On the one hand, it can be in exceptional circumstances only that an employer is acting properly in summarily dismissing an employee on his committing a single act of negligence; on the other, their Lordships would be very loath to assent to the view that a single outbreak of bad temper, accompanied, it may be, with regrettable language, is a sufficient ground for dismissal."

In the instant case I do not think this sudden and isolated display of bad temper, accompanied as it was by insulting words to the defendant, in the circumstances such as I have stated, was such as to justify summary dismissal for misconduct. This misconduct was not such as would interfere with the proper running of the business nor was the insolence incompatible with the continuance of the plaintiff's employment.

In my judgment, the plaintiff as a senior clerk ought to have been given three months' notice. He was paid $54 per week and I award the sum of $54 for twelve weeks. There will be judgment for the sum of $648 with costs to be taxed.

Judgment for the plaintiff.

Solicitors: *T. Malcolm Milne & Co.* (for the plaintiff); *Llewellyn Roberts* (for the defendant).

COLLYMORE AND ABRAHAM *v.* THE ATTORNEY-GENERAL

[COURT OF APPEAL OF TRINIDAD AND TOBAGO (Wooding, C.J., Phillips and Fraser, JJ.A.), January 27, 1967]

Constitutional Law—Constitution of Trinidad and Tobago—Declaration of human rights and fundamental freedoms—Protection of rights and freedoms—Freedom of association—No abrogation except as provided by Constitution.

Trade Union—Right of free collective bargaining—Right to strike—Whether rights recognised as common law rights—Enforceable rights—Exemptions—Immunities—Liberties—Whether restraint on right to strike interference with fundamental freedom—Freedom of association.

Practice and Procedure—Enforcement of protective provisions—Original jurisdiction of High Court—Motion—Declaratory order.

Statute Law—Ultra Vires—Interpretation of statute—Statutory prohibition—Whether limitation on power of parliament—Whether rule of construction—Trinidad and Tobago (Constitution) Order in Council 1962, *Second Schedule—The Constitution of Trinidad and Tobago, Cap.* 1, *ss.* 1, 2, 3, 4, 5, 6 *and* 7; *Cap.* 4, *Part II, s.* 36—*Supreme Court of Judicature Act* 1962 [*T.*], *s.* 12—*Industrial Stabilisation Act* 1965 [*T.*], *ss.* 6 (1) (*b*), 8 (2) (*b*), (3), 10 (2), 11 (2), (4) (*e*), 23, 24, 34 (3), 36 (5), 37 (3), 41, 52—*Trade Unions Ordinance* [*T.*]—[*United Kingdom Statutes*] *Combination Acts* 1799 *and* 1800—*Combination Law Repeal Acts* 1824 *and* 1825—*Friendly Societies Act* 1855—*Molestation of Workmen Act* 1859—*Master and Servant Act* 1867—*Criminal Law Amendment Act* 1871—*Trade Union Acts* 1871 *and* 1875—*Conspiracy and Protection of Property Act* 1875—*Trade Disputes Act* 1906—*Trade Disputes and Trade Unions Act* 1927—*Trade Disputes Act* 1965—*Canadian Bill of Rights* 1960, *ss.* 1, 2.

The appellants, being members of the Oilfield Workers Trade Union unsuccessfully moved the High Court to declare as *ultra vires* the Industrial Stabilisation Act 1965, which is declared in its preamble to be an act to provide, *inter alia*, for the compulsory recognition by employers of trade unions and organisations representative of a majority of workers and for the establishment of an expeditious system for the settlement of trade disputes. By s. 34 a worker is prohibited from taking part in a strike in connection with any trade dispute unless the Minister of Labour fails to refer the dispute to the Industrial Court.

The appellants in their motion alleged that apart from being otherwise repugnant to the Constitution, certain provisions of the Act abrogated, abridged or infringed the right of free collective bargaining and the right to strike which it was contended are common law rights and are accordingly encompassed in the fundamental freedom of association which is specifically recognised and declared in s. 1 (j) of the Constitution and is protected by s. 2 the relevant portions of which read as follows:

"2. Subject to the provisions of sections 3, 4 and 5 of this Constitution, no law shall abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms hereinbefore recognised and declared and in particular no Act of Parliament shall—

(b) impose or authorise the imposition of cruel and unusual treatment or punishment;

.....

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

.....

(h) deprive a person of the right to such procedural provisions as are necessary for the purpose of giving effect and protection to the aforesaid rights and freedoms."

Held: (i) that s. 2 of the Constitution of Trinidad and Tobago is an enactment limiting the power of Parliament and is not a rule of construction;

(ii) that the Supreme Court is the guardian of the Constitution; consequently it is not only within its competence but also its right and duty to make binding declarations, if and whenever warranted, that an enactment passed by Parliament is *ultra vires* and therefore void;

(iii) that the right of free collective bargaining and the right to strike are not included in the fundamental freedom of association recognised and declared by s. 1 (j) of the Constitution and are consequently not protected as such under the provisions of ss. 2 and 6 of the Constitution;

(iv) that orders of prohibition mandamus or injunction may issue to prohibit or direct the Industrial Court or its members in respect of proceedings before it prior to the giving or making of its judgment, order or award;

(v) that "cruel" in relation to treatment or punishment prohibited by s. 2 (b) of the Constitution means not merely severe or barsh but means inhumane and inflictive of human suffering.

Appeals dismissed.

Cases referred to:

(1) *R.* v. *Cambridge Journeymen-Tailors* (1721), 8 Mod. Rep. 10; 88 E.R. 9.
(2) *R.* v. *Eccles* (1783), 1 Leach, 274; 99 E.R. 684, C.C.R.
(3) *R.* v. *Duffield* (1851), 5 Cox, C.C. 286.
(4) *R.* v. *Rowlands* (1851), 5 Cox, C.C. 436.
(5) *R.* v. *Druitt, Lawrence and Adamson* (1867), 10 Cox, C.C. 592; 16 L.T. 855.
(6) *Hornby* v. *Close* (1867), L.R. 2 Q.B. 153; 15 L.T. 563; 10 Cox, C.C. 393.
(7) *Hilton* v. *Eckersley* (1855), 6 E. & B. 47; 25 L.J.Q.B. 199.
(8) *Farrer* v. *Close* (1869), L.R. 4 Q.B. 602; 20 L.T. 802.
(9) *R.* v. *Bunn* (1872), 12 Cox, C.C. 316.
(10) *R.* v. *Hibbert* (1875), 13 Cox, C.C. 82.
(11) *Temperton* v. *Russell*, [1893] 1 Q.B. 715; [1891–4] All E.R.Rep. 724; 62 L.J.Q.B. 412; 69 L.T. 78; 57 J.P. 676; 41 W.R. 565; 9 T.L.R. 393, C.A.
(12) *Allen* v. *Flood*, [1898] A.C. 1; 67 L.J.Q.B. 119; 46 W.R. 258; 77 L.T. 717; 62 J.P. 595; 14 T.L.R. 125; 42 Sol. Jo. 149, H.L.

(13) *Lyons (J.) & Sons* v. *Wilkins* (1899), 1 Ch. 255; 68 L.J.Ch. 146; 79 L.T. 709; 63 J.P. 339; 47 W.R. 291; 15 T.L.R. 128, C.A.
(14) *R.* v. *Bauld* (1876), 13 Cox, C.C. 282.
(15) *Taff Vale Ry. Co.* v. *Amalgamated Soc. of Ry. Servants*, [1901] A.C. 426; 70 L.J.K.B. 905, n.; 83 L.T. 474; 50 W.R. 44; 44 Sol. Jo. 714; *rvsd.*, [1901] 1 K.B. 170, C.A.; *restored*, [1901] A.C. at p. 434, H.L.
(16) *Bedford (Duke)* v. *Ellis*, [1901] A.C. 1; 83 L.T. 686.
(17) *Quinn* v. *Leathem*, [1901] A.C. 495; 70 L.J.P.C. 76; 85 L.T. 289; 65 J.P. 708; 50 W.R. 139; 17 T.L.R. 749, H.L.
(18) *Bussy* v. *Amalgamated Soc. of Ry. Servants & Bell* (1908), 24 T.L.R. 437.
(19) *Vacher & Sons, Ltd.* v. *London Society of Compositors*, [1913] A.C. 107; 82 L.J.K.B. 232; 107 L.T. 722; 29 T.L.R. 73; 57 Sol. Jo. 75, H.L. *affirming*, [1912] 3 K.B. 547, C.A.
(20) *Ware & De Freville, Ltd.* v. *Motor Trade Association*, [1921] 3 K.B. 40; 90 L.J.K.B. 949; 125 L.T. 265; 37 T.L.R. 213.
(21) *Rookes* v. *Barnard*, [1964] 1 All E.R. 367; [1964] A.C. 1129; [1964] 2 W.L.R. 269; 108 Sol. Jo. 93; [1964] 1 Lloyds Rep. 28, H.L.
(22) *Spackman* v. *Plumstead Board of Works* (1885), 10 App. Cas. 229; 53 L.T. 157, H.L.
(23) *General Medical Council* v. *Spackman*, [1943] A.C. 627; 169 L.T. 226, H.L.
(24) *Green* v. *Blake and Others*, [1948] I.R. 242.
(25) *Hopkins* v. *Smethwick Local Board of Health* (1890), 24 Q.B.D. 712; 59 L.J.Q.B. 250; 62 L.T. 783; 54 J.P. 693; 38 W.R. 499, C.A.
(26) *Board of Education* v. *Rice*, [1911] A.C. 179; 80 L.J.K.B. 796; 104 L.T. 689; 75 J.P. 393; 27 T.L.R. 378; 55 Sol. Jo. 440, H.L.
(27) *University of Ceylon* v. *Fernando*, [1960] 1 All E.R. 631; [1960] 1 W.L.R. 223; 104 Sol. Jo. 230; 76 L.Q.R. 177; 23 M.L.R. 428.
(28) *Baxter* v. *Commissioners of Taxation (N.S.W.)* (1907), 4 C.L.R. 1087.
(29) *Liyanage* v. *R.*, [1966] 1 All E.R. 60; [1967] 1 A.C. 259.
(30) *Lumley* v. *Gye* (1853), 2 E. & B. 216; 22 L.J.Q.B. 463; 1 W.R. 432; 17 Jur. 827; 118 E.R. 749.
(31) *Gozney* v. *Bristol Trade and Provident Society*, [1909] 1 K.B. 901; 78 L.J.K.B. 616.
(32) *Russell* v. *Amalgamated Society of Carpenters and Joiners*, [1912] A.C. 421; 81 L.J.K.B. 619; 106 L.T. 433; 28 T.L.R. 276; 56 Sol. Jo. 342, H.L.
(33) *Crofter Hand Woven Harris Tweed Co., Ltd.* v. *Veitch*, [1942] 1 All E.R. 142; [1942] A.C. 435; 166 L.T. 172; 31 D.L.R. (2d) 209.
(34) *Federated Amalgamated Government Railway & Tramway Service Assocn.* v. *N.S.W. Traffic Employees Assocn.* (1906), 4 C.L.R. 488.
(35) *Richardson* v. *Mellish* (1824), Bing. 229; 9 Moore, C.P. 435.
(36) *D'Aguiar* v. *Attorney-General*, [1962] 4 W.I.R. 481.
(37) *Bribery Comr.* v. *Ranasinghe*, [1964] 2 All E.R. 785; [1965] A.C. 172; [1964] 2 W.L.R. 1301; 108 Sol. Jo. 441; 27 M.L.R. 705; 235 L.T. 311, P.C.
(38) *King* v. *Parker* (1876), 34 L.T. 887.
(39) *Williams Bros. (Hull), Ltd.* v. *Naamlooze Vennootschap (W.H.) Berghuys Kolenhandel* (1915), 86 L.J.K.B. 334; 21 Com. Cas. 253.
(40) *Bonsor* v. *Musicians Union*, [1956] A.C. 104; [1955] 3 W.L.R. 788; 99 Sol. Jo. 814; [1955] 3 All E.R. 518; 220 L.T. 295; [1956] S.L.T. 25; 19 M.L.R. 121; 106 L.J. 454.
(41) *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, [1892] A.C. 25; 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, H.L.
(42) *Mitchel* v. *Reynolds* (1711), 1 P.Wms. 181; 24 E.R. 347.

(43) *Nordenfeldt* v. *Maxim Nordenfeldt Co.*, [1874] A.C. 534; 71 L.T. 489; 63 L.J.Ch. 908; 10 T.L.R. 636.
(44) *South Wales Miners Federation* v. *Glamorgan Coal Co., Ltd.*, [1905] A.C. 239; 74 L.J.K.B. 525; 92 L.T. 710; 53 W.R. 593; 21 T.L.R. 441.
(45) *R.* v. *Canadian Pacific Ry. Co.*, 31 D.L.R. (2d) 209; 1963 Ont. Rep. 108.
(46) *Canadian Pacific Ry. Co. v. Zambri*, [1962] S.C.R. 609; 34 D.L.R. (2d) 654.

Appeals by Learie Collymore and John Abraham against an order made by CORBIN, J., dismissing their motion for an order declaring certain provisions of the Industrial Stabilisation Act 1965 *ultra vires* on the ground that they infringed the Constitution of Trinidad and Tobago.

A. J. Alexander for the appellants.
G. A. Richards, Q.C., Attorney-General with *G. des Iles, Solicitor-General*, for the respondent.

WOODING, C.J.: Section 36 of the Constitution provides that "subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Trinidad and Tobago". In my judgment, the section means what it says. And what it says, and says very clearly, is that the power and authority of Parliament to make laws are subject to its provisions. Parliament may therefore be sovereign within the limits thereby set, but if and whenever it should seek to make any law such as the Constitution forbids it will be acting *ultra vires*. The Constitution also makes express provision in and by its s. 6. for the enforcement of the prohibitions prescribed by its Chapter I. The chapter, hereafter referred to as such, comprises the first eight sections of the Constitution and deals with "The Recognition and Protection of Human Rights and Fundamental Freedoms". And it is under the facility of s. 6 that the appellants have claimed and are in my opinion entitled to the right to proceed.

The appellants moved for an order declaring that the Industrial Stabilisation Act 1965, to which I shall hereafter refer as the Act, is *ultra vires* the Constitution and is therefore null and void and of no effect. In the main, they founded their claim for relief on the ground that the Act falls within the mischief against which s. 2 of the chapter provides. That section prescribes that, subject to ss. 3, 4 and 5 none of which comes into question here,

> "*no law shall* abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms hereinbefore recognised and declared and in particular *no Act of Parliament shall*"

authorise, effect, impose or deprive in any of the respects enumerated and set forth in a number of paragraphs lettered (a) to (h). In the course of his submissions the Attorney-General expressed the view that this section is not an act of limitation but rather a rule of construction. I disagree profoundly. He would have us regard the section as having the same effect as s. 2 of the Canadian Bill of Rights which was enacted in 1960 and which is known and accepted to be the source of the chapter. But that section reads as follows:

> "*Every law of Canada shall*, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, *be so construed and applied* as not to abrogate, abridge or infringe or to authorise the abrogation, abridgment or infringement of any of the rights or freedoms herein recognised and declared, and in particular, *no law of Canada shall be construed or applied* so as to"

authorise, impose or deprive as in the said section expressly provided. Manifestly, the Canadian enactment is fundamentally different. It is not entrenched as a part of a constitution but is merely enacted as a statute of Parliament. Much more to the point, it is in terms interpretative and not prohibitive. In

my opinion, the change from the language of the source was deliberate and purposive. I am accordingly in no doubt that our Supreme Court has been constituted, and is, the guardian of the Constitution, so it is not only within its competence but also its right and duty to make binding declarations, if and whenever warranted, that an enactment passed by Parliament is *ultra vires* and therefore void and of no effect because it abrogates, abridges or infringes or authorises the abrogation, abridgment or infringement of one or more of the rights and freedoms recognised and declared by s. 1 of the chapter. I so hold.

I turn then to the principal issue. The appellants' main contention was that the Act abrogates or abridges what they termed to be the right of free collective bargaining and the right to strike, both of which they maintain to be inherent in the freedom of association which is a fundamental freedom under the Constitution. To the extent that s. 24 of the Act imposes the condition that no agreement between a trade union and an employer shall have effect unless or until it is registered and that s. 23 authorises the court constituted under the Act (hereafter referred to as "the Industrial Court") on objection by the Minister of Labour to refuse to register it although it was freely negotiated between them, I am in no doubt that the freedom of collective bargaining has been abridged. It may well be that the abridgment does not cut very deep or that in so far as it does it is in the public interest, but with such questions this court is not concerned. I am likewise in no doubt that the Act considerably abridges if indeed in substance and effect it does not altogether abrogate the so-called right to strike or to declare a lockout: see Parts VI and VII of the Act. In so saying, I recognise as the learned Attorney-General argued that the Act nowhere specifies that workers shall not strike and that *ex facie* it appears to forbid and thereby to postpone the taking of strike action only prior to and pending the operation of the machinery set up by Part VI of the Act. But since the operation is not interrupted except by the default or neglect of the Minister of Labour to refer the dispute within the prescribed time to the Industrial Court and does not cease until the reference has been finally determined, and since an order or award is binding under pain of severe penalties for any breach thereof, I do not understand how it can be said that the Act in substance does not exclude strikes. I think, therefore, that the Act does substantially abrogate the so-called right to strike, but for the purposes of this appeal it suffices that the so-called right is abridged. Thus I come to the nub of the issue. This, as I see it, is whether the freedom of collective bargaining and the so-called right to strike are, or either of them is, inherent in (in the sense of being an integral feature of) the freedom of association guaranteed by the Constitution.

My first observation is that individual freedom in any community is never absolute. No person in an ordered society can be free to be antisocial. For the protection of his own freedom everyone must pay due regard to the conflicting rights and freedoms of others. If not, freedom will become lawless and end in anarchy. Consequently, it is and has in every ordered society always been the function of the law so to regulate the conduct of human affairs as to balance the competing rights and freedoms of those who comprise the society. Hence, although at common law, as is now under the Constitution, every person was free to associate with his fellows, a clear distinction was at all times drawn between the freedom to associate, the objects to be pursued in association and the means to be employed to attain those objects. If the objects or the means offended against the law, then, notwithstanding the freedom to associate, all or any of the associates could be charged with the commission of a crime or might be held liable in damages for the commission of a tort. In either case, the crime or tort was conspiracy. And while the legislature has from time to time intervened when it has found intervention necessary or expedient to redress any imbalance between the competing rights and freedoms, the distinction between

association on the one hand and objects and means on the other has nonetheless remained unaffected.

In referring to the appellants' contention I have spoken of the so-called right to strike. Corbin, J., who dealt with the motion in the High Court denied the right. He pointed to what he described as the "sharp distinction between the mere 'freedom' to strike and the 'right' to strike", and he quoted in his support passages from Professor Freund's Labour Relations and the Law, at p. 15, and Hood Phillips' Constitutional and Administrative Law (3rd Edn.), at p. 484. I agree with the distinction, but in the context of constitutionally-guaranteed rights and liberties I prefer to regard the freedom and to speak of it as an immunity. I shall show why.

In the medieval system of industry in Britain, the recognised crafts were catered for by guilds which were combinations of masters and journeymen. At first, their concern was to protect the standards of their respective crafts by defining the terms of service for apprentices, but they did from time to time also determine the piece-rate to be paid to journeymen. Later, wages were frequently regulated by statute. But the decline in the 18th century in the official regulation of wages, accompanied as it was by the decay of the guilds, led to combinations of workers one of the objects of which was to secure and maintain adequate remuneration for the work they did. Quite early they resorted to strike action, but equally early such action was condemned as conspiracies to do or cause injury to others or as conspiracies in restraint of trade. Thus, in 1721 certain journeymen tailors were found guilty of conspiracy for refusing to work at less than the wages they demanded and, on a motion in arrest of judgment, it was held that although the wages so demanded were in excess of what had been directed by statute that was not the gist of the offence. It was, the court said,

> "not for the refusing to work, but for conspiring, that they were indicted, and a conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them, or any of them, to do if they had not conspired to do it:"

(see *R.* v. *Cambridge Journeymen-Tailors* (1)). Then in 1783, in *R.* v. *Eccles and Others* (2), seven persons who went on strike were convicted of conspiracy to impoverish a tailor and to prevent him from carrying on his trade and the conviction was upheld, Lord Mansfield saying:

> "persons in possession of any articles of trade may sell them at such prices as they individually may please, but if they confederate and agree not to sell them under certain prices, it is conspiracy; so every man may work at what price he pleases, but a combination not to work under certain prices is an indictable offence."

I am in some doubt about these decisions however. If the combinations had as their object the securing of what the accused persons considered to be adequate remuneration for themselves and their refusal to work did not involve them in any breach of contract or in any intimidatory, obstructive or other unlawful act, then neither the object nor the means can properly be said to have been unlawful. But it appears that they were regarded, and accordingly condemned, as combinations in restraint of trade or as conspiracies to injure. My doubts need not trouble me however. As plainly appears from their affidavit in support of their motion, the appellants' claim of a right to strike is in essence a claim to combine with others to bring about a stoppage or other dislocation of work so as to exert pressure on their employer to give way to their demands and at the same time to retain their employment as of course. That is, in effect, a claim of right to commit breaches of contract without liability to have the contract discharged for its breach. That, too, is how "strike" is defined in the

Act. So, since that is the quality of the strike with which this appeal is concerned, it suffices to say that no one can doubt that a combination to withdraw from work in breach of contract was punishable as a conspiracy at common law. The illegality of such combinations was explicitly confirmed by the Combination Acts of 1799 and 1800 which were enacted under the stress of the war with revolutionary France. However, after peace was restored the Acts were repealed by the Combination Laws Repeal Acts of 1824 and 1825. These provided that peaceful combinations, if limited in scope to fixing wages and hours of labour, were no longer to be an offence whether under the common or statute law, but they confirmed that violence and intimidation by any person (whether acting singly or in combination with others) and molesting or obstructing persons at work were offences for which punishment was accordingly prescribed. It was this modification of the common law as originally applied which was expounded in the earliest decisions to which we were referred, *R.* v. *Duffield and Others* (3), *R.* v. *Rowlands and Others* (4) (1851), 5 Cox, C.C. 436 and (on appeal) 466, and *R.* v. *Druitt, Lawrence and Adamson* (5). It must consequently be borne in mind that at the outset trade unions were by the common law combinations which were illegal for having objects in restraint of trade and/or for employing means by their resort to strikes which were in breach of the law. The Combination Laws Repeal Acts were thus the first step forward from illegality towards immunity.

Thereafter, many conflicts were waged between employers and workers, the employers often hiring "blackleg" labour as well as devising a document which they required their workers to sign repudiating participation in any trade union activity, and the workers organising themselves in associations for mutual assistance to secure better wages and conditions of employment as well as legislation such as would correct the imbalances in power and bargaining position between themselves and their employers. The earliest of such enactments was the Friendly Societies Act 1855 which gave legal protection to societies with benefit functions and under which trade unions began to register. Then came the Molestation of Workmen Act 1859 which sought to clarify the Combination Laws Repeal Act 1825 by specifically exempting peaceful picketing in trade disputes over wages and hours from the penalties for "molestation" and "obstruction". But this apparent progress was set back by the decision in *Hornby* v. *Close* (6) whereby the Court of Queen's Bench held that a mutual society which, in addition to the rules for the *bona fide* relief of sick members and for other ordinary purposes of a friendly society, included in its constitution rules for the encouragement, relief and maintenance of men on strike was not a friendly society within the meaning of the 1855 Act and, further, that societies which were really trade unions were societies which existed for illegal purposes, that is to say, for purposes in restraint of trade. In the last-mentioned respect, the court approved and followed the decision of the Court of Exchequer Chamber in *Hilton* v. *Eckersley* (7) in which it was held that a combination of masters to employ only men who satisfied certain stipulated conditions was illegal for being in restraint of trade so that, even if they might not be liable to prosecution, any agreement they made for carrying out their purposes was likewise illegal and therefore void. The principle in *Hornby* v. *Close* (6) was followed in *Farrer* v. *Close* (8) although the rules in question there "admitted of a perfectly innocent construction and were capable of being applied to purposes only which were within the scope of the object of a friendly society"; but the court held that it must look to the actual working of the society and not to its ostensible character and, in its view, the evidence showed that the society merely professed to be a friendly society, the rules having "in their practical application . . . been made subservient to the purposes of a trade union instead of being confined to those of a friendly society".

A measure of relief was provided by the Trade Union Act 1871. It authorised

the registration of trade unions as such and declared that the purposes of a trade union should not "by reason *merely* that they *are* in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise" or "so as to render void or voidable any agreement or trust". Nonetheless, the courts were not "to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach" of any agreement by members *inter se*, or between members and their trade union, or between one trade union and another albeit that the one might be a trade union of employers and the other of workers. It will be observed that the statute recognised trade unions for what the common law regarded them to be, hence it permitted them to register and to operate, hold and be given legal protection for their property as associations which were no longer unlawful merely because they were combinations in restraint of trade. At the same time, Parliament emphasised its use of the word "merely" by enacting a Criminal Law Amendment Act prescribing penalties for the use of violence, threats or intimidation and for molesting or obstructing any person in furtherance of trade union activity, and by defining molestation or obstruction so as to prohibit much of the peaceful picketing by watching or besetting which had been exempted from criminal liability by the Molestation of Workmen Act 1859.

How little in the way of immunity was gained by the Trade Union Act 1871 became speedily plain. In December of the following year a number of gas-workers were convicted of conspiracy for agreeing and combining with others to go on strike because a fellow worker had been dismissed: see *R.* v. *Bunn and Others* (9). In his summing up to the jury BRETT, J., stressed that the charge was one of an illegal conspiracy at common law which would be proved once it was shown that the accused had agreed among themselves or with others either to do an unlawful act or to do a lawful act by unlawful means; and he directed them in law that the breach without just cause of contracts of service was an illegal act for which each contract-breaker was punishable on conviction (that was indeed the state of the law at that time) and that, even if they were to suppose that interference with the exercise of the employer's business was a lawful thing to do, yet the agreement and combination to do that lawful act by the unlawful means of all of the men simultaneously breaking their contracts would bring them within the definition of a conspiracy.

Bunn's case was followed by *R.* v. *Hibbert and Others* (10) in which the indictment was for conspiracy to molest and obstruct employers with a view to coerce them to alter their mode of business. CLEASBY, B., directed the jury that the Criminal Law Amendment Act 1871

> "makes it an offence to molest and obstruct any person with a view to coerce him, if a worker, to quit his employment, or, if a master, to alter his mode of carrying on business;"

and he went on to explain that

> "the meaning of the words molestation or obstruction is defined . . . to be the persistent following a workman about from place to place, or the hiding of a workman's tools. It is also a molestation or obstruction to watch or beset the house or other place where such person resides or works or carries on business, or happens to be, or the approach to such house or place, or if with two or more other persons he follows such person in a disorderly manner in or through any street or road."

Thus the trade unions and the workers whose interests they strove to promote were almost as far from immunity as ever. All that they had really gained was immunity from criminal liability for conspiracy for combining to withhold or without breaking their contracts of service to withdraw from work, provided the

combination was peaceful and was for fixing wages and hours of labour. However, relief was now nigh. By the Conspiracy and Protection of Property Act 1875 it was provided that

> "An agreement or combination by two or more persons to do or 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 committed by one person would not be punishable as a crime,"

and also that

> "Attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting"

which was confirmed to be an offence. Further, it repealed the Master and Servant Act 1867 which had retained as offences breaches of contracts of service in what were described without definition as cases "of an aggravated character" so that no such breach was any longer a criminal offence. But it is important to notice, especially when what is being discussed is the so-called right to strike, that the Act was essentially exemptive in character. It nowhere declared that anything which had been a conspiracy or a breach of contract of service would no longer be so. All that it did was to provide immunity from criminal liability for it.

The trade unions were soon to become aware of the liabilities to which they were as yet exposed. These were through actions for civil wrong. Thus, in *Temperton* v. *Russell and Others* (11), the Court of Appeal held that members of a joint committee of three trade unions, who in furtherance of a trade dispute had induced a number of persons to break their contracts to supply the plaintiff with building materials and to refuse to enter into further contracts with him, were liable in an action for damages both for maliciously procuring the breaches and for maliciously conspiring to injure the plaintiff by preventing persons from contracting with him. Three years later the House of Lords, although disagreeing with certain *dicta* of LORD ESHER, M.R., and LOPES, L.J., in *Temperton*'s case (11), nevertheless confirmed that liability would arise if damage resulted from anyone doing an unlawful act or using any unlawful means to attain his purpose: see *Allen* v. *Flood* (12). The procuration knowingly and for his own ends of a breach of contract, which is an actionable wrong, would be such an unlawful act: that was the first limb of the action in *Temperton* v. *Russell* (11). Conspiracy to injure would be such an unlawful means, which was the second limb of that action. And since watching or besetting a man's house with the object of compelling him to do or not to do that which it is lawful for him not to do or to do may constitute an actionable nuisance at common law, that too would be such an unlawful means: see *Lyons (J.) & Sons* v. *Wilkins* (13). This *Lyons*' case was of added importance because, as did the earlier case of *R.* v. *Bauld and Others* (14), it called attention to the statutory limit upon the exemption from the offence of watching or besetting, an exemption which was already being mistranslated into a right of peaceful picketing. As CHITTY, L.J., pointed out,

> "the only case in which watching or besetting is allowed, or in other words, is not unlawful, is that mentioned in the proviso at the end of the section" [s. 7 of the Conspiracy and Protection of Property Act 1875] "namely, where the attending at or near the house or place where a person resides, or works, or carries on business, or happens to be . . . is in order merely to obtain or communicate information'. Attending in order to persuade is not within the proviso."

What however I think must have been most disturbing of all to trade unions were two House of Lords decisions in 1901. The first—*Taff Vale Ry. Co.* v.

Amalgamated Soc. of Ry. Servants (15)—established that a registered trade union may be sued in its registered name or, confirming *Bedford (Duke)* v. *Ellis* (16), by means of a representative action, which meant that all or any of its funds were rendered liable for the payment of damages recoverable for tort. The other—*Quinn* v. *Leathem* (17)—confirmed the authority of *Temperton* v. *Russell* (11) (shorn however of the *dicta* disapproved in *Allen* v. *Flood* (12)) that a combination of two or more persons, without justification or excuse, to injure a trader by inducing his customers or servants to break their contracts or not to deal with him or not to continue in his employment is actionable if it results in injury to him. These decisions made it abundantly clear that the immunity from criminal liability afforded by the Conspiracy and Protection of Property Act 1875 was not a safe shield. Further effort was therefore necessary to secure full legal immunity.

Immunity apparently complete was at long last achieved with the enactment of the Trade Disputes Act 1906. By it

(a) an act done in pursuance of an agreement or combination by two or more persons, if done in comtemplation or furtherance of a trade dispute, was no longer to be actionable unless the act was actionable if done without such agreement or combination;

(b) picketing was made lawful provided (and whether) it was for the purpose of peacefully obtaining or communicating information or of peacefully persuading any person to work or abstain from working;

(c) an act done by any person in contemplation or furtherance of a trade dispute was no longer to be actionable "on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business or employment of some other person or with the right of some other person to dispose of his capital or his labour as he wills"; and

(d) no court was any longer to entertain any action against a trade union, whether of workmen or masters and whether in the name of the trade union or by means of a representative action, in respect of any tortious act alleged to have been committed by or on behalf of the trade union.

It should I think be observed that this immunity of a trade union from liability for tort, designed as it was to be fully protective of the funds of trade unions, was not restricted to tortious acts committed in contemplation or furtherance of a trade dispute; it extended to any tort: see *Bussy* v. *Amalgamated Soc. of Ry. Servants and Bell* (18); *Vacher & Sons, Ltd.* v. *London Society of Compositors* (19); and *Ware & De Freville, Ltd.* v. *Motor Trade Association* (20). This put trade unions in the exceptional position once, but no longer, enjoyed by the Crown of total immunity for any wrongdoing. But, as was discovered in *Rookes* v. *Barnard* (21), intimidation in any form, be it violent or subtle, continued to be an unlawful means of inducing a desired result: hence it was held that trade union officials who intimidated an employer so as to achieve their purpose, and to whom as individuals the blanket immunity of their trade union was of course unavailable, could claim no immunity at all because

(i) intimidation even by a single person without agreement or combination with others is actionable at the suit of the person to whom he has thereby knowingly caused injury and

(ii) unlawful interference with a person's employment was made immune by the Act of 1906 only if lawful means were used to that end.

I need take no account now of the Trade Disputes and Trade Unions Act 1927 which was the British Parliament's answer to the "general strike" in 1926, or of the Act of the same name by which it was repealed in 1946, or of the Trades Disputes Act 1965 which displaced the decision in *Rookes* v. *Barnard* (21).

None of these is relevant here. The common law of England is deemed to have been enacted as part of our law subject however to such statutes of general application of the Imperial Parliament and to such enactments of our legislature as were in operation on March 1, 1848: see s. 12 of the Supreme Court of Judicature Act 1962. Accordingly, until 1933 when our legislature was first persuaded to introduce trade union legislation, our law on the subject was the same as applied in England after the repeal of the Combination Laws.

In 1933 our legislature enacted a Trade Unions Ordinance having essentially the same effect as the English Trade Union Act 1875. It included the same provision that the purposes of a registered trade union "shall not, by reason *merely* that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise". Hence the law even then remained substantially in the terms stated by BRETT, J., in *R.* v. *Bunn* (9). It was not until ten years later that the legislature enacted the Trade Disputes and Protection of Property Ordinance providing the immunity for which the workers had clamoured. The immunity so made available was the same as was provided in Britain by the Conspiracy and Protection of Property Act 1875 and the Trade Disputes Act 1906. That is as far as our legislation went up to the coming into force of the Act. Here, therefore, *Rookes* v. *Barnard* (21) remains a binding authority.

I have made this review not only to show why I prefer to regard the so-called right or freedom to strike as what in essence it is, a statutory immunity, but more so because I think it exposes the fallacy of integrating the statutory immunity with the freedom of association. The immunity was a consequence of the free association which enabled the associates to win for themselves legislative relief from the imbalances to which the common law had made them subject. So just as the freedom of a builder to build should not be confused with the building he planned nor yet with the tools which he used for its erecting, so too freedom to associate should not be confused with the immunities which the associates secured nor yet with the means which were employed for their securing. Association, its objects and the means it employs are, as always, separate and distinct in their identities.

In my judgment, then, freedom of association means no more than freedom to enter into consensual arrangements to promote the common-interest objects of the associating group. The objects may be any of many. They may be religious or social, political or philosophical, economic or professional, educational or cultural, sporting or charitable. But the freedom to associate confers neither right nor licence for a course of conduct or for the commission of acts which in the view of Parliament are inimical to the peace, order and good government of the country. In like manner, their constitutionally-guaranteed existence notwithstanding, freedom of movement is no licence for trespass, freedom of conscience no licence for sedition, freedom of expression no licence for obscenity, freedom of assembly no licence for riot and freedom of the press no licence for libel.

What is or is not inimical to the peace, order and good government of the country is not for the courts to decide. But the comment may perhaps be made that "strike" is a word of significant import. I believe it is true to say that trade unions have always regarded the power to strike as an essential weapon. And, as LORD DEVLIN said in *Rookes* v. *Barnard* (21) ([1964] A.C. 1129, at p. 1219) it is easy to see that at the time of the enactment of the Trade Disputes Act 1906 in Britain, and I would add of the Trade Disputes and Protection of Property Ordinance in 1943 here, the legislature

> "might have felt that the only way of giving labour an equality of bargaining power with capital was to give it special immunities which the common law did not permit."

But now that trade unions are no longer struggling for survival or recognition and they enjoy the wholly discriminatory privilege (no longer as I said enjoyed by the Crown) of total immunity from liability for tort, and when under the protective cover of statutory immunities the strike weapon was so extensively used that to many it began to appear that the imbalance had tilted the other way, it is likewise easy to see that Parliament may have considered that the best means of holding the scales in equal poise was to refer to a tribunal for its impartial adjudication all disputes which the parties themselves should fail to resolve. That was within the prerogative of Parliament. And it should perhaps be noted that Parliament's decision accords with the view expressed by Sidney Webb as far back as 1906 when he wrote that

> "A strike or a lockout . . . necessarily involves so much dislocation of industry; so much individual suffering; so much injury to third parties, and so much national loss, that it cannot, in my opinion, be accepted as the normal way of settling an intractable dispute . . . I cannot believe that a civilised community will permanently continue to abandon the adjustment of industrial disputes—and incidentally the regulation of the conditions of life of the mass of the people—to what is, in reality, the arbitrament of private war:"

see his memorandum annexed to the Report of the Commission of Inquiry (of which he was a member) which led to the enactment of the Trade Disputes Act 1906. Accordingly, it seems tolerably plain that Parliament may reasonably have hoped by means of the Act to ensure industrial peace in the interest not only of the workers and employers but moreso of the entire community. In this regard it may perhaps be in order to quote also from Professor V. O. Key's POLITICS, PARTIES AND PRESSURE GROUPS as follows:

> "The public good is, after all, a relative matter. It rarely consists in yielding completely to the demands of one class or group in society. It more often consists in the elaboration of compromise between conflicting groups, in the yielding to one class at one time and to another at another, and sometimes in the mobilization of the support of the great unorganized general public to batter down the demands of class interest."

That brings me to what I have said I consider to be an abridgment of the right of free collective bargaining. Collective bargaining is one of the principal objects of a trade union, so it should be particularly observed that s. 3 of the Act preserves it fully, to the extent that it obliges every employer not only to recognise any trade union which is representative of 51 per cent or upwards of the workers employed by him, but also to treat and enter into such negotiations with it as may be necessary or expedient for preventing or settling trade disputes. What then has been abridged is freedom of contract. But that is not a freedom recognised, declared or guaranteed by the Constitution. And since the world has long since departed from the *laissez-faire* doctrines of Adam Smith against which the trade unions themselves had often to contend, finance controls, commodity import controls, price and a number of other economic controls have become a familiar in our modern-day society. So, because there is nothing in the Constitution which prohibits Parliament from restricting freedom of contract it was a policy decision for Parliament, and is not a question for the courts, whether in the interest of the country the People (to use the language of the Act) should be permitted any say on the terms of industrial agreements so as to ensure as far as practicable that, as recited in paragraph (b) of the preamble to the Constitution and repeated in s. 9 (2) of the Act, "the operation of the economic system should result in the material resources of the community being so distributed as to subserve the common good".

The appellants also challenged the validity of the Act or of some of its provisions on six subsidiary grounds. First, it was said that, because by s. 6 (1) (b)

it provides for the appointment by the Governor-General of four of the five members constituting the Industrial Court for such period and on such terms and conditions as he thinks fit, the appointees are not independent and therefore the provision offends against paragraphs (e) and (f) of s. 2 of the Constitution. I am unable to follow that argument. So much I think depends upon the meaning to be ascribed to independent. In relation to tribunals the word in my opinion means free from influence from any source and thus independent in judgment and assuring impartiality. The meaning given to it by the appellants includes outward and recognisable guarantees of its existence. But other than to the Judiciary of the Supreme Court such guarantees are not offered or available, or from the point of practicality capable of being offered or being made available, to members of every tribunal whatever. That is no reason however to question either their independence of judgment or their impartiality or their integrity. Which is all that s. 2 (f) of the Constitution demands and, even so, only in criminal proceedings. It is also to be observed that s. 2 (e) of the Constitution does no more than prescribe that "no Act of Parliament shall deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations". These principles, as I conceive them, are no different from what are ordinarily known as the principles of natural justice which have from time to time been variously described. For instance, in *Spackman* v. *Plumstead District Board of Works* (22) ((1885), 10 App. Cas. 229, at p. 240), LORD SELBORNE, L.C., referred to them as "the substantial requirements of justice" and "the essence of justice"; in *General Medical Council* v. *Spackman* (23), ([1943] A.C. 627, at pp. 644, 645), LORD WRIGHT called them "the essential principles of justice"; and in *Green* v. *Blake and Others* (24), ([1948] I.R. 242, at p. 248), BLACK, J., spoke of them simply as "justice without any epithet". As in the Constitution, they were likewise spoken of as "fundamental justice" by LORD ESHER, M.R., in *Hopkins and Another* v. *Smethwick Local Board of Health* (25) ((1890), 24 Q.B.D. 712, at p. 716). The principles are well known and for the present need no recital since the only charge that they have been breached is founded upon the alleged denial of independence to the Industrial Court. I would remind those who make that charge that the Act took care to specify that the President shall be a judge of the Supreme Court, against which no criticism has however been levelled, and that the four members to be appointed by the Governor-General shall be (i) a barrister or solicitor of at least ten years' standing, (ii) a duly qualified accountant, (iii) a duly qualified economist and (iv) either another duly qualified accountant or another duly qualified economist or a person experienced in industrial relations. To suggest in such circumstances that the Act deprives persons going before the Industrial Court be it never so little of the right to a fair hearing either in accordance with the principles of fundamental justice or by an independent or impartial tribunal is to my mind, if I may borrow the language of LORD WRIGHT in *Spackman*'s case (23), not only theoretical but almost fantastic.

The second ground relates to s. 8 (2) (b) of the Act which provides that a judgment, order or award of the Industrial Court in any proceedings under the Act "shall not be subject to prohibition, mandamus or injunction in any Court on any account whatever". It was said that the Industrial Court has been invested with very wide powers. Undoubtedly so. But the only power on which reliance was sought to support this ground is its general power under s. 11 (4) (e) of the Act to give, in relation to a trade dispute,

> "all such directions and do all such things as are necessary or expedient for the expeditious and just hearing and determination of the trade dispute."

Because prohibition, mandamus and injunction are excluded in relation to any exercise or non-exercise of that power, so the argument ran, s. 2 (h) of the Constitution has been contravened. This paragraph of s. 2 prescribes that "no

Act of Parliament shall deprive a person of the right to such procedural provisions as are necessary for the purpose of giving effect and protection" to the human rights and fundamental freedoms recognised and declared by s. 1. I find it impossible to conceive what directions may be given or things done within the scope of the power which could in the least adversely affect any of those rights or freedoms. The power, be it noted, not only speaks of the *expeditious* but couples it with the *just* hearing and determination of the trade dispute. Further, s. 8 (3) of the Act gives a right of appeal from any judgment, order or award of the Industrial Court on a point of law: so any unjust hearing or determination of a trade dispute, that is to say, unjust in law and not in sentiment, may then become the subject of review. It is right too that it be noticed that it is only a judgment, order or award which s. 8 (2) (b) of the Act exempts from being subject to prohibition, mandamus or injunction: hence, to the extent that these remedies may be applicable, if at all, they may go to prohibit or direct the Industrial Court or its members in respect of proceedings before it prior to the giving or making of its judgment, order or award. On examination, therefore, I am of opinion that this second ground also is purely theoretical.

Thirdly, it was said that ss. 10 (2) and 11 (2) of the Act are repugnant to paragraphs (b), (e) and (h) of s. 2 of the Constitution. The provisions of the two subsections are such that they should be set out in full. They are as follow:

"10. (2) For the purpose of collecting such information, statistics and other material as may be required for the case of the People of Trinidad and Tobago, the Attorney-General may authorise a public officer—

(a) to enter upon the business premises of *any* employer, trade union or other organisation" (by definition this means organisation representative of employers or workers) "at any reasonable time and to require the production of *any* books, documents, accounts, returns or other material relevant to *any* trade dispute existing or *anticipated*;

(b) to inspect *any* building, factory or works where workers are employed and to examine *any* material, machinery or other article therein;

(c) to interview *any* workers employed by *any* such employer.

11. (2) Notwithstanding anything contained in the Income Tax Ordinance or in any other law, the (Industrial) Court may require the Commissioner of Inland Revenue or any other person who may be able to give information to the Court to provide such information as it may require from time to time. The Court may *in its discretion on application* by parties to the proceedings disclose information so obtained and may also prohibit the publication thereof."

When it is noticed that by s. 10 (1) of the Act the case for the people "shall include the presentation of arguments, submissions and evidence generally reflecting the public interest in the issues involved" in any trade dispute, and when regard is had to the several considerations enumerated in s. 9 (2) by which the Industrial Court is directed to be guided in making its awards so that "the operation of the economic system should result in the material resources of the community being so distributed as to subserve the common good", the words "any" and "anticipated" which I have italicised in s. 10 (2) are, I think, alarming. In exercising the authority which he may be given by the Attorney General thereunder a public officer may uncover vital commercial secrets or gather valuable information about manufacturing processes all or any of which, if so disposed, he may thereafter use or abuse. Moreover, this may occur in relation to the business of an employer who is not a party to or in any way himself concerned in the trade dispute which, even so, may not yet have arisen but be only anticipated between a trade union and some other employer. I have also italicised the phrase "in its discretion on application" in s. 11 (2) since *ex facie*

it gives the Industrial Court a discretion, to be exercised only on application by parties to the proceedings, either to disclose or to withhold information which it has itself required and obtained—presumably because the court thought it would be either necessary or helpful for its adjudication on the matter before it. In this regard, it is certainly relevant that the principles of fundamental justice mandatorily require a fair opportunity to be given to each of the parties to any dispute to correct or contradict any relevant statement or information to his prejudice which may be in or which may come to the knowledge of the tribunal having seisin of it: see *Board of Education* v. *Rice* (26), ([1911] A.C. 179, at p. 182), *per* LORD LOREBURN, and *University of Ceylon* v. *Fernando* (27), ([1960] 1 All E.R. 631, at pp. 637, 639) *per* LORD JENKINS for the Privy Council.

I should say at once that I do not agree that there is anything in either of the subsections which is offensive to s. 2 (b) of the Constitution. In my view, for reasons which will appear later, that provision is wholly irrelevant. The substantial question is whether anything in either of the subsections abrogates, abridges or infringes any of the recognised and declared rights and freedoms or deprives anyone of the right to a fair hearing in accordance with the principles of fundamental justice. The contention was that s. 10 (2) of the Act infringes the right of privacy and the right to the enjoyment of property, and that s. 11 (2) abridges or infringes the right to a fair hearing. I shall consider the subsections accordingly.

First, s. 10 (2) of the Act. The only right of or akin to a right of privacy recognised and declared by the Constitution is the right of the individual to respect for his private and family life: see s. 1 (c) of the chapter. No authority to a public officer to interview a worker employed by an employer upon whose business premises he may enter pursuant to para. (a) of the subsection of the Act can constitute, in my view, any breach of this right. And whether the right to the enjoyment of property has been affected is not a point which in my opinion is open to the appellants. I regret this because, as I have said, the subsection alarms me. But no inferences should be drawn from this statement of alarm or regret. The point was not argued nearly as fully as I would have wished, and my own consideration of it was stopped short the moment it appeared that it was not open to the appellants. Accordingly, I reserve my opinion upon it and pass on to say why the appellants are incompetent to raise it. The right to bring proceedings such as the present is given by s. 6 (1) of the Constitution. But the subsection stipulates that any person seeking to exercise it must allege, and therefore also show, that some provision of ss. 1 to 5 or of s. 7 "has been, is being, or is likely to be contravened *in relation to him*." Both the appellants have alleged and proved that they are employees of Texaco Trinidad Inc. Neither of them therefore is an employer. And although both of them are members of the Oilfields Workers' Trade Union and of its General Council, they do not qualify either singly or conjointly to be regarded as a trade union or other "organisation" within the meaning of that term. Nor do they so allege. And since it is only the business premises of an employer, trade union or other organisation or a building, factory or works where workers are employed that a public officer may be authorised under s. 10 (2) of the Act to enter or inspect, any invasion (if it is) of the right to the enjoyment of property which the subsection may authorise is not and cannot be a contravention, actual or threatened, of any right in relation to the appellants or either of them. Accordingly, they cannot apply for redress in respect thereof.

I come next to s. 11 (2) of the Act. Read with sub-ss. (1) and (3) of the section, it becomes I think clear that the Industrial Court can require the giving of information such as is referred to in sub-s. (2) only in the course of proceedings actually before it. The parties will therefore be aware of any such requirement if it is made. Accordingly, the effect of the subsection would seem to be to substitute a right to apply for disclosure of the information thus obtained in

place of the obligation which in my opinion ordinarily rests upon a tribunal seeking the information to invite correction, explanation or contradiction by the party to whose prejudice such information may be. This was probably prompted by the specific reference to the Commissioner of Inland Revenue and the highly confidential nature of any information which the Industrial Court may require him to give. But, in my view, such a substitution does not without more deprive anyone of the right to a fair hearing in accordance with the principles of fundamental justice. Further, although the Industrial Court is given a discretion to grant or refuse the application, it is under an imperative obligation to exercise it as those principles require. If it does not, it will be guilty of error in law which can be the subject of appeal. Questions may be raised whether the parties can always be certain of the need to make application whenever it arises, but I doubt that any occasion is likely to occur when they will not. If it did, I have no doubt that a court independent of the parties and seeking to do impartial justice, as the Industrial Court by its constitution can confidently be expected to be, will at once call attention to the right and invite the party concerned to apply. The subsection could, I think, have been more carefully worded but, policy questions apart with which as I have said this court has nothing to do, I must reject the appellants' contention.

The fourth ground is that ss. 34 (3), 36 (5) and 37 (3) of the Act are in conflict with s. 2 (b) of the Constitution in so far as the same provide for the cancellation of a trade union's registration for the commission of the offences therein referred to. It was said that the Act has thereby imposed or authorised the imposition of cruel and unusual treatment or punishment which s. 2 (b) of the Constitution prohibits. I do not agree that it is in any sense cruel to cancel the registration of a trade union for an offence against the law. The severity of the punishment is presumably a measure of the gravity of the offence in the view of Parliament. But, that apart, the contention is I think basically unsound. Section 2 of the Constitution is concerned to protect the human rights and fundamental freedoms recognised and declared by s. 1. It does so by a general followed by particular prohibitions. Some of the particular prohibitions are undoubtedly apt to protect artificial legal entities also, as for example the prohibition against any Act of Parliament depriving a person of the right to a fair hearing in accordance with the fundamental principles of justice (paragraph (e)) or depriving a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law (para. (f)). But, in my opinion, the prohibitions are intended to protect natural persons primarily. I say so because (a) the rights they protect are expressly designated as *human* rights; (b) four of the six of them enumerated in s. 1 are further defined as rights of the *individual* and the other two are obviously so, being (i) the right to join political parties and to express political views and (ii) the right of a parent or guardian to provide a school of his own choice for the education of his child or ward; (c) the fundamental freedoms no less than the rights are recognised and declared to have existed and are to continue to exist "*without discrimination by reason of race, origin, colour, religion or sex*", thereby I think clearly implying that they are freedoms of the individual; (d) four of the five of them enumerated in the section relate beyond question to the individual only; and (e) in the context of the required non-discrimination, I would interpret the fifth, "freedom of the press", as a compendious reference to those responsible for press publications. All the more then because of what I conceive to be the primary purpose of s. 2, but also because I think it accords with its essential meaning, I would interpret "cruel" in its relation to the treatment or punishment prohibited by s. 2 (b) as not merely severe or harsh but as inhumane and inflictive of human suffering.

The last two grounds may be taken together. In my view, both ss. 41 and 52 recognise that a trade union or other organisation acts, as it must, through its Executive. Consequently, if a trade union or other organisation is charged

with an offence under s. 41 (1) of the Act, it is not a deprivation of its constitutional right to a fair hearing in accordance with the principles of fundamental justice or of its cognate constitutional right to be presumed innocent until proved guilty according to law that s. 41 (3) should deem the act constituting the offence, if directed by a member of its Executive, to be its own. Correlatively, it is likewise not any such deprivation if any offence against the Act is committed by a trade union or other organisation that s. 52 (2) should deem every member of its Executive to be *prima facie* guilty also. Nevertheless, I would add that since s. 41 (3) affects only a trade union or other organisation, neither of the appellants can rely on it to complain of any contravention, actual or threatened, in relation to him such as is necessary to qualify him to move in respect of it under s. 6 (1) of the Constitution.

In the result, then, I am satisfied that CORBIN, J., was right to refuse the appellants the relief they sought and I would dismiss their appeal with costs.

PHILLIPS, J.A.: Chapter 1 of the Constitution of Trinidad and Tobago (the second Schedule to the Trinidad and Tobago (Constitution) Order in Council (1962)) is entitled:

> "The recognition and protection of human rights and fundamental freedoms."

These rights and freedoms are specifically enumerated in s. 1 and s. 2 seeks to protect them by providing *inter alia* as follows:

> "Subject to the provisions of ss. 3, 4 and 5 of this Constitution, no law shall abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms hereinbefore recognised and declared."

It is interesting to compare this provision with s. 1 of the Canadian Bill of Rights 1960, which formed the basic model for the drafting of the provisions of Cap. 1 of the Constitution. The Canadian prototype of s. 2 of the Constitution (so far as is material for present purposes) is to the following effect:

> "Every law of Canada shall, unless it is expressly declared by an Act of Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorise the abrogation, abridgment or infringement of any of the rights or freedoms herein recognised and declared. . . ."

It is, in my opinion, not surprising that in view of the particular language of this section the Canadian Bill of Rights has been described by an eminent authority as "only an Interpretation Act". (See the article by Professor Bora Laskin (Professor of Law, University of Toronto) entitled "*Canada's Bill of Rights: A Dilemma for the Courts?*" in Vol. 11, I.C.L.Q. (1962), Part 3, p. 530.)

It was submitted by the learned Attorney-General that the doctrine of *ultra vires* is not applicable to the present case. The argument was not fully developed, but it seemed to be based on a suggestion that the legal efficacy of Cap. 1 of the Constitution was not (or could not be) greater than that of the Canadian Bill of Rights, with regard to which there is ample scope for a conflict of legal opinion. (See the article "*Fundamental Rights in the New Commonwealth*" by S. A. de Smith (Professor of Public Law in the University of London) in Vol. 10, I.C.L.Q., pp. 228–232.)

However, whatever may be the true interpretation to be placed upon the requirement of s. 2 of the Canadian Bill of Rights that laws to which it is applicable shall be "so construed and applied" as not to derogate from the constitutional guarantees to which it refers, it seems to me that the imperative provisions of s. 2 of the Constitution are so clear and explicit as not to admit of the possibility of their being construed otherwise than as rendering invalid any law which

offends against the prohibitions therein contained. When once this proposition is accepted, it appears to me to be obvious that even without express provision a power of judicial review of Parliamentary legislation must reside in the Supreme Court of this country. This conclusion is only in consonance with the view expressed more than half a century ago by GRIFFITH, C.J., BARTON and O'CONNOR, JJ. of the High Court of Australia in *Baxter* v. *Commissioners of Taxation (N.S.W.)* (28) ((1907), 4 C.L.R. 1087, at p. 1125) that:

"English jurisprudence has always recognized that the Acts of a legislature of limited jurisdiction (whether the limits be as to territory or subject matter) may be examined by any tribunal before whom the point is properly raised. The term 'unconstitutional', used in this connection, means no more than *ultra vires*."

Actually, however, the position is put beyond doubt by the express terms of s. 6 of the Constitution which are as follows:

"6. (1) For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of the foregoing sections or s. 7 of this Constitution has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction—

(a) to hear and determine any application made by any person in pursuance of sub-s. (1) of this section; and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of sub-s. (3) thereof,

and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said foregoing sections or s. 7 to the protection of which the person concerned is entitled.

(3) If in any proceedings in any court other than the High Court or the Court of Appeal any question arises as to the contravention of any of the provisions of the said foregoing sections or s. 7 the persons residing in that court may, and shall, if any party to the proceedings so requests, refer the question to the High Court unless in his opinion the raising of the question is merely frivolous or vexatious.

(4) Any person aggrieved by any determination of the High Court under this section may appeal therefrom to the Court of Appeal.

(5) Nothing in this section shall limit the power of Parliament to confer on the High Court or the Court of Appeal such powers as Parliament may think fit in relation to the exercise by the High Court or the Court of Appeal, as the case may be, of its jurisdiction in respect of the matters arising under this Chapter."

This is the section which has been invoked by the appellants in this case, and for the reasons indicated, I have no hesitation in rejecting any submission to the effect that either the High Court or the Court of Appeal is not vested with full jurisdiction to make a declaration as to the validity of any law alleged to contravene the constitutional guarantees stipulated by Cap. 1 of the Constitution.

The resulting legal position, therefore, is that the legislative powers of the Parliament of Trinidad and Tobago, although a sovereign independent state, "as in the case of all countries with written constitutions, must be exercised in accordance with the terms of the constitution from which the power derives". (See *per* LORD PEARCE, delivering the judgment of the Judicial Committee of the Privy Council in *Liyanage* v. *R.* (29), ([1966] 1 All E.R. 60, at p. 67). This power of judicial review is only one of various features which are to be found

in the Constitutions of many countries of the Commonwealth. See Professor de Smith's *The New Commonwealth and its Constitutions* (1964), Cap. 3, p. 77, where the learned author makes the following statement:

"Among the characteristic features of modern Commonwealth Constitutions are the limitation of parliamentary sovereignty, guarantees of fundamental human rights, judicial review of the constitutionality of legislation. . . . The aim of many of these provisions is to capture the spirit and practice of British institutions; the methods of approach involve the rejection of British devices and the imposition of un-British fetters on legislative and executive discretion."

The appellants having unsuccessfully challenged in the High Court the constitutional validity of the Industrial Stabilisation Act 1965 (hereafter called "the Act") have appealed to this Court on a variety of grounds. In opening the appeal counsel for the appellants submitted that there were three broad questions which arose for determination by the Court. These he formulated as follows:

(1) Are there included in the freedom of association recognised in and by the Constitution of Trinidad and Tobago and/or any other law applicable to Trinidad and Tobago, the right of free collective bargaining and/or the right to strike?

(2) Does the Act abrogate and/or abridge and/or infringe and/or authorise the abrogation and/or abridgment and/or infringement of either of these rights?

(3) Is the Act otherwise repugnant to the Constitution?

I propose to deal first with the second of these questions. In this connection it is necessary at the outset to refer to the absolute prohibitions against strikes contained in ss. 36 and 37 of the Act in relation to certain categories of workers. Section 36 applies to workers engaged in essential services which are defined in the Schedule to the Act, while s. 37 is applicable to persons who may compendiously be described as persons engaged in public services. In my opinion, however, the validity of neither of these sections is in issue for the reason that the appellants do not fall within the category of persons to whom either of these sections relates and accordingly are not entitled to complain that as a result of these prohibitions any of the provisions of the constitutional guarantees have been, are being or are likely to be contravened *in relation to them*.

The contention of the appellants with regard to this question was founded on what was alleged to be the conjoint effect of ss. 16, 34 and 35 of the Act, and I am satisfied from the undisputed facts of the case that the appellants are entitled to *claim* redress by way of a declaration of the invalidity of ss. 34 and 35 on the ground that they are persons whose constitutional rights may be affected by the provisions thereof. In this connection I reject the faint submission advanced by the learned Attorney-General to the effect that the validity of s. 34 was not actually in issue, presumably for the reason that there is no evidence that the appellants sought to contravene its provisions and thus to incur the severe penalties therein prescribed. Put in another way, this argument amounted to a submission that the appellants were not entitled to declaratory relief in what was said to be a purely hypothetical and speculative matter. (See Zamir's THE DECLARATORY JUDGMENT (1962), pp. 151–154.)

One of the main objects of the Act, as stated in its long title, is to provide:

"for the establishment of an expeditious system for the settlement of trade disputes,"

for which purpose there is established an Industrial Court. Section 16 lays down the procedure to be followed in the case of the existence or apprehension of a

trade dispute, whereby such dispute, real or apprehended, may, if not previously settled, be referred by the Minister of Labour for settlement by the Court, whose decisions are by s. 16 (8) rendered "binding on the employers and workers to whom the settlement relates".

It is in the context of the provisions of s. 16 that ss. 34 and 35 of the Act must be considered. Section 34 provides as follows:

"34. (1) An employer shall not declare or take part in a lockout and a worker shall not take part in a strike in connection with any trade dispute unless—

(a) the dispute has been reported to the Minister in accordance with the provisions of this Act; and

(b) the Minister has not referred the dispute to the Court for settlement within twenty-eight days of the date on which the report of the dispute was first made to him; and

(c) the Minister has, within forty-eight hours of the decision to go on strike, been given fourteen days notice in writing by the trade union or other organisation of its intention to call a strike or declare a lockout, as the case may be, so, however, that no such strike shall be called or lockout declared until after the last day on which the Minister may refer the dispute to the Court.

(2) An employer who declares or takes part in a lockout in contravention of sub-s. (1) is guilty of an offence and liable on summary conviction to a fine of twenty thousand dollars or to imprisonment for three years or both such fine or (*sic*) such imprisonment.

(3) Any trade union or organisation which calls a strike in contravention of sub-s. (1) shall be guilty of an offence and liable on summary conviction to a fine of ten thousand dollars or to imprisonment for two years or to both such fine and such imprisonment; and the court shall, in the case of a trade union, notwithstanding the provisions of s. 21 of the Trade Unions Ordinance, cancel the registration of such trade union.

(4) Any individual who calls out any workers on strike in contravention of sub-s. (1) is guilty of an offence and—

(a) if he is a member of the Executive of a trade union or other organisation, liable on summary conviction to a fine of two thousand five hundred dollars or to imprisonment for twelve months or to both such fine and imprisonment;

(b) if he is not such a member, liable on summary conviction to a fine of five thousand dollars or to imprisonment for two years or to both such fine and imprisonment.

(5) Any worker who takes part in a strike called in contravention of sub-s. (1) is guilty of an offence and liable on summary conviction to a fine of two hundred and fifty dollars or three months imprisonment or to both such fine and imprisonment.

(6) A prosecution for any contravention of any provision of this section shall not be instituted save by or with the consent of the Attorney-General."

Section 35 is to the following effect:

"35. (1) No worker may go on strike and no employer may declare a lockout while proceedings in relation to a trade dispute between such worker and such employer are pending before the Court or the Court of Appeal.

(2) Any person who contravenes the provisions of sub-s. (1) is guilty of an offence and liable on summary conviction—

(a) in the case of an employer, to a fine of twenty thousand dollars or to imprisonment for two years or to both such fine and such imprisonment; and

(b) in the case of a worker, to a fine of two hundred and fifty dollars or to imprisonment for three months or to both such fine and such imprisonment."

It is observed that a strike is permissible only in the unlikely event of the Minister not doing what may be said to be his plain duty of referring a trade dispute to the Industrial Court for settlement in accordance with the provisions of the Act; and even in such a case compliance with the terms of s. 34 (1) (c) is made a pre-requisite condition. When a dispute has been referred to the court, the effect of s. 35 is to prohibit strikes during the pendency of legal proceedings for the settlement of the dispute, the decision of which, being binding on the parties thereto puts an effective end to the dispute and so renders resort to strike action futile and unnecessary. In my opinion, the effect of these sections is virtually to prohibit recourse to strikes as a means of settling industrial disputes.

In dealing with this aspect of the case the learned trial judge posed to himself the question—"whether the Industrial Stabilisation Act infringes the Constitution and *takes away* the power to strike if such had been established"—and answered it unfavourably to the appellants by coming to the conclusion that "the Act does not *prohibit* strikes". It should immediately be observed that the true question for determination is not whether the Act prohibits strikes, but whether its effect is "to abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement" of the so-called "right" to strike, on the assumption that such a right exists and that it is one of the fundamental rights or freedoms guaranteed by the Constitution.

In this connection it was argued by the learned Attorney-General that the effect of the sections under review was merely to postpone the appellants' right (if any) to strike and that such postponement did not amount to an abrogation, abridgment or infringement of it. I am unable to accept this submission. In my judgment, the undisputed limitation of the so-called "right" to strike effected by the Act clearly amounts at least to an abridgment or infringement of that "right" within the meaning of s. 1 of the Constitution.

I now turn to a consideration of the first question posed by counsel which is undoubtedly the main question arising on this appeal. The manner of formulation of the question was necessitated by the fact that nowhere in the Constitution is the so-called "right" to strike expressly declared to be one of the rights specifically guaranteed thereby, and was based on the submission that this so-called "right" is in fact constitutionally protected in that it forms an essential ingredient of the specifically guaranteed "right of association and assembly" (s. 1 (j)), in its application to workers in general and more especially to members of trade unions. Put in another way, the argument was that the so-called "right" to strike, though not expressly mentioned in Cap. 1 of the Constitution, is in fact protected by necessary implication.

The history of the development and legal recognition of trade unions is indissolubly bound up with the common law principle of restraint of trade as well as the law of conspiracy. In order to prevent the growth in the number of combinations, either of employers or workmen, for the purpose of altering wages or conditions of labour, which had been the subject of statutory regulation from the time of the occurrence of the Black Death in England in 1348, several statutes were passed from an early period prohibiting the formation of such combinations. Despite these prohibitions however, trade combinations continued to flourish under the impetus of the Industrial Revolution. The policy of the State was to repress this growth by means of a general enactment, namely, the Combination Act 1799 which was superseded by the Combination Act 1800. This last mentioned statute as well as earlier special combination statutes were eventually repealed by the Combination Laws Repeal Act 1824. "This Act expressly removed all criminal liability for conspiracy whether under

the common or the statute law, for combining to alter wages, hours or conditions of work, to regulate the mode of carrying on any manufacture, trade or business or to induce persons to leave, refuse or return to work". (See CITRINE'S TRADE UNION LAW, 2nd Edn., p. 7.) It should be noted here that the Combination Laws Repeal Act 1824 was replaced by the Combination Laws Repeal Amendment Act 1825.

Thereafter the history of the trade union movement in England is essentially the history of a struggle for the securing of statutory immunity against the penalties or disabilities imposed by the common law as a result either of its doctrine relating to conspiracy or that relating to restraint of trade. Subsequent Acts of Parliament of the U.K., which it is necessary to note in any account, however scanty, of the history of the attainment of legal immunities by the trade union movement are the Molestation of Workmen Act 1859, the Trade Union Acts 1871 and 1876, the Criminal Law Amendment Act 1871 (commencing on the same date—June 29, 1871—as the Trade Union Act of that year), the Conspiracy and Protection of Property Act 1875, and the Trade Disputes Act 1906.

It is useful for the purposes of this judgment to set out a few of the provisions of these enactments. Reference may first be made to ss. 2 and 3 of the Trade Union Act 1871, which is sometimes described as the Charter of Trade Unions. They are as follows:

> "2. The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise.
>
> 3. The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust."

Section 3 of the Conspiracy and Protection of Property Act 1875 (as amended by the Trade Disputes Act 1906) provides (so far as is material for present purposes) as follows:

> "An agreement or combination by two or more persons to do or procure to be done any act in contemplation of furtherance of a trade dispute shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime.
>
> 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 actionable.
>
> Nothing in this section shall exempt from punishment any persons guilty of a conspiracy for which a punishment is awarded by any Act of Parliament.
>
> Nothing in this section shall affect the law relating to riot, unlawful assembly, breach of the peace, or sedition, or any offence against the State or the Sovereign."

It has been said that the "effect of this section is to legalise strikes subject to the exceptions contained in ss. 4 and 5" (see note in 5 HALSBURY'S STATUTES (2nd Edn.), p. 896). The effect of each of the last mentioned sections is to withhold in specified cases the general exemption from liability to criminal prosecution contained in s. 3 by providing penalties for the wilful and malicious breach of a contract of service in certain circumstances. Whereas s. 4 is applicable to employees who are engaged in certain essential services, s. 5 is of a more general nature and applies to any case where the employee knows or has reasonable cause to believe that—

> "the probable consequences of the [breach], either alone or in combination with others, will be to endanger human life, or cause serious bodily injury, or to expose valuable property whether real or personal to destruction or serious injury."

As early as 1853 the common law of England had established as a distinct head of tortious liability the wilful inducement of a breach of contract without legal justification (*Lumley* v. *Gye* (30)). This species of legal liability was one to which organisers of strikes as well as strikers themselves were constantly exposed, and it was a great step in the process of the so-called "legalisation" of strikes when this liability was removed by ss. 2 and 3 of the Trade Disputes Act 1906 which finally established what is known as the "right of peaceful picketing" by providing as follows:

> "2. (1) 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.
>
> (2) .....
>
> 3. An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills."

I consider the foregoing brief historical references sufficient for the purpose of illustrating the meaning of the expression "right" as it has come to be used in reference to the activity known as striking. It is observed that the development of the law has been along the line of statutory exemption from legal liability for acts which were (or were assumed to be) contrary to the common law principles relating to restraint of trade and conspiracy. Apart from the fact that there were certain circumstances to which legal immunity was not extended, there is to be noted the constant vigilance of the Legislature to ensure that what were regarded by the common law as certain basic rights of the individual were not violated; for example, freedom from annoyance, coercion, intimidation and violence.

Counsel for the appellants contended that the "right" to strike is one that emanates from and is recognised by the common law. This submission was based on certain judicial *dicta* and particularly those of FLETCHER MOULTON, L.J., in *Gozney* v. *Bristol Trade and Provident Society* (31), ([1909] 1 K.B. 901, at p. 922), where the learned Lord Justice said (*inter alia*):

> "But the real fallacy of the argument on the part of the defendants lies deeper. It proceeds on the proposition that strikes are *per se* illegal or unlawful by the law of England. In my opinion there is no foundation for such a proposition. . . . Strikes *per se* are combinations neither for accomplishing an unlawful end nor for accomplishing a lawful end by unlawful means, and I therefore come unhesitatingly to the conclusion that the fact that the arrangements for giving strike pay do in a sense facilitate strikes is quite immaterial for the purposes of our decision, and that the defendant society does not become illegal by reason of its having this as one of its objects. . . ."

In order to appreciate the true significance of these expressions it is necessary to bear in mind that in *Gozney*'s case FLETCHER MOULTON, L.J., was not determining the "legality" of an actual strike, but was dealing with the rather more abstract question as to whether a rule of a society which made provision for the

payment of strike pay to its members offended against the common law principle of restraint of trade, and was merely stating that strikes are not by their intrinsic nature and under all circumstances necessarily illegal at common law by reason of the doctrine of restraint of trade.

In *Russell* v. *Amalgamated Society of Carpenters and Joiners* (32), it was held by a majority decision of the House of Lords (LORDS MACNAGHTEN, SHAW OF DUNFERMLINE, MERSEY and ROBSON—EARL LOREBURN, L.C. and LORD ATKINSON not considering it necessary to express an opinion on this point), that certain rules of a society registered under the Trade Union Acts 1871 and 1876, which provided for the "militant" purposes of a trade union were such as to make the society an illegal association at common law as they were in unreasonable restraint of trade.

During the course of his judgment LORD MACNAGHTEN said, *ibid.*, at p. 430:

> "It is not every restraint of trade that is unlawful. But I cannot doubt that restraint of trade which is unreasonable, oppressive, and destructive of individual liberty is unlawful."

Counsel for the appellants relied on the following passage from the judgment of LORD SHAW OF DUNFERMLINE, *ibid.*, at pp. 435–436:

> "Strikes may be perfectly legal or they may be illegal. It depends on the nature and mode of the concerted cessation of labour. If this concerted cessation is in breach of contract, then it could not be said to be within the law any more than could a breach of contract by a single workman. If, on the other hand, a strike be a cessation of labour on the expiry of contract, there is no necessary illegality there, any more than in the case of an individual workman completing his current bargain and then choosing to remain idle. But, of course, in this latter case, the concert for the cessation of labour may be for the sole or deliberate or obvious purpose of restraining trade, in which case different legal consequences might ensue, and to this I have referred. All of these principles (excluding the exceptional case last mentioned) are now well settled by authority; and they are no longer questioned."

Of course the ideal type of strike, which is more likely to be found in Utopia than in the hard, practical world of modern industry, is one in which a number of workmen, without the slightest coercion or intimidation from others, and not exercising any among themselves, voluntarily combine to achieve a simultaneous cessation from work not involving a breach of their contracts of employment. On the further assumption that neither restraint of trade nor an intention to injure other persons is the "sole or deliberate or obvious" or (to use the terminology of later cases) the "real purpose" of the strike and that no breach of the ordinary law of the land takes place during the execution of such an operation, it may be true to say that such a strike is not tainted by illegality and is perfectly lawful. It must at the same time be remembered that just as the common law principle of freedom of contract allows to an individual employee the right of lawful termination of his contract of employment, so also no employer is legally compellable to re-employ a worker who has availed himself of that right. This is, in my opinion, the process of reasoning which fundamentally underlies the various judicial *dicta* which refer to the "lawfulness of strikes" or the "right" of workers to go on strike.

In his charge to the jury in *R.* v. *Druitt Lawrence and Adamson* (5), a trial for conspiracy, BRAMWELL, B., said (*inter alia*) (10 Cox, C.C. 592, at pp. 600–601):

> "The men had a perfect right to strike, and if the whole body of the men struck against the masters, why should not the whole body of masters strike against the men?. . .
>
> No right of property or capital, about which there had been so much declamation, was so sacred or so carefully guarded by the law of this land as that of personal liberty. . . .

> But that liberty was not liberty of the body only. It was also a liberty of the mind and will; and the liberty of a man's mind and will, to say how he should bestow himself and his means, his talents, and his industry, was as much a subject of the law's protection as was that of his body. . . .
>
> The public had an interest in the way in which a man disposed of his industry and his capital; and if two or more persons conspired by threats, intimidation, or molestation to deter or influence him in the way in which he should employ his industry, his talents, or his capital, they would be guilty of a criminal offence. That was the common law of the land, and it had been in his opinion re-enacted by an act of Parliament, passed in the 6th year of the reign of George IV. . . ."

In *Crofter Hand Woven Harris Tweed Co., Ltd.* v. *Veitch* (33), ([1942] 1 All E.R. 142, at pp. 158–159), LORD WRIGHT said:

> "Where the rights of labour are concerned, the rights of the employer are conditioned by the rights of the men to give or withhold their services. The right of workmen to strike is an essential element in the principle of collective bargaining."

Notwithstanding the various *dicta* on which counsel relied, one fact that cannot be gainsaid is that "striking" is an activity that is replete with opportunities for, and provides strong inducements towards, the commission of illegal acts, and as such has a natural tendency to lead to situations of grave unrest and disorder which are inimical to the interests of the community as a whole, and which it is the duty of every state to endeavour to prevent or curb by any lawful means within the limits of its executive or legislative powers.

See s. 36 of the Constitution.

Enough has been said to show the extent to which the so-called "legality" of strikes in England is founded upon immunities provided by statute, and it is pertinent to observe here that the "legality" of strikes in this country before the coming into operation of the Act depended mainly on legislative provisions substantially similar to those existing in England. These are to be found in the Trade Unions Ordinance, Cap. 22 No. 9 and the Trade Disputes and Protection of Property Ordinance, Cap. 22 No. 11. In such circumstances I consider as being basically unsound the submission of counsel for the appellants, in so far as it ignored the role of statute law in the process of the so-called "legalisation" of strikes and suggested that the "right" to strike is the right of individuals under the common law, which, as it existed in England on March 1, 1848, is deemed, subject to the provisions of statutory enactments, to have been in force in Trinidad as from that date. (Section 12 of the Supreme Court of Judicature Act 1962).

The gradual evolution by means of legislative enactment of the so-called "right" to strike, which as late as 1927 was substantially affected in England by the Trade Disputes and Trade Unions Act of that year, passed in consequence of the General Strike of 1926, is such as to impel me to the view that this "right", if it may properly be so called, is something that is in its nature very different from the well-known basic rights or liberties of the subject which derive in England from the "common law", but which, owing to the constitutional sovereignty of the British Parliament, are themselves liable at any time to be abridged by legislative enactment. Under the "unwritten" British Constitution there is no scope for the existence of fundamental rights and freedoms in the sense in which they exist under our Constitution. See Hood Phillips, CONSTITUTIONAL AND ADMINISTRATIVE LAW, 3rd Edn., pp. 19 *et seq.*, 43 and 44. It should be noted here, in parenthesis, that the Trade Disputes and Trade Unions Act 1927 [U.K.] was repealed in 1946.

At this point reference may usefully be made to 7 HALSBURY'S LAWS (3rd Edn.), pp. 195–196, para. 416, where the following statement appears:

"... the liberties of the subject are not expressly defined in any law or code. Further, since Parliament is sovereign, the subject cannot possess guaranteed rights such as are guaranteed to the citizen by many foreign constitutions. It is well understood that certain liberties are highly prized by the people, and that in consequence Parliament is unlikely, except in emergencies, to pass legislation constituting a serious interference with them."

The liberties in question are described in a passage in which the learned authors state: (*op. cit.*, para. 418):

"The most important liberties which have been created and elaborated under these conditions are:

(1) The right of personal freedom or immunity from wrongful detention or confinement. . . .
(2) The right of property. . . .
(3) The right of freedom of speech or discussion. . . .
(4) The right of public meeting. . . .
(5) The right of association, which arises from the fewness of the restrictions on the making of contracts and the constitution of trusts, from the ease with which companies can be formed under the Companies Act, 1948, and Trade Unions under the Trade Union Acts, and from the laxity of the law of conspiracy.

It seems that there should be added to this list the following rights, which appear to have become well-established:—

(6) The right of the subject to have any dispute affecting him, which is brought before a judicial tribunal or officer, tried in accordance with the principles of natural justice. . . .
(7) The so-called right to strike, or the right of the subject to withhold his labour, even in concert with others, so long as he commits no breach of contract, or tort, or crime."

Two points need to be paid particular attention:

(a) The use of the expression "so-called right to strike".
(b) The diffident manner of expression of the learned authors' opinion as to whether this so-called right should be added to the well-known list of liberties of the subject.

From their treatment of the matter it is clear that the learned authors consider this so-called right to strike as something separate and distinct from the well-established right of freedom of association, which, in any event, has never been unlimited but has always been conditioned by the necessity for paying regard to the rights of others. In my opinion, this method of treatment is correct. It is, of course, further to be observed that many eminent writers on Constitutional Law do not classify the right of freedom of association as *per se* a liberty of the subject or otherwise than as an emanation from other well-established rights, namely, the rights of personal freedom, freedom of speech and public meeting. For example, in WADE AND PHILLIPS' CONSTITUTIONAL LAW (7th Edn.), p. 514, the topic of "freedom of association" is dealt with as a particular aspect of "Liberty of Discussion". Professor Hood Phillips (*op. cit.*) classifies what are commonly known as the liberties of the subject, in chapters respectively entitled "Freedom of Person and Property, Freedom of Speech and Freedom of Association and Public Meeting". The last mentioned topic is introduced as follows:

"The rights of association and assembly consist in the liberty of two or more persons to associate or meet together provided they do not infringe any

particular rule of common law or statute. Those who take part in an association or assembly will infringe the law if either their object is unlawful or they pursue or threaten to pursue their object by unlawful means."

Whatever the nature of the classification that may be adopted in relation to the freedom of association, in my judgment, a logical distinction falls clearly to be drawn between freedom of association strictly so called and freedom to engage in any particular activity of an association. While, for example, the law permits the members of a social club to associate for the purpose of "rational recreation", which they may consider to be substantially achieved by the consumption of alcoholic beverages, I think it could hardly be said that a law which puts an absolute prohibition on the drinking of such beverages in any way interferes with the freedom of association of the members. Moreover, it seems to me that the difference in legal origin and evolution between the right of freedom of association and the so-called "right" to strike is such as to make it impossible to hold that the so called right to strike is an essential ingredient of freedom of association in its relation to members of trade unions and workers generally.

This is perhaps the appropriate stage at which to express my opinion that neither the legal recognition of trade unions nor their right to bargain collectively on behalf of their members has been impaired by the Act, except in so far as it may be said that the combined effect of ss. 22, 23 and 24 is to limit a trade union's freedom of contract in that the Industrial Court is empowered, at the instance of the Minister of Labour, to nullify the validity of an industrial agreement arrived at consensually between the parties. But, as has been pointed out by the learned President, freedom of contract is not one of the fundamental freedoms guaranteed by the Constitution. On the other hand, s. 3 of the Act, by providing for compulsory recognition by employers of trade unions representative of a majority of their employees, and by compelling employers to "treat and enter into such negotiations with any such trade union or organisation as may be necessary or expedient for the prevention or settlement of trade disputes", may in one sense be said to have the effect of enhancing a trade union's power of collective bargaining.

I am not unmindful of the fact that this view may be countered by the contention that the inability of workers to strike deprives them of a potent weapon whereby they have been customarily enabled to bring pressure to bear on their employers for the purpose of improving their conditions of labour. Whether this is so or not appears to me to be immaterial to the determination of the question as to whether the workers' "right" to collective bargaining has been curtailed. To illustrate the truth of this proposition, the following analogy may be considered helpful. Assume an industrial dispute to be equivalent to warfare. While the fact that one of the combatants is denied the use of a particular weapon may weaken his capacity to fight, it does not affect his *right* to carry on the contest. I consider it only fair to add that in the present case the other combatant has also been deprived by the Act of the use of an equally potent weapon, viz, the lock-out.

Reference was made by counsel for the appellants to the following passage appearing in RIDGE'S CONSTITUTIONAL LAW OF ENGLAND (6th Edn.) (1937), at p. 390, in relation to the "rights of the subject":

"The rights secured are essentially (1) personal freedom; (2) security of property; (3) freedom of speech; (4) right of public meeting; and (5) right of association. This last right includes that of striking, i.e., of combined withholding of labour where there is no breach of contract or tort or crime. . . ."

It is worthy of observation that the assertion that the right of association includes that of striking is not made in the 8th edition of the same work (published in 1950) and for the reasons indicated I am of opinion that this view of the

learned author is not correct in so far as it implies that the "right" of striking is a necessary and indispensable element of the right of freedom of association. The conclusion to which I have thus arrived inevitably leads me to reject the submission that the so-called "right" to strike falls by necessary implication within the constitutional guarantee of the "freedom of association and assembly" established by s. 1 (j) of the Constitution.

Counsel appears to have put forward the alternative contention that the so-called "right" to strike, although not falling within the terms of s. 1 of the Constitution, would nevertheless be entitled to the benefit of the protective provisions stipulated by s. 2. From this proposition I must express my profound dissent. In this connection I would refer to some observations made by GRIFFITH, C.J., while delivering the judgment of the High Court of Australia in *The Federated Amalgamated Government Railway and Tramway Service Association* v. *The N.S.W. Traffic Employees Association* (34) ((1906), 4 C.L.R. 488, at p. 534). Although made in relation to a Federal Constitution involving the distribution of powers between the States and the Commonwealth of Australia, I am of the view that they are equally applicable to the provisions of our Constitution. The learned Chief Justice said:

> "It follows, we think, from this consideration that the rules of construction expressed in the maxims *expressum facit cessare tacitum* and *expressio unius est exclusio alterius* are applicable in a greater, rather than in a less, degree than in the construction of ordinary contracts or ordinary statutes."

I have deliberately refrained from embarking upon any consideration of the true juristic nature of the alleged "right" to strike which is in issue in this case, as I do not think it strictly necessary for the determination of the appeal. It is significant that no attempt was made by counsel to define the nature of this "right". However, it appears that the appellants are claiming that they are legally entitled to non-interference by Parliament with the special statutory immunities that have, before the Act came into operation, been applicable to persons who engage themselves in the activity commonly known as striking. In my judgment, they have signally failed to prove the existence of any such right.

The expression "right" is, of course, used in a multiplicity of senses (see SALMOND ON JURISPRUDENCE (11th Edn.), pp. 259 *et seq.*, JOWITT'S DICTIONARY OF ENGLISH LAW, Vol. 2, pp. 1560–1561), and I agree with the learned trial judge's opinion that no "positive right" to strike exists, in the sense of a right which is legally enforceable or the infringement of which gives rise to legal sanctions. Nevertheless, whatever the nature of its juristic foundation, even a so-called "right", however nebulous or ill-defined, assumes the character of a fundamental right or freedom if it is expressly so declared by the provisions of the Constitution. On the other hand, it is clear that the difficulty of holding that it is so declared only by implication increases in direct proportion with the extent of uncertainty of the alleged "right".

It may be noted that a "right" to strike, subject to regulation by law, is proclaimed by the Inter-American Charter of Social Guarantees (Jenks, THE INTERNATIONAL PROTECTION OF TRADE UNION FREEDOM (1951), p. 358), and that it has later found expression in the European Social Charter which was signed by thirteen of the member States of the Council of Europe in Turin on October 18, 1961—(Article 6 (4)). Moreover, such a "right" is one that has been recognised by the Constitution of more than one European country, e.g. the Constitution of the Fifth French Republic of October 4, 1958, reaffirming the preamble to the Constitution of the Fourth French Republic (1946); the Italian Constitution of 1946 (Article 40). See Kahn-Freund, LABOUR RELATIONS AND THE LAW, pp. 191, 211. It should, of course, at the same time be observed that there is nothing novel about the abolition or limitation of the "right" to strike, as there are

several countries where such a situation exists, e.g., Portugal, Turkey, Bolivia, Colombia, Thailand, Ceylon, Venezuela, Canada. (See Jenks (*op. cit.*), pp. 359 *et seq.*)

One further observation should be made. The contention of the appellants in this case is not that the alleged "right" to strike, which is claimed to be one of the fundamental rights or freedoms guaranteed by the Constitution, cannot be completely abolished by an Act of Parliament. Their sole complaint is that this was not done in a manner authorised by the provisions of ss. 4 and 5 of the Constitution.

For the foregoing reasons I am of opinion that the appellants have failed to establish their contention that ss. 34 and 35 of the Act are invalid as being *ultra vires*. I have given careful consideration to all the other questions arising in this appeal. As regards these I am in complete agreement with the conclusions arrived at by the learned President, whose judgment I have had the opportunity of reading before its delivery. In the result, I must reject the appellants' claim to a declaration that the Act is "*ultra vires* the Constitution of Trinidad and Tobago and is null and void and of no effect". Accordingly, I too would dismiss this appeal with costs.

FRASER, J.A.: I begin this judgment with a quotation from the writings of Professor Dicey who said:

> "In almost every country some forms of association force upon public attention the practical difficulty of so regulating the right of association that its exercise may neither trench upon each citizen's individual freedom nor shake the supreme authority of the state. The problem to be solved, either as a matter of theory or as a matter of practical necessity, is at bottom always and everywhere the same. How can the right of combined action be curtailed without depriving individual liberty of half its value; how can it be left unrestricted without destroying either the liberty of individual citizens, or the power of the Government?"

Professor Dicey wrote this in 1905 and what he said then may strike us as being fundamentally valid today because this case concerns the legality of an Act of Parliament which attempts to offer a solution to the problem posed. On an application to the High Court by motion the appellants sought a declaration that the Industrial Stabilisation Act 1965 is *ultra vires* the Constitution and is null and void and of no effect. CORBIN, J., dismissed the motion and the appellants have appealed.

The Industrial Stabilisation Act 1965, hereinafter referred to as the Act, received the Royal Assent and became operative on March 29, 1965. The preamble introduced it as an Act to provide for the compulsory recognition by employers of trade unions and organisations representative of a majority of workers, for the establishment of an expeditious system for the settlement of trade disputes, for the regulation of prices of commodities, (and) for the constitution of a court to regulate matters relating to the foregoing and incidental thereto.

The appellants' complaint is directed mainly against ss. 34, 36 and 37 of the Act which are said to have infringed and abridged (s. 34) and abrogated (ss. 36 and 37) the right to strike and consequently, it is contended, the provisions of s. 2 of the Constitution have been contravened for the reason impliedly that the Industrial Stabilisation Bill was not passed in the manner provided in s. 5 of the Constitution. Other sections of the Act are said to contravene the Constitution but I propose to deal with what the appellants apparently consider to be the heart of the matter. Briefly, the appellants contention is this: s. 1 of the Constitution recognises the existence of certain human rights and fundamental freedoms and declares an assurance of their continuity without discrimination

by reason of race, origin, colour, religion or sex. In protection and preservation of those rights and freedoms s. 2 prescribes that subject only to the provisions in ss. 3, 4, and 5, no law shall abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the declared rights and freedoms. Although, admittedly, a law or Act of Parliament passed in accordance with ss. 4 and 5 may abrogate, abridge or infringe any of the declared rights and freedoms, it is contended that the provisions of s. 5 not having been complied with in the manner prescribed or at all, there is no authority to abrogate, abridge or infringe any of the declared rights and freedoms as allegedly done by the Act. The argument is thence projected this way: if, as is contended for the appellants, the right of free collective bargaining and the right to strike are common law rights exigible by members of a trade union and are included in the freedom of association as declared in s. 1 (j) of the Constitution it follows necessarily that any law or Act of Parliament, specifically ss. 34, 36 and 37 of the Act, purporting to infringe, abridge or abrogate the right to strike is *ultra vires* the Constitution having regard to the non-compliance with s. 5 (1) and (2) which read as follows:

> "5. (1) An Act of Parliament to which this section applies may expressly declare that it shall have effect notwithstanding s. 1 and 2 of this Constitution and, if any such Act does so declare, it shall have effect accordingly except insofar as its provisions may be shown not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.
>
> (2) An Act of Parliament to which this section applies is one the Bill for which has been passed by both Houses of Parliament and at the final vote thereon in each House has been supported by the votes of not less than three-fifths of all the members of that House."

Without equivocation it should be said at once that the effectiveness of trade union action by resort to the strike weapon is considerably impaired and circumscribed by s. 34 of the Act; s. 36 actually prohibits the participation in a strike by workers in essential services; and s. 37 prohibits members of the public service and its uniformed branches from going on strike. In the event the appellants' contention is sound namely, that there is, and one must add, always had been, a common law right to strike it may well be that the provisions of ss. 34, 36 and 37 of the Act are *ultra vires*, there being a non-compliance with the provisions of s. 5 of the Constitution.

The Attorney-General submitted that the right to strike, if it can be so described, is not included in the fundamental freedom of association and assembly as declared in s. 1 (j) of the Constitution and that nowhere in the Constitution is to be found a declaration of such a right in clearly defined terms. He submitted also that the doctrine of *ultra vires* is not applicable to the instant case; that the right to strike is not a legal right; and, he said finally, that the Court must approach the matter from the point of view of the public interest. This final proposition was not developed by the Attorney-General and therefore I do him no injustice if I give it a wide berth; but in steering clear of so imprecise a reference to the "public interest" which, if given the most favourable interpretation in its context, appears to be conterminous with "public policy", I recall the words of BURROUGH, J., in *Richardson* v. *Mellish* (35) who, in speaking about public policy said:

> "I, for one, protest . . . against arguing too strongly upon public policy; it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail."

In a case of this kind "public interest" if construed as "public policy" must mean the principles upon which freedom of contract or private dealing is restricted by law for the good of the community. To give the words their literal meaning would introduce ideas of executive action based on a presumed social contract and this must inevitably involve political considerations. These are subjects with which I am not here concerned. My function is clear. My function is the same as was that of DATE, J., in *D'Aguiar* v. *Attorney-General* (36) "to interpret the Constitution as it stands".

Deferring for the moment the question whether the right to strike is a legal or other right I now consider the three other submissions made by the Attorney-General. The first point is that the doctrine of *ultra vires* is not applicable to the instant case. Having regard to the provisions of s. 6 of the Constitution it is difficult to understand this submission. By that section any person may apply to the High Court for relief against the operation of any law which may offend against the provisions of s. 2 of the Constitution. There is no doubt in my mind about this and the conjoint effect of ss. 2 and 6 of the Constitution is to confer upon the High Court the function of judicial review over such legislative measures as may be taken in contravention of the expressed provisions of ss. 4 and 5 of the Constitution. No question of the sovereignty of Parliament arises here. It is simply a matter of obeying the Constitution. No one, not even Parliament, can disobey the Constitution with impunity. Parliament can amend the Constitution only if the constitutional prescriptions are observed and providing Parliament fulfills the requirements of the Constitution its power is sovereign and supreme. But if Parliament fails or omits or neglects to do so and thereby contravenes the expressed provisions of the Constitution any person who alleges that he has been, or that he is, or that he is likely to be prejudiced by such contravention may seek recourse to the High Court and pray its relief.

There is clear authority for this view. I refer to the case of *Bribery Comr.* v. *Ramasinghe* (37) in which the Privy Council held that a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law; so that where, as in that case, the Constitution required the Speaker's certificate as a necessary part of the legislative process a Bill which did not comply with that provision was invalid and *ultra vires* even though it received the Royal Assent. LORD PEARCE in his judgment said ([1965] A.C. 172, at p. 194):

> ". . . The Court has a duty to see that the Constitution is not infringed and to preserve it inviolate. . . . The English authorities have taken a narrow view of the Court's power to look behind an authentic copy of the Act. But in the Constitution of the United Kingdom there is no governing instrument which prescribed the law making powers and the forms which are essential to those powers. There was therefore never such a necessity as arises in the present case for the Court to take any close cognisance of the process of law-making."

Later in the judgment at p. 196 he posed the following question:

> "When a sovereign Parliament has purported to enact a bill and it has received the Royal Assent, is it a valid Act in the course of whose passing there was a procedural defect, or is it an invalid Act which Parliament had no power to pass in that manner?"

That question was answered at p. 197 in this way:

> ". . . a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law . . . the proposition . . . is not acceptable that a legislature, once established, has some inherent power derived from the mere fact of its establishment to make a valid law by the resolution of a bare majority which its own constituent instrument has said shall not be a valid law unless made by a different type of majority or by a different legislative process."

This opinion confirms my own and on this point the case of *Liyanage and Others* v. *R.* (29) is also of considerable interest.

The subsidiary submission of the Attorney-General that nowhere in the Constitution is to be found a declaration of a right or freedom to strike is correct; but this does not dispose of the appellants' contention that the right to strike is included in the freedom of association; and so I turn now to the main submission of the Attorney-General on this point that the right to strike is not included in the freedom of association and assembly. If the right to strike is not included in the freedom of association then the short answer to the appellants' is that they have no case because the Constitution does not protect from legislative interference any rights other than those expressly or by necessary implication recognised and declared in s. 1; but if the right of free collective bargaining and the right to strike are included in the freedom of association then they are protected by the Constitution.

In order to decide whether or not the right to strike is included in the freedom of association I must first determine whether the right to strike is a common law right and therefore entitled as such to protection on the ground that it is by necessary implication included in the freedom of association as contended by the appellants. In a careful argument Mr. Alexander recruited as an ally the *dictum* of LORD WRIGHT in *Crofter Hand Woven Harris Tweed Co., Ltd.* v. *Veitch* (33), ([1942] A.C. 435, at p. 463) in which he said:

> "The right of workmen to strike is an essential element in the principle of collective bargaining."

He also referred to the judgment of FLETCHER-MOULTON, L.J. in *Gozney* v. *Bristol Trade and Provident Society* (31), who said ([1909] 1 K.B. 905, at p. 921):

> "Strikes are well-known occurrences in the labour world, and every workman who is prudent and realises his duty towards those who depend on him will take steps to provide against the suffering they bring. Every time a workman practices thrift he facilitates his taking part in future strikes, and no doubt that intention is present when he thus acts, and it is strange that such a motive should be held to be tainted with illegality."

There are other encouraging references notably among them being an article on "The Law of Associations" by Professor Dennis Lloyd at p. 99 of LAW AND OPINION IN ENGLAND IN THE TWENTIETH CENTURY, edited by Morris Ginsberg. At p. 106 Professor Lloyd says:

> "At the turn of the century the trade unions were still relatively weak, and although lawfully established for more than a quarter of a century under the ill-defined status conceded by the 1871 Act and with the right to strike legally recognised, they still appeared to be vulnerable to common law actions for conspiracy or wrongfully inducing breaches of contract."

Later in the same work in commenting on the Trade Disputes Act 1906 as a far-reaching consequence of the decision in *Taff Vale Ry. Co.* v. *Amalgamated Soc. of Ry. Servants* (15), he said:

> "This remarkable piece of legislation which appeared to go far beyond what was necessary to preserve the inviolability of the right to strike, had the result, as was judicially observed two years later, of removing the trade unions 'from the humiliating position of being on a level with other lawful associations. . .'."

The foregoing are merely two of a number of expressions from differing sources which apparently tend to support the argument and give the impression that the right to strike is an established and recognised right protected and enforceable by law. Whether this is so is still to be judicially determined. Therefore it is at once necessary to define the terms of the proposition in order to limit the

scope of the enquiry. Accordingly, definitions are indicated for the words "strike", "right" and "common law".

Firstly, the word "strike". HANNEN, J., in *Farrer* v. *Close* (8) defined a strike at p. 612 as "a simultaneous cessation of work on the part of workmen". This definition was elaborated upon a few years after in *King* v. *Parker* (38) ((1876), 34 L.T. 887, at p. 889 by KELLY, C.B.), who said:

> "I conceive the word means a refusal by the whole body of workmen to work for their employers, in consequence either of a refusal by the employers of the workmen's demand for an increase of wages, or of a refusal by the workmen to accept a diminution of wages when proposed by their employers."

Not the least significant difference between these two definitions is the introduction by KELLY, C.B., of the element of a wage dispute as the real determinant while the common factor between them remained a simultaneous cessation of work by a group of workmen. From these definitions arise two clear inferences. The first is that a strike is a collective rather than an individual activity; and secondly, that wage rates were wholly the subject of agreement *inter partes* between the employer and the employed. The only significant development to the definition of a strike since 1876 occurred in 1915 in *William Bros.* (*Hull*), *Ltd.* v. *Naamlooze Vennootschap* (*W.H.*) *Berghuys Kolenhandel* (39) in which SANKEY, J., said that a strike is "a general concerted refusal by workmen to work in consequence of an alleged grievance". A nice distinction arises from this definition and it is that the determination is no longer a dispute as to wages but rather the existence of an alleged grievance. This I think arose as a result of the definition of a trade union which for the first time was provided in s. 16 of the Trade Union Amendment Act 1876 as follows:

> "16. The term 'trade union' means any combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restricting conditions on the conduct of any trade or business, whether such combination would or would not, if the principal Act had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade."

Accordingly, strike action was resorted to as a means of collective bargaining within the total scope of the trade union function and purpose and the definition of a strike has since remained as defined by SANKEY, J., in 1915. It is therefore a means of collective rather than individual action and is a simultaneous cessation of work by workmen in consequence of an alleged grievance. The definition of "strike" in the Act accords substantially with and is an elaboration of the judicial definition.

Ordinarily, the question—what is the common law—should not be difficult to answer; but where, as in this case, a common law right is being claimed it will be necessary to determine both the nature of the common law and the character of the rights which it recognised as existing and enforceable. In JOWITT'S DICTIONARY OF ENGLISH LAW the common law is said to be:

> "that part of the law of England which before the Judicature Acts 1873–75 was administered by the common law courts. It is sometimes used in contradistinction to statute law, and then denotes the unwritten law, whether legal or equitable in its origin, which does not derive its authority from any express declaration of the will of the legislature. It depends for its authority upon the recognition given by the courts to principles, customs and rules of conduct previously existing among the people. This recognition was formerly enshrined in the memory of legal practitioners and suitors in the courts; *it is now recorded in the law reports which embody the decisions of the judges together with the reasons which they assigned for their decisions.* . . . With

reference to the subjects with which it deals, the common law is divided into civil and criminal; the former includes the two great branches of private rights arising out of contracts and torts; the latter deals with crimes."

This then is the common law which, by virtue of s. 12 of the Supreme Court of Judicature Act, No. 12 of 1962 is deemed to have been in force in Trinidad since March 1, 1848, and accordingly we must look for authority and guidance to the "law reports which embody the decisions of the judges together with the reasons which they assigned for their decisions". In considering this question references will have to be made to the common law rights and disabilities recognised by the Courts and to the statutory measures adopted to alter the common law.

The civil liberty which has become known as the freedom of association and assembly has been developed by judicial precedent especially in the enunciation of the common law of contract. The Great Britain of the late 18th century was a developing industrial society in which contract supplied the legal instrument which enabled men to bargain for their services and to move freely from place to place. The idea of contract allowed men to negotiate terms and conditions of employment, at first individually and later collectively, through the agency of trade unions. The policy followed in earlier centuries of official regulation of wages by Act of Parliament had already declined by 1700 and in the century following workmen, deprived of their accustomed statutory protection began to combine among themselves, ostensibly to seek Parliamentary redress, but not infrequently for the purpose of enforcing wage demands against their employers by the direct and repressive sanction of "bad-work, go-slows or turn-outs (later known as strikes"). This then was the background in which the common law of contract had to develop and expand and the common law of combinations and associations had to be enunciated. The attitude of the Courts of the time is interesting. On the criminal side, the common law offence of conspiracy was at once invoked to curb agreements among workmen to combine and thereafter began the judicial development of the crime of conspiracy. Based on the wide proposition of HAWKINS—see P.C., Bk. 1, C. 72, s. 2—that

"all confederacies whatsoever wrongfully to prejudice a third person are highly criminal at common law, as where divers persons confederate together by indirect means to impoverish a third person"

the definition of conspiracy was gradually narrowed until it found its final resting place in *Quinn* v. *Leathem* (17) as "the agreement of two or more, to do an illegal act by lawful means, or a legal act by illegal means". On the civil side, the courts were not willing to recognise the existence of associations of workmen and were content to invoke the principles applicable to clubs and societies (religious and friendly). The theory was that a man was free to associate with whomsoever he wished and it was not the business of the courts to interfere with or enquire into the terms upon which membership of an association was offered and accepted. This disinclination to interfere with the domestic affairs of trade unions was not inspired solely by the recognition of the freedom of association but it remained the attitude of the courts until the case of *Bonsor* v. *Musicians Union* (40) in which it was held that the civil courts had jurisdiction to judicially review arbitrary action taken domestically by a trade union. The disinclination to interfere was not limited to the domestic affairs of unions but was applied as well to their agreements with employers and this was given statutory authority by s. 4 of the Trade Union Act 1871, which provides that:

"nothing in this act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any agreement between one trade union and another" [this includes employers' associations].

A similar provision is to be found in s. 6 of the Trade Unions Ordinance, Cap. 22 No. 9. An interesting aspect of industrial relations becomes apparent from what has been said and it is—that the collective labour agreement which in this day and age must affect the economic and social lives of a great portion of the working population both here and in the United Kingdom, has substantially remained outside the scope of judicial review.

The common law in the late 18th century was being made to work its purpose as it appeared to the judges of that time. The writings of Adam Smith and Jeremy Bentham were gradually informing the economic and political policy of *laissez-faire* and among the ideas gaining ascendancy was the idea that the wealth of a nation was best secured by giving free play to the efforts of the individual to better his condition and therefore that each individual should be left free to conduct his own trade in his own way. These ideas had already influenced the development of legal theory and the concept of the illegality of contracts in restraint of trade had been introduced into the common law on the ground of public policy. A discernible jurisprudence was being formed around the theme of restraints on trade in the law of crime on the one side and the law of contracts and torts on the other. According to Russell—see RUSSELL ON CRIME (11th Edn.), p. 214—the common law courts received conspiracy

"as a loosely expressed doctrine capable of almost indefinite extension. In effect it marked the point at which an agreement between two or more persons to do any act which the court disliked even on moral grounds, could be punished as a criminal conspiracy."

On the criminal side the flexibility of the crime of conspiracy resulted in repressive sanctions against combinations in restraint of trade and on the civil side contracts held to be in restraint of trade was jealously scrutinised. One of the early instances of the development of these ideas arose in a unique indictment for conspiracy against a group of journeymen tailors who were found guilty for agreeing among themselves not to work for wages less than those demanded by them collectively—*R.* v. *Cambridge Journeymen-Tailors* (1). The conspiracy alleged was not the agreement not to work (as it would have been in later years) but rather the agreement to demand higher wages which was construed as a conspiracy to raise their wages and, in effect, was a conspiracy in restraint of trade. Agreements in restraint of trade were considered at first to be void and then later to be unenforceable; combinations in restraint of trade became criminal conspiracies or actionable torts; and so it is that the early common law of trade unions is largely to be found in the reports of civil actions and criminal prosecutions touching respectively, the validity and enforceability of contracts and of rules of associations which were in restraint of trade; and the disabilities to which workmen and trade unions, whose objects were in restraint of trade, would suffer.

The social conditions of industrial England were in part responsible for a series of Acts culminating in the Unlawful Combinations of Workmen Acts 1799–1800 which made it a criminal offence for workmen to agree together for the purpose of obtaining in combination higher wages or shorter hours of work, or preventing any person from employing whomsoever he thought proper or for any workmen by persuasion or intimidation or any other means wilfully and maliciously to endeavour to prevent any person from taking employment, or to induce any person to leave his employment. The effect of this legislation was to make a mere collective agreement to combine for certain purposes a criminal conspiracy so that *a fortiori* the method whereby the combination was to effect its purpose must itself have fallen within criminal activity at common law as will shortly be demonstrated. The Unlawful Combinations of Workmen Acts were repealed by the Combination Laws Repeal Act 1824 which expressly removed all criminal responsibility for conspiracy (whether under the common law or statute

law) to combine to alter wages, hours or conditions of work or to induce persons to leave or refuse to return to work. This Act was followed by a series of industrial stoppages involving some rioting, violence and bloodshed and consequently the situation had to be restored by the Combination Laws Repeal Amendment Act 1825. The 1825 Act did not legalise strikes or lock-outs or the persuasion of persons to leave, refuse or return to work; but it prescribed the combinations which were to be free or immune from criminal responsibility, limiting them to combinations for the purpose of the determination of wages, policies and hours of work required by those combining. The Act dealt with assaults, intimidation, etc., for interference with the freedom of employers or workmen, and left conspiracies to commit any of the acts prohibited to be dealt with as conspiracies at common law to commit crime. An informative note on the 1825 Act is to be found in the ENCYCLOPAEDIA OF THE LAWS OF ENGLAND (2nd Edn.), Vol. 3, at p. 481. The editor says:

> "There are two conflicting views of the effect of this statute—one that all combinations to raise wages were criminal at common law, and that the statute created certain exceptions; the other, that such combinations were only criminal by statute, and that the Act of 1825 got rid of the old statutes and formed a new code on the subject."

As his authority for that statement and those following the editor cites 3 Stephen, Hist. Crim. Law, 226 and continues:

> "Concurrently with this conception the opinion prevailed that conspiracies in restraint of trade were offences at common law, apart from the enactments referred to."

Finally he says:

> "The opinion is thus summed up at 3 Stephen, Hist. Crim. Law, 218
> (1) That all combinations of workmen to raise wages were illegal, with the limited exceptions introduced by the Act of 1825;
> (2) that all combinations to injure or obstruct an employer in his business, whether by his own workmen or outsiders, is a criminal conspiracy;
> (3) that agreements in restraint of trade are certainly so far unlawful as to be void, but it is uncertain whether they are criminal conspiracies."

In two prosecutions in 1851 for conspiracy among workmen to alter wages the courts recognised that the exercise of the right by fellow workmen to combine for the purpose of raising wages and altering the hours of work (which were among the exceptions in the 1825 Act) necessarily involved the right to withhold their labour to achieve that purpose—see *R.* v. *Duffield* (3) and *R.* v. *Rowlands* (4). The conclusion which may be drawn from these cases is that the freedom to withhold labour was exercisable without being unlawful only where the purpose to be achieved fell within those purposes made immune from criminal prosecution by the 1825 Act. This conclusion coincides with the judicial view then current and expressed by CROMPTON, J., in *Hilton* v. *Eckersley* (7) that all combinations to alter conditions of work were criminal conspiracies at common law as being in restraint of trade. This view was also held by BLACKBURN, J., in *Hornby* v. *Close* (6) and remained the common law rule until disapproved by *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (41) after the Trade Union Act 1871. In RUSSELL ON CRIME (11th Edn.) Vol. 2, p. 1719, the author says:

> "prior to 1871, it had often been held criminal to conspire under certain circumstances for workmen to combine to raise the rates of wages; or to injure or obstruct employers; or to induce workmen to leave their employment; or to procure their discharge; or to strike; or to picket the works of employers."

On the civil side the common law of contracts in restraint of trade was considerably influenced by the judgment of PARKER, C.J., in *Mitchel* v. *Reynolds*

(43), in which it was held that a contract under seal to restrain a person from trading in a particular place, if made upon a reasonable consideration, might be good; but if the restraint was general not to exercise a trade throughout the kingdom the contract was void for being oppressive. A long line of cases followed *Mitchel* v. *Reynolds* (42), culminating in *Nordenfeldt* v. *Maxim Nordenfeldt Co.* (43), which may be said to express the current view which is that contracts in general restraint of trade are void as being contrary to public policy. A partial restraint will be binding in law if made on good consideration, and if it is reasonable. Having regard however to the changes introduced by modern extensions of business and modern facilities of communication, a restriction unlimited in space may now be binding provided that it is not more stringent than is reasonably necessary for the protection of the covenantee, and that it is not injurious to the interests of the public.

In the meantime, after the 1825 Act statutory reforms in trade union law were introduced from time to time to neutralise judicial interpretation of the common law and to avoid the illegality of action in restraint of trade by creating areas of immunity from criminal responsibility at first and later from civil liability in favour of combinations of workmen and thereafter in favour of individual workmen engaged in trade union activity. The cumulative effect of a series of judicial decisions following the 1825 Act was that while a strike to raise wages might be lawful, it was unlawful either to threaten the employer that such a strike would take place, or to persuade persons by peaceful picketing to take part in it. Consequently, the Molestation of Workmen Act 1859 legalised peaceful picketing and relieved persons engaging in certain combinations from being deemed guilty of criminal conspiracy. But the judicial interpretation of the common law increased the feeling of insecurity among trade unions because trade unions being combinations with objects including restraints upon trade which the courts considered unreasonable, they were declared to be unlawful associations to whose agreements and trusts the law would afford no protection. The decision in *Hornby* v. *Close* (6), emphasised the disadvantages of a trade union whose objects were held to be in restraint of trade. In that case a trade union which brought a prosecution against a treasurer for larceny and embezzlement (having become registered as a Friendly Society in order to bring proceedings) was held not to be a society established for a purpose which was not illegal because it was a union in unlawful restraint of trade. The Court could not give any protection to the considerable funds of the union and the fraudulent treasurer went scot free. This was a shocking experience for the trade union movement and social justice demanded a change. Accordingly, the Trade Union Funds Protection Act 1869 was enacted to correct the position. Shortly after in 1871 the first major reform was made by the Trade Union Act 1871 which in prescribing a system of registration of trade unions partially legalised them. Section 3 provided that the purposes of any trade union shall not, by reason merely that they are in restraint of trade be unlawful so as to render void or voidable any agreement or trust. The Act also provided immunity from prosecution for criminal conspiracy to the members of a trade union the purposes of which were in unlawful restraint of trade; but as already pointed out, the Act barred a court from entertaining legal proceedings brought to enforce domestic agreements. The trade union movement experienced another surprise by the case of *R.* v. *Bunn* (9) in which BRETT, J., held that a threat by workmen to go on strike unless the employers reinstated a discharged workman was a criminal conspiracy at common law by reason of coercion. As a direct consequence of this decision the Conspiracy and Protection of Property Act 1875 was passed. This Act granted wider immunities to trade unions and their members from criminal prosecution and the protection seemed absolute or nearly so until two judgments of the House of Lords demonstrated otherwise. In *Taff Vale Ry. Co.* v. *Amalgamated Soc. of Ry. Servants* (15) it was held that a registered trade

union could be sued as such in a civil action and that its funds were liable for damage inflicted by its officials. In *Quinn* v. *Leathem* (17) where trade union officials had maliciously threatened a strike against the plaintiff's chief customer, unless the plaintiff dismissed his non-union workers, the House of Lords, only two weeks after *Taff Vale* (15) held that they were liable in damages for the tort of conspiracy. The considerable agitation attending these judgments resulted in the passing of the Trade Disputes Act 1906, which provided in s. 1 that:

> "an act done in furtherance 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 actionable."

The 1906 Act thus prescribed still wider immunities from civil liability for trade unions and their members and in that position the trade unions stood believed by all in trade union circles to be secure and comprehensively protected until the case of *Rookes* v. *Barnard* (21).

The decision in *Rookes* v. *Barnard* (21), being declaratory of the common law, albeit within a narrow orbit, is binding on this court. It is significantly important in the legal history of trade unionism because it illustrates the continuing power of the courts to prescribe the areas of immunity in the discharge of their duty in construing statutes in relation to the common law. In that case the tort of intimidation was fully developed. It was held that although the ordinary breach of a contract to work, which may necessarily arise in a strike, is not an unlawful act (since and by reason of the 1906 Act) nevertheless the breach of a specific term of the contract of employment is an unlawful act and a threat to commit such a breach amounts to the common law tort of intimidation, and was not protected by s. 3 of the Trade Disputes Act 1906. It was held further that an agreement to commit the tort of intimidation was a conspiracy to commit an unlawful act and was not protected by s. 1 of the Act; consequently it became actionable by any person to whom foreseeable damage was caused.

This is a logical refinement of the common law tort of intimidation correctly applied by the court in order to protect the right of an individual to exercise his professional (or trade) talents freely from the restraints imposed by the threat of unlawful collective action. It may be that the Trade Union Acts had provided such wide protection to trade union activity that the power of men in combination impinged upon individual liberty. What the court did was to redress the balance by refusing to allow an unlawful restraint on trade and so was able to protect the individual against the oppressive power of unrestrained collective action.

The Trade Unions Ordinance, Cap. 22 No. 9 is a composite of the Trade Union and Trade Disputes Acts 1871–1906 and for this reason it is commensurately a product of 100 years of interaction between the common law and statute law. From time to time the rules and principles of the common law have been made to give way to ameliorative changes by legislation in order to create conditions more agreeable for collective bargaining and to create an atmosphere more conducive to vigorous growth of the trade union movement. Legislation has not been used as an instrument of suppression but rather as an instrument of abstention. It has been used to safeguard activities of trade unions by protecting them against fraud and saving their members indirectly from the inequality of bargaining power. It has restrained the sanctions of the criminal law and granted relief from the weight of civil action. In short, statute law has granted a beneficient immunity from criminal responsibility and civil liability to trade unions and to their members provided they act lawfully in contemplation or furtherance of a trade dispute. But beneath a hundred years of statutory exemption there lay the authority of the common law, at first expressive, but lately dormant, yet alive and in being and able effectually to contain the tide of unrestrained freedom and restate the limits of what may seem to have become absolute immunity; and after all, as stated by LORD EVERSHED in *Rookes* v. *Barnard* (21), ([1964] 1 All E.R. 367, at p. 384) this is:

> "in accordance with the well-known principles of our law, one of the characteristics of which is (as has been pointed out by many eminent scholars, including CARDOZO, C.J.) that its principles are never finally determined, but are and should be capable of expansion and development as changing circumstances require, the material subject matter being tested and retested in the law laboratories, the courts of justice."

I shall now consider more fully the third term among the definitions proposed, namely, the right. What I have said about the contest between the common law and statute law should adequately demonstrate that acts which may have been criminally illegal at common law were not declared to be legal by statute but instead, were exempt from criminal prosecution and civil action if done in certain circumstances. The question which arises therefore is *whether a person who in doing an act which is exempted by statute from penal sanctions or from claims for compensation for civil injury, can be said to have acquired a right to do the act.*

It is to be observed that a strike necessarily involves a number of persons but that the human rights and fundamental freedoms recognised and declared in s. 1 of the Constitution are obviously applicable only to individuals and not to an association of individuals because the categories of discrimination viz, race, origin, colour, religion and sex are intelligible only on the basis of individual identity. It is for this reason that the appellants moved the High Court as individuals alleging that their individual rights, specifically their right to join other persons in a strike, have been abrogated, abridged or infringed. Both appellants are members of the Oilfield Workers Trade Union which is affiliated to the National Trade Union Congress and consequently, to the International Federation of Free Trade Unions, and as such they claim the right to strike in concert with others. It should be borne in mind that a strike is a collective stoppage of work, and to the extent to which it involves a stoppage of work by the individual workman, it may be said to be a collective stoppage of work resulting from personal breaches of contracts of work by individual workmen. It must follow therefore that a right to strike if it exists at all, can only properly exist as a collective right; but as will be seen from the appellants' affidavit, this is not being claimed. The failure to make this claim does not result from inadvertance but instead, it stems from a recognition of the true scope and intent of s. 1 of the Constitution by which individual human rights and freedoms are declared. In praying the court's jurisdiction the appellants' affidavit speaks firstly of their membership of a union and secondly of an agreement between their employers (Texaco Trinidad, Inc.) and the union whereby exclusive representation for the purpose of collective bargaining in respect of wages, hours and conditions of employment is given to the union on behalf of its members. It is not clear whether all the employees of Texaco Trinidad, Inc., are members of the union but it is stated that in 1960 the workers employed by the company were dissatisfied by the delay in concluding an agreement and they were all—

> "urged by the then leadership of the Union to call a strike. In response to this pressure the Union called upon us to withdraw our labour which, after due notice, we did. The outcome was a satisfactory agreement under which we served for the following two years."

The clear implication is that the collective stoppage of work was effectively used in the technique of collective bargaining. The appellants swear also that in 1962 when the question of renewal of the 1960 agreement arose a satisfactory collective agreement was negotiated between the union and the company without

recourse to strike action or the threat of strike action. It is also alleged that the 1962 agreement (dated February 16, 1963) by its terms became liable to amendment by negotiation in 1965; that negotiations started and having continued inconclusively from April 6 to July 27, 1965, were broken off by the company on that day. By virtue of the Act, the dispute between the union and the company became the subject of proceedings in the Industrial Court which, the appellants contend, has no jurisdiction to hear the dispute. Finally it is said in para. 16 that but for the enactment of the Industrial Stabilisation Act the union and the company would have been able freely to conclude a new collective agreement or alternatively,

> "the leaders of the Union or we (the appellants) ourselves in concert with the employees of the company and other workers in the Industry would have been free, without fear or threat of being charged and convicted of criminal offences punishable under the Act, to threaten or take strike action or other lawful and customary measures to bring about such an agreement."

Manifestly, the statement contained in para. 16 contemplates not only that the employees of the company may go on strike to bring about an agreement satisfactory to themselves but also that other employees in the oil industry, presumably those working for other oil companies, may simultaneously go on strike with the appellants and their fellow workers in order to bring about an agreement satisfactory to the employees of Texaco Trinidad, Inc. There is immense significance in this statement. The question which inevitably arises is—what is the precise right being claimed by the appellants. The full implications of their affidavit must therefore be examined in order to ascertain this. A simple and self evident proposition must be stated at once. It is this. Every man engaged on contract is at liberty to withdraw his labour in the manner prescribed by the contract or by notice or for justifiable reason. In none of these situations can the stoppage of work by him be considered unlawful because there is no breach of contract. On the other hand a person who, without notice or justifiable cause, summarily withdraws his individual labour for the purpose of negotiating higher wages or better conditions of work commits an unlawful act and personally is civilly liable for a breach of contract. As was said by LORD LINDLEY in *South Wales Miners Federation* v. *Glamorgan Coal Co., Ltd.* (14), ([1905] A.C. 239, at p. 253):

> "To break a contract is an unlawful act; or in the language of Lord Watson in *Allen* v. *Flood*, [1898] A.C. 96, 'A breach of contract is in itself a legal wrong,' a breach of contract would not be actionable if nothing legally wrong was involved in the breach."

I may add here that it is immaterial that actions for breaches of this kind are not usually brought by employers. I return therefore to isolating the precise right claimed. As already pointed out the claim cannot be in respect of the individual right to lawfully withhold labour. Moreover no claim is made or could have been made that the right to strike is a right *in rem* exigible by all workmen everywhere and can be so declared in an action such as this; consequently the employees of other oil companies can form no part of the consideration in this case. The claim must therefore be for a personal right. But the individual as such has no personal right to strike for the reason that a strike is a collective activity which necessarily involves more than one workman. By elimination therefore the only other possibility is a claim by the appellants to be entitled as individuals to break their contracts of service simultaneously with other employees and, notwithstanding the individual commission of a wrongful act, to join collectively in a strike. In effect, the appellants are claiming an individual right to do a wrongful act, *i.e.* to stop work unlawfully in order to enjoy a collective right to strike. When expressed in these terms the real incongruity

of the position rises to the surface. Except in the rare cases of justification in the criminal law particularly in cases of homicide, there is no authority anywhere for the proposition that the common law recognised as a personal right the freedom of an individual to commit an unlawful act. Put crudely, the proposition is that a wrongdoer has a personal right protected and enforceable in law to do an unlawful act.

I say protected and enforceable in law because every right is a legally protected interest, regardless of the source of the right whether by statute, common law or equity, and is enforceable in a court of law. The right which the appellants claim is an individual and personal right to strike or more accurately, to take part in a strike. Careful examination of the English cases will disclose that there has never been a right to strike recognised by the common law nor has it been so declared by statute. The exceptions or immunities which individuals have enjoyed singly and collectively in their freedom to associate in trade unions are not enforceable rights exigible against the world. There is no case decided in Great Britain which comes near to recognising such a right. On the contrary there is a great deal of learning supporting a contrary view.

I should however mention the case of *R.* v. *Canadian Pacific Ry. Co.* (45) in which MCRUER, C.J., of the High Court of Ontario held that the right to strike is a common law right which was recognised as such by the Labour Relations Act 1960. Of the judicial *dicta* upon which he mainly relied one is in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (41), ([1892] A.C. 25 made by LORD BRAMWELL at p. 47):

> "There is one thing that is to me decisive. I have always said that a combination of workmen, an agreement among them to cease work except for higher wages, and a strike in consequence, was lawful at common law; perhaps not enforceable *inter se*, but not indictable."

Another of the *dicta* is the statement of LORD WRIGHT in *Crofter* v. *Veitch* (33), MCRUER, C.J., ultimately summed up the position as he saw it (31 D.L.R. (2d) 209, at p. 215) in this way:

> "The principles of law that I have just been discussing are authoritatively restated by the Hon. Mr. Justice Rand in *Newell* v. *Barker & Bruce* ((1950), 2 D.L.R. 289, at p. 299) . . . where the learned judge said:
>
> It is now established beyond controversy that in the competition between workmen and employers and between groups of workmen, concerted abstention from work for the purpose of serving the interest of organised labour is justifiable conduct. On the authority of the cases that I have discussed and many others, I am forbidden to accept the argument put forward by Mr. Jackett that on the facts as found by the learned magistrate the strike is unlawful at common law. . . . Although the Act does not purport to create a statutory right to strike, as I indicated it recognises the common law right to strike and so doing, limits it."

On appeal to the Ontario Court of Appeal ROACH, J.A., said:

> "This Court is in substantial agreement with the reasons of the learned Chief Justice . . . and, subject to what I shall say in a moment, with his order . . . it would be lawful under the common law for the employees here concerned to go on strike, their purpose in so doing not to injure the employer but to bring about what they consider to be improvements in their working conditions and monetary benefits . . . quite apart from the common law the statute has recognised the lawfulness of a strike. . . ."

An appeal to the Supreme Court of Canada in the name *Canadian Pacific Ry. Co.* v. *Zambri* (46) was dismissed. But LOCKE, J., considered that the case should be decided upon the assumption that the strike of the members of the Union was

lawful as had been found by McRuer, C.J., whose finding had been approved by the Court of Appeal. Cartwright, J., with whom Kerwin, C.J., Taschereun and Fanteux, JJ., concurred found on the particular facts that the strike was lawful under the provisions of the Labour Relations Act but said (34 D.L.R. (2d) 654, at p. 663):

"I find nothing in the Act that renders lawful the calling of, or participation in, a strike where the cessation of work is in breach of a term in the contracts under which the employees are working requiring the giving of notice of a prescribed length before ceasing work; clear words in a statute would be required to bring about such an alteration in the law . . . the employee cannot have it both ways; if he is still an employee it is his duty to work, and if he refuses to work he is in breach of the contract of employment and the employer can treat it as at an end. But in my opinion the position of the parties is altered by the relevant provisions of the Act."

Judson, J., with whom Abbott, Martland and Ritchie, JJ., concurred referred to the relevant section of the Act and said:

"This subsection limits the right to strike until its requirements have been complied with. But once the statutory requirements have been complied with, the strike becomes lawful under the Act. The foundation of the right to strike is in the Act itself. . . . Whatever the common law may say about strikes this Act says that this strike is lawful because the statutory conditions have been complied with."

I have discussed the case at some length because it is the only case I have seen in which a court within the common law jurisdictions in considering the legal quality of a strike has held that the right to strike is a common law right. It should be observed however that no member of the Supreme Court of Canada approved the reasoning of McRuer, C.J., and it was held that the foundation of the right to strike in Canada is to be found in the expressed provisions of the Labour Relations Act.

An interesting work on this subject is Labour Relations and the Law (1965), edited by Professor Otto Kahn-Freund. In the introduction to the chapter on the Law and Industrial Conflict in Great Britain, Dr. K. W. Wedderburn says this:

"The modern law of industrial conflict has never been codified. It rests upon case law decisions and upon statutes which have from time to time been added to those decisions. Many of the statutes were passed with the object of changing certain common law rules evolved by the judges, and in consequence, the statutory principles frequently appear as an 'immunity' from 'ordinary' common law liabilities granted to trade unions or to individuals in trade disputes. For example the 'right to strike' or a right to freedom of association for trade unions, is nowhere positively and expressly established in English law—Although both rights have been recognised as part of our law and as fundamental to collective bargaining by certain modern judges, in substance such rights have to be spelled out of those 'immunities', which are frequently little more than immunity from judge-made prohibitions or limitations on the right to organise and to act collectively . . . the removal of the threat of prosecution for conspiracy based on mere combination in the case of strikes in furtherance of 'trade disputes' is the rock upon which the modern right to strike has been built in British Labour Law."

The authors' comment on modern judges is a reference to the *dictum* of Lord Wright in *Crofter Hand Woven Harris Tweed Co., Ltd.* v. *Veitch* (33), but in that case the right to strike was not an issue because nothing in the nature of a strike had occurred. What had occurred was the imposition of an embargo on

the handling of goods consigned to the company and an interdict (an injunction in Scots law) was sought to prevent it. Apart from Lord Wright no other judge expressed the right in those terms and it is perhaps as well that the full text of Lord Wright's *dictum* be quoted. He said at p. 463:

"As the claim is for a tort, it is necessary to ascertain what constitutes the tort alleged. It cannot be merely that the appellants' right to freedom in conducting their trade has been interfered with. That right is not an absolute or unconditional right. It is only a particular aspect of the citizen's right to personal freedom, and like other aspects of that right is qualified by various legal limitations, either by statute or by common law. Such limitations are inevitable in organised societies where the rights of individuals may clash. In commercial affairs each trader's rights are qualified by the right of others to compete. Where the rights of labour are concerned, the rights of the employer are conditioned by the rights of men to give or withhold their services. The right of the workmen to strike is an essential element in the principle of collective bargaining."

In that context no one will challenge the *dictum*. I also hold that collective bargaining involves, although not necessarily so, the use of the strike weapon by the workmen but it may also involve, again not necessarily so, and in fact less frequently, the use of the lock-out as a device by the employer. There is, it may be added, no legal distinction between combinations of employers and those of workmen. Their legality or illegality is determined by the same tests; and any combined action which may be unlawful in workmen is equally unlawful in employers. Some surprise if not alarm may possibly be expressed by workmen if employers of the present day ventured to claim a common law right to stage a lock-out. I have said enough I think to indicate that in my judgment the common law has never recognised a right to strike nor has such a right ever been declared by statute.

In many countries of the world, principally in the Latin-American republics, the right to strike is expressly recognised by law. On the other hand in this country as in many other countries sharing the heritage of the common law there has never been an enforceable right to strike by anybody, anywhere at any time. It would seem that the belief that such a right exists stems from the proposition that any act which the law does not prohibit may lawfully be done and thereby a legal right to do the act, protected and enforceable, comes into being as a natural consequence. That proposition is juristically not sound.

In parody of the platitude by the English pleader who said "the forms of action are dead but they rule us from the grave", I would say the doctrine of *laissez-faire* is dead but we must beware it does not rule us from its grave. Nor indeed should it be exhumed. The realities of economic survival in the 20th century and the clamant demand for social justice among all manner of men should, by a discernible necessity, make more acceptable the policy of intervention by the state to control and limit the unfettered exercise of individual liberty in order to subserve the common good and to harness adequately the creative and the productive capacity of a people. The Constitution has given to Parliament the power to make laws for the peace, order and good government of Trinidad and Tobago. But these great opportunities may be lost if misinformed opinion encourages the fear that legislative restraints must naturally result in the unnecessary deprivation of individual liberty. Such a reaction may well lead to a revival of the doctrine of unrestricted freedom and the fate men fear may yet befall them not because of state controls believed to be misguided but rather because of the anarchy which will inevitably flow from the unfathomable power of unrestrained collective action.

The right or the liberty or the freedom of collective bargaining, call it what you will, and its coercive arm, the right or the liberty or the freedom to strike

are in reality the residue of immunities from criminal responsibility and civil liability enjoyed by trade unions and their members which have crystallised after nearly two hundred years of interaction between judicial interpretation of the common law on the one hand and the overriding authority of Parliament through statute law on the other hand. The right to indulge in a concerted stoppage of work which alone can constitute a strike is no more than a statutorily implied exemption from criminal and civil consequences limited in scope to action taken in furtherance or contemplation of a trade dispute. The course the common law has run commenced with the case of *Mitchel* v. *Reynolds* (42) and has reached, perhaps not yet full circle, to the case of *Rookes* v. *Barnard* (21), while the strictures and later the variations and ameliorative changes wrought by statute law started with the Unlawful Combination of Workmen Acts 1799–1800 and culminated with the Trade Union and Trade Disputes Acts 1871–1906 from which the Trade Unions Ordinance, Cap. 22 No. 9 and the Trade Disputes and Protection of Property Ordinance, Cap. 22 No. 11 are drafted. In neither of these sources can I find recognised or declared a collective right to strike nor a personal right to take part in a strike. Consequently, I must hold that there is no common law right to strike and it must therefore follow that the so-called right to take part in a strike is not included in the freedom of association protected by s. 2 of the Constitution.

In my judgment, ss. 34, 36 and 37 of the Industrial Stabilisation Act 1965 do not infringe, abridge or abrogate the fundamental freedom of association recognised and declared in s. 1 (j) of the Constitution and therefore did not require to satisfy the provisions of s. 5 in order to be validly assented to. On this aspect of the appeal the appellants have failed and sharing as I do the views so adequately expressed by the learned Chief Justice on the other grounds of appeal I also would dismiss this appeal and I agree with the order proposed by the Chief Justice.

Appeals dismissed.

Solicitors: *J. B. Kelshall & Co.* (for the appellants); *Crown Solicitor* (for the respondent).

BRITTO AND STAUBLE *v.* ALVES

[Court of Appeal of Trinidad and Tobago (Wooding, C.J., McShine and Phillips, JJ.A.), February 13, 1967]

Road Traffic—Road—Meaning of—User of road—Whether by public generally or conditionally—Whether only by a class of the public will suffice—Motor Vehicles and Road Traffic Ordinance, Cap. 16 *No.* 3 [*T.*], *s.* 28 (1).

The appellant Britto was not the holder of a driving permit. He drove a motor crane on the Bonne Aventure Road, a privately owned road, and was accordingly charged for so doing. The appellant Stauble was charged for employing Britto to drive. Both were convicted. The important point was whether the Bonne Aventure Road is a road as defined in the Motor Vehicles and Road Traffic Ordinance. On appeal

Held: (i) that the criterion by which any privately owned road may be adjudged to be a road within the meaning of the Ordinance is whether the road is used by the public generally or conditionally and not whether it is used by a class of the public only. *Dictum* of Stoby, C.J., in *Cordeau* v. *Stoute* (1) approved;

(ii) that the Bonne Aventure Road is not a road within the definition in the Ordinance.

Appeals allowed. Convictions quashed.

Case referred to:

(1) *Cordeau* v. *Stoute* (1962), 4 W.I.R. 394.

Appeals by Mervyn Britto and Harold Stauble against convictions and orders of disqualification for holding a driving permit.

M. de la Bastide for the appellants.
C. Bernard for the respondent.

WOODING, C.J., delivered the judgment of the court: The appellants were charged in connection with the driving of a motor crane on the Bonne Aventure Road at Pointe-a-Pierre, the appellant Stauble being charged with employing the appellant Britto to drive the crane, Britto not being the holder of a driving permit issued under the Motor Vehicles and Road Traffic Ordinance, and Britto being charged with driving the crane without being the holder of a driving permit. The magistrate convicted both appellants and they have both appealed.

The first point taken on behalf of the appellant Stauble—and we deal with it notwithstanding the view we have reached on the second point in the case as we think it should be brought to the attention of the magistrates for their guidance generally—was that Stauble was not the employer of Britto, but was the managing director of the company, H. J. Stauble, Ltd., which employed Britto. The prosecution led no evidence as to who employed Britto, so at the close of the prosecution case the charge against the appellant Stauble ought to have been dismissed. There is however clear authority that if no point is taken at that stage there is no obligation—I stress the word obligation—on the part of the court to dismiss an accused person without calling on him. We nevertheless think that the court should do so. But if, not having been discharged, the accused person goes into the witness-box and gives evidence against himself, that evidence must be considered when the magistrate comes to consider his decision at the end of the entire case. The only evidence as to employment was given by Stauble and Britto, and their evidence clearly was that the employer was H. J. Stauble, Ltd. and that the appellant Stauble was merely the employer's agent for giving orders to Britto. That being so, the company, and not the appellant Stauble, was Britto's employer. The charge against Stauble should accordingly have been dismissed. On that ground alone, therefore, he is entitled to have the appeal against his conviction allowed.

The second point taken was as to whether the Bonne Aventure Road is a road within the meaning of the Motor Vehicles and Road Traffic Ordinance. The term "road" is therein defined as meaning:

> "Any street, road or open space to which the public are granted access and any bridge over which a road passes, and includes any privately owned street, road or open space to which the public are granted access either generally or conditionally."

We have been referred to a decision of the Supreme Court of Barbados in its appellate jurisdiction, *Cordeau* v. *Stoute* (1), and we agree with respect with the judgment of Stoby, C.J., who speaking for the court said that:

> "when an offence under the Act is alleged to have taken place on a road and a witness for the prosecution refers to the incident as occurring on a road, then, in the absence of cross-examination or evidence showing that the place is not within the terms of the definition, a magistrate may have no difficulty in finding that the particular place is a road."

We observe the use of the verb "may" because, as we understand the learned Chief Justice, it is not that the magistrate *must* find, but that he *may* have no