THE CONTRACT OF SERVICE: THE CONCEPT
AND ITS APPLICATION

by

Brian William Napier
of Queens' College Cambridge

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The research on which this dissertation is based was carried out largely in Cambridge: in the Squire Law Library, the collection of labour law materials deposited therein, and in the University Library. Part of chapter 11 draws on personal interviews with Mr. E.J. Hamley, Secretary, the Fisheries Organisation Society and Mr. N.C. Osborne, Secretary, the Firth of Forth Fishermen's Association, and I wish to record my gratitude to both these gentlemen for their assistance. I am also grateful to the Press Office of the Civil Service Department for the literature on conditions of employment in the civil service which they have supplied.

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This dissertation is entirely my own work and contains nothing which is the product of collaboration. Neither has it previously been submitted, in whole or in part, for any degree, diploma or qualification at any other university.

I should like to dedicate this work to my father.
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CHAPTER 1

INTRODUCTION
It is impossible to proceed any distance in the investigation of the institutions of British labour law without coming up against the prospect of the contract of service in one guise or another. It manifests its importance in many ways: it determines the application of a wide range of statutes governing terms and conditions of employment; it is an integral component in the doctrine of vicarious liability in the law of tort; it is a key factor when it comes to deciding the lawfulness of the taking of strike and other forms of industrial action, and it is, of course, the ultimate common law measure determining the rights and duties of employer and employee. On occasions its importance stems from its status qua contract (e.g., for the purposes of the tort of inducing breach of contract), at other times (e.g., in delimiting the scope of statutes governing terms and conditions of employment) what is significant about the contract of service is the difference between it and other types of contract. The relationship between employer and independent contractor, partner and partner, and principal and agent, for example,

1. An explanation of the terminology of the subject is useful at the outset. 'Contract of employment' may be defined as a generic term, comprising the species of the contract of service and the contract of apprenticeship - see, e.g., Trade Union and Labour Relations Act 1974 (c. 52), s. 30(1). However, the phrase 'contract of employment' is commonly used to refer to the contract of service alone. In this thesis I have endeavoured to refer to the contract of service as such; on occasions, however, for reasons of style I have used the looser terminology, but only when the context eliminates any ambiguity. The words 'employer', 'employee' and 'employment' should not be assumed to refer exclusively to the parties to, and the relation consisting of, the contract of service. While they often will refer to this, they are also used in their popular sense, and may simply indicate a situation in which one person undertakes work for another, irrespective of how, in law, such a relationship is classified.
all give rise to contracts which are broadly similar to the contract of service in that they join parties in an employment relationship, but they must be distinguished from it.

The many different functions performed by the contract of service have earned it the title of the 'corner-stone'² of British labour law. But, to an increasing extent in recent years, the role fulfilled by the contract within the field of labour law has attracted trenchant criticism from lawyers who feel that it is and has been detrimental to the proper legal evolution of the employment relationship. Professor Rideout, perhaps the most vociferous critic, has argued that the corner-stone is "filled with rubble",³ and that the future demands the development of a 'status' of employment, the incidents of which would not be subject to irrelevant influences from the common law of contract. His criticisms would be supported by many who think that Britain should fall into line with continental and American practice, and concede greater legal importance to collective agreements in determining the content of the employment relationship.

The attack on the contract of service (or more precisely the role it plays in modern labour law) comes from many fronts. For convenience these may be summarised under three headings: doctrinal, legalistic and specific.

The 'doctrinal' attack on the contract of service is in many ways the most radical. It is based on the proposition that the analysis which the contract provides of the

relationship between employer and employee is essentially false. This includes, but goes beyond, the assertion that the outcome of such a framework has been the neglect of influences on the employment relationship outside the individual bargain between employer and employee; the argument is that the traditional contractual approach presupposes a freedom of action on the part of the employee which, if it exists at all, does so only in the narrowest of senses. In short, the economic and social forces directing the behaviour of a typical industrial worker in our society are perceived as far more important than the notional 'freedom' to choose a course of action which is the mainstay of arguments based on contract. In the words of Professor Kahn-Freund, "to mistake the conceptual apparatus of the law for the image of society may produce a distorted view of the employment relation."\(^4\) The unequal distribution of power between employer and employee has long been recognized outside the law - as Adam Smith remarked, masters could combine together more easily, legally and effectively than their men, and could hold out longer: "In the long run the workman may be as necessary to his master as his master is to him; but the necessity is not so immediate."\(^5\)

In certain legal systems this fact was appreciated by judges earlier this century. In the U.S.A. by 1921, for example, Taft C.J., in the course of upholding the legitimacy of a strike against low pay, stated

\(^4\) Labour and the Law, 116-7.  
\(^5\) The Wealth of Nations, 169.
a single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. 6

In England, however, the courts have traditionally shied away from such an explicit statement of the status quo, with the exception of Lord Wright's famous observation that the right to strike is essential to the principle of collective bargaining. The traditional view, in the words of Lord Atkin, is that

ingrained in the personal status of a citizen under our laws was the right to choose for himself whom he would serve: and ... this right of choice constituted the main difference between a servant and a serf. 8

By contrast, only a few years after this statement was made, the Supreme Court of the U.S.A., interpreting the National Labor Relations Act, established the supremacy of the collective over the individual bargain:

The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with the terms which reflect the strength and bargaining power and serve the welfare of the group. 9

9. J.I. Case Co. v. N.L.R.B. (1944) 321 U.S. 332, 337-8. In 1967 it was stated that "the (labour) policy (i.e. of the NLRA) therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees...only the union may contract the employee's terms and conditions of employment...the employee may disagree with many of the union's decisions but is bound by them." Per Justice Brennan, N.L.R.B. v. Allis Chalmers Mfg. Corp. (1967) 388 U.S. 175, 180.
As has been observed, the nearest British courts have come to recognizing the disparity of bargaining power between employer and employee (apart from the Crofter case, already mentioned) has been in the context of restrictive covenants. In the Nordenfelt case, Lord MacNaghten actually stated that "there is obviously more freedom of contract between buyer and seller (of a business) than between master and servant or between an employer and a person seeking employment." But the restrictive covenant cases at the turn of the century proceeded on what, to modern eyes, is a very narrow construction of 'public interest' - one which demanded that

a man should be free to exercise his skill and experience to the best advantage for the benefit of himself and of all those who desire to employ him,

but one which did not concern itself with the general content of the terms on which labour was sold for wages. In refusing to give legal support to restrictive covenants the courts were only secondarily (if at all) concerned with protecting the interests of the individual who had by contract limited his future freedom of action; they saw their role as protecting

9. continued. It is possible, however, that an individual bargain made between employer and employee, more favourable than that contained in a collective agreement, would be upheld by the courts. See P.J. Dekom, "Individual vs. Collective Agreements; A Study in Conflict and Union Leverage," (1974) 42 Fordham L.R. 495.


the public interest in freedom of trade: "the idea that the
state on behalf of the community should intervene to dictate
or alter terms of contract is, on the whole, alien to the
classical theory of common-law contract." 14

The second group of criticisms of the role of the modern
contract of service falls under the 'legalistic' heading.
These criticisms are generally concerned with the way in which
the contract operates within the context of ordinary legal
principles in general, and the law of contract in particular.
The characteristic of outside intervention in the terms of the
contract provides a useful starting point for discussion. As
illustrated above, the principle of non-intervention by the
courts in the content of contracts of service has, with certain
recent notable exceptions, 15 been maintained up to the present
day. In place of judicial intervention, the outstanding
feature of the modern contract of service is statutory inter-
vention. A contract of service which is subject to a wages
regulation order (under the Wages Councils Act 1959), and which
provides for less than the prescribed minimum statutory wage, is
automatically varied by the statute. It is provided that the
contract "shall have effect as if for that less remuneration
there were substituted the statutory minimum remuneration." 16

An award made by the Industrial Arbitration Board, 17 "shall

14. W. Friedmann, Law in a Changing Society, 123. See too,
O. Kahn-Freund, Introduction to K. Renner, The Institutions
of Private Law, 39.
15. e.g. the Court of Appeal in recent years, particularly under
the influence of Lord Denning M.R., has shown a willingness
to imply terms into the contract. See such cases as Morgan
v. Fry [1968] 2 Q.B. 710; Secretary of State for Employment
16. Wages Councils Act 1959 (c. 69), s. 12.
17. i.e. under the Terms and Conditions of Employment Act 1959
(c. 26), s. 8.
have effect as an implied term of the contract of employment.\textsuperscript{18} It "shall be a term of the contract under which a woman is employed"\textsuperscript{19} that she receives equal treatment with men in the same employment. The statutory minimum periods of notice laid down by the Contracts of Employment Act 1972\textsuperscript{20} automatically apply to contracts of more than thirteen weeks' duration.\textsuperscript{21}

This phenomenon of statutory intervention in the contract of service, as illustrated by the above examples, is often hard to understand. It is a way of introducing reforms in the law which is not consistently followed by Parliamentary draftsmen. The Employment Protection Bill 1975, for example, which radically alters the sum of legal obligations owed by employers towards their employees, achieves this transformation, by and large, without encroaching on the contract of service. The new rights of employees to guarantee payments,\textsuperscript{22} maternity payments,\textsuperscript{23} time off work,\textsuperscript{24} a written statement of reasons for dismissal\textsuperscript{25} and itemised pay statements,\textsuperscript{26} are all expressed quite independently of contract, though it would have been perfectly possible for these to have been described as terms of the contract incapable of being removed or altered by agreement between the parties except insofar as any change was to the employee's advantage. This indeed is the course of action which has been adopted by the draftsmen elsewhere in the Bill.

\textsuperscript{18} s. 8(4).
\textsuperscript{19} Equal Pay Act 1970 (c. 41), s. 1(2) (and see now the Sex Discrimination Bill 1975, cl. 8(1)).
\textsuperscript{20} c. 53.
\textsuperscript{21} s. 1(1). This period will soon be reduced to four weeks (Employment Protection Bill 1975, Sched. 15, Part II, para. 1), but the principle remains the same.
\textsuperscript{22} cl. 22.
\textsuperscript{23} cl. 37.
\textsuperscript{24} cl. 62. cll. 49, 50, 51.
\textsuperscript{25} cl. 62.
\textsuperscript{26} cl. 72.
where they have provided sanctions against employers who refuse to recognize independent trade unions, and it is not obvious why there should be this divergence between different parts of the same Bill.

There are, however, other problems associated with the practice of subjecting the contract of service to large-scale statutory intervention, quite apart from those of trying to find some rationale behind the choice of contract as a vehicle for reform in certain circumstances. Statutory tampering of this nature will never go far enough to satisfy those who have doctrinal objections to the contract of service: "il ne faut pas songer à rétablir d'une manière quelconque la liberté du consentement individuel dans le contrat de travail; l'industrie et le commerce moderne l'interdisent." Moreover, the association of reforms with the common law of contract may lead to the application of technical rules which are inappropriate in a situation where there is obvious utility in keeping matters as simple as possible. In recent years such relatively esoteric doctrines as variation, estoppel, unilateral repudiation and the implication of a duty of cooperation have all been considered in relation to the contract

27. cl. 16. cf. also the amendments made in s. 8 of the Terms and Conditions of Employment Act 1959 by the Employment Protection Bill, Sched. 11, Part I, para. 9, which are to the same effect.
of service. Arguably, this is a sign of an unduly legalistic approach. On the other side of the coin to this criticism are the objections voiced by contract lawyers who are concerned about the abuse suffered by contractual principles in the employment arena. There is the general point that a contract of service which becomes an institution "moulded by jus cogens" \(^{33}\) is itself merely a shell of the traditional common law concept of contract, which presupposes the general freedom of the parties to decide on the terms under which they will deal with each other. Secondly, the courts have shown their willingness (to borrow the words of Lord Denning in a recent case) "to step over the trip wires of previous cases and to bring the law into accord with the needs of today"; \(^{34}\) this has been exhibited in a number of instances - not only in relation to the contract of service \(^{35}\) - where established common law principles have received strained interpretations. Sometimes it appears that the courts, in interpreting the contract of employment, have forgotten the adage that "hard cases make bad law".

Lastly, there are to be considered the so-called 'specific' objections which there are to the contract of service. These concentrate not on whether contract as an institution is suitable in itself, nor on whether the use made of the contract of service by Parliament is acceptable to ordinary legal principle, but on the actual content of the terms of the contract. These terms,

\(^{34}\) Hill v. Parsons, supra, at 316.
\(^{35}\) Consider, e.g., Lord Denning's toying with the idea of a doctrine of abuse of rights in English law in Cory Lighterage Ltd. v. T.G.W.U. (1974) I.C.R. 339, 357, or the interpretation given to standard principles of agency in Heatons Transport (St. Helens) Ltd. v. T.G.W.U. (1973) A.C. 15.
it is said, are disproportionately anachronistic and irrelevant to modern conditions - a less radical criticism than wholesale rejection of contract as a legal institution. Under this heading, reference is particularly made to the rules which specify the measure of authority enjoyed by an employer over his employee, and here it must at once be conceded that there is a wide gap between theory and practice. It is disappointing to find (in what purports to be a modern account of the law\textsuperscript{36}) that the common law is stated as being that an employee must not, on pain of summary dismissal, absent himself from the service of his employer without permission, even when the reason for his absence is to visit a close relative believed dangerously ill.\textsuperscript{37} Similarly it is somewhat odd to learn of the modern relevance of a case\textsuperscript{38} which decided that certain employees were bound to attend, late at night and at their own expense, at an inaccessible rendezvous, for the purpose of carrying out specified employment after they had already done a full day's work. It may now be true, however, that the presentation of such legal antiquities as up-to-date law is wrong, not just unrealistic. Much of the old law has, of course, been removed by statutory reform, or else deprived of practical significance. The law of wrongful (as opposed to unfair) dismissal is perhaps the best example of old rules which now will be invoked only in the exceptional case. It has been stated judicially\textsuperscript{39} that the fact of a dismissal being wrongful is not sufficient to show that it is

\textsuperscript{36} J.C. Wood (ed.), Cooper's Outlines of Industrial Law, 99, 81. 
\textsuperscript{37} Turner v. Mason (1845) 14 M. & W. 112. 
\textsuperscript{38} Beale v. Great Western Railway Co. (1901) 17 T.L.R. 450. 
\textsuperscript{39} Treganowan v. Robert Knee and Co. Ltd. (The Times, 11 June 1975).
unfair; the body of law relevant to wrongful dismissal must now, it seems, be treated as quite separate from that relating to unfair dismissal. But even where statute has not changed matters in either of these ways, the common law itself may well have. In Richardson v. Koefod, the Court of Appeal declared that the old rule, whereby a hiring was presumed to be of a year's duration, was no longer law. In Wilson v. Racher, they went even further; dealing with the problem of whether an employee's insubordination justified his summary dismissal at common law, Edmund Davies L.J. said of the precedents which were cited:

Many of the decisions which are constantly cited in these cases date from the last century and may be wholly out of accord with current social conditions. What would today be regarded as almost an attitude of Czar-serf, which is to be found in some of the older cases...would, I venture to think, be decided differently today. We have by now come to realise that a contract of service imposes upon the parties a duty of mutual respect.

Notwithstanding these various moves towards an up-dating of the law in force, it remains of interest to know, roughly, the relative age of the rules of the contract of service. In an attempt to meet this inquiry, a graph is set out below. This plots the number of decided 'points of law' derived from the first eight chapters of the English and Empire Digest volume.

42. At 430.
43. The term 'point of law' is used to describe a separate entry in the Digest. Thus one case may give rise to several 'points of law'.
44. The areas of law covered by these chapters are: The Relationship of master and servant; Particular Classes of Servant; The Contract of Service; Duration and Termination of Contract; Remuneration; Breach of Contract and Remedies Therefor; Duties and Liabilities of Master; Duties and Liabilities of Servant.

Particular topics not included are vicarious liability, industrial injuries, and redundancy payments.
concerned with the law of master and servant against the year in which they were reported.

Bearing in mind the crudity of the data the results should be read with caution. They do not show how the volume of litigation on the contract of service has changed over the years; the presentation is concerned only with the law in force in 1970. But the graph does give some quantitative idea of the indebtedness of the modern contract of service to rules propounded in the course of the 19th century. This may not be surprising – the 19th century was the period of
expansion for the law of contract, and it may well be that similar research conducted on the contracts of agency and partnership would display the same pattern. However, evidence of strong 19th century influence does naturally lead to a discussion of whether major reform is necessary to clear the contract of much dead wood. When it is recollected that a leading principle of Benthamite thought was that "the sale and purchase of labour should be entirely a matter of free contract as the sale or purchase of boots and shoes," it would not come as a surprise if much of the case law dating from a time when his ideas were influential could benefit from revision in the light of modern conditions.

Problems and Approaches

A corner-stone, whatever the defects in its composition, nevertheless supports the edifice above it, and a critical view of the importance attached to the contract of service is no reason for denying it the study which it merits. What this thesis attempts to do is to provide better understanding of a concept which is a familiar part of modern law but which remains in many ways ambiguous and difficult to define. The observation of Lord Denning, that "it is often easy to recognise a contract of service but difficult to say wherein the difference lies," may owe something to common sense (and even to philosophy), but it is little comfort to the continuing stream of litigants

46. In Stevenson, Jordan and Harrison, Ltd. v. Macdonald and Evans (1952) 1 T.L.R. 101, 111.
47. cf. St. Augustine, Confessions, Bk. II: "What then is time? If no one asks of me, I know; if I wish to explain to him who asks, I know not."
whose presence before the courts evidences their inability to make this apparently easy recognition. It is not, however, the intention to pursue 'the' definition of a contract of service. This is a task which has consumed much energy, both on the part of judges and academic writers in the law, but which has so far produced disappointing results. When, after more than half a century of learned debate and analysis, it can be said that the best criterion by which a contract of service could be recognized was the judgment of an "ordinary person", it does not seem that much progress has been made, and it is not intended to flog a dead horse even further.

The first object of the following chapters is to give a better understanding of the stages of evolution which have preceded the modern contract of service. At the very least an awareness of history should point the way to a more critical and selective approach towards the legal authorities involved in any discussion of the individual employment relationship. When one reads a statement such as "the regulation of the contract of service begins in 1349 with the Ordinance of Labourers," it is important to know that the relationship there referred to under the name of the contract of service has only the most tenuous links with the modern legal institution which goes by the same name. Nor is it necessary to go back so far in time to find a suitable example — when it is said that the terms 'master' and 'servant' precisely describe the parties to a contract of service, it becomes important to know whether the master—


servant relationship is on all fours with that between employer and employee.

It is hoped, however, that this thesis will do more than introduce a sense of historical perspective into the viewing of legal authorities. The second object is to consider atypical employment situations, where the courts have either not accepted the presence of the contract of service at all, or have accepted it subject to important qualifications. Because of the overall importance which the contract of service has assumed in modern law, there is sometimes a temptation to see it as constituting (along with the contract for services) an exhaustive frame of reference for the legal regulation of the employment relationship. This is not so, and the chapters on public employment and the concept of office show alternatives - either within the sphere of contract or outside it altogether.

As well as showing alternatives, the chapters on public employment also illustrate the very borderlines of the contract of service - the areas where, if it is accepted, it operates under strain and in abnormal conditions. By studying the abnormal, it is hoped that the features of the paradigm contract of service may be elucidated.

The title of the thesis mentions both the conceptual and practical aspects of the contract of service. So far most of what has been said about content relates to the former, but the latter is not neglected. The chapters on history are not simply concerned with the development of legal doctrine; an attempt is made to connect the changes which were taking place at a conceptual, theoretical level with those which were affecting patterns of social and economic organization.
So too in the study of public employment the question of the effect of the contractual (or otherwise) classification of the employment relationship on particular rights and duties is recognized as an important issue. But the chapter which is most concerned with the practical implications of the contract of service is the penultimate, which consists of a case study of one industry – the British fishing industry – and the effect which the legal interpretation of the employment relationship has had upon those who work in it. This industry merits special attention because the frequent refusals of the courts to accept that certain fishermen work under contracts of service has led to their exclusion from state welfare schemes offering protection in times of unemployment or incapacity for work. Given the conditions of employment which prevail in the fishing industry, this exclusion has been sorely felt. The chapter seeks to show how fishermen have been placed at a disadvantage in comparison with other manual workers because of the fact that they may work under a kind of partnership, and usually receive a proportion of their total remuneration by way of a share in the profits of a fishing venture. An outline is given of how there has gradually emerged an appreciation of the inequity of the special treatment afforded them, and how piecemeal reform has sought to remedy this.

The thesis is divided into two parts. Part I contains the chapters concerned with the historical evolution of the contract of service, which trace the law's changing attitudes towards the regulation of the individual employment relationship. From medieval times until the 19th century, change is discussed at a general level. When the 19th century is reached, however,
in recognition of the need for selectivity in the discussion of an era when so many particular changes were taking place in the substantive law, a different approach is adopted. Two sets of case law are considered, one dealing with the interpretation of the Master and Servant Acts, the other with the doctrine of common employment, in an attempt to show how the courts were developing the individual employment relationship at this crucial time. Part 2 of the thesis is concerned with aspects of the modern law of the contract of service, and comprises studies of the employment relationships of various categories of public employees and office-holders, as well as the case study of employment in the British fishing industry, referred to above.
PART 1

HISTORICAL DEVELOPMENT
CHAPTER 2

LAW AND THE CHANGING EMPLOYMENT RELATIONSHIP TO 1563
A. Slavery and Villeinage

It is chronologically appropriate to begin discussion of the individual employment relationship with an examination of slavery, though it cannot be maintained that this is a form of organization of labour which is only to be found in the very earliest stages of development of a society. In Scotland, for example, a form of compulsory labour, with workers 'adscriptii glebae', was introduced in the coal mining and salt manufacturing industries as late as the seventeenth century, and was not abolished until nearly the beginning of the nineteenth. In England, there were slaves in Anglo-Saxon times, and their descendants were the villeins of a later era, but it is the law of Rome that contains the fullest legal discussion of the institution. The combination of military victories producing thousands of captives and a labour-intensive agricultural economy created the ideal situation for widespread reliance on slave labour. It is not every economy that can benefit from this, as Adam Smith appreciated when he described the labour of the slave as the "dearest of any", because of the slave's natural desire to eat as much and work as little as possible. The importance of the slave to Rome, however, in the period of the Empire, may be measured by the weight of legal literature devoted to discussion of the subject, compared to the scanty treatment of the contracts of hire and employment in the


writings of the jurists. 3 Here, the technical rules are less important than the overall legal analysis. "A slave is a man without rights, i.e. without the power of setting the law in motion for his own protection." 4 His economic importance is witnessed by his standing in the same category as cattle and horses, and, in strict law, he enjoyed no more rights than they did. In the later law his position was de facto improved, in that he might be entrusted with a trading fund (peculium) to administer, and he might, from the time of Pius, seek protection from ill-treatment by a cruel master. But, although he might rise to fill many employments of skill, learning and responsibility, he remained a "man without rights". He could not legally marry, participate in public life, make a will, or own property. Though the master could be liable for his slave's acts, either vicariously in delict or as principal, in the limited form of agency that was known to Roman law, what is distinctive about the state of slavery is the complete lack of reciprocity between the parties. It is this feature which distinguishes classical slavery from the attenuated form in which it was found in the Middle Ages, under the name of villeinage.

If we look at the social organization of the labouring classes in England during the early Middle Ages, it is no longer possible to identify slavery in the form known to the Romans. In the wake of the Norman conquest the true slaves ('theows')

3. F. Schulz, Classical Roman Law, 544: "The classical law of hire did not more than reflect the needs of actual life. Contracts with free workers were not as frequent as today, since slave labour was more important than free labour. Factory workers were as a rule slaves... Thus the modern problems of the law of labour could hardly arise."

of Anglo-Saxon society had been replaced by a class of unfree bondmen or serfs, who owed extensive duties to the lord, but duties which were not unlimited. They were fixed by custom, and the discovery of what custom ordained was a matter largely left to the decision of representatives of the serfs themselves. As Bloch remarks, this gave rise to "a stability absolutely contrary to the very conception of slavery, of which the arbitrary authority of the master was an essential element." Together with these serfs, there were the lord's free tenants, who held their lands by his grant, and collectively they were given the name, borrowed from the French, of 'vilains'. Other forces, however, superimposed a social division which went deeper than a simple classification into free and unfree peasantry; tenure became far more significant than status, and the jurisdiction enjoyed by the lord over his subjects became recognised as excluding the jurisdiction of the king's courts. From the 13th century onwards, the free tenants and the serfs were increasingly grouped together as a single class and, where they were bound to render heavy agricultural labour services, given the generic term 'villeins'. Moreover, they took on many of the unfree characteristics previously confined to the quasi-servile bondsmen. Speaking of villeins in this new sense, Britton could say that one of them was his lord's "chattel ... to give and sell at his pleasure", and it

5. cf. H. Nabholz, "Medieval Agrarian Society in Transition," in J.H. Clapham and E. Power (eds.), Cambridge Economic History, Vol. 1, 512, "in theory he [i.e. the villein] was subject to his [lord's] arbitrary will; in fact custom gave him a good deal of protection, for both he and his lord were bound by ancient precedent."
8. i. 297.
certainly appears, vis-à-vis his lord, the circumstances of this type of servant were not very different from those of an absolute slave. He had no proprietary rights against his lord; he was protected by the criminal law only to the extent that his lord could not maim or kill him; he could be dispossessed of his land at his lord's will; if he left his land without his lord's permission he could be forcibly retrieved; his status passed automatically to all his children. Yet the differences between the two states were expounded by jurists knowledgeable in Roman law. Bracton, writing fifty years before Britton, explains that the rightlessness of the serf existed only in relation to his lord and not, as was the case with the slave in Rome, in relation to all of society. As against the latter, the villein enjoyed more or less the rights and obligations of a free man, entitled to hold property and bound to pay taxes and render military service at the state's demand. Thus it may be said that "villeinage is the relation of a person to his lord; it is not, like slavery, a condition of rightlessness against the world at large." In Marxist terms, one crucial difference is that the serf is possessed of the means of production (i.e. by having his own 'villein plot' which he could cultivate when he had satisfied the services due his lord), whereas the slave has no such haven of private

Within the feudal framework there was little room for the development of a law regulating the affairs of lord and villein, not only because of the enormous social gulf between them, but also because the lord was judge in his own manorial court, and had exclusive jurisdiction over his serfs. The 'sokemen', who were free peasants, had access to the royal writ monstraverunt should their lord seek to overstep the customary limits on the services they were bound to render, but the unfree villeins were quite unprotected by law. Nonetheless, despite the theoretical omnipotence of the lord, the relationship between him and his villeins was conceived of as mutually beneficial to the parties concerned. In return for labour services and the proceeds of the many taxes which it was his prerogative to levy, the lord gave not wages but the opportunity of cultivating a small patch of ground. The lord's power over his villeins was extensive and sanctioned by law, but the villeins too had some influence over their lord, consisting of the power to exert economic pressure. They could, and sometimes did, run away or offer passive non-cooperation in rendering their

12. The difference between a slave and a villein was to be developed several centuries later, by 18th century lawyers who argued whether slavery as an institution could be said to have been part of English law. In Smith v. Gould (1706) 2 Lrd. Raym. 1274 it was held that, in general, no man could have a property in another. The Lord's rights in his villeins formed an exception, but even here the right of property was said to be qualified, not absolute. On this basis it was held that a black slave could not be the subject of an action in trover. See infra, pp. 89-90.
14. An attempt to sue the lord in the king's courts would be met and defeated by the plea of 'exceptio villenagi' – Vinogradoff, op.cit., 46.
15. Nabholz, loc.cit., suggests that typically the labour services rendered to the lord would occupy two or three days each week.
services, and it was obviously in the lord's interest not to provoke such reaction by ill treatment. Given this symbiotic relationship, it is possible to see the presence of an exchange between the parties in some way analogous to that existing in a modern employment setting, where wages are given in return for work. But there are important differences. The villein's relations with his lord were far less calculated and truncated than those of a worker to his employer. For example, outside the area of duties delimited by clear custom, there were a variety of 'benes' - extra services, such as additional assistance at harvest time - which no doubt would bring reward from the lord, but which were rendered not out of duty, but because of good will. So too, the lord was much more than an employer; he was likely to be directly involved in many, if not all, of the main institutions of the villein's life. He and his servants would participate together in husbandry, in government and in festivity, and the lord accepted responsibility for the general well being of those under his dominion in a way which has no parallel today. Fundamental change affected this model of economic and social organisation in the 14th and 15th centuries, however, when it became apparent that hiring servants

16. It is appropriate to refer here to the illuminating discussion of status by R.H. Graveson (Status in the Common Law). He makes the point that the relationship between villein and lord in the feudal period was recognisably contractual in character, in so far as it was based on certain express and implied undertakings given by both sides (at 38). Of course, the particular set of duties was determined by the status of the parties - the relations between lord and villein were very different from those between lord and knight and lord and king - but elements of contract were present in determining them. Thus it is necessary to guard against a simplistic description of the transition from lord and villein to employer and employee in terms of a movement from status to contract.

to work the land was more profitable than direct demesne farming, and conditions of political unrest made the obligations of villeinage harder to enforce. The result was the large-scale commutation of compulsory labour services to the payment of rents, and a marked increase in the bargaining power of wage-earners, which in turn was a crucial factor in the circumstances which gave rise to state intervention by way of the Statute of Labourers.

Of course, while demesne farming was predominant in England up to the 14th century, it was by no means the only method of employing labour. The life of any society requires the provision of goods and services through engagements and bargains made between persons of more or less similar social rank, and early judicial records show the enforcement of these simple agreements affecting craftsmen, victuallers and casual labourers. These agreements cannot be described as 'contracts' without risk of confusion, since what we understand by that term in legal vocabulary does not date much beyond the early 17th century. The terminology used in the records themselves is 'conventio', and this is used to cover a range of agreements, including those which we today would divide into 'contracts of service' and 'contracts for services'. These records, of course, do not refer to the law produced by the central courts of royal authority (these are discussed below) but to the informal, variable and flexible standards which were enforced by the local courts of town and country. The records, for example,

of borough customals "recognise the existence of a servant's contract, but do not reveal the manner in which contracts of service were made, or much of the procedure." The records certainly show simple breaches of agreement reaching these courts (e.g. to sew a shirt or to stay in domestic service) and attracting what appear to be both civil and criminal penalties, and it is suggested that in them the negligent workman was punished. Additionally, they provide examples of particular duties laid upon employers - e.g. the prohibition (with the sanction of a heavy fine) of hiring a servant who is already engaged to serve another, and the obligation laid on the hirer of discovering the circumstances in which the servant left his last master. The consequences of hiring someone else's servant must have been dire, to judge from the detailed discussion in a custumal of around 1300 given to the problem of what steps were necessary to effect the voluntary transfer of a servant to a new master by the old without raising the risk of an action of enticement. In some areas the local courts were precocious in developing law which only evolved, if at all, in the central courts at a much later date; e.g., in Littleport, Cambridgeshire, during the reign of Edward II there were attempts to enforce the specific performance of labour agreements, and several instances of claims for unliquidated damages for the breach of such agreements. In 1275, at the Abbot of Ramsey's

20. Borough Customs, cit. supra, lxxxiv.
22. Borough Customs, 216.
court in the Fair of St. Ives, a servant hired for the year at a wage of 10s had repudiated his contract, and was ordered by the court to complete the year's service. The monopoly of these minor courts over actions arising out of employment was attributable to several factors, one of which was the ruling of the Statute of Gloucester in 1278 that all claims under forty shillings (a sum well over the average yearly wage at that time) could not be brought in the king's courts. The other main restriction on jurisdiction, which is evidentiary in character, is discussed below in more detail.

B. The Statute of Labourers

It is widely accepted that the influence of the state in modern times has brought an "ever-growing number of imperative norms, which the parties cannot set aside to their detriment" into the employment relationship, and it is certainly true that these norms are primarily the result of twentieth rather than nineteenth century thinking. But it would be wrong to think that the Victorian belief in the merits of unregulated bargaining was in keeping with earlier law or, indeed, economic theory. This much was recognised by prominent Victorian writers themselves: Sir James Stephen comments on this fact in his History of the Criminal Law of England, and Sir William Holdsworth, some few years later, likens the

24. Select Pleas in Manorial and other Seignorial Courts, cit. supra, 156.
25. 6 Edw. I, c. 1.
27. Vol. III, 203. After surveying the various forms of state interference, he concludes that what was protected was not 'freedom of trade', but "the freedom of employers from coercion by their men."
relationship between master and servant in the 14th and 15th centuries to that between the parties to a marriage. Both types of relationship were more than nominally dependent upon contract, but the rights and duties associated with each status were determined by law, and not just by what the parties agreed.28

The natural starting point for any account of state intervention in the individual employment relation is the Statute of Labourers, 1351,29 which, along with its successor, the Statute of Artificers, 1563,30 constituted the main manifestation of such activity until the 19th century. There were earlier instances31 of external legislative interference, but the 1351 Act32 is distinguished from its predecessors in that it was not only promulgated by Royal authority, it was also enforced by representatives of that same authority - the Justices of the Peace.33 The Act can make good claims to be the first

28. H.E.L., Vol. II, 463. He notes that, in the 14th century, the thought that wages and prices should be determined by free competition would have been seen as a 'monstrous absurdity', and he goes on to express his approval of the stabilized economy of the Middle Ages.
29. 25 Edw. III, st. 2.
30. 5 Eliz., c. 4.
32. Strictly, an Ordinance of 1349, followed by a statute in 1351. For convenience, subsequent reference to the Statute should be taken as comprehensive of both. The Ordinance was an emergency measure, hastily drafted and full of loopholes, whereas the Statute of 1351 "betrays the hand of the expert lawyer as well as the experienced administrator," H.M. Cam, Law-Finders and Law-Makers in Medieval England, 140.
33. Until 1359, enforcement was in the hands of 'Justices of labourers', who held separate commissions from the J.P.'s, but in that year the functions of the former were transferred to the latter.
instance of prices and incomes legislation,\textsuperscript{34} and it was passed to bring employment practice into accord with what were felt to be pressing social and economic needs. What precisely these needs were, however, is still a subject of dispute. Either the legislation was designed to break the anachronistic ties of feudalism and set free a pool of wage labour available for hire at set, reasonable rates, or else it was meant to stop the progress towards freedom entailed in the dissolution of the system of villeinage, to which reference has already been made, by checking the movement of workers through the country in search of better wages. The principal provisions of the Statute (1) fixed maximum wages for workers in specified employments, (2) compelled labourers to observe their service agreements, (3) imposed restraints on the mobility of labour by the imposition of criminal sanctions on workers leaving their territory illegally, and (4) required all persons within a statutory definition to work, if they were physically capable of so doing.\textsuperscript{35} The Act was passed just after the Black Death had decimated the population of England, and one of its manifest objectives was the protection of employers of labour from the excessive wage demands on the part of their employees, who found they could dispose of their labour in a seller's market.\textsuperscript{36}

\textsuperscript{34} It contained a provision that victuals were to be sold at reasonable prices.


\textsuperscript{36} cf. the explanation given by Bacon for the Statute: "those few labourers that remained of the sword, plague and other disasters of these wasting times, understood their advantage, and set a value upon their labours, far above their merit; apprehending that men would rather part with too much of a little, than to let their work lie still that must bring them in all they have." An Historical and Political Discourse of the Laws and Government of England, 2nd Part, 65. cf. Y.B. 40 Edw. III, M. f. 39, pl. 16.
The statute was passed at a time of fundamental social change in England; more or less contemporary with it was the beginning of a minor industrial revolution. Within less than a century the English cloth industry expanded its exports from 5,000 to 18,000 pieces, and at the same time there was growth in metal working, mining and glass-blowing, in a process of change which affected all Europe. Against this background it is hard to assess the statute's success in regulating practice in the payment of wages and the employment of labour by threat of criminal sanction. There is evidence showing that the justices of the peace throughout the country made genuine efforts to punish contraventions, particularly concentrating their efforts in attempts to discourage the giving and taking of excessive wages. Proceedings arising out of this section of the statute were criminal, not civil, in character. The common sanctions imposed on offenders were imprisonment, the stocks and fines, and the initiation of a prosecution was a matter not for the aggrieved party who had paid too much (though occasionally this did happen) but for either constables or juries of indictment, appointed by the justices for this very purpose. The occupations covered by the maximum wages clause were "agricultural labourers, servants and artisans", and Dr. Putnam's survey of selected sessional records for the decade immediately following enactment shows that a wide classification of workers were affected. The statute itself provided a reasonably detailed list of occupations specifically

37. These changes were not confined to England - see P. Boissonade, Life and Work in Medieval Europe, 296. By 1371 there were factories employing 120 weavers in Amiens.
38. J. Bellamy, Crime and Public Order in England in the Late Middle Ages, 33.
39. The Enforcement of the Statutes of Labourers, 72.
mentioned as included, but this was not treated as exclusive and was extended by judicial interpretation. Two characteristics of the statutory list are interesting: firstly, that both villeins and non-villeins were identically treated; secondly, that the occupations constituted "practically every variety of economic class as far as manual labourers were concerned, but with very few individuals above this class." Those who extended the contents of this statutory list did so by applying the principle of *eiusdem generis*, in a way which obviously suggests they saw their concern to lie only with workers below a certain social status.

In absolute terms, the attempted statutory suppression of wage rates proved no more successful in medieval times than it has done recently. The 15th and 16th centuries were the "golden age of the English labourer", in which the combination of expanding trade and manufacturing opportunities, taken with a national shortage of labour, brought an increase of virtually 100% (measured against an index of the price of corn) to the wages of agricultural and industrial labour between 1300 and 1500. The shortage of labour was worsened by the departure of large numbers of workers from the available labour force to take over farms left unattended since the plague years. The most that can be said for the zealous enforcement of the maximum wages clause at sessional level is that it possibly prevented an even higher increase in wages, and possibly kept the increase that did take place within limits which the economy could

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The many amendments to the Act of 1351 show a tendency towards increasingly restrictive regulation of labour, often backed by cruelly savage punishments. By 1360 labourers who absented themselves from their service rendered themselves liable to the penalty of branding; by 1388 'servants or labourers were restricted from leaving their parish without a 'passport' from their last master stating their business in so doing, and 'artificers and craftsmen' in non-essential employments were rendered subject to compulsory work at harvest time. The same statute also fixed set wages for agricultural labourers, but the following year a more flexible scheme, whereby a discretionary power was given to the justices of the peace, subject to a statutory maximum, was adopted in preference. In 1444 it was enacted that a servant who wished to change master at the end of his term of employment was bound to swear a covenant with his prospective master before a constable, and inform his present master of his intention, before half of his current term had elapsed. Failure to do so rendered the new covenant void, leaving the servant obliged to continue in service with his old

43. cf. E. Miller, "The Economic Policies of Government," in M. Postan, E.E. Rich and E. Miller (eds.), The Cambridge Economic History of Europe, Vol. III, 281. The theory that the Peasants' Revolt of 1381 was prompted by the attempts of lords, using the machinery of the Statute of Labourers, to reinforce feudal bondage has been criticised by Postan, who argues that the 'feudal reaction' of the 14th century was confined to the years immediately following the Black Death. For a contrary view, see M. McKisack, The 14th Century, 1307-1399, 419.
44. 34 Edw. III, c. x.
45. 12 Ric. II, c. iii. Note that artificers were not included within this part, though they are mentioned elsewhere in the Act.
46. 13 Ric. II, c. viii.
47. 23 Hen. VI, c. xii.
master for a subsequent year. These and other\textsuperscript{48} minor amendments to the Statute of Labourers were the precursors of the new regime for the regulation of labour introduced by the Statute of Artificers in 1563.

These successive measures of administrative interference with employment, however, give little information on the legal antecedents to the modern contract of employment. Rather, they illustrate police measures designed to shore up a social system which was "rapidly melting away before new economic conditions"\textsuperscript{49} on many fronts. Not only the system of agriculture was changing; the guilds during this period evolved from institutions, holding out a promise of social mobility for the skilled, to élite, closed societies, entry to which was largely restricted to members of select families.\textsuperscript{50} In them it became increasingly difficult to make the transition from journeyman to master status,\textsuperscript{51} and masters exploited their journeymen by, for example, requiring them to swear on oath, when taken on as apprentices, that they would never set up business on their own without obtaining the master's consent.\textsuperscript{52} This particular abuse of power was eventually prohibited by statute in 1536.\textsuperscript{53}

\textsuperscript{48} e.g. 2 & 3 Edw. VI, c. xv (1548), which prohibited all conspiracies and covenants of artificers, workmen or labourers "not to make or do their work but at a certain price or a rate."


\textsuperscript{50} See G. Unwin, \textit{Industrial Organization in the 16th and 17th Centuries}, Chap. 2.

\textsuperscript{51} For a discussion of the growing tensions between masters and their journeymen in the years following the Black Death, see W. Cunningham, op.cit. \textit{Supra}, 351.

\textsuperscript{52} Dobb, op.cit. \textit{Supra}, 119, suggests that the creation of a class of underprivileged journeymen made direct investment in the employment of wage-labour a profitable enterprise. Arguably, these journeymen were the antecedents of the urban proletariat.

\textsuperscript{53} 28 Hen. VIII, c. v.
One notable feature of this early legislation is very obvious: the economic superiority of the master is reflected and strengthened by statute. This legal acceptance of an unequal division of power between the parties to the employment relationship has never subsequently been subject to question from the common law.

C. Early Ideas of Contract

For this purpose, the part of the Statute of Labourers which is most interesting is the 'contract' clause. This, it will be remembered, is the section containing the prohibitions against servants leaving their employment within their term of service, and against the knowing retention of such fugitive servants by other masters. The evidence is that this section, along with attendant questions of interpretation, frequently attracted the attention of the central courts until the passing of the Statute of Artificers. Why should this have been so? Perhaps the main reason is that it was construed as giving a remedy to a deserted or disobeyed master, which was entirely new in the context of the national law. It has already been established that, in the various local courts, there was little doubt that breaches of informal agreements gave rise to a cause of action, but the strict doctrine of the common law had hitherto given no assistance to an aggrieved master whose servant had left him. The primitive state of the law simply did not provide the necessary machinery; first

54. If the second master was in the same county as his predecessor, he was presumed to have known of the existence of the original service agreement.

55. see, e.g., Brooke's Abridgement, tit. Laborers, for a summary of the cases.
of all there was the jurisdictional limitation. The king's courts would hear only claims above a value of forty shillings. This was in the region of a year's pay in 1278, though subsequent increases in wage rates made this a less formidable sum. A more effective block was the requirement that the writ of covenant (which was *prima facie* the obvious writ in the circumstances) could only be brought if the agreement to serve was in writing. Only a very few service agreements would pass this test. The action of debt on a contract, which did not require writing, lay only to allow the servant to claim against his master for unpaid wages, and gave no assistance to the master complaining against a servant who had deserted his work. To have allowed the master to sue on a mere oral undertaking to serve would have been tantamount to allowing an action in respect of simple exchange of promises, a development which did not become generally possible until the full evolution of assumpsit centuries later. For all these reasons, the stage of development reached by the common law by the mid 14th century precluded any widespread enforcement of agreements to serve. A great breakthrough was achieved, however, in the first few years after the enactment of the

56. Writing was, of course, unnecessary in the local courts. In France, there are extant records showing written contracts of employment and apprenticeship, made in the years 1350-1450. See P. Wolff, *Commerce et Marchands de Toulouse*, 80. There are signs that during this period the French were faced with labour problems similar to those encountered by the English: for instance, a statute of 1357 forbids the hiring of one servant by another master, in an attempt to promote a stable work force.

57. Watkin's Case (Y.B. 3 Hen. VI, f. 36, pl. 33) established that a servant could bring such an action, even where there had been no express agreement on the amount of wages payable. It was held that he could recover the amount specified by the Statute.

Statute of Labourers, and certainly by 1355.\textsuperscript{59} In that year a civil action was accepted as lying in respect of unwarranted departure from employment, under the analogy of (or 'fonde sur', as the Year Book says) the Statute. This civil action, of course, was in addition to the criminal consequences laid down by the Statute. Once established, this civil action appears fairly frequently in the reports, and, in contrast with what had existed before, gives rise to decisions recognisably contractual in character. For example, it is certain that the older common law allowed an action to a master where his servant was forcefully 'prist' out of his service,\textsuperscript{60} and possibly an action where a third party peacefully induced the servant to leave of his own accord,\textsuperscript{61} but the basis of the action of trespass \textit{vi et armis} given in this situation was the proprietary rather than the contractual interest the master had in relation to the servant. Thus, it was no defence to show that the servant in question was under age and could not validly consent,\textsuperscript{62} or that service was purely voluntary on the servant's part.\textsuperscript{63} In contrast, an action on the retainer under the Statute was defeated if the servant was a minor: "l'action ne gist vers luy car son covenaunt est voide.\textsuperscript{64}

In other areas, too, the contractual element emerges in a form recognisable to the present law. The Statute permitted departure from service if 'cause reasonable' could be shown,

\begin{itemize}
\item \textsuperscript{59} See Y.B. 28 Edw. III, M., f. 21, pl. 18.
\item \textsuperscript{60} Y.B. 47 Edw. III, M., f. 14, pl. 15.
\item \textsuperscript{61} G. Jones, "Per Quod Servitium Amisit," (1958) 74 L.Q.R. 39.
\item \textsuperscript{62} Jones, loc.cit., 51, citing Y.B. 21 Hen. VI, M., f. 9, pl.19.
\item \textsuperscript{63} Jones, ibid., Y.B. 22 Hen. VI, f. 43.
\item \textsuperscript{64} Brooke's Abridgement, Laborers, pl. 6; Putnam, op.cit., 186. Y.B. 2 Hen. IV, P. f. 18, pl. 7.
\end{itemize}
and the working out of what type of conduct amounts to this represents the first tentative delimitation of the duties owed by the employer to his employee, and vice versa. The classes of workers affected by the contract clause appear to have varied with time, becoming more restricted in later years. Initially, it seems that this clause, unlike its partner dealing with the specification of maximum wages, was not restricted to the 'labouring classes' but was applied to such exalted professions as bailiffs, school-teachers and merchants as well. The line was drawn, however, at applying it to chaplains, as a priest was held to be neither a labourer nor an artificer but a servant of God. A similar argument was to be invoked successfully some five hundred years later to excuse a curate from compulsory insurance under the National Insurance Act 1911. But though, with this exception, virtually all types of salaried workers were held to fall within the ambit of this part of the Statute in the time of Edward III, by the time of the reign of Henry VI not only chaplains, but other higher ranking occupations were excluded. It was said judicially that "it (i.e. the Statute) was not made but for labourers in husbandry; as in the case of a knight, or esquire, or a gentleman, you cannot compel him to be in your service by the statute." 

65. For authorities, see Putnam, op.cit., 186-7.
67. In Re National Insurance Act 1911 [1912] 2 Ch. 563, where Parker J. held that the authority exercised over a curate by his vicar or bishop was not attributable to contract, but to an ecclesiastical jurisdiction.
68. Y.B. 19 Hen. VI, H., f. 59, pl. 15; Y.B. 10 Hen. VI, M., f. 8, pl. 30. Rent collectors, for example, were excluded as well as chaplains. The suggestion had been raised in the early years of the Statute that artificers were only subject to the provisions prohibiting excess wages, but this was rejected. See Putnam, 189.
69. Y.B. 10 Hen. VI, M., f. 8, pl. 30 (supra).
Why was there such a change in the scope of this particular provision? One possible explanation may be linked with the developments taking place in the common law. Precisely because the 14th century common law was of little use to a master who wished to sue for breach of agreement, the absence of such a remedy may have been a major influence behind the peculiarly liberal interpretation given to this part of the Statute in the first years of its existence. But in the course of the following century, the common law made important advances in broadening the range of consensual agreements that could support litigation. The opening up of alternatives on this front may have allowed a reversion to a restrictive interpretation more in keeping with that accorded to the rest of the Statute. Certainly, from as early as 1370, there are accounts of writs alleging trespass against persons who have not complied, either through misfeasance or nonfeasance, with service agreements, and reported cases in the early 15th century show that non-feasance cases came within an ace of being accepted as a basis for an action of trespass. Misfeasance in service agreements was accepted as giving such an action as early as 1348, and there are strong indications that nonfeasance causing consequential loss was similarly accepted long before the

70. For discussion of the process whereby actions in trespass in respect of breach of agreement became possible (where previously the only remedy was by way of writ of covenant), see S.P.C. Milsom, "Reason in the Development of the Common Law," 31 L.Q.R. 496, 505 ff.

71. Watkin's Case, supra, p. 35. See C.H.S. Fifoot, History and Sources of the Common Law, 341.

72. Humber Ferry Case. Y.B. 22 Lib. Ass., f. 94, pl. 41.

73. The non-feasance involved in breach of a service agreement would frequently give rise to such consequential loss - e.g. the departure of an agricultural worker might result in neglect of crops. See J.H. Baker, Introduction to English Legal History, 185.
eventual evolution of a comprehensive doctrine of assumpsit in the 16th century. If what has been suggested above did in fact take place, it would have permitted the adoption of different criteria for determining the scope of the action on the retainer without depriving the master of his legal remedies against disobedient servants. This amounts to a suggestion that the changing common law affected the interpretation given to the Statute; conversely, it is also probable that the innovations embodied in the Statute hastened the widening scope of the actions lying in trespass. One effect of the Statute was to elevate the breach of an agreement to the level of a statutory wrong, and in this new guise it may have been assimilated more easily into the developing concept of trespass. 74

D. Summary of Developments

The years between the Statute of Labourers and the Statute of Artificers represent the first formative period in the development of the law of the employment relationship. In this period fundamental social and economic change took place, most notably in the demise of the system of villeinage as the predominant form of organisation of labour and the growth of a powerfully numerous class of wage earners, who, when they were found in towns, formed the beginnings of an urban

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74. "In the middle ages and particularly in towns where life so largely revolved round the crafts, bad workmanship and false dealing at every level were commonly regarded as offences against public authority as well as private wrongs to those damaged" (Milsom, Historical Foundations, 273). Baker, op.cit., 186, also draws attention to the 'public callings', such as inn-keeper or ferryman, where failure to render service was a breach of public duty.
proletariat. At the beginning of the period the common law had not developed remedies to aid the master whose servants had acted in breach of their agreements with him, and the only legal regulation came from the varying standards of the local courts. The Statute of 1351 was used by the central courts to fill this loophole at least until the common law (which built upon the Statute) had progressed sufficiently to offer its own alternatives. In the judicial discussion of the scope and nature of the statutory action, certain basic rights and duties of the parties were discussed, for the first time, in a contractual rather than proprietary context, and the outcome of such discussions was the legal consolidation of the privilege and power of the master. This was the beginning of a process which a Marxist legal philosopher was to describe by the words: "Wage labour is a relation of autocracy with all the legal characteristics of despotism."\(^75\)

In the decisions on master and servant recorded in the Year Books, apparently simple points of law, self-evident, for the most part, to a modern lawyer, are established. At the time when they were decided, however, they were singularly important, laying down fundamental principles in a situation where there were few, if any, precedents. Thus, in relation to the right of the servant to his wages, it was held that such a right arose, in the case of a servant within the scope of the Statute of Labourers, because of the very fact of the relationship, irrespective of the failure to specify explicitly any sum.\(^76\) This was in contrast to executory agreements, where

75. K. Renner, Institutions of Private Law, 114.
76. Y.B. 3 Hen. VI, H., f. 23, pl. 1.
the plaintiff's case was lost if he could not show that a price for his work had been agreed, and it was an example of the special favour which, as a result of the Statute of 1351, the common law showed to service agreements. But the construction of the Statute sometimes limited a party's rights; though a claim for eight years' salary was held good (despite the Statute's concern with yearly hirings only), it was not possible to recover wages in excess of those allowed by the Statute. At a general level, however, it was established that failure to pay wages amounted to the necessary 'cause reasonable' justifying the servant's departure, as also did battery and permission from the master. It was also held that no wages were due if the hiring agreement were terminated before its span with the concurrence of the servant. The reasoning here was that nothing became due until the year had elapsed, and the contract could not be severed. More liberally, a claim for wages on the part of persons who, though not members of the category that might be compelled to serve in husbandry, had nevertheless worked as such was allowed. A distinction here can be detected between the concept of service and that of servant - in Fitzherbert's phrase, "A gentleman by his covenant shall be bound to serve, tho' he were not compellable. And an action will lie against them for departing from their service, by reason of the covenant." The scope of the Statute itself was viewed restrictively:

77. Y.B. 38 Hen. VI, M., f. 14, pl. 30.
78. Y.B. 11 Hen. VI, M., f. 10, pl. 19.
80. Y.B. 10 Hen. VI, M., f. 23, pl. 78.
81. Y.B. 38 Hen. VI, H., f. 22, pl. 4.
actions against chaplains,\textsuperscript{83} and persons who 'served at will',\textsuperscript{84} (i.e., presumably part-time, whenever their masters required them) were disallowed, as well as actions concerning servants not engaged in husbandry.\textsuperscript{85} In several ways the new statutory remedies were infused with notions redolent of an earlier era - the lord, for instance, was held to have retained the right to take his villein out of another's service,\textsuperscript{86} though this was later restricted to the situation where he had genuine need of his services. A retainer for life was valid,\textsuperscript{87} whereas one for forty days was held to be superseded by one made subsequently for the statute-specified period of a year.\textsuperscript{88} These decisions illustrate characteristics of the close feudal relationship. And though they are unnecessary, even a hindrance, in a society requiring a flexible, mobile labour force, they could still be contained within the economic conditions of the late Middle Ages.

By and large, however, in the period 1351-1563 the law, in statute and in judicial decisions, accommodated and encouraged

\textsuperscript{83} Y.B. 10 Hen. VI, M., f. 8, pl. 30.
\textsuperscript{84} Y.B. 22 Hen. VI, M., f. 30, pl. 49.
\textsuperscript{85} See also on this point the judgement of Coleridge J. in Lumley v. Gye (1853) 2 El.& Bl. 216, 261 f. He was concerned to show, by an examination of the cases already cited and others, that "a singer at operas, or a dramatic artiste to the owner and manager of Her Majesty's theatre, is not a 'messor, falcator aut alius operarius vel serviens' within either the letter or the spirit of the Statute of Labourers."
\textsuperscript{86} Y.B. 29 Edw. III, T., f. 41. The intrusion of a lord into an apprenticeship agreement made by one of his bondmen is recorded as late as 1561. See Bland, Brown and Tawney, op.cit., supra, 231.
\textsuperscript{87} Y.B. 4 Hen. IV, M., f. 14, pl. 12.
\textsuperscript{88} Y.B. 11 Hen. VI, M., f. 1, pl. 2. Fitzherbert, op.cit., 168.
the transition from compulsory to free labour. 89 There was one minor regression, towards the end of the period. The Vagrancy Act of 1547 90 punished, inter alios, those who left their employment before their term of hiring had elapsed with branding, and slavery for two years. The master was empowered to "cause the said Slave to work by beating, chyvinge or otherwise, in such work and Labor how vyle so ever it be," and if the slave absconded he was punished, on the first occasion, by enslavement for life, on the second, by death. This draconian legislation was the product of troubled times, and remained in force for only two years. According to Blackstone, "the spirit of the nation could not brook this condition, even in the worst abandoned rogues," 91 yet still it shows that the notion of legal serfdom was not far under the surface, even as late as the 16th century. 92

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89. e.g. by Y.B. 38 Hen. VI, P., f. 25, pl. 2, a master cannot imprison a servant who has deserted his service - he must be content with an action against him by the Statute of Labourers.
90. 1 Edw. VI, c. 3.
92. The last reported case concerning villein status was Pigg v. Galey (1618) Noy 27.
CHAPTER 3

THE WORKER AS A SUBORDINATE BOUND BY CUSTOM:

THE PERIOD 1563 - 1814
A. Introduction

In this chapter it is proposed to examine the attitude of the law towards the relationship between master and servant in the period covered by the span of the Statute of Artificers, which was enacted in 1563 and repealed in 1814.\(^1\) It is convenient to use these dates as a guide in the notoriously arbitrary business of selecting 'eras' in history, though unfortunately they do not closely coincide with the major changes in society which might reasonably be expected to have influenced the development of employment law. Thus, by the middle of the 15th century, feudalism and the system of villeinage were no longer important as forms of economic organization.\(^2\) Compulsory labour services, never popular amongst those obliged to perform them, had been abandoned in favour of free labour, a movement perhaps partly attributable to new values preached by the reformed church, but more likely the product of simple economic forces. Masters abandoned villeinage in the late Middle Ages for the same reason their predecessors had abandoned slavery centuries earlier: in both cases a cheaper, more efficient method of acquiring labour was available. The widespread acceptance of hired labour meant that the idea of 'man as a chattel' had disappeared, but, though the change suggests progress to modern observers expecting movement from status to contract, in many ways the advantages the new system brought to workers themselves were more

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1. The 1814 Act (54 Geo. III, c. 96) repealed the apprenticeship clauses of the Statute. The wage regulation clauses had been repealed the previous year (53 Geo. III, c. 40). For an outline of the history of the legislation, see R.Y. Hedges and A. Winterbottom, The Legal History of Trade Unionism, chap. I.

theoretical than real. The labourer might now be independent, a free citizen, but, as far as his material well-being was concerned, "Villeinage ceases but the Poor Law begins."³

On the other hand, by the time the Statute of Artificers was repealed, it is clear that a contractual analysis of the dealings between master and servant had gained judicial acceptance. The phrase 'contract of hiring' occurs frequently in the case law of the late 18th century; indeed, as early as 1681, it is stated in a leading Scottish legal work that "the servants with us, which now retain that name, are indeed free persons, and have at most but hired their labour, and work for their masters for a time, which is a kind of contract betwixt them..."⁴ But what had not yet occurred by the end of the period under consideration was the evolution of the 'contract of employment' as a distinct legal entity, with its own peculiar rules and attributes. While contract was established as the broad basis of employment, there was little sign of any attempt to separate out and classify the many variations the relationship might take. Thus, it is possible to distinguish, at the start of the 19th century, at least four kinds of master-servant relationship in agriculture:⁵ (1) servants hired by the year or quarter, (2) on the large farm, a regular labour-force usually fully employed throughout the year, (3) casual labourers, paid daily or on piece-rate, (4) skilled specialists, such as well-diggers or fencers, who might contract for each job they took on. Similarly, four variations on the theme of employer and

⁵. Weaver v. Best (1623) Winch. 75.
employee might be found in the weaving industry of the 18th century.6 Yet, as late as 1831, the census of that year did not distinguish between labourers, the self-employed and masters. The classification of employment was far from being unimportant - "It was an age of minute social distinctions. Lines were drawn between the artisan and the labourer, the master and the journeyman, as they were drawn between the lodger and the housekeeper"7 - but the process was rendered increasingly difficult by the innovations in industrial organization which accompanied the onset of the Industrial Revolution. The employment of workmen under a skilled foreman, for example, blurred the previously sharp division between the labourer and the artisan in many newly established trades. The word 'servant' had a more or less precise meaning in everyday usage. It has been suggested that it applied, in the 17th century, to anyone who worked for wages, irrespective of whether calculated by piece-rates or time-rates, and irrespective of the length of the period of hiring.8

But the law offered little, if any, guidance on how the term was to be interpreted, for the simple reason that it was

6. ibid., 298-9.
8. C.B. MacPherson, The Political Theory of Possessive Individualism, 282. cf. P. Laslett, The World We have Lost, 45-6, for a discussion of the terms 'yeoman', 'husbandman', 'labourer', 'cottager' and 'pauper'. Of these, the most important and widely used was 'labourer' which, contrary to modern usage, denoted someone who worked for another and did not have a trade skill.

R. Burn, Justice of the Peace, Vol. III, 54, states that "in general, the law never looks upon any person as a servant, who is hired for a less term than one whole year; otherwise they come under the denomination of labourers," but there is no evidence of any consistency of practice here.
a matter of little legal consequence. When it did matter, perhaps for the purposes of deciding the scope of a provision of the Statute of Artificers, the individual worker whose fate lay in the balance was unlikely to have either the means or the knowledge to argue the point. It is significant that one of the watersheds of the early law on the relations between master and servant is the case law on the subject of 'settlements'. Since 1662 it had been possible for parishes to avoid responsibility for the maintenance of the poor who did not belong to the parish, e.g. transient beggars. But the obligation to provide poor relief did exist in relation to all those who had gained a 'settlement', i.e. become established within the parish. One of several criteria for judging this was the existence of a hiring for a year, and service for that period. In consequence, there was much quarrelling over the substance of hiring agreements between parishes, each seeking to transfer the financial burden of maintaining a pauper from its own shoulders. All this was productive of much law on the master-servant relationship, but the litigation arose quite independently of the wishes of the servant whose indigent state required relief by one or other public body.

The acceptance of contract as the basis of the employment relation went hand in hand with the emergence of laissez-faire

11. In a similar way, the modern battle between insurance companies striving to avoid responsibility for the torts of an employee loaned or hired out from one employer to another has often produced important case law bearing upon the individual employment relationship, but usually this has happened over the heads of the individual workers who are parties to the employment contracts in question. See, e.g., Lister v. Romford Ice and Cold Storage Co. Ltd. [1957] A.C. 555; Morris v. Ford Motor Co. Ltd. [1973] Q.B. 792.
social philosophy. Frequently it was eulogized — as Paley remarked in 1791, "Service in England is, as it ought to be, voluntary and by contract; a fair exchange of work for wages; an equal bargain, in which each party has his rights and his redress; wherein every servant chooses his master."

Moreover, the developments taking place within the law of contract itself towards the end of the 18th century increased its attractiveness to employers bent on driving the keenest bargain with the men they employed. The judges' response to the demands of a market economy was to reject the equitable conception of contract which had been a feature of the law in the 18th century: they would enforce the express terms of the agreement between the parties, but refused to go beyond this to look at the justice of the bargain, or to imply terms to mitigate harsh consequences. Cutter v. Powell, decided in 1795, illustrates this. The case is chiefly remembered as an example of the common law principle that partial performance of entire contracts gives no right to partial payment, but there is more to it than this one point. What is not widely known is that the decision was not declaratory of the standard judicial approach at the end of the 18th century towards partly performed service contracts. The seaman's contract in issue in that case was firstly special in that, by providing for unusually high remuneration in the event of full performance, payment for partial performance was implicitly excluded. Moreover, it was expressly stated by Lawrence J. that


14. (1795) 6 Term Rep. 320.
with regard to the common case of a hired servant to which this has been compared; such a servant, though hired in a general way, is considered to be hired with reference to the general understanding upon the subject, that the servant shall be entitled to his wages for the time he serves though he do not continue in the service during the whole year. 15

This dictum is a clear indication that the law of master and servant at the time upheld a right to pro rata payment for services rendered in accordance with the general practice of employers, which was to pay this. All four judges in Cutter v. Powell said that, were it to be shown that such a practice obtained in relation to the payment of seamen, they would have decided the case differently. In the words of Lawrence J.

> if the plaintiff in the case could have proved any usage that persons in the situation of the mate are entitled to wages in proportion to the time they served, the plaintiff might have recovered according to that usage. 16

From this it is reasonable to infer that, in the majority of service agreements on land, the legal position of the servant was far stronger than might be implied from the existence of a rule of law which stated (according to Glanville Williams 17) that he would recover nothing if he only partly performed his contract. In fact, of course, there was good Year Book authority for such a rule, but this may have been distinguished by later judges. Firstly, the old authorities referred to the action of debt, and, of course, by the 17th century hardly anyone was suing in debt because of the rival attractions of indebitatus assumpsit. Secondly, the old cases concerned attempts by high status workers to claim part payment. The

15. At 326.
16. Ibid.
earliest authority,\textsuperscript{18} which dated from 1431, concerned a chaplain who had only worked for part of a year, while the authority of 1687\textsuperscript{19} concerned a partly performed agreement between individuals relative to the job of acting as a receiver of rents. It is possible that, when faced with claims brought by low status workers under the heading of \textit{indebitatus assumpsit}, the courts were prepared to distinguish these early authorities and allow recovery. Certainly this hypothesis is consonant with the decision in \textit{Worth v. Viner},\textsuperscript{20} where a servant recovered part payment for part service, though this did occasion strong criticism from Viner in his Abridgement.\textsuperscript{21}

Whether or not the judges of the 18th century did favour the claims of servants in this way, their 19th century brethren certainly saw things very differently. The common law rule against apportionment in agreements between master and servant was affirmed in such famous cases as \textit{Lilley v. Elwin}\textsuperscript{22} and \textit{Boston Deep Sea Fishing and Ice Co. v. Ansell}.\textsuperscript{23} Today, of course, such cases as these are no longer accurate illustrations of the law, both because of the probable application of s. 2 of the Apportionment Act 1870\textsuperscript{24} to wages,\textsuperscript{25} and because of the

\begin{itemize}
  \item \textsuperscript{18} \textit{Y.B. 10 Edw. IV, M., f. 18, pl. 23.}
  \item \textsuperscript{19} \textit{Plymouth v. Throgmorton (1687) 1 Salk. 65.}
  \item \textsuperscript{20} \textit{3 Vin. Abr. 8–9. In Y.B. 10 Hen. VI, M., f. 23, pl. 78, the action is one of debt, but the nature of the employment is not stated.}
  \item \textsuperscript{21} Perhaps because Viner was himself the unsuccessful defendant? At any rate he criticized a reference to an implied term allowing apportionment as "introducing belief and imagination for evidence, in opposition to positive proof" which "must be very fatal and dangerous." Op.cit., 9.
  \item \textsuperscript{22} (1848) 11 Q.B. 742.
  \item \textsuperscript{23} (1888) 39 Ch.D. 339.
  \item \textsuperscript{24} 33 & 34 Vict., c. 35.
  \item \textsuperscript{25} \textit{Moriarty v. Regent's Garage Co. Ltd. [1921] 1 K.B. 423.}
\end{itemize}
abandonment of the common law rule that unspecified periods of hiring are presumed to be of a year's duration. 26

From what has been said already, it should be obvious that the years around the beginning of the 19th century are likely to prove important in the history of the modern contract of employment, partly for the light they shed on the emergence of particular principles of law, such as the servant's right to claim wages for part performance, partly for the information they give on the intellectual climate prevailing in society at a time when the conceptual basis of the modern law was being established. What the rest of this chapter seeks to do is to look at the period between 1563 and 1814 and discuss the changes that were taking place in society at large, and in the forms of industrial organization in particular, and relate these to the changes and developments in the law dealing with the employment relation. Of necessity, the treatment of such a wide field of inquiry demands careful selection of topics. It is not intended to discourse on the general economic history of the period, and only those themes which have, or might reasonably be expected to have, a close relationship with the content of the law of employment are examined.

B. **English Society 1563 - 1814**

The first division to make in dealing with this period is between society before and after the Industrial Revolution, a division which is not easy to make because of the problem of ascribing a date to the beginning of the Industrial Revolution. This is not the place, however, to debate theories as to the nature or dating of the Industrial Revolution or Revolutions; for the present, a date around 1750 will be postulated. The reason for distinguishing the two periods in the present context is simply that the phenomenon of industrialization brought changes not only of degree but also of kind into the forms of industrial organization current in society, and these changes were accompanied by others taking place in the law itself and in social philosophy—all of which touch on matters likely to affect the attitude taken by the law to the relationship of master and servant. Because of the pivotal importance of the Industrial Revolution, it is possible to talk in general terms of pre-industrial society, which presents certain unities. "English economic history before 1750 is in large measure the story of economic stagnation." The economy was under-developed, with the consequence that a large proportion of the labour force was engaged in agricultural work. An analysis

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of occupations in the county of Gloucestershire in 1608, for example, shows that over two thirds of the able bodied men were employed either in agriculture or the service of the gentry.  

By comparison, the first census of 1801 shows just over a third of all families dependent on agriculture, while trade, manufactures and commerce accounted for over two-fifths. This division of labour shows that pre-industrial society was predominantly rural, and it has been estimated that, as late as 1700, some eighty-five percent of the population lived on the land. Technological advance during the period was slow. The typical manufacturing processes were labour-intensive, requiring relatively little capital investment. Of course, there were exceptions to this rule; in mining and heavy industries producing iron, paper and brass and other basic manufacturing materials, the 17th century saw the establishment of costly and sophisticated factories, employing large numbers of workers. But by and large, the units of industrial production were small.

In the skilled trades, such a typical unit might be made up of a craftsman employing a journeyman and one or two apprentices, and within the unit it was hard to draw the lines which are usually taken today as separating employer from employee. The typical master craftsman would work alongside the men he employed, doing more or less the same work, and be closer in spirit and outlook to them than to men of his own

status in another industry. In the words of the Webbs, this amounted to an "industrial society still divided vertically trade by trade, instead of horizontally between employers and wage-earners." The true divide came not between the journeyman and his master, but between the latter and the merchant who supplied him with his materials, for the merchant had capital where the craftsman generally did not. But the merchant did not usually buy the craftsman's time by wages. More often the relationship was that of creditor to debtor. The merchant would advance money and raw materials, and in exchange the producer would pledge the product he would use them to make, an arrangement which frequently led the craftsman into a spiralling trail of debts.

In pre-industrial society it is an anachronism to speak of a wage-earning class (though a large section of the population lived on a bare level of subsistence); for most workers, not only those engaged in the type of employment just mentioned, wage earning was no more than a part-time occupation, a supplement to other forms of income. Thus, "the social problem in the sixteenth century was not a problem of wages, but of rents and fines, prices and usury, matters which concern the small-holder or the small master-craftsmen as much as the wage-earner." Domestic servants received their board and lodgings as a major part of their remuneration, while

32. cf. Thompson, op.cit., 265, who says of certain artisan trades in the early nineteenth century "the gulf between the small master and the skilled journeyman might, in psychological and sometimes in economic terms, be less than that between the journeyman and the common urban labourer."
34. Tawney, Agrarian Problem in the Sixteenth Century, 100; Hill, Reformation to Industrial Revolution, 175.
35. Tawney, op.cit., 23n.
agricultural labourers would in most circumstances have access to land they could use to grow their own food. Clapham remarks that, as late as 1825, most labourers had a garden or patch of ground where they might grow potatoes.\(^{36}\)

However, at least one section of the community became increasingly dependent on wage payment as their sole source of income, though unfortunately it is hard to discover much about them beyond the obvious fact of their extreme poverty. These were the many cottagers and small-holders who lost their land through the effects of enclosure, and who were faced with the prospect of either running the gauntlet of the barbarous anti-vagrancy laws of the sixteenth and seventeenth centuries, or heading for the towns. Those who chose the latter course would find the jurisdiction of the guilds denied them all but menial employment as hired servants.\(^{37}\)

The ranks of the poor and vagrant were swollen not only by the consequences of enclosure, but also by the general economic depression which affected England in the 16th and 17th centuries. The period of prosperity for the poorer classes, the 'golden age' of the labourer was past, and prices and population increased, while wages remained stationary. Matters did not improve until after the Revolution and, before this economic revival, there were various interventions by governments attempting to eliminate the symptoms, if not the causes, of depression. Reference has already been made to the Tudor and Elizabethan Poor Laws; the

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Statute of Artificers too was enacted as a counter measure to anarchy and unemployment.\textsuperscript{38} This statute sought to promote stability in employment by the following methods: (1) by stipulating that apprenticeships in all skilled crafts were to last seven years,\textsuperscript{39} and, by allowing entry to those crafts only to those who had completed such a period of training, it attempted to preserve traditional craft standards. This has been described as "a vain endeavour to give fixity and permanence to a condition of things which already, in great part, belonged to the past,"\textsuperscript{40} for the new direction in which the economy was moving made a departure from medieval practices inevitable. (2) Continuity of employment was promoted by naming thirty key occupations where all hirings by law had to be by the year,\textsuperscript{41} and where unemployed persons of a certain status might be subjected to compulsory labour.\textsuperscript{42} This was in addition to a more general provision by which a wider category of unemployed persons might be compelled to work in the fields at harvest time.\textsuperscript{43} Moreover, even for those not subject to compulsory labour, the statute forbade the practice of travelling through the country in search of better work.\textsuperscript{44} To move from one parish to another required official permission, in the form of 'honourable discharge' signed by officers of the parish the worker was leaving. The employer who hired someone without

\textsuperscript{38} For a full historical account of the pedigree and content of the Statute, see Tawney, "The Assessment of Wages in England by the Justice of the Peace," reprinted in Minchinton, \textit{op.cit.}, 38 ff. \\
\textsuperscript{39} s. 24. \\
\textsuperscript{40} Unwin, \textit{op.cit.}, 139. \\
\textsuperscript{41} s. 2. \\
\textsuperscript{42} s. 3. \\
\textsuperscript{43} s. 15. \\
\textsuperscript{44} s. 7.
such a passport was subject to a £5 fine, while the worker himself was whipped and imprisoned. (3) The practice of assessing wage rates through the adjudication of justices of the peace, which, as we have seen, was originally introduced on a national scale by the Statute of Labourers in 1351, was retained and modified slightly. No longer were the justices bound by a statutory maximum, and the assessment of rates was allowed to proceed on a more flexible, local basis instead of by reference to a uniform, national standard. The rationale for assessment had changed too. Instead of protecting landowners from the rapacious wage demands of agricultural workers who knew they were in short supply, it is suggested by Tawney that the intention in the 16th century was the protection of one class of workers against another, the protection of small craftsmen or landholding peasants against the claims of their workmen. As stated above, the small employer was often of meagre resources, and unable to withstand wage demands on his own.

All in all, the Statute was a conservative piece of legislation, which attempted to meet social change by removing inequalities in employment between members of the same social class, while retaining an hierarchical ordering of these social classes within society at large. Thus, while there would notionally be less discrepancy between the wages in a particular trade due to the making of assessments, the penalties for breach of the statutory provisions varied in their application to the

45. s. 8.  
46. Ibid.  
47. s. 11.  
classes of employers and workers. There is nothing here to detract from the legal consolidation of the employer's economic power, which the previous chapter showed was already apparent in the medieval law.

(1) The Practical Importance of the Statute of Artificers

Much controversy surrounds the discussion of the impact which the Statute of Artificers had on employment practice, but it is clear that some of its provisions soon fell into desuetude. By the late 17th century (and possibly some time earlier) wage assessments had ceased to be of significance. Legal decisions of that period show the courts restricting the application of assessments to workers hired by the year, though this limitation is not stated in the Statute itself. One explanation for this decline was the changes taking place in the labour market; in the course of the 17th century the number of wage-earners gradually increased, but their bargaining power decreased as they became more and more dependent on their wage as their livelihood. Consequently, they were less able to demand excessive wages, and the control which assessment provided over such demands was not required. Some aspects of the Statute, however, continued in force for many centuries -

49. cf. the fine of 40s which the Statute imposed on masters who unduly dismissed their servants, while servants who unduly departed were subject to imprisonment (ss. 8, 9).
51. R.K. Kelsall, "Wage Regulation under the Statute of Artificers," reprinted in Minchinton, op.cit., 193. One reason for this was that the process of enclosure of agricultural land meant that the alternative of forsaking wage employment and living off their own produce was less likely to be open to them.
52. D.C. Coleman, "Labour in the English Economy of the Seventeenth Century," (1956) Ec.H.R. 280, suggests that the sections of the Statute dealing with discipline and labour mobility were quickly disregarded.
most notably the rule as to yearly hiring, at least in agriculture. But here the Statute had done no more than incorporate what was already a practice established by custom in that industry.

Although the Statute of Artificers was largely conservative in its aims and contents, there is evidence that certain aspects of the more sophisticated attitudes towards labour which were beginning to emerge in the 16th century influenced those who drafted it. During the 16th century, it is said, it was first realized that labour was an important factor of production, and the Statute re-enacted measures intended to boost the productive power of individual workers. The length of the working day was set, and the time allowed for meal breaks specified. Such concern for hours worked goes hand in hand with an increase in industrial as opposed to agricultural work. The latter, in the Middle Ages, was by all accounts pursued sporadically and leisurely; over a hundred days in the pre-Reformation calendar were 'holy' days when no work at all would be done, but an industrialized society, towards which England was headed in the 16th century, needed regular, disciplined

53. In non-agricultural employment this was not necessarily so. e.g. Pott's Law Dictionary of 1803 states (445) "in London and other places, the mode of hiring is by what is usually called a month's warning or a month's wages: that is the parties agree to separate, on either of them giving to the other a month's notice." cf. Temple v. Prescott, cited Caldecott's Magistrates' Cases (1736) 14n, where dismissal on a month's notice was stated as the "general usage or practice in London and environs." The case dates from 1775.


55. In summer, from 5 a.m. to 7 or 8 p.m., with 2½ hours for meals and rest. In winter, from dawn to dusk, subject to the same rest periods. One penny was to be forfeited for every hour's absence.

labour and these excessive holidays were abolished in 1536. As the economic value of hard work was appreciated, its performance too took on a new respectability. The teaching of the medieval Church was that work was a "labour imposed by the fall of Man,"57 and as a penance it had no intrinsic religious value. By contrast, the reformed Church placed great emphasis on thrift, hard work and the accumulation of savings, the qualities conveniently summarised by the term "Protestant Ethic". This led to two widely held assumptions about the nature of the servant's duty. Firstly, there was no doubting the servant's inferiority to his master: "no inferiours are more bound to obedience than servants. It is their main, and most peculiar function to obey their masters."58 Secondly, an act of disobedience was viewed not simply as a private matter between the servant and his master, but as a challenge to the established order of society. Since it was said that "the master takes his authoritie over the servant, from no creature in heaven or earth but onely from God himself,"59 a challenge to his authority was to be suppressed as an act of petty treason.60 This was no doubt hard on the servant, but he might take comfort from the fact that the corollary of his master's powers of command were his obligations not only to supervise fairly, but also to look after him in times of sickness, and supply him

57. Thomas, op.cit., 56.
59. Ibid., 300.
60. Until 1828 it was the crime of petit treason for a servant to kill his master. C.M. Smith, The Law of Master and Servant, 255.
with food and clothing in addition to wages. \footnote{61} This at least was the theory, which was of course altered by particular agreement between the parties. But it would be misleading to explain the relationship wholly in consensual terms (except perhaps where the employment was of a transitory nature). Where the servant formed part of his master's establishment, the latter's rights and duties were akin rather to those exercised by a paterfamilias over his household. \footnote{62}

\textbf{(2) The Move to Industry}

In the course of the late 17th and 18th centuries there were significant changes taking place in the pattern of employment. The numbers employed in agricultural work fell, while those employed in domestic service rose dramatically (by the end of the 18th century there were no less than ten thousand in London alone). \footnote{63} But it was within the industrial sphere that the changes affected the content of the relationship rather than just the numbers of persons who participated in it. The Industrial Revolution brought about the most radical changes in industrial organization, but before this there are to be considered the consequences of the spread of domestic industry, which antedated the factory system by half a century or more. \footnote{64}

This form of production flourished for as long as the manufacturing process did not demand sophisticated machinery,

\footnote{61}{The master's duty to care for a sick servant was recognized by law. It was, for example, recognized that a period of sickness did not prevent the acquisition of a settlement: "A servant that lies thus under the visitation of God, which befalls him not thro' his own default, is and must be taken to be all the while in the service of his master," R. Burn, \textit{op.cit.}, supra, 70; \textit{infra}, p. 131.}

\footnote{62}{cf. \textit{Admiralty Commissioners v. S.S. Amerika} [1917] A.C. 38, per Lord Parker at 45.}

\footnote{63}{M.D. George, \textit{op.cit.}, 119.}

\footnote{64}{For a general account, see H. Perkin, \textit{op.cit.}, 107 ff.}
close supervision of work carried out, or the precise synchronization of labour. It accounted for a wide range of manufactured goods, but was particularly important in relation to textiles; weaving and spinning being well suited to cottage industry. Its present interest lies in the status and conditions of employment enjoyed by those who worked under it, for they stand somewhere between the skilled small master or journeyman of Elizabethan industry (where the product was more likely to be sold directly to the consumer, and not through a trader as intermediary) and the full-time factory worker.

"Domestic industry, and its incomplete subjection to capital, retained its basis so long as the sturdy independence of a class of middle-sized yeoman farmers remained." This observation picks out both the cause of the eventual decline of the system and the feature which distinguishes it in the present context.

For a while, the domestic system was of unrivalled importance in industrial production, and those employed within it enjoyed a large measure of prosperity and independence, but change set in by the end of the 17th century, with the accumulation of large amounts of capital by a few individuals among those who 'put out' work to the domestic worker. This led to the creation of large empires, where the economic independence of the home producer was reduced to a fiction. By the 18th century it was common for domestic capitalists to employ hundreds and even thousands of outworkers. The increasing power of the employer meant the outworker was stretched to produce more and more for less return, and, in

addition, the employer's economic superiority was backed up by legislation punishing the worker who failed to perform satisfactorily, e.g. by not returning work he had undertaken to do within the specified time. Eventually, though it was a slow process, technological improvements led to the substitution of factory for domestic work in most trades, but not before the domestic worker's standards of living had collapsed in an attempt to win the impossible production battle against the machines. All this points to increasing exploitation and, when the system was in decline, grim working conditions. Yet throughout it all the domestic worker cherished the freedom to plan the nature and extent of his own work which the system allowed him. He might have to work seventy or eighty hours a week to earn a living, but hunger and not an employer was his task master. He prized this freedom to the extent of spurning factory work when it became available which would have brought much better pay; the early factories were staffed by women and children, or Irish or Scottish peasants free from such independent spirit.

The domestic worker's antipathy to factory employment was but one manifestation of a general contempt for wage labour which permeated popular opinion in the 17th century. Though hard work was viewed with approbation by the Church, the voluntary renunciation of one's freedom of action which was entailed by accepting employment as a wage labourer was classed as a social disgrace by the poor themselves. It was "a kind of hell into which peasants may fall if things are not"

68. This is true only on a long term view. In the short term, the Industrial Revolution produced much employment for outworkers. Thompson, op.cit., 288.
bettered." Political theorists appear to have shared in this view of the degradation of wage labour: Winstanley, writing in 1649, wished to exclude servants from the franchise. One of the original contributions made first by Hobbes and developed by Locke is that labour exists as a commodity, capable of alienation as any other and without obloquy, but this was an avant-garde notion which took time to become accepted. To disdain factory employment, of course, became more and more impracticable as the Industrial Revolution progressed. Workers swallowed their pride and accepted the new status quo. Nevertheless, it is important to remember that the humiliation of accepting servant's status was keenly appreciated by a large number of those who were forced to do so.

(3) Factory Employment

The concentration of particular industries within factories represents perhaps the most important distinguishing feature between pre-industrial and industrial social organization. For the workers this change meant subjugation to the will of the factory owner. Previously, in the domestic and small scale industries which had preceded factory-based employment, "the personal relation with the master, scarcely separated by class, was often intimate and there was a lack of discipline which no factory system could tolerate." Small wonder that a

70. "He that gives and he that takes hire for work shall both lose their freedom and become [compulsory] servants for twelve months." The Law of Freedom in a Platform, cited Hill, "Pottage for Freeborn Englishmen," 346.
72. J.H. Plumb, op.cit., supra, 89.
prevailing theme in the Charity and Sunday Schools of the time (which provided elementary education for the working classes) was the inculcation of habits of submission and obedience. 73

As an early supporter of the Sunday School movement enthused in a letter,

The greater part of the children educated in the Sunday schools are not merely taught to be diligent and laborious by words and precepts, but what is far more useful and efficacious, they are actually trained up from their very childhood in habits of industry. They consist for the most part of such as are employed in trades, manufactures, or husbandry work... 74

Obedience, of course, was not new in itself, but what was new was the regime of rigid and particularized discipline. Their fear of loss of their autonomy was more than justified by the conditions the new recruits met. In 1700 the 'Law Book' of the Crowley Iron Works consisted of "an entire civil and penal code, running to more than 100,000 words, to govern and regulate [the] labour-force." 75

For all the efforts of State and Church to inculcate high standards of work discipline, the evidence is that, before the factory era, the pattern of work in domestic industry was, at the least, sporadic, consisting of bouts of intense labour interspersed with periods of idleness. 'Saint' Monday was almost universally observed as a holiday, while time lost would be made up on the days from Wednesday to Saturday.

Some workers were better off than others, but there was no precedent to the conditions to be found in the factories.

The worker who left the background of his domestic workshop or peasant holding for the factory, entered a new culture as well as a new sense of direction. It was not only that "the new economic order needed... part-humans: soulless, depersonalized, disembodied, who could become members, or little wheels rather, of a complex mechanism". It was also that men who were non-accumulative, non-acquisitive, accustomed to work for subsistence, not for maximisation of income, had to be made obedient to the cash stimulus, and obedient in such a way as to react precisely to the stimulus provided.

Whereas before the authority of the employer had taken the form of general instructions as to the nature of the allotted job and how it was to be performed, it now manifested itself in the form of a multitude of precisely defined written standards, which the worker was compelled to follow by fines, threatened dismissal and, on occasion, physical chastisement. A man might forfeit a quarter day's pay for lingering over his meal, or be fined a shilling for whistling at his work. The force of works rules today is explained in contractual terms by the labour lawyer, the rules, or rather an obligation to comply with them, being incorporated in the individual contract of employment. It is evident, however, from the autocratic tone of these early rules, and the absence of any record of litigation on their operation, that such an interpretation never suggested

76. Thompson, op.cit., supra, suggests that in the pre-industrial economy, it was the common agricultural labourer who was likely to be driven hardest by his employer, though even he would benefit from the interruptions of weather and seasonal variations.


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itself to employers or employees. If any rationale of the former's legislative authority was needed, there was the teaching of popular religion. A fundamental doctrine of Methodism was that hard work and subjection to authority were ways of attaining grace, and factory owners were often urged to exert strict discipline over their workers for the sake of the latter's spiritual welfare. 79

With the establishment of factory employment the relationship between employer and employee became much more specific in character. Industry previously had rested upon

a traditional network of social relationships, held together by deference and hierarchy. The factory often appeared to tear apart existing relationships without replacing them with new ones, to underline the subordinate status of the worker while augmenting the influence of new and often rough masters. 80

In the medieval period, the relationship of lord and villein pervaded most of the areas of social action, not just that relating to employment, 81

and in such a society there was the likelihood that each would develop feelings of loyalty and compassion for the other, because of the diffuse nature of the dealings between them. The Scottish collier, who worked as a slave for his master, might nevertheless expect to receive from him as of right maintenance in sickness and old age, and a coffin for his burial. 82

Factory work, however, encouraged "the segmental attachment of the alienated," 83 and a relationship in which each was trying to exploit the other (though the employer's economic superiority

83. A. Fox, Beyond Contract: Work, Power and Trust Relations, 185.
left little doubt as to the outcome of the struggle). In earlier times the norms of the employment relation had been settled by custom, craft or guild rules and occasional statutory provisions. As Selznick has pointed out, the essence of these sort of rules was that they were prescriptive, that is to say they did not encourage the parties to plan in detail the incidents of their own relationship (except for such elementary matters as wages and the type of employment in question). Even the length of service was not usually open to negotiation, since this was customarily set at one year. The idea of a master-servant relationship terminable at will would have been thought incongruous and unnecessary (as well as illegal) in pre-industrial society, but it became, of course, essential to the running of a factory-based economy, where market trends dictated the size of the workforce engaged at any one moment. It was at this stage of development that the use of a contractual model in explaining the employment relationship began to grow in popularity. Not only did this seem appropriate to the new state of affairs, where the cash nexus measured the extent of the involvement the parties had with each other. It also could be used to construct a superficial theory of equality, which allowed employers to justify the imposition of all sorts of dire working conditions on their employees, and yet argue that there was nothing wrong

84. Law, Society and Industrial Justice, 128.
85. i.e., because it would be contrary to the provisions of the Statute of Artificers which required hirings to be for a yearly period. Of course this only applied to certain professions, albeit the key ones. See supra, p. 57. Inevitably many of the most menial jobs must have been allotted on a temporary basis. Under s. 8 of the Statute of Artificers, however, the master who wished to get rid of his servant before the year was up had to give a quarter's notice, or show lawful cause for the dismissal before two magistrates, under penalty of a fine of 40s.
in this, because the workers had agreed to take employment on these terms.  

86. "The contract of employment inevitably becomes a prerogative contract, a mode of submission, if provision is not made for employee participation in the continuing process of rule-making and administration,"  

87. but this, of course, was anathema to the early believers in laissez-faire.  

Lastly, it is perhaps worth mentioning one apparent anomaly. The precise ordering of the workforce, and their subjection to the prescriptions of the factory employer took place at a time when, on other fronts, more credit was being given to the intelligence and rationality of the same workforce in the ways they planned their lives. For centuries there had, amongst political philosophers, been an unshakable belief in the 'utility of poverty' and in the impossibility of improving the production of the labouring classes except by showing them the consequences of not working hard. At last, however, in the late 18th century a more generous view of human nature began to prevail, under which the inducement of the carrot was thought more efficacious than the threat of the stick.  

88. Gradually such ideas spread down into society from the theories of 'progressive' economists such as Adam Smith, but, at the same time, the contracts governing employment in the new factories treated the workforce as irresponsible, potentially work-shy sheep, whose every action needed to be carefully specified in advance.  

86. Paley, op.cit. Supra, p. 49.  

87. Selznick, op.cit., 137.  

C. Master and Servant Law 1563 - 1814

(1) The Sources of Legal Regulation

(i) Legislation

In looking at the law of master and servant in the years between 1563 and 1814, the Statute of Artificers of 1563, whose wage-regulating provisions were law during this period, occupies a central position. No statute subsequent to it had such ambitious aims - the achievement of a planned economy dominated by state control, to be realized through the promulgation of a nation-wide code of employment and a system controlling craft training and entry into the skilled trades. Indeed, the changing economic philosophies of the 17th and 18th centuries made a repetition of legislation of this scale and nature increasingly unlikely; it has already been said in the preceding chapter that the Statute was an essentially conservative measure, and the system of institutional controls over commerce which it perpetuated grew more and more discredited as theories favouring state abstention and individualism grew in popularity. These ideas eventually bore fruit in the doctrines of classic laissez-faire at the end of the 18th century, but before this happened the provisions of the Statute of Artificers were widely ignored. However, before the demise of wage regulating machinery and the enforcement of apprenticeship regulations, the Statute was certainly the main single source of master and servant law. This much may be judged partly by examining the content of decided cases throughout the period,

89. 5 Eliz., c. 4.
91. See supra, p. 58.
partly by observing the structure of the discussion of master and servant law in contemporary legal literature. The latter is typically found to be based on a framework derived from the Statute of Artificers. With characteristic legal conservatism, this presentation continues in editions published long after the known desuetude of the provisions of the Statute which are solemnly stated as the law.

By the opening of the 18th century, much of the Statute of Artificers was already spent; some of its provisions, e.g. those forbidding the hiring of certain classes of workers for less than a year, or those requiring the giving of testimonials by masters to departing servants, were probably never seriously implemented because of their unpopularity and the difficulties involved in enforcing them. The progress of the century saw the fall into desuetude of the more important parts of the Statute, notwithstanding their continuing presence on the statute book. This left a gap, in fact if not in law, in master and servant law, which to some extent was filled by a variety of statutes. Parliament before 1700 had restricted


93. s. 3.
94. s. 10; cf. Servants' Character Acts (infra, note 104).
95. Adam Smith, writing in 1776, could say that "though anciently it was usual to rate wages, first by general laws extending over the whole kingdom, and afterwards by particular orders of the justices of the peace in every particular county, both these practices have now gone entirely into disuse." *Wealth of Nations*, 245.
its operations in this field to relatively minor matters. For example, it had amended the Statute of Artificers in ways which demonstrated its concern for the safeguarding of the economic interests of the industrial population. In 1603, "by reason that Ambiguitie and Question have risen and bene made whether the ratings of all maner Artificers Workmen and Workwomen his and theire Wages, should or might be rated by the saide Lawe," wage regulation by the justices of the peace was expressly extended to all types of workmen, whether hired by the day, week, month or year, and however paid. Occasionally, too, statute had been invoked to impose special regulations on a particular group of workers in response to problems affecting that industry; this happened with weavers in 1609 and silk workers in 1661. Instances of ad hoc legislation multiplied in the course of the 18th century, as the changes taking place in the nation's industry created new problems in the master-servant relationship, and exacerbated old ones. Statutes were passed to punish the dishonesty of outworkers who made use of the opportunities their system of working afforded them to misappropriate materials or tools entrusted to them by their employer, while, on the other hand, employers were repeatedly enjoined to pay the wages of their workers in cash and not in truck, by the same measures. Special penalties were introduced for those who responded to the challenge of factory produced

97. Preamble to 1 Jam. I, c. 6.
98. 7 Jam. I, c. 7.
99. 13 and 14 Car. II, c. 15.
100. See A. Harding, A Social History of English Law, 310.
101. e.g. 22 Geo. II, c. 27 (1749). See, for further details, Burn, op.cit., supra, 291-2.
goods by destruction of the machines they thought were depriving them of their livelihoods.102

Similarly, the criminal law was extended to cover breaches of trust,103 a crime which grew in importance and frequency as the number of commercial transactions taking place itself increased; another attempt to ensure the existence of a trustworthy class of servants resulted in the creation of the crime of giving a false character reference.104 The 18th century also saw a stepping up in the passing of legislation designed to deal with grievances in particular trades - specific statutes governed the trades of hat-making,105 tailoring106 and clock-making,107 to name but three - and such legislation often contained provisions similar to that of the Statute of Artificers for the regulation of wages, hours of work, or the punishment of workers who left their employment before the agreed date of termination.108 This, of course, corroborates the evidence we have from other sources that the duplicated provisions of the earlier legislation were no longer effective. Adam Smith states in The Wealth of Nations that the practices of wage rating "have now gone entirely into disuse". As far as the collective activities of the working population were

102. e.g. 22 Geo. III, c. 40 (1782).
103. e.g. 39 Geo. III, c. 85 (1799); 'An Act to Protect Masters against Embezzlements by their Clerks or Servants'.
104. 32 Geo. III, c. 56 (1792).
105. 5 Geo. II, c. 22 (1731).
106. 7 Geo. I, c. 13 (1720).
107. 27 Geo. II, c. 7 (1753).
108. See too 20 Geo. II, c. 19 (1747), infra, which duplicated much of the ground covered by the Statute of Artificers. One may judge that the 1747 Act was important in practice from the precedents given by Burn (op.cit., 313-8) as a help to justices who were faced with its enforcement.
concerned, the Combination Acts of 1799 and 1800 imposed on a national scale the restrictions which earlier in the century had been imposed on the more militant of individual trade organizations – e.g. the tailors in 1720, or the paper makers in 1795. Lastly in this brief account of the instances of legislative activity relevant to the law of master and servant, there were several statutes which, in the phrase of the Webbs, "tinkered with the law of settlement. The Statute of 1692 had altered earlier law and impinged upon employment law by stating that a settlement in a parish might be obtained, inter alia, by service for a year. This had the effect of discouraging the traditional yearly hiring, since employers were often unwilling to give a settlement, and servants often unwilling to forfeit settlements they had previously established in another place. Not surprisingly, this new means of acquiring a settlement also gave rise to much legal dispute over the precise meaning of the phrase "hiring for a year".

109. 39 Geo. III, c. 81.
110. 39 and 40 Geo. III, c. 106.
111. 7 Geo. I, c. 13.
112. 36 Geo. III, c. 111.
114. 3 Wm. and Mary, c. 11.

In passing, it is worth noting that the possibility of removal from a parish where one was not established did not discourage the 'tramping' system, whereby better employment in different parts of the country was sought. See S. and B. Webb, op.cit., 330-6.
(ii) Case Law

General

So much for the main features of legislation during the period under study. The case law, of course, to an extent follows the same patterns, reflecting the concern of statutes with different issues at different times: thus the number of cases turning on the interpretation of the apprenticeship provisions of the Statute of Artificers shows a sharp decline in the course of the 18th century, while those dealing with agency and breach of trust correspondingly increase. The common law, however, could also develop without the aid of a statutory skeleton, the more so in a period when, in general terms, Parliament has been described as "unusually quiescent". For example, it was the judges of that era who alone fashioned the doctrines of vicarious liability from the premise that a servant who committed a tort did so on the 'implied command' of his master. This example of judicial creativity may also be attributed to the needs of the times, for, as society grows more industrialized, it is natural for there to be greater awareness of the potential damage that can result from negligent acts, and a demand for an effective system of reparation.

As for the internal law of the master-servant relationship, the common law had successfully resolved the procedural complications attendant upon the old writs of covenant and

117. C.H.S. Fifoot, English Law and its Background, 114.
118. Turberville v. Stamp, (1698) 1 Lord Raym. 264, and Boson v. Sandford, (1689) 2 Salk 440, are the fons et origo of the doctrine, which is quite foreign to the earlier common law.
debt. After Slade's Case, the flexibility of the writ of indebitatus assumpsit was assured, and the effective enforcement of consensual executory agreements became possible. In 1675, Sheppard could write, "if one bind me to do work for him, and do not promise any thing for it; in this Case the law implieth the Promise, and I may sue for the Wages and set forth in my Declaration, that I deserved so much for the doing of it."

But the scope of implied terms in the contract was still limited. For example, inadvertence in the performance of his duties by the servant - the shepherd who "shall suffer my Sheep to be drowned, or to turn shabbie by his negligence" - brought liability in tort (an action upon the case), and not in contract for breach of the implied promise to carry out a job with due skill and attention.

Interpretation of the Statute of Artificers

The cases which show how the courts interpreted the Statute of Artificers provide even better evidence of the law's response to economic and social pressures on the master-servant relationship than the kind of developments, mentioned above,

120. Actions upon the Case for Deeds, 50.
121. Ibid., 290.
122. The servant's liability for misfeasance dates from Levison v. Kirk, (1610) Cro.Jac. 265, where it is argued that, if the act was such as would render a stranger liable, a fortiori, a servant would be liable to his master. However, Sheppard points out (390) that there "must be some consideration to bind a Labourer", and this suggests that, against certain unskilled, casual labourers, the action in case did not lie. cf. the tailor who, we are told (391) was liable for misfeasance even in the absence of consideration (i.e. regular hiring). Perhaps this illustrates that the liability in case depended on the principle spondet peritiam artis and the common labourer had no ars for which he had to answer. But apparently the established servant who refused to do his customary work was liable in assumpsit.
that were taking place independently in the law of contract and tort. A good example can be found by looking at the apprenticeship provisions which were originally intended to restrict entry into the skilled trades, and thus encourage a ready supply of agricultural labour. 123 Admittedly, the relationship between apprentice and master is only analogous to that between master and servant, but both were affected by the belief, current in educated society in the 17th and 18th centuries, that access to trades should be open to as many potential workers as possible. In the case of apprenticeship, the outcome is the gradual narrowing down of the scope of restrictions, imposed by the 1563 Statute, whereby a seven year period of training was first necessary. Looking first at the series of judgments delivered by Coke in the monopoly cases in the early 17th century, though it is true that in part his statements of the law may have been shaped by a desire to attack the powers of the sovereign, 124 it emerges that he conceived of the apprenticeship regulations as requiring strict interpretation. According to him, such restrictions as these imposed ran contrary to the principle of the common law that no man should be prohibited from working in any lawful trade. 125 Thus they applied only to persons who sought to follow one of the specified trades in a public, 126

124. C. Ogilvie, King’s Government and the Common Law, 134-43.
125. Ibid., 54; also Norris v. Staps, (1615) Hob. 211, where practice of a skill in private is described as "not a trade, but a service."
not a private, capacity, and they applied only to trades of skill. This much is certain from his various dicta, though the extent to which he should be seen as a protagonist in the movement towards free trade and laissez-faire is open to dispute.

Notwithstanding the views of Coke, it is the opinion of the author, who has most closely researched the early history of the enforcement of the apprenticeship regulations, that "hostility in the central courts to the regulation of apprenticeship can be found before 1642, if at all, only in isolated judgments or opinions." However, in subsequent years there is no lack of evidence to show that the provisions were viewed with increasing disfavour by the judiciary. Casual forms of apprenticeship were accepted as satisfying the statutory requirements, and some judges went even further. Lord

127. Tolley's Case, (1613) 2 Bulst. 186, where Coke held the restrictions did not apply to an upholsterer. The skill requirement was not imposed by the statute itself, which merely stated that "none shall set up, occupy, use or exercise any craft, mystery or occupation now used or occupied within the realm of England and Wales; except he shall have been brought up therein seven years at least as an apprentice" (s. 31). The exclusion of upholsterers was overruled in 1668, in R. v. Seellers, 1 Lev. 243.


129. M.G. Davies, The Enforcement of English Apprenticeship, 243. R. v. Fredland, (1638) Cro. Cas. 499, is an exception, where the trade of a hemp-dresser was held not to be within the regulations.

130. Hobbs v. Young, (1689) Garth. 162 - son employed several years with father; R. v. Morgan, (1710) 10 Mod. 70 - woman living with skilled husband several years; R. v. Maddox, (1705) 2 Salk 613 - following a trade for seven years without being bound apprentice; Froth's Case, (1698) 1 Salk 67 - overseas service for seven years.
Mansfield in Raymond v. Chase stated:\textsuperscript{131}  

1st, this is a penal law; 2dly, it is restraint of natural right; and 3dly, it is contrary to the general right given by the common law of the kingdom; 4thly, the policy upon which the Act was made, if from experience become doubtful - Bad and unskilled workmen are rarely prosecuted.

He either forgot or neglected, in the interests of what he saw as commercial expediency, the political justification of the measure, i.e., the need to stem the flow of labour from the land. He also forgot the other half of Coke's legal justification: "this statute is not only that one should have skill, but made purposely to keep youth from idleness, and to bring them up in labour."\textsuperscript{132} The puritanical concern to force the idle to work is gone, and replaced by a desire to see the most efficient use of the country's labour resources. For at least ten years previously it had been recognized that a covenant not to exercise a trade in which one was skilled was void.\textsuperscript{133} As Lord Mansfield said on another occasion,

In the infancy of trade, the Act of Queen Elizabeth might be well calculated for public weal, but now when it is grown to that perfection we see it, it might perhaps be of utility to have those laws repealed, as tending to cramp and tie down that knowledge it was first necessary to obtain by rule.\textsuperscript{134}

To what degree are other sections of the Statute of Artificers, dealing with the master-servant relationship, affected by the reception of such new economic policies on

\textsuperscript{131} (1756) 1 Burr 2. The issue was whether the statute regulations applied to an unqualified partner in a partnership where the other qualified partner did all the skilled work.

\textsuperscript{132} Tolley's Case, cited supra, 191.

\textsuperscript{133} M. Dalton, The Country Justice (1746) 138. Note that this observation does not occur in the 1635 edition of the same work.

the part of the judges? The Statute is drafted in a style which, by modern standards, is loose and imprecise and would seem to leave it open to a multitude of opportunities for legal dispute over interpretation. But the case law is relatively limited. Perhaps the most litigated section of the Statute is, however, that which deals with the power of magistrates
to limit, rate and appoint the wages, as well of such the said artificers, handicraftsmen, husbandmen, or any other labourer, servant, or workman, whose wages in times past have been by any law or statute rated and appointed, as also the wages of all other labourers, artificers, workmen or apprentices of husbandry, which have not been rated. 135

In 1604, as we have seen, magisterial jurisdiction was extended "to the rating of all labourers, weavers, spinsters, and workmen or workwomen whatsoever, either working by the day, week, month, year, or taking any work by the great or otherwise." As amended, this section of the Statute of Artificers was apparently of the widest application, yet the cases show a flat refusal on the part of the judges to extend it beyond servants employed in husbandry. In 1676 an order of certiorari was made, quashing the rating of a coachman's wages by justices,137 and, in a case probably earlier than this, a justice who made the mistake of assessing a seaman's wages found himself liable to damages of £30.138 The attitudes revealed in these cases were subsequently confirmed on a number of occasions,139 with no mention at all of amendment to the Statute of Artificers made by the Act of 1604. We know for certain that domestic

135. s. 15.
136. 1 Jam. I, c. 6, s. 3.
137. De Vall's Case, T. Jones, 47.
138. Byncroft's (or Ryecroft's) Case, (1688) 5 Mod. 140.
gardeners, Gentlemen's servants, and journeymen are all examples of particular types of employment which were held to be outside the scope of wage regulation.\textsuperscript{140} For a time, however, the effect of this stance was somewhat mitigated, for it was said that "courts of law are indulgent in remedies for wages."\textsuperscript{141} This meant that the courts would presume that any unspecified claim for wages was a claim for wages in husbandry,\textsuperscript{142} though of course this presumption would be of no avail should the servant foolishly declare his actual employment. However, this judicial concession ended with \textit{R. v. Helling}\textsuperscript{143} in 1716, subsequent to which the presumption was no longer accepted by the courts. On the other hand, judicial favour did extend the power of justices to cover orders for the payment of wages from employers,\textsuperscript{144} although strictly the Statute authorized only their assessment. So too, orders made by a single justice were upheld, though two were required under the Statute.\textsuperscript{145} The presumption, derived from a remark of Coke,\textsuperscript{146} that a hiring of labour for an indefinite period would be taken as being of a year's duration, mitigated the insistence onhirings of that length, which, however, excluded as a class day labourers from having their wages assessed.\textsuperscript{147} Of course, the servant who, for one reason

\begin{footnotes}
\item 140. \textit{R. v. London}, supra.
\item 141. \textit{R. v. Gouche}, (1702) 2 Salk 441.
\item 144. \textit{Shergold v. Holloway}, (1735) Sess. Cas. 154, where it was argued that this was the 'common practice'.
\item 145. Ibid.
\item 146. Co. Litt. 42.
\item 147. \textit{R. v. Champion}, (1689) Carth. 156.
\end{footnotes}
or another, found he was outside the protection of the Statute
was not left without remedies for the recovery of his wages.
"If the justices of the peace ... do neglect to set down the
wages, yet a servant may bring an action upon his own
contract,"\(^{148}\) and this rule protected equally the servant
not employed in husbandry, or hired for a set period less than
a year. But a servant who chose to sue for his wages at common
law might find himself in a weak position vis-à-vis his master.
He could, it is true, bring an action in debt, as opposed to
assumpsit, but "'tis a good plea [in reply] ... to say that he
[scil. the master] required him to do his business and he [scil.
the servant] refused."\(^{149}\) What is more, in any dispute between
master and servant, the master's word was to be taken in
preference to the servant's.\(^{150}\) This harsh common law rule
lasted into the 18th century, by which time the law had accepted
that domestic servants were employed on the exceptional conditions
that a month's notice on either side was enough to end the
relationship. An action of assumpsit for a month's wages
following a summary dismissal could also be defeated by showing
evidence of past disobedience on the part of the servant.\(^{151}\)

\(^{148}\) Weaver v. Best, (1623) Winch. 75.
\(^{149}\) Viner's Abridgement, Vol.XV, s.v. Master and Servant, 320,
translating a comment made by Hales J. in 1563 in Anon.
10 Moo. K.B. 10.
\(^{150}\) Robinson v. Hindman (1800) 3 Esp. 235, where the misconduct
consisted of negligence and often sleeping out at nights.
This point is, of course, linked with the question of
partial performance of service contracts (see supra p. 50).
The principle accepted in the 19th century appears to be
that dismissal could be justified by relatively minor mis-
conduct, and, when the servant had been dismissed, he could
not be said to have completed his year's service; ergo,
because there was no recovery for part performance, he would
get nothing. "The plaintiff was hired for a year...and
having violated his duty before the year expired, so as
to prevent the defendants from having his services for the
whole year, he cannot recover wages pro rata." Per Parke J.
Not only were magistrates limited to assessing the wages of servants in husbandry, they also had to consider the occupation involved before exercising the jurisdiction they enjoyed under s. 4 of the Statute of Artificers, by which they might interpose their authority to help masters rid themselves of servants before the expiry of the year's hiring. In these circumstances, the master had to show "some reasonable sufficient cause or matter" before a justice of the peace, who then might dismiss the servant from his engagement on his own authority. If the master did not go to a magistrate, his only alternative was to wait, and give a quarter's notice to the servant, which would run during the last quarter of the year's service. Should the master fail to apply to a magistrate and fail to give the requisite notice, his unilateral act of dismissal did not, as in modern law, effectively terminate the relationship. Rather, the relationship continued in force. This remained the law until 1817, when in Spain v. Arnott, Lord Ellenborough held that, while a master in husbandry could have recourse to a magistrate in order to get rid of his servant, he was not bound to do so. "The relation between master and servant, and the laws by which that relation is regulated, existed long before the statute [of Artificers]" and, because the master had the "superior authority", he was competent to dismiss on his own initiative. All this, however, applied only if the servant was employed in husbandry. If he was not, and was dismissed by his master, the question of whether the dismissal 'dissolved' the relationship (at least for the purposes of the law of

153. 2 Stark 256.
settlement)\textsuperscript{154} depended on whether the dismissal was in the circumstances justified.\textsuperscript{155} But it was settled that in this situation the justices had no power to dismiss - this was the responsibility of the master alone.\textsuperscript{156}

It is as well to mention here the liabilities incurred by the master who did dismiss his servant unjustifiably. In principle, because the hiring was presumed to be for a year, he would be liable for wages up to the end of the year. In the case of domestic servants, however, it was mutually convenient for the hiring to be on a monthly basis, and the claim to wages was accordingly limited to this period. This was eventually accepted by the courts,\textsuperscript{157} but only after some difficulty. As late as 1773,\textsuperscript{158} Lord Mansfield had refused to permit the dismissal of a wet-nurse on a month's wages, and had instead awarded the servant a whole year's wages, even though the former was said to be the "general practice in London and environs."

Although there was the occasional flurry of wage regulating activity among justices in the late 18th century, this was more the result of political pressures than a reflection of current practice. "Generally, ... the determination of wages was a matter for bargaining between masters and men,"\textsuperscript{159} and new legislation gave wider jurisdiction to magistrates. In 1747,\textsuperscript{160}

\textsuperscript{154} See supra, p. 48.  
\textsuperscript{155} Per Mansfield C.J. in R. v. Inhabitants of Brampton, (1777) Caldecott's Magistrates' Cases, 11.  
\textsuperscript{156} See R. v. Inhabitants of Hulcott, (1796) 6 T.R. 583.  
\textsuperscript{157} See Robinson v. Hindman, supra, p. 83.  
\textsuperscript{158} Temple v. Prescott, discussed by Caldecott, op.cit., 14n ff.  
\textsuperscript{160} 20 Geo. II, c. 19.
an act which, in its preamble, recognized that the laws then in force for regulating the payment of wages and the behaviour of servants were 'insufficient and defective' was passed to allow one justice to hear complaints from either masters or servants. This applied to servants in husbandry hired for a year or longer, and "artificers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters and other labourers" in any other employment, employed for any certain time. This jurisdiction was granted even where there had been no relevant assessment of wages for the current year, a sure sign that the old system was by then in decay. The act gave wide powers to the magistrate to punish disobedient servants, either by sending them to houses of correction, abating their wages, or by dismissing them from their service, and to punish "misusage, refusal of necessary provision, cruelty or other ill treatment" on the part of the master, by granting a certificate of discharge to the servant. 161

These provisions were extended to servants in husbandry hired for less than a year in 1757, 162 and in 1766 163 the master's authority was strengthened when early departure from employment was made punishable by justices by a term of between one and three months in a house of correction. 164 Although the classes of workers included by the phrase 'other labourers' in the 1747 Act would seem to be diverse, it was not until 1806 and the

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161. s. 2. For details of the content of the certificate, see Burn, op.cit., 313-8.
162. 31 Geo. II, c. 11, s. 3.
163. 6 Geo. III, c. 25, s. 14, which applied to any "artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer or other person."
164. There is no reported case on the scope of this act until 1837, when it was held, applying the principle of eiusdem generis to the words 'other persons', that domestic servants were not included. Kitchen v. Shaw, (1837) 6 Ad. & E. 729.
important case of Lowther v. Earl of Radnor\textsuperscript{165} that it was settled that a worker not employed in husbandry was covered. On the particular facts, it was held that magistrates did have jurisdiction under the legislation to adjudicate in a dispute between a well-digger (who by modern standards might easily have been classified as an independent contractor\textsuperscript{166}) and his employer over wages. Lord Ellenborough stated the object of the 1747 Act as being to afford "to certain servants and workmen, and to labourers in general, a speedy, easy and cheap mode of recovering their wages when they amount to a small sum; and to masters an easy method of correcting trifling misdemeanours and ill behaviour in their workmen and labourers."\textsuperscript{167}

In fulfilling the first of these two functions, the 1747 Act, as subsequently interpreted in Lowther v. Earl of Radnor, emerges as the precursor of the provisions of the Employers and Workmen Act 1875,\textsuperscript{168} by which justices had jurisdiction to determine disputes between employer and workman of a value not exceeding £10. The definition of 'workman' in the later act corresponds to the description of those covered by the earlier act, for all manual workers under contract are included. The only exception is a 'domestic or menial servant', and he or she would equally have been excluded from the scope of the earlier act, "it being impossible for any magistrate to be a judge of employment of menial servants, or of course to assess their wages."\textsuperscript{169} The jurisdiction of magistrates under s. 4 of the

\textsuperscript{165} 8 East 113.
\textsuperscript{166} He appears to have been paid by piece-rates and he also personally employed a labourer to assist him in his work.
\textsuperscript{167} At 125.
\textsuperscript{168} 38 and 39 Vict., c. 86.
1875 Act remained until 1971,\textsuperscript{170} but, of course, the changes in the value of money deprived it of importance. However, in 1747, when the monetary limits were first set, £10 was approximately a year's wages for a servant in husbandry.

\section*{Slavery}

In the course of the 18th century, English society once more became acquainted with the practice of slavery; indirectly, through the commercial importance assumed by the slave trade, directly, when West Indian planters brought their personal servants back with them to the home country. How did this development fit in with the law's approach towards the master-servant relationship? The answer to this question is complicated by two factors. First, the conflict between abolitionists and those who had vested property interests in the continuance of slavery did not make for an atmosphere in which legal principles were dispassionately examined. Secondly, there are indications that the leading protagonists in the debate over the legal basis of slavery were inconsistent in the attitudes they took. Lord Mansfield, for long revered as the judge who, by his judgment in \textit{Sommersett's Case},\textsuperscript{171} denied slavery a place in English law, has been censured in a recent book\textsuperscript{172} as a reactionary and unprincipled man - a keeper of slaves in private life - who delivered this judgment only with the greatest reluctance, after long delay, and who vigorously sought thereafter to limit the implications which the abolitionists tried to draw from it. The same author\textsuperscript{173} attacks Sir William

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{170} It was repealed by the Industrial Relations Act 1971 (c. 72), Sch. 9.
\item \textsuperscript{171} (1772) 20 St. Tr. 1.
\item \textsuperscript{172} F.O. Shyllon, \textit{Black Slaves in Britain}, chap. 7.
\item \textsuperscript{173} Ibid., chap. 5.
\end{itemize}
\end{footnotesize}
Blackstone as a weak-willed sycophant, who changed and qualified his views on slavery in successive editions of the Commentaries in order to ingratiate himself with Mansfield.174

However, leaving personalities aside, and attempting to trace the progress of legal concepts, it may be said that, in the discussion of slavery and the law, two questions are usually intertwined: (1) Does a master have a property right in his slave, as in a chattel? (2) Does a master-servant relationship exist between master and slave? The answer to the former was in the affirmative, according to the decision of the first reported case, Butts v. Penny in 1677, where slaves were said to be the proper object of an action in trover, just as cattle. This view was supported in Gelly v. Cleve176 in 1692, but challenged shortly thereafter, in Chamberline v. Harvey.177

The facts were that a black slave had been brought to Britain and given his freedom by a man who was not, according to the law of Barbados, his true owner. The slave then served several masters in England, latterly the defendant, at a wage of £6 per annum. The next development was when the true owner appeared, claimed title in the slave, and brought an action of trespass against the defendant. This action failed. It was accepted that the actio per quod might lie where a man was deprived by another of his slave's service, but trespass was rejected. The clear implication from the report is that the slave is not simply

174. For an explanation of the context of Sommersett's Case which is more charitable to these lawyers, see E. Fiddes, "Lord Mansfield and the Sommersett Case" (1934) 50 L.Q.R. 499.
175. 2 Lev. 201.
176. (1692) 1 Lord Raym. 147.
177. (1695) 5 Mod. 182.
a piece of property. Some ten years later, in Smith v. Gould,\textsuperscript{178} a similar approach was taken. This time an action in trover for a negro was refused, and again Butts v. Penny\textsuperscript{179} was not followed. Arguments drawn from the Bible and from the old law of villeinage were rejected: "Men may be the owners, and therefore cannot be the subject of property."\textsuperscript{180} In a case argued in the same year (1706), similar views were expressed by Holt C.J.; an indebitatus assumpsit brought for payment of the price of a negro, sold by the plaintiff to the defendant, failed because "as soon as a negro comes into England, he becomes free: one may be a villein in England, but not a slave,"\textsuperscript{181} though here the objection was procedural rather than substantive. Lord Holt suggested that the plaintiff should amend his pleadings to show that the negro had been at the time of the sale in Virginia, where by local laws he would have been a saleable commodity.

These cases\textsuperscript{182} show the rejection of the concept of the slave as property in English law. There are other authorities, however, which point in the opposite direction. In 1729 the Law Officers of the Crown delivered their notorious opinion to the effect that the state of slavery was unaffected by the arrival of slaves on English soil,\textsuperscript{183} and one of them (as Lord Chancellor Hardwicke) took this opinion with him on his elevation to the Bench. In Pearne v. Lisle,\textsuperscript{184} he said, "I have no doubt

\textsuperscript{178.} (1706) 2 Salk. 666.  
179. Supra  
180. At 667.  
182. See too Shanley v. Harvey, (1762) 2 Eden 126, 127, per Lord Northington L.C., "As soon as a man sets foot on English ground he is free."  
183. For the text of the opinion, see Shyllon, op.cit., 26.  
184. (1749) Amb. 75.
but trover will lie for a Negro slave; it is as much property as any other thing." 185

These conflicting cases, along with many other arguments for and against slavery, were considered in Sommersett's Case, 186 and, as is well known, the abolitionist cause prevailed. Habeas corpus was granted to effect the release of an imprisoned slave about to be shipped back to the West Indies. The subsequent reluctance of Lord Mansfield to go beyond a very narrow interpretation of the principle at issue has already been mentioned, but popular opinion took the judgment as a general charter of freedom for slaves. And though there is no scarcity of evidence showing that, in practice, slave trading and holding continued until the end of the century, 187 no English court subsequently accepted the legitimacy of slavery within England. The geographical qualification is important: in dealing with colonial matters, English judges upheld slavery until 1827. 188

If the slave was not bound to his master by the laws of property, then was he in the same legal relationship as that between a master and a hired servant? This question arose,

185. At 76.
186. Supra.
188. Williams v. Brown, (1802) 3 Bos. & Pul. 69; The Slave, Grace (1827) 2 St. Tr. (N.S.) 273. But in Keane v. Boycott, (1795) 2 H. Bl. 511, it was held that a contract made between an infant slave and a new employer in a colony where slavery was recognized had the effect of freeing the slave from his slavery. And in Forbes v. Cochrane and Cockburn, (1824) 2 St. Tr. (N.S.) 147, it was held that as soon as runaway slaves came on board a British ship, they became free. In both of these cases one can see judges minimizing the operation of slavery outside England.
e.g., in the not uncommon situation where a black, who had come to England as a slave, became free under English law and (perhaps unaware of his new position) remained in the service of his former owner. It will be remembered that in one of the early slavery cases, a slave had been referred to as a "slavish servant", in respect of whom an actio per quod servitium amisit might lie in appropriate circumstances. A fortiori a manumitted slave who continued in his master's employment might well have been classed as a species of servant. But in Alfred v. Marquis of Fitzjames a claim for wages brought by such a former slave in respect of services rendered was rejected, on the ground that there "was no original contract of service for wages." Again, in R. v. Inhabitants of Thames Ditton, Lord Mansfield denied a settlement to an enfranchised slave who had worked in a parish for many years, because "the statute says there must be a hiring, and here there is no hiring at all." It is tempting to conclude from these two cases that, by the late 18th century, the compelling logic of bargain was uppermost in the judicial conception of the employment relationship, and that it was because there was no such bargain evident in the circumstances of the continued employment of an ex-slave that the decisions in question were reached. Certainly, it would have been possible, had the court so wished, to imply an obligation on the part of the master to pay wages. Earlier in the century, there had been discussion of the role of contract in relation to slavery. Blackstone had advanced (and rejected)

189. Chamberline v. Harvey, supra.
190. (1799) 3 Esp. 2.
191. (1785) 4 Doug. 300.
192. cf. Sheppard, supra, p. 77.
several possible justifications of the state of slavery and one of these was based on the idea of sale. There could, he said, be no sale by an individual of himself into slavery, because of lack of consideration:

> Every sale implies a price, a quid pro quo, an equivalent given to the seller in lieu of what he transfers to the buyer; but what equivalent can be given for life and liberty, both of which (in absolute slavery) are held to be in the master's disposal? His property also, the very price he seems to receive, devolves ipso facto to his master, the instant he becomes his slave... of what validity then can a sale be, which destroys the very principles upon which all sales are founded.  

Nonetheless, he originally qualified his rejection of slavery with the observation that a right to service acquired "by contract or the like" might remain vested in the master of a former slave and would be recognized by English law, although such a right, insofar as derived from slavery, would not be. Given the extensive power which a master had, by law, over his hired servant in the 18th century, it is perhaps not surprising that Blackstone has been taken to task for making this distinction. One of his posthumous editors, Edward Christian, points out that the only basis on which a slave could bind himself was by contract, and since he was, by definition, of defective capacity, contract was impossible for him.

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197. The contract argument was also examined by Francis Hargrave, counsel for Sommersett, in the course of his lengthy and erudite attack on the institution of slavery. He points out (20 St. Tr. 64-5) that there can be no 'contract' between slave and master because of the slave's incapacity, and argues that, even if there is, no court should enforce its terms, insofar as they require the servant to go back to America and slavery with his master.
in 1802, an English court gave effect to the terms of a contract entered into by one who was a slave at the time of contracting. The truth may be that, when Blackstone made this qualification, he was not specifically concerned to reconcile what he said with contractual principles. The phrase he used was "contract or the like", and there is evidence from other sources that he did not see the master-servant relationship exclusively in a contractual light. For example, he discusses that relationship, along with that of husband and wife and parent and child, as one of the "three great relations in private life." This is a classification which suggests status rather than contract. So too, the servant's right to his wages is only partly explained in contractual terms. A menial servant is said to derive his right from 'agreement', but a labourer or servant in husbandry derives his from "the appointment of the sheriff or sessions", that is, the persons charged with supervising disputes arising out of the relationship. In thus referring to the role of contract, without being over-concerned with the strict rules of contract law, Blackstone emerges as very much the child of his time, of a period when lawyers were increasingly perceiving employment through contractual spectacles, but when the traditional understanding based on status was still exerting a strong influence.

199. Emphasis added.
201. Ibid., 428.
(2) The State of the Relationship

The purpose of the foregoing discussion of the law has been to see how it responded to the new demands made upon it by the social changes taking place in England between the years 1563-1814. The nature of the changes was as diverse as the forces forming society, and some attempt has been made to catalogue the most important of them, as seen from the viewpoint of the master-servant relationship. In the main, they may be grouped under two headings. As society moved from a pre-industrial to an industrial stage, there were major changes in the forms of organization of labour and in the expectations of the parties who found themselves masters or servants in these changed conditions. There is obviously a close link between the outward appearances of types of employment - place of work, remuneration, duration of hiring - and the attitudes the parties have towards each other and towards their work. The best example of innovation in the employment of labour is seen in the introduction of factory employment in the 18th century, when this is contrasted with the incidents of industrial production in Elizabethan and Stuart times (though the rise in the importance of domestic industry marks an intermediate stage in the transition). The new style factory makes new demands of those who work in it; it is necessary for the workforce to provide a concentrated and disciplined effort for set, regular periods. This is the classic consequence of subordinating the natural work rhythm of human beings to the tempo of machines. It produces, amongst other things, the alienation from work which marks the

end of a society characterised by having the performance of work organized, in the widest sense, on a familial basis.  

Whereas previously it was accepted that the relationship of master and servant entailed a host of responsibilities and duties which went far beyond the supervision and execution of the work task itself, the new factory system required from the worker no more and no less than satisfactory performance of his narrowly defined duties, and required from the master no more than a cash payment in return. Intertwined with this new method of organizing labour, a trading philosophy evolved to justify it; the idea of state regulation of economic life was rejected, and it was presumed that the sure way to prosperity was to leave all to the private bargaining, as individuals, of the parties themselves. This had the effect of promoting the servant to a certain legal equality with his master, since, as the theory of laissez-faire ran, both were equal parties to a contract. This in turn made belief in the inherent inferiority of the servant harder to sustain, at least at a theoretical level.

In theory, if not in fact, the 18th century saw the advance of the dignity of free labour and, with the eventual success of the anti-slavery movement, the abolition of the grossest forms of inequality between master and worker.

However, these major changes associated with the growth in factory employment took place largely outside the lines of legal control. In none of the cases dealing with the enforcement or interpretation of the Statute of Artificers and its successors is there discussion of factory employment. The workers in the cases are either engaged in husbandry, domestic

service, or such traditional non-factory crafts as carpentry or tailoring. There is a straightforward explanation for this, for it was the justices of the peace who put into execution what law on employment there was, and their jurisdiction was strongest in agricultural regions, weakest in industrial regions. Early in the century, wage regulation "died out in the woollen industry both in the West of England, where capitalism was most deeply entrenched, and in the West Riding of Yorkshire,"204 and we may assume that the wider, police jurisdiction disappeared with it. So, although we know that in industries, such as metal-mining, iron-smelting and glass-blowing, it became customary for employers to try and tie down their valuable labour by means of detailed rules and contracts of employment requiring regular attendance and fidelity,205 there is no mention of such devices in the reported cases.

In spite of the absence of legal authority in this field, it is possible to arrive at some understanding of the conception of the nature of the master-servant relationship which informed the law of this period. There are many examples of laws favouring the master's interests. The existence at common law of a variety of remedies and defences (bringing of an action in case, refusal to pay wages) available to the master confronted with a disobedient servant is contrasted with the single, often ineffective right to sue for unpaid wages.206 In other

204. Lipson, op.cit., 263.
205. Ashton, op.cit., 211.
206. In Hussey v. Pusy, (1657) 1 Sid. 298, an action in case was brought against a servant who had smuggled goods on board ship contrary to his master's orders. It was argued that "serra inconvenient de allow que servants serra liable al action par chascon breach del command de lour master," but the action was upheld, on grounds of public policy.
situations, the master enjoyed rights to which there was no counterpart for the servant. The servant was expected to spring to the master's defence were he assaulted, but the converse was not true. **207** Again, the master could chastise his servant: in Lambarde's *Eirenarcha* it is acknowledged that all assaults amount to a breach of the peace,

> for some are allowed to have privately a naturall, and some a civill power (or authoritie) over other; so that they may (in reasonable manner onely) correct and chastise them for their offences, without imputation of any such breach. After one sort, the parent is suffered (with moderation) to threaten and chastise the child within age. By reason of the other sort of power, the master is not punishable (if not outrageously) he chastise his servant, the scholemaster his schollers or a gaoler... his unruly prisoners, or the Lord his villeine. **208**

In 1696, during the trial of a master for murder of his servant, the prosecution conceded in the accused's favour "that his servant sent a saucy answer, for which he might have corrected him; but then it must be done with a fit and proper instrument, and not with a sword." **209** Even at the end of the 18th century, the test of whether the death of a servant as a result of chastisement was manslaughter was whether the master was "so barbarous as to exceed all bound of moderation," **210** and it was accepted that "parents, masters and other persons, having authority in for domesticus, may give reasonable correction

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207. The master was not allowed to assault someone attacking his servant, because, it was argued, he had the remedy of the *actio per quod servitium amisit* to compensate him for loss of services. *Leeuard v. Basilee*, (1697) 1 Salk 407.


210. 1 *Hawkin's Pleas of the Crown*, 111. It was murder if an inappropriate instrument such as a sword was used for chastisement, and this led to death. See also Hale's *Pleas of the Crown*, 473.
to those under their care." 211 The servant was conceived of as part of the family, and subject to quasi-parental authority. 212 Like a stern father, "a man may as well send for his servant from a conventicle as from an alehouse and keep him from going to either of those places." 213 It is perhaps unnecessary to repeat that all these rules were evolved in relation to servants who formed part of the household; there is no record of their application to factory workers or even to the class of casual labourers which existed in pre-industrial society. A final example of unequal treatment concerns the effect of unilateral termination of the employment relationship. We have seen that, after 1817, the master had power to make an effective, if unlawful, termination. 214 But the servant could not do so. It was "clearly against the policy of the law if the servant by his own act of delinquency should have the power of dissolving the contract," 215 and a servant sent to a house of correction for disobedience was held to be still bound to his master when released.

The complex state of the changing relationship between master and servant at the end of the 18th century does not fit

211. Foster's Discourses on the Criminal Law, 262.
212. It is difficult to fix any definite date for the lapsing of the master's rights to inflict physical chastisement. Somewhere near the beginning of the 19th century may be suggested. Professor Amos, writing in 1833, states "It has been said that a master may give moderate chastisement to his servant for negligence or misbehaviour. But it may be doubted whether such a power be not confined to apprentices and menial servants, under age, where the master is considered as standing in loco parentis." (Legal Examiner, Vol. 3 (1833) 443, 450.)
213. Anon., (1676) 2 Mod. 167.
easily into a simple contractual explanation, but it is clear that, by the turn of the century, the pre-eminence of contract was well established. Yet many of the peculiarities of the modern law can only be understood by remembering the inadequacy of contract as a complete explanation.

In assessing the state of the law on any one issue — say, the power of the master to dismiss, or the right of the servant to a period of notice — it was necessary, then as now, to be aware of legal discrimination between different classes of workers. The difference, however, between the old and the new law is that the basis for discrimination at the end of the 18th century was the nature of the work being carried out, and not the classification in law of the type of contract under which the job was performed. Additionally, the duration of the employment and the method under which payment was made to the worker would be important in deciding whether the action for loss of services (the actio per quod servitium amisit) lay to protect the employer. But the first question of importance, in a context where 'servant' was not a term of art,

217. For example, the action in case for procurement of a servant was not originally conceived of as depending upon the existence of a contract between the plaintiff and the servant he had lost, but, by 1797 (Nichol v. Martyn, 2 Esp. 754), breach of contract was held to be a prerequisite of bringing a successful action. See G. Jones, "Per Quod Servitium Amisit," (1958) 74 L.Q.R. 39, 52. cf. Holdsworth, R.E.L., Vol. IV, 384.
218. See G. Jones, op.cit., 54-5. It is probable that the actio per quod lay where servants had been engaged for a "time certain", though paid by the day, but did not lie where there was employment of casual labour, hired and paid by the day. It is certainly very doubtful whether the statement of Denning L.J. in I.R.C. v. Hambrook [1956] 2 Q.B. 641, that the actio per quod applied only to the loss of services of domestic servants, is accurate.
was whether the work in question was domestic service,
for the law showed a great reluctance to interfere with
the patriarchal authority of the master in his own household.
The second was whether the work was in husbandry, for, if it
was, it was most likely to come under statutory supervision.
CHAPTER 4

THE MASTER AND SERVANT ACTS
A. The Legislation

Reference to the 'Master and Servant Acts' most readily brings to mind the Act 4 Geo. IV, c. 34, which was passed in 1823. According to information available to the Parliamentary Select Committee investigating master and servant law in 1865-66, it was this statute which provided the authority for most of the criminal prosecutions made in the mid-19th century. This Act, however, was only one of several statutes which together made up the law in force. Even without considering the several statutes dealing with employment in particular trades and with piecework, there had been two earlier 18th century acts which had covered more or less the same ground. As the 1823 Act itself announced, its purpose was the extension of an already established scheme, under which criminal penalties were laid down for breach of the contract of employment by the employee, and jurisdiction over disputes arising between employer and employee was given to the justices of the peace. In one form or another such a scheme had been a feature of English master and servant law since the 14th century, but, the provisions of the Statute of Artificers having fallen into disuse by the 18th century, an Act of 1747 had re-introduced provisions to this effect. These were amended, in 1766 and again in 1823, as well as on other less important occasions.

2. e.g. 22 Geo. II, c. 27 (1748); 17 Geo. III, c. 56 (1777).
3. Supra
4. 20 Geo. II, c. 19.
5. 6 Geo. III, c. 25.
6. The 1823 Act was itself later extended in 1830 by the Act 10 Geo. IV, c. 32, which applied it to workers in the woollen, linen, fustian, cotton, iron, leather, fur, hemp, flax, mohair and silk manufactures.
The amending statutes did not render their predecessors inoperative, but rather gave the would-be litigant a choice of authority on which he could base his claim. Naturally, there was a preference for suing under the most recent statute, but this did not always happen and, so long as the litigation did not touch upon some point of law specifically altered by a subsequent act, the use of an earlier statute was accepted by the courts without question. The choice of statute, however, was not always an arbitrary matter.

This is illustrated by the case of R. v. Hoseason\(^7\) in 1811, which is also interesting as an example of the type of injustice to which, as a whole, the system was prone. A farmer, who was also a magistrate, had sat in judgment over one of his own servants, who had been brought before him by his bailiff on a charge of misconduct and refusal to work. Such a flagrant breach of natural justice attracted attention even in those days and led, eventually, to a criminal prosecution being brought against the magistrate. However, he succeeded in obtaining a discharge, having convinced the court that the assumption of jurisdiction in these circumstances had been an honest mistake on his part. He was ordered to pay the costs of the proceedings against him. His servant, on the other hand, was less fortunate. The sentence he had been given was for a month's commitment to a house of correction, under s. 2 of the 1747 Act. His punishment amounted to more than deprivation of liberty and hard labour; the words of the statute were "commitment to the house of correction, there to be corrected." It emerges from the

7. 14 East 605.
report of the case that the understanding of 'corrected' by the superintendent was that the miscreant was to be whipped during his stay, a punishment which had already been carried out by the time the miscarriage of justice had been noticed. Had proceedings been brought under a subsequent amending act, the 6 Geo. III, c. 25 of 1766, the magistrate would only have had the power to 'commit' servants. There was no mention of 'correction' in the statute, and it was held in R. v. Hoseason that whipping was a necessary part of commitment under the 1747 Act but not of commitment under the 1766 Act. The postscript to these events is that, under the 1823 Act, the magistrate could only punish by sentencing an offender to commitment and hard labour,9 and, when on one occasion an over-enthusiastic justice specified corporal punishment as well, the conviction was held to be bad.10 Thus, it was by no means unimportant for the servant (or justice) to know under which statute a prosecution was being brought. Yet another distinction was that, under the 1747 Act, a writ of certiorari would not issue in respect of any proceedings initiated under it,11 whereas, apparently, this restriction did not apply when the 1823 Act was used.12 Appeal to quarter sessions from the original verdict seems to have possible under both: it was expressly permitted by s. 5 of the 1747 Act and, by implication, extended to the later Act, but it was subject to a very important qualification. No appeal was permitted against an order of

8. Supra.
9. s. 1.
10. Reid v. Fenwick (1842) 6 J.P. 491.
11. s. 6.
commitment to a house of correction\textsuperscript{13} (or from the conviction which preceded such commitment\textsuperscript{14}). This, of course, deprived the servant of appeal on the matter which was most important to him – his personal freedom. Masters, however, could and no doubt did appeal against orders made against them for the payment of wages to their servants. In such circumstances, the servant sentenced to detention had only one remedy by which he might obtain his release, the writ of \textit{habeas corpus}.\textsuperscript{15} This, together with the action for false imprisonment\textsuperscript{16} (which would commonly be brought after release), provided the setting for the scrutiny by the superior courts of the interpretation on the part of the justices of the provisions regulating the punishment of disobedient servants.\textsuperscript{17}

\textbf{B. Who was a 'servant'?}

The post-1747 Acts already mentioned, together with a few others of lesser importance, had as their objective the extension of the original statutory scheme for enforcing the contract of employment by criminal sanctions and settling disputes between masters and servants. Servants in husbandry hired for less than a year were brought within this scheme in 1757,\textsuperscript{18} tinners and miners in the stannaries in 1754,\textsuperscript{19} while one of the main

\begin{itemize}
\item[13.] 20 Geo. II, c. 19, s. 5.
\item[14.] R. v. Justices of Staffordshire (1810) 12 East 572.
\item[15.] See, e.g., \textit{Ex Parte Johnson} (1839) 9 L.J. M.C. 27.
\item[16.] A justice who misinterpreted the law did so at his peril: \textit{Lancaster v. Greave} (1829) 9 B. &S. 628.
\item[17.] To repeat, there was no appeal on issues of fact. cf. the difficulties in the way of workers who sought to appeal from conviction under the Combination Acts – see G.D.H. Cole and R. Postgate, op.cit., supra, 173.
\item[18.] 31 Geo. II, c. 11.
\item[19.] 27 Geo. II, c. 6.
\end{itemize}
achievements of the 1823 Act was to give an improved remedy to the servant whose master lived at a distance and was therefore difficult to reach in case of complaint. 20 But though the system gradually became more comprehensive and more sophisticated, it always depended upon the establishment of two fundamental propositions: that there was a relationship of master and servant between the relevant parties, and that the particular employment was one of those within the contemplation of whatever statute under which the proceedings were being brought.

Analytically, these two questions are quite separate, though in fact this does not appear to have been recognized by the courts of the time. In the earlier cases dealing with the scope of the legislation, the problems were seen as turning on the inclusion of atypical employment relationships within a loosely defined category. For example, in Lowther v. The Earl of Radnor, 21 which concerned a worker who today might well have been described as an independent contractor, discussion centred on whether or not the apparently compendious phrase 'other labourers' (used in the 1747 Act to determine its scope) should be interpreted to cover a person employed to dig wells. The issue was seen as whether the Act applied to servants who were not employed in husbandry, and that was all. It might have been argued, but it was not, that the well-digger was outside the statute because he was not properly described as a servant.

20. In these circumstances the justices were given power, by s. 4, to issue orders against "stewards, agents, bailiffs, foremen, or managers" who superintended the master's business in the district. The 1823 Act also introduced improvements in the execution of orders made by magistrates.

21. (1806) 8 East 113. Supra, p. 87.
Sometimes, of course, this kind of approach was unobjectionable, for example in deciding whether or not a domestic servant\(^\text{22}\) or a carpenter\(^\text{23}\) should be included within such a phrase.

In time, however, an awareness of the uniqueness of the master-servant relationship began to dawn upon the courts, and more attention was paid to the terms on which work was done. As a result there were attempts to define some of the essential ingredients of the master-servant relationship, and there is a collection of cases in the first half of the 19th century particularly interesting in this respect.

The case which may be taken as the starting point for this process is, however, considerably earlier. Hart v. Alridge\(^\text{24}\) dates from 1774, and, what is more has no connection with the master and servant legislation now being discussed. Instead, the issue which arose there was whether a journeyman was properly described as a servant for the purposes of the tort of enticing a servant from his work. Lord Mansfield lost little time in disposing of arguments to the effect that he was not, and thus that the action was ill-founded; he said that a journeyman was a servant by the day; and it makes no difference whether the work is done by the day or by the piece. He was certainly retained to finish the work he had undertaken, and the defendant knowingly enticed him to leave it unfinished.\(^\text{25}\)

Two considerations appear to have influenced his verdict.

First, social status - the journeyman "stood in the relation

\(^{22}\) Kitchen v. Shaw (1837) 6 Ad. & E. 729.
\(^{23}\) Wiles v. Cooper (1835) 3 Ad. & E. 524.
\(^{24}\) 1 Cowp. 54. The case is cited by G. Jones, "Per Quod Servitium Amisit," (1958) 74 L.Q.R. 39, 50, as evidence showing that the action for procurement depended on the performance of services, and was not seen as requiring a contract between the parties.
\(^{25}\) At 55-56.
of servant to the plaintiff", and Lord Mansfield expressly referred to the possibility of a man "living in his own house" as an indication that he could not properly be described as "any master's journeyman". Secondly, and more interestingly (given subsequent developments), Lord Mansfield hinted he might have decided differently had the journeyman taken in work from several sources:

For if a man lived in his own home and took in work for different people it would be a strong ground to say that he was not the journeyman of any particular master. 26

The underlying idea, of course, is that commercial independence, manifested either by ownership of assets or by business organization, is incompatible with the social inferiority implied by 'servant'. It is interesting that Aston J., who sat alongside Lord Mansfield in the case, thought that even if the journeyman did live in his own house the action would properly lie. It would, he said, be a very bad consequence for trade if it did not, and he would have been prepared to hold that the man was "a servant quoad hoc".27 In other words, for reasons of expediency he was prepared to interpret 'servant' in a way free from connotations of status.

Neither of Lord Mansfield's criteria of service were, however, to be developed for some time; there is no indication that there was any conception of the master-servant relationship as a distinct legal phenomenon. As late as 1827 this remains true. In Branwell v. Penneck28 (a case which dated from after 1823, yet where proceedings had been brought under the 1747 Act)

26. At 56.
27. Ibid.
28. (1827) 7 B. & C. 536.
the defendant in an action of trespass was a justice of the peace. He had issued a warrant for seizure of the plaintiff's goods after the latter had failed to comply with an earlier order for the payment of wages, and the present case was based on an allegation that, in making the original order, the magistrate had exceeded his jurisdiction. The 'servant' in respect of whom the order had been made, and whose application to the magistrate had begun the whole chain of events, had been sent by the plaintiff to look after property which the latter had seized, in his capacity as attorney, under a writ of fieri facias. The 'hiring' appears to have been informal and excessively vague in its terms - no mention, for instance, being made of wages, while the job itself was unsupervised. There was, however, no suggestion that the appropriate relationship of master and servant had not been shown to exist - perhaps it was thought sufficient that the employer and the person employed were obviously of very different social status. Instead, it was held that the magistrate had jurisdiction under the 1747 Act only to award payment of wages to labourers whose wages might be subject to regulation. And because this test was not satisfied in the above circumstances, the magistrate was held to be in the wrong.

The test based on the scope of the wage fixing provisions of the Statute of Artificers was extremely useful in delimiting the powers of magistrates under the Master and Servant Acts, especially since, the earlier statute having been long ignored, it was unlikely that any representation made about its meaning would be controverted. Eventually, however, situations arose where this test was found to be inadequate. That is to say,
while there was no doubt that the occupation in question was one of those included within the Statute of Artificers, it was nonetheless felt that other characteristics of the relationship between the parties should be taken into account in deciding whether it should be classified as subject to magisterial supervision. In 1829 there were two cases, concerning allegedly ultra vires acts by magistrates, giving rise to problems of this kind: 

Hardy v. Ryle and Lancaster v. Greaves. In the former the worker who had been prosecuted was a weaver, in the latter a builder, and there would have been little doubt that, on the test of the scope of the Statute of Artificers, both would have been held to be included and the prosecutions under s. 3 of the 1823 Act thereby upheld. In fact, both were held to fall outside the legitimate limits of the magistrates' powers. In Hardy v. Ryle, the conviction and the order of committal set out that the plaintiff (who was now suing for wrongful imprisonment) had neglected to fulfil a contract to weave certain goods. Bayley J. pronounced the following test:

Now there is a very plain distinction between being the servant of an individual and contracting to do 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.

The conviction was held to be bad, as it did not evidence any contract to serve. In Lancaster v. Greaves the information on which the justices had proceeded was criticised for similar

29. (1829) 9 B. & C. 603.
30. (1829) 9 B. & C. 628.
31. Supra.
32. At 612.
33. Supra.
reasons; Parke J. maintained:

The statute 4 Geo. IV c. 34 s. 3, upon which this question turns, applies only to cases of contracts to serve. There may indeed be a service, not for any specific time or wages, but to be within the statute there must be a contract for service to the party exclusively. Here there was no such contract but a contract to make a certain road for a certain price. 34

Ten years later these views were reiterated in Ex Parte Johnson,35 this time in the context of an imprisoned calico printer who sought his freedom by a writ of habeas corpus. Again there was no disputing the prima facie authority of the justice, for calico printers were expressly mentioned as one of the trades to which s. 3 of the 1823 Act applied. However, relying on the precedents of Hardy v. Ryle36 and Lancaster v. Greaves,37 counsel successfully argued that no relation of master and servant existed and that the magistrate had overstepped his jurisdiction. Williams J. thought that, had he been obliged to decide solely on the construction of the statute, there would have been no doubting the outcome, but he read the earlier cases as requiring him to be satisfied that there was "service, in the ordinary sense of that word". He held that there was not:

the contract here entered into, was nothing more or less than a contract to perform a particular work, wholly distinct from entering into a service in the familiar meaning of that term. It is clear that this contract might have been performed and yet the prisoner might notwithstanding his engagement to Mr. Makepeace, have entered into divers other contracts with, and been working for divers other persons at the same time. 38

34. At 631.
35. (1840) 9 L.J. M.C. 27.
36. Supra.
37. Supra.
38. At 29. This was in spite of the argument that, when it had included calico printing within the employments listed in s.3, the legislature must be presumed to have known of the system of working in the trade.
(1) 'Butty' Workers

The theme which emerges from this trilogy of cases is one which has clear links with Lord Mansfield's remarks in *Hart v. Alridge* cited above. Exclusiveness of service is taken to be an essential ingredient of the master and servant relationship. If the worker could, by the nature of his employment, provide his services contemporaneously for the benefit of several employers, he could not be described as the servant of any of them. Circumstances were to provide opportunities for the application of this new test (and to encourage the courts to look for other characteristics of the master-servant relationship) when, in the 1850's, it became necessary to classify workers who enjoyed a considerable degree of independence in carrying out their jobs.

*In Re Bailey* was the first of many cases in which the status of a 'butty' collier had to be decided. Bailey, who had been imprisoned under s. 3 and had applied for a writ of *habeas corpus*, worked under a system whereby he contracted with a mine owner to deliver coal at a certain price per ton, and then hired men to help him extract it from the ground. It was argued that the necessary master and servant relationship had not been established in this type of working arrangement. The court held, however, that, while it was competent for the prisoner to attempt to show that there was no evidence for a finding that the relationship did exist, this had not been done in

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41. (1854) 3 E. & B. 607.
the present case, and accordingly they refused to interfere with the conviction. Thus it may be said that this verdict shows a superior court which was, at least, not totally opposed to extending the concept of 'servant' to include the butty worker. Lord Campbell C.J.\textsuperscript{42} stated that a contract simply to buy the proceeds of a worker's labour, such as would result from a bargain to buy a fisherman's catch, would not be a contract of service, but he thought that, as between butty collier and mine owner, there was a continuing relationship of employer and employee. Wightman J.\textsuperscript{43} thought that the fact of the collier being obliged to tender a month's notice before he could end his contract, and the fact that during that period of notice he was not permitted to undertake work for anyone else, pointed to a contract of personal service.

A year later, exclusiveness of service emerged as the main criterion in deciding on the lawfulness of the detention of a master tailor under s. 3. The evidence was that the prisoner had his wages paid on a piece-work basis; he might refuse any work he did not wish to take on, and the contracts under which he worked did not last beyond the particular job on which he was engaged at any one time. Wightman J. referred to Hardy v. Ryle,\textsuperscript{44} Lancaster v. Greaves\textsuperscript{45} and Ex Parte Johnson,\textsuperscript{46} and said:

\begin{quote}
in all those cases, the decision that the party was not a servant turned mainly upon the circumstances that during the continuance of the particular employment the party was at liberty to work for other persons. But here, Gordon was to work in the premises of his employer, and for him only, until the work was done. \textsuperscript{47}
\end{quote}

\textsuperscript{42} At 618.
\textsuperscript{43} At 619.
\textsuperscript{44} Supra.
\textsuperscript{45} Supra.
\textsuperscript{46} Supra.
\textsuperscript{47} Ex Parte Gordon (1856) 25 L.J.M.C. 12, 14.
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\textsuperscript{42} At 618.
\textsuperscript{43} At 619.
\textsuperscript{44} Supra.
\textsuperscript{45} Supra.
\textsuperscript{46} Supra.
\textsuperscript{47} Ex Parte Gordon (1856) 25 L.J.M.C. 12, 14.
The conviction was upheld.

The 1823 Act, as Blackburn J. was candidly to comment in 1866, "was passed for the protection of masters." By comparison, the Truck Act 1831 was enacted for the manifest protection of certain classes of workmen. But both statutes shared problems of definition when it came to considering the position of the 'butty' worker, and, just as it had been necessary to decide whether he was a 'labourer' in terms of the 1823 Act, it had to be decided whether he was an 'artificer' or a 'workman or labourer' as these terms were used in the 1831 Act. In construing the truck legislation the courts took a less abstract line of reasoning than they had done in interpreting the Master and Servant Acts. It was recognized that "the object of [the 1831 Act] is to protect such men as earn their bread by the sweat of their brow," and a contractor who had been engaged to make a railway cutting was held to be outside the scope of the Act, apparently because he was an example of a person taking work on a 'great scale', and someone not within the 'proper understanding' of the term 'labourer'. Much, however, turned on the particular facts of each case - until the middle of the century 'butty' colliers were often held to fall within the Act, though the 'class' interpretation of the

49. 1 & 2 Will. 4, c. 37.
50. By s.25 of the 1831 Act, "all Workmen, Labourers, and other Persons in any Manner engaged in the Performance of any Work, Employment, or Operation, of what Nature soever, in or about the several Trades and Occupations aforesaid, shall be and be deemed 'Artificers'." This term 'Artificer' was in 1887 deemed to include all those within the definition of 'workman' as contained in the Employers and Workmen Act 1875 (38 & 39 Vict., c. 90) s. 10, by the Truck Amendment Act 1887 (50 & 51 Vict., c. 46) s. 2.
51. Riley v. Warden (1848) 2 Ex. 59, per Parke B. at 68.
52. Ibid.
scope of the legislation was repeated: the Act was said to be "not at all designed for the protection of persons taking contracts for labour to be done by others."\(^{53}\)

The similarities which existed between problems of interpretation of the Master and Servant Acts and the Truck Act were bound to be noticed, and it is no surprise to find Erle J., in a case where it was necessary to decide whether a gang of independent workers fell within s. 3 of the 1823 Act, referring to the Truck Act case of Bowers v. Loveken\(^{54}\) as an authority, and describing the 1823 and 1831 Acts as "in pari materia".\(^{55}\) Rather, it is surprising that the parallels between the two statutes should not have drawn comment until so late as 1863. The explanation is perhaps that the courts in general had no wish to apply a single standard in interpreting both statutes. Certainly the view of Erle J. on this point was never adopted by his colleagues. In Ingram v. Barnes\(^ {56}\) (in which he dissented) and again in Sleeman v. Barrett,\(^ {57}\) the scope of the Truck Act was interpreted more narrowly than the 1823 Act, and 'butty' workers who would have been likely to qualify as 'handicraftsmen' or 'labourers' under the master and servant legislation were said not to be protected by truck legislation.

\(^{53}\) Sharman v. Saunders (1853) 13 C.B. 166, per Maule J. at 176. See too Bowers v. Loveken (1856) 6 E. & B. 584, Weaver v. Floyd (1852) 21 L.J. Q.B. 151. Note that in Chawner v. Cummings (1846) 8 Q.B. 311 the defendant (who acted as a middleman, hiring out knitting frames belonging to master manufacturers to workmen, and buying their work at a piece rate) was held to be an 'employer' within the Truck Act.

\(^{54}\) Supra.


\(^{56}\) (1856) 26 L.J. Q.B. 82.

\(^{57}\) (1863) L.J. M.C. 153. In this case Pollock C.B. dissociated himself with the remarks Erle J. had made in Bowers v. Loveken, supra.
The comment which naturally springs to mind is that the judges followed one standard when the legislation was for the benefit of employers, another when for the benefit of the employed. In fact, the test which Pollock C.B. advanced\textsuperscript{58} for the application of the Truck Act was whether the contract was for labour, or for the result of labour. If the latter, the Truck Act was said to be excluded. This test served to remove most workers on the 'butty' system from this form of statutory protection, irrespective of the fact that they habitually worked alongside any labour they might hire to help them fulfil their original contract.

(2) The Test of Exclusive Service

To revert to the above, the first test used for determining who was a servant within the meaning of the Master and Servant Acts, this deserves further study, for it throws light on how the courts viewed the nature of the master-servant relationship. It is submitted that what underlies this criterion is a conception, essentially feudal in origin, of the ramifications of a servant's duties. There is no sign, of course, that a master who employed a large number of servants was ever questioned in his status as master; this in no way detracted from the obligations the law held he owed to each of them \textit{qua} servant. But where, on the other hand, the services which a servant was bound to render to his master included allegiance, it was inconceivable that more than one master could claim this. If exclusive service as a test is linked with this ancient understanding of the duties of a servant,

\textsuperscript{58} Sleeman \textit{v. Barrett}, supra.
we would expect to find it in evidence some time before the cases on the master and servant legislation in the early 19th century. This is in fact so; it was this test which was used to answer the problems raised when, as happened not uncommonly, a testator left a legacy to be shared "among all his servants" without specifying exactly who they were.

A servant, to be entitled to a legacy left to "servants" must not be subject to the orders of any other person than the testator. 59

Though pronounced in 1852, this statement of the law drew on a line of cases dating from 1685; 60 in 1806, in Chilcot v. Bromley, 61 it had been held on this principle that a servant supplied by a 'job-master' (an intermediary who performed equivalent duties to the modern employment agency) was not a 'servant' for the purposes of a legacy left by the person who had directly benefited from his services.

Further evidence of how the courts thought of the employment relationship as productive of almost complete full-time subordination of the servant to his master, even as late as the 19th century, emerges from one of the first cases to deal with the contractual effect of factory rules. In R. v. St. John, Devizes, 62 a settlement case, 63 it was necessary to decide the extent of the demands a factory owner might legitimately make on his employees. When the employee in question had been hired, he had been told that the duration of the working day was twelve hours, this being the normal operating hours of the factory.

59. C.M. Smith, Law of Master and Servant, 344.
62. (1829) 9 B. & C. 896.
63. Supra, p. 48.
Did this amount to an 'exceptive' hiring, that is one which did not give rise to a settlement because the servant was only liable to serve his master for a proportion of the whole twenty four hour day? No, said Bayley J. (the judge who, in the same year, decided *Hardy v. Ryle* 64), because, notwithstanding the reference to a twelve hour day,
in every contract of hiring, the law will imply that the party hired shall work at all reasonable hours when required. Generally speaking, the ordinary working hours in a manufactory are twelve hours per day; but it does not therefore follow that the master may not on extraordinary occasions require his servants to work at other hours; and whether he does so or not, the relation of master and servant, continues during the whole day... the stipulations that the servant should obey the rules and regulations of the factory with regard to hours of work did not give the servant any right to say that the master should not require her services at all reasonable hours. Such a stipulation does not imply that she is not to work beyond certain hours. 65

The important point here is not so much the actual decision, for the consequences of holding the hiring to be exceptive would have been to disrupt the working of the settlement laws for countless thousands of workers, but the fact that the judge felt capable of talking of the employment relationship in these terms. Other early cases support this conception of the unqualified authority enjoyed by the master over his servants; for a settlement by hiring to arise, "it was essential ... that the servant should be under the power and coercion of the master during the whole time,"66 and if a contract of employment specified that only certain hours were to be worked, or even

64. Supra, p. 111.
65. At 899.
that Sunday was to be observed as a holiday for the servant, this could be fatal to the acquisition of a settlement.\textsuperscript{67} Not until \textit{R. v. Inhabitants of Preston}\textsuperscript{68} in 1843 was the law changed. In that case, contrary to what had been accepted in \textit{R. v. St. John, Devizes},\textsuperscript{69} it was held that the effect of a written document specifying the hours of work in a factory was to incorporate these hours of work into the contract of employment, and thus to produce an exceptive hiring.

The persistence both of the idea of exclusive service and of the master's residual right to demand service at any time of day or night illustrates the difficulty which judges in the early 19th century experienced in coming to terms with the dimensions of employment relations in an industrialized society. Although they spoke the orthodoxy of contract, it is clear that many of their opinions were informed by an understanding which dated from an earlier era, when there was more to a master-servant relationship than the sale of a fixed amount of labour in exchange for wages. It was this understanding which they brought to the problems of interpretation which arose from the Master and Servant Acts and the Truck Act, and it was one which only disappeared slowly as its irrelevance to the social conditions of the times became more and more

\textsuperscript{67} Here it is important to distinguish between theory and practice. It was, of course, normal practice for servants to work only certain hours of the day and to be free on Sundays; the courts only objected when this custom was made explicit.

\textsuperscript{68} (1843) 4 Q.B. 597.

\textsuperscript{69} Supra.
C. Repeal

The resentment that the Master and Servant Acts attracted from the working classes was not only attributable to the heavy penalties imposed on employees who were in breach of their contracts of employment. It was also felt to be unjust that these penalties were imposed only on the employee and not on the employer when the latter was in breach. The Webbs comment that "It is difficult in these days, when equality of treatment before the law has become an axiom, to understand how the flagrant injustices of the old Master and Servant Acts seemed justifiable even to a middle-class Parliament." In fact, the main argument relied on by the Acts' defenders was that a remedy of damages, as opposed to criminal punishment, was effective only against a master, who could be expected to have the means to pay, and not against a servant, who might be expected to be indigent. There was also, it is true, an initial superficial equality in the scheme for the settlement of disputes between master and servant produced by the Acts; either party might

70. The test of exclusive service has virtually perished as a criterion useful for identification of a contract of employment in modern law. P.S. Atiyah, Vicarious Liability in the Law of Torts, 62, notes the few instances when it has been invoked during this century, and concludes "the absence of any provisions requiring exclusive service is in general no indication for or against a contract of service." A part-time worker may have a contract of service - see, e.g., Market Investigations Ltd. v. Minister of Social Security [1968] 3 All E.R. 732.

71. History of Trade Unionism, 249.

72. See, as one source of this very common argument, "Master and Servant," Solicitors' Journal 11 (1866-7), 327-8.
complain to a magistrate of a breach by the other. But the servant could complain only if he had not received his wages (up to a maximum of £10), or if he had been maltreated by his employer, e.g., by having been beaten or refused food. The master could complain of any "misdemeanor, miscarriage, or ill-behaviour" on the part of his servant, which gave him much wider scope. The remedies available to each side were quite different: the servant who established his complaint might hope for an order directing the master to pay wages due, or, if the complaint was of maltreatment, a free discharge from his employment by authority of the magistrate. A successful complaint by a master, however, could result in discharge of the servant, abatement of his wages, or a spell in a house of correction (and, originally, a whipping) for a period of up to three months. Execution too worked to the advantage of the master, for there was no adequate sanction available against refusal to comply with an order for the payment of wages. The general power to imprison persons not meeting an order for payment of money was held not to apply to a defaulting master in this situation. A final cause of complaint was that, even after conviction and imprisonment under the Acts, the servant was not thereby excused from his service but had, under pain of further prosecution, to return to his original engagement.

Such laws were the natural target for the political weaponry of the early trade unions, and their literature of

73. 20 Geo. II, c. 19, s. 2.
74. Supra, p. 105.
75. Wiles v. Cooper (1835) 3 Ad. & E. 524.
the time provides a constant source of information on the injustices to which their application was felt to give rise. 77

To some extent, there are signs that the popular feeling against the Acts was transmitted to the courts themselves. At least on many occasions they were prepared to set aside convictions on what appear to be extremely slender grounds. The superior courts demanded the utmost formality of the proceedings before the justices; a conviction might be set aside because of failure on the part of the justices to give a decision on whether wages were to be abated during a period of imprisonment, 78 or because, although it had been stated that the defendant was a minor, it had not also been stated that he had contracted as such. 79 It was not enough to allege absence on the part of the servant who was being prosecuted - it had also to be alleged that the absence was without lawful cause. 80

And the servant, who through a genuine mistake of fact, thought that he had been at liberty to leave his engagement might not be convicted under the Acts. 81 Mens rea was demanded of him.

Strong evidence of judicial sympathy for the workman is to be found in the Scottish case of Ferguson v. Thow, 82 where a conviction and sentence of imprisonment was set aside on the ground that the magistrate had omitted to sentence the detained worker to hard labour. One of the judges attempted to justify this ground of appeal by the argument that such an omission might actually be detrimental to the worker's interests, by

81. Rider v. Wood (1859) 2 El. & El. 333.
82. (1862) 4 Irvine 196.
allowing him to become unfit during his period of incarceration!

Full repeal of what was increasingly an unpopular law did not take place until the Employers and Workmen Act 1875, but before then there had been reform which had attempted to introduce greater equality into the scheme. By the Master and Servant Act 1867, although imprisonment of a servant remained possible if the magistrates considered his misconduct to be of an 'aggravated' character, it was in principle recognized that both master and servant should have their disputes with each other treated as civil and not (as had been the case with masters' complaints against their servants) as criminal matters. Power was given for justices to award damages in place of imposing fines, and statistics show a drop of two thirds in the number of committals to prison after the passing of the Act.\textsuperscript{83}

One of the prime movers for reform of the law had been Lord Elcho, a prominent Scottish landowner and industrialist. A select committee had sat under his chairmanship in 1865 and 1866, producing recommendations\textsuperscript{84} which were incorporated in the 1867 Act. From the reports of the evidence heard by Lord Elcho's committee we can gather information on how the old law affected employment practice.

It appears that in some industries in certain regions (particularly Scotland), the old Master and Servant Acts were practically a 'dead letter' in the 1860's, with few, if any, prosecutions ever initiated under them.\textsuperscript{85} The reason for this

\begin{thebibliography}{99}
\bibitem{83} Simon, op.cit., 186.
\bibitem{84} B.P.P. 1865 (370) Vol. VIII; 1866 (449) Vol. XIII
\bibitem{85} This was particularly true of the large engineering and shipbuilding establishments in and around Glasgow, and in the mines. See evidence of Mr. A. Campbell, (1866) QQ. 383-9; Mr. J.W. Ormiston, (1866) QQ. 2092-5; Mr. J. Dickinson, (1866) Q. 2114.
\end{thebibliography}
was the system of 'minute contracts', that is, contracts according to which the employment could be terminated by either side on the giving of a short period of notice - usually, in fact, a day rather than a minute. The popularity which this system of hiring acquired cannot be said to have been caused directly by the Master and Servants Acts. Rather, it was an extreme example of the movement away from the contracts of long duration which were found to be unsuitable for factory employment. Since 1845, for example, the contracts of colliers in the north east of England had changed from a yearly to a monthly basis, while in Sheffield, where there had been a tradition of monthly hirings, new industries introduced in the mid-19th century specified fortnightly hirings. But the initiative for change here came from the employers - usually after a strike - and it is very likely that one of the considerations which moved the workers to accept short hirings with little protest was the prospect of freedom from possible prosecutions under the Master and Servant Acts. Certainly employers used the existence of the Acts as a threat over their workforce. One witness, when asked if he knew of any attempts to contract out of the 1823 Act, replied

No, but I have seen this, which is indeed just the reverse; I have seen a list of rules hung up in a factory or mill as long as my arm, against almost every possible offence, against men's smoking or being late, and a variety of other matters, and then at the end that the master shall have the option of either firing the offender, or of

86. cf. the terms of engagement of the boiler-makers in Allen v. Flood [1898] A.C. 1.
87. Supra, p. 69.
88. Evidence of Mr. T.E. Forster (1866) QQ. 1552-3.
89. Evidence of Mr. W. Dronfield (1866) QQ. 780-92.
taking him under the 'Master and Servant Act' or both; and I have known a magistrate send a man to prison after he has been fined under the rules. 90

The debates on the bill which was to become the Master and Servant Act 1867 are distinguished by the breadth of agreement among nearly everyone who spoke on the need for reform of the old law. Naturally, of course, there were differences of opinion over the precise form such change should take. Lord Elcho's own comments are worth quoting at some length, for they not only summarise dramatically the way in which the old law operated, but also illustrate what might be described as the 'new' understanding of the employment relationship which made it possible for an arch capitalist, opposed to the power of trade unions, to be found at the head of a campaign to alter laws which, as has been seen, were very much biased in favour of the employing class.

The present state of the law was shortly this - for an alleged breach of contract, a man might be taken out of bed at night, brought by a policeman before a magistrate, and sentenced on the evidence of his employer to three months' imprisonment, with hard labour, without time being afforded him to bring formal evidence for his defence. The hard labour was a necessary part of the sentence, for sentences which did not include it had been quashed. This harsh law was really a remnant of serfdom, and dated from a time when it was not a harshness but a relaxation, since it enabled men to enter into contracts respecting their labour, which before they had been unable to do. But what in the eighteenth century formed a relaxation might constitute a galling and grievous restriction in the present day: it was an unjust, harsh, unequal and unnecessary law. It was most desirable that the breach of contract should be made the subject of a civil action. In Scotland there were 35,000 miners, and 25,000 did not serve under this law. 91

90. Evidence of Mr. W.P. Roberts (1866) Q. 2234. See too evidence of Mr. A. Campbell (1866) Q. 410.
91. (1867) 187 H.C. Deb., cols.1603-12.
As a fervent believer in free trade, Lord Elcho, along with many others of his class, felt the interference which the Master and Servant Acts made in the free bargaining between employer and individual employee to be anachronistic and wrong in principle. The philosophy which underlay the provisions of the Acts was one which, as has been shown above, could be traced back to the first Statute of Labourers in 1351. The 1823 Act itself has been described as the "tail-end of the penal labour laws which were essential to the early growth of capitalism, but which became in due course a hindrance to its further development."92 Its continued existence in the middle of the 19th century was an embarrassment to the political philosophy of the day, just as the wage fixing provisions derived from the same medieval source had been in the previous century. The scheme which was in operation in the first half of the 19th century had in fact been introduced at a time when English society was still at a pre-industrial stage of development. When in 1875 its last vestiges were removed by legislation, an important point in the development of the modern employment relationship was achieved; from that date on, to quote the Webbs, "master and servant became, as employer and employee, two equal parties to a civil contract."93

92. Simon, op.cit., 198.
93. History of Trade Unionism, 291.
CHAPTER 5

THE CONTRACT OF SERVICE AND THE EMPLOYER'S LIABILITIES IN THE EVENT OF ACCIDENTAL INJURY OR DISEASE
A. The Law before Priestley v. Fowler

The question of who bears the cost of accidents at work, and of incapacity as a result of illness, can be asked of any society, no matter what its system of organizing labour. For obvious reasons, however, its importance is greatly magnified with the rise of a factory-based economy, where the opportunities for inflicting and receiving injuries are much increased. The basic question is whether the employer pays for the loss of earnings (and other disabilities) suffered by the incapacitated worker, or whether the loss lies where it falls, on the worker himself.\(^1\) In the early and middle 19th century the answer given by the courts, indirectly but quite clearly, was in favour of the latter alternative. The doctrine of common employment, which had the effect of severely limiting the injured worker's rights of action, was the principal manifestation of their views on the subject. It did not make it impossible for the employee to sue his employer in respect of injuries received through the carelessness of a fellow servant - the most likely cause of an accident at work - but, by holding him to have consented to running the risk of injuries arising in this way, it deprived him of his best chance of obtaining compensation. The doctrine meant that he was unable to sue his employer on the basis of respondeat superior and, unless he could establish personal negligence on the part of the employer (which had to be of a narrowly defined type), he was left with only an empty claim against the fellow servant whose negligence had caused his injuries.

\(^1\) And, subsequently, of course, on to the community which undertakes to look after him.
The effect of common employment was to restrict the tortious liability of an employer vis-à-vis his employees. There is no authority on this heading of liability earlier than Priestley v. Fowler in 1837, a case which determined the extent of liability imposed on the employer for his own negligent acts. Priestley v. Fowler is discussed in detail below, but first it is intended to examine what evidence there is of the earlier law on the master's liability and to consider reasons for the absence of any clear statement of this.

To consider possible reasons for the absence of statements of the law first, there are two points to make. It was only at the beginning of the 19th century that negligence began to be widely accepted as a basis of liability in tort; it had been important in tort (or, to be more accurate, in the 'action on the case') before then, but only in a narrow range of situations. This argument is developed more fully below. Secondly, it is important to remember that it was not until 1846 that a statutory exception was made to the rule in Baker v. Bolton after the toll exacted by railway and industrial accidents had produced intolerable distress among dependants. It is surely not irrelevant that the first and many of the subsequent claims brought, with varying success, on the basis of the employer's

2. 3 M. & W. 1.
3. See pp. 139 ff., infra.
4. i.e. by the reform introduced by Lord Campbell's Act (9 & 10 Vict., c. 93), which gave to personal representatives of a deceased the right to bring an action against the person who had caused the death, in circumstances where the deceased would himself have had a right of action.
5. (1808) 1 Camp. 493.
vicarious liability for the negligence of his employees were initiated by dependants of an employee who had suffered fatal injuries. Before 1846, only the employee himself could even entertain the notion of suing his employer, and the number of occasions when this would happen might be limited by two factors. As has already been said, the absolute level of industrial accidents was likely to be much lower, and the accidents themselves less harmful, in a society where heavy machinery was relatively unknown. Thus the chances of a workman suffering injury in the first place were much fewer than they were later. Secondly, in pre-industrial society there was a good chance that a partially disabled worker could be accommodated within the units of economic production. The household or the farm is inherently more flexible in its use of labour than the factory, with its specialised demands. Moreover, the assumption of responsibility by the master for injured as well as sick servants would seem to be appropriate, given the characteristics of the Gemeinschaft (already described)\(^7\) of the master-servant relationship in the pre-industrial era.

There is some evidence, admittedly slight, in support of this contention that the master would be responsible for looking after disabled servants. Dalton states:

if a servant, retained for a year, happens within the time of his service to fall sick, or to be hurt or lamed, or otherwise to become non potens in corpore by the act of God, or in doing his master's business, yet the master must not therefore put such servant away, nor abate any part of his wages for such time. \(^8\)

\(^7\) Supra, p. 62.
\(^8\) M. Dalton, Justice of the Peace, 141. This repeats a similar statement in the first edition in 1635. cf. R. Burn, Justice of the Peace (1764 ed.), 70: "A servant that lies thus under the visitation of God, which befalls him not thro' his own default, is and must be taken to be all the while in the service of his master."
This is certainly suggestive of an extensive duty falling on the master, and one which goes beyond a responsibility to look after a sick servant. To be "hurt or lamed" is proposed as an alternative to falling sick, just as "in doing his master's business" is seen as an alternative source of disablement to the "act of God", which presumably is the description given to the onset of disease. If the master's duties did extend to the care of all such servants it would be no more than the corollary to the extensive powers of discipline he enjoyed over them while they were able to work, and it would also fit well with the early judicial pronouncements made on the topic of the master's obligations in respect of medical assistance afforded to his servants. The cases on this subject are the next to be examined in this preliminary investigation. 9

(1) The Duty to Provide Medical Assistance

Towards the end of the 18th and the beginning of the 19th centuries, there are a number of cases dealing with the importance of sickness in regard to certain aspects of the Poor Law. Two main issues emerge: firstly, whether the intervention of illness broke the year of continuous service necessary to acquire a settlement in a parish, and, secondly, whether the master or the parish authority were bound to pay for unsolicited medical treatment given to a sick servant. 10

The first question was settled quickly and decisively: sickness did not prevent a settlement - "if this exception

9. Note that the Webbs (Industrial Democracy, 366) suggest the reason for the late development of the law of employer's liability to be that, until 1837, no one had thought of the "insurrectionary" step of suing his employer.

10. Clearly, if the master had engaged a doctor to cure his servant, he was liable on account of the contract he had made.
were to be allowed, it might prevent all the settlements in the kingdom.\textsuperscript{11} To begin with, the answer to the second question was that the master was bound to pay. Lord Mansfield treated the matter as decided by a "condition incident to humanity ... implied in all contracts,"\textsuperscript{12} and this view was upheld on a number of subsequent occasions.\textsuperscript{13} But, in time, it was questioned and even rejected. In Newby v. Wiltshire,\textsuperscript{14} a farmer's boy had broken his leg in falling from a wagon. The local parish overseer took charge of the medical treatment (which involved amputation) and sought to recover the expenses incurred by the parish from the master. Lord Mansfield, while deprecating the latter's lack of humanity, held that "the parish is bound to take care of accidents," and gave judgment for the defendant. This judgment was cited in the later case of Scarman v. Castell,\textsuperscript{15} where a master was sued by an apothecary for expenses incurred in looking after a sick servant. Lord Kenyon C.J. held that the master was bound to pay, and distinguished Newby v. Wiltshire,\textsuperscript{16} which had been cited in argument by the defendant, from the present case on the ground that the servant in that case had been a servant in husbandry. From the scanty information given in the report, and by implication, the servant in Scarman v. Castell must be taken to have been employed in his master's household. A more convincing reason for distinguishing Newby v. Wiltshire would

\begin{itemize}
  \item \textsuperscript{11} R. v. Inhabitants of Islin (1721) 1 Strange 423, per Pratt C.J. at 424. See too R. v. Inhabitants of Sutton (1794) 5 T.R. 657.
  \item \textsuperscript{12} R. v. Inhabitants of Christchurch (1760) Burr S.C. 494.
  \item \textsuperscript{13} e.g. R. v. Inhabitants of Wintersett (1783) Cald. 298; Scarman v. Castell (1795) 1 Esp. 270.
  \item \textsuperscript{14} (1784) 2 Esp. 739.
  \item \textsuperscript{15} Supra.
  \item \textsuperscript{16} Supra.
\end{itemize}
have been the injustice of allowing Castell to escape paying for services he had himself ordered, but a distinction drawn by reference to the kind of work done by the servant passed into the law. It was upheld in Simmons v. Wilmott,\(^{17}\) where Lord Eldon accepted as settled law that the master was liable in respect of treatment given to a sick menial servant, provided that the illness had not resulted from the servant's own misconduct or debauchery. He also said that a person who takes care of a sick pauper, the proper responsibility of the parish, and spends money on medical treatment for him, could recover his expenses from the parish. In Wennall v. Adney,\(^{18}\) however, there was a definite rejection of what Lord Kenyon had said in Scarman v. Castell,\(^{19}\) and, for a variety of reasons,\(^{20}\) the strongest of which was probably the desire to enforce what were seen as parish responsibilities, the liability of a master to pay for surgical attendance upon a sick servant was denied by the court. Subsequently, even the master's responsibility in respect of a menial servant was doubted.\(^{21}\) In Cooper v. Phillips,\(^{22}\) a master was held bound to pay a doctor's bill, but no authorities were cited in support of the judgment, and a contemporary account of the law in force concludes a survey of these cases with the comment that the "better opinion would

17. (1800) 3 Esp. 91.
18. (1807) 3 B. & P. 247.
19. Supra.
20. Heath J. thought that it would be more to the servant's advantage to claim against the parish. Rook J. based his decision on the ground that there was no implied term to provide medicines in the contract, and Chambre J. thought the same.
21. Sellen v. Norman (1829) 4 C. & P. 80. Gazelee J. was, however, quite adamant that no such responsibility could arise towards servants who were not menial.
22. (1831) 4 C. & P. 581.
seem to be that a master is not bound to find his servant in medicines. 23 Apprentices, however, were held to be in a different position from servants, the courts recognizing that the master stood more or less in loco parentis.

B. Priestley v. Fowler

It was against the background of the above cases that Priestley v. Fowler 25 was decided in 1837. It is acknowledged to play a central role in the judicial approach towards the problem of allocating legal responsibility for the cost of industrial accidents, and it is, indeed, usually taken as the starting point in any discussion of employer's liability. In Kenny's well-known aphorism, "Lord Abinger [who delivered the judgment in Priestley v. Fowler] planted the doctrine of common employment, Baron Alderson [in Hutchinson v. York, Newcastle and Berwick Railway Co. 26] watered it and the Devil gave it increase." 27 As has been mentioned above, it was the doctrine of common employment which constituted the main stumbling block in the path of the injured employee (or, if deceased, his personal representative, after 1846) seeking compensation. Thus it was to mitigate the harshness of the common law rule that legislation was introduced, first in 1880 and, more successfully, in 1897. 28

25. 3 M. & W. 1.
26. (1850) 5 Ex. 343.

Quite clearly, the case which is understood to have initiated the doctrine of common employment deserves careful examination, but there is a striking lack of uniformity in the conclusions drawn by those who have sought to do this. No consensus of what the case was about and what were the grounds for decision emerges. For example, Holdsworth discusses the case under the heading 'tort' and states that Lord Abinger "introduced the doctrine of common employment." Lord Atkin, in the course of an exhaustive examination of the nature and origins of the doctrine, concludes that "it is perhaps difficult to extract from this judgement any principle other than the negation of any implied contract of the master to be liable for the safety of his servant in respect of the matters complained of in the action." Similarly, Roscoe Pound has said that the case was "brought and argued on a contract theory ... a theory of what was and what was not implied in a contract of employment." But a more recent commentator treats the decision as relevant only to the fixing of the boundaries of the tort of negligence, and states that the fact that the plaintiff was contractually bound to the defendant as a servant was "immaterial... The court would have laid down the same law if the action had been brought against the owner of a carriage by a friend who had been invited to take a ride." Some

authorities have described Priestley v. Fowler as the 'fons et origo' of common employment,33 while others have reserved the title for a subsequent case.34 Thus the first question to ask is what exactly was decided in the case? From there we can go on to ask what information the decision gives us about the state of the obligations arising out of the master-servant relationship in 1837.

(1) Facts and Pleadings

The plaintiff was a butcher's boy, who received the injuries in respect of which he was suing when a cart he was driving overturned because it had been overloaded. He was at first successful, suing his employer at Assizes and obtaining a jury verdict awarding him £100 damages, it being held that the defendant had known of the dangerous state of the cart, though the actual loading of it had been done by another employee of his. These proceedings form the background to the reported case which was heard in the Court of Exchequer, and where the defendant was successful in having upheld a motion to arrest judgment on the original verdict,35 thus avoiding the liability with which he had been burdened at first instance. The judgment of the Court of Exchequer was based on the legal inadequacy of the plaintiff's pleas.

Looking first at the declaration made by the plaintiff,

33. Winfield on Tort, 144.
35. He was thus not 'nonsuited' as A. Ruegg states in A Century of Law Reform, 269.
that part of his claim which tells us precisely the grounds on which he was relying, the first point of importance to emerge is that the claim was concerned with the employer's personal liability, and not with the vicarious responsibility he carried for the torts of his employees by the operation of the maxim \textit{qui facit per alienum facit per se}. The allegation was that he, the defendant, had a duty

"to use proper care that the van should be in a proper state of repair, and should not be overloaded" and that he "did not use proper care that the van should not be overloaded...in consequence of the neglect of which duties [the plaintiff was injured]."

There is no allegation of the defendant being responsible for the negligence of the fellow servant to the plaintiff, who had actually loaded the cart. Since it is the vicarious liability of the employer that the doctrine of common employment limits, and not the liability for his own personal negligence discussed here, it is hard to see what connection this case can have with that doctrine, no matter how interpreted by subsequent judges.

The second point of importance is that the plaintiff's cause of action had nothing to do with the contract of employment which existed between him and the defendant. The declaration provides accurate information as to the legal basis of the plaintiff's cause of action, and it is quite clear that the writ on which he pinned his hopes of success was that of trespass on the case, or 'case' for short. It was not

37. (1837) 3 M. & W. 1.
38. cf. Ingman, loc.cit.
assumpsit, \(^{40}\) for no allegation was made that the defendant had 'undertaken' or 'promised' \(^{41}\) that the cart would be in a safe condition. Counsel for the defendant fastened on this point, arguing that

the cause of action, supposing that any exists, arises out of an implied contract on the part of the master so to load the van as that the plaintiff should be carried safely. \(^{42}\)

He denied that there could be any liability of the master of such implied term in the contract. Since, in fact, Lord Abinger upheld the objection made as to the legal adequacy of the plaintiff's pleas, it is certainly possible that he agreed with this criticism, though, as will be shown below, the considerations which weighed most heavily in the shaping of his judgment were not derived from legal principle.

Why did Priestley not sue in assumpsit, relying on the implied term argument? The answer to this appears to involve consideration of two factors: the unsuitability at the time of the contract of employment as a vehicle for carrying such a term, and the attractiveness, at the same time, of a claim in case. One argument which can quickly be disposed of is that the choice was dictated by the desire of the plaintiff to avoid adjudication of the issue by magistrates under the jurisdiction they enjoyed by virtue of the Master and Servant Acts. \(^{43}\) This only applied when the grievance of the servant was in respect of

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\(^{40}\) Historically, of course, assumpsit was only one variant of an action on the case for trespass, but the forms of writ for trespass on the case and trespass on the case in assumpsit were substantially different. For examples of both, see F.W. Maitland, *Forms of Action at Common Law*, 90.


\(^{42}\) 3 M. & W. 1.

\(^{43}\) A suggestion made by E. Jenks, *A Short History of English Law*, 325.
unpaid wages or maltreatment; there is no indication that it would have been appropriate for a claim of consequential loss.

Taking the supposed inadequacy of assumpsit first, it is obvious that no reliance can be placed on the accuracy or otherwise of the suggestion made by counsel for the defendant that the claim should properly have been brought under this heading. He, after all, was not arguing with the intention of giving legal instruction, and, by convincing the court that the plaintiff had chosen the wrong line of legal argument, he simply hoped to destroy the latter's case. Other evidence, however, lends support to his forensic claims. For example, since the parties had clearly reached no express agreement on the nature of the employer's liability in the situation that had arisen, it would have been essential to show the presence of an implied term by which the employer undertook that the cart would be in a safe condition. At this time, the device of implication was not popular with the courts. Of course, it might be maintained that such a term should be implied as a corollary to the implied undertaking on the part of the employee that he would do his job skilfully. But though there was a principle that "it is the duty of every artificer to exercise

44. By the 1747 Act (20 Geo. II, c. 19) s.1, magistrates were given jurisdiction in "Complaints, Differences and Disputes" between master and servant, with power to award wages up to £10. By s.2 they had jurisdiction to hear complaints of maltreatment of the servant by the master and, if they found this was established, they could dismiss the servant from the service of his master.

In the 1823 Act (4 Geo. IV, c. 34) s.4, the earlier law was amended so as to allow servants to claim wages from agents of their master when the master himself was not at hand. Still the maximum that could be recovered was £10. See supra, p. 103 ff.

his art rightly and truly as he ought" that led the way to a liability in case, not in **assumpsit** and, in any event, applied only to the skilled workman (artificer) who was engaged in a common calling, such as a blacksmith.

In general, the underdeveloped state of the law in regard to implied terms in contract meant that, in circumstances where the modern lawyer would naturally look for an implied term, his early 19th century counterpart would sue on some other basis. For example, in 1828, a servant alleged that he was entitled to a suit of clothes from his master, which the latter had kept when he, the servant, had been wrongfully dismissed. The circumstances were that the terms of his engagement were that he was to receive £30 a year and the suit of clothes in question. Faced with such facts today, a lawyer would first think of implied contract, arguing that the employer was contractually bound to hand over the clothes. In fact, the plaintiff brought an action in trover, only to be nonsuited, but made no reference to any implied undertakings. It is going too far to assert, as one writer has done, that it is a 'misnomer' to speak of a contract between master and servant in the early 19th century, because of the disparity in bargaining strength between the two parties. Judgments of the period show an understanding of the general applicability of contract law principles, but the content of these principles was very different from what it is today.

46. Fitzherbert N.B., 94D.
While contract offered very doubtful prospects of success, for the reasons given above, the alternative of suing in case was, it is submitted, particularly attractive in 1837. This was so for a number of reasons. Four years earlier, in Williams v. Holland,\(^50\) it had been established that a plaintiff who brought an action in case when technically he should have sued in trespass would not be nonsuited. Thus plaintiffs were no longer forced into making a choice which, by virtue of the complex and apparently arbitrary differences between trespass and case, was inevitably something of a gamble.\(^51\) More importantly, however, the beginning of the 19th century was a period when the area of the law dealing with what we now understand as tortious conduct was in a state of flux. Negligence, which in earlier days had been relevant only as a means of establishing 'tortious' liability in a restricted range of situations, was in the process of being recognized as giving rise itself to an independent cause of action.\(^52\) This was the formative period of the modern tort of negligence, and it was a time when the boundaries of this new cause of action were still uncertain. In such circumstances, it would not be surprising if an enterprising counsel envisaged the success of action founded on negligence, relying on the novel, but by no means

50. (1833) 10 Bing. 112.
51. If injury was direct, trespass was appropriate. If indirect, case. Thus a plaintiff who alleged the wrong had been committed by a servant of the defendant would sue in case, but might be met and defeated by evidence that the master had himself committed the act. And vice versa. See S.F.C. Milsom, Historical Foundations of the Common Law, 349.
52. "To harvest the rich crop of running-down actions, the judges were forced to recognise negligence as a distinct species of Case." C.H. Fifoot, Judge and Jurist in the Reign of Victoria, 32. See too P.H. Winfield, "The History of Negligence in the Law of Torts," (1926) 42 L.Q.R. 184, 194.
unreasonable, liability which is at the bottom of Priestley v. Fowler. Furthermore, he might have been encouraged in his optimism by what he knew of recent judicial developments. In Govett v. Radnidge\(^5\) in 1802, Lord Ellenborough had gone against earlier authority to hold that a plaintiff, who had alleged negligence on the part of a carrier resulting in damage to the goods he had consigned to him, might be allowed to sue on the basis of either a breach of an implied term or on 'tortious negligence'. This judgment, which has been described as having "foreshadowed the development of a century",\(^5\) had subsequently, it is true, been disapproved,\(^5\) but, at the time when Priestley v. Fowler was being argued, the possibility of success in an action in case where the parties were already joined by contract was still open.\(^5\)

The combination of these various factors mentioned above provides, it is submitted, an explanation of the choice made by Priestley's counsel to pursue his claim in tort rather than contract.

(2) The Judgment

The gist of the defendant's argument was that the only possible cause of action was not case, but assumpsit, and that the plaintiff's declaration did not disclose enough to

\(^{53.}\) (1802) 3 East 62.
\(^{54.}\) Fifoot, History and Sources of the Common Law, 165.
\(^{56.}\) In Pozzi v. Shipton (1838) 8 Ad. & E. 963, Patterson J. had said, at 975-6, "we purposely refrain from giving any opinion, whether the doctrine in Govett v. Radnidge or that in Powell v. Layton be the true doctrine." The controversy was finally resolved in favour of Govett v. Radnidge - see Marshall v. York, Newcastle and Berwick Railway Co. (1851) 11 C.B. 655.
substantiate the latter. Lord Abinger showed no sign of considering an argument based on contract in his judgment, though from interjections he made earlier it appears that he at least saw that the duty owed by a common carrier to his passenger (i.e. to the effect that he would be safely carried) did depend on implied contract. But in his judgment he was only concerned with what, to use modern terminology, could be described as the 'duty of care', breach of which was alleged by the plaintiff. He denied the existence of any such duty. His reasoning, however, owes little to legal principle - it is essentially one example of the familiar 'floodgates of litigation approach',57 and it is based on what he saw as the intolerable consequences of allowing such a claim to succeed. However, Lord Abinger introduces a potentially confusing gloss on the arguments advanced by counsel in support (and denial) of the existence of an employer's personal duty of care. He describes the consequences of holding an employer liable for all the negligent acts of everyone he employs, both as servants and as independent contractors, as inconvenient and absurd. However,

57. cf. the explanation given by Brett L.J. of the decision in Priestley v. Fowler in his evidence to the select committee on employer's liability in 1877: "Lord Abinger, who had been one of the greatest advocates ever known at the bar, had an advocate's talent, which mainly consists in the invention of analogies, and there never was a more perfect master of that art than Lord Abinger, and he took it with him to the bench; and I think it may be suggested that the law, as to the non-liability of masters with regard to fellow-servants, arose principally from the ingenuity of Lord Abinger in suggesting analogies in the case of Priestley and Fowler." B.P.P. 1877 (285) Vol. X, Q. 1919.

E. Foss, A Biographical Dictionary of the Judges of England, 591, says of Lord Abinger, "He had too much the habit of deciding which of the two parties in a cause was in the right, and arguing in his favour."
here he may be criticised on two counts. He is misrepresenting the law, for there was at that time and still is, in general, no vicarious liability for the acts of independent contractors as opposed to servants. His mistake here may be overlooked, since Quarmann v. Burnett\textsuperscript{58} had not yet been decided and the law on this point was unclear. But, more seriously, his judgment conflates the two conceptually distinct headings of liability. Fowler was being sued for breach of a personal duty of care, but Lord Abinger here introduces irrelevancies drawn from a consideration of the vicarious liability of a master. On the facts of the case, the wrong happened to be attributable to the fault of a fellow-servant, but the plaintiff was not relying on the maxim \textit{respondeat superior} but was alleging actual negligence on the part of his employer. Lord Abinger's failure to separate these two types of liability in itself renders his \textit{dicta} of very dubious value, but there are even more inconsistencies. Lord Abinger's judgment proceeds on the basis that the master did not know of the dangerous state of the cart, and concludes that the servant was in as good, and probably a better, position to know whether it was safe. The argument which had been successful at Assizes, to the effect that the defendant did know of the cart's shortcomings, appears to have been entirely overlooked by Lord Abinger.\textsuperscript{59} Against this background, the learned judge's comment that "the servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in

\begin{footnotes}
\item[58] (1840) 6 M. & W. 499.
\item[59] The report of the case in (1838) L.J. 7 Ex. 42 confirms this, since it is there reported that Lord Abinger envisaged a possible right of action arising out of the ordering of a servant into a situation known by the master to be potentially harmful to his health (i.e. placing him in an infected bedroom).
\end{footnotes}
which he reasonably apprehends injury to himself"⁶⁰ is no more than a gratuitous remark thrown in to buttress a judgment short on reasoned principle; it certainly would be quite wrong to interpret it either as the expression of the ratio of the case, or as one of the main strands in Lord Abinger's verdict.⁶¹

From this distance in time it does little good to castigate the decision in Priestley v. Fowler as 'corrupt' and motivated by 'self-interest'.⁶² It is impossible to know whether Lord Abinger was consciously engaged in class warfare or merely expounding, in a rather slapdash manner, the law as he saw it. Leaving aside the attribution of moral blame, it is important to appreciate that the case can stand on its own, in the context of the law of the time. Counsel for the plaintiff took a calculated risk on being able to exploit the opportunities provided by the expanding law of torts, but lost before a basically conservative⁶³ bench. Lord Abinger was subsequently to deny, in Winterbottom v. Wright,⁶⁴ the existence of another duty of care. The circumstances were quite different but the line of reasoning was the same. A coachman, injured when the

⁶⁰. 3 M. & W. at 6.
⁶¹. In the same vein, Lord Abinger also produces a specious argument that denial of a right of action on these facts will, in the long run, be beneficial to the interests of the servant, since it will encourage him to take care in carrying out his job. This presumes that people will be happy to accept the pain and suffering attendant upon an accident, if only they are sure that they will receive financial compensation.
⁶². Thus, Ingman, loc.cit.
⁶³. The Dictionary of National Biography, Vol. XVII, 890, describes Lord Abinger as one who had "never been a very ardent reformer", and records that he opposed the Reform Bill.
⁶⁴. (1842) 10 M. & W. 109. A further difference is that in this case the plaintiff attempted to sue on the basis of the contract for the supply of the coach between the manufacturer and his employer. See E.H. Levi, Introduction to Legal Reasoning, 10-14.
coach crashed due to a defect in its manufacture, was held unable to sue the manufacturer who had supplied the vehicle to his employer, because, in the words of Lord Abinger, of the "absurd and outrageous consequences, to which I can see no limit" would such an action be generally available. Although in later years judges were to invest Priestley v. Fowler with many other qualities, its real importance is as an indication of the unsettled nature of the law of torts at the time when it was decided.

(3) Subsequent Developments

(i) Farwell's Case

This is not the appropriate place to discuss the intricacies of the development of employer's liability in the course of the 19th century; strictly this is relevant to the present study only in so far as it bears upon the contents of the contract of service, and the way in which the contract was handled as a conceptual tool by the courts. Nevertheless, some clarification is first of all necessary. Priestley v. Fowler was not, to begin with, seen as having any bearing upon vicarious liability. The linking of the case with that concept did not take place until 1850. This is easy to show: treatises on the law of vicarious liability published in the intervening years make no reference to it. For example, Saunder's textbook on pleading and evidence, the second edition of which went to print just too early to take account of Hutchinson v. York, Newcastle and Berwick Railway Co., gives an exhaustive account of

65. At 114.
67. (1850) 5 Ex. 343. Judgment in the case was delivered at the end of May. The preface to Saunder's textbook bears the date 1st January 1851.
exceptions and qualifications to the rule of respondeat superior, but makes no mention of the case. Similarly, an earlier account of the state of the law regulating the master's liability for the torts of his servants ignores Priestley v. Fowler.68 The case was, however, cited and relied on by Shaw C.J. in the American case of Farwell v. Boston & Worcester Railroad Corporation69 in 1842 to build a doctrine of startling originality, which provides an excellent example of the judicial tendency at this time to reduce as much as possible of the law with which they were dealing to the terms of contract.70

In Farwell's Case the plaintiff was injured through the negligent act of a fellow worker. He unsuccessfully sued the common employer for damages. Having said that, the similarity with Priestley v. Fowler ends, for in this case the plaintiff sued on the ground of breach of the contract of employment by the employer. This procedural difference provides the key to an understanding of the case, though Shaw C.J. relied on Priestley v. Fowler (which, it has been shown, had no connection with contract) as one of the main supports71 for a theory to the effect that there should be no implied term in the contract of employment by which the employer undertook to indemnify the employee for injuries caused by the negligence of a fellow worker. In his view, "the claim ... is placed, and must be maintained, if maintained at all, on the ground of contract,"72 because of the principle of respondeat superior

69. The judgment of Shaw C.J. is printed in (1856) 3 MacQueen, 316-22.
71. He also cited an American authority, Murray v. South Carolina Railroad Co. (1841) 1 McMullen 305.
72. 3 MacQueen 317.
does not apply to the case of a servant bringing his action against his own employer to recover damages for an injury arising in the course of that employment, where all such risks and perils as the employer and the servant respectively intend to assume and bear may be regulated by the express or implied contract between them, and which, in contemplation of law, must be presumed to be thus regulated. 73

The invocation of contract, and the exclusion of tort, was the important innovation in Farwell's Case. It provided the stepping stone to the explanation of the doctrine of common employment in terms of a contractual assumption of risk by the employee. Thus Shaw C.J. went on to say,

he who engages in the employment of another for the performance of specified duties and services for compensation takes upon himself the natural risks and perils incident to the performance of such services, and in legal presumption the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectively guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others. 74

When this judgment is compared with that in Priestley v. Fowler, it will be noticed that in the earlier case the 'consent' of the employee to run the risk of another's negligence was merely one, not very prominent, reason given by Lord Abinger for the rejection of the plaintiff's claim. By contrast, in Farwell's Case, this consent is elevated to become a vital link in a theory which saw the incidents of the relationship between employer and employee as the product of an extended bargain.

Another feature of Farwell's Case is that there is no discussion of the existence of any personal duty of care on the part of the

73. Ibid.
74. 317-8. Emphases added.
employer owed to his employee: the choice is taken as lying between contract on the one hand and liability through the operation of respondeat superior on the other. In reading Shaw C.J.'s judgment, it is worth bearing in mind the comment later made by Lord Atkin that it was based on what he termed a fallacious proposition from first to last - namely, that the doctrine of respondeat superior only applies to strangers, that it has no application to the servants of the employer; and that a cause of action against the employer can only be based on contract. 75

(ii) Hutchinson's Case

In the years following the decision in Priestley v. Fowler, 76 there were no immediate signs that the British courts were adopting a contractual analysis of the nature of the employer's duty, as propounded in Farwell's Case. The Scottish courts in particular had no truck with the doctrine of common employment, which was "a principle as distasteful as it was alien to Scottish jurisprudence," 77 and which was accepted by them only after the incontrovertible authority of a House of Lords decision had ordained it. Before Bartonshill Coal Co. v. Reid, 78 the Scottish courts had established the existence of a stringent duty of care on the employer to look after the safety of his employees, and this owed nothing to contract. The actions brought by employees alleging breach of this duty were delictual (tortious) in character, and were decided on the basis of whether culpable negligence could be proved on the part of employees.

76. Supra.
78. (1856) 3 MacQueen 260. The process by which this doctrine was inflicted on Scots law is described by A.D. Gibb, Law from Over the Border, 99-100.
for which it was accepted their employer was responsible.\textsuperscript{79}

Only after unsuccessful attempts to introduce the ratio of the decision in *Hutchinson v. York, Newcastle and Berwick Railway Co.*\textsuperscript{80} into Scots law, did the judges begin to frame their reasoning in terms of contractual obligations.\textsuperscript{81}

In England, the court in *Hutchinson*, though sitting some eight years after the decision in *Farwell*, did not have knowledge of Shaw C.J.'s opinions when they delivered their judgment. Their attention was focussed on *Priestley v. Fowler*, which was described by Alderson B. as "indistinguishable in principle" from the facts before them. Of course, it was distinguishable, having, as shown above, been brought on the basis of an allegation of breach of the employer's personal duty of care towards his employee, while the later case was concerned with vicarious liability of the employer through the doctrine of *respondeat superior*. A worker was killed by an accident at work caused by the negligence of a fellow worker, but his widow's claim against his employer failed, because, it was said, the risk of such injury was one which he

\textsuperscript{79.} See, e.g., *Sword v. Cameron* (1839) 1 D. 493, remarkable for the precocious statement by the Lord Ordinary (upheld by the Court of Session) that "the master of a work is not entitled to conduct it in such a way that his people suffer unnecessarily in limb or life" (at 496).

In *Gray v. Brassey* (1852) 15 F. 135, 141, Lord Ivory stated, obiter, "there is nothing inherent in the contract of service - of locatio operarum - which implies any warranty further than this - that the master must use every precaution for the safety of his servants, that he would for the safety of third parties."

\textsuperscript{80.} (1850) 5 Ex. 343.

must be taken to have agreed to run when he entered the defendant's service... The principle is, that a servant, when he engages to serve a master, undertakes, as between him and his master, to run all the ordinary risks of the service, and this includes the risk of negligence on the part of a fellow-servant, whenever he is acting in discharge of his duty as servant of him who is the common master of both. 82

This is a conclusion to the same effect as that reached in Farwell, but it is reached by different means. There is no denial, for example, of the tortious character of the employer's potential liability. Perhaps one reason for this is that the action was brought not at common law, but under the recently introduced provisions of Lord Campbell's Act, 83 which gave a right of action to a personal representative. Strictly, this should not have been relevant to the main question, for the 1846 Act only permitted the representatives a right of action if one had already accrued in the deceased; 84 thus the nature and extent of the original claim were still crucial. But the intervention of statute perhaps obscured the issue, so prominent in the judgment of Shaw C.J., of whether respondeat superior operated within the confines of the employment relationship. At any rate, no opinion was expressed on this point. Secondly, although the consent of the employee was the decisive factor in the court's decision, the consent to run the risk of injury through the negligence of a fellow servant was not presented as the outcome of a distinct bargaining process, as was suggested in the American case. There was no argument, for instance, that the remuneration received by the employee for his work contained an extra element to compensate him for running this risk.

82. 349.
83. Supra, p. 130.
Instead, it simply and flatly stated that the worker "must be taken to have agreed to run" the risk. The underlying idea is certainly contractual, but this idea is not developed to any degree in the judgment.

C. Developed Theories of Employer's Liability

The principle by which the 'consent' of an employee excused the employer from what would otherwise have been his vicarious liability was established in Hutchinson's Case, and it is thus from 1851, the year of its decision, that the doctrine of common employment can be said to date. The doctrine was first greeted with enthusiasm by the judges whose ingenuity had created it. Lord Cockburn said of the case where he (mistakenly) thought the principle had been laid down, "there never was a more useful decision, or one of greater practical and social importance in the whole history of the law." However, later in the century an awareness spread among judges of the terrible hardship caused by the operation of the doctrine, and a process was set in train by which its effect was minimised. In the current century this narrowing down of common employment was continued, so that it was whittled away by "a whole battery of technical devices" before receiving the final coup de grâce from statute in 1948.

85. (1851) 5 Ex. 351.
87. Vose v. Lancashire and Yorkshire Railway Co. (1858) 27 L.J. Ex. 249, 252. He gave this description to Priestley v. Fowler.
88. J. Stone, Legal Systems and Lawyers' Reasoning, 306. As examples of 20th century devices, he cites (a) the introduction of the concept of non-delegable duty as to safe systems of work (Wilson & Clyde Coal Co. Ltd. v. English [1938] A.C. 57) and (b) the restriction of the class of 'fellow-servants' (Radcliffe v. Ribble Motor Services Ltd. [1939] A.C. 215).
89. Law Reform (Personal Injuries) Act 1948.
Among the more important reforms to take place in the 19th century were the restriction of the defence of *volenti non fit injuria*, making it much harder for the employer to show that the employee had consented to the risk of injury and not merely acquiesced in it.  

There was also the creation of new actions based on breach of statutory duty, in which common employment was held not to apply, and breach of the employer's personal duties of care, which together gave the injured employee a wider range of effective remedies. Legislation helped too, by creating liabilities incumbent on the employer independent of the common law, in the form of the Employer's Liability Act 1880 and the Workmen's Compensation Act 1897. In all these developments, bringing improved remedies to injured workmen, the contract of employment was of little importance, for these changes in the law either made it easier for the employee to sue his employer in tort, or through a right of action directly derived from statute. Nevertheless, distinctly contractual language continued to be used by the courts in their discussions of liability, and it is now intended to see what form these discussions took, both in relation to liability based on breach of a personal duty of care, and in relation to that arising through the principle of *respondeat superior*.

1. **Employer's Personal Duties**

In the comparatively recent case of *Matthews v. Kuwait Bechel Corp.*, it was necessary for procedural reasons to know whether the personal duties in respect of safety, which the

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employer owes to his employee, were such that breach of them would ground an action in contract as well as one in tort. Sellers L.J. was sure that this was so, and in reaching this conclusion he drew on earlier dicta of the House of Lords.94 But, though this must now be taken as stating the modern law, was it so in the 19th century?

The important case is Riley v. Baxendale,95 which, it is submitted, does not easily slip into the limbo of lost causes, as Sellers L.J. thought it ought.96 The plaintiff was the administratrix of a railway porter who had died in an accident caused, it is clear to modern eyes, by the failure of the employer to provide a safe system of work. No doubt influenced by the unwillingness previously shown by the courts to countenance the existence of a duty in tort on which she could rely,97 the widow argued that the defendants were in breach of an implied term in the contract of employment, to the effect that they would not expose their employee to extraordinary danger and risks in the course of his employment. This approach was firmly rejected by the Court of Exchequer, in terms which make it clear that they perceived more to be at stake than an issue of pleading.98 Pollock C.B. expressed the opinion that not

95. (1861) 6 H. & N. 445; 26 L.J. Ex. 319.
96. Matthews v. Kuwait Bechtel Corp. at 69.
98. It was largely on this ground that Sellers L.J. in Matthews v. Kuwait Bechtel Corp. attempts to minimise the importance of the decision. The report of Riley v. Baxendale in 6 H. & N. 445 (which appears to have been the one used in Matthews) gives neither a full nor a particularly informative account of the arguments used in the case; subsequent references are to 30 L.J. Ex. 87, which is far more complete.
"every duty a person may be called upon to perform can be turned into an implied contract," and, in reply to an argument by counsel that the language of Alderson B. in 

Hutchinson's Case ("the servant undertakes ... to run all the ordinary risks of service") denoted the contractual nature of the employer's duties, replied:

The Court [i.e. in Hutchinson] did not mean to say that there is a contract to that effect; all that is there meant is, that the servant takes upon himself to run the risk. 101

In his judgment proper, he affirmed that "a duty cannot be turned into a contract, simply by saying that it is implied that a man will do his duty," and he reiterated the warning he had expressed in Vose v. The Lancashire and Yorkshire Railway Co. against allowing exceptions to eat away the doctrine of common employment. Wilde B. was of the same opinion, and clearly saw the duties owed by the employer to his employee as a matter for the law of tort:

I do not think it follows that where there is a duty cast on any one by law, that duty can be transformed into a contract. 104

Only Martin B. showed much concern with the pleading issue. The case as a whole stands in direct contrast to the approach taken by Shaw C.J. in Farwell v. Boston and Worcester Railway Co., and his expression of the employer's liability in terms

99. At 88.
100. Supra.
101. At 88.
102. Ibid.
103. (1858) 2 H. & N. 728, 730.
104. At 88.
105. Supra. But note that Shaw C.J.'s dictum on the exclusive competence of contract in relations between employer and employee was subsequently approved by Blackburn J. in Morgan v. The Vale of Neath Rly. Co. (1864) 5 B. & S. 570, 579, discussed infra.
of contract. Until 1959, no subsequent attempt was made to rely on contract in these circumstances and, though there are certainly dicta which could be given a contractual interpretation, it is submitted that the only reason for this is that, contract being ruled out as of any practical importance, the judges responsible for such statements were less than scrupulous over the language they used. Of course, the personal responsibility of the employer for his employees' safety was enlarged and refined by the courts, until it reached its apogee in Wilsons and Clyde Coal Co. Ltd. v. English, but breach of this duty was always a source of tortious liability. Though it would be correct to say that this duty arose out of the master and servant relationship, it was never argued that the employer had promised to provide safe staff, plant or a system of carrying out the work.

In the light of Matthews v. Kuwait Bechel Corp., the present day position is that, although contract is now established as a viable alternative to tort, few litigants would voluntarily rest their case on this ground of liability, particularly if there is any evidence that they themselves, by their own negligence, have contributed to the injuries received. To explain this requires some examination of questions of causation and of the law of contributory negligence, and the first necessity is to realise that these pose two separate

106. e.g. Clarke v. Holmes (1862) 7 H. & N. 937, 948: "master is bound to exercise due care"; Wilson v. Merry (1868) L.R. 1 Sc. & Div. 326, 344: employer's duties said to be derived from "the nature of the contract of service"; Smith v. Baker and Sons [1891] A.C. 325, 353: "a master who employs a servant...is bound to take all reasonable precautions for the workman's safety."

108. Supra.
problems. In the few cases dealing with this somewhat esoteric part of the law, this primary distinction has not always been observed. In *Quinn v. Burch Brothers (Builders) Ltd.*, a sub-contracting builder was not provided with a ladder by the main site contractor, though by his contract he should have been. Instead he used a perch of his own construction and, because he failed to make it stable, fell off and injured himself. He sued the main contractor for breach of contract, seeking to fasten upon him the loss he had incurred as a result of the fall. He failed: the Court of Appeal held that the failure to provide the ladder could not be termed the cause from which the accident "probably and naturally" flowed. Damages might have been recovered for the expense of acquiring a substitute ladder, but that was all. This in itself illustrates a relatively well-known principle, namely, that "a higher degree of probability is required to satisfy the test of remoteness in contract than in tort." But the judge at first instance, Paull J. (whose views on this point were, admittedly, not considered on appeal), having stated that the plaintiff's own negligence had broken the chain of causation, went on to consider whether the Law Reform (Contributory Negligence) Act 1945 might nevertheless allow the plaintiff to recover a proportion of his loss. To consider the 1945 Act as possibly mitigating the effects of the rules of causation was, it is submitted, quite wrong. In *Davies v. Swan Motor Co. (Swansea) Ltd.*, Bucknill L.J. had said that "all the [1945 Act] intended to do was to alter the legal

110. Per Sellers L.J. at 390.
112. 8 & 9 Geo. VI, c. 28.
consequences of negligence by both parties causing or contributing to the damage complained of."\textsuperscript{114} The Act only works to change the previous common law rules as to the effect of contributory negligence in a situation where there was already a \textit{prima facie} liability on the defendant, and this, of course, presupposes that the necessary causative links have been established.\textsuperscript{115} But even supposing this difficulty is cleared up, and the facts show that the breach of contract did 'cause' the loss, what relevance has contributory negligence at this stage? This depends firstly on the old question of whether breach of contract can ever amount to the necessary 'fault' required by the wording of the 1945 Act.\textsuperscript{116} If it cannot, then the Act does not apply, and the allocation of responsibility will depend on the law which regulates loss deriving from concurrent causes. The signs are, however, that the courts rejected such "technical arguments that should have no place in a rule depending upon broad considerations of justice and equity,"\textsuperscript{117} and have accepted that at least some breaches of contract may give rise to this 'fault'. Some, but not all. In addition to the act being in breach of contract, it would appear that it must also be in breach of a duty to take care, or, in the words of Paull J.:

\begin{quote}
in order to apply the Act, one has to find that there was some term which imported a duty not to be negligent and a breach of that term. \textsuperscript{118}
\end{quote}

\textsuperscript{114} At 310.
\textsuperscript{115} G. Williams, \textit{Joint Torts and Contributory Negligence}, says, at 635, "The \textit{Contributory Negligence Act} presupposes the common law of causation, which is introduced as a limiting factor upon the operation of the Act by the use of the word 'result'."
\textsuperscript{116} See, e.g., Treitel, op.cit., 829-31.
\textsuperscript{117} G. Williams, op.cit., 328.
\textsuperscript{118} Quinn v. Burch Brothers (Builders) Ltd., cited supra, at 381.
How does one find such a "term which imported a duty not to be negligent"? The answer appears to be by turning to the law of tort, to the 'neighbour principle', and seeing if there is a "general duty to protect against injury". This means examining the relationship in which the parties stand to each other. In *Quinn* Paull J., by his decision, showed that he did not think that a main contractor owed a duty of care to a labour-only sub-contractor. Obviously, though, such a term would exist if the parties were employer and employee. Thus, in principle, in every situation similar to that which arose in *Matthews v. Kuwait Bechel Corp.*, the 1945 Act should be applicable to deal with the effect of contributory negligence. Even with regard to independent contractors, however, the position may now be different from that which is suggested by Paull J. Since *Quinn* was decided, it has been established that a main contractor may owe a duty of care in tort towards a sub-contractor. In *McArdle v. Andmac Roofing Co.*, Davies L.J. recognized a "common law duty ... to take reasonable steps ... to prevent the workmen from coming to harm," where the 'workmen' were the employees of sub-contractors on the site. If, on the facts, such a duty of care can be shown to exist, then there is no reason why, in a situation such as arose in *Quinn*, it could not be said that there was an "implied term not to be negligent", breach of which would constitute 'fault' in

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119. Ibid.
120. Supra.
121. [1967] 1 All E.R. 583.
122. At 589. This arose, semble, because of the disparity in size between the main contractors and the sub-contractors. In this situation, the main contractors were to be taken as assuming the duty of co-ordinating the work carried out by their various sub-contractors, and they had a duty to see that reasonable safety precautions were taken.
terms of the 1945 Act. The recent case of *Sole v. W.J. Hallt Ltd.*,\(^{123}\) while not directly relevant, is interesting because here too, as in *Quinn*, a sub-contractor himself contributed to an accident because of his own negligence. Swainwick J., by allowing him to succeed in a claim under the Occupiers' Liability Act 1957,\(^{124}\) widened the tortious remedies available to such a contractor against his main employer. He also commented that, had the action relied on contract, the authority of *Quinn's Case* would have required him to hold that the contributory negligence broke the chain of causation.\(^{125}\) It has already been argued that *Quinn* proceeded on the basis of an erroneous treatment of contributory negligence, and, since in *Sole v. W.J. Hallt Ltd.*,\(^{126}\) a duty of care was said to exist between the plaintiff and the defendant, it is submitted that there would have been no reason for denying the application of the 1945 Act had the claim been based on contract, provided that the necessary causative links had been established between the breach of contract and the actual loss in respect of which damages were being claimed.

To summarise, an injured worker is still likely to prefer to pitch a claim in which he alleges his employer has failed to take reasonable care for his safety in tort rather than contract. By so doing he will be able to take advantage of the less stringent rules operating in this part of the law setting the extent of the damages which he may recover. He would also be well advised to sue in tort, if he is seeking to recover from his employer on the basis of the latter's vicarious liability

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124. 5 & 6 Eliz. II, c. 31.
125. At 1040.
126. Supra.
for the negligence of a fellow servant, for, although, after Matthews, the personal duties of the employer towards his employee must be taken as running in contract, these duties do not extend to the vicarious liability of the latter, which remains a matter for tort alone. At the same time, it is possible to imagine good reason in law (not just the fortuitous and unusual pattern of events which characterised the facts in Matthew's Case) why a contractual claim could be preferred. The basis of claims in tort is the establishment of fault on the part of the employer and, if (as, for example, occurred in Davie v. New Merton Board Mills) the employer is able to show absence of fault, he is likely to avoid liability. Liability for breach of a contract is not, however, restricted in this way. Professor Hamson has, in a note on Davie's Case, described how, if a contractual term could have been established to the effect that the employer undertook that due care had been used in the construction of the tool that turned out to be defective and injured the plaintiff, the absence of fault on the part of the employer would have been irrelevant in holding him liable when it emerged that such due care had not been used. But, if the attitudes of the members of the House of Lords in Davie are to be taken as a guide, it is unlikely that the courts will abandon what has been termed their "instinctive acceptance of a category", and accept such a use of the law of contract in an area where they have for long been accustomed to thinking

only of the law of tort. Finally, if a claim is brought against an employer in contract, and if it can be shown that the breach of that contractual term was a legal cause of the employee's loss, then the fact that the employee has himself been negligent should not of itself be fatal to his claim. Though it has not been authoritatively stated to be the law, the indications are that the Law Reform (Contributory Negligence) Act 1945 will apply to contract as well as tort, at least where the breach of contract in question can be said to amount to 'fault'. In many areas this is problematical, but not in the relationship of employer and employee where there is clear evidence of a duty of care owed by the former to the latter.

(2) Common Employment

Vicarious liability has no obvious or necessary links with contract; it simply permits a person damnedify by an 'agent's' wrong to sue his principal. The 'agent's' torts

131. Even before the decision in Matthews v. Kuwait Bechel Corp. (supra), it would have been possible to produce arguments in favour of allowing the employee in Davie's case to sue in contract. In Lister v. Romford Ice & Cold Storage Co. [1957] A.C. 555, the employee was said to be bound by an implied term that he would perform his duties with proper care, and it might reasonably have been argued that, if the employee's duties are contractual, so should the employer's be. This point is made by Hamson, loc.cit. It is also established that a person who hires out tools impliedly undertakes that they are as fit as care and skill can make them - see White v. John Warwick [1953] 1 W.L.R. 1285. The failure of the House of Lords to explore this avenue of potential liability is an excellent example of the process of conceptual reasoning, as described by P.S. Atiyah, Introduction to the Law of Contract, 36.


133. The quotation marks are intended to show that the word is not being used with contractual connotations.
are deemed the principal's responsibility, but it is out of
the former that the cause of action arises. The fact that the
injured party happens to be in contract with the principal has
no obvious bearing on this chain of events. However, volenti
non fit iniuria is a good defence to a claim in tort and, when
applied to an industrial context in the shape of an argument
that the employee entering into a contract of employment consents
to running the risk of injury through the negligence of his
fellow employee, it is an easy step to the assumption that this
consent must be enshrined as a term in the contract of employment.
This certainly occurred in Farwell's Case, though there it was
also assumed that the only responsibility the employer could owe
must be derived from contract. This second assumption was no
part of English law, at least after Riley v. Baxendale, but,
with regard to the first assumption, Alderson B. stated in
Hutchinson v. York, Newcastle and Berwick Railway Co. that
the worker

knew, when he engaged in the service, that he was
exposed to the risk of injury, not only from his
own want of skill or care, but also from the want
of it on the part of his fellow-servant; and he
must be supposed to have contracted on the terms
that, as between himself and his master, he would
run this risk. 136

Perhaps the Locus classicus, however, of this line of
thinking in English law is the judgment of Blackburn J. in
Morgan v. The Vale of Neath Railway Company, where, from
a synthesis of Farwell and Hutchinson, he drew the following
conclusions:

134. Supra.
135. Supra.
136. (1850) 5 Ex. 343 at 351.
137. (1864) 5 B. & S. 570.
The principle I take to be that a servant who engages for the performance of services for compensation, does, as an implied part of the contract, take upon himself, as between himself and his master, the natural risks and perils incident to the performance of such cases; the presumption of law being that the compensation was adjusted accordingly, or, in other words, that these risks are considered in his wages. 138

Blackburn J. was convinced of the contractual nature of the employee's assent in common employment; nine years later he was to allow the personal representative of a pilot, killed by the negligence of a shipowner's servants while on board a vessel in the course of his employment, to recover damages from the shipowner, on the ground that there was no implied contract between the deceased and the defendant. 139 Other judges would sometimes take a similar view: Field J. in Griffiths v. Earl of Dudley, 140 the case which established that employees might contract out of the provisions of the Employers' Liability Act 1880, said:

At the time of the passing of the [1880] Act the law stood thus: it was an implied term of the contract between employer and workman that the latter should not recover damages if he is injured by the negligence of a person in the common employment. 141

What, however, prevented a more complete acceptance of this explanation of common employment was the application of the doctrine to persons who, for one reason or another, did not have any contract into which any implied term could be read. Volunteers and the employees of sub-contractors, for example, were tarred with the brush of 'collaborateur', though it was

138. At 578-79. For another early example of this reasoning, see Fowler v. Lock [1872] L.R. 7 C.P. 272, per Grove J. at 277.
139. Smith v. Steele (1875) L.R. 10 Q.B. 125.
140. (1881) 9 Q.B.D. 357.
141. At 363.
quite obvious that they had no contract with their 'common' employer. The courts, however, approached the obstacle of explaining why the doctrine should extend to these people with little concession to conceptual reasoning. In Degg v. The Midland Railway Co.,\textsuperscript{142} for example, the representative of a fatally injured volunteer was held debarred from recovering against the employer of a negligent workman. In reply to counsel's objection that the deceased could not be said to have 'undertaken' any risk, Bramwell B. stated that there was as much of an undertaking in the situation where the injured party had volunteered as when he was directly employed:

the consideration may not be as obvious, but it as competent for a man to agree, and as reasonable to hold that he does agree, that if allowed to assist in the work, though not paid, he will take care of himself from the negligence of his fellow-workmen, as it would be if he were paid for his services.\textsuperscript{143}

It is a patently Procrustean exercise to interpret the 'benefit' that a volunteer receives from being allowed to proffer his gratuitous services as consideration for a binding contract. More often, the judges did not attempt to build a contract out of thin air, but rested content with flat assertions to the effect that the volunteer (or sub-contractor's employee) could be in no stronger a position than the ordinary employee. Such a person was said to be a servant "for this purpose"\textsuperscript{144} (scil. common employment), or it was simply announced that a volunteer "cannot stand in a better position than those with whom he associates himself,"\textsuperscript{145} or that he "puts himself in the control

\textsuperscript{142} (1857) 1 H. & N. 773.
\textsuperscript{143} At 780.
\textsuperscript{144} Wiggett v. Fox (1856) 11 Ex. 832.
\textsuperscript{145} Potter v. Faulkener (1861) 5 L.T. 455.
of another person, and in respect of that other person he is for the time being in the position of a servant." 146

D. The Demise of the Contractual Explanation

With the passing of time, it became more and more difficult to defend the thesis that the employee assumed the risk of injury through the negligence of a fellow servant as part of his contract of employment. Not only was the law on volunteers and others without a contract unsatisfactory, in addition there was increasing awareness of the fictions and inaccuracies surrounding the application of the theory to the paradigm case. It was realised that there was little true 'agreement' on the matter of assumption of risk, and economists maintained that the 'danger factor' in the calculation of the employee's remuneration was of negligible importance. Criticisms such as these were taking place in the context too of a shift from the classic

146. Swainson v. North Eastern Railway Co. [1878] 3 Ex.D. 341. This observation is taken from the judgment of Bramwell L.J., which deserves short discussion on another ground. Both in this case and in his evidence before the Parliamentary Select Committee inquiring into the state of employers' liability (B.P.P. 1877 (285) Vol. X, Q. 1190), Lord Bramwell sought to stand common employment on its head, in an attempt to justify its existence. Instead of saying that the injured employee could not recover because he had forfeited his right of action by contract, he maintained that he could not recover because he had never contracted for such a right of action. This, of course, depends on the proposition that the employer's liability arises out of the terms of the contract of employment, and we have seen that this view was decisively rejected in Riley v. Baxendale (supra).

Eventually a volunteer was able to sue the employer of a negligent employee, on the basis of a duty of care owed to him by the latter, but this was not until 1944. See Lomas v. M. Jones & Son [1944] K.B. 4.
laissez-faire of early Victorian times. As the need for legislative interference in employment, in such areas as factory safety and the employment of women and young children, was felt, it became increasingly harder to stand by a rule of the common law which had the effect of denying compensation to the majority of victims of accidents at work.

(1) Legal Objections

Some of the first sustained criticism of the 'implied contract' approach to common employment is to be found in two articles in the Solicitors' Journal in the years 1877 to 1879. This began with a reasoned attack on the minority judgment in Woodley v. The Metropolitan District Railway Co., a case in which a worker, employed by a sub-contractor to the defendant company, had been injured by a train while working in a dark tunnel. A jury held there had been negligence on the part of the railway company, but the majority of the judges in the Court of Appeal held that the plaintiff, by continuing to work when he knew of likely danger, had voluntarily exposed himself to risk. The dissenting minority would have allowed recovery by the plaintiff, on the ground that

the servant is considered to contract that he will run all the ordinary risks arising from the nature of his master's business and from the regulations under which it is carried on, and all risks arising from the negligence of his co-servants; but the servant of the contractor enters into no such contract with the railway company, because he enters into no contract with the railway company at all.

Such reasoning was rejected by the anonymous contributor to the

149. Per Mellish C.J., 391.
Solicitors' Journal: "the notion of implied contract is pregnant with confusion when applied to cases such as that under discussion."\(^{150}\) Instead, a strong plea was made for recognition of the rationale of common employment as consisting in the fact that the action of the fellow-servant was for the benefit of both master and servant. This, it was maintained, justified the exception which common employment made in the rule of *respondeat superior*. This plea was repeated the following year, this time with the comment that the device of the 'implied term' explanation was derived from a situation where the courts found themselves faced with a "manifestly absurd or unendurable result"\(^{151}\) - i.e., the holding of an employer liable for injuries suffered by one of his employees as a result of the negligence of another - and where they had invented the implied term as a means of avoiding this outcome. Historically, there seems a good deal of truth in this assertion. The argument that common employment was justified because vicarious liability was appropriate only to protect the interests of third parties outside the undertaking headed by the employer was to re-emerge some sixty years later, in a last attempt to defend the doctrine.\(^{152}\)

Evidence given before the Select Committee which sat in 1876 and 1877 produced many criticisms of the 'implied term' explanation of consent. In particular, it was stressed that the contract of employment seemed to be anomalous in this respect. Why was the passenger injured by the negligence of

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150. *S.J.* 22, 3.
151. *S.J.* 23, 190.
a railway employee allowed to recover against his employer, while the fellow servant injured in similar circumstances could not? Lord Bramwell's answer was simply that the common law implied an undertaking to carry the passenger with due care and safety in the former situation, but implied no protection for the employee in the latter. But this was just dogma. More revealing was his reply when asked a question on Priestley v. Fowler. He was forced to admit that "the case of Priestley and Fowler is, of course, thoroughly well known to me by name ... but I could not tell the Committee at the present moment the details of it." This tends to confirm the suggestion made earlier that, although lip service was paid to the case as the source of common employment, many judges had never troubled to read it carefully, and thus improperly accepted it as authority for points of law with which it had never been concerned.

The other Lord Justice of Appeal to testify was Brett who expressed in some detail the discomfort he had experienced in applying the doctrine of common employment in his judicial capacity. Having attributed the decision in Priestley v. Fowler largely to Lord Abinger's rhetorical skills, he went on to reject the 'implied contract' theory in these terms:

155. (1837) 3 M. & W. 1.
156. Q. 1107.
158. In Lovell v. Howell (1876) 1 C.P.D. 161, 167, he had confessed to a difficulty in understanding or defining the principle on which the employer's immunity rested.
My view is this, that it is impossible to say truly that when a workman makes his contract of service with his masters, that servant has in his mind the recollection, or the memory, that he may be injured by the negligence of a fellow servant. It is not true in fact, and it cannot be said that it is, and that, therefore, is not any ground upon which you ought to imply a supposed agreement on his part...

[this exception to respondeat superior] is founded upon a wrong application of the principle of implied contract. 159

Because he also believed the whole idea of vicarious liability was mistaken 160 (he thought that there should only be liability for personal fault), he described common employment as "a bad exception to a bad law". 161

(2) Rejection of Fictions

Professor Stone has written that "the most effective criticism [of common employment] was that which disputed the truth or the justice of the premises used to base that rule." 162

One of the main functions of the lay evidence given before the Select Committee in 1876 and 1877 was the demolition, by the patient testimony of experienced witnesses, of the armchair reasoning which had been used to rationalise common employment. The General Secretary of the Amalgamated Society of Railway Servants, speaking of an area of employment where there had been 726 deaths and 3,104 injuries as a result of accidents at work in 1875, said:

It has been asserted that men are paid higher wages in proportion to the risk they run. Nothing could be more inaccurate. In dangerous occupations on railways, the risk is greatest when the experience is least, and when the rates of wages are lowest. 163

159. Q. 1926.
160. cf. his precocious formulation of the 'neighbour principle' in Heaven v. Pender (1883) 11 Q.B.D. 503.
161. Q. 1931.
162. Legal Systems and Lawyers' Reasonings, 60.
He refuted too the contention that servants were well placed to know of and guard against lack of skill on the part of their fellow workers:

Thousands of servants never see each other, live miles from each other, are in totally distinct departments, and under different officers. 164

Skilful questioning by Alexander MacDonald, the miner's leader, elicited an admission from a railway manager that danger did not dictate wage levels, 165 though other employers of labour sought to deny this. 166 A miners' agent denied that an extension of employer's liability would increase recklessness among the working population, pointing out that no man would run the risk of being injured in the hope of gaining compensation, since he would never know in advance whether the outcome of the injury to which he was leaving himself open would be disablement or death. 167

E. Conclusions

These objections, voiced in legal literature and before the Select Committee, were not immediately fatal to the role of the implied contractual term in the doctrine of common employment. In 1891, in the case of Johnson v. Lindsay, 168 the House of Lords narrowed the scope of common employment, but reaffirmed that, when it did operate, it was founded on an "implied undertaking by the servant to bear the risks" 169 which

164. Q. 935. See too the evidence of R.S. Wright, QQ. 619-20; G. Howell, QQ. 77-9.
166. e.g., evidence of R. Baxter, Q. 1245.
169. Per Lord Watson, at 382.
justified the exception to the maxim *qui facit per alienum facit per se*. Lord Watson was prepared to treat volunteers as *pro hac vice* servants, though he rejected Lord Bramwell's argument that injured servants could not recover damages from their employer because of the lack of any positive term to this effect in their contracts of employment. Even the Solicitors' Journal\(^{170}\) changed its stance and, forgetting what it had argued some thirteen years earlier, endorsed this approach, with its emphasis on implied contract. As late as 1939, in *Radcliffe v. Ribble Motor Services Ltd.*\(^{171}\) Lord MacMillan still thought that, though a clear fiction, the servant's acceptance of the risk of injury was essentially in the form of an implied contractual term; Lord Wright, speaking in the same case, thought it was a "fundamental principle" that a contract between employer and employee should exist, into which an undertaking to run the risk could be implied.\(^{172}\) It should be said, however, that it often suited the purposes of the judges to rely on this traditional approach, for it was compatible with considerable narrowing of the doctrine. Thus, in *Tozeland v. West Ham Union*\(^{173}\) it was open for the court to deny the application of the doctrine to a workhouse pauper injured at his employment: there was nothing "in the nature of a voluntary bargain on the part of the servant to run the risk."

Even though the courts were prepared to continue to use the device of the implied term in this way when it was useful to them, there was little enthusiasm for attempts to rely on

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172. At 247.
intricate contractual arguments. In Burr v. Theatre Royal, Drury Lane Ltd., 174 Collins M.R. was faced with an ingenious submission by counsel that, since the contract of employment contained a written term by which certain aspects of the employer's liability in respect of injuries inflicted by fellow servants were regulated, the implied term by which the employee would normally be deemed to have undertaken the risk of negligence on the part of these fellow servants was excluded. He replied:

I think that this argument pushes the idea of implication in this connection too far. That idea has, in relation to the subject, been introduced in the attempt to analyse the grounds of a well-established rule of law. We are here dealing with a positive rule of law with regard to the relation of employer and employed, which is really incidental to that relation rather than dependent on any actual intention inferred to have existed in the minds of the parties in the particular case. 175

Thus, he refused to apply the principle of expressio unius est exclusio alterius and held common employment applicable. 176 This case is important in marking the point at which it was at last openly conceded that common employment was based on a wider justification than contract, although, as has been illustrated, in later years the judges still talked loosely of the doctrine in contractual terms.

It is clear that, in the history of the career of the doctrine of common employment, the contract of employment played an important role, though always in an auxiliary capacity. When the employer was liable in respect of injuries, he was so

175. At 555.
by virtue of the law of tort. The foundation of common employment was that the defence of volenti non fit iniuriam limited this liability when one servant was injured by the negligence of another. At the inception of common employment, in cases like Hutchinson v. York, Newcastle and Berwick Railway Co.\textsuperscript{177} and Morgan v. The Vale of Neath Railway Company,\textsuperscript{178} the consent which was deemed to exist in the mind of the injured employee when he had accepted employment was expressed as an implied term in the contract of employment, although after Riley v. Baxendale\textsuperscript{179} it was settled that it was only in tort that the employer could be liable, even if he had acted in breach of the personal duties of care he was held to owe to his employees. There was a superficial attractiveness in using the contract of employment in this way, given the predilection of the age for the institution of bargain. Later in the century, however, as a result of what has been described as "a more differentiated social conscience and a more realistic view of the employment relationship,"\textsuperscript{180} common employment in general, and the device of the implied term in particular, were called into question. The myth of contract was hard to maintain after the disclosures of lawyers and men with practical experience of working conditions before the Select Committee in 1876 and 1877. Perhaps because the doctrine as a whole was already felt to be doomed, however (and thus there was no enthusiasm for investigating its theoretical consistency), there was never an effective divorce between the contract of employment and

\textsuperscript{177} (1850) 5 Ex. 343.
\textsuperscript{178} (1864) 5 B. & S. 570.
\textsuperscript{179} (1861) 6 H. & N. 445.
the 'consent' necessary for common employment; after Burr's Case\textsuperscript{181} in 1903 the connection with contract was of little more than nominal importance, at least when it was attempted to invoke contractual arguments in support of the presence of common employment. When contract (or, more accurately, the absence of contract) offered an opportunity for the narrowing of the doctrine, the courts were quick to make use of it. In Hayward v. Drury Lane Theatre Ltd. and Moss' Empires Ltd.,\textsuperscript{182} a dancer, who was auditioning for a prospective contract with the defendants, was injured through the negligence of one of their servants. \textit{Prima facie}, she would have had a good chance of recovering against them, but they sought to show, by citing the volunteer cases, that the apparent absence of a contract was not fatal to common employment. Scrutton L.J., in a careful judgment that was later to pave the way for the new approach to the effect of the doctrine on volunteers, upheld the decisions in Degg v. The Midland Railway Co.\textsuperscript{183} and Potter v. Faulkener\textsuperscript{184} on grounds which had nothing to do with the existence or otherwise of a contract between plaintiff and defendant, and distinguished them from the case before him.\textsuperscript{185} Here, the plaintiff would succeed: "there being no contractual relation

\textsuperscript{181.} [1903] 1 K.B. 544.
\textsuperscript{182.} [1917] 2 K.B. 899.
\textsuperscript{183.} (1857) 1 H. & N. 773, supra.
\textsuperscript{184.} (1861) 5 L.T. 455, supra.
\textsuperscript{185.} He chose to take the ratio of these volunteer cases as being that a trespassing volunteer cannot complain against an employer ignorant of his presence about the negligence of one of the latter's servants, because to allow this would be to place the volunteer in a better position than true servants when it came to suing the employer. Here the employer did know of the volunteer's presence. This approach was taken up in Holdman v. Hamlyn (infra) and in Tomas v. M. Jones & Son [1944] K.B. 4.
on the admitted facts, the implication [scil. of taking the risk of the negligence of fellow-servants] cannot be made." 186

In the same case, Neville J. was "not satisfied that the doctrine of common employment extends to cases where there is in fact no contractual relation between the master of the negligent servant and the injured person." 187 A later example of a similar use of contract is *Holdman v. Hamlyn*, 188 where a boy of ten was injured by someone who was said to be in the position of a fellow servant. Du Parq L.J. held, on the facts, that the necessary undertaking to run the risk of negligence could not be implied into the contract the plaintiff had with the defendant, but he thought that, even if it could be, "it would then have been the duty of the court, to consider whether the contract as a whole was for the infant's benefit." 189 Obviously, they would have held it not to be. 190

So far as the personal, as opposed to the vicarious, liability of the employer was concerned, the defence of *volenti* was of diminishing importance as the 20th century progressed. The hostility to the doctrine, which had begun with the cases in which it was established that knowledge of a risk did not amount to consenting to it, was developed and refined to such

186. At 915.
187. At 917.
188. [1943] K.B. 644.
189. At 670.
190. *Young v. Hoffman Manufacturing Co. Ltd.* [1907] 1 K.B. 650, where such a contract was held to ensure for an infant's benefit, was disapproved. Note that in *Cribb v. Kynock Ltd.* [1907] 2 K.B. 548 (where a fifteen year old girl had been injured while working in a munitions factory) the doctrine of common employment had been applied. Bray J. (at 562) discounted any suggestion that this showed the contract was not for the benefit of the infant, referring to "the very large remedies...which have been given to servants by the Employers' Liability Act and the Workmen's Compensation Act."
an extent that, by the 1940's, it was exceptionally difficult for an employer to take refuge in it. This hostility, of course, was part of the judicial manoeuvring by which it was sought to minimise the effect of common employment.\(^{191}\) If the employer could not be sued on the basis of his vicarious liability, it was important to make his personal liability as wide as possible, and \textit{volenti} was a potential answer to a claim under this heading. Accordingly, the defence could not be invoked where the employer himself was in breach of statutory safety regulations, nor where there was any suggestion that the 'consent' had been obtained by coercion, or where the employee did not properly understand the nature of the risks he was assuming.\(^{192}\) Perhaps it was only available:

When the servant is engaged specifically for the performance of a dangerous duty and the presence of the danger is a mutually recognised element in the bargain for remuneration, [where] the servant undertakes the risk for the sake of higher pay.\(^{193}\)

In such a situation - a typical example would be a worker in an explosives factory who is paid 'danger money' for working there - the consent is a term of the bargain between him and his employer. It is supported by consideration and is clearly contractual. But, notwithstanding the narrowness of the area in which \textit{volenti} might be invoked as a defence, it was never argued that the consent \textit{must} be contractual. Indeed, in the leading case of \textit{Bowater v. Rowley Regis Corp.},\(^{194}\) Lord Goddard stated:

\(^{191}\) For details, see G. Williams, \textit{Joint Torts and Contributory Negligence}, 296 ff.


\(^{194}\) Supra.
It must be shown that he [the servant] agreed that what risk there was should lie on him. I do not mean that it must necessarily be shown that he contracted to take the risk, as that would involve consideration, though a simple way of showing that a servant did undertake a risk on himself would be that he was paid extra for so doing. 195

Professor Glanville Williams thought the same, pointing out that infants might be held to be able to give effective consent, though their minority would preclude them from making a contract in which the same consent was contained as a term.196 The views of both judge and academic have been vindicated in the recent line of cases dealing with the effect of notices disclaiming liability for injury to passengers in private motor vehicles. When displayed prominently in the car, these have been held to establish the defence of volenti, even though for one reason or another the car passenger and driver have not been in a contractual relationship.197 It is of interest, however, to note that in the most recent of these cases, Birch v. Thomas,198 all three judges in the Court of Appeal considered the doctrine of fundamental breach as possibly limiting the effect of such a non-contractual disclaimer, though this is a
document with its roots firmly planted in the law of contract.199

195. At 481.
198. Supra.
199. See Lord Denning M.R. at 908; Megaw L.J. at 909 agreed with him, while Stephenson L.J. at 910 spoke of "fundamental breach of the terms of this gratuitous licence". See too Bennett v. Tugwell (supra), at 253.

In I.C.I. Ltd. v. Shatwell, supra, Lord Pearce expressed the consent which existed between the two shotfirers in contractual terms, though there was no need for this. He said (at 688), "On the facts it was an implied term (to the benefit of which the employers are vicariously entitled) that G. would not sue J. for the injury that he might suffer, if an accident occurred. Had an officious bystander raised the possibility, can one doubt that G. would have ridiculed it?"
The present status of the defence with regard to the employment relationship is largely dependent upon I.C.I. Ltd. v. Shatwell, 200 which stands as authority for the proposition that *volenti* can operate to exclude an employer's vicarious liability in circumstances where there is no question of he himself being in breach of his personal duties of care. In the present context, the chief interest of the case is the suggestion (on which he expressed no final opinion) made by Lord Reid that it might no longer be 'permissible' 201 for an employer to bargain with his employee that the latter would accept the risks of an unsafe system of work. This invites the comment that, while it would be reasonable to prevent an employer contracting out of the results of his own carelessness, it would be far more difficult to justify a prohibition on employing workers to do jobs which are themselves inherently dangerous, and where they are remunerated accordingly. 202 A more technical point concentrates on the fact that Lord Reid only considered the possible effect of public policy on a contractual assumption of risk by the employee, negating the common law duty of the employer in respect of his employee's safety. For the sake of completeness, it should be recognized that the situation contains four variable factors, and is thus theoretically

200. Supra.
201. At 674.
202. cf. Lord Herschell in Smith v. Baker and Sons [1891] A.C. 325, 360, "Where a person undertakes to do work which is intrinsically dangerous, notwithstanding that reasonable care has been taken to render it as little dangerous as possible, he no doubt voluntarily subjects himself to the risks inevitably accompanying it, and cannot, if he suffers, be permitted to complain that a wrong has been done him, even though the cause from which he suffers might give to others a right of action."
capable of producing four different permutations. The employer's duty might arise either from the common law, or (after Matthews v. Kuwait Bechel Corp.)\textsuperscript{203} out of a term in the contract of employment, and similarly the consent necessary for \textit{volenti} might either be contractual in nature or not. The particular combination present to the mind of Lord Reid in \textit{Shatwell} is the commonest likely to occur in practice, but it is not exhaustive of all possibilities.\textsuperscript{204}

\textsuperscript{203}. Supra.

\textsuperscript{204}. The other alternatives would be: (a) a non-contractual assumption of risk by the employee, against a common law duty of care; (b) a contractual assumption of risk, against a contractual duty of care; (c) a non-contractual assumption of risk, against a contractual duty of care.
PART 2

ASPECTS OF THE MODERN LAW
CHAPTER 6

THE ARMED FORCES
A. The Absence of Contract

It is settled law that the relationship between a member of the armed forces and the Crown is inherently different to that between the parties to a contract of service, though it is difficult to state the precise legal base for the former. There are a plethora of judicial dicta which may be cited to show the peculiarity of employment in the services:

Military matters between military men are for military tribunals only. 1

All engagements between those in the military service of the Crown and the Crown are voluntary only on the part of the Crown, and give no occasion for an action in respect of any alleged contract. 2

The terms on which persons in the civil and military services were employed were entirely apart from any form of contract which could not be altered without the consent of both parties. 3

The oath of enlistment imposes an obligation to render service, but that obligation is created by law, and does not depend upon any contract to which the airman and the Crown are parties...in enforcing discipline officers in the forces are not performing or acting under a contract; they are performing duties incidental to their positions. 4

Officers serve according to the tenor of their commissions, soldiers and seamen in accordance with their engagements. None of them has at common law any right of action against the Crown for breach of contract, not even a right to sue for pay; for none of them is employed under any contract of service. 5

So far as can be judged, the Crown itself is of the opinion that servicemen are unaffected by the law of contract. In

evidence given before the Latey Committee on the Age of Majority in connection with the practice of boy recruitment, the view of the Treasury Solicitor was that:

The arrangements for enlistment are appropriate to a change of status rather than to the assumption of contractual obligations leading to an action for damages for breach. 6

Thus there was no prospect of invoking the Infants Relief Act 1874 7 to enable boy recruits (who had signed up for periods of service of up to twelve years) to obtain relief from their obligations. 8 Crown policy is to treat servicemen in a completely different way from other public employees, subject only to a small compromise. They are permitted to join and subscribe to trade unions, but can have no further participation in their affairs. 9

It is far easier to state what servicemen do not have a right to do than to elaborate the duties owed to them by the Crown. They do not have a right to complain of what they allege to be wrongful dismissal, 10 to sue for pay which they have not

7. 37 & 38 Vict., c. 62.
8. This was the conclusion of the N.C.C.L. See Civil Liberties and Service Recruitment (N.C.C.L.) July 1970, 2.
   By s. 128 of the Social Security Act 1975 (c. 14), members of the armed forces are treated as 'employed earners' for certain limited purposes. Members of the armed forces are, of course, excluded from protection against unfair dismissal (Trade Union and Labour Relations Act 1974 (c. 52), Sched. I, para. 33(2), and from the new rights conferred on individual workers by the Employment Protection Bill 1975 (Employment Protection Bill 1975, cl. 109(2)).
10. In Re. Poe (1833) 5 B. & Ad. 681; Dickson v. Combermere (1863) 3 F. & F. 527; Grant v. Sec. of State for India (1877) 2 C.P.D. 445; De Dohse v. The Queen (1886) 37 T.L.R. 114.
received,\textsuperscript{11} to sue for their pension,\textsuperscript{12} nor to leave their service when they wish.\textsuperscript{13} These various disabilities (by comparison with the legal position of ordinary workers) have been justified on several different grounds. It has been said that enlistment gives rise to a 'contract' where the obligations are all on the one side\textsuperscript{14} - the serviceman's - or one which is unenforceable\textsuperscript{15} in the ordinary courts. On the other hand, there has been judicial refusal to intervene in the dealings between servicemen and the Crown, sometimes because (it has been said) to do so would be contrary to discipline\textsuperscript{16} or public policy,\textsuperscript{17} sometimes because it would amount to an encroachment on the prerogative rights of the Crown.\textsuperscript{18} In particular, dealing with the reluctance of the courts to entertain claims against dismissal, this has been explained both in terms of the

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\item 11. Gidley v. Lord Palmerston (1822) 3 B. & B. 275; Ex Parte Napier (1852) 18 Q.B. 692; Leaman v. The King [1920] 3 K.B. 663. What would appear to be a disadvantage can occasionally work to their benefit, however. The pay of members of the armed forces does not amount to 'earnings' for the purposes of the Attachment of Earnings Act 1971 (c. 32) and cannot be attached. See s. 24(2)(b). But cf. Report of the Committee on the Enforcement of Judgment Debts (1969) Cmdn. 3909, para. 725(b), which recommended the contrary.
\item 12. Gibson v. East India Co. (1839) 5 Bing N.C. 262; Mitchell v. The Queen, supra. Under the Army Act 1955 (3 & 4 Eliz. II, c.18) (ss. 9-14), there is power to delay the discharge of non-officers who have completed their engagement if circumstances require it. cf. O. Hood Phillips, Constitutional and Administrative Law, 335, "enlistment being a civil contract, its terms cannot be varied without the consent of the soldier." For the position of officers, see Hearnson v. Churchill [1892] 2 Q.B. 144.
\item 13. See Acton J. in Leaman v. The King, supra; O. Hood Phillips, op.cit., supra.
\item 15. Gibson v. East India Co., supra.
\item 16. In Re Tufnell (1876) 3 Ch.D. 164.
\item 18. In particular, dealing with the reluctance of the courts to entertain claims against dismissal, this has been explained both in terms of the
\end{itemize}
incapacity of the Crown to contract out of its powers to dismiss at will and in terms of an implied promise giving the Crown such powers in the contract between the parties.

Enough examples of the different approaches taken by the courts have been given to show that, while it is true that the courts "have been inclined to treat the relationship between the Crown and its military servants as a law apart," there is no one sure theoretical foundation for the many directions their judgments have taken. It is not intended here to rework the cases in an attempt to find common ground. It is more important to notice that the unwillingness of the courts to adjudicate over complaints from servicemen arising out of their employment is far more justifiable in some areas than in others. While the dictates of discipline and good order impose limits on the type of claims that can be entertained, it is hard to understand why a serviceman should not be able to sue for his pay after he has left the service, or why he should not, at

19. In Re Tufnell, supra; Grant v. Sec. of State for India, supra. G. Williams, Crown Proceedings, 63.
20. De Dohse v. The Queen, supra. cf. the discussion on civil servants, infra, pp. 224-55.
22. Such a right exists in Australian but not in English law. See G. Nettheim, "Do Members of the Armed Forces have any Rights in their Employment?" (1973) 5 Fed. Law Rep. 200, 213.

In fact, the point seems to have been conceded by Tindal J. in Gibson v. East India Co. (supra). He states (at 275) that it is expedient and often absolutely necessary that military pay should be suspended and kept in arrears "until the service, in respect of which it is earned, has been entirely completed."
common law, 23 be able to sue for his pension. 24

The alarm with which some writers have viewed the absence of legal restraint on the Crown's treatment of its military servants has prompted attempts to maximise the evidence which points to the existence of binding obligations. But all too often this leads to the making of bricks from straw. Thus it is historically interesting (but no more) to note that, by the common law of the late 18th century, a serviceman did have a right to sue for his pay. 25 A contrary principle is now established in English law. 26 Again, too much should not be made of the case of Owners of S.S. Raphael v. Brandy, 27 as an authority for the existence of a contractual relationship. The facts were that a stoker was employed on board a merchant ship and, additionally, was in receipt of a yearly retainer by virtue of his service in the Royal Navy Reserve. He was injured on board the merchant ship, in an accident which resulted in the amputation of two fingers, and rendered him unfit for further service in the Reserve. He claimed compensation from his civilian employer under the Workmen's Compensation Act 1906 and sought to recover a sum in respect of the retainer which

23. There may be a statutory right to payment of a disability pension. See War Pensions Act 1920 (10 & 11 Geo. V, c. 23) s. 8; Pensions Appeal Tribunals Act 1943 (6 & 7 Geo. VI, c. 39) s. 11 (cf. Browning v. War Office [1963] 2 W.L.R. 52).

24. It should perhaps be stated that the point at issue depends on the balancing of executive necessity against the principle of pacta sunt servanda. Arguably, the Crown should set high standards of consistency in its dealings wherever possible. See Robertson v. Minister of Pensions [1949] 1 K.B. 227, per Jenning J. at 231.


26. Supra.

27. [1911] A.C. 413.
he could no longer earn. For this part of his claim to succeed, he had to show that the retainer was money paid under a "concurrent contract of service", and in this he succeeded, both before the Court of Appeal and the House of Lords. The argument that the facts disclosed no such contract was only raised before the House of Lords, and was rejected by Lord Loreburn L.C. with the words that:

The authorities cited go no further than to say that when there is an engagement between the Crown and a military or naval officer the Crown is always entitled to determine it at pleasure, and that no obligation contrary to that would be recognized as valid in law.

Since then, however, the cases already cited show that the courts have gone beyond the cautious view taken by Lord Loreburn.

It is true that the existence of a rule by which the Crown may dismiss at pleasure does not logically lead to the rule whereby the serviceman cannot sue for his pay, but this and other extensions have been made. In consequence, Brandy's Case stands as only weak authority for the contractual analysis of employment in the armed forces. Similarly, the Privy Council case of Williams v. Howarth provides sub silentio authority for the competence of a contractual claim for pay, but must be taken as having been passed over by subsequent developments.

32. See the cases cited supra, note 11.
33. Supra.
34. Note how the case was distinguished by the Privy Council in Att. Gen. for N.S.W. v. Perpetual Trustee Co. Ltd. [1955] A.C. 457, 487-8. Their Lordships did not accept that, in every situation where there is a contract of service, a master-servant relationship arises (the reverse of the way in which the point is usually made).
B. A Master-Servant Relationship?

While the evidence is almost completely against a contractual explanation of service in the armed forces, it is less damning towards the suggestion that there are close associations between such service and the old master-servant relationship. It will be appreciated that here the latter terminology is being used in a special sense — not to signify the old-fashioned names for the parties to a contract of employment, but to denote the institution which antedated the development of such a contract. It is argued elsewhere\(^{36}\) that, although, since at least the demise of villeinage, employment can in general be said to have been consensually based, there is a difference in law and practice between the extra-domestic employment relationship in pre-industrial and industrial English society. This distinction is important in relation to the operation of an early cause of action, the *actio per quod servitium amisit*. The *actio per quod* forms one exception\(^{37}\) to the rule that actions causing purely economic loss give no right to sue in tort to the person damnedified. It allows a master to recover the loss he incurs when one of his servants suffers incapacitating injuries through the intentional or negligent acts of another. Since 1956, its scope in English (but not Australian) law has been strictly limited;\(^{38}\) it now applies only where the servant injured is employed in menial or domestic work, as a member of his master's household, though there is convincing evidence that this limitation is based on

\(^{36}\) See *supra*, p. 62 ff.


\(^{38}\) The Law Reform Committee in its Eleventh Report ((1963) Cmnd. 2017) recommended the abolition of the action, on the ground that it was out of accord with modern ideas and produced capricious results (para. 5).
a mistaken interpretation of the historical evidence. 39

For present purposes what is interesting is the question whether it was appropriate for the Crown to bring this action in respect of losses incurred through the injury of members of the armed forces. This was a problem not confined to the United Kingdom, and different countries answered it in their own ways. In the United States, for example, the Supreme Court in 1947 40 rejected an invitation to extend the scope of the actio per quod into this sphere, arguing that to do so would be to ignore

factors of controlling importance... These are centered in the very fact that it is the Government's interests and relations that are involved rather than the highly personal relations out of which the assertedly comparable liabilities arose. 41

They also pointed out that a change in the law of the type sought would directly affect fiscal policy, and so was a matter appropriate for handling by Congress rather than by the courts. However, a decision of the Canadian Supreme Court in 1948 42 held that a statute, which provided that "for the purposes of determining liability" a member of the armed forces was to be deemed to be a Crown servant, had the effect of opening the way to the bringing of an actio per quod by the Crown. The Australian view, expressed in The Commonwealth v. Quince, 43

41. At 312.
42. R. v. Richardson (1948) S.C.R. 57.
43. (1944) 68 C.L.R. 227.
was that the action did not lie. Of the three judges in the High Court of Australia who concurred in this majority decision, only one (McTiernan J.\textsuperscript{44}) thought that the absence of any contract between servicemen and the Crown was significant. The other two judges (Rich J.\textsuperscript{45} and Starke J.\textsuperscript{46}) were prepared to accept that a de facto master and servant relationship would support the action, but did not think that the present relationship amounted to this. Until 1955, the position in English law was unclear; in Admiralty Commissioners v. S.S. Amerika\textsuperscript{47} Lord Sumner had hinted that the action might be inappropriate, but in Attorney-General v. Valle-Jones\textsuperscript{48} (a case later approved by the Irish courts)\textsuperscript{49} it had been conceded by counsel that the Crown, in its capacity as employer of servicemen, could bring the action. Eventually the matter was decided in 1955,\textsuperscript{50} though as the result of a case whose facts were concerned with the application of the doctrine to a police constable. Their Lordships in the Privy Council, however, assimilated police and armed forces employment, and remarked that the actio per quod "did not depend on any contract of service between master and servant but on the single fact of service."\textsuperscript{51} It was, they held, inappropriate both in respect of police constables and members of the armed forces; there was a "fundamental difference\textsuperscript{52} between the domestic relationship of master

\textsuperscript{44} At 250.
\textsuperscript{45} At 242.
\textsuperscript{46} At 245.
\textsuperscript{47} [1917] A.C. 38, at 51.
\textsuperscript{48} [1935] 2 K.B. 209.
\textsuperscript{50} Att. Gen. for N.S.W. v. Perpetual Trustee Co. Ltd., supra.
\textsuperscript{51} At 483.
\textsuperscript{52} At 489.
and servant and that between the Crown and the holder of a public office. Att. Gen. for N.S.W. v. Perpetual Trustee Co. Ltd. was soon followed by I.R.C. v. Hambrook,\textsuperscript{53} where the further (and historically dubious) restriction was imposed that the service had to be of a menial character before the action would lie.

Although, so far as English law is concerned, the \textit{actio per quod} must now be accepted as inapplicable in respect of service in the armed forces, this does not show that the Crown-serviceman relationship has no similarities with that of the old master-servant relationship. The decisions in Perpetual Trustee\textsuperscript{54} and Hambrook\textsuperscript{55} were primarily attributable to a desire to limit the scope of the \textit{actio per quod} for reasons of public policy\textsuperscript{56} - so much so that, in the latter case, historical evidence which did not fit in with this intention was disregarded. In fact, many of the demands made of soldiers are very similar to those which masters in an earlier age might have made of their servants. Social inferiority, strict obedience to authority, and exclusive service are the distinguishing marks of a servant in the late 18th century,\textsuperscript{57} and these are still characteristic of the modern private soldier, though less so of the officer. The soldier is expected to subordinate his whole life to his calling - there is no time when his services cannot be called upon.\textsuperscript{58} Similarly, allegiance is expected of him, and he is expected to devote

\begin{itemize}
\item \textsuperscript{53} Supra.
\item \textsuperscript{54} Supra.
\item \textsuperscript{55} Supra.
\item \textsuperscript{56} See Lord Denning M.R. in I.R.C. v. Hambrook, at 655.
\item \textsuperscript{57} Supra, p. 61 ff.
\end{itemize}
all his energies to his job and not to take other employment contemporaneously with his service. Of course, the analogy cannot be pressed too far; the soldier who disregards lawful authority is subject to punishments which are imposed by military law, which is a separate system of law to that applicable to private citizens. But even here it is worth remembering that the relatively stiff disciplinary penalties meted out to the disobedient soldier are matched by the system of imprisonment and fines which were operated under the Master and Servant Acts. 59

If soldiers are analogous to servants in this way, it would be reasonable to expect to find the doctrine of respondeat superior in evidence in relation to Crown service, for, like the actio per quod, this operates on the fact of service rather than on the presence of a contract of employment. There is, however, little authority on this area of the law, perhaps because, before the Crown Proceedings Act 1947, 60 it was very difficult to sue the Crown in tort. The outcome of the one case where the question was raised, Tobin v. The Queen, 61 does not appear to support the present hypothesis: the Crown was held not to be accountable for damage inflicted by a naval captain. But in part the decision turned on the procedural impropriety of bringing a petition of right in tort, 62 as well as on the substantive issue of the applicability of respondeat superior. In any event, the reasons given for this second leg

59. Supra, p. 122.
60. 10 & 11 Geo. VI, c. 44.
61. (1864) 16 C.B. (N.S.) 310.
62. The case may thus be distinguished by concentrating on it as purely an authority on procedural matters. See The Commonwealth v. Quince, supra, per Willis J.
of the judgment are unconvincing. It is stated that "the Queen does not appoint a captain to a ship by her own mere will, as a master chooses a servant," that "the will of the Queen alone does not control the conduct of the captain in his movements, but a sense of professional duty" and, lastly, that "the act complained of was not done by the order of the Crown, but by reason of a mistake in respect of the path of duty." Even by the standards of the mid-19th century, this amounts to an unconvincing set of distinctions. The implication is that, in the ordinary master-servant relationship, the master does appoint every servant personally, supervises his every act personally, and does not bear responsibility should he commit any tortious act outside the acts he was directly instructed to do. The case was not followed in Australia in Shaw, Savill & Albion Co. Ltd. v. The Commonwealth, and the present position in English law is that statute, in the form of the Crown Proceedings Act 1947, has reversed the common law rule. As with the actio per quod, the rejection of respondeat superior in its application to the Crown by the common law is best seen as based on considerations of public policy, and not as evidence that the relationship between Crown and serviceman is inherently different from that which at one time obtained between master and servant.

63. All at 523.
64. (1940) 66 C.L.R. 344.
65. s. 2(1). See Atiyah, Vicarious Liability, 391 f.
66. Z. Cowen, op. cit., at 486.
67. cf. McArthur v. The King [1943] 3 D.L.R. 225, 264-5, where Thorson J. puts forward five grounds on which the member of the armed forces finds himself in a fundamentally different position from that of an ordinary civilian employee. The difference he finds most significant is the subjection of the member of the armed forces to the strictures of military law and the corresponding loss of civil rights.
The absence of contract in the serviceman's employment relationship has certain technical consequences. As has already been mentioned, the Infants Relief Act 1874 cannot apply, because there is nothing on which it can fasten. Again, if there is no contract, anyone who encourages members of the armed forces to desert their service will not commit the tort of inducing breach of contract, though they are likely to fall foul of the criminal law. But the consequences go beyond these incidental matters: the relationship between Crown and serviceman is stripped of those obligations and duties which are explained (when they occur in an ordinary employment relationship) in terms of implied contract. Thus, the serviceman has, for example, no duty to carry out his job with due skill, to co-operate with the Crown in the common purpose of the enlistment, or to observe good faith in his dealings with the Crown. Perhaps it would be more accurate to say that, if these duties are incumbent upon the serviceman, they must be justified in some extraordinary way.

68. For details of the statutes penalising such offences in relation to the different services, see Halsbury's Laws of England (3rd ed.), Vol. XXXIII, para. 1422. A member of the armed forces owes both a duty to obey orders and a duty of allegiance to the Crown. The difference between these duties is discussed briefly in R. v. Arrowsmith [1975] 1 All E.R. 463, a case dealing with an offence under s. 1 of the Incitement to Disaffection Act 1934 (24 & 25 Geo. V, c. 56).


72. In fact, the wilful non-cooperation which is the basis of such activities of working to rule would probably amount to conduct prejudicial to good order and discipline, and thus be contrary to the Army Act 1955, s. 69, Air Force Act 1955 (3 & 4 Eliz. II, c. 19), s. 69, as amended by the Armed Forces Act 1971 (c. 33), s. 33.
However, not all the duties owed by an employee to his employer are of a contractual nature, and in respect of these the serviceman is potentially in the same position as the employee under a contract of employment.

One important class of non-contractual duties is that described as fiduciary, and it has been held that this does apply equally to a serviceman. In *Reading v. Att. Gen.*, an army sergeant was held unable to recover money confiscated by the Crown, which he had 'earned' in bribes for misuse of his official position to the benefit of smugglers. He was subject to the equitable rule that a fiduciary must forfeit bribes to the person in whose interest he is, or ought to be, acting. In *Reading v. Att. Gen.*, an army sergeant was held unable to recover money confiscated by the Crown, which he had 'earned' in bribes for misuse of his official position to the benefit of smugglers. He was subject to the equitable rule that a fiduciary must forfeit bribes to the person in whose interest he is, or ought to be, acting.

It is not intended to explore the nature of these fiduciary obligations in depth at present, but it may be questioned whether the assimilation of a serviceman to an ordinary fiduciary is justified on grounds of principle. The general rule is that a person in a fiduciary position is not, unless the contrary is specifically stated, entitled to make a profit. He is not permitted to put himself in a position where his interest and duty conflict. In a non-technical sense, the fiduciary holds property and acts on trust for his principal, and must not profit from breach of that trust. But with a public officer, the trust

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74. *Lister & Co. v. Stubbs* (1890) 45 Ch.D. 1, 12.
which is broken is one which was owed to the public at large, not to the Crown alone. As Lord Mansfield stated in 1783, if a man accepts an office of trust and confidence, concerning the public, especially when it is attended with profit, he is answerable to the king for his execution of that office; and he can only answer to the king in a criminal prosecution. 77

However, it has long been settled that the Crown could recover profits made by a public officer from the misapplication of public funds, 78 and Reading's Case 79 now stands as authority for the proposition that the Crown can sue for breach of the confidence it reposes in its military servants, just as an employer can similarly sue his employees.

77. R. v. Bembridge (1783) 22 St. Trials 2, at 155.
79. Supra.
CHAPTER 7

THE POLICE
The task of classifying the employment relationship of members of the police force is not as straightforward as it might appear at first sight. It is complicated by two factors. In the first place, it raises important issues of constitutional law; the police officer is a central figure in the apparatus of the state and his duties, involving responsibility for the maintenance of order in society, mark him out as different from the ordinary worker. Thus, the incidents of his employment are a matter of public as well as private law. The consequence of this has been that most studies of his duties and responsibilities towards his superiors have been from the point of view of the constitutional, rather than the labour, lawyer. The second complication is the product of a certain pattern in litigation during the present century. A major preoccupation of the courts until recent times has been whether the actio per quod servitium amisit and the doctrine of respondeat superior applied to members of the police force, and as a result the cases in which there is discussion of the relationship between the police and their 'employers' concentrate on these issues. It is important to realise at the outset that such cases are not directly concerned with the question whether police officers work under a contract of service, although, of course, the judges in them have often taken the opportunity to make observations on this particular topic. But because neither the actio per quod nor respondeat superior turns on the existence of a contract of service, such observations should be recognized as strictly obiter.

1. cf. G. Friedman, Modern Law of Employment, 79: "the law which relates to such employments appertains more to certain aspects of constitutional and administrative law or the law of local government than to the general common and statute law relating to employment."
2. See the discussion of these topics in the preceding chapter.
In the following discussion, points made earlier when dealing with employment in the armed forces are not reiterated. The general comments\(^3\) on the possible consequences of an employment relationship standing outside of contract should therefore be borne in mind.\(^4\) It may be briefly mentioned that in relation to the police service, as with the armed forces, any inducement to breach of duty is a criminal offence.\(^5\)

The peculiarities of employment in the police force are several; a striking example is that the grounds on which an ex-policeman may find himself deprived of his pension are surprisingly wide. By statutory instrument,\(^6\) a police authority may order the forfeiture (in part or in whole, temporarily or permanently) of a pension if the grantee behaves in certain ways. He may find he loses his pension if he is sentenced to a term of imprisonment of more than a year, if he carries on business as a private detective after he has been required (on reasonable grounds) by the police authority not to do so, or if he carries on business which is either illegal or involves making use of the fact of his former police service in "a manner which is discreditable or improper". So too he is vulnerable if he publishes, or supplies to another for publication, in a manner which is "discreditable or improper" any information which he

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4. By the Trade Union and Labour Relations Act 1974, s. 30(2), a person in police service is neither an 'employee' nor a 'worker'. Thus he has no protection against unfair dismissal. He is also excluded from the protections of the Employment Protection Bill 1975, which builds upon the definitions given in the earlier act (cl. 113(1)).
5. Police Act 1964 (c. 48), s. 55.
had obtained during his police service. These are extraordinary powers, no doubt taken in order to deter the likes of a retired Royal bodyguard from selling his memoirs to the press, which allow the retention of control over conduct after leaving the police force to a degree which would be highly unusual in private employment.

A. Who is the Employer?

Leaving aside for the moment the problem of defining the nature of the employment (using the word in a non-technical sense) relationship the police constable has, it is first necessary to identify the person or authority with whom he shares that relationship. This is not easy because the functions which an employer would normally be expected to fulfil are, in the case of the police, not to be found in any one place. From the point of view of a member of the force below the rank of Deputy Chief Constable, there are three sources he might look to in order to discover what are characteristically the functions of an employer.

(1) The Chief Constable

The appointment and disciplining of all ranks below Assistant Chief Constable are, by statute, a matter for the

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7. Reg. 69.
8. The powers taken here are much more sweeping than in other areas of public employment. Compare the civil servant. Under the Principal Civil Service Pension Scheme 1972 forfeiture of pension benefits will take place only where there is conviction of gross misconduct against the State, and appeal against forfeiture is allowed to an independent board. Para. 8. 3. Infra, chap. 8, note 9.
9. The question is not posed for higher ranks for reasons which will appear below.
Chief Constable of the relevant police area; it is he who decides whether a disciplinary charge is proved and what the punishment will be, subject to a right of appeal to the Home Secretary. Thus, it is not strictly accurate to say that the police are 'appointed' by the local police authority, for the appointment of subordinate officers and internal promotion are his responsibility, not theirs. These are powers normally held by an employer over his employees, but there has never been any serious attempt in English law to establish the existence of a master and servant relationship, or a relationship based on a contract of employment, between the Chief Constable and his subordinates. Probably this is because the Chief Constable is seen more as an administrative chief (subject, for example, to many external controls from other agencies, and without control over pay) rather than an authority in his own right. This is so notwithstanding the fact that he is now vicariously liable for the wrongs of his constables (yet another characteristic of employers). This responsibility, however, is merely a technical device introduced by the Police Act 1964 to ensure adequate compensation for those injured by such wrongful acts; having paid any such compensation, the


12. The issue did arise in Scots law. See infra, pp. 209-12.

13. Police Act 1964, s. 48.
Chief Constable is entitled to recover it from the police fund. 14

(2) The Crown

To some extent, the police constable is an obvious representative of the Crown. 15 His concern with the preservation of the internal security of the state has already been mentioned, and, moreover, on appointment he swears allegiance to Her Majesty, as do non-alien members of the armed forces. The courts, however, in cases arising out of the law of tort, have been concerned to establish that the relationship between policeman and Crown is distinguishable from that between employer and employee. The leading case here is Att. Gen. for New South Wales v. Perpetual Trustee Co. Ltd., 16 where the Privy Council was called upon to decide whether the services performed by an Australian police constable were such as would support the bringing of the actio per quod when the Crown was deprived of them through the negligent acts of a third party. (The structure of the police force in New South Wales was very different from that in this country, the appointment of police constables being a matter for the Crown.) The constable was held not to be a servant for the particular purpose of the actio per quod. Though strictly its ratio is confined to

   See also G.H. Treitel, "Crown Proceedings: Some Recent Developments," (1957) Public Law, 321, 333. He argues that it is still an open question whether a police constable is an 'officer' of the Crown (as defined by s. 38(2) of the Crown Proceedings Act 1947), for the purposes of s. 2(6) of that Act (which would not involve holding the Crown vicariously liable for his torts).
this point, the case is also valuable because of the comments it contains on the common law relationship between Crown and constable. According to their Lordships, there is a "fundamental difference" between the domestic relation of servant and master and that of the holder of a public office (such as a constable) and the State which he is said to serve. The constable "is a ministerial officer exercising statutory rights independently of contract"; his authority is original, not delegated, and he exercises it at his own discretion - a view in keeping with an earlier Australian authority which had decided that the originality of a constable's power prevented the Crown being vicariously liable for his acts. The oath of allegiance sworn to the government of New South Wales was itself taken as pointing to the special nature of the relationship he had with the Crown, being described as "not the usual concomitant of the master and servant relationship." Here, in parentheses, it may be mentioned that, as in relation to the armed forces, the oath of allegiance may only be a partial explanation of the obedience which the constable is bound to show his employer. The fact of entering into the service may also produce a duty of obedience. The importance of the Perpetual Trustee case cannot be ignored. If there is no analogy between police service and the standard service of

17. cf. supra, p. 192. Note that a later attempt to circumvent the effect of this decision by resort to the doctrine of unjust enrichment was unsuccessful. See Receiver for the Metropolitan Police District v. Croydon Corporation [1957] 2 Q.B. 154.
18. At 489.
19. Ibid., 489-90.
20. Enever v. The King (1906) 3 C.L.R. 969.
21. At 487.
an employee in a situation where the Crown, as employer, exercises direct control over the administration of a police force, then it is exceedingly unlikely that such an analogy would stand in this country where the control exercised by the Crown is covert (though perhaps of no lesser importance).\textsuperscript{23}

It would now seem to be settled beyond reasonable doubt that the policeman is a Crown servant only in the loosest of senses.\textsuperscript{24}

Though the executive, in the person of the Home Secretary, enjoys "sweeping powers"\textsuperscript{25} over the making of regulations governing the appointment, dismissal, discipline and conditions of service of police officers,

the Crown does not appoint policemen. It does not dismiss them and it does not equip them. It is a very odd servant whose master does none of these things.\textsuperscript{26}

(3) The Local Authority

In the past there has been much discussion of the possibility of establishing a master–servant relationship between police constables and the local watch committee or police committee. Since the reforms of the Police Act 1964 have reduced the functions of these supervisory bodies (notably in relation to appointments, promotions and discipline\textsuperscript{27}), the

\textsuperscript{23} For an assessment of the importance of central government in this area, see D. Reagan, "The Police Service: An extreme example of central control over Local Authority Staff," (1966) Public Law, 13.

\textsuperscript{24} cf. Fletcher v. Nott (1938) 60 C.L.R. 55, where an Australian police constable was described as having a contractual relationship with the Crown.

\textsuperscript{25} Reagan, op.cit., at 14.

\textsuperscript{26} Wilson, op.cit., at 39.

\textsuperscript{27} In line with the recommendations of the Royal Commission on the Police ((1962) Cmnd. 1728, para. 188), which disapproved of the arrangements whereby in the county borough forces in England and Wales, powers of discipline, appointment and promotion were vested in the watch committees.
arguments in favour of such an analysis are less pressing. It is to be noted, however, that long before 1964 the courts had shown themselves opposed to accepting the local authority as an employer of the police.28

The leading case is Fisher v. Oldham Corporation,29 which, according to the report of the Royal Commission on the Police, established that "whatever else he might be, the constable was not the servant of any organ of local government."30 This, however, is not an accurate statement of the ratio. What was at issue was whether or not the defendant corporation, acting through the medium of their watch committee, were vicariously liable for wrongful acts on the part of their police officers.31 The decision that they were not does not support the much wider proposition that there can be no employment relationship between the parties, though there is an understandable tendency to conflate the two issues. If respondeat superior does not apply there is perhaps a presumption that there is no contract of employment between the parties, but that is all, for although the two phenomena overlap they are, as has already been emphasised, by no means coterminous. In much the same vein,

28. In Stanbury v. Exeter Corporation [1905] 2 K.B. 838, Wills J. (at 843) expressed the obiter but influential opinion that a local corporation could never be held liable for the wrongful acts of one of its police officers because the officer was performing duties that were to the benefit of the public at large. cf. G. Treitel, "Crown Proceedings: Some Recent Developments," (1957) Public Law, 321, 333.
30. Para. 63.
31. Note that this decision did not affect the special position of railway constables, it being well established that the railway company (which had statutory powers to appoint constables) was vicariously liable for their wrongs. See Lambert v. G.E. Railway [1909] 2 K.B. 776, distinguished in Fisher's Case by McCardie J. at 373-4.
it was recognized in Fisher itself that the existence of
the actio per quod did not establish the presence of a master-
servant relationship.32 McCardie J.'s dictum that it would be
contrary to established decision and sound public policy to
hold that the "normal relation of master and servant" existed
between the parties may thus be criticised on the grounds that
it is too wide. His judgment may also be attacked on the ground
that some, at least, of the arguments he uses are defective.
From the proposition that, were the watch committee to attempt
to instruct the police to release an apprehended felon, the
police would have a duty not to obey, he deduces that the police
cannot be the servants of the local authority; it is not
difficult to refute this point by showing that no employee
is under a duty to obey an unlawful order from his employer.33

According to McCardie J., a police constable was not the
servant of the corporation, but "a servant of the State, a
ministerial officer of the central power."34 In saying this,
however, it is unlikely that he was intending anything more than
a broad description; his primary concern was the rejection of
the specific claim before him, not the suggestion that some form
of substantive liability might attach to the Crown in respect of
the constable's torts. By 1930 the tactics of judicial
deflection of claims in this area of the law were well

32. McCardie J. ... refused to allow the decision in Bradford
Corporation v. Webster [1920] 2 K.B. 135, that an actio
per quod lay at the instance of a corporation in respect
of loss incurred through the injury of a police constable
by a third party, to decide the question of whether "the
normal relation of master and servant" existed between a
constable and the defendant corporation.
34. At 371.
established, though not so much in England (where there was a
dearth of authority) as in Scotland. In that jurisdiction a
line of cases dealing with attempts to apply the doctrine of
respondeat superior to the police service stretches back to the
mid-19th century. The first was Melvin v. Wilson,\(^35\) where the
head of the Glasgow police force was sued as responsible for
the wrongful detention suffered by the pursuer. The latter
had been detained (perhaps not surprisingly) after being seen
carrying a peacock through the streets of Glasgow in the early
hours of the morning, but had not been brought before the police
court the following morning, as by law he should have been.
The interest of the case\(^36\) lies in the obiter remarks of Lord
Jeffrey, who disagreed with the argument that the head of police
was an unsuitable target for such an action. Stressing the
powers and authority the police chief enjoyed, he commented that
"parties who appoint others to do an act, are liable in civil
damages for any wrong committed by the parties so authorised to
act."\(^37\) The superintendent of police should bear the
responsibility, for who else would? This robust reasoning
was, some ten years later, characterised as obiter and impliedly
disapproved in Bair v. Burnett,\(^38\) where a police superintendent
or chief was described as a "fellow-servant" alongside constables
of inferior rank. Both types of officer were described as under
the control, or at least responsible to, the magistrates of the
town and the public at large. In 1891,\(^39\) a pursuer sought to

\(^{35}\) (1847) 9 D. 1129.
\(^{36}\) The action eventually failed on the ground that it was
brought out of time.
\(^{37}\) At 1137-8.
\(^{38}\) (1857) 19 D. 405.
\(^{39}\) Young v. Magistrates of Glasgow (1891) 18 R. 825.
rly on this decision and sued the magistrates as responsible in law for their police officer's delicts, only to find that the judges of the Court of Session talked of the "mistaken analogy between cases like the present and cases in which an employer is held responsible for the negligent acts of persons in his employment." The relation between the magistrates and the police was said to be "not a relation of employment, but ... an official relation constituted by statute," though no effort was made to explain why employment and public service should thus stand in mutual exclusion of each other. One judge, however, ventured to say that the police were the servants, and acted under the authority of, the Committee of the Police Commissioners, a body established under s. 15 of the Local Government (Scotland) Act 1889 for the control of the police.

Two years later this view again found judicial support when a claim against a county council was unsuccessful. Of course, the inevitable happened. When, the following year, a claim was brought against a statutory joint committee, this too failed, on the excuse that the standing joint committee did not exercise proper control over the police force. In this case, Girdwood v. Standing Joint Committee of the County of Midlothian, renewed reference was made to the extensive powers of the chief constable over his men, and the latter's obligation to obey, not only the orders of the former, but also

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40. Per Lord MacLaren at 829.
41. Ibid.
42. Lord Adam, at 829.
43. 52 & 53 Vict., c. 50.
45. (1894) 22 R. 11.
those of the Justices of the Peace. At the same time it was said "they are not the servants of the chief constable, Sheriff or Justices, but of the State."\textsuperscript{46} The Standing Joint Committee were not entitled to interfere in any way with the police in the fulfilment of their duties...the relation of master and servant to and or of employers and employed does not subsist between the Committee and the police; and there is...no legal ground on which either the Committee or its members can be called on to answer for the errors of the police. \textsuperscript{47}

Some twenty years later, an action, this time brought against a chief constable on the basis of his vicarious liability, failed on the ground that the wrong in question (the unlawful photographing and fingerprinting of the pursuer) had not been carried out on the defender's express orders;\textsuperscript{48} Lord Salvesen, in a dissenting judgment, stated it was 'strange' to make this point "when the defender does not repudiate what his subordinates did, but strenuously endeavours to justify their actings."\textsuperscript{49} Certainly, if it is accepted that one basis of the imposition of vicarious liability is because, though [the employers] were not present to dictate how directions given by another should be carried out, yet [they] had vested in their servant a discretion in the manner of carrying out such directions, \textsuperscript{50}

the requirement of direct instruction seems out of place.

It would be quite unrealistic not to recognize that the successive failures of the Scottish courts to find the appropriate defender for the purposes of applying \textit{respondeat

\textsuperscript{46} Per Lord Kincairney at 13n.
\textsuperscript{47} At 13n.
\textsuperscript{48} Adamson v. Martin 1916 S.C. 319.
\textsuperscript{49} At 329.
\textsuperscript{50} Per Lord Simonds, Mersey Docks and Harbour Board v. Oggins and Griffiths (Liverpool) Ltd. [1947] A.C. 1, at 18.
superior to the police service were largely the product of a policy decision to restrict the liability of the police (and those responsible for them) in delict. Of course, the individual officer who committed a wrong might be liable, but too often he was likely to be a man of straw. One commentator has suggested, in a review of the cases listed above, that "concepts of service derived from the private field work uneasily in the field of public law." This, of course, is far from being a justification of what has happened in the past; rather it is an indication of the unwillingness of judges to apply such doctrines of private law in this particular context. As the Crown Proceedings Act 1947 demonstrates, there is no inherent incompatibility between public employment and vicarious liability.

B. The Implications for Tenure of Absence of Contract

If police officers are to be taken as working outside a contract of employment (as appears to be the generally accepted view), what security and protection do they have in keeping their jobs? It is suggested that it may be possible, in answering this question, to draw a distinction between policemen of superior and inferior rank. Grounds for so distinguishing already exist: superior officers are appointed by the local police authority, subject to the approval of the Home Secretary, whereas lower ranks are appointed by the Chief Constable himself.

52. It may be mentioned that this approval is by no means automatic. For details of Home Office practice, see D. Reagan, op.cit., supra, 15-21. cf. Kilmarnock Magistrates v. Secretary of State for Scotland (1961) S.L.T. 333.
(1) Chief, Assistant Chief, Deputy Chief Constables

These superior officers are the furthest removed from the standard contract of service. In a modern case Lord Denning M.R. described the Commissioner of Police for the Metropolis (the holder of an office similar, but not identical, to that of a chief constable in other parts of the country) as having certain duties to enforce the law, but said, that in carrying out these duties, "he is not the servant of anyone, save of the law itself." But both the Master of the Rolls and Edmund Davies L.J. were of the opinion that, should the Commissioner blatantly disregard the laws he was supposed to enforce, a legal remedy, possibly mandamus, would lie in order to force him to do his duty. An action for breach of contract on the part of the local police authority would appear highly inappropriate, however. The chief constable's duty arises out of the agreement he has with that authority, but quite independently of any consensual acts. It is a duty imposed by the law itself, which automatically attaches to anyone who holds the office. This must be accepted as axiomatic, but unfortunately it makes it difficult to define the distribution of rights and obligations between the chief constable and the appointing authority with the same precision which could be expected were the parties joined by a contract of employment.

The Royal Commission on the Police wrote in 1962 that, while the status of a police constable was established beyond doubt

54. The appointment of the Commissioner is regulated not by the Police Act 1964, but by the Metropolitan Police Act 1829 (10 Geo. IV, c. 44) s.1, as amended by the Metropolitan Police Act 1856 (19 & 20 Vict., c. 2) s.1.
55. At 136.
as not being the servant of the police authority, that of the chief constable was uncertain.\(^{57}\) Faced with conflicting evidence\(^{58}\) as to whether the police authority could issue instructions binding on the chief constable, they inclined towards the view that he was not bound by the directions of the authority and, by implication, not a party to a master-servant relationship. Nevertheless, they did recommend general control by central government or by the local police authority over the general policies of a force — e.g., over such matters as parking of motor vehicles, the approach taken to breaches of the peace arising out of industrial disputes, etc.\(^{59}\) The Report recommended that,

> while the chief constable would continue to enjoy immunity from orders he would nevertheless be exposed to advice and guidance of which he would be expected to take heed.\(^{60}\)

Since 1964, a chief constable is obliged to submit an annual report to his police authority and to the Home Secretary.\(^{61}\)

It would be reasonable to assume that, in the unlikely event of, say, failure to pay a chief constable the salary due to him, or in any situation where there was an apparent breach of fundamental obligations by either side to the appointment, a court would bear in mind arguments and principles drawn from contract,\(^{62}\) but it would be unsafe to go beyond this very cautious observation. Certain duties normally associated with the institution of the contract of employment — e.g., the

\(^{57}\) Cmnd. 1728, para. 78.

\(^{58}\) cf. Evidence of Association of Chief Police Officers of England and Wales (Minutes of Evidence 15, 849); Evidence of Association of Municipal Corporations (Minutes of Evidence 11-12, 629-31).

\(^{59}\) Para. 93.

\(^{60}\) Ibid.

\(^{61}\) Police Act 1964, s. 12(1); s. 30(1).

duty incumbent upon both parties to co-operate in the performance of their respective duties; the duty of the person employed to show fidelity towards his employer and not to divulge confidential information - seem suitable for translation to this particular relationship. Others - notably the duty of obedience - do not travel with such ease.

In one area at least, however, it is settled law that the principles which apply are not those associated with the normal contract of employment. Dismissal, along with the imposition of lesser disciplinary penalties, is controlled by regulations made under statute, and the former power which police authorities wielded, by which they might dismiss their chief constable without giving him reasons for their decision and without right of appeal, no longer exists. But the decision of the House of Lords in Ridge v. Baldwin in 1963, though dealing with the exercise of that now defunct power, lays down principles of lasting importance in the common law. It will

63. See supra, p. 201.
64. These powers were contained in the County Police Act 1839 (2 & 3 Vict., c. 93) s.4; Municipal Corporations Act 1882 (45 & 46 Vict., c. 50) s. 191(4).
66. The position is now regulated as follows. By the Police Act 1964, s. 5(4)(5); s. 6(5), a police authority may require a chief constable, deputy chief constable or assistant chief constable to resign in the interests of efficiency, if it has given the officer an opportunity to make representation against being so required, and has obtained the approval of the Home Secretary. By s. 29(2)(3), the Home Secretary may require a police authority to ask a chief constable to resign in the interests of efficiency, though he too must give an opportunity for the making of representations. By s. 33 the disciplinary authority in relation to these senior officers is said to be the local police authority, and this has powers to impose a range of penalties, from dismissal to a caution. By s. 37(1), any police officer, of whatever rank, can appeal to the Home Secretary against his conviction of a disciplinary offence or the sentence he receives. For details of practice in this area, see Reagan, op.cit., 23 ff.
be remembered that in this famous case the majority of the House of Lords held that a chief constable was entitled to proper notice of the charge against him and to a right to a hearing before he might lawfully be removed from his office on the grounds of misconduct. The leading speech was that of Lord Reid, and it was he who gave most attention to the nature of the relationship existing between the chief constable and the local police authority. In the context of dismissal, he contrasted this relationship with (a) the 'pure case' of master and servant, and (b) the case where an office was held at pleasure. In neither (a) nor (b) did the person employed have any right to a hearing before being dismissed. The chief constable, however, was different. He was protected because he might only be removed from his office on grounds specified by statute, and all office holders within this category, said Lord Reid, were entitled to be told why they were being removed and given an opportunity to speak in their defence. 67

The reasoning behind this conclusion was an "unbroken line of authority", 68 of cases relating to the deprivation of public office. Professor De Smith comments that, prior to their resurrection by Lord Reid, these cases had largely been forgotten - partly because the concept of a public office as a species of property right had gone out of fashion, partly because, in modern times, statutory regulation had taken over from the common law as the protector of the rights of the office holder. 69 The old authorities show how the concept of a public

67. At 66. See too Lord Morris of Borth-y-Gest at 122.
68. Ibid.
office was totally divorced from employment under contract.\textsuperscript{70} Protection was said to be available to a magistrates' clerk\textsuperscript{71} and to a school-teacher\textsuperscript{72} in retaining their jobs, though today at common law such protection would be primarily measured by the terms of their contracts of employment.\textsuperscript{73} In the school-teacher's case, the judge conceded, it is true, that the right being discussed -

\begin{quote}
\textit{is really a common law one depending on a contract, viz., the right to keep the place to which he had been validly appointed until he is turned out of it by persons who have observed the necessary formalities for that purpose.}\textsuperscript{74}
\end{quote}

but he nonetheless proceeded to grant an injunction restraining the dismissal of the plaintiff without giving him a hearing, a step which would have been quite unthinkable in the setting of an ordinary master and servant relationship. It contravenes the principle that the courts

\begin{enumerate}
\item 70. For a discussion of whether the judges of the Supreme Court of Judicature (another category of 'holders of public office') are properly described as "persons in His Majesty's service", see W.I. Holdsworth, "The Constitutional Position of the Judges," \textit{(1932} 48 L.Q.R. 25. He argues that only those officers appointed under the Royal Prerogative are properly described as 'servants' of the Crown, and thus excludes the judges because of their historical independence from the Prerogative. \textit{cf.} Terrel v. Secretary of State for the Colonies \textit{[1953]} 2 Q.B. 482, and Lord Goddard's views on the nature of the tenure of a judge of the Supreme Court of Malaya. And see infra, p. 289.
\item 71. Osgood v. Nelson \textit{(1872)} L.R. 5 H.L. 636.
\item 72. Fisher v. Jackson \textit{(1891)} 2 Ch. 84.
\item 73. Subject to important qualifications contained in Fullbrook \textit{v. Berkshire Magistrates' Courts Committee} \textit{[1971]} 69 Knight's Local Gov. Rep. 75, and Malloch \textit{v. Aberdeen Corporation} \textit{[1971]} 2 All E.R. 1278. Both are discussed infra.
\item 74. At 95. See too Rendall \textit{v. Blair} \textit{(1890)} 45 Ch.D. 139, per Bowen L.J. at 156, where the appointment of a charity school headmaster is stated as resting on a "contractual employment of him to teach".
\end{enumerate}
should be very unwilling to extend decisions the effect of which is to compel persons who are not desirous of maintaining continued personal relations with one another to continue these personal relations, \[75\]

but there is no indication that any incongruity in granting the injunction was appreciated. According to the judgment of North J., the prevailing authority was \textit{Capel v. Child,} \[76\] a case illustrative of "a high water mark of judicial intervention," \[77\] dealing with the application of \textit{audi alteram partem} to interference with the duties of a holder of ecclesiastical office. In the other case referred to, \textit{Osgood v. Nelson,} \[78\] which concerned the removal of a magistrates' clerk, even less attention was paid to any notion of contract. By statute, the clerk might be removed for cause assigned, and Lord Colonsay was prepared to say that any attempt to remove him \textit{mala fide} or for frivolous or patently wrong reasons would bring judicial intervention. But not because this would amount to a breach of an undertaking between the parties — rather because the actions would amount to a wrong or an improper exercise of the power vested in the corporation as employer. \[79\]

Today, a chief constable (and, by implication, his senior colleagues) benefits from these antecedents, though the concern of the courts has shifted from the protection of proprietary interests to the regulation of administrative decision-making, and the imposition thereon of standards of fair behaviour. \[80\]

\[75\] De Francesco v. Barnum (1890) 45 Ch.D. 430, 438.
\[76\] (1832) 2 Cr. & J. 588.
\[77\] De Smith, op.cit., 138.
\[78\] Supra.
\[79\] At 652.
\[80\] For a general discussion of the \textit{audi alteram partem} rule, see De Smith, op.cit., chap. 4.
(2) Inferior Ranks

In the Perpetual Trustee Case, the Privy Council appears to have accepted that, were an ordinary police constable to be described as a servant, the same description would have to be applied to the most superior officers in the force.\(^\text{81}\) The grouping together of all grades of policemen, however, is not self-evidently right.\(^\text{82}\) The constable on the beat is not faced with the same problems as his chief constable; he does not find himself in the same delicate relationship with central and local government. He holds his appointment from a different source and, to make an obvious point, while he typically obeys, his chief constable typically commands. So, while it may be accepted that the police constable renders service which is "different in nature" or "on a different plane"\(^\text{83}\) from that rendered in an ordinary relationship by employee to employer, the low ranking constable has a closer affinity with such a relationship than has his superior. In at least one case,\(^\text{84}\) dealing with the legal right of a constable to his pay, the relationship between a watch committee and a police constable was stated as being that of "employer and employed",\(^\text{85}\) and in

\(^{81}\) [1955] A.C. at 481.

\(^{82}\) cf., e.g., the special regulations applying the Redundancy Payments Act 1965 to certain superior police officers: Redundancy Payments Termination of Employment Regulations 1965 (S.I. 1965 No. 2022). In Yates v. Lancashire County Council [1975] 10 I.T.R. 20, a police sergeant unsuccessfully claimed a redundancy payment after reorganization had caused the constabulary in which he served to disappear. The Tribunal adopted the judgment of McCardie J. in Fisher v. Oldham Corporation and said that a constable was not a Crown servant, but the holder of a public office and, by implication, excluded from the 1965 Act.

\(^{83}\) [1955] A.C. at 482.

\(^{84}\) Wallwork v. Fielding [1922] 2 K.B. 66.

\(^{85}\) Per Lord Sterndale M.R. at 74.
another it has been accepted by two judges of the Court of Appeal that the authority charged by statute with the payment of the salaries of police officers is 'obliged' to do so. There is a natural inclination to equate, in many respects, the duties of an ordinary police constable with those of an employee in private employment.

Notwithstanding these considerations, however, the common law classifies low and high ranking officers together when it comes to deciding what protection exists against being unfairly deprived of employment. This means that the ordinary constable shares the above-mentioned benefits of holding public office. In *Cooper v. Wilson* the Court of Appeal had to decide the effect of the dismissal of a police officer by a watch committee which had failed to observe the standards of natural justice, as laid down in statutory regulations. It was held that the presence of the chief constable at the time when the watch committee were in the process of deciding what sentence to impose had contravened natural justice and "it follows from this conclusion that there was in law no decision of the Watch Committee." This case is still good authority for the

87. [1937] 2 K.B. 309.
88. The regulations were made under the Police Act 1919 (9 & 10 Geo. V, c. 46) s. 4.
89. Per Scott L.J. at 348.
proposition that, in the imposition of disciplinary penalties, authorities must act fairly, though this principle is subject to the de minimis rule. So too it is possible that the courts will intervene if there is evidence showing that powers granted for other reasons - e.g., the power to transfer constables in the interest of greater efficiency - are used instead as disciplinary measures.

The only authority against the view that the courts will oversee the imposition of disciplinary measures in the police force is very slight. It is derived from the comments of Lord Goddard C.J. in Ex Parte Fry, where, sitting in the Divisional Court, he refused leave to move for certiorari to an officer in the fire service who alleged he had been irregularly disciplined. Speaking in general terms, Lord Goddard found it impossible to say that a chief officer of a force which is governed by discipline...is, in exercising disciplinary authority over a member of the force, acting either judicially or quasi-judicially, any more than a schoolmaster is when he is exercising disciplinary penalties over his pupils, and he said that he knew of no case where the writ of certiorari had issued to control the application of disciplinary penalties to police officers. On appeal from this ruling, the Court of Appeal upheld his decision, but on the specific ground that the granting of leave to move for certiorari was a discretionary matter, not on the basis that there was, in the circumstances,

94. At 733.
The views of Lord Goddard have not found acceptance in Scotland, and they are at variance with current judicial thinking on the control of administrative action. In particular, they conflict with a dictum of Lord Denning M.R. in the recent case of Buckoke v. Greater London Council. That case concerned an attempt to challenge the legality of an order issued by a chief fire officer to his men, and in the course of the proceedings Lord Denning commented that

they [i.e. the disciplinary body] must act fairly just the same as anyone else: and are just as subject to control of the courts. If the fireman's disciplinary tribunal were to hold an order to be a lawful order, when it was not, I am sure the courts could interfere; or if it proceeded contrary to the rules of natural justice in a matter of serious import, so also the courts could interfere.

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95. [1954] 1 W.L.R. at 736, per Singleton L.J.
96. McDonald v. Lanarkshire Fire Brigade Joint Committee 1959, 3 C. 141, 147.
98. [1971] 2 W.L.R. 760.
CHAPTER 8

THE CIVIL SERVICE
Any attempt to discuss employment in the public sector must give special consideration to that branch of public employment which concerns service in the direct civilian employment of the Crown. Size alone justifies this: the Crown, in this capacity, is the largest single employer in Britain, giving work to approximately \( \frac{3}{4} \) million civil servants. Apart from its sheer bulk, however, the civil service also presents, to those interested in the response of the law to different employment situations, a fascinating opportunity for study. The civil service is, traditionally, governed by its own peculiar legal principles and system of industrial relations, and it is instructive to compare the legal rights and obligations of civil servants in their jobs with those of other workers in private industry or business, and to consider why and how differences have arisen.

A. Definitions

(1) Who is a civil servant?

First it is necessary to see what classes of public employees are included within the generic term 'civil servant'. A recent definition of 'Crown employment' is

employment under or for the purposes of a government department, otherwise than as a member of the armed forces. ¹

This might be thought to catch the essence of civil service employment, but the standard definition, adopted by the last three Royal Commissions on the civil service and used by the Civil Service Department itself in its annual statistics, is

¹ Trade Union and Labour Relations Act 1974, Schedule 1, para. 33(2).
servants of the Crown, other than holders of political or judicial offices, who are employed in a civil capacity and whose remuneration is paid wholly and directly out of moneys voted by Parliament. 2

Two observations may be made on this second definition. In the first place, the source of remuneration is critical to the definition of a civil servant. For example, the Minister for the Civil Service, in his recently acquired statutory capacity to make and administer pension schemes for the whole civil service, may only do so in respect of employment funded either directly by Parliament or through the Consolidated Fund. 3

Secondly, what of the distinction in the definition between judicial and political office holders and civil servants? One possible basis for this is the source of the authority by which appointment to a post is made. It is characteristic of civil servants that they are appointed and controlled by the prerogative powers of the Crown, whereas superior judges (at least in the United Kingdom) hold their appointments under statute. 4 Unfortunately, however, this test is not foolproof. Ministers of the Crown were at one time certainly regulated in their employment by the prerogative, though it is possible that recent legislative change has now placed them in a new

3. Superannuation Act 1972 (c. 11) s. 1(6).
4. For discussion of the tenure of county court judges and magistrates, see Lord Goddard C.J. in Terrel v. Secretary of State for the Colonies, cited supra, at 496.
The legal definition of a civil servant is narrower than that which would be applied by the general public. For example, workers employed in Research Councils, the Forestry Commission, and other grant aided bodies are not included, though in fact the terms and conditions of their employment are similar. Neither does the definition extend to persons employed in the staffing of such bodies as rent tribunals, or the Monopolies Commission; when, for pension purposes, it has proved necessary to group the staff of these bodies alongside civil servants, delegated legislation has been required.

The two traditional divisions of civil servants have been into (1) established and unestablished, and (2) industrial and non-industrial. Though both are of declining importance, they still deserve attention.

(2) Established and Unestablished

An established civil servant is one who has been admitted to the civil service with a certificate from the Civil Service Commission, or, more rarely, holds his appointment directly from the Crown.

Becoming established depends on the fulfilment of conditions as to age, health, character and competency; its importance is succinctly stated by G.A. Campbell:

5. See Ministerial Salaries Consolidation Act 1965 (c. 58), which contained statutory provision for the appointment and remuneration of ministers. The present law is now to be found in the Parliamentary and other Pensions Act 1972 (c. 48), s. 2, and the Ministerial and other Salaries Act 1972 (c. 3), Sched. I, Parts I-IV.

6. By 1971, approximately 3,500 civil servants had been affected by such powers, which existed by virtue of s. 98(4) of the Superannuation Act 1965 (c. 74). (Source: Civil Service Statistics 1971, H.M.S.O.)

Whereas the established civil service staff are for all practical purposes guaranteed employment for the whole of their working life, the unestablished employees may have their service terminated on a week's or a month's notice. 8

In the past the cachet of established status has also brought entitlement to a civil service pension, acknowledged to be one of the most attractive features of the job, but since June 1972 pension rights have been extended to unestablished staff as well. 9

Establishment was criticised by the Fulton Commission, who were unmoved by Treasury arguments that the security of tenure it brought was needed if staff were to be attracted to departments whose lifespan might be cut short by political vicissitudes. The Commission's views were that establishment "hampers the elimination of the small minority who do not earn their keep." 10 In so concluding they were backed by statistics showing that, under legislation providing for the compulsory retirement of civil servants on grounds of inefficiency, only 326 had left the service in the years between 1951 and 1965. 11

The Commission recommended the replacement of establishment by a scheme whereby, after a two-year probationary spell, employment as a non-industrial civil servant could be terminated by the giving of six months' notice, though only on a set list of grounds. To date this reform has not been implemented, though obviously the extension to the civil service as a whole of the

8. The Civil Service in Great Britain, 186.
9. See the Principal Civil Service Pension Scheme 1972, laid before Parliament on 15 June 1972 under s. 2(11) of the Superannuation Act 1972, para. 1.4.
11. H.M. Treasury, Memorandum No. 22 to Fulton Commission. The legislation in question was the Superannuation Act 1965 (c. 74) ss. 9, 10, 45.
statutory protections against unfair dismissal\textsuperscript{12} has had the effect of improving the legal rights of unestablished as well as established staff. Both because of this development, and because the whole concept of immobility of staff is unsuited to the reforms proposed by Fulton, establishment is now of decreasing importance.\textsuperscript{13} The reforms in the pension structure, already mentioned, are particularly important here.

Historically, establishment and pension entitlement had always gone hand in hand, ever since the Superannuation Act 1859,\textsuperscript{14} which provided that no unestablished civil servant would be deemed to have served in the permanent civil service for the purposes of that Act. The gratuity in lieu of pension received by unestablished staff was far less favourable.\textsuperscript{15}

(3) **Industrial and Non-industrial**

In the past there has been a close link between non-industrial work and establishment status, and industrial work and unestablished status. Thus section 5 of the Trade Disputes and Trade Unions Act 1927\textsuperscript{16} (which prohibited established civil servants from belonging to trade unions of which outside workers were members, or which were themselves affiliated to outside

\textsuperscript{12} See infra, p. 253.

\textsuperscript{13} The current attitude towards establishment is to give established posts to all successful applicants for employment in the civil service, subject to confirmation of their appointment after completion of the relevant probationary period. Nevertheless, "The certificate of qualification issued by the Civil Service Commissioners will remain the hallmark of permanent appointment (and a guarantee that those selected have been chosen after fair and open competition)." Civil Service Department, Third Report (1971-1973), para. 50.

\textsuperscript{14} (22 Vict., c. 26), s. 17.

\textsuperscript{15} For details see Treasury Evidence to the Donovan Commission, Minutes of Evidence 10, para. 1651.

\textsuperscript{16} 17 & 18 Geo. V, c. 22.
bodies such as the T.U.C.) did not affect the industrials. 17

The definition of an industrial civil servant is by occupation and status - e.g., workers below foreman level in armament factories, naval dockyards, storage depots, engineering, ship-building and building establishments, workers in the Royal Mint and the Ordnance Survey, ancillary workers in research establishments and H.M. Forces' camps. 18 Classification as an industrial or non-industrial does not affect the legal nature of the relationship with the Crown as employer, but nonetheless there are important differences in the conditions of employment enjoyed by the two classes. For example, in 1971 approximately one half of industrials enjoyed establishment status, as against approximately three quarters of non-industrials. 19 The determination of industrials' pay and conditions of employment is governed by the Fair Wages Resolution of the House of Commons, which means that they must not be less favourable than comparable standards observed in private employment. 20 A small number of industrials - e.g., H.M.S.O. printers - are 'trade-rated', that is to say their pay is set

18. See the National Board for Prices and Incomes, Pay of Industrial Civil Servants, Report No. 18, Cmd. 3034 (1966), Appendix 1.
19. Source: Civil Service Statistics 1971 (non-industrials); Treasury Evidence to the Donovan Commission (cit. supra) (industrials). Published statistics do not give the proportion of established industrials and, since 1971, no longer list industrials as a separate group.
20. Note C. Grunfeld (1960) 23 M.L.R. 198, who points out that this Resolution, which broadly requires contractors who obtain Government work to behave as model employers, makes the reservation of unqualified powers of instant dismissal by the Crown appear anomalous. No model employer should wish to use such powers. Now, of course, such powers must be seen in the light of the protections against unfair dismissal. See infra, p. 253.
in accordance with agreements reached by collective bargaining in private industry (in which the Government takes no part), but the majority participate in a form of Whitleyism that is different from and more complex than that applicable to non-industrials. Industrials have no access to 'God' (the Civil Service Arbitration Tribunal), which finally determines issues where the National Whitley Council cannot agree; instead, the Industrial Arbitration Board will, by consent of both sides, arbitrate in similar circumstances when agreement cannot be reached in the Trade Joint Councils. Most industrials are members of unions not restricted to civil servants, unlike the 'staff associations' of non-industrials. The standards of service expected of non-industrials, as set out in the handbook 'Staff Relations in the Civil Service', do not apply to industrials. It follows that the statement contained therein that the taking of strike action is a disciplinary offence does not apply to them, and, of course, it can only amount to a breach of contract if there is a contract to be broken. However, it has been said in the past that, if there were a strike, "the Government would undoubtedly take disciplinary action by exercising their right, as an employer, of instant dismissal without hope of reinstatement."  

In practice, the reaction is likely to be much less severe. Recent evidence of Government policy suggests that loss of pay

21. For a general description of the institutions and practice, see H.A. Clegg, The System of Industrial Relations in Great Britain, 376-84; Treasury Evidence to the Donovan Commission, cited supra.

22. (1946) 419 H.C. Deb., col. 213. Statement by the Attorney General, when considering the hypothetical consequences of a strike by prison officers.
would be the only sanction, though on one occasion strikers were temporarily deprived of their establishment status as a punishment.\(^{23}\) Although it is perhaps true that there is not, in the industrial civil service, the same level of dedication and \textit{esprit de corps} that characterises the non-industrial service, industrials are not spared the strictures of civil service employment. A recent report records that a prison officer, who broke a civil service rule by appearing in a television programme (which was quite unrelated to his work) was suspended on half-pay for a month, and received severe reprimands both from his prison governor and from the Home Secretary.\(^{24}\)

B. Legal Peculiarities of Civil Service Employment

(1) Traditional Arguments

It is as well to start off on a cautionary note. It was said thirteen years ago, and remains substantially true today, that "the exact nature and consequences of the relationship between the Crown and its employees cannot, in the present state of the law, be clearly stated."\(^{25}\) The case law defies rational analysis. Why then does so much effort continue to be expended on what looks from the beginning a fruitless task? One writer in particular has protested at the futility of the whole process, and maintains that "legal protections in an organisation of long traditions like the civil service are less valuable than the protection afforded by the general

\(^{23}\) Treasury Evidence to Donovan Commission, cited supra, para. 1665.

\(^{24}\) The Times, 29 August 1973.

standard of employment mores." But this writing off of the problem as a barren exercise in legal conceptualism has not deterred others from treading the same path. The reasons are not hard to find. It is the constitutional lawyer and not the labour lawyer who has been most active in this field, and the former finds much of interest in the relationship between Crown and civil servant. Different theories of executive action converge and conflict; the Amphitrite principle, for example, meets estoppel, and the right of the Crown as employer to dismiss at pleasure may be explained either as an instance of the Crown's prerogative powers, or else as a term in an agreement between the parties. There is also, however, much scope for the labour lawyer here. The British civil service is justly famed for the excellence of its administration and the fairness and impartiality of its decision making, but not matter how superlative these are, the courts remain the ultimate arbiters when internal machinery for resolving disputes has been exhausted. Administrative excellence can never be a substitute for judicial safeguards and, indeed, it has been said that the better the internal machinery, the less reason there is for opposing judicial review. If and when parties cannot agree, it is important for all concerned to know where they stand in law

26. L. Blair, "The Civil Servant - Political Reality and Legal Myth," [1958] Public Law 32 at 38. See too, "The Civil Servant - A Status Relationship?" (1958) 21 M.L.R. 265. Among modern writers on this topic, Blair is unusual in that he stresses the similarities between civil servants and members of the armed forces, and argues that both work under a status, rather than contractual, relationship.


and, in the present context, this involves examining and classifying the legal nature and content of the relationship between Crown and civil servant. Thus, the problems of analysis and exposition of the employment relationship, however intractable, cannot simply be ignored. At the same time, it is salutary to remember that there is no magic in the attachment of labels, and the answer to the first question that comes to mind - does the civil servant have a contract of service? - is likely to tell us as much about how we use this particular piece of legal terminology, as to inform us about the actual conditions under which he works. As Hart has said, the only satisfactory definition of legal concepts entails examination of the contexts in which they are used. However, the question may be phrased in a way which makes its practical usefulness more apparent - is the civil servant a participant in a relationship subject to rules of a basically contractual character, or is he governed in his employment by a body of rules which are essentially sui generis?

The tendency of academic writers over the past thirty years has been to argue for a contractual explanation of civil service employment, and there are a number of indications that this approach is now commending itself both to the legislature and the judiciary. Before examining these, however, it is first necessary to trace in outline the confused state of the earlier law.

Over the years the courts have established a body of case law which marks out the civil servant as working under conditions very different from those applicable to the ordinary employee under a contract of employment. Probably the best known and
most important difference concerns dismissal, and the following
discussion concentrates on this particular aspect of their
employment. Whereas the ordinary employee might claim damages
for breach of contract, if dismissed summarily without proper
justification, the civil servant has no remedy at all, except
in exceptional circumstances. 29 In the words of Lord Herschell
in Dunn v. The Queen,

I take it that persons employed...in the service
of the Crown, except in cases where there is some
statutory provision for a higher tenure of office,
are notoriously engaged on the understanding they
hold their employment at the pleasure of the Crown. 30

This point, of course, illustrates the central paradox of
the whole subject; the yawning gap between theory and practice.
While in legal theory the civil servant was unprotected (in the
absence of statute), in practice he enjoyed, if established, a
level of security in his employment unrivalled elsewhere.

In practice it is almost unknown for a man
or woman to be dismissed after established
in the civil service...dismissal is a
disgrace reserved for the dishonest or
corrupt. 31

It is true that in one recent case judicial notice was indirectly
taken of this fact, 32 but by and large the courts have stead-
fastly chosen to ignore it and concentrated on the civil servant's
rights in law, though the Crown itself tacitly concedes that
these rules in themselves give a false notion of what happens

A.C. 575; Reilly v. The King [1934] A.C. 176; Rodwell v.
Thomas [1944] 1 K.B. 596.
30. At 119.
32. McLelland v. Northern Ireland General Health Services Board
in practice.\textsuperscript{33}

The substantially unfettered powers of the Crown to dismiss at will has led it in the past to assert other peculiar privileges \textit{qua} employer. Until very recently, it was open to doubt whether a civil servant might sue the Crown to recover unpaid salary or wages. In \textit{Mulvenna v. The Admiralty}\textsuperscript{34} (a Scottish case whose ratio has now been reversed by statute) public policy was advanced as a reason for denying such a right, while in \textit{Lucas v. Lucas}\textsuperscript{35} the right to deprive a civil servant of his unpaid salary was said to be consequent upon the right to dismiss him at will. It has been argued by one distinguished commentator that the right to dismiss at will also gave rise to the right to alter unilaterally the terms on which a civil servant was employed.\textsuperscript{36} Current opinion is against this,\textsuperscript{37} but the logic of the argument is hard to fault. If the Crown could terminate the employment relationship as it liked without incurring thereby any legal obligations, why could it not offer to mitigate its powers by being prepared to continue the employment on different terms? Lastly, it should also be mentioned that the prevailing legal opinion used to be that not only did a civil servant have no right to his salary, he also might not sue for

\textsuperscript{33} "Every civil servant, established as well as unestablished, holds his or her appointment at the pleasure of the Crown, which means that the Crown may dismiss him or her at any moment, without notice and without compensation. That is the legal position, but naturally the Crown does not act in that way without having an extremely good cause for doing so, and it is only if you should be guilty of really serious misconduct that you need be afraid of summary dismissal." \textit{Handbook for the New Civil Servant, Civil Service Department (1973)}, 35.

\textsuperscript{34} 1926 S.C. 842.

\textsuperscript{35} [1943] P. 68.


the payment of his pension. 38 This too, however, has now been changed by statute. 39

In all these different ways the civil servant found himself legally naked of rights which would be accepted as commonplace by anyone who worked under a contract of employment. In addition, he incurred special restrictions on his behaviour out of office hours. For example, a civil servant was and still is allowed to participate in political activity only to a limited extent, and only after consulting his superiors; if he is of senior rank when he retires, he must obtain approval if he seeks to take up a post in private employment within two years. 40

Of the several attempts to justify the special legal treatment accorded to civil servants in their employment, the most persistent have been based on the notion of public policy or public interest. This is easily invoked, but less easily justified. One argument runs thus: it is agreed that there is no curb on the powers of the Crown to dispense with the services of members of the armed forces whenever it likes. The continued employment of a civil servant could be just as harmful to State interests as that of a military officer. Therefore, the rules which apply to the dismissal of the latter

40. Estacode K.a.8 (July 1965). (Estacode is the body of internal rules which govern employment in the civil service. See infra, p. 248.)

Note also Estacode K.b.1 (August 1969), where it is stated that, in bargaining between staff and official sides, the staff side may not discuss or negotiate on individual cases where there has been disciplinary proceeding. It is stated that "this is because discipline is a managerial function not a negotiable condition of service." This is a restriction on collective bargaining which would not be found in private industry.
should also apply to the former. But this really only amounts to an argument for applying, in the case of civil servants, the ordinary common law rules which govern termination of the contract of employment. Save in very exceptional circumstances, it is always open to an employer to terminate the contract immediately and effectively. If, of course, he is not justified in his unilateral action, he will be liable for damages for breach of contract and, now, for unfair dismissal as well, but that is all. As Glanville Williams has commented, in respect of the Crown's right of summary dismissal,

All that the rule does, therefore, is to save the Crown the trouble of drawing its contracts of employment properly, or the trouble of proving misconduct if challenged in court, or the expense of maintaining a useless servant for the term for which he was unwisely engaged. The rule is not necessary in order to prevent an unsuitable person being continued in the public service, for there is in any event no obligation on the Crown to provide work for its servants.

Similar comment could be made on the former powers of the Crown to withhold salary or pensions - again the primary beneficiary was the public purse rather than the public interest. Arguably, it is far more to the public interest to see the Crown uphold the highest standards in its behaviour as an employer, and to keep the promises it has solemnly made.

41. See Kay L.J. in Dunn v. The Queen, cited supra, at 120. cf. Shenton v. Smith [1895] A.C. 229 at 235, where the justification is given as being the convenience of the working of the public service.

42. See now, Sandars v. Ernest A. Neale Ltd. [1974] 3 All E.R. 327. This topic is discussed in greater detail in the following chapter.


44. Though it was said (Treasury Evidence to the Donovan Commission, paras. 1662-3) that the discretionary nature of pensions made no effect on their payment.

As much has been recognized by the legislature and courts of several Commonwealth countries, where various restrictions have been imposed on the wide powers of the Crown; similar changes to the same general effect are taking place in English law at the present time.

It is, of course, only comparatively recently that the many difficulties associated with the discussion of a civil servant's conditions of employment have become widely appreciated. For example, to consider the Crown's right to dismiss at pleasure, before the Second World War the judges proceeded from case to case dealing with the subject, without any single, consistent theory to guide them in what they were doing. They proceeded on the basis of the broad understanding that the employment rights of Crown servants fell into a special category, being subject to a rule allowing instant dismissal. Usually this special rule was explained as an 'implied term' in the employment agreement, and it was accepted that, as such, it might be displaced by specific statutory provision. But it would not be displaced by a simple agreement to employ a civil servant for a set number of years, nor by internal regulations laying down procedural requirements that had to be fulfilled before a dismissal took place, whether these were the product of

48. e.g. Shenton v. Smith (supra) at 234-5; Dunn v. The Queen (supra) at 119; Gould v. Stuart (supra) at 577; Mulvenna v. The Admiralty (supra) at 859-60.
50. Shenton v. Smith (supra); Denning v. Secretary of State for India (1920) 37 T.L.R. 138.
delegated legislation or the deliberations of the National Whitley Council. Most of the early cases suggest that the courts viewed the rule as essentially contractual in character; this was certainly the basis on which Lord Atkin made his important obiter remarks in Reilly v. The King.

If the terms of the appointment definitely prescribe a term and expressly provide for a power to determine 'for cause' it appears necessarily to follow that any implication of a power to dismiss at pleasure is excluded.

Though in that case the Privy Council expressly reserved its opinion as to whether there was a contract between the petitioner civil servant and the Crown, the application of the doctrine expressio unius est exclusio alterius in the context of implied terms is recognizably contractual in character. On the other hand, however, there were also in existence dicta which suggested that it was impossible for anyone purporting to represent the Crown to enter into a contract otherwise than on the terms allowing it to be terminated at will. This may not appear very different from the first explanation, but there is a crucial difference. If the Crown is barred from bargaining

53. In Williams v. Heath Assessment Committee (1935) 154 L.T. 261, a case concerned with a rating appeal, it was stated by Lord Hewart C.J., obiter, that a sub-postmistress was an independent contractor, not a servant or agent of the Crown. But in Appeal of Roberts, Re Postmaster-General [1939] 4 All E.R. 269, a case concerned with insurable employment under the National Health Insurance Act 1936, Branson J. distinguished Williams, and held that sub-postmasters worked under a contract of service with the Postmaster-General. In neither case was there any hesitation in describing the employment relationship as contractual. For discussion of the present position of postmasters vis-à-vis the Post Office, see Malins v. Post Office [1975] I.C.R. 60, infra, p. 270.
55. See Lord Esher M.R. in Dunn v. The Queen (supra) at 118-9.
away any of its powers of instant dismissal, this is a defect of capacity which permeates all its dealings with its civil servants.\footnote{cf. Rowlatt J. in Rederiaktiebolaget Amphitrite v. The King [1921] 3 K.B. 500 at 504. G. Williams, op.cit., 63.} This point is further considered below.

(2) Recent Tendencies

(i) Case Law

A convenient starting point for a discussion of the modern law is the case of Lucas v. Lucas.\footnote{Supra.} Not so much for its intrinsic interest (the decision was to the effect that the pay of a civil servant might not be made the subject of garnishee proceedings) as for the influence it has had on the development of the law. It prompted a learned article in the Law Quarterly Review by D.W. Logan,\footnote{"A Civil Servant and his Pay," (1945) 61 L.Q.R. 240.} critical of the outcome, and this in turn was followed by a series of attempts in the 1950's and 1960's to analyse the nature and consequences of the Crown-civil servant relationship.\footnote{e.g., I. Richardson, "Incidents of the Crown-Servant Relationship," (1955) Canadian Bar Review 424; B. Beinart, "Legal Relationship between Government and Employee," (1955) Butterworth's S.A.L.R. 21; Blair, op.cit., supra; Marshall, op.cit., supra. In addition to these articles, specifically dealing with the problems, there are also references to them in works by G. Williams, op.cit., supra; J.D.B. Mitchell, The Contracts of Public Authorities, 27 ff.; H. Street, op.cit., supra; P.W. Hogg, Liability of the Crown, 148 ff. The most recent study is by T.C. Hartley and J.A.G. Griffith, Government and Law, chap. 5.} One result of this was that judges (assuming they read the literature) were made aware of the many different theories behind the peculiar treatment of civil servants, and had their attention drawn to the ways in which their colleagues in other common law countries had approached similar problems.
The conclusions reached by academic lawyers who studied the subject were usually both complicated and lengthy - one writer explained the power of the Crown to dismiss at will as being based on an implied term in the agreement between the parties, and capable of exclusion by an express term if the exclusion would be in the public interest\(^{60}\) - and the judiciary have shown no inclination to adopt any of the available alternatives in their entirety. But the pattern of recent cases shows that they, along with the academics, share a concern to restrict the special privileges enjoyed by the Crown as employer.

It would be quite wrong, of course, to give all the credit for any general change in outlook to the academic lawyers. The first case which signified a new approach was *Robertson v. Minister of Pensions*,\(^{61}\) which provided Denning J. (as he then was) with a platform on which he might expound the radical principles he had laid down the preceding year in *High Trees*.\(^{62}\) A military officer, he held, was entitled to rely on as binding an assurance made to him by an official in the War Office to the effect that a disability from which he suffered was attributable to war service, because, if he could not, he would have been financially prejudiced. Denning J. attacked the doctrine of executive necessity (by which the Crown sought to justify its retraction of the assurance) in general, and the judgment of Rowlatt J. in the *Amphitrite* in particular. Although the case before him concerned the service of an army officer, Denning J. maintained that what Rowlatt J. had said had now to be seen and

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60. Richardson, op.cit., supra, 424.
61. Supra.
qualified in the light of what Lord Atkin had said in Reilly v. The King. The effect was that, "in regard to contracts of service, the Crown is bound by its express promises as much as any subject." This principle he reiterated in Falmouth Boat Construction Co. Ltd. v. Howell, though on this occasion it was unanimously rejected by the House of Lords.

Shortly after Lord Denning's valiant attempts to restate the law, a Scottish decision, Cameron v. Lord Advocate, also came down in favour of an extension of the civil servant's rights in his employment. The pursuer successfully established the competency in law of an action in which he claimed damages for breach of contract from the Crown, based on an alleged breach of an agreement to employ him for a specified period. The Lord Ordinary (Mackay) disapproved Mulvenna v. The Admiralty, Lucas v. Lucas, and High Commissioner for India v. Lall in so far as they were against his decision, doubted whether the employment of civil servants was a matter which concerned "the welfare of the State" as that term was used in the Amphitrite (and so negotiated any difficulties produced by that case), and maintained that Reilly v. The King was decisive of the issue at hand. He rejected the contention of the Crown that Reilly only supported an exclusion of the right to dismiss at will where there was a statutory provision to this effect.

63. At 231.
64. [1950] 2 K.B. 16.
66. 1952 S.C. 165.
67. Supra.
68. Supra.
69. (1948) L.R. 75 I.A. 225.
70. At 177.
71. At 173.
72. At 176.
These steps towards a relaxation in the earlier law were abruptly curtailed, in England, by the decisions of Lord Goddard C.J. in two cases decided in the mid-1950's: *Terrel v. Secretary of State for the Colonies* \(^73\) and *I.R.C. v. Hambrook*. \(^74\) Both have been mentioned previously, and it is sufficient to remember that in neither was the existence of a contract necessary for the decision. In *Terrel* Lord Goddard held (1) that any purported non-statutory limitation on the Crown's right to dismiss at will was an ineffectual clog on that right, \(^75\) and (2) that this right was established as a rule of law and might not be taken away by any contractual arrangement. \(^76\) Arguments drawn from the principles of estoppel (and thus from what Lord Denning had said in *Robertson*) were dismissed as inapplicable. In the subsequent case of *I.R.C. v. Hambrook*, Lord Goddard took an even more positive line —

an established civil servant is appointed to an office and is a public officer, remunerated by monies provided by Parliament, so that his employment depends not on a contract with the Crown but on appointment with the Crown. \(^77\)

In a provocative judgment which failed to goad the Court of Appeal into the elucidation of a dark area of the law, \(^78\) he used this reasoning as a basis for denying the application of the *actio per quod* to civil service employment. Furthermore, in *Terrel* his dicta suggested that a dismissed civil servant might possess a contractual right to unpaid salary; in *Hambrook*

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73. [1953] 2 Q.B. 482.
75. At 497.
76. At 498.
77. At 654.
he explained the basis of recovery as quantum meruit, and he said that only in "exceptional cases" might there be a contractual element in or collateral to a civil servant's employment.79

His views had a profound effect on the subsequent law, and did much to discourage any rapprochement between civil servants and ordinary employees working under a contract of employment. In Riordan v. The War Office,80 Diplock J. (as he then was) stated that any attempt to restrict the Crown's right of summary dismissal by means short of statute was void, though he was prepared to accept that the conditions upon which a civil servant was employed were

mutually binding terms of employment...
sufficiently analogous to a contractual relationship to make it proper for me to construe the regulations in the case as I would the terms of a contract of employment.81

Interestingly, he read the crucial passage (cited above) in Reilly v. The King as supporting the view that a contract did exist between Crown and civil servant, contrary to the view expressed by Lord Goddard in Hambrook.82

Since Riordan there has been relatively little litigation, a fact perhaps in itself indicative of the conclusive effect Lord Goddard's remarks were taken to have on the subject. Two reported cases, where the nature of Crown employment was peripherally discussed, were Dudfield v. Minister of Works83 and Gallagher v. Post Office.84 In the former an attempt by

79. At 654.
81. [1959] 3 All E.R. at 557.
82. [1956] 2 Q.B. at 653.
83. (1964) 108 S.J. 118.
a civil servant to recover wages failed, but not on the ground that any such action was bound to be incompetent. The question of whether or not such an action would lie was not decided. Again, in the latter case, Brightman J. expressly avoided making any comment on whether a civil servant could sue on an action for breach of contract.

Similarly, evasive tactics were pursued by the Privy Council in *Att. General for Guyana v. Nobrega*, 85 where litigation arose out of the unilateral reduction in status of a teacher civil servant. The court a quo (the Court of Appeal of Guyana) 86 had held that this was outside the powers of the Crown, with the exception of Luckhoo L.J. who had agreed with the judge of first instance that, since there was a right to dismiss summarily, there was a right to take this less drastic step. 87 However, the views of Cummings J.A., one of the judges of the majority, were particularly assertive —

neither principle nor binding authority... supports the view that a contract between the Crown and its servants — except with regard to the implied term of dismissal at pleasure — must be construed in a manner different from the ordinary contract of master and servant. 88

Both he and Sir Kenneth Stoby C. thought that there was no right unilaterally to alter the terms of employment. The Privy Council, however, found that, on the facts, the communication which had passed between the parties amounted to a termination of employment by the Crown, coupled with an offer to retake employment at an inferior grade. Thus, "no question arises

87. Both judges accepted G. Williams' reasoning on this point. (Supra, p. 235.)
88. At 208.
as to the right of the Crown to reduce or vary the terms of a contract of service unilaterally." 89

All of these last three cases decided after Riordan v. War Office show a reluctance on the part of the courts to confirm the extraordinary powers enjoyed by the Crown as an employer. In the most recent case, Kodeeswaren v. Att. Gen. of Ceylon, 90 the Privy Council went further, and actually disapproved earlier authorities. The facts concerned the right of a Ceylon civil servant to sue the Crown for allegedly unpaid salary, and the judgment contains interesting observations on the relevant English law. Lord Diplock, delivering their Lordships' judgment, approved as 'penetrating' Logan's article, referred to at the beginning of this chapter, disapproved Mulvenna, Lucas and Lall, 91 and rejected the Crown's submission that the right to dismiss at pleasure carried with it the right to withhold earned salary.

In their Lordships' view this is a non sequitur. A right to terminate a contract of service at will coupled with a right to enter into a fresh contract of service may in effect enable the Crown to change the terms in future... But this cannot affect any right to salary already earned under the terms of his existing contract before its termination. 92

What is the present overall state of the common law?

The right to dismiss at will, though much criticised, appears to be established at present ab initio in all agreements between the Crown and its civil servants. This right can certainly be excluded by statute; it may be capable of being excluded by less, but this on the whole appears unlikely. 93 Nevertheless,

89. At 1608.
91. cf. Cameron v. Lord Advocate, supra.
92. At 465.
93. See Lord Diplock in Kodeeswaren at 460.
this aspect of the common law has lost much of its practical significance since the introduction of general statutory protection against unfair dismissal, in a form which binds the Crown. 94 The prevailing view now appears to be that the relationship between civil servant and Crown is contractual. 95 Certainly the Crown cannot withhold money in respect of services which have been rendered. It is at least doubtful whether the Crown has any other special powers to alter the terms of its relationship with its civil servants. 96 Even if there is, strictly, no contract between the parties, the signs are that the interpretation which will be put on such a relationship will be virtually identical to that given to the relationship between employer and employee, except in so far as recognition will be accorded to the special rules allowing dismissal at pleasure.

(ii) Statute

This topic is only briefly covered. It is not proposed to compile a comprehensive list of all circumstances in which statute impinges upon the conditions of a civil servant's employment. Since the source of the Crown's control over the civil service is the prerogative, there is no general scheme

94. Infra.
95. cf. Malins v. Post Office [1975] I.C.R. 60. This case (discussed infra, p. 254) concerned the security of tenure of a sub-postmaster in his employment by the Post Office. Employees of the Post Office are now, of course, no longer Crown Servants, but his appointment dated from 1958. In discussing the period 1958-1969, Thesiger J. (at 70) accepted that the plaintiff worked under a contract of service with the Crown.
of empowering statutes.\textsuperscript{97} This is in marked contrast to the practice in other countries, especially those of the Commonwealth, where it is customary to find the regulation of the civil service expressed in statute.\textsuperscript{98} In Britain the authoritative source of regulations is Estacode, an official publication under the jurisdiction of the Minister for the Civil Service, which has been described as containing "the legal rules governing the relationship between a civil servant and the Crown."\textsuperscript{99} It is, however, a publication containing, in addition to a vast quantity of straightforward rules about conduct and conditions of service, statements of the law applicable to civil servants which might be considered contentious. It contains, for example, the proposition that there is a 'contract of service' between the Crown and the civil servant,\textsuperscript{100} and also states that the possession of powers of instant dismissal on the part of the Crown is attributable to the latter's prerogative powers.\textsuperscript{101} It is not, of course, nor is it intended to be, an academic

\textsuperscript{97} Since 1968 the Minister for the Civil Service has taken over responsibility for the running of the civil service from the Treasury. By reg. 2(1) of the Minister for the Civil Service Order 1968 (S.I. 1968 No. 1656) he is charged with "functions with respect to the organisation and conduct of the civil service of the State, the manner of admitting persons thereto or to situations therein, and the remuneration, conditions of service, express and allowances of persons serving therein." He also now has extensive responsibilities for the civil service pension scheme.

See also the Order in Council dated 22nd October 1969, made under the Royal Prerogative, which vests control of the civil service in the Minister.

\textsuperscript{98} e.g. State Services Act 1962 (New Zealand); Civil Service Act 1952 (Canada); Public Service Acts 1922-1968 (Australia). See, generally, H. Marshall, op.cit., supra; E.I. Sykes and H.J. Glabeek, Labour Law in Australia, 451 ff.

\textsuperscript{99} B. Hepple and P. O'Higgins, Public Employee Trade Unionism in the United Kingdom, 24.

\textsuperscript{100} K.b.11 (Amendment No. 547, July 1970).

treatise on the relevant law, but a source of practical information. As such its contents are the de facto law of the civil service, but it has never been referred to by the courts on the several occasions when they have been called upon to interpret the legal consequences of civil service employment.

Of course, the fact that statute is not a primary source of control does not mean that it has no part to play. Statute commonly affects the civil service at two levels; the scope of certain statutes affects all such employment (sometimes in addition to private employment as well) in a particular respect, while others merely regulate, or provide for the making of regulations dealing with, matters important for a restricted class of civil servants. To deal with the latter phenomenon first, it is common to find, as part of statutes setting up new or reorganizing old functions of government, some passing reference to the engagement of staff necessary for the jobs in question. Typically, the statute will provide that "X Board [or the appropriate Minister] may appoint such staff as necessary, subject to the approval of the Civil Service Department [formerly the Treasury] as to numbers and salary."102 There may also be a provision to the effect that persons so appointed are dismissible at the pleasure of the appointing authority. It can thus be said, in respect of persons affected by such provisions, that they are civil servants employed under statutory rather than prerogative authority. But it is a distinction of no practical importance, for their terms and conditions of

102. See, e.g., Factories Act 1961 (9 & 10 Eliz.II, c. 34), s. 145; Health and Safety at Work etc. Act 1974 (c. 37), s. 13(1)(d).
employment will be the same as those employed in the traditional way. Occasionally, a specific term of employment will be regulated by statute; there are various statutes specifying the public holidays to be observed by certain departments in the civil service.

Such instances of statutory intervention in employment are essentially random, and may give rise to unforeseen difficulties when the law is about to be changed. For example, there were problems to be overcome in the enactment of s. 24 of the Administration of Justice Act 1970 (now s. 20 of the Attachment of Earnings Act 1971). This provision, which reversed the common law rule laid down in *Lucas v. Lucas*, was designed to render the salaries of Crown servants liable to attachment for civil debt, in line with the recommendations of the Report of the Committee on the Enforcement of Judgment Debts. As the bill proceeded through Parliament it was discovered, at committee stage, that a particular statute existed which would have excluded the salaries of customs and excise officers from the change in the law. It was found necessary to insert an extra clause to deal with this, and, in the words of the Attorney General, to guard against "other statutory provisions lurking in the background not yet brought

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104. e.g., Holidays Extension Act 1875 (38 & 39 Vict., c. 13), s. 1; Inland Revenue Regulation Act 1890 (53 & 54 Vict., c. 21), s. 9.
105. c. 31.
106. c. 32.
107. Supra.
to light, which contain similar exemptions." Another example of anomalous statutory intervention, operating in an entirely different area of employment and now without practical significance for civil servants because of changes in the law, was the Post Office Act 1953,\textsuperscript{110} s. 48. This provides, inter alia, that it is a criminal offence wilfully to detain or delay any postal packet. Until the Post Office ceased to be a government department, this had the almost certain effect of making strike action by a civil servant a criminal offence.\textsuperscript{111}

As opposed to such random statutory interference, there are three recent statutory reforms which have affected the conditions of employment in the civil service in a more fundamental way. The reform enacted in the Administration of Justice Act 1970 has already been mentioned. So too reference has been made to that introduced by the Superannuation Act 1972, but it is worth quoting the words of the Under-Secretary of State for Health and Social Security in his presentation of the bill which was to become that Act.

\begin{quote}
I confirm that the apparently not very powerful words in [section] 1(1)(a) "or to be paid or may be paid"...amount to that legal entitlement [sic. to a pension] which is the novel and welcome innovation of the Statute.\textsuperscript{112}
\end{quote}

The last, and most important, statutory change in the law concerns dismissal from employment. The residual powers of the Crown to dismiss its servants at will have now been outflanked by the scheme of statutory protection against unfair dismissal

\begin{itemize}
\item \textsuperscript{110} 1 & 2 Eliz. II, c. 36.
\item \textsuperscript{111} This particular provision is discussed in B. Aaron and K.W. Wedderburn (eds.), Industrial Conflict: A Comparative Legal Survey, 377. For the law regulating strike action by civil (and public) servants in Europe, see 364-77.
\item \textsuperscript{112} (1971) 826 H.C. Deb., col. 853.
\end{itemize}
introduced originally by the Industrial Relations Act 1971 and now contained in the Trade Union and Labour Relations Act 1974. This scheme, of course, applies primarily to unfair dismissal in private employment, and the inclusion of the Crown within it is remarkable. It is perhaps the strongest indication yet of the steady erosion of the exceptional powers enjoyed by the Crown as employer over the last few years. Even as recently as the mid-1960's such a development would have seemed improbable. The Crown, for example, was not included within the scope of the Contracts of Employment Act 1963 - probably, it is suggested, because of the desire to keep intact the powers of instant dismissal. In 1964 the United Kingdom government specifically excluded civil servants from the categories of workers to be covered by the I.L.O. Recommendation No. 119, directed against arbitrary and improper dismissals, which in principle it accepted. This was done "for constitutional reasons". Improvements in the 'floor of rights' of ordinary workers have, before 1971, generally by-passed the Crown, though in fairness it should be pointed out that sometimes this has been because the internal rules of the civil service were at least as good and probably better than those contained in the new statutory scheme.

113. Schedule 1, para. 33(2).
115. Cmnd. 2548.
116. See the Treasury Evidence to the Donovan Commission, para. 1660, where it was said that civil service redundancy schemes were superior in almost all respects to the statutory scheme.
117. The position of the Crown servant under the Employment Protection Bill 1975 is that he is included within most of the improvements made in individual rights (cl. 109(1)). In line, however, with the principle that mandatory orders will not issue against the Crown, the Central Arbitration Committee does not have jurisdiction to insert particular
The clause which eventually became s. 162 of the Industrial Relations Act 1971, and is now to be found in the Trade Union and Labour Relations Act 1974, was introduced into the Industrial Relations Bill only after it had been pointed out that the definition of the persons protected by the unfair dismissal provisions probably did not extend to civil servants, because of the likely absence of any contract of employment in their work.118 The relevant provisions are worded in a special way in recognition of the separateness of Crown employment; a civil servant, for example, is not dismissed, but suffers "termination of employment".119

It would, however, be unwise to deduce too much from this, or indeed from similar provisions in the Employment Protection Bill 1975. The latter states (in clause 108(4)) that, "in so far as a person in Crown employment is employed otherwise than under a contract of employment," Schedule 1 to the Contracts of Employment Act 1972 shall be modified accordingly when it comes

117. continued. terms into the civil servant's contract (or, more accurately, "terms of employment" (cl. 109(7)(b)) in circumstances where the Crown has refused to comply with a recommendation for recognition of a trade union (cl. 16), or to disclose information for the purposes of collective bargaining (cl. 21). It is also assumed that the Crown as employer will not become insolvent; thus clauses 55-61, dealing with the priority of certain debts in such an eventuality, are not applicable to Crown employment. Neither are certain provisions (clauses 81-87) concerning wages councils and statutory joint industrial councils applicable. See, for general discussion, H.C. Standing Committee on Session 1975, cols. 1617-20.

Perhaps the most important exceptions are those relating to clause 89, and clauses 90-97. The new scheme which replaces s. 8 of the Terms and Conditions of Employment Act 1959 does not apply, nor does the new procedure for handling redundancies. Thus there is no prospect of civil servants enjoying the benefits of protective awards, though redundancy as such is known to the civil service.118 P. O'Higgins, "Civil Servants and the Bill," State Service, May 1971.

118. Para. 33(3)(b).
to computation of a period of Crown employment. It is best to read such provisions as introduced ex abundanti cautela, and not as clear implications that the civil servant's employment is totally divorced from the scope of the contract of service.\textsuperscript{120}

There is one area in which the civil servant who alleges unfair dismissal may, by comparison with the employee in private employment, find himself at a disadvantage. Extensive provision is made for the protection of national security in relation to claims of unfair dismissal, and the civil servant is, by virtue of the nature of his employment, particularly prone to be subject to this. This could arise in three different ways. First, if evidence germane to the dismissal is likely to relate to matters of national security, or if a person is likely to disclose information "seriously prejudicial" to the interests of national security, an Industrial Tribunal may, if it wishes, order the hearing to be in private.\textsuperscript{121} Secondly, again for the purposes of safeguarding national security, a Minister of the Crown may by certificate exempt certain Crown employment or a particular Crown employee from the operation of the law of unfair dismissal.\textsuperscript{122} Thirdly, a Minister of the Crown may by certificate conclusively establish that a dismissal was for the purposes of safeguarding national security, or that a particular request for information could not be complied with because disclosure would have been against the interests of

\textsuperscript{120} cf. the ingenious but unsuccessful argument of counsel in Malins v. Post Office [1975] I.C.R. 60 at 64.

\textsuperscript{121} Trade Union and Labour Relations Act 1974, Schedule 1, para. 21(5)(c); para. 33(3)(e). Industrial Tribunals (Labour Relations) Regulations 1974 (S.I. 1974 No. 1386), reg. 6.

\textsuperscript{122} Trade Union and Labour Relations Act 1974, Schedule 1, para. 33(4)(5).
national security. Either course of action will have the effect of requiring the Industrial Tribunal to dismiss the complaint. While recognizing the legitimate priority of the protection of national security, these last two provisions appear unnecessarily wide and repetitive. If a claim can be effectively cancelled by ministerial certificate, why should there be a separate rule allowing particular employees to be removed from the class of those eligible to claim in respect of unfair dismissal? Also, why should it be the law that the interests of national security should preclude recovery of compensation altogether? The protection which is required relates to the disclosure of secret information; bearing this in mind it would have been no less efficacious (and much fairer to individuals) to have provided for some payment in the event of dismissal on the grounds of national security, and merely to have dispensed with any form of hearing before an Industrial Tribunal. As has already been argued in relation to the common law rights of civil servants in respect of dismissal at pleasure, public policy is a dangerously loose concept which is too easily invoked, and is applied to negate too many rights.

123. Schedule 1, para. 18(2).
124. Schedule 1, para. 18(1).
125. Supra, p. 237.
CHAPTER 9

RESIDUAL CLASSES OF PUBLIC EMPLOYMENT
A. Introduction

So far, in discussing public employment, attention has been focussed on persons in the armed forces, police and civil services. In this chapter it is proposed to take a broader approach and comment on employment which is 'public' without being included within the above categories. It is not possible to say with precision what these residual public employments are, because the concept of 'public employment' is not one with which British labour law is familiar.\(^1\) This is in contrast to much foreign law. Though it has been said by one distinguished American economist, in his analysis of modern western society, that "no sharp line separates government from the private firm,\(^2\) in his own country there is a well established body of law dealing with the peculiar incidents of public employment, and considerable academic energy has been expended in arguing over the merits of this special treatment. The traditional view taken towards strike action by public employees, for example, is summed up in the words of President Roosevelt:

A strike by public employees manifests nothing less than an intent on their part to obstruct the operations of government until their demands are satisfied. Such action looking towards the paralysis of government by those who have sworn to support it is unthinkable and intolerable.\(^3\)

This attitude was reflected in statutes and judicial decisions whose effect was to cripple the representatives of public employees in collective bargaining: individual employees were

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denied the right to join or organize trade unions, state and municipal authorities were held to be under no obligation to bargain collectively with their employees, and, most importantly, public employees were held to have no right to take strike action.  

By the Taft-Hartley Act 1947, the taking of such action by government employees entailed dismissal, forfeiture of civil service status and ineligibility for government employment for a period of three years. Recently, however, there has been a relaxation in the rigours of the law of the United States, to the extent that collective bargaining (but not, as yet, the right to strike) is permitted, a move which in part indicates the growing dissatisfaction felt with the traditional justifications for discriminating against public employees in this way, and in part amounts to a legal readjustment designed to meet the social phenomenon of rapidly expanding unionism among this class of workers, which was a feature of the 1960's. European experience has been along similar lines; there is a tradition of separate, generally restrictive regulation of the taking of industrial action by public employees in Germany, Sweden, Italy and France, though again this has been subject to relaxation in recent years.

In Britain, by contrast, there has never been separate regulation of public employment, and thus there has been little

4. For details, see A. Cox and D.C. Bok, Labor Law, Cases and Materials, 957-75.
5. Wedderburn and Aaron, op.cit., 368.
7. "The 1960's have already earned a place in labour relations history as the decade of the public employee." Cox and Bok, op.cit., 958.
8. Wedderburn and Aaron, loc.cit.
incentive to define the term. 'Public officer' has been
defined as one who "discharges any duty in the discharge of
which the public are interested, more clearly so if he is paid
out of a fund provided by the public,"9 and this is the nearest
approximation. But this is not altogether satisfactory for
present purposes. In the first place, the courts have tended
to interpret 'public officer' as applying only to persons in the
service of a national authority,10 and, as will become evident,
a definition is needed which will extend to those employed at
local level as well. Secondly, the definition given above gives
no hint of what is distinctive about public employment, beyond
the rather obvious point that the discharge of the duties of the
employment concerns the public. It would be useful to find a
definition which helped to explain the different approaches taken
by the common law towards different types of public employment
within the categories now under consideration; something which,
for example, cast light on the reason why (quite apart from the
existence of distinctive rules drawn from statute or subordinate
legislation) the common law applied different principles in its
application to the dismissal (a) of workers employed in
nationalised industries, (b) of National Health Service doctors,
and (c) of teachers employed by a local authority. All these
workers are, in a recognizable sense, 'public'. In an attempt
to discover an analytical tool which will discriminate between
different types of public employees, regard may be paid to the
role played by statute in regulating their employment, though

(armed officer held to be a 'public officer' for the purposes
of conviction for the common law misdemeanour of accepting
a bribe).
10. See, e.g., R. v. Mirams [1891] 1 Q.B. 594, 596-7; Beeston and
not to the particular substantive rules which are derived from statute, but rather to the degree of statutory intervention. It is suggested that, in general, the more there is of such intervention, the greater will be the extraordinary protection accorded by the common law to the public employee in his employment, and it is intended to examine this hypothesis in relation to certain types of employment which are both 'residual' (in the sense given above) and 'public' (in the wide sense of serving the community).

Before proceeding with this, however, a qualification may be made to a statement made above. It was said that, in practice, public employment is not treated differently, or under a separate heading, from private employment. This is subject to the observation that a small number of statutory provisions, in terms capable of extending to the whole workforce, are (or, rather, were) by the nature of things particularly important for the public sector. This is a reference to the offences contained in the now-repealed Conspiracy and Protection of Property Act 1875, and the Industrial Relations Act 1971, which punished breach of a contract of employment when the party in breach had cause to believe that the probable consequence of his breach was the endangering of human life or the exposure to the risk of destruction of valuable property. Because national or local government is the supplier of many essential services (e.g., sewerage, water, electricity, police, etc.), these criminal provisions were in effect particularly applicable to a variety of workers in the public sector.

11. s. 5.
12. s. 147.
It is now proposed to consider the consequences for the common law governing dismissal of classifying employment as both 'public' and 'residual', as defined above. Attention is focussed on dismissal because not only does this topic raise issues of theoretical importance in the law of the employment relationship, but it also is the topic which has received the most scrutiny by the courts.

B. The 'Right to Work' and Public Employment

Before proceeding with the examination of public employees whose terms and conditions of employment are, to a greater or lesser extent, subject to specific statutory regulation, it is worth looking at the features of certain kinds of employments not strictly within such a definition. The employments - or professions - referred to are those where their public quality is derived from the fact that society, as a whole, has a particular interest in ensuring that those who seek to practise within them maintain minimum standards of skill and integrity. Doctors, veterinary surgeons, architects, solicitors: all share a regime of statutory control which consists broadly of a regulatory authority, made up of individuals appointed in accordance with statutory provisions, whose task it is to decide whether practitioners (and would-be practitioners) are possessed of the requisite qualifications. 13 These authorities control admission into the professions mentioned, typically by administering a register on which all practitioners must be

13. See Medical Act 1956 (4 & 5 Eliz. II, c. 76) s. 33, Medical Act 1969 (c. 40) ss. 11(3), 13(1), (2)(a),(3), 16; Veterinary Surgeons Act 1966 (c. 36) s. 16; Architects Registration Act 1931 (21 & 22 Geo. V, c. 33) s. 7(1); Solicitors Act 1957 (5 & 6 Eliz. II, c. 27) s. 47, Solicitors Act 1965 (c. 31) ss. 20, 22, 29(2), Schedule 4.
enrolled before they may legally practise.

Because of the power wielded by such bodies, the courts have taken it upon themselves to supervise the relationship between them and the individual worker (or would-be worker). The common law requires any such body to act fairly; if it does not, its decisions may be challenged and declared invalid in the courts. The reason for this has been stated as being that

There is the right of every man to earn his living in whatever way he chooses unless by the law or by his own voluntary submissions his way is taken from him. 14

Most commonly the courts have been called upon to intervene when the alleged unfairness consisted in a denial of the right to a fair hearing on the part of the worker refused entry to, or removed from, the register.

Common justice requires that before a man is guilty of an offence carrying such consequences [scil. deprivation of the right to work] there should be an inquiry at which he has the opportunity of being heard. 15

The existence and scope of the 'right to work' gives rise to problems in their own right, which are not contained within the present framework of public employment. Entry into various areas of employment is regulated, not by statutory bodies appointed to protect the public from ill-qualified practitioners, but by trade unions influenced by more sectional interests. It is with regard to the latter that there has been most judicial activity.

While discussion of the broader implications of the 'right

to work' would be inappropriate here, it is useful to mention briefly the facts of Vine v. National Dock Labour Board to explain certain features of the operation of the 'right to work' in the context of public employment. Vine was employed as a docker under the National Dock Labour Scheme, a scheme devised to rid the industry of its reliance on casual labour. This meant that, among other things, the defendant Board assumed responsibility for paying dock labourers who could not find work, but, in the ordinary course of things, payment for work would be made by the private employer who benefited from the docker's labour. The similarity to the employment model of certain professions (as considered above) arises from the fact that only dockers who were registered with the Board were eligible for employment in the docks; "unless registered he is deprived of the opportunity of carrying on what may have been his lifelong employment as a dock worker." Vine successfully challenged in the courts his removal from the register by the Board, on the grounds that this had been brought about by a wrongful delegation of disciplinary powers to a committee. He obtained a verdict declaring his dismissal from the register to be null and void.

Of interest is the attitude taken by the House of Lords to the relationship between the parties. Although the Board occupied


18. Per Lord Keith of Avenholm at 508.
a position of authority over the plaintiff, even paying him in the circumstances of unemployment, there was, according to Lord Keith, no equation possible here between this relationship and the standard employer-employee relationship, embodied in a contract of service. 19 The fact that, vis-à-vis the Board, the docker enjoyed a 'status' meant that the remedy sought, the declaring of the removal from the register as null and void, should be granted. By contrast, "in the ordinary case of master and servant ... the repudiation or the wrongful dismissal puts an end to the contract." 20

Thus a body exercising statutory powers by which it controls the eligibility for employment of all workers within a certain type of employment, 'public' in the particular sense adopted here, exists as a third force to be reckoned with in the employment relationship. There is a sui generis relationship between it and the individual worker, which cannot be described in contractual terms for, not only does it extend to those already accepted and inscribed on the relevant register, it also applies to those who seek admission. Though this is not the only context in which the nebulous term 'status' is used, it is suggested that this is the most appropriate. To summarise, a decision made by such an authority which is ultra vires, 21 which contravenes the principles of natural justice, 22 which is

19. Ibid.
21. Vine's Case, supra.
manifestly unreasonable, or which can be shown to have been made for improper reasons is liable to be set aside by the courts in exercise of their common law powers.

C. Nationalised Industries

This topic may be disposed of quickly. Employment within the nationalised industries is separately discussed in order to provide an instance of public employment where the terms and conditions of employment are subject to minimal extraordinary statutory intervention. Employment here is virtually identical to employment within the private sector. Unlike the categories next to be considered, statute makes no specific provisions for the employment of workers. Instead, the corporation in question is typically given a general statutory mandate to do all that is "requisite, advantageous or convenient" for the carrying out of its duties set by statute, and it is this mandate which gives the necessary authority for the taking on of employees. It is doubtful whether this vestigial form of statutory authority for their employment makes any substantial difference to the common law rights of employees.

25. The prerogative writs run against statutory bodies; declarations and injunctions are competent both against statutory bodies and non-statutory domestic tribunals.
26. i.e., ignoring the many instances of statutes which apply across the board to employment generally.
27. Post Office Act 1969 (c. 46) s. 7. See too, Electricity Act 1947 (10 & 11 Geo. VI, c. 54), ss.1, 2; Coal Industry Nationalization Act 1946 (9 & 10 Geo. VI, c. 59), s. 1.
28. It is also common to find nationalised industries exhorted, by statute, to participate in collective bargaining. But the courts have shown no inclination to treat such provisions as anything more than window-dressing. See Gallagher v. Post Office [1970] 3 All E.R. 712, per Brightman J. at 720.
practice especially conscious of its public position and its consequent responsibilities to set good standards of industrial relations, is classified, by the courts, as similarly placed to the private employer.\textsuperscript{29} The principle that no public body can be regarded as having statutory authority to act in bad faith or from corrupt motives, and any action purporting to be that of the body but proved to be committed in bad faith or from corrupt motives, would certainly be held to be inoperative\textsuperscript{30} is, in its terms, widely enough expressed as to apply to any purported dismissal taking place within a nationalised industry. In fact, however, there is no record of any challenge to a dismissal being made on the grounds of the motives prompting the public corporation. Motivation, of course, is a crucial factor in the new statutory law of unfair dismissal, and the predominance which the latter now in practice exerts over this whole field of law makes it unlikely that the common law will find much opportunity to develop; though recent case law (discussed below) raises the suggestion that the public nature of employment within a nationalised industry might give employees common law rights to a hearing before being dismissed.

\textsuperscript{29} See now, especially, R. v. Post Office, \textit{Ex Parte Byrne} [1975] I.C.R. 221, where it was unsuccessfully sought to obtain an order of certiorari to quash a disciplinary penalty imposed on a post office employee. Bridge J. said (at 227), "it seems to me quite inescapable that the only legal authority which any Post Office employee superior in rank to the present applicant exercises, or can exercise, in relation to the applicant is an authority which derives exclusively from the contract which the applicant has made with the Post Office, namely, his contract of employment."

D. **Local Government and National Health Service Employees**

There is a complex web of specific statutory regulation affecting the terms and conditions of employment of workers within this category. The individual generally finds himself peculiarly well protected by the common law. In the first place, the general freedom of the employing authority to act is subject to the qualifications as to honesty, good faith and *ultra vires* set out above. In one of several cases dealing with the dismissal of a schoolteacher by a local education authority, a hypothetical situation was considered. It was stated that, if an education authority purported to dismiss one of its teachers for totally spurious reasons, such as the colour of her hair, the courts would act to set such a dismissal aside. They have also done this when a dismissal has been held to be *ultra vires*.

If an employee does find he has been dismissed in a way which contravenes the above mentioned principles, he has a good chance of obtaining remedies which are denied to employees outside public employment. In private employment, the common law will only allow him to sue for damages for breach of contract, declarations to the effect that his dismissal was invalid and ineffective being extremely unlikely, though theoretically possible. The public employee in local government or in the

34. See I. Zamir, *The Declaratory Judgment*, 141. Since *Hill v. C.A. Parsons and Co. Ltd. (supra)* it is also a possibility (albeit very remote) that an injunction will be given to prevent employers from proceeding with a planned dismissal of an employee.
National Health Service may, however, seek a declaration that, his dismissal being invalid, he continues to be employed. He may also have the prospect of obtaining an injunction prohibiting his employers from treating him as though he had been dismissed by them. What explanation is there for these peculiarities of public employment?

It appears to be settled law that

if the person dismissed has not a mere contract of service but has a status or can only be dismissed by specified procedure which alone confers the power to dismiss him, then the employment is not effectively terminated by wrongful dismissal. 35

The distinction drawn by Ungoed Thomas J. between 'status' and the existence of 'specified procedure for dismissal' may prove useful. It has been suggested 36 that the term 'status' is best applied to the facts revealed in Vine's Case, to the sui generis relationship between an individual and the body regulating the right to work. If 'status' is confined to this area, then it is the existence of 'specified procedure' which is the cause of judicial intervention when the right to work is not an issue. And since such procedure is, in the case of public employees, very likely to be contained in the form of statute or subordinate legislation, this intervention may be explained as a judicial wish to control powers conferred by statute. It is established that the courts

may award relief where an administrative body has acted without authority or has stepped outside the limits of its authority or has failed to perform its duties, 37

36. Supra.
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36. Supra.
and it is possible to view the activities of the courts in relation to public employment as an application of this principle. However, it must be appreciated that to attach the reason for judicial intervention to the statutory source of the authority being exercised, rather than to the peculiar rights of the person affected, is a matter of emphasis rather than of clear categorization. The courts themselves adopt no such convention in talking of status, and are inclined to use the term liberally in dealing with all kinds of public employment. Nevertheless, the fact of terms and conditions of employment being contained in statutory form does appear to have some link with the attribution by the common law of special protections against dismissal, as has already been noted.

Whatever analytical framework is used, however, it cannot be claimed that the cases relevant to this part of the law show much consistency. Dismissals from employment may be challenged on the grounds already stated and in the ways already stated, but not in all situations which might appear appropriate. A useful beginning is the somewhat puzzling case of McElland v. Northern Ireland General Health Services Board, described as being "the first case in which a dismissal from employment which was merely of a contractual nature was declared invalid."

The House of Lords held that the appellant (a senior clerk employed by the respondent Board) was entitled to a declaration that her dismissal from employment was invalid. When her services had been engaged, various grounds of dismissal had been specified; in the event she was dismissed for a reason —

redundancy - which had not been mentioned at the outset. The case stands out on a limb as an authority. The verdict was by a majority of three to two, and there is no sign among the judges whose views carried the day that they appreciated the nature of the departure they were making from the common law as previously expounded. 40 Lord Oaksey 41 and Lord Evershed 42 treated the question at issue as primarily that of whether a term allowing dismissal for redundancy might be implied into the contract. They did not consider the rule that dismissals from employment, however wrongful, are generally effective. Lord Goddard, the other judge of the majority, made it clear that he saw the facts in terms of a non-technical estoppel: the Board had "debarred themselves" 43 from going outside the grounds for dismissal specified at the beginning of the employment relationship. The case shows the judges taking a peculiar stance when public employment is being discussed. Strictly, however, it does not come within the category of the present discussion, for statute itself did not intervene to any extent in the terms and conditions of employment of the plaintiff. 44

In the years shortly after McLelland, little use was made of it as an authority. Notably, in Barber v. Manchester

40. Only the judgment of Lord Keith of Avenholme, one of the dissenting judges, shows any sign of this.
41. At 599.
42. At 613.
43. At 602. This would also appear to be the view taken of the ratio of the case by Thesiger J. in Malins v. Post Office [1975] I.C.R. 60 at 68.
44. Although the appellant's pension rights were the subject of specific statutory control - by the Health Services (Superannuation) Regulations (Northern Ireland) 1948 (S.R. & O., N.I. 1948 No. 161) - the terms and conditions of her service at the time when she was taken into employment were outside statutory control.
Regional Hospital Board, Barry J. held that, despite the fact that the dismissal of a consultant surgeon was ultra vires of a memorandum probably amounting to subordinate legislation, he would not grant a declaration that the dismissal, though in breach of contract, was also invalid: "in essence it was an ordinary contract between master and servant and nothing more." However, the learned judge was prepared to treat it as extraordinary in another way, recognizing that, because the employing body was a creature of statute, the court would have intervened had it been established (as, on the facts, it was not) that the decision to dismiss had been reached mala fide. In Francis v. Kuala Lumpur Councillors, a dismissal which was irregular (in that it contravened statutory procedures) was held nevertheless to have been effective in terminating a contract of employment, by a Privy Council which was influenced by the unreality of a judgment holding that the appellant was still in the employment of the respondents, when in fact he had not worked for them for several years. More recently, in Vidoyadaya University Council v. Da Silva, the Privy Council held that there was merely an ordinary contract of master and servant between a lecturer and his university, though the latter owed its existence to statute. Thus, the courts refused to grant an order of certiorari to quash a dismissal allegedly contrary to natural justice. This case, however, again concerned facts where the terms and conditions of employment were not directly

46. At 196.
47. At 193.
influenced by statute or subordinate legislation. In *Tucker v. British Museum Trustees*, the Court of Appeal held that an employee of the British Museum, who, by the terms of his engagement, might be dismissed at pleasure, was not entitled to the benefits of natural justice before being dismissed; Lord Denning M.R. looked no further than the term stating the appointment was held only at pleasure. In *Pillai v. Singapore City Council*, the Privy Council again refused to hold a dismissal carried out in apparent breach of statutory procedures as invalid. It expressed the obiter opinion that the procedures were directory rather than mandatory, and that natural justice would in any case only be implied where the persons being dismissed were of high status, as the appellants patently were not.

In all these cases, the courts minimised, if they did not deny altogether, the special protections against dismissal enjoyed by public employees. Positive judicial support for the existence of such protections was, until recently, thin on the ground. In the background there were, it is true, the cases already mentioned in which a succession of judges had indicated that dismissals (usually of schoolteachers) by local authorities would be quashed if *ultra vires*, *mala fide*, or manifestly unreasonable. But these had little practical importance, and the principles laid down in them seem to have been little invoked after the rush of cases in the 1920s prompted by the decisions of local education authorities to

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50. (1968) 112 S.J. 70.
52. See cases cited supra, p. 267.
dismiss married women schoolteachers. In 1956 they were resurrected for the purpose of obtaining a declaration that a proposed dismissal of teachers who had refused to undertake the voluntary task of collecting money for school meals was ultra vires.

In the course of the 1960's there was more evidence of judicial stirring. In Ridge v. Baldwin, the House of Lords held that, at common law, a chief constable of police was entitled to natural justice before dismissal and, though this dealt with a very special employment relationship, it undoubtedly signified a wider role for natural justice in dealings between employer and employee. In Scotland, in Palmer v. Inverness Hospital Board, a court declined to follow the lead taken by Barry J. in Barber's Case. On very similar facts, Lord Wheatley chose to construe directions contained in a circular issued by the Department of Health, dealing with appeal procedure from notice of dismissal in a very different way. He held (as Barry J. had done) that the contents of the circular were embodied in the contract of employment of a hospital doctor, but went on to say that non-observance of the procedure, amounting to a denial of natural justice, afforded grounds for the reduction (i.e. quashing) of the dismissal. Barry J.,

53. cf. Education Act 1944 (7 & 8 Geo. VI, c. 31), s. 24(3), "no woman shall be disqualified for employment as a teacher... or be dismissed from such employment, by reason only of marriage."
56. See supra, p. 216.
57. 1963 S.C. 311.
58. At 319.
it will be remembered, was prepared only to award damages for breach of contract. Lord Wheatley went beyond this because, according to him, the circular stated that its purpose was to make it clear that an appeal would be handled in an equitable manner, and "this, in my view, must apply to the whole procedure," not just to the actual decision to dismiss the pursuer. 59

In Fulbrook v. Berkshire Magistrates' Courts Committee, 60 the dismissal of a magistrates' clerk, though subject to procedures laid down by statute, was held not to require observance of natural justice. However, the related act of depriving him of his superannuation rights did. In the latter circumstance the defendant committee "were exercising a power to determine a question affecting the plaintiff's rights from which a judicial element is to be inferred." 61

In the present context, however, by far the most important case in recent years has been Malloch v. Aberdeen Corporation, 62 both for deciding (a) the circumstances in which an obligation to observe natural justice will be implied into the employment contracts of public employees, and (b) when the courts will hold a failure to observe such standards as leading to a decision that a dismissal is void and ineffective. Malloch,

59. An alternative approach would have been to see the circular as legislative in effect and operating to restrict the terms on which the defenders could enter into contracts with their employees, so that they were bound to observe natural justice. This would have allowed the termination of employment in the case to be reduced as an ultra vires act. See Zamir, op.cit., 145; Mahoney v. Newcastle Board of School Trustees (1967) 61 D.L.R. (2d) 77.
61. Per John Stevenson J. at 89.
a schoolteacher implacably opposed to the introduction of a new statutory scheme of registration for teachers in Scotland, was dismissed from his job without being given the opportunity to argue his case. He successfully appealed to the House of Lords and obtained a reduction of his dismissal, by a majority of three to two. The two dissenting judges (Lord Morris of Borth-y-Gest and Lord Guest) did so primarily because they believed that the various statutes which together governed the appropriate dismissal procedure did not imply a legal right to be heard into the contract of employment of the appellant. Lord Guest rejected as "insupportable" the contention that, just because the respondents were a public body, they were bound to give every employee a hearing before dismissing him, and opined that any reduction of dismissal notice in the master-servant relationship would amount to specific performance of a contract for personal service. Lord Reid (with whom Lord Simon agreed) read the relevant statutes in a different light and did not find it difficult to imply a right to a hearing. He, however, did not explicitly link such a right to a term in the contract of employment, but saw it rather as a duty imposed on the respondents by statute. Here it may be observed that this approach is in line with that whose acceptance is urged in the present section; the employee's rights of the type now being discussed arise not from the agreement between him and his employer, but from the fact that his employer, in employing him, is exercising a power given him by statute. Lord Reid

63. At 1287.
64. At 1291.
65. Ibid.
66. At 1293.
67. At 1282.
denied that the effect of reducing the dismissal would be specific performance:

the result would be to hold that the appellant's contract had never been terminated and it would be open to the respondents at any time hereafter to dismiss him if they chose to do so and did so in a lawful manner.68

Lord Wilberforce's judgment in Malloch is the furthest reaching in its implications. Crucial to his assenting judgment is the fact that the employment in question is public in character. He saw the issue as one of administrative law.69 He rejected the conceptual reasoning by which, once the employee had been classed as a 'servant', he was denied the protection of natural justice, and he approached the problem as being separate from the determination of the purely contractual rights of the employee. All depended on the nature of the employment, and his attempts to make sense of the "illogical and even bizarre" list of cases (given above) stating what classes of employees are entitled to natural justice before dismissal merit quotation at length.

If there are relationships in which all requirements of the observance of rules of natural justice are excluded (and I do not wish to assume that this is inevitably so), these must be confined to what have been called 'pure master and servant cases',

68. At 1284. It follows from this that the reason why the courts accept that a dismissal, however wrongful, is effective in terminating an employment relationship has nothing to do with a refusal to allow specific performance of the contract of employment. This, no doubt, is a reason for a refusal to grant injunctions restraining dismissal, but a refusal to declare a dismissal wrongful and ineffective must rely on other grounds - perhaps that a dismissal will always break the relationship of mutual confidence which is a prerequisite of the employment relationship. See Sandars v. Neale [1974] 3 All E.R. 327, per Donaldson P. at 333. cf. H.W.R. Wade, Administrative Law, 206: "contracts of employment are not specifically enforceable; therefore dismissal, however wrongful, is legally effective."

69. At 1293.
which I take to mean cases in which there is no element of public employment or service, no support by statute, nothing in the nature of an office or status which is capable of protection. If any of these elements exist, then, in my opinion, whatever the terminology used, and even though in some inter partes respects the relationship may be called that of master and servant, there may be essential procedural requirements to be observed, and failure to observe them may result in a dismissal being declared to be void. 70

E. Conclusions

In the movement towards improvement of an employee's rights to security in his employment, Malloch's Case has been described as leading up a "blind alley". 71 This harsh verdict springs from a belief that reliance on the common law for reform of this part of the law is likely to be unproductive. Now, of course, statutory protections against unfair dismissals are available, but it would be wrong, because of this, to reject the common law protections as of no importance. They are still worth study, for they apply when the preconditions for inclusion within the statutory scheme of protection are not met; when, for example, a public employee has been employed for less than six months, and is dismissed for reasons which are not 'inadmissible'. Secondly, the common law is important because the remedies it gives are not exactly the same as those available under statute. Under the Trade Union and Labour Relations Act, an unfairly dismissed employee may be awarded financial compensation, or it may be recommended by an industrial tribunal that he be re-employed or re-instated. Because there is no power to

70. At 1294.
order re-instatement, it may be said that the statutory law of unfair dismissal presupposes that dismissal will always be effective, however unfair it is. On the other hand, the common law permits certain public employees to obtain a declaration that a purported dismissal is invalid qua the powers and obligations of the dismissing authority, and thus without legal effect.

A final formal difference which may be noted between dismissal in public and private employment is discussed by Ganz. The existence of statutory dismissal procedures in public employment means that the courts do not generally determine (as they do in private employment when it is claimed that a dismissal has been in breach of contract) whether a dismissal is justified by the behaviour of the employee. Instead, they scrutinize the way in which this decision is made, but leave the actual making of it to whatever body is charged with operating the statutory procedures. They will not usually take it upon themselves to re-examine the substantive issues on appeal. Ganz argues that the act of delegation should be seen as a 'judicial act' and so as giving rise to an obligation to heed natural justice, a view which is consonant with the general line of reasoning taken by Lord Wilberforce in Malloch. This argument draws on the general notion that the peculiarities of the public employee's rights in the event of his dismissal are derived not so much from the special

72. Even under the reforms proposed by the Employment Protection Bill 1975, this statement will remain true. The penalties for refusal to accept back into employment an unfairly dismissed employee who wishes to return are increased, but still the act of dismissal is effective (ccl. 63-4).
74. At 292.
75. Supra.
contents of his contract of employment, but from the classifying of the dismissal decision as an act subject to the principles of administrative law.
CHAPTER 10

OFFICE AND OFFICE-HOLDERS
A. Introduction

No discussion of the different categories of employment relationships would be complete without mention of the special problems emanating from the concepts of 'office' and 'office-holder'. As will be seen, these are terms of imprecise and varied meaning, but they are ones which not infrequently arise in labour law. Yet there has been, to date, little attempt either to distinguish the various different types of officers, or to explain the points of similarity and dissimilarity in the relationship between the holder and grantor of an office, as compared to that between employer and employee under contract. In one leading textbook, for example, it has merely been observed that

their [i.e. office-holders'] relationship with the person under whose control or whose subordinate they are cannot be regarded as that of master and servant, but must be considered as something especial, governed by its own particular principles and rules...it may be that it depends upon the enjoyment of some status as opposed to the performance of some contract. 1

Professor Rideout has gone a little further, describing office-holder as a term which seems to be reserved for those who are dependant workers, habitually engaged by a single employer, but incapable of being held to be employees because they do not fit into the definition of servants. 2

The topic, however, demands more rigorous analysis than either of these summaries allows. 3 It is important to realise

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3. The Encyclopaedia of Labour Relations Law states (para.1-020n) that the holder of a common law office is entitled, in certain circumstances, to a declaration that his dismissal is invalid. Ridge v. Baldwin [1964] A.C. 40 is cited as authority for this proposition.
   cf. Blackstone, Commentaries, Bk.2, 36: an office is "a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging."
at the outset that the terminology of 'office' and 'office-holder' has been considered by the courts in different contexts. In the first place, the classification of an individual as an 'office-holder' may be significant for the operation of a particular rule of law. This is so, for example, in the context of the law of defamation, where slander of a man in his office was actionable without proof of special damage.\(^4\)

4. See Gatley on Libel and Slander, 86. The test was whether the words referred to the character or conduct of the plaintiff in the carrying on of his business, profession or trade. See now Defamation Act 1952 (15 & 16 Geo. VI and 1 Eliz. II, c. 66), s. 2.

Under the old law a distinction lay between slander of persons holding offices of profit and those holding offices of honour. Slanderous allegations of unfitness or want of competency in performing an office of profit were actionable per se, without proof of special damage. "The probability of pecuniary loss to the plaintiff ensuing from such an imputation obviates the necessity of proving special damage" (Gatley, op.cit., 87). On the other hand, words imputing disability to an office holder gave a right of action only where the person in question earned his living by doing what he was said not to do well; see Twysden J. in Bill v. Neal (1661) 1 Lev. 52. But though you could call a justice of the peace a "fool, an ass, a beetle-headed justice" with impunity, verbal attacks on the moral character (as opposed to the competence) of the holder of an office of honour in the execution of that office were actionable. This distinction appears as early as How v. Prinne (1702) 2 Ld. Raym. 812 (allegation of Jacobite sympathies made against a J.P. held actionable), though it was subsequently doubted in Onslow v. Horne (1771) 2 Black W. 750.

The main interest of these cases lies in the close assimilation, for the purposes of the law of defamation, of paid and unpaid offices. In Duvall v. Price (1694), Shower H.L. 12 it was argued by counsel that evidence of loss of office as a J.P. was not proof of special damage: "that can be no damage, the same being no place of profit, but merely of burden and trouble" (at 14). There is no sign, however, of this argument being accepted by the courts.
In *Cleghorn v. Sadler*, it was held that a war time fire-watcher was not the holder of an office and so could not, without proof of such damage, sue in respect of a slanderous attack on her reputation. This example shows the definition of a person as an office-holder as important for the operation of a common law rule; more often, however, it is important for statutory purposes. The House of Commons Disqualification Act 1975, for example, debars certain office-holders from membership of the House of Commons. But this Act is itself exceptional in that it specifies itself the relevant offices whose holders are debarred; in any case of difficulty arising out of its interpretation, the problem is likely to be, not deciding whether or not a person is an officer, but whether the person is an officer within the class specified by the Act. More often the difficulty raised by use of the term 'officer' lies in deciding whether a person falls within that description. Perhaps this difficulty can best be illustrated by looking at the provisions of the Income and Corporation Taxes Act 1970 and its predecessors, which specify what income is assessable to tax under Schedule E. Tax on this basis is chargeable on emoluments of "any office or employment" which fall under one

5. [1945] 1 K.B. 325. cf. *Heartley v. Banks* (1858) 5 C.B.N.S. 40: "an office necessarily implies that there is some duty to be performed", per Cockburn C.J. at 55. In that case, persons who were, by Royal appointment, "military knights of Windsor", with the ensuing obligations to carry out religious duties and to stand at the doors of their homes to do homage to the Sovereign when she passed on the way to Windsor Castle, were held not to hold 'offices' for the purpose of registration for voting rights. Heartley's case shows status without duty being held insufficient to create an office; Cleghorn's case is an example of duty without status giving the same result.

6. c. 24.

7. See First Schedule, Parts I-IV.

8. c. 10.

9. s. 181(1).
or more of three categories which are set out in the section. The interpretation of this and similar sections has given the courts the opportunity to indicate the range of employment situations covered by the term 'office' as well as to decide particular cases.\textsuperscript{10}

It is generally true that, when the terminology of 'office' and 'office-holder' appears in statutes, its function is analogous to that of 'contract of service', though it is a concept less well understood, having attracted neither the volume of case law nor theory that the contract of service has. However, this very imprecision renders it a useful open-ended classification. When used in conjunction with the concept of the 'contract of service' it is possible to refer to a wide class of persons. The persons who are included within such a category are those who, in the opinion of the legislature, deserve to be grouped together with the ordinary employee. A clear example is to be found in the Social Security Act 1975.\textsuperscript{11}

This Act, \textit{inter alia}, amends the classes and definitions of contributions payable by earners towards the upkeep of the system of national insurance. By the predecessor of the

\textsuperscript{10} e.g., in Great Western Railway v. Bater [1920] 3 K.B. 266 at 274 Rowlatt J. defined an 'office or employment of profit' as "an office or employment which was a subsisting, permanent, substantive position, which had an existence independent of the person who filled it, and was filled in succession by successive holders." cf. McMillan v. Guest [1942] A.C. 561 at 566, where Lord Wright approved a dictionary definition of office as "a position or place to which certain duties are attached, especially one of a more or less public character." In Dale v. I.R.C. [1953] 2 All E.R. 671 a paid trustee was held to hold an 'office of profit' within the meaning of s. 14(3) of the Income Tax Act 1918.

\textsuperscript{11} (c. 14) s. 2(1). This is a consolidating measure. The original change in the classification of classes of contributors was made by the Social Security Act 1973 (c. 38), s. 1(7).
1975 Act, the two main classes of contributors were 'employed persons' and 'self-employed persons', and the distinction between these was that the former were "persons gainfully occupied in employment ... being under a contract of service," while the latter group comprised all those gainfully in employment without such a contract. The position now is that the primary division is between 'earners' and 'self-employed earners'.

The genus of 'employed earner' comprises both the species of the person under a contract of service and the person "in an office (including elective office) with emoluments chargeable to income tax under Schedule E." The circularity of this latter definition - one of the tests for the application of Schedule E tax is that there must be an 'office' or 'employment' - is less important than the fact of its introduction. It is a recognition of the inadequacy of the standard bipartite division of employed persons (as expressed in the definitions of the National Insurance Act 1965, mentioned above). Perhaps too it is a belated recognition of the strained reasoning which Megaw J. adopted in the case of A.U.E.W. v. Minister of Pensions and National Insurance. There, in interpreting provisions of the National Insurance (Industrial Injuries) Act 1946, which defined insurable employment as employment where there was a contract of service, his Lordship held that such a contract existed between a trade union and a union member who carried out paid duties as a 'sick steward'. He reached this conclusion notwithstanding the facts that the member was obliged by union

15. 9 & 10 Geo. VI, c. 62.
rules to accept these duties and that, in his own judgment, there was no contractual relations between union and union member other than the contract of membership. Under the present law, the 'sick steward' could be described as an office-holder, and still be brought within the scope of industrial injury benefit. 16

Many other instances could be given of the use of 'office' or 'office-holder' as a reference point in a statutory context. 17 However, bearing in mind that the present inquiry is intended to yield a comparison between office-holder and employee, it is of more interest to see what particular characteristics have been attached to the former by the courts. Unfortunately, modern authorities on this point are relatively few and, when they do occur, there is no guarantee that they will be in agreement. Different courts have, for example, at different times held different views as to the distinguishing characteristics of an office-holder. In the tax case of Great Western Railway v. Bater, 18 the permanency associated with the concept of office was singled out for special emphasis, while in a more recent Scottish case, dealing with the classification of a worker for National Insurance purposes, the superior status of an office-holder was what attracted the judge's attention:

The word 'officer' in my opinion...denotes a person under a contract of service, but, in such a collocation as the present, it denotes a servant of somewhat special status, as holding an appointment to office under the local authority which carries with it authority to give orders to other servants. 19

17. See Stroud's Judicial Dictionary, s.v. "Office" for a list of instances on which courts have considered the meaning of the word.
18. Supra.
Before proceeding to examine particular features of the office-holder's employment, one note of explanation is due. In the discussion of office which follows, the concept of public office is discussed, but no mention is made of the police, the armed forces, and certain other public employees who are frequently described as 'office-holders'. Separate consideration is given to the employment relationships of such persons. 20

B. The Concept of Office

The few examples given above show the need for a consideration of the concept of office before any useful comparison can be made between the position in law of an office-holder and a worker employed under a contract of service. This naturally leads to an examination of its history, though it is necessary to preface this examination with a statement of its limitations. What follows is not, and does not purport to be, a comprehensive history of the institution of 'office'. It is unfortunate that no such study exists, given the proprietary significance of office for the middle and upper classes in English society until the 19th century, but the present inquiry is limited to those aspects of office which may be compared with the incidents of the contract of service and its antecedent, the master-servant relationship. It is an inquiry, moreover, which is rendered necessary by present day patterns of thinking.

Because of the legacy left by 19th century ideology, there is today a natural inclination to explain an employment relationship as the product of agreement between the parties. It is argued elsewhere, however, that both at the level of practice

20. See supra, pp. 184 ff.; 200 ff.; 257 ff.
and theory, the master and servant relationship which existed before the 19th century was far less amenable to such consensual analysis, and it must be stressed that undue emphasis on consensualism would be similarly misplaced in a study of the office-holder's employment relationship. The duty to carry out certain tasks can, of course, be explained as resting on a bargain, but this is by no means the only explanation. In particular, the duty can be explained as incidental to some other transaction concerning the parties involved. This point can be simply illustrated by an example taken from Roman law: the commodatarius is obliged diligently to look after the article he has borrowed and to return it after the purpose for which it has been loaned has been accomplished, but not because of agreement to that effect (though no doubt this could readily be inferred from the actions of the parties). He is obliged to act in this way because the law attaches these obligations to the gratuitous loan of a res non fungible. So it is with the duties of certain office-holders; incidental to the occupation of their office they are obliged to do certain things. Neither the presence of agreement nor remuneration renders their obligations explicable in terms of bargain. Payment is no consideration - it is as incidental or 'appurtenant' to the office as are the specific obligations of the holder himself. So, for example, if you held the ancient office of forestership, you might have found that with that office went certain land,

21. Historically the granting of profitable office at the instance of the Crown was a well recognized way of giving reward for past services. See Holdsworth, H.E.L., Vol. X, 509, and see, e.g., Sir Thomas Wroth's Case (1553) 2 Plowden 452 (grant of office of gentleman-usher for services rendered to the son Henry VIII); Sir Henry Nevil's Case (1570) Plowden 378 (grant of office of parkership of a park in return for "good and acceptable service" to the grantor.
but these emoluments were not central to the granting and acceptance of the office, as payment for services was central to the institution of the contract of service, or the relationship of master and servant. Precisely because of this, the idea of honorary, unpaid office was and is perfectly acceptable (one thinks, perhaps, of the Justice of the Peace as a leading example), whereas the idea of a contract of service unsupported by consideration is self-contradictory. What is more, because the law relating to the holding of office was, to a large part, conceived of as belonging to the law of property, it also became natural to think of the office having some form of metaphysical existence of its own - a res incorporalis is nonetheless a res. 22 This, perhaps, has contributed to the modern understanding of the permanency of an office: unlike a job, it may be said to exist whether or not it is occupied at any one point in time. 23

(1) Public Office

To judge from the treatment accorded to the subject of office in early law books, the great majority of offices were in keep of the Crown. Such offices might be termed 'public' for no better reason than that their holders "hath any duty concerning the publick" (a scheme of classification suggested in one case of 1699 24). That the Crown should occupy such a position of importance in regard to offices should come as no surprise;

22. See Pollock and Maitland, History of English Law, Vol. I, 135 ff. for an account of how another example of a res incorporalis - an advowson - was brought within the limits of the law of real property.

23. This, of course, is not absolutely true. One might, e.g., speak of someone having acquired the job of doorman at the Regal cinema - a phrase which implies the existence of the job before the particular person came along. But it is submitted that this usage is exceptional in this context; not so when offices are being discussed.

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it has been said that the concept of office was originally understood in terms of real property. Offices were, for example, protected by the assize of novel disseisin\(^\text{25}\) and, later, by the action on the case for disturbance.\(^\text{26}\) They were included within the class of freeholds, they might be bought and sold, and they might be subject to a reversion: "a man may have an estate in them, either to him and his heirs, or for life, or for a term of years, or during pleasure only."\(^\text{27}\)

Offices concerned with the administration of justice and the collection of Royal revenues were, however, exceptional in this respect. By a statute of Edward VI,\(^\text{28}\) it was forbidden to buy or sell them, although the evidence is that this law was only obeyed infrequently.\(^\text{29}\) Similar considerations of public policy forbade the granting of judicial offices subject to reversionary rights

\[
\text{for he who at the time of the grant in reversion may be able and sufficient to supply the office of judicature, and to administer justice to the King's people, before that office falls, may become unable and insufficient to perform it.} \text{30}
\]

\(^{25}\) Jehu Webb's Case (1608) 8 Co. Rep. 45B. (Assize of novel disseisin brought to recover the office of the Master of the Tennis-Plays.) However, the assize lay only if the office were one of profit. In Webb's Case it was held to be a valid objection to the pleadings that they did not disclose that the office was one of profit. It was relevant in that case that the office of recent creation. Had it been an ancient office, it might well have been presumed to have been one of profit.

\(^{26}\) Comyns' Digest, Vol. V, 215. Originally it appears that the action upon the case protected the person who did not enjoy a freehold in his office; later the holder of such an office could elect to proceed by means of the action upon the case.

\(^{27}\) Blackstone, Commentaries, Bk.2, 36. See G.E. Aylmer, The King's Servants, chap. 3, for a detailed account of the traffic in public offices at the time of Charles I.

\(^{28}\) 5 & 6 Edw. VI, c. 16 (1551).

\(^{29}\) Aylmer, op.cit., 87.

\(^{30}\) Auditor Curle's Case (1609) 11 Co. Rep. 2B at 4A.
That the prohibition of the sale of these select offices constituted a departure from ordinary practice is demonstrated by the care taken in the same statute of 1551 to make it clear that other offices were not affected. Special mention, for example, was made of the non-applicability of the prohibition to offices of parkership and inheritance, and to offices in the gift of certain judges.

As all grants of land were ultimately traceable to the Crown, it was natural that freehold offices should be similarly analysed. Indeed, the Royal power to create new offices was singled out by Coke as one of the three "new things which have fair pretences [but which] are most commonly hurtful to the commonwealth" on account of the "intolerable grievance" this caused the subject.

The control enjoyed by the Crown over the granting of freehold office was an important factor in the political contests of the 17th and 18th centuries, but it was one which increasingly was felt to be unacceptable in the course of the 19th. The opportunities it gave for favouritism and corruption to operate on a large scale are notorious, and its abolition (as a basis for the public administration of the state) was a precondition to the introduction of a meritocratic civil service. By 1870 (when entry into the civil service by means of competitive examination was established) this had been achieved. Today, the concept of a freehold public office has little practical

31. s. 3; s. 6.
32. Inst. 2, 540.
importance, but it cannot be ignored in any historical survey or in any explanation of the remedies available to an office-holder faced with the prospect of removal from his office.

(2) Non-public Officers

There are four relevant meanings ascribed to 'officer' in the Oxford English Dictionary. One of them is concerned, broadly, with the public officer whose position has been briefly considered above. Another concerns itself with a highly specialised class of officers - that of heralds and pursuivants - and can be ignored for present purposes. The remaining two describe an officer as "a person engaged in the management of the domestic affairs of a great household or collegiate body" and as "a person holding office and taking part in the management or direction of a society or institution." Both of these definitions, in so far as they have been reflected in the law, add something to the understanding of an officer as described above, and thus require examination.

Statute, of course, cannot be ignored in any consideration of non-public (and public) officers. From the 19th century onwards, 'officer' has proved an attractive and convenient label to attach to those who hold positions of authority in a variety of institutions, as can be illustrated from a large number of

34. Though it lingers on in the attitudes taken by the courts towards explaining the nature of a civil servant's employment. Thirty years ago Sir Douglas Logan pointed out the fallacy of using arguments drawn from a superseded notion of office as property in the discussion of whether the salary of a civil servant could be charged or assigned. (op.cit., 258.)

cf. Trade Union and Labour Relations Act 1974, s. 24, which provides for the making of payments to persons who have ceased to be members of the C.I.R. and N.I.R.C. These are described as "compensation for loss of office".
examples. But there is little common ground between these
different statutory examples, and a more fruitful line of
inquiry is to see what understanding the common law has had
of the idea of private office.

The concept is one of respectable antiquity. Littleton,
writing towards the end of the 15th century, could say:

As if a man grant by his deed to another the office
of Parkership of a park, to have and occupy the
same office for term of his life, the estate which
he hath in the office is upon condition in law, to
wit, that the parker shall well and lawfully keep
the park, and shall do that which to such office
belongeth to do, or otherwise it shall be lawful
to the grantor and his heirs to oust him, and
to grant it to another if he will. 36

Coke comments on this passage to the effect that "there be at
this day more conditions in law annexed to offices than were
when Littleton wrote." 37 In particular, by Coke's day, a
distinction had been drawn between nonfeasance as a cause of
forfeiture in regard to public and private office. It had been
argued in the Earl of Shrewsbury's Case, 38 and it was accepted
by Coke himself in his Institutes, that

non-user of itself, without some special damage, is
no forfeiture of private office; but non-user of
publick offices which concern the administration
of justice, or the Commonwealth, is of itself a
cause of forfeiture. 39

35. e.g., Friendly Societies Act 1896 (59 & 60 Vict., c. 25)
s. 36(2); Bankruptcy Act 1914 (4 & 5 Geo. V, c. 59) s. 149;
Companies Act 1948 (11 & 12 Geo. VI, c. 38) s. 74; County
Courts Act 1959 (7 & 8 Eliz. II, c. 22) s. 201; Transport
Act 1962 (10 & 11 Eliz. II, c. 46) s. 92(1); Industrial and
Providential Societies Act 1965 (c. 12) s. 74.
36. s. 378. For information on private patronage in Elizabethan
times, see D.M. Loades, Politics and the Nation 1450-1660,
305-7.
38. (1610) 9 Co. Rep. 46B, at 50A.
In general, however, no fundamental difference was recognized between the holder of public and non-public office. The relatively brief discussion of the latter in the sources is attributable simply to the fact that public office was of much greater practical importance.

(3) The Officer as Superior Servant

The office of parkership of a park has been given as a leading example of a non-public office, that is, an office which was not necessarily in the grant of the Crown. It has been suggested that this office was often given in return for services rendered to the grantor in the past — for "good and acceptable service", as one deed which makes a grant of parkership states. Reward, however, is not the complete explanation. In the same case as that in which that deed appears, there is a suggestion that the granting of the office is also for the benefit of the grantor. Counsel, arguing against the possibility of forfeiture of the office, maintains that, had it not been specifically excluded by the statute, the office of parkership would have been classified alongside those judicial and other offices which it is forbidden to sell. Like these offices, he says, it requires skill and diligence in the

40. But reference should be made to the general statement of principle laid down by Lord Mansfield in the case of R. v. Bembridge (1783) 22 St. Trials 2, at 155. He propounded two rules, relevant to the criminal liability of public officers. (1) When a man accepts public office, he is answerable to the King for the execution of that office, and he can only answer in a criminal prosecution, for that is the only way the King can punish his misbehaviour. (2) Where the public officer is guilty of a breach of trust which would, were private citizens involved, give rise only to a civil action, he is nonetheless open to a criminal prosecution.


41. Sir Henry Nevil's Case, supra.
person of the grantee, and it shares, with such offices as stewardship and bailiwick of husbandry, the characteristic of being "granted in respect of the fitness and capacity which the grantor has conceived in the person of the grantee to exercise such an office."\[42\] Similarly, it is true, the Crown, in appointing persons to judicial office, has always had a concern in the efficient execution of the duties attached thereto - but this concern is a reflection of the public interest\[43\] which there is in such efficiency. The employer in the public sector is and always has been necessarily motivated by extra-economic considerations. What is more interesting is the conception of the office-holder as a kind of superior servant in the field of non-public office, directly concerned with the furthering of the proprietary interests of his employer.

Reported cases show that this stage of development was reached comparatively early. The steward and the bailiff appointed by the lord of the manor to look after his business interests were certainly seen as 'officers',\[44\] and there is even a record of the term being applied to one so lowly as a

\[42\] Ibid.
\[43\] In 1388 it had been enacted (12 Ric. II, c. 2) that no offices concerned with the administration of justice should be appointed "for any Gift or Brocage, Favour or Affection." According to Coke (Co. Litt. 378A) this was "a law worthy to be written in letters of gold, but more worthy to be put in due execution."

cf. Blackstone's explanation of the prohibition of the sale of judicial office. He thought (Commentaries, Bk. 2, 36-7) that the law presumed that he who bought an office would, by bribery or other corrupt or unlawful means, make his purchase good, to the detriment of the public at large.

Appreciation of the essential similarities between certain office-holders and servants led to various conclusions. First, sympathetic hearing was given by the courts to the grantor of office who wished to be rid of the person on whom he had conferred office (subject to protections given to the office-holder by virtue of his freehold title). Secondly, it became possible to argue that someone who claimed to be entitled to the privileges of a freehold office was, in truth, no more than a servant without such privileges.

To turn to the first of these points, the courts solved the dilemma of balancing the rights of the grantor and grantee of office by a characteristic compromise. It was said in 1614 by Coke J.

si home ad un office ove un fee, cestuy que officier il est poct luy discharge del office, mes nemy del fee. [Coke J.] hoc est lou le fee est certein, mais lou le fee est uncertain la il ne poct luy discharge del fee ou office, car le fee accrue per l'exercisant del office. 46

The courts protected the proprietary interests of the office-holder, but refused to order specific performance of the relationship against the will of the grantor of the office.

Two other examples will reinforce this argument. In Harvey v. Newlyn,47 an office-holder — the bailiff of a manor — was

45. Veale v. Priour, supra. It would not be surprising if this reference were to a housekeeper employed by some ecclesiastical body. After the Restoration, office in the Church was recognized as giving the right to vote. The word 'office' was interpreted very broadly indeed. In 1693 a chorister of Ely cathedral voted by virtue of his notice, and in 1803 the brewer, butler, bell-ringer, gardener, cook and organ-blower of Westminster Abbey all voted on a similar pretext, though these votes were subsequently disallowed. See E. Forrit, The Unreformed House of Commons, Vol. I, 23.

46. Frevill v. Ewebancke (1614) 1 Rolle 83.

47. (1601) Cro. Eliz. 859.
disturbed in his office by the new owner who had purchased the manor from the person who had granted the office in the first place. The unanimous view of the court was that

the purchaser of the manor might discharge the plaintiff and revoke that grant, although it were for life; because he sheweth not that there was any fee granted for the execution thereof; nor that he had any other profits of exercising of it; for without profit it is but an office of trouble, and then the plaintiff hath not any cause to complain when he hath not any loss; but if he were to have had a fee, or other profit in certain for executing thereof, it had been otherwise. 48

This shows that protection here is being accorded not primarily to 'office' as an abstract concept, but to the remuneration which accrues from the occupancy of offices; the right to office itself is protected only in so far as it determines the extent of proprietary rights.49 A final illustration of this is Slingsby's Case,50 where the King was held entitled to dispense

48. At 859. According to Coke (Co. Litt. 233b) the principle was expressed thus: "no man can frustrate or derogate from his own grant to the prejudice of his grantee." From his comments it appears that such employments as bailiffs, receivers, surveyors and auditors were conceived of as offices, and the relevant office-holder was paid by way of a set fee. Other offices - such as the parkership of a park - in addition brought in incidental profits. A parker might, for example, be entitled to the skins of deer killed in his park.

49. cf. L'Evesque de Sarums Case (1608) Mo. (K.B.) 808, where a special note was made to the effect that a new office could be created by a private individual, although no fee was attached to it to begin with. "Les Justices teignont cleare que le constitution del novel office & officier fuit bone coment que nul fee annual ne casual fee fuit adeprimus annex ou done a ceo." Arguably the qualification 'at first' (adeprimus) is of major importance here. Quaere what protection would have been accorded to a private office which was permanently honorific.

Bartlett v. Downes (supra) may be relevant here. In that case the competency of a private person to create a freehold office was called in question. The view of the court was that "if profit belonged to the office, and it had been so alleged in the declaration, the grant of the office for life would have been good" (at 620).

50. (1680) 3 Swanst. 178. See Logan, op.cit., at 253.
with the services of the holder of the office of Master of the Mint. It is reported that "it were strange to deny the king that liberty which every subject hath, to refuse the service of any man whom he doth not like," though, at the same time, the King might not interfere with the continued payment of the office-holder's salary: this would have been an invasion of his proprietary rights.

There are also cases showing attempts to argue that would-be office-holders were no more than servants. In *Whitechurch v. Pagett* (perhaps one of the earliest examples of a claim for compensation for unfair dismissal), a sub-clerk employed under a person who held office as custos breviom was awarded a large sum of damages in respect of having been expelled from his job. On appeal it was argued that he had had only an employment, not an office, because the actual person who had dismissed him

ad le feazant & le custody de touts choses & est responsable pur touts defaults miscarriages & issint est le sole officier & les 7 clerks sont come ses servants...& que sont removable a son pleasure.

In *Field v. Boethby*, Glyn C.J. had explained the problems thus:

Jeo die, que coment chescun office soit un imployment, uncore e converso chescun imployment n'est un office come si jeo grant al un pur make mon hay ou pur arer mon terr ou pur heard mon flock, ceux sont imployments & differ del esteant steward de mon manor etc. queux sont offices.

51. At 179.
52. (1662) 1 Sid. 74.
53. This argument was not directly answered in the reported judgments.
54. (1657) 2 Sid. 37.
55. At 142.
From these few cases it can be deduced that the social status of the person who claimed to be an office-holder, and the responsibility and control he enjoyed in the carrying out of his duties, were important factors in deciding whether or not he fell within that privileged class; in 1706 a steward of court was held not to come within the terms of a bequest made to 'servants',\textsuperscript{56} and, a century later, the court of King's Bench refused a mandamus to restore a man to statutory office on the ground that he was only a "servant to a fugitive body".\textsuperscript{57}

Even actual classification as an officer did not bring an end to one's problems, however. The courts distinguished high and low grade officers, and reserved their strongest remedies for the former.\textsuperscript{58} In 1794 the court of King's Bench refused a mandamus to restore a vestry clerk to his office.\textsuperscript{59}

\textsuperscript{56} Townshend v. Windham & Robinson (1706) 2 Vern. 546.

\textsuperscript{57} R. v. The Guardians of the Poor of St. Nicholas, Rochester (1815) 4 M. & S. 324.

\textsuperscript{58} When faced with a borderline case, the courts looked to the facts of appointment for life and payment by salary as indicia of an office which could be protected by mandamus. e.g., in Ile's Case (1671) 1 Vent. 153, the court at first doubted whether mandamus would restore a sextant to his office "because he was rather a servant to the parish, than an officer, or one that had a freehold in his place," but mandamus was granted after evidence had been given that the sextant, by custom, held office for life and received 2d from each household in the parish per year. In R. v. Churchwardens of Thame (1719) 1 Str. 115, mandamus was refused where there was no evidence of appointment being for life. See too R. v. Vicar and Churchwardens of Dymack [1915] 1 K.B. 147.

\textsuperscript{n.b.}, an information in the nature of quo warranto (another obsolete mode of contesting the validity of a person's claim to public office) also did not lie where the appointment was not of a substantial nature. Dismissibility at pleasure was evidence of lack of substance. See R. v. Speyer [1916] 1 K.B. 595, per Lord Reading C.J. at 611; R. v. Fox (1858) 8 El. & Bl. 939, per Crompton J. at 945. In Darley v. R. (1846) 12 Cl. & Finn 520, Lord Tindal C.J. (at 542) stated that, if the office-holder in question were to be a mere servant, an information in the nature of quo warranto could not be sustained.

\textsuperscript{59} R. v. Churchwardens of Craydon (1794) 5 T.R. 713.
words of Lord Kenyon C.J.:

This is not a fixed permanent office, for which a mandamus will lie. It depends altogether on the will of the inhabitants, who may elect a different clerk at each vestry. Neither is any salary annexed to this situation... This is an office merely of a private nature; and if a mandamus were to be granted to restore to the office of vestry clerk, I should soon expect to hear of an application for a mandamus to restore to the office of a toll-gate keeper of a turnpike road... 60

C. Vicarious Liability

Having seen something of the lines along which the concept of office has developed, it is now appropriate to look in more detail at the modern law, and to see what important differences there are between the office-holder and the employee who works under a contract of service. The three areas in which comparisons are made are vicarious liability, payment and removal. In relation to the first, it should perhaps be made clear that it is not assumed that the presence of a contract of service is the only, or indeed the leading, test for the imposition of vicarious liability. Vicarious liability can exist where there is no such contract.61 But it is fair to say that this liability is commonly associated with the contract of service, and it is on this understanding that the comparison proceeds.

(1) Public Office

Even to know that a person is within this class of office-holder is not enough to settle the issue. It is possible to give one kind of answer by means of a definitional

60. At 714.
ploy. If 'public officer' is defined as one who "performs duties in the performance of which he is not subject to control by the person or body which appointed him," then it is exceedingly unlikely that his torts will involve anyone in vicarious liability. This can be explained in two ways. First of all, assuming he has been appointed by the Crown, he will be an 'officer' but not a Crown servant or agent and thus, according to one view of the Crown Proceedings Act 1947, no liability will be placed upon the Crown. On similar reasoning, he would not be described as a servant for private law purposes, so freeing his 'employer' here too. Alternatively, the reason why the appointing authority may have no control over him may be because the relevant duties are imposed on their appointee not by them but by statute. If this is so, then the ratio of Stanbury v. Exeter Corporation will apply: no vicarious liability when the tortfeasor's acts are done in pursuance of statute-imposed duties.

But if the public officer is defined more loosely as one exercising duties which are the concern of the community at large, then, provided that he can be described as a servant, there will be no objection to a finding of vicarious liability. Thus, in Ormerod v. Rochdale Corporation, the defendant corporation had, by local act of Parliament, power to appoint and dismiss their medical officer of health. Said Bruce J.,

62. And also paid wholly out of the Consolidated Fund, moneys provided by Parliament or a fund equivalent thereto in respect of his duties. Crown Proceedings Act 1947, s. 2(6).
63. Atiyah, op.cit., 392.
64. [1905] 2 K.B. 838.
65. (1898) 62 J.P. 153.
where the power to appoint and the power to remove is subject to the control of the Local Government Board, the officer of health must, I think, be regarded as the servant of the corporation. They appoint him and they pay his salary. He is appointed to carry out regulations framed by the council. 66

The point may be made that, in this last situation, the public officer so defined may in reality be nothing more than an ordinary employee under a contract of service exercising rather special functions - but in modern usage 'officer' and 'servant' or 'employee' do not stand in contradistinction, though formerly this was not so. 67

The conclusion to be drawn is that, in the case of public officers (defining them broadly as individuals carrying out duties in which the public at large are concerned), there is no necessary bar to the application of vicarious liability. In the end this will depend upon two inter-related factors: the nature of the duties which the officer performs, and the degree of control exercised over him by the body which is potentially vicariously liable for his torts.

(2) Non-public Officers

Here again it is not possible to lay down anything more than the broadest of guidelines, such is the diversity of individuals which falls under this heading. In fact, it is

66. At 154.
67. cf. Smith v. Martin and Kingston upon Hull Corporation [1911] 2 K.B. 775, where it was unsuccessfully maintained by counsel that, because elementary schoolteachers were described as 'officers' by act of Parliament (Elementary Education Act 1870, s. 35), they could not be 'servants' for whom the defendant were vicariously liable. Fletcher Moulton L.J. stated (at 781) that he could see nothing to distinguish such a schoolteacher "in respect of his being under a contract of service, from any other official."
of little intrinsic importance in deciding whether vicarious liability applies to know whether the tortfeasor can be described as an office-holder. Rather, it is crucial to know whether he is a 'servant'\(^68\) and not all private office-holders are. Thus, a company director or a paid trade union official could fairly be described as office-holders, and yet at the same time qualify as servants for the purposes of vicarious liability. In contrast, such office-holders as trustees, or certain holders of positions of authority (such as, for example, the honorary secretary of a voluntary association) could not so qualify.

D. Payment

There is a single point of importance to be made under this heading. It is derived from an obiter dictum of Lord Goddard C.J. in *I.R.C. v. Hambrook*,\(^69\) and it is to the effect that a public officer (such as Lord Goddard thought an established civil servant, or a colonial judge holding office at pleasure,\(^70\) to be) does not have a contractual basis to his employment. Nevertheless, he can sue for payment, according to his Lordship, on a quantum meruit. If this is the law applicable to public officers, then no doubt the same principles could apply in appropriate\(^71\) circumstances to allow the holder of a non-public

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\(^68\). Or, possibly, 'agent', insofar as that term refers to a motley class of persons (such as voluntary vehicle drivers, sheriff's officers and the like) who are certainly not servants but whose torts nevertheless attract vicarious liability. See Atiyah, op.cit., part 3.

\(^69\). [1956] 2 Q.B. 641.

\(^70\). *Terrel v. Secretary of State for the Colonies* [1953] 2 Q.B. 482.

\(^71\). Of course, allowance must be made for the officer who performs duties on a gratuitous basis. e.g., a trustee under a will, where the testator makes no provision for payment. cf. *Dale v. I.R.C.*, supra.
office to recover remuneration for services rendered. 72

E. Removal

It has been seen that the classification of someone as an office-holder has no particular significance in answering the question of whether another is vicariously liable for his torts. Does this matter when it comes to considering what common law protections he enjoys against removal from his position? Once more, different types of office produce different answers. It is, for example, beyond doubt that certain public officers who are also employees can, at common law, be dismissed only in accordance with the principles of natural justice, and any attempt to circumvent these principles may result in a purported dismissal being declared void and ineffective. However, the cases culminating in Malloch v. Aberdeen Corporation 73 are considered under the heading of public employment. 74 These apart, there is still diversity to be found among the protections available to different private office-holders. The officers of a company, for example, may be dismissed at any time by ordinary resolution of the shareholders. But the company director is given special protection in his office. 75 Other officers of the company have no entrenched statutory rights and can probably be removed subject to the ordinary law of the contract of employment, but in the case of the director "the right which

72. And see Veale v. Priour (1663) Hardres 351. Hales C.B. said (at 355) of an office, "Though there be no certain fee, yet the party must have what he reasonably deserves, as every one must, that does anything for another at his request."
73. [1971] 2 All E.R. 1278.
74. Supra, p. 267 ff.
75. Companies Act 1948 (11 & 12 Geo. VI, c. 38), s. 184.
a master has to dismiss a servant who has been guilty of serious misconduct has no application."\textsuperscript{76} By s. 184 of the Companies Act 1948 the director (and the company) must be given advance warning of a proposal to remove him from office by shareholders' resolution, and he must be given a chance to present his defence at the meeting when the proposal is put.\textsuperscript{77}

In a similar fashion, the officers of a corporation aggregate, who, in the absence of a provision to the contrary, are presumed to hold office for life, are removable by the corporation itself by virtue of powers inherent in it.\textsuperscript{78} But they too must be given the opportunity to be heard in their own defence before they can be deprived of their freehold offices.\textsuperscript{79}

The problems associated with the removal of officers have, however, in recent times particularly been brought to the fore in connection with the removal of trade union officials, and here a useful starting point is a dictum of Lord Chelmsford, delivered in the House of Lords in 1867.

The possession of a particular status, meaning by that term the capacity to perform certain functions, or to hold certain offices, is a thing which the Law will recognise as a patrimonial interest, and that no one can be deprived of its possession by the unauthorized or illegal act of another without having a legal remedy.\textsuperscript{80}

This dictum has been considered in the Australian courts for the purposes of deciding whether the secretary of a trade union

\textsuperscript{76} L.C.B. Gower, Modern Company Law, 557.
\textsuperscript{77} It should be noted in passing that careful drafting of the company's articles of association may lead to virtual circumvention (for practical purposes) of s. 184. See Bushell v. Faith [1970] 1 All E.R. 53.
\textsuperscript{79} Ibid., para. 1268.
\textsuperscript{80} Forbes v. Eden (1867) L.R. H.L. 1 Sc. 568, at 576.
could be said to enjoy a right of property in his position, **qua** office-holder, and so be entitled to an opportunity to be heard before being removed from it. In *Roper v. Collinridge*, however, the conclusion was in the negative, and it is fair to say that this finding is in line with the general approach taken by the courts towards the status of such officials.

The Court of Appeal has, for example, held that, for the purposes of the law of defamation, the general secretary of a trade union was privileged from having to disclose documents possessed by his trade union. The reason given was that the alternative would amount to an infringement of the principle that a servant could not be required to disclose documents possessed by his master. Subsequent to this case, the view has been expressed that union officers are no more than servants under contracts of employment for the purposes of their removal.

The contrary view, which has on occasions found support in Australia, that officers of trade unions (and friendly societies) have sufficient proprietary rights to warrant judicial protection, has simply not been taken up by British courts. Two cases, however - *Taylor v. N.U.S.* and *Leary v. N.U.V.B.* - have reopened an issue which ten years ago might well have been thought closed. In the former, the plaintiff

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81. (1935) St. R. Qu. 1, per Webb J. at 18.
82. See Citrine’s Trade Union Law, 295-6.
(who was a subordinate union official) claimed that he could only be dismissed from his office in accordance with natural justice; the grounds upon which the judgment of Ungood-Thomas J. proceeded are not particularly clear, but there is more than a hint that, as an office-holder, the plaintiff was entitled to special protection, though he did not get the declaration he sought to the effect that his employment with the union continued. Not only did his Lordship refer to such cases as *Vine v. National Dock Labour Board*[^89] and *Kanda v. Government of the Federation of Malaya*[^90] (where extra-contractual factors were considered and applied), he also declined to give the declaration sought, not on the ground that it had no legal support, but instead on the much more practical ground that, the plaintiff having obtained new employment, such a declaration would be "wholly unreal".[^91] It need hardly be said that practical considerations are relevant only after a prima facie legal case has been made out. In the more recent case of *Leary v. N.U.V.B.*[^92], Megarry J., faced with a similar situation, refused to grant an injunction forbidding the defendant union from acting on a decision to dismiss the plaintiff from his office. But the possibility of granting such an injunction was seriously contemplated. Megarry J. was influenced in this by the unreported case of *Shanks v. P.T.U.*[^93] in which such a course of action had taken place. He indicated that he questioned the statement of the law made in *Citrine* to the effect that no injunction could be granted to protect officials

[^91]: At 553.
[^92]: Supra.
[^93]: 15 November 1967.
who were not members of the committee of management of a
trade union. He said:

At the trial it will be possible to explore more fully
the status of the plaintiff, and in particular whether
the characteristics of his office as an area organiser
leave him, despite the process of election which
brought him to that office, substantially in the
position of a servant, and so able to claim only
damages for wrongful dismissal, or whether instead
he is on the other side of the line and holds an
office or status to which the court will secure
his restoration by injunction or otherwise. 94

There the law rests at present. It is highly likely that, in
future, the courts will at common law require the removal of
trade union officials to be carried out in accordance with
natural justice. 95 If this happens, however, it will not be
because a proprietary basis can be given to the office-holder's
rights, it will be for the more direct reason that the courts
think his rights in his office sufficiently important to
warrant this kind of protection. 96

94. At 451. The suggestion that the fact of election to office
is incompatible with the existence of a contract of service
finds support only in a dictum of Buckley J. in Shanks v.
P.T.U., supra.

95. See especially, Trade Union and Labour Relations Act 1974,
s. 6(6)(13). The effect of these provisions is to require
natural justice to be taken into account in the drafting
of union rules. The specific sanction is a refusal by
the Registrar of Friendly Societies to allow the trade
union to appear on the list of registered trade unions -
s. 8(6).

These provisions are due to be repealed by the Trade
Union and Labour Relations (Amendment) Bill 1975.

96. According to Durayappah v. Fernando [1967] A.C. 337 at 349,
"the office held, status enjoyed or services to be
performed" are factors to be taken into consideration
when considering the applicability of audi alteram partem,
cf. the statement made in an American case (Bianco v.
Eisen (1944) 75 N.Y.S. 2d 914 (Sup. Ct.) per Nall J. at
916): "the unimpeded exercise of the functions of elective
office, such as membership on the executive board of a
labor union, is a right so fundamental as to be deemed
the equivalent of a property right."
F. Office and Employment

The above considerations of office have been conducted with an eye to the development and present status of the contract of service as the principal legal explanation of the employment relationship. From this point of view, certain general observations may be made.

(1) Modern Usage

In modern law, the concept of office has to be recognized as offering an explanation of the employment relationship which is not identical to that offered by the contract of service. Here one must proceed with caution, for it is evident that there is much overlapping between the two. Many so-called 'officers' are, in truth, simply employees dignified under a special name because they happen to work in the public sector. This phenomenon is well illustrated by a case dating from 1893. In Legg and Others v. Stoke Newington,97 the plaintiffs sued the defendant corporation for payment of compensation, under a local act of Parliament which provided for compensation for all 'officers' who lost their jobs as a result of local government reorganization. One argument which was advanced on behalf of the defendants was that Legg, one of the plaintiffs (who was a sanitary inspector) was not within this description. But Day J. said:

We are now in 1893 and not 1855. This is an age of exaggeration and humbug; we do not now even in Acts of Parliament use the same language as we did 100 years ago. No doubt in those days these plaintiffs would have been called 'servants' and not 'officers', and very properly so too. I must, however, read this Act in the sense of our time, and I think it clearly means to compensate any of its servants who, by its operation, have suffered any pecuniary loss.

97. The Times, 28 May 1895.
Judgment was given for all twelve plaintiffs in the case, including in their ranks such menial employees as clerks, office-boys, and hall porters.

This honorific use of the term 'officer' is now so well established amongst public employees as to be beyond challenge, but it is one which is to be regretted in view of the confusion which an unnecessary multiplication of terms brings into a part of the law already besought by difficulties. However, there is more to 'office' than this honorific usage. Besides referring to persons who, in modern law, could and should be assimilated to the category of workers employed under contracts of service, it also covers certain persons outside such a group. Judges, for example, and persons who gratuitously perform services for unincorporated associations are conveniently and accurately described as 'officers'. Here the terminology fulfils a useful function: some generic term for such persons is needed, if 'employee' is rejected as unsuitable. But in this context the word 'officer' conveys far less information on the incidents of the employment relation than do, for example, such words as 'servant', 'employee' or 'agent'. This is so for two reasons. Partly it is because there has been less litigation (in modern times) on the employment relationship of such persons. Partly it is because the net thrown by the concept of office is itself

98. See, e.g., National Health Service Act 1946 (9 & 10 Geo. VI, c. 81), s. 79(1); Administration of Justice Act 1964 (c. 42), s. 38; Parliamentary Commissioner Act 1967 (c. 15), s. 12. In all of these statutes, 'officer' is defined so as to include servant or employee.

99. Cf. Police Act 1964, which refers throughout to 'members' of a police force, and the Trade Union and Labour Relations Act 1974, s. 30(1), where a union 'officer' is defined as a "person elected or appointed in accordance with the rules of the union to be a representative of its members or some of them."
a wide one; authorities relevant to the employment of a justice of the peace are likely to have little relevance to that of the secretary of a local golf club. At any rate, the appearance of the term 'officer' should alert the labour lawyer to the possibility that he may be faced with a non-standard employment relationship.

(2) Conclusions

A study of the institution of 'office' is important in giving an understanding of the development of the modern contract of service. One feature of the latter which it emphasises is its classlessness - the contract of service is capable of application (with few exceptions) to the employment relationship of persons in all walks of life. The predecessor to the contract of service - the master-servant relationship - was far less catholic in its scope. It was closely associated with the employment relationship of low status workers. Against this background, the concept of office provided a necessary explanation of certain high status employment, just as, in Roman law, mandate filled gaps left by the institution of locatio conductio operarum.

One of the most interesting questions posed by a comparison between office-holder and servant is, at what point did a servant become eligible to be classed as an officer? At an analytical level, this question was never considered by the courts, but, of course, practical problems did arise from time to time. One instance may be added to those already discussed. The moneyers (a class of skilled tradesmen employed in the Royal Mint) claimed for themselves the privileges of office-holders, as late as the middle of the 19th century. Their
claims were rejected, however, on the grounds that past records showed that as a class they were subject to control by the superior officers of the Mint, and that their appointments were derived not from the Crown or by Treasury Constitution (modes which distinguished these superior officers) but from the Master of the Mint himself. The same conclusion had been reached by a committee of inquiry, which had reported nearly one hundred and fifty years previously:

the workers and moneyers, except the master, are no standing officers, nor have salaries, but, as workmen, receive wages, after a certain rate in the pound weight, for all the gold and silver they work and earn.

What is worthy of note is that, as late as 1849, there was no clear guide laid down by which an office-holder and a servant might be distinguished from one another, though the consequences of making the distinction were, by the common law rules of the time, of the utmost significance. Quite obviously, this lack of clear guidance was not a major problem, no doubt because the demise of freehold office went hand in hand with the growing importance of the institution of contract in general, and the contract of service in particular.

It is nonetheless disappointing that a study of the concept of office, such as has been conducted in the preceding pages, cannot give answers to the straightforward questions which are the first to arise. One cannot, for example, state with any certainty who is and who is not an office-holder in the eyes of the modern law. This is because the concept of office,

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unlike that of the contract of service, is not a legal term of art, and while it appears in a wide range of contexts it has never been subject to a satisfactory definition. All that one can point to is a grouping of characteristics normally associated with the use of the particular terminology. It may be said of an office-holder that he is usually a person of relatively high social status, who may not be removed from his office without regard to the principles of natural justice and who occupies a position of some permanence. None of these attributes, however, is in itself either necessary or sufficient. When it becomes necessary to consider the importance of the contract of service in relation to office-holders, again one is obliged to rest content with inconclusive answers. There is no clear division between those office-holders who work under contracts of service, those who work under contracts for services, and those who work under neither. Rather, the principal division which falls to be made separates those officers who participate in an employment relationship traceable to a bargaining foundation, and those who do not. Local government employees, civil servants, members of a police force: all are, in modern conditions, primarily workers. They perform their duties as part of the terms of a bargain, in return for remuneration. On the other hand, such office-holders as justices of the peace, or corporators, or holders of positions of authority within a company do not fall into this class. No doubt many individuals within the second category do view their offices as occasions of profit, but this is not in itself sufficient to invalidate the division being made. In general, offices of this second type cannot be accurately described in
terms of bargain, because of a lack of reciprocity in the dealings between the parties, and this is why the presence of remuneration is not essential to their constitution.

Ordinary speech supports the distinction being drawn between officers who are in essence employees, and those who are not. One may speak of an individual 'obtaining' or 'getting' a job in the employment of central or local government, whereas one would speak of someone 'being appointed' to the bench, or 'having conferred' upon him some honorary office, or 'being elected' into some position of executive authority within a trade union, or 'accepting' the offer of a college fellowship. The passivity ascribed to this kind of office-holder recalls his historical associations with the role of the grantee in the relationship between grantor and grantee of real property.
CHAPTER 11

THE EMPLOYMENT RELATIONSHIP IN THE BRITISH FISHING INDUSTRY
A. Introduction

In this penultimate chapter the contract of service is approached from a quite different direction. Previously in this part of the thesis, the approach adopted has entailed a study of the contract of service (and the more general, related question of the legal analysis of the employment relationship) in relation to types of employment which are special for either of two reasons. Either they are 'public' in one sense or another (and thus the relationship between employer and employee leads to a consideration of matters of public and not merely private law), or, in the case of 'office', the historical evidence clearly shows that the link between the parties is not explicable in terms of agreement, but is derived from the kind of relationship which existed between grantor and grantee of real property. In both public employment and 'office' employment, it is principally the contractual basis to the employment relationship which is in doubt, to a greater or lesser extent.

In relation to employment in the fishing industry, however, there is no questioning the existence of contract as the foundation of the relationship; what is often uncertain is whether the particular contract under consideration is properly described as a contract of service.

This chapter, however, is not concerned with arguing in favour of the appropriateness (or otherwise) of a contract of service for fishermen. The main interest of employment in the fishing industry is that a body of men, whose job requires the performance of dangerous tasks by physical effort, who are of low social status, and not exceptionally well paid, have been excluded over the years from the provision of state welfare
benefits, often to their extreme distress. This exclusion is intimately connected with the legal classification of their employment relationship, and the objective is to describe the main instances of exclusion, and to show how the courts and the legislature have proceeded in the business of classification.

B. The Background - Employment Structure

(1) General

It is a mistake to think of the British fishing industry as an homogeneous entity. There is a fundamental division between deep-sea, trawl fishing and all other forms of sea fishing (which may together be termed 'inshore'), and this division permeates the industry in all important respects - in the pattern of ownership and in the organization of the workforce as well as in the type of work undertaken. Trawler fishing is, and has been for all of this century, big business in ways in which inshore fishing is not.1 Britain's trawlers are today owned by a relatively small number of companies - in 1970 eight owners controlled 74% of the fleet2 - and these are organized into two powerful employers' organizations, the British and Scottish Trawlers' Federation. This pattern of control has prevailed since the trawling industry underwent a technological transformation at the end of the 19th century. Around that period, steam trawlers replaced sail, and the new equipment could only be provided by owners possessed of large financial resources. Sail-powered trawlers quickly became

1. J. Tunstall, Fish - An Antiquated Industry
2. White Fish Authority, Annual Report and Accounts for Year ending 31 March 1971 (H.M.S.O.), para. 82.
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obsolete, and control of the industry passed from a class of successful ex-fishermen to a few corporate bodies.

Today, deep-sea trawlers account for nearly two thirds of the total financial value of fish caught, while approximately one third of the eighteen thousand fishermen who work full time are employed on board trawlers. 3

It is not possible to talk in such general terms of the other forms of sea fishing. One of the most prominent features of the inshore fishing industry is its lack of organization. Included within the description of 'inshore' are a variety of fishing vessels, ranging from shellfishing boats of under twenty feet in length to modern, efficient trawlers, which differ from their 'deep sea' counterparts only in falling short of the eighty feet minimum length which is usually associated with that class of ship. Inshore boats, like deep-sea trawlers, primarily catch demersal fish (e.g., cod, halibut, skate), but pelagic fish (herring, mackerel) and shellfish together make up about one third of their catch as a whole.

Ownership of inshore boats (especially the larger ones) by companies is not unknown, but there is an absence of strong federations akin to the B.T.F. On deep-sea boats unionism is high - about 75% of crew members belong to a trade union, most of them to the T.G.W.U. 4 - but on inshore boats it is of

negligible proportions. This, no doubt, is in part due to difficulties of organization, but it is also a reflection of the very strongly independent character of many workers in this branch of the industry.\(^5\)

(2) Trawler Officers

Within the category of trawler fishermen, skippers and mates (collectively termed 'officers') occupy a special position. They are, for example, differentiated from the rest of the crew by being required, by law, to hold certificates of competence conferred by the Board of Trade. More important for present purposes, they are also paid on a different basis to the rest of the crew.

As a general rule skippers and mates are paid on the value of the catch with no basic wage, while the rest of the crew are paid a basic wage plus a share in the proceeds of the sale of the fish.\(^6\)

It used to be that officers were paid a percentage of the net profits, and the 'poundage' of the crew was calculated in the same way, but the 1946 Court of Inquiry expressly recommended a change to the use of gross profits of the trip as a basis for calculating payment, thus freeing the crew from the risk of losing money through chance market fluctuations in the price of fish. This reform has been strenuously resisted by the trawler owners in its application to skippers and mates, for

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5. Consequent to the 1946 Court of Inquiry (supra), a National Joint Industrial Council was established for the deep-sea fishing industry, but there is no equivalent body for the inshore fishing industry. There are only numerous cooperative societies scattered round the country, and these are strictly non-partisan. See the Report of the Committee of Inquiry into the Fishing Industry (Fleck Committee), (1961) Cmdn. 1266, para. 154.

they argue that it gives the officers responsible for the management of the ship and the care of the fish at sea no direct financial interest in the costs and profitability of the voyage. Whatever method is adopted, it is still essentially a system of payment by results, and in consequence the officers work under tremendous strain. They often have to balance commercial advantage against physical danger. It is accepted by them partly, no doubt, because of tradition, partly because of the lure of high earnings which success brings.

The social status of the trawler officers is such that they do not fit easily into any employer-employee dichotomy. As with the rest of the crew, they are, of course, employed by the owners, but, though their antecedents are invariably the same as those of the crew members under them, they maintain a definite social distance from the latter. At sea, they eat separately, while on shore they frequent their own clubs and form a largely self-contained cultural grouping. As has been mentioned above, the difference in the way in which their pay is calculated means that their interests in how they pursue their jobs are not the same as those of their crew.

(3) Share Fishermen

All fishermen, to a greater or lesser degree, achieve their total remuneration by participation in the profits of each fishing trip. Yet the term 'share fishermen' is usually reserved for workers in the inshore fishing industry. As will be appreciated subsequently, this category of workers is considered separately by the courts and by the legislature in

7. Fleck Committee, para. 100.
their legal classification of employment relationships. By way of introduction, some explanation of the particular types of fishermen covered by this description is necessary. Many inshore fishermen, particularly if they are engaged in shell-fishing, are grouped into small units; either they work alone, or in the company of a friend or relation or two. Such units account for a large number of the fleet of six hundred fishing vessels which are under forty feet in length. Because of their scattered situation and the informality and variety of their working arrangements, they do not fit easily into any legal analysis, and the ensuing discussion does not attempt to cater for their special problems. When reference is subsequently made to the class of share fishermen it should be taken as applicable to those fishermen who work on boats between forty and eighty feet in length.

In Scotland alone, there are over five hundred such seine and ring-net fishing vessels, manned by crews of between five and eight. The owner is often to be found working alongside other crew members, and the remuneration of all on board is almost entirely dependent upon profits. Share-out arrangements vary from place to place, but, typically, from the gross proceeds of the sale of the fish are deducted certain agreed expenses, such as food, harbour dues and boat insurance. Assuming there is a crew of six, what remains after these deductions is divided into twelve shares, six of which go directly to the owner. The other six are equally divided among the crew, including the skipper. So a skipper owner will receive seven twelfths of the net profits, though out of that he will, of course, have to pay for the boat's upkeep.
A common variation in Scottish fishing is to allow for the existence of an 'orradale' (overdeal?), under which the crew are given an extra share, but the responsibility for replacing nets is theirs too. The idea behind this system is to encourage the taking of special care when handling the very valuable nets. As might be expected, this system of share fishing (whatever particular variation is chosen) is of great antiquity, and has not changed much for over a hundred years.

(4) A Common Feature

It is worth advertung briefly to a common feature of the jobs of all fishermen, whether deep-sea or inshore. According to a Report published in 1969, fishing is a very dangerous occupation. "Fishermen are alarmingly more at risk than the average male worker." The dangers arise not only from the possibility of total shipwreck, but from the operation of dangerous, often necessarily unguarded machinery in appalling weather conditions. The Report concluded that the greater the distance travelled from home ports to fishing grounds, the greater the risk of injury. On average, over a period of four years, working as a fisherman was some seventeen times more dangerous (in terms of risk of death) than the job of the average male worker. This is an important point to bear in mind when the question of the inclusion of certain classes of fishermen within the categories of workers eligible for compensation for industrial injuries is examined.

9. I owe this information to a discussion with Mr. N.C. Osborne, Secretary, the Firth of Forth Fishermen's Association.

10. Report of the Committee of Inquiry into Trawler Safety (1969) Cmnd. 4114, para. 9. There is no reason to suppose that fishing has not always been extraordinarily dangerous. Indeed, it was particularly so after the first war, when wrecks and mines constituted additional hazards.
C. Legal Problems arising from Fishing Employment

(1) Payment by Results

As has been noted above, both types of fishermen - trawler and inshore - participate in the profits of a fishing trip. The difference is that for trawler fishermen profit sharing is a relatively small supplement to their basic wages, where for share fishermen it is their sole pay. What effect does this feature of the terms of their employment have upon the legal classification of the contracts under which they work?

The locus classicus of judicial opinion on this point is the judgment of Pollock B. in Tucker v. Axbridge Highway Board. In deciding whether the defendant Board was vicariously liable for the negligence of a workman employed by it to move stones, he observed that

he [i.e., the workman] was, however, employed and paid by the board, and a servant would not be made a contractor merely because he was paid by piecework or by quantity. This statement of the law remains true today, although it may now be said that payment by results is one factor, in itself inconclusive, which points towards the absence of a contract of employment, insofar as it is prima facie evidence of a person being in business on his own.

Some early 19th century cases, however, specifically consider the importance to be attached to payment by results in deciding whether an employment relationship is one which gives rise to servants, independent contractors, partners or

12. At 27.
agents. They merit brief examination, though the diversity of the contexts in which they arise makes it impossible to draw from them any coherent principle of law.

The very first of these actually dealt with fishing employment. A sailor was engaged in whale-fishing, and he brought an action to recover his wages from his captain. He had agreed, in lieu of fixed wages, to receive a small proportion of the profits of the voyage, and in the captain's defence it was argued that this made him a partner along with the captain (who also was paid by a share in profits) and thus barred him from suing the latter. Lord Alvanley rejected this argument and simply interpreted the share in profits as wages. The next case, *Dry v. Boswell*, concerned the alleged existence of a contract of partnership between two parties - the owner of a lighter and a lighterman - where the latter was paid by an equal share in the net profits earned by the boat. Lord Ellenborough indicated that a participation in profit and loss constituted a partnership, but thought that the facts of the case before him did not amount to this. It was said that, had the payment for working the ship been one half of the gross payments, that would not have amounted to partnership either, but would merely have been one form of paying the lighterman for his work (though it is not clear whether, in such a case, he would have been classed as a servant or an independent contractor). The decision in *Ex Parte Hiskin, In Re Elliss* in 1850 concerned a claim for preference in bankruptcy made by one who claimed he was a 'clerk

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15. (1808) 1 Camp. 329.
16. (1850) 3 De G. & Sim. 662.
or servant' and thereby was entitled to preference over other creditors in respect of his claim for unpaid wages. It was held that the mere fact that his remuneration was to take the form of a share in profits did not disqualify him from being classed in that favoured group. In *R. v. Wortley,* an agreement to farm land in return for an annual salary plus one third of the net annual profit was held to be the agreement of a labourer and not a partner, and in the important case of *Harrison v. Churchward* the superintendent engineer of a firm of cross channel ferry operators was similarly held not to be a partner in the firm. He was paid a percentage of net profits on top of a basic salary, and a Chancery judge stressed that, in order to establish a partnership, it was necessary to show that such was the intention of the parties to the contract. He held that no such intention emerged from the document which set out the employment conditions of the plaintiff, and which referred to the plaintiff as under the control of the defendants, provided as to his mode of dismissal, and was, all in all, carefully worded so as to defeat any implication of partnership.

In cases decided shortly before *Tucker v. Axbridge Highway Board,* it was held that payment by salary was a "material circumstance" in deciding whether a worker was a "clerk or servant," though even one who performed his service voluntarily, without remuneration at all, might be found to be included under this description, at least for the purposes

17. (1851) 2 Den. 333.
18. (1860) 29 L.J. Ch. 521.
19. Supra.
of the criminal law. Any provision for the termination of the relationship was especially likely to be fatal to an argument in favour of an implied partnership.

Of cases decided after Tucker, it is worth mentioning a 1907 decision by which an opera singer, paid at a certain rate per performance, was held to be a servant for the purposes of ranking in bankruptcy. But a traveller who, whilst engaged in travelling for the purposes of his own business, took in orders for another businessman in consideration of one half of the profits these orders produced was held unable to sue as a servant for wrongful dismissal. According to Peterson J. there was no employment in the strict sense of the term. The plaintiff was not the servant in any way of the defendant; he was not bound to do any work whatever...there was no obligation on the part of the plaintiff to do work for the defendant, nor was there any obligation on the part of the defendant to provide work for the plaintiff, but there was merely a provision that the defendant would in a certain event pay certain remuneration to the plaintiff.

(2) The Share Fisherman and the Law

The question of how share fishermen have been dealt with by legal classification must now be considered. The earliest authority (apart from Wilkinson v. Frasier) dates from 1802, and concerns a variety of share fishing practised at the port of Hastings. Proceeds of catches were

23. In Re the Winter German Opera Co. Ltd. (1907) 23 T.L.R. 662.
26. Supra. This case is anomalous in so far as it concerns whale-fishing.
distributed (according to a scheme of division devised by the masters of each boat) between the owners of the boat, the owners of the nets, and the master and crew. It was held that proceedings brought for the recovery of a tithe of the fish caught, which were directed solely against the proprietors of the boats, were defective in that they did not name all the persons interested in the profits of a fishing adventure. The issue of the proper classification of the employment relationship did not directly arise, but the report is nonetheless an indication that the Court of Exchequer viewed all members of the crew as liable to account for a tithe payment, and such a view is certainly consistent with a relationship of partnership existing inter se. The next case, however, showed a shift in opinion. In similar circumstances (reported, however, in much greater detail) in 1836, Alderson B. stated that, although the evidence showed that ordinary crew members shared in losses as well as profits, the distribution of profits to them was "really only a mode of calculating the amount of wages due to the dredgers [scil. crew members] from the owners of the boats." Similarly, in Mair v. Glennie, Lord Ellenborough had earlier remarked that the captain of a ship who received one fifth of the profits or losses of a voyage could not thereby be regarded as a partner with the shipowner; for, "according to that mode of argument every seaman in a Greenland voyage would become a partner in the fishing concern."

29. At 68. Thus a bill for the recovery of customary tithes which did not name crew members was not held bad for want of parties.
30. (1815) 4 M. & S. 240.
Apart from these early cases, there is no further direct authority on the common law classification of share fishermen's employment in English law. There are, however, a number of cases dealing with how such workers fared when they came into contact with the Workmen's Compensation Acts, and these are discussed below. Also considered below are cases elucidating the common law position of workers in employments comparable, in one way or another, to share fishing. But it is convenient at this juncture to complete the review of cases specifically on share fishermen and, in the absence of English authority, it is proposed to discuss two recent Scottish cases dealing with this subject.

The first, decided in 1948,31 arose out of an injury suffered by a share fisherman whilst on a fishing trip. The argument centred on the question of whether it was competent to hold a partnership (a separate legal *persona* under Scots law) vicariously liable for a delict committed by one partner which injured another. It was held that such an action did not lie, a conclusion which, it might appear, would have the effect of placing a fisherman in a worse position than if he had been classed as a servant of the boat owner. Such an alternative approach would have been possible - the only contribution made by the pursuer was his labour, while the boat owner supplied both the boat and the gear - but it was never explored by counsel. No doubt the reason for this was that the doctrine of common employment was at that time still in force, and any finding that the employee had been injured by the negligence of  

a fellow-servant would have been fatal to his claim for damages against their employer. The Court accepted without question that the facts disclosed a relationship of partnership. However, with the passing of common employment, the share fisherman was (and still is) denied the protection derived from the doctrine of vicarious liability, as the employee under a contract of service was and is not. In 1961, another decision had the effect of at least ensuring that similar disadvantages did not intrude into other areas of the law of delict. In Parker v. Walker and Others,32 a share fisherman sued the owners of the boat on which he worked in respect of injuries incurred through defective machinery on board. Here, again, the facts seemed to disclose partnership: the crew shared the proceeds of each trip with the owners, paid Schedule D tax and, for the purposes of National Health Insurance, were treated as self-employed. Indeed Lord Walker, sitting in the Outer House of the Court of Session, had no difficulty in reaching such a conclusion:

in my view the critical matter is the mode of remuneration. The facts (a) that each contracting party is remunerated solely by a share of the net profits of the business and (b) that such remuneration is due not from one to another but from a common agent [viz. the firm of fish salesmen charged with administration of the fishing trips] tips the balance in favour of joint adventure. 33

He, however, equated the duties owed by the owners to the crew in respect of the plant they provided with that owed by an employer to his employees:

33. At 254.
the crew must be able to rely on the defenders for the safe condition of their boat and her gear...the defender's duty cannot be placed lower than to exercise reasonable care to provide safe gear and it does not, I think, matter whether that duty be regarded as a term of the contract implied by law or as a legal obligation arising out of the contractual relationship. 34

Thus, in so far as the question has come before the courts (of England and Scotland) for their decision, the prevailing opinion would appear to be that share fishermen are to be classed as working outside the relationship of employer and employee and within that of partnership. However, despite Lord Walker's confident belief that the substance of his judgment rendered 'academical' the choice between these two alternative models, as a general finding this does have considerable importance.

Finally, it is worth mentioning that, in Canada, the partnership analysis of share fishing has recently been approved by the majority of the British Columbia Court of Appeal. In Mark Fishing Co. v. United Fishermen, 35 it was held this was because the fact that the crew were bound to pay a share of any losses arising from the fishing trip was "inconsistent with the relationship of master and servant and consistent with the relationship of co-adventurers." 36

Davey C.J.B.C., however, dissented from this finding, principally because he thought it important that the crew had no say in where their boat was to fish, a working arrangement

34. At 256.
36. Per Robertson J.A. at 625.
which he found incompatible with true partnership.\footnote{At 589. He also thought (at 560) it was important that, if the crew were to be treated as partners, they would be personally liable for damage caused by the captain's negligence - a conclusion which he felt was not one which had been intended by the legislation.}

(3) A Comparison

(i) Other mariners paid by share

Outside the fishing industry, it was common at the turn of the present century to find the masters and other officers of small cargo vessels remunerated according to the profits made from their trips. When such persons were injured or killed by accidents on board, they or their dependants naturally sought to recover compensation from the scheme of Workmen's Compensation which, from 1906, was available to seamen. However, the scheme required, inter alia, the existence of a contract of service between employer and workman, and there are a series of cases in which the compatibility of such a method of payment with such a contractual arrangement is considered. It should, of course, be said that fishermen also sought the protection of Workmen's Compensation, but they were subject to special statutory provisions and their experiences are considered separately below.

Only two years after the introduction of protection for seamen, the Scottish courts took a common-sense attitude to the problem outlined above.\footnote{Clark v. G.R. & W. Jamieson 1912 S.C. 1190.} A man was killed while sailing on a 'flatboat' (a cargo vessel which brought fish from the trawling fleet to the curing station). The Court of Session held that he fell within the statutory definition of 'workman', although he and the other crew members on board were paid entirely by

\footnote{Clark v. G.R. & W. Jamieson 1912 S.C. 1190.}
a share in profits. There was, said the Court, no bailment on the part of the crew — the boat never passed from the possession or control of its owners. Neither was there a partnership relationship, for the crew members contributed no part of the capital, nor did they stand to lose by having to bear a share in any losses incurred. "The result is, what is sufficiently obvious even to one who is not a lawyer, that this is just a contract of service."\textsuperscript{39}

It may be said that such a conclusion was in keeping with the spirit of an earlier English authority,\textsuperscript{40} where Collins M.R. had said (in discussing the scope of the Act which was the direct predecessor of that of 1906):

\begin{quote}
On going through the Act, it is obvious that its whole scheme rests on the fundamental interpretation that an ordinary person would put on the word 'workman'. It presupposes a position of dependence; it treats the class of workmen as being in a sense 'inopes consilii' and the Legislature does for them what they cannot do for themselves: it gives them a sort of State insurance, it being assumed that they are either not sufficiently intelligent or not sufficiently in funds to insure themselves.\textsuperscript{41}
\end{quote}

But a ship's officer, in a position of authority and responsibility, was a different matter. The courts found it difficult to accept that such a man could be within the scheme. In the leading case,\textsuperscript{42} the fact that the master of a boat was free from the control and direct supervision of the owner was thought fatal to the existence of a master-servant relationship. Though this conclusion was subsequently to be challenged,\textsuperscript{43} it

\textsuperscript{39}Per Lord McLaren at 234.
\textsuperscript{40}Simpson \textit{v.} Ebbw Vale Steel, Iron and Coal Co. [1905] 1 K.B. 453.
\textsuperscript{41}At 458.
\textsuperscript{42}Boon \textit{v.} Quance (No.1) (1909) 3 B.W.C.C. 106.
\textsuperscript{43}Jones and Another \textit{v.} Owners of the Ship 'Alice and Eliza' (1910) 3 B.W.C.C. 495, where Boon \textit{v.} Quance was distinguished on the facts.
ultimately prevailed, with the effect that this class of superior workers was generally excluded from Workmen's Compensation. It is worth remembering, however, that the reason for their exclusion was not that they participated in profits, but that they did not satisfy the requirements of control, which at that time were held to be the touchstone of a contract of service.

(ii) Taxi cab drivers

The tracing of the law relating to the employment relationships between taxi (and their predecessors, hackney) cab drivers and owners presents a fascinating illustration of the flexibility of the common law in general, and of the doctrine of vicarious liability and the contract of service in particular. The issues which a consideration of the development of the law in the latter part of the 19th and early 20th centuries raises are relevant to a discussion of the employment relationships prevailing among certain classes of fishermen, as will be explained below.

First, however, it is as well to quote a statement of the law from a relatively modern case:

It may well be that in one case the driver is the agent of the owner, in another case he may be the servant of the owner, and a third case may be one of a simple bailment. I also think that it may be two or more of these classes of association when viewed from different angles, that is to say the driver may be, for the purpose of the National Insurance Act 1946, a servant of the owner, and for the purposes of the returns of income tax he may be regarded as an independent contractor. Indeed, I am disposed to think that this very

peculiar relationship, in which the owner, the driver, the fare and the cab itself seem to be described in almost interchangeable terms, is, or may be in certain circumstances, a sort of association which is in some senses, perhaps, sui generis, and that it is very difficult to ascertain in any set terms and as a matter of general principle what the relationship may be. 45

The explanation of this "very peculiar relationship" lies with the attempts of the courts over a period of several years to produce from an analysis of the employment relationship in the industry two apparently irreconcilable results. On the one hand, it has been thought desirable to ensure that owners paid for damage inflicted on third parties by the negligent driving of those they 'employed', while on the other, it has been found necessary to deny the existence of any contract of service between the parties because of the nature of their relationship. 46

It is in the features of this relationship that the analogy with share fishermen arises. Typically, it would proceed on the following basis: 47 the owner hires out his cab to a driver who pays him a certain sum of money in respect of a given hiring period - either weekly or daily. Once the driver obtains the cab in this way, he is free to earn as much (or as little) as he chooses and can; his remuneration comes from the difference between his gross takings and the sum paid to the owner by way of hire. The owner garages and generally maintains the vehicle

47. For a detailed description of the conditions of employment as a taxi cab driver in London around 1920, see the Report of the Departmental Committee on Workmen's Compensation (1920) Cmd. 816, Minutes of Evidence, QQ. 21, 716-808, 22, 726-816.
and is the registered proprietor of the cab. Sometimes this
simple system is subject to variations in detail, as where the
driver undertakes to wear the livery of the company which owns
his cab, or is bound, instead of making a flat payment of a
hire charge, to pay to the owner a proportion of all the fares
he takes. But always the elements of the relationship are
that the driver contributes nothing but his labour, and the
owner takes his profits from a hiring out of equipment. It
is in this respect that there is a similarity with share
fishing, where the deck hand also may well own nothing and
effectively pays another (through the system of share payment)
for the opportunity of using that person's equipment by which
to earn profits. Both cab driver and fisherman depend
entirely on profits for their remuneration, though in the case
of the former these are directly related to his own efforts,
while the fisherman operates as one member of a team. Another
difference, of course, is that it is common among share fisher-
men (but not standard practice) for the owner of the boat to
work alongside his crew, in a way which is impossible in the
operation of taxi cabs. Nevertheless, it is submitted that
there are sufficient points of formal similarity to justify
an examination of the employment law relating to the latter.

The starting point is with the case of Bowles v. Hider.

49. cf., e.g., Challinor v. Taylor [1972] I.C.R. 129, where the
driver paid the owner 65% of the takings and the cost of an
employed person's National Insurance stamp, and the owner
paid for the cost of all fuel, insurance and maintenance.
The N.I.R.C. refused to allow an appeal against the decision
of an Industrial Tribunal, which had held that the driver
did not have a contract of service (and so was not entitled
to a Redundancy Payment).

50. (1856) 6 E. & B. 207.
in 1856, where a passenger's luggage was lost through the negligence of a hackney cab driver. The owner of the cab (who was the licensed proprietor) was sued in respect of the loss, and Lord Campbell C.J. held him liable with these words:

This is an action of contract; and the true question which we have to determine is, whether there was such a contract between the plaintiff and the defendant as the declaration alleges...looking to the position of the proprietor, and the drivers of a cab under the circumstances proved,\textsuperscript{51} and to the Acts of Parliament which regulate their respective duties, we are of opinion that the driver is to be considered the servant or agent of the proprietor, with authority to enter into contracts for the employment of the cab on which the proprietor is liable... The Acts of Parliament referred to always regard the proprietor and driver of the hackney cab as employer and employed, or master and servant, and clearly contemplate that the party who engages the cab under the care of the driver shall have a remedy against the proprietor... It would be most inconvenient and unjust towards the public if an action, such as the present, brought against one who proclaimed\textsuperscript{52} himself to be the actual proprietor of the cab, when it was engaged by the plaintiff, and actually was so, could be defeated by evidence of a secret agreement between the proprietor and the driver with respect to the remuneration of the driver, and proportions in which the earnings of the cab are to be divided between them.

In a situation in which a modern lawyer would affix any liability on the proprietor through the device of vicarious liability, this early case postulates a direct contractual link between the customer and the proprietor, made through the medium of the driver. How did this approach affect the legal nature of the relationship between driver and owner? The question arose in Fowler v. Lock,\textsuperscript{53} where it was argued that the doctrine of common employment applied, so that drivers undertook the

\textsuperscript{51} i.e., the driver hired his cab and horses at a fixed sum per day.

\textsuperscript{52} Several Acts of Parliament required the proprietor to affix his name to the cab.

\textsuperscript{53} (1872) L.R. 7 C.P. 272.
normal risks of injury in their job, and so could not sue an
owner for injuries received from a recalcitrant horse supplied
by him. This argument convinced one judge in the Court of
Common Pleas, who thought it would a "remarkable hardship" to
hold the owner liable to third parties and, at the same time,
to deny him the protection ordinarily enjoyed by masters in
respect of injuries received by their servants; but the opinion
which prevailed was that the driver was a bailee, and so free
from the trap of common employment.

From these beginnings the case law developed. The third
party liability of the owner was soon established as based on
vicarious liability - Lord Campbell's insistence upon
contract being quietly forgotten - and the difficulty in
reconciling this with the apparent absence of a master-servant
relationship was solved by legal fiction: this relationship was
deemed to exist "so far as the public are concerned". It
made no difference to the owner's liability where the driver
happened to provide his own horse, or where the owner was not
the licensed proprietor under the Hackney Carriage Acts.

Only if the registered licensee of the cab had no proprietary

54. Willes J. at 283.
55. Grove J. at 280; Byles J. at 281.
56. On subsequent appeal ((1874) L.R. 9 C.P. 751) the Court of
Appeal were undecided on the legal issues, and a new trial
was ordered. At that trial ((1874) L.R. 10 C.P. 96) a jury
found that the cab and horses were supplied to the driver
qua bailee and not qua servant.

57. Venables v. Smith (1877) 2 Q.B.D. 279; a temporary setback
was King v. Spurr (1881) 8 Q.B.D. 104.
58. i.e., in Powles v. Hider, supra.
59. King v. London Improved Cab Co. (1889) 23 Q.B.D. 289, per
Lord Esher at 283.
interests at all in the cab could he escape liability.\textsuperscript{62}

Perhaps it is no surprise that, though for the purposes of vicarious liability and the criminal law\textsuperscript{63} the driver was treated as a servant, he was not so treated when the question arose of his inclusion with the scheme of Workmen's Compensation. There was, said the courts, no control exercised by the owner, and thus no contract of service.\textsuperscript{64} It was debated whether the relationship was one of co-adventure or bailment, but it certainly was not that of employer and employee.

The outcome of this line of interpretation was considered by a Departmental Committee on Workmen's Compensation\textsuperscript{65} which sat in 1920. This heard evidence from the London Cabmen's Association to the effect that any compensation received in the event of accidental injury depended on chance membership of trade unions and friendly societies.\textsuperscript{66} The cab owners contributed nothing. The Committee concluded:

\begin{quote}
We feel that the distinction which has been drawn between a London taxi-cab driver and a person working under a contract of service is one of form rather than substance; and that the London driver ought not to be deprived of benefits enjoyed by similar workers in other places simply because his remuneration is arrived at by a different method.\textsuperscript{67}
\end{quote}

Effect was given to this by s. 9(2)(a) of the Workmen's Compensation Act 1923,\textsuperscript{68} which included within the definition

\begin{itemize}
\item \textsuperscript{62} Kemp v. Elisha [1918] 1 K.B. 228.
\item \textsuperscript{63} R. v. Solomons [1909] 2 K.B. 980.
\item \textsuperscript{64} Doggett v. Waterloo Taxi-Cab Co. [1910] 2 K.B. 356; Smith v. General Motor Cab Co. Ltd. [1911] A.C. 188.
\item \textsuperscript{65} Supra.
\item \textsuperscript{66} Evidence of Mr. Alfred Smith, QQ. 21, 757-62.
\item \textsuperscript{67} Part IV, s. 1, ss. 3.
\item \textsuperscript{68} 13 & 14 Geo. V, c. 42.
\end{itemize}
of 'workman'

a person engaged in plying for hire with any vehicle or vessel the use of which is obtained from the owner thereof under any contract of bailment...
in consideration of the payment of a fixed sum or a share in the earnings or otherwise, and in relation to such a person the owner of the vehicle or vessel shall...be deemed to be the employer. 69

With this change in the law this consideration of employment law in the taxi cab industry stops, although, as the quotation given at the outset illustrates, the common law has to date failed to rationalise the many twists and turns which this process of development has taken. Two observations of a general character may be made on the evolution of the law up to 1923: first, it shows in sharp contrast the concern of the judges to protect property rights in the community at large against their indifference to the legal helplessness of the injured driver who sought to recover compensation from the owner of his cab. This, perhaps, is nothing more, however, than an affirmation, in different form, of the principles underlying the doctrine of common employment itself. Secondly, and more interestingly, it displays a willingness on the part of courts and government to hide substantial policy decisions behind the cloak of legal technicalities. As much is evident in the whole approach of the courts as they carefully weighed the facts of individual cases to see if the necessary and all important element of control was revealed. As much is evident, too, from a Parliamentary statement by Winston Churchill, one

69. This wording was amended by the Workmen's Compensation (Amendment) Act 1938 (1 & 2 Geo. VI, c. 29) so that the person from the vehicle or vessel was obtained was not required to be the owner. With this modification, it remains the basis of the taxi driver's present inclusion within the scheme of National Insurance. See National Insurance (Classification) Regulations 1972 (S.I. 1972 No. 555) Sched. 1, para. 5; Sched. 3, para. 1.
of the architects of Liberal welfare reform, in his capacity as Home Secretary in 1911. When asked to comment on the consequences of the House of Lords decision in Smith v. General Cab Co. Ltd., he said:

The case referred to does not decide that taxicab drivers as such are not entitled to the benefits of the Compensation Act, but only that in the circumstances of the particular case the contract between the drivers and the proprietor was not a contract of service. The question is entirely one of the nature of the contract. If it is a contract of service, the Act applies. To extend the Compensation Act to persons entering into contracts other than contracts of service would alter the whole character of the Act.

(4) Welfare Legislation

(i) Workmen's Compensation Act

The ambitious intention of the Liberal Government which introduced the Workmen's Compensation Act 1906 was "to include all occupations which are at all risky", and seamen and fishermen were specifically mentioned. However section 7(2) of the Act provided that:

This Act shall not apply to such members of the crew of a fishing vessel as are remunerated by shares in the profits or the gross earnings of the working of such vessel.

This provision did not form part of the original Bill which

71. Supra.
72. (1911) 23 H.C. Deb., col. 2578.
73. H.J. Gladstone (Home Secretary). (1906) 155 H.C. Deb., col. 574. The Report of the Departmental Committee on Compensation for Injuries to Workmen, (1904) Cmd. 2208, para. 306, had recognized the claim of fishermen to be included within compensation, while at the same time recognizing that many fishermen did not have contracts of service. They suggested a special inquiry to settle the matter.
74. Workmen's Compensation Act 1906, s. 7(1).
became the 1906 Act. It was introduced by amendment in Standing Committee on the strength (according to one M.P. representing a fishing constituency, who was later to press strenuously for its repeal) of a deputation of share fishermen which made representations that such men as had a little boat of their own, or are partners in a boat, or are partners in nets or in working a boat, would be injured if they were included in the proposed Act.

At any rate, it passed into law without controversy at the time, and perhaps with less care given to its precise wording than might have been possible. It is important to make clear that those who promoted it sought only the protection of one relatively small, though not unimportant, category of fishermen: those who were entirely remunerated by sharing in profits. And the accepted view among those members of Parliament who had served on the Standing Committee was that its effect was limited to this purpose. Replying to an amendment designed to remove the provision, the Solicitor General in 1906 spoke of the representations made by the share fishermen and indicated that he accepted that "every one of them was his own employer, as they shared profits." As will shortly be described, this unfortunate piece of legislation had, in the hands of the courts, the effect of excluding the whole of the British fishing fleet from the scope of Workmen's Compensation for a decade;

75. cf. Workmen's Compensation Bill of 26 March 1906, cl. 8; Workmen's Compensation Bill of 26 June 1906, cl. 7(1).
77. Sir George Doughty, Member for Grimsby. See (1911) 24 H.C. Deb., col. 1807
78. (1906) 166 H.C. Deb., cols. 856-8.
clearly there developed a wide gap between its original and later interpretation.

At first, however, the courts (at least in Scotland) minimised its effect. As has already been mentioned, in *Clark v. G.R. & W. Jamieson*, the Court of Session had held that it was possible for a man to be paid entirely by participation in profits and yet retain a contract of service, and in *Colquhon v. Woolfe* it further held that, for section 7(2) of the 1906 Act to operate, the greater and not just any part of a fisherman's remuneration must come from shares. This was a point of crucial importance which must not be overlooked, for it was established practice in trawl fishing for the basic wage to be supplemented by the proceeds of sale of various by-products - such as oil obtained from fish livers - obtained in the course of a fishing trip. Unlike the typical arrangements prevailing among inshore fishermen, only the skipper and mate on board a trawler were paid entirely by a sum which varied according to the catch. These officers, of course, were from the beginning excluded from compensation by section 7(2); in many cases they would also fall outside the scheme by virtue of their level of earnings, which might exceed the limit of £250 per annum. It was their exclusion which first attracted criticism of the section. The Member of Parliament for Grimsby, Sir George Doughty, pressed hard for reform. In 1911 and 1912 he introduced two Bills, virtually

79. (1908) 2 B.W.C.C. 228.
80. 1912 S.C. 1190.
82. Workmen's Compensation Amendment (Share Fishermen) Bill 1911; Workmen's Compensation Amendment (Share Fishermen) Bill 1912.
identical in wording, designed to bring such trawler officers into the compensation scheme. In the House he argued that

Out of every eleven crew members there are nine who are insured under the Workmen's Compensation Act. Two are not covered. They are the two most responsible men, the skipper and the mate. 83

All this, however, was to no avail. The government conceded that there was a case for including those share fishermen who were not also part-owners, but stressed the practical problems involved in working out such matters as average weekly earnings, and were unable to hold out any promise of early legislation. A third Bill, promoted by a different M.P. after Doughty had failed twice, met with a similar fate.

In the meantime, however, developments of major importance were taking place in the English courts, where a different reading of section 7(2) was gaining favour. In Whelan v. Gt. Northern Steam Fishing Co., and in Admiral Fishing Co. v. Robinson, the Court of Appeal had held a trawler crew who were not officers to be excluded from compensation because they received a supplementation out of profits to their basic wage. The latter case was distinguished on its facts in Colquhon v. Woolfe, where the full impact of the new English line of interpretation was appreciated by Lord Dundas,

If, then, one is to read the language of subsection (2) without any addition or qualification, one must, in my opinion, hold that the Legislature has excluded from the Act any member of a fishing crew whose remuneration includes a share (however small) in the profits or gross earnings of the vessel. 89

84. (1912) 45 H.C. Deb., col. 475.
85. Share Fishermen (Workmen's Compensation) Bill 1913.
86. (1909) 2 B.W.C.C. 235.
88. Supra.
89. At 1199.
The difference of opinion on this matter between the Court of Session and the Court of Appeal could only be resolved by a decision of the House of Lords, and this took place in 1913. In *Costello v. Owners of the Ship 'Pigeon'*[^90] it was held by a majority of three to two that a trawler's boatswain, remunerated partly by fixed wage and partly by a share in profits, was outside the compensation scheme. According to the leading judgment of the Earl of Halsbury, such was the outcome of a 'plain reading' of section 7(2); the alternative and unsuccessful argument was that

> when this Act says that all fishermen are to be compensated unless they be such as are remunerated by a share of the profits it means that those shall be compensated who are remunerated by something besides a share of the profits.[^91]

Thus a provision originally intended (and accepted) as a measure to exclude one relatively small and specialised sector of men employed in the fishing industry had the effect - because the majority of the judges in the Court of Appeal and the House of Lords knew neither the circumstances in which it had become law nor the employment conditions prevailing in the fishing industry as a whole - of placing virtually all men employed in the industry outside insurable employment.

Shortly after the *Costello* decision, yet another Bill[^92] on share fishermen was introduced into the Commons. This time, however, it was not concerned with the plight of trawler officers, but with that of the ordinary crew members. It sought to amend section 7(2) so that only those who received the greater part of their remuneration from profits or gross

[^91]: Per Earl Loreburn at 414.
[^92]: Share Fishermen (Workmen's Compensation) Bill 1914.
takings would be caught by it. But this too went the same way as its predecessors, and vanished without even so much as a debate.

Some idea of the disastrous effect of the Costello decision can be gained by comparing the number of memoranda of agreements registered in the county and sheriff courts of England and Scotland before and after it. By Schedule 2, para. 9 of the 1906 Act, it was obligatory to register such memoranda, which are evidence of settlements between employers and injured workmen or their dependants. In 1912 and 1913 the numbers of registered memoranda were, respectively, 291 and 293. In 1914 (the year immediately after Costello) the number fell to 116.\footnote{93}

In subsequent years the courts followed, as they were bound to, the interpretation given to section 7(2) by the House of Lords. While it was conceded that the \textit{de minimis} rule might save a fisherman whose participation in profits was negligible, the standard arrangements for the distribution of 'liver money' or 'stocker' were sufficient to give grounds for exclusion.\footnote{94} In one very hard case,\footnote{95} a vessel was lost with all hands as she proceeded towards the fishing grounds; thus her crew had had no opportunity of earning any extra payments. Nonetheless, the Court of Appeal held that the fact that, by custom, such payments would have been made was enough to decide the issue.


\footnote{94. \textit{e.g.}, Burman \textit{v.} Zodiac Steam Fishing Co. \textit{[1914]} 3 K.B. 1039; Buchan \textit{v.} The Scottish Steam Herring Fishing Co. Ltd. \textit{(1917)} S.L.T. 343.}

\footnote{95. Stephenson \textit{v.} Rossall Steam Fishing Co. Ltd. \textit{(1915)} 84 I.J.K.B. 667.}
There was, it is true, an attempt to limit the Costello decision by distinguishing a right to a share in profits from a right to receive a 'bonus' — i.e., a sum of money measured in relation to the success of the catch — but little progress was made on this front.

The War, of course, was an obstacle to reform, and it was not until 1920 that the Home Office appointed a Departmental Committee (earlier referred to in connection with taxi drivers) which heard evidence of the hardship caused to injured fishermen or their dependants. The President of the National Union of British Fishermen told the Committee:

> Any compensation received at present is entirely due to the employer's magnanimity, and the fishermen's position is almost one of begging for charity during incapacity to work caused by accidents to liable to happen.

The Committee recommended that trawler fishermen be brought back into the scheme of compensation insurance (as, of course, they had been before Costello), but they did not recommend that herring fishermen — i.e., purely share fishermen — should be so included. This too was in line with what had originally been intended some fourteen years earlier, and in 1920 the herring fishermen did not even trouble to make representations before the Committee. As regards trawler crews, the view of the Committee was: "In all material respects the relationship

99. It is, of course, a moot point whether this was because they genuinely did not wish to be included within the scheme, or whether their failure to argue their point of view was attributable to poor organization within their own industry.
between the trawler owner and the trawler fishermen is one of master and servant."

Section 8 of the Workmen's Compensation Act 1923\(^{100}\) gave effect to these views by providing that, henceforth, only crew members remunerated "wholly or mainly" by a share in the profits or gross earnings were to fall outside the compensation scheme. The difference this made may again be illustrated by reference to the statistics on the registration of memoranda, indicating the number of settled claims within the industry: 1920 - 60; 1921 - 60; 1922 - 53; 1924 - 291; 1925 - 537; 1926 - 505.\(^{101}\)

(ii) Share fishermen and welfare legislation

With the passing of the 1923 Act, trawler fishermen were brought back within the category of protected workers for the purposes of workmen's compensation. Share fishermen, however, remained excluded for many years. By the Workmen's Compensation Act 1925,\(^{102}\) it was provided that they might be included by ministerial ruling, but this power was never exercised. It was not until the major restructuring of welfare legislation in 1946 that a substantial change in their status took place. In 1948 they were finally brought within the industrial injuries insurance scheme,\(^{103}\) subject only to the qualifications (designed to sift the genuine, career share fisherman from the part-timer) that they must be wholly or

\(^{100}\) 13 & 14 Geo. V, c. 42.
\(^{102}\) (15 & 16 Geo. V, c. 84), s. 35(2).
\(^{103}\) National Insurance (Industrial Injuries)(Insurable and Excepted Employments) Regulations 1948 (S.I. 1948 No. 1456), First Schedule, Part 1. This order was made under powers conferred by the National Insurance (Industrial Injuries) Act 1946, First Schedule, Part 1, para. 2.
mainly engaged in share fishing and must derive all or most of
their remuneration from it. These rules are still in force
today.104

Apart from compensation for accidental injuries, there were,
of course, also provisions, from 1911 onwards, for state
administered sickness and unemployment insurance. In relation
to these the question of the inclusion or otherwise of share
fishermen raised several problems. The National Insurance Act
1911105 provided106 that share fishermen might be excluded from
health insurance in the event of a special order to that purpose
being made by the Insurance Commissioners. In Scotland,
instead of so proceeding, the Commissioners, under s. 66 of
the Act, presented a petition to the Court of Session107 in
which they asked for a decision on whether or not share fisher­
men were 'employed persons' within the meaning of the Act. The
Court of Session fastened on the custom whereby such fishermen
were bound to share losses as well as profits:

The liability for loss is to my mind the
determining factor in the case. These
fishermen who are liable for a share of
the loss are not under a contract of service.108

Thus they were held excluded.

However, by statute the share fishermen were brought into
health insurance in 1928.109 But unemployment insurance raised

104. For the modern law, see National Insurance (Industrial
Injuries) Mariners (Insurability) Regulations 1954
(S.I. 1954 No. 782).
105. 1 & 2 Geo. V, c. 55.
106. First Schedule, Part II, (k).
107. Scottish Insurance Commissioners v. McNaughten 1914
S.C. 826.
108. Per Lord Mackenzie at 833.
s. 20.
further problems. Throughout the 1930's and 1940's the question of inclusion remained a live issue, and it was examined by three separate committees of inquiry. In 1932 the Royal Commission on Unemployment Insurance\(^{110}\) admitted that the reason for the specific exclusion of share fishermen in the Unemployment Insurance Act 1920\(^{111}\) had been the belief that fishing would escape the general economic depression of the time. This in fact had not happened and the whole industry was seriously affected. The Commission, however, recommended against a change in the law, because

> it would be a matter of insuperable difficulty to fix, either generally or in a specific case, the point at which genuine involuntary unemployment justifying a claim for benefit began. \(^{112}\)

This was a reference to the informal and independent working arrangements which prevailed in the industry, where the decision to go out to fish would depend on a number of factors - such as the weather, the state of the market, etc. - to be weighed up by the skipper in discussion with the crew as a whole. Four years later\(^{113}\) the problem was again examined in the context of an inquiry, chaired by W.H. Beveridge, set up to look into the position of workers who did not have contracts of service. This time there was a more sympathetic appreciation of the problem; share fishermen were acknowledged as the "peasant proprietors of the sea",\(^{114}\) and the ruses to which the Scottish

\(^{110}\) Cmnd. 4185.
\(^{111}\) 10 & 11 Geo. V, c. 30.
\(^{112}\) Para. 382.
\(^{113}\) Report of the Unemployment Insurance Statutory Committee in accordance with Section 57(1) of the Unemployment Insurance Act 1935 on share fishermen in relation to the Unemployment Insurance Scheme (H.M.S.O.).
\(^{114}\) Para. 22.
fishermen had resorted in order to bring themselves within insurance were described.

By this time the English share fishermen had adopted the practice of paying a small, almost nominal, weekly wage payment to crew members, with the result that they could be held entitled to unemployment benefit. In Scotland, however, there was the added complication that it was common to find part ownership of the boat or its equipment among the ordinary fishermen. This made the establishment of a contract of service even more difficult. In attempts to circumvent this, the practice had grown up of transferring rights of ownership to relatives or friends. This seems to have occasioned considerable confusion, as often, for example, a fisherman would transfer his rights of ownership to his wife, in ignorance of the exclusion of employment between husband and wife from the scope of the scheme. Again, however, the bogey of possible abuse still determined the Committee's conclusions. The analogy with health insurance (into which share fishermen had been assumed) was rejected; the veracity of a claim for sickness benefit could be checked by a doctor, but

the risk insured against by unemployment insurance is the termination of a contract of service. This presupposes a contract, it can only be certified by an employer.

The fears of the investigators were summed up as follows:

115. Even this device was not without complications. In Sturley v. Powell [1930] 1 K.B. 677 it appears that a county court held that such a minimum weekly payment did not amount to the payment of a guaranteed minimum wage, but was recoverable as a loan.

116. Para. 25.
The importance for the purpose of unemployment insurance of a genuine contract of service is not a technicality, devoid of substance. The nature of the share fishermen's occupation as a partnership of men working on their account, and not as employment under orders, appeared again and again in the course of our investigations. Once he has paid thirty contributions in two years he need pay no more in order to get benefit. Working fishermen are in a very strong position to pay the minimum and get the maximum. The machinery of the unemployment exchanges, for instance, in testing the reality of unemployment by offer of jobs is inapplicable; the crew of each boat would want to choose their own partners; the decision, again, either to work or not to work on any particular day would rest substantially with the whole partnership; there is no outside employer whose offer of a job can determine whether work is available or not. 117

It may be commented that, insofar as this view was based on the fallibility of human nature and the opportunities for abuse, it is hard to refute, though it is interesting to note that the architects of unemployment insurance were firm in their belief that there was no room in their scheme for discrimination between the 'deserving' and the 'undeserving' poor. 118 But it is somewhat ironic that much should be made of the importance of any lack of control exercised over the crew of a fishing vessel. For the control exercised by a skipper over his crew in the execution of their jobs, if not in the decision whether or not to put to sea, far exceeds the normal authority of employer over employee.

It was not until 1948 that the full benefits of welfare legislation were eventually extended to share fishermen. 119

118. D. Fraser, op.cit., supra, 157 ff.
In that year the Minister of National Insurance was advised by the National Insurance Advisory Committee to exercise his discretionary powers under the National Insurance Act 1946 to bring into full insurance share fishermen who were not owners or part owners of the vessel or gear, on the basis that they were "substantially in the position of employed persons".\textsuperscript{120}

The N.I.A.C. considered working owners and part owners were strictly separable, but, in the interests of preserving the internal cohesiveness of the whole crew, recommended that they too should be included by a special exercise of ministerial discretion. The possibility of abuse was met by requiring fishermen claiming unemployment benefit to satisfy extra qualifications. For each day on which he claims, a fisherman has to prove that

\begin{quote}
  it is a day on which he performed no work as a share fisherman and in respect of which...he has not neglected to avail himself of a reasonable opportunity of employment as a fisherman.
\end{quote}

Additionally, if he is master or a member of the crew of a fishing vessel, of which either the master or any member of the crew is owner or part owner, he must prove there was no work available, (a) because of the weather, or (b) because the vessel was undergoing repairs and maintenance (though not of a routine nature), or (c) because there was a lack of fish in any waters the vessel could reasonably be expected to operate, or (d) because of "any other good cause".\textsuperscript{121}

\textsuperscript{120} Para. 22.

These regulations appear to have effected a satisfactory compromise. The fishermen are pleased to find that the extra requirements for unemployment benefit are not too stringently enforced, and the state is pleased with a formula which makes allowance for the inclusion of an odd category of workers without setting a troublesome precedent.
CHAPTER 12

CONCLUSIONS
The aim of this thesis has been the elucidation of the contract of service, the legal institution which has for so long dominated British labour law. The potential for discussion of such a vast topic is enormous, and no attempt has been made to mount a comprehensive study of its many aspects. Instead, certain aspects dealing with the process of its development and its use in modern law have been selected, and it is through these that the amorphous mass which is the law and practice of the contract of service has been approached.

An understanding of the nature of the contract of service requires an appreciation of its history, and this has entailed a study of the attitudes taken by the law (and particularly the courts) towards the regulation of the employment relationship through the ages, until the eventual emergence of the contract of service in a guise recognizable to modern eyes. The date of that emergence may be said to be somewhere around the middle of the last century, for it was then that there was the burst of judicial creativity,\(^1\) which resulted in the production of the common law rules and principles which make up the bulk of the modern contract. Before the 19th century the individual employment relationship had, it is true, been seen as founded on contractual principles, but it was only in the mid-19th century that a conscious effort was made to explain the employment contract as an integral, though specialised, branch of the general law of contract. The 19th century was a time when contract as a legal institution was revered as a fair and desirable way of ordering human affairs, and the employment

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1. Supra, p. 12.
relationship was particularly amenable to this kind of analysis.

The transition, however, from earlier understandings of the nature of the employment relationship was not easily carried out. Although the contractualism of the judges was to prove compatible with, and even instrumental in, the development of doctrines which went to the exploitation of the working classes (e.g., common employment), the concept of bargain which went with it nonetheless demanded the erection of a formal theory of equality\(^2\) between employer and employee which conflicted with past practice.

The employment relationship is essentially based on power, and the superior economic power of the employer controls the actions of the employee. This simple economic truth was quickly recognized and accepted by the courts at a time when they did not feel bound to justify their actions before a specious theory of equality. The first important stirrings of judicial creativity in relation to employment are to be found in the Year Book cases elaborating the rights of action which grew up in the shadow of the Statute of Labourers. The decisions reported there are few and far between,\(^3\) a fact which is important in itself. The paucity of decided cases shows that, at this time, the employment relationship was not seen as a matter for legal analysis. The few cases which there are, however, demonstrate the partiality which the judges showed to the employer's interests. This favouritism is found repeatedly in cases covering the 16th, 17th and 18th centuries, though it should be remembered when reading them that they give, in themselves, a false picture of the state of the social characteristics of the employment relationship.

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2. cf. W. Paley, cited supra, p. 49.
In part, of course, this is to be expected. Reported cases can be relied on to represent the pathological side of human behaviour, but there is more to the point than this. It was a feature of pre-industrial society that the harshness of the master's legal authority was softened by the background of custom and practice against which it operated. The paternalistic authority which a master enjoyed over his servants was extensive but it was not unlimited and, what is more, it entailed corresponding obligations on his part.\footnote{Supra, pp. 50, 55-6, 133.} In agricultural, domestic and small-scale factory employment of the pre-industrial era, master and servant were closely bound together in social and economic units.

In the course of the 18th century, however, the nature of the standard relationship between employer and employee began to alter with the onset of industrialization. The notion of paternalism was replaced by a more premeditated form of economic exploitation, and the employment relationship became less diffuse, more centred on the cash nexus. Different, more specialised and more finite demands were made of servants who took up factory employment.\footnote{Supra, pp. 67, 95-6.} This change in the real world, however, took some time to percolate through to legal understanding; in part because the new factories grew up outside the control of the justices of the peace (who continued to be occupied with predominantly agricultural and domestic employment). In part, too, legal conservatism was an important factor. We may be sure that, when Blackstone referred to the master-servant relationship as one of the "three great relations of private
life", he was thinking not of the relationship as it existed within the new factories, but as it had existed in the past. Only gradually did the courts come to appreciate the changes to which they had to give legal effect. Just as the working population had itself to accept the indignities and loss of status that went with accepting factory employment, so the judges had to produce new doctrines to meet these new conditions. In so doing they were not conspicuously swift. Until well into the 19th century there are cases showing that exclusive, full-time service was still considered the hallmark of the master-servant relationship. In applying these standards to factory employment, the judges showed themselves insensitive to the progress that was taking place around them.6

It was only in the course of the 19th century that theories of employment law progressed far enough for distinctions to be drawn between different types of working relationships on the basis of the legal nature of these relationships, and not simply on the social status of the parties involved. There had, of course, always been rules and principles available to answer the question of who was and who was not a servant.7 This was essential when there existed a body of law, generally oppressive to those who found themselves subservient to it, and when those of superior social status, who performed what may be loosely described as employment tasks, enjoyed the privileges which went with the concept of office. But, because the category of 'servant' was as much a social institution as a legal one, it was not necessary to specify the lines which demarcated the

7. Supra, pp. 106-21, 298.
servant's position from others. Servile status was a matter for acceptance rather than argument, and, anyway, persons who were in danger of finding themselves classified as servants were unlikely to have either the inclination or the means to argue the point before a court of law. Nonetheless, principles by which such a disputed point might be settled did exist, and occasionally saw the light of day. The 19th century saw not only the continuation of this rather crude division based on social status, it also saw the introduction of discrimination based on the legal classification of employment contracts. 'Butty' workers were excluded from the protections of the Truck Acts, not on the ground that they were of high social status, but because they did not work under the appropriate type of contract, i.e., a contract of service. Judges who were unwilling to extend the Truck Acts any more than they were bound to do found that differentiation between workers on the basis of the nature of their employment contracts offered a convenient rationalisation for their inclinations. 8

Once the courts had become aware of the existence and individuality of the contract of service, they did not hesitate to use it to implement their ideas on the shape the employment relationship should take. This, after all, was scarcely an innovation - their predecessors had similarly shaped the law of master and servant. What was new, however, was the introduction of lines of specifically contractual argument. This is exemplified by the development of the doctrine of common employment. 9 Lord Abinger's views on the nature and

9. Supra, chap. 5.
extent of a master's liability for injuries caused to one of his servants through the negligence of another were seized upon and translated into a theory loosely based on contractual doctrine. (The qualification 'loosely' is necessary because, in their enthusiasm for the ideas they were propounding, the judges conveniently overlooked any arguments drawn from contract law which went against common employment. Thus volunteers and others who were not, in fact, in any contractual relationship with the employer in question were nonetheless held subject to the doctrine.)

By the middle of the 19th century the contract of service had evolved as a distinctive legal institution. Further information on its characteristics and importance can be gained by looking at how it operates (or does not, as the case may be) in relation to special areas of employment, abnormal in one sense or another. Public employment is particularly interesting. The different categories of public employment offer a series of instances where the contract of service occupies a role of varying importance. There is a very definite progression evident here. It is idle to argue that the contract of service has any role to play in relation to the armed forces; persons employed under this category simply do not have a contractual relationship with their employer.10 The position of the police is less certain: they clearly do not have anything approaching a standard contract of service, but (especially with regard to the inferior ranks) the objections to a contractual basis of some sort to their employment are less forceful. Still, however, the balance of legal opinion supports the view that

10. Supra, p. 184.
there is no such relationship. With civil servants, on the other hand, while this was once so, recent tendencies show an acceptance of contract (subject, of course, to the special rights retained by the Crown at common law in the event of dismissal). It is with public employees in local government and the N.H.S. that a contract of service can first be recognized - though here it is supplemented by the fact of judicial control through principles of administrative law. Finally, workers in nationalised industries, though employed by bodies 'public' in the sense that they draw their authority from statutory sources, are employed under standard contracts of service, without this element of judicial control.

This range of responses to acceptance of the contract of service can only be understood in terms of a mixture of reasons, some historical, some reflecting conscious policy decisions by the courts and legislature. Service in the armed forces and in the police has, in one form or another, been known for a long time. It has indeed many similarities with the characteristic employment relationship before the 19th century, requiring a high degree of obedience, loyalty and full-time service. Yet, whereas the master-servant relationship developed into that of employer and employee joined by a contract of service, this transition was never contemplated in relation to soldiers or policemen. The reasons for rejection of the contract of service have never been explicitly stated, but it is suggested that a factor of importance is the formal equality which such a move would bring to employer and

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\textsuperscript{11} Supra, pp. 202 ff.
\textsuperscript{12} Supra, p. 247.
employee. The courts, particularly in the earlier part of this century, maintained a high regard for arguments of executive necessity and they have, in the past, felt that to admit contract into these areas would be detrimental to the public interest. Gradually, in recent years, they have been brought to see the fallacy of this belief, and have accepted change. The most striking example of this is in relation to the civil service, where the civil servant is now much more closely assimilated to the position of a private employee without any apparent prejudicial effect on the public interest.

There is room for further development along these lines, although it is unlikely that the courts will take it upon themselves to go against what is now well established law. The arguments in favour of extending the contract of service are perhaps least convincing in regard to the armed forces (although even here there is no convincing reason why a soldier should not have legally enforceable rights to pay and pension), but there is no good reason why members of police forces should not be held to be employed under such contracts. The immediate advantage such a move would bring would be the clarification of the legal rights he enjoys in his employment. At present these are hidden within what is conveniently but unhelpfully described as a sui generis relationship.

In relation to other types of public employment (local government, the National Health Service, but not nationalised industries) the characteristic of service which calls for comment is the phenomenon of judicial control. The readiness of the courts to regulate the procedural and (to a lesser extent) substantive practice of dismissal is the most explicit
recognition of the fact that an employment relationship is essentially a power relationship. Their intervention is usually ascribed to the public nature of the power being exercised by the employing body, but this is an explanation without being a justification. It is both unfair and illogical to restrict the supervision of the courts to selected classes of public employment, and only the timely development of a law of unfair dismissal has diverted attention from the potential implications of Malloch's Case.¹³

The main consequence of denying a contract of service to certain types of public employees has been to create confusion about the legal rights they enjoy in their employment. This in itself is to be regretted, but at least its practical consequences have been minimised by the pride which public employers generally take in maintaining high standards of behaviour towards their employees. With certain classes of workers, however, the absence of a contract of service has been associated with consequences much more directly prejudicial. Share fishermen (and certain other minority groups of workers with extraordinary terms and conditions of employment, such as taxi cab drivers) have, in the past, fallen foul of a dangerous flaw in reasoning. From the perfectly legitimate premise that most workers are employed under contracts of service, it has been assumed by those in authority that those who are not are not properly classed or grouped as workers. Thus, for many years, share fishermen enjoyed less protection against unemployment, incapacity through sickness and industrial injuries than did workers at large. It would be wrong to

ascribe this wholly to the courts - the decision to exclude them from the appropriate schemes was taken by statute - but their exclusion was certainly supported by the narrow conception of the contract of service which was followed by the courts of the early part of this century, and the fact that they did not have contracts of service was continually used as justification for the treatment they received.\textsuperscript{14}

The creation of the concept of the contract of service and its application in the ways described in this thesis have been a great - perhaps the great - creative act of the common law in the field of the law of employment. From individual cases there grew a theoretical concept with a life and strength of its own, possessed of sufficient individuality and identity to allow it to be used as reference point not only in other areas of the common law, but in statute as well. It must be acknowledged, however, that the period of judicial creativity is now ended. It will, of course, remain possible for individual judges to interpret particular rules and applications of the contract of service to one end or another, but, in comparison with what has gone before, these are matters only of detail. The fact is that, to paraphrase a saying drawn from another context, individual labour law is now seen as a matter too important to be left to the judges, and, when one views the confusion which has resulted from recent attempts by the judiciary to prove the contrary,\textsuperscript{15} this development is, on the whole, to be welcomed.

\textsuperscript{14} Supra, pp. 348, 350.
Despite this change, however, it would be premature to mourn the passing of the contract of service. Its future would appear assured, for it still remains a favourite of the Parliamentary draftsman. It is true that several important reforms in individual employment law have been introduced apparently independently of the concept, but on closer examination even they rely indirectly upon it. Protection against unfair dismissal and redundancy, for example, are the best known examples of recently introduced employees' rights which are not expressed as terms compulsorily implied within a contract of service. Soon they will be joined by other specific rights specifically provided for under the Employment Protection Bill. But these rights still make use of the contract of service. Only 'employees' are and will be able to exercise them, and 'employees' are defined as persons who work under a contract of employment. Where it is required of the employee that he be continuously employed for any length of time before he becomes entitled to any such right, again what is required is the continuity of a contract of service for a specified time. When, in addition, it is remembered that direct reliance on the device of contract is still an important avenue of reform, then any radical diminution of the importance of the concept seems unlikely in the near future.

16. e.g., Contracts of Employment Act 1972, Schedule 1, para. 4.
17. e.g., Sex Discrimination Bill 1975, cl. 8, which specifies the 'equality clause' which will form part of the contract of employment of all women.
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<td>24 H.C. Deb., col. 1307.</td>
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<td>Workmen's Compensation Amendment (Share Fishermen) Bill.</td>
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<td>1912</td>
<td>37 H.C. Deb., col. 942.</td>
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<td>Share Fishermen (Workmen's Compensation) Bill.</td>
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