(A. Peter)
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AN ANALYTICAL AND COMPARATIVE HISTORY OF MASTER AND SERVANT LEGISLATION IN TASMANIA

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PREFACE

When I began to research the topic of master and servant legislation in Tasmania my main object was to examine the factors leading to the passage of the Master and Servant Act in 1856, to explain how it worked and to examine its implications, principally in relation to the economic torts of modern industrial law. However, I found that certain aspects of the Act could not be explained without reference to the 1854 Master and Servant Act and that, in turn, the 1852 Servants and Apprentices Act and the 1840 Apprentices and Servants Act called for attention.

Although the 1840 legislation was the first of its type in Van Diemen's Land it had been preceded in New South Wales by similar legislation in 1828, and since the intention of the governments of both colonies was to clear up doubts as to the applicability of English law it became necessary to examine the English provisions which treated breaches of contracts of employment as criminal offences.

The thesis is therefore much more of an historical study than was originally intended, although Chapter 10 does attempt to show why the continued existence of the 1856 Act still constitutes a danger to unions and their members in Tasmania and in other states possessing similar statutes. An analysis of each colonial Act is prefaced by a chapter which seeks to place it in its political, social and economic context with particular emphasis on the legal aspects of various contemporary schemes of immigration.

I should like to thank Professor Derek Roebuck for his always helpful advice and encouragement, and the Law School secretaries, particularly Mrs. Suzanne Reid, for their patience and perseverance in typing a difficult manuscript.

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CHAPTER 1

GENERAL INTRODUCTION

A General Orders of the N.S.W. Governors regulating conditions of work of convicts and free men 1778-1823

A year before the First Fleet anchored in Sydney Cove (1788), Letters Patent constituting the First Charter of Justice for New South Wales (1787) provided, *inter alia*, for minor criminal and civil matters to be dealt with by Justices of the Peace. In N.S.W. the first bench met in 1788 and the process of supplementing the work of the higher N.S.W. Courts established by the same Charter began. However, in Van Diemen's Land until 1814, justices were the only source of judicial authority and consequently played a much more vital role in shaping the growth of transplanted English law despite the paucity of their numbers. At first free men were sent to the criminal courts in Sydney and even after the second Charter of Justice for N.S.W. in 1814 which finally established the authority of a Deputy Judge-Advocate for V.D.L. able to preside over separate Civil and Criminal Courts, it was still necessary in serious cases concerning free men to have the trial conducted in Sydney. On the other hand all cases concerning convicts, except murder, were dealt with locally.

With some doubts English law was applied in the colony according to Blackstone:[1] "For it hath been held that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birth-right of every subject, are immediately there in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law, as is applicable to their own situation and the condition of any infant colony; such, for instance, as the general rules of inheritance, and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the law of police and revenue, such especially as are enforced by penalties, the mode of maintenance for the established clergy, the jurisdiction of the spiritual courts and a multitude of othe provisions, are neither necessary nor convenient for them, and therefore are not in force. What shall be admitted and what rejected, at what times, and under what restrictions must, in case of dispute, be decided

in the first place by their own provincial judicature subject to the revisions and controul of the King in council: the whole of their constitution being also liable to be new-modelled and reformed by the general superintending power of the legislature of the mother country".

As Professor Castles has indicated,[2] this passage had a considerable influence in Australia in the nineteenth century and it is clear that it served to justify both the implementation of English law and its denial in cases where that law was not applicable to the condition of the "infant colony".

The condition of the colony was, to say the least, a peculiar one with respect to the laws relating to master and servant. When Phillip arrived in 1778 there were fewer than "a dozen free men outside the ranks of soldiers, sailors and officers".[3] This meant that the services of convicts had to be granted for the hard pioneer work of clearing the ground as well as for domestic use by civil officers and the military. In this way the assignment system began, sanctioned by the English Secretary of State with the proviso that the assigned convicts should be housed, fed and clothed by their masters.

A decade or so later Governor King instituted specific terms, including rates of wages for certain descriptions of labour, in an agreement which employers of convict labour were bound to sign. The agreement was concluded between the employer and the Government and amounted to a legal covenant that the employer would maintain a convict in a certain way for a certain period, receiving his labour in return. There was never any question of the English law relating to master and servant applying in these circumstances because there was no agreement to serve as between employer and convict which would have given the latter the legal status of "servant". There appears, however, to have been one brief, early flowering of such an agreement which did establish that nexus. It became possible for assigned convicts to work "on their own hands"[4] and this unforeseeably led to convicts hiring themselves out for wages to other employers after their day's work for the assigned employer had finished. Governor King described it as an established custom at Norfolk Island among convicts assigned to Government work. Presumably this also meant that the assigned servant could sue the employer to whom he had hired himself out on the agreement for any unpaid wages due. In the absence of any order by the Governor to this effect the basis of the action would have rested in the transplanted English common law

and legislation empowering justices to make an order for the payment of wages due. If this were so then it is probable that the assigned convict working for wages in his own time was, together with his master, subject to other English legislation regulating the master and servant relation in the same way as free men in the colony.

The problem was not however a relevant one at the time, for the colony was closely regulated by a series of promulgations and orders by the Governor affecting the conditions of work of free men as well as convicts and the validity of these directives where they conflicted with English law was not challenged for another twenty years. Thus when King issued an order in 1801 preventing convicts from working in their own time, after pressure exerted by employers who claimed that their absolute control of convict servants was threatened, that was the end of the matter for all concerned and one can only conjecture as to the true legal basis for any claim for unpaid wages or attempt to punish for misconduct that might have been made.

In one respect the order brought a surprising benefit to the assigned servant. Although his whole time once again belonged to his master the Governor ordered, by way of compensation, that a master should pay his assigned servant a yearly wage. His position therefore became more akin to that of the free servant although it should be noted that the order did not affect the convict status of the assigned servant and in particular did not sanction the making of an agreement between the assigned servant and his master. It could hardly be argued that the assigned servant could choose which employer he was going to serve or, *a fortiori*, whether he would enter into service at all. Similarly, although the master could choose his assigned servant within limits, there was no question of his agreeing *vis-a-vis* the convict to pay him a wage. Wage rates were fixed at first at 10d a day by order of the Governor and the master was obliged to obey. The assigned servant seems to have been permitted to sue in order to recover wages due but this was definitely not an action based on any agreement other than the covenant between a master and the government. Besides, many of the actions met with little success because magistrates were more concerned with the purpose than the letter of the regulations.

For example, in one case[5] a female convict was assigned to an employer who had agreed to pay her a certain sum every year for her five year period of assignment. The employer refused to pay the total amount due on the

expiration of her period of assignment and she sued to recover it. The magistrates held, however, that the regulations contained in the General Order were intended to enable a convict to receive "fit common comforts" during the period of assignment and since she had been supplied with these she could not recover the amount.

In another case concerning a deduction from wages which the assigned servant claimed was not a proper one, the magistrates dismissed the case holding "that yearly wages were allowed to convicts as a payment for overtime, in order to provide extra rations, and so long as the Master gave extra rations, and some few luxuries, the magistrates would not interfere further than to see that the several articles set down in the account between master and servant were not exorbitantly charged". Recovery of the regulation wage by the assigned servant was therefore permitted but because of the attitude taken by magistrates who were themselves employers, an assigned servant's action was unlikely to succeed.

Generally speaking, the position of assigned servants continued to improve throughout the first decade of the nineteenth century. Governor King issued a number of orders on an attempt to regulate every aspect of the assignment system. In some cases these regulations applied to the master-convict relationship much of the English law regulating master and servant, with variations dictated by the conditions of the colony and the status of the labourer.

Under the 1800 regulations an assigned servant was to be provided with a sheltered lodging on his master's farm but was not to absent himself from work nor be guilty of insubordination. On the other hand, the master was forbidden to hit or flog his servants and was directed to apply to a magistrate who could order the flogging. The magistrate's powers of punishing assigned servants were limited in 1811 to the ordering of a maximum of 50 lashes or 30 days hard labour. No remedy was provided for the assigned servant in 1800, but 2 years later masters were warned that if they mistreated their servants the latter might appeal to the magistrates and the masters would be dealt with according to their situations in the colony, and their servants would be taken from them. It hardly needs stating that the punishment of those few masters who were dealt with in this way was very light in comparison to the reverse situation.[6]

In 1803 a further regulation provided that masters were not to discharge their assigned servants until the expiration of the assigned period and in 1807 another declared that masters must employ assigned servants for one year before they could be exchanged. In terms of regulating the assignment system this provision was of no small importance. By a process of trial and error the best and most efficient labour in any group of newly arrived convicts was creamed off leaving the less able man at the convict barracks or on Government work. The effect of the order was to enable a more even distribution of convict labour and to provide for greater stability in the assignment system. The period of assignment chosen was a reflection of the common law "yearly hiring" whereby a servant hired for an unspecified period was deemed to have agreed to serve for a year in the absence of any evidence to the contrary. Furthermore at common law service could be terminated by prolonged illness of the servant or in certain types of employment by the servant's conviction of certain types of offence. Similarly it is found in the 1807 order issued by Governor Bligh that the employment for a year rule might be disregarded if an assigned servant was ill or had been convicted of an offence before a magistrate.

The common law duty of "faithful service" was also transposed into the master-convict nexus as was the rule that proper performance was always a condition precedent to payment. Payment of wages to an assigned servant was thus conditional on good behaviour during the whole period of his assignment and if "faithful service" had not been rendered, an assigned servant did not recover his wages.

The regulations of the assignment system therefore borrowed heavily from established principles of English law associatedwith the hire of free servants. It is not contended, however, that successive Governors deliberately set about implementing these principles in the assignment system, but rather that the early Governors, particularly King, did what was thought reasonable in order to control a peculiar system of labour. There is perhaps nothing remarkable in the fact that, as Englishmen, their ideas of what was reasonable were bound to be a strong reflection of the English law of master and servant as far as the condition of the colony would permit. For example, Coghlan states that Governor Phillip, in fixing the hours of convict labour, took as a guide his experience of English labourers, but he adds that Phillip had also to consider the character of men for whom he was legislating.[7] The result was a working day of 11 1/2 hours, although by the end of the

eighteenth century the hours worked were from 5 a.m. - 3 p.m. on weekdays and from 5 a.m. - 10 a.m. on Saturdays.

On the other hand many regulations associated with the assignment system had no counterpart in English law relating to the hiring of free men. For example, under a series of regulations ending in 1835, Governor Darling instituted a system of proportioning the number of assigned servants to the amount of land held by the master in response to the tremendous demand for assigned servants. Such an allocation of labour could only have been part and parcel of an assignment system involving convicts and could not in any way be considered an application of the existing English law. But it is interesting to note that in the earlier days of settlement, when the only free men were those who had served their sentences or who had been pardoned, regulations were issued which provided that every free labourer who was not already under a contract of service, should with certain exceptions, take work when offered at the specified wage or be treated as a vagrant.[8]

These regulations were not without an excellent precedent in English law. In 1349 the first of the Statutes of Labourers was enacted[9] which, *inter alia*, provided for wage fixing and the punishment by imprisonment of able-bodied men and women under the age of sixty who were not merchants or skilled artificers or who were not living on their own land, and who refused to serve anyone who might require their services at the rates of hiring that existed prior to the Black Death. It is well known that this disease had decreased the population of England by one third and caused an enormous scarcity of labour. The object of the Statute was to stabilize the labour market in the face of an overwhelming demand for labour and a similar situation faced the early Governors of N.S.W. and V.D.L. The object of the 1797 regulations was to ensure a supply of labour for the development of estates which began to be formed at an early stage in the history of settlement, and to prevent the foundation of a "class of idle vagabonds".[10] Implicit in the idea of ensuring a supply of free labour was that of ensuring its supply at the lowest possible price and, as with the Statute of Labourers, harsh measures were used to enforce this object. With the arrival of the notorious Governor Bligh in 1806 the penalties for free labourers who refused to work at regulation rates or who demanded more were, for the first offence, two days and one night in the stocks and, for subsequent offences, three months hard labour. Employers of labour at above regulation rates were liable to

be imprisoned for ten days without bail and incur a fine of £5.

The effect of the regulations was also very similar to that of the Statute of Labourers for, although the increase in the rates of wages was checked temporarily, the upward swing was maintained. Unlike the Statute, however, parts of which remained in force as late as the eighteenth century,[11] Governor Hunter's regulations were relatively short-lived because during the first two decades of the nineteenth century, with the increasing number of free immigrants and the establishing of an influential class of emancipists, it became impossible to enforce such a provision. Rates were still theoretically fixed under the regulations but actual rates paid were always in excess of those stipulated. It seems that the regulations were primarily aimed at agricultural and general labourers with all attempts to regulate the wages of artisans and skilled mechanical labourers proving futile.[12]

In conformity with Blackstone's statement, the general law applicable in N.S.W. and V.D.L. from 1778-1823 was thus English law in conjunction with the General Orders of the Governors. Since, in terms of labour regulation, the latter were related directly to the peculiar condition of the colony, it would be more accurate to state that the General Orders regulating labour were reinforced by the English law of master and servant to the extent that English law was not inconsistent with them. Despite the fact that in the "First Charter of Justice for N.S.W." the power of the magistrates was stated to be "the same power to keep the peace, arrest, take bail, bind to good behaviour, suppress and punish riots, and to do all other matters and things with respect to the inhabitants residing or being in the place or settlement aforesaid, as Justices of the Peace have within that part of the Kingdom of Britain called England with the respective Jurisdiction", the authority of the colonial justices was not limited to offences under English law. Disobedience of the Governor's orders was recognised as an offence by magistrates from the very beginning.[13] Furthermore, it is clear from the orders themselves, for example, those of Governor Bligh in 1806, that they empowered magistrates to sentence offenders to certain stated punishments where they were contravened. The harbouring or inveigling of apprentices or convict deserters was punishable by six months hard labour exclusive of other penalties imposed by general law if the offender was a free man, and, if a prisoner, by 100 lashes, with other penalties at the magistrates' discretion.[14]

B The main English legislative sources

As mentioned above, many of the offences committed by free servants during this period involved the contravention of one or more of the orders of the Governor and, since the orders were themselves often a restatement of earlier English legislation governing the master-servant relationship, it is necessary at this point to examine briefly the main English statutes which, together with the common law, provided both a source for regulation of labour by general order and a residue of offences where no specific order covered the case.

1) The Statute of Labourers (1349)

The origin of legislative restrictions on servants is to be found in the Statute of Labourers which had two objects. The first, which has already been alluded to, was to enforce service at rates of hiring that existed prior to the Black Death. The second was contained in the second part of this statute which enacted that if a labourer or servant left his service before the time agreed upon he would be punished by imprisonment.

2) The Statute of Apprentices (1563)

Numerous other statutes were enacted[15] during the following two centuries which taken together tended to confuse the position so that in 1563 the Statute of Apprentices was passed[16] in an attempt to bring the law up to date, as indicated by the expansive and well-meaning preamble.[17]

The Statute of Apprentices was thus a consolidating enactment which repealed and replaced the Statute of Labourers and subsequent amendments without altering the basic principles of the earlier legislation.[18] Sections 5 and 6 stated that no servant should leave or be made to leave before the end of his term, or should leave or be made to leave without one quarter's warning given before the end of his term. The penalties referred to in Section 8 and 9 were forty shillings for the master unless some reasonable and sufficient cause for dismissing the servant was shown and, for the servant, a term of imprisonment until he agreed to continue to serve his master. Section 7 provided that every person between the ages of twelve and sixty years . . . should be . . . compelled to be retained to serve in husbandry by the year with any person engaged in that occupation", with certain stated exceptions. In the light of this provision the order of Governor Hunter in 1797 can hardly be called novel.

The same is true of the hours of work of convict labour fixed by Phillip soon after his arrival in the colony. We have seen that the working period from sunrise to sunset was the result of Phillip's "experience of English labourers". But English labourers did not choose to work these lengthy hours; they were bound to do so because the Statute of Apprentices, in more flowery style, required them to work "from the spring of the day in the morning until the night of the same day" with a minimum time off for breakfast, dinner, drinking or sleeping, and with the penalty of forfeiting one penny for every hour's absence.[19] Similarly, with reference to Governor Bligh's General Order of 1806 which laid down the penalty of a stay in the stocks for free labourers who refused to work at the regulation rate, Section 22 of the Statute of Apprentices provided that "in the time of hay or corn harvest . . . all artificers and persons as be meet to labour" shall "serve by the day for the moving, reaping, shearing, getting or inning of corn, grain and hay . . . and . . . none of the said persons shall refuse so to do upon pain to suffer imprisonment in the stocks by the space of two days and one night" with an additional fine of forty shillings.[20]

Perhaps the most important extension in the Statute of Artificers of the "departure from service" clauses in the Statute of Labourers is to be found in Section 13 under which any artificer or labourer who agreed to finish a piece of work and failed to complete it could be fined the sum of £5. Much of the Statute of Apprentices was itself repealed by later enactments but this section remained in force until late in the nineteenth century. Little was done to alter the Elizabethan statute during the seventeenth century but in the eighteenth and early nineteenth centuries the general trend of master and servant legislation was to make the Elizabethan provisions more definite and stringent by applying them to particular trades in a long series of statutes.[21]

It has been remarked that "the intolerable oppression which these laws enabled unscrupulous employers to commit was, at the beginning of the [nineteenth] century, scarcely inferior to that brought about by the Combination Laws".[22] In particular, it seems the pieceworker clause of the Statute of Apprentices contributed in no small way to the overall oppression. The problem in many trades was that the nature of the employment was such that a servant could not but start another piece of work before he had finished the previous one in order to be continuously working during any given period. Yet, when a dispute arose with a master over hours of work, wages or

on any other aspect of the conditions of work and there was a strike, or a servant left his employment after an argument with his master, the latter would prosecute for leaving work unfinished. The point was enthusiastically made by George White, a leading early nineteenth century trade unionist, in a paper published in 1823[23] that the existence of this clause had led to more abuses and more prosecutions of workmen than under the Combination Acts. White continued, "the labourer or workman can never be free, unless this law is modified. The Combination Act is nothing: it is the law which regards the finishing of work which masters employ to harass and keep down the wages of their workpeople; unless this is modified nothing is done, and by repealing the Combination Act you leave the workman in ninety-nine cases out of a hundred in the same state you found him - at the mercy of his master". At the time this was written all trades union energy was being directed at the repeal of the Combination Acts *i.e.* at the restriction on the freedom of servants to enter into a contract rather than towards reform of an oppressive punishment for a breach of that contract. Repeal of the Combination Acts was achieved in the following year but it was to be almost another half century before the harsh punishment of this particular type of breach of contract as a crime was remedied in England. In Tasmania, the possibility of such a prosecution still exists today in certain cases.

3) The 1747 Act (20 Geo. 2, c. 19)

Historically, perhaps the next really significant piece of English master and servant legislation after 1563 was the "Act for the better adjusting and more easy Recovery of the Wages of certain servants, and for the better regulation of such servants and of certain Apprentices"[24] passed in 1747.

Under the Elizabethan Statute justices were empowered to meet together twice a year in order to establish wages for servants covered by the Act. Yet it is clear that by the middle of the eighteenth century the fixing of wages in this manner had "gone entirely into disuse".[25] It was therefore found necessary to pass more specific legislation detailing the powers of justices in dealing not merely with wages disputes but with "all complaints, differences and disputes" arising between masters and servants.

The Act of 1747 is important because its provisions revealed a shift from the mediaeval protectionist policy obvious in the wording of the Elizabethan Statute to one more approaching the emerging ideas of laissez-faire.

In effect the Act acknowledged that justices may not have fixed wages in any year to ensure a fair return to the industrious worker. It authorised them, after a servant's complaint, to order payment of an amount of wages, which they though "just and reasonable" but no more than £10 in the case of a servant and £5 with regard to any artificer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, or labourer.[26] Thus, the 1747 Act still permitted justices to exercise their traditional wage fixing powers but it considerably affected that power, in the first place, by impliedly sanctioning the non-fixing of wages every year,[27] *i.e.* allowing justices to wait for a complaint before acting to order what was a just and reasonable amount; and secondly, by permitting the phrase "just and reasonable" to be limited in terms of the amount recoverable.

Furthermore, the phrase "just and reasonable" was capable of a variety of interpretations. For example, a just and reasonable amount as between the complainant and his master might be substantially less than an amount based on the Elizabethan view of wages as an amount to secure to wage earners a "convenient" livelihood. Also the "just and reasonable" amount might be more or less than the amount actually agreed upon by the parties.

When the laissez-faire doctrine had become more firmly established in the mind of the legislature an attitude of "administrative nihilism"[28] prevailed which, in this area, meant a reluctance to permit unnecessary intervention in imposing terms on the master over and above those agreed between him and his servant. Consequently, in 1823[29] we find that justices were only able to order payment of what "shall appear due", without any reference to justice or reasonableness in the amount. The limits of £10 and £5 were retained so that it was possible that the amount ordered to be paid might be less than the actual amount due and far less than what was reasonable in the circumstances.

The 1747 Act applied only to servants in husbandry who were hired for a year or more, and to artificers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters and other labourers employed for any certain time or in any other manner.[30] But this was extended by subsequent legislation to servants in husbandry employed for less than a year;[31] to tinners and miners in the stannaries;[32] and to persons employed in the manufacture of hats and in fustian, iron, leather, fur and hemp manufactures.[33] A much wider judicial extension is to be found in *Branwell* v. *Penneck* (1827)[34]

where it was held that the 1747 Act applied to all servants in all trades whose wages justices had the power to fix under the Statute of Apprentices. Hence the importance of the 1747 Act to all servants except those in domestic service. The categories of servants to which the 1823 Act applied were no different.

4) A comparison between the 1747 Act and the 1823 Act (4 Geo. 4, c. 34)

It is interesting to note the number of small but effective ways in which the provisions of the 1747 Act were made oppressive for servants and more lenient towards masters, by the 1823 Act.

a) Penalties

In 1747 justices were empowered after twenty-one days from the making of an order for payment of wages, to issue a warrant for distress and sale of the master's goods and chattels;[35] whereas in 1823 the magistrate was not limited by any fixed period. The period within which the master might pay before a warrant could issue for distress was "such period as the said justice or justices shall think proper",[36] and it was therefore possible, given the close-knit community of employers of labour of which the local magistrate was usually a member, for a servant to be denied payment of wages judged to have been earned, for a considerable time.

Moreover, it was firmly established in *Wiles* v. *Cooper* (1835)[37] that magistrates had no power under the 1747 and 1823 Acts to imprison a master where there was no sufficient distress. It was argued for the servant that an Act passed in 1824 entitled, "An Act for the more effectual Recovery of Penalties before Justices and Magistrates on Conviction of Offenders; and for Facilitating the Execution of Warrants by Constables",[38] which authorised imprisonment for up to three months for non-payment on a distess warrant, must have been intended to apply to a master after a distress warrant was issued for non-payment of wages under the 1747 and 1823 Acts. But the court rejected this argument holding that the 1823 Act applied only to penalties and since non-payment of wages did not involve a penalty on the master the Act was inapplicable, and no provision in the 1747 or 1823 Acts authorised his imprisonment.

Section 2 of the 1747 legislation empowered a magistrate acting on the oath of a master, mistress or employer to deal with complaints of servants' misdemeanours, miscarriage or ill-behaviour in their service or employment

and to punish them by commitment to a house of correction, "there to remain and to be corrected, and held to hard labour for a reasonable time not exceeding one month". The phrase "there to remain and be corrected" was by no means a superfluous one. It meant that correction was in the first instance to take the form of whipping, with hard labour as an additional later spur to self-improvement. Two other alternatives were given: abatement of some part (presumably therefore not the whole) of a servant's wage, or discharge from his contract of service.[39] When the position was reversed, however, and it was the servant who was complaining of the misconduct of his master, the only remedy given was discharge; no penalty or punishment of any sort was inflicted on the master.[40]

b) Procedures

The procedures outlined in both Acts also show the same bias towards masters. Where a master complained, his complaint on oath was sufficient to give a magistrate jurisdiction to hear and determine the matter. Furthermore, in *Finley* v. *Jowle* (1810)[41] it was held that a complaint by a master merely in writing was sufficient providing it was verified by the oath of another person. This meant that a master did not have to be present at the hearing of the complaint against his servant. Attendance was also unnecessary where a master was the defendant although no such provision existed regarding the servant. A master, unlike his servant, had little to lose by failure to present his case. As we have already noted no punishment could be incurred by him except the dubious one of the court's relieving him of a complaining servant.

After a complaint made on oath by a servant a justice was bound to proceed by way of a summons, allowing his master a reasonable time in which to appear if he so desired. It is not made clear in the 1747 Act how the magistrate was to proceed against a servant but by Section 3 of the 1823 Act the latter was not given the luxury of a summons to attend within a reasonable period because the section authorised a justice to issue a warrant for the apprehension of the servant. As might be expected, the effect on servants was extremely oppressive. When a dispute occurred with his master a servant could be seized at any time of the day or night and held in prison until his case was heard.

There was also an attempt to enable a master's agent to prosecute his master's servants in his own right, which if it had been successful would have enabled a master who hired through an agent to avoid being involved in any way in the distasteful business of prosecution. The Act referred

throughout to "any master, mistress or employer" and it was argued in *Rex* v. *Hoseason* (1811)[42] that the word "employer" was used to distinguish a master from his agent who might actually perfom the function of employing a particular servant. But the court, refusing to see any distinction, held that the employer of a servant was the master for whose service he was retained and not the bailiff of the farm who in fact hired him.[43] This meant that the complaint on oath which initiated proceedings against the servant had to be that of the master although, as has already been indicated, it was still possible for a master to avoid the inconvenience involved by complaining in writing and for his bailiff to verify this on oath. After 1823 however, in order to trouble the master as little as possible and especially where his bailiff was the only one to have very much contact with the labouring class, the oath of the master's "steward, manager or agent" was sufficient to enable a justice to issue his warrant for the servant's arrest.[44] This put servants not only at the mercy of their master but at the mercy of someone who was himself often under considerable pressure respecting his own contract of employment and who was therefore likely to react much more severely in the fact of petty insubordination and misconduct.

The 1823 Act also enabled a servant covered by the Act to recover unpaid wages from the master's steward, agent bailiff, foreman or manager"[45] because it "frequently happens" that masters "reside at considerable distances from the parishes or places where their business is carried on, or are occasionally absent for long periods of time beyond the seas". For this reason too the acceptance of the bailiff's oath as sufficient to justify the issue of a warrant for the arrest of the servant made sense; but the master's absence was not a stated pre-requisite and the prosecution could be left in hands of his agent even where a master did not reside away from his place of business.

Furthermore, a servant had to be careful in phrasing his complaint to the magistrate. In *Wiles* v. *Cooper*[46] it was argued on behalf of the master that the information before the magistrates under both the 1747 and 1823 Acts for non-payment of wages must show that the relation of master and servant existed in one of the specified occupations between the debtor and the informant, and that the "servant" concerned had not contracted to serve in this case because the information merely stated that wages were due "for labour as a carpenter". The point did not have to be decided as it was held that the plaintiff master succeeded on other grounds in his action for trespass

and false imprisonment against magistrates who had imprisoned him for non-payment of wages on a distress warrant. Littledale J. did hint, however, that even though the evidence on the minute of Petty Sessions added that the "servant" was a journeyman carpenter at 14s. a week and even though the warrant itself stated that wages were due for work and labour "as a servant", it was the information alone which gave justices their jurisdiction.

c) Status and Contract

This dicussion brings us to an intriguing and significant difference between the 1747 and 1823 Acts. In the former no mention at all is made of the word "contract". The earlier Act seems to proceed on the basis of naming particular categories of workmen and their masters, mistresses and employers, to whom its provisions apply. The Act refers to "discharge from service or employment" but nowhere is there any reference to a contract of service or employment. On the other hand, in the 1823 Act, penalties are imposed on servants not because of their status but because of their misconduct in relation to a contract of service. Under Section 3 a justice was authorised to punish any "servant in husbandry, artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer, or other person" by sending him to a house of correction with hard labour for a reasonable time not exceeding three months and/or by abating a part or the whole of his wages, or by discharging him from his contract of service or employment. These punishments were applied for offences amounting to breaches of contract but the offences themselves differed according to whether the contract of service was in writing or not. Where there was a contract in writing signed by the parties an offence was committed if the servant either did not commence service, or absented himself from service after its commencement and before the term was completed, or did not fulfil his contract in some other way. And where the contract was not in writing penalties were imposed if a servant either absented himself before the term was completed or failed to perform his contract in some other way, for example, by failing to complete a piece of work.

Not only was there an insistence in the 1823 Act that a contract existed but it was of the utmost importance that the contract established was a contract of service *i.e.* one which created the master-servant relation. This is well illustrated by two cases decided in the Court of King's Bench within a short period of each other in 1829.

In *Hardy* v. *Ryle*[47] it was held that a contract to weave certain goods at the house of a weaver was not a contract to serve within Section 3 of the 1823 Act, so as to give a magistrate jurisdiction to commit the weaver "for neglecting his work after commencing upon the same".

In the course of his judgment Bayley J. stated that "to be within the Act, the party must not only be included in the enumeration of persons to be affected by it but must also have 'contracted to serve'. Now there is a very plain distinction between becoming the servant of an individual and contracting to do certain specific work. The same person may contract to do work for many others, and cannot, with any propriety, be said to have contracted to serve each of them. If that be so, the conviction and commitment are bad for they do not show that the plaintiff contracted to serve, but to weave certain goods".

It is interesting at this point to observe that Bayley J.'s statement has much in common with those of more modern judges on the distinction between a contract of service and a contract for services. There is a very obvious difference but it is not easy to put one's finger on it. The "control" test did not emerge as a so-called rule until 1840[48] but this has since proved not to be the magic monocle with which a judge can distinguish immediately a servant from an independent contractor. The modern position is almost as hazy as in Bayley J.'s day with the proviso that today's judges know that there is no simple answer to the problem. However, the reasoning of Bayley J.'s, that a man cannot be a servant if in the absence of peculiar circumstances he can contract to work for more than one employer,[49] appears to beg the question as to the status of the workman. Whether there is anything peculiar in the circumstances will to a large extent depend on whether the workman is a servant or not. If this were not so there could never have been any prosecutions, either against a second employer for inducing someone else's servant to work for him, or against a servant for neglecting or absenting himself from his first master's work. Thus whether a man with two employers was a servant guilty of an offence under Section 3 of the 1823 Act or an independent contractor not subject to the Act was a question which depended (as it does today) on the view taken by any particular judge of the "propriety" of the circumstances.

Although the "control" test as the basis for the distinction can be

attributed to the decision in *Quarman* v. *Burnett*,[50] there were in fact earlier formulations of it by individual judges. The test was evolved primarily as a means of distinguishing between servants and independent contractors as regards the employer's liability for the torts of the former. Diamond[51] states that the argument that an employer was liable for the torts of his employee irrespective of the question whether he had the power to control, was put as late as *Laugher* v. *Pointer* in 1826[52] where it was rejected and the control rule formulated in the judgments of Abbott C.J. and Littledale J. The latter judge also appeared in *Hardy* three years later and yet, like Bayley J. in that case, he did not refer to the control test in deciding that no contract of service was involved. Similarly, in *Lancaster* v. *Greaves*, decided by the Court of King's Bench in 1829, it was held that the relation of master and servant must exist under the 1823 Act and that a workman who had contracted to build a road for a certain price within a certain time was not a servant under a contract of service and not there subject to the penalties prescribed by the Act for non-completion. Littledale J. was again very brief. He merely stated that "the present plaintiff was not the servant of the complainant" without alluding to the notion of control as a distinguishing characteristic. It is thus curious that, at a time when the control factor was playing such an important role in distinguishing servants and independent contractors for the purposes of their employers' tortious liability, the same concept was not also used to determine whether there was a contract of service for the purposes of the 1823 Act.

Perhaps the answer is that in cases based on the 1823 Act the Court of King's Bench was primarily concerned with the question whether the formal information, conviction and commitment established the jurisdiction of the magistrates. There was never any need for the Court to go beyond what was contained in the information, conviction and commitment and to apply a test on all the facts to ascertain the status of the workman. For example in *Lancaster*, Lord Tenterden distinguished *Lowther* v. *Lord Radnor*,[53] which was similar on its facts, on the ground that in the latter case the decision of the Court proceeded on the facts laid before the justice, and the facts there stated in the information did show the relation of master and servant; and the only question raised was, whether a labourer employed in digging a well was within the description of persons made subject to the provisions of the statute. Whereas in *Lancaster* it was clear that "the information itself failed to show such relation; the defendant, therefore, had no jurisdiction, and the plaintiff consequently, was entitled to recover."

d) Conclusion

We have been examining some significant provisions of the 1823 master and servant legislation in comparison with those of the earlier Act of 1747. It has been shown that the changes were generally speaking for the worse from a servant's point of view and many of them mirrored the shift towards the new laissez-faire philosophy with its emphasis on leaving the employer, as a capitalist, free from legal restriction.

The eighty years or so which divided the two Acts was one of the most important periods in the history of English social and economic institutions. At the end of the first half of the eighteenth century England stood on the threshold of a new industrial order. Adam Smith's "Wealth of Nations" had not yet been published so that no theory of laissez faire could truly be said to have guided the social, economic and political decisions of the day. Yet capitalism was already replacing the small cottage industries and small independent manufacturers. Certain phenomena were seen to exist in the field of money, prices, interest, profits and taxation which were as yet not capable of explanation in terms of a theory and could not be successfully controlled by the legislature because they were regulated by natural causes. We have already noted the way in which the Statute of Apprentices was responsible for securing a fair wage to servant and labourer, and that this was part of the paternalistic function of the State in the sixteenth century, along with the securing of honest manufacture, a just price and a reasonable profit. By the end of the first half of the eighteenth century many of the laws securing these laudable objects had been jettisoned in the face of demands from both the new capitalist employers and their employees. But in the early part of the century many of the old laws had been retained to a large extent. The legislature "was not prepared to leave commercial men entirely free to conduct their businesses as they pleased, and to trust to unrestricted competition to produce harmonious and equitable results".[54] The result, not unexpectedly, was a mixture of retaining some of the old restrictions on prices and wages and restating others, such as in the 1747 Act, in a slightly less restrictive form.

Nowhere is this better illustrated than in relation to the wage fixing powers of justices, which were little used during the second half of the eighteenth century and were almost completely abolished in 1813[55] two years after the famous decision in *R.* v. *The Justices of Kent.*[56] Here it was held that the power to rate wages was still extant but that, since it was

discretionary, justices were correct in their refusal to exercise it.

We have seen that the power of the justices to rate wages was orginally introduced by Section 4 of the Statute of Apprentices to ensure a fair return for labour and that the idea of working for a statutory wage was the result of the Statute of Labourers at a time when the main object was to prevent higher wages being secured by labourers. By the end of the eighteenth century this situation was reversed. Justices were of the opinion, in response to the new laissez faire philosophy, that interference on their part was not beneficial to the economy as being contrary to the laws of nature and that consequently parties to a contract of service ought to be left to fix their own rates. The theory naturally provided an excellent excuse for their actions which, as employers themselves or close friends of other local employers, resulted in the lowest possible wages being paid in pursuit of the maximisation of profits. In view of the generally low level of honesty and integrity among justices during this period it is doubtful whether wages would have been significantly higher even if they had excercised their discretionary jurisdiction. The contrary is expressed by Henry Fielding in "An Enquiry into the Causes of the Late Increase of Robbers" published in 1751. Fielding argued that the disuse of the powers of justices to rate wages was one of the causes of a recent increase in the number of robbers and that there would not be oppression by the justices in rating wages because they would not "unite in a cruel and flagitious act, by which they would be liable to the condemnation of their own consciences, and to be reproached by the example of all their neighbouring countries." It is recognised, however, that Henry Fielding was outstanding as a magistrate because of his honesty and integrity and that there was little to distinguish the vast majority of other justices in their corrupt administration of justice. Consequently, his honest optimism was probably misplaced.

In spite of the general trend towards disuse of the rating power in the second half of the eighteenth century there were still instances of legislation affecting particular trades which did give this authority.[57] The general trend is well illustrated in the wool trade where although wage fixing for wool weavers was approved in 1756, there was a strong movement by wool trade employers which resulted in the repeal of the relevant legislation scarcely one year later. According to the Webbs[58] the struggle over the Woollen Cloth Weavers Act of 1756 marked the passage from the old ideas to the new. But the fact that there were Acts after this date which implemented wage fixing

by justices is an indication that no such hard and fast line can be drawn.

The failure of the legislature to generally re-establish the rating powers of justices, in line with the growing awareness of laissez faire, led to workers having to look after themselves to secure a fair wage. Inevitably the means whereby this end was effected was through combination.

It is not proposed at this point to discuss the common law concept of conspiracy and the Combination Acts of 1799 and 1800 which, until their partial repeal in 1824 and 1825, rendered recourse to the common law doctrine of conspiracy unnecessary. The purpose of this part of the introduction has been to discuss the English criminal law sanctions affecting the contract of service between an individual master and servant as a preface to an examination of their implementation and adoption in the New South Wales and Van Diemen's Land Colonies, at first through General Orders of the Governors and later by important colonial master and servant legislation passed between 1828 and 1856. Admittedly, the Combination Acts were part of colonial law until their partial repeal by the 1824-1825 legislation in England, and this in turn became part of the law of the colony,[59] but the former Acts seem to have been of very little consequence in the colony. Far more effective sanctions were available for a largely convict population. The first recorded[60] attempt to combine by convict servants was as late as 1822 when a convict was brought before magistrates at Liverpool, charged with the offence of inciting his master's servants to combine for the purpose of obliging him to raise their wages and increase their rations. The unfortuante man was sentenced to solitary confinement on bread and water for one month, with 500 lashes and the additional punishment of spending the remainder of his original sentence at a penal settlement. This action seems to have been effective in convincing other convicts, who might have been similarly inclined, of the futility of such conduct.

Free labourers, however, do not seem to have been deterred by this. The first recorded[61] attempt to combine by free labourers was in June 1824 when a number of coopers were committed for trial for conspiracy against their employer's interests in combining to demand a greater rate of wages than was usual or allowable. Coghlan explains the fact that there is no record of their trial by pointing to the repeal in the U.K. of the Combination Acts "shortly afterwards", which cancelled their offence. But this can more easily be accounted for by lack of certainty, at that time, on the question

whether the Act applied in the colony. News of the repeal in June 1824 would not have reached the colony for five months or more during which time it would have been possible to have tried and convicted the offenders. If Coghlan is correct in his assertion it is more than a little ironic that news of the repeal which appears to have reached Australia so quickly did not filter through more rapidly to areas much less remote from London. The 1824 Act[62] was apparently passed so quietly and quickly that magistrates in one Lancashire town sentenced several cotton-weavers to imprisonment for combination some weeks later without being aware of the reform.[63]

C The Reception of English master and servant legislation in N.S.W. and V.D.L.

1) Validity of the Governor's Proclamation implementing the English 1747 Act

It has already been noted that throughout the period from settlement in 1788 to the establishing of a Legislative Council in N.S.W. (1823) and V.D.L. (1825) the labour market was controlled by a series of General Orders, Proclamations and Regulations issued by successive Governors, affecting both free men and convicts, together with their employers. Despite misgivings from time to time[64] concerning the use of legislative powers by the Governors, no serious problem arose until 1818 when the validity of Governor Macquarie's taxing proclamations was successfully challenged, leading ultimately to the passing of an English Indemnity Act.

More important to this discussion was a proclamation issued on 21st November 1818,[65] which empowered magistrates to try disputes over wages between masters and servants. As the preamble acknowledged, the proclamation purported to implement the English 1747 master and servant legislation in the colony in view of the "doubtful" nature of its application by its own force. These doubts seemed to have been well founded because, shortly afterwards, Judge-Advocate Wylde in the Governor's Court decided that the 1747 Act could not apply by its own force and furthermore, much to Macquarie's dismay, could not be applied by the Governor's proclamation. The result of the ruling was a public meeting of magistrates and a protest to the Governor against Wylde's decision. However, when an official opinion was sought the Governor was found to be without any constitutional authority in attempting to apply British statutes in the colony. The opinion given by James Stephen Junior[66] appears to have been based on two grounds. The first was general and could therefore

have been applied to all attempts to exercise legislative powers by the Governor, as indeed it was in connection with his assumption of broad taxing powers.[67] The second was more specifically related to the provisions of the 1747 Act.

In the first place Stephen argued that the Colonists took with them to a settled country the constitution and laws of England which did not force them to accede to the irresponsible exercise of the legislative function. Secondly, there was a vital distinction between Macquarie's proclamation and the 1747 Act which clearly made the former a denial of an important right set out in the latter. A comparison of the details of the proclamation and the provisions of the 1747 Act reveal a number of minor differences purporting to make the English legislation more suitable to the conditions of the colony. For example, the proclamation applied to the classes of servants covered by it "whether the said Servant, Artificer, Mechanic or Labourer shall be a Convict transporter hither, and still under sentence of the law, or a Free man or woman." It also, not unnaturally, permitted discharge from service as a remedy for a servant only if [he was] a "Free Man or Woman", and, unlike the English Act the proclamation did not make similar provision for apprentices. But it was the absence of any provision similar to Section 5 of the 1747 Act, which gave a right of appeal to Quarter Sessions against a decision of a magistrate, that led to its more specific condemnation by Stephen. This defect was almost certainly not an oversight on the part of the Governor. The difficulty lay in the fact that there was no Quarter Sessions jurisdiction in N.S.W. and V.D.L. at that time, so that "if the Act were considered to be in force there it would arm the Magistrates with the power of deciding without appeal, a power which the legislature did not deem it expedient to confer in this Country".

The general criticism was nullified by the provisions of the British Act of 1823 setting up a Legislative Council and, *inter alia*, establishing Courts of Quarter Sessions, but the uncertainty as to the effect of the proclamation and the application of the 1747 Act remained in N.S.W. until the first colonial master and servant legislation was passed in 1828; in V.D.L. doubts were not finally dispelled until 1840.

The British Act of July 1823, entitled "An Act for the better administratio of Justice in N.S.W. and V.D.L."[68] provided for a Legislative Council in the former and a new system of courts for both N.S.W. and V.D.L. The Supreme

Court of V.D.L. was founded on this authority as were the inferior Courts of General or Quarter Sessions (criminal) and Courts of Request (civil), but the powers of magistrates acting alone or with another "out of sessions" were overlooked by the Act. This defect was however remedied in 1825 by an Act passed by the newly formed Legislative Council which in effect authorised Courts of Petty Sessions.

2) Judicial decisions on the Reception of specific English master and servant statutes

In June 1825 V.D.L. was separated from N.S.W. by an Order in Council which set up an independent Legislative Council and in V.D.L. in 1828 the "Australian Courts Act"[69] re-enacted the 1823 provisions with some amendments. The well-known Section 24 established a date for the reception of British Statutes and the unenacted law, although for many years there was still no easy answer to the question whether any particular Statute or common law principle was embodied in colonial law. The problem is well illustrated in the field of employee legislation by two cases to come before the Queensland Supreme Court, *Bilby* v. *Hartley* and *Walsh* v. *Kent*, although strictly speaking only the latter involved an English master and servant Act.

In *Bilby* v. *Hartley and Others*,[70] Frederick Bilby, a shearer, had attempted to persuade three non-unionists to contribute to a fine for certain shearers who were awaiting trial for cutting a bridge. The non-unionists were threatened, *inter alia*, with being chucked out of dinner at the sheep station if they did not contribute and were also told they would be roughly handled if they came in to tea. They considered their lives in danger and complained to the manager of the station who advised them to seek the protection of the law. Bilby was convicted of an offence under Section 3 of the English Act of 1825[71] and was fined £10 plus costs or three months imprisonment in default. The main object of the Act was to legalise only certain combinations of workmen in contrast to an 1824 Statute which had been much more beneficial to the trade union movement in removing completely the shackles of the Combination Acts; but the 1825 legislation had also provided in very broad and undefined terms for penalties to be imposed against individuals which rendered unlawful many acts performed in support of a combination as "coercion" or "intimidation". Thus Section 3 stated that every person who, by violence, threats or other means, intimidated another should be sentenced to a period of imprisonment not exceeding three months with hard labour. On appeal to the Full Court it was argued in Bilby's defence that the 1825 Act was not in force in the colony of Queensland.

The Chief Justice, decided the case in two parts. First, assuming the Act was applicable to the colony he thought that intimidation had been established on the facts because, although he could not bring himself to use most of the foul language of Bilby to justify his finding,[72] he thought that the threat to "chuck out" the non-unionists did amount to intimidation. Secondly, he tackled the problem of the applicability of the 1825 Act, a question which should surely have been answered first. Two issues were relevant here: first, the meaning of Section 24 of the Australian Courts Act as to what law was imported into the colony; and secondly, the extent to which the English 1825 Act was repugnant either to the circumstances existing in N.S.W. in 1892 or to the circumstances existing in 1828 when the Australian Courts Act was passed.

Section 24 provided "that all laws and statutes in force within the realm of England at the time of the passing of this Act (not being inconsistent herewith, or with any character or letters patent, or order in council which may be issued in pursuance hereof) shall be applied in the administration of justice in the Courts of N.S.W. and V.D.L. respectively as far as the same can be applied within the said Colonies, . . . "

The Chief Justice was of the opinion that the words "administration of justice" referred not only to the practice of the English Courts but extended to cover the whole area of English substantive law in so far as it could be applied to the circumstances of the colony. He further thought that even though the 1825 Act was not applicable in 1828 because of the peculiar circumstances of the colony yet "if in the progress of life and society, circumstances so altered within the colony that it would apply, or might be applicable then, I think, it would have to be applied, because there are many things which legislatures do not legislate for immediately". He continued, "They legislate not only for immediately existing evils, but for prospective evils that are likely to arise. . . . A statute is not passed for a day; it is passed for all time until the legislature sees fit in its wisdom or in its folly, to repeal it, to modify it, or to re-enact something else in its place. So long as it is in the Statute Book, if the circumstances to which it might apply or ought to apply arise, it is our duty sitting as a Court here to apply it. I think the question then is: Is there anything in 6 George IV so absolutely inconsistent with the circumstances existing at the present time that its provisions cannot be applied in the administration of justice? On the face of it, looking at this Act - which seems to have repealed

all the existing Acts affecting labour combinations, and to have passed one general statute - I may say that I cannot resist the conclusion that, at all events, in respect of this particular offence, there is nothing in the statute inconsistent with its application in this colony. On the contrary it seems to me to apply to the circumstances of this particular case".[73]

In so arguing, his views are in marked contrast to the generally accepted approach to the reception of British statutes by the Australian Courts.[74] The courts would first examine a particular British statute in order to see whether it was generally suitable to an overseas colony. The next step was to ask the additional question whether such a statute was suitable to the circumstances existing in the colony at the time of reception in 1828.

In the above passage it is clear that Lilley C. J. was begging the question. It is difficult to see how the 1825 Act could be "in the Statute Book" unless it had been accepted in 1828 in which case the judge's application of it to the facts in hand was no more than any judge does when he applies an Act in court. If it was not applicable because the facts of the case did not contravene the Act's provisions, this says nothing about the validity of the Act; and similarly where it was applied because the facts did fit its provisions. The only question was whether the British Act was in the Statute Book of N.S.W. and hence of Queensland by being received in 1828. If it was not, because the conditions in N.S.W. at that time were not suitable for it, it is difficult to see how it could have been applied in 1892 no matter how relevant then to the circumstances of the colony or to the facts of the case.

The other judges of the Full Court, Harding and Real JJ. in much shorter decisions, reached the same conclusion as to the applicability of the 1825 Act, without really supporting the Chief Justice's view that even Acts not suitable and therefore not received in 1828 could become so at a later date when circumstances had changed. Harding J. thought that "by 9 George IV all English law applicable to the colony at once attached and although the occasion for the use of it might not arise for ten years, twenty years or fifty years, still it was there as the sanction for the conduct of the people thereafter". Unfortunately, although he thought that the 1825 Act was part of the received law applicable to the colony in 1828 he was not prepared to justify this by reference to the circumstances that existed in N.S.W., particularly in the labour market, at that date.

On the other hand Real J. was prepared to say that the circumstances of the colony in 1828 were such as to render the 1825 Act capable of being applied; but he wisely refused to offer an opinion on whether the Act was applicable in the light of changed circumstances since 1828 if not applicable in the circumstances existing at that time.

The view propounded by Lilley C.J. had earlier been referred to as "subsequent attraction" by Lord Watson in the Privy Council in *Cooper* v. *Stuart*[75] but the principle was relevant only to the reception of unenacted law. The Chief Justice in *Bilby* v. *Hartley* seems to have applied it erroneously to the reception of British Statutes.

The second of the two Queensland cases was *Walsh* v. *Kent*[76] where Patrick Burns, a shepherd, lodged a complaint against his master W. H. Walsh for assault. Walsh pleaded guilty, was fined, and the magistrate purported to discharge Burns from his contract. Walsh applied for a writ of prohibition to prevent this on the grounds, *inter alia*, that the magistrate had no jurisdiction to order the discharge. Lutwyche J. in a short but informative judgment in the Supreme Court found original authority for the justice's action in the Statute of Apprentices (5 Eliz., c. 4) and was then concerned to see whether the Act was in force in the colony. He pointed out that before the Statute was passed a denial of wages, or of meat and drink, or a battery on the part of a master justified a servant in quitting his service without more,[77] but that the Statute did not permit a servant to act on his own view of the case since he was bound to prove a lawful cause of departure before a justice.

It is perhaps worth noting at this point that there was really no need for the judge to look back as far as the sixteenth century for statutory authority. Section 2 of the 1747 Act[78] [already referred to,] would undoubtedly have been applicable to the situation since Lutwyche J. had found that the shepherd Burns was a servant in husbandry. [and came within the Statute of Apprentices, and although the 1747 Act did not expressly apply to servants in husbandry it was held to have covered such servants by the decision in *Lowther* v. *Lord Radnor* (1806)]

There was, however, no doubt in the mind of Lutwyche J. that Burns could be properly discharged from his contract of service providing the Statute of Apprentices had been received in 1828, and providing there was no colonial

Act after that date which repealed its provisions. On the first proviso the judge accepted that the Statute had been received in 1828 on the dangerously wide ground that "By 9 Geo. IV., c. 83 s. 24 [Australian Courts Act] it is provided that all laws and statutes in force within the realm of England at the time of the passing of that Act should be applied in the administration of justice in N.S.W." The learned judge did not seem to be troubled at all by the requirement of applicability to the circumstances of the colony in 1828. He then explained that given its acceptance in 1828 as part of the law of N.S.W. it necessarily became part of the law of Queensland by virtue of Sections 20 and 22 of the Order in Council of June 1859 which established the colony of Queensland. The next step was to ascertain whether any colonial Act had been passed which repealed, either expressly or by implication, the Statute of Apprentices.

The first colonial Act relating to masters and servants was passed in 1828 by the N.S.W. Legislative Council and was entitled "An Act for the better regulation of Servants, Labourers, and Workpeople".[79] The preamble,in reciting that "many of the Acts of the British Parliament, relating to servants and labourers, are not applicable to the colony of N.S.W., and great uncertainties consequently prevail in the administration of justice between masters and servants in the said colony," gave the *raison d'etre* of the statute. It was therefore argued for the master in *Walch* that since the N.S.W. Act was more suitable to the circumstances of the colony in 1828, the Elizabethan Statute obviously could not have been appropriate. After referring to this argument Lutwyche J. went on to point out that the 1828 Act was repealed and replaced by later N.S.W. and Queensland enactments and that none of them expressly repealed[by later N.S.W. and Queensland enactments and that none of them expressly repealed]the Statute of Apprentices. Moreover the Statute was not even by implication inconsistent with the only relevant Queensland master and servant Act then in force.[80] The conclusion was therefore, that the magistrate had quite properly exercised his jurisdiction under the received Statute of Apprentices.

It should be noted however that these two Queensland cases are only authorities for the reception of the particular Imperial Acts concerned and it is not possible to conclude that all general English statutes relating to master and servant in existence on July 25th 1828 (the date the Australian Courts Act received the Royal Assent) were similarly received as part of the law of both N.S.W. and V.D.L. The main ones of 1747, 1766 and 1823 were probably *prime facie* suitable to the condition of the colony in 1828 but the position is complicated by the N.S.W. Master and Servant Act passed a few days before the Australian Courts Act; and the argument that its provisions were more suitable to the condition of the colony at that time.

D The N.S.W. Master and Servant Act (1828) and a comparison with similar English legislation

In view of the fact that it did not expressly repeal any of the English Acts it is necessary at this point to turn to the master and servant legislation enacted in N.S.W. in 1828[81] in order to determine, on the one hand, the extent to which its provisions were a mere reflection of existing English statutory law in this field and, on the other, the extent to which it was novel in attempting to meet the very different circumstances of a penal colony.

1) Main provisions of the N.S.W. Act

Under Section 1 any artificer, manufacturer, journeyman, workman, labourer or servant employed as a menial or house servant or on any form or estate, who left his service during the time for which he was hired or engaged by a master or employer or who refused or neglected to perform diligently the work he was hired or engaged to do, or who returned his work or left it before it was finished without the consent of his employer, could be arrested and brought before one or more justices who, if no reasonable excuse was given, could sentence him to imprisonment for up to six months or to hard labour in a house of correction for up to three months. In addition the justice could order him to forfeit all wages due or a part at his discretion.

Harsh penalties were also provided for such servants who wilfully or negligently spoiled, destroyed or lost goods or materials entrusted to them for work or simply for their care or use by their masters or employers. They were liable to pay an amount double the value of the materials damaged or lost to the owner (usually the master or employer but not necessarily so) and suffer imprisonment until it was paid, or failing payment, imprisonment for a period of from one to six months.[82]

In a feeble attempt to redress the balance in case the accusation of bias was levelled at the colonial legislature, members of which were invariably employers, Section 4 provided that if a master or employer ill-used his servant the latter could make a complaint on oath leading to the issue of a summons by one or more justices, compelling the appearance of the master on the day named in the summons. Whether or not the master was present on that day a Justice could proceed to hear the case and, if proved, award such amends as were thought fair and reasonable, provided the amount

did not exceed a sum equal to six months wages of that particular servant. (In this way if a master halved the wages of his servants he could terrorise two for the price of one.) If the master refused to pay the amount awarded it could be recovered by distress and sale of his goods and effects. In addition, a justice was empowered to discharge the servant from the remainder of the period he had contracted to serve.

Not only was a servant penalised in the manner prescribed by Section 1 for quitting service but anyone who knowingly received, employed or entertained him while he was still employed or retained committed an offence under Section 2 and was liable to a fine of between £5 and £20, half of which was awarded to the aggrieved master and the other half paid towards maintaining the colony's poor.

A right of appeal to Quarter Sessions was given against a conviction by the justice or justices in all cases, but the amounts of the recognizance and sureties were sufficient (£20 recognizance and two sureties of £10 each) to ensure that, where a term of imprisonment was ordered, the appellant remained in gaol or in the House of Correction until his appeal was heard; and since a master could not be imprisoned for an offence under the Act only servants suffered in this way. In cases of appeal where a fine rather than imprisonment was the sentence, the person convicted was bound to enter into a bond, with two sureties of double the amount of the fine. For the majority of servants who wished to appeal these requirements were simply too much to satisfy and, even where these difficulties were overcome, the prospect of losing the appeal was not a cheerful one. For example, a servant convicted of harbouring under Section 2 who might have been able to find the money to pay a £10 fine (a year's wages for many servants), and who was thinking of an appeal, would in all probability decide to pay the fine rather than risk the amount being increased to £20 at Quarter Sessions plus the costs of the appeal, with imprisonment on default until the total sum was paid. So much for the laudable words of the Act: that "if any person convicted of any offence . . . punishable by this Act, . . . shall think himself . . . agrieved, . . . such person shall have liberty to appeal".[83]

Having summarised the main provisions of the Act the question is raised to what extent was the Act inconsistent with the existing English master and servant legislation?

2) Types of employee affected

The N.S.W. 1828 Act was much wider than the English legislation in terms of the types of employee affected. It was held in *Kitchen* v. *Shaw*[84] that despite the general phrase "or other person" in the description of persons subject to the Act, a domestic servant was not included because the words were to be construed *eiusdem generis*. The Act under consideration was that of 1766;[85] but the wording of the 1823 Act[86] was almost identical, and included the same phrase.[87]

On the other hand, the N.S.W. legislation did not attempt to specify workmen in particular trades as being covered. A much more general approach was taken in applying it to "any artificer, manufacturer, journeyman, workman, labourer or servant"; although Section 1 does then specifically mention menial or house servants.

3) Employee offences

The circumstances in which an offence was committed under Section 1 seem to be much the same as in the 1823 Act, with possibly one exception. It has already been noted that the English legislation of 1823 distinguished between contracts of service in writing signed by the parties and unwritten contracts. Where a contract was not in writing a servant committed an offence by absenting himself from service before the expiry of the agreed term or by neglecting to fulfill his contract or by being guilty of any other misconduct or misdemeanour in the execution of his contract. On the other hand, where a contract was in writing, a servant could be convicted of an additional offence by failing to enter into or commence his service according to his contract". The colonial Act of 1828 did not make this distinction between written and unwritten contracts of service although the language of Section 1 would seem to be wide enough to cover a failure to commence service according to the agreement as an absence "during any part of the time for which he or she shall have been so hired or engaged", without the need for the contract to be in writing.

Moreover, the colonial legislation was wider in another respect than the English 1823 Act since it enacted in the latter part of Section 1 the infamous pieceworker clause of the Statute of Apprentices whereby it was

made an offence to return or leave work unfinished.

4) Penalties on employees

Both Acts enabled one justice to exercise jurisdiction but there were some significant differences in the penalties which could be imposed by him for a servant's breach of contract.

In 1747[88] the alternatives available to a magistrate in England were either committal to a house of correction for up to one month with correction by whipping or the discharge of the servant from his service. This was altered in 1766,[89] without the earlier Act being repealed, to enable a justice to send a servant to the house of correction for a period of from one to three months. An attempt to combine the punishments of the two Acts was rejected as beyond the jurisdiction of a justice in *Rex* v. *Hoseason* (1811)[90] with the result that a justice purporting to act under the later Act could not order bodily correction by whipping during a one to three month stay in the house of correction. If he wanted to have the servant whipped as well as imprisoned he could only commit for a period of up to one month in accordance with the 1747 Act.

By the 1823 Act,[91] which extended the earlier penalties, the alternatives were restated as either a maximum of three months hard labour in a house of correction with abatement of the whole or part of the servant's wages or discharge of the contract of service. Again, although the Act did not expressly say so, there was judicial authority for the fact that whipping could form no part of the servant's sentence. In *Wood* v. *Fenwick* (1842)[92] a complaint was made under Section 3 of the 1823 Act against a servant for absenting himself from his service. The conviction stated that he should be imprisoned in the house of correction, "there to remain and be held to hard labour for one month," but the commitment required the keeper to receive him into custody "and there to remain and be corrected and held to hard labour for one month", following the pattern of Section 2 of the 1747 Act. It was held that "the correction" referred to must be understood to mean something beyond hard labour and therefore the commitment was bad in two respects: because it varied from the conviction and because it authorised a punishment not warranted by the statute.

It seems also that a justice could not impose both penalties at the same time. He could order imprisonment with hard labour and abatement of wages,

or discharge from service, but could not commit for punishment and also discharge the servant.

The 1828 N.S.W. Act[93] constituted a considerable departure from these provisions. After conviction of a servant there remained the possibility of up to three months imprisonment in a house of correction with hard labour, together with forfeiture of all or part of the servant's wages; but the alternative of discharging him from his contract was replaced by the harsher measure of imprisonment in a common gaol for up to six months with the additional penalty of forfeiture of all or part of his wages.[94]

5) Wilfully or negligently spoiling, destroying or losing goods

With regard to Section 3 of the 1828 legislation which made it an offence for a servant to wilfully or negligently spoil, destroy, or lose any goods, wares, work or materials entrusted to his care by his master, there was again a substantial difference when compared with the English legislation.

Numerous Acts were passed in England in the eighteenth century in order to deal with the problem of servants "purloining or embezzling" their masters' goods but it is difficult to find any precedent making merely losing goods carelessly a criminal offence with the drastic penalties imposed by the colonial Act. Doubtless it was easy for a servant to say that he had lost his master's goods when in fact he had purloined or embezzled them and in many cases in the eighteenth century the embezzlement would be established before a magistrate by very little more than the fact that the servant was not able to account for them, but it was a far cry from this to enacting that the loss of goods in itself be penalised as an offence. The nearest the English legislation came to this was in Section 6 of an Act passed in 1777[95] which enabled a servant to be convicted or purloining or embezzling even though no proof was given as to whom the materials belonged. He was convicted on a suspicion of the goods having been embezzled and his failure to account for them to the satisfaction of the justices; the onus of disproving the allegation was on him and the allegation could be made in relation to all work materials which were, or had at any time been, in his possession as a servant in the trades mentioned in the Act.

For example in *Davis* v. *Nest and Others* (1833)[96] a servant in the wool trade was tried before magistrates on the oath of a credible witness of having in his possession certain materials used in woollen manufacture. These

materials were suspected of having been embezzled and purloined by him and he was convicted because he could not produce either the person from whom he bought the materials or a satisfactory account of them.

The earliest eighteenth century[97] statute which specifically applied to servants embezzling their masters goods was one passed in 1701 "for the more effectual preventing the Abuses and Frauds of Persons employed in working up the Woollen, Linen, Fustian, Cotton and Iron Manufactures of this Kingdom" which was amended in 1740[98] and extended to workers in various aspects of the leather industry. Section 1 of the last mentioned statute enacted that persons employed in the stated trades who purloined, embezzled, secreted, sold, pawned, exchanged or otherwise illegally disposed of materials with which they had been entrusted would incur the severe penalties mentioned. These were, for a first offence, forfeiture of double the damages sustained by the owner plus full costs of the prosecution and, in the event of immediate payment not being made, imprisonment and whipping in a house of correction with hard labour for up to fourteen days; and or a subsequent conviction, forfeiture of four times the value of damages sustained by the owner plus the costs of prosecution, with between one and three months hard labour and a public whipping "once or oftener" at the discretion of the justice, if payment was not immediately forthcoming.

Harsh as these penalties might seem, they do not appear to have succeeded in their purpose because less than a decade later in 1749[99] a whole new batch of trades was added to the list and there was a further increase in penalties on the grounds that the "forfeitures to which offenders against the previous acts are subjected have not been sufficient to deter persons from committing the offences thereby intended to be prevented". There can be little doubt that the main object of punishment during the eighteenth century was to deter. Holdsworth[100] has remarked that during this period the "punishments were sometimes barbarous, quite unsystematic, and, by reason of their frequent mitigation (caused to a large extent by their undue severity) so uncertain in their operation that they were ineffective to accomplish the only end at which they aimed - deterrence". Blackstone[101] and Madan[102] among others recognised this but the Legislature, throughout much of the eighteenth century, tended to take the view that if the existing penalties did not deter, they needed to be increased. And so it was with the criminal offence of embezzlement by servants.

In 1777[103] it was thought necessary to "vary" the punishment. The variation took the inevitable form of a further increase in prison terms with hard labour. A first offence was to incur a period of imprisonment of between fourteen days and three months, with hard labour and for subsequent offenders, from three to six months hard labour. Whipping did not entirely disappear under the Act but was destined to play a more subdued role in the general deterring effect of these sentences since justices were empowered to award a public whipping only once "if such additional punishment shall . . . be deemed proper".

These were the English statutes which formed the background for Section 3 of the 1828 N.S.W. master and servant legislation. As has already been indicated the colonial legislation went considerably further by penalising mere careless loss on the part of a servant. Moreover, it should be noted that the English Acts were designed primarily to prevent particular abuses in basic manufacturing trades where continual handling of his master's materials, sometimes in a servant's own home, gave rise to easy opportunities for pilfering. Domestic servants were not mentioned in the Acts and consequently were not effected by them, but that class of servants was specifically covered by the colonial Act of 1828. The result was that if a domestic servant, for example, a maid, lost one of the hundreds of items belonging to her master that she might have entrusted to her care in the course of her duties during one week she could be convicted and punished under Section 3. Thus, in this area the colonial Act with its acceptance of mere loss as constituting an offence together with the fact that all servants were covered by it, was the cause of considerable injustice and oppression for colonial servants and was in no way a mere reflection of existing English law.

One further point is worth making here. The English legislation considered above was limited to embezzling, purloining, secreting, selling, pawning, exchanging, or otherwise unlawfully disposing of materials or wares; it did not apply to wilfully or negligently spoiling or injuring property entrusted to a servant by his master. Certain other eighteenth century English Acts did provide penalties for spoiling work but in the main this was done as part of the general regulation of workmen in particular trades and more especially to combat the increasingly effective use of combinations of workmen in those trades. For example, in 1725[104] an Act was passed to make combinations of wool combers, weavers, and of frameworker knitters and stocking

makers illegal, and included a clause prohibiting spoiling of goods by individual woolcombers, weavers or any person retained or employed in "the art or mystery" of a woolcomber or weaver. More specifically, the offence was committed by any such person who "shall wilfully damnify, spoil or destroy . . . any of the goods, wares or works committed to his care or charge, or wherewith he shall be entrusted". Every person convicted before two or more justices was required to forfeit and pay to the owner double the value of the goods, which was to be levied by distress and sale of the offender's goods. If the amount of the forfeiture was not forthcoming the servant was committed to a house of correction for up to three months with hard labour or until satisfaction was made. These provisions were extended in 1749[105] to journeymen, dyers, hotpressers and all others in the woollen manufactures and to all persons employed in the silk, mohair, fur, hemp, flax, linen, cotton fustian, iron and leather trades and in the making of hats or felts.

It is important to appreciate that the industries to which these Acts applied were not randomly selected. They were trades in which a very considerable amount of disruption by organised groups of workers had been experienced[106] and it was not until the Combination Acts of 1799 and 1800 that a more general approach was adopted. The partial repeal of the Acts in 1824 and 1825 took with it these earlier prohibitions against combinations in particular trades, but the offence of spoiling etc. committed by individuals remained so that there was some justification for its appearance in the 1828 N.S.W. Act.

It should also be noted that the English legislation required the spoiling or destroying to have been committed wilfully rather than negligently, unlike the N.S.W. Act. Thus, for example, a domestic cook who burnt a cake carelessly was in a much more serious position if she performed this historic act in N.S.W. after 1828 than if she had been a cook in England. What might perhaps have been her one and only culinary failure would have constituted an offence under Section 3, even though her carelessness might not have amounted to a breach of contract at common law and probably would not have justified summary dismissal.

Like the substance of the colonial offences described in Section 3 the stated penalties were also inconsistent with existing English law, but whereas, generally speaking, the offences compared unfavourably from the point of view of colonial servants the reverse was true with regard to

penalties. A colonial magistrate could not order a flogging and, moreover a term of imprisonment after failure to pay the forfeiture could not be given with hard labour. Forfeiture of double the value of the goods spoiled or lost was considered to be a sufficient deterrant and it also appealed to employers who could expect to make a 100% profit after a successful prosecution, providing they only prosecuted those servants who were able to pay the amount and providing the servants did not choose to go to prison instead.

6) Employer offences

Section 4 of the N.S.W. Act gave a servant a remedy against his master where the latter "shall ill-use" the former. "Ill usage" was not defined and the answer to the question whether "ill usage" included non-payment of wages due, as well as physical mistreatment was uncertain. At first sight it would appear that this was so because the amount of the "fair and reasonable amends" to be awarded by a justice by way of remedy was limited by reference to an amount representing six months' wages of the servant concerned. But it should be noted that the reference to wages in this section did not necessarily imply a right to recover unpaid wages. The amount ordered to be paid may only have constituted what was thought to be a fair and reasonable compensation for the ill usage, with the maximum amount recoverable calculated in each case by reference to the six month wage figure. Because the reference to wages in this way did not necessarily imply a right to recover up to six months' unpaid wages it cannot be convincingly argued on this ground that "ill usage" must therefore have included "non-payment of wages". As will be seen, the English legislation also empowered a justice to award what was fair and reasonable by way of amends to a servant for misusage or cruelty but the English Acts gave separately a clear power to order payment of wages as such, and thereby acknowledged a servant's right to recover them within limits. It seems unlikely, however, that the colonial legislature intended to exclude magisterial regulation of this vital aspect of the employment relation (leaving it to the individual servant to take separate proceedings for recovery of the amount) and, in view of the silence of the other provisions and the important English legislative precedents, it is possible that the word "ill-usage" referred to both cruelty and non-payment of wages. If this is a correct assumption the amends awarded where ill usage was in the form of non-payment of wages due must have included an amount constituting the unpaid wages, providing this was a "fair and reasonable" amount and did not exceed the six month wage figure.

The most recent English Statute before 1828 which specifically referred

to ill-usage in the sense of physical cruelty was the 1747 Act[107] which, as we have seen, gave the sole remedy of discharge where there was any "misusage, refusal of necessary provision, cruelty or other ill treatment". A separate section[108] permitted recovery of a wages amount which a justice thought was "just and reasonable", up to a maximum of £10 for certain categories of servants and £5 for others. In 1823[109] the limit was raised to £10 for all servants covered by the Act.

The procedure for bringing a complaint before a justice and the nature of the penalties to be imposed were very similar to those in the N.S.W. Act. In N.S.W. however, the effect of combining the "physical mistreatment" and "non-payment of wages" aspects of ill-usage in one section, with two separate remedies *i.e.* amends and discharge, capable of being applied as alternatives, was to deprive a servant of his right to have his contract of service discharged on proof of physical mistreatment by his master. Under the English legislation this was the only remedy given where there was ill-usage of this type. Moreover, because the colonial Act permitted a justice to award amends as an alternative to discharging from service, a servant could, despite winning his case, be forced to continue in service with a cruel master, a device probably dictated by the recurrent shortages of labour in the colony.

At the time the N.S.W. legislation was passed there does not appear to have been any real difference between the maximum amount of wages recoverable in England and in the colony. Contrasted with the £10 maximum in England were the six months wages of, for example, N.S.W. mechanics who, in 1833, could earn £15-£20 per annum with rations and lodgings or, at the other end of the scale, agricultural labourers who, in 1831, were earning from £10-£14 per annum.[110] It is safe to say that, as time went on, the N.S.W. servant was in a happier position than his counterpart in England in not being limited to any specific amount, because as wages rose so did the maximum recoverable by him under the Act. It was, of course, possible for the English workman to recover sums owing in excess of £10 by an action in the High Court (after 1846 in the County Court) and for the colonial servant to sue in the Supreme Court where more than £10 was due, but many servants must have been unaware that such a course was open to them.

It should be noted too that, although the colonial legislation placed a limit of six months wages on the amount recoverable by a servant for ill-usage, no similar restriction existed where a servant was convicted of a

breach of contract under Section 1 and in addition to imprisonment was ordered to forfeit "all or such part" of his wages due at the discretion of the justice. Thus, where he was paid by the year and the offence was committed just before he was due to be paid, the amount forfeited by him and "recovered" by his master was considerably in excess of the six months wages recoverable in the reverse situation. Moreover, the financial gain to be made by the master was a strong inducement to fabricate charges of neglect of work shortly before pay day.

7) Knowingly receiving employing or entertaining a servant

By Section 2, perhaps the most remarkable section in a largely extraordinary Act, it was made an offence to "knowingly receive, employ or entertain" a servant who was already employed during the period of his employment without his master's consent. The section constituted a restatement in criminal form of the civil action for enticing a servant from his master and as such the original English legislation would seem to be the Statute of Labourers in 1349 on which the civil action has been argued to rest.

Like the civil action, the N.S.W. statutory offence did not require the enticer to have actually employed the servant. A mere "receiving" or "entertaining" was sufficient in many senses of the words, as is graphically illustrated in *Evans* v. *Walton*[111] where an action was brought against the defendant who had tricked a publican into believing that his nineteen year old daughter was needed by a sick relative; the girl went instead to a "house of ill fame" with the defendant and then returned home. The action succeeded on the basis that the girl was to be treated as a de facto servant because she often assisted her father in the public-house. Both civil action and statutory crime also emphasised not so much the enticer's knowingly enticing a servant as the fact that the wrongdoer knew the servant to be already employed.

The wording of the colonial Act was sufficiently wide to cover situations which would have given rise to a civil action for harbouring a servant *i.e.* where a person, after notice, continued to employ or receive another man's servant, although at the time he first hired or received the servant he did not know he was already employed and had not enticed him away. Unfortunately, however, the terminology of the section was so wide that it was capable of being applied where no action at common law would ever have been contemplated. It is difficult to escape the conclusion that under the Act a servant who, without his master's permission, went home to see his sick father for a few

minutes during his working hours, exposed his relative to a penalty for so receiving or entertaining him in the house quite apart from any penalties which the servant himself might suffer for this action under Section 1. In this example it would not be easy for the master to point to ensuing damage if the servant concerned made up his work later in the day and no action would therefore lie at common law against the relative even assuming a court would accept this as "knowingly receiving or entertaining". Yet under the colonial act he was liable to a fine of between £5 and £20, half of which was received by the master, and half paid towards maintaining the poor of the colony.

Unlike the civil action with its insistence on loss to the master measured by damages, the rationale of the N.S.W. statutory criminal offence is more difficult to determine. Like the Statute of Labourers itself it can probably be ascribed to a general acute shortage of labour giving rise to strong fears by employers of losing their labour to another employer who was prepared to pay more. Coupled with this was the notion of treating servants who absented themselves from their work without excuse as criminals so that one who then employed them or otherwise gave them protection was in turn penalised as a protector of criminals.[112]

8) Appeals

A right of appeal from a decision of one or more justices to the next Court of Quarter Sessions was given by Section 6 of the N.S.W. Act. This was a basic provision available, theoretically, to all persons aggrieved by a decision of a magistrate, but because it was hedged about by certain restrictions it had the effect of denying appeals to the majority of servants.

In England the 1747 Act, for example, gave a right of appeal to masters and the particular types of servant covered by the Act except against an order of commitment. When an appeal was heard and determined a Court could award reasonable costs not exceeding 40s. In 1766[113] it was further enacted that a person wishing to appeal (except in cases of commitment[114]) was bound to give six days' notice of his intention and within three days afterwards was required to enter into a recognisance with sufficient surety and to agree to abide by the judgment of the Justices at Quarter Sessions and to accept their award of proper and reasonable costs.

The need for a recognisance was well illustrated in an Act of 1777 "for

the better regulating the hat manufactory"[115] which, in the preamble to Section 3, stated that earlier legislation regulating abuses and combinations in the woollen, linen, fustian, cotton, iron, leather, fur, hemp, flax, mohair, silk and hat industries had been found to be "ineffectual, by reason that the persons convicted of any such offences have a power to appeal to the justices at quarter sessions, against any conviction, without being obliged to enter the recognizances for their appearance at such sessions to prosecute such appeal, and abide the order of such sessions, whereby they evade the punishment inflicted by the said act, and hold the same in contempt".[116] It was therefore enacted in Section 3 that, before there could be an appeal against a conviction or a suspension of the proceedings under a conviction, the prospective appellant was required to enter into a recognisance in the sum of £10 with two sufficient sureties in the sum of £5 each for the appearance of the person convicted at Quarter Sessions to prosecute the appeal, and to abide by the decision made there.

A further restriction on the right to appeal appeared in the more general 1823 Act which applied to all servants except those in domestic service and which provided that an order made by a justice was final and conclusive when it was made for the payment of wages with a certain time.

The N.S.W. Act followed the general pattern of the English legislation in granting a right of appeal, but again there were some important dissimilarities. For example, under the colonial Act, although recognisances and sureties were required, costs capable of being awarded by Quarter Session were only limited by what was just and reasonable. With regard to differences in the colonial appellants favour it is worth noting that an appeal against a conviction ordering a term of imprisonment was permissible as was an appeal against an order for payment of wages within a certain period. On the other hand, the amounts of the recognisance and sureties required a bond of double the sum adjudged to be forfeited or, where a term of imprisonment was given, a £20 recognisance with two sufficient sureties of £10 each.

These large amounts reflected poorly on the attitude of the colonial legislators towards the working class, especially when one bears in mind the earnings of labourers at this time. A servant who wished to appeal against his conviction was required to enter into a recognisance often involving very much more than his annual wage. For example, where a friend or relative of a servant was fined the maximum of £20 for receiving or entertaining him under

Section 2 the wrongdoer was then bound to enter into a bond of £40 in order to appeal; or, to take another example, where the value of the master's goods carelessly lost or damaged under Section 3 was £30, the amount of the bond was £60. In short, it is difficult to escape the conclusion that the main aim of the section was to deter appeals by servants.

It has already been noted that two different approaches to the question of the amounts of recognisances had been adopted in England in the master an servant legislation of the eighteenth century: the 1766 Act left them to be assessed by a justice while the 1777 Act required a fixed amount. The main advantage of the former was its flexibility; its main disadvantage was the fact that a justice's discretion could be exercised unreasonably to deter an appeal in any particular case. Conversely, the main attraction of the latter was its consistency, despite its moderately deterring effect on all servants' appeals. At first glance Section 6 of the colonial act appears to fall into the latter category but, in effect, it is probably more correct to discribe it as an example of the former. The section did not expressly state that the amount of a bond was to be left to the discretion of a justice but the practical result of providing for "a bond . . . in the penal sum of double the amount of the penalty so incurred or forfeited", where the amount of the sum to be forfeited was, within wide limits, at the discretion of the justice (for example under Section 1), was to make the amount of the bond ultimately depend on the exercise of a magisterial discretion.

9) The Repugnancy Question

The comparative survey above has shown that in many fundamental respects the colonial Act of 1828 represented a much tougher policy towards colonial servants than did the existing English legislation. In general terms, not only were more severe penalties imposed on a wider class of servants but they were imposed, in some instances, for criminal offences unknown to English law. Given these basic discrepancies the question arises whether the N.S.W. Master and Servant Act was repugnant to the fundamental principles of English law, a question which in theory is not easy to answer mainly because one colonial judge's view of what were the fundamental principles was likely to differ considerably from another's.[117] In any case there is, perhaps, little to be gained by discussing the N.S.W. master and servant legislation and the repugnancy question in terms of differing judicial views as to the interpretation of the repugnancy doctrine. The Australian Courts Act which set up a review procedure by all judges of the Supreme Court of N.S.W. under Section 22, did not

receive the royal assent until 25th July 1828, whereas the N.S.W. Master and Servant Act was passed on 17th July 1828. This meant that the latter legislation fell to be considered as to its repugnancy by the procedure laid down in Section 29 of the English "N.S.W. Act" of 1823, whereby no proposed legislation was to be placed before the Legislative Council or passed as a law unless the Chief Justice alone had certified that it was not repugnant to the laws of England. Thus the fact that the master and servant legislation became law at all is confirmation of the fact that Chief Justice Forbes did not think it repugnant to English law, and the views of other judges who might have differed in their application of the repugnancy doctrine were not in anyway relevant to the legal procedure.

The test of repugnancy to which the colonial master and servant Act was subjected had been made clear by Forbes when writing to the Governor in 1827: a proposed law should not, in the first place, be repugnant to the law of England *in pari materia* but, to the extent that there were differences, they should be justifiable by reference to different local circumstances.[118] It seems likely, therefore, that the numerous differences between the existing English legislation concerning the master-servant relation and the provisions of the colonial Act of 1828, were noted by Forbes and that he was convinced that the vastly different circumstances of the colony were sufficient to justify them.

It might be argued that the N.S.W. Master and Servant Act of 1828 is not relevant to the history of master and servant legislation in Tasmania because, as from 1825, V.D.L. acquired its own Legislative Council independent from that of N.S.W. To a certain extent this is true, but the importance of the N.S.W. Act as the first piece of colonial master and servant legislation must not be overlooked. Even after 1825 it was only to be expected that the new colony should take a great interest in measures passed in N.S.W. In the light of the uncertainty that prevailed at that time concerning the applicability of British Statutes in general and the English master and servant legislation in particular (as evidenced by the preambles in both the 1818 Proclamation and the 1828 Act), it is more than likely that similar legislation would have been enacted in V.D.L. within a few years had it not been for the passage of the Australian Courts Act shortly afterwards. In providing a definite date for the reception of British Statutes the latter Act removed some doubts as to the applicability of important British Acts passed since settlement, particularly those of 1823,[119] 1824[120] and 1825[121] which were considered vital for the regulation of masters and servants in V.D.L.

Thus in the island colony, where the contract of employment was regulated until 1840 mainly by the 1823 Act, the lot of the servant after 1828 was marginally happier than than of his N.S.W. counterpart governed by the harsher measures of the local Act. Coghlan has argued[122] that the N.S.W. legislation, which he described as "draconian", was merely a reflection of the harsh and overbearing policy of the authorities in England towards the labouring class. This is a little misleading, however, in its implication that the N.S.W. Act was merely an application of existing English law, which was not the case. And to the extent that the N.S.W. Act was silent, the local law was not merely a reflection of existing English law but was the English law itself, by virtue of Section 24 of the Australian Courts Act.

NOTES

1. 1 Comm. (1st ed.) 106-107; (18th ed.), 111-112.

2. Castles, *Introduction to Australian Legal History*, 10.

3. Coghlan, *Labour and Industry in Australia*, Vol. I, 24.

4. Coghlan, *op. cit.*, 53 refers to convicts working "on their own hands". The phrase was used as early as Langland in *Piers Plowman*: "Labourers that have no land to live on but their hands". See Trevelyan, *English Social History*,(2nd ed. 1946), 11.

5. Coghlan, *op. cit.*, Vol. I, 61.

6. In 1811 the powers of magistrates to punish assigned servants for breaches of discipline were limited to 50 lashes or 30 days hard labour.

7. Coghlan, *op. cit.*, 48.

8. By General Hunter in 1797.

9. 23 Ed. III.

10. Coghlan, *op. cit.*, 65.

11. Plucknett, *History of the Common Law*, 32.

12. Coghlan, *op. cit.*, 59.

13. Castles, *op. cit.*, 48.

14. See "Abridgement of General orders" printed in N.S.W. Almanack 1806, for a comprehensive summary of existing orders.

15. 25 Edw. III, stat. 1, c. 1; 37 Edw. III, c. 6; 12 Rich. II, c. 3-9; 13 Rich. II, stat. 1, c. 8; 6 Hen. VI, c. 8; 14 and 15 Hen. VIII, c. 2; 21 Hen. VIII, c. 16.

16. 5 Eliz. c. 4.

17. "Although there remain and stand in force presently a great number of acts and statutes concerning the retaining, departing, wages and orders of apprentices, servants and labourers, as well in husbandry as in divers other arts, mysteries and occupations; yet partly for the imperfection and contrariety that is found, and doth appear in sundry of the said laws, an for the variety and number of them, and chiefly for that the wages and allowances limited and rated in many of the said statutes, are in divers places too small and not answerable to this time, respecting the advancement of prices of all things belonging to the said servants and labourers; the said laws cannot conveniently, without the 'great grief and burden to the poor labourer and hired man, be put in good and due execution: and as the said several acts and statutes were, at the time of the making of them thought to be very good and beneficial to the common wealth of the realm (as divers of them are), so if the substance of as many of the said laws as are meet to be continued, shall be digested and reduced into one sole

law and statute, and in the other orders for apprentices servants and labourers, there is good hope that it will come to pass, that the same law (being duly executed) should banish idleness, advance husbandry, and yield unto the hired person, both in time or scarcity and in the time of plenty a convenient proportion of wages".

18. Its operation was however limited to servants employed in husbandry and did not extend to menial or domestic servants.

19. S. 12.

20. A proviso in s. 23 permitted servants to go into other shires for haymaking etc. if there was none available in their own area, providing they carried the required testimonial from a justice. And s. 3 of 13,14 Car. 2, c. 13 extended this to all types of work and authorised a justice of the peace to punish as a vagabond in a house of correction any person who refused to return to his own parish after the work was over.

21. The main English Acts up to 1828 were: 7 Geo. I, st. 1, c. 13 (tailors); 9 Geo. I, c. 27 (shoemakers); 13 Geo. II, c. 8 (all leather trades); 20 Geo. II, c. 19; 27 Geo. II, c. 6; 31 Geo. II, c. 11 (various trades); 6 Geo. III, c. 25 (agreements for a term); 17 Geo. III, c. 56 (textiles etc.); 39 and 40 Geo. III, c. 77 (coal and iron); 4 Geo. IV, c. 34 (all trades).

22. B. & S. Webb, *History of Trade Unionism* (1894), 251.

23. Entitled, *"A Few Remarks on the State of the Laws at present in existence for regulating Masters and Workpeople"*.

24. 20 Geo. II, c. 19.

25. See Adam Smith, *Wealth of Nations*, bk. i, ch. x, 65. This was broadly true although formal determinations of wages are to be found in the M. S. Minutes of Quarter Sessions for another half century. See B. & S. Webb, *op. cit.*, 49.

26. S. 1.

27. Although it was not until 1811 in *R.* v. *Justices of Kent* (14 East 395) that the wage fixing powers of justices were judicially recognised as discretionary.

28. S. & B. Webb, *op. cit.*, 51.

29. 4 Geo. IV, c. 34, 5.5.

30. S. 1.

31. 31 Geo. II, c. 11, s. 3. (1758).

32. 27 Geo. II, c. 6, s. 2. (1754).

33. 10 Geo. IV, c. 52 (1829).

34. 7 B. & C. 536; 108 E.R. 823.

35. S. 1.

36. S. 2.

37. 1 H. & W. 560; 3 Ad. & E. 524; 111 E.R. 513.

38. 5 Geo. IV, c. 18.

39. It seems from *Lancaster* v. *Greaves* (1829) 9 B. &. C. 628; 109 E.R. 233 that a magistrate could not both commit for punishment and also discharge from service, as he was only authorised to discharge from service in lieu of punishment.

40. The section was often difficult to implement against men who formed part of a combination. Holdsworth (*op. cit.*, Vol. XI, 490) citing Hammond, *The Skilled Labourer*, 14 - 15, mentions a letter written to the Earl of Northumberland referring to a strike of coal-miners against a combination of masters which had attempted to alter their conditions of employment. The writer explained that although the power to imprison existed under 1747 Act, yet where there was a general combination of thousands of men - "in the first place it is difficult to be executed as to seizing the man, and even if they should not make a formidable resistance which scarce can be presumed, a few only can be taken . . . so the punishment of probably twenty or forty by a month's confinement in a house of correction, does not carry with it the least appearance of terror, so as to induce the remaining part of so large a number to submit, and those men that should be so confined would be treated as martyrs for the good cause, and be supported and caressed, and at the end of the time brought home in triumph, so no good effect would arise". (See also Holdsworth, Vol. viii, 382-4).

41. 12 East 248; 104 E.R. 97.

42. 14 East 605; 104 E.R. 734.

43. Today, such statutory language would probably be an indication that both the master-servant and employer-independent contractor relations were to be regulated, but in 1747 the distinction was not significant. The control test was not formulated until 1840.

44. S. 1.

45. S. 4.

46. *Op. cit.*

47. 4 M. & R. 295; 109 E.R. 224. See also: *Lancaster* v. *Greaves* (9 B. & C. 628). Although outside the period under discussion these cases are relevant in casting light on the meaning of the 1823 Act.

48. *Quarman* v. *Burnett* 6 M. & W. 499.

49. The same point was made by Parke J. in *Lancaster* v. *Greaves*, *(op. cit.)*

50. *Op. cit.*

51. *The Law of Master & Servant* (2nd ed.), 16.

52. 5 B. & C. 547.

53. 8 East 113.

54. Holdsworth, *op, cit.*, Vol. XI, 464.

55. 53 Geo. III, c. 40.

56. 14 East 395.

57. Thames coal heavers in 1770 (10 Geo. III, c. 53); silk weavers in London and Westminster in 1773 (13 Geo. III, c. 68); London and Westminster weavers of silk mixed with other materials in 1792 (32 Geo. III, c. 44); silk and mixed weavers in other stated factories in 1811 (51 Geo. III, c. 7).

58. *Op. cit.*, 51.

59. See *Bilby* v. *Hartley & Others* (1892) 4 Q.L.J.R. 137.

60. Coghlan, *op. cit.*, 39.

61. *Ibid.*,

62. 5 Geo. IV, c. 95.

63. S. & B. Webb, *op. cit.*, 103.

64. See Castles, *op. cit.*, 119.

65. H. R. A. Ser. IV, Vol. 1, 323 and 325. Published in the Hobart Town Gazette on 26th December 1818.

66. Opinion on the Validity of Statute 20 Geo. II, c. 19, in the Colony (1822) H. R. A. Ser. IV, Vol. 1, 413.

67. See Castles, *op. cit.*, 118-125.

68. 4 Geo. IV, c. 96.

69. 9 Geo. 4, c. 83.

70. (1892) 4 Q.L.J.R. 137.

71. 6 Geo. IV, c. 129.

72. *Op. cit.*, 142, "The facts are too disgusting to be recited from the bench", *ibid.*, 143, "Looking at the language on the depositions, which is much too foul to pass through the mouth even of the judge whose position sometimes necessitates that he should recite such language, I think it is not necessary for me to recite it now. There is one part sufficient, without touching upon the fouler part to sustain the charge". Real J. *(ibid.*, 139), was so affected by the language used by Bilby that he admitted that "If it were applied to me, and there were a great number there, I should provide myself with a pistol. I would rather pay the 6s. 10d. than have it applied to me." To which the Chief Justice consolingly replied "Most men would prefer to pay 6s. 10d. rather than submit to such language."

73. *Ibid.*, 144.

74. See: Stephen J. in N.S.W. Supreme Court in *Ex parte Lyons* in *re Wilson* (1839) (Legge 140, 152).

75. (1889) 14 App. Cas. 286.

76. (1862) 1 Q.S.C.R. 44.

77. Com. Digest, Justice of the Peace, B. 63.

78. *Op. cit.*

79. 9 Geo. IV, No. 9.

80. 25 Vic. No. 11.

81. *Op. cit.*

82. S. 3.

83. S. 6.

84. (1837) 1 N. & P. 791; 6 A. & E. 729; 112 E.R. 280.

85. 6 Geo. III, c. 25.

86. 4 Geo. IV, c. 34 extending the 1747 Act, 20 Geo. II, c. 19.

87. *Ibid.*, s. 3.

88. *Op. cit.*

89. 6 Geo. III, c. 25.

90. *Op. cit.*

91. S. 3.

92. 10 M. & W. 195; 152 E.R. 439.

93. S. 1.

94. For comments on the alternatives of house of correction or common gaol see: Holdsworth, *op. cit.*, Vol. XI, 568.

95. "An Act for amending and rendering more effectual the several laws now in being for the more effectual preventing of Frauds and Abuses by Persons employed in the Manufacture of Hats, and in the Woollen, Linen, Fustian, Cotton, Iron, Leather, Fur, Hemp, Flax, Mohair, and Silk Manufactures; and also for making Provisions to prevent Frauds by Journeymen Dyers". (17 Geo. III, c. 56.) Under Section 7 of this Act an employee was deemed to have embezzled materials remaining after he had worked up goods if he had not returned them to his employer within 8 days. By Section 16 all offences in relation to goods and materials were extended to tools and in the manufacture of goods.

96. 6 C. & P. 167; 172 E.R. 1192.

97. Although larceny by a bailee could be committed by a servant who embezzled his master's goods, after having been entrusted with them as a bailee, as early as the sixteenth century (See Holdsworth, *op. cit.*, Vol. XI, 533)

98. 13 Geo. II, c.8.

99. By 22 Geo. II, c. 27.

100. *Op. cit.*, Vol. XI, 581.

101. Comm. iv, 19.

102. *Thoughts on Executive Justice*, 36-37.

103. 17 Geo. III, c. 56.

104. 12 Geo. I, c. 34.

105. 22 Geo. II, c.27 s.12.

106. See Lipson, *Economic History of England*, 392-395, for an account of the disturbances leading to the passage of the 1725 Act.

107. *Op. cit.*, s. 2. The 1823 Act was silent as to physical cruelty, although dealing with non-payment of wages.

108. S. 1.

109. *Op. cit.*, S. 2.

110. Coghlan, *op. cit.*, 201-202.

111. 36 L.J., C.P. 307. See Smith, *Law of Master & Servant*, (4th ed., 1885), 158.

112. A specific reference to employing or harbouring servants in N.S.W. was made in the British Act of 1823 for the better Administration of Justice in N.S.W. and V.D.L. (4 Geo. IV, c. 96 s. 42) which provided for a civil action with treble costs rather than a criminal offence. It applied solely to certain categories of immigrant servants who had contracted in the U.K. by way of indenture to serve in N.S.W.; it did not purport to apply to colonial servants who had contracted in the colony. It was re-enacted and extended to V.D.L. by Section 36 of the Australian Courts Act 1828. Also worth noting is the context of the section; for it followed closely on the heels of one penalising persons assisting the escape of convicts (Section 34 in 1823 and Section 39 in 1828). No equivalent to Section 42 was enacted with respect to servants in the U.K. although the opportunity had recently existed since the infamous 1823 master and servant legislation (4 Geo. IV, c. 34) had been passed just one month earlier.

The civil action also appeared in two British Acts (5 Geo. IV, c. 86 and 6 Geo. IV, c. 39) setting up the N.S.W."Australian Agricultural Co." and "Van Diemen's Land Company" respectively which, *inter alia*, permitted U.K. servants to contract to serve these Companies in the colonies. Section 2 of the 1828 N.S.W. master and servant Act, passed just a few days before the Australian Courts Act, was therefore a novel provision in

making employing or harbouring a criminal offence in addition and in extending it to cover all colonial servants whether indentured immigrants or not. Because the Australian Courts Act was a statute of paramount force the civil action remained for indented immigrants by virtue of Section 36 of that legislation and in other cases by virtue of the received unenacted law; but because the criminal offence was no longer to be found in English law its appearance in N.S.W. in 1828 could only have been justified by reference to local conditions.

113. *Op. cit.*, s.5.

114. See *R.* v. *Justices of Staffordshire*, (1810) 12 East 572; 104 E.R. 223.

115. 17 Geo. III, c. 55.

116. See *R.* v. *Twyford* (1836) 5 A. & E. 430; 111 E.R. 1228 where a servant was convicted and sentenced to eleven weeks' imprisonment. He gave notice of appeal but failed to prosecute it and mandamus was refused because, since the convicting justices had power to commit only in case of a recognisance not being given, and Quarter Sessions had power only to imprison where the magistrates decision was confirmed on appeal, it was doubtful whether the justices might afterwards commit in execution.

117. See for example the opinions of jusges in the Supreme Court of N.S.W. on the Act of Council 5 Will. IV, No. 9, referred to in Campbell, "*Colonial Legislation and the Laws of England*" Univ. of Tas. L. R., Vol. 2, 148, 164-166.

118. H. R. A. Series I, Vol. 8, 284, 16/4/1827.

119. 4 Geo. IV, c. 34.

120. 5 Geo. IV, c. 95.

121. 6 Geo. IV, c. 129.

122. *Op. cit.*, 213.

CHAPTER 2

BACKGROUND TO THE APPRENTICES AND SERVANTS ACT (1840)[1]

The courts in V.D.L. continued to apply the received English law of master and servant for a considerable period after the enactment of the 1828 master and servant legislation in N.S.W., and it was not until 1840 that the Legislative Council of V.D.L. succeeded in passing a similar statute which met with the approval of the British authorities and received the royal assent. During the 1830s, with gradually changing conditions in the colony, it was felt by the colonists that many English master and servant statutes, although legally applicable, were not really suitable to the needs of the colony and several unsuccessful attempts were made to correct this situation.

A Criticisms of the 1837 Act of Council

Van Diemen's Land might well have had its first master and servant Act three years earlier had it not been for the genuine concern shown by the Secretary of State in England at the injustice of a number of proposed clauses. On Nov. 20th 1837, a bill "to consolidate the laws relating to Apprentices and Servants" was read for the first time in the Legislative Council. Four days later it was committed after a second reading and with a speed almost unbecoming of parliamentary procedure the committee reported the next day. After a single re-committal the bill was read for the third and final time and was passed on November 27th 1837.[2] A copy of the Act of Council was sent by the Lieutenant-Governor, Sir John Franklin, to England for the royal assent, but in the Despatch of 11th July, 1839 from Lord Glenelg, Secretary of State, the colonists were informed that the new Queen "had been pleased to disallow it".[3] Reasons for the refusal were set out at some length, although other "ordinances" which had been disallowed received very little comment. It can therefore be assumed that considerable importance was attached to explaining the defects in the proposed measure.

In the first place, Lord Glenelg noted that the Act contained clauses authorising the infliction on servants and apprentices of severe penalties: "but the offences for which these punishments are denounced are so comprehensive as to include any misconduct whatever which if not absolutely venial might be culpable only to a very light extent". In addition, he was particularly concerned that the penalties to be imposed were to be left to the

discretion of only one Justice of the Peace and, moreover, that the heavy penalties on servants were not offset by equivalent penalties for employers: "This law also fails in the essential conditions of reciprocity as the offences of Masters against their Apprentices and Servants are very inadequately punishable".

In addition to the general inadequacy of punishments for employer offences there were two serious omissions. One of them was the failure to provide any remedy of discharge for an apprentice where he complained of ill-treatment. In fact, although this was not noted by the Secretary of State, Section 5 of the Act was so badly phrased that it probably did not give any remedy at all to an apprentice where he was ill-used. The section empowered a single justice in the case of non-payment of wages to order the payment of arrears or, where there was ill-treatment, to fine an employer to the extent of six months wages of the particular artificer, manufacturer, journeyman, workman, labourer or other servant concerned. But this did not help apprentices who did not receive wages; and even those who did receive wages were unable to recover them because the power to order payment was limited to the categories of employees just mentioned, although a marginal note to the section did seem to indicate that a remedy was intended to be given to apprentices.

The other omission referred to in the Despatch was the failure of the Act, in cases of cruelty, to expressly reserve to the "ordinary tribunals ... the right of inflicting the higher penalties which might be indispensable". In other words, extreme cases of cruelty should have been dealt with by Quarter Sessions and not disposed of summarily by a single justice.[4]

The final criticism was that the Act "embraces the case of Agreements for service entered into beyond the limits of Van Diemen's Land [but] does not comprise the provisions necessary to prevent the frauds or other malpractices of which the parties might in such cases be convicted".[5]

With these objections in mind, a revised draft of the disallowed Act was introduced on June 6th 1839 almost immediately after the Governor's Address at the beginning of the 1839 session. The next day it was read for the second time and was committed but it never emerged from committee during that session. The main objection to this bill according to the Van Diemen's Land Attorney-General, Edward Macdowell, was a trivial one.[6] Members of the Legislative Council were not opposed to either its principles or its substantive provisions

but only to the mode in which it professed to carry into effect those regulations affecting female domestic servants guilty of misconduct. During the course of discussions the Chief Police Magistrate had stated that the "Female Factory" (where convict women were put to work, mostly at the wash-tub) was the place to which these, mainly free, women would be sent and, although he made it apparent that they would be much better off there than by being confined in the gaol as the only alternative, "yet the sound of the Factory seemed to terrify the Country Gentlemen and the measure was accordingly lost". In forwarding once again a draft of the bill to the Governor in May 1840 the Attorney-General made it clear that he had since ascertained that "it was in the competency of the Government to carry the provisions of the Act into effect without having recourse to the Factory",[7] presumably a reference to imprisonment the House of Correction which appeared in the 1840 Act as an alternative to gaol.

Accordingly, the Governor's Address for 1840, read on August 15th 1840, again proposed consolidating the law of masters, servants and apprentices because of the great uncertainty that existed in the administration of justice between them, and the fact that many of the U.K. Acts were inapplicable to the circumstances of the colony. A revised draft was again submitted shortly afterwards[8] and, on September 5th 1840, the new Servants and Apprentices Act was passed, this time receiving the royal assent.

A detailed analysis of the 1840 legislation in the light of the N.S.W. 1828 Act as well as in connection with the existing English law will be undertaken shortly, but at this point it would be interesting to see whether the new Act really did correct the deficiencies of the disallowed 1837 proposal.

First, there can be no doubt that the "severe penalties" were not in any way alleviated where they were imposed on apprentices and servants - up to one month's hard labour for mere breaches of contract in, for example, being absent or neglecting or refusing to work or returning work unfinished, with the additional penalty of forfeiture of wages in the case of servants.

Secondly, despite the admonition concerning the "comprehensive" nature of the employee offences covering all shades of misconduct the new Act did not alter a single word in describing the offences comprising breaches of contract. Even the residual phrase "or shall be guilty of any other misconduct" remained.

Thirdly, taking heed this time of the words of Lord Glenelg, two or more justices were required in the new Act to hear and determine cases. It is fair to say that the colonists regarded the rejection of the proposal that one justice could impose penalties at his discretion as constituting the essential objection on the part of the British Government when the definition of employee offences was so wide and the penalties so harsh. Thus, rather than attempt to define the offences more rigidly or lessen the penalties, they correctly assumed that the authorities in England would be more sympathetic to a comprehensive definition provided that at least two justices were required to exercise their discretion as to the severe penalties.

Fourthly, criticism on the grounds of failure of reciprocity, which was stated to be an "essential condition", was, not surprisingly, entirely neglected in the new legislation. After all, this was what the employer colonists thought master and servant legislation regulating the contract of service was for - to distinguish "us" from the common herd, the riff-raff of a convict colony.[9] It is surprising that the 1840 failure to punish employer breaches with equal severity did not meet with a refusal of the royal assent in the same way as the 1837 proposal. Why had the principle changed in the space of a mere three years? The answer to this question is twofold. In the first place it is clear that, although the principle had not altered, circumstances in the U.K. had resulted in a change in attitude towards employees.

Early in 1841, when the Secretary of State read the Despatch from Franklin containing a copy of the 1840 Act the recent Chartist riots must have been uppermost in his mind. The Chartist Movement was a working class movement making political demands but with social and economic pressures behind it, which began in 1838 with the publication of a "People's Charter". In May 1839 the first of three petitions was presented to Parliament at a time of great economic distress but the House of Commons, fearing an attempt at revolution, refused to consider it and this led in July 1839 to riots in Birmingham and Newport which were put down. These events would certainly help to explain the British Government's more sympathetic attitude to the new proposals of the employers constituting the V.D.L. Legislative Council.

The second reason for the success of the 1840 Act in receiving the royal assent was that the principles or essential conditions enumerated by the Secretary of State were untenable in 1837 and remained so three years later. They amounted to a statement of fairness in dealing with disputes between masters and servants which was forty years ahead of its time and which, unfortunately for employees conflicted not merely with the proposed colonial legislation but also with existing English law. This point was forcefully made by the V.D.L. Attorney-General in a letter to the Colonial Secretary accompanying the 1839 draft bill.[10] After referring to Lord Glenelg's criticisms of the disallowed 1837 Act as containing clauses authorising the infliction on apprentices and servants of severe penalties for comprehensive offences imposed by only one justice, Macdowell acidly commented, "It would be extremely unbecoming in one to question the correctness of the sentiments entertained by the Secretary of State and expressed in the foregoing paragraph but it would be equally unbecoming in me to ignore the wisdom of provisions which have been long since incorporated into British Acts of Parliament and which are from these copied almost literally as far as the objections in this paragraph are concerned with the disallowed Act". Though the Attorney-General's sentence construction might have left something to be desired, his sally on Lord Glenelg's "sentiments" was supported by a reference to the most recent English master and servant legislation, which completely undermined the latter's stand. He quite rightly point to the 1823 Act[11] to show that it authorised any one justice to commit a servant guilty of a breach of contract to a House of Correction for a reasonable time not exceeding three months with hard labour, and to abate a proportionate part of his wages. As Macdowell explained, this statute was not confined to labouring in any of the trades enumerated but extended to all labouring and to every species of misconduct "and the only difference which an industrious comparison of the British Act with the disallowed Act enables me to discover, is that the penalty in the disallowed Act is one month's imprisonment less than that given under the English Act".

On the question of discharge as a remedy for apprentices complaining of ill-treatment, the Attorney-General was forced to admit that he had been in error in failing to provide it, although he did point to the marginal note to the proposed Section 5 which was some indication that the colonial legislature had, at least, intended to provide it, and explained that this would be remedied by an entirely separate section which finally appeared as Section 7 in the 1840 Act.[12] He returned to the attack, however, with regard to Lord

Glenelg's objection to the omission of an express reservation to the ordinary tribunals of certain cases of cruelty where the right of inflicting higher penalties might have been indispensable. Again Macdowell's main argument lay in the English Act itself. The colonial Act had merely "followed the words" of that Statute which contained no such reservations. Moreover, he was of the opinion that such a clause was not, and never had been, necessary. "The term cruelty is one somewhat undefined in its nature. The treatment of the notorious Mrs. Brownrigg[13] to her apprentices was cruelty but it was murder also, and I am not aware that it required any reservations in an Act of this kind to rescue such a case from the summary jurisdiction of the Magistrate". This was supported by a later judicial authority to the effect that the English Act did not apply and justices had no power to convict a servant summarily where his offence amounted to a felony.[14]

With regard to the 1840 Act and the Secretary of State's final criticism of the disallowed 1837 Act i.e., that it embraced agreements for service made in the U.K. without containing provisions to prevent frauds and other malpractices necessarily involved in such a situation, it would be as well to explain at this point that the anxiety of the British Government had its roots in the field of emigration policy.

B Legal problems in connection with immigrant servants

In the middle of the 1830s two schemes were in operation for bringing immigrants to N.S.W., one directed by the Government of N.S.W. through its agent in England acting in conjunction with the English Emigration authorities, the Land and Emigration Commission, and the other known as the "Colonial Bounty" system because a bonus was paid for every approved immigrant landed in the colony. The bounty system, although preferred by the colonists for a number of reasons, was not under the control of the Government Immigration Agent and inevitably various frauds and abuses arose where private agents acted for N.S.W. employers in securing employees in England. In V.D.L., on the other hand, at this time tightly controlled emigration was entirely in the hands of the English Emigration authorities and no bounty system was in operation. Although the disallowed 1837 Act purported to regulate contracts of employment entered into in the U.K., on the arrival of the immigrants in V.D.L., no further clauses existed to prevent unfair practices in the U.K., because the size of the problem was not great so long as immigration remained solely a matter for the Land and Emigration Commissioners.

There was also another factor which might have explained the criticised omission. In Nov. 1837, when the Act which was later disallowed was passed by the Legislative Council, immigrant servants were not desperately required, with the exception of domestic servants, as reported by Franklin in April 1838. The convict assignment system was wide-spread and generally satisfactory, which meant that it was difficult to justify considerable expenditure in bringout out free labourers when there was every possibility that with no employment they would depart for other states. Legislation to remedy abuses where contracts of service were entered into outside V.D.L. was not therefore of great concern to the colonists at this time. But in June 1840 the assignment of newly arrived convicts ceased and then, as Coghlan has remarked, "the labour question assumed a different aspect".[15]

Employers in V.D.L. quickly realised the need to attract immigrants to the colony and held a meeting to press the Governor for the introduction of a bounty scheme similar to the one operating in N.S.W., to which the Governor agreed. Three months later, in September, the 1840 Servants and Apprentices Act was passed and yet, despite a new awareness of the importance of immigration and of the pending bounty system as a private venture, the Act still did not attempt to lay down any rules for the regulation of known abuses in such a scheme. The explanation is to be found in the inability of the colonial Government to legislate at all to prevent malpractices in connection with agreements for service entered into beyond the limits of V.D.L.

The 1840 Act, like the earlier disallowed one, was only intended to enable parties who had entered into such contracts to gain the protection (if that is the correct word from the point of view of the servants) of its provisions upon arrival in the colony and "the frauds or malpractices of which parties contracting out of this Island might be convicted cannot in any way be affected by this Act".[16] The main concern of the colonists was merely to remedy the situation which had existed previously where, because of uncertainty as to the application of received English master and servant legislation and doubt as to the enforceability in the colonial courts of contracts of service entered into outside V.D.L., both parties, if not in point of law at least in point of practical utility, were left remediless. As the Attorney-General had commented in 1839, "no gentleman in the profession recollects for at least six years a single action successfully terminated brought either by a master against a servant or by a servant against a master for the violation of any contract entered into by an Indented [sic] Servant". Thus when the Governor Sir John

Franklin wrote his Despatch,[17] enclosing a copy of recently passed 1840 Act, he stressed both the need in the colony for that piece of legislation and the importance of an Act being passed in Great Britain to provide an easier mode of rendering contracts for service made in the U.K. effectual in the colony.

The Governor had sought the advice of the Attorney-General as to the form of an agreement to be entered into by emigrants before leaving the mother country in order to bring them within the provisions of the 1840 Act on their arrival in the colony and, despite "every possible consideration with an anxiety to discover the means of legally effecting a most desirable object", the Attorney-General was of the opinion[18] that this could be done only by an Act of the Imperial Parliament or by colonial employers going to the U.K., entering into contracts with servants there and then returning to the colony accompanied by them. Needless to say, the latter was not a very practical suggestion for V.D.L. employers and a third possibility was considered, namely, the appointment in England of an agent who would enter into such contracts on behalf of colonial employers. This proposal was only tentatively put forward because Macdowell was not entirely sure that the contracts would be valid in the colony. But on one point he expressed no doubts whatsoever: that whether the contract was entered into in V.D.L. or in the U.K. with emigrants, "they become liable to, and have thrown around them the protection of the present [1840] Act". In other words, the 1840 Act could apply to make breaches of such contracts criminal offences whether or not the contracts themselves were enforceable in the colony by virtue of an Act of the British Parliament or otherwise.

This was by no means as certain as the Attorney-General seemed to think. The whole basis of the English 1823 Act rested on the relation of master and servant, bound together by a contract of service; and where no valid contract existed the jurisdiction of a justice under the Act was also non-existent.[19] If Macdowell was correct, therefore, in his conclusion that contracts of service made in the U.K. were not valid in the colony, it is not easy to understand how the provisions of the 1840 Act could have been applied to such contracts so as to bind an emigrant on his arrival. Where the emigrant commenced work according to his contract there was not necessarily a problem, since a colonial contract might be implied from the mere fact of his working and other circumstances, but where he failed to commence work in V.D.L. according to his contract in the U.K., the 1840 legislation would not apply.

The likelihood of "servants" not commencing their "service" in this way was, of course, enhanced by frauds and abuses in the U.K. which might have been adopted to persuade possible emigrants to sign contracts of service. It was further promoted in 1840 by the much higher wages to be gained in N.S.W., partly because many N.S.W. employers at this time paid only a nominal rent for their land, so that even if the 1840 Act had been available to impose harsh penalties on newly arrived immigrant servants it is doubtful whether the temptation to proceed to the mainland rather than to service would in many cases have been resisted. In the words of the Attorney-General, "as long as that temptation exists you cannot persuade the Emigrant that he commits any moral offence in violating a contract into which, on the principle of readily believing that which is agreeable to us, he will consider that he was entrapped, he will see or hear that between him and nearly double wages there is situated Bass Strait and having none of those home ties by which he was attached to his country and which mitigates if it did not reconcile him to privation he will seek in another and neighbouring colony the advantages which are denied him here".

The conclusion reached by Macdowell was that, since there was no hope of persuading such a servant that he had a moral obligation to perform his contract, the 1840 Act would provide an effective legal sanction; but it has already been shown that this was probably not so in the absence of a British Act, or where there were special circumstances such as a colonial employer actually in the U.K. contracting there, or, possibly, where an agent in the U.K. was employed.

No British Statute was in fact passed during the 1840s in accordance with the Governor's request, for the excellent reason that one already existed. The Attorney-General had pointed to certain provisions in a British Statute known as the Van Diemen's Land Company Act (1825)[20] which enabled the Company to enter into contracts with artificers, handicraftsmen, clerks, mechanics, gardeners, servants in husbandry and other labourers in the U.K. for service in the colony and which authorised the enforcement of such contracts in the colony's courts, and had argued that what was required was a general provision by the Imperial Government to the same effect. It is therefore more than a little puzzling why the Attorney-General did not refer to the general authority contained in an earlier Act on which the limited provisions of the V.D.L. Company Act were based.

Section 4 of the V.D.L. Company Act authorised the Company to enter into contracts with certain employees in the U.K. "in such and the same Manner and Form and upon under and subject to all such and the same Conditions and Regulations as are sanctioned and prescribed in and by the said Act passed in the Fourth Year of His present Majesty's Reign, in respect to Contracts entered into for the like Purposes with any private Person or Persons". The Act alluded to here was the 1823 Act for the "better Administration of Justice in N.S.W. and V.D.L." (4 Geo. IV, C.96) which, in Section 41, permitted any artificer, handicraftsman, mechanic, gardener, servant in husbandry or other labourer of the age of 18 years or more to contract by way of indenture "with any person or persons about to proceed to or actually resident in N.S.W. or V.D.L. ..... or with the agent or agents of such person or persons". The term of the contract was for any period of seven years or less and servants were to agree to faithfully serve or "to proceed to and faithfully serve such person or persons in the said Colonies".

The Court of Sessions or any two or more justices in the colonies were then empowered to punish servants by fine or imprisonment or both for any wilful violation of the terms of the indentures or any misdemeanour, miscarriage or ill-behaviour in service. Disputes between masters and men were to be settled and orders or awards made were to be enforced by execution against personal effects or by arrest and imprisonment for up to three months (Section 43).

A civil remedy was also given to colonial masters against any person who employed, retained, harboured or concealed an immigrant servant with intent to deprive the employer of his services, or with intent to defraud or injure the employer might be awarded treble costs (Section 42).

These provisions were re-enacted in the 1828 Australian Courts Act (9 Geo. IV, C.83) with the inclusion of clerks and domestic servants in the categories of servants affected, and since this statute was enacted for a limited period to expire in 1836, the relevant sections were continued until 1842 when they were made permanent.[21] They were therefore in existence when the Apprentices and Servants Act was passed in 1840, yet no express reference was made to the English 1823 or 1828 Acts by the Attorney-General or by the Governor in his Despatch, despite the fact that both statutes were of paramount force and there could be no question of their not being applied in the Colony.

It seems almost incredible that Macdowell should have been unaware of these sections and in fairness to him it should be noted that he acknowledged in his opinion that contracts might be made in the U.K. and be valid in V.D.L. where an employer was about to proceed to the colony with his newly acquired servant, and in this respect he might have had the relevant sections of the Australian Courts Act in mind; but if this were so it is not at all clear why he expressed doubts on the validity in the colony of contracts made between servants and colonial employer's agents in the U.K. when Section 41 of the 1823 Act (Section 35 in 1828) expressly authorised this. Moreover, the request for an Imperial Act to settle the question would appear to have been utterly pointless. Unfortunately, the Colonial Secretary in England made no comment on this aspect when he informed the Governor that the 1840 Act had received the royal assent.

The legal difficulties which have been discussed had not suddenly arisen for they had been bothering the "legal gentlemen" of the colony for some time, but it was not until the cessation of assignment in 1840 which led, through employer interests, to the implementation of a bounty scheme for immigration that the issues came to a head. This was recognised by the Governor in his November 1840 Despatch where, after referring to the need for a British Act to solve the problem of contracts for service made in the U.K., he said, "This question is now ... invested with a degree of interest which formerly did not attach to it. The discontinuance of assignment and the increased demand for free labour, render it highly desirable that every legal, as well as every pecuniary facility within the power of the Government should be extended to those who are desirous of forming contracts with labourers in England wishing to emigrate".

In 1841 the bounty scheme brought out 333 people to the colony and in 1842 about 900,[22] but was then discontinued due to the large number of convicts under short sentence who were about to flood the labour market. The urgency was thus removed from the plea for a British Act to make emigrants contracts in the U.K. valid in V.D.L. and the position remained uncertain though not disastrous throughout the 1840s. It was not until a renewed interest in immigrant labour was shown by employers in the colony, as a result of the cessation of transportation in the early 1850s, that the problem again became vitally important.

NOTES

1. 4 Vict. No. 12.

2. 1 Vict. No. 15.

3. The despatch was laid on the table of the Legislative Council during the Governor's Address to the Legislative Council at the beginning of the 1839 session.

4. See *infra*

5. *Ibid.*

6. Letter from Attorney-General to Colonial Secretary, May 20th 1840.

7. The Attorney-General's letter was one of the enclosures in the Despatch to Lord John Russell of the 19th November 1840 containing *inter alia* a copy of the 1840 Act.

8. August 18th 1840. The bill was read a second time, was committed on August 19th and the committee reported on September 2nd.

9. Daphne Simon writing on "*Master & Servant*" in *Democracy and the Labour Movement* (1954) edited by John Saville, 160 put the point well when she wrote:

> "It is a special characteristic of capitalist society in contrast to all earlier class societies that the position of the ruling class is not supported by a privileged legal status. In slave society the slave owners are plainly the masters of the slaves because the slaves are their chattels, beings without legal rights; and in feudal society the feudal lords are plainly the rulers over the serfs because the serfs are legally unfree and forced to labour part of the time for the lords without reward. In capitalist society, however, the capitalist *as such* has no rights which the wage-earner does not have, and their relation to each other is not determined by their having a different status but by the contract which they both enter into. Hence the law regulating their relation forms part of the law of contract"

10. May 6th 1839. This letter was also an enclosure in the Governor's Despatch of Nov. 19th 1840 to the new Secretary of State, Lord Russell.

11. 4 Geo. IV c.34.

12. But the inability of an apprentice to recover any wages due where the complaint was "non-payment of wages" remained. In this respect the existing English legislation was more comprehensive, as will be seen.

13. Elizabeth Brownrigg, midwife, was convicted of the murder of one of her female apprentices who died after being cruelly flogged. She was hanged at Tyburn on 14th September 1767 and her skeleton was exposed in a niche at Surgeons' Hall in the Old Bailey, "that the heinousness of her cruelty might make the more lasting impression on the minds of the spectators". See *Dictionary of National Biography*, 84.

14. *Reg* v. *Fytche* (1844) 8 Jur. 576, B.C.

15. *Op. cit.*, 368.

16. Letter from Attorney-General to Colonial Secretary, 6th May 1839.

17. November 19th, 1840.

18. Letter of 20th May 1840 to the Colonial Secretary.

19. *Lancaster* v. *Greaves* (1829) *op. cit.*

20. 6 Geo. IV c.39, which provided for the creation of the V.D.L. Company by charter for the cultivation and improvement of waste lands in the colony by courtesy of the convicts.

21. By 6 & 7 Will; IV c.46; 7 Will. IV & 1 Vict. c.42; 1 & 2 Vict. c.50; 2 & 3 Vict. c.70; 3 & 4 Vict. c.62; 5 & 6 Vict. c.76.

22. Coghlan, *op. cit.*, 369.

CHAPTER 3

THE APPRENTICES AND SERVANTS ACT (1840)

The importance of N.S.W. legislation of 1828 to both the form and substance of the first piece of master and servant legislation to emerge from the Legislative Council of V.D.L. and receive the royal assent, may be illustrated by a comparison of their respective provisions. Generally speaking the form of the 1840 Act[1] and its N.S.W. counterpart was very similar in the creation of offences committed by masters and servants; misconduct in connection with the contracts of service was made an offence, as was employing or receiving another's servant. In addition, the 1840 Act extended the offences to incorporate the master-apprentice relation, which was the subject of an entirely separate Act in N.S.W.[2] The V.D.L. legislation also embraced certain specifically mentioned independent contractors who were distinguished from servants by the nature of their occupations and, accordingly, treated separately. It will be shown that this distinction was warranted in view of case law developments in connection with the 1823 English Act. As regards omissions, it is to the credit of the V.D.L. Legislative Council that nothing corresponding to the N.S.W. Act's Section 3 ("wilfully or negligently spoiling or losing etc.") was included in the 1840 statute. We have already noted the width and injustice of this particular section and nothing further need be added to it here.

A Servants' misconduct

In the same way as the N.S.W. legislation, Section 1 of the 1840 Act made it an offence for a servant to absent himself from service or to refuse to or neglect to perform his work diligently. Apart from some minor tightening up in phraseology,[3] the only difference in the 1840 Act with regard to the substance of the offence was the inclusion of the general words, "or shall be guilty of any other misconduct". In this respect the V.D.L. legislation followed more closely the English 1823 Act. Both the procedure and penalties, laid down by the 1840 legislation differ considerably however from the N.S.W. Act. Although a complaint could be made to one justice, two or more were required to determine whether an offence had been committed under Section 1, and throughout the Act.

The effect, in theory, was to replace the sometimes very summary procedure before one justice, which was still in operation in N.S.W. and England, with the wisdom of two magistrates, one supposedly acting as a check upon the other.

As regards penalties, under Section 1 the 1840 Act empowered justices to send a convicted servant to gaol for up to two months or, at their discretion, to a House of Correction with hard labour for a maximum of one month. In addition they were authorised to order forfeiture of all or part of any wages due. These alternatives were identical to those in the 1828 N.S.W. Act except that the maximum terms of imprisonment were very much lighter than those prescribed by the N.S.W. enactment. On the other hand, as in N.S.W., the V.D.L. legislature was not prepared to follow the English 1823 Act in granting discharge from the contract of service as a further alternative. Consequently, a master might have his servant punished again and again under the Act and still retain his services. The evils of this system, especially where the employer was harsh and oppressive, can be readily imagined, yet so great was the demand for labour than an employer often thought it better to retain a recalcitrant servant rather than have none at all, and this notion pervades not only the 1828 Act in N.S.W. and the V.D.L. Act of 1840, but also most of the later 1850's master and servant legislation of the latter colony.

B Misconduct by independent contractors

Section 2 of the V.D.L. Act was also an important one in the history of master and servant legislation because, for the first time, a clear distinction was made between the master-servant relation and what would, today, be referred to as the employer-independent contractor relation. This section applied specifically to "artificers, splitters, fencers, well sinkers, mowers, reapers, gatherers of hay and corn, shepherds and other labourers", who occasionally contracted with persons for the performance of work "in a certain time and at a certain price", and who then left their work before the terms of their contracts were fulfilled "to the greatest disappointment and loss of the persons with whom they so contract". The section then laid down the penalties for non-fulfilment of the contract.

The existence of Section 2 shows two things. First, that the employee contractors singled out by the Act constituted an important group in the largely rural industry of the colony because of the nature of their work. They were men whose services were required only from time to time by an individual employer, but who were nevertheless in a strong position *vis-à-vis* potential employers either because their skills were in short supply or because of the urgency of the seasonal need for their services.

Secondly, the existence of the section is a clear indication that the Legislative Council of V.D.L. was fully aware in 1840 of certain case-law developments in England after the N.S.W. Act had been passed in 1828. It has already been noted that neither the English 1823 Act nor the later one in N.S.W. purported to distinguish the master and servant relation from that of employer and independent contractor. We have see that the control tests was adopted as a means of distinction in 1840 (*Quarman* v. *Burnett*) but that English law had begun to grope its way to this conclusion in dissenting opinions in one or two important cases in the late 1820s, involving employers' liability for the torts of their employees. Furthermore, it has been shown that the distinction itself, though not the means of distinguishing, was recognised in 1829 (*Lancaster* v. *Greaves*) in relation to the English 1823 master and servant legislation. This development came too late to affect the drafting of the N.S.W. Act, but it did cause the separate treatment, in 1840, of employees under contracts for services as distinct from contracts of service.

The sentence prescribed for breach of contract by artificers, splitters, fencers etc., in Section 2, was a maximum of two months hard labour in the House of Correction; no other alternatives were available. In particular, the section is silent on the question of the convicted contractor forfeiting any money owed to him by the employer. In the majority of cases concerning contractors, payment would not be due until full performance of the work, so that nothing would be owed to the contractor who was convicted of a Section 2 offence and, consequently, nothing could be forfeited. However, unlike a servant under Section 1, only non-performance in the sense of failure to complete the contract was punishable since there was no equivalent to the Section 1 offence of being "guilty of any other misconduct" in relation to the contract.[4]

C Misconduct by apprentices

Another important relation regulated by the 1840 Act was that of master and apprentice. The N.S.W. Act was silent on this aspect of employment because the situation was covered by two general clauses in a separate Act passed on the same day which made it clear that all masters and apprentices in the colony were subject to English law with disputes between them settled by two justices acting according to the equity of the case.[5] In V.D.L., however, in the absence of any local legislation the English law of master and apprentice was applicable until 1840 by virtue of Section 24 of the Australian Courts Act (1828).

1) English law of master and apprentice

The English law relating to apprentices was contained in a series of Acts commencing with the Statute of Apprentices in 1563[6] which, *inter alia*, provided for the punishment of persons who refused to be apprentices and the settling of disputes between masters and apprentices.[7] During the eighteenth century many of the master and servant Acts already referred to included special provisions relating to apprentices. In 1747,[8] the remedy of discharge from apprenticeship was given to a certain class of apprentices where there was a complaint of "any misusage, refusal of necessary provisions, cruelty or other ill treatment" against a master. The remedy was only available however to an apprentice upon whose binding out no larger sum than £5 "of lawful British money" was paid, or one who had been "put out" by the parish.[8]

In 1766,[10] a single justice was empowered to order all apprentices (other than those upon whose binding out more than £10 had been paid) who left before the expiry of their apprenticeships, to serve the periods they were absent in addition to the original apprenticeship periods, or, alternatively to make satisfaction to their masters. On refusal they faced the prospect of imprisonment in a House of Correction for up to three months. It should be noted, however, that the 1766 Act did not purport to punish apprentices for general misconduct, other than mere absence. A magistrate was therefore only empowered to convict for misconduct under the 1747 Act. Conversely, no remedy was given in the 1766 legislation for ill-treated apprentices and, unfortunately, recourse

to the 1747 Act did not always provide the apprentice with his remedy. Under the 1766 Act, if the premium had been more than £5 but less than £10, a master was able to have his apprentice punished when he absented himself, perhaps after cruel treatment, but such an apprentice was unable to invoke the provisions of the 1747 Act for his protection because he was outside the operation of that statute.

Almost thirty years were to elapse before special attention was given to this injustice and in 1793 an Act was passed entitled "An Act to authorise Justices of the Peace to impose fines upon Constables, Overseers and other Peace and Parish Officers, for Neglect of Duty, and on Masters of Apprentices for ill Usage of such their Apprentices, and also to make Provision for the Execution of Warrants of Distress granted by Magistrates".[11]

Section 1 of this "rag, tag and bobtail" legislation enabled two or more justices receiving a complaint of ill-usage from any apprentice whether put out by the parish or not (provided no more than a £10 premium was paid on his binding out), to fine the master up to 40s. A further rise in the amounts of premiums normally demanded for binding out resulted in another extension in 1823[12] to include apprenticeships where no greater sum than £25 had been paid.

Less than a month later the same session of Parliament passed the important 1823 master and servant legislation which has already been referred to, and which was also concerned, as its title suggests, with the master-apprentice relation.[13] By virtue of Section 1, any master or his steward, manager or agent could complain to a justice concerning his apprentice's "misdemeanour, misconduct or ill behaviour" or the apprentice's act of absconding from service and upon conviction all or any part of the apprentice's wages could be abated or he could be sent instead to the House of Correction with hard labour for up to three months. This procedure was only applicable where the binding out premium was £25 or less.

Moreover, under Section 2, all complaints and disputes arising between master and apprentice respecting wages were to be settled by one or more justices who could order payment of wages to an apprentice provided the sum in question did not exceed £10. The Act did not purport to affect any other

remedies of the apprentice against his master for ill usage, etc. so that even after 4 Geo.IV, c.34, he was bound to rely on the 1747 enactment, as extended by the 1793 Act and 4 Geo.IV, c.29, for relief from an overbearing master.

A question which often caused difficulties between master and apprentice was whether the master was bound to return the premium when the apprenticeship was discharged. Behind the issue lay a long history of uncertainty.

It has already been noted that the Statute of Apprentices (Section 35) provided the remedy of discharge of an apprentice from his apprenticeship at his or his master's instigation, but unfortunately the Statute was silent as to the justices' power to order repayment of the premium. Some cases decided after 1563 appear to have held that the latter was incidental to the power to discharge,[14] whereas *Rex* v. *Vandeleer*[15] is a clear authority the other way. None of the eighteenth century legislation which has been referred to mentioned the problem and their silence made the matter even more perplexing. In 1823, after almost three centuries, justices were given the discretion of ordering a refund of the premium, subject of course to the overriding requirement of a £25 or less binding out premium.[16] Where the premium was greater than this amount, difficulty remained until judicially settled in *East* v. *Pell*.[17]

The case was decided in the Court of Exchequer of Pleas to which a master had appealed after the justices at sessions had ordered the discharge of his apprentice John Pell, and the refund of the £30 premium on the grounds of ill usage. The appellant argued that the limited power (i.e. limited by reference to the £25 premium) granted to justices by 4 Geo.IV, c.29, would have been unnecessary if it had previously existed without limitation under the Elizabethan Statute. This argument was accepted by Lord Abinger C.B. who was of the opinion that no express power to discharge the indenture was given by the Statute of Apprentices to a single justice and that therefore the master should succeed. The other judges came to the same conclusion for different reasons.

Parke, B. was not prepared to lay much stress on the opinion of the legislature as supposed to be shown in the statute of 4 Geo. IV, c.29. He

preferred to decide the case on the ground that "there is no current of authorities obliging us to put a different sense upon the words of the statute than that which in ordinary construction they would bear." [18]

Alderson, B. agreed that the Elizabethan statute only gave the power to discharge but he added, *obiter*, that the statute was not intended to apply to cases where no premium was given at all. He pointed out that the earlier part of Section 35 gave the power to force an apprentice into apprenticeship and, if he refused, to commit him "until he be contented" to do so. The section then proceeded to enact that if any such master misused his apprentice a complaint could be made to a justice. The master referred to, he argued, was the master who had compelled his apprentice to come to him, and who had received no premium. "The whole clause leads to the conclusion that this was not an omission in the statute, but that it was intended not to apply to cases where a premium was not contracted for."[19]

2) A comparison of the Colonial and English provisions.

Against this briefly sketched background of the then existing English legislation the sections in V.D.L. Act of 1840 relating to masters and apprentices may be placed in a better perspective. Section 3 provided a master with a remedy against his apprentice where the latter absented himself from his master's service before the expiration of the term of his apprenticeship. Rather surprisingly, the section is an almost exact replica, not of the provisions of the later 1823 Act (4 Geo. IV, c.34) as would be expected, but of those contained in the earlier 1766 Act. The only important differences between the 1766 and 1840 Acts are as follows:

First, Section 3 of the V.D.L. legislation required a minimum of two justices to determine the issue as against one under the 1766 Act.

Secondly, the penalty exacted on an apprentice for refusing to serve the extra time or refusing to make satisfaction for the loss sustained by his master was imprisonment in the House of Correction for up to one month with hard labour, whereas the 1766 Act did not refer specifically to hard labour. On the other hand in the latter the possible term of imprisonment was longer: a maximum of three months.

Thirdly, the 1840 Act did not apply where the binding out premium was more than £20.[20] As we have already seen the figure in the 1766 Act was £10, extended to £25 by the later 1823 Act (4 Geo. IV, c.34). It is not easy to see why the limit was retained at all so as to exclude certain masters and apprentices from the provisions of the Acts, both English and colonial. There is no doubt that the effect was to create two classes of apprenticeships depending on the amount of the premium, one where disputes were subject to regulation and one where they were not. It is possible, however, that the legislation was intended to distinguish apprenticeships where a considerable sum had been paid by an interested party, such as a close relative, who might be expected to be personally concerned with the health of the relationship between the master he had chosen and the apprentice, from those where, generally speaking, no one had invested very much and was not likely to be greatly concerned about the later conduct of the parties. Only in the latter case was statutory regulation thought necessary. Support for this view is to be found in the fact that the 1747 Act applied to apprenticeships either where no more than £5 was paid as a premium or where apprentices were put out by the parish, presumably whatever the amount paid at the binding out.

Perhaps an additional reason for the limit was that where a large premium was paid there was thought to be less of a need to compensate a master for any loss suffered due to his apprentice's absence or misconduct. Usually in such cases a master would keep the premium, especially as the law was unsettled outside the Acts until *East* v. *Pell* in 1839.

Fourthly, the 1766 Act contained an exemption clause which prevented a long-lost apprentice from being taken in later life and forced to serve the period of his absence or face the penalties. Section 3 enacted that an apprentice could not be compelled to serve or to make satisfaction after the expiration of seven years after the end of the original apprenticeship period. Nothing similar appears in the V.D.L. Act.

It should be noted that Section 3 of the 1840 legislation only dealt with apprentices' absenteeism and was not concerned with any other form of misconduct. The jurisdiction of magistrates to punish for misconduct was provided by Section 4 which laid down different penalties. The remedies of a master in V.D.L. against his apprentice therefore depended

on whether the apprentice was guilty of absconding and refusing to serve extra time or to make satisfaction, or guilty simply of misconduct. In the former case, hard labour for up to one month in the House of Correction was the result; in the latter, because of the peculiar significance of the words "there to be corrected"[21] the apprentice could expect whipping to be part of his punishment there, although he might, in addition or as an alternative, be discharged from his apprenticeship.[22]

An apprentice's remedy for his master's "mis-usage, refusal of necessary provision, cruelty, or ill-treatment towards him" was provided by Section 7 of the 1840 Act. Like the provisions of the English 1747 Act which it closely resembles, the only remedy provided was that of discharge from the apprenticeship. The other remedies provided by the 1793 and 1823 Acts were not included. The ill-used apprentice was therefore unable to have his master fined and, furthermore, if the cause of the ill-treatment was a disagreement concerning wages the apprentice was unable to bring the dispute before a justice to order payment to be made to him, as could his English counterpart under Section 2 of the 1823 Act. The power to make such an order, provided the amount did not exceed £10, might yet have existed by virtue of the reception of the English 1823 Act as part of the law of V.D.L., but the apprentice who looked for assistance on the point in 1840 received no help from the local legislation.

D Servants contracting by deed or in writing

Before leaving the master-apprentice provisions of the 1840 Act it is worth noting that they applied not merely to persons who were bound by "indenture, deed or agreement in writing to serve" as apprentices but also to servants who had contracted in these forms. By implication, therefore, Sections 1 and 5, which have already been examined, covered only those servants who had not contracted in writing. Consequently, there was a significant difference in the nature and extent of the remedies given to both master and servant where the servant had contracted in writing and where he had not. A master's remedies in the former case, where his servant was guilty of being absent from service, were to force the servant to make satisfaction or to serve the extra period and, in the event of refusal, to cause him to be imprisoned for up to one month in a House of Correction, or where there was misconduct by his servant, to have the same sentence imposed with the alternative of discharge of the contract, or both imprisonment and discharge.

On the other hand, in the more usual case where the contract was not in writing, a master's remedies for both misconduct and absence were to have his servant imprisoned in the ordinary gaol for up to two months or in the House of Correction for up to one month with the possibility in either case, of the additional remedy of forfeiture of wages.

These complicated provisions were avoided by the simpler but harsher N.S.W. legislation, which did not draw a distinction between servants who had contracted in writing and those who had not.

E Offences by employers

Where a servant or contractor was seeking a remedy against his master or employer for "mis-usage, refusal of necessary provision, non-payment of wages, cruelty or other ill-treatment," Sections 5 and 6 provided that two or more justices could make an order for wages due and, further, an order for six months' wages as amends. For the V.D.L. servant this was more advantageous than similar clauses in the N.S.W. Act which authorized the recovery of up to six months' wages as amends, but which did not provide for the recovery of earned wages, as such.

The general effect of the V.D.L. legislation was that, in addition to recovering wages due to him, an unpaid servant was provided with a remedy which both penalized the master and, unlike a fine or discharge from the contract, invariably benefited the servant. It would be unrealistic to suppose, however, that servants in V.D.L. greeted the emergence of the 1840 Act with anything remotely resembling joy, for six months' wages as amends for a master's cruelty rested lightly in the balance against long periods of imprisonment for a servant's misconduct. Moreover, unlike the N.S.W. Act, the 1840 legislation failed to provide for the sometimes useful alternative or additional remedy of discharge from the contract of service where a servant was the complainant.

F Knowingly employing, receiving or entertaining an employee

Two further sections of the 1840 Act remain to be discussed. The first is Section 8 which borrowed heavily from Section 2 of the N.S.W. Act in creating the offence of knowingly employing, receiving or entertaining one who is already employed, during his term of employment.

Because the V.D.L. legislation distinguished servants from certain types of independent contractors, and also dealt with apprentices, Section 8 formulated the offence in wider terms so as to include all three categories of employee. Moreover, where an apprentice[23] was concerned a person committed the offence if he should "knowingly harbour" as well as knowingly "employ, receive or entertain" the apprentice.

The addition of the word "harbour" and the separate treatment of apprentices from servants and independent contractors in the section would seem to indicate that the additional offence of harbouring[24] could only apply where an apprentice was involved and not in connection with a servant or independent contractor. On the other hand, it has already been noted that the phrase "knowingly receive, employ or entertain" in Section 2 of the 1828 N.S.W. Act, was capable of covering "harbouring" without the latter being specifically mentioned, so that the addition of this word in the 1840 Act in relation to apprentices would seem to add nothing to the width of the offence although it was obviously the intention of the Legislative Council to add something, otherwise the separate treatment of apprentices cannot readily be explained. It is also significant that a later V.D.L. Master and Servant Act passed in 1852 restated this offence so that a person could be guilty of "harbouring, employing, receiving or entertaining" all three classes of employees. This was done presumably to clear up doubts as to the applicability of Section 8 of the 1840 legislation to the harbouring of servants and independent contractors.

Given the peculiar nature of the labour market in the colony and the constant anxiety of employers that their employees would be tempted away from them by the lure of higher wages under another employer, it would be expected that a substantial penalty would be imposed on the second employer. This expectation is fulfilled for the section empowered two or more justices to order payment of a fine up to £50. Unfortunately, like the N.S.W. legislation,[25] the wording of the section was wide enough to catch not merely employers but also friends and relatives of an employee who might knowingly receive or entertain him during his working hours.

G Appeals

Finally, although a right of appeal was given by Section 10, it existed only in cases where "a pecuniary penalty" was given, and employees sentenced to periods of imprisonment with hard labour were therefore denied the possibility of relief.

NOTES

1. 4 Vict. No.12.

2. 9 Geo. IV, No.8 (1828).

3. For example, 1840 Act "... employed in any nature howsoever either as a menial or house servant or in any other capacity."

   1828 Act "... either as a menial or house servant, or on any farm or estate." (Both Acts clearly applied to domestic servants which was not the case with the English 1823 legislation).

   1840 Act "... who shall have been hired or engaged by or with any master or mistress or employer or employees for any time or term whatsoever."

   1828 Act "... employer or employees, for any time whatsoever,..."

4. Under Section 6 a remedy for ill usage etc. provided for the classes of independent contractors referred to in exactly the same terms as for servants under Section 5, i.e. payment of wages and possibly amends in addition.

5. 9 Geo. IV, No.8, s.4 (1828).

6. 5 Eliz. c.4, s.35.

7. The remedy, if the master was found to be at fault, was discharge of the apprentice from his "apprenticehood"; if the apprentice was at fault then the justices were empowered to "cause such due correction and punishment to be ministered unto him, as by their wisdom and discretions shall be thought meet".

8. 20 Geo. II, c.19, s.3.

9. Masters were also able to take steps to have their apprentices punished for "any misdemeanour, miscarriage, or ill behaviour". The penalty was imprisonment in a House of Correction, "there to remain and be corrected" with hard labour for up to one month or alternatively discharge from the apprenticeship.

10. 6 Geo. III c.25, s.1.

11. 33 Geo. III c.55.

12. "An Act to increase the Power of Magistrates in Cases of Apprenticeships" (4 Geo. IV, c.29, s.1).

13. "An Act to enlarge the Powers of Justices in determining Complaints between Masters and Servants, and between Masters, Apprentices, Artificers and others (4 Geo. IV, c.34).

14. For example, *Dillan's Case* (1 Salk 67); *Rex* v. *Johnson* (1 Salk 68).

15. 1 Str. 69.

16. By 4 Geo. IV, c.29, s.2.

17. 150 E.R. 1588.

18. *Ibid.* 1592.

19. *Ibid.*

20. For a case where magistrates acknowledged that they had no jurisdiction because more than this amount had been paid on the binding out of an apprentice charged with absence without leave, see Record Book of Charges Laid, Police Court, Hobart Town December 1840 to May 1841, on January 20th 1841.

21. See *Wood* v. *Fenwick op. cit.*

22. It is very likely that whipping was not intended to be part of the apprentice's punishment. Section 4 empowered magistrates to "punish the offender by commitment to the House of Correction there to remain and be corrected and kept to hard labour for a reasonable time not exceeding one calendar month or otherwise by discharging such apprentice", but the proviso which gave the power to commit in addition to discharging the contract omitted the phrase "and be corrected". Since the object of the proviso was to permit the addition of the already mentioned alternatives the absence of the phrase raises doubts that whipping really was intended as part of the apprentices punishment where he was merely committed to a House of Correction. Moreover, the phrase was not used in Section 1 which referred to the imprisonment in a House of Correction of a servant guilty of misconduct and it would therefore seem very unlikely that it was intended that a young apprentice should suffer what was not inflicted on an adult. Nevertheless, the phrase remained in the Act and enabled justices in V.D.L. to follow the interpretation accepted by the court in *Wood* v. *Fenwick*, and order the whipping of a convicted apprentice.

23. This would include servants who had contracted by indenture, deed or agreement in writing as well as apprentices by virtue of the word "such" which refers back to the original full description of the category in Section 3.

24. *I.e.*, continuing to employ or entertain after notice that the employee was already employed although no such knowledge existed at the time the employee was first employed or entertained.

25. Where the amount of the fine was a minimum of £5 and a maximum of £20. The N.S.W. Act (s.2) provided that half the fine was to be applied to the maintenance of the poor in the colony, but the V.D.L. Act in 1840 was silent on the question, although the later Act in 1852 did make specific provision for it.

CHAPTER 4

BACKGROUND TO THE SERVANTS AND APPRENTICES ACT[1] (1852)

In retrospect there can be little doubt that the general tenor of the 1840 Act was one of intolerance and injustice towards the free servant, although it must be borne in mind that many free men were ex-convicts and that the number of free immigrant labourers was vastly outweighed by the number of ticket-of-leave and assigned servants on the labour market. If the 1840 Act is regarded as an extension of the convict rules and regulations made necessary by the peculiar conditions of the colony the provisions of the Act are thrown into better perspective. This rationalisation would not, of course, have appealed to the free immigrant in the colony but, since their numbers were small and since they had been subjected to a similar form of oppression in the U.K. by virtue of the English master and servant legislation, their complaints were either not heard or not made at all. This was particularly so in the absence of any strong union voice which in England was ultimately successful in securing the partial repeal of the offending legislation in 1867 and its total repeal in 1875.

A number of cases decided shortly after the 1840 Act was passed seem a first glance to indicate a marked difference in the severity of punishments awarded for offences proscribed by it, depending on the status of the accused.[2]

On May 25th 1841, John Holland, an assigned servant, appeared before the Chief Police Magistrate in the Hobart Town Police Court charged by his master with being drunk and, on pleading guilty, was sentenced to one month's hard labour. On the other hand, four days later, George Culliford, a free hired servant was fined 5s. for the same offence after a complaint by his master.

Two days later, Benjamin Walker, an assigned servant, was charged by his master "with feigning sickness on Saturday last and a strong suspicion with intending to abscond for the purpose of joining some Bushrangers". He was sentenced to be returned to the service of the Government (often chain gang work) and it was also recommended that he be sent on probation to Port Arthur. In June 1841, another assigned servant was convicted on a complaint by his

master of being drunk and neglecting his duty. His punishment was a four month stint of hard labour. On the other hand, Thomas Gordon, a free servant convicted of misconduct in his hired service in being drunk and threatening to assault his master, was committed to the House of Correction "there to be held to hard labour for one month". Two other free men convicted on January 22nd 1841 of absenting themselves without leave from their hired service were committed to the House of Correction there to be held to hard labour for 48 hours.

Free indentured apprentices also appear to have been dealt with fairly leniently. In two cases in the Hobart Police Court in January and February 1841 apprentices convicted of absenting themselves without leave were merely admonished.

It should be noted, however, that the discrimination in sentencing free men and convicts for similar offences was not practised within the provisions of the 1840 Act. Many of the sentences imposed on assigned servants and men holding tickets-of-leave were far more than the maxima laid down by the Act. It is safe to assume, therefore, that the Act did not apply to convicts in service and that they were convicted and sentenced by virtue of the general powers vested in justices rather than under the specific authority of the Act. This is well illustrated by the case of William Archer, a ticket-of-leave man, who was convicted of misconduct in being on his ex-master's premises in the company of two female assigned servants and two bottles of spirits. The sworn statement of a Mr. Carter disclosed that Archer had been "paid off" by him and told to "go away" but that when Carter had returned home that evening he had found the accused comfortably ensconced in his loft. The important point here is that the offence had been committed after the relation of master and servant had been terminated. The Act could not, therefore, have been applicable and the sentence (ticket-of-leave suspended with an order that Archer should reside in the interior of the colony) was not one which could have been imposed under it.

Where free men had been convicted under the Act and sentenced to hard labour the attitude of the authorities appears to have been one of unmitigated, uniform severity, with long hours on the Tread Mill. In July 1850, Denison declared that "The Tread Mill does of course some good but . . ." he was in favour of putting men sentenced to hard labour on public works outside the prison. Accordingly, he wrote to the Law Officers to request them to look

into the powers of the prison authorities to take men outside for stone breaking. When informed that there were 100 "free" men who had been sentenced to hard labour in prison, some of them probably under the 1840 Act, he expressed the view that all "free" men should be included, but was further advised by the Attorney-General in August of that year, "in every instance of a prisoner not convicted of felony, to abstain from resorting to the measure contemplated until advised by us that it is safe to do so".[3]

The legal question revolved around an interpretation of Section 28 of the Quarter Sessions Act[4] which provided that,"where any person not being a transported offender shall have been sentenced to hard labour or imprisonment with hard labour or to solitary confinement it shall be lawful for the Lieutenant-Governor to cause such sentence to be carried into effect in any gaol or house of correction within this Island and its Dependencies as to such Lieutenant-Governor may from time to time seem meet or (where any such person was so sentenced for felony or other infamous crime) to cause every such sentence of hard labour to be carried into effect in or on any of the public works or roads of this Island or its Dependencies or otherwise an either in or out of chains as such Lieutenant-Governor shall from time to time think proper".

The Solicitor-General, in an opinion given on 1st August 1850, in which the Attorney-General concurred, thought that, with regard to the first class of offenders mentioned, *viz.* those sentenced for misdemeanour or any offence less than that of felony or infamous crime (which would have included those sentenced under the 1840 Act), it was beyond the authority of the Lieutenant-Governor to direct their sentences to be carried into effect in or on any of the public works of the colony or anywhere except within the walls of some gaol or house of correction or some yard forming a part of a gaol or house of correction and not being separated from it by a road or otherwise. Consequently,it looked as though the tread mill was destined to remain the most important, if least unproductive, instrument of torture for men and women sentenced to hard labour for breaches of contract. But the Solicitor-General had given Denison the key with which he promptly unlocked the problem. Within a matter of days land was acquired from a Mr. Gunn at a rent of £8 p.a. for seven years which happened to be adjacent to the prison and was declared to be a part of it, thus avoiding the legal objection. A shed was constructed to house the 100 "free" men who were employed breaking stones and the cost of the project was to be defrayed from money allocated to the repair of streets

since the stones were to be used for that purpose. Euthusiasm for the scheme grew to the extent that further land was rented at £20 p.a. to provide a right of way for a "train road" between the quarry in Park Street, Hobart, and the stone breaking yard, although it is a fair assumption that the "free" men concerned were not nearly so enthusiastic.

In 1838, out of a total population of 46,000, there were 32,000 adults of whom 18,000 were convicts. Because the British Government continued to send convicts to V.D.L., even though there was no employment for them, at the rate of 3,000 a year, and because the number of free men remained static, by 1840 there were 24,000 convicts out of 38,000 adults, or almost two-thirds of the adult population which was convict. Of this number a substantial proportion were available at very low rates on the labour market.

When in 1840 a Select Committee of the House of Commons reported on transportation, the assignment system was halted and in 1843 a new system came into operation in the colony under which a convict was to pass through five stages on the road to liberty. First, hard labour with definite moral and religious instruction; secondly, as a member of a probation gang with a continuance of the same instruction; thirdly, as a probation pass-holder; fourthly, as a holder of a ticket-of-leave after half his sentence was served; and finally, with either a conditional or absolute pardon.

Pass holders were of three types. The first category was composed of those who could take private employment only with the prior consent of the Governor. Half their earnings was placed in the Savings Bank and was left there until they reached the ticket-of-leave stage. Those in the second category could be employed with the subsequent approval of the Governor and could keep two-thirds of their wages, the remaining third was deposited in the Bank. The third group also required the Governor's subsequent approval but could keep the whole of their wages. Advancement depended on good conduct reports at each stage although it was not necessary to go through all three categories of pass-holder.

In the words of one of the authors of the scheme, Lord Stanley, "The pivot of the whole plan is that part of the system which is described as probation gangs, a state through which all must pass, in which all must be observed, known and closely superintended - where all may be brought within the reach of moral and religious influences - a stage from which all will be

anxious to emerge and to which the incorrigible and refractory may be sent back". The theory was that moral and religious influences would have most impact where it was toughest because convicts would want to get on to a more lenient stage.

The obvious drawback to the scheme, and one which contributed in no small way to its eventual failure, was the mere surface acceptance by convicts of the indoctrination. Also important was the fact that reform depended very much on the co-operation of employers in their relations with convicts and this was not forthcoming because employers were not as a whole interested in their convict employees' spiritual well being. Their only interest in them was, in many cases, the employees' ability to labour. Furthermore, from 1841 until 1845, V.D.L. suffered the effects of a severe economic depression with the result that there was little or no demand for the services of probation pass-holders, not to mention the additional burden of character reform. The scheme depended on mercilessly hard work in the early stages and effective supervision by employers so that where employment was not forthcoming the plan was bound to fail. For example, because there were no private employers, as early as 1844 it was found necessary to employ 2,600 pass-holders on Government relief work and clearing scrub which grew again almost as soon as the convicts had finished the task[5]

The provisions respecting banking of convicts' wages were entirely neglected and in the end the Governor took the employers' view that no saving could be expected from the small wages allowed (initially 3s. 5d. a week) with the result that the first two categories of pass-holders were ignored and only men qualified to receive passes in the third category were given them. Eardley Wilmot who had succeeded Arthur as Governor in 1843 was blamed for the failure and was replaced by Denison in 1847.

It has been said that "the grievous complaint against the Stanley probation system was that, in replacing the assignment system of indentured labour it robbed employers of a supply of cheap labour".[6] But it would probably be equally correct to say that the failure of the Stanley probation system was due to the non-co-operation of employers in a time of economic depression. It was as much a lack of demand for labour as a failure in supply that contributed to the cessation of the scheme. It was only in 1845 when V.D.L. began to emerge from the depression and after the Stanley system had been in operation for almost two years that the employers' concern for "abundant and cheap labour" was re-awakened.

This concern was directed to securing a supply of free immigrants rather than the setting up of a new system of transportation. As Professor Townsley has indicated, the anti-transportationists campaign slowly took the form of a moral crusade[7] and Governor Denison was very concerned with the growing colonial abolitionist view. Consequently, when proposals were put forward in the U.K. for the reintroduction of transportation in 1846 the Governor received, in 1847, an assurance from Earl Grey who had succeeded Gladstone at the Colonial Office that no more convicts would be sent to V.D.L. for two years.

By this time the economy had picked up and the employment of pass-holders was such (10,673 out of 14,871 pass-holders) that the economic health of the colony was to a large extent dependent on their labour. The result was not a happy one for free immigrants. Wage rates were depressed to unreasonable levels and free labourers were continually undercut and left without work by the employers' desire to keep costs as low as possible and the convicts' willingness to escape the horrors of gang work. It is not therefore surprising that there was very little immigration during the 1840s except in the first year or so before the recession when some wage rates actually rose after the cessation of transportation and the assignment of newly arrived convicts in June 1840. But the influx was slight and many immigrants who set out on the strength of them arrived to find low rates in the prevailing depression. In fact free labourers' wages were so low in 1844 that they were unable to buy tobacco, spirits and beer of which they were the main consumers and the Government revenue consequently suffered. Free artisan wages around the middle of the decade were 5s. - 7s. per day and, understandably, there was a considerable exodus to the mainland in order to find better rates.

Large numbers of convicts who had received either an absolute or a conditional pardon also joined the emigration, although this slackening in the supply of labour had no affect on wage rates. Coghlan records that the mechanics of Hobart still complained in 1849 of unfair competition by convict labourers which had resulted in 200 free labourers being unemployed.[8]

In summary, the decade as a whole was marked by the existence of a substantial pool of cheap labour so that at no time did the employer group feel seriously threatened by the demands of free immigrant employees for higher wages and consequenly little or no thought was given to strengthening the master and servant legislation.

However, this attitude was in marked contrast to the first half of the 1850's which saw the enactment of such legislation no less than three times: in 1852, 1854, and 1856. We shall see that, after moderate "strengthening" in 1852, the 1854 Act reached a peak of oppression unequalled in the long history of master and servant legislation, before the 1856 Act restored the position to slightly less intolerable levels of injustice. What were the factors which contributed to this sudden flurry of activity in varying degrees of harshness? In general terms it is easy to reply that all factors that influenced the supply and nature of the labour force in the colony, or which affected the demand for labour, were bound to have an effect on the character and timing of any piece of master and servant legislation. But it is difficult to be precise about the extent of the effect of any individual factor at any particular time. All that can be said is that as pressures built up in the labour market from a number of causes the reaction of the employer group through the Legislative Council was the passing of more extreme measures against employees. Conversely, as these pressures eased for one reason or another, less severe restrictions could at least be contemplated.

In the first few months of 1851 there was a considerable demand for labour but wage rates were still low.[9] Then, in June 1851, it was learnt that gold had been discovered on the mainland and many free labourers left immediately for the N.S.W. and Victorian goldfields, causing a sharp increase in the demand for convict labour, and eventually leading to a severe shortage of labour generally. At first employers refused to pay the higher wages demanded by the market but by early 1852 substantial increases had been recorded.[10]

Unlike the previous decade when the influx of convicts more than compensated for the ex-convicts who left the colony the labour market continued to experience a shortage even when convicts were arriving in 1851 and 1852 at the rate of 2,000 a year, because large numbers of ex-convicts joined the hunt for gold. One solutuion would have been for the colonial Government to have asked for the number of convicts to be increased but this suggestion was not capable of being implemented given the widespread anti-transportation support in V.D.L., especially since other colonies had refused to receive convicts after 1849. With the passage of the Australian Colonies Act in 1850 and its implementation in V.D.L. a new Legislative Council had been formed which for the first time included members elected by those entitled to vote. The elections which took place in October 1851 were dominated by the

transportation debate and all sixteen elective seats were filled by anti-transportationists when the new Council met in December. It would therefore have been almost impossible for those members to have advocated an increase in the number of convicts being transported even in the crisis then being experienced by employers in V.D.L. Since no relief could be expected from that quarter it is not surprising to find that a Committee of the Legislative Council was appointed early in 1852 to promote immigration as a means of solving their problems or, more specifically, by hiring workmen in Britain at much lower wages than were then being demanded in V.D.L.

It will be recalled that a shortlived bounty system of immigration had operated in V.D.L. in the early part of the 1840s with the assistance of private labour agents who received a bonus from the Government for every approved immigrant landed. The scheme had as its basic philosophy the maintaining of a direct relation between supply and demand in the labour market. Unfortunately, the agents became divorced from the employers and this led to many abuses. Unscrupulous agents misrepresented the "comfortable" passage out as well as wages and conditions in the colony and consequently, in the U.K., legislation was enacted in 1841 which provided for regulations to ensure basics such as adequate provisions, sleeping arrangements on board and the presence of a medical officer. The legislation was not however successful in other respects and its requirements led, *inter alia*, to the falsification of references of potential immigrants which inevitably resulted in dissatisfaction with the quality of the immigrants.

These defects, together with the fact that with the supply of labour in private hands there was a measure of uncertainty involved, led to the cessation of the bounty scheme in 1842. It was not revived during the 1840's mainly due to the large number of convicts available for employment at very low wages and also because the land revenue from which the bounties were paid declined, with the result that further expenditure was halted.

However, the pressures of an acute labour shortage were again experienced by employers in the early 1850s for reasons already indicated and it was therefore predictable that the proposals for immigration contained in the Report of a Committee of the Legislative Council, tabled in June 1852, should have received very favourable support by employers in the colony. Basically, the suggestion was that male assisted immigrants should be bound by contracts made in the U.K. to serve their employers for a certain number of years at

fixed rates. Employers would apply to Immigration Agents at Hobart or Launceston and would pay £3.15s. for each immigrant required and a promissory note for the same amount, payable on the arrival of the immigrant. A certificate would then be issued by the Agent and an employer would send it to his agent in the U.K. who would choose a likely immigrant. The certificate, in effect, constituted the immigrant's passage ticket on one of the Land and Emigration Commissioners ships. Not being a philanthropist, the employer would recover his money from the employee because the latter would have signed a promissory note for £7.10s. before he left the U.K. The amount would be deducted from his wages at the rate £2.10s. per annum over the three years he would have contracted to serve and, to safeguard the employer's investment, he would be bound to repay that amount for each year he failed to serve. The committee also suggested that the necessary funds be provided from the general revenue of the colony rather than from the land revenue except in the case of single women who would be sent out in the normal way under the auspices of the Land and Emigration Commissioners. Denison agreed wholeheartedly with the scheme but would not agree to the raising of a £50,000 sum to finance it until it had received the blessing of the Colonial Office.

The prospect of a substantial influx of immigrant employees to the colony led to a general review of the existing master and servant legislation with particular emphasis on the problem of the validity of contracts made in the U.K. and, thus, within a few days of appearance of the report of the Select Committee on Immigration, another committee of the Legislative Council was formed "to inquire into the Laws now in force in reference to Apprentices and Indented Servants and to consider the propriety of amending such laws". Members of the committee were Sharland, Cox (member for Morven), Gleadow (Cornwall), the Speaker (Dry, member for Launceston), the Attorney-General (Valentine Fleming) and the Solicitor-General (Francis Smith). After the period for bringing up the report had been extended the "Apprentice Law Repeal Bill" was introduced in the Legislative Council on 8th October, passed on the 19th October and on the next day, received the Governor's assent as the Servants and Apprentices Act.[11] The speed with which the bill was passed was a sure indication of the troubled state of the colony at that time for, by October 1852, Denison had calculated that the available male labour was only half of what it had been in April 1851.

NOTES

1. 16 Vict. No. 23.

2. See Record Book of Charges Laid; Police Court; Hobart Town Dec. 1840 - May 1841.

3. See Colonial Secretary's Correspondence Vol. 167 No. 4771.

4. 18 Vict. No. 13.

5. Coghlan, *Labour and Industry in Australia*, Vol. I, 328.

6. Townsley, *The Struggle for Self-Government in Tasmania 1842-1856*, vi.

7. *Ibid.*

8. Coghlan, *op. cit.*, 450.

9. Coghlan, *op. cit.*, Vol. 2, 72 for details of rates in 1851.

10. Employers claimed that wages had risen in most cases from 25-33% and in a few instances, up to 50%. In addition it was claimed that the cost was really much higher because the best men had left and the high rates were being paid for inferior labour.

11. 16 Vict. No. 23 (1852).

X →

CHAPTER 5

THE SERVANTS AND APPRENTICES ACT (1852)

The provisions of this Act[1] follow closely the general form of those in the 1840 legislation. Harsh penalties for breach of contract by servants, independent contractors and apprentices were still to be contrasted with the weak remedies available to employees where there was misconduct by their employers; the offence of harbouring or enticing from employment was retained although its redefinition probably led to a widening of the offence. Two new procedural aspects of regulation appear for the first time: the procedure respecting an action for the occupational hazard of seduction of female apprentices and servants under age was made easier; and, as a result of a method of immigration designed to secure servants from the U.K., contracts of service entered into in the latter country were deemed to be valid for the purposes of the other provisions of the Act.

The Preamble in Section 1 gave no reason for the inadequacy of the 1840 legislation which had led to its replacement. Fortunately, the earlier Act was repealed in toto with the result that the V.D.L. Legislature avoided the complicated and confused maze created by the English Acts which had purported to "extend" or "vary" existing legislation.

A Offences by servants

Section 2 defined once more the offences capable of being committed by any "artificer, manufacturer, journeyman, workman, labourer or other servant" and which constituted breaches of their contracts of service, viz. absence from employment, refusal or neglect to work, returning work or leaving it unfinished, or any other misconduct. Despite the apparently comprehensive nature of these offences in the 1840 Act employers had found that there were loopholes which needed to be closed.

During the 1840s when employers in V.D.L. had contracted through agents with employees in the U.K., service to commence on arrival or shortly afterwards, difficulties arose when a servant who had contracted in this way arrived but failed to commence his service. Even assuming the validity of the contract in the colony it was doubtful whether the 1840 Act could have been invoked against him. Section 1 had provided for an offence, *inter alia*, where the

servant absented himself "during any part of such time for which he or she shall have been hired or engaged" or where he refused or neglected to work "in a diligent and careful manner". Because the period of hire had not commenced it could not be said that such a servant had absented himself during the period of hire; and, secondly, it was not a refusal or neglect to work carefully because this only applied to an obligation imposed during the period of employment. The servant's conduct amounted to a refusal to enter into work according to the contract and as such was a breach of contract (incidentally raising questions as to the validity of the contract), but it did not amount to a criminal offence punishable under the existing legislation. The same was true of the colonial servant hired to commence work at a future date who did not appear on the agreed date, although here there was no doubt that his master could sue him for breach of contract.

In order to remedy this, Section 1 of the 1852 Act enacted, *inter alia*, that any servant "engaged by or on behalf of any person for any time or term whatsoever" who "shall fail refuse or neglect to proceed to and enter upon such service or employment pursuant to such hiring or engagement", would incur the penalties provided. This provision was by no means a novel one. It has already been noted that a similar clause existed in the English legislation of 1823, but it will be recalled that the English Act created the offence only where there was a contract of service in writing and signed by the parties with the result that if a servant had not so contract no offence was committed by his failure to commence service.[2]

The distinction between written and unwritten contracts made good sense in this area. Before a justice had jurisdiction under the 1823 Act a contract of service must have been established on the evidence. In the absence of a contract in writing this was generally easier to do where actual service had been undertaken, but where a servant had not yet entered into service and it was sought to penalise him for failing to do so, it was logical to limit the offence to cases where the contract was in writing and signed. Not only was it logical but it was also necessary as regards yearly hirings, in view of the requirements of Section 4 of the Statute of Frauds (1677) which would not defeat an action for wages in respect of services actually performed, but which required a contract of service to be in writing where service had not been entered into. The effect of the colonial Act in not making the distinction was to place working people in an invidious position, because it was possible for an "employer" to cause a man he disliked to be heavily punished where there was really no contract and where there were

no outward acts of service directly referable to a contract to serve at some future date which had since elapsed. Moreover, since the Statute of Frauds had almost certainly been received as part of the law of V.D.L. in 1828, it followed that such a contract, assuming it was not evidenced in writing, was not technically enforceable, yet the 1852 Act purported to give justices jurisdiction to punish a servant for his failure to enter upon service.[3]

We have already seen that the alternative penalties to be found in the 1840 legislation for what might generally be called misconduct by a servant, were the same as in the N.S.W. 1828 Act viz. imprisonment in a common gaol of imprisonment with hard labour in a House of Correction with the addition in both cases of forfeiture of any wages due. The 1852 Act sought more flexibility in this area while at the same time increasing the maximum period of imprisonment in a House of Correction from one to two months. It provided for imprisonment in either a Gaol or House of Correction with hard labour in both instances for two months and, as an alternative or additional penalty, forfeiture of all or any part of wages due. After 1852 it was no longer necessary for justices or order imprisonment and forfeiture when all that was required to meet the case was forfeiture alone.

The 1852 legislation thus went some way towards the flexibility of penalties displayed by the English 1823 Act, although the V.D.L. legislation once again failed to provide for discharge of contracts of service where eimployees were guilty of misconduct, an omission indicative of the existence of a tight labour market in the colony at that time.

B Offences by labourers (independent contractors)

Turning to Section 3, which provided penalties for misconduct by "any labourer who shall contract with any person for the performance of any work", it is at first glance puzzling why labourers should have been singled out for special mention when they were among the categories of workers affected by the provisions of the Section 2. It will be recalled, however, that a separate section of the 1840 Act[4] applied specifically to certain independent contractors who had contracted "for the performance of work in a certain time and at a certain price". The object of Section 2 of the 1852 Act was therefore to make all labourers who contracted not as servants but as independent

contractors, "for the performance of any work", not merely subject to the same penalties as servants but also in respect of the same offences. Unlike a servant, the only offence which could have been committed by an independent contractor under the 1840 Act was that of absenting himself from his employment before the termination or completion of his contract. After 1852 the whole battery of offences was levelled at him including the newly created one of failing to commence performance of his work, as well as the general residual one of being "guilty of any other misconduct during the continuance of such contract".

C Offences by apprentices

The sections of the 1840 Act relating to apprentices had also proved to be unsatisfactory for masters in attempting to control their apprentices' absenteeism and misconduct. In the first place, as we have already seen, an apprentice who absented himself from service was required by his master either to make satisfaction for the loss sustained by his absence (presumably a sum of money) or to serve the period of absence in addition to the original period. If he refused to do either, he could be brought before the justices, but in this event the Act merely gave them the power to determine what satisfaction was to be made and to punish the apprentice if the latter did "not give security to make such satisfaction". No power was given which would enable the justices to order the period of absence to be served as an additional term unless the word satisfaction was given two different meanings in the same section: one where it was used as an alternative to serving the absence period and the other where it included serving the period. This interpretation was not however a very satisfactory one and it must therefore be concluded that the 1840 Act was deficient in this respect.

Secondly, as we have already noted, misconduct and absence by an apprentice were treated differently by separate sections, yet absenteeism could justifiably be described as a species of misconduct and, in fact, apprentices were often charged with misconduct in service by being absent.

Thirdly, where an apprentice was imprisoned or discharged, his master lost his services either temporarily or permanently. At a time when labour was generally in short supply the inexpensive service rendered by an apprentice

who had passed the initial period of utter incompetence was generally regarded by a master as worth retaining except in the worst cases of misconduct; yet the provisions of the 1840 Act were not flexible enough to permit this.

Finally, the 1840 master and servant legislation was not clear on the question whether "bodily correction" in a House of Correction was part of the apprentice's punishment for misconduct.

The 1852 Act went some way towards correcting these defects. Under Section 4 both absence from service and misconduct were made offences and dealt with in the same way. The same period of imprisonment was retained with the exclusion of the phrase "and be corrected" in order to make it clear that apprentices could not be whipped. The alternative of discharging an apprentice from his apprenticeship was also retained, although the section specifically stated that justices were authorised to cancel the indenture, deed or agreement in writing when discharging the apprentice, an aspect which the 1840 Act had left uncertain. The third alternative of adding both the previously mentioned punishments was also reaffirmed in 1852, and the later statute added a further alternative remedy, viz. returning the apprentice (or indented servant) *to* the service of his master or employer. Taken together these alternatives gave justices a very wide discretion in dealing with recalcitrant apprentices.

Although absence from service was made an offence punishable in the same way as misconduct by Section 4, the existing provisions with regard to absence were retained with slight modifications by Section 5 of the 1852 legislation. Consequently, an apprentice who absconded could in the first instance be compelled by his master under Section 5, either to serve the extra period constituted by his absence or to make satisfaction for the loss. If he refused both alternatives he could be taken before the justices and, in the event of his refusal to make the satisfaction determined by them, or to give security, he could be imprisoned with hard labour for up to one month. This section was concerned solely with the punishment of apprentices who would not make, or give security for, the satisfaction determined by the justices. It was not an alternative form of proceedings to those under the preceding section. Thus, an apprentice convicted and

sentenced to a period of imprisonment under Section 5 might, in addition, be imprisoned for his absence under Section 4 and these harsh measures could be invoked against him "from time to time as often as any such apprentice ... shall ... so absent himself from such service".[5]

Section 5 also stated that the period of absence should be "deemed to be part and parcel" of the original term of apprenticeship. It is curious that like the earlier legislation, the 1852 Act did not specifically give justices the power to order an apprentice to serve the period of absence as part of his apprenticeship. It preferred to authorise a master to compel his apprentice to serve the extra period or to make satisfaction and it is at this stage that the section states that the period is to be considered as part of the original term of apprenticeship. The only sanction available in the event of a refusal by the apprentice was, like the 1840 Act, to enable justices to determine what satisfaction should be made and to punish only for refusal to make the satisfaction. In short, although a master was able to "compel" his apprentice to serve the "absence period" where no satisfaction had been made, magistrates were not given the power to order this, either in the 1840 or 1852 Acts. Perhaps the answer lay in the reluctance of the courts to make an order for what would have amounted to specific performance of a contract of service.

D Employer offences

With regard to employees' complaints against their employers, the Servants and Apprentices Act dealt with the issue in a similar way to the 1840 legislation. Separate sections were devoted to servants, independent contractors and apprentices (including indented servants), and the remedies were rephrased so as to give justices more flexibility in individual cases.

1) Against servants

The result of the wording of the 1840 Act was to empower justices to order payment of any wages owed "and further to award "fair and reasonable" amends. Because these remedies were given in respect of any form of ill-usage and not merely for non-payment of wages, some difficulties in interpretation must have been experienced. Was the authority to grant amends only given as an additional discretionary remedy where an order for payment of wages due had already been made; or, were the remedies alternatives, permitting an award of amends where physical cruelty rather than non-payment

of wages was being complained of by a servant? If the former were the case, it would appear that no remedy was provided for a master's ill-usage where no wages were owing; if the latter, then a servant could not get additional amends where he complained of unpaid wages and an order was made compelling his master to pay.

These difficulties were avoided by the 1852 Act which enabled justices "to order the payment of wages due and owing ... or to order and award ... amends to be made ... as such justices shall think fair and just", or to order payment of both wages and amends. Unfortunately, although these clear alternatives in Section 6 solved the problems associated with the earlier legislation, the section in turn gave rise to a further problem in that magistrates were empowered to order amends as an alternative to payment of wages even when a servant had proved that his master had not paid his wages. Had non-payment been treated separately from other forms of cruelty, it would have been possible to have provided, on the one hand, for the payment of wages as the primary remedy for non-payment with the additional discretionary amends, and on the other hand, for amends as the only remedy for all other types of ill-treatment. It is perhaps not an unfair comment that not nearly as much thought was directed towards those sections of the Act dealing with employees' remedies as was given to the remedies of employers. Not only was a servant denied the right to recover all wages due, since the justices might decide to award a lesser amount as amends instead, but he was still not provided with the remedy of discharge from his contract of service where there was physical cruelty.

It does not take a great deal of imagination to appreciate the unhealthy position of a servant who was instrumental in a prosecution, whether successful or not, against his master yet had to continue in that master's employment. No doubt, in the worst cases of employer misconduct a servant might have argued at common law that the contract was at an end, for a master had no right to chastise his servant.[6] But the uncertainty and expense of such an action would have deterred the majority of servants, even if they had been aware of the possibility.

2) Against labourers

The remedies provided in Section 7 for labourers who contracted as independent contractors and who complained of ill-treatment or non-payment by their employers were of the same order as for servants, with the exception that the non-payment referred to was, as would be expected, "non-payment of any monies which shall be due and owing" rather than non-payment of wages. It is significant that the 1840 Act which sifted out particularly important classes of independent contractor in V.D.L. and dealt with them separately because they "contract with persons for the performance of work in a certain time and at a certain price", did not properly distinguish this group from servants when describing their primary remedy for non-payment as "the payment of such wages as shall appear to be due or owing". By 1852 it had become accepted that "wages" were attributable to a contract of service whereas "monies" originated, *inter alia*, under what would today be called a contract for services involving an independent contractor. In line with this distinction the 1852 Act adopted a different method of expressing the limits of the justices' jurisdiction in ordering payment of amends by an employer as "the total amount of monies which would become due and payable ... for or in respect or by virtue of such contract if completed".

3) Against apprentices

The prosecution and punishment of masters for ill-treatment of apprentices and indented servants, was laid down in Section 8 which also reiterated the 1840 Act with the exception that justices were given the power to cancel indentures after discharging apprentices. It has already been seen that the earlier legislation, although permitting discharge as a remedy for apprentices and indented servants (though not servants and independent contractors), assumed this would involve cancellation and therefore did not expressly authorise it. The validity of the indenture deed or agreement in writing was therefore in some doubt. In order to resolve this uncertainty, Section 8 authorised justices to cancel the indenture and Section 9 went on to provide conclusively that it should thenceforth to all intents and purposes be deemed to be cancelled and of no force or effect whatsoever.

X 7

E Knowingly and unlawfully harbouring, employing receiving or entertaining an employee

With regard to the offence of "knowingly" employing, receiving or entertaining another's servant, it has already been noted that the 1840 Act added "harbouring" in the case of apprentices. This was extended to servants and labourer contractors by Section 10 of the 1852 legislation with the result that a person could be punished who "knowingly and unlawfully"[7] harboured, employed, received or entertained an employee from any of the three groups.

The same £50 maximum penalty was retained as in 1840 and to encourage prosecutions Section 10 provided (following the 1828 N.S.W. Act) that half of whatever penalty was fixed by the justices would be paid to any informer concerned. But whereasin N.S.W. the poor of the Colony directly benefited from the other half, the remainder in V.D.L. was used "in aid of the General Revenue."

The origin of the offence in Section 10 was to be found in the Statute of Labourers, although in England by the nineteenth century the only course open to an aggrieved employer was to sue for damages (*per quod servitium amisit*), since the wrong had ceased to exist as a criminal offence.[8] The gist of the civil action in the nineteenth century was loss of service where one man had the right to the labour of another arising from a contract of hiring.

F Seduction of a female servant

Another closely related civil action[9] with the same insistence on loss of service as a basic requirement was the action for seducing a female servant. Again, it was essential that the relation of master and servant be established in order to create the right to service although, because this action came to be used by parents against the seducers of their daughters, there was a strong inference of the right to service where a daughter resided at home, even in the absence of any clearly expressed contract of service. Since the basis of the action was loss of service, it was essential that the girl was in the actual or constructive service of the plaintiff at the time of the seduction. For this reason the plaintiff in

Harris v. *Butler*[10] failed when his daughter, who was apprenticed as a milliner to the defendant's wife, was seduced by the defendant; and, similarly, in *Dean* v. *Peel*[11] where the girl was in the domestic service of another although she intended to return home at the end of her term.

It was to correct this situation that Section 11 of the Servants and Apprentices Act was passed, "to facilitate in the manner hereinafter provided the mode of redress by female apprentices and servants under age who may be seduced by their master or employer whilst in the service of such master or employer". The section went on to provide that where a parent, guardian or other person *in loco parentis* brought the action for seduction, it would not be necessary to prove that the female apprentice or servant "was and continued to be the servant of such parent ... or to give evidence of any service or constructive service". Every seduction action by a parent could therefore be maintained as though these matters had been proved.[12]

Furthermore, where a female apprentice or servant did not have a parent or other person entitled to bring the action, a judge of the Supreme Court of V.D.L. could appoint a fit and proper person to sue *in forma pauperis* provided the girl was not possessed of property to the value of £5, over and above any debts and liabilities.[13] These sections merely purported to make the civil action easier and, unlike Section 10, did not create an additional criminal offence. Their effect on the civil action was, however, limited since they only applied in cases concerning female apprentices and servants who were under age, although the fact that a female servant was over age was not a bar to a civil action.[14]

The reasons for the inclusion of Sections 11 and 12 are not too difficult to discover. Colonial employers as a group probably contained a larger proportion of ex-convicts than employers in the U.K. The risk of seduction of young female servants and apprentices, particularly domestic servants, was therefore a very real one, although not necessarily any greater than in the U.K. But whatever the true situation, the fact was that the colonial Government was very concerned to assuage certain doubts of the British Government arising from the apparently crude vice-ridden condition of the penal colony.

The new immigration proposals had suggested a scheme for bringing single women to the colony from the U.K., for they were in constant demand as domestic servants.[15] The English Emigration authorities had in the past been

reluctant to encourage this as experience had shown that the emigration of single women not accompanying their parents was undesirable. The inclusion of these clauses may have helped to overcome some of this reluctance, although in view of their limited effect and the fact that only a few single women under age would arrive in the colony unaccompanied by their parents, it seems more likely that the provisions were directed to parents who had already emigrated accompanied by their daughters under age, in order to encourage them to let their daughters enter into domestic service, secure in the knowledge that the loss of family honour could be recompensed in the courts without too much difficulty.[16]

G Immigrant servants' contracts made in the U.K.

The existence of Section 13 in the 1852 Act was extremely important to employers of labour at that time and, since some space will be devoted to an explanation of its significance, it would be worthwhile quoting the section in full.

"And Be It Enacted that if any person in any part of the United Kingdom of Great Britain and Ireland or any other part beyond the seas shall make or enter into any contract or agreement in writing for service in this Colony for any time or term certain as an artificer manufacturer journeyman workman labourer or other servant employed in any manner howsoever either as a menial or house servant or in any other capacity whatsoever and shall arrive in this Colony in pursuance of such contract or agreement, such contract or agreement in writing shall be of the same force and effect as if the same had been made and entered into in this Colony and such person so making or entering into the same shall be subject and liable to the several provisions in this Act contained in the same manner to all intents and purposes as though such person were an artificer manufacturer journeyman workman labourer or other servant hired or engaged as in the second section of this Act mentioned".

The problem of the validity in the colony of contracts of service formed in the U.K. was one which had caused some concern at the time the 1840 Act was passed. It will be recalled that the Governor had requested the British Government to remedy the uncertainty that existed by legislative action but that the urgency of the situation caused by the cessation of the assignment of convicts was lessened for various reasons leading to a decline in interest among colonial employers in any immigration scheme to secure free immigrant

servants. With the revival of this interest in the early 1850s and its manifestation in the specific proposals of the Select Committee, which have already been discussed, the question of the validity of service contracts made by intending immigrants in the U.K. was once more of the utmost importance.

If the Attorney-General was correct in his analysis in 1839, then it is true to say that the need for an Imperial Act remained throughout the 1840s and it is difficult to see how the local legislature could have had the capacity to do in 1852 (by Section 13) what it was incapable of doing in 1840. It seems more likely however that he had not fully grasped the significance of Sections 35 and 37 of the Australian Courts Act (1828) which were confirmed in 1842[17] and, consequently, Section 13 was a mere restatement of existing law rather than a novel provision.

Perhaps it would be more accurate to describe Section 13 as having had much the same effect as Sections 35-37 of the Australian Courts Act although achieved in a slightly different way. The colonial draftsman hit upon the idea of "deeming" contracts made in the U.K. to have been made in the colony so that Section 2 and other relevant sections in the Act could operate in the normal way; whereas the 1828 British statute, in a more long winded fashion made necessary by the absence at that time of any local master and servant legislation by which "deemed to be colonial" contracts could be regulated in V.D.L., provided that it was lawful for artificers etc. to contract in the U.K. to serve in the colony, that punitive costs might be recovered on a successful action for concealing or harbouring, that artificers etc. could be punished for wilful violation of their indentures or misconduct in service and, generally, that all complaints and disputes between masters and servants could be settled by the Court of Sessions or two justices by any order or award thought just. Bearing in mind that the Australian Courts Act was a statute of paramount force, the width of the last mentioned provision meant that there was no conflict when, by the legal fictioned contained in Sectic 13, all other relevant sections of the 1852 Act were applied to immigrant servants who had contracted in the U.K.

Two possible points of conflict should, however, be noted. First, Section 13 did not limit the terms of the contracts; and secondly, it did not limit persons having the capacity to contract in the U.K. to those

over a certain age. It can therefore be assumed that the section should be read subject to the 1828 legislation on these aspects with the result that the intending emigrant in the U.K. must have been eighteen years of age or over and could only have contracted for a maximum of 7 years service.

Like the Australian Courts Act, Section 13 of the 1852 colonial legislation was understandably limited to contracts made in writing. Oral contracts for service in the colony made in the U.K. were therefore presumably not valid in V.D.L. or, at least, were unenforceable by virtue of Section 4 of the Statute of Frauds, and an immigrant servant who foolishly arrived on the strength of such an agreement could not bind his employer to provide work for him, but equally he could not be convicted for failing to commence service.

Even with contracts in writing, the fact that they were made in the U.K. sometimes gave rise to considerable evidentiary difficulties. Thus, Section 14 provided that the production of any such contract, with evidence that the immigrant subsequently arrived in the colony and that the immigrant was called or known by the name disclosed in it, or that he had confessed to having made a contract with the employer named in it, was sufficient prima facie evidence of both the contract itself and the identities of the parties even without proof of the execution of the contract.

NOTES

1. 16 Vict. No. 23.

2. This point was made by the Duke of Newcastle in his Despatch of 16th June 1853 but, since the despatch contained the information that the royal assent had been given to the 1852 Act, it could scarcely be termed an objection.

3. Only contracts not to be performed within the space of one year were affected.

4. S.2

5. S.5

6. Although he could chastise his apprentice for disobedience or neglect. See *Winston* v. *Linn*, 1 B. & C. 460.

7. The word unlawfully does not appear to have added anything to the offence and in 1856 the draftsman of a new master and servant Act returned to the earlier form of "knowingly".

8. See Jones "*Per Quod Servitium Amisit*" 74 L.Q.R. 39.

9. An important distinction between the action for seduction and that for enticing away or harbouring servants or apprentices was that in the former it was not necessary to prove that the defendant knew the person seduced to be the plaintiff's servant. See *Fores* v. *Wilson*, Peake 55 per Lord Kenyon.

10. 2 M. & W. 539.

11. 5 East, 46.

12. Fleming, *Law of Torts* (4th ed.), 575, has indicated that this was achieved in Tasmania by the Evidence Act 1910, s.118 but, it appears to have been enacted, in a more limited form, almost sixty years before that date.

13. S.12.

14. *Bennett* v. *Allcott*, 2 T.R. 166.

15. See the pamphlet for intending immigrants to the colony forwarded by Denison in the Despatch of 4th August 1853, at page 13, which stated that "it was scarcely possible to express too strongly the great want which exists of female servants and needlewomen. Some families cannot obtain any female servants, - others, which would employ several have only one; many ladies of property are obliged to do the work of servants".

16. These sections were re-enacted in the 1854 (Sections 33 and 34) and 1856 (Sections 35 and 36) master and servant legislation.

17. 5 and 6 Vict., c.76 s.53.

CHAPTER 6

BACKGROUND TO THE MASTER AND SERVANT ACT (1854)[1]

In the latter half of 1851 and the early months of 1852, a severe shortage of labour was experienced, as we have already noted, mainly due to emigration to the mainland goldfields, and it was this decrease in supply which was responsible for the higher wage rates rather than any real increase in the demand for labour at that time. In fact, in some areas the shortage was so great that certain industries were no longer able to function, among them whaling, shipbuilding, timber and very nearly, agriculture, resulting in an overall slackening in demand for labour.

In the second half of 1852 and throughout 1853, the total picture for V.D.L. employers grew considerably blacker for, with the establishment of the huge mainland goldfield camps demand for V.D.L. produce increased enormously causing employers to be frantic in their search for employees to enable them to supply the lucrative mainland market. The increased demand for labour was further heightened by the continued exodus to the goldfields and the result was reflected in the generally high rates of wages paid.

A Cessation of transportation

The discovery of gold in N.S.W. and Victoria was also a mixed blessing for V.D.L. employers in one other respect. Despite the general feeling in the colony against transportation which had led to the success of the abolitionists in the 1851 elections, there was still a strong body of opinion among some employers which supported the retention of the convict system. In addition, the British Government was still not convinced of the evils of that system, and it was not until it was appreciated that an ex-convict would not turn to pastoral pursuits in the colony but would depart

immediately he was free to do so for the goldfields that the Government became convinced of the need to abolish transportation to V.D.L. Accordingly, on 15th December 1852 Sir John Pakington, Secretary of State for the Colonial Office, disclosed the British Government's intention to cease transportation of convicts to the colony and news of this was received at the end of April 1853.

This important event in the history of the colony was celebrated with great public festivities although many employers appreciated the worsening effect it would have on the labour market. Not only was the abolition of transportation a further spur to increased wage rates in the free labour market but convict rates were similarly affected and were in reality well above those registered at the convict hiring depots.[2]

B Rejection of the immigration proposals of June 1852

Much hope for a solution to their problems was placed by employers on the immigration proposals submitted to the British Government for approval after a Select Committee of the Legislative Council had been appointed in early 1852 and had reported in June of that year. It will be recalled that the proposals met with general approval in the Colony and were adopted by the Council before being approved by the Governor, subject to the acquiescence of the British Government in the raising of a loan necessary to finance the scheme. Great care had been taken in the details of the plan so as to avoid the objections raised by the British Government against the "bounty immigration" which had operated in the early 1840s. Many colonist employers would have preferred a simple system of immigration under indentures but were hopeful that the carefully elaborated proposals of the Select Committee would this time meet with the approval of the Land and Emigration Commissioners in the U.K. and, in anticipation, certain new clauses were included in the Servants and Apprentices Act (1852) *(supra)*.

It therefore came as a great disappointment when a despatch was received from England in September 1853 which rejected the proposed scheme. The Commissioners objected to it in the first instance because labourers were to be indentured to masters they had never seen. The dangers for both masters and men were obvious especially where their relationship was bound to continue for three years. But in this case the Commissioners

were genuinely concerned for the future well-being of the intending immigrant rather than worried by the fact that a colonial employer might get an unsatisfactory employee for a lengthy period. The demand for labour was so great that employers were prepared to accept this as a very small risk, and to take the view that the master and servant legislation would in any case secure their interests, especially since the amendments made in 1852. It is more than likely, however, that the Commissioners had considered the harsh effect of the 1852 legislation on servants contracting in the U.K. and that this was a factor in the general objection to labourers being indentured to unseen masters.[3]

The second main reason for rejecting the proposals was that wage rates were fixed for three years before immigrants could be aware of the current rates in the colony. There could be little doubt that this was exactly what was intended by employers. The Committee appointed by the Legislative Council, which had first put forward the scheme of immigration, had taken evidence from employers of labour which, *in toto*, had amounted to a general desire to engage employees in England at substantially lower rates than were then current in V.D.L. In theory, this increase in supply of labour through immigration would, after a while, have had a depressing effect on the labour market and wages would have come down, other things being equal. But V.D.L. employers were not prepared to wait for this to happen and made it clear to the Committee, though they were not prepared to inform their prospective servants, that the employment of immigrants in this way would not only immediately lower wages but, since rates would be fixed at a low level for three years, also ensure a supply of cheap labour for the immediate future.

Had the immigration proposals been acceded to, a master would have been in an exceptionally strong position *vis-à-vis* his servant who, having arrived in the colony, discovered the true wage rates, refused to fulfil his contract, and consequently felt the full force of the 1852 Act. As we have seen, not only could the servant be punished severely each time he absented or misconducted himself, but he could be forced back each time to serve the same employer until the three year period had elapsed. Having learnt that there were legal obstacles to such prosecutions, from past experience in dealing with similarly disillusioned employees under the "bounty immigration" scheme of the early 1840s, employers in V.D.L. must

have been particularly pleased at their foresight in including Sections 13 and 14 in the 1852 Act. However, with the rejection of the new immigration scheme the utility of these sections was now greatly diminished.

Other aspects of the proposals which did not secure the approval of the Commissioners included the fact that selection of immigrants was taken out of the Commissioners' hands while they were bound, if requested, to carry immigrants in their ships; and the cost of carrying wives and children of immigrants which had been inadequately provided for.

In conclusion it was suggested that the scheme should be replaced by the one then in operation in N.S.W. which did not bind the immigrant to any particular employer until he reached the colony and which had the added advantage of leaving him free to negotiate his own wages. The Legislative Council in V.D.L. was bound to comply with respect to the land fund which was not under its control but it was determined to press ahead with the ideas of the employer group it represented in relation to the general revenue of the colony which was under its direction.

C The "bounty" scheme of January 1854

New proposals were therefore drafted and circulated by Champ, the Colonial Secretary, to all members of the Legislative Council, on the 8th December 1853, together with a request for their comments in writing with a view to the implementation of an Immigration Act early in 1853.[4] The proposals were designed to be free from the major defects of the previously disallowed scheme.

Mechanics, labourers and domestic servants were to be introduced from any part of Europe upon payment by a colonial employer who had made a declaration of his intention of employing the immigrant, of £3 for a single immigrant or of £5 for a family, for which he received a transferable or bounty ticket. The cost of the passage was to be paid by the colonial Government as soon as the immigrant arrived in the colony. On his part the immigrant would contract to repay the £3 or £5 to his employer and to remain four years in V.D.L. or to repay one quarter of the passage money for each year he failed to do so. Bounty tickets could also be obtained by relatives

of possible immigrants who were of the labouring class in the colony. The scheme was incorporated in the form of regulations and published by the Government in the *Gazette* of January 23rd 1854.

It will be noted that no contract of service was to be entered into until the immigrant reached the colony and that, in the face of a continuing shortage of labour and the Commissioners' objections, employers had abandoned any attempt to fix wages at a low level for a period of years. An immigrant was quite free on arrival to negotiate terms with his employer after becoming aware of current rates. But the bounty scheme immediately ran into legal difficulties similar to those previously experienced in connection with contracts of service made in the U.K.

After digesting the contents of the Champ's circular over the Christmas recess a considerable number of replies were received from members of the Council including one from William Nutt, (member for Buckingham) dated 31st December 1853. Nutt referred to the proposal that immigrants were to contract to remain in the colony for 4 years or to pay a certain amount of the cost of their passage, and thought it was doubtful whether such an agreement made in England would be binding in V.D.L. He was also unsure about the identity of the other party to the agreement and concluded that an Act to prevent immigrants from leaving the colony would be illegal unless the agreement was entered into in the colony.

Further problems were encountered when Champ wrote to Macdowell, the Crown Solicitor, referring to that part of the proposals which spoke of supplying each "applicant for a bounty ticket with a blank form of agreement for contracts to be executed in Europe by the Immigrants", and asked him to draft such a form.

The reply, dated 23rd January 1854, contained the following draft contract.

"I the undersigned ... of ... a Free Emigrant do hereby for the considerations herein mentioned agree with ... the Secretary to Her Majesty's Emigration Commissioners to serve and hire myself to such suitable Employer in Van Diemen's Land as the Immigration Agent there, as soon as may be after my arrival there, shall select and choose. And I engage to serve the person to be so selected in such capacity, upon such terms and for such a period as may be agreed upon:- to obey all his lawful and

reasonable orders and otherwise to make myself generally useful, subject to the Laws of V.D.L. applicable to Free Hired Servants. It being understood that a passage out and all proper necessaries during such passage shall be provided for me free of any expense to me, that I shall receive wages from the day of embarkation and payable on my arrival in V.D.L. after the rate of ... per week by the Immigration Agent there and afterwards such wages as may be agreed upon from my Employer, monthly.

That my first engagement or hiring shall not be for less than 6 months - and that during that period I shall repay towards my passage out the sum of £3 and that I shall afterwards and within four years pay the remainder of the expenses of my passage out either at once or by instalments of not less than one fourth part thereof at one time. The said expenses of my passage out to be considered a Debt due from me to the Colonial Treasurer of V.D.L. and forasmuch as such debt cannot be conveniently demanded recovered or paid if I should remove from that Colony before it is discharged I engage to remain in V.D.L. aforesaid for four years after my arrival there unless in the meantime full payment shall have been made thereof".

One of Nutt's queries was answered by this. The other party to the agreement was to be the Secretary to the Land and Emigration Commissioners in the U.K. But the more important problem, regarding the status in the colony of an agreement made in the U.K., remained and was not alluded to by Macdowell, although he did preface his draft contract with what must have been to Champ an astonishing comment. He stated that it was the first time he had ever been asked to frame an obligation whereby a free civil subject contracted to restrict his freedom and bound himself not to leave a particular place for a stated time, where the contract was not either a contract of hire or of apprenticeship. And he added, "it may admit of considerable doubt whether such a stipulation can under any circumstances and on principle be supported".[5]

D The Assisted Emigrants Act (1854)

The Lieutenant-Governor, Sir William Denison was very much in favour of the bounty scheme as the only method of assisted immigration in the colony, but, at the same time, he was being pressed by the English

Emigration authorities to adopt the N.S.W. scheme in the cause of uniformity.[6] The result was a compromise. On the same day that the Colonial Secretary received the Crown Solicitor's letter[7] he wrote, on Denison's instructions, to the Attorney-General, Valentine Fleming, requesting him to adapt the provisions of the N.S.W. Immigration Act passed at the end of December 1852, to provide those clauses necessary for the efficient operation of the bounty scheme and, in particular, to include clauses which would enable the Government to enforce contracts entered into by immigrants and prevent them from leaving the colony until their obligations had been fulfilled. Ostensibly he left Fleming to do what the latter thought best but he also gave his own opinion as to what punishment should be meted out to any immigrant attempting to quit the colony before completion of his term or payment of the prescribed sum, namely, "imprisonment with hard labour for a certain term and arrest and detention by or by authority of his master or employer or any magistrate or Immigration agent or other officer appointed by the Government for that purpose". Consequently, when the Assisted Emigrants Bill was introduced by the Governor at the opening of a new session of the Legislative Council on April 18th[8] it was indeed an adaptation of the 1852 N.S.W. Immigration Act, with the exception that the bill provided in addition for punishment of immigrants who left the colony in breach of their agreements in the manner outlined by Champ.

Briefly, the N.S.W. Immigration Act required all male immigrants and single women selected by the Commissioners to contract in the U.K. to enter into contracts of service with a colonial employer for two years at the current rate of wages. Part of the passage money was to be paid before they left the U.K. and the rest was to be repaid to their employers from wages after they arrived, the proportions depending on the occupation of the immigrant. An employer was to be responsible for paying the balance of the passage money in the colony, one half at the time he engaged an immigrant and the other a year later. When the immigrant arrived he could pay the balance of the passage money there and then or, if not, he was required to take employment in which case the Act authorised employers to make the necessary deductions. The immigrant could terminate his service at the

end of one year by the payment of the second half of the amount owing. If not, this was deducted from his wages for the second and final year of service. If he broke the agreement he was liable to be imprisoned for three months.

To say the least, the N.S.W. scheme had experienced some difficult teething problems of a legal nature. At the end of 1853 a report dated 30th July 1853, was received by the N.S.W. Government in which the Land and Emigration Commissioners stated that the principle of the scheme had been approved by the Duke of Newcastle. The report was, on the whole, also commendatory of the details but it was felt that several aspects should be revised. The Commissioners referred to criticism of the Act which had characterised it as introducing "unmistakable slavery" into the colony and pointed out that the form of agreement signed by the immigrant in the U.K. should make it clear exactly what was the bargain between the emigrants and the colony. It was also noted that although the agreement gave the immigrant a fortnight in which to procure a master for himself no mention was made of the option in the body of the Act.

The only other major criticism arose from a rather technical legal point. By Section 35 of the Australian Courts Act of 1828 servants of various kinds could contract in writing with persons about to proceed to or actually resident in N.S.W. or V.D.L.D. or with their agents, to serve them for up to 7 years, and this could be achieved without the agreement requiring a stamp. The Commissioners pointed out that under the proposed N.S.W. agreement the emigrant would not be contracting with any such ascertained person or his agent and consequently the agreement would not fall within the 1828 Act and would remain liable to stamp duty. Moreover, since the N.S.W. Immigration Act seemed to permit these agreements to be unstamped the result was to place in jeopardy the validity of the legislation. In the words of the Commissioners, "We imagine that the Colonial Legislature could not render valid, even in the colony, a document carrying on its face the violation or evasion of the English Revenue Law, though the 11th clause of the Act if interpreted by the marginal note bears the appearance of having been intended to do so. Still less certainly could this Board be the channel of effecting such indentures without securing that they should be stamped as required by the Revenue Law of this country".[9]

There could be little doubt that if stamp duty had been required to be paid it would have amounted to a tax on indentured immigration and this was recognised by the Board which was prepared to suggest that the exemption of 1828 Act be extended to all contracts by which immigrants bound themselves to perform in Australia any of the services specified in that Act.

The report of the Land and Emigration Commissioners on the operation of the N.S.W. scheme was fortuitously received by Denison before the V.D.L. Assisted Emigrants Bill received its second reading and provided the excuse needed to at least delay the implementation of what was to him an unsuitable immigration scheme; for on the basis of the defects revealed by the report he "did not think it necessary to press the measure forward"[10] and on April 25th 1854 the Colonial Secretary obtained leave to withdraw the bill from the Legislative Council. The Secretary of State in England was, however, determined to persevere with the N.S.W. scheme and much to Denison's annoyance sent out two ships containing immigrants under the scheme, and with more expected the latter was forced to re-introduce the bill which he assented to on 15th September as the Assisted Emigrants Act.[11]

Its main provisions were, as already indicated, primarily an adaptation of the N.S.W. Act. Emigrants who in pursuance of an agreement made in the U.K. had been provided with a passage to the colony and who had not paid the full cost before leaving the U.K. were bound to pay the amount outstanding to the Immigration Agent within 14 days of their arrival, in which case the agreement was declared to be void. If the amount due was not paid in this way the unhappy situation arose whereby the Immigration Agent was authorised to enter into a contract of service on behalf of the immigrant for two years with any competent employer and to sign it in the name of the immigrant whether the latter had given his consent or not.

The employer, on his part, agreed to pay half the balance to the Immigration Agent immediately and the other half a year later. He was also authorised to recoup this by making eight equal deductions over the two year period *vis-à-vis* his employee. An immigrant could terminate his

contract at any time after one year's service providing he gave three months notice in writing and paid his employer any amount outstanding for his passage. But if an immigrant, having entered into such an agreement, attempted to depart from the colony before fulfilling his obligations he could be imprisoned with hard labour for up to three months.[12] Moreover, because it was felt that the immigrant could easily evade these obligations through "the facilities which the numerous intercolonial Traders offer ... by leaving this Colony for Victoria",[13] a maximum penalty of £50 might be incurred by the Master of any ship who knowingly conveyed the immigrant or allowed him to be on board, the amount of the fine to be paid to any informer.[14]

E Legal problems arising from the refusal by immigrants to enter into service

The effect of these provisions was, however, extremely doubtful in the case of an immigrant who, having arrived in the colony, refused to commence work with the employer selected for him by the Immigration Agent. This situation was not in the least bit fanciful and, in fact, the inability of the legislatures in N.S.W. and V.D.L. to lay down firm watertight legal procedures eventually led to the failure of the N.S.W. system of immigration in both colonies.

Leaving aside the stamp duty question alluded to by the Land and Emigration Commissioners problems arose firstly, because the agreement was made in the U.K. or, more accurately, outside the colony, and, secondly, because the agreement did not amount to a contract of service. The problems were not, however, limited to the N.S.W. scheme. The blank form of agreement drafted by the Crown Solicitor in January 1854 for the use of potential employers applying for a bounty ticket, gave rise to the same difficulties since it was to be signed by an intending immigrant in the U.K. (or anywhere else outside the colony), but was not a contract of service with any particular colonial employer. An important difference did exist however between the N.S.W. scheme agreement and the bounty agreement in that the latter contained a clause whereby the prospective immigrant bound himself to stay four years in the colony whereas the former

(set out in Schedule A of the Assisted Emigrants Act), merely provided that the immigrant would enter into a contract of employment for two years on his arrival. Thus, in the case of bounty agreements there was the additional question, already referred to by the Crown Solicitor, of whether in the circumstances and on principle such a restrictive obligation could be supported outside a contract of service. However, despite Macdowell's reservations, leaving the colony in breach of a bounty agreement was made an offence by Section 7 of the Assisted Emigrants Act.

The main legal difficulties which beset both systems of immigration in V.D.L. were discussed in correspondence which began in November 1854 when the Colonial Secretary, Champ, wrote to the Law Officers requesting their comments on the opinion of Lock, the Immigration Agent, which he had expressed in his Report on Immigration of November 3rd. Lock had reiterated his view, first stated in March 1854, that the U.K. agreement did not amount to a contract of service with any particular colonial employer and that therefore Section 13 of the 1852 Servants and Apprentices Act (which in October 1854 had become Section 25 of a new Master and Servant Act), was not applicable, and further that it was difficult to see what action could be taken against an immigrant who refused to enter into the service found for him by the Immigration Agent even though he had arrived in pursuance of the U.K. agreement. He was supported by Macdowell, the Crown Solicitor,[15] who thought that the only remedy possible in such a case was by civil action, but although he acknowledged that a moral wrong was committed he was wholly at a loss to discover a remedy even by a civil action.[16] On the other hand, the Attorney-General, Francis Smith, did not agree and, while expressing no opinion on the nature of the agreement made in the U.K., he did think that because the Immigration Agent was empowered by Section 6 of the Assisted Emigrants Act[17] to bind any immigrant not paying his passage money according to the U.K. agreement, irrespective of his consent, the relation of master and servant was declared to arise by that section and the master and servant legislation was then applicable to punish the immigrant with imprisonment and hard labour if he refused to serve. According to the Attorney-General the immigrant was not free to enter into any contract of service for himself nor to decline one entered into on his behalf by the Immigration Agent until he had paid his passage

money. The Immigration Agent, in reply, pointed out that the Attorney-General had overlookedthe fact that employers would refuse to have immigrants bound out to them against their will and that, therefore, there was no scope for the effective operation of the master and servant legislation.

Before considering the merits of the arguments it should be noted that the Immigration Agent and the Crown Solicitor on the one hand and the Attorney-General on the other were very much at cross-purposes. Smith was merely explaining the way in which the Assisted Emigrants Act was supposed to work in conjunction with the master and servant legislation,[18] while Macdowell was more concerned with the legality of the provisions of the former in the light of general legal principles, and Lock's contribution was clearly in terms of the ineffective operation of the Act in practice.

The Attorney-General was almost certainly wrong in his assertion that the master and servant legislation was applicable in the circumstances described; since that statute only operated where there was a contract of employment and one of the essential elements of such a contract was the consent of both parties. Thus an agreement for service entered into on behalf of an immigrant without his consent could not be binding on him; no civil action could be taken by his "employer" for breach of contract and no prosecutions could be taken under the master and servant legislation. The validity of Section 6 of Assisted Emigrants Act which purported to validate such "agreements" even if made without the consent of the immigrant was therefore extremely doubtful. No wonder the criticism had been made in the U.K. that this system of immigration introduced "unmistakable slavery" into the colony, for only the requirement of consent distinguished the relation of master and servant from that of master and slave.

When the Attorney-General argued the application of the master and servant legislation through the operation of Section 6 of the immigration statute he could only have been correct to the extent that he was referring to the operation of the former where an immigrant failed to enter into service according to the colonial "agreement" made for him by the Immigration Agent, rather than where he had actually entered into and partly

performed the "agreed" service and it was sought to punish him for misconduct, because in the latter case the colonial courts would probably have construed a contract, and therefore a genuine master-servant relation which would not have rested on Section 6 of the Assisted Emigrants Act. There was also a third possibility involving the indirect application of the master and servant legislation by virtue of Section 13 of the Servants and Apprentices Act (1852) (re-enacted with one small modification as Section 25 of the Master and Servant Act (1854)), which deemed contracts of service made in the U.K. to have been made in V.D.L. so that immigrant servants could be prosecuted on arrival for, *inter alia*, failing to proceed to their agreed service. It has already been indicated however, that the form of the U.K. contracts required under both the N.S.W. and bounty schemes did not make them contracts for service with any identifiable colonial employer and it was not therefore possible to argue the application of the master and servant legislation in this way.

One further possibility remains to be examined. Could the consent in advance, expressed to be irrevocable, to the Immigration Agent's action be upheld in the colony in the face of a refusal on the part of the newly arrived immigrant to accept the service found for him? It is important to remember here that the consent to be found in the U.K. contract was an entirely different concept from that required for a contract of service. The consent of a servant who contracted with an employer amounted to a willingness to work for that particular employer at the agreed rate of wages and other conditions. It was therefore not possible to transpose a general consent to enter into service into the specific consent necessary for a contract of service with a particular colonial employer. Moreover, even if the Immigration Agent was to be regarded as the agent of the emigrant, appointed by the terms of the U.K. contract to irrevocably bind the immigrant on his arrival in the colony, the later purported withdrawal of the agent's authority may have amounted to a breach of contract as regards the agent, but the principal could hardly be said to be bound by his agent's actions when both agent and would-be employer were aware that he was no longer willing to contract.

It is therefore more than likely that the master and servant legislation was not available to coerce unwilling immigrants into service according to their agreements in the U.K. But what about the possibility of a civil action for breach of contract on the U.K. agreement itself? The Crown

Solicitor seems to have been correct in asserting that the basis for such an action was not easy to discover. The main difficulty appears to have been that since an emigrant agreed to pay a sum of money to the Immigration Agent "in consideration of a Passage being provided for me ... by Her Majesty's Emigration Commissioners", it would seem that the Immigration Agent could not have sued on the agreement either because he could not have shown any consideration for the promise[19] or more probably because there was no privity of contract between him and the emigrant.[20]

F The Master and Servant Bill

The Assisted Emigrants Act, as it emerged from the Legislative Council after being introduced a second time, was much shorter and also much clearer than the first bill. Many clauses of the first bill were concerned with punishing misbehaviour etc. by immigrants during their periods of service and the harbouring and concealing of immigrants, whereas the Act itself did not refer to such offences. It was decided instead to restrict the second bill to purely immigration matters and to deal with offences by immigrants in connection with their contracts of service by means of a new master and servant Act. This was a logical development in view of the fact that the agreement made in the U.K. before departure of the immigrant did not amount to a contract of service with any particular colonial employer and it was therefore only if and when such a contract was made in the colony that the master and servant legislation came into operation.[21] Hence the importance of the dubious Section 6 of the second bill which presumed the relation of master and servant or master and apprentice to arise where the contract of service had been made on the immigrant's behalf but without his consent. Accordingly, on 30th May 1854, the Colonial Secretary wrote to the Solicitor-General requesting him to "have the goodness to prepare and submit for approval the draft of a bill to make such alterations in the Apprentices and Servants Act [1852] as you may consider to be necessary". Enclosed with the letter was the Colonial Secretary's draft outlining the amendments he wished to see in legal form.

There were substantial differences between the master and servant bill as drafted by the Solicitor-General and the Master and Servant Act as it emerged from the Legislative Council and these will be considered at a later stage. More relevant to the present discussion is the recognition of the fact that one of the main pressures behind the new Master and Servant Act came, as in 1840 and 1852, through the implementation of a new immigration scheme and the need for legal regulation of the scheme after the arrival of the immigrants and their entry or presumed entry into service contracts. Although the opportunity was taken to make other major alterations to the 1852 legislation, there can be little doubt that the second immigration bill and the master and servant bill proceeded hand in hand, and that certain aspects of the new immigration regulations would have been unworkable had it not been for certain clauses in the Master and Servant Act passed shortly after the Assisted Emigrants Bill became law.

Unlike the 1852 Act no Select Committee was first appointed to look into the matter of general reform of the law of master and servant and the bill was initiated by the Attorney-General on 16th August 1854. It received its second reading within a week and in committee there appears to have been vigorous discussion resulting in significant amendments to some clauses so that it was not until 27th September that a final report was made after two recommittals. On 3rd October it was assented to by Denison and published in the *Gazette* on the same day.

As it happened, the system erected by the elaborate Immigration Regulations of January 1854 and the accompanying legislation enacted later in the year collapsed, not primarily because of the associated legal problems which have bee discussed but because the prediction of the Immigration Agent proved to be correct. There was, in fact, a general reluctance on the part of newly arrived immigrants at the end of 1854 to enter into the contracts of service provided fo them, a reluctance mainly due to a change in the economic climate of the colony leading to much lower wage rates than had been advertised in a pamphlet for intending immigrants, which had been published in 1853 and extensively circulated in the U.K. Threats of legal proceedings against them were not effective even assuming a valid cause of action. Moreover, from the employer's point of view a refusal by the immigrant to enter into a contract of service indicated an unwillingness to work at the current rates and resulted in a reluctance to hire. In N.S.W., therefore, the scheme was dropped towards the end of 1855 and in Tasmania in 1856, although bounty immigration was maintained intermittently for several years.

NOTES

1. 18 Vict. No. 8.

2. See Coghlan, *Labour and Industry in Australia*, Vol. II, 767.

3. In N.S.W. under an Act of 1852 immigrants were bound by contracts made in the U.K. to enter into contracts of service when they reached the colony but in many cases after arrival they refused to do so possibily because they learnt for the first time that if they broke their indentures they could be imprisoned for up to three months with hard labour under the N.S.W. 1828 master and servant legislation. See Coghlan, *op cit.*, 595.

4. Colonial Secretary's Correspondence, Vol. 246, 9551.

5. *Ibid.*

6. Denison also felt obliged to implement the N.S.W. scheme because the Legislative Council had given a pledge that an Act would be passed to that effect and because a large sum of money had been placed in the hands of the Land and Emigration Commissioners to be expended in accordance with the N.S.W. scheme. See Governor's Despatch No. 65 of 3rd May 1854.

7. 24th January 1854.

8. Legislative Council Minutes, contained in the Despatch No. 69 of 10th May. Included with the bill was a useful letter from the Immigration Agent with extensive comments on the new bounty scheme, including a reference to the legal problem arising from the proposals where a servant bound himself to no particular employer, and the silence of the bill on this question. See also the Colonial Secretary's Correspondence, Vol. 246, 9551. Letter from Immigration Agent dated 30th March 1854.

9. Colonial Secretary's Correspondence, Vol. 246, 9551.

10. See Despatch No. 66 of 3rd May 1854.

11. 18 Vict. No. 2. Coghlan erroneously records that the Act was passed in response to a statement by the Land and Emigration Commissioners that they would cease sending out emigrants under the N.S.W. scheme until a colonial Act had been passed to enforce contracts made in the U.K. for the repayment of passage monies. The statement was made in a report accompanying a despatch from the Secretary of State dated in England on 22nd September 1854 and thus could not have been instrumental in securing the passing of the Assisted Emigrants Act.

12. S.7.

13. Governor's Despatch No. 66 of 3rd May 1854.

14. S.8.

15. Macdowell was both Crown Solicitor and Solicitor-General at this time for Francis Smith had become Attorney-General and Valentine Fleming, Chief Justice.

16. See Colonial Secretary's Correspondence Vol. 261. 10634. Letter from Crown Solicitor dated 22nd November 1854. Letter from Attorney-General dated 27th November 1854. Letter from Immigration Agent dated 2nd December 1854.

17. Section 6 enacted that "Every such Agreement or Indenture as is hereinbefore mentioned, executed by the Immigration Agent, whether with or without the Consent of the Party to be bound thereby, shall be as valid and binding on such Party, whether of full Age of Twenty-one years or not, as if the same had been executed by such Party or by any Parent, Guardian, or other lawful authority by or on his Behalf, and the Employer and employed mentioned in such Agreement or Indenture shall respectively be deemed to be Master and Servant or Apprentice, as the case may be, within the Meaning, and shall be liable and subject to the Provisions of any Law now or hereafter in force relating to Masters and Servants".

18. A new master and servant Act had been passed on Oct. 3rd 1854.

19. *Price* v. *Easton* (1833) 4 B. & Ad. 433 per Lord Denman.

20. *Ibid.* per Littledale J.

21. There was, however, a certain amount of difficulty experienced with some clauses. The original master and servant bill had contained Clause 24 (punishment for immigrants departing from the colony contrary to engagement) and Clause 25 (penalty on masters of vessels conveying such immigrants) which eventually appeared as Sections 7 and 8 of the Assisted Emigrants Act. This was definitely the best place for them since the "engagement" broken was the agreement signed in the U.K.

CHAPTER 7

THE MASTER AND SERVANT ACT (1854)

The main factors which contributed to the passage of this exceptionally harsh Act[1] have already been discussed and it is proposed at this point to comment briefly on two general aspects before turning to a more specific examination of its provisions.

A General

1) Detail

The 1854 Act was a more substantial piece of legislation than that enacted in 1852, with 36 sections and against 16, in the earlier one. As would be expected from this, the new Act contained a great deal more in the way of detailed regulation of contracts of employment. Moreover, the whole style of presentation was different. Sections were generally shorter and without the verbiage and pedantic repetition of the 1852 and earlier Acts which were expressed in the long-winded style typical of legislation up to the middle of the nineteenth century. Consequently, the 1854 Act was much easier to read and to administer by employers and magistrates although the illiterate employee gained nothing at all on this score.

2) The distinction between a contract for service and one for the performance of work

It will be recalled that the 1852 legislation distinguished between artificers, manufacturers, journeymen, workmen, and labourers who were servants on the one hand, and labourers who were independent contractors not under a contract of service on the other; although the offences for which they could be convicted were made the same. However, the manner of expressing this distinction in 1852 had given rise to considerable difficulty. For example, it was not easy to know whether the 1852 Act applied to occupations such as dressmaking and millinery where women contracted as independent contractors. In such cases Section 2 of the 1852 Act was not applicable because the employees were not servants and they could hardly be described as labourers in the same mould as fencers, sawyers and splitters under Section 3. Again, the phrase "or other servant" in Section 2, following the words "artificer,

manufacturer, journeyman, workman, labourer", was capable of both a wide and a narrow interpretation and there was thus some doubt as to whether all categories of servants were included. With these difficulties in mind, Section 1 of the 1854 legislation set about defining its terms by describing in some detail the occupations covered by the terms "labourer" and "servant".

The term "Labourer" was to extend to "Artificers, Mechanics, Tradesman, Manufacturers, Journeymen, Handicraftsmen, Gardeners, Farm Labourers, Shearers, Fencers, Sawyers, Splitters and all other workmen and labourers of every class or description whatsoever; and shall also extend to and include Laundresses, Sempstresses, Dressmakers, Milliners, Needlewomen and all other workwomen and female labourers of every class or description whatsoever, and whether married Women or single".

The term "Servant" was to include "all Persons so as aforesaid comprehended under the term 'Labourer' and all Grooms, Coachmen, Shepherds, Herdsmen, Working Overseers, Storemen, Porters, and all menial domestic farming and other servants of very Class or Description whatsoever, whether male or female, and whether married Women or single".

It is clear from these definitions, despite first appearances, that the framers of the Act were not attempting the foolish task of distinguishing a contract of service from a contract for the performance of work simply by classifying occupations. If this had been so, the statement that "the term 'Servant' shall extend to and include all Persons so as aforesaid comprehended under the term 'Labourer'" would have made nonsence of the distinction. What was really intended by this statement was that those who pursued occupations as independent contractors in the category of "labourers" could also pursue those occupations as "servants". In other words, a labourer was to be distinguishe from a servant not in terms of the nature of his occupation but in terms of the nature of his contract. The word "labourer" was thus synonomous with the more recent expression, "independent contractor".

This interpretation is supported by two other definitions in the first construction section. "The Term 'Master' shall extend to and include 'Mistresses' and the term 'Employer' shall mean any Person, male or female, by or on behalf of whom any Contract or Agreement shall have been made with any Labourer for the Performance of any work". In other words, when the term "employer" was used in the Act it was being used in contradistinction to the term "master" and, because it was clearly stated that the term "master" included "mistress",

there could be no argument that "employer" was a general term covering both "master" and "mistress". It was an "employer" who contracted with a "labourer" and the relation so formed was to be contrasted with that of master and servant even though the servant's occupation may have been "labouring", because the nature of the contract giving rise to a master-servant relation was to be distinguished from that of employer and labourer.

Moreover, it was only where a contract of service was formed that the relation of master and servant arose, for the final clause in Section 1 declared that "The relation of Master and Servant shall be deemed to commence immediately upon the Agreement or Engagement for Service being made or entered into.. . . " It can therefore be assumed that the contract between employer and labourer was not a contract of service and, although the Act referred to it as a contract for the performance of work, it would be more correct to describe it as a contract for services.

Although the framers of the 1854 Act therefore realised that, ultimately, the distinction between a labourer and a servant lay in the nature of their contracts it was still felt necessary to attempt some sort of classification of the main V.D.L. occupations into one or other of the two categories. This was, however, entirely unnecessary and also very confusing.[2] For example, although the definition of a servant included all occupations comprehended under the term "labourer", there was no similar clause in the definition of a labourer which would have permitted grooms, coachmen and shepherds who had not contracted as servants to be brought within the provisions of the Act. A magistrate faced with this problem was able to turn to the blanket phrase in the definition of labourer - "and all other workmen and labourers of every Class or Description whatsoever" - in order to justify a finding that such groom, shepherd or coachman was a labourer under the Act. But if this were so it would be clear that something other than the man's occupation would have determined that he was a "labourer", because his occupation as groom, coachman or shepherd would in itself, by reference to the definitions, have pointed to his being a servant.

To take the reverse situation, because the definition of a "servant" concluded with the phrase - "and other servants of every Class or Description whatsoever", this would automatically have included those who by occupation alone would have been labourers but who were really servants because they had contracted as such. In other words, because the concluding phrase caught all

servants regardless of occupation it was pointless to list certain occupations as being always referable to a contract of service. It was also superfluous to state that "the term servant shall extend to and include all persons so as aforesaid comprehended under the term 'labourer'" because, given that they had contracted as servants, their occupations were irrelevant. To do so was to confuse the basic distinction which rested ultimately on the nature of the contract itself in each individual case.

No doubt the category into which workers were placed was merely a statement of what was generally true at the time. Most fencers, sawyers, splitters, gardeners etc. did contract for the performance of certain work as independent contractors or labourers and, conversely, most grooms, shepherds, storemen, porters etc. probably contracted as servants. But as we have seen there was no way that comprehensive definitions and therefore successful distinctions could be drafted and based on these occupations.

The above discussion is particularly important because, with one exception, the form of the definitions was retained by the Master and Servant Act (1856), which is still in effect today and it is fair to say that no modern court in Tasmania would need to rely on the definitions or indeed would feel that they had very much to contribute to the still vexing question - is this a contract of service or a contract for services?

B Extension in classes of servants and labourers affected

Turning to the main body of the Act, Section 2 gave rise to a considerable extension in the number of servants and labourers affected. Neither the 1840 nor 1852 statutes had referred to the position of servants and labourers under age and married women who were servants or apprentices. In view of the silence of the preceding legislation it might be argued that such persons were able to prosecute and to be prosecuted for breaches of contract in the same way as other servants and apprentices; but it seems that such servants were not legally punishable for misconduct as "Servants" under the 1852 Act.[3] Since these cases formed a fairly numerous class in the colony and because married women were most frequently to be found in domestic service *i.e.* in the employer's own home, it was thought necessary to make them amenable in the same way as other servants. Accordingly, Section 2 extended the provisions of the Act to all apprentices and to all servants and labourers above the age of fourteen years and the burden of proof was placed on the person who claimed

that he or she was younger than this.

In view of the extreme penalties which the Act authorised for employees' misconduct it is surprising that such youthful servants and labourers were exposed to the full rigours of an oppressive law without some mitigation of punishment being expressly provided for, and without a murmur of disapproval from the British Government.

In order to safeguard a parent or husband's right to the services of his child or wife, Section 3 was enacted which, incidentally, did not appear in the first draft of the bill.[4] Under it a husband, or any parent or guardian of an infant below the age of eighteen years, could put an end to a contract of service or apprenticeship entered into by his wife or child without his consent by giving a month's warning to the master after which the contract was deemed to be terminated and any deed, contract or agreement relating to it was void. This section did not apply to the parent of an infant who had entered into an agreement as a labourer and thereby formed a contract for services. Such a contract was in effect a business contract and not binding on him, unlike a contract of service which, if beneficial to the infant, was legally binding. There was therefore no need to provide his parent or guardian with the power to put an end to the "contract" where it had been made without the parent's consent.

C Termination by notice

It has already been noted in the introduction to the 1854 Act that for a number of reasons a serious shortage of labour was experienced by colonial employers immediately before the Act was passed and this was reflected in many of its clauses. One example is to be found in Section 4 which enacted that "where the Term or Period of Service of any Servant shall be or become indefinite as to Duration, such Service shall not be terminable by either Party by less than a Month's previous warning, unless otherwise expressly agreed".

The rules relating to the period of hiring and the associated question of the period of warning or notice were contained in the common law. In the early 1850's these rules depended on whether the agreement was for a definite or an indefinite period. If the hire was for a definite period the contract was terminated automatically at the end of that period, in the absence of any

express agreement as to a period of notice; but problems arose where no period of hire was agreed upon. Where there was an indefinite hiring there was a general rule that the hiring was a hiring for a year, but it was not an inflexible rule of law and was to be considered in connection with the circumstances of the particular case.[5] In the case of a domestic or menial servant an indefinite hiring did constitute a hiring for a year which could be terminated by either side giving a month's notice. In the case of a servant in husbandry an indefinite hiring was usually a hiring for a year although it was not capable of being terminated by notice at any time during the year.[6]

If the clear intention of the parties was that the hire was to be by the week or by the month then, although the hire was for an indefinite period, it could hardly be presumed that there was a yearly hiring. In this event it was probable that the period of notice required to terminate the contract was one week or one month or whatever.

Within a few weeks of the passage of the Act the true purpose and effect of Section 4 was made known. A letter dated 25th November 1854,[7] was received by the Colonial Secretary from James Radcliff, the magistrate at Spring Bay, requesting him to state a case for the opinion of the Attorney General, Francis Smith, on this clause of the new Act. Two cases had come before Radcliff and although he had dealt with them he remained in some doubt as to the true meaning of the section.

In the first one, where a servant had contracted to serve by the week, the magistrate was convinced that the Act required such a servant to give a month's rather than a week's notice. In the second case, a servant hired by the year went to his master at the end of the year and told him "My year is up today and I'm leaving". His master replied that he was not aware that he was going to leave and was entitled to a month's warning. When the case came before him Radcliff was of the same opinion and thought that Section 4 of the Act required a month's notice to be given.

Francis Smith's reply[8] assured the magistrate that he was correct in both instances. The effect of the fourth clause was that whenever a warning was necessary to terminate a service that warning must not be less than a month unless otherwise expressly agreed between the parties. He went on to point out that where a servant was hired not for a year or week but by the year or

week, the hiring was indefinite as to duration and in both cases required a month's notice to terminate it in the absence of an express agreement to the contrary.

It is important to appreciate that on this interpretation Section 4 was not simply a restatement of the common law rule in statutory form. As we have seen, at common law where the hire was "by the week" the hiring was indefinite as to duration and required notice in order to terminate it but there was probably an implied agreement that the period of notice was to be one week only. In 1854, because of the great scarcity of labour, more and more men were contracting in this way so that they could move on at a week's notice to more lucrative employment. The purpose of Section 4 was thus to stabilise the labour market to a certain extent, except in those cases where there was an express agreement on a shorter period of notice. Such an agreement was not always easy for a servant to prove, with the result that in many cases he was unable to leave until he had served his master for at least one month.

As regards a hiring "by the year" the effect of Section 4 was to extend the common law rule, which applied to domestic and menial servants, to all servants whatever their occupation.

Although the section was not concerned with contracts of hire for a definite period, because such contracts did not require a period of notice in order to terminate them in the absence of any express agreement to the contrary, it should be noted that Section 4 was phrased so as to catch what had initially been a contract for a term certain. At common law it was possible for a contract of service to be expressed to be for a definite period in the first instance which, if not terminated at the end of the period, continued indefinitely. Because section 4 referred to a period of service which "shall be or become indefinite as to duration" the statutory one month's notice was required in such a case even though the duration of the initial contract may only have been one week.

D Payment of wages

Like the preceding clause, Section 5 was designed to make it more difficult for a servant to leave his employer in the lurch after a short period of service. It enacted that the wages of servants and apprentices should, in all cases,

unless otherwise expressly agreed be deemed to be due and payable quarterly. This apparently innocuous clause was in reality full of unhappy implications for the contemporary employee.

In the absence of any express agreement as to the intervals at which wages were payable, servants, whether hired indefinitely or for a definite period, were not entitled at common law to be paid wages until the end of the year or the end of the period for which they were hired so that there were definite advantages to be gained from this section by employees under yearly hirings with nothing said as to the time of payment. But because the tendency was for servants to agree to service for shorter rather than longer periods in order to take advantage of the prevailing short-term increases in wages, and because Section 5 applied to "all cases whatsoever" where there was no express agreement to the contrary, a servant who contracted indefinitely "by the week" was entitled to receive his wages only once every quarter. This was not a very satisfactory situation for such servants since it meant that they could not sue for wages until the three month period had expired and further, that the remedy provided by the Act[9] against a master who failed to pay wages was useless here since it could not be pursued until well after servants and their families would have died of starvation.

If a servant sought employment elsewhere to relieve his distress he would himself be in breach of contract and his absence from service was an offence under the Act for which he could be severely punished.[10] Furthermore, if he did take this step he might prejudice his chances of recovering the unpaid wages because at common law, where payment was quarterly and the servant was guilty of any misconduct including absenteeism during that quarter, he was not entitled to wages, for any part of the quarter up to the day he left since there could be no apportionment of an entire sum.[11] Wages would not therefore be due for the whole of that quarter even though he might have served almost all of it.

The "quarterly payment" rule provided by Section 5, taken together with other sections in the Act, was thus inordinately repressive, especially when it is appreciated that it was often difficult for a servant to prove an express agreement for a shorter period by which wages were payable when there was a mere oral agreement.

E Offences by servants

"Misconduct" by servants was dealt with in Section 6:

"If any Servant engaged by or on behalf of any Master shall not enter upon his Master's Service according to such Engagement or shall absent himself from his Master's Service before the lawful Termination thereof or shall refuse to perform the same, or shall not perform the same in a diligent and careful Manner, or shall disobey any lawful command of his Master or of any Person by his Master in that behalf authorised, or shall be guilty of any other Misconduct in the Execution of his Service, or relating thereto, or during the Continuance thereof, every Servant in any such case so offending, being convicted thereof before a Justice of the Peace, upon complaint made by or on behalf of such Master, shall be liable to Imprisonment with hard labour for any period not exceeding three months or to forfeit the whole or any portion of the wages due or accruing, or, at the discretion of such Justice to both such Punishments".

It will be apparent that this did not create a new offence, for it had appeared in much the same form in the earlier master and servant legislation of the colony. It is true that under the 1852 Act (Section 2) a servant was only convicted of failing, refusing or neglecting to work in a diligent and careful manner after having been required by his master to do so, whereas in 1854 not performing the work in a diligent and careful manner was an offence *per se* without the additional requirement. In both Acts such behaviour by a servant was termed "misconduct" so that, in effect, there was little practical difference between the two statutes on this point. Similarly, under Section 6 it was an offence to disobey any lawful command of the master or his agent and, although not specifically mentioned by the 1852 Act, such a refusal amounted to "misconduct" and was punished as such.

The fearful nature of Section 6, therefore, lay not so much in the novelty of the offence created as in the mode of its administration and in the character of the penalties inflicted. It is an important indication of the extent of pressures caused by a very tight labour market that throughout the 1854 Act only one justice was required to hear and determine complaints brought before him, and Section 6 was no exception in this respect.[12]

The official reason for permitting one magistrate to exercise jurisdiction was that it was difficult to obtain the attendance of two magistrates to try

master and servant cases, particularly in country districts, and that this had in some instances caused a positive denial of justice.[13] Moreover, there was the argument that Van Dieman's Land had merely moved into line, for in New South Wales and the United Kingdom only one justice was necessary under the 1828 and 1823 Acts respectively. There had been many examples, however, of the abuse and ignorance of magistrates sitting alone, sometimes in private houses[14] trying master and servant cases in the U.K.[15] These abuses were not likely to be any the less in Van Diemen's Land, but employers in the colony had felt so threatened by economic developments in the previous two years that they and their representatives in the Legislative Council were anxious to ensure that magistrates had the power to deal with recalcitrant employees as quickly and as summarily as possible.

The proposal had not been entirely without opposition in the Legislative Council. Kermode, M.L.C. for Campbell Town, suggested when the bill was at the Committee stage that two justices should be required to determine whether an offence under this section had been committed. He was supported by Clerke (M.L.C. of Longford, on the death of Archer in 1853), Chapman (Hobart), Morrison (Sorell), Allison (one of the non-elected members of the Legislative Council who had previously been defeated by Kermode for the Campbell Town seat) and Fenton (New Norfolk) but unfortunately they were in the minority and were unable to affect this aspect of the Act.[16]

A similar attempt was made by Kermode in relation to the maximum period of imprisonment with hard labour but despite his efforts to lower the term to one month Section 6 extended this period from two to three months.

As with the 1852 Act, Section 6 permitted the forfeiture of wages as an alternative or additional punishment but an important new remedy was given to a master by virtue of Section 12 which authorised a justice to order the discharge of a contract at the complainant's request. A master could therefore relieve himself of a troublesome servant over and above any punishment inflicted on the latter under Section 6. The remedies for this group of servants' offences appear at first sight to have been brought more into line with those in the United Kingdom under the 1823 Act although on a closer look this is seen not to be so.

For the first time in the history of the colonial legislation, discharge from service was available as a general remedy for all complainants whether

masters or employees. It is at first more than a little surprising to find such a remedy given at a time when masters were generally speaking very keen to retain their servants. But it must be remembered that a justice could only exercise his jurisdiction in this respect after a request had been made to him by a complainant so that in relation to the offences created by Section 6 it was only when a master wished to get rid of his servant that discharge was available. This was not the case in the United Kingdom under the 1823 Act where it was possible for a master to prosecute his servant for misconduct etc. only to find that he had lost his services because a justice had exercised his discretion of discharging the servant. Moreover, under the English Act a magistrate could not both commit a servant for punishment and also discharge him from service; he was only authorised to discharge from service in lieu of punishment[17], unlike Section 12 of the 1854 Act in V.D.L. where discharge was an additional and not an alternative remedy.

The three month maximum period of imprisonment with hard labour was particularly harsh as regards apprentices' absenteeism or misconduct under Section 7, since previously, the maximum had been one month's imprisonment. Bearing in mind the generally younger age of apprentices it might be thought that this would have been reflected in a slightly more lenient approach but the spirit in which the 1854 Act was conceived would not permit vexatious apprentices to be regarded in a different light from other troublesome employees merely because of their youth.

F Offences by apprentices

As regards alternative punishments for apprentices, the 1854 Act discarded the possibility of discharging an apprentice *to* the service of his master and replaced it by forfeiture of a part or the whole of his wages in the same way as servants. Section 12, in providing for discharge of the apprentice from his service, did not of course arm an employer with a new remedy against apprentices because it already existed under the 1852 Act. The cumulative effect of the punishments in the 1854 Act was, however, much more severe for apprentices than it had been two years earlier. It was now possible for an apprentice to be sentenced to imprisonment for up to three months with hard labour plus forfeiture of wages plus discharge from his apprenticeship. The possibility of discharge was of little consequence to the employee where there was a labour shortage but it was to be more keenly felt in the months following the passage of the 1854 Act which saw a steady

decline in wages and employment.

G Labourers' offences

Having dealt with servant' and apprentices' misconduct the Act proceeded to punish labourers for their breaches of contract in an identical way[18] so that if convicted, labourers could, *inter alia*, be discharged from their contracts at the request of their employers.

H Aggravated employee offences against employers and occupiers

1) Abusive or obscene language

If the punishments had not been so severe, Sections 9 and 10 might have brought a smile to the lips of employees at that time, for they sought to protect the new-found gentility of the Tasmanian employer by making it an offence to use any "abusive, profane or obscene language to or in the prescence or hearing of his Master or Employer or any of the Family of such Master or Employer" or, where work was being undertaken at another house by his master or employer, any "abusive, insolent, profane or obscene language to or in the prescence or hearing of the Occupier of such House or any of his Family".

This provision had not appeared in any previous master and servant legislation in the colony probably because employers in the past had themselves been generally more roughly hewn and were as likely to use such language as their employees without either side regarding the use as constituting a serious obstacle to their continued relations. But times had changed and the Government was determined to stamp out the profusion of "blue" words and phrases that warmed the Tasmanian air.

The scope of the offences was very wide. Words did not have to be directed at a master or employer for it was sufficient they were spoken in his presence or even within his hearing although he was nowhere in sight. Not only did the 1854 Act make life more difficult for the colonial employee but he was, in addition, being denied the right to complain about it in characteristic style to another person or even to himself. He never knew where his employer's children might be playing so that a quiet curse in the course of a tiresome job might result in the employee being handed over by a young child to the Constable in whose custody the employee could be held, without a warrant, until taken before

a justice as authorised in Section 9.

The section concluded "and the Justice before whom such servant, apprentice or labourer shall be brought is hereby authorised to proceed against him in the same manner as if he had been brought before such Justice by virtue of a warrant issued for that purpose under the Authority of this Act." A justice was therefore undoubtedly authorised to proceed as if the servant had been arrested by a warrant charging him with the use of abusive, profane or obscene language (or with one of the other offences created by Section 9), but there appears to have been a glorious oversight in the drafting of this section because nowhere was there any reference to the penalties to be imposed should the employee be convicted. Yet the punishment under Section 10, for abusive, insolent, profane or obscene language by an employee to or in the presence or hearing of, an occupier or his family on whose premises work was being carried out by the employee's master or employer, was clearly stated as being a maximum of three months imprisonment with hard labour. It seems unlikely, therefore, that any employee was actually prosecuted under Section 9 for any of the offences mentioned there until the 1856 Master and Servant Act provided a punishment for the offences. This is not to say that employees could never have been punished for abusive or obscene language because, after an order by the master or employer or a member of his family to desist, a repeat performance amounted to disobeying a lawful order and was punishable accordingly under Section 6; and even the first utterance was capable of being construed as "misconduct".

2) Assaults and drunkenness

What has been said above in relation to abusive language also applied to the other offences created by Sections 9 and 10. An employee who assaulted or conducted himself in a violent, unruly or insubordinate manner towards his master or employer or any of their respective families committed an offence, as did an employee who was drunk or disorderly on his master's or employer's premises; although, since these were created under Section 9 without penalties, they were probably inoperative. On the other hand, the effective Section 10 made it an offence for any servant or labourer to be "drunk or guilty of violent or disorderly conduct" on the premises of an occupier for whom his master or employer was undertaking work or to be guilty of any ill behaviour towards the occupier or any of his family.

3) Sections 9 and 10 compared

The purpose of both sections was the same but whereas Section 9 applied to all employees *i.e.* servants, labourers and apprentices, because all employees were likely to be concerned, Section 10 did not apply to apprentices probably because it was unlikely that an apprentice would be working on the premises of another person without his master being there to oversee his work; and, if he was working with his master on another's premises, he could be punished for swearing in his master's presence under Section 9 although no action could be taken by the occupier and his family even if they had been offended. On the other hand, there was every possibility that servants and labourers might be working in their master or employer's absence on the occupier's premises in which case they could not be prosecuted without the assistance of Section 10. If by any chance both master or employer and occupier heard them swearing, since both sections created separate offences, they might possibly have been convicted under both heads.

One other vital distinction between the two sections should be mentioned at this point. Where an occupier was offended under Section 10, a prosecution commenced in the normal way by making a complaint or laying an information against the servant or labourer, leading to a warrant for his arrest.[19] Conversely, Section 9 provided for arrest without warrant where a master or employer or their families were the victims of an employee's offence under the section. The rationale for permitting arrest without warrant, though not the reason for restricting it to masters rather than occupiers, lay in the great inconvenience which was often experienced under the 1852 Act in dealing with violent servants in the absence of any legal power which would enable them to be placed in custody immediately. A master was bound to wait until an information had been laid before a magistrate and a warrant issued, and in many instances the conduct was continued to the annoyance of the master and his family.[20] Quite rightly, Section 9 was designed to remedy this situation but unfortunately the width of the section was such that it caught the fairly innocuous act of insubordination along with the act of rebellion, and the stifled curse along with the obscene ravings of a drunken servant.

I Special provisions relating to imprisonment of employees

1) Period of imprisonment or absence not counted as service

It will be remembered that in both the 1840 and 1852 Acts the Van Diemen's Land Government had been concerned to see that apprentices who absented themselves

should be compelled to serve the period of their absence as part of their apprenticeship term.[21] In 1854, so that masters would not be deterred from prosecuting by the fact that they might lose the services of their servants for up to three months, at a time when they were urgently needed, this idea was extended from apprenticeships to other contracts of service by Section 11:

"Neither the Period of Absence without Leave nor that of Imprisonment for any Offence under this Act shall be accounted Part of the Period or Term of Service of any Servant or Apprentice, but such Servant or Apprentice shall on being found at any Time after such Absence or immediately on the Expiration of any such Imprisonment, as the Case may be, return to and continue in his Master's Service for such Period as is equal to the Period of Service which was unexpired when he absented himself or was imprisoned whichever may have first happened; and the Period of Service after such Absence or Imprisonment shall be deemed to be a Part and Continuation of the original Service, and in case, and as often as such Servant or Apprentice shall fail or refuse so to return and continue in such Service for such Period as aforesaid, he shall be liable to be punished as for Misconduct during his Service".

Thus, not only was an absence without leave not counted as part of the period of service for both servants and apprentices, but even the period of imprisonment resulting from convictions under other sections of the Act could be ignored in calculating the period of service remaining. There was to be no respite from a particularly evil employer for, even in the physical agonies of imprisonment with hard labour, there was the gloomy prospect of a return to his service. This was undoubtedly one of the most short-sighted and unjust measures in the 1854 Act.[22] Relations between a servant who was forced to return to the service of the man who had caused him to undergo the fearful punishment of three months hard labour, could never by anything but poor, yet the slightest word or shrug or curse, whether real or imagined, could send a servant back again and again to the same punishment and the same master. Where the contract of service was discharged by the justice this was not possible, but we have seen that this could only occur at the request of the complainant.

Unlike the 1840 and 1852 legislation which enacted that apprentices were to serve the period of their absence as extra time, the 1854 Act did not purport to extend the period of service in this way. It has already been noted in connection with the 1852 Act[23] that such an approach was very unsatisfactory especially as no power was given to justices to order the extra period to be served should an apprentice refuse to do so at this masters's order. In this

event the justices were merely empowered to determine what satisfaction should be made by the apprentice and to punish him should he refuse to make it. The apprentice did not of course escape without punishment when he refused to serve the extra period or to make satisfaction to his master caused by his absence but, his persistent refusal meant that he could be ordered by the justices to make satisfaction but not to serve the extra period. In cases where he was unable to make the satisfaction required he was punished for his failure by imprisonment with hard labour, but in this event the master gained nothing under the earlier legislation because he then lost the services of his apprentice not only for the period he was imprisoned but also for the period constituted by his earlier absence.

By section 11 of the 1854 Act, however, a more negative but more effective method was adopted when it was enacted that "neither the Period of Absence without Leave, nor that of Imprisonment . . . shall be accounted Part of the Period or Term of Service", and that the servant or apprentice should return to his master's service to continue for the period that was unexpired at the time he absented himself or was imprisoned, and it follows from this that "the Period of Service after such Absence or Imprisonment shall be deemed to be a Part and Continuation of the original Service". This approach avoided the necessity of statutorily tacking on an extra period of service which had not been agreed to by the parties, and was more in keeping with the laissez faire ideas of the time. But the Government was still reluctant to give a justice the power to order what would have amounted to specific performance of the contract and a continued refusal or failure by a servant to return to his master's service was made punishable as misconduct each time it occurred.

In clearly stating that the period of imprisonment resulting from a conviction for an offence under the Act was not to be regarded as part of the period of service, Section 11 resolved doubts that had existed as to whether a master could require his imprisoned servant to continue working for him whilst incarcerated. The 1852 and 1840 Acts were silent on the point but there was a good precedent in the United Kingdom with respect to the English master and servant legislation. In 1814 in *R.* v. *Barton-upon-Irwell*,[24] Lord Ellenborough had pointed to the underlying philosophy when he said, "it would be clearly against the policy of the law if the servant by his own act of delinquency should have the power of dissolving the contract", and he went on to add that "the imprisonment of the servant was so far from being a cessation of the service that perhaps his labour might have been required of him by the master even while he

was in prison". In V.D.L. after 1854, since the period of imprisonment did not constitute part of the term of service, a master could not require his servant so to work for him although in any case it is difficult to see in practical terms how such work could have been fitted into a day filled with hard labour for Her Majesty.

In other respects however the English Master and Servant statutes and the 1840, 1852 and 1854 colonial legislation operated in a similar way. Under the English legislation, although not expressly stated, the master could require the return of his servant after his imprisonment[25] and if the servant went away without his master's consent after serving his sentence, his absence constituted a further act of disobedience for which he could be punished.[26]

2) Solitary confinement

A particularly obnoxious new provision in the 1854 Act, whose novelty was equalled by its savagery, was contained in Section 16:

"Where Imprisonment with hard labour may be awarded for any Offence under this Act, it shall be lawful for the convicting Justice to sentence the Offenders to be imprisoned and kept to hard Labour in some Gaol or House of Correction and also to direct that the Offender shall be kept in Solitary Confinement for the whole or any Portion of such Imprisonment with hard labour, not exceeding Thirty Days, as to such Justice in his Discretion shall seem proper".

Never before had such a clause appeared in any master and servant legislation; certainly not in the United Kingdom, and not even in the earlier New South Wales Act of 1828 when a much higher proportion of the employees to which the Act applied were ex-convicts. There can be little doubt that the infliction of solitary confinement in addition to long periods of imprisonment with hard labour for minor breaches of contract marked an all-time low in the treatment of free men as dangerous criminals. One of the most amazing aspects of this clause was the fact that it was viewed by the Government as necessary for the benefit of the employee. The explanation given by the Governor was that it was designed to protect convicted servants sentenced to hard labour by shielding them from indiscriminate association with vicious characters in prison.[27] The effect of up to thirty days solitary confinement in small cells on the minds and bodies of employees guilty of breaches of contract was not considered as outweighing this supposed benefit. When the bill first appeared in the Legislative Council no limit to the number of days which could be ordered to be

spent in solitary confinement was indicated. Fortunately, the intervention of of the Member for Campbell Town, Robert Kermode, led to the acceptance of a limit of thirty days at the committee stage and saved the Government from being responsible for an even grosser act of intolerance and oppression.[28]

3) Female employees

It was also largely through Kermode's efforts and the support he could muster in Council that Section 17, was included in the Act, which permitted a justice, in his discretion, to impose a pecuniary penalty on female employees instead of imprisonment with hard labour and solitary confinement. But the maximum pecuniary penalty of £20 was set so high that the Legislative Council could hardly be accused of adopting too lenient a view towards female servants. This sum had to be paid immediately "or within such period as such justice shall think fit to appoint for the Purpose" and, since it was only designed to replace imprisonment with hard labour as a punishment, the other possible penalties remained so that the almost impossible task of raising more than a year's wages[29] could be made doubly so by a justice ordering, in addition, forfeiture or abatement of wages already earned. Failure to pay in accordance with the order resulted in the very thing the section purported to avoid - imprisonment with solitary confinement for up to fourteen days.

It seems almost incredible now that Section 17 was known as the "mitigatory clause", but it was in this light that the Legislative Council was persuaded to accept it when it appeared for the first time at the committee stage on 19th September 1854.[30] The only notable difference between the clause as introduced and the section as it appeared finally in the Act was that the period of imprisonment for non-payment of the fine was initially a maximum of three months without any mention of solitary confinement.

J Employer offences

As regards employee complaints against employers, Sections 18 and 19 jointly provided remedies in a very similar form to the earlier 1852 legislation. Section 18 dealt with recovery of wages or money owing and Section 19 was concerned with a variety of other matters which could generally be termed employer misconduct. For the first time in the history of master and servant legislation in V.D.L. separate treatment was given to the question of recovery of wages and money owing; non-payment was not merely dealt with as a species

of ill-treatment in a general section. The difficulties, already referred to in connection with the 1840 and 1852 Act, which stemmed from attempts to deal specifically with recovery of wages in a general section embracing all forms of employer misconduct were therefore avoided in 1854.

Section 18 stated that:

"Upon Complaint made to any Justice of the Peace by any Servant, Apprentice, or Labourer against any Master or Employer, concerning the Non-payment of Wages due, or of Money owing for work done, it shall be lawful for such Justice to summon such Master or Employer to appear before him or any other Justice, and any such Justice as hereby authorised to hear and determine such Complaint and, in case the same shall be established to his satisfaction, to order the Payment within such reasonable Period as he shall think proper, by the Defendant to the Complainant of such Wages or Money as shall appear to be due, and, also of such sum of Money not exceeding Five Pounds as Compensation for the Non-payment of such Wages or Money as he shall think reasonable."

The section clearly enabled an employee to recover what was due to him and there was no possibility that a justice could order the payment of amends as a substitute for the sum owing. Any amends ordered to be paid were in every case to be in addition to the primary remedy of recovery of wages or money. However, where amends were ordered to be paid the maximum was to be a sum of £5 in all cases rather than a maximum of six months wages of the particular employe as previously. The alteration though small, was significant. Wages had risen at an alarming rate right up to the time when the 1854 Act was passed. The Immigration Agent reported that 12s. a day was the usual wage of skilled workmen during the first nine months of 1854[31] so that a master convicted of non-payment of wages under the 1852 Act might have found himself, at least in theory, having to pay a very substantial sum in addition to wages owed. Hence the importance to V.D.L. employers of the £5 limit on compensation.

Further safeguards for employers lay in the fact that both the amount of compensation payable and the time within which the money or wages owed had to be paid were at the discretion of the justice. The former had always been the case under the 1852 Act, but since no provision had been made for the latter[32] it was more than likely that the sum was payable immediately. After 1854 the amount owed was to be paid "within such reasonable Period as [the justice] shall think proper". Where the "reasonable" period was a relatively long one an unfair burden was placed on the shoulders of a man who had won his

case against his employer.

Other forms of employer misconduct were dealt with by Section 19. In addition to the familiar ones of misusage, refusal of sufficient and wholesome food or other necessaries and neglect, it was made an offence for an employer or master to use abusive, profane or obscene language towards his employee. In the event of a conviction the employer could be bound to pay up to £20 as compensation. But again the actual amount was left at the magistrate's discretion and so was the time within which the employer could pay.

Misconduct towards employees was therefore treated in a completely different light from the reverse situation and there was never any question of a master or employer being sent to prison with hard labour and solitary confinement for ill-treating or swearing at his servant. Moreover, one cannot even compare an employer's position with that of a female employee under the "mitigatory" Section 17 because, although the maximum pecuniary penalty was the same, a female employee forfeited wages in addition if convicted and also could be imprisoned if she failed to pay the penalty. Failure to pay compensation after a conviction under Section 19 of an employer on the other hand, merely resulted in distress and sale of his goods and chattels under Section 21.

K Knowingly hiring, employing, retaining, harbouring, concealing or entertaining an employee.

In order to ensure that the employee who had absented himself before the termination of his contract really was regarded as a fugitive criminal, Section 30 re-enacted the "harbouring" clause of the earlier master and servant legislation as follows:-

"If any Person shall knowingly hire, employ, retain, harbour, conceal or entertain any Servant or Apprentice so engaged or bound as aforesaid to any Master before the lawful Termination of his Service, or any Labourer having so as aforesaid contracted with any Employer before the Completion of his Contract, every Person so offending being convicted thereof in a summary way before a Justice of the Peace, shall for every such Offence forfeit and pay a Penalty not exceeding Fifty Pounds whereof one Moiety shall be paid to the Informer or Complainant for his own Use and the other Moiety to the Colonial Treasurer in aid of the General Revenue: Provided that it shall be lawful for

the Defendant to appeal from such Conviction if he thinks fit"..

The implications of this section have already been discussed in connection with the 1840 and 1852 Acts and very little more need be added because there were only minor differences in phraseology. It will be recalled that the 1852 Act made it an offence to "knowingly and unlawfully harbour, employ, receive or entertain" another's employee. As already mentioned the absence of the word "unlawfully" does not appear to have materially affected the nature of the offence. The addition of the word "hire" was in conformity with the distinction made in 1854 between servants who were "hired" and labourers who were "employed". Also, the rather vague word "receive" was replaced by "retain" and "conceal" which in turn served only to exemplify other words such as "harbour". Very little if anything was gained by these alterations.

On the other hand, perhaps more significant, was the use of the phrase "before the Completion of his Contract" in place of "during the continuance of any such contract". Because Section 11 of the 1854 Act had provided that neither the period of absence without leave nor the period of imprisonment received by a servant guilty of absconding should be counted as part of the contract of service, it would never have been possible to have prosecuted a "harbourer" of a servant who had absconded either from his service or from prison after having been convicted, since there was no"continuance of service". There was no doubt, however, about the validity of a prosecution where a person had harboured such a servant "before the completion of his contract". These difficulties did not arise in connection with the 1852 Act because it was accepted, as in the United Kingdom, that service continued during a servant's absence and probably even during his imprisonment after a conviction under the master and servant legislation.

The same heavy maximum penalty was retained at £50 as it had been since 1840, and informers were encouraged by the prospect of recovering half of this small fortune. As with many other sections of the 1854 Act this provision was not a popular one and was described at a later date as "a violation of the great and fundamental principles of British liberty as embodied in Magna Charta inasmuch as it renders any and every free servant unconvicted of crime, whether fleeing from outrage or otherwise, an outcast in a strange land".[33]

L Costs

Distress and sale of an employer's goods was also authorised in order to pay the costs assessed by a justice after a conviction or adjudication against the employer. An employee in this position was liable to have costs deducted from his wages or money "then or thereafter due or accruing".[34] The possibility of paying costs as one of the consequences of losing a case has always been an important factor in the mind of the would-be litigant. Other factors are the extent to which the law places him in a disadvantageous position as regards the other party and the extent to which he can expect impartial treatment by those responsible for administering the law. In the eyes of the servant who had a real and genuine complaint against his employer, the combined effect of injustices in the substance of the law and its administration by an often biased justice, and the possibility of meeting costs in addition, was more than enough to deter him from making the initial complaint in many cases.

M Procedure

1) Summons or warrant

One of the commonest complaints among employees in relation to the earlier colonial legislation, and indeed in the United Kingdom under the 1823 Act, was the procedure used to ensure their appearance in court. It has already been shown that under the English master and servant legislation a servant could be arrested at any time of the day or night after a complaint by his master whereas, conversely, a servant could only proceed by way of a summons. This pattern was followed in the colonial legislation of 1840 and 1852, rather surprisingly in the latter instance despite the passage of Jervis's Act in 1848[35] which gave magistrates in England and Wales the option of issuing a summons.

By Section 13 of the 1854 Act however, the powers of colonial magistrates were brought into line with their English counterparts and they were given a discretion to proceed by warrant or summons against servants, except presumably for an aggravated offence under Section 9. One problem stemming from this development, and provided for by Section 14, was the fact that many employers did not know the names of their employees. They were therefore permitted to describe the employee concerned and this was accepted by the justice as a sufficient basis for the issue of a warrant for the arrest of the servant described, thus placing every "tall, dark male" employee for miles around at risk of being

apprehended at an awkward moment and detained in prison for up to seven days as described by Section 15. Under this section any servant brought to a justice by virtue of a warrant was obliged to spend up to a week in custody in order that reasonable notice could be given to his employer to appear and substantiate the complaint. The alternative was for the servant to enter into a recognisance, with sufficient surety for a sum thought to be "reasonable" by the justice to appear at a future date.

No similar procedure regulated the appearance of masters because they were not brought before a justice by means of a warrant for arrest and, even when summoned, Section 20 enabled a justice to deal with a complaint against an employer in his absence although, since the general word "defendant" was used in Section 20, it may be assumed that the presence of a servant was also not necessary where he had been summoned rather than arrested.

2) Forms of proceeding

In the United Kingdom, the 1823 Act had given rise to a plethora of technical and procedural litigation. English lawyers defending servants convicted under the Act were primarily concerned with the form (for example, questions of the validity of warrants of commitment) rather than with the substance of the case, when they appealed from a magistrate's decision. This was in most cases the easiest and quickest way of securing their client's release from prison. Where it was sought to have a conviction quashed for defects on the face of it, a writ of certiorari might be issued and the appeal court would then admit the defendant, who was in prison under the conviction, to bail, and when the defects of form were established the defendant would be discharged.[36]

Sections 23 and 24 of the 1854 V.D.L. Act were included in order to block up any escape routes of this nature. Section 23 pointed out that the forms of proceeding contained in the Schedule to the Act were intended only for the "Assistance and Convenience" of Justices and that provided other forms used by them were of substantially the same effect, it did not matter that there were modifications to meet the particular circumstances of the case.

3) Certiorari

Under Section 24 no conviction or adjudication under the Act was to be held bad for want of form; or was to be removed into the Supreme Court by Writ of Certiorari, or otherwise. Moreover, no warrant of commitment or distress

was to be held void by reason of any defect therein, provided there was a valid conviction in substance to sustain it. As might be imagined, these provisions proved to be an effective obstacle to any appeals on the ground of bad forms of procedure.

4) Appeals

The 1840 Act had given a right of appeal in all cases where a pecuniary penalty was awarded and the prerogative writs and orders were also available In 1852 a general right of appeal was not granted but there was no reason to presume that the prerogative writs and orders were not available. But since the 1854 Act quashed the possibility of certiorari or any other means of getting a master and servant case into the Supreme Court and also did not grant a general right of appeal, it appeared to be totally effective in preventin any appeal from the decision of a single justice except where it specifically allowed this as, for example, under Section 20.

However in *Reg.* v. *Smith*[37] (1862) the Supreme Court, (Chief Justice, Sir Valentine Fleming and Puisne Judge, Francis Smith) was faced with applying an identical provision to Section 24 in the Master and Servant Act (1856) and found a way of permitting a conviction under the Act to be brought before them. They accepted the principle that a statute taking away certiorari in express terms would not prevent the proceedings from being reviewed by certiorari if it appeared to the Court that the justices had acted without jurisdiction. Since the magistrates' jurisdiction depended on whether the information clearly formulated an offence under the Act, it was necessary to turn to the information which stated, "I have in my employ one George Smith as a shepherd on wages, that he had neglected his duty as a shepherd in not satisfactorily accounting for the number of sheep he had in charge, there being at present nine hundred sheep deficient".

The Solicitor-General argued strongly that there could be no doubt that the offence of neglect of duty had been committed, but the Court held that since the information specified the way in which duty was neglected, and since the Act did not deal with a failure to account which may or may not have been consistent with an offence under the Act, there was no offence on the face of the information on which the conviction was based. The justices had therefore acted without jurisdiction and the conviction was quashed. The decision emphasised the importance of the information and underlined the fact that, provided employers kept within the terminology of the Act, review by the Supreme Court was not possible.

N Immigrant servants

As regards the immigration aspects of the 1854 legislation Sections 25-29 contained provisions thought necessary to ensure the successful operation of the January 1854 Immigration Regulations in conjunction with the Assisted Emigrants Act. When comparing Sections 25-29 with Sections 13 and 14 of the 1852 Act it should be remembered that the main differences between them are explicable by the fact that they were drafted against a background of different immigration schemes: on the one hand, the 1852 proposals which had been disallowed in 1853 by the British Government, and on the other, the New South Wales and bounty systems operating in 1854.

Essentially, Section 25 made agreements for service formed in the United Kingdom or elsewhere outside V.D.L. as valid as if the parties had contracted in the colony.[38] In this respect the section was merely a re-enactment of Section 13 of the 1852 Act. But there was at least one significant difference between the two sections.

In the first place, Section 25, after declaring United Kingdom agreements to be valid in the colony, added the words "and effectual without a stamp". It will be recalled that the Land and Emigration Commissioners in their report on the New South Wales scheme had made the point that since the New South Wales scheme agreement was not a contract of service it was not exempt from stamp duty under Section 35 of the Australian Courts Act (1828), and that the attempt by the New South Wales Government in the 1852 Immigration Act to declare all such agreements as valid in that colony was illegal. The same argument did not apply to Section 13 of the Van Diemen's Land Servants and Apprentices Act (1852) because the agreements under the disallowed immigration proposals were in fact contracts of service. But in 1854, because both bounty and New South Wales scheme agreements were not contracts of service, an identical problem confronted the Van Diemen's Land Government and led to the above amendment. This would not have been sufficient, however, to have overcome the Commissioners' objection. What was required was the passing of an Act in the United Kingdom extending the exemption of the 1828 Act to all such agreements whether contracts of service or not. The enabling legislation was in fact passed on August 10th 1854,[39] two months before the 1854 Master and Servant Act became law and, although news of it could not have been received at the time the latter was passed, Section 25 was thereby validated in so far as the section might otherwise have been invalid as an evasion of the English revenue law.

The English 1854 Act in referring to agreements made in the U.K. "for or relating to service" covered the bounty and N.S.W. agreements as well as contracts of service; on the other hand, section 25 referred to agreements "by which any Servant . . . shall be engaged by or on behalf of any Master for the Service of such Master in the Colony" i.e. only to contracts of service. The results were not however disastrous for N.S.W. and bounty agreements because the English section was of paramount force. But it is important to realise that the English 1854 Act was only concerned with the stamp duty aspect and did not in any other way affect the validity or otherwise of agreements made in the U.K. for or relating to service. The only relevant English statute on the enforceability of such agreements was the "N.S.W." Act 1823 (4 Geo. IV, c. 96, Ss. 41 and 43) re-enacted by Sections 35 and 37 of the Australian Courts Act (1828), which only applied to contracts of service. Section 25, was clearly intended to make all agreements made in the U.K. under the N.S.W. and bounty immigration scheme enforceable in the colony and subject to the master and servant legislation. But unfortunately the draftsman had simply extracted the section from the 1852 Act without realising that because the N.S.W. and bounty agreements were not contracts of service the statutory language above was incapable of bringing such agreements within its scope. In other words the section had served its purpose in 1852 because the 1852 immigration proposals later disallowed by the British Government had involved contracts of service, but it was not relevant to the new immigration agreements.

Thus, as we have seen in November 1854 the Crown Solicitor and the Immigration Agent correctly pointed to the inability of the colonial Government to take effective action, either in the civil courts or under the Master and Servant Act, against immigrants who had broken their U.K. agreements. Section 25 was therefore only relevant where colonial masters had acted on their own initiative and contracted themselves, or through agents, outside the bounty and N.S.W. schemes. Only for this fairly limited group of immigrants were the provisions of the Master and Servant Act applicable immediately on their arrival in V.D.L.

Section 26 was identical to Section 14 of the 1852 Act in facilitating proof of the agreements referred to in the previous section, but an entirely new and very necessary provision appeared as Section 27, which made it clear that immigrants who had contracted as servants outside the colony were only entitled to be paid wages after their arrival since that was when service was deemed to commence, unless otherwise expressly agreed.

The two remaining immigration sections of the Master and Servant Act applied to all colonial masters and servants regardless of the original immigrant status of the servant, that is, irrespective of whether he was a bounty immigrant, New South Wales scheme immigrant, immigrant servant or in any other category.

Under Section 28 any master who, under Government Regulations or otherwise had contributed any sum towards the passage money or outfit of any servant engaged by him or on his behalf in the colony or in the United Kingdom or elsewhere, was authorised to deduct it from his servant's wages provided no more than half wages was taken on each pay day. For immigrants arriving under the bounty scheme this requirement was not excessive. Upon arrival they were paid wages[40] from the date of embarkation and, providing they stayed in Van Diemen's Land for four years, were only bound to repay the £3 or £5 which had been contributed by their prospective employers, but things were not so rosy for immigrant servants who had entered into contracts of service before their arrival. These servants were subject to Section 27 and, unless there was a stipulation in their contracts to the contrary, were not entitled to be paid wages while on board ship and, where their masters had paid the entire cost of their outfit and passage they were obliged to live on half wages for a considerable period after arriving with severe punishments under the other provisions of the Master and Servant Act if they broke their contracts. This situation was exacerbated by Section 28 which went on to provide that a servant could not leave his service, which was deemed to continue notwithstanding the expiration of the term originally agreed upon, until the sum was repaid in full.

Faced with the possibility of surviving on half pay many servants would inevitably have turned to their masters to borrow against future earnings and this was anticipated by Section 29 which stated that where any advance was requested and paid on account of wages, service was deemed to continue in the same way as in the previous section.

NOTES

1. 18 Vict. No. 8. The 1852 Act was repealed by Section 35.

2. See *Ruse* v. *Erdmann* (*Mercury*, 9th July,1884).

3. Governor's Despatch of 20th November 1854.

4. Colonial Secretary's Correspondence, Vol. 246, 9551. Reply to letter from Colonial Secretary to Solicitor General - 30th May 1854.

5. See *Baxter* v. *Nurse*, G.M. & G. 935; 7S. N. C. 801, S. C.

6. See *Lilley* v. *Elwin*, 17 L. J. 132 Q. B.

7. Colonial Secretary's Correspondence Vol. 246, 10755.

8. Colonial Secretary's Correspondence Vol. 246, 10755.

9. S. 18.

10. S. 6.

11. See *Atkin* v. *Acton*, 4 C. & P. 208.
Ridgway v. *Hungerford Market Co.*, 3 A. & E. 171; 4 N. & M. 797.
Turner v. *Robinsen*, 6 C. & P. 15; 5 B. and Ad. 789; 2 N. & M. 829 SC.
Lamburn v. *Cruden*, 2 M. & G. 252; 2 Sc N. R. 533 S. C.

12. Section 32 provided that the jurisdiction vested in one magistrate might in all cases be exercised by more than one but the fact remains that one magistrate was sufficient for what was sometimes a very summary form of justice.

13. Governor's Despatch of 20th November 1854.

14. Section 32 (1854) Act provided that every complaint under the Act was to be heard in a summary way "at some public Police Office or Place used as such, or usual Place of Meeting of Justices for the Purpose of holding Petty Sessions", but this was often the justice's private residence in country districts at that time.

15. For examples in the U.K., see Daphne Simon, *Master and Servant*, in *Democracy and the Labour Movement*. (1854) 160, 171. See also in N.S.W., Coghlan, *Labour and Industry in Australia*, Vol. II 772.

16. Legislative Council of V.D.L. Votes, Proceeding & Papers, Vol. 4, 1854.

17. *Lancaster* v. *Greaves* (1829), 9 B. & C. 628.

18. S. 8.

19. Or possibly to a summons. S. 13.

20. See Governor's Despatch of 20th November 1854.

21. 1840 Act, s. 3; 1852 Act, s. 5.

22. Although it is likely that it merely put into statutory form what had been practised in connection with the 1840 and 1852 legislation.

23. S. 5.

24. 2 M. & Sel. 329, 333.

25. *Ibid.*

26. See D. Simon, *op. cit.*, 166; and also the evidence of W. P. Roberts (the miners' solicitor) to the U.K. Select Committee appointed to inquire into "The State of the Law as regards Contracts of Service between Master and Servant" 1865-1866. 1866 XIII Q. 1667-72. It is probable that the V.D.L. 1840 and 1852 Acts were applied in the same way although they too were silent on the point and it was not until 1854 that this was given a statutory form.

27. Despatch of 20th November 1854.

28. *Courier* 26th March 1855, reporting a Working Class Meeting in Hobart.

29. Coghlan records that in Denison's account of the state of the Colony in 1853, the usual rate for ordinary useful women servants was £14 - £16 per annum. *op. cit.*, 767.

30. Legislative Council of V.D.L., Votes, Proceedings and Papers, Vol. 4, 1854.

31. Coghlan, *op. cit.*, 769.

32. S. 6 of the 1852 Act.

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

34. S. 22.

35. 11 and 12 Vict., c. 43. But not in Scotland where servants continued to be arrested in every case.

36. For example, *Ex parte Lord*, 4 D. & L. 405.

37. *Mercury*, 24th May 1862.

38. "Every Deed or other Agreement in Writing heretofore or hereafter made and entered into in the United Kingdom or elsewhere out of the Colony, by which any Servant above the Age of fourteen Years has been or shall be engaged by or on behalf of any Master for the Service of such Master in the Colony, shall in all Courts in the Colony be valid and effectual without a Stamp, and shall be of the same Force and Effect, and shall subject the Parties thereto to the same Consequences, as if the same had been made and entered into with the Colony, and all the Provisions of this Act shall extend to such Parties immediately upon Arrival in The Colony".

39. "An Act to Amend the Laws relating to Stamp Duties" (1854) 17 and 18 Vict., c. 83, s. 21.
"All Indentures of Apprenticeship, Bonds, Contracts and Agreements entered into in the United Kingdom for or relating to the Service in any of Her Majesty's Colonies or Possessions abroad of any Person as an Artificer, Clerk, Domestic Servant, Handicraftsman, Mechanic, Gardener, Servant in Husbandry, or Labourer shall be and the same are hereby exempted from all Stamp Duty".

40. The amount was described as "wages" in the Crown Solicitor's draft contract of January 1854 but it is clear that the amount was to be paid by the Immigration Agent when the immigrant arrived in the colony, and not by his first employer. It was not evidence that the bounty contract was a contract of service.

X 5

CHAPTER 8

BACKGROUND TO THE MASTER AND SERVANT ACT (1856)

A Administration of the 1854 Act

Within a few weeks of consenting to the 1854 Act[1], Sir William Denison caused a notice to be circulated to all justices requesting them to administer what he by then perceived to be a harsh measure with care and without oppression. In a letter written by Champ, the Colonial Secretary, to the Chief Police Magistrate on 10th November 1854, he stated that it was the wish of the Lieutenant-Governor that the Act should be administered with great caution lest injustice should be done in cases where a light punishment would have been sufficient. In particular it was requested that the Chief Police Magistrate suggest to all Police Magistrates the propriety, only in extreme cases, of inflicting the full penalty authorized by Section 16 relating to the mode of punishment by solitary confinement.[2]

These were not mere anticipatory fears being expressed by the Governor, but genuine anxieties based on an experience of only one month's operation of the Act which had been accompanied by a flurry of magisterial activity both judicial and administrative. With thoughts of overflowing gaols and houses of correction, magistrates prepared to receive large numbers of convicted employees, and complaints were made to the Chief Police Magistrate, after a review of local "accommodation", that a shortage of space would limit the sentences that could be imposed by a magistrate in his district. Typical of many was one written on 23rd October 1854 by Noyes, the Magistrate from Great Swanport, who pointed out that great trouble and inconvenience could be saved if the watchhouses of Swansea and Triabunna could be declared to be "Houses of Correction" under the Act because they possessed cells eminently suitable for solitary confinement. He further reported that the cells at Swansea were in good order and that those in Triabunna could be made serviceable with a trifling expense, but he complained that he had no means of imposing hard labour. He went on to suggest

that magistrates in country districts should be able to sentence men convicted under the Act to hard labour and that this should be fulfilled on the roads under the surveillance of the Police and Watchhouse Keepers, because "their labour would compensate the Government for the expense of their maintenance and punishment - whilst the exposure would induce to good behaviour very generally amongst the labouring classes".

A further problem arose in connection with female servants sentenced to imprisonment with solitary confinement under Section 17 where there was a failure to pay any fine imposed. Not only was the cost of police escorts to the nearest House of Correction to be considered but, more importantly, it was felt that the journey itself would lead to great immorality because males would have to be escorted together with female servants. Similar points were made by the Police Magistrate from Sorell[3] requesting that the Sorell and Buckland Watchhouses be proclaimed Gaols or Houses of Correction so that the expenses occurred by escorts would thus be saved. If not, the Sorell Magistrate argued, he would be unable to sentence a female servant to solitary confinement because he would have to send her to Hobarton or Richmond "perhaps in the company of notoriously bad characters".

One view was that the watchhouses should become Houses of Correction rather than Gaols so that they would come under the immediate charge and discretion of the Police rather than the Sheriff.[4] However, Champ requested the Crown Solicitor to draw up a proclamation making Gaols of the buildings in George Town, Buckland, Swansea and Triabunna and the proclamation was signed by Denison on 10th November 1854.[5] A similar proclamation was made on 28th November regarding Evandale. On the same day Champ wrote to the Sheriff asking him to take the necessary steps to appoint more gaolers should they be required and explaining that the watchhouses were made gaols rather than houses of correction because "it was found that all Houses of Correction were under the orders of the Comptroller General of Convicts and that all future ones must be under the same officers". Rather mystifyingly he added that "this would not suit our purpose".[6]

B Movement for reform

If the 1854 Act had given rise to great concern among its administrators it was nothing as compared to the anxiety and frustration experienced by those affected by its implementation. It would be incorrect to state that a wave

of working class unrest swept the community as a result, but slowly and perceptibly, as the details of more and more cases of harsh injustice become known, there grew a feeling of mutual resistance and anger among a large section of the workforce in the colony, particularly in and round Hobart. At first this expressed itself in the form of letters to the press. One of the earliest and most articulate complaints against the Act appeared in the Courier on 27th September 1854, a few days before the Act was passed, signed by Henry Hollis, a servant, who, on his own account, had arrived penniless in the Colony from Melbourne. As one result of his letter he received a donation of £2 by a gentleman "advocating the working man's cause" and he used it to run off copies which were then distributed.[7]

1) First meeting of the working classes

Throughout the ensuing months Hollis appears to have gained the respect of a large number of working men and women and emerged early in the following year as an important spokesman for their cause[8] for, on the evening of 21st March 1855, he addressed the first meeting of the working classes which met to proclaim their antagonism towards the Act, at Mr. Mitson's, Union Inn on the corner of Liverpool and Campbell streets in Hobart Town. During the course of his address he disclosed that a petition was to be presented to the Legislative Council and expressed his hope that the Legislative Council would take immediate steps to secure the liberty of every free subject of the Queen from such rash and reckless encroachments as were represented by many of the provisions of the 1854 Act. In a fine piece of rhetoric he further hoped "that it will remedy the great social wrong inflicted on a large proportion of the population of this colony by the unwise, the cruel, the imprudentlegislation of the last session; that it will guarantee alike to all classes the invaluable blessings of freedom and thus lay a sound and solid basis on which to build the future prosperity and greatness of Tasmania".

More specifically he related numerous actual and hypothetical cases to show how the Act had or might affect an individual employee. He pointed out that a servant girl could be committed to prison for refusing to obey her master, that is, given into the care of a "rude constable" and by that rude constable taken to gaol. When she came out she was bound to return to the same master or be dragged back by that same rude hand. He quoted the case of a servant girl from Ireland who together with another girl was employed by a tradesman. The other left and the Irish girl was required to do the work of

both of them. She refused, was torn away from the house, taken before a police magistrate, sentenced to 7 days imprisonment and made to work for the same master after her release. He thus illustrated the wide nature of offences such as "neglect" or "misconduct". Similarly, where a man was not strong enough to do his allotted task and the master claimed he was as strong as any other servant, on the servant's replying that he was not, there would be a "disobedience or orders" and he might be imprisoned with solitary confinement. If, for example, 12 weeks wages were due to him this might be forfeited when the magistrate sentenced him.

There was also a large degree of scepticism concerning Section 5 which stated that wages were to be paid quarterly unless otherwise agreed. In practical terms this meant that a larger amount of wages lay in the hands of the employer for a longer period. Hollis claimed that the real reason for the insertion of the clause was that at about the time it was included in the bill a small quantity of gold had been discovered at Macquarie Harbour and the dishonest intention of the Legislative Council was to make it difficult for employees to leave their jobs with up to three months wages unpaid. Whatever the truth of this statement, it can be seen that the distrust of the Legislative Council engendered by the Act as a whole was very real.

It was always possible, and thus always a nagging fear for servants who had no means of support other than their wages, that a master might trump up some charge just as wages were due to be paid. Wages could then be ordered to be forfeited and the servant returned to the same master, only to have some other offence alleged just as wages were due again. In this way a man could be kept in a state of perpetual servitude by his master without any expense at all. It was also not unknown for a servant to be fined the exact amount of wages due to him. In one case mentioned by Hollis a servant girl was owed £11 in wages at the time she gave one month's notice to leave in order to marry. Her master refused to accept it; the girl left and was brought up on a plea that she had agreed to serve for 12 months. She was fined exactly £11 curiously - "an amount that would pay twice over the most brutal assaults coming before the magistrates in England".

After condemning the harshness of Section 16 (providing for up to 30 days solitary confinement) and Section 17 (the "mitigatory" clause for female employees), Hollis referred to the remedy given to servants under Section 19 for ill-usage. A servant could, it was true, complain against his master but he was bound to obtain a summons first; and, while the servant had gone to fetch the summons, his master could have him arrested for absenting himself without his consent. Even in a case where a summons was obtained and a servant won his case, the only penalty was a £20 maximum fine for the most violent conduct by his master.

These examples support what Coghlan has recorded,[9] that the Act was administered in the same harsh spirit in which it was conceived. He mentions the case of a woman servant who having arrived as a free immigrant was brought before a magistrate and charged with having disobeyed a lawful command. She was ordered to pay £5 or be imprisoned with 14 days solitary confinement. The Tasmanian press was full of similar reports.[10]

Most of these grievances eventually formed the basis of a petition to the Governor and the Legislative Council, but at this stage probably without much hope that anything would be achieved given the attitude of the majority of the Council at the time the Act was passed. Hollis disclosed at the meeting that he had tackled some members for their views on the operation of the legislation and Robert Kermode (Campbell Town) was the only representative of the people, i.e. elected member, to oppose its introduction, and was the "only one to stand up against the infamous clause that would send a helpless servant girl to prison for three months - and could be made solitary for the whole period by one police magistrate".[11] Certain other prominent people contacted by Hollis appeared not to know a great deal about its detailed operation.

The meeting concluded with the appointment of a Committee of five and the adoption of a resolution forming the basis of a petition which Kermode had already agreed to present to the Legislative Council, although he was not himself present at the meeting.

2) Second meeting

During the month of April 1855, what had started as essentially a working class protest drew in, either from the justice of its cause or for other reasons which will be discussed later, a small section of the more influential persons in the community. The next reported[12] meeting took place on the

evening of Tuesday 1st May at the Mechanic's Institute to receive the report of the Committee on steps taken to repeal the Master and Servant Act. Among those present by invitation were Arthur Perry (M.L.C. for Hobart), Dr. W. Crooke (M.L.C. for Buckingham), Elliston (the Mayor of Hobart) and Aldermen O'Reilly and Thomson and others,[13] the majority of whom were concerned as much with securing popular support for forthcoming elections as with the grievances of workmen. The chairman, John Richards, commented at length on the object of the meeting and launched a general attack against the Act complaining that it was the wish of England that her subjects living in the colony should enjoy as near as possible the same rights and privileges as prevailed in the mother country, and that this was not so in Tasmania; that immigrants were induced out with families and expected the protection of British Laws and the enjoyment of British liberty; and that the time of the Council was wasted with points of order, yet when a tyrannical and oppressive Act was passed their excuse afterwards was that it was a piece of hasty legislation.

William Filer, Secretary of the Committee, reported to the meeting on progress made towards repeal of the offending legislation. Despite Denison's earlier circular to magistrates on the administration of the Act, Sir Henry Fox-Young who had recently replaced him, was not in any hurry to meet a group of mere workmen for, when Filer sent a note to the Governor requesting an interview in order to show the injustice of the Act, he received no reply although he was hopeful of securing an interview at a future date. On the other hand, the Secretary disclosed that he had corresponded and had interviews with "many of the most influential gentlemen of all parties" and had met with scarcely any objection to the proposals for reform. Hence he concluded that it was the unanimous opinion of every class of people that the Master and Servant Act was a one-sided piece of legislation. Despite this hearty optimism it seems likely that the lack of any positive resistance at this time could be attributed to other causes and did not justify the conclusion that all classes were agreed on the injustice and bias of the 1854 Act.[14]

The meeting was once again subjected to a blistering criticism of the Act by Hollis. After referring to the origin of the Bill and drawing, in the words of the Courier, "a fanciful analogy between its compilation by the Attorney-General from the Acts passed in the darkest ages of European History and the incantation of the witches in Macbeth", he concluded in a lighter vein by ad-

mitting that he had heard that the present Attorney-General was a very amiable fellow in private life and conscientious in public duties, but that "this child of his did not bear the slightest resemblance to his dear papa; for a more mischievous, scratching biting little imp never existed"; and that, although it was certainly a bad thing to recommend child murder, he thought that the sooner this child was strangled, the better.

At this point the character of the meeting changed. All those who had attended and who had spoken at the previous meeting were working men genuinely concerned with the oppressive character of the "biting little imp"; likewise for the first part of the second meeting. But when some of the invited "influential gentlemen" got to their feet to address the second meeting it rapidly became very clear that their presence was not dictated by altruistic feelings.

The Legislative Council, in 1851, had been comprised of 24 members of whom 16 were elected as representatives of the people, the remainder being nominee members appointed by the Lieutenant Governor. An increasing enthusiasm for self-government in the colony led eventually to the appointment of a Select Committee of the Legislative Council to report on a Constitution for Tasmania. Its proposals were embodied substantially in a Constitution Bill passed in the last week of October 1854, a few days after an Extension Bill had been passed which provided for a larger Legislative Council. The idea behind the Extension Act was that a new Constitution should be debated by a wider and more representative group of members and, accordingly, a series of elections was conducted in the first few months of 1855. The Extension Act provided for an increase in the size of the Legislative Council to 33 members, and of the nine new members, six were to be elected. One each was to be added to Hobart, Launceston, Buckingham and Cornwall and two new electoral divisions were created in Glamorgan and Wellington (by re-arranging the boundaries of Westbury and Oatlands).[15]

The second meeting of the working classes was therefore seen as a very convenient forum for many influential gentlemen, an opportunity to secure the popular vote by espousing a popular cause.[16] Now it so happened that the election for the third Hobart seat on the Council had already taken place[17] and it might therefore seem unlikely that very much significance would have been attached to the meeting by so many important people. But, fortunately for the cause of master and servant reform in Tasmania, Dunn, who had held

the second Hobart seat[18] after 1851, decided to resign and the election was to take place a few days after the meeting at the Mechanics Institute. The only two contestants were John Lord, described as "little known politically",[19] although apparently an establishment man and Elliston, the Mayor of Hobart, both of whom were present at and addressed the meeting of the working classes.

Lord agreed with the previous speaker Dr. Crooke, who had recently secured the second Buckingham seat and who was one of his supporters, that the Act was unjust and bore no comparison with the N.S.W. Master and Servant Act which, *inter alia*, provided for bail and an appeal.[20] He concluded by saying that if elected he would do all he could to help, although later when three cheers were called for him the Courier recorded that it appeared "to those seated in the body of the hall that the groans predominated". Elliston on the other hand seems to have been more acceptable to the working classes and was received with cordial cheers. Although an employer of labour he was prepared to acknowledge that the masters in this country had a great deal to learn as to the proper mode of treating their servants "and that if masters wished to be respected they must do all they could to make them happy and comfortable". By a strange coincidence there just happened to be an old servant of the Mayor's in the audience who had been in the colony for 40 years and vouched for the truth of the Mayor's statement.

Edward Macdowell, ex-Solicitor-General and Crown Solicitor, then spoke. He sympathised with the objects of the meeting and said he had remonstrated with many members of the Legislative Council when the Act was passed. He claimed that it was not generally known that a Committee of the Council had sat to take evidence on the subject, that this evidence had been of a one-sided character and that the Attorney-General in bringing forward the Act had acted on the views of a majority of the Select Committee and of the Legislative Council. And he recommended the Committee of Working Men to get a copy of it.[21] He knew that many people were saying that the Governor ought to have disallowed the Act, but since Sir William Denison for the last 18 months had governed the colony on the views of a majority of the Legislative Council, the Governor was not in any way to blame and was as unfavourably disposed to the Act as were the working classes. The blame thus lay fairly and squarely with the Legislative Council whose time had been taken up with personalities and unprofitable discussions. At the same time he did not believe members of the Legislative Council saw the effect of the Act, for they intended it "merely as a check on

servants" and had no idea that free women would be dragged to prison to have their hair cut short and be treated like convicts.

If this were true the Legislative Council would be deserving more of pity for their incompetence than anger at their harsh treatment of employees; but their innocence as protested by Macdowell must be doubtful. The provisions of the Act were very clear and it was no sharp lawyer's twist to innocent legislative words that sent free women to be shorn like convicts and free men to long stints of hard labour with solitary confinement. Despite Macdowell's insistance that the Attorney-General would now help to get the Act repealed, the fact remained that that legislation had been specifically framed, put up and passed in response to strong pressures which existed at that time and it is difficult to believe that all concerned did not know exactly what was proposed. However, no-one appears to have challenged Macdowell's statement. What mattered most was the repeal of the obnoxious Act and the working class spokesmen who had watched their cause grow with the electioneering were only too willing to forget the previous attitudes of many of their invited "influential gentlemen" and concentrate on supporting those who would support them if elected.[22] Consequently, when a resolution was moved by George James, another of the original instigators of the first meeting, it was in terms which thanked, firstly, Kermode for his manly stand against the Act, secondly, those present members of the Legislative Council who had attended the meeting and supported the repeal and finally, possible future members of the Legislative Council for their support if elected.

Before the meeting ended, however, Elliston announced that he had decided not to contest the election. He thought he had support from the working classes but could not account for the indifference of the "higher classes" and the apathy of his own friends. He attacked the electioneering of Lord and complained that, because the election was being held in May rather than June, between six and seven hundred of his supporters would not be eligible to vote. All this was of course irrelevant to the meeting, as Macdowell pointed out, but it nevertheless serves to show that the forthcoming election was very much on the minds of all present and that the meeting on master and servant law reform had by this stage degenerated into a pre-election harangue.

3) The petitions

Elliston was as good as his word and Lord was returned uncontested at the Hustings facing the New Market before R.C. Eardley Wilmot, the Returning

Officer.[23] While his supporters, Macdowell, Perry, Crooke and Morrison (Sorell) were expressing their gratitude and extolling his merits, a deputation of the working classes (Hollis, Filer, Richards, Partridge and James) were being granted an audience with the new Governor at which a petition was presented. Sir Henry Fox-Young intimated that he would forward a special message to the Legislative Council at its first sitting recommending early consideration of the matter, and was sure that the necessary new legislation would be passed. The Governor had in fact already intervened himself in one extreme case where a man had been committed so that it is safe to say that he was very much aware of the existence of the circular to magistrates of his predecessor Denison and had either personally been keeping a watchful eye on the operation of the Act or had been kept informed of its worst abuses by the Colonial Secretary. Nevertheless, he was undoubtedly impressed by the quiet dignity and articulate character of the petition, a reflection of the ability of its prime mover, Hollis, who informed the Governor in a short verbal address when he handed over the petition that "he had no doubt that when the Act was fully discussed, it would be found that many of the provisions thereof were quite unsuited to a free people".

The first meeting of the newly extended Legislative Council did not take place until the 17th July 1855 and, as Fox-Young had promised, he sent the petition[24] to the Council on that day, together with a short note in which he stated that he felt assured that it would receive at the hands of the Council all the consideration and attention which a matter of so much importance required. This was followed two days later by a second petition[25] in much the same terms, presented by Robert Kermode as he had promised in March.

Both petitions claimed, generally that free subjects were thrown into common gaols and houses of correction summarily and without warrant not for any known offence but for failure to obey or act in accordance with the wishes of an employer. Moreover, in the petition to the Governor, the telling point was made that under the 1854 Act only one magistrate was enabled to inflict solitary confinement on a free servant whereas two magistrates were required to authorise such a punishment for the worst convict; and that prison discipline was felt much more severely by free servants than was the case with "Prisoners of the Crown". The petitions then outlined the other

major grievances against the Act. The fact that an employee's liberty was enjoyed only at the whim of his employer due to the vagueness of offences such as "disobedience of orders", "negligence", "carelessness", "insolence" etc. and the fact that upon conviction for such vague offences all wages then due, however large, in respect of service faithfully performed in the past might, at the police magistrate's discretion be declared forfeited. This possibility in turn provided an inducement to unprincipled employers to prefer petty and even groundless charges. Furthermore, the Act permitted imprisonment for the extremely long period of three months with hard labour and at the magistrate's discretion an employee could be ordered to spend a large part of it in solitary confinement; and the two-fold punishment of forfeiture of wages and imprisonment for a trifling breach of a civil contract or for some undefined offence not against the law but against the will of an employer was entirely disproportionate to the alleged offence. Pains and penalties in the Act were distributed very unevenly. Imprisonment with hard labour and solitary confinement on the one had was met with a mere fine on the other. In particular, there was no provision for imprisonment of an employer who failed to pay a fine after a conviction for ill-treating his employee. As regards Section 17, the substitution of a fine instead of imprisonment with hard labour at a magistrate's discretion for female employees was entirely inoperative as a mitigating factor because a magistrate could, at his discretion, declare all wages forfeited at the time of conviction thus making it impossible for a woman to pay the fine; and the £20 fine payable by the woman was entirely disproportionate to any offence contemplated by the Act, especially in view of the fact that Section 17 was intended to operate in respect of lesser offences.

Also strongly condemned was Section 30 whereby a £50 fine could be imposed not only for knowingly employing or hiring a servant before the lawful termination of his contract of service but even for harbouring, concealing or entertaining any servant. In the emotional words of the petition framed by Hollis this was "a violation of the great and fundamental principles of British liberty as embodied in Magna Charta, inasmuch as it renders any and every free servant unconvicted of crime, whether fleeing from outrage or otherwise, an outcast in a strange land; that it closes the door of the mother

upon the child seeking refuge in times of adversity, and restrains the dutiful assistance of children to their aged parents in the extremity of their distress: that such a law is not known, is not applicable to the vilest criminal fleeing and concealing himself from justice in the British Empire; and that England will learn with astonishment, with alarm and regret, that her sons and daughters who have been induced to leave the shores of their native land to establish for themselves by a course of industry, a home in this Colony, are subject to a law unknown in any other civilized country, and which in its operation, if carried out in all its stringency, must prove totally subversive of liberty to the labouring classes of the community".[26]

So that there could be no doubt at all what they wanted, the petitioners to the Legislative Council concluded with four "requests". In the first place, they sought returns showing the number of servants, male and female, committed under the Act to the various prisons in the Colony together with the terms of their engagement, their length of servitude, the nature of their offences, the various periods of their imprisonment whether solitary or otherwise, the amount of fines inflicted and whether or not they had been paid, as well as the amount of wages forfeited. In addition, for the purposes of comparison, they sought returns showing the number of employers against whom complaints had been made together with the nature of such complaints, the number of convictions, the amount of fines inflicted, and whether or not they had been paid. A further essential "request" was for the appointment of a committee of the Council to receive evidence as to the injurious tendency of the provisions of the Act and the need for its repeal or, at the very least, for its modification so as to place the law on an equitable footing both as regards the employer and the employed. Finally, the petitioners desired the Legislative Council to act immediately on the evidence presented to the committee in order to secure from rash and reckless encroachments the liberty of every free subject of the Imperial Majesty of Britain, to "remedy the great social wrong inflicted on the labouring portion of the population of this Colony by the mistaken legislation of the last session of the Council, guarantee alike to all classes the invaluable blessings of freedom, and thus lay a sound and solid basis on which to build the future prosperity and greatness of Tasmania".

As far as the first two requests were concerned, it was hoped that if any further spur were needed to reform in the Act the publication of those details would provide it. In particular it was felt that a comparison of the nature and extent of penalties inflicted on employers with those on employees would show the bias of the 1854 legislation and the weight of injustice accumulated over the months since its passage. The importance of obtaining this information led to Adye Douglas (M.L.C. for Launceston) giving notice of the request on the first day of the new session.[27]

C The Master and Servant Bill of July 1855

The campaign appeared to have been entirely successful for, within a week and without pausing to propose the appointment of a select committee, T.D. Chapman (M.L.C. for Hobart) initiated the desired reform bill on 24th July 1855.

1) Its provisions

The bill, in effect, was designed to repeal the whole of the 1854 Act. All persons in gaol or in a house of correction for any offence under the previous Act were to be discharged when the new one was passed. As regards domestic servants the then existing law of England was to be applicable in the Colony and, with three small exceptions, no part of the new bill was to apply to them.

Complaints were to be heard at the nearest police-office. Any labourer, servant or apprentice wilfully damaging or destroying tools, after a summons obtained from one justice, might be brought before two justices. If the offence was proved the penalty was either an order to pay the value of the damage or imprisonment for up to one month. Complaints were to be disposed of in a summary way and any sums ordered to be paid might be paid within a reasonable time.

Any labourer, servant or apprentice breaking his engagement, absenting himself from service, refusing or neglecting to perform his duty, disobeying lawful commands, using obscene or blasphemous language, being drunk and disorderly on his employer's premises, was to forfeit a maximum of no more than one month's wages. The employer would not be able to recover in this way more than two month's wages during one year, but the employee could be

dismissed seven days after his third conviction in one year. Two days absence from service was to be considered an abandonment of service and where this had occurred and more than six months remained to be served under the agreement, the servant might be ordered to pay to his master an amount equal to four months' wages. Where the performance of work was contracted for, the labourer or independent contractor who failed to perform according to his contract would be liable to pay an amount equal to one quarter of the sum agreed on.

Refusal or failure of the employer to pay wages due would give a single justice jurisdiction if the amount was less than £20. If more than this sum was involved the case was to be heard in the Supreme Court. Furthermore, a refusal or failure to supply wholesome food where this was stipulated for in the agreement would, if the complaint was made within 14 days, render the master liable to pay a sum fixed at the discretion of the magistrate. Where there was either a refusal or failure to pay wages or supply wholesome food a servant might, within seven days after the offence, leave his service unless the justice certified that the master had reasonable cause to dispute the claim.

Penalties were to be imposed on a master where he refused to receive into his service any servant according to the contract. And where a master or his overseer swore at, assaulted or struck the servant or labourer, the latter might terminate the contract within one week. On the other hand, where a servant or labourer was convicted of these offences, the employer might dismiss within one week after the offence. As in England it was still thought necessary to allow a master more rope, literally, in dealing with his apprentice and it was therefore only made an offence for a master to more than moderately strike or assault his apprentice, in which case cancellation of the indenture would be the result.

Sickness or illness were to be a sufficient answer to absence or non-performance of work; and to counter an abuse which, in many cases, rendered the remedy given to employees by the 1854 Act absolutely futile, it was provided that the time occupied in going to lay complaints was not to be considered an absence.

Other important innovations were that married females were to be enabled to take the same proceedings as unmarried ones and persons over 16 years of age. Where they were below this age their parents or guardians were empowered to act for them. Wages of servants and apprentices in any city, town or township were deemed to be payable weekly unless otherwise agreed and elsewhere, monthly. Most importantly, a right of appeal from a decision of the justices was to be given.

A further provision, fully exemplifying the new spirit in which the bill was conceived, was that which gave an employee the right to be treated in the same way as his employer when he failed to pay, for whatever reason, an amount ordered by the Court. In the past a master had always had the payment of penalties enforced by distress and sale of his goods and chattels. Now a servant was to be placed on the same footing by attachment of wages due to him in respect of past or future employers, providing this was certified at the time of the servant's conviction. Furthermore, where a servant had not left his master's service at the time of conviction his master was empowered to take all or any part of the wages due as a set-off against the amount ordered to be paid. The mode of enforcing damages against the master was thus not by imprisonment but by the sale of his goods if he had any (excluding his clothes and tools of trade) and by attaching his future earnings, whether he continued with his master or not. This, it was hoped, would work efficiently and not unjustly in those cases where a servant, having made a fair contract, deliberately broke it, in order to get higher wages elsewhere.

In a memorandum accompanying the bill the draftsmen, Pitcairn and Macnaughton, clearly stated their conviction that this was the best way of solving the problem of being fair to the majority of masters and servants while at the same time providing for the sharp practices of a few on both sides. They argued logically that "To the master it appears a sufficient remedy. He hires, for instance, a ploughman at £40 a year, that is, something under 2s. 6d. a day, and his food may be taken at 2s. a day additional; that is, in all, 4s. 6d. a day. This is all that the master proposes to give. It is by his own estimate the value of the ploughman's services. If the man neglects his work or leaves his service, the master ceases to pay him, and the Act gives him besides, damages for the breach of contract as he himself has valued it".[28]

Taken as a whole there can be little doubt that this bill was of tremendous benefit to the labouring classes in the colony. Not only had it tackled the problem of harsh and unequal penalties, both in relation to the offence committed and as between master and servant, but an attempt had also been made to make sure that there would be no more convictions for such a vague and ill-defined offence as "misconduct". Although it was of course still possible that trivial acts of misconduct might be labelled "neglect to perform duty" or "disobeying lawful commands", it would no longer be possible to compound the injustice by meting out the awful punishments envisaged by the previous legislation.

In general terms the bill was declared to be an adaptation of the existing master and servant law of England to the circumstances of the colony, but in some respects it was more lenient to employees in its approach than English law. Special attention was given to the problem of destruction of tools by employees and this was the only offence for which imprisonment was stipulated in the bill, even then only as an alternative to paying the cost of the damage. With regard to all other employee offences, unlike English law at that time, imprisonment was discarded as a means of punishment either for the offence itself or for failure to meet an order to pay on conviction.[29]

2) Its lapse

With the first reading of the bill, events seemed about to proceed rapidly to a successful conclusion and the jubilant supporters of reform looked forward to the emergence of the new legislation which would mark the culmination of their efforts. Unhappily, however, other events occurred which pushed master and servant reform well and truly into the background.

Instead of proceeding to the second reading the whole question of master and servant reform was referred to a Select Committee[30] on the 9th August and, although the Committee was due to report on 28th of that month, no report emerged. The time for bringing up the report was extended to 28th September but again no report was forthcoming. Not only had the bill lapsed, but it appeared that all interest in the topic in the Legislative Council was lost. After such a bright start the flame had flickered and gone out as a result of neglect by many of those who had promised so much before their elections.

What had happened? The answer, in short, is the *Hampton* case. It is not proposed to enter into a long discussion of the case for the only aspect of it which had any relevance to master and servant legislation was the fact that members' concern arising from it was so great and so concentrated that many important measures,[31] including the master and servant bill, were almost completely ignored from the end of July until the middle of September 1855.[32] Briefly, on the very same day that the master and servant bill received its first reading, Wedge (M.L.C. for Morven) got to his feet in the Legislative Council and asked a series of embarrassing questions of the Colonial Secretary concerning the maladministration of the Convict Department by its Comptroller-General, Dr. John Hampton. Members of the Legislative Council were not at all satisfied with the almost complete exoneration of Dr. Hampton and some other senior officers in the Department by the Lieutenant Governor and the Executive Council, who had investigated the allegations some weeks before.

The result of Wedge's questions was the setting up of a Select Committee to conduct an enquiry. Against the wishes of the Lieutenant Governor, Dr. Hampton was called on 6th September and refused to attend, claiming the full powers and privileges of the British House of Commons. A Speaker's Warrant was issued for his arrest on the grounds of contempt but again Hampton refused to submit declaring it to be illegal, and he then went on to serve writs of Habeas Corpus on both the Speaker and the Sergeant-at-Arms. The Solicitor-General was of the opinion that the Speaker's warrant was illegal although the Attorney-General was not so sure, but the Legislative Council insisted that Hampton should appear before them and requested the Chief Police Magistrate to assist in his arrest. The Chief Police Magistrate was in turn advised by the Lieutenant Governor that he was to refuse to give that assistance. Any further activity on the part of the Legislative Council was brought to an end when the Governor announced its prorogation on 19th September and in so doing read its members "a severe lecture" on their "attempt to substitute tyranny for law".[33]

D Further meetings of the working classes on other matters

The prorogation of Council at this time was nothing less than a disaster for the genuine and ardent supporters of the movement for reform of the 1854 Act. The momentum gained through the justice of their cause and the occurrence

of the elections which extended the Council from 24 to 33 members, had faltered against the weight of the time and attention given to the Hampton question. Now there was no possibility at all that anything would be done until the end of November when Council resumed its sitting. Meanwhile the energy and enthusiasm of the labouring population of Tasmania, which had been built up to secure master and servant reforms, was slowly and gradually dissipated on significant though less important matters.

About the middle of September 1855 a preliminary meeting of the working classes took place at the Shakespeare Tavern in Campbell Street Hobart Town, to discuss the steps to be taken to cut the length of the working day on Saturdays by finishing at 4.00p.m.[34] Certain resolutions were adopted which were put to a full public meeting on the evening of 24th September at the Sir George Arthur in Campbell Street.[35] It was agreed that a deputation should be appointed to take round an address as a preliminary move to various prominent employers to see whether they might be persuaded to acquiesce in the proposal. When the deputation reported to a further meeting on 4th October 1855 it was to show a substantial measure of success. Of the 23 employers approached in the carpenters and builders trade, 20 had agreed to the reduction in hours, and the deputation "was received most cordially by the great majority of employers". This reception prompted the meeting to agree to extend its application to other employers of labour so as to make the movement more general in its operation and, accordingly, they resolved to publicly notify "the tradesmen of Hobart Town, that on and after Saturday next, the 6th instant, labour will cease at 4 o'clock".

This victory, though small and mostly conceded, was one of the earliest for the labour movement in Tasmania. Its initiation by working men was undoubtedly the direct result of the unity and optimism inspired by the campaign for master and servant law reform, although its success was probably attributable to other more diverse factors which were also responsible ultimately for the implementation of master and servant reform itself.

It has already been noted that the timely occurrence of elections resulting from the Extension Act, particularly in Hobart where there was a further one occasioned by the resignation of Dunn, was crucial in understanding why the campaign to reform the 1854 Act was taken up by so many influential gentlemen of the colony who had supported the "monstrous" Act only a few

months previously. It was a valuable lesson not only to those candidates who won on the strength of their support for the reform, but to others who realized that popular support had to be gained for new elections in the spring of 1856 under the new Constitution which was a prelude to self government.

It was not therefore surprising to hear of the success at that time of the deputation of working men in securing a small reduction in hours on one day of the week. Nor was it surprising that, within a few days of the second meeting and before the third meeting on hours, another meeting of the working classes of Hobart Town was announced to take place at the Amphitheatre on 3rd October "for the purpose of expressing sympathy with and adopting means to support the great majority of the Legislative Council who battled wholely in defence of the Constitutional rights and privileges" in connection with the *Hampton* case.

The Mercury, at least, appeared to be in no doubt as to the true nature of this meeting for in an editorial on the day of the meeting it asked bluntly what the "great majority" had done for the working man? In answer to its own question it replied, "In the Council nothing but evil, out of it, nothing but oppression and wrong: and now forsooth, they are called upon to sympathise with their oppressors! We tell them now, as we have told them before, that this scheme is nothing more nor less than an "Electioneering Dodge" to advocate the political interests of designing men and to secure their re-election under the New Constitution. By causing the abrupt but inevitable prorogation of the Council, the best interests of the Working Classes have been utterly disregarded, in asmuch as measures most useful to them have been indefinitely retarded; what cause for sympathy then, can exist or why call upon them to support men who have so recklessly disregarded the rights and privileges of the working man".

To say the least, it was a very rowdy meeting.[36] No-one could be found who would take the chair to enable the meeting to commence amid the noise, and when one was forthcoming, he had no sooner taken the chair than a portion of the platform in front gave way with a crash, scattering the press reporters from their table "and inducing the chairman to vacate his seat, with an alacrity that showed no desire on his part to renew it; nor did he, and the chair was again vacant". With the appearance of his successor however business was suppose to have commenced; but again did not because loud cheering for and against the "great majority", those in favour largely inspired (according to the *Mercury*) by agents of the *Daily News*[37] and the *Colonial Times*, prevented any real discussion.

This attempt to graft a popular cause in the name of democracy on to the main body of working class discontent, while at the same time ignoring the vital matter of reform in the master and servant legislation, appears to have been recognised by many working men for the "electioneering dodge" that it clearly was.[38] The Hampton question, in which the Gregson-Chapman group had played such an inglorious part,[39] was recognised by many ordinary people as involving the Legislative Council in an unseemly controversy in respect of its powers with the effect that a great deal of ridicule and scorn was cast at the notion of a representative institution in the colony.

Fortunately, on the day before the Legislative Council was again summoned by the Lieutenant Governor, the Supreme Court gave its ruling in favour of Dr. Hampton,[40] and Council was able to resume the work it had interrupted for four months.

E The Master and Servant Bill of January 1856

On 1st December 1855 yet another Select Committee was appointed on the motion of Chapman, "To enquire into the present state of the Law in respect of Masters, Servants and Apprentices; and to consider whether and in what respect it is desirable to amend the same". With the exception of Perry who had died, the Committee was constituted in the same way as the previous one which had failed to report in August.[41] The new committee was this time requested to report on or before 20th December but, although the period was extended, no report appeared before Council dissolved for the Christmas break. The delay on this occasion was mainly due to wrangling over the estimates and in respect of the new electoral bill. The Courier[42] reminded members that their duty was to resolve three questions - the Estimates, the Electoral Bill and the passing of a new master and servant Act - and then to request the Governor to proceed to a dissolution. It added that many new measures were being debated and Committees extended merely in order to continue the monopoly of the existing Legislative Council.

When Council re-assembled on January 8th 1856 there was still apparently no immediate hurry to bring in the new bill and it was not until 25th January that it received its first reading. However, at this late stage, things began to move more quickly for it was read a second time four days later and committed. On January 31st it was re-committed for the consideration

of three new clauses suggested by the Attorney-General and the Committee reported the next day. Three days later it was read a third and final time and three days after that on February 7th 1856 it was assented to by the Governor who acknowledged the attention paid to his recommendation that the 1854 Act should be "reconsidered" and who trusted that the amended Act would work satisfactorily.

F Convictions under the 1854 Act

Through all these months of delay and prevarication on the part of the Legislative Council the 1854 Act had of course continued to be implemented. One of the most damning pieces of information concerning the Act was a document entitled "Masters and Servants Law: Return of Convictions",[43] tabled by the Colonial Secretary on 21st December 1855 in response to the request made by Douglas in July 1854. As the Committee of the Working Classes had hoped, a glance at its pages revealed the enormity of the injustice perpetrated by magistrates through the agency of the 1854 legislation. Although it had taken five months to appear, for whatever reason, it was in all probability the final spur to the much needed reform after being digested by members over the Christmas recess.

Before taking a closer look at the return it is worth noting that the convictions recorded were not stated to be for any definite period after October 1854. It is therefore probable, although by no means certain, that convictions up to a few days before the return was tabled were included and that therefore the return covers something like fourteen months of the Act's operation. Moreover, it contained nothing like the information requested by Douglas, for it was limited to a description of the nature of the offences and the punishments awarded. Thus, although it showed the number of servants committed under the Act to gaols or Houses of Correction, the nature of their offences, the various periods of their imprisonment, solitary or otherwise, and the amount of fines inflicted, it did not indicate the terms of engagement of those convicted, including their length of service; nor did it show whether or not fines had actually been paid or in every case the amount of wages forfeited.

More importantly, the returns did not indicate separately for purposes of comparison the number of employers against whom complaints had been made,

the nature of such complaints, the number of convictions together with the amount of fines inflicted, and whether or not those fines had been paid.

However, it is fair to say that if all this information had been provided by the Colonial Secretary's Department, it is doubtful whether the return would have been available before the middle of 1856; and in any case it is possible to pick out from the description of the offences in the return the majority of those committed by employers, such as "non-payment of wages". On the other hand the offence listed as "breach of contract" is capable of being attributed to either side.

A further difficulty in analysing the return is that no attempt was made by the Colonial Secretary's Department to either classify the offences or correlate the punishments. In all, 101 offences are listed but, unless the wording of an offence in the magistrates' returns of cases was exactly the same as another, the offence was listed separately. For example, offences solely involving absence appear separately as "Absent from service", "absence from service to the serious loss of the master", "absent from work and the master's premises", "absent from work", "absent without leave", "absent without leave and leaving work unfinished", "absconding", "absence before termination of engagement and refusing to work", "not returning to service", and so on. These offences are not even grouped together in the return, and the same applies to other broad categories such as insolence and drunkenness. The problem stems from the Act itself with its broad approach to employee misbehaviour. "Misconduct" is seen to be an enormous cloak covering every aspect of wrongdoing by employees, although why the return should distinguish between "Misconduct" and "general misconduct" is beyond comprehension, for both are equally vague.

A similar problem exists with respect to the recorded results of the cases heard. What appears to have happened is that research into the magistrates' returns was divided between 5 persons on some unknown basis, perhaps in terms of geographical division of Tasmania. Only general directions were given as to what was required and consequently each person compiled his own classification of the nature and extent of the punishments and orders given. Such was the extent and variety of alternatives available to magistrates under the Act, that it is almost impossible to correlate the different approaches to present an accurate total picture. And even if this could be done it would

meaningless because no specific categories of offences exist. All that can be done as far as employee offences are concerned is to make one or two general observations and illustrate them with a few specific examples.

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

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

Immorality as a form of misconduct was treated very harshly. A female servant convicted of "misconduct in having a man in bed with her upon her master's premises" was sentenced to 3 months imprisonment with hard labour and forfeiture of all wages due. Assuming this was part of a course of conduct is likely that her peripatetic paramour suffered similarly for there is an almost identical conviction recorded against a male servant for having a female sleeping in his room on his master's premises.

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

The number of identifiable employer offences is, not surprisingly, very small. They comprise "non-payment of wages", "ill-treatment of a servant

and using obscene language", "ill-usage of an apprentice" and "neglecting to pay wages and not giving sufficient rations". The number of cases is 64 and by far the largest category was the neglect or failure to pay wages which accounted for 59 of these. In marked contrast to the severity of the magistrates' administration of a harsh Act against employees, their attitude towards employers was full of self restraint. In 49 cases the only result of a successful prosecution was that the defendant was ordered to pay the amount of wages due. Despite the power to order a master to pay compensation of up to £5, in only 4 instances was this done, and in only one was the sum awarded more than £1.[44] Of the remaining 6 cases, 3 were dismissed and 3 were determined by an order to pay wages due plus costs of the case.

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

Of the four convictions for harbouring where there was the possibility of a £50 fine, one was reprimanded and ordered to pay costs, one was simply fined (£1) and two were fined £1 and £5 respectively and, in addition, ordered to pay costs. Despite the width of the harbouring section (s.30) it does not appear that it was used to any great extent for a number of possible reasons: firstly, the difficulty of obtaining evidence where two of the parties (the absconding servant and his second master) were happy with the arrangement; secondly, a reluctance on the part of the first employer and the magistrate to pursue a fellow employer when in all probability in a time of labour shortage the first employer would himself not hesitate to offer employment to a skilled man already employed by someone else; and

thirdly, the fact that the employment had increased since the Act was passed in October 1854 and replacement labour was easier to obtain.

G Conclusion

Although the successful reform of the 1854 Act has been shown to be attributable more to its emergence as an issue in key elections rather than to any general concern among employers that the Act was too oppressive, or to an admiration for the way in which working class leaders had conducted themselves in their cause,[45] it must be acknowledged that there were a number of other factors which also played a part in creating a climate favourable to reform.

Probably the most important of these, was the vastly different economic situation which prevailed in Tasmania towards the end of 1854. It has already been explained that the enactment of the harsh measures in the 1854 legislation was largely a reaction to various intense pressures in the labour market which had caused an acute shortage of labour. Not surprisingly, as soon as these pressures eased a more flexible attitude to labour was possible. Even as the first master and servant bill was receiving its first reading in August 1854 it was becoming apparent that the tide of economic activity was changing and with it the relations between employer and employed. It was reported by the Immigration Agent that for a skilled workman 12s. a day was the usual wage during the first nine months of the year and only 8s. a day during the last three.[46] Unemployment was also becoming more common in contrast to the relative scarcity of labour in the previous two years.

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

The passing of tne new Act in early February 1856 marked an improvement in relations between employer and employed in the colony and, though the new legislation was still in many respects as harsh as that which was being fought so strenuously by unionists at this time in England, it was nevertheless a welcome relief from the constraints of the previous one. Only one thought might have detracted from the satisfaction of those four or five working men who had so successfully handled the campaign for reform, that had it not been for the delay caused by the *Hampton* affair, they might have gained far more, since many sensible and fair provisions of the first bill of July 1855 did not find their way into the Act of 1856.

NOTES

1. 19 Vict. No. 28, passed on 3rd October 1854.

2. Colonial Secretary's Correspondence, Vol. 261, 10687.

3. In a letter to the Chief Police Magistrate dated October 26th 1854. Colonial Secretary's Correspondence, Vol. 261, 10654.

4. See a letter signed by J. Burnett and dated 4th November 1854, *ibid.*

5. Under the authority given by s.3 of 8 Vict. No. 16, "An Act for the Regulation of Prisons".

6. Perhaps an allusion to the improper conduct of the Comptroller General of Convicts, Dr. Hampton and certain other senior officers of the Convict Dept., first exposed by the *Daily News* in May of the following year, and which led to the infamous "*Hampton* Case". See Townsley, *Struggle for Self-Government in Tasmania*, Chap. VII.

7. *Courier*, 26/3/55.

8. Others were George James, John Partridge, William Filer and John Richards, all working men.

9. Coghlan, *Labour and Industry in Australia*, Vol. II, 772.

10. For examples, see *Mercury* 19/3/55; 2/4/55 (neglect of duty); 14/5/55 (disobedience of orders); 27/4/55 (absent without leave).

    See also: Return of Convictions, Paper No. 20, Vol. 5, Legislative Council Votes, Proceedings and Papers 1855, tabled by the Colonial Secretary and ordered to be printed on 21st Dec. 1855.

11. Hollis was referring to the fact that Kermode was initially responsible for the 30 days limit on solitary confinement in s.16, and the mitigatory clause, s.17.

12. *Courier*, 3/5/55.

13. Others included, John Lord (later M.L.C. for Hobart), Edward Macdowell (ex-Sol.-Gen.), T.J. Knight (M.L.C. in 1856) and D'Emden (editor of the radical "*Courier*").

14. See *infra*.

15. Townsley, *op. cit*, 145-146.

16. Candidates in Elections under the Extension Act held before the second working class meeting took place had been slow to perceive the possibilities of taking up reform of the Master and Servant Act as the main board in their election platforms. Hollis mentioned at the first meeting in March that he "had attended before the candidates upon this Act.

Dr. Crooke was "disgusted"; Mr. Walker thought it was "most objectionable" (and he knew nothing of it until he was mentioned); and Dr. Bedford said nothing. Was it not extraordinary - was it not most extraordinary that these influential gentlemen should not know anything of this Act but had to give it their 'serious attention'?" Having won the election in the few weeks between the first and second meeting and been returned as the second member for Buckingham, Dr. Crooke then became an ardent reformer in order to help his friend John Lord win the vacant Hobart seat.

17. Arthur Perry had been elected.

18. The other was held by T.D. Chapman.

19. *Mercury*, 27/4/55.

20. The original N.S.W. legislation in 1828 (9 Geo. IV No. 9) had been replaced by subsequent Acts in 1840 (4 Vict. No. 23), 1845 (9 Vict. No. 27) and 1847 (11 Vict. No. 9).

21. It seems unlikely that such a report was ever tabled in the Legislative Council. The Votes, Proceedings and Papers contain no reference to either a report of such a committee or even to its appointment. However, it remains one of the unhappy aspects of the 1854 Act that insufficient attention was given to its clauses. Macdowell's statement might well be regarded as an attempt by the Executive, of which he was a member, to excuse their hasty initiation of the new measures, ostensibly for the purpose of controlling a new wave of immigrants, while at the same time laying the blame with the majority of the Legislative Council.

On the other hand, bearing in mind the Solicitor-General's strongly principled preface to his draft contract for immigrant servants in January 1854, it is possible that he did foresee the injustices and object to many of the clauses of the 1854 Master and Servant Act at the time the bill was passed, but was unable to persuade either the other members of the Executive, particularly the Colonial Secretary and the Attorney-General, or a majority of the Legislative Council to look more carefully at its provisions.

In fairness to the Attorney-General, it was admitted by Hollis at the first meeting (See *Courier* 26/3/55) that the former had been in favour of what eventually appeared as the "mitigatory" clause 17, which for female employees laid down an alternative of a £20 maximum fine and a 14 day maximum period in solitary confinement in default, but even so it was unrealistic to suppose that any female servant could pay a fine of £20 and she would therefore go to prison in almost every case. Furthermore, although Kermode had proposed one month as the maximum period of imprisonment in section 6, his suggestion was defeated by the acceptance of three months as proposed by the Attorney-General himself which hardly points to the compassion of the latter.

22. The committee appears to have given ~~their~~ his support to Lord. The *Mercury* (20/4/55) reported a meeting of the committee of the working classes to secure the election to the Legislative Council of John Lord in the following month, on the evening of Wed. 18th April at the Waterloo Hotel. During the course of the evening "Lord exposed and denounced the obnoxious and oppressive laws which press so heavily upon the working classes, as well as a large portion of our trades people: in a word Mr. Lord proved to all present that he was in every respect the most fit and proper person to represent his fellow colonists in the Legislative Council".

23. *Mercury*, 11/5/55.

24. Paper No. 2, Vol. 5, 1855, Legislative Council Votes, Proceedings and Papers.

25. Paper No. 8, *ibid.*

26. Hollis was not quite accurate in his statement despite his fine rhetoric. N.S.W. had been subjected to the doubtful benefits of such a law since 1828 (9 Geo. IV No. 9 s.2), although perhaps the reference to civilized countries excused the mainland colony from consideration in this respect. This law was also not unknown in V.D.L. before 1854 since it had appeared in the 1840 and 1852 master and servant statutes and it is therefore difficult to accept that the British Government would react to its re-enanctment in 1854, "with astonishment, alarm and regret".

27. 17th July 1855.

28. *Courier*, 28/7/55.

29. Both the radical and not so radical press appear to have been in favour of this reform. Two of the most vigorous anti-government papers, the *Colonial Times* and the *Hobart Town Courier*, had been supporters of reform at least since the time of the first meeting of the working classes in Marc 1855, although for the *Courier* this was definitely a change of opinion sinc the editor, D'Emden, was anxious to state in one editorial (18/8/55) that h supported reform "whatever our opinions may have been in past time relative to a stringent master and servant act".

30. Members of the Committee were the Colonial Secretary (Champ), the Attorney-General (Smith), Kermode, Sharland, Perry, Allison, Officer, Anstey, Crooke Clark, Butler, Meredith, Douglas, Chapman and the Solicitor General (Rogers).

31. Also e.g. electoral reform for the purposes of the new Constitution.

32. For a full account of the circumstances, see Townsley, *op. cit.*

33. Coghlan, *op. cit.*, 536.

34. *Mercury*, 14/9/55.

35. *Mercury*, 24/9/55.

36. *Mercury*, 5/10/55.

37. Founded in May 1855 under the editorship of Maxwell Miller.

38. It was followed by another meeting of the working classes to support and express their sympathy with the "great majority" on 15th October 1855 (*Mercury* 17/10/55) which laconically reported that in its early stages the meeting consisted of only about a dozen dirty looking men and some boys, "The only industrious working man there was selling oranges". According to the *Mercury*, pursuing their theme of the "great majority"

the Chapman-Gregson clique conceived the idea of a dinner in their own honour which took place on 19th November 1855 and commenced with the band playing "See the Conquering Hero Comes" (*Mercury* 21/11/55).

39. Gregson was Chairman of the Select Committee of the Legislative Council which investigated the affair.

40. *Hampton* v. *Fenton* (Speaker) *and Fraser* (Sergeant-at-Arms). 27th November 1855

The case went to the Privy Council which also decided in Hampton's favour: *Fenton and Fraser* v. *Hampton* (1858) 11 Moo. 347; 14 E.R. 727.

41. Brewer who was elected on 11/12/55 as the representative for Hobart in place of Perry was appointed to the Committee two days later. Votes, Proceedings and Papers of the Legislative Council of V.D.L., Vol. 6, 1855.

42. 22/12/55.

43. Votes, Proceedings and Papers of Legislative Council of V.D.L., Vol. 6, Paper No. 20.

44. The amount was £2. 4s. 0d.

45. Macdowell at the first meeting in March 1855 had intimated that "if the working classes persisted in the same honourable, regular, and able manner in which they had commenced this movement, they would assuredly succeed".

46. Coghlan, *op. cit.*, 769.

CHAPTER 9

THE MASTER AND SERVANT ACT (1856)

Whatever the reasons for which it was passed, the new Master and Servant Act[1] in 1856 marked an important turning point in the attitude of the administration towards working men and women in the colony. The final dismissal of the convict system to a merited oblivion was bound to bring with it many important legal ameliorations, as a result of a less coercive tone in the government of the country. Coupled with this was a recognition of the fact that the future welfare of Tasmania depended on the successful implementation of schemes of immigration to ensure a regular supply of honest hard-working people.

The 1856 Act was undoubtedly an important example of this more tolerant attitude, but it was still not without many faults, not the least being a general approach to disputes between master and men which continued to be marked by injustice stemming from unequal treatment, though to a lesser extent than before. To illustrate this it will be necessary to examine the Act in detail to see firstly, how far it met all the complaints levelled at the previous Act; secondly, to what extent it fell short of the proposals contained in the first bill of July 1855; and finally, how it compared with the English law of master and servant at that date.

A Definitions of "servant" and "labourer"

Like the 1854 Act, which was repealed by it except as to existing convictions,[2] the 1856 legislation appeared to distinquish between servants and labourers by classification of occupations, although in fact the distinction rested on the nature of the contract. There were, however, one or two important differences in the definitions.[3] In the first place, "gardeners" were specifically included in the definition of "servant" in the later Act, although in 1854 they had appeared under the heading of "labourer". This move was in line with the decision in the English case of *Nowlan* v. *Ablett* (1835) which had held that a gardener was a domestic servant although he had in addition to his wages a separate house to live in and the privilege of taking

apprentices. The case did not, however, decide that a gardener was always a domestic servant. As with the Act, the question of the status of the employee was a matter of evidence in each case.

A more significant development at first glance was the absence of any reference to females or female occupations in the definitions of "labourer" and "servant". No attempt was made to expressly include the female independent contractor pursuits of laundress, sempstress, dressmaker, milliner or needlewoman which had been specifically covered in the 1854 definition of "labourer". Nor was there a general clause in the 1856 Act which caught "all other Workwomen and female Labourers of every Class or description whatsoever, and whether married Women or single".[5] Similarly, with respect to the 1856 definition of "servant", there was no concluding reference to servants "whether male or female, and whether married women or single".[6] This did not mean, however, that female labourers and servants were excluded from the provisions of the 1856 Act. Given the rule that masculine included feminine, the words "and all other Workmen and Labourers of every Class or Description whatsoever" in the definition of "labourer", and "all other Servants of every Class or description whatsoever" in the definition of "servant",[7] were sufficient to include female labourers and female servants, respectively, despite the preceding lists of male occupations. This interpretation is supported by certain other sections of the Act which are specifically stated to apply to male servants, labourers and apprentices.[8] The categories of employees covered was thus the same in both 1854 and 1856 Acts.

B Employee offences

A servant's refusal to commence in his master's service, his absence or refusal to fulfill that service, his disobedience of any lawful command, or any other misconduct related to his service, constituted offences for which he could be punished.[9] Nothing was done in 1856 to define more precisely what constituted "other misconduct" and in this regard the abuses connected with the earlier legislation remained. In other respects the 1856 Act was considerably less harsh. Two justices were necessary to convict in all cases under the Act and the maximum penalty was a £10 fine rather than a lengthy period of imprisonment with hard labour and solitary confinement.

The alternative of forfeiture of the whole or part of a servant's wages at the magistrates' discretion was however retained together with the

possibility of both a fine and forfeiture. It was therefore still possible for a master to complain of a trivial act of misconduct and avoid paying wages just as they were due. Apprentices and labourers were similarly treated.

C Aggravated employee offences

Certain other employee offences were dealt with more seriously by Sections 11 and 12. Under Section 11, swearing or blaspheming within the hearing of the employer or master or his family, being drunk and disorderly on his employer's or master's property, or assaulting or acting in a violent manner towards his master or employer or his family, could result in a maximum fine of £20 or at the discretion of the justices, imprisonment with hard labour for up to three months. This section had much the same effect as that intended for Section 9 in the 1854 Act but it was drafted with more care. It will be recalled that Section 9 did not clearly give authority to a magistrate to punish an offender up to any stated maximum after conviction; nor did it give him authority to discharge the employee, because he was authorised only vaguely "to proceed against him". On the contrary, Section 11 of the 1856 Act specifically stated the maximum punishments and the procedure to be adopted. The offending servant, labourer or apprentice could be given into the custody of a constable by the master, employer or any member of their families or taken into custody by a constable, and conveyed as soon as possible before one justice without a warrant. The magistrate was then empowered to discharge him or remand him for hearing before two justices who could deal with him "in the same Manner as if he had been brought before them by virtue of a summons or warrant issued for that Purpose under the Authority of this Act". Where the offences took place on the property of a person other than the master, employer or their respective families the procedure under Section 12 was not so drastic and a complaint made by the occupier was dealt with in the normal way, although the maximum penalties were the same as those in Section 11. Both Sections referred, *inter alia*, to a servant, apprentice or labourer conducting himself in a "violent" manner. Whereas in 1854[11] the offence was constituted by "violent, unruly or insubordinate conduct" towards his master or employer and their families or "ill-behaviour" towards an occupier or his family, much wider offences which had led to convictions for mere insubordination. All the same, it should be noted that even minor acts of insubordination or unruly behaviour could still be penalised as "misconduct" under Sections 8-10 although the procedure and maximum penalties were less discomfiting than that which was provided under Sections 11 and 12.

Both sections also limited the offence committed by an employee to the use of profane or obscene language, whereas the equivalent sections in 1854 had referred to "abusive, profane or obscene language" and "abusive, insolent, profane or obscene language", respectively. In excluding abuse and insolence and restricting harsh words as an offence to the hard-core profanities and obscenities, the 1856 legislation did go some way towards excising the trivial from the area of criminal offences, but most of this pruning was worthless given the retention of the general word "misconduct" in other sections.

While dealing with this topic it would be as well to mention that where the employer was the guilty party, the uttering of abusive as well as profane or obscene language was retained as an offence under Section 20, probably as an oversight. Another aspect of this particular offence was, however, brought into line with Sections 11 and 12. Previously, although an employee could be convicted of bad language to or in the presence or hearing of his master, employer or their families or the occupier or his family, the employer only committed an offence if he used bad language "towards" his employee. Section 20 was, accordingly, amended to put the employee on an equal footing and permit him to complain about the curses of his employer whether or not he was the victim. In the light of the deficiencies and glaring injustices of the other parts of the 1856 Act it seems almost incredible that the legislature concerned itself with swearing and that the opportunity to delete it from the statute book as a criminal offence with severe penalties on either side, was not taken.

D Imprisonment of female employees

Sections 11 and 12 applied only to male employees. The reason for the exclusion of female apprentices, servants and labourers was not the fact that female employees did not swear, blaspheme or indulge in violent conduct at times, which was of course not true, but the fact that the legislature had come, or been forced, to recognise that the degradation accompanying imprisonment with hard labour was too great a penalty for free women to suffer even in relation to what were considered to be the more serious employee offences. To this end it was provided by Section 23 that no female servant or apprentice of whatever age could be imprisoned under the provisions of the Act[12] together with male servants or apprentices under the age of 16. There was, however, no reference to the position of male and female labourers.

Male and female labourers under the age of 16 were expressly excluded from the operation of the Act.[13] Adult male labourers, like adult male servants and apprentices were not intended to be able to escape imprisonment for certain offences and were therefore not included in Section 23. But adult female labourers such as laundresses and milliners were erroneously omitted from the saving clause of Section 23. No problem arose directly because Sections 11 and 12 were the only ones which provided imprisonment for offences by employees and as we have seen only male employees were affected. But unfortunately Section 21 did provide for imprisonment with the possibility of hard labour and solitary confinement in default of payment of a penalty and was a general provision not limited to male employees.

This gave rise to a serious loophole in the stated policy of the legislature of protecting female employees from the rigours of imprisonment for an adult female labourer might be convicted and fined under, for example, Section 10, for returning her work unfinished or not performing it in a careful manner, and imprisoned on failing to pay the fine. No protection was then afforded by Section 23. Adult female labourers were thus in much the same unenviable position as under the 1854 Act.

E Imprisonment of employers and employees for non-payment of a penalty or sum of money.

The punishment prescribed under Section 21 where there was a default in payment of a penalty had the merit, at least ostensibly, of treating both employer and employee equally. Both sides were liable to imprisonment and, at the justices' discretion, to hard labour for up to one month and solitary confinement for up to seven days for non-payment of a penalty or sum of money, which might have been imposed, on an employer, under Section 20 for ill-treatment or abusive language and, on an employee, under Sections 8-12. In effect, however, Section 21 was still a very biased section.

Under Section 19 an employee who claimed that wages or money was owing to him could complain in the first instance to any justice and, if successful, two justices were then empowered to order[14] payment of the amount[15] within a reasonable period and also an amount not exceeding £5 as compensation for the injury.[16] Where there was a failure by an employer to pay the compensation

awarded, Section 21 operated to send him to prison, but the section expressly exempted an employer who was ordered, but who failed, to pay the amount of wages itself from this consequence.[17] Thus, where orders were made for the payment of a wages amount and a measure of compensation, an employer could avoid the possibility of imprisonment by paying the compensation but not the wages or money owing to his employee. Moreover, in many instances an employee would be unable to show the necessary injury which it was the purpose of compensation to redress so that an award of the wages or money owing was the only order made, leaving the employee in an apparently helpless position, except that a distress warrant could probably be issued under the Magistrates Summary Procedure Act (1856) by virtue of Section 23 of the Master and Servant Act[18] where there was a failure to comply with the order.

The source of this injustice lay in the different treatment of employer breaches amounting to failure to pay, from employee breaches amounting to failure to perform. On the face of it there was equality, since a breach on either side could result in the payment of an amount independently of any order respecting wages or money which might be owed.[19] But in fact, the employees breach was an offence *per se* and any fine imposed was paid as a result of a conviction for the offence, whereas an employer's breach in not paying wages or money did not result in the payment of a fine after conviction. The amount, over and above any wages or money due, which he might be ordered to pay was merely as compensation and thus where no additional injury had been suffered by his employee no amount at all was payable except the wages to which the employee was entitled in any case. In other words, unlike the employee, an employer was not punished simply because he had broken his contract. Section 21, in providing for imprisonment "in default of payment of any penalty or sum of money under this Act", was therefore not relevant to such an employer because, in the first place, as we have already seen, his failure to pay wages as ordered was expressly excluded; secondly, he could not be ordered to pay a penalty for his breach of contract *per se* and thirdly, no "sum of money" was payable in a case where no additional injury had been suffered by his employee.

Section 21 was also the cause of an inequality between servants who worked for wages, and labourers as independent contractors who were paid sums of money. It has already been shown that masters who refused to comply with orders under Section 19 to pay wages owed to their servants could not be imprisoned under Section 21; but an order under Section 19 to pay "money owing

for work done" to labourers could, if disobeyed by an employer, lead to his imprisonment because section 21 applied expressly to a failure to pay a "sum of money" although exempting an award of "wages".

At this point it should be noted that under an entirely new Section 18 two justices were empowered to award the whole or any part of the penalty imposed on an employee to his employer as compensation for any loss or injury satisfactorily proved to have been the result of the employee's misdemeanour; but this did not bring the law relating to employees in line with that provided for employers by Sections 19 and 20. The question of compensating the employer was a secondary matter not necessarily linked to the amount of the fine required to be paid by an employee convicted of an offence under Sections 8-12, for an employee could be fined heavily without his employer having suffered any loss whatsoever. If the employer had in fact suffered injury he would be compensated in the same way as the employee but the detriment to the employee was potentially much greater, quite apart from the possibility of imprisonment.

Section 18 also authorised magistrates to award the whole or a part of any sum forfeited in the same way as any penalty imposed. A difficulty arose where an employee was ordered to forfeit his wages and no award was made to his employer under Section 18 because he could prove no loss. In such a case the master or employer was probably not bound to pay the forfeited wages or money to the Crown and could keep the amount, although it could hardly be described as compensation in the circumstances.

F Penalties and procedures as regards employer offences compared with those for employees

A disparity of treatment as between employer and employee is revealed by a comparison of the procedures and penalties enacted for the more serious employee and employer offences in Sections 11 and 20 respectively. On the one hand arrest without warrant and a fine of up to £20 or imprisonment with hard labour for up to three months was the rule for employees, and on the other, while the maximum amount the employer would have to pay for swearing or blaspheming, failure to provide necessaries or any other ill-treatment was set at £30, there was no alternative possibility of imprisonment with hard labour and no procedure by way of warrant, let alone arrest without warrant. Moreover, as in Section 19, the amount payable by an employer was expressed to be for

"reasonable Compensation to the Complainant for the Injury" rather than a fine for the offence as such, an injury which was particularly difficult to establish where an employer had used abusive language and which should be contrasted with the absence of any similar requirement where the positions were reversed. Failure to pay could, however, lead to imprisonment of the employer under Section 21.

The oppressive nature of arrest by warrant for all employee offences had been mitigated, in theory, by the 1854 Act[20] which had permitted a justice to commence proceedings at his discretion either by warrant or by summons. It has already been shown that, as in England, the discretion was more often than not exercised by the issue of a warrant and this was one of the main employee complaints against the 1854 legislation. An opportunity therefore existed in 1856 to treat both sides fairly by requiring the issue of a summons in all cases, but this was not taken, and instead an attempt was made to temper the exercise of the magisterial discretion.

Section 15 provided that after a complaint had been made a justice was bound to issue a summons in the case of a female employee, but for male employees he might issue a warrant "where it shall be proved to such Justice to be necessary". This provision was a definite improvement on the 1854 position and, taken out of context, might be described as essential in bringing unwilling criminals before the bench. Nevertheless, in the context of a recent history of close association between employers and magistrates which resulted in a biased exercise of the 1854 discretion, and bearing in mind that the only way in which an employee could proceed against his employer was by way of summons, Section 15 was still open to considerable criticism.

G Return to service after period of imprisonment or absence

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

At first sight it would appear that the 1856 Act endorsed the general approach of the prior legislation since Section 13 was in almost identical terms to the former Section 11. Only two small alterations were made. First, the insertion of the words "or in consequence of the non-payment of any Penalty imposed by this Act" was found necessary in order to dove-tail with Section 21.

In 1854, because the punishment for offences by male servants or apprentices was in every case imprisonment or forfeiture for the offence itself, there was no reason to provide for imprisonment for the non-payment of fines, although because female employees could be fined it was necessary to stipulate that where the fine was not paid then imprisonment would follow. For male employees the drafting of Section 11 in 1854 was, therefore, successful in stating that the period of imprisonment "for any offence under the Act" was not to be counted as part of the period of service, but for female servants who had been convicted, fined, and then imprisoned for failing to pay the fine, it could not be said that they had been imprisoned for an offence under the Act for the purposes of Section 11, with the result that the section was inoperative as regards them.

In 1856, however, with the adoption of the possibility of fining all employees as a punishment for offences committed, it became necessary to provide in Section 21 for imprisonment on a failure to pay the fine,[21] and in order to prevent a similar loophole from appearing, it was essential to amend Section 13 to cover imprisonment in consequence of the non-payment of any penalty imposed by other sections of the Act *i.e.*, such an imprisonment was not to be counted as part of an employee's period of service.

The second amendment to Section 13 placed a limit of twelve months on the period of absence after which the servant or apprentice could not be compelled to return to his master's service by the threat of being convicted for misconduct for each refusal to return. This provision certainly prevented the employer from acting out of mere vindictiveness many years after the event, although the section as a whole affirmed his right to claim the remainder of the service where the period of absence of his servant was less than a year, irrespective of motive.

The worst abuses were capable of being prevented, however, where a servant was discovered within the year, by a vital amendment in Section 14[22] which gave two justices the power to order discharge of the contract of service not only

at the request of the complainant[23] but also, unlike the 1854 enactment, at the request of the defendant. This meant that an absentee servant who had been detected within a year after his absence might be punished for his act of misconduct in refusing to return but was able to have the contract discharged at his own request, thus preventing the incessant punishment permitted under the prior Act.

The authority given to magistrates to discharge a contract of service even against the wishes of the complainant employer, whatever the nature of the offence committed by the employee, was an important step towards securing adequate protection of employees from recurrent ill-treatment in cases where they were either provoked by, or acted in self-defence against, over-bearing employers, but were still guilty of misconduct in its various forms. The step was not taken earlier because during the early 1850s, as we have seen, the legislature for various reasons was reluctant to allow employees to escape from their bonds unless that was what their employers wished but by 1856, mainly due to changes in the labour market more favourable to the employer group, a more tolerant approach became economically possible.

H Discharge from service certification scheme

Although it is true to say that some of the most glaring injustices of the previous legislation were corrected by the 1856 Act, making it a more lenient one for employees, certain entirely new clauses were included which were indicative of a continuing policy of fairly rigid control over the employment relation by the legislature.

The provisions contained in Sections 31-33 laid down a scheme whereby a servant[24] was obliged to obtain a certificate of discharge from his master on the termination of his contract of service. If the master refused he could be fined up to £20 and, in the event of a refusal without reasonable cause, a magistrate was authorised to grant the discharge. The servant was then required to produce the certificate on entering into new service, and any master who contracted with him without taking the certificate was liable to be convicted before two justices and fined up to £5, half of which went to any informer involved. The only exceptions were where a servant had been previously employed for less than a fortnight, in which case the prior employer was not bound to give a certificate and, secondly, where a person was entering into service for the first time in the colony. A penalty of up to £20 was also provided for giving false certificates or false discharges.

In many respects these were sensible and very necessary provisions which constituted an attempt to combat employee misconduct, especially absence, without recourse to sentencing offenders to long periods of imprisonment with hard labour and solitary confinement in the first instance.[25] As a result, a servant who had absented himself from his master could not expect to get employment elsewhere and it was hoped that this would act as a much more effective deterrent than the threat of imprisonment. Moreover, it was thought that a servant who was prepared to quit his master's service and remain absent for more than twelve months without being able to earn a living elsewhere must really have felt a deep rooted dislike of him master and, as we have already seen, would not be forced to return to him.[26] In effect, therefore, Sections 31 and 32 made it practically impossible for a servant to quit his master's service and in so doing cast a new light on the apparently more lenient Section 13.

Although the Act did not lay down any directions as to the form to be taken by the certificate of discharge it is implied by Section 33, which provided for a penalty where certain details were falsely alleged in the certificate, that it would contain information relating to a servant's length of service and capacity in his previous employment, the date of discharge and the date on which the servant left his service if this was not the date on which the contract was discharged, as well as the name and address of the servant and his previous employer. But it seems likely that in some cases the certificate was considerably more detailed and would, in effect, have amounted to a character reference for the next master. Servants who had misbehaved were therefore unlikely to obtain other employment and, as with absence, it was hoped that all other forms of employee "misconduct" would consequently be curtailed.

Before commenting on one or two aspects of the wording of the sections containing these provisions two further points of general interest might be made. In the first place, it is significant that the scheme did not originate until 1855-56 when the shortage of labour already described had been eased to a situation where there was considerable unemployment. Had the scheme been implemented in the 1852 or 1854 Acts it would almost certainly have failed because the masters' need for servants would have outweighed in many cases any penalties involved in their being hired without certificates, or the risk involved in hiring a person with a bad character reference. It has been said of Section 32 that the penalty imposed on a master for hiring without a

certificate was a good check to persons who hired men without sufficient care as to whether they were wronging their neighbours, especially as the men they hired could turn round upon them afterwards for the sake of half the £5 fine;[27] but it is fair to say that the incentive to obey the law came more from knowledge that another servant was readily available to do the work.

Given the economic climate of the time, the scheme of servants' certificates was an advantageous one from a master's point of view for he could avoid the risk of employing unwittingly any of the hard core of undesirable workers. But what of the many oppressive masters who badly mistreated their servants? No thought appears to have been given to the implementation of a similar scheme to warn unsuspecting servants away from contracting to serve such masters. Yet such a step would have been fair and reasonable in isolating the worst masters and thus reducing not only the number of employer offences but also those committed by sorely provoked servants. It must be added, however, that for the very reason the certification scheme was a success for masters it would probably have been a failure for servants, namely, the economic climate of the years 1855-56. In the face of a great deal of unemployment servants would not have been in a position to pick and choose their employers, and would have been forced into disastrous service in order to earn a living.

Turning now to look more closely at the phrasing of the three sections, it should be noted that the offence contained in Section 32 was constituted by the act of "employing or entertaining any servant" without a certificate. It is not at all clear what effect the words "or entertaining" were intended to have unless designed to extend the offence to merely receiving or sheltering a certificateless servant, in which case it is difficult to perceive that there would ever have been a conviction for "entertaining", because there was no obligation to require and receive the certificate unless the ex-servant was entering into new service and this would not be so where he was "entertained" as distinct from "employed". A better interpretation of "entertaining" is that it was limited to the time immediately before the second contract of service was formed, so that an employer committed an offence if he did not require and receive the certificate, either before he made a binding contract with his prospective servant, or after there was such a contract and the servant could properly be described as "employed". This construction is not entirely satisfactory, however, for until a contract was formed there was no "servant" and the only way to make sense of the word was to restrict the offence of entertaining a servant without a certificate to cases where the reason for the

absence of the certificate was the continuing existence of a contract of service with the previous master. Yet this was already provided for by Section 34 (harbouring or employing another's servant).

In other respects the drafting of Sections 31 and 32 was clear and unambiguous. More specifically, it did not permit the "old" master to send the certificate directly to the "new" master. The former was bound to "give" it to the servant who must "receive" it. The servant must then "produce and deliver" it to his new master who was obliged to "require and receive" it from him. Both masters would clearly have been guilty of an offence should they have attempted to short-cut these proceedings.

It has already been mentioned that the scheme for controlling servants and apprentices laid down in Sections 31-33 was an entirely new one as far as the Tasmanian master and servant legislation was concerned. But, once again, as with so many "novel" sections in the history of that legislation in the colony, credit for the idea must go to a much earlier source in English law.

In this instance the relevant enactment is the Elizabethan Statute of Apprentices (1563)[28] which prevented servants from leaving the place in which they were last employed unless they obtained testimonials signed by local dignitories or "two honest householders" declaring that theirs were lawful departures. The testimonial or certificate was to be written in the required form stating, *inter alia*, the place from which the servant was departing and, besides being given to the servant, was also registered by the parson, vicar or curate of the parish who took "for the doing thereof two pence, and not above". Furthermore, a servant could not be accepted into any other service without showing his testimonial in the presence of his new master to the head officer of the town or place in which he was about to enter into service. The penalty suffered by a servant who attempted to depart without this testimonial was imprisonment until he procured one, providing he did so within 21 days. If he was unable to procure it within this time he was whipped and treated as a vagabond. Any master who hired a servant without the certificate was fined £5 and where the unfortunate servant was arrested with a counterfeit or forged testimonial he was again whipped as a vagabond.

It will be apparent that there were substantial differences between the Elizabethan system and that contained in the 1856 Master and Servant Act, despite their overall similarity. In the former the onus was placed on the

servant to obtain a valid certificate, with severe penalties if he failed, yet no obligation was cast on his master to provide it;[29] whereas under the 1856 Act the onus was reversed and a penalty prescribed for a refusal to provide one by a master to his departing servant. The formalities of registration and acknowledgement by local officials were also omitted in the Tasmanian scheme. On the other hand, although both statutes provided for a £5 fine should a master hire a servant without a certificate, the effect of the fine in real terms was, of course, considerably less under the nineteenth century Act.

Another aspect of the certification scheme which owed a great deal to an earlier British statute was contained in Section 33 which made it an offence to give false certificates or false discharges. The relevant British legislation was "An Act for the preventing the Counterfeiting of Certificates of the Characters of Servants" (1792)[30] passed because "many false and counterfeit characters of servants have either been given personally, or in writing, by evil-disposed persons being, or pretending to be, the master, mistress, retainer or superintendant of such servants, or by persons who, have actually retained such servants in their respective service, contrary to truth and justice and to the peace and security of His Majesty's subjects".[31]

The eighteenth century enactment constituted a comprehensive attempt to curb the activities of these "evil-disposed persons". Not only did it make it an offence to falsely assert in writing that a servant had been hired for a period of time or in a particular capacity,[32] or to falsely assert in writing that a servant had been discharged at any other time or had not been hired in any previous service[33] (which became Section 33 of the Tasmanian Act), but impersonation of any master, mistress, executor, administrator, wife, relation, housekeeper, steward, agent or servant resulting in the giving of a false character to a servant was also punishable. The 1792 Act also made it an offence for a person to offer himself as a servant pretending to have served where he had not served or with a false or altered certificate[34] or pretending not to have been in service before.[35]

These aspects were not dealt with by the colonial legislation. In many instances, if not himself guilty of writing or amending his certificate, a servant would have been aware of its false nature and have raised a pretence on the basis of it, but the Tasmanian Act, unlike the English one, did not seek to punish the servant for that pretence; it merely sought to punish the

person guilty of the false assertion in writing. In short, the Tasmanian servant who produced a false certificate was in a much better position than his counterpart in England unless he himself had made the false assertion in writing, in which case he was liable to be fined £20 with one half to be paid to any informer.

The existence of Section 33 was also important in protecting servants who had been given certificates which contained certain false assertions made by previous masters But because of the narrow scope of that section in covering only falsehoods in relation to the period of service, position held and date of discharge or departure from service, whereas a certificate often contained a full character reference, there does not appear to have been any real statutory protection of a servant's good character against vindictive masters.[36] The only course of action open to an aggrieved servant who could show damage was to sue his master for giving him a bad character, but this was not always easy because it was necessary to prove express malice, and a representation made bona fide, though false in fact and injurious to the servant, was not actionable.[37]

I Costs

A further complaint by workmen against the earlier legislation had been directed at the imposition of often heavy costs in addition to forfeiture, fines and imprisonment. The rule which permitted costs to be awarded, sanctioned by distress and sale of the employer's goods or deductions from the employee's wages or money, was amended in 1856 to the extent that no more than £3 could be ordered to be paid.[38]

J Other provisions

In many other respects the 1856 Act was simply a rehash of the 1854 legislation. A month's warning was necessary to determine an indefinite service unless otherwise expressly agreed;[39] wages were payable quarterly;[40] magistrates were empowered to remand employees arrested by warrant for up to seven days unless they gave sufficient surety;[41] *certiorari* was taken away;[42] the offence of employing or harbouring remained in exactly the same terms;[43] seduction of female apprentices and servants under age was dealt with in the same way;[44] and those sections in the 1854 Act directed specifically to contractual problems connected with immigration also reappeared in the same form.[45]

The oppressive 1854 legislation had undoubtedly been ameliorated to a certain extent, but the foregoing discussion has shown that by no means all of the injustices contained in the Act had been corrected. What finally emerged as the 1856 Act was a grave disappointment to those who had strenuously campaigned for master and servant law reform, especially in the light of the proposals contained in the first bill of July 1855.

K Comparison of the 1856 Act with the bill of July 1855

One of the most significant aspects of the first bill's provisions was the absence of any reference to imprisonment of servants, either for an offence in connection with misconduct, or for failure to pay a fine or an amount awarded to an employer as compensation for the offence. Instead, distress and sale of a servant's goods and/or attachment of wages was proposed. The amount of the fines were also more realistically assessed so that absence from service, neglect to perform duties, disobeying lawful commands, the use of obscene language and being drunk and disorderly on the master's premises, were punishable by a fine of no more than one month's wages as against a £10 or £20 fine (the equivalent of 6 months or a year's wages, respectively) in the Act. Misconduct was not punishable as an offence unless it amounted to one of these specific offences. Where a servant's misconduct amounted to an assault or involved striking another the more practical step was proposed of permitting his master to dismiss him immediately or within one week after the offence, and the same was true of the reverse situation. Wages were to be paid weekly in some cases, unless otherwise agreed, whereas the Act re-affirmed the 1854 view that they were to be paid quarterly, unless otherwise agreed, thus leaving a larger sum in the master's hands for a longer period.

Other proposals in the bill designed to protect the livelihood of servants were also omitted in the 1856 legislation, for example, the requirement that a master could not recover more than two months wages during any one year except where his servant had absented himself and there was more than six months of the agreement left to run, in which case four months was recoverable; that two days absence was necessary to constitute abandonment of service except where illness provided an explanation; that the time occupied in laying a complaint against a master was not considered an absence; and that it was an offence for the master to refuse to receive into his service any servant according to the engagement. Instead, mainly because

the economic climate had changed considerably since July, 1855, the framework of the 1854 Act was retained: imprisonment was still possible; arrest without warrant remained; misconduct was still as wide as previously; fines were excessive; forfeiture of wages was unlimited; no appeal was possible except in one case[46] and many of the major innovations merely imposed further one-sided controls on servants.[47]

L Comparison of the 1856 Act with the existing English legislation

Although most of the more liberal provisions of the first bill did not find a place in the 1856 Act the Tasmanian employee still found himself in a more favourable situation than that which prevailed in Britain at that time and for a number of years until 1875.[48]

In 1856 the main British statutes under which masters could prosecute their servants for breach of contract were the 1747,[49] 1766[50] and 1823[51] Acts, particularly the last mentioned one[52] which had not been amended.

Like the 1856 Act, the 1823 legislation punished the vague offence of "misconduct" as well as absence from service,[53] neglect[54] and other more specific acts amounting to breaches of contract, including failure to enter upon the service, although the English statute only made this an offence where the contract was written and signed. Arrest in England was usually by warrant although since the passage of Jervis's Act in 1848[55] magistrates had the option of issuing a summons, whereas in Tasmania the emphasis was placed on procedure by way of summons unless a warrant was proved to be necessary, and then only in the case of male employees. Again, two magistrates were necessary to convict in the colony as against one in England and the punishment in the mother country was almost as severe as that under the V.D.L. 1854 Act, namely, imprisonment with hard labour for up to three months or by an abatement of wages in whole or in part with the alternative in either case of discharge from service.

The English servant also continued to be plagued by the fact that after serving a term of imprisonment for his offence he could be required to return to his master[56] to serve out the remainder of his service and if he refused "there was no end to the power of commitment".[57] In Tasmania, on the other hand, it has been shown that a considerable improvement was effected in 1856 under Section 14, at least in the light of the previous colonial master and

servant legislation. It is doubtful, however, whether the amendment to Section 14 placed the Tasmanian employee in any more favourable a position than his English counterpart in 1856. Under the 1823 Act a workman could only be committed again and again where a magistrate refused to exercise his discretion to discharge his contract as an alternative to imprisonment and/or abatement. The same would appear to be true in Tasmania because, although the defendant employee was permitted to request discharge there was nothing in Section 14 to suggest that the justices were bound to grant that request in every case.

NOTES

1. 19 Vict. No. 28.

2. S. 3.

3. In s. 1 the definitions of "master" and "employer" remained the same as in 1854 although it should be noted that the 1856 definition of employer contained a drafting error when it stated that "the Term 'Employer' shall mean any Person male or female, by or on behalf of whom any Contract of Agreement shall have been made with any Servant for the Performance of any Work". "Servant" should read "Labourer", otherwise there was little sense in distinquishing a master from an employer or the master-servant relation from that of employer-labourer (independent contractor).

4. 2 C. M. & R. 54.

5. S. 1 of the 1854 Act.

6. See *Rüse* v. *Erdmann* (*Mercury*, July 9th 1884), in which the magistrates erroneously interpreted the phrase "other servants of every class and description whatsoever" to exclude a servant employed as a re-toucher and photographic artist. The justices were of the opinion that where general words were used in a statute, they were governed usually by the particular words which preceded them and must be interpreted to mean something *eiusdem generis*, and that a higher class of service was involved in the case than any of those contained in the construction clause. The case against the servant for absence under Section 8 was therefore dismissed without any evidence being heard.

   The Supreme Court, however, ruled that whether a man is a servant or not within the meaning of Section 8 is a question of fact and not of law. As such it must be determined on the evidence by the magistrates and, accordingly, the case was remitted to them.

   The decision serves to illustrate the confusion caused by the Act's listing occupations in the definition of "labourer" and servant in Section 1 when the distinction rested on the nature of the contract in each case as disclosed by the evidence. See the discussion in relation to the 1854 Act *supra*.

7. See S. 1 1854 Act.

8. Ss. 11, 12, 15, 16, 17.

9. S. 8.

10. Ss. 9 and 10.

11. S. 9.

12. In a well intentioned though patently pious pamphlet entitled, *"The Master and Servant Act 1856: With Explanations for the Benefit of Employers and Employed"*, for servants and others who might have had difficulty in understanding the legal jargon of the Act itself, Charles Eardley-Wilmot, magistrate and coroner for Sorell, had this to say about Section 23:

"It is to be hoped that the humanity which prompted this change in the laws will be appreciated by the female servants in this land; and that they will show by their steadiness, their sobriety, their honesty, and their general good conduct that a higher power than a mere dread of punishment and corporal suffering will keep them clear of doing wrong".

N.B. One of Eardley-Wilmot's reasons for writing the pamphlet was so that "I may save many a poor fellow from applying for assistance to a most mischievous class of persons - one found in every country district in this Island - the Bush-lawyer, who has just enough knowledge also to make him mislead his unfortunate quasi-client."

Unfortunately, the author views the 1856 Act through rose-tinted spectacles at times. After declaring that his sympathies are for the poor on the Island he states, "I would say one more word to them . . . to those who have had a practical compliment paid to them in the amended Act which places a lighter burthen upon them, which does not so much threaten as advise - I would say, Shun intemperance - the poor man's bitterest enemy." He concludes with the ambiguous statement that "I have rarely tried a case under the Master and Servant Act where the servant has been a temperate man, and I have never convicted a man of drunkenness in the Police District of Sorell who had deposited money in the Savings Bank". This comment is all the more remarkable when it is realised that the magistrate was also the director and founder of a Savings Bank at Sorell in which, according to information given in a Legislative Council debate (reported in the *Courier* on 21st December 1855), almost £1,000 was deposited. Was this amount the accumulation of small sums handed over by servants as a form of security against convictions for drunkenness in Eardley-Wilmot's Court?

13. S.4.

14. Although Section 19 for the first time expressly limited to the jurisdiction of the justices to cases where the amount of wages claimed did not exceed £30.

15. In *Hamilton* v. *Thomas* (*Mercury*, July 1st and September 5th 1865) a carpenter had contracted to make a number of chairs but, although he remained willing to work, the contract was not completed. The magistrates awarded him the balance of the contract price and £2.10s. compensation. On appeal, the Supreme Court accepted the argument that Section 19 of the Master and Servant Act did not confer authority to adjudicate in cases where the contract had not been completed.

The decision therefore does no more than confirm that the common law rule in *Cutter* v. *Powell* (1795) (101 E.R. 573) was not affected by Section 19. But the evidence appears to show that the reason why the chairs were not completed despite the carpenter's willingness to work was that the employer unjustifiably prevented him from doing so.

16. However, the costs involved in laying an information and securing a summons were strong deterrents for the majority of servants. In 1856 the cost of an information on oath and a summons was 8s.6d. with an additional 1s. for the oath of each witness, a fortnight's wages for most servants.

17. *Re Brittain* (*Mercury*, 17th March, 1886) where a master was imprisoned by magistrates for non-payment of wages after insufficient effects were found to satisfy a distress warrant. The Supreme Court rules, however, that although magistrates could issue a distress warrant under Section 20 of the Magistrates Summary Procedure Act (1856) and by Section 21 of the Master and Servant Act could imprison for default in payment thereunder, imprisonment for non-payment of wages was not possible because Section 21 expressly excluded it.

A different view was expressed by the Supreme Court in *Henrichsen* v. *Page* (1898) (Nicholls and Stops Reports, Vol. 1, 85) on similar facts. Clark, J. (with the concurrence of Dodds, C.J.) pointed out that Section 23 of the Master and Servant Act provided that, subject to the provisions of that Act, the Magistrates Summary Procedure Act would apply to the enforcement of all penalties and sums of money ordered to be paid under the master and servant legislation. The effect of section 21 was only to make "special and distinct provision in regard to default in payment of any penalty or sum of money other than wages". It was held, therefore, that imprisonment for non-payment of wages was within the jurisdiction of the magistrates. *Re Brittain* was not mentioned except in the head-note.

For a similar problem in connection with the English 1823 master and servant legislation see: *Wiles* v. *Cooper* (1835) 111 E.R. 513.

The Magistrates Summary Procedure Act also applied to limit the amount of wages that might be recovered summarily to six months. Section 22 of the Master and Servant Act stated that "all proceedings under this Act shall be commenced within twenty-one days after the act complained of, excepting only proceedings for the recovery of wages", but did not specify what the period was as regards wages. The Supreme Court held, however, in *Bernacchi* v. *Davies* (*Mercury*, April 13th 1896), that the limit of six months contained in the Magistrates Summary Procedure Act applied by virtue of Section 23 of the Master and Servant Act.

But see *Charles* v. *Plymouth* (64 L.P. 466) which concerned the English Employers and Workmen Act (1875) and which was distinguished in *Bernacchi* v. *Davies*.

18. See *Re Brittain op. cit.*

19. Although for an employee this was a fine of up to 10 as against 5 for an employer.

20. S.13.

21. S.21 only applied to adult male employees (and apparently adult female labourers) because female servants and apprentices and male apprentices under the age of 16 were exempted by Section 23. Section 4 excluded infant servants and labourers of both sexes from the provisions of the Act.

22. See for example *Thomas* v. *Hamilton* (*Mercury*, 1st July 1865).

23. See also *East* v. *Simpson* (18/7/66) where the Supreme Court held that the discretionary power in s.14 did not affect the common law right to dismiss summarily for misconduct.

24. The scheme did not apply to labourers.

25. Although this was still indirectly achieved by setting the maximum fine for employee offences so high that payment was impossible for most

of them and imprisonment with hard labour and solitary confinement resulted under Section 21.

26. S. 13.

27. Charles Eardley-Wilmot *op. cit.*

28. Ss. 10 and 11.

29. See *Carrol* v. *Bird* 3 Esp. 201, where it was held that a master was not bound to give a servant a character.

30. 32 Geo. III, c. 56.

31. S. 1, Preamble.

32. S. 2.

33. S. 3.

34. S. 4.

35. S. 5.

36. Similarly under the English Act.

37. See *Hargreave* v. *Le Breton* 4 Bur. 2422;
Warr v. *Jolly*, 6 C. & P. 497.

38. S. 24.

39. S. 6. See *East* v. *Simpson, op. cit.*.

40. S. 7.

41. S. 17. This only applied to male employees.

42. S. 25.

43. S. 34.

44. Ss. 35 and 36.

45. Ss. 26-30.

46. S. 34, (harbouring or employing servants).

47. For example, Ss. 31-33.

48. For an excellent account of the position in Britain and the movement for reform there, see Daphne Simon, *op cit.*.

49. 20 Geo. II, c.19.

50. 6 Geo. III, c.25.

51. 4 Geo. IV, c.34.

52. Witnesses before a British Select Committee appointed to inquire into the State of the Law as regards Contracts of Service between Master and Servant mentioned that these eighteenth century statutes were still operative, but agreed that the 1823 Act was by far the most important, 1865, VIII, Q. 5, 10, 11; 1866, XIII Q. LL, 12, 273.

53. "Absence" *e.g.*, three miners at Dewsbury were prosecuted for "absenting" themselves from work and received fourteen days hard labour for refusing to go into a pit although the pit was in an extremely dangerous state through firedamp. *Beehive*, Nov. 10th 1866.

54. "Neglect" - See *e.g.* The case of Eli Swift an ironworker at the Phoenix Ironworks Rotherham reported in the *Glasgow Sentinel*, February 4, 1865. Swift refused to teach a labourer the work which he, Eli Swift, was engaged to perform because he considered it a part of his capital. Consequently he was draffed from his bed about midnight by a policeman and put in the cells under the court house although it was known perfectly well where he lived. At nine o'clock the next morning he was tried in the private house of one of the local magistrates. Three of his friends asked to be admitted to give evidence but they were refused and Smith was sentenced to a month's imprisonment in Wakefield Gaol. Swift's friend contacted W. P. Roberts who sent a statement of the case to J. A. Roebuck, Radical M.P. for Sheffield, and he brought the matter up with the Home Secretary, but "in due time there came the ordinary lithogram, expressing great regret that nothing could be done."

    See the evidence of W. P. Roberts 1866, XIII, Q. 1662-5 in the course of which he said of this case that"there was as gross a failure of justice as could be; I do not believe that such a failure of justice could have occurred in any other country than this". Illness was also sometimes punished as "neglect". See the evidence of William Evans, who reported master and servant cases in the *Potteries Examiner* in which he mentioned the case of a potter who in 1866 was imprisoned for two weeks for neglect of work although he produced a doctor's certificate testifying that he was too ill to go to the potting shed. 1866, XIII Q. 1282.

55. 11 and 12 Vict. c. 43.

56. See Lord Ellenborough in *R.* v. *Barton-upon-Irwell* (1814), 2 M. & Sel. 329, 333.

57. 1866, XIII Q. 1667-72; evidence of W. P. Roberts, Chartist and trade union solicitor Q. 1664.

CHAPTER 10

POSTSCRIPT: PRESENT SIGNIFICANCE OF THE MASTER AND SERVANT ACT (1856) AS AMENDED

Master and servant legislation in Tasmania achieved a form and substance in 1856 which has inevitably been altered over the years, but it is remarkable that its core provisions, making criminal offences of employer and employee breaches of contract, have remained with very little in the way of amendment.

A Amendments during the period 1856-1884

One of the first aspects of the 1856 Act to go was the system of certification and related offences set up by Sections 31-33 which was repealed in 1882.[1] The opportunity was also taken at this time to replace the inflexible and unfair rule contained in Section 6 which required a month's notice to be given in order to terminate contracts of indefinite duration. Instead, the period of notice in such cases was related to the intervals at which wages were payable, so that one week's notice was necessary when wages were payable weekly, a fortnight where they were payable fortnightly and a month in any other case.[2]

In 1884 employees were finally freed from the ignominy of arrest by warrant on the complaint of their employers in contrast to the necessity of a summons in the reverse situation; Sections 15 and 16 were repealed in so far as they authorised a justice to issue his warrant in the first instance for the arrest of any servant, apprentice or labourer.[3] Also repealed was Section 17 which had authorised a magistrate to commit an employee to prison without trial for up to seven days after his arrest, unless he entered into a substantial recognisance.[4]

These significant, but relatively minor, amendments were the sum total of the Tasmanian Government's response to nearly thirty years' experience of the 1856 Master and Servant Act.

B Reforms in the U.K. during the same period

The same period in the U.K. had seen much more achieved in the way of reform. It has already been noted that the 1856 Act had provided the new State of Tasmania with a headstart and that, although far from being a model statute, it placed the Tasmanian employee in a less disadvantageous position than an employee in the U.K. at that time. The positions were reversed, however, within twenty years. This was achieved in two stages.

1) Master and Servant Act (1867)

In 1867, after the report of a Select Committee had been published,[5] a new Master and Servant Act[6] was passed which, generally speaking, gained for British employees much the same benefits as had existed in Tasmania since 1856, although considerably less than had been anticipated by reformers in the U.K. Two justices were authorised to award damages instead of a fine or could assign part of a fine as damages. They could also discharge a contract (not a new power for they already possessed it under the 1823 Act[7]) or, alternatively, order it to be fulfilled. In ordinary cases of misconduct they were able to abate wages or impose a maximum fine of £20 which was recoverable by distress and sale and, ultimately, by imprisonment, but in cases of aggravated misconduct, misdemeanour or ill-treatment or where there was injury to person or property, the penalty was imprisonment for up to three months with hard labour.

The same period of imprisonment with hard labour was provided by Section 11 of the 1856 Act, although the types of conduct referred to in this section would not necessarily have amounted to aggravated misconduct under the British Act, for example, swearing. But, as trade union leaders and others in the U.K. quickly realised, the decision as to whether an "aggravated" or an "ordinary" misdemeanour had been committed was left entirely to the justices and there was no reason to suppose from past experience that swearing, for example, would not be dealt with as an aggravated misconduct.

It should be noted however that the British legislation dealt with aggravat ill-treatment of servants by masters in the same way and should be contrasted with Section 11 which only applied to employees, employers incurring no more tha maximum of £30 in damages for equivalent offences under Section 20. The British Act was also more egalitarian in requiring a summons to be issued in all cases although , as we have seen, this was not achieved until 1884 in Tasmania.

2) Employers and Workmen and Conspiracy and Protection of Property Acts (1875)

The proponents of reform in the U.K. were completely dissatisfied with what they saw as the half-hearted measures of the 1867 legislation but the set-back was a spur to improved organisation by trade union leaders. A Royal Commission was set up, in March 1874, and reported on master and servant law in July of that year. Its recommendations became the Employers and Workman Act,[8] "a change of nomenclature", said the Webbs, "which expressed a fundamental revolution in the law". The law relating to master and servant was finally assimilated into the law of contract and both parties were, at least in theory, made equal parties to a civil contract when imprisonment for a breach of contract was abolished, except in limited cases under the Conspiracy and Protection of Property Act (1875)[9] where the breach had the effect of depriving people of gas or water supplies or involved a danger to life or serious injury to property.[10]

C Resort to master and servant legislation during the strikes of the 1890's

In the face of these momentous developments in the history of U.K. trade unionism and the law of employment, the Tasmanian Government remained committed to the 1856 Master and Servant Act and, as we have seen, only minor amendments were made in the 1880s.[11] No organised pressure groups existed which were capable of securing its repeal, since an organisation of trade unions did not come into existence in the State until 1882[12] and, in any case, unions were more concerned at that time to ensure that an equivalent of the English Trade Union Act (1871) which, *inter alia*, gave protection to trade union property and provided a system of registration, was enacted in Tasmania.[13]

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

The importance of this simple but very effective prosecution against a striking employee was illustrated during the great maritime, mining and shearing strikes of the early 1890s when unions in N.S.W. and Queensland entered into a long struggle with employers on the question of compulsory unionism.[14] Among the legal weapons used in these States to eventually bring down the unions were master and servant Acts[15] similar to that in Tasmania, as well as prosecutions for conspiracy in the absence of any statute corresponding to the English Conspiracy and Protection of Property Act in those states. There was, however, a consistent approach on the part of the legislatures in N.S.W. and Queensland in not enacting a Conspiracy and Protection of Property Act while retaining the Master and Servant Act, which was not the case in Tasmania.

D Amendments under the Statute Law Revision Act (1934)

An historic consequence of the unionists' disillusionment with the head-on confrontation approach to industrial disputes was, ultimately, the general acceptance of some system of conciliation and arbitration at both state and federal levels. In Tasmania, in 1910, this took the modified form of a wages board for each industry, where decisions were based on agreement rather than arbitrated. The opportunity was then ripe to repeal the Master and Servant Act but it was not taken and the Act remained untouched on the statute book until 1934 when, by virtue of the Statute Law Revision Act[16] and later proclamations thereby authorised, a number of amendments were made to it.

Section 5, in so far as it enabled the husband of a married woman to terminate by a month's notice any contract of service entered into by his wife without his consent, was repealed largely because it embodied the anachronistic principle that a husband was entitled to the services of this wife at all times and also because in 1935[17] a married woman became personally liable on her employment contracts, making her husband's lack of consent irrelevant.

Important amendments were made to Sections 11 and 12 which had provided the penalty of imprisonment with hard labour for up to three months for the more serious employee offences against employers and occupiers, with the result that although the same excessive maximum period was retained, a convicted employee can no longer be made to serve his term with hard labour. Section 11 was brought into line with Section 12 by deleting that part of the former which

related to arrest without warrant. An employee cannot now be taken into custody without a warrant except in situations justifying a "citizen's arrest" which are much more limited than those previously envisaged by Section 11.

Other clauses totally repealed by proclamations under the Statute Law Revision Act were Section 21 (whereby in default of payment of a penalty or sum imprisonment with hard labour and solitary confinement could be imposed), Section 25 (which had prevented an application of *certiorari* in master and servant cases) and Sections 35 and 36 (relating to the seduction of females). The only other amendment of any substance was to Section 7 where wages were deemed to be payable weekly unless otherwise expressly agreed rather than quarterly as before.

One minor error was rectified in Section 19 which had previously referred to two justices hearing complaints against employers but had then stated that "he" was to award no more than five pounds as compensation. It is also worth noting that the drafting error in Section 1[18] where "servant" instead of "labourer" was used in the definition of "employee" making nonsense of the distinction between the master-servant relation and that of employer-labourer, was perpetuated after 1934; and, finally, that Section 6 (length of notice required to terminate contracts of indefinite duration), as re-drafted, fails to include contracts in which the period of service "becomes" indefinite as to duration as distinct from one which "is" so, a failure on the part of the draftsman acting under the Statute Law Revision Act (1934) to appreciate that "shall be or become" in the original section was not an unnecessary duplication of words.

E Renewed interest in the 1856 Act by employers

As mentioned earlier, these amendments did not touch the main provisions of the 1856 Act and, consequently, it is true to say that, except in one case,[19] all the offences which existed in 1856 are alive and well nearly one hundred and twenty years later. In 1894, a generation after the abolition of the last English Master and Servant legislation, the Webbs had remarked, "it is difficult in these days when equality of treatment before the law has become an axiom, to understand how the flagrant injustice of the old Master and Servant Acts seemed justifiable even to a middle-class Parliament". How surprised and puzzled they would have been had they been told then that Tasmania, together

with all but one of the other Australian States, would still be clinging to their Master and Servant Acts like old friends in eighty years' time.

The analogy is perhaps an unfortunate one because, in the first place, the Act has never been a friend to Tasmanian employees, particularly in its younger days when it was very much like its predecessors, a "biting little imp" and secondly, it would probably be more accurate to describe the Act as an old forgotten friend in having lain idle and neglected for so long. It is for this reason that, despite its poor record in the nineteenth century, most Australian writers on industrial law today discuss the Master and Servant Acts as so much history,[20] or do not bother to mention them at all.[21] The reason most often given is that when a strike occurs it is far more likely that appropriate action would be taken by an employer under State or Federal systems of conciliation and arbitration or under laws which apply specifically to strikes than that he would prosecute under the Master and Servant Act. This has certainly been the case in the past with one or two exceptions,[22] but there are indications now that employers, thwarted by their inability to take what they regard as effective action against striking employees and their unions, particularly at the federal level, are turning away from possible courses of action open to them by the Federal and State machinery for settling disputes and are consulting their lawyers for new remedie

Similarly, it has been argued in the past that employers in Australia would never need to turn to the ordinary courts for civil actions in tort against striking employees because the paths to the various industrial tribunals are so well-trodden and well-known. In the U.K., because these highly regulated systems of conciliation and arbitration do not exist, the torts of civil conspiracy, intimidation, and inducing a breach of contract have been honed by constant use against employees and unions into weapons of considerable accuracy by the English courts, particularly during the 1960s. Their effectiveness thus makes them an attractive proposition to Australian employers and there are signs that this is beginning to be appreciated.[23]

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

necessarily participating in a strike.[24]

1) Criminal conspiracy

There is, however, a second way in which the Master and Servant Act could be used with more devastating effect against striking employees. The Tasmanian Conspiracy and Protection of Property Act (1889) protects persons acting in combination in furtherance of a trade dispute against prosecution for criminal conspiracy providing the act would not be punishable as a crime if done by one person.[25] At first sight therefore it appears that, since striking employees are in breach of their contracts and these breaches are criminal offences under the Master and Servant Act capable of being committed by individuals, the employees can be prosecuted for conspiracy and the 1889 Act cannot be invoked for their protection. If the strike were in connection with matters dealt with by a Wages Board determination the statutory penalties[26] could be imposed but the prosecution for conspiracy would appear to be a possible alternative.

Fortunately for employees in Tasmania this conclusion is invalidated or, in more modern terms, rendered "inoperative", by the fact that "crime" is defined by Section 2(4) of the Conspiracy and Protection Act so as to include only summary offences punishable by imprisonment and, although this was so before 1856, the Master and Servant Act of that year did not provide imprisonment for ordinary breaches of contract in Sections 8, 9 and 10 and these sections have remained unaltered. Technically, therefore, no "crime" is committed by striking employees for the purposes of the Conspiracy and Protection of Property Act and they are protected by its provisions although still open to prosecution for any "criminal offence" under relevant sections of the Master and Servant Act.

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

It is not therefore in the field of criminal conspiracy that the existence of the Master and Servant Act constitutes a special threat to employees who strike in Tasmania, but in relation to the action for civil conspiracy.

2) Civil conspiracy and other economic torts

After the Conspiracy and Protection of Property Act had prevented prosecution for criminal conspiracy to injure and had lessened the possibility of conspiracy involving an unlawful act by re-defining what was meant by intimidation and coercion, the courts developed the two forms of conspiracy as civil actions where damage could be shown. In England this development was halted for civil conspiracy to injure by the Trade Disputes Act (1906)[27] which, providing there was a trade dispute, erected a statutory barrier identical to that created by the Conspiracy and Protection of Property Act for criminal conspiracy to injure. The narrow form of both civil and criminal conspiracy remained untouched whether or not there was a trade dispute, but if strikers steered clear of committing independent crimes there was nothing to fear.[28]

The situation changed however when the House of Lords in *Rookes* v. *Barnard* accepted that a tort could provide the necessary unlawful act for civil conspiracy.[29] The tort "discovered" by the Law Lords in this case was "intimidation" which was previously thought to have been limited to criminal law as a threat to do an unlawful act. But it was held that a threat to strike was, in the circumstances, a threat to break the individual contracts of service, that this was a threat to do an unlawful act and that, therefore, there was intimidation which in turn provided the unlawful element for civil conspiracy since it had caused injury.[30]

What so enraged many unionists and commentators[31] was the fact that the Law Lords accepted not merely that a tort could constitute the independently unlawful act for civil conspiracy, but that in doing so they impliedly held that the breach of contract itself (rather than a threat of a breach of contract) was illegal. This meant that an action was possible for conspiracy to break a contract, something unknown to English lawyers at that time except in a limited category of cases involving criminal breaches of contract where there was a risk of danger to life, or of serious injury to property etc. under the Conspiracy and Protection of Property Act. But in Tasmania, as in other States which have retained their Master and Servant Acts, the extraordinary decision

in *Rookes* v. *Barnard* is completely irrelevant in this respect, because wherever an independently unlawful act is needed in order to prove that a tort has been committed by striking workers, as in conspiracy, intimidation (if there is a threat to strike) and indirectly inducing a breach of contract[32] (if strikers make it impossible for a customer of the employer to fulfill his contract, by persuading the customer's employees to go on strike), the Master and Servant Act is there to assist an employer since a strike necessarily involves absence from work and this is a criminal offence under the Act.

For Tasmanian employers the main advantage of the Act is that it creates a straightforward criminal offence and would be likely to succeed in court where arguments based on the *Rookes* v. *Barnard* reasoning might fail. This would be particularly important in the light of the decision in *Williams* v. *Hursey*[33] where the High Court held that the unlawful element for conspiracy involving an unlawful act was established by assault and breaches of the Stevedoring Industry Act 1956 rather than because a number of torts had been committed. It would therefore be uncertain to say the least, whether the extension of the illegal act to torts and breaches of contract would be accepted by the Tasmanian Supreme Court or by the High Court, but, ironically, a breach of contract in the guise of a criminal offence under the Master and Servant Act would not raise the same problems.

A civil action by an employer for conspiracy is also possible where the independently unlawful act is provided by Section 65 of the Wages Boards Act (1920) which makes it an offence for any union, union official or employee "to counsel, take part, support or assist directly or indirectly any strike on account of any matter in respect of which a Board has made a determination". This undoubtedly constitutes an additional hazard for strikers who, besides being heavily fined under the section, could be liable to pay damages to an employer. But if such an action did find its way into the Tasmanian courts an offence under the Master and Servant Act would almost certainly be preferred as the principal means of providing the necessary unlawful element because, in the first place, its effectiveness is not limited to situations where a strike has occurred "on account of any matter in respect of which a Board has made a determination"; and secondly, there is no need to establish that a "strike" has occurred. This can sometimes be a difficult exercise in view of the uncertainties involved in legally defining a strike[34] and the absence of any definition in the Wages Boards Act.

On the other hand, all that needs to be proved under the Master and Servant Act[35] is that the employee refused or neglected to perform his work or was absent from work "before the lawful termination thereof". Thus where no strike exists because, although there is a cessation of work in combination, no demands are being made, as, for example, where a number of key workers acting together decide to take a week off from work in order to watch Tasmania play the M.C.C. and thereby bring production in a factory to a halt, no civil act for conspiracy is possible if reliance is placed on Section 65 of the Wages Boards Act; but such an action would have every chance of being successful if offences under the Master and Servant Act were argued.

At first glance it might be thought, where at least one of the persons procuring a strike is a union official who, because he has no contract with an employer cannot break it, that if the employer wishes to include the official as one of the defendants in an action for conspiracy, he will in every case be bound to rely on the Wages Boards Act for the unlawful element, rather than on the Master and Servant Act. A look at *Rookes* v. *Barnard*[36] is sufficient to dispel the idea, however, since one of the defendants there was in fact a full time trade union official, yet he was still held liable in conspiracy on the grounds that the unlawful act (breach of contract) need not be capable of being committed by all the defendants provided that at least one o the conspirators was guilty of it.

The same arguments apply *a fortiori* to strikes in respect of matters governed by a Federal award in the State because there is no general prohibition of strikes in the Australian Conciliation and Arbitration Act (1904-74).

It is also likely that in many cases it would be more convenient and advantageous for an employer to argue on the Master and Servant Act in order to establish the unlawful element necessary for civil conspiracy and the other economic torts where there were breaches of employment contracts, rather than sue each individual employee for the breach, with a smaller total amount of damages as a result of the application of different principles of assessment in contract and tort. Moreover, there is the additional consideration that an action for breach of contract cannot be taken against any full-time union offici involved since they do not have contracts with the employer who is struck at.

F Conclusion

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

NOTES

1. Master and Servant Act (46 Vict. No. 18) s. 3.

2. *Ibid.* s. 2. This was achieved in 1882 and not in 1934 under the Statute Law Revision Act as stated by J. H. Portus in "*The Development of Australian Trade Union Law*" (1958), 94.

3. Master and Servant Act (1884) s. 2.

4. *Ibid.* s. 3.

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

6. 30 & 31 Vict. c. 141 (1867).

7. 4 Geo. IV c. 34, s. 3.

8. 38 & 39 Vict. c. 90.

9. Ss. 4 and 5.

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

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

12. See J. H. Portus, *op. cit.*, 91 quoting Coghlan, *Labour and Industry in Australia*, Vol. IV, 231. There appears to have been some form of organisation, however, as early as 1848 (See Sutcliffe, *History of Trade Unionism in Australia*, 34.), although the Tasmanian Trades Hall Council was not formed until 1883.

13. This was successful in 1889.

14. See Sykes and Glasbeek, *Labour Law in Australia* (1972), 374-80.
    T. A. Coghlan, *op. cit.*, 2098.
    J. T. Sutcliffe, *op. cit.*, 37-43.
    J. H. Portus, *op. cit.*, 100-16.
    J. J. Macken, *Australian Industrial Law: The Constitutional Basis* (1974), 3-13.
    B. Healey, *Federal Arbitration in Australia* (1972), 5-15.
    J. Hutson, *Penal Colony to Penal Powers* (1966), 32-49.

15. It is ironic that the master and servant legislation which treated the two sides so unequally where there was a breach of contract should have

been resorted to by employers whose slogan throughout the campaign was "freedom of contract".

16. 25 Geo. V, No. 28.

17. Married Women's Property Act 1935 s. 2.

18. Section 1 was renumbered as Section 2 by the Statute Law Revision Act 1958 s. 4.

19. The offences in connection with the servants' certificates scheme in Sections 31-33 which were repealed in 1882.

20. For examples see Portus, *op. cit.*, 93; and Sykes, *Strike Law in Australia* (1960), 70.

21. For example, Sykes & Glasbeek, *op. cit.*

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

23. See *Woolley* v. *Dunford* (1972) 3 S.A.S.R. 243, *Adriatic Terrazzo & Foundations Pty. Ltd.* v. *Robinson et al.*, (1973) 4 S.A.S.R. 294 discussed in Portus, *Civil Law and Dispute Settlement* Jo. Ind. Rel., September 1974, 281.

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

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

26. Wages Boards Act 1920 s. 65.

27. S. 1. No equivalent to the Trade Disputes Act has been enacted in Tasmania with the result there are no statutory restrictions on an action for conspiracy to injure.

28. See *Williams* v. *Hursey* (1959) 103 C.L.R. 30.

29. [1964] A.C. 1129.

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

31. See, for example, Wedderburn, *The Worker and the Law* (1971), 2nd ed., 372.

32. Probably more correctly termed indirect interference with contractual relations in view of the decision in *Torquay Hotel Co. Ltd.* v. *Cousins* [1969] 2 Ch. 106.

33. *Op. cit.*

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

35. Ss. 8, 9 and 10.

36. *Op. cit.*