FORMALISM AND VALUE; STRUCTURE AND FUNCTION:

TRADE UNIONS AND THE LAW

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CONTENTS

PART II

PART III

ABSTRACT

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FORMALISM AND VALUE; STRUCTURE AND FUNCTION: TRADE UNIONS AND THE LAW

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The present study attempts an assessment of the impact of trade unions on the present legal system.

The work is divided into three Parts.

In Part I, I argue for the development of basic trends in the modern legal system. The matter is considered from the perspective of the development and emergence into dominance of new, basic cultural values and their subsequent refinement and extension in the legal system. The vehicle for the exposition of this thesis is certain selected areas of the law of evidence. It is argued that the process is dynamic: the legal system was (and still is) being transformed into something which is qualitatively different than that which previously existed. The new values establish and support a formal structure in which they are reflected.

Part II considers the problems this has created for legal theory generally. I have argued that the chronic problems of legal theory - proliferation of theory and intractability of basic issues - manifest a crisis of confidence which has its roots in the inability of legal theory to explain satisfactorily certain states of affairs in terms of the values that inform the legal system.

Part III brings together the threads of the first two Parts. The themes developed there are now related critically to the ways in which extant legal theory deals with trade unions. An effort is made to establish a true meaning or "cash value" for the term "trade union" in order that their power can be related in significant ways to the power of the national legal order. This lays the groundwork for a critical examination of the notion of 'legal personality' as it operates in the legal system,

A brief conclusion sets out the alternatives for action which appear as a result of the work.

PART I

CHAPTER ONE: INTRODUCTION

In this paper I had originally set out to deal with certain specifics of the application of the criminal law to Trade Unions.

As I worked, however, I found that typical solutions to technical problems of evidence and procedure depended for their efficacy upon the assumed existence of a certain state of affairs. In relation to Trade Unions, I began to gradually consider this assumption a questionable one, than all that implied for my "solutions". Moreover, the hypothesis seemed to me to leave virtually untouched, where it did not in fact distort an appreciation of, a more fundamental matter, as follows: why has the application of criminal sanctions to Trade Unions always been so unusually difficult a matter?

In an effort to deal with this problem, my inquiries lead me to attempt the formulation of another theory that would better explain the present position of Trade Unions before the law. Accordingly, my study became far more general than I had intended, and lead me into areas far from my original inquiry.

I developed my thesis, on the 'practical' side, by tracing its development in certain selected areas of the law. I chose the law of evidence, as I take it to be the area of the law most closely connected with the requirements of practice, and because it can be shown to display a consistent development of the notion central to my thesis. This is Part I of this work.

The hypothesis and its process, being thus established by Part I, was then applied to the field of legal theory generally, and constitutes Part II of this paper.

At this point, I was ready to draw the lines of contact to the relevant parts of the body of legal materials we know as 'trade union law'. Part III of this paper is taken up with working out the implications of Parts I and II for the law of trade unions.

Study shows that the boundaries of coherence in the area of trade unions and their relationship to the law are in large part constituted and set by the perimeters of the notion of legal personality. The structure of argument, by the same token, is largely an exploration of the applicability of various possibilities thrown up by this idea. The pervasiveness of "legal personality" as an organizing tool suggests that my first task should be and it will be to open argument with some preliminary remarks on the notion and its relationship to trade unions.

Discussions on legal personality, it has been pointed out, are apt to involve confessions of philosophic faith.[1] This area is the border territory between law and political science; it is virtually impossible to proceed without opening up the writer's views of the whole of legal theory.[2] There is a close interaction between the doctrines of the law, including the doctrine of legal personality, and the prevailing ideas of the times. Periodic investigations should be made into the relationship between legal trends and developments in the structure of the political community.[3]

Trade union literature and legal materials cluster around the notion of legal personality. We find a basic division in theory that has been described as follows:

> Legal opinion has been divided into two camps. First, there is what we will call the legal entity theory. According to this, registration creates an entity possessing full juridicial personality in the sense in which that term has been used above - a 'near corporation'.
>
> The opposing camp adheres to the view that registration does not alter the nature of the union, but simply confers upon it certain privileges including that of suing and being sued in its registered name. It would deny that a union is a legal entity. This we shall call the procedural theory.[4]

The theories are attempts by the law to articulate the content of

the term 'trade union'. The difficulty encountered is a matter of record. The problem is not one of definition; trade unions cause problems that are not resolved by the juggling of words.

The main theories indicate that different answers to the problem are possible. The practical importance of this is that different rules and analogies, and perhaps, therefore, different solutions, may be brought into play. Strictly speaking, however, the matter remains to be decided by choice and not necessity. It is therefore not my intention to canvass the arguments of the day which champion one view or the other. Neither major branch of theory has proven entirely satisfactory in any event.[5]

It is obvious that for a discussion to proceed at all, there must be a level at which the similarity of points of view overwhelms their differences; there must be a common level for the support of differences and distinctions. It is not always obvious, however, because it is not always the case, that enquiry into that common similarity will be rewarded. Nevertheless, there are cases in which this approach can be pursued with profit and I think that the instant matter is one such. Although it may take many forms, such an enquiry is largely a matter of providing and elucidating a context in which the problem becomes manageable; because of this the lines of enquiry which eventually converge at the very subject in question may often

have to start from far off. That is the case here.

Instead of concentrating on the differences between the various theories, then, I want to concentrate on what I consider to be the most significant aspect of their similarity, because of the importance I believe it has for the subject under consideration. Both major branches of theory are based on the assumption that there is a factual entity called a 'trade union'. The differences between them proceed from that common assumption and consist of the different views each takes of the way in which the law has dealt with that entity. The following comment is representative:

> The legal distinctions between corporations and unincorporated groups do not correspond to any essential difference in their nature. The latter may exist as factual entities....They act as entities and...may not be impeded by their lack of corporate personality.[6]

The inadequacy of the theories is that while either will do, or at any rate, has done, neither seems necessarily related to the decision of practical problems.[7] In the one case[8] in which the question of the legal nature of a trade union came squarely before the House of Lords, two of the law lords said it was a legal entity, two said it was a voluntary unincorporated association, and one said it was both, leaving jurisprudents and academics to fight over the fifth judgement

of Lord Keith of Alvonholme.[9]

The underlying assumption is clear enough in the procedural rule version, and Denning, L.J. (as he then was) explicitly articulated the assumed factual basis which supports the legal entity theory in the Bonsor case when it was in the Court of Appeal:

> Let me first show, however, that a trade union is a legal entity. And I start by observing that as a simple matter of fact, not law, a trade union has a personality of its own distinct from its members....[10]

Lord Denning did not claim that legal personality flowed necessarily from what he considered to be the self-evident proposition that a trade union has a factual personality, but that is clearly in the forefront of his argument.[11] He repeated his argument, post-Bonsor, in the cases of Willis v. Association of Universities of the British Commonwealth[12] and Boulting v. Association of Cinematograph, Television and Allied Technicians.[13]

I consider the assumption to be significant not primarily on the question of its truth or falsity, but because I think it is representative of the single most pervasive and important characteristic of our legal system - the shared feeling that law is relevant to the extent that it is related to "the facts". I do not want to examine the conscious distinction we make between fact and law, but merely to make this point: a feeling of inadequacy, at least, would today

be the reaction to a law which was generally felt to be hopelessly divorced from a common understanding of the existence of a certain state of affairs. Our differences of opinion on the adequacy of our laws depend to a large extent upon the manner in which their content is seen to be related to what we know, or think we know, to be the case, "in fact".

My own confession of legal philosophy is that I believe the law is intelligible only in relation to the values, lives and aspirations of the people whose conduct it regulates. Even a purist like Kelsen has to 'presuppose' a functioning political organization upon which to erect his model legal system. Law is a distinct concept only because we share so many common, and often unstated assumptions about what is relevant and what is not, what words have what meaning, how much precision is required in argument, and the like.[14] Our basic cultural patterns and values are so deeply shared that this very fact makes possible the separation of the field of law from others like religion, politics, or economics,[15] and color the whole spectrum of our existence. Dicey has said quite properly:

> ...the whole body of beliefs existing in any given age may generally be traced to certain fundamental assumptions which at the time, whether they actually be true or false, are believed by the mass of the world to be true with such confidence that they hardly appear to bear the quality of assumptions.[16]

On this view, which I adopt, the legal system will reflect, more or less accurately, the basic values of the culture in which it exists. The problems of trade unions are therefore a wheel (trade union law) within a wheel (the legal system) within a wheel (the culture). The cultural setting is seen as the expression of a certain value or values that is or are fundamental and characteristic, and which serve as the criteria which both identify the culture and differentiate it from others. If we can say with even general accuracy what constitutes the basic value of the culture, some general notion of a basic constituent value of the legal system, and eventually, of the particular part of the system in which we are interested, will be had thereby. That value will not be mirrored in every facet, every nook and cranny, of the legal world, at least not in equal measure. It is, to borrow a phrase, a reflection "compatible with both throwbacks and precocities",[11] but in general outline and import, its meaning should be clear.

None of this is particularly difficult. It does, however, raise matters, the attempts to explore which will consume a good portion of this paper.

The first is: have our basic cultural values always been

constant? Has the value now reflected by the legal system always been at its centre? Secondly, if there has been a change of this nature, we will know, unless our values represent the proverbial mellenium and are eternal, that there is reason in principle to expect a change in the future. That is, we will know that a dynamic process is involved. This is important, because one of the vital functions of any theory is prediction of results (at least often enough to prevent the theoretician from making a fool of himself.). If we consider the legal system as part of an evolving and dynamic process, and if there is some understanding of the basic value that underlays that process, it should be possible to say in a general way, at least, the direction in which future developments will occur.

These are limited objectives, but present theories on the nature of a trade union seem productive of little other than more argument.

My general thesis is that our present 'modern' legal system, insofar as the phrase 'legal system' connotes a coherent, generally self-consistent body of rules, principles and opinions, existing in harmony with a culture and expressing fidelity to a basic value

dates from only about the mid-16th century. This involves the proposition that what is referred to as "the English legal system" is not a unity in an important sense of that term. I want to be as clear as is possible that I am not arguing for the development of 'modern' trends, which are connected to, but just different from, earlier events, in that the earlier events were not quite as 'modern' as the later ones. That is a view I reject.

It is traditional to view the English legal system as a unity, having a continuous 'history'; the events of which are more or less causally connected. This is the approach of Holdsworth in his great work on the subject,[18] of Pollock and Maitland,[19] and of Thayer[20] and Wigmore[21] in the field of evidence, to which a considerable portion of this paper will be devoted. The development of the law is traced to the present from its origins in a very remote past. There are senses in which, and purposes for which, the assumption that the history of the 'legal system' extends in an unbroken line. But unfortunately, this approach is usually coupled with the idea that this continuity also displays the development of a single idea, or set of ideas, progressing in a like manner. I think this latter assumption, the presence of

which is quite clear in the literature, is quite distinct and deserving of the most careful attention.

If this theory of the development of the law were to be drawn on a graph, the course of the law's history would be represented by a more or less straight line, running upwards from 'there' (the past) to 'here' (the present), with most writers often expressing the view that we are better 'now', than we were 'then'. I am going to refer to this one-dimensional view as 'linear'.

Despite its wide acceptance in legal writing, and its undoubted advantages, this approach is in one important respect, qualitatively blind, because we stand on the meaning and values of our present legal system to look back upon and evaluate its history, and are always prevented thereby from considering the worth and meaning of the measure itself. That is, the linear view must always run the risk of ignoring the possibility that instead of the difference between then and now being quantitative (a view that functions on the assumption of the same basic values then and now), it may be qualitative (a view that functions on the assumption of different values then and now). If there is a basis for the latter view, it would to that extent be a mistake to use the values

represented in our legal system to characterize at least some of the past. My position is that there is an argument for the occurrance of a fundamental shift in the basic value reflected in the legal system. I think also that an understanding of its nature is important for the development of a workable approach to the problems the law faces with trade unions, many of which ultimately lie close to our choice of values.

The concern of our 'modern' age has been with the world around us. The dominant philosophies of our age, by whatever -ism they are prefixed, relate primarily to the interpretation of a finite and material world. Our dominant theories of knowledge derive from the lessons of experience, and their truth is the truth of the senses. We are more at ease with the weighable, countable, measurable and quantifiable than we are with the 'truths' of revelation. The intellectual leadership of our own time is indisputably, and significantly, in the hands of the physical scientists. The very word 'science' has come to signify precision, accuracy, knowledge and truth. Various social disciplines live for, and argue about, the applicability of the word to their several pursuits. Even when supplications are directed to our moral sense, the entreaties to charity or pity come in terms of the material needs of others; their poverty, their hunger or their want of the material necessities of life.

We express this conventional wisdom compendiously by saying that we live in a materialistic world. Apart from those with an axe to grind in favour of an alternative system, it is not usual to consider the implications of that statement in terms of the values that inform the structures of the institutions that govern our lives. Perhaps the most striking, and certainly, for our purposes, the most important, characteristic of our present age is its concern for 'facts'. It is a matter of overriding importance to us in virtually every matter of substance. We tend to believe or not to believe, according as the facts indicate one way or the other. We appeal to the facts for our truth, and around this concern for the facts we build a formal structure to advance our understanding, in law as in other fields.

Our empiricist philosophies and theories of knowledge, our social and legal structures, insofar as they reflect and articulate the outlook characteristic of our age, are not so much right, as inevitable. Their method is founded on the belief in the value of the lessons of experience, and it consists in seeking the truth of problematic propositions of fact through investigation of, and inference from, other, non-disputed propositions of fact. The present strength of 'science' lies in the fact that it grows out of presently

prevailing ideas of the value of experience as a source of knowledge; that is what Huxley meant by calling it "organized common sense".

Just because it is so close to basic beliefs, however, it is too easy to forget that empiricism, considered in its formal aspect, represents a linking of logic and experience that is not itself compelled by logic, and which is not necessary to a coherent theory of knowledge. Other methods and different assumptions about the nature of truth and reality are possible and have in fact existed. For example, the Platonic theory of knowledge not only did not rely on sense data as a foundation for knowledge; that was regarded as an intrusive impediment to knowledge, productive only of 'opinion'.[22]

The period in Western European history which precedes our present modern age, however, was I think, another such different period with different assumptions and values, and some understanding of its main characteristics is a necessary foundation for an understanding of the shift into 'modern times' which took place in the mid-16th century.

We will be following this shift in relation to the development of the law of evidence. Our aims are modest. This is not the place for a detailed discussion on the political and social thought of the middle ages. The broad outlines of its characteristic beliefs are reasonably, and, for my purposes, sufficiently, clear. I will

accordingly deal briefly with this matter in the following chapter.

PART I

CHAPTER ONE: INTRODUCTION: NOTES

1. by L. C. Webb, in Legal Personality And Political Pluralism (1958) (L. C. Webb, ed.,), hereinafter referred to as 'Legal Personality'

2. see, David P. Derham, 'Theories of Legal Personality', in Legal Personality, supra, fn. 1, p. 1

3. see L. C. Webb, in Legal Personality, supra, fn. 1, intro., p. vi

4. M. A. Hickling, 'Legal Personality and Trade Unions in the British Isles', (1965), 4 West. L. Rev. 7 at p. 20, hereinafter referred to as 'Hickling'. For reasons that appear later, I do not think registration is an important feature of this explanation. As far as the implied distinction between substance and procedure are concerned, see Thurman Arnold, 'The Role of Substantial Law and Procedure In The Legal Process' (1932), 45 Harv. L. Rev. 617 at pp. 634, 643, 644, 645; and K. W. Wedderburn, 'Corporate Personality and Social Policy: The Problem of the Quasi - Corporation' (1965), 28 Mod. L. Rev. 62 at pp. 63,64. It must be of at least doubtful utility.

5. see, e.g. 'Hickling', supra, fn. 4, at pp. 40-46; 'Wedderburn', supra, fn. 4; K. W. Wedderburn, 'Trade Union Membership - Validity of Rules', [1964] Camb. L. J. 16 at p. 17; K. W. Wedderburn, 'The Bonsor Affair: A Post Script'(1957), 20 Mod. L. Rev. 105; Dennis Lloyd, 'Damages For Wrongful Expulsion From A Trade Union: Bonsor v. Musicians' Union' (1956), 19 Mod. L. Rev. 121; T. C. Thomas, 'Trade Unions and Their Members', [1956] Camb. L. J. 67.

6. Hickling, supra, fn. 4, p. 9

7. Hickling, supra, fn. 4, p. 46

8. Bonsor v. Musicians Union, [1956] A.C. 104 (H. L.)

9. see, e.g. the articles collected supra, fn. 5.

PART I

CHAPTER ONE: INTRODUCTION: NOTES

10. [1954] 1 Ch. D. 479 at p. 507

11. see J. C. Hicks, "Jargon And Occult Qualities" (1956), 19 Mod. L. Rev. 158 at p. 161

12. [1965] 1 Q.B. 141 at 147 (C.A.) See also, Pearson and Salmon L. J. J., similarly, at p. 150.

13. [1963] 1 All E.R. 716 at p. 724 (C.A.)

14. see Rupert Crawshay-Williams, Methods and Criteria of Reasoning (1957), at p. 4, hereinafter referred to as "Methods".

15. see Sydney Hook, "Dialectic in Society and History", in Readings in the Philosophy of Science (1953, H. Feigl and M. Brodbeck, [illegible] 701 at p. 706, hereinafter referred to as 'Readings'

16. A. V. Dicey, Lecturer on the Relation Between Law and Opinion in England In The 19th Century (1930), p.

17. from R. H. Tawney, Religion and the Rise of Capitalism (1926). [illegible] hereinafter referred to as "Tawney"

18. Sir William Holdsworth, A History of English Law (7th edn., revised, eds. A. L. Goodhart, H. G. Hanbury and S. B. Chrimes) (1956), hereinafter referred to as "H.E.L." followed by the volume number, cited in lower case roman numerals, and the page reference.

19. Sir Frederick Pollock and Frederic William Maitland, The History of English Law (2nd edn., 1898), hereinafter referred to as "P. and M.", followed by the volume number, cited in lower case roman numerals, and the page reference.

20. James Bradley Thayer, A Preliminary Treatise On Evidence At The Common Law (1898), hereinafter referred to as "Thayer, Evidence". This work is not in the library and consequently was available for short periods only on loan from other sources. However, a

20. (cont.) considerable amount of the material in the book which was of interest appeared in (1891-92) 5 Harvard Law Review at p. 45, under the title 'The Older Modes of Trial', and at pp. 249, 295 and 357, under the title 'The Jury and Its Development', prior to being published in his Evidence. Accordingly, I have used these articles in various parts of the paper. The first will be referred to as "Thayer, 'Modes'", the latter as "Thayer, 'Jury'".

21. John Henry Wigmore, A Treatise on the Anglo-American System of Evidence in Trials At Common Law (3rd edn., 1940), hereinafter referred to as "Wigmore", followed by the volume number in lower case roman numerals, then by the section number, and by the page reference.

22. See, e.g. Bertrand Russell, History of Western Philosophy (1946), C. 15.

PART I

CHAPTER TWO: THE MEDIEVAL WORLD VIEW

It is not without reason that one can speak of "the gulf between the medieval world and the modern".[1] As a unified system of thought, and of institutions reflecting that thought, the age was remarkable. Holdsworth sees this as the distinguishing characteristic of the time; "it was dominated by a unique set of intellectual ideas."[2] The integration of intellectual and institutional activity with the dominant value of the time was so complete that it is only with difficulty that various aspects of the period can be separated for purposes of discussion.

To us, one of the most striking features of that age is the unmistakeable impression it gives of a period, which was conceived by the people of the time, to be somehow abstracted and safe from the passage of time, static and immovable, a kind of millenium. The Christian religion - the basic social institution of the time, articulated this view to the full. The social system was regarded as an unalterable natural phenomenon.[3] "Many among the leading political principles of the Middle Ages are in essence nothing else than a particular interpretation of fundamental Christian ideas."[4]

These 'fundamental Christian ideas' enshrined the basic values of the system. They were not regarded by medieval minds as being constructed by man, but "as the divinely revealed substratum of all human science"[5]. Like the ideas of any religion, the basic values of Christianity point to what lies beyond this vale of tears. The Middle Ages were the great ages of faith and of the paramountcy of religious thought. The disciplines that we know today as economics, politics, law and the like were the handmaids of theology[6]. Medieval thought was characterized by a world-view that saw the entire universe as one articulated whole. This found expression in the theocratic and spiritualistic concept of the medieval 'God-state'[7] that comphrehended the heavens and the earth[8]. The whole culture was prevaded by the notion of a "divinely instituted harmony which prevades the universal whole and every part thereof."[9] A well known passage expresses the medieval world view in summary form:

> To every being is assigned its place in that whole, and to every link between Beings corresponds a divine decree. But since the world is one organism, animated by one Spirit, fashioned by One Ordinance, the self-same principles...appear in the structure of its every part....every particular Being...is a diminished copy of the world; it is a microcosmies...in which the macrocosmos is mirrored. In the fullest measure this is true of every human individual, but it holds good also of every human community and of human society in general. Thus the Theory of Human Society must accept the divinely created organization of the universe as a prototype of the first principles which govern the construction of human communities[10].

The culture inspired by this view has been called a theocracy,[11] a 'God-State'[12], a 'Christian Commonwealth' fundamentally dependent on religious faith,[13] and a 'Christian community', controlled throughout by Christian principle.[14]

It was from the expression of this value that the culture derived its unity and coherence. Consider the following passage;

> Its major principle or value was God, the true reality value. All the important sectors of medieval culture articulated this fundamental principle - value as formulated in the Christian Credo....Its architecture and sculpture were the 'Bible in Stone'. Its literature, again, was religious and Christian through and through. Its painting articulated the same Bible in line and color. Its music was almost exclusively religious....Its philosophy was almost identical with religion and theology and was centered around the same basic value - principle: God. Its science was a mere handmaid of Christian religion. Its ethics and law were but an elaboration of the absolute commandments of Christian ethics. Its political organization, its spiritual and secular powers, were predominantly theocratic and based upon God and religion. Its family, as a sacred religious union, was indissoluable and articulated the same fundamental value. Even its economic organization was controlled by a religion prohibiting many forms of economic relationships, otherwise expedient and profitable, and stimulating many forms of economic activity, otherwise inexpedient from a purely utilitarian standpoint. Its dominant mores, ways of life, and mentality stressed the union with God as the only supreme end, and a negative or indifferent attitude toward this sensory world, with all its wealth, pleasures and values. The sensory world was considered a mere temporary 'City of Man' in which a Christian was but a pilgrim aspiring to reach the eternal City

> of God and seeking to render himself worthy to enter it. In brief, the integrated part of medieval culture was not a conglomeration of various cultural objects, phenomena and values, but a unified system....[15]

In this climate of belief, there was little room for clearly distinct concepts of the law, the state and the church. Gierke said of this:

> Throughout the whole Middle Age there reigned, almost without condition or qualification, the notion that the One-ness and universality of the Church must manifest itself in a unity of law, constitution and supreme government; and also the notion that by rights the whole of mankind belongs to the Ecclesiastical Society that was thus constituted. Therefore it is quite common to see the Church conceived as a state.[16]

Figgis is even more direct: "in the Middle Ages the Church was not a state, it was the state; the state, or rather the Civil authority (for a separate authority was not recognised), was merely the police department of the church."[17]

The civil power and the religious power were the two governments of a single society, but there was only "one really universal order in Christendom, and its right name was the church"[18]. Accordingly one cannot speak of the state in any modern sense of the term, except, of course, insofar as the Church was so conceived. Indeed Gierke tells us that there was not even a separate philosophy of the state until the 13th Century,[19] and its appearance and rise not surprisingly

was contemporaneous with the beginnings of the decline of the medieval system.[20] The powers of the medieval church were not merely theoretical: "papal supremacy was real. Clerical immunities, and appeals to Rome and the authority of the Canon law made the power of Edward I or Phillip the Fair far less universal than that of even a weak modern state".[21] Religion, from its position of transcendence, bestowed upon political authority whatever limited justification the latter possessed.[22]

The holy and timeless view characteristic of the medieval period is perhaps most manifest in its concept of law; Holdsworth says the whole period was "dominated by the conception of the rule of some kind of law."[23] Its fundamental idea was of a uniform single state existing on a Christian basis, "with a place for bishops no less than Counts, and orthodoxy a condition of citizenship".[24] Christianity in theory extended to all mankind; it was a single, universal community, ordained and Governed by God, directed to one purpose and requiring, therefor, one law.[25] The idea that law was a fundamental natural standard of legal right was a basic tenet of the age.[26] Human welfare and even religion itself were conceived under the form of legality.[27] Law did not depend on the state for its existence;[28] it stood above the whole community of mortals, universal, eternal; the discovered or revealed wisdom of the mind of God.[29] Of this law, of course, the Church was guardian and exponent.[30]

It is difficult to overemphasise the importance of the religious basis of the medieval legal systems. The age strained every activity into the service of a single idea, the fulfillment of the Divine plan. Tawney quotes from the Summa Theologica: "The perfect happiness of man cannot be other than the vision of the divine essence"[31] to give us what he considers the characteristic thought of the age. It is a synthesis which makes the worth of the whole of material and spiritual life depend upon how it relates to this value.[32]

Compare with this supernatural outlook the naturalistic view of John Locke, well into the 'modern' period: 'The great and chief end of men uniting into commonwealths and putting themselves under government is the preservation of property'.[33]

There is a vast difference between these two opinions. The social, political, legal and economic organization of the Middle Ages found its sanction in the supernatural commission of religion. Its outlook is wider, more encompassing; human affairs are only a part of a much larger whole. The whole of the spirit is as real as the world of the senses, and it is far more important. Medieval society comphrehended the heavens and the earth, the living and the departed. In the characteristic thought of the medieval systhesis, the world of the flesh and that of the spirit were not divided absolutely, but

appear instead as differences within a larger unity. They are degrees of the same reality.[34] Our own time sees human, and not religious, affairs at the centre of events, and our explanations of our reality vary accordingly. Tawney says "not the least fundamental of divisions among theories of society is between those which regard the world of human affairs as self-contained, and those which appeal to a supernatural criterion."[35]

It is generally agreed that the medieval synthesis reached the peak of its extension in the late 12th or early 13th centuries.[36] Just as shadows begin to lenghten,just as the sun passes its height, however, contemporaneously, the seeds of a new notion began to take root, and "the old system began internally to dissolve."[37] As the basic idea-value that gave the medieval system its unity slowly waned, the strength of the new value as steadily waxed until it burst the medieval shell. What is important for our purposes, however, is not so much the genesis and growth of this new idea, as it is the effect its emergence as the dominant idea-value of our culture has had on the development of the legal system.

We can note in passing that while today we do not consider the basis for the theory of the middle ages to be serviceable, and we may in fact find them incredible, we must not be so blinded by the gulf that separates the two ages that we are deprived of all sympathy for

the age and its achievements. The ideas that found expression in the middle ages quickened a flourishing culture, extended it, and sustained it for centuries in relative stability.

Our present legal system, like our present culture, owes more to utility than to legality. The contrast between it and the classical medieval legal system is as sharp as possible. At its basis is the belief in the basic notion of empiricism: that the truth about disputed propositions of fact is found through the investigation of, and inference from, other, non-disputed propositions of fact.[38] Empiricism itself, of course, depends upon a belief in the general proposition, not for mention in this paper save as an assumption, that the true reality is that of the senses, and that our knowledge is consequently a product of our interpretation of that reality. That is the most basic and characteristic belief of our age. Sorokin expressed it thus:

> ...at the end of the 12th century,...there emerged the germ of a new-and profoundly different-major principle, namely, <u>that the true reality and value is sensory</u>. Only what we see, hear, smell, touch or otherwise precieve through our sense organs is real and has value. Beyond such a sensory reality, either there is nothing, or, if there is something, we cannot sense it; therefore it is equivalent to the non-real and the non-existent.[39]

I want to consider the effect of the adoption of this basic premise of our legal system in the formal area in which our law is

conceived, that is, jurisprudence, and in some specific areas in which the theory of the working law is developed, that is, the realm of evidence. Pressures of time have forced me to rely, in the latter case, almost entirely on secondary sources. Most of it consists, accordingly, of a reinterpretation of the accounts of others. I have endeavoured to rely on the standard historical accounts of the relevant areas.

In the second part of the paper, I will develop the line of argument commenced in the first part, relying on more traditional methods and materials.

PART I

CHAPTER TWO: NOTES

1. J. N. Figgis, From Gerson to Grotius (2nd edn., 1916), at pp. 4, see also pp. 23-29, (hereinafter referred to as 'Figgis')

2. H.E.L., supra, fn. 18, c. 1, ii, p. 127

3. Tawney, supra, fn. 17, c. 1, pp. 56-65

4. A. P. D'Entreves, The Medieval Contribution To Political Thought, (1939), at p. 8, hereinafter referred to as 'D'Entreves'

5. O. von Gierke, Political Theories of the Middle Age (transl. F. W. Maitland, with an introduction by F. W. Maitland, 1959), at p. 2, hereinafter referred to as 'Gierke'; see also H.E.L., ii, p. 130

6. J. N. Figgis, The Divine Right of Kings (at p. 257; Ernest Barker,'Medieval Political Thought' in The Social and Political Ideas of Some of The Great Medieval Thinkers (ed. F.J.C. Hearnshaw, 1923, repr. 1967), at p. 15, hereinafter referred to as 'Barker'; H.E.L., ii, p. 130

7. see Gierke, p. 8 The phrase is his.

8. Gierke, p. 8; 'Barker', pp. 13, 32

9. Gierke, p. 8; see also 'Barker', at p. 32: "A single universal society which mirrored the harmony of heaven."

10. Gierke, p. 8 (emphasis in text)

11. Gierke, p. 7; 'Barker', p. 15

12. Gierke, p. 8

13. J. B. Morrall, Political Thought in Medieval Times (1958), at p. 10, hereinafter referred to as 'Morrall'; Tawney, pp 19-20

PART I

CHAPTER TWO: NOTES

14. 'Barker', p. 12

15. Petirim A. Sorokin, The Crisis of Our Age: The Social and Cultural Outlook (1941, 1945-9th printing), hereinafter referred to as 'Sorokin, Crisis', at pp. 17-19. This book is a more easily readable abstract from the author's Social and Cultural Dynamics (1941, repr. 1962), a large work in four volumes. Sorokins views on the unity of medieval culture appear in the context of an elaborate theory of rythmic shifts in basic culture values, which is related to an explanation of the meaning and direction of our present (i.e. modern European) culture.

16. Gierke, pp.18-19.

17. Figgis, p. 5; see similarly, Barker, pp. 13-14, 15, 23; H.E.L. ii, p. 128; Morrall, p. 28.

18. Figgis, p. 18; see also pp. 29-30; see Tawney, pp. 18-19

19. Gierke, p. 1

20. Ewart Lewis, Medieval Political Ideas (1954), vol. i, introduction, p. X; 'Barker', pp. 29-32; Gierke, p. 87

21. Figgis, p. 29-30; see similarly, Gierke, pp. 10-22, 104-109

22. Morrall, p. 10

23. H.E.L., ii, p. 127

24. Figgis, pp. 11-12; see also p. 20

25. Gierke, p. 10

26. Gierke, p. 2; Ewart Lewis, Medieval Political Ideas, supra, fn. 20, at p. 15

PART I

CHAPTER TWO: NOTES

27. Figgis, pp. 17, 18, 19

28. Gierke, pp. 74, 85

29. Gierke, pp. 74-76

30. 'Barker', p. 19; Gierke, pp. 18-19

31. Tawney, p. 19

32. See Tawney, pp. 19-21

33. J. Locke, Two Treatises of Government, book ii, Chapter IX, s. 124, cited Tawney, p. 6; see also pp. 179, 189

34. See, e.g. Gierke, p. 8; Tawney, pp. 6-7, 20

35. Tawney, p. 7

36. See, e.g. Gierke, pp. 1, 4-10; 'Barker', pp. 11-12, 23, 29-32; Sorokin, Crisis, p. 19; Ewart Lewis, Medieval Political Ideas, supra, fn. 20, introduction, p. X.

37. Gierke, p. 4; see also Sorokin, Crisis, pp. 19-20

38. See, e.g. John Henry Wigmore, The Science of Judicial Proof (3rd edn. 1937) at pp. 25-27, hereinafter referred to as "Wigmore, Proof"; see also Bertrand Russell, Human Knowledge: Its Scope and Limits (1948), at p. 516 H. hereinafter referred to as 'Russell, Human Knowledge'

39. Sorokin, Crisis, pp. 19-20

PART I

CHAPTER THREE: THE JURY

PART I - The Growth of the Jury

The distorting influence of the linear account of legal history is clearly evident in the standard accounts of the growth and nature of trial by jury. There is a sense in which this method of trial has been with us since the introduction of the jury by the Norman kings[1] but there are also sound reasons, as we shall see, for another view. The linear account classifies and characterizes data in emotive language which overemphasizes a belief in present methods. Comments throughout the orthodox accounts of the development of the jury indicate the predominance of the view that the present state of the jury represents an 'arrival' at the end of a lengthy road.[2]

A summary of the standard accounts of the development of the jury can begin conveniently by noting that in 'modern' times, we understand by the word 'trial' "a process of reasoning from evidence by means of which the truth as to the facts in issue is elicited"[3]. There was no such procedure in ancient law.[4] Instead, there was a variety of "primitive methods" which flourished because "a reasonable adjudication upon disputed facts would have been impossible."[5] The language of the law did not even have a word for 'trial' - "we have

not to speak of trial; we have to speak of proof"[6] - that did not come until the 14th century.[7]

The jury evolved in these times, and because of this, it "naturally long retained many marks of its ancient enviornment."[8] At this point in the accounts, the discussion usually splits into two parts; the first in which the "older methods of trial" will be discussed; the second in which trial by jury will be featured. It becomes reasonably clear that this division reflects a strong value judgement as well as an organizing technique, but I will follow it for the sake of present convenience.

We learn that, in the medieval legal system, once an issue be determined between the parties, it was the task of the Court to select the process by which proof might be made.[9] Upon the result of that proof final judgement followed as of course.[10] Usually it was the defendant or accused who went to the form of proof so prescribed, and only "sometimes" did the Court indicate that it was influenced by "rational considerations" as to the probabilities of the truth of the contentions of the parties.[11] This was not as awkward or unfair as it might sound, since the award of proof by the Court was considered a benefit, and not a burden.[12]

There were four main methods[13] for the proof of disputed matters of fact - trial by witnesses, trial by compurgation or law wager, trial

by battle and trial by ordeal.[14] For reasons that will appear below, I think trial by jury might properly be added to this list.

Trial by witnesses amounted to the proof of disputed matters of fact by the production of persons by either plaintiff or defendant to swear an oath to their belief in his version of the disputed facts.[15] These bands of witnesses, usually preappointed for the purpose of bearing witness to a particular transaction, were treated as a formal test. Their 'testimony' for want of a better term, was not weighed; instead, one looked to see whether they all told the same tale; and counted their numbers.[16] Thayer said of them: "there was no testing by cross-examination; the operative thing was the oath, and not the probative quality of what was said, or its persuasion on a judge's mind".[17] Trial by jury eventually replaced trial by witnesses, for reasons which will be considered below.

Compurgation or law wager is described by Holdsworth as follows:

> If a defendant on oath and in a set form of words will deny the charge against him, and if he can get a certain number of other persons (compurgators) to back his denials with their oaths, he will win his case. If he cannot get the required number, or they, do not swear in proper form, 'the oath bursts,' and he will lose.[18]

Originally, the compurgators swore the same oath as their principal - that he was not guilty, or did not owe the money or the like.[19] In the 12th century this changed to an oath in their belief in the truth of his assertions.[20] This neatly removed any effective possibility of punishment for perjury, and contributed in part to the decline of this remedy.[21] Its fall into desuetude was very gradual, however; it was still very much a living thing in the 14th and 15th centuries, after which its disappearance became more rapid.[22] Isolated instances of its use continued until its formal abolition in 1833.[23]

Holdsworth calls the trial by battle "the judicium Dei par excellence"[24]:

> It was not merely an appeal to physical force because it was accompanied by a belief that Providence will give victory to the right. Christianity merely transferred this appeal from the heathen deities to the God of Battles.[25]

It came to England with the Normans[26] and became one of the chief modes of trial in the kings courts.[27] It was used in a wide variety of circumstances - to prove innocence of a crime, of a right to property, to obtain payment of a debt and was even a means of settling at least the incidental questions arising out of 'international' (for want of a better term) disputes.[28] Champions came to be used

as a matter of course and were permanently retained by various institutions and persons of substance.[29] Although it remained part of the law of England until the 19th century, being finally abolished in 1819,[30] it had passed its zenith by the beginning of the 13th century.[31]

Trial by ordeal rests on the proposition that God will intervene by a miracle or similar sign to resolve the matter at issue.[32] It is a belief found almost universally among "primitive races"[33] and "barbarous people".[34] It involved the deeming of right, (and consequently the final judgement of the Court) to be on the side of the person who could (to use Holdsworth's examples) carry the hot iron, plunge his arm into boiling water, or sink when thrown into water.[35] The ordeal was abolished in England in 1219 due to the combined disapproval of Church and King,[36] but versions of it lingered for centuries.[37]

In his discussion of the methods of proof in use during the medieval period, Holdsworth draws his line here, and then moves on to consider in much greater detail the history of the development of the jury. He says of the 'older methods of proof':

> The Court was interested simply in determining which of the two parties must go through the forms of the selected proof, and in seeing that the forms were observed. The decision followed, as of course. They seem to us barbarous and unreasonable. But, for the age in which they flourished it is difficult to see that any other methods would have been possible.[38]

This account fairly bristles with questionable assumptions. It is a mark of the pervasiveness of the idea that our present methods are the only ones of any substance that the adequacy of the medieval proofs should fall to be judged by present standards even by a scholar of Holdsworth's stature. Because of this, there is a complete failure to consider the methods of our present system as a basis for proof instead of the system of proof. The pronounced stress of what he sees as the empty formalism of the medieval period can leave us only with a feeling of relief that a less enlightened age has passed, and moreover, it has the effect, as regards our system, of preventing, or at least inhibiting any appreciation of its own formalism. The notion that trial by jury is beyond further progress prevades his writing.[39]

It is far from apparent that during the medieval age "a reasonable adjudication upon disputed facts would have been impossible."[40] Again, it is attempting a great deal to write off a thousand years of Western European civilization with the epithets "barbarous", "superstitious", "primitive", and the like. "Different", for our purposes, will do as well, and we can begin a reassessment of the development and nature of the jury with this in mind.

Holdsworth chooses to fasten on the 14th Century as the time during the course of which the modern jury first emerged, because,

he says, it was during that time that "the use of the jury in connection with the central government came to be chiefly confined to judicial functions."[41] While this may be so, stating the matter thus forecloses consideration of a change in the nature of those judicial functions at different points in time. Since this is important for my argument, it is appropriate to note that the system of enquiry by jurors was introduced to England by the Norman kings[42] and that wide, although not exclusive, use was made of it in the judicial machinery from the 12th Century onwards.[43] If the modern jury is seen as dating from the 14th Century, the existence of the competing and quite different judicial institutions briefly described above compels the view that the emergence of the jury must be reckoned as peculiar and exceptional[44] in terms of prevailing ideas and methods of procedure.

There are grounds, however, which suggest that originally the jury was part and parcel of the medieval legal system, in concept and operation. The jury, as mentioned, had been playing a part in the judicial system in England since the time of the Norman Kings.[45] It was ranked side by side with the other methods of proof[46] - the whole question of guilt or innocence was submitted to the jury as to one of the older modes of proof, and the verdict was accepted as

was the result of the older modes.[47] The jury functioned for centuries without 'evidence'; that only came in as a regular feature of jury trials in the Mid-16th century.[48] It was the resemblances between the new (jury) procedure, and not the differences, which were the most striking and historically most important[49] - the jury system existed for centuries alongside the "older" forms of proof. It could not have sustained itself as it did if it were an alien form. The people for whom it operated were persons for whom the older forms of proof were living institutions.[50] These are matters not as consistent with Holdsworth's view that the jury was novel and exceptional in the Middle Ages, (although "naturally" there was a "tendency" to view the jury as a formal mode of proof), as it is with the view that it was a constituent, integrated part of the medieval legal system.

The appearance of linear development of the jury is given by the fact that the jury existed in the medieval legal system and presently exists in our own. It disappears when we consider that it is the idea or value that the jury represents, and not the bare fact of its existence, or the name by which it is known, that is significant. Unless these values are the same in both periods, comparisons are likely to be nominally correct only, and may in fact be misleading in important respects.

From our present,'modern' point of view, it is difficult to escape the inference that medieval law and procedure was a random grouping of empty rituals, or the sum of the deplorable ignorance of the time or both. This seems hardly adequate, however, to describe a period in history during which a stable civilization and its legal systems, flourished for centuries.

We can progress, I think, by considering the matter from the point of view of the dominant idea of that age, an outline of which was given in the preceding Chapter. If we think of the "older forms of proof" including the jury, to be important not in themselves, but by virtue of what they represent, the question of what they represent in common, or what they are in common can be answered thus: they are all non-evidentiary methods of proving the truth of disputed matters of fact, and they all depend ultimately on the oath to the Christian God.[51] For trial by witnesses and by compurgation this is obviously correct. When the medieval jury first makes its appearance, it was essentially a "body of neighbours summoned by some public official to give upon oath a true answer to some question."[52] "It was the jury's oath, or rather their verdict, that tried the case" when the jury trial first emerged.[53] In the trial by ordeal, proof of the truth of the oath sworn was secured by the intervention of God to strike down the false swearer and protect the truth sayer and ensure his

success.[54] Trial by battle in this sense was a form of trial by ordeal; even when a champion was used he had to swear as a witness,[55] and the combatant who was worsted was a convicted perjurer.[56]

The theory which underlay the medieval oath was much different than that which justifies its use today.[57] Our oath, when used, is a non-obligatory method of reminding the witness of a superhuman punishment, somewhere, sometime, in store for those who swear a false oath. It is calculated to put him in a frame of mind to tell the truth. By contrast, the medieval oath was an objective summoning, then and there, of the divine vengeance of the Christian God. When the witness remained unscathed, the divine judgement had pronounced him a truth teller. Pragmatically, to question the workings of the divine judgement would have been impious and possibly very dangerous. Intellectually, human questioning of an inscrutable providence would have been futile. It was the function of the court to follow the manifestations of the divine will, not to question them, and that is what happened most of the time.[58]

If the initial emergence of the jury can be considered as non-problematic in the sense that it can be assimilated to the existing notions of proof and their manifestations, it is possible to unify the methods of proof used by the medieval legal system, on grounds

other than the display of a remarkable degree of superstitious ignorance. They are considered as manifestations of the central value of the legal system, which in its way reflected the central value of the medieval culture. When we accept Aquinas' statement of the perfect happiness of man - "the vision of the divine essence"[59] - we must also accept its implication of a negative or indifferent attitude toward "the sensory world, with all its wealth, pleasures and values", noted by Sorokin.[60] That sensory world did not occupy, much less fill, the stage as it does now. In a great age of faith in God, the modes of proof were the different ways used by a non-evidentiary system to prove the truth of disputed questions of fact, just as trial by judge sitting with a jury, or by judge alone, or by arbitration, or by domestic tribunal, are some of the different ways utilized by an evidentiary system for the same purpose.

Just as our variety of methods have their different types of cases to which they typically apply, so too the medieval forms of proof had typical situations when one or the other might be more appropriate. Compurgation was generally used in cases in which the plaintiff had not much more than his word to support his claim and survived mainly in the actions of detinue and debt; at quite an early period it could

not generally be used where the Crown was a party, and it was never[61] used when trespass, deceit or forcible injury was the gist of the action.[62] Trial by witnesses had its own more or less special sphere of application.[63] Trial by battle had a wide range of potential application, but it soon ceased to be available for debt[64] and it could not be used when the Crown was the accuser.[65]

Trial by jury initially emerged as an option. It stood side by side with, and operated with, the still flourishing older methods of proof.[66] An option was obviously needed.[67] The ordeal vanished from England in 1219 as a result of the combined disapproval of Church and King.[68] Compurgation and trial by battle were closely circumscribed in their operation by opposition from the Crown. Trial by witnesses declined, it would seem, because it was too far in advance of its time, at least as far as England was concerned.[69] A degree of overlapping between the various modes of proof can be seen then just as the same thing occurs today. For example, in several important questions touching proprietary actions for land or advowson the tenant or defendant could elect to defend by battle or by a special form of jury called the grand assize.[70] However, in all of this we can see fidelity to the basic cultural value as reflected in

the medieval legal system - there is no effective concept of a right to be tried other than by a divine judgement, just as today there is no effective concept of a right to be tried other than by an appeal to the evidence.

We can see this clearly when we consider the completely inverted positions held by each legal system on the question of proof. Proof in the medieval legal system was a benefit, and not, as at present, a burden.[71] The defendant or accused generally proved his innocence, not the plaintiff his guilt. In that non-evidentiary system, proof was an opportunity of trial by the Divine will and the judgement of the Court was a determination of what form that opportunity would take, so the judgement came before the trial.[72] Human difficulties with proving a negative only arise in an empirically based system of proof, and that is why proof in our fact-based, evidentiary system has to be the burden or onus of proving the affirmative of a claim or assertion. In the medieval legal system the award of proof itself was the judgement of the Court.[73] The Court then has no desire and no need to hear conflicting testimony.[74] If the defendant makes his proof, he wins his case.[75]

This non-evidentiary point of view explains why the medieval trials "were not trials in the modern sense of the word"; were not

processes "of reasoning by means of which the truth as to the facts in issue is elicited." Nevertheless, while it is no doubt true that "rational judgement" on the facts was never more than a minor feature of the medieval legal system, it would be a mistake, at least in terms of our theory, to explain this in terms of impossibility and lack of opportunity.[76] We can say, instead, that this 'rational adjudication' did not exist precisely because the legal theory of the day conceived the adjudication (if that is the word) as super-rational, specifically, as divine. There was little factual adjudication because, according to the values that informed the sacral processes of proof, it would have been superfluous. The modes of proof did not depend on evidence for their efficacy. They were appeals to the supernatural.[77] It is to this value, and not to that of the present, that the early jury was assimilated.

Indeed, it is this very absence in the medieval legal system, of our own overriding concern for the importance of this 'rational adjudication' that can be regarded, not only as the characteristic of that system, but as its specific differentia. In a very real sense men tried their own cases; the task of the courts was to regulate disputes, not to resolve them.[78] Consider Thayer's comment:

> In these trials, there are various conceptions: the notion of a magical test...an appeal for the direct intervention of the divine justice; that of the

> application of a mere test, sometimes having a real and close relation to the probable truth of fact, sometimes little or no relation... like a child's rigmarole; that of regulating the natural appeal of mankind to a fight; that of simply abiding the appeal to chance. There was also the appeal to human testimony, given under an oath, and perhaps under the responsibility to fight for it. But what we do not yet find, or find only in its faint germs, is any trial by a court which weighs this testimony or other evidence merely in the scale of reason, and decides a litigated question as it is decided now. That thing, so obvious and necessary, was only worked out after centuries.[79]

'Evidence', in this setting would have been superrogatory and it hardly existed as a distinct concept.[80] Little use was made of oral testimony;[81] there was no process for compelling the attendance of casual witnesses;[82] volunteers were discouraged,[83] and there was no distinction between averments and the evidence to support them.[84] Wigmore tells us that the amount of information obtained by the jury through ordinary witnesses produced in court, even as late as during the 15th century, was small, and that what there was of it was "but little considered and of small importance"[85] and Pollock and Maitland say that "on the whole, trial by jury must have been in the main a trial by general repute."[86]

It would appear, moreover, that the option of jury trial, far from being a welcome advance, was long regarded as an unwholesome abberation, at least to the extent that it left the channels of the

more overtly sacral forms of proof and entered into the realm of 'evidence'.

Jury trial was an alternative that operated by consent,[87] the strict right of the parties being tried by compurgation, ordeal, or battle.[88] From the overt political nature of much of its history, it is not difficult to understand why, initially, not many people were prepared to consent to it.[89] Holdsworth shows that a trial by witnesses[90] was shunned by the medieval legal system to the point where it was a matter of principle that "no one is to be convicted of a capital crime by testimony."[91] Pollock and Maitland say of these words that they "represent a strong feeling; mere human testimony is not enough to send a man to the gallows."[92] 'Public opinion' to use Holdsworth's phrase, was against the introduction of this form of trial[93] and it was this deep rooted distrust of trial by jury that gave rise to the refusal to use direct compulsion to force an accused to submit a question of guilt or innocence to a jury.[94] Instead, the indirect persuasion of the peine fort et dure, even to the point of pressing to death, or until 'consent' be extorted, was used. This "senseless barbarity" was part of the law of England until 1772.[95]

Holdsworth attributes the growth of the remedy to the fact that it was one of the chief instrumentalities of an expanding royal power in the 11th and 12th centuries, but even that force was insufficient to secure the establishment of trial by jury as a matter

of compulsion. The aversion with which it was regarded is shown by the fact that there are only two recorded instances where a jury was empanelled to try a man without his consent.[96] It was "too serious a break with tradition to punish a man capitally who, without his consent, had been allowed no chance of proving his innocence by any of the world-old sacral processes."[97] An attempt to impose it by force in the 13th century, we are told, might have meant its extinction.[98] The forms of proof had a firm hold on the age. Even though empanelling a jury to try a man without his consent was the "obvious answer", it was not to come for five hundred years.[99] As late as the end of the 13th century trial by jury was still extremely unpopular.[100] Thayer speaks of "the extraordinary nature of the actual achievement" in seeing it established[101] and Holdsworth says:

> The author of the 'Mirror of Justices' was in some ways a fair representative of the average conservative opinion of the day. He considered it 'an abuse' that men were driven by the judges to put themselves on their country, when they had offered to defend themselves with their bodies.[102]

"The day" was the first quarter of the 14th century.

When these attitudes are considered in conjunction with the oppressive methods used to control and punish the jury;[103] the details of the corrupt packing of Juries;[104] of the ruinous delays

and of the bribing and terrorizing of jurors,[105] the reluctance of public opinion seems merely prudent. Indeed, it seems little short of grotesque to describe it, as does Holdsworth, as "retrogressive and conservative" because it did not favour this alternative form of proof.

PART II - The Survival of the Jury

Nevertheless, it is clear that the jury did survive to become the characteristic institution of English law. Holdsworth indicates that the decline of the old forms of proof, which on his reckoning, excludes the jury, gave rise to a need "to find some new means of determining the guilt or innocence of a suspected person."[106] The petty jury accordingly arose to meet this need; the older forms of proof were "discredited."[107] We have considered the jury originally to be part of the medieval legal system in concept and in operation, however, and there seems no apparent reason why the jury in that aspect did not go the way of ordeal and compurgation. We have also seen how its development into something approaching its modern form was resisted for centuries. Holdsworth's reasons will not therefore serve for our purposes, and I will look elsewhere.

Although the jury came into the medieval legal system as an

alternative form of proof based on the same premise as its contemporaries, it displayed one crucial difference from the others: its structure was such that of all the medieval forms of proof, the jury alone could (not 'did' or 'must') provide a vehicle for what Holdsworth refers to as a "rational adjudication on disputed facts."[108] With it, says Wigmore "a system for the process of persuasion becomes possible."[109] We have noted before that the seeds of the destruction of the medieval world were sown when the system was at the height of its power and extension.[110] As basic cultural ideas over the centuries shifted from a supersensory to a sensory basis, this potential of the jury came to be of the first importance. It was the avenue that was to be decisively exploited in the development of the law as it is today.

In the law we can say that the development of the jury is connected to the development of the idea that disputes could be resolved in and by the court, rather than being merely regulated by it. From a mere possibility, that idea has become almost a definition of a modern court - disputes now must, not could, be decided by evidence offered in court. In England, the potential for development contained in the structure of the jury provided the wedge with which to split apart the concepts of proof and evidence.

The older forms of proof or of deciding the truth of disputed matters of fact spoke to an altitude that by the 16th century had spent much of its force. With the passing of its dominance, the forms of proof it had quickened declined also, surviving as anachronisms and curiousities no longer of practical value. Nevertheless, those forms and the ideas they represent, had shaped a legal system that was functional for centuries. If they seem devoid of content, mere "forms" of proof, then that is because we do not now believe in the content they had. It was radically different than that which we would now consider serviceable, and involved assumptions in which we now have little or no faith. If, by contrast, the content of our system seems more substantial and realistic, more 'rational', then that is because we do believe in the content it has and in the assumptions it makes.

It is missing a step to describe them in emotive terms behind which can be heard the unpleasant sound of self-congratulatory back slapping, and to point out their inadequacy is merely to beg the real question, which must be 'inadequate in relation to <u>what</u>?' Wigmore comes close to capturing this in the following passage:

> The contrast...between employing rational and non-rational modes of proof is after all not between the use of scientific reasoning and the employment of superstitious ordeals; it is rather between employing the best standards we know and those which

> we know are not the best. For instance, the acceptance of a judicium Dei, for the men of a certain time, was the national and appropriate process, the method accepted and employed in everyday affairs as well as in legal proceedings [111]

but he still wants to see the difference between the two ages as consisting in varying degrees of conformity to a single value or standard, instead of as a question of success in relation to the two quite different values that characterize each age. The 'forms of proof' declined because they could not cope in a satisfactory manner with the rising concern for the empirical world that transfigured our culture and threw up legal systems faithful to its own assumptions.

The modern jury emerged as the mode of proof characteristic of a new English legal system during the 16th Century. It arose during a maelstrom of political, economic and religious upheaval the like of which had not been seen in Europe for the thousand years since the fall of Rome. "Revolution" is a word commonly used to describe compendiously the various aspects of this turmoil,[112] and it does not seem inappropriate.

During that century, Western Europe was lacerated by the struggle of a new value to find expression. That value had eddied,

unintegrated with the medieval synthesis, within the culture, for centuries.[113] "We see within the medieval husk an 'antique-modern' kernel. Always waxing, it draws away all vital nutriment from the shell, and in the end that shell is broken."[114] The intellectual vehicle for this revolution was the learning of antiquity, and it struck at the very roots of medieval culture. Indeed, it fairly stood the values of that society on their head: it was "the Graeco-Roman cultural tradition in its self-appointed task of building a durable political society on purely national foundations, with an appropriate backing of force,"[115] the same values, indeed, that had been reversed by the ascendency of the medieval culture.[116] The disappearance of the transcendental position of religion, and of the dependence of the community on it, in practice, and also later, in theory, marks the end of the medieval period in Western European history.[117]

Tawney saw the character of the "new world of the 16th Century" in the outburst of economic energy in which it had been born.[118] The century saw, along with tremendous moral, political and intellectual disturbances, "the vastest economic crisis that Europe had experienced since the fall of Rome."[119] His summary of the 'economic sensations' of the 16th Century is worth quoting at length, because

it is nothing less than a catalogue of the specific ways in which medieval society was rent asunder and destroyed, seen from an economic point of view:

> ...it saw a swift increase in wealth and an impressive expansion of trade, a concentration of financial power on a scale unknown before, the rise amid fierce social convulsions, of new classes and the depression of old, the triumph of a new culture and system of ideas amid struggles not less bitter.
>
> It was an age of economic, not less that of political, sensations....The decline of Venice and of the south German cities which had distributed the products that Venice imported, and which henceforward must either be marooned far from the new trade routes or break out to the sea, as some of them did, by way of the low countries; the new economic imperialism of Portugal and Spain; the outburst of capitalist enterprise in mining and textiles; the rise of commercial companies, no longer local but international, and based, not merely on exclusive privileges, but on the power of massed capital to drive from the field all feebler competitors; a revolution in prices which shattered all customary relationships; the collapse of medieval rural society in a nightmare of peasants' wars; the subjection of the collegiate industrial organization of the Middle Ages to a new money power; the triumph of the State, and its conquest, in great parts of Europe, of the Church - all were crowded into less than two generations....In...three quarters of a century, the whole framework of European civilization had been transformed.[120]

It does not require much imagination to consider the vast distance between the outlook that underlay and made possible these catastrophic events, and the attitude that says: "The perfect happiness of man cannot be other than the vision of the divine essence."

It is the difference between the mountain and the valley; between the world of the spirit and that of the flesh. In medieval times the cares of the material world were clearly subordinated to the problem of salvation, which was the real business of life; the economic and materialistic currents that characterize our time were then a highly suspect branch of personal morality.[121] Religion, the transcendental foundation of the medieval culture, began a journey that would see it relegated to the status of a relatively unimportant compartment of the new culture, one among many. It has no preceived vital connection with the more important matters manipulated by a nascent temporal power, which is dominated more and more, as time passes, with the idea of human affairs as entirely self contained, ruled by men and considerations of expediency rather than by revelation and authority.[122]

If we overlook this great intellectual gulf between the two ages, however, we display so strong a belief in the substance of an evidentiary system as the only correct method that we foreclose the possibility of considering it in its formal aspect as a method which is consistent with our views on what constitutes the true substance of reality. It does not follow from the fact that our present system grew slowly over a period of hundreds of years that its content grew or evolved out of the concepts of the medieval system. Some of the

vehicles of the medieval legal system were adopted, but their medieval content was emptied, and they became fundamentally different in their function and meaning.

The jury was a case in point. In their ultimate relation to their respective legal systems, the jury that was part of the medieval legal system, and our 'modern' jury are alike only in name. In the words of Pollock and Maitland, "there was real change, but there was formal permanence."[123] The jury functioned as a non-evidentiary form of proof in the former system, and it functions as an evidentiary form of proof in our own, but in neither case was it, or is it, any more than an option. In the medieval system, the choice at various times was between compurgation, ordeal, battle, witnesses or jury. In the present system it is between jury and judge, by whatever name the judge be called. In the medieval system the forms of proof were founded on the sacred oath, and there was no effective choice other than to be tried by the will of God. In the present system, the forms of proof are founded on 'evidence' and there is no effective choice other than to be judged by its weight. These are the basic characteristics of the respective systems, their substances, and they are indelibly stamped on the forms of proof peculiar to each.

The jury was potentially adaptable, and therefore suitable,

if not necessary, to both systems, but there is no link, other than that of narrative and name, between the two types. To speak of one evolving out of the other is somewhat like talking of an apple growing out of an orange. The jury survived the decline of the medieval legal system because there was a potential division between the function of witness (giving 'evidence' as to 'facts') and that of juror (drawing 'inferences' on the way to 'proof'). That division was developed because it corresponded to an early, but crude and empirically inaccurate, formal division between fact and opinion. (We shall see later the important role this division has played in shaping the modern law of evidence)

The jury is simply a method of deciding the truth of disputed questions of fact by reference to a human agency, and in that sense it is essentially and substantively, as regards basic assumptions, no different than the methods in use for the same purpose in other legal systems of the present day. Our views on its worth are mainly emotive political opinions that have more to do with the traditional isolation of England and the peculiarities attendant on that fact, than with anything else. "What is peculiar to England is not the dissatisfaction with waged 'laws' and supernatural probations, nor the adoption of an 'inquisition' or'inquest' as the core of the new

procedure, but the form that the inquest takes, or rather retains."[124] The account given by Pollock and Maitland[125] of the difficulties and competition trial by jury faced from the canonical inquisition, which rapidly forced its way into the temporal courts - "we may almost say that the common law of Western Europe adopted it"[126] - can leave us in little doubt that it was not the inherent superiority of the jury system, but rather, a combination of religious orthodoxy and inertia, that led to its eventual success. Some of Maitland's words from his famous introduction to Gierke may be an appropriate way to end this rather extended discussion:

> Englishmen in particular should sometimes give themselves this warning, and not only for the sake of the Middle Ages. Fortunate in littleness and insularity, England could soon exhibit as a difference in kind what elsewhere was a difference in degree.[127]

PART I

CHAPTER THREE: NOTES

1. H.E.L., i, p. 313; Thayer, "Modes", p. 45

2. See, e.g. H.E.L., i, pp. 299, 304, 347-350; Thayer, "Modes", pp. 46, 64, 66; Wigmore, i, s. 8, pp. 240, 241

3. H.E.L. i, p. 299

4. ibid

5. ibid

6. P. and M., ii, p. 598

7. H.E.L., i, p. 299

8. ibid, p. 298

9. ibid, pp. 298, 301

10. ibid, p. 301

11. ibid

12. ibid, p. 302

13. see P. and M., ii, pp. 639-640 for some "miscellaneous proofs"

14. H.E.L. i, p. 301; Thayer, "Modes", p. 47

15. H.E.L., i, p. 302; P. and M., ii, pp. 601, 637-639; Thayer, "Modes", pp. 51-57

16. H.E.L. pp. 302, 303

17. Thayer, "Modes", p. 51; see also H.E.L., i, p. 302; P. and M., ii, pp. 637-639

PART I

CHAPTER THREE: NOTES

18. H.E.L., i, p. 305; see also P. and M., ii, p. 601; Thayer, "Modes", pp. 57-63

19. Thayer, "Modes", p. 58; H.E.L., i, p. 305

20. H.E.L., i, p. 305; Thayer, "Modes", p. 58

21. H.E.L., i, p. 306

22. See e.g., H.E.L., p. 306-308; Thayer, "Modes", p. 61-63, Wigmore, i, s. 9, pp. 290-291

23. fn. 22, supra

24. H.E.L., i, p. 308; see also, generally,Thayer, "Modes", pp. 65-70

25. H.E.L., i, p. 308

26. Thayer, "Modes", p. 65

27. ibid, p. 66

28. See H.E.L., i, 308-309; Thayer, "Modes", p. 66

29. H.E.L., i, p. 309

30. H.E.L., i, p. 310; Thayer, "Modes", pp. 69-70; Wigmore, i, s. 9, p. 291

31. H.E.L., i, p. 310; Thayer, "Modes", p. 69

32. H.E.L., i, p. 310; see Thayer, "Modes", pp.63-65

33. H.E.L. p. 310

34. Thayer, "Modes", p. 64

35. H.E.L., i, p. 310; see also, on this, Thayer, Evidence, pp. 34-39

36. H.E.L., i, p. 311; Thayer, "Modes", p. 64

PART I

CHAPTER THREE: NOTES

37. Wigmore, i, s. 9, pp. 291-292

38. H.E.L., i, p. 311

39. See, e.g. H.E.L., i, pp. 299, 304, 347

40. fn. 5, supra.

41. H.E.L., i, p. 314

42. H.E.L., i, p. 313; P. and M., i, pp.139, 143; Thayer, "Modes", p. 45

43. H.E.L., i, 314, 327-330; P. and M., i, 139, 143, 149

44. See e.g., H.E.L., i, p. 314

45. H.E.L., i, 314, 327-330; P. and M., i, 139, 141; Thayer, "Modes", p. 45

46. H.E.L., i, 331; P. and M., ii, p. 627; Thayer, "Modes", p. 47; Wigmore, i, s. 8, p. 235

47. H.E.L., i, p. 317, 318; iii, p. 616; IX, p. 181; P. and M., ii. p. 627, 658, 659

48. H.E.L., i, p. 304, 334, 335; iii, p. 648; V, p. 419, 420; IX, p. 127; Thayer, "Jury", p. 358 et. seq.

49. See, e.g. H.E.L., iii, p. 615; Thayer, "Jury", p. 361

50. See H.E.L., iii, p. 616, and see f.note 63, infra.

51. See P. and M., ii, pp. 599-600; Wigmore, i, s. 8, p. 235; James B. Thayer, 'Law and Fact in Jury Trials' (1890), 4 Harv. L. Rev. 147 at p. 157, hereinafter referred to as "Thayer, 'Law and Fact'"

PART I

CHAPTER THREE: NOTES

52. P. and M., i, p. 138

53. Thayer, "Law and Fact", p. 157. See also, similarly H.E.L., i, p. 312; Thayer, Modes, p. 45

54. See Wigmore, vi, s. 1815, 1816, pp. 283-286 for an account of the history and theory of the oath; see also H.E.L., ix, p. 189

55. H.E.L., i, p. 309; P. and M., ii, p. 604

56. P. and M., ii, p. 600

57. see fn. 54, supra

58. See H.E.L., i, pp. 311, 317

59. Supra, Chapter 2, p. 23

60. Supra, Chapter 2, p. 20

61. on trespass, see P. and M., ii, p. 635, contra

62. H.E.L., i, p. 307; P. and M., ii, pp. 634, 635; Thayer, "Modes", pp. 58-60

63. H.E.L., i, p. 304, notes 3, 6, 8, 9, 10; P. and M., ii, pp. 637-639; Thayer, "Modes", p. 53. It should be noted that during the 13th Century this method of proof was a serious rival of trial by jury. (H.E.L., i, 303-304; P. and M., ii, 637-639). It is significant that Holdsworth sees as a reason for its decline the fact that it was coming to be rationalized into an inquisitional method requiring the weighing of evidence (H.E.L., i, 303-304). The method of proof that replaced it was trial by jury; because the jury did away with this need; (H.E.L., i, 303-304, 312) because "what jurors or recognitors of our twelfth century deliver is no judgement; they come to recognise, to declare the truth; their duty is no judica facere but recognosore ulritatem"

PART I

CHAPTER THREE: NOTES

63(cont.). (P. and M., i, p. 140; H.E.L., ibid, see also P. and M., ii, p. 638, where the authors assign no reason for the decline of this form of proof; and see Thayer, Treatise, p. 184: "to say what the fact was, and the phrase for this matter was rei veritatis"). The implication is that trial by witnesses grew ahead of its time, and failed because it began to rely on evidence and the quality of evidence. The jury replaced it because it was an analogous body, but closer to the prevailing modes of proof and ideas of the time than was the developing trial by witnesses.

64. P. and M., ii, 633; H.E.L., i, p. 308, note 11.

65. H.E.L., i, p. 323

66. H.E.L., i, p. 331

67. H.E.L., i, pp. 323-324

68. H.E.L., i, p. 311; P. and M., ii, pp. 617-620

69. see fn. 63, supra.

70. H.E.L., i, 327-328; P. and M., i, 147-149; Thayer "Modes", p. 65

71. H.E.L., i, 299, 302; ix, 133; P. and M., ii, pp. 602-603

72. H.E.L., ii, p. 106; ix, 133; Thayer, "Modes", p. 47

73. P. and M., ii, p. 602

74. ibid

75. ibid

76. see e.g., H.E.L., i, p. 299; ix, p. 130

77. P. and M., ii, p. 598, 600; Wigmore, i, s. 8, p. 235

PART I

CHAPTER THREE: NOTES

78. Thayer, "Law and Fact", p. 157; Thayer, "Modes", p. 47; Thayer, "Jury", p. 256.

79. Thayer, "Modes", p. 47 (emphasis added)

80. H.E.L., iii, p. 635; ix, p. 131; Wigmore, i, s. 8, p. 235

81. H.E.L., i, 334; iii, 648; v, 419; ix, 127; generally, Thayer, "Jury", pp. 312-319 passim

82. H.E.L., i, 335; ix, 197-203; Thayer, "Jury", p. 318

83. H.E.L., i, 334, 335; Thayer, "Jury", pp. 358, 361

84. H.E.L., iii, p. 635, 638, 639, 650; ix, p. 131; Thayer, "Jury", p. 317

85. Wigmore, v, s. 1364, p. 12; see also Thayer, "Jury", p. 360 et seq.

86. P. and M., ii, p. 655; see also Thayer, "Jury", p. 360 et seq.

87. H.E.L., i, p. 326, 328, 330; P. and M., i, p. 149, ii, pp. 618-619, 623; Thayer, "Jury", p. 317

88. H.E.L., i, pp. 326, 328, 330

89. H.E.L., i, pp. 316-321, 326-327

90. A conviction by jury was regarded as a conviction by witnesses: H.E.L., ix, p. 179; fn. 7, P. and M., ii, p. 650; Thayer, "Jury", p. 360

91. "Et nemo de capitalilous placitis testimonio convincatier", Leges Henrici, 31, s. 5, cited P. and M., ii, p. 650, and n. 2. Holdsworth says: "The first of these principles was that no one ought to be convicted of a capital crime by mere testimony" (H.E.L., ix, p. 179)

PART I

CHAPTER THREE: NOTES

92. P. and M., ii, p. 650

93. H.E.L., i, pp.326-327

94. H.E.L., IX, p. 179; P. and M., ii, pp. 650, 651

95. H.E.L., i, p. 327; IX, p. 179; P. and M., ii, pp. 650-652; Thayer, "Jury", pp. 265-273

96. see P. and M., ii, p. 651

97. P. and M., ii, p. 650

98. P. and M., ii, p. 657

99. H.E.L., i, p. 326; IX, p. 180; Thayer, "Jury", p. 271

100. H.E.L., i, pp. 326-327

101. Thayer, "Jury", p. 256

102. H.E.L., i, pp. 326-327; see also Thayer, "Jury", pp. 255-57, 364 et seq.

103. see, e.g. H.E.L., i, 337-347

104. see, e.g. H.E.L., i, p. 343; Thayer, "Jury", pp. 372-373

105. see, e.g. H.E.L., i, p. 343; Thayer, "Jury", pp. 372-375

106. H.E.L., i, pp. 323-324

107. H.E.L., i, p. 323

108. H.E.L., i, p. 299; ix, p. 163

109. Wigmore, i, s. 8, p. 235

110. see Chapter two, p. 25, supra

PART I

CHAPTER THREE: NOTES

111. Wigmore, i, s. 9, p. 292 (emphasis in text)

112. see, e.g. D'Entreves, p. 6: "the great spiritual revolutions"; Figgis, p. 16: "a revolution in political thought"; "as yet unended" (p. 39); Tawney, p. 66: "a religious revolution"

113. see Ch. two, p. 25, supra

114. Gierke, p. 4; see also Morrall, p. 9

115. Morrall, p. 9

116. ibid

117. ibid

118. Tawney, p. 69

119. ibid, p. 66

120. Tawney, pp. 69-70

121. see Tawney, pp. 31-33 for a good presentation of this view.

122. Figgis, pp. 16, 17, 39; see Tawney, Ch. I - 'The Medieval Background', passim.

123. P. and M., ii, p. 641

124. P. and M., ii, p. 604

125. P. and M., ii, pp. 655-661

126. P. and M., ii, p. 657

127. Gierke, introduction, pp. ix-x

PART I

CHAPTER FOUR: THE NOTION OF 'EVIDENCE'

The revolution which "transformed the whole framework of European civilization" in two generations also transformed the legal systems that flourished in it. The 16th Century saw the emergence into dominance of the new value that had broken the unity of the medieval synthesis, and in the legal system this manifests itself in the pronounced and decisive shift of the legal system from a non-evidentiary, to an evidentiary basis. It made a system of evidence necessary where before it had not even been possible.[1]

A legal system, like any other cultural subsystem, is circumscribed in its growth, development and extension by the same considerations which limit the extension of the ideas which underlay the culture supporting it. By what I have called the basic value, or idea-value, or main principle, of the legal system I mean its substance, its gist, the thing that at once forms the ultimate basis of comparison with, or differentiation from, other legal systems, and which makes it a compatible component of the cultural system in which it functions. It is the identity of the system. The system has extension, but there are limits to the changes an idea can

undergo; after a point it becomes recognizably something other than it was. What I mean in the present context is that there is a fundamental level at which a legal system must be faithful to, and consistent with, the basic view of the culture of which it forms a part, in order that we can say "it is a legal system of that culture."

Fidelity to a superrational form of proof requires and presupposes a basic underlying belief in a supernatural agency, the workings of which are beyond human understanding. We have seen that this outlook was characteristic of Western Europe during the medieval period. In these conditions of belief, questions of what we call 'evidence', insofar as they are distinct at all, are telescoped into the concept of proof. The law did not even have in its vocabulary a word for 'trial' until the 14th Century.[2] The judgement of the court came before the trial, in the form of an award of proof. The trial was essentially between private parties and their God. Evidence, on any reckoning, is only food for a conclusion on what it was, in thought or deed, that actually happened. In medieval theory, God as Arbiter knew this perfectly already; the trial is only the manifestation of His will, that imperfect men may know it as well. That is why, for example, the worsted champion is a convicted perjurer.[3] A belief in the ideas that underlay these forms of proof would make our present forms of proof seem as empty of true content as those

of the Middle Ages now seem to us.

The shift of the legal system onto a factual or empirical basis for determining the truth of disputed propositions of fact had two effects that concern us here. We have seen that it introduces the notion that the court can resolve, as well as regulate, disputes. That is, it removed the power of decision firmly into human hands. In this commonplace, we have the ingredients for splitting proof into its two components, evidence (fact) and conclusion (inference) that is found in our present system of proof. This in its turn introduces the theoretical possibility that men can 'rationally' (i.e.by evidence) influence a decision one way or the other. As Wigmore put it: "a system for the process of persuasion becomes possible."[4] It is this possibility that makes the rules of evidence necessary.[5]

The rules of evidence are not the 'processes of reasoning'. The law provides no test of relevancy. Rather, it is assumed that the reception of anything irrelevant, not rationally probative, is forbidden. Not everything so probative, however, is admissible.[6] To use Thayer's expression of this:

> ...two leading principles should be brought into conspicuous relief, (1) that nothing is to be received which is not logically probative of some matter requiring to be proved; and (2) that everything that is thus probative should come in, unless a clear ground of policy or law excludes it.[7]

These two 'Axioms'[8] underlie the whole structure of the modern law of evidence. Wigmore tells us that the first axiom prescribes "merely that whatever is presented as evidence shall be presented on the hypothesis that it is calculated, according to the prevailing standards of reasoning, to effect rational persuasion".[9] The second "expresses the truth that legal proof, though it has peculiar rules of its own, does not intend to vary without cause from what is generally accepted in the rational processes of life; and that of such variations some indication may, in theory, always be demanded."[10]

It can be seen from this that the characteristic function of our rules of evidence is to exclude material that is already deemed to be relevant. Not every relevant matter of fact is 'evidence'.[11] Thayer says that "it is the characteristic of these rules to shut out what is relevant; not all that is relevant,...but some things that are relevant, and notwithstanding they are relevant."[12] The rules of evidence "in their ultimate relation" are exceptions to a general rule in favour of the admissibility of all evidence that is rationally probative.[13]

Evidence, itself, is always offered to prove the truth of a matter of fact, otherwise than by reference to what is already known.[14] Its function, even in the case of 'direct' testimony, is always to serve as a basis for inference to the truth of another matter of fact.[15] Evidence gives the tribunal a new basis for its

deliberations which reason alone, will not, or at least does not, supply.[16] A phrase such as "prove the truth of a matter of fact" lies close to the value that underlays our present legal system. What does it mean? Thayer's comment is straightforward and accurate:

> The question of whether a thing be a fact or not, is the question of whether it is, whether it exists, whether it be true. All enquiries into the truth, the reality, the actuality of things, are enquiries into the fact about them. Nothing is a question of fact which is not a question of the existence, reality, truth of something; of the rei veritas.

The foregoing passage shows, plainly and typically, the fundamental, value-laden assumption of our legal system, in the theory of its practice, so to speak, that truth and reality are to be found, if at all, in the investigation of, and inference from, matters of fact. In the law of evidence, that basic value finds its expression in the first axiom, and in that part of the second which provides for the admissibility of all that is rational and probative. It is with the last part of the second axiom - the rules of evidence, the clear grounds of policy or law - that we will be concerned for the balance of this chapter.

The characterization of the rules of evidence as exceptional provisions correctly indicates the restrictive nature of these rules vis a vis the system's basic value, but it may also tend to give a

spurious unity to an eclectic grouping of political and moral values which are unintegrated with, and in many cases inimical to the extension of that value throughout the system. As Wigmore says:

> ...everything having a probative value is...assumed to be admissible, and...therefore any rule of policy which may be valid to exclude it is a superadded or abnormal rule....when the rules of evidence are taken in view as a system, these rules of policy appear as merely so many reserved spaces in the vast territory of logically probative material.[17]

Their unity, considered in their general aspect as political and moral values, consists in their opposition to the basic value of the culture. Their characterization, in law, as a system of rules of law, speaks primarily to the question of their authority and only incidentally to their value. In the law of evidence we shall see that the trend is for them to retreat steadily in the face of the extension of the basic value of the legal system.

The notion of the rules of evidence as a system is often coupled with the conventional view that their emergence is due to the existence of the jury. Consider the following passage:

> The most characteristic rules of this branch of law - the rules which exclude certain kinds of testimony - are due, as Thayer has pointed out, to the existence of the jury; and have been evolved by the judges, partly to prevent the jury from being misled by the testimony produced, and partly to keep them to the issue defined....But though these rules lose much of their point when applied by tribunals which do not work with a jury, yet they are applied by these tribunals....at the present day they are applied in all Divisions of the High Court.[18]

Nevertheless, it is not necessary to take this view at all; still

less for the reasons indicated. There is an important level, moreover, at which it may be incorrect.

We have seen that the jury existed in England as part of the judicial machinery since the advent of the Norman Kings.[19] Its function was almost exclusively judicial from the 14th Century onwards.[20] Yet, 'the rules of evidence', said to be due to the existence of the jury, and indeed, 'evidence' itself, does not emerge as a distinct concept for nearly five hundred years after the initial introduction of the jury as a form of proof. And when 'evidence' comes, in our present meaning of the term, we shall see that it quite explodes into existence.[21] Even in the 15th Century, Wigmore tells us, 'evidence' in the present meaning of testimony of witnesses produced in Court was "but little considered and of small importance",[22] and it was not until the Mid-16th Century that the jury regularly heard evidence.[23] For hundreds of years after the jury was established, there was no distinction between averments and the evidence to support them.[24] There was no process for compelling the attendance of witnesses until after the Mid-16th Century;[25] and volunteers were also discouraged from coming forward with testimony until that time, and the crime of perjury did not exist until then.[26]

Even granted, however, that the existence of the rules of evidence can be attributed to the existence of the jury, not to

mention its stupidity and waywardness, what will explain the continuing and extensive use of the same rules in 'non-jury' situations? It is generally conceded that while in the latter circumstance, these rules 'lose much of their point', they are applied nevertheless. A linear view can only look to the effluxion of time, during which things get 'better', as the likely cure for this anomaly. To borrow a phrase from Wigmore in a similar context, for the time being this state of affairs is the best, being generally accepted; when the time comes that thought advances and improves, the time will come, again, when this state of affairs will be recognised as inferior.[27]

Yet this, patently, has not occurred. The 'anomaly', to the contrary, has been growing more and more marked. Moreover, the passage cited from Holdsworth[28] clearly implies that the 'non-jury' tribunal could operate on one set of rules of evidence, and the jury on another.

It is difficult to conceive how this could be. To name but one practical objection, the opportunities for forum shopping it would create could tear a legal system to shreds. But perhaps as importantly, how could such a distinction be stated in principle? Clearly, the formal distinction between the two modes of trial is slight and of no consequence. Precisely, it is the difference between a decision by

one man and one by a body of twelve. If the term 'evidence' is not to be stretched beyond recognition and meaning, it would have in either event to retain the flavour of an empirical method of determining the truth or falsehood of disputed propositions of fact. Otherwise, it would be impossible to distinguish a trial from a poorly conducted public meeting.

It is no doubt true that the substance of the rules of evidence would lose much of their rationale when applied to non-jury tribunals if the reasons assigned for their development are correct. I have taken,however, a different point of view from the beginning. That is that the present legal system, like the culture of which it is a part, relies for its knowledge of the events and processes of the world, on the interpretation of the experience of human sensory and intellectual apparatus. We have distinguished this predominant outlook from the quite different point of view that characterized the medieval legal system. Our present mode of proof, 'by evidence', then, appears as a manifestation of that central idea-value, and the rules of evidence are seen as abnormal and superadded limitations in the path of the full extension and realization of that principle.

The important point here for our purposes is that in this context, the rules of evidence do not relate to control or correction of a wayward jury.[29] The jury is simply one of the forms of proof

that serve the basic value; the rules of evidence relate, albeit in a restrictive way, to the value itself. That is, the most significant thing is that the arbiter of the truth of disputed questions of fact, by whatever name designated, decides on the evidence, and it is on the evidence, not on the tribunal, that the rules operate.

On this account, the 'anomaly' of applying 'jury rules' to 'non-jury' situations is seen to be apparent only and the matter becomes explainable as of course. There is no substantive difference between trials with or without a jury, and accordingly no conflict or anomaly in the use of the same rules for each. It is thus possible in principle to group the two modes of trial together without undue strain on thought or language, and to eliminate the anomalous account offered to explain the persistent application of the same rules to both.

The two forms of trial use the same rules because they are moving to the same result (a determination of the truth of a disputed question of fact) by the same substantive method (investigation of, and inference from, other matters of fact) and it is therefore proper that in each case, the same limitations (the rules of evidence) should apply. These limitations do not relate to the alleged stupidity of jurors, but to the authoritative presence in

the law of various specific moral and political values, in the form of the rules of evidence, which are unintegrated, and usually inconsistent, with the basic value that underlays the method of proof itself.

PART I

CHAPTER FOUR: NOTES

1. See H.E.L., i, p. 302-311; ix, pp. 130, 142, 178, 179.

2. H.E.L., i, p. 299

3. see P. and M., ii, p. 600

4. Wigmore, i, s. 8, p. 235

5. I am not here concerned with definitions of evidence. I am concerned with the term in its use to describe the process of presenting evidence for the purpose of demonstrating an asserted fact. See Wigmore, i, s. 1, p. 3

6. Thayer, Evidence, pp. 264-265

7. Thayer, Evidence, p. 530. See also, Wigmore, i, ss. 9, 10, 11, pp. 289-296 Wigmore's use of 'rational' for Thayer's 'logical' is to be preferred because of the essential empiric nature of evidence.

8. The word, and its use in this sense, is Wigmore's. See Wigmore, Evidence, i, s. 9, p. 289: "The modern system of evidence rests upon two axioms."

9. Wigmore, ibid

10. ibid, p. 293. See also, ibid, s. 8C, p. 262: "Our system of evidence is sound on the whole....it was and is based on experience of human nature, - and that is saying a great deal for it." (emphasis in text)

11. See H.E.L., ix, pp. 127, 128, 129; Thayer, Evidence, p. 264

12. Thayer, Evidence, p. 515

13. Wigmore, i, s. 10, p. 293

14. Thayer, Evidence, pp. 263-264

PART I

CHAPTER FOUR: NOTES

15. ibid

16. ibid

17. Wigmore, i, s. 10, pp. 293-294, and material there cited.

18. H.E.L., ix, p. 127; see also Thayer, Evidence, p. 509; Wigmore, i, s. 8, pp. 234-241.

19. H.E.L., i, pp. 314, 327-330; P. and M., i, p. 139, 141; Thayer, "Modes", p. 45

20. H.E.L., i, p. 314

21. H.E.L., iii, p. 635; ix, p. 131; Wigmore, i, s. 8, p. 235

22. Wigmore, v, s. 1364, p. 12; see also, similarly, Thayer, Evidence, p. 130; "Jury", pp. 312-319; H.E.L., i, pp. 334; iii, p. 648; v, p. 419; ix, p. 127

23. H.E.L., i, p. 304, 334, 335; iii, p. 648; v, pp. 419, 420; ix, p. 127; Thayer, "Jury", pp. 358 et seq.; Wigmore, v, s. 1364

24. H.E.L., iii, pp. 635, 638, 639, 650; ix, p. 131; Thayer, Evidence, pp. 514-515; "Jury", p. 317

25. H.E.L., i, p. 335; ix, p. 197-203; Thayer, "Jury", p. 318

26. H.E.L., i, pp. 334, 335; Thayer, "Jury", pp. 358, 361

27. see Wigmore, i, s. 10, p. 292, passage cited Ch. Three, p. 51, supra

28. supra, p. 67

29. No one seems to know how a jury operates, in fact, in any event.

PART I

CHAPTER FIVE: THE SIGNIFICANCE OF COMPELLABILITY

The medieval legal system knew three types of witnesses, all of them of the 'pre-arranged' type, used in certain classes of cases only: the secta, a body of witnesses which swore to a belief in a plaintiff suit, and early fell into disuse; deed witnesses, who swore to the genuineness of the instrument;[1] and transaction witnesses, who swore to the event they had been pre-appointed to witness.[2] We would today consider their role formal and empty. They came to Court not for the purpose of answering questions truthfully, but to swear (usually on the basis of a previous agreement to do so) a set oath as to the occurance of a particular event. Pollock and Maitland say, to distinguish them from the modern witness, that their oath was assertory, not promissary.[3] Even when they were used, these witnesses did not regularly testify in open Court, but were joined to the jury and retired with them.[4] In truth, they were the remnants of the old trial by witnesses, once a separate form of proof, and by joining them to the jury they became a part of that proof.[5]

In the 16th Century, however, the position of the law on witnesses began to change with singular rapidity. The function of

the juror witness declines.[6] Contemporaneously, there emerged the regular and unprecedented use of the compellable, "casual"[7] witness, presented for the purpose of stating propositions of fact in open Court, which statements were used as a basis for inference to the truth of the propositions of fact in issue between the parties.[8] The regular use of the casual witness as a common feature of jury trials was an innovation startling both in the extent of its break with previous procedure and in its sudden (as these things are measured) appearance.

It was a change that reflects a great alteration in intellectual outlook from earlier days. We learn from Wigmore that in the 15th Century, "the ordinary witness, as we today conceive him, coming into Court and publicly informing the jury, was...a rare figure, just beginning to be known."[9] However, during the following century, the situation underwent a dramatic reversal, related by Wigmore as follows:

> Contrasting the end of the 1400s and the beginning of the 1600s, it appears, as the marked feature, that the proportion between the quantity of information obtained from ordinary witnesses produced in court and of information by the jury itself contributed was in effect reversed....by the early 1600s the jury's function as judges of fact, who depended largely on other person's testimony presented to them in Court, had become a prominent one, perhaps a chief one.[10]

The advent in strength of this new development can quite firmly be placed in the 16th century, when the operative growth of its groundwork and superstructure into a coherent, integrated and generally self-consistent body of doctrine occurred.

A law of evidence hardly existed until the 16th century.[11] The medieval legal system drew no clear distinction between averments and the evidence to prove them - counsel averred what he considered necessary and a witness might or might not be present to sustain them.[12] We also miss a step if we fail to notice that the 'modern' witness was so infrequent during the 15th century precisely because his evidence was not considered to be of particular importance - in the 15th century, testimony was "but little considered and of small importance."[13] As late as 1499, it could still be said by a judge: "suppose no evidence is given on either side, and the parties do not wish to give any, yet the jury shall give their verdict for one side or the other; and so the evidence is not material to help or harm the matter."[14]

It is common to speak of the jury at this time as fulfilling two functions - "the double capacity of triers and of witnesses."[15] This can be misleading if it is taken to indicate the presence in the legal system, albeit in one body, of the well developed and separate concepts of witness and juror, that are characteristic of a much later period. The fact that the two functions were not formally

distinct but were combined in one body, and the absence of any rules as to how the jury should inform themselves, strongly suggests that the idea of proof was not yet divorced from that of evidence. Prior to the 16th century, the jury were not so much the formal representation of a distinct function as they were the proof itself.[16]

It is true that jurors were expected to inform themselves as best they could on the matters which would fall to be decided by them,[17] but that is not the same as saying that they acted, in fact or in theory, on material that would be considered as 'evidence' in the present sense of the word. "Some of the verdicts," say Pollock and Maitland, "...must be founded upon hearsay and floating tradition."[18] The notion of evidence, and its development as an important part of the law, does not come until the practice of regularly calling casual witnesses to assist the jury, and that does not come until the 16th century.

Until that period, not only was there no appreciation of any necessity to call a person to the stand to utilize his knowledge for the benefit of the jury - the casual witness was simply not welcome at all. He was regarded as a meddler, and his presence was actively discouraged. He fell, and more importantly, was clearly intended to fall squarely within the net of 'maintenance',[19] which was spread so widely at the time.

The gist of the offence of maintenance was the "unlawful upholding of the demandant, or plaintiff, tenant or defendant in a cause depending in suit, by word, action, writing, countenance, or deed."[20] It can be seen from the accounts of this practice[21] that the technical matter of determining what constituted maintenance involved a narrower question than determining the popular meaning of the word itself. The upholding or supporting of a cause was of course necessary, but the main issue was one of settling the ambit and content of the word "unlawful." It is reasonably clear[22] that what was unlawful generally was any attempt to influence the jury, and it is equally apparent that the evidence of the casual witness fell within the scope of such an attempt. Additionally, it appears that the general basis upon which it was considered lawful to maintain was either an interest in the outcome or a more or less close relationship to someone who did have such an interest.[23]

The non-partisan witness was not only rare - he was considered unnatural.[24] In Wigmore's words: "the person informing the jury must either be an interested party, or his counsel or his servant or tenant or relative...or he must have been oficially called upon, either by summons as juror or deed witness or by the express request of the jury or of the judge."[25] These are not the attitudes and conditions usually associated with the basic committment of our present legal

system.

Where there is little place for the notion of the casual witness at all, there is still less for the idea of a witness who could be compelled to come to court to tell what he knew touching the matters at issue. The idea of compulsory testimony current today is based on the general acceptance of a duty to testify.[26] That was so far removed from the ideas prior to the 16th century, a person would not even be permitted, still less compelled, to testify to a fact, unless at the time the event occurred he had been then and there 'taken to witness.'[27] The giving of testimony was linked not to a general duty, but to some specific pledge given beforehand to bear testimony when requested.[28] The development of the idea of a general testimonial duty was several centuries off.[29]

This state of affairs lasted well into the 16th century. Although these attitudes may be difficult to reconcile with present views, Wigmore tells us that this feature of thought "contains the whole explanation of the ordinary witness' position in the 1400s."[30]

Yet if we leave the 16th century for the moment, and go to the beginnings of the 17th, we find a reversal of affairs nothing short of breathtaking. The casual witness, discouraged actively in the 15th century, is now the chief source of information for the jury. Interest

in the cause, formerly a usual and commonly accepted justification for hearing a witness, is instead as clearly recognised as a disqualification. The unity of proof has been shattered. In its place can be preceived the concepts of evidence and inference, which division is coming to be functionally reflected in the legal system; the jury is clearly starting to be identified with the latter, the witness with the former. Witnesses, hitherto unchallengeable have become instead subject to various rules of disqualification. The law of evidence has made an appearance as a more or less distinct body of rules. The deed-witness, relic of the old trial by witnesses, and, in the 15th century, half juror, half witness, has become almost entirely assimilated to the casual, 'ordinary' witness. And, most importantly for our immediate purposes, witnesses had become compellable.[31]

The compellability of witnesses was the second step in a radical change in the attitude of the law toward the casual witness. First came the notion that witnesses were desirable. This was manifested in a variety of ways. Obviously the hurdle of maintenance had to be overcome. It is reasonably clear that as the 16th century wore on, "the evils which had led to the undue extension of the offence of maintenance had been diminished."[32] Its criminal character declines, and the usual method of its use came to be through a civil suit at the

instance of the person aggrieved.[33] The courts had long held that what a court ordered to be done could not be maintenance[34] and this provided the lead with which to avoid the obstacle. The courts began to issue process on demand for the Crown to call its witnesses,[35] and the same thing began to occur with increasing frequency on the civil side.[36] In 1562, by 5 Elizabeth I, c. 9, there came the recognition of a general right to have compulsory process, and impliedly, of the general testimonial duty it would eventually entail.[37] That statute imposed a penalty on the witness who disobeyed a summons and gave a right of action to the party wronged by his failure to attend. Holdsworth says that "this statute begins a new epoch in the law of evidence."[38]

This is no doubt true. Where a generation previously, they had been considered as meddling, unnecessary interlopers, witnesses will soon come to be regarded as indispensible. If we take a linear view of this matter, we can greet this development as being unusually swift, but not overdue, and certainly welcome in any event. It would be seen as being generally in line with the steady, overall progression of the legal system to its present state. Let us consider the matter further, however, in the light of the theory we have been discussing.

There is a natural tendency, that comes with prolonged exposure, to take the presence of witnesses so for granted that one overlooks

the fact that their importance lies only in what they do. A witness 'gives evidence': he offers by means of his statements to prove that such and such a state of affairs existed, for the purpose of having the matter of fact so proven act as a basis of inference to the truth of another matter of fact.[39] The idea that the truth is obtainable in this way is a thoroughly modern idea. The premises from which the inference is drawn are not 'given'; they depend not on authority or revelation, but on induction. To the extent that the legal system now moved along these lines, then to that extent it departed, and on that point could be distinguished from, its medieval predecessor. And it did so depart to the extent that 'evidence' was offered, accepted and considered important, because the form of the inference in evidence is always inductive and empiric.[40]

The reception of oral statements as proof of the truth of matters of fact, and the use of those statements as the basis for proof of the truth of the facts in issue dominates our system of proof. Everything in our method of proof is intimately related to it. Documents, in the absence of consent or of special statutory dispensation, are not 'evidence' unless they are 'properly'introduced by the oral testimony of a witness.[41] Estoppels are now founded securely on human conduct, which only comes to the court through the medium of a witness;[42]

presumptions are said to "take the place of evidence" - i.e. they dispense with oral testimony in the interests of convenience, and unless they are really substantive rules of law, they are subject always to the weight of contrary testimony.[43] Judicially noticed 'facts', essential to any evidentiary system, are always open to challenge by testimony to the contrary.[44]

Our system of proof is not comprehensible without the witness. The medieval legal system had no essential need of witnesses because, generally speaking, it had no need of evidence. Its proofs of disputed issues of fact were super-evidentiary, divine and deductive. The present legal system cannot function without witnesses, because it cannot operate its system of proof without 'evidence', and behind this need for evidence lies the assumption that the truth comes from the 'facts', which are knowable by and accessible to, men. Indeed, this is the substance of Wigmore's very statement of the content of evidence.[45] The spreading use of the casual witness tells us of the emergence of the concept of evidence into a position of dominance in the legal system, and that in itself is significant because it marks the shift of the legal system to a human, indictive and empirical method of determining the truth of disputed questions of fact.

The significance of compellability, then, is that it is the formal recognition of the committment of the legal system to the values and

assumptions that make 'evidence' necessary. It was this faith in the assumption that an empiric process of determining the truth was not only possible, but was of the first importance, that in the 16th century underwrote the dramatic movement of the legal system from a non-evidentiary to an empiric basis.

PART I

CHAPTER FIVE: NOTES

1. and who may or may not have been present at the time of its execution: Wigmore, v. s. 1364, p. 10

2. See H.E.L., i, pp. 300-301; ii, p. 81; ix, pp. 167-168, 178-180; Wigmore, v, s. 1364, pp. 9-10

3. P. and M., ii, p. 601; see also H.E.L., ix, 178-179

4. Wigmore, v, s. 1364, p. 11; H.E.L. ix, p. 179; Wigmore, viii, s. 2190, p. 63; Phipson, para. 648, p. 280

5. Wigmore, viii, s. 2190, p. 63

6. Wigmore, v., s. 1364, p. 11, note 9; viii, s. 2190, p. 63

7. The term is Phipson's: see p. 280 (for citation see, infra, fn. 4, Ch. 7)

8. Wigmore, v, s. 1364, p. 12; H.E.L., i, p. 334; iii, p. 648; v, p. 419; ix, pp. 127, 131

9. Wigmore, v., s. 1364, p. 11; see also viii, s. 2190, pp. 62-63; H.E.L., ix, 177-185; Thayer, Evidence, pp. 122-134; Phipson, para. 648, p. 280

10. Wigmore, v., s. 1364, p. 12, see also Phipson, para. 648, p. 280

11. H.E.L. iii, pp. 635, 638, 639, 650; ix, p. 131; xii, p. 365; Thayer, "Jury", p. 317; Evidence, p. 514-515

12. see Wigmore, v, s. 1364, p. 11; H.E.L., iii, 635, 638, 639, 650; ix p. 131; Thayer, "Jury", p. 360, et. seq.

13. Thayer, Evidence, p. 130, cited Wigmore, v., s. 1364

14. Vavasouer, J., cited Wigmore, i, s. 1364, p. 12

15. Wigmore, viii, s. 2190, p. 62; see also H.E.L., ix, pp. 181-182: "the double position of the jury as witnesses and fenders of facts...."

PART I

CHAPTER FIVE: NOTES

16. see, e.g., P. and M., ii, pp. 622-628; H.E.L., ix, pp. 180-181, 210 and note 3; Wigmore, ii, s. 575, p. 677

17. see, e.g. Wigmore, v, s. 1364, pp. 10-12; viii, s. 2190, p. 62; P. and M., ii, pp. 624-625, 627.

18. P. and M., ii, p. 624, and see additionally, n. 2 p. 624

19. see H.E.L., i, p. 334, 335; ix, p. 182; Thayer, "Jury", pp. 318, 358, 361; Wigmore, ii, s. 575, p. 677; v, s. 1364, p. 10; viii, s. 2190.

20. Coke, Second Institute, cited H.E.L., iii, p. 398, (emphasis added). On maintenance, see further: H.E.L., iii, pp. 394-400; v. p. 201-203; vii, p. 524-525; viii, p. 397-398

21. see authorities cited fns. 19, 20, supra

22. see, e.g. H.E.L. iii, p. 398-399; Wigmore, viii, s. 2190, p. 64

23. H.E.L., iii, p. 398-400; Thayer, Evidence, pp. 124-129, Wigmore, viii, s. 2190, p. 64

24. Wigmore, ii, s. 575, pp. 676-677; see also Thayer, Evidence, pp. 120-134

25. Wigmore, viii, s. 2190, p. 64

26. see Wigmore, viii, s. 2190, pp. 65-66; H.E.L. ix, pp. 177-185

27. P. and M., ii, p. 601; H.E.L., ix, p. 179-180; Wigmore, viii, s. 2190, p. 63 and note 8.

28. Wigmore, viii, s. 2190, p. 63

29. ibid, p. 66

30. ibid, p. 64; see also ii, s. 575, p. 674; v, s. 1364, p. 1

PART I

CHAPTER FIVE: NOTES

31. On these various points, see generally, Wigmore, ii, s. 575; v, s. 1364; viii, s. 2190; H.E.L., ix, pp. 177-203

32. H.E.L., ix, pp. 184-185; see also viii, pp. 397-399; iii, pp. 394-400

33. H.E.L., viii, 398-399

34. Wigmore, viii, s. 2190, pp. 64, 65; H.E.L., i, p. 335

35. Wigmore, viii, s. 2190, p. 67

36. ibid, p. 65

37. supra, p. 80, fn. 29

38. H.E.L., ix, p. 185

39. Thayer, Evidence, pp. 263-264

40. Wigmore, Proof, pp. 21-27; Evidence, i, s. 30, pp. 415-427; ii, s. 476, p. 516

41.

42.

43.

44.

45. Wigmore, Evidence, i, s. 1, p. 3

PART I

CHAPTER SIX: PRIVILEGE, COMPETENCY AND THE DRIFT TO COMPELLABILITY

The perspective of a linear theory of legal history is such that the unity of the great changes in the law of evidence in the 16th century is found in the concept of the perfect ability of the legal system. Putting the matter crudely, the 16th century is regarded as 'better' than the 15th, because the former is more like the 20th century than is the latter. The difficulties which surround this view are in sharp relief when we come to consider the origin of some of the more historically prominent of the rules of evidence. (These difficulties, we shall see, are due largely to the one-dimensional anticipation of evolution from analogous situations that is characteristic of the theory as an explanatory mechanism.) In this chapter, I want to examine some of the most prominent of these rules in the light of the alternative theory we have been discussing.

One of the most venerable of the rules of evidence was the privilege of a party to a jury trial to be free from compulsion to testify at the suit of his opponent. Of this Wigmore says, in a vein that will become familiar: "It is a little singular that the oldest and once the most firmly established of all the privileges should also be

the most obscure in its history and precise mode of origin."[1]

It will be recalled that during the 15th century, interest in a cause, or some close connection with a party, was a virtual requirement for qualification as a witness;[2] by the early 17th century, however, the situation had been reversed. Of the beginnings of that rule, with its complete overturning of an established practice, Wigmore says "that the history of its origin is obscure and not precisely ascertained."[3] This disqualification does not appear for any of the ancient kinds of witnesses; it did not exist for the modern witness when he first began to appear in the 16th century, yet it is plainly firmly established by the early 17th century.[4]

There is thus this apparently peculiar situation: the party is privileged against being compelled to testify against himself at the suit of his opponent. At the same time, he is disqualified from offering evidence in his own behalf. Wigmore is unable to state the policy for the privilege, although he does suggest some reasons for its longevity.[5] Holdsworth is in a similar position.[6]

On the matter of disqualification from interest, both are more forthcoming. Wigmore's opinion is that the general notion of disqualification through interest originated with the particular idea of the disqualification of the parties, and that accordingly, the task at hand is to explain the latter.[7] He attributes party disqualification to the

reluctance of the age to allow a person to take an oath that had not the savour of decisiveness, since the oath was then regarded as a form of proof.[8] Holdsworth adopts this part of Wigmore's account,[9] but he additionally suggests that along with what he calls these "accidental historical causes" the disqualification developed due "partly to the same set of ideas which made for a similar exclusion of this testimony in the Canon law."[10]

With respect, there are difficulties with both branches of this explanation. Disqualification of the parties was plainly accepted and established during the latter half of the 16th century.[11] By this time compulsory process as a matter of course, which by all accounts was viewed as desirable, had been operating for a generation, and the regular use of the casual witness predates that time.[12] The casual witness was competent, compellable, was fast becoming the jury's most important source of information - and gave evidence on oath.[13] The deed-witness, who alone had been a compellable witness prior to 5 Elizabeth I, C. 9 had also played the part of witness and had sworn an oath, although admittedly his role was not as distinct in this respect as that of the casual witness.[14] It is not clear why the same reasoning that kept out the oath of a party did not operate in a similar fashion on these oaths.

Holdsworth's attempt to tie in the canonical practice of disqualifying parties is beset also with some difficulties. For one, Wigmore expressly disagrees.[15] Again, it might reasonably have been expected that if the common law had been so influenced by canonical practice, Chancery, with so much direct borrowing from ecclesiastical procedure, would have been even more so. Yet, the reverse is apparently true: "a party opponent in Chancery was compellable to answer interrogatories under oath, like any witness...from the beginning of systematic Chancery practice."[16] This negatives any privilege for the party.[17] On the question of competency, it was the common law, and not the canon law, that provided the lead, and Chancery followed the common-law rules for disqualification.[18] Wigmore finds this to be puzzling: "there must, then, have been, at some stage, a departure from the canon law rules for witnesses, and the puzzling thing is that this stage appears to have been at least as early as those common law rules themselves."[19] Whatever were the forces that led to these results, it would appear that they cut across the entire legal system.[20]

Both writers see the privilege of a party from compulsion and the disqualification from interest as being separate matters. Neither can suggest any reason why the two should be grouped together.[21] It must be considered somewhat remarkable, then, that the two were not only so

grouped, but were not severed until the mid-19th century;[22] they were discussed by judges for centuries in the same breath, as it were.

Difficulties of a similar nature arise in both accounts of the history of the husband-wife relationship in the law of evidence. Wigmore says of the privilege:

> The history of the privilege not to testify against ones wife or husband is involved, like that of civil parties, in a tantalizing obscurity....of the precise time of its origin, as well as the process of thought by which it was reached, no certain record seems to have survived.[23]

In this case also, we find that the privilege has always been closely linked with the disqualification of a husband or wife to testify on each others behalf. Wigmore notes again the mutual attraction;[24] Holdsworth agrees,[25] both clearly think it anomalous. Wigmore says of the privilege:

> What is a little odd is that it comes into sight about the same time as the disqualification of husband and wife to testify on one another's behalf, for the two have no necessary connection in principle, and yet they travel together, associated in judicial phrasing, from almost the beginning of their recorded journey.[26]

Holdsworth has a similar view. On the general connection between privilege and competency, which the law persisted in making, "it is obvious," he says, "that there is no necessary connection between the causes which render a witness incompetent, and the causes which may make it fair that he should be exampted from the general rule of

compulsion."[27]

The privilege-disqualification rules in the cases of interest and the husband-wife relationship were major parts of the law of evidence for several hundreds of years. The orthodox accounts of them are tacit admissions of failure to account for both their origins and the nature of their relationship and mutual attraction. As far as their beginnings are concerned, there seem to be no analogies, no evidence of articulated links with past legal history. In both areas, the privilege and disqualification seem to wink into existence during the late 16th and early 17th centuries.

It would be a mistake, for our purposes at least, to see the problem of the origin of these rules as a problem of history. It is, instead, one of theory. The linear view of legal history typically ensures continuity by the tracing of developments from analogous situation to analogous situation. One of its defects, accordingly, is its difficulty in dealing, in all but the vaguest terms, with the generation of new ideas that represent a sharp conceptual break with the prevailing drift of past situations. The origin of the rules we have so far considered is problematic only on the assumption that the link generally found with a previous and similar situation always constitutes a necessary part of explanation.

In ordinary situations, there can be no doubt that this approach is both serviceable and useful. However, the situation during the 16th cen-

tury was far from ordinary; it was in fact, the most extraordinary period, in almost every sense of that term, for a thousand years. For our present purposes, the period is significant in that it saw the explosion into chaos of the unity of the legal ideas of the medieval period. They ceased to form a system; they "dis-integrated", became random and inefficaceous. At the same time, however, 'modern' ideas, themselves previously characterized in medieval terms as anomalies, abberations and random trends, had achieved the unity implied by the word 'system'. In law, this resulted in a shift, startling in its suddenness (but matched in this respect by developments in other areas of the culture), to the resolution of disputes according to empiric criteria. In a word, 'evidence' moved to the centre of the stage; and this made the compulsion of witnesses necessary, as follows:

The determination of the truth with respect to a disputed state of affairs must be a basic aim of any legal system. How one goes about it depends upon the method viewed as most likely to elicit the truth. It is a matter of belief in, and selection of, a process. In our present system, the empiric bias of our culture can be seen in our selection of the process of presenting evidence. 'Evidence' in this process represents, in Wigmore's words, the following content:

> Any knowable fact or group of facts, not a legal or logical principle, considered with a view to its being offered before a legal tribunal for the purpose of producing a persuasion, positive or negative, on the part of the tribunal, as to the truth of a proposition, not of law or of logic, on which the determination of the tribunal is to be asked.[28]

The provision of material having that content to a court is the highest functional imperative in our working legal system. Ideally, anything that served that end should have been grist for the mill. Compellability is the process practically necessary to serve that imperative by ensuring that such material is brought to the tribunal, thereby allowing it the means to pursue that primary goal.

Yet, after this is said, we have seen that it is the characteristic function of the rules of evidence to exclude some of the material so provided. Wigmore called the rules "abnormal and superadded",[29] and this is so because they are in conflict with the basic value of the system.

It is the implications of this conflict that concern us now. For one thing, it follows that the rules of evidence do not necessarily, and indeed are not even likely, to depend for their validity on 'rational' grounds. The criticism of the reasons provided from time to time for the existence of any particular rule on this ground misses the point that the paradigm role of the rules is precisely to <u>avoid</u> the impact of rationally probative material on the proposition to be proven. The policy behind this exclusion may be religiously, politically, morally, socially or otherwise expedient, but it is not necessarily rational. The rules must serve some policy, to be sure, but their emotive basis, ultimately based on shifting appreciations or opinions on fluid factual situations, implies the possibility of varying points of view. The

rules of evidence can be, and often are, justified on several grounds, which need not be, and often are not, consistent with one another or with the true state of affairs. That is, the rules, considered in relation to the legal system, are themselves non-empirical; considered in relation to the particular proposition the truth of which is to be decided, they are, in their ultimate relation, anti-empirical.

Any proposition, therefore, at one time or another, may have objective legal validity as a rule of evidence, depending on the climate of opinion at the time. What is more important is whether the rule commands enough support to survive as a functioning part of an active legal system. The factor which must bear most heavily on this question in the long run is how the rule measures up to the standard set by the basic value of the legal system, because this is the fundamental assumption and article of faith that binds the system into a unity. It reflects, in the law, the basic reality value of the culture itself.

All of this bears on our problem as follows:

There are no analogous situations to be discovered, no history to the rules of evidence we have discussed, prior to the 16th century, because they began only <u>after</u> the emergence, establishment and straightforward application of a principle, the dominance of which was itself new, and which was profoundly different from the principle that

had been the intellectual support of the medieval legal system. Speaking of the emergence, during the late 16th century, of the husband-wife privilege, Wigmore says: "the ordinary witness, who had only within two generations become a common figure in jury trials, was plainly not subject to any disqualification whatever before this same period of the Elizabethan reign...."[30] The rules of evidence began, and remain, non-empiric reactions to that basic empiric principle, expressed in the working of the system by the introduction of compulsory process, and in its theory as follows: none but facts having rational probative value are admissible; all facts having rational probative value are admissible.[31] The rules of evidence depend upon that principle for their existence, and whatever unity they may have derives from, and is intelligible only in terms of, their opposition to it.

If this is kept to the fore, we can now see why the notions of privilege and disqualification were always linked by the judiciary and why it is futile to seek the reason for this link in the particular reasons for each rule.

Considered from the point of view of this general principle, the notions of both privilege and competency are limiting factors - they both stop evidence from coming in, and that is their unity. The idea of competency implies a mandatory limitation; that of privilege a permissive one. In fact, they are the same rule looked at from

different points of view and the questions which arise do not relate to their function, but the extent of their application.

The fact that in each case, (interest and husband-wife relationship) one is called a privilege, and the other a disqualification reflects only the relative strength of two value judgements operating on reverse sides of the same situation, and requiring (and getting) for their justification no more than various expressions of opinion. That is the content of the characterizations of 'privilege' and of 'disqualification' and that is why the privilege-disqualification aspects of the two rules on interest and husband and wife have always been closely linked by the courts, if not the theorists.

The difficulty in making the connection seems to stem from a concentration on the specific reasons for each rule at the expense of considering the function they perform. This leads to a fragmentation into four of what are at most, from a functional point of view, two rules. This in its turn tends to foster a view that sees as a difference in kind what is truly only a matter of degree. On a closely allied problem, Wigmore uses words that are apt in this connection:

> The tendency of modern times is to abandon all attempts to distinguish between incapacity which affects only the degree of credibility and incapacity which excludes the witness entirely. The whole question is one of degree only, and the attempt to measure degrees and to define that point at which total incredibility ceases and credibility begins is an attempt to discover the intangible.[32]

It would be a mistake in the present case, however, to infer from the above passage that the general idea of incapacity has been dropped from the modern law.

An examination of the orthodox accounts shows that the criticisms of the original rules of competency were directed not so much at the idea itself as against the several attempts to atriculate it acceptably in various areas of the law. The notion of an excluding disqualification remains; the law still assumes that there are people incapable of giving credible testimony.[33] The usual description of the development of the law on competency has been to say that the law came to regard objections to a witness as a matter that was to be considered against the weight of his testimony rather than against his competency to give it.

This casts the question of competency as a matter of testimonial qualification at the possible expense of obscuring the fact that a witness is only important for his evidence. Competency is a concept that is most easily intelligible in relation to testimony. Consideration of the witness apart from his evidence may be the cause of the failure to grasp the fact that an objection to competency classified as a "disqualification" really constitutes an absolute objection to the credit of testimony; while other objections to competency, regarded as defects to be counted against the weight of evidence, are relative

objections to credit of testimony.

Here again, the two characterizations of 'disqualification' and 'defects to be counted against the weight of evidence' or its equivalent reflect the relative strength of varying opinions. In this case, the question is whether trustworthy testimony can reasonably be expected. Different items, therefore, can from time to time, shift back and forth from one characterization to another depending as the strength of opinion varies in one direction or the other.

Nevertheless, there has been, as Wigmore has pointed out, a steady trend. The main distinction between the 16th and 17th centuries and the present day is not on a matter of principle, but lies in the difference in the beliefs of people, then and now, as to what will be required to justify the success of an absolute objection to the credit of the testimony of a witness. The direction this trend has taken is significant for our purposes.

The movement of the law has been steadily to cut down the ambit of operation of the absolute objection to credit so as to bring the rules of evidence more into line with the basic, utilitarian and empirical value of the system. That value requires qualifications, but only to this extent: that a witness be qualified by relevant experience and by the ability to recollect and narrate it.[34] The

extension of the main value has meant that incapacities which depended on non-utilitarian considerations (i.e. upon the religious or moral character of the witness) or upon unsound factual generalizations directed at a guarantee of truthfulness were ungulfed as absolute objections to credit and became permissible as relative objections only. This happened over a long period of time: to the inability of a non-Christian to be a witness because of a lack of belief in the Christian God;[35] to discrimination against aliens;[36] to disqualification through conviction of certain crimes;[37] to disqualification from interest;[38] and to the disqualification of husband and wife.[39]

The areas in which an absolute objection to credit can still be made have been narrowed to those in which the probability of untrustworthy testimony exists, and can be demonstrated empirically to exist, to a very high degree.[40] What must be demonstrated is an impairment of some or all of the empirical capacities to observe, recollect and narrate. The impairment, moreover, must be related to the specific subject upon which evidence is to be given. If the demonstration shows that the impairment is such as substantially to negative trustworthiness upon the specific subject of testimony, then an absolute challenge to credit will be successful.[41]

The modern theory of absolute challenge to credit is thoroughly

empiricist. The obvious candidates for inclusion in it are insanity and infancy. These disqualifications were known to the law in the 16th and 17th centuries, but their application depended upon what, by present standards of practice, must seem an overambitious factual generalization. Insane persons were considered unfit to be witnesses at all.[42] The disqualification for infancy depended not on an individual assessment of the intelligence of the particular child with respect to ability to observe, recollect and narrate, but upon the presumption that a child below a certain age was incompetent.[43] Present theory assimilates to itself all forms of mental impairment that relate to the empirical qualities demanded by the reliance on evidence, however caused - insanity,[44] feeble mindedness,[44] deafness,[44] muteness,[44] intoxication,[45] blindness,[46] disease[46] as well as the lack of development of these capacities due to the youth of the witness.[47]

The common acceptance of this basis for incapacity is as significant as the fact of its existence. The trend displayed by this branch of the law is another example of the development of internal harmony in the legal system that has come with the gradual extension of its fundamental value to its various parts.

PART I

CHAPTER SIX: NOTES

1. Wigmore, viii, s. 2217, p. 168; see also ibid, s. 2218, p. 170 and note 1

2. supra, p. 79

3. Wigmore, ii, s. 575, p. 674

4. Wigmore, ii, s. 575, pp. 674, 675, 677, 679; viii, s. 2227, p. 211; H.E.L., ix, 193-197

5. Wigmore, viii, s. 2217, pp. 168-170

6. H.E.L. ix, 197-198

7. Wigmore, ii, s. 575, pp. 678-682

8. ibid, p. 681-682

9. H.E.L., ix, p. 193

10. ibid

11. Wigmore, ii, s. 575, p. 680; his own date is 1582

12. supra, p. 82

13. Wigmore, v, s. 1364, p. 12

14. H.E.L. ix, pp. 167, 168, 180

15. see Wigmore, ii, s. 575, pp. 678-79, 683

16. Wigmore, viii, s. 2217, p. 169

17. Wigmore, ii, s. 575, p. 683

18. ibid

19. ibid

PART I

CHAPTER SIX: NOTES

20. Holdsworth, incidentally, marks no difference between the rationale for the canonical rule ("persons ought not to be put under the temptation of committing the mortal sin of perjury." -ix, p. 190) and the rationale of the secular rule, which sees perjury as a threat to the secular interest of the administration of justice in an acceptable manner (ix, p. 196; and see also Wigmore, ii, s. 576, pp. 686-693 and passages cited therein.) I think a difference in emphasis and outlook can fairly be discerned.

21. see Wigmore, viii, s. 2217, p. 169; H.E.L. ix, p. 197-198

22. H.E.L., ix, p. 196 and note 9

23. Wigmore, viii, 2227, p. 211

24. ibid, p. 212-213

25. H.E.L. ix, p. 197: "The same attractive influence is also apparent in the closely connected rule as to the incompetence of the parties to litigation."

26. Wigmore, viii, s. 2227, p. 211; see also ii, ss. 600, 601, pp. 730-736; H.E.L., ix, pp. 197-198.

27. H.E.L., ix, p. 197

28. Wigmore, i, s. 1, p. 3; see also note 1

29. Wigmore, i, s. 10, p. 293

30. Wigmore, viii, s. 2227, p. 211 (emphasis added); see also ii, s. 575, passim, but sp. at pp. 675-676.

31. See Wigmore, i, ss. 9, 10, pp. 289-295; see also Thayer, Evidence, pp. 198, 264, 265, 268. Empiricism is as (or more correctly from our point of view, 'where') empiricism does. The policies that support the rules of evidence at any given time may or may not represent a correct assessment of the state of affairs with which they are concerned. The point is that it doesn't matter whether

CHAPTER SIX: NOTES

31. (continued)
or not they do. The courts do not use, and neither they nor anyone else think they have to use, any methodology to assess the empirical validity of the policies they articulate as justifications for the various rules of evidence. It is beside the mark that such studies may have been carried out outside the legal system. They are not legally authoritative until and unless adopted in some way, and when this occurs, they are assumptions only, not proven, and hence they are, and always remain to the legal system, expressions of opinion only.

32. Wigmore, ii, s. 501, p. 594, the problem was the policy of abolishing disqualification through mental derangement. See, similarly, ii, s. 509 (disqualification by infancy)

33. It should be pointed out here that my position is that the law during the 16th century operated on the same major premise as it has today, but the dominance of that idea was not then as fully extended. The rules of evidence are a reaction to this value and their function then was the same as it is now - the exclusion of relevant testimony.

34. See Wigmore, ii, s. 478, p. 518; s. 650, p. 755; s. 657, p. 762; s. 658, p. 768.

35. H.E.L., ix, p. 189-190

36. Wigmore, ii, s. 516, p. 605

37. H.E.L., ix, pp. 191-193; Wigmore, ii, s. 519, pp. 608-612

38. H.E.L., ix, pp. 193-197; Wigmore, ii, s. 576, pp. 686-695; s. 577, 579, pp. 701-706

39. Wigmore, ii, ss. 600, 601, 602, 603, pp. 730-738, and see on this, statutory materials collected in ii, s. 488, pp. 525-527 and 1972 Supplement, pp. 204-205 for England.

PART I

CHAPTER SIX: NOTES

40. Wigmore, ii, s. 495, p. 588; and s. 508, p. 599 - testimonial capacity is presumed to exist.

41. See Wigmore, ii, ss. 492-495, pp. 583-588

42. H.E.L. ix, p. 199; Wigmore, ii, s. 498, p. 591

43. H.E.L., ix, p. 188; Wigmore, ii, s. 505, p. 595

44. Wigmore, ii, s. 498, p. 591

45. ibid, s. 499, p. 592

46. ibid, s. 500, p. 593

47. ibid, s. 505, p. 595

PART I

CHAPTER SEVEN: THE RULE EXCLUDING EVIDENCE OF OPINION

Our present day emphasis on the importance of evidence represents our belief in the process used by our legal system to determine the truth about disputed propositions of fact.[1] English law developed its superadded rules of evidence on a basis that presupposes the existence of this process. Their characteristic function has been the selective exclusion of some of the material thrown up by that process.[2] Two of the major mechanisms of the law of evidence are the rule excluding evidence of opinion and the rule excluding 'hearsay' evidence. In this chapter I want to consider the meaning of the rule against reception of evidence of opinion.

The mechanics of the medieval legal system, insofar as they truly represented the dominant and very different beliefs of that period, are, in the light of present day beliefs and attitudes, usually and pejoratively characterized as primitive, superstitious and excessively formalistic. On a comparison, we would consider the value of our present system to lie at least partly in our belief that it is none of those things to any significant degree, with the attendant implication that our legal system is less formal and more 'realistic'. Nevertheless, our legal system does

have a formal structure which serves our own assumptions, and which has left its mark and imposed its limits in a variety of places and ways. The rule excluding evidence of opinion is a rather curious example of the kind of influence our basic assumptions and values can and have had on the formal structure of the legal system.

Wigmore summarizes his account of the history of the rule as follows:

> The sum of the history is, then, that the original and orthodox objection to 'mere opinion' was that it was the guess of a person who had no personal knowledge, and the 'mere opinion' of an expert was admitted as a necessary exception; that the later and changed theory is that wherever inferences and conclusions can be drawn by the jury as well as by the witness, the witness is superfluous, and that thus an expert's opinion is received because and whenever his skill is greater than the jury's, while a lay opinion is received because and whenever the facts cannot be so told as to make the jury as able as he to draw the inference. The old objection is a matter of testimonial qualifications, requiring personal observation; the modern one rests on considerations of policy as to the superfluity of the testimony. In the old sense, 'opinion' - more correctly, 'mere opinion' - is a guess, a belief without good grounds; in the modern sense, 'opinion' is an inference from observed and communicable data.[3]

Here is a modern English statement of the rule:

> A witness may not give his opinion on matters calling for the special skill of an expert unless he is an expert in such matters, and he may not give his opinion on other matters if the facts upon which it is based can be stated without reference to it in a manner equally conducive to the establishment of the truth, or if it would not assist the court in coming to a conclusion.[4]

Both Wigmore and Cross consider the rule to be of relatively minor importance.[5]

As far as the present functional importance of the rule is concerned, it is difficult to dispute this assessment, and I shall not do so. Opinion is a necessary part of every trial. Normal conversation is impossible without it. The opinions of witnesses, expert and non-expert, feature in virtually everything they say. The conclusion of the jury represents their opinion on the evidence; those of the judge, his opinions on the many matters of fact and law that fall to be decided by him during the course of a trial. Even considered from the point of view of overt expressions of opinion, these matters excite few objections, provided only, that in the case of the witness, he be by some circumstance better equipped to draw the inference than is the jury.[6] In fact, the texts show quite clearly that the rule is restricted in its operation to those relatively few situations in which it is easily possible for the subject matter of testimony to be cleanly severed from opinions that have that testimony as a basis. Even here, however, as we shall see later, there is evidence of the effect of the somewhat peculiar development and function of this rule.

Apart from its workings, the rule has another side, the formal side, which is generally ignored, but which for our purposes is the most important. We can begin our consideration of it by noting some

of the decidedly peculiar features offered by the rule. For one thing, it has been noted that the rule is somewhat different from those which shut off certain facts actually probative of the issue.[7] For another, its history as a specific rule is largely a story of it being called forth by the development of certain exceptional situations - we seem to have the exceptions before we have the expression of the general rule itself.[8] The latter does not come until the early 19th century.[8]

Wigmore points out in the passage cited above that the rule excluding evidence of opinion has rested on two bases, each quite distinct. The original 'rule' was related to the matter of testimonial qualification, but the intimacy of that connection is not often considered. The following words express our adoption of an empirical method for determining the truth of disputed questions of fact:

> None but facts having rational probative value are admissible; all facts having rational probative value are admissible, unless some specific rule forbids.[9]

The witness as means to that end is only important for what he knows, and what he represents as knowledge must rest on the basis of his own personal observation.[10] In our legal system that is, and has always been, the distinguishing qualification that makes him worth listening to, and additionally, that is what makes his formal characterization as 'witness' possible.

It is possible to view the opinion rule as the recasting of these axioms into a form which does for the witness what the axioms do for the evidence he brings. Just as the axioms do not of themselves admit or exclude, the opinion rule of itself does not shut off facts probative of the matter in issue.[11] For this reason, it has been doubted that the rule is one of evidence at all.[12] As the rule was originally framed, this view is very close to the truth. If we keep in mind that our 'rationality' consists in the sense we can make of our linking of logic with the events and processes of the empirical world, we can intelligibly restate the axioms of evidence in the following manner:

> None but persons having an opportunity to observe the events and processes of the empirical world, and actually observing them, are permitted to relate them in evidence; all such persons are permitted to relate them, unless some specific rule forbids.

In this case, we simply assume the relevancy of the testimony, and speak of the 'witness' instead of the 'evidence'. On this view, the opinion rule is a matter directly related to testimonial competency.

This, in fact, is how the matter was regarded by early modern law. The term 'opinion' was applied to the offerings of a witness who displayed upon examination a lack of the necessary connection with the subject matter of the dispute - i.e. he had displayed either or

both a lack of opportunity for personal observation and the actual utilization of it.[13] Wigmore says this involved no new principle, but was "merely a special application of an ordinary principle of testimonial capacity."[14] Experts were permitted to testify under a clear exception to this rule.[15]

Quite apart from the fact that we have viewed, throughout this paper, the emergence into dominance of this "ordinary principle" as an extraordinary event, this would seem, with respect, less a 'special application' of it than its sole meaning. It is the mirror image of the general rule for testimonial capacity; personal acquaintance with facts is the basis for evidence, 'mere opinion' is opposed, in early modern law, to this acquaintance; it is therefore not evidence.

In this sense, the opinion rule does not have a 'history' which is separate from that of the modern legal system itself, any more than does the 'rule' that 'rationally probative' material is only and always admissible. In early modern law, the opinion rule, in so far as it is distinct, is a version of or a way of stating, the very boundaries of the system itself, and that is why no account of it as a separate rule is found, or is necessary, before the late 18th and early 19th centuries. It would be like trying to explain the meaning of the measure 'foot' by using a twelve inch rule; it is, at that

point, one of the things that makes explanation possible, and is not itself explainable.

The direct assimilation of the notion of opinion to the basic testimonial qualification did not last. Instead, in the late 18th century, we have the emergence of a separate rule on opinion, in which the emphasis shifts away from testimonial qualification to the evidence itself; to what the witness will be permitted to say, assuming him always to be basically qualified. What he will be able to state are 'facts'. Expert evidence of opinion becomes admissible not as a clear exception to the testimonial qualification of personal observation, but as a matter of necessity - the facts could not be understood without its reception. Its reception could be, and was, justified by an analogy close enough to that of the 'fact-witness' so as not to cause alarm. Wigmore puts the matter as follows:

> The general notion was expressed (in one shape or another) that the jury needed such help, always had had it, and must have it now, opinion or no opinion. In the great case of Folkes v. Chadd, the notable feature of Lord Mansfield's opinion is his frequent use of the word 'facts'; he is trying to show that this kind of witness 'opinion' really has a sufficient flavour of fact about it to suffice....Lord Mansfield in effect answered the objection that the expert had no personal knowledge, no facts, by pointing out that the subject was in truth one of fact, but of a class of facts of which expert persons alone could have knowledge.[16]

The matter of interest to us is what occurred to bring about this change, and what connection if any, this shift in emphasis had on the

development of the basic premise of the legal system.

We shall see that the matter hinges upon what it was thought could be made, and what it was possible, in fact, to make, of the distinction between fact and inference from fact which has been institutionalized in our legal system. That division is at the bottom of our axioms of evidence, and accordingly, of our notions of capacity to give evidence. If the assumption is not made that it is in significant respects sound, 'evidence' and 'witness' and 'juror' are not distinct ideas. The theoretical question of its soundness however, is quite separate from the question of whether it can be maintained in practice without significantly inhibiting the function of the system. In the interval between hypothesis and methodology we will find some direction to the reasons the rule has developed as it has.

There are few who would now argue that the formal division is as functionally sound as its language suggests.[17] It is an idea that belongs to a less sophisticated view of reality than would be generally acceptable today. However, its importance to us lies primarily in the pervasiveness of its influence on the development of our legal institutions and structures. It echoes through the legal system in the formal divisions of witness and juror, and evidence and proof. Fact is to inference as witness is to juror as evidence is to proof. In

one very famous case, we see an explicit statement of how this formal arrangement was supposed to function:

> ...the verdict of a jury, and evidence of a witness are very different things, in the truth and falsehood of them: a witness swears but to what he hath heard or seen, generally or more largely, to what hath fallen under his senses. But a jury-man swears to what he can inferr (sic) and conclude from the testimony of such witnesses, by the act and force of his understanding, to be the fact enquired after, which differs nothing in the reason, though much in the punishment, from what a judge, out of various cases consider'd by him, inferrs (sic) to be the law in the question before him.[18]

All formulations of the opinion rule to this day, no matter what meaning is given to the word, depend on this division[19] for their statement.

Our system separates evidence from proof.[20] Testimony itself, represented formally in all its aspects by the divisions 'fact-witness-evidence', is not equated with truth and knowledge. These come to be represented by the divisions 'inference-juror-proof'. The logical consequence of this view is that the inference of the witness, expert or otherwise, is generally inadmissible, not on grounds of truth, falsehood, relevancy, or dimness or clarity, or the sources of knowledge upon which it is based, but simply because nothing turns on it.[21] The witness serves the formal method of proof, but the jury is that method, and its opinion, because of that, is authoritative.

It is the tendency of writers to concentrate on the functional operation of the rule at the expense of failing to consider the now essentially formal character of the rule itself. Yet it is in this aspect, as we will see, that the rule retains such importance as it has today.

The distinction between having a group of witnesses draw an inference, and having a group of jurors do the same thing is purely formal. A witness might not hear all the testimony, or might not know the law, but these are matters which are easily put right. In fact, it is immediately apparent that to alter things in this fashion would be to reintroduce the early jury, as it was before its functions were severed and formalized into the now separate spheres of witness and juror.

The formalism, or rather the formalistic function, of the opinion rule is caught by the emphasized words in Stephen's formulation:

> The fact that any person is of opinion that a fact in issue, or relevant or deemed to be relevant to the issue, does or does not exist is deemed to be irrelevant to the existence of such fact....[22]

and

> When there is a question as to any point of science or art, the opinions upon that point of persons specially skilled in any such matter are deemed to be relevant facts.[23]

To "deem" something to be such and so is to treat it as if it were

such and so, regardless, and even in spite of, the true state of affairs. The strength of this formulation is that it lets us see that the decision to accept or reject opinion is a matter determined not by its actual relevancy, but on either the formal characterization of the person who draws the inference ('witness' or 'juror'), or exceptionally, on the necessity to have certain material put before the jury.

What this means is that the rule itself, leaving aside for the moment any consideration of exceptions to it, is almost entirely devoid of functional content.[24] The tendency of writers to concentrate on function (i.e. "substance") rather than on structure (i.e. "form", "procedure" or the like) results in the rule being dismissed as an important factor in the law of evidence. This is a view that ignores its true nature and meaning. Let us consider Cross' statement of the rule.[25]

Cross' distinction between expert and non-expert opinion is not important for our purposes. In any event, this exception to the general rule excluding evidence of opinion has become; in fact, and almost in terms, an independent rule which excludes the opinions of non-experts on matters requiring special skill and knowledge.[26] The third element in his definition[27] is given over to the exclusion of the opinions of

witnesses which would not assist the court in coming to a conclusion. The admissibility of these opinions, with respect, would seem to be barred not by the opinion rule, but by prior obstacle of a lack of rational probativity. Cross' own examples, moreover, indicate that when the case for probativity is made out, the situation changes in favour of the admission of such evidence.[28]

The core of Cross' statement of the rule is in his second class of statements of opinion excluded by the rule. I will repeat it here:

> A witness may not give his opinion...if the facts upon which it is based can be stated without reference to it in a manner equally conducive to the truth.[29]

It is significant to note that the rule is stated in the functional terms characteristic of our present legal system, but it is more important for us to see that this surface veneer of functionalism is close to being meaningless. The actual content or substance of the rule can be varied infinitely by the widening or narrowing of the meanings of the operative terms 'fact' and 'opinion', both of which lack any empirical meaning except in the context of a particular situation. In general, they refer to nothing.

Even if we assume, as Cross does,[30] a practical and relatively easily made distinction, this exclusionary rule is quite narrow in terms. The actual examples given to support it, however, show that, in practice, it is narrower still. They are these sort of cases: the

accident eye witness cannot be asked whether the driver of the car was negligent, but he can give his opinion on the speed of the car, state of the weather and identity of the driver;[31] the nautical expert, having heard all the evidence, cannot be asked whether the captain of one ship acted improperly, but he can tell the court what the duty of the captain would be in that situation;[32] the doctor giving testimony having heard all other evidence in a medical negligence suit may not be asked whether the defendant doctor was guilty of any want of skill, but he can nevertheless tell the court whether he has heard anything suggesting improper conduct on the part of the defendant,[32] and so on.

These and similar situations pose acute problems for any explanation of the opinion rule that concentrates on its function in manipulating evidence. Phrased one way, these questions amount to asking the witness to answer the very question for the court, and are not permitted. Phrased differently, they achieve the same result, but this is allowed. There is, as Cross is forced to admit, "considerable force in the view that this distinction is a mere play on words."[33] He is uneasy, and later inconsistent, with his own explanation that this method lessens the danger of having the tribunal act on the opinion of the witness instead of considering the matter itself.[34]

This is a case in which it will be profitable to discuss the rule in its formal and in its substantive aspects. Expert opinion, to start with the latter, is in substance a separate rule which excludes the opinion of non-experts in appropriate cases. The opinions of lay witnesses are dealt with by a rule operating in an undefined area bounded by terms which have no determinate content. Moreover, typical instances of its application disclose a clear case of the worship of the letter and the neglect of the spirit. The trend is to even further relaxation of the rule both with respect to expert[35] and non-expert[36] evidence of opinion.

The substance of the rule excluding evidence of opinion is now expressed by those instances, classified as exceptions to the general rule, which permit its admission. These exceptions <u>are</u> functional, however. Their characterization as 'exceptional' is correct only in terms of a general rule which itself is non-functional with respect to the basic value-principle of the legal system. They will continue to assume more and more importance as the realities of application overwhelm the theory upon which the general rule is based, and more and more is seen as being inference, and less and less as 'fact' or data.

This, it is submitted, is the real reason for the present state of the opinion rule, and it is possible to identify and link events in

the past in a way which supports this view.

Legal history from the 16th century onward displays a steady trend in the direction of isolating the functions of the judicial machinery in a way that corresponds to this basic division between fact and opinion. The neat division suggested by the opinion rule does not today tell us enough about the world in the way in which we believe it must be understood. In the early modern legal system, however, the difficulties entailed by this theory could be prevented from breaking into the open in practice because they were obscured by the division of the witness-juror.[36a] But from the time the casual witness becomes a regular feature of jury trials in the 16th century, the witness function of the juror is in steady, if gradual, decline.[37] There is no general rule on opinion at all until after the witness function of the jury had disappeared and it had become a passive judge of fact. The actual articulation of the opinion rule comes only in the late 18th and early 19th centuries;[38] the juror had lost his character as witness by the late 17th and early 18th centuries.[39]

It was also about this time that the slow and gradual drift of the person "skilled in art or science", away from his ancient and usual role of amicus curiae, to his present role of witness to the jury, began.[40] This process was completed by the late 18th century,[41] and this put the problem of accounting for evidence of opinion squarely

before the court. It is about this time, when functions have been logically defined for some time, that the issue becomes clearly visible and the first rulings begin to appear.

The impracticability of carrying the fact-inference distinction to its logical conclusion was immediately apparent, but there is this difficulty: acceptance of opinion, because its exclusion was intimately connected with the basic principle of testimonial competency, itself an expression of the basic principle of the system, would have implied a rejection of the conceptual functions of the system itself. Whether or not this consideration was present to legal minds of the time, I do not know, but it may in this connection be significant that there occurred a change of startling suddenness in the justification for reception of opinion evidence. From a position that held 'mere opinion' not based on knowledge of the facts not to be evidence, this happens:

> ...in another generation's time, there occurs this mutilation, that '<u>opinion</u>' is not 'evidence'; - a very different and vastly broader proposition.[42]

This proposition includes the former, but it also paves the way for the new rationale that was speedily assigned to it: necessity. Opinion is not evidence, only facts are evidence, so the only way to justify its reception was if it stood in a position of necessity with respect to the reception of, or understanding of, the facts.[43] This has the effect, even if not necessarily the purpose, of getting the matter off the rocks of principle and into the more easily manageable waters of expediency, where it has remained ever since.[44]

The functional inadequacy of the opinion rule, as expressed, has meant that the history of the rule has consisted of the steady advance of exceptions to it, which serve the substantive burden of its inadequately expressed meaning, and leave the rule itself an empty shell. In substance, it is the exceptions to the rule which perform the characteristic excluding function of the rules of evidence.

While the functional inadequacy of the fact-inference division can explain the substantive emptiness of the present rule, it leaves the question of why the general rule remains. Apart from inertia, there seems to be this reason: what the rule excluding evidence of opinion does, and virtually all that it does, is to prevent, formally, the ursurpation of the judging function of the jury or other judge of fact, and to render the arbiter formally identifiable as the authoritative judge of the truth of the disputed matters of fact.

If this view of the present meaning of the rule is taken, the awkward situation that arises with witnesses answering questions with expressions of opinion that canvass the very issues before the court disappears. Although the orthodox accounts consider the locus of the ultimate decision making power as a relevant factor, they do so typically from the point of view of the substance of the rule. Accordingly, the point is not taken that the difference between A drawing an inference, and B doing the same thing, is purely formal. Formal methods, therefore,

Cross' "mere play on words" are quite sufficient to distinguish between them. What matters is not who draws what inferences, but whose inference is authoritative, and of that there can be no possible doubt.

This is the answer to those criticisms of the usurpation rationale[45] which rely on the fact that the witness is not trying to, or could not if he wanted to, usurp the function of the jury. The point is that he must not appear to do so. Accordingly, a rule which prevents the appearance of this is quite good enough. The necessity for such formal safeguards depends entirely upon how strongly we feel the authority of the inference by the court can and should be or needs to be, manifestly and formally distinguished from the inferences drawn by witness. As long as we feel we need a rule which reflects the formal separation of judge of fact, we will have an opinion rule.

PART I

CHAPTER SEVEN: NOTES

1. supra, p. 94

2. Thayer, Evidence, pp. 180-181, 263-269; H.E.L. ix, p. 127-132

3. Wigmore, vii, s. 1914, p. 10 (emphasis in text). See pp. 1-10 passim, for Wigmore's full account of the rule. For Holdsworth's, see H.E.L., ix, pp. 211-214.

4. Rupert Cross, Evidence (1967), p. 360, hereinafter referred to as "Cross" and see similarly, Phipson on Evidence (11th edn., 1970, John H. Buzzard, Roy Almot and Stephen Mitchell, eds.), para. 1272, p. 503, para. 1276, p. 505, and pp. 506-507, hereinafter referred to as "Phipson"

5. Wigmore, vii, s. 1918, pp. 10-14, sp. at p. 11; Cross, p. 360. Wigmore tends to consider the value of the rule to lie entirely in its utility, and he is driven to doubt this by the experience of the U.S.A. jurisdictions.

6. Wigmore, vii, s. 1917, p. 10; Cross, pp. 360, 365, 368

7. By Learned Hand, 'Historical and Practical Considerations Regarding Expert Testimony' (1901), 15 Harv. L. Rev. 40, at p. 44, hereinafter referred to as "Hand, 'Expert Testimony'"

8. Hand, "Expert Testimony", at p. 50; Wigmore, vii, s. 1917, p. 7

9. Wigmore, i, ss. 9, 10, at pp. 289, 293 respectively.

10. Wigmore, ii, s. 657, p. 762; see also ss. 650, 656, 658; vii, s. 1917, p. 3.

11. supra, Fn. 7

12. Learned Hand, "Expert Testimony", at p. 44

13. Wigmore, vii, s. 1917, p. 2

PART I

CHAPTER SEVEN: NOTES

14. ibid, p. 3

15. ibid, p. 5

16. ibid, p. 4

17. see, e.g. Cross, p. 360; Wigmore inveighs against this division at length - vii, s. 1919, pp. 14-17; see also Zelman Cowen and P. B. Carter, Essays on The Law of Evidence (1956), at p. 162, hereinafter referred to as 'Cowen and Carter, Essays'

18. per Vaughan, C.J., in Bushell's Case (1671) Vaughan 135 at p. 142; 124 E.R. 1006 at p. 1009

19. See Cross, p. 360

20. See Wigmore, ii, s. 650, p. 755

21. See Wigmore, vii, s. 1918, p. 10

22. Stephen, Digest, Article 48 (4th edn.), emphasis added; cited with approval H.E.L., ix, p. 211

23. ibid, Article 48, emphasis added.

24. see Cowen and Carter, Essays, p. 163; Wigmore, vii, s. 1929, pp. 27-29

25. supra, p. 107

26. see Cross, pp. 360-362

27. ibid, pp. 360,363

28. ibid, p. 363

29. ibid, p. 360

30. ibid

31. ibid, pp. 362, 368

PART I

CHAPTER SEVEN: NOTES

32. ibid, pp. 362-363

33. ibid, p. 362

34. ibid, pp. 364-365, 367, 369, for example. Wigmore, vii, s. 1919, 1920, 1921, 1922, pp. 14-21 canvasses the 'erroneous theories' which have been used to justify the rule, Cross' among them. His own view of its correct rationale will be found in s. 1918, p. 10 H.

35. Cross, p. 367, and supplement to 3rd edition at p. 16

36. ibid, p. 369 36(a) on the general effect of restraint on the growth of the rules of evidence as a result of the persistence of the jurors witness-function, see Phipson, para 648, p. 280

37. see H.E.L., i, p. 335, 336; iii, p. 648; ix, p. 127; Wigmore, v, s. 1364, p. 12 and see the extract from Bushells Case, supra, p. 115, where the notion of a functional division based on the fact-opinion dichntomy is explicit. This case, decided in 1671, held that juries could still go on their own knowledge and were not bound by what they heard in court. (see p. 1015, E.R.)

38. see Wigmore, vii, s. 1917, p. 7

39. see Phipson, p. 279; H.E.L., i, p. 319, 332-337.

40. see the cases collected in Hand, "Expert Testimony", supra, sp. at pp. 45-50; see also Wigmore, vii, s. 1917, p. 4; H.E.L. ix, p. 212.

41. Wigmore, vii, s. 1917, p. 4; H.E.L., ix, p. 212

42. Wigmore, vii, s. 1917, p. 6 (emphasis in text)

43. see Wigmore, vii, s. 1917, pp. 6-7

44. see Thayer, Evidence, p. 525

45. Wigmore, vii, s. 1920, pp. 17-18, for example: "an empty bit of rhetoric"; "so misleading, as well as so unsound, that it should be entirely repudiated"; see also, Cowen and Carter, Essays, p. 170

PART I

CHAPTER EIGHT: THE HEARSAY RULE

Holdsworth calls the hearsay rule "the most famous and characteristic of all the rules of the English law of evidence."[1] The rule deals with testimony as to the assertions of third parties, and it has had many formulations. Here are several:

> ...express or implied assertions of persons other than the witness who is testifying, and assertions in documents produced to the court when no witness is testifying, are inadmissible as evidence of the truth of that which was asserted.[2]

.....

> ...former oral or written statements of any person whether or not he is a witness in the proceedings, may not be given in evidence if the purpose is to tender them as evidence of the truth of the matters asserted in them.[3]

.....

> ...a statement oral or written made otherwise than by a witness in giving evidence, and a statement made or recorded in any book document or record whatever, proof of which is not admitted on other grounds, are deemed to be irrelevant for the purpose of proving the truth of the matter stated.[4]

Wigmore contented himself with indicating the essentials of the rule; his example and words will do well enough for my purposes:

> ...the Hearsay rule...signifies a rule rejecting assertions, offered testimonially, which have not been in some way subjected to the test of cross-examination.[5]

The rule has a beginning, unlike the opinion rule, which is quite clearly severable from the 16th century emergence of the present legal system. Holdsworth's account cannot link the rule with anything prior; he is clear that in the middle ages no such rule existed.[6] Wigmore says that its history as a distinct idea, as opposed to a formulated rule begins only in the 16th century, and it does not gain "a complete development and final precision until the early 1700's."[7] The fact that the rule is clearly part of the modern legal system suggests that we will find its basis in utility and not in principle. But, more in line with our present purposes, we will also see how the formalism of our legal system encouraged and shaped its growth.

The most marked change in the development of trial by jury in the 16th century was "that the proportion between the quantity of information obtained from ordinary witnesses produced in court and information by the jury itself contributed or obtained was in effect reversed."[8] The former element in the 15th century was "but little considered and of small importance."[9] By the early 17th century, however, the function of the jury as judges of fact who depended upon testimony given by witnesses produced in court had become "a

prominent one, perhaps a chief one."[10] Compulsory process as of course to enforce the attendance of witnesses was introduced in 1562.[11] The same statute introduced the crime of perjury.[12]

With this increasing reliance on evidence, there naturally arose questions upon its sufficiency, especially as the functions of providing evidence and deciding the issue on evidence so provided came to be more exclusively the provinces of witness and juror respectively. The subsidiary and more particular matter of whether the statements of persons not before the court would suffice for proof is a special application of this general notion.[13]

The idea of hearsay thus arises, related to the quality of evidence, but the rule we know now was far from being self-evident. Quite the contrary, there was originally no exclusion of this type of testimony. It was received down to mid-17th century as a matter of course, even where objection was taken to it admission.[14] This practice was widespread, uniform and unmistakeable.[15] Even after the rule was fixed, the role of hearsay as corroborative evidence lingered on.[16]

The practice of receiving hearsay as evidence came under increasing pressure with the passage of time and by 1690, we are told, the general doctrine excluding hearsay evidence had been established.[17] Although it was originally justified on the ground that it was inadmissible as testimony which lacked the sanctity of an oath, it was recognised as early as 1696 that these statements were no different in principle, and

that the real weakness of the hearsay statement was the lack of ability to cross-examine.[18]

The division: "fact-opinion" (or non-fact, or inference), permeates the formal structure of our mode of proof. 'Evidence', as an idea, became distinct to the extent that this division was actualized in the structure of the system. That is, in the progressive separation of the function of the witness from that of the juror along the lines suggested by the two formally distinct concepts of 'evidence' (fact) and 'proof' (inference, opinion), respectively. This clear formal division provided the basis for deciding how much of the former was sufficient to justify the latter.

Given the now commonly admitted empirical inadequacy of the fact-opinion division, it is not surprising that just as the formal concepts of 'evidence', 'proof', 'witness' and 'juror' became actualized in the legal system, the functional difficulties of actually operating on the basis of that distinction became almost immediately apparent. We have seen in the previous chapter how this conflict between the theory and the reality called forth a separate opinion rule, altered its rationale, and emptied it eventually of its substantive content. In the case of hearsay we see the same process at work - the rule becomes fixed at about the time the jury lose their character as witnesses. On the latter event Holdsworth says that "it was not till the latter part

of the 17th century that the jury lost their character as witnesses."[22] On the former, Wigmore says "no precise date or ruling stands out as decisive; but it seems to be between 1675 and 1690 that the fixing of the doctrine takes place."[23]

These developments were not isolated events. The completion of the division of the functions of witness and juror on a line corresponding to the fact-non-fact division fundamental to the legal system led to the rapid development of a number of other important rules of evidence: the privilege against self-incrimination, the notion of disqualification from interest, the proof of handwriting, the admission of secondary evidence, the admission of declarations of deceased persons and declarations against interest.[24] Eighteenth century evidence law continued to develop along the lines marked out during the later part of the 17th century.[25] Rules on proof became more precise and elaborate, growing out of the experience of trials at nisi prius.[26] The rule on hearsay was by this time well established and the 18th century saw the development of exceptions to it.[27]

We can see by the foregoing that the idea of hearsay is firmly placed in a system that requires the personal attendance of 'witnesses', who are to tell what they know concerning the matters in dispute, and who are subject to cross examination. The rule assumes the relevancy

of what is said[28] - it operates on material that has been found relevant and excludes it notwithstanding its relevancy.

The rule is justified universally, to all intents and purposes, on the lack of an opportunity to cross-examine the deponent. Holdsworth says:

> the modern rule is only beginning to be heard of in the 17th century, ...it is heard of only in connection with the modern witness, and...its rationale is based on the modern practice of cross-examination which came in with this type of witness.[28(a)]

Wigmore calls cross-examination "the greatest legal engine ever invented for the discovery of truth,"[29] and thinks it is, at least in some senses, the "great and permanent contribution of the Anglo-American system of law to improved methods of trial procedure,"[30] greater even than trial by jury. Its absence in other jurisdictions is accordingly viewed with disfavour.[31]

Nevertheless, these other jurisdictions do seem to manage, in one way or another, without at least the full blooded practice of cross-examination to which we are accustomed, and also, of course, without its companion, the hearsay rule. It may not be inappropriate, therefore, to consider why the practice is so important in our system. The reasons of utility which support the practice are well enough canvassed by Wigmore;[32] I have nothing to add on that account.

Even when we know why such importance is attached to it, however, there is still this question which is of interest: Why did the practice arise in the first place? That is, why do we do things this way? The answer, I think, lies in the formal structure of our mode of proof and is as follows:

Cross-examination is necessary only because the present mode of proof has been structurally faithful, if that expression is appropriate, to the formal division of fact and non-fact that was the original, if now inadequate, expression of the basic value of the new legal system that emerged as dominant during the 16th century. It is only when the function of the witness is separated from that of the juror, along lines suggested by the two formally distinct concepts of evidence and proof, that it becomes necessary to have a party or his representative lighten the burden of ignorance of the latter, by questioning the former.

The modern witness becomes more and more important as the witness function of the jury declines; the jury becomes more and more passive as their witness function is drained away. From a body which is supposed to use its own knowledge, however obtained, it becomes a body that is to have no knowledge at all of the facts in dispute. Before this dramatic although gradual, reversal, the jury could, and did, and was supposed to, perform the task of enlightening itself.

The practice of cross-examination arises only when the modern witness makes his appearance,[33] and as he comes to dominate as the source of evidence and the basis, accordingly, for inference (proof), this occurs: to find out the 'facts', 'what happened', the passive juror must rely on the memory, preception, sincerity and use of language of a man he cannot question himself. The witness, too, is a prisoner of this arrangement - he must give his testimony publicly in court; he is forbidden to retire, as he once did, with the witness-jurors, and to deliberate with them in private.

Cross-examination is necessary to test the witness in all the four aspects mentioned above, but that itself is only necessary because, according to the structure of our particular mode of proof, there is no other way for it to be done. It performs for the jury a necessary task it can no longer perform for itself. A passage from Thayer emphasizes this point:

> ...imagine what would have happened if the petit jury had kept up the older methods of procedure, as the grand jury in criminal cases did, and does to the present day - if, instead of hearing witnesses publicly, under the eye of the judge, it had heard them privately and without any judicial supervision, it is easy to see that our law of evidence would never have taken shape, we should still be summing it all up, as Henry Finch did at the beginning of the 17th century, 'L'evidence al jurie est quegunque chose que serve le partie a prover l'issue pur luy.'[35]

This relates to the hearsay rule as follows.

Testimony comes from 'witnesses', persons produced in court to give statements which are offered as 'evidence' of the truth of the matters asserted by the statement.[36] The hearsay rule assumes relevancy and distinguishes between statements of the following form when offered by a witness:

X says "I saw Y"
A says "I heard X say: 'I saw Y'"

The first is admissible if offered for the purpose of proving the truth of what is asserted by X. The second is inadmissible if offered for the same purpose. They are both cases in which the witness offers to the court the evidence of what came to his senses, but the second statement is hearsay, inadmissible because there is no chance to cross-examine.

If X is in court himself, he can offer his statement as evidence of the truth of what is asserts. He would then be cross-examined on the question of whether what he asserted was true - i.e. - did he see Y in fact? However, when witness attempts to tell the court the same thing in the form: "I heard X say 'I saw Y'" there are <u>two</u> questions for the jury where before there was only one. Namely: did it happen (i.e. wat it true that A heard X say <u>that</u>) and secondly, if he did, then was the thing said by X true (i.e. did X see Y?).

The jury can decide the first question as well as they can decide any other, and where the making of the statement by X is in issue, or is relevant to the issue, the statement comes in as 'original' evidence and the question of hearsay simply does not arise.[37]

If the relevance of the statement by X lies in the truth of the matter asserted by him, then because he is not present, the advantage of cross-examination is gone. But note that although the lines of inference are stretched, they are not broken. The hearsay rule is simply the articulation, at an arbitrary point on the chain of inference, of the value judgement that the truth of facts leading to, or bearing on, legal liability should not (not, 'cannot') be drawn by way of inference from this type of testimony. Exceptionally at common law, this was done, because the rule does not operate on relevancy, but on reliability. As was the case with opinion evidence, the strength of Stephens formulation of the hearsay rule[38] is that it correctly identifies hearsay evidence to be "deemed to be irrelevant for the purpose of proving the truth of the matter stated." This hits on the artificality of the operation of the rule in excluding relevant evidence of all the definitions, only this one pinpoints why the rule exists.

Because the rule is simply a subsidiary development of the idea

of the sufficiency of evidence, there is no particular reason for treating it as anything more than a tool. If it proves cumbersome or inefficient, there can be no reason in principle for not getting rid of it; still less for not modifying it to suit changing circumstances.[39]

To sum up, then,the hearsay rule is indirectly linked to, and supported by, the formal structure of our legal system. Hearsay is inadmissible only because there is no opportunity for cross-examination. Cross-examination, however, is only a development that occurred because the jury were, or became, unable to ask questions themselves. This in turn results from the fact that the structure of our legal system is the mirror of a non-operational division between fact and inference, with the jury being cast in the role of passive judge of the material (facts) provided entirely by the witness.

PART I

CHAPTER EIGHT: NOTES

1. H.E.L., ix, p. 214. For similarly emotive descriptions see Wigmore, v, s. 1364, p. 27, ("esteemed", "greatest contribution"); Phipson, p. 268 ("fundamental rule")

2. Cross, p. 387

3. Phipson, para. 632, p. 268. See also p. v, preface, for recognition of the value of Professor Cross' work in this area.

4. Stephen, Digest of the Law of Evidence, Article 15, cited Phipson, p. 269

5. Wigmore, v., s. 1362, p. 3

6. H.E.L., ix, p. 215. He suggests it originated in equity. H.E.L., v., p. 333

7. Wigmore, v, s. 1364, p. 9

8. ibid, p. 12

9. Thayer, Evidence, p. 130

10. Wigmore, v, s. 1364, p. 12

11. By 5-6 Elizabeth 1, c. 9

12. ibid

13. H.E.L., ix, p. 217; Wigmore, v, s. 1364, p. 13

14. Wigmore, v, s. 1364, p. 15

15. Wigmore, v. s. 1364, p. 15; Phipson, para. 648, p. 279

16. Wigmore, v, s. 1364, pp. 16-18; Phipson, para, 648, p. 281

PART I

CHAPTER EIGHT: NOTES

17. Wigmore, v, s. 1364, pp. 16, 18

18. H.E.L., ix, pp. 218, 219; Wigmore, v., s. 1364, pp. 18-26; Phipson, para. 648, p. 281 puts this date at 1716.

(There are no notes 19-21 inclusive)

22. H.E.L., i, p. 319; see also p. 304: "The modern witness, and the modern law of evidence, only gradually began to appear when, in the course of the 16th century, the jury were losing their character of witnesses."

23. Wigmore, v, s. 1364, p. 16

24. The trend in developments cut across the Chancery side of the system as well. See H.E.L., xv, p. 141, and v, p. 333, where Holdsworth traces the doctrines on hearsay, self-incrimination and solicitor client privilege to equitable beginnings. See also ix, pp. 353-358, where the increasing reliance of Chancery on the common law viva voce method of witness examination and cross examination is traced.

25. This was along a broad line usually referred to as a trend to letting objections go to credit rather than to competency. See Ch. Six, supra; H.E.L., xii, pp. 504-510. For some particular examples, see H.E.L., ix, p. 196 - evidence of parties and persons interested; pp. 197-198 - evidence of husband and wife; pp. 208-209; impeachment of ones own witness; 205-218, passim, on the rejection of the canonical testis unis testis nullis rule; and xv, pp. 139-141, Wigmore, ii, s. 488, pp. 525-527, and 1972 Supplement, pp. 204-205 for a summary of English legislation on these and related matters.

26. H.E.L., xii, pp. 506, 509

27. ibid, p. 507

28. Wigmore, v, s. 1364, p. 9 28(a) H.E.L., ix, p. 215

PART I

CHAPTER EIGHT: NOTES

29. Wigmore, v., s. 1367, p. 29

30. ibid

31. ibid: "...it is apparent enough, in some of the great continental trials, that the failures of justice could hardly have occurred under the practice of effective cross-examination."

32. Wigmore, v, s. 1368, pp. 33-49 passim.

33. H.E.L., ix, p. 215

34. Wigmore, v, s. 1367, p. 29

35. Thayer, Evidence, pp. 180-181; see also Phipson, para. 648, p. 281

36. Cross, p. 3

37. See Cross, pp. 388-393 passim; Phipson, pp. 275-277

38. supra, pp. 128-129

39. see, e.g. the Criminal Evidence Act, 1965, Stats. U.K. 1965, c. 20; Criminal Justice Act 1967, Stats. U.K. 1967, c. 80, sp. ss. 2, 9; Civil Evidence Act 1968, Stats. U.K. 1968, c. 64, pt. I.

PART II

CHAPTER ONE: INTRODUCTORY

Part I shows how a specific area of the practical law - the law of evidence - grew up around and was shaped by the strength of the emphasis given by our age to explanation that is tied in significant ways to the world of sensible reality. What is true in the practice of law is also true in the theory of law.

While its actual problems are of course quite different from those of evidence, legal theory also can be usefully viewed in this light, and the same process, not surprisingly, can be seen to be at work.

Professor Hart has pointed out that "few questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange and paradoxical ways as the question 'what is law?'"[1] It seems to be a species of the general intractability of theoretical issues in philosophy and related areas.[2] My aims are much more modest than an attempt at providing an answer to that or similar problems.

Our purposes do not require the direct consideration of the

very questions jurisprudence has to answer. Rather, I will consider how the ways in which we attempt the answers to those problems has been affected by the form in which we cast our attempts at explanation.

The selections from the literature which are offered are representative only, and not exhaustive; they are, perhaps, more straws in the wind than a show of convincing thoroughness.

If the problems of legal theory have proven themselves obstinate, they have also produced a literature of such proportions so as to be well-nigh unmanageable, especially when as here its study forms only a part of another theme. Nevertheless, I believe the material relied upon to be adequate for the purpose.

Generally speaking, the theoretical process is a more or less complex amalgam of description, differentiation, classification and judgment.[3] However, the methods of framing theories in the light of what has gone before can usefully be divided into two, according as they show a tendency toward the use of a logical method, or towards an empirical method.[4]

At the logical extreme of this spectrum would be found a purely 'analytical' jurisprudence. Making a virtue out of staying

away from phenomenological world, this method of description would profer to the curious a "legal system" in which "givens" (legal propositions) are applied according to the processes of logic. All these 'givens' are related to one another in logical fashion, and all are ultimately reducible to, and deductible from, one single proposition or set of propositions.[5] Max Weber identified the postulates of this formal rationality in modern law as follows:

> (1) Every decision of a concrete case consists in the application of an abstract rule of law to a concrete fact situation.
>
> (2) By means of legal logic abstract rules of positive law can be made to yield a decision for every concrete fact situation.
>
> (3) Positive law constitutes a "gapless" system of rules or must at least be treated as if it were such a system.
>
> (4) Every instance of social conduct can and must be conceived as constituting either obedience to, or violation, or application, of rules of law.[6]

From such a model will flow propositions that are self-consistent, necessary, independent of experience, and, for reasons that will be discussed below, generally unsatisfying.

The search for finality and conclusiveness implicit in any

such deductive jurisprudence model discloses a point of contact with medieval rather than 'modern' thinking.[7] In one very important sense, this thinking swims against the main intellectual current of the past four hundred years. Present day physical science, the present epitome of intellectual rigor, is based upon, and has made much of, the principle of induction, which flows naturally from the assumption, fundamental to empiricism, that there is a reality "out there", knowable in a reasonable and significant manner, or at least for reasonable and significant purposes.[8] There is no way to prove or disprove this assumption, although there can be few who now do not share it, at least as a working rule. It is, if you like, the filter through which passes, or the lens through which we see, our vision of reality, and because of this, logic tends to be viewed generally as a necessary, though not a sufficient, condition of knowledge.

At the far end of our division, in opposition to the logicians, stand those legal theories which, accepting in law the drift of modern thought in general, show in their expression that they have been overwhelmed by the magnitude of dealing with the phenomena of the sensible world. In these theories, it is 'realistically' managing what one can, and not the manipulation of logical relationships,

that is considered important, and, indeed, possible.[9]

In a world where the nation state is the dominant form of political organization, the ultimate questions of most jurisprudents fall to be answered in the context of working legal systems which stand in close relationship to those states.[10] The presupposition of a functioning national legal order, usually sound in fact, is the major boundary condition for most theory. The forsaking of unbridled force implicit in the notion of a legally organized community requires both the existence and efficaeous functioning of dispute resolving machinery. The courts must solve problems on a basis and in a manner that is generally acceptable and which is in fact generally accepted. There appears to be no disagreement here, even among the more formally minded. Kelsen, for example, uses this idea as the "minor premise" in this "normative syllogism": "The constitution is actually established and effective."[11] Likewise Hart: a bulk of a given society "must generally share, accept and regard as binding the ultimate rule of recognition."[12] In a word, the proper function of the legal machinery is to function properly and that function is presupposed by theory. If we look at that functioning system, however, rather than "presupposing" it, some things are clear.

The crudest observation of a legal system will yield these two conclusions: (1) that the "law", whatever it is, is always applied to the "facts"; and (2) that the law is applied to these "facts", not in gross, but in the context of each particular "case". This question then naturally, arises: how is it possible to generalize successfully about these observable processes? Because of our assumption that a satisfactory explanation consists in an account of the facts which will render them unsurprising and less difficult, we sense a need for a link between what actually goes on and the things we say about that state of affairs. There is accordingly a tendency to let that question shade into and almost merge with another: what is the method by which we can check the accuracy of our theory, i.e., how can it be verified?[12a]

We thus have a general situation in which the value (that is, the belief in) a theory is in some manner a function of the degree to which the theoretician can elucidate a theory which can be shown to "fit the facts" to be explained, because it is just that which induces a feeling of conviction. In jurisprudence, however, the actual connection between theories and problematic states of affairs has for the most part remained obscure,[13] where it in fact has not been actually

disparged and deprecated.[14] "Facts", however, despite these tendencies, still have great emotional significance for us. Thayer said this:

> The question of whether a thing be a fact or not, is the question of whether it is, whether it exists, whether it be true. All enquiries into the truth, the reality, the actuality of things, are enquiries into the fact about them. Nothing is a question of fact which is not a question of the existence, reality, truth of something; of the rei veritas.[15]

We see this attachment to "the facts" even more plainly, if we note that additionally, it is clearly of some practical value to distinguish what is "real" from what is not. There is at least this functional difference between what we know and what we believe: anyone who cannot distinguish that which constitutes the facts of sensible reality from that which does not is commonly regarded as being deficient in that respect. We have special laws for severe cases of this nature. The property of such a person may have to be administered; some of the 'normal' incidents of human society may not be attributed to him - he may not have the freedom of movement; he may not bear the responsibility for crime; and the like - all of these being things that would be the lot of 'normal' people.

At this practical level, however, it is generally unnecessary to canvass the question of what we mean when we refer to the "facts". The 'incapacity' incapacitates, and we concern ourselves with attending to that matter. Yet if we attend to our own legal system we can see educated men arguing at length as to what constitutes the "facts" in a given case. Although it might be said that in this sense at least lawyers and lunatics have more in common than either is often given credit for. The difference between them in this respect must be that while a person who has difficulty distinguishing sensible reality from fantasy or imagination will be unaware that he has a problem (how could he tell?), a lawyer will be not only aware that appearances can be deceiving, but will be engaged in determining which is which in a context that displays a social utility of the highest order.

It is this indeterminancy or "play" that seems to be present when people discuss the "facts" that needs some further enquiry if it is to be related to the major difficulty of present day jurisprudence. That problem as we shall see, is a problem of confidence and belief. It will be the particular task of the next chapter, and in a more general sense, of the balance of this part, to elucidate this matter.

PART II

CHAPTER ONE: NOTES

1. H. L. A. Hart, The Concept of Law (1961), at p. 1, hereinafter referred to as "Hart, Concept".

2. See e.g., David Hume, A Treatise of Human Nature (1969, E. Mossner, ed.) at p. 41, hereinafter referred to as "Hume"; and see also Crawshay-Williams, Methods, passim, for an extended treatment of this problem.

3. Crawshay-Williams, Methods, p. 6.

4. A.J. Ayer, Language, Truth and Logic (2nd ed. 1946), at p. 41. Ayer goes further than this: "...tautologies and empirical hypotheses form the entire class of significant propositions." Hereinafter this work is referred to as "Ayer, Language." I think this is clearly a notional division and the two are not mutually exclusive in fact. Quite clearly, for example, the framing of a sentence which purports to state a fact requires the use of some logic.

5. See on this Julius Stone, Legal System and Lawyers' Reasonings (1964), at p. 41-61, and sp. at p. 47. He cites Austin and Kensen as aiming at such a 'monist' system. The fact that Hart, Concept, pp. 253-254 might not agree is indicative more of the fact that these are relative terms than it is of anything else. They are tendencies rather than the exclusive basis of discrete theories. (Hereinafter referred to as "Stone, Legal System")

6. Max Weber, Law and Economy In Society (1954, ed. M. Rheinstein, at pp. li, 64, cited in Lord Lloyd of Hampstead, Introduction To Jurisprudence (3rd edn. 1972), at p. 399, n. 2., hereinafter referred to as "Lloyd, Jurisprudence". This particular work of Weber's does not appear to be available in the library.

PART II

CHAPTER ONE: NOTES

7. See, e.g. Nathan Isaacs, 'How Lawyers Think' (1922), 22 Col. L. Rev. 555 at p. 562; Lee Loevinger, "Jurimetrics: The Methodology of Legal Enquiry" in Jurimetrics (1963, Hans Baade, ed.), p. 5 at p. 7, hereinafter referred to as "Loevinger, Jurimetrics."

8. See Bertrand Russell, Wisdom of the West, (1959, P. Faulkes, ed.), p. 73, hereinafter referred to as "Russell, Wisdom"; see also Bertrand Russell, Human Knowledge: Its Scope and Limits, (1948), at p. 516: "Empiricism may be defined as the assertion 'all synthetic knowledge is based on experience.'" This second work is hereinafter referred to as "Russell, Human Knowledge."

9. These are, of course, the various 'realists'. They will be discussed in more detail in Chapter Four, infra.

10. See, e.g. Hans Kelsen, Pure Theory of Law (1957, Max Knight, transl.), where the relation is one of identity: see generally, c. 6, sp. at p. 286-290: "The state is a relatively centralized legal order." (Hereinafter referred to as "Kelsen, Pure Theory.") Karl Olivekrona, Law As Fact (2nd ed. 1971), at p. 72: "Historically speaking, the state presupposes the law....At higher stages of civilization the state and the law are always co-existent..."; and at p. 271: "The system of rules called the law of a modern state is characterized by its relation to the state...the state does not exist independently of the law. It presupposes the law: without law and law observance there is no state." (Hereinafter referred to as "Olivekrone, Law As Fact").

11. Kelsen, Pure Theory, p. 212; generally see pp. 211-214 for an elaboration of the connection preceived by Kelsen to exist between validity and effectiveness.

12. Hart, Concept, p. 110

12a. See Ayer, Language, pp. 87-88.

PART II

CHAPTER ONE: NOTES

13. See, e.g. H.L.A. Hart, "Definition and Theory In Jurisprudence" (1954), 70 Law, Q. Rev. 37: "the common mode of definition... has...led at certain points to a divorce between jurisprudence and the study of the law at work, and has helped to create the impression that there are certain fundamental concepts that the lawyer cannot hope to elucidate without entering a forbidding jungle of philosophical argument." Hereinafter referred to as "Hart, 'Definition'"

14. See, e.g. Stone, Legal System; at p. 42: "the devices through which men seek to achieve their purposes in the legal area are intellectual devices..." (emphasis in text); and at p. 43: "in other words, we are dealing with intellectual and not with sensory data..."

15. Thayer, Evidence, p. 191; see also n. 2., pp. 191-192.

PART II

CHAPTER TWO:[1] FACTS AND THEORIES

Part I - Facts

Anyone who seeks a further reduction of the phrase "the facts", when used with reference to the knowable reality we all assume, will immediately find himself in this position: the facts must be what they are and nothing more. So, how do we find out what that is?

As we cast about for the best means of determining this, however, we find it leads directly, and for us, naturally, into the methodological problem implicit in a theory that assumes the over-riding importance of experience of the sensible world as the source of its knowledge. That problem can be stated as follows: because our knowledge of facts arises from experience the question of whether empirical statements are "true" or "false" is a question that is only satisfactorily answered by experience. At many points the distinction between 'fact' and results of the method for determining 'fact' are indistinguishable. 'Verification' and 'truth' blend into one another. The organized observation and the arrangement

of appropriate experiential circumstances characteristic of modern science is its strongest claim to our loyalty and belief, because these practices accord most closely with the common view of how to meet this problem of verification. This running together of the concepts of truth and verification is at the root of the problem of confidence facing jurisprudence.

There are of course problems particularly in framing generalized theories. Observation is an activity, at least in theory, that is indefinitely refineable. It has been a criticism of empiricism that its view of the world has been too atomic and fragmented to be really useful.[2] This difficulty is avoided, rather than met, by viewing observation as a purpose directed activity, yielding information intelligible in terms of the purpose of the enquiry undertaken. What one sees is at least in part a function of the purpose for which one looks. This functional view focusses on relative precision of observation as a function of the scope of enquiry. One is a precise as one needs to be: "there is no point in sharpening precision to a higher degree than the problem in hand requires. You need no razor to cut butter."[3]

Concern with the facts of the world manifests itself in the making of factual statements.[4] These statements differ from logical statements, because their denial does not generate any formal, logical

inconsistency. The question of the truth of a factual statement cannot be answered by an appeal to semantics, symbology, analysis or syntax study alone. The determination of its truth is a matter of belief in, and selection of, a method or process by which empirical propositions are validated. Our process or method is to say that the statement will be false if it fails to satisfy some material criterion;[5] and that material criterion is observational experience.[6] By that method we distinguish those factual statements that are true from those that are false.

Observation alone would merely overwhelm us with data. Our ability to interpret it presupposes both knowledge, (in the sense of well substantiated belief) and its structure, theory. The distinction between the facts and theories is of fundamental importance,[7] but we shall see that in much jurisprudence it is one which is often not drawn with clarity sufficient to avoid serious confusion.

We must also attend to the relationship between what we know and what we seek by our theories to confirm. Enquiry is a "theory-laden" activity.[8] The shape and structure of our theories gives an impetus both to <u>what</u> we look at, and <u>why</u> we do so. They provide the criteria of relevance for significant observation: what we look at, and why, depends in part at least on the relationship between events

that we intend to elucidate by means of the results of our observations - i.e. - on the purpose for which enquiry was undertaken.[9] When the facts do not square with the consequences of an hypothesis, given our conventions as to rationality, the theory must be modified to accord with observation or it must be abandoned in favour of one which does.

"Facts" are "that" or "to the effect that", and they are expressed in "that-clause" linguistic constructions.[10] It is to be noted therefore that "facts" are neither observed nor observeable.[11] The proper subject of affirmation or negation is not "facts", but propositions. What we observe are not "facts" but the events, processes and states of affairs and objects in the world, and we make statements about them. The question of whether the statement is true or false, is, for us, largely one of how we find out. Our bias leans in this direction: if the content of the statement - i.e. what the statement states - agrees with our observation, then we say "the fact is" that the statement is true. Facts are, then, what true statements state: We see things existing in the world in the way they are described in the statement.[11a]

Our theories are, at least in part, exercises in description,[12] and description proceeds by the assimilation of "similarities" and

the ignoring of "differences"[12]: we will look at some things, but not at others. This has important implications for the development of legal argument, as follows:

What we look at is to some extent theoretically determined;[12a] it is observed for a particular purpose. If the purpose is different, even slightly different, then one theory may look at more things, or less things, than another, or it may look at the same things in a different light.[12b] That is, the objects, events, processes or states of affairs in the world are related one to the other by theory, structured by it, and, depending upon the purpose of the enquiry they have some potential to be described in this relation, or that relation, or then, or now, and the like. This will hold as long as the theory is not completely general.[13] To the extent that a theoretical statement actualizes these potentials for description, say, in this way, then to this extent, and for this purpose, the statement may be said to be true, assuming always that verification is possible. But to that extent, and for that other purpose or purposes, those "same" objects, processes, events and states of affairs remain potentially the subjects of statements that can also be said to be true.

The significance of this is that it is possible, because of the

purpose-directed nature of our special, non-general, theories, to predicate, even simultaneously, contradictory statements of the "same" states of affairs: "The different theories of the corporation may be looked at as merely stressing a particular advantage, and in this sense the conflicting theories may be simultaneously true."[14] This is so precisely they are viewed for this purpose or that purpose, and, accordingly, are seen in this relation or that relation. This means that "within" a particular theory, we must expect and accept probability, and not certainty, as the optimum result.[15] "Outside" a given hypothesis, the lack of absolute certainty functions as a sort of structural impediment when one theory is being compared to others giving an account of the "same" facts.[16]

This line of thought has assumed verifiability; it can be seen to be bending ever back to the relationship we preceive between knowledge and observation; that link is seen as almost tautological.[17] If the facts are "those structural possibilities inherent within states of affairs";[18] "true statement possibilities" within the subject matter;[19] the "world's possibilities for being described in an available language", 'out there' and potentially describable even before anyone states them;[20] then there must be some link between

theory and the 'outside' such that "some statements made about these states will be certifiably true, and some will be certifiably false."[21]

This is the "show me" age. A large part of our belief in the truth or falsity of a statement depends on methodological considerations - is there a process by which we can verify or falsify this statement and thus reduce its possibilities to probabilities, one way or the other? The convergence of the notions of methodology and truth is important. The tendency to identify the two can range in strength from a modest doubt as to the grounds for asserting a statement to be true, to an outright rejection of the non-verifiable as meaningless.[22] It is not for me to discuss the validity of this view; it is enough for our purposes to note that it exists as a cultural attitude, most pronounced, it is true in the physical sciences, but shared to some degree at least by virtually everyone. It has been well expressed by Sorokin:

> Only what we see, hear, smell, touch and otherwise preceive through our sense organs is real and has value. Beyond such a sensory reality, either there is nothing, or if there is something, we cannot sense it; therefore it is equivalent to the non-real and the non-existent."[23]

or similarly, by Ayer:

> The criterion which we use to test the genuinenes of apparent statements of fact is the criterion of verifiability. We say that a sentence is factually significant...if, and only if, he knows how to verify the proposition which it purports to express-that is, if he knows what observations would lead him, under certain conditions, to accept the proposition as being true, or reject it as being false.[24]

The first is the statement of a man who describes an attitude; the second that of a man who believes in it.

Part II - Theories

We neither commence nor complete the operation of explanation in isolation,[25] nor will we ordinarily have an arbitrary starting point. Our speculations take place within the framework of a general body of knowledge and supposition that in some respects will be related significantly to the perplexing matter at hand. Nevertheless, it will be useful to consider a more or less widely accepted description of the process of explanation.[26]

Discussion must have a basis; some supposition or hypothesis laid down or assumed as the foundation for argument. Russell calls the adoption of the hypothesis "the framework for all scientific argument."[27] Robinson says "...the logical notion of hypothesis...did not arise in any specialized domain of human thought such as law...

or mathematics, but as a natural and inevitable notion that arises whenever men use any prolonged reflection."[28] Russell also provides a concise statement of its use in a system which relies on induction:

> In arriving at a scientific law there are three main stages: the first...observing the significant facts; the second...arriving at any hypothesis, which, if...true, would account for these facts; the third...deducing from this hypothesis consequences which can be tested by observation. If the consequences are verified, the hypothesis is provisionally accepted as true, although it will usually require modification later on as a result of the discovery of further facts.[29]

The hypothesis is obviously a very important part of discourse. It grounds and guides thinking on the problem subsequent to its formulation. It will be both the source of whatever system, if any, is erected, and arbiter of the internal coherence of that system.

The emphasized portions of the foregoing passage however, alert us to several things about theories which we should now note. The first is that hypothesis qua hypothesis is never verified in the sense we have discussed in Part I of this chapter: it is never itself measured against the results of observation. Secondly, the hypothesis is an assumption only. It is tentative and we are uncommitted to it. If we were so committed, it would be a definition, not a theory. The

following passage should elucidate this important point:

> Confronted with himself and nature, Western man arrives by observation and scientific hypothesis at a theoretical conception of the character of these two factors. This theoretical conception even when determined by empirically and experimentally controlled scientific methods, always affirms more...than bare facts by themselves provide. In short, scientific theory always asserts more than observation gives, and is not verified directly,...as by mere observation; instead, it is an hypothesis proposed a priori, verified in part at least indirectly through its experimentally checked deductive consequences. As the contemporary Spanish philosopher Ortega ...has put it, 'Physics is a knowledge a priori, confirmed by a knowledge of a posteriori.' This a priori is, however...a hypothetical a priori, subject to change in its formal as well as its empirical content, not a categorical and immortally certain a priori, even with respect to its formal concepts. Albert Einstein has given expression to the same characterization of Western scientific and philosophical knowledge....
>
> > "Since...perception only gives information of this external world or of 'physical reality' indirectly, we can only grasp the latter by speculative means. It follows... that our notions of physical reality can never be final. We must always be ready to change...in order to do justice to preceived facts in the most logically perfect way."[30]

The theoretic or scientific or hypothetic component of our thought we never sense immediately, nor do we intuit, apprehend or preceive it. It is posited, postulated, mathematically designated,

and we verify it indirectly through its experimentally checked deductive inferences.[31] It (the theory) is always subject to change to fit new facts. This shows us clearly on what side of the logical-empirical line our emphasis lies presently, but it also tells us that a theory really represents a judgment that this way of things is better than that way. Thus, it is inappropriate to theory as being true or false in any absolute sense of those terms. Empirical hypotheses are neither conclusively verifiable[32] nor conclusively confutable[33] even in this indirect sense. They are merely useful to a greater or lesser degree.

The actual "proof" of an hypothesis qua hypothesis is a matter for logic. We must begin from a higher starting point of which the hypothesis in question is shown to be a consequence.[34] The hypothesis is empirically unverifiable, and insofar as we hold to a theory, we believe in it. When we are able to verify experimentally, observationally, empirically, that the consequences properly deduced from an hypothesis, do give a satisfactory account of observable facts, then we say there is reason to believe the hypothesis itself to be true. This belief may be strong or weak, but it varies with the facts known,[35] and it is tied not to logic,

but to our basic assumption that all knowledge is rooted in the experience of the sensible world.[35] Logic is independent of experience and is concerned only with formal self-consistency.[35]

The physical sciences have so refined the notion of observation, both conceptually and in practice, that it seems at times to be peculiar to those disciplines. This is clearly not the case. Ayer, speaking of "the laws of science" and "the maxims of common sense" said: "there is no difference in kind between them. The superiority of the scientific hypothesis consists merely in its being more abstract, more precise and more fruitful."[36] Russell views the men of science as the epitome of "everything that distinguishes the modern world from earlier centuries."[37] Their marks of distinction were these: "they had two merits not necessarily found together: immense patience in observation, and great boldness in forming hypotheses. The second of these merits had belonged to the earliest Greek philosophers; the first existed, to a considerable degree in the later astronomers of antiquity. But no one among the ancients, except perhaps Arestarchus, possessed both merits, and no one in the middle ages possessed either."[38]

The philosophy of verification based on observation has been taken to extreme lengths in various fields of endeavour.[39] This poses acute problems for belief in legal theory. The fact that this extension occurs is for our purposes important as a sign of faith in

that method. As the methodology and its results come to be more and more closely identified with truth, there must come a severe crisis of confidence in the value of legal theories. This is because the so-called 'scientific method' is merely the refined core of our basic view of reality, of "the nature of things". An extreme view of the 'nature' of things is as follows:

> All questions of the form, "what is the nature of X?" are requests for a definition of a symbol in use, and...to ask for a definition of a symbol X in use is to ask how the sentences in which X occurs are to be translated into equivalent sentences which do not contain X or any of its synonyms. Applying this to the case of truth we find that to ask "what is truth" is to ask for such a translation of the sentence "(the proposition) p is true..."[40]

and to conclude:

> what they are really discussing most of the time is the question "what makes a proposition true or false?" and this is a loose way of expressing the question "with regard to any proposition p what are the conditions in which p (is true) and what are the conditions in which not-p?" In other words, it is a way of asking how propositions are validated.[41]

The existence of this attitude, albeit not in such explicit form, cannot but be assumed to exist to a considerable degree.

Jurisprudence, with its obvious lack of systematic, articulated links between legal theory and the states of affairs the theory seeks

to explain, is bound to be in severe difficulty with the answers attempted to questions such as "What is law?" or "the more obscurely" framed question "What is the nature (or the essence) of law?"[42] Given the way we look at things, answers to these and similar questions will tend to inspire belief to the extent that they attend to, and are seen and felt to attend to, the linking of the theory in the book with the situation "on the ground". If that is not, or cannot, be done, then to the extent the reader equates verification with truth, there will be a temptation to dismiss the answer as speculative and even as meaningless. The extent and nature of our belief in a theory, given our conventions of rationality, is to a greater or lesser extent dependent on, and a function of, how well that theory explains a problematic, empirical state of affairs.

The persistence of Hart's "recurring questions" is just another way of saying that theories have not been satisfactory in this respect.

I want now to consider what we have discussed in relation to modern legal theory.

PART II

CHAPTER TWO: NOTES

1. I want in this chapter to put forward a non-contentious view on what we mean when we use the word 'facts'. The possible range of such an enquiry is very wide indeed, and since this is not a philosophical discussion as such, I have made the assumption that the subject matter is methodologically manageable in significant ways. It would be as well if at this point I indicated that much of the account that follows is derived from N.R. Hanson, Observation and Explanation: A Guide to the Philosophy of Science (1972), sp. at pp. 1-5 (hereinafter referred to as "Hanson", Observation). His narrative is illuminating, and is presented with a minimum of contentious argument and with the expressed desire to keep a moderate distance from both "the bare jagged rocks of symbology" and "the turbulent teeming maelstrom of phenomenology". (p.2)

2. Concentration on verification in the face of constantly receding 'facts' has led some to turn to logic. See, e.g. Ayer, Language. p. 38; Bertrand Russell, The Scientific Outlook (1931) (hereinafter referred to as "Outlook") c. 3.

3. H. Fiegl, "The Scientific Outlook: Naturalism and Humanism", in Readings in the Philosophy of Science (1953, H. Fiegl and M. Broderick, eds.) p. 8, at p. 12 (hereinafter referred to as "Readings").

4. Hanson, Observation, p. 2.

5. C.G. Hempel and P. Oppenhiem, 'The Logic of Explanation', in Readings, p. 319 at pp. 321-324; (hereinafter referred to as "Hempel and Oppenhiem"); Ayer, Language, pp. 90, 121; Hanson, Observation, pp. 2, 3.

6. "Hempel and Oppenhiem", at p. 322; Hanson, Observation, pp. 2, 3.

PART II

CHAPTER TWO: NOTES

7. See, e.g., G.B. Brown, Science: Its Method and Philosophy (1950) at p. 7; Hanson, Observation, p. 5: the union of knowledge and theory is "making sense out of sensors".

8. Hanson, Observation, p. 5.

9. Crawshay-Williams, Methods, pp. 22, 6, 35; Jerome Michael and Mortimer J. Adler, "The Trial of An Issue of Fact: 1 (1934) 34 Col. L. Rev. 1224 at p. 1241.

10. See Hanson, Observation, p. 9.

11. Ibid, p. 10: "What would they look like."

11a. Ibid, pp. 2-15 passim; see also Michael and Adler, "The Trial of an Issue of Fact", supra, fn. 9 at p. 1267, fn. 65.

12. Crawshay-Williams, Methods, pp. 6, 22, 35.

12a. This is important. It grounds the "now-a-days quite familiar idea that classes of things are man-made quite as much as they are nature made" and that when we sort or group objects "what the things thus classed together have in common is what we need to treat them in the same way for a given purpose": Crawshay-Williams, Methods, p. 33; Russell, Outlook, at pp. 98-99: the order we appear to find is the result of a human "passion for pigeon holes."

12b. This was one of Llewellwyn's insights: "What is true of some law simply will not hold of other law. What is true of some persons as to some law will not hold of other persons, even as to the same or similar law". Jurisprudence, p. 32.

13. Our theories are 'special' or particular, even though theory always works in the direction of greater and greater generality, and towards the union of apparently disparate topics. See Russell, Wisdom, pp. 72-73.

PART II

CHAPTER TWO: NOTES

14. Geoffrey Sawyer, "Government as Personalized Legal Entity", in Legal Personality, p. 158 at p. 161

15. Ayer, Language, pp. 36-37; 90-91.

16. Hanson, Observation, p. 2; Crawshay-Williams, Methods, p. 33; Ayer, Language, p. 121; J. A. Stewart, Plato's Doctrine of Ideas (1909), p. 46.

17. See Russell, Outlook, at pp. 40, and sp. 58; Ayer, Language, c. 1. passim; Hanson, Observation takes a "middle way": pp. 2-3: Observational experience is required to screen those factual statements which 'obtain' from those which do not."; p. 7-8: "...LaPlace recognized the indispensibility of observation at some point ... if ever scientific theory is to be harnessed to the natural world 'outside'..." (emphasis in text); p. 8: "the philosophical 'middle way' must always be the one which recognizes significant observations within a science as those which melt the criteria of relevance embodied within extant theory..." (emphasis in text).

18. Hanson, Observation, p. 14. Emphasis in text.

19. ibid

20. ibid; see a statement by Morris R. Cohen, "Reason in Social Science," in Readings, p. 663 at p. 667: ... "it is well to note that the invention of a technical term often creates facts for social science. Certain individuals become introverts when the term is invented." (emphasis in text)

21. Hanson, Observation, p. 14.

22. Hanson, Observation, p. 74: "dust bowl empiricism"; or see, e.g. Ayer, Language, pp. 13-14. See also Loevinger, "Jurimetrics", pp. 1, 7, 8.

23. Sorokin, Crisis, pp. 19-20. (emphasis added)

PART II

CHAPTER TWO: NOTES

24. Ayer, Language, p. 35. See also, similarly pp. 13-14, 15, 33-34, for example. (emphasis added)

25. I will not deal or attempt to deal with the more controversial problem of the source of the initial generation of the theory. "There is no such thing" Russell says, "as a logic of invention." (Wisdom p. 73). Hanson, Observation, pp. 63-67, and N. R. Hanson, Patterns of Discovery (1961) c. 4 deal with this. At ibid (hereinafter referred to as "Hanson, Patterns"), pp. 86-87 Hanson suggests that we operate initially as follows, to narrow the range of inquiry:

    1. Some surprising phenomenon P is observed.
    2. P would be explicable as a matter of course if H were true.
    3. Hence there is reason to believe that H is true.

    See also Russell, Outlook, p. 58 for his account of the mechanics of formulation for scientific laws; and Ayer, Language, p. 100.

26. The account which follows draws on Russell, Wisdom, pp. 72-73; Hanson, Observation, pp. 60-63; R. Robinson, Plato's Earlier Dialectic (1953), c. 7; J.A. Stewart, Plato's Doctrine of Ideas (1909), pp. 37-47; Brown, Science, c. 2; Ayer, Language. The characterization of theories as "hypothetico-deductive systems" (the phrase is Hanson's) seems to meet the requirements of explaining what occurs after a theory is set up. It is a formal approach that treats deduction from hypothesis not as an absolute beginning of thought, but as a beginning relative to some more or less severable train of thought. See R.Robinson, Plato's Earlier Dialectic, supra, p. 96; Hanson, Patterns, pp. 70-73.

27. Russell, Wisdom, p. 72.

28. R. Robinson, Plato's Earlier Dialectic, p. 99.

29. Russell, Outlook, p. 58 (emphasis added).

PART II

CHAPTER TWO: NOTES

30. F.S.C. Northrop, The Meeting of East and West (1946, 10th printing 1958) p. 294.

31. Petirim A. Sorokin, Sociological Theories of Today (1966), at p. 251. The theories of Northrop, supra, fn. 30, are well explained and examined critically by Sorokin, at pp. 245-263, sp. at pp. 250-252.

32. Ayer, Language, pp. 37, 38, 94.

33. ibid, pp. 38, 94-95.

34. Russell, Wisdom, p. 73.

35. See e.g. Russell, Wisdom, pp. 72-73; Hanson, Observation, p. 62; F.S.C. Northrop, The Meeting of East and West, supra, fn. 30, pp. 294-296; Russell, Outlook, p. 58; H. Fiegl, "The Scientific Outlook: Naturalism and Humanism" in Readings, p. 8 at p. 13. The burden of these references is that the view of the world is unfinished and tentative. This flows from the ideas that knowledge comes from experience, experience is contingent; therefore knowledge is contingent. The indefinite refinements of observation that can be carried out introduce a radical instability into ideas of knowledge, but observation is not the requirement of logic, it flows from our ideas on truth.

36. Ayer, Language, p. 49.

37. Bertrand Russell, History of Western Philosophy (1946), p. 547, hereinafter referred to as "Russell, History."

38. ibid, p. 549.

39. Hanson, Observation, p. 74; Jurimetrics, passim; Ayer, Language, passim.

40. Ayer, Language, pp. 87-88.

41. ibid, p. 90.

42. Hart, Concept, p. 6.

PART II

CHAPTER THREE: THEORETICAL CREDIBILITY

Part I - Things That Go Bump In The Books

The learned literature abounds in attempts to explain states of affairs that virtually all agree are complex, but the search for a systematic, applied methodology, linking the consequences of theory with the experience it seeks to describe, is a vain one. It does not exist: "We do not have and are not likely ever to have a jurisprudence that is 'experimental' or 'scientific.'"[1] The lack of any viable methodology has meant, perhaps inevitably, that in legal theory the distinction between facts and theories has become blurred, with the resulting confusion that this can cause. We should not be deflected by the abundance of statements in the literature which are made after the manner of the statement of fact. There is now well-nigh universal use of this form of expression, but it is by no means clear that we have its substance as well. In a sense, this is the price jurisprudence pays for belief: "Realism is dead; we are all realists now."[2] The question is: Are we convincingly so?

By way of examining this further, I want to consider it in relation to Professor Hart's "rule of recognition". The rule of recognition is by the author's own reckoning, one of the central thesis of his book.[3] He makes a determined effort to get it out of the shadow of Kelsen's 'basic norm.' To this end, Hart draws the following distinction:

> ...the view...here differs from Kelsen's in the following major respects.
>
> 1. The question whether a rule of recognition exists and what its content is...is regarded throughout this book as an empirical, though complex, question of fact.[4]

Here is a statement not only cast in the form of a factual proposition, but one in which pains are taken to insist that the rule itself is a fact.

That may be so; yet, apart from the immediate question which springs to mind - why should I believe that? - there is something else seriously wrong with this statement. It is this: the rule of recognition is unquestionably a construct required by theory, to explain, or to partially explain the "fact" of a "legal system". It is an hypothetical, theoretical entity; a "pure case". Viewing

or regarding its existence as "an empirical, though complex, question of fact" tells us precisely nothing about the world.

The argument does not appear to be materially assisted by the assertion that the rule is assumed or "tacitly presupposed", rather than being explicitly stated. It can be demonstrated to exist or it cannot. If it cannot, nothing is gained by describing it as if it existed and if the existence of the rule of recognition can be demonstrated, there is not the slightest attempt at a reasonably convincing methodology in the book. It remains the undetectable or undetected "fact". If its existence is purely contentious, but when or if challenged in the very terms in which it is proposed, there is no evidence to support the statement that it does exist.[5]

If it is necessary to deal with items like the rules of recognition, then I think, clearly, that Kelsen's terminology is to be preferred. It recognizes that the "existence" of the hypothetical, empirically unverifiable and unverified qua hypothesis, basic norm can only be presupposed, or, if its "existence" is to be demonstrated, this can only be achieved, as with any hypothesis, by showing it to be the properly deducible logical consequence of a higher hypothesis...and so on.[6] In Kelsen's theory the basic norm

is not so deducible precisely because he says it is not:

> The norm which represents the reason for the validity of another norm is called, as we have said, the "higher" norm. But the search for the reason of a norm's validity cannot go on indefinitely like the search for the cause of an effect. It must end with a norm which, as the last and highest, is presupposed. It must be presupposed, because it cannot be "posited", that is to say: created, by an authority whose competence would have to rest on a still higher norm. This final norm's validity cannot be derived from a higher norm, the reason for its validity cannot be questioned. Such a presupposed highest norm is referred to in this book as basic norm.[7]

Presumably Kelsen takes this position because he feels it is necessary to ground his theory, and, accordingly, it is not necessary for the norm to be anything other than what he says it is.[7a] Logical entities are neither confirmable or confutable by experience. Indeed, that is their strength - they are independent of experience.[8] The basic norm is truly, as Kelsen has said, and Hart has quoted, an "assumption", a "juristic hypothesis", a "postulated ultimate rule"[9] - and so is Hart's "rule of recognition". As the matter stands, the basic norm and the rule of recognition are theoretical account of facts, but they are not facts themselves, and neither is linked to facts, by any conventional methodology.

Hart's difficulties do not cease at this point, however. The rule of recognition is said to "exist" as part of something else: "...the foundations of a legal system consist...in an ultimate rule of recognition providing authoritative criteria for the identification of valid rules in the system."[10] Here again we have in factual proposition form the implication that there is something 'out there' that corresponds to the name 'legal system.' In fact, of course, the legal system is itself hypothetical. Stone says:

> ...considering the nature of the law...our first reactions (take) the form not of logical discoveries, but of certain assumptions...Chief among these is the assumption that the law itself is logical, so that, on the one hand, the process of applying its directive to concrete situations will be one of logical reasoning, while, on the other hand, the inter-connections between these directives are of a logical kind so as to make the totality in some sense a system.[11]

The idea of a legal system represents an organizing tool, no matter how fundamental, and however unlikely it is to be questioned, that is rendered necessary by any attempt to study the law in isolation. It is impossible to identify that phrase with any specific state of affairs. It refers to nothing but the subjective ideas men have about doing things, or viewing things done, in this way or

that. In Olivekrona's words, the phrase "legal system" lacks "semantic reference".[12] It is, nevertheless, the key assumption in most modern legal theory, and one which, as we shall see, plays a significant role in the discussion of legal personality and trade unions that occurs in Part III.

Hart's "rule of recognition" is an example of Weber's "ideal-type".[13] It is a one-factor, accentuated analysis of what is conceived to be the feature of another "ideal-type" - the legal system - seen from a particular point of view. The theoretical nature of these entities is even more readily apparent if we see what happens when we try to do without them. If we refuse to make the assumption that there exists a legal system (or a "rule of recognition"), matters remain manageable. They represent ways of looking at things, but they are not the only ways. Olivekrona drives this point home:

> Think of the English common law. Is it anything but a conglomerate of rules? What exists is a vast bulk of records of decisions by the courts during several hundred years, plus the general opinion among both jurists and the public that the courts ought to seek guidance in those records for deciding new cases (in so far as statutes do not prescribe anything else), plus the fact that the courts generally act in conformity with this opinion. As everyone knows the precedents are subject to many different interpretations. It seems to be not only useless, but highly misleading, to ascribe a ficticious unity to the mass of precedents by means of the figurative talk of a will.[14]

It is this failure to articulate the hypothetical nature of the concept, and its presentation after the manner of a matter of fact, that obscures the nature of the persistent difficulty encountered by attempts to "close in" the "legal system". This problem often and typically surfaces in the form of a complaint that such efforts ignore the fact that the "legal system" is ultimately rooted in some "non-legal" reality, as in the following passage by Friedmann:

> Kelsen must similarly acknowledge defeat when it comes to the question of conflicting fundamental norms. The question which is the fundamental norm his theory cannot avoid, for without it the whole structure would collapse. The 'minimum of effectiveness' which according to Kelsen must decide is at the bottom nothing else but Jellenik's Normative Kraft des Faktischen...How can the minimum of effectiveness be proved except by an enquiry into the political and social facts. And this implies the necessity for a further political choice: Does the obedience of the majority, of an enlightened minority or sheer physical force decide? Whatever the answer, purity here ceases.[15]

The point of this argument is somewhat elusive however, since Kelsen's theory appears to stop at the very point at which Friedmann's complaint begins. Insofar as the criticism may be taken to refer to law as Kelsen conceives it, the logical construct of the basic norm has no empirical content. That is its strength;[16] it is independent of experience. It is what it has to be and it is

nothing more. If the complaint relates to determining what empirical content Kelsen intends that to be, then the question does not appear to be one of law at all:

> the basic norm...refers directly to a specific constitution, actually established by custom or statutory creation, by and large effective, and indirectly to the coercive order created according to this constitution and by and large effective; the basic norm thereby furnishes the reason for the validity of this constitution... The basic norm is...not the product of free invention. It is not presupposed arbitrarily in the sense that there is a choice between different basic norms....Only if this basic norm is presupposed, that is, only if it is presupposed that one, ought to behave according to this...constitution - creating act and of the acts created according to this constitution be interpreted...as objectively valid legal norms...
>
> In presupposing the basic norm...the contents of this constitution and of the national legal order created according to it is irrelevant...The presupposition of the basic norm does not approve any value transcending positive law.[17] (emphasis added).

The true burden of Friedmann's criticism really amounts to this: he cannot bring himself to believe in a theory of law that makes a virtue out of turning its back on the sensible world. Laski summed up this feeling (for that is what it is) in his famous remark that Kelsen's theory was an exercise in logic, but not in life.[18] Max Radin overtly expressed this view thus:

> "with their utmost efforts...those who seek to make a mathematics or a logic of law cannot make it pure Euclidean...a geometry of law has to depend somewhere on a human interposition or on a divine source that speaks an extremely human language...We shall be lucky indeed if only one such arbitrary interpolation is needed and that at the course. But that single one colors all that follows..."[19]

Friedmann criticizes Kelsen for what he considers Kelsen's failure in his attempt to establish a "pure" theory of law on the grounds he has not taken care to integrate and give an account of the facts relevant to the articulation of that theory. But this, considered more closely, can be no possible basis for criticism, because what it amounts to is an assertion by Friedmann that his assumption and Kelsen's assumption differ, in ambit at any rate. That this is so cannot be doubted, but if Kelsen is true to his own theory or assumption, he is not to be placed in difficulty by the articulation of another assumption that generalizes argumentatively on material that Kelsen has defined as being outside the ambit of his theory on <u>any</u> view of it. Kelsen's theory simply does not comprehend the matters Friedmann raises. From Kelsen's point of view, then, it is not "purity" that "here ceases". It is law[20] itself.

Part II - The Significance of Theory

The "legal system" (and similar works), a phrase that refers to nothing, has been hypostatized to the point where it seems virtually invulnerable. It is commonly confused with reality. The failure to realize that it is only a way of abstracting, from a vast indifferentiated sea of experience, those items which answer the criteria of relevance established by the bounds of extant theory, is assisted by the lack of any articulated links to the reality that theory seeks to explain. We can see this coming through in this way: the perennial jumping off point for new theories in jurisprudence has been not usually a difference of opinion over the interpretation of subject matter, but, witness Friedmann vs. Kelsen, supra, a very real lack of agreement on just what that subject matter is in the first place. The total collection of "facts" considered relevant by existing legal theories fits the boundary conditions of no legal theory whatever. The result has been, very nearly, that one legal theory is as good as, and is refutable only by, another legal theory, and so on. If any theory ignores facts that can reasonably be related to the problem at hand, (and this can be, and often is, done simply by narrowing or widening definitions of subject matter) it can, and often does, happen that those

"facts" will provide the foundation for alternative hypotheses. Participants in discussions involving such competing theories part company at such a fundamental level that it must be by good fortune alone that any definite issue is ever joined. These factors must surely be among the reasons for the obstinacy of theoretical disputes in jurisprudence.

So we seem to have got round to this position: one theory is as good as another is as good as another is as good as another. This, it is to be observed, is not a problem concerning theory; it concerns the basis upon which we give or withhold belief. Our basic cultural assumption is that the true reality is sensory. Accordingly, our notions of truth and verification are close. Yet, with legal theory we seem to be in a situation where the will to explain has been sundered from the possibility of doing so: - we have no empirical methodology which will systematically link theory to reality. The effect is that legal theory is, in a very important sense, cut off from the source of belief. There is no arbiter, no ready access to an authoritative source of decision. And even if we arrive at such a source, it will offer us no absolute certainty, but only probability. In the face of this, the problem is to determine how it is that the statements of legal theory can be significant to us. Why do we

believe?

'Evidence' today forms the substratum of belief, but there is a tendency to concentrate on the regularized, systematic observation of states of affairs to a degree that can be distorting and misleading. We have seen that the refinements made by modern science with respect to observation are specialized applications of a generally held notion of the proper method for the pursuit of knowledge. Concentration on verification through observation in this area alone, where it is more formalized and institutionalized, runs the risk of ignoring the implicit organization of sense data, our "common sense", which is the ultimate foundation for the so-called 'scientific method'. Our experience has shown us that certain types of observation are trustworthy for us, even when made by others, and we draw on personal experience by way of confirmation. The information we obtain and structure in this way is of the type that will influence, positively or negatively, our beliefs about states of affairs, because it is rooted in the sensible world. To the extent that legal theory strikes this chord, then to that extent, it will be significant to us.

We may also be mislead, by an over-emphasis on the principle of verification, into a failure to consider the effect of the exis-

tence of more than one theory to explain the 'same' subject matter. This multiplicity introduces an element of falsification to the field of legal theory. We appreciate, for example, that there is a distinction between the "pure theory" of Kelsen, and our daily horoscope, even though we may think that on occasion, events have been accounted for by both. We are not deceived. The detail in Kelsen's theory makes it possible to know, at the time the theory was put forward, those conditions which, if they existed, would weaken it as an account of the legal order.[22] If and when it is thought that these conditions do exist, and sufficient account is deemed not to have been taken of them by extant theory, another theory or theories may be, and often are, built upon these neglected foundations, or the theory itself may be modified by a shift in emphasis "within" the theory.[23] To the extent that these new departures are justified, they will constitute falsifications of the theory under attack. The horoscope, however, is usually so general and indeterminate at the time it is made that the range of circumstances with which it might be compatible is so wide as to render it, in the sense we have been discussing, virtually meaningless.

The feeling conveyed by theory is one of <u>understanding</u>. The level, of course, varies from theory to theory; we get different

ideas about the subject matter from different theories. The two factors of general or 'vague' or 'weak' verification, and of falsification, go at least part of the way to explaining why some legal theory can exert a "grip" apart from an explicitly demonstrated empirical foundation, even in the age of empiricism, while others can be and are dismissed out of hand. To the extent that a theory generally explains (and even determines) what our experience tells us is generally the case, and to the extent that we know at the time what it would take to falsify that theory, then to that extent we feel qualified to judge the worth of that hypothesis.

It follows that a theory which comes closest to explaining (and even determining) the material we consider relevant to the subject matter will exert the strongest hold. Its assumptions become part of the theoretical landscape; if they are soundly based they, or some of them, may become to be thought of as being part of the very state of affairs they seek to explain. We may even come to think of their falsification as if it were to involve a contradiction. The assumption thus becomes virtually invulnerable, with the result that significant advances on this theoretical position may have to come through the positing of new general and fundamental assumptions, rather than by a further critical exploration of the

consequences of the old hypothesis.

The substratum of our belief is our view of the experience of the sensible world. Our basic empiricism has its cost: we have no certainty, only the infinitely varying degrees of probability,[24] in our knowledge of that world. The price we pay for our roots in empiricism rises as the distance from the specifics of experience increases. As the lines which bind theory to fact stretch, the sense of understanding and conviction fostered by theory weakens. Legal theory is quite a distance out on this line. In it, we find more of a mania for deduction, and more over-ambitious attempts at systematization than many writers have felt is proper. Our choice of the "proper" theory - i.e. - the one providing the best account of the "facts" - is, in the absence of articulated systematic links to the 'outside', much more a matter of judgement and opinion than we are at most times prepared to admit.[25] This point, although not usually phrased in quite this fashion, has been a motive force in the development of modern legal theory. In the concluding chapter of this part, I will accordingly give a brief account of the response and adjustment of legal theory to this most basic point of view.

PART II

CHAPTER THREE: NOTES

1. Loevinger, "Jurimetrics", p. 7.

2. William Twining, Karl Llewellwyn and The Realist Movement (1973), at p. 382, hereinafter referred to as 'Twining'.

3. Hart, Concept, p. 245.

4. ibid

5. Hart's view seems defensible only if one takes a rather startling view of what constitutes the facts: A view in which the facts are the conditions a subject matter would have to meet to be explanable in terms of the theory constructed to account for them; they would be entirely "theory-determined". This would seem, however, to be a view more formal and abstract than the general tenor of the work would suggest.

6. See pp. 23-24, supra, Ch. II.

7. Kelsen, Pure Theory, p. 194, see also ibid, p. 8.

7a. ibid, p. 201.

8. See, e.g. Ayer, Language, pp. 74-77.

9. Hart, Concept, p. 245. (Kelsen's General Theory of Law And The State is not available in the library.

10. ibid

11. Stone, Legal System, p. 44, see also p. 46: "...many efforts of analytical jurisprudence - especially those directed to making sense out of the assumption that the legal order as a whole is a 'system'"; p. 47: "The assumption that a legal order is in some sense a unified system..." (emphasis in text). See also: W. Friedmann, Legal Theory (1967, 5th edn.) at pp. 16-21, for a brief general discussion. (Hereinafter referred to as "Friedmann, Legal Theory".)

PART II

CHAPTER THREE: NOTES

12. Olivekrona, Law As Fact, p. 183, for example.

13. Max Weber, The Methodology of the Social Science (1949, transl. E.A. Shils and H.A. Finch), at p. 90; see also, generally, c. 2 "Objectivity in Social Science and Social Policy".

14. Olivekrona, Law As Fact, p. 76. See also: Nathan Isaacs, "How Lawyers Think" (1923) 22 Col. L. Rev. 555 at p. 556, similarly.

15. Friedmann, Legal Theory, p. 285. Note the unclear use of the terms "political" and "social" facts. Are these used metaphorically, or not?

16. Supra, pp. 30-31.

17. Kelsen, Pure Theory, p. 201. See also fn. 10, Ch. 1, pt. ii, where references are given indicating the relationship preceived to exist between the state and the legal system. There is a connection between the sense of order given by an established nation state and the growth of legal posituism that has been noted by Professor Dias: R.W.M. Dias, Jurisprudence, (1964, 2nd ed. of Dias and Hughes on Jurisprudence), at p. 352; and "Law At The End Of Its Tether" (1972), 31 Camb. Law J., p. 293. It must also be remembered that Kelsen did not found posituism - he merely set out to purify it - see Pure Theory, p.1.

18. H. J. Laski, A Grammar of Politics (4th ed.) p. vi.

19. Max Radin, Law As Logic and Experience (1940, 1971 reprint), pp. 12-13, hereinafter referred to as "Radin, Law and Logic; see also Karl N. Llewellwyn, Jurisprudence: Realism in Theory and Practice (1962), note 12, p. 19 at p. 20; hereinafter referred to as "Llewellwyn, Jurisprudence".

PART II

CHAPTER THREE: NOTES

20. see e.g. Kelsen, Pure Theory, c. 5, "The Dynamic Aspect of Law" sp. at pp. 194-195, 197, 201.

21. "This is what T. H. Huxley had in mind when he defined science as 'organized common sense'. Not a mere collection of miscellaneous items of information, but a well connected account of the facts is what we seek in science." Feigl, "The Scientific Outlook: Naturalism and Humanism", in Readings, p. 8 at p. 12.

22. See on this Hanson, Observation, pp. 76-77; Ayer, Language, p. 35.

23. Cohen, "Reason in Social Science", in Readings, at pp. 663 identifies this as one of the main reasons for the proliferation of theory.

24. See, e.g. Ayer, Language, pp. 10-11, 37, 94, 135-136.

25. There are some who think and say that it is nothing but that: e.g. "Jurisprudence is engaged in asking questions such as: What is the nature of law? What is the end or aim of law? What is property...These are questions that seek ultimate answers... These are not questions that can be answered by any scientific discipline...the answers are those of philosophy, ethics, aesthetics, or theology. In response to such questions man can offer only speculation, preference or faith." Loevinger, "Jurimetrics", p. 7.

PART II

CHAPTER FOUR: THE RESPONSE OF THEORY

The problem which faces legal theory is one of belief in its truth - the author must believe his theory; he must hope others will believe it too. No collection of statements known to be false could constitute an explanation of the legal system. We have seen, however, that the problem of inspiring conviction, belief and confidence in a theory in our present age is to a large extent a matter of linking the theory in significant ways to the facts of which it gives an account. The responses of theory to this central concern have been many and varied. Some of them have tended to run in the direction of abstracting legal theory, on one ground or another, from dependence upon its empirical setting, while others drift to a greater or lesser extent to the other extreme of attempting to put facts and theories as close together as is possible.

It is characteristic of the first approach to insist that giving an account in law is somehow different in kind than a similar operation in another field. There are extremes to which this drift can be developed, and of the writers who choose to whistle past the empirical graveyard, Kelsen is perhaps the best known. This should not be

surprising. Kelsen set out to achieve this purpose; he claimed to be the ultimate legal positivist.[1] He set out to restate what had been said before by others, but at the same time to strip from the 'science of law' its "uncritical mixture" with, and "adulteration" by, "elements of psychology, sociology, ethics, and political theory."[1]

His first step is to draw a distinction between 'causal science' and 'norm science': "If a social science, different from natural science, exists, it must describe its object according to a principle different from causality."[2] After this distinction has been elaborated, he says:

> It is obvious that the science of law does not aim at a causal explanation of the legal phenomena delict and sanction. In the rules of law by which the science of law describes these phenomena, it is not the principle of causality which is employed, but another principle that we designates as imputation.[3]

This principle, as Kelsen himself points out,[4] is one for which science, (excluding Kelsen) "does not as yet have a generally accepted word." Nevertheless, on this theoretical vehicle, Kensen rides off into the elaboration of his theory of law. To borrow a turn of phrase from Ayer,[5] Kelsen's treatment is a way of pleading the "special" nature of law in the "strong" sense. In the "weaker" sense, other variations on this theme are not difficult to find. Hart has said: "legal notions

however fundamental can be elucidated by methods properly adapted to their special character";[6] "Long ago Bentham issued a warning that legal words required a special method of elucidation, and he annunciated a principle that is the beginning of wisdom in this matter...";[7] "...the language involved in the enunciation and application of rules constitutes a special segment of human discourse which leads to confusion if neglected."[8] Friedmann also deals with the difference in kind preceived to exist between legal theories and other types of hypothesis, albeit in more emotive terms, when he says, in discussing some of the suggested possibilities of some recent scientific theories:

> They do not affect the basic difference between the objectives of natural and social sciences. The former are exclusively concerned with the study of matter, the latter with the purposive behavior of human beings....There remains an indeterministic element in the human decision which is not of the same order....As long as men do not become purely chemically and genetically pre-determined... chemical substances...they will differ in their ideas, their goals, their conceptions of good and bad which direct their objectives.[9]

Stone has even said that in law "we are dealing with intellectual and not sensory data," whatever that may mean.[10] Hart in his book speaks of "conceptualism" and "formalism"[11] to denote this heavily abstract approach.

In the "heaven of concepts" described by Hart, "a general term

is given the same meaning not only in every application of a single rule, but whenever it appears in any rule in the legal system."[11] Lloyd says of 'formalism' that it "was marked by a reverence for the role of logic and mathematics and a priori reasoning as applied to philosophy, economics and jurisprudence, with but little urge to link these empirically to the facts of life."[12] It has to be noted however, that actual examples of legal philosophers who consistently and consciously adhered to this line of argument, are scarce. In discussing critics of "mechanical jurisprudence" Dworkin says:

> ...they are right in ridiculing its practitioners. Their difficulty, however, lies in finding practitioners to ridicule. So far they have had little luck in caging and exhibiting mechanical jurisprudents. (all specimens captured - even Blackstone and Joseph Beals - have had to be released after careful reading of their texts)[13]

The term is therefore not an absolute one; it connotes a drift, or tendency, in theory rather than a school or movement. One man's empiricist is another man's formalist. The "American realist" movement, so called, for example, saved a special emphasis and disapprobrium for "British empiricism." The former school, we are told:

> ...was especially hostile to the so called British empirical school derived from Hume, and to which Bentham, Austin and Mill adhered....while these thinkers were positivist and antimetaphysical, they were for the anti-formalists, not empirical enough, since they were associated with a priori reasoning not based on actual study of the facts.[14]

The point of contact for the views we have canvassed so far in this chapter is their shared view that we know the things we know in law in different ways than we know what we know in, say, physics. The assumption that law is 'special' and therefore knowable only by either some inarticulate mystical process, or by a process of understanding different in kind from our understanding in other areas, is defensive in character, and it does not appear to be a necessary one.[15] It is better phrased in terms of a methodological inability than of a difference in kind. Legal theory must be among the last refuges of this metaphysical traditionalism.[16]

The effect, if not the purpose, of this line of thinking is that the boundaries between fact and theory become fudged and blurred, enabling, to a large extent, the finessing of the difficulties presented by a phenomemonological world. The "facts", in a sense, become "givens". We have already discussed this.[17] The obscurity, previously noted,[18] of the relationship between legal theory and legal practice is one of its fruits. During the course of a critique of the assumptions of classical jurisprudence, Llewellwyn picks out its main weakness:

> Here, again without notice and without enquiry, we assume that practice of the judges conforms to the accepted oughts of the books; that the verbal formulations of oughts describe precisely the is-es of practice. A toothed bird of a situation....Where is men's ideology about their doing, about what is good practice - where is that ideology or has it ever been an adequate description of their working practice?[19]

When these assumptions are made, legal theory is permitted, with the facts hypothetically more malleable than observation of them might confirm, to develop a marked reliance on logical considerations. These exhibit the attractive feature of being independent of experience. If premises are agreed, it is accordingly possible to cram the world between the covers of a book. This trend reaches its final expression in the theory of Kelsen, for whom law is a purely cognitive discipline, devoid of particular content: "The science of law does not prescribe that one ought to obey the commands of the creator of the constitution. The science of law remains a purely cognitive discipline ...."[20] Law, he says, is concerned neither with reality[20a] nor facts[20b] as its object. Kelsen sees his theory as the quintessence of all previous positive law:

> ...the Pure Theory of Law does not inaugurate a new method of legal cognition. It merely makes conscious what most legal scientists do, at least unconsciously, when they understand the mentioned facts not as causally determined, but instead interpret their subjective meaning as objectively valid norms, that is, as a normative legal order, without basing the validity of this order upon a higher meta-legal norm...in other words, when they consider as law exclusively positive law. The theory of the basic norm is merely the result of an analysis of the procedure which a positivistic science of law has always applied.[22]

If Kelsen says nothing new, then he says it in a definitive manner. For our purposes, however, it is less important to investigate the intrinsic merits of this trend of thought than it is to consider both the reason why it has failed to foreclose argument, and why it is

attractive in the first place.

The first matter presents little difficulty. Holding a formalistic view in unadulterated form operates adversely on belief because it assumes the existence of a degree of structure in the events to be managed by the system, that few would share or concede to be the case. Its view, and the common view, of the degree of change and its effect on the law, are far apart. The theory is too static; we purchase predictability, a requisite of any theory, at the price of far too simplistic a view of the scope of the job to be managed by the system. The reasons why formalistic theories have been unsatisfactory are canvassed in the Concept of Law; they are basically variants on this theme.[23]

What are its attractions, then? 'Formalism' and theories to the extent that they 'formalize', builds upon a notional relation between prediction and explanation.[24] To use an appropriate legal analogy, the relationship is akin to that said by lawyers to exist between the prerogative writs or orders of certiorari and prohibition - they are really the same activity viewed from different points in time. Within the framework of a purely formalist analysis, prediction is seen to be the explanation of an event before it happens, while explanation is viewed as a "prediction" of it after it occurs. This homes in on the problem of how we render the problematic unsurprising and explainable as of

course. We can go "forward" within the theory to explain in advance (predict) what we do not know, but which we expect to occur. We can go "backwards", also, within the theory, from the perplexing matter until we find something in our theory which is not in any way doubtful, and which can be inferentially linked to the unsettling or surprising element. It is this "potential predictive force" which gives explanation an important part of its persuasive power.[25]

It is obvious that this approach requires as a basis something which is entirely non-problematic. It is based on the minimum conditions of adequacy to be met by any attempt at explanation. Its range is general and it has the formidable task of explaining the infinite variety human conduct. This complex state of affairs is homogenized and made malleable and plastic by being harnessed to well understood, well defined meanings which apply in all situations in a way which permits of explanation in the sense mentioned above. The closer to universality general terms in the system become, the more perfect the system itself is reckoned to be. Results are 'perfectly' predictable. Indeed, in systems like that of Kelsen's, the law and its workings are the subject of a purely 'cognitive' discipline to the extent that the facts are completely denatured: the basic norm, central to the theory and obviously not "legal" is a simple, empty, theoretical shell, the precise contents of which are irrelevant, precisely because they must consist of what ever is necessary to justify the existence of a 'presupposed' legal order.

The facts, quite simply, are defined out of relevance by the narrowing of the scope of the theory so that in the 'theory determined' state of affairs that results, law becomes a study that is independent of experience. That is at once the main strength and the main weakness of a formalist approach. Perfectly executed self-consistency with ones assumptions provides an intellectual defence that reduces criticism to carping on the adequacy of the boundary conditions set to subject matter by the theory. It also provides the perfect platform for an overview: "The Pure Theory of Law is a theory of positive law. It is a theory of positive law in general, not of a specific legal order. It is a general theory of law, not an interpretation of specific national or international legal norms...."[26]

However, by perservering to a greater or lesser extent in the somewhat breathtaking manoeuver of ignoring the very facts it seeks to explain, it guarantees a continuing critical assault, based ultimately, as we have seen, on the apphrehension that the theory is unsufficiently connected with the "reality" of its subject matter. Llewellwyn saves a special acerbacity for this tendency:

> ...herein lies the scientific advance involved in the concept. You are freed of any necessity of observing what the courts do, and of limiting your discussion to that. You get back into the ultimate realities behind their doing. Obviously you can think more clearly among these ultimate realities. They are not so much obscured by inconsistency and divergence of detail. They are not answerable to fact.[27]

Logic has been slow to convince that it is the only, or even the

decisive criterion in resolving the problem of accounting for the legal order. Logic proceeds from agreed premises, and it does not deal with the truth of those premises.[28] The fact that a conclusion does not follow from its premises does not demonstrate the conclusion to be false; it shows merely that it has been improperly deduced.[29] It has been said that "those who believe in deduction as the method of arriving at knowledge are compelled to find their premises somewhere, usually in a sacred book."[30] It depends ultimately upon a resort to authority, and once doubt is thrown on the truth of the premises, deduction collapses as a foundation for conclusive argument.

At this point we can see emerging in more general form the particular difficulty encountered by attempts to "close off" a system by means of reliance on logical method.[31] It can be done, but belief in the theory then falls on the two edged sword of our views on the value of experience as the source of knowledge. If the system is self-contained, as with Kelsen, then to the extent that the student regards experience as the source of knowledge, he will not share the author's belief in the truth of his theory, because the theory is independent of that experience. If, on the other hand, experience does come into play to some extent, as in "the so-called British empirical school

derived from Hume, and to which Bentham, Mill and Austin adhered"[32], for example, then the doors are opened, and the contingent, many-faceted nature of experiential reality comes in to be accounted for, the connection between verification and truth is made explicit, is eventually investigated, and our belief in these theories is confounded, to a greater or lesser extent, by the inability of theory to forge systematic and articulated links to "the facts" of which it gives an account.

Given our assumptions and conventions of rationality, it should not be surprising if faith in logic as a decisive method is, in some quarters at least, a scarce commodity.[33] Unease with the efficacy of logical explanation has its theoretical manifestation. At the far end of the logical-empirical spectrum we can see a view which also retreats from the possibility of dealing with the complex empirical world: but this view is founded on the impossibility of expressing wholly in the form of rules the infinite variety of phenomena thrown up for the consideration of the legal system. It runs in a different direction. Its essence was almost too well expressed by Oliver Wendell Holmes in his famous remark, "the life of the law has not been logic: it has been experience."[34]

This view is burdened with the realization that a study of a

functioning legal order implies a continuous assessment of human personality, physical and social enviornment, economic conditions, ethical values and the like. It is a view common to, and usually associated with, much American juristic writing:

> ...granted the dangers of generalizing about 'the realists', if there is one thread that runs consistently through the work of American jurists from Holmes through Pound and the pioneers of the realist movement to Lasswell and MacDougall and beyond it is this: that there is more to the study of law than the study of a system of rules; that for most purposes legal doctrine should be seen in the context of legal processes and legal processes should be seen in the context of the totality of social processes.[35]

Hart calls this 'movement' one of "rule-skepticism"; in his view it plays Charybdis to the formalist Scylla.[36] What can be said of law from this point of view may be very little indeed compared to some of the more formal and general theories. Llewellwyn, perhaps the leading 'realist', said of the place of formal categories and concepts in law:

> throughout we run into the need for reexamining the majestic categories of the romantic period of jurisprudence. The old categories are imposing... but they are all too big to handle. They hold too many hetero geneous items to be reliable in use. What is true of some law simply will not hold of other law. What is true of some persons as to some law will not hold of other persons, even as to the same or similar law. I care not how reclassification is made so long as it is in terms of observation and of organizing the date usably, and with back check

> to the facts...what we need is patience to look and see what is there; and to do that we must become less ambitious as to how much we are going to look at all at once.[37]

Realism is an empiricist point of view, with the attachment to verification that that implies, which has been overwhelmed by its own lack of viable methodological possibilities; it is skeptical and timid in this respect, not reassuring enough. "Frank felt that the so-called legal realists were related only in the negative sense, in their skeptical attitude towards legal rules, and in their curiousity for observing the law in action."[38] Characteristically, and accordingly, it tends to define the area of inquiry with a keen eye on practical possibilities, in order to reduce to a manageable minimum the necessary ambit of the theory at hand, and, thereby limit the facts for which that theory will have to account. General questions, such as "what is law", insofar as they remain intelligible, are given answers that home in on the activities of the courts and of lawyers, and more particularly on the possibility of predicting the decisions of courts.[39] "When the law is viewed as a set of predictions it becomes a body of empirical statements, and the law itself aims to become an empirical science in a very elementary sense."[40]

The skepticism of the realists reached a peak in the work of Jerome N. Frank. Where the other realists dealt mainly with upper

level courts,[41] Frank struck at the roots of the system itself. Using the symbols "R" for rules and "F" for facts and "D" for decision, he proceeds:

> The courts are...supposed to ascertain the facts in the disputes which become law suits...A court is supposed to determine the actual objective acts of the parties.... No matter how certain the legal rules may be, the decisions remain at the mercy of the court's fact finding. If there is doubt about what a court...will find were the facts, then there is at least equal doubt about its decision.
>
> What is the F? Is it what actually happened....? Most emphatically not. At best, it is only what the trial court...thinks happened. What the trial court thinks happened may, however, be hopelessly incorrect. The court...must guess at the actual, past facts.... The F is merely a guess about actual facts.[42]

It has been said of Frank, and I think correctly, that the mere enumeration of his proposals "even in their totality do not reflect the full thrust of his labours. He struck deeper than he perhaps realized."[43] Frank walked on the very edge of utter skepticism. He was, to use his own phrase, a "fact-skeptic",[44] a member of a subgroup of the realist family, with similar aims, but at the same time going much further:

> No matter how precise or definite may be...formal legal rules, say these fact-skeptics, no matter what the discoverable uniformities behind those formal rules, nevertheless it is impossible, and will always be impossible, because of the elusiveness of the facts upon which decisions turn, to predict future decisions in most (not all) law suits....the pursuit of greatly increased legal certainty is, for the most part, futile....

> ...the rule-skeptics, restricting themselves to the upper court level, live in an artificial two-dimensional world, while the legal world of the fact-skeptics is three-dimensional....The Rule-skeptics are but the left wing adherents of the old magical tradition. It is from the tradition itself that the fact-skeptics have revolted.[45]

The 'traditional' American realist position sets up an area for study in which only the lawyer will move with ease:

> The law reaches the ordinary man through a professional person whose business the law is. These lawyers undoubtedly declare what is to be done and what is to be avoided, just what Chrysippus said it was the law's function to do. They are constantly at work in and out of courts telling specific persons that they must refrain from specific acts, or must perform these acts.[46]

His comings and goings make the mystery of the law a commonplace for him. He, at least, is understandable and manageable.

However, we can see gathering here the same forces that put pressure on a formalist analysis. There are the same unpalatable choices. As in the more formalistic theories, the potential range of the theory is unlimited: "Nothing that can happen to a man and nothing he can do is by its nature withdrawn from legal examination."[47] Unlike those theories, however, the empirical bent of realist theory dictates that this swirling phenomenology cannot be denatured or ignored, so it deals with the possibility of being overwhelmed by the lack of a presently existing, viable methodology, by attempting to carve out a

manageable area of this vast subject matter. That is its main strength: it appeals directly to our sense of what is credible: "How, by taking thought and giving study, can we achieve more of manageable certainty than life has been willing to just drop in our laps."[48]

Because theory is tied so closely to method, and because methodology in this area is so uneven, the realist position became anti-theoretical in effect, even if not in intent. Its explicit empirical basis seeks a link between what is methodologically possible and this comes to be identified with what is theoretically desireable or useful.[49] Twining says of them:

> One of the safer generalizations that can be made about the realists...is that they did not look on themselves as philosophers. It is to their credit that they preceived...some connection between legal philosophy and the problems of legal education, legal research and legal literature, but their primary concern was more with the latter than with the former.[50]

The credibility of the realist position suffers most, then, as does that of the thoroughgoing formalist, from the emphasis placed on its greatest strength, that is, in the realist case, on the insistence on empirical observation. This causes the study of law to become fragmented and splintered: the realists have superior tactics in comparison with the formalist, they speak to the foundation of our belief,

but they have little or no strategy. There is no room for a theoretical overview: "All the anti-formalists were primarily concerned with method rather than with a specific programme of reforms, and herein lay their weakness."[51] This reluctance to chance a drift into formalism by setting up concrete objectives and programmes that might later become stratified and reactionary was a characteristic of the more general intellectual movement of which 'realism' was but a part.[52] Instead of being formalist, it seemed that realism would become merely formless, amorphous. This was not lost on Llewellwyn:

> The quest for narrower, more significant, categories is always a sound first approach to wide categories which are not giving satisfaction-in-use. But of course, once satisfactory, narrower categories have been found and tested, the eternal quest recurs, for wider synthesis - but one which will really stand up in use.[53]

On the whole, however, realism failed to meet this challenge. Even for their limited objectives, the then extant methodologies of the social sciences were either woefully inadequate, were never employed seriously, or where they were, were used by men who were never more than gifted amateurs.[54]

The present direction of realism, through its "descendants, the jurimetricians and behavioralists"[55] seems to be tending to more emphasis on the same methods that landed it in trouble in the first place.

The substance of the difficulty of encouraging belief in legal theory is being approached by way of junking jurisprudence entirely as a useful pursuit, and starting afresh with a new legal science. This is in effect what "jurimetrics" has done. The term "signifies the scientific investigation of legal problems."[56] The implication, nay, the statement, is that this is precisely what jurisprudence does not do - what it does do is to engage in expressions of "speculation, preference or faith."[56b] The difference between this approach, and the more traditional realist approach, appears to be one largely of technique.[56a] An assumption is made that judicial behavior is predictable, and the most sophisticated techniques available are pressed into the service of making that prediction possible.[57] The main thrust of their work is the development of techniques into a viable methodology that will permit the identification of those operative factors in decision making that are measurable. This trend represents the movement of Hanson's "dust-bowl empiricism" into the field of legal theory. In so far as verification is taken to be the criterion for the truthfulness of a statement; goodbye to jurisprudence.

At the end of this discussion, then, we can see the factor of overriding importance in the evaluation of legal theory to be the canons of knowledge and belief that for us govern what is fact and what is

credible. Our conception of adequacy is presently tied to the connection of the theory to those states of affairs in the empirical world of which it seeks to give an account. That principle underlies our deliberations, and the demands of credibility are unsatisfied to the extent that it is ignored. Our conviction in the truth of the explanations of law which presently compete for our belief is, in a general way at least, significantly related to this value. Whether or not the law is a discipline that can be systematized in a much more thorough way is a matter of opinion and need not detain us here. We can now move on to the final Part of this enquiry, where the notions developed in Part I and in this Part will be linked to one of the chronic problems of legal theory: legal personality and the trade unions.

PART II

CHAPTER FOUR: NOTES

1. Kelsen, Pure Theory, p. 1, see also pp. 204, 205, and infra, pp. 51-52

2. ibid, p. 75, and see generally, pp. 75-81

3. ibid, p. 81

4. ibid, p. 76

5. see e.g., Ayer, Language, pp. 36-37, 90-91

6. Hart, "Definition", p. 37

7. ibid, p. 41

8. ibid

9. Freidmann, Legal Theory, p. 52. See also Cohen, "Reason in Social Science", in Readings, pp. 66ff. for an extended discussion in support of this point of view; Theodore Abel, "The Operation called Verstehen" in Readings, p. 677: "...we understand the human and the social in ways different than we understand the material."

10. Stone, Legal System, p. 43

11. Hart, Concept, p. 127, 249. See also p. 125

12. Lloyd, Jurisprudence, p. 399, and note 2, see also p. 400-403; Stone, Legal System, pp. 301-304; Julius Stone, Social Dimensions of Law and Justice (1966), at pp. 9-15 (hereinafter referred to as "Stone, Law and Justice"); Jerome Frank, Law and The Modern Mind (1949), c. 13, "Mechanistic Law" (hereinafter referred to as "Frank, Law and the Modern Mind"); Morton White, Social Thought in America: The Revolt Against Formalism (1947, republished 1957 with a new preface and epilogue) generally, and sp. at pp. 11, 15-18, and c. 5, "The Path of the Law" (hereinafter referred to as "White, Social Thought In America"

PART II

CHAPTER FOUR: NOTES

13. R. M. Dworkin, "Is Law A System of Rules?" in Essays in Legal Philosophy (1968, ed. R.S. Summers), p. 25 at p. 27.

14. Lloyd, Jurisprudence, p. 399, and see also p. 400. See White, Social Thought in America, pp. 14-15 on this particular point, and for a detailed account of the American realist attack on 'formalism' see Twining, Chs. 2-5, pp. 27-83

15. "Hempel and Oppenheim", in Readings, at p. 319 indicate that motivational and causal explanation exhibit no formal differences, and it is possible at least in principle to translate statements about motivation, purpose and the like into descriptive statements that escape the subjectivity assumed to be an insuperable barrier by the traditional approach - see ibid., pp. 321-331, sp. at pp. 325-331.

16. Radin, Law and Logic, refers, albeit sympathetically to "that vast scholastic discussion which is the law on the books." (p. 44) See Russell, Outlook, p. 46-47: "Traditionalists have always hoped that somewhere a region would be found to which the scientific method would prove inapplicable."

17. Ch. III, Pt. I, passim, supra

18. Ch. I, p. 7, and n. 13

19. Llewellwyn, Jurisprudence, p. 17

20. Kelsen, Pure Theory, p. 204 20(a) ibid,p.78 20(b) ibid, p.102

21. ibid, pp. 205 see also p. 1

22. ibid, pp. 204-205

23. Hart, Concept, pp. 121-132

PART II

CHAPTER FOUR: NOTES

24. see, e.g., "Hempel and Oppenheim", pp. 322-323; Ayer, Language, pp. 96-99

25. see Hanson, Observation, p. 40; Ayer, Language, C.5 generally, pp. 96-99 sp.; "Hempel and Oppenheim", pp. 331-337, where the 'concept of emergence', a sophisticated form of the basic proposition that hypotheses are only tentative and provisional, is discussed.

26. Kelsen, Pure Theory, p. 1

27. Llewellwyn, Jurisprudence, p. 11. See also Radin, Law as Logic, C. 1 passim, for a discussion of these two opposing tendencies.

28. J. Stone, The Province and Function of Law (1950), c. 6, s. 1, pp. 137 ff.; Stone, Legal System, pp. 46-47; Ayer, Language, p. 34; O. C. Jensen, The Nature of Legal Argument (1957), p. 21.

29. Ayer, Language, p. 34

30. Russell, Outlook, p. 33. Russell classes jurists with Christains, Mohammedans and Communits as people who use "deduction from inspired books" as the method for arriving at the truth.

31. see, supra, pp. 34-37

32. Lloyd, Jurisprudence, p. 399

33. See, e.g. Radin, Law & Logic, pp. 12-13, 25, 32; Llewellwyn, Jurisprudence, n. 12, p. 19 at p. 20

34. Oliver Wendell Holmes, "The Common Law"(1881), p. 1. On Holmes views on the uses of formal logic, see White, Social Thought In America, pp. 15-18 and Chapter v, "The Path of the Law".

35. Twining, p. 382. See also, e.g., Llewellwyn, Jurisprudence, c. 15, "Law and the Social Sciences - Especially Sociology", pp. 352 ff., and Friedmann, Legal Theory, c. 25, pp. 292-294.

PART II

CHAPTER FOUR: NOTES

36. Hart, Concept, pp. 132-137. Twining criticizes this statement, among others of a similar nature, as examples of "the unscholarly practices of indeterminate attribution of views and of unfounded generalizations about realism" - see pp. 80-81

37. Llewellwyn, Jurisprudence, p. 32, emphasis intext. See also p. 56, note "C"

38. Julius Paul, The Legal Realism of Jerome N. Frank (1959), p. 130. See similarly Radin, Law as Logic pp. 46-53; Llewellwyn, Jurisprudence, pp. 54-57.

39. See, e.g. Llewellwyn, Jurisprudence, p. 56; Radin, Law As Logic, p. 37: "most of the discourse about law deals not with statements that the judge has made, but with statements a lawyer imagines the judge will make.When a lawyer ...says this or that about the law, he is forecasting the judgement of the court." "...rules...are important so far as they help you see and predict what judges will do or so far as they help you get judges to do something..."; K. N. Llewellwyn, The Bramble Bush (1951), p. 14; Jerome Frank, Courts On Trial (1949), p. 73, hereinafter referred to as "Frank, Courts on Trial"; O. W. Holmes, "The Path of The Law" (1897), 10 Harv. Law Rev. 457, sp. at p. 461: "The prophesies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."

40. White, Social Thought in America, p. 63

41. Frank, Courts on Trial, p. 74: often without indicating to their readers that they were writing of appellate courts and not of the law in action at the trial level.

42. ibid, pp. 15-16. The Chapter is appropriately titled: "Facts Are Guesses" and see also Ch. V - "Wizards and Lawyers"

43. Leon Green, in a Foreward to Julius Paul, The Legal Realism of Jerome Frank (1959), at p. viii

44. Frank, Courts on Trial, p. 74. Some drew back from this: see Mortimer and Adler, "Trial of an Issue of Fact": 1, supra, Ch. II,, fn. 9, at p. 1231.

45. ibid.

PART II

CHAPTER FOUR: NOTES

46. Max Radin, Law As Logic, p. 10 and see O. W. Holmes, "The Path of The Law" (1897), 10 Harv. Law Rev. 457 (at p. 461 for his "what does the law mean for a bad man" point.)

47. Radin, Law As Logic, p. 27

48. Llewellwyn, Jurisprudence, p. 160. See also Radin, Law as Logic, p. 27: It is, therefore, not the common and usual situation, but the marginal and exceptional one with which the law deals.

49. Freidmann, Legal Theory, C. 25, pp. 292-304 has a useful discussion on their position.

50. Twining, p. 376. See also Llewellwyn, Jurisprudence, pp. 55-57 for his list of their "common points of departure"

51. Lloyd, Jurisprudence, p. 405, n. 31 (emphasis in text)

52. White, Social Thought In America, Chapter xii - "The Twenties", passim

53. Llewellwyn, Jurisprudence, p. 56, note "C" - emphasis in text.

54. See Lloyd, Jurisprudence, pp. 405-407

55. Lloyd, Jurisprudence, p. 406

56. "Jurimetrics", p. 1 56b Lowinger, "Jurimetrics", p. 7

57. Lloyd, Jurisprudence, p. 419; Julius Stone, Law and The Social Sciences (1966), p. 70

56a. Julius Stone, Law and The Social Sciences (1966), p. 70

PART III

CHAPTER ONE: PROVIDING A BODY FOR THE AUTOPSY

Extant legal theory on the question of legal personality and trade unions is generally regarded as inadequate.[1] It has also been suggested that the difficulties are mainly 'theoretical', and accordingly, of little practical importance.[2] The same writer notes, nevertheless, that it is reasonably clear that clarification of difficulties in this area will be a matter for legislation.[2A] It should require no firmer example than the debacle of the Industrial Relations Act 1971[3] to demonstrate the practical value of theoretical soundness in the preparation of legislation for use in a working legal system. Legislation is perhaps the one area in law where the academic becomes the practical. If it is not to muddy the waters still further, the issues to be dealt with by theory must be disentangled and examined on the basis of a realistic appraisal of possibilities. The following analysis is concerned with this task, rather than with reconciling conflicting authorities.

The argument has been developed at length in Parts I and II of this paper that the law has followed the general drift of the culture toward the idea that the significance of theory is measured by its articulated connection with the states of affairs it seeks to explain.

This has led to a spate of efforts to break down the categories of traditional legal theory in terms of the facts that support them. The difficulty encountered has caused the development of a more cautious and skeptical approach - less and less is found to be data, and more and more to be inference, hypothesis, and supposition.[4] Because of the importance of this concept of the necessity of articulated links to the empirical world, - it operates on the giving and withholding of belief, - the position of legal theory, in this respect, is thought to be relatively disadvantageous: "the great anomaly of legal language" is its "inability to define its crucial words in terms of ordinary factual counterparts."[5] It will be the function of the balance of this chapter to provide, as it were, a body for the autopsy we will be conducting on the theories of legal personality and trade unions. What do we mean, in fact, when we use the phrase "trade union"?

The technical problem posed for the law by trade unions is one of ascription, analogy, or imputation[6] which can be phrased roughly as follows: when an individual (A) does or refrains from doing an act which can or may engage his legal liability, civil or criminal, is that act or omission to be considered as being legally referable solely to A, or is it to be imputed also to the trade union of which A is a member?[7] Professor Hart has tried to show,[7A] using Maitland's famous "Nusquamia"

example[8] that attempts to answer this question have generally fallen under one or the other of two general approaches.[8A] His analysis is extremely useful, as much for what it ignores as for what it shows.

The first method Hart calls the "confusing way" of definition. The issue in our context is stated by defining what a trade union "is", and answering the question by a process of deduction from that statement. Here, "can this imputation be made" means "is this included in the definition."[9] The second, or "illuminating way", works to its result by concentrating on the network of analogies by which the law connects individuals, corporations, trade unions, clubs and the like. Looking at the paradigm states of affairs that these appear designed to deal with, we can see if the facts of the case at hand will permit its inclusion within the existing law, readily or at all, and if not, whether the present case, although in some ways different, is enough like the old cases to permit a reasonable extension of the relevant analogy to cover the new circumstances.[10] Here, "can" means "ought". This "ought" we are told, "is a debatable legal issue, but the important thing is to see that this legal issue, and not some logical issue, is the character of the question."[11]

For our purposes, this second approach has at least one serious flaw that has not gone unnoticed: "Is not its meaning simply that

legal rules may provide that Nusquamia, like every other debtor, will have to pay; or more simply still, that the law is the law....we have to know something more."[12] Nevertheless, I think that the distinction Hart plays for is a real one. I think also, however, that its import, in the terms we have been using in this paper, is merely obscured by his opposition of "legal" and "logical". If a matter is not logical, then I think it must be empirical or factual. "Analogy" and "ought", in the sense in which these terms are employed by Hart, open the door on the empirical world - on this choice or that, for this reason or that, and in this lies its importance for us. Analogy is the lowest form of induction.[13]

The distinction between the 'confusing' and 'illuminating' ways and the reason they are often confused in practice, would appear to be just this: in the latter, we are invited to deal with facts, not givens or constants, definitions or logical entities. Impliedly, this involves the abandonment of absolute certainty, means that we must proceed provisionally and tentatively, and remain ready to make the adjustments in theory which become necessary when the consequences of theory do not fit the facts. In a word, our premises become <u>hypotheses</u>, not <u>definitions</u>. In an actual case, the difference between them is the degree of conviction required by each. We are committed to a definition; an hypothesis is a tool.

To the extent that we want to do more than look up the law - i.e. if we want to know what the rule means, or how it can be, or how it came to be, that there is such a rule (and I think, with respect, that that is the true substance of Maitland's famous query, and of most other questions on legal personality) - then Hart's analysis will not be helpful because it is excessively formal and is isolated out of time.[14] Although it points unequivocally at factual material, it in fact ceases to operate just short of the situation 'on the ground'. To follow the course he suggests leaves us with this result: we lose the certainty that comes with a purely logical analysis. It is true that a measure of credibility is gained by using language that suggests a link with the empirical world. However, this is an advantage, the utility of which must be greatly tempered by the fact that we either look merely at the rules, a course that will convince but few, or we look at what we can call the reasons for the rules. In the latter case, our enquiries are again confounded by the lack of a specialized methodology by which conclusions can be authoritatively verified. This leads, as we have seen, to a proliferation of generally unconvincing theory.

In the result, then, we are brought by Professor Hart to fact our difficulty, only to realize yet again that we have not the means to

solve it satisfactorily. Theory must inspire belief and confidence; and that can only be done by addressing explanation to the prevailing conventions of belief. The question - "What is a trade union?" must therefore, be answered, in substance, by saying "A trade union is..." and the answer must be empirical or it will not be believed. So, in the end, it is not, as Hart suggests, the question that must be different, but the answers to it. If we carry Hart's analysis into practice, past the point of merely stating it, then undoubtedly "we are involved in most of the discussions which the supporters of Fiction and Realist theories and their variants have put forward - the discussions which Professor Hart hoped to avoid."[15]

If we are to progress, we need a reasonable description of what a trade union is in fact, and a sketch of the basic features of the context in which it moves and operates. From the first, we should get an idea of the state of affairs to which theory must be linked to be convincing; from the second, with which I will deal in the following chapter, should come a reasonable perspective on the problems raised by trade unions.

There is a tendency in both the cases and the learned writings to criticize extant theory by the measure of how it relates to a somewhat vague 'entity', existing in fact, the exact outlines of which remain

unspecified and which accordingly are quite plastic. This permits the use of a variety of assumptions articulated in the form of statements of fact. Thus we find the author of one leading text on trade union law referring to the "conferring" of "legal personality" on "classes of objects which have defined empirical characteristics",[16] and similar remarks are not uncommon.[17] There is a confusion of fact and theory here that is most unfortunate: remarks of this nature tell us very little about trade unions. What, one could well ask, are the "defined empirical characteristics" of a trade union? This is the language best suited to kindle belief, but it is almost entirely lacking in substance. What seems to be wanted to begin with is a rough account of the brute factual situation. For this purpose I am content to adopt as my own the following general explanation of the factual situation, on a regularized view of the matter, that appears to obtain when the law deals with organized groups:

> The 'juridicial person' is primarily a word structure. A company has a name which is officially registered and legally protected. A paper organization is defined by the statutes. A corresponding actual organization is set up. Legal transactions are carried out in the name of the juridicial person. Usual rules of civil law apply to them. When a property right is ascribed to a juridicial person, this has the same sort of directive function in general commerce as the ascription of a right to a physical person. The word is a red light for people in general. The rules of the organization designate persons entitled to make decisions concerning its property; for them the word has the function of a green light. In litigation

> the juridicial person has to be 'represented' by somebody designated to the task according to the statutes. If the court orders the juridicial person as defendant to pay a sum of money to the claimant, executive measures can be taken with regard to the property defined, according to legal rules, as belonging to the juridicial person.
>
> The whole time, the regular use of the name is essential. It fits into the general use of legal language ascribing rights and duties to juridicial persons as quite analogous to the ascription of rights and duties to physical persons.[18]

This, it is submitted, is a reasonably accurate summary of the standardized view taken by the law towards organized groups of a certain stature. We shall see that, in the case of trade unions, it is the significant qualifications that have to be made to this description which constitute most of what makes trade union law distinctive. For the moment, however, we can use it as a basis for stating three matters which are simple and reasonably clear from this description.

First, the term 'trade union' refers to no specific object. "It" has no empirical content - "it" cannot be weighed, measured photographed, imprisoned, or the like. "It" is not the same as "its" offices, officers, typewriters, employees or property. All of these presuppose "its" existence. Secondly, it can also be said that 'trade union' at least refers to some sort of relationship (the 'union'?) between physical persons, but it must be equally clear that this relationship is not itself actual - i.e. measurable or otherwise empirically detectable in itself. It must be of a supersensible kind -

a matter for inference only. In short, the term 'trade union' denotes nothing than can be identified with any factual situation that actually obtains.[19] Notwithstanding this, we can further, and finally, say, that men have subjective ideas about the nature and purpose of their relationship to each other "in" the trade union. These subjective ideas, held both by "members" and "non-members", are facts, and it will do no harm to say that the term "trade union" refers to these subjective ideas.[20]

If these things are so, however, it is a necessary implication from them that the content of the term is not in fact constant, either from person to person, or from time to time. This is the difficulty finessed by Hart's method, or perhaps occasioned by it,[21] but finding the "cash value", as it were, of the expression at any one time, as difficult as that may be, is at the centre of any attempt to regulate trade unions. It is analogous to discovering the value of a piece on a chess board: it is a matter which depends entirely upon the position of the piece relative to every other piece on the board at the time one wants to know. It is obvious that precision here is extremely difficult. To that extent, generalizing is inevitable, but an attempt must be made to build upon as sound a factual base as can, in the circumstances, be managed.

We can also infer from certain evidence that at least some of the subjective ideas men have about unions have enough in common to form a core of evaluative ideas by which the union is differentiated from other bodies relying on other sets of ideas. These are the sets of "us and them" thoughts that enable us to talk intelligibly about "it". Groups, including trade unions are noticeable as such because of the inferences we draw from various patterned and noticeable human actions occurring from time to time. These actions are evidence that certain people think of themselves and of others, at least part of the time, as being 'part of' this group, or "belonging to" that association, in common with, or in differentiation from, certain others. It is this evidence of the existence of these ideas, and not the union "itself", which is a name referring to nothing tangible, that is the factual material caught up by statutory "definitions" of trade unions, such as are contained in, for example, the Trade Union Act, 1871.[22]

To consider an example which may illustrate this: a man is interviewed on television. He says he is, or is referred to as, the president of union A. He says that union A has called a strike. If he is believed at large, it must be because those to whom his words are conveyed believe he properly holds a position that carries with it, as an incident, the power to make such a statement. If those on whose behalf he purports to speak, the "members of the union", in fact cease work in circumstances from which it can be inferred that they have "gone on strike",

then that is evidence both of the existence of certain ideas held more or less in common - i.e. of the "existence" of the "union" - and of its strength. This brings us to the second part of this discussion - that is, given that the existence of these union-ideas is the *sine qua non* to the *attraction* of our attention, it is still not sufficient to explain the *quality* of the view we take of these ideas. That is a matter which depends upon other considerations, and which will best be discussed separately in the next chapter.

PART III

CHAPTER ONE: NOTES

1. see, e.g. "Hickling", p. 46; Wedderburn, "Corporate Personality and Social Policy: The Problem of the Quasi-Corporation" (1965), 28 Mod. Law Rev. 62, at p. 63, hereinafter referred to as "Wedderburn, 'Corporate Personality and Social Policy'"; Leicester C. Webb, "Corporate Personality and Political Pluralism" in Legal Personality p. 45 at p. 64-65, hereinafter referred to as "Webb, 'Corporate Personality and Political Pluralism'".

2. "Hickling", p. 46

2A. ibid.

3. 19-20 Eliz II, c. 72

4. see, e.g. Llewellwyn, Jurisprudence, pp. 32-34 ; Hart, "Definition", pp. 41, 43-45; Axel Hagerstrom, Inquiries into the Nature of Law and Morals (1953,ed. K. Alivekrona, transl. C.D. Broad), hereinafter referred to as "Hagerstrom, Inquiries", at pp. 1-16 ; A. Vilhelm Lundstedt, Legal Thinking Revised (1956), p. 17; Olivekrona, Law As Fact, C. 6: "The Concept of A Right in Legal Theory" passim, also see pp. 207-208; Felix S. Cohen, "Transcendental Nonsense And The Functional Approach" (1935), 35 Col. L. Rev. 809 at pp. 821 ff. and sp. at p. 823; Walter Wheeler Cook. The Logical and Legal Bases of the Conflict of Laws (1949), p. 30; Kelsen abandoned the attempt: see Pure Theory, pp. 70-101: "Law and Science".

5. Hart, "Definition", p. 41

6. see, e.g. Olivekrona, p. 251; Kelsen, Pure Theory, p. 176; Hart, "Definition", pp. 59-60

7. see Kelsen, Pure Theory, p. 176 7A. in "Definition"

PART III

CHAPTER ONE: NOTES

8. i.e. - who owes you money when you are "owed" it by an organized group - in Maitland's example, the fictional soureign state of Nusquamis: see Frederick William Maitland, "Moral Personality and Legal Personality", in Selected Essays (1936, eds. H. D. Hazeltine, G. Lapsley, and P. H. Winfield), p. 223 at pp. 236-237, hereinafter referred to as "Maitland", S.E."

8A. I have taken it that his approaches are conceptually, as opposed to actually, distinct.

9. Hart, "Definition", p. 57

10. ibid.

11. ibid.

12. S. J. Stoljar, "The Corporate Theories of Frederick William Maitland", in Legal Personality, p. 20, at pp. 42-43 (Stoljar's "Change of approach" suggested concentration on the separate property of the unit in question as the basis for its differentiation. On this, see H.A.J. Ford, Unincorporated Non-Profit Associations (1959). This does not appear to be available in the library. See also: Geoffrey Sawer, "Government As Personalized Legal Entity", ibid, p. 158 at pp. 158-161.

13. see, e.g. Alfred Sidgewick, Fallacies: A view of Logic From the Practical Side (1883), at p. 212; Wigmore, Proof, p. 19

14. see Geoffrey Sawer, "Government As Personalized Legal Entity", in Legal Personality, p. 158; see also R. W. M. Dias, Jurisprudence (3rd ed., 1970) at p. 384; (hereinafter referred to as "Dias, Jurisprudence"), and pp. 544, 545.

15. Geoffrey Sawer, ibid, p. 160

16. "Hickling", p. 8, see also p. 9. Mr. Hickling is the author of the 3rd edition of Citrine's Trade Union Law (1967), hereinafter referred to as "Citrine", and as to which, see for similar remarks, pp. 177-178.

PART III

CHAPTER ONE: NOTES

17. see, e.g. J. C. Hicks, "Jargon and Occult Qualities" (1956), 19 Mod. L. Rev. 158 at p. 161; Denning L. J. in Bonsor's Case [1954] 1 CH. 479 at p. 507; Denning M. R. in Willis' Case, [1965] 1 Q.B. 141 at p. 147 (C.A.)

18. Olivekrona, Law As Fact, p. 251; see also, similarly, Hart, "Definition", pp. 59-60: "analogy with a living person and shift of meaning are therefore of the essence of the mode of legal statement which refers to corporate bodies."

19. This is a straightforward extension of Olivekrona's views on the nature of a right - see Law As Fact, pp. 182-185, sp. at p. 184 - but I do not think it an unwarranted one. The common view of the present nature of legal personality has been expressed by "Hickling", at p. 8 - it is derivative from the concept of a right in most modern theory.

20. I think that this is closer to the sense of A.V. Dicey's famous remark (made in (1904) 17 Harv. Law Rev. 511 at p. 513, see fn. 10, CH. 3, infra) about the "existence" of bodies of organized men than the interpretation apparently put upon it by Denning L.J. in Bonsor's Case, (supra, fn. 17) and by Denning M. R. in Willis' Case, (supra, fn. 17). The debt this view owes to Olivekrona is too great to be repaid by a specific footnote.

21. "Naturalists think mainly in the time-frame of a continuum and positivists in the time-frame of the present, so for a good deal of the time they would appear to have been shadow-boxing on different planes." Dias, Jurisprudence, pp. 544-545; "...positivism is suited only to the context of the present time-frame" ibid., p. 384.

22. 34 and 35 Vict., c. 31.

PART III

CHAPTER TWO: THE IMPORTANCE OF UNIONS

The reasons for the importance of trade unions, in contrast to the mere theoretical inference of their existence, lie beneath, and give meaning to, the trade union theories themselves, and an understanding of the issues involved is essential to a proper appreciation of them. The importance of trade unions because of the way I have described them in the preceding chapter, is a function of the interplay of various and everchanging estimates of the actual or potential strength of the union or bond between the members. In order to assess this realistically, we need to know whether and to what extent these individuals can act in concert, in accordance with a common understanding or purpose, so as to affect the occurence or non-occurence of significant events. Obviously this is a matter for judgement in a particular case, but our purposes are wider and it is therefore necessary, despite the dangers, to commence with some important general features which are discernable and which should now be stated.

The key to a proper understanding of the general importance of the unions would appear to lie in the relationship that can be sketched between two reasonably obvious statements that can be made about them, and the implications of the present state of legal theory on the subject.

In the first place, the union operates in significant ways in areas which are considered by the state to be at least partly within its own range of activities and purposes: "It is just because the union in each trade and place is something unique, because it has a monoply and has a quasi public position, that we are entitled to ask what are the purposes it serves, what objects shall the law allow it to pursue, what requirements it shall be allowed to impose on its members."[1] Secondly, the strength of the union - that is, the extent to which the bond preceived to exist among members can be translated into effective action - clearly depends upon the implicit or manifest offer of the use of coercive power, both "internally" on its own members, and "externally", upon its opponents, to secure or advance its ends. On the first aspect of the second matter, the Webbs make the following comment:

> ...this universal aspiration of trade unionism - the enforcement of membership - stands...on the same footing as the enforcement of citizenship....the refusal of the Northumberland Miners to "ride" with non-society men is, in effect, as coercive on the dissentient minority as the Mines Regulation Act.... The insistence upon the Englishman's right to freedom of contract was, in fact, in the mouths of staunch trade unionists, perilously near cant....No trade unionist can deny that, without some method of enforcing the decision of the majority, effective trade combination was impossible."[2]

On the other, "external" arm of this second point, 'bargaining' by

the union on behalf of its members, generally represented as the optimum trade union position having regard to the present state of affairs, is enforced ultimately by, and would have its effectiveness manifestly impaired by the absence of, the strike, the picket, blacking, the boycott and other similar practices. While trade unions are, of course, not to be described exclusively or comphrehensively in this manner, I want to make the important point that trade unions are consensual and voluntary organizations only to a point. To be effective, they require the continuing threat, and fairly regular use, of coercive power. Whatever threatens that, threatens the importance of the union.

Because of the way in which English legal theory has developed, the sphere and manner of union operations are at the heart of the problems trade unions have raised in the law. They become significant when attempts are made to link them to the general mainstream approach of English legal theory. This has been dominated by the work of Bentham and Austin. Although their work is seminal, it did not arise in a vacuum. At least part of its influence stemmed from the fact that it developed along lines, and discussed ideas and concepts in terms that English lawyers could readily understand, even if they might disagree with its tone, and the strength and direction of its emphasis.

The bedrock of their legal systems is their overdeveloped concept of unlimited or sovereign power contained in a single, independent, effectively functioning political community (the state), actually controlled by some person or group of persons. This person, or group of persons, is the sovereign. He is identified by the fact that he is actually obeyed.[3] From the sovereign, actually in control, spring commands that are the expression of his will. All laws are commands or, additionally, according to Bentham, prohibitions,[4] but only the commands of the sovereign are law, and nothing else is law.[5] The continuence of the actual habit of obedience to the commands of the sovereign which enable his initial identification as such, is ensured by the punishments and sanctions that attach to disobedience of the dictates of his will. This threat of punishment is both the necessary and sufficient condition for the existence of the law: without it the law would not bind, and if it did not bind, it would not be law.[6] The continuing cohesiveness of the political community is guaranteed by the laws: that is, by the commands[7] of the sovereign backed with efficaceous threats. The theories are variations on the theme of power and of the effective extensions of power: "Laws and other commands are said to proceed from superiors and to bind or oblige inferiors....Superiority is often synonomous with precedence or excellence....But, taken with the meaning wherein I here understand it,

the term superiority signifies might: the power of affecting others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct to one's wishes."[8]

If a body is not sovereign, then it is subject: "A society political but subordinate is merely a limb or member of society political and independent. All the persons who compose it, including the person or body which is its immediate chief, live in a state of subjection to one and the same sovereign."[9]

It is not my purpose to pass upon whether or to what extent the theories of Bentham and Austin are defensible in total. Their importance for this paper lies in their clear (some, or most, would say 'overemphatic') representation and highlighting of a matter which is and has for long been, of fundamental importance in English legal theory - the role of power in the concept of the state.

The obvious practical difficulty with Austin's theory,[10] upon which a mountain of critical comment has been heaped, was the difficulty of assimilating it, as a matter of fact, to the traditional doctrine of the supremacy of Parliament, which is the characteristic and cornerstone of British Constitutional law. The actual political situation underlying that doctrine has seemed, generally, to be more diffuse and complex than Austin's theory allows: the situation 'on the ground' suggested that although there was a great deal that could be done by parliament, its power was subject to very real practical limitations. The theory, in a word, seemed to ignore, or fail to account satisfactorily for,

certain salient features of the legal system.[11] These practical limitations on the power of Parliament were recognised and they required, and were given, a statement of its 'supremacy' in 'legal' terms which allows it to ride free of the political situation. Dicey provides the modern, orthodox statement of the theory:

> The principle of Parliamentary Sovereignty means neither more nor less than this: namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and further, that no person is recognised by the law of England as having a right to override or set aside the legislation of Parliament.[12]

On this much, most writers appear to be in agreement.[13] But while the so-called political dimension of the question has been duly noted[14] as a practical limitation on parliamentary sovereignty, it remained for Jennings to point out an inference which is abvious from this situation, but which is, at the same time, of the utmost importance for the balance of this paper: if parliament was the "legal" sovereign, and the electors (or, anyone else, for that matter) were the "political" sovereign, then "legal sovereignty is not sovereignty at all. It is not supreme power. It is a legal concept, a form of expression which lawyers use to express the relations between parliament and the courts. It means that the courts will always recognise as law the rules which parliament makes by legislation...."[15]

Viewed as a general proposition, I think Jennings' remark overstates a valid point - parliamentary sovereignty must be at least what he says it is, but, as Salmond has pointed out, it is, in fact, not merely that: "The doctrine of Parliamentary Supremacy in England... involves more than mere usage and practice: it involves acceptance of the view that Parliament's word ought to be observed. Nor is it, on the other hand, a mere hypothesis to be assumed for the sake of argument: for Parliament is in fact supreme."[16]

We must observe that there are two very distinct strands or themes here - the "is" and the "ought" of parliamentary sovereignty, - and it is the nature of the connection between the two which bears on our subject. Dicey's artificial distinction between "legal" and "political" sovereignty is a useful one for many purposes, but our topic requires that we attend to the basis upon which it rests: it is possible because in England the laws have generally been made by the same people who also hold the substance of the political power necessary to enforce them. The "legal" sovereign and the "political" sovereign have not generally been at odds. This convergence, in the context of an increasingly representative government permitted the reduction of the power relations of politics to genial statements linking the power of

the government to the consent of the governed, and holding it to be limited thereby. This fortunate conjunction of power and legitimacy, however beneficial for theory, is a political fact, not a law of nature, and like all such facts, it is liable to change. This relatively stable social equilibrium leading to an undue emphasis on consent as the operative factor, tends to obscure Austin's central point, which I take to be this: at some level, the functioning of the state, membership in the state, and activities within the state like the functioning, membership and various activities of a trade union, are non-voluntary and ultimately based on force. One well known writer, in a passage which seeks to pinpoint the "common element" in the many and diverse theories of the state, put it as follows:

> This common element is the basic fact of organized force.... the first step in political theory is and remains the fact that, in order to achieve those ends, in order to set up those structures, force has to be resorted to, and must be effective. The notion of the state, however different its versions, always comes back ultimately to the successful carrying through of mans will, to a relation of command and obedience in a social context.[17]

Kelsen has taken this relationship of force and law, and, in equating the law with the state conceived as organized and effective force, has distilled it to its essence with his heavily abstract analysis:

> In traditional theory the state is composed of three elements, the people of the state, the territory of the state, and the so-called power of the state,

> exercised by an independent government. All three elements can be...comphrehended only as the spheres of validity of a legal order....The state population is the personal sphere of validity of the national legal order....The so-called state territory can only be defined as the spatial sphere of validity of a national legal order....The so-called state power is the validity of an effective national legal order. That the government exerting the power must be independent means that it must not be bound by any other national legal order....The power of the state is no mystical force concealed behind the state or its law; it is only the effectiveness of the national legal order.[18]

Other writers have agreed with this characterization of state power as the extension of an "effective" (i.e. coercive) legal order although they do not, of course, necessarily accept that its effectiveness depends merely on force.

> The power of the State is, in a word, a system of laws actually enforced.[19]

> Without law and law observance there is no state....law observance is conditioned by the regular use of force.... The relationship between the state and law is characterized by interdependency.[20]

> We are not so much concerned with...the amount and direction of the forces the state brings to bear upon individual conduct, as with the existence, strength and complexity of these forces. For these forces are the state; their strength makes it sovereign....It is the power to strike at offenders within and without which gives to states and maintains in them an individual existence: it is this which preserves them from inward collapse, and from absorption into the existence of other states outside them.[21]

This then, is the minimum condition for the existence of the "is" of Parliamentary supremacy.

The theories of Austin and Bentham did not deal with the problem of the binding force of law from any perspective other than that of a "duty" arising solely from the fact of compulsion.[22] Salmond has pointed out,[23] however, that there is, as a matter of fact, a general acceptance of the view that the laws of parliament ought to be obeyed. Accounting for this sense of obligation, and for the binding force of law after the manner of Austin and Bentham has never been generally accepted as entirely satisfactory, and this problem in legal theory is chronic and recurring.[24]

Of most interest to us, however, is the undoubted tendency of people to identify what they actually do with what they feel they ought to do. In other words, although we may at some levels speak intelligibly of the existence of a generally shared feeling that parliament "ought" to be obeyed, at least part, though not all, of that "ought" is composed of the fact that its dictates are in fact habitually obeyed, and this at least partially because obedience is or would be compelled. This is another way of saying that in reality, there is a more or less strong indirect connection between the "is" and the "ought" of Parliamentary sovereignty.

Olivekrona points out[25] that there is a theoretical expression and justification for this - he calls it "idealistic positivism" -

which is to be found mainly in the writings of certain continental jurists. There occurs the idealization of the "is" of obedience into the "ought". This, he says, correctly, in my estimation, "comes closest to the general, popular view. To the public the laws appear as the commands or decrees of a supreme authority in society. But this authority is not regarded as possessing naked power only. It is supposed to have a right to legislate. Therefore it is held to be capable of imposing real duties."[26] Anson saw this as axiomatic: "The absolute strength of the state is a conception necessary to the foundation of any jurisprudence which is not merely a speculative and ideal arrangement of rules of conduct...."[27]

That the existence of this tendency to idealize power carried with it the twin tendency of the power so idealized to realize itself has been clear to some writers:[27A] Laski accused Austin of sponsering an omnicompetent state.[28] For him the modern state represented only a change in perspective from the problem posed by the medieval notion of unity. The problem remained the reduction and reconciliation of the many into the one, but that one was now the state.[29] Laski saw very clearly that this development would lead to a blurring, or bridging over, of any distinction between moral obligation and legal obligation. From the exercise of the legal right, the existence of the moral right

would, before long, be inferred: "it will be preached eventually that where a state...has a legal right, it has also a moral right which passes so easily into a moral obligation. Government, then, stands above the moral code applied to humbler individuals....It gains the power to crush out all that conflicts with its own will, no matter what the ethical implication of that will."[30]

In the realization of this ideal power, the hallmark of its efficaceous use lies in its exclusiveness. To function effectively, the law must, generally, constitute not only a method of characterizing states of affairs and resolving conflicts, although it is at least that. The state arrogates to itself the ultimate power to decide all disputes: the law generally must constitute the only and sole and exclusive method of authoritative characterization and resolution. Kelsen points this out:

> If the state is comphrehended as a social community, it can be constituted only by a normative order. Since a community can be constituted by only one such order, (and is, indeed, identical with this order), the normative order constituting the state can only be the relatively centralized coercive order which is the national legal order.[31]

Maitland saw this tendency actually unfolding:

> No longer can we see the body politic as...A system of groups, each of which in its turn is a system of groups. All that stands between the state and the individual has but a derivative and precarious existence....we may see the pulverizing, macadamizing tendency in all its glory, working from century to century, reducing to

> impotence, and then to nullity, all that intervenes between man and the state.[32]

Considered at the level of power, then, the assumption of state or Parliamentary supremacy which characterizes English Constitutional law would appear to be underpinned at any one time, in fact, by the existence to some degree or other of the following two states of affairs. First, by the fact of the existence of the actual power of the national legal order, which, it is generally conceded, must exist at some minimum level of effectiveness in order to qualify for the title at all. Secondly, there is the fact of the existence of a generally held notion of the legitimacy of the coercive national legal order, to the extent that the actual functioning of that legal order gives rise to the idea that the state has the right, as well as the power, to legislate, and thereby give rise to a duty to obey the law.

With this background, we now have the context necessary to permit us to attend to the causes of the inadequacy of trade union theory. The foregoing discussion bears on the problem as follows:

Salmond, in the passage quoted above[34] has overstated the case for the factual supremacy of Parliament, if by "is supreme" he is taken to mean "inevitably supreme". In the special case of trade unions, it is in the reservations we must make to that statement, considered in the light of what has gone before, that we must begin. The theory of the legal supremacy of the state is always adopted by the courts, and is almost always soundly based in fact, in both of the senses discussed above. Additionally, the courts will not only always recognise the validity of laws passed by Parliament, and will recognise only those laws - they will also, if required to do so, set in motion the machinery to actually enforce them. In almost every case, their actions will be efficaceous. The law will actually be obeyed, although of course, in almost all cases it will be unnecessary to involve either the courts or the coercive executive machinery, because of the feeling that the law ought to be obeyed.

The inadequacy of trade union theory results from the fact that, although these theories, as we shall see, rest on the assumption of state supremacy always and necessarily made by the courts, there is at least occasional instability in both of the key areas which provide the factual basis for that assumption. In the case of trade unions, therefore, the assumption of the existence of sufficient and actual power

to enforce the law, which is the minimum condition for the theory of state supremacy upon which the courts always operate, is not always soundly made. Accordingly, there is a gap between the ideal and the actual power of the state, but it is a gap that the courts, as the extension of a theoretically unique and exclusive power, cannot bridge without involving themselves in fundamental theoretical contradictions. Olivekrona puts the general case as follows:

> ...actual power positions...are easily confounded with... ideal powers....To a great extent, both kinds of powers, etc., coincide. He who is supposed to have a certain right according to the law usually possesses a corresponding actual power. But this is not always the case. In the ideal world of law, the effects take place according to the law with infallible regularity. In the empirical world of facts, the effects of legal rules, ...the attitudes of people in general, etc., are varied and more or less uncertain.[35]

Moreover, for a variety of reasons, not the least of which is the treatment received at the hands of the state, trade unions and their members do not always accept that Parliament ought to be obeyed.

It is obvious, of course, that actual disobedience of the law combined with a feeling that it ought not to be obeyed are not phenomena peculiar to trade unions. The difficulties caused or engendered by them, however, are particularly acute in this area because the implication from the hypothesis of state supremacy is

that trade unions are subordinate to, and essentially bound up with the state, and accordingly, are to be subject to state control exercised (inter alia) by the national legal order. In fact, as we shall see, in some very important respects, trade unions are less "in" the state than parallel to it. They may work with the state, but that can be from choice as easily as from necessity. There appear to be, in fact, no essential connections between them. The state did not in fact create the unions, and their power is not in fact derivative from the state. We shall see that the relationship between them expressed by theory is a forced relation, which is often wildly at variance with the facts.[36] The crucial point however, is not that the sovereignty theory used by the courts is either sociologically unreal or ethically objectionable, but rather that these obvious objections to it can, in the case of trade unions, be put forward by the unions, in one form or another, backed by a force countervailing that of the state, and which experience has shown must be respected. In truth, the great weakness of legal theory of trade unions is that the doctrine of state supremacy which is their support is in fact set upon an unresolved "pre-legal" or "proto-legal" problem involving the fundamentals of conflict between competing groups. The theories are styled "legal", and they are legal in form and expression, because the trade union meets the state, directly or indirectly, in the legal aspect often

enough to call forth not one, but a variety of general theories, concentrating now on this, now on that, advantage. These confrontations always occur, however, against the background of the possibilities of conflict between the non-derivative, uncommitted power of the unions, and the drive of the national legal order towards effective extension. When this is combined with the tendency which we shall explore later, of the law in this area to retreat into the non-experiential world, we have a virtual perscription for the destruction of credibility in the relevant theories.

Many of the statements made in this chapter anticipate future argument. Nevertheless I think the material put forth gives an outline sufficiently clear to indicate that the "facts" for which trade union theories must ultimately account, and in which their true significance is rooted, is the substance of state power vis a vis the independent power of the unions. The balance of this paper will be devoted to developing and securing evidence for this position.

PART III

CHAPTER TWO: NOTES

1. W. M. Geldart, "Legal Personality" (1911), 27 Law Q. Rev. 90, at p. 105; see also Leicester C. Webb, "Pluralism and After", in Legal Personality, p. 178 at pp. 178-179

2. Beatrice and Sydney Webb. The History of Trade Unionism (189, 190) pp. 280-281, hereinafter referred to as "The Webbs, History". See also, Bonsor's Case, [1954] 1 CH. 479 at p. 485, per Denning L. J. on the position of closed shops and coerced membership.

3. Jeremy Bentham, The Limits of Jurisprudence Defined (1945, 1970 reprint, edited and with an introduction by Charles Warren Everett), hereinafter referred to as "Bentham", at p. 101: "how by a sovereign I mean any person or assemblage of persons to whose will a whole political are (no matter on what account) supposed to be in a disposition to pay obedience; and that in preference to the will of any other person."; John Austin, Lectures on Jurisprudence (5th ed., ed. Robert Campbell, 1885, 1929 reprint) Vol. 1, p. 221: "If a determinate human superior, not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent." (emphasis in text. This work will hereinafter be referred to as "Austin", followed by the volume and page number) Austin did not see much distinction between the state and the sovereign: see p. 242, note (p) at p. 243: "The state is usually synonomous with the sovereign" (emphasis in text). Bentham thought the will expressed must be "the will of a sovereign in a state." (p. 101, emphasis in text).

4. (See Bentham, pp. 90-96 for his extended definition of the word "law". It is not suggested that anything turns in this). See Bentham, p. 58: "nor can there be any act of law which is not either a command or a prohibition"; see Austin, Vol. 1, p. 79: "Laws proper, or properly so called are commands...."; p. 88: "Every law or rule...is a command. Or rather, laws or rules properly so called, are a species of commands." See also, p. 86. (emphasis in text).

PART III

CHAPTER TWO: NOTES

5. Bentham, pp. 101-102: "Suppose the will in question not to be the will of a sovereign, that is of some sovereign or other; in such a case, if it come backed with motives of a coercive nature, it is not a law, but an illegal mandate, and the act of issuing it is an offence." Austin, vol. 1, p. 88: "Every positive law...is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign and supreme." See also pp. 88, 96, 220, for similar comments.

6. Bentham, p. 53: "In every law must be comprised two things: 1. a specification of the cases in which the punishment is to attach; 2. a specification of the punishment itself: without punishment, no such thing as law....' Austin, vol. 1, p.91: "...it is only by the chance of incurring evil, that I am bound or obliged to compliance. It is only by conditional evil, that duties are sanctioned or enforced." See also p. 89. (emphasis in text.)

7. Or, in the case of Bentham, additionally by the prohibitions of the sovereign - supra, fn. 4.

8. Austin, vol. 1, p. 96. (emphasis in text) See also p. 221 and Olivekrona, Law As Fact, at pp. 27-32.

9. Austin, vol. 1, p. 226

10. These comments also apply to the theories of Bentham.

11. See Hart, Concept, Chapter iv - "Sovereign and Subject", pp. 50-76.

12. A.V. Dicey, Introduction to the Study of the Law of the Constitution (10th edn., 1959, E.C.S. Wade, ed.), pp. 39-40, hereinafter referred to as, "Dicey, Law of the Constitution"; see, similarly, W. Ivor Jennings, The Law and the Constitution (1948), pp. 170, hereinafter referred to as "Jennings, Law and the Constitution"

PART III

CHAPTER TWO: NOTES

13. see, e. g. D.C.M. Yardley, Introduction To British Constitutional Law (3rd ed., 1969), at pp. 27-28, hereinafter referred to as "Yardley, Constitutional Law"; O. Hood Phillips, The Constitutional Law of Great Britain and the Commonwealth (2nd ed., 1957), at p. 44, hereinafter referred to as "Phillips, Constitutional Law"; E.C.S. Wade and A. W. Bradley, Constitutional Law (8th edn. of Wade and Phillips Constitutional Law, 1970), p. 46; Jennings, Law and the Constitution, at pp. 144, 170; H. W. R. Wade, "The Basis of Sovereignty" [1955] Camb. Law J. 172.

14. see, e.g. Yardley, Constitutional Law, p. 28; Wade and Bardley, p. 56; Dicey, Law of the Constitution, pp. 76-79.

15. Jennings, Law and the Constitution, p. 149

16. P. J. Fitzgerald, Salmond On Jurisprudence (12th ed., 1966), at p. 112.

17. A. P. D'Entreves, The Notion of the State (1967), at p.

18. Kelsen, Pure Theory, pp. 287-290. These are his conclusions. Argument in support of them is to be found in the text of these pages.

19. Hagerstrom, Inquiries, p. 54

20. Olivekrona, Law as Fact, at p. 271. See also p. 72: "At higher stages of civilization the state and the law are always co-existent. They are mutually interdependent. On the one hand, the state organization is regulated through rules of law....On the other hand, the rules of law must be backed by state power to achieve efficacy."

21. Sir William R. Anson, The Law and Custom of the Constitution (1922, 5th ed., Maurice L. Geuyer, ed.), at p. 19 (emphasis in text) hereinafter referred to as "Anson, Law and Custom of the Constitution."

PART III

CHAPTER TWO: NOTES

22. Bentham, p. 316: "A law commanding or forbidding an act thereby creates a duty or obligation"; Austin, vol. 1, p. 89; "Being liable to evil from you if I comply not with a wish which you signify, I am bound or obliged by your command, or I lie under a duty to obey it." (emphasis in text).

23. Supra, fn. 16

24. see, e.g. Hart, Concept, pp. 6-7, 163-176; Olivekrona, Law As Fact, pp. 45-61 passim.

25. Olivekrona, Law As Fact, at p. 46

26. Ibid. see also Kelsen, Pure Theory, pp. 4-10, sp. at p. 8, where a similar analysis is presented.

27. Anson, Law and Custom of the Constitution, vol. 1, at p. 21.

27A. Laski, Problems of Sovereignty, infra, fn. 28, at p. 20

28. Harold J. Laski, Studies in the Problems of Sovereignty, (1916, 1968 reprint), at p. 68, hereinafter referred to as "Laski, Problems of Sovereignty".

29. Ibid, at pp. 2-6

30. Laski, Problems of Sovereignty, at p. 20.

31. Kelsen, Pure Theory, p. 287. See also Hagerstrom, Inquiries, at pp. 17-20, where this view is discussed, and see additionally, fn. 17, Chapter 3, Part 2, for material cited therein.

PART III

CHAPTER TWO: NOTES

32. Maitland, "Moral Personality and Legal Personality" in S.E., p. 223 at p. 228. On this point see the following: the previous article, passim; Maitland's introduction to Gierke, at pp. xxx-xxxvii ff.; David P. Derham, "Theories of Legal Personality", in Legal Personality, p. 1 at pp. 9-10; S.J. Stoljar, "The Corporate Theories of Frederick William Maitland, ibid, p. 20 at pp. 38-44; Martin Wolff, "On the Nature of Legal Persons" (1938), 54 Law Q. Rev. 494 at pp. 508-511; H.E.L., ix, pp. 46-47.

33. There is no note number 33.

34. supra, fn. 16, p. 21

35. Olivekrona, Law As Fact, pp. 252-253.

36. see, on this, Laski, Problems of Sovereignty, at pp. 11-12, 14-15, 23-24.

PART III

CHAPTER THREE: TO 1871

Prior to 1799, a large number of statutes regulated various phases of industry and commerce and incidentally[1] prohibited combinations made in defiance of them. It was usual for such statutes to prohibit the combination only after having made provision for a remedy, albeit Parliament's remedy, for the grievance which was understood to have been the encouragement for the formation of the combination in the first place.[1] Any combination in defiance of that statute would constitute an interference with the work of Parliament and the Courts.[2] Again, an agreement to form such a combination, as an agreement to commit a statutory crime, was, accordingly, a criminal conspiracy at the common law.[3] The better view seems to be that the illegality of trade unions was statutory, and that combinations for trade purposes were not themselves criminal at common law.[4] Combinations to enforce these laws, for example, were not in practice regarded as illegal, although they were usually within the letter of the law.[5] Statutory regulation of industry and commerce fell into desuetude at about the time changing economic conditions made it imperative that wage earners, if anything other than the good will of their employers was to stand between them and the economics of profit,

must begin to bargain collectively for the sale of their labour. It was a situation calling for some sort of action.

In the result, a fear of combinations on the part of Parliament combined readily with the laissez-faire doctrine of freedom of trade to produce a situation in which that theory was so interpreted as to secure the maximum freedom for manufacturers, down to and including the active interference of the state in their behalf.[6] Wage earners were far removed from the locus of political power. Combinations of workmen formed for the purpose of regulating wages, hours and other conditions of employment not only remained illegal, "but actually they were much more ruthlessly suppressed."[7]

The Combination Acts of 1799[8] and 1800[9] which sought to achieve this result represented a marked change in emphasis from the previously existing state of affairs. They not only erected a general criminal prohibition in the stead of what had been fragmented attempts to exclude combination as an incident to the various Parliamentary schemes for the regulate of industry and commerce: the standard accounts indicate that the Combination law "was really an act for the suppression of strikes and of trade unions."[10] They also indicate that the case of combinations of workmen was but a particular, if severe, instance of a wider view which saw combinations in general as threats to the political authority of the state.[11] The letter of the law bears out

this theory: "the statute imposes a penalty upon combinations among masters for the reduction of wages or for an increase in the hours or quantity of work....this provision....shows that in 1800 Parliament was in theory opposed to every kind of trade combination."[12] The Combination Acts were also accompanied by a variety of similar enactments "against any treasonable or seditious society, or against any society which might turn out to foster treason and sedition."[13] In fact, however, as far as trade unions were concerned, the reality was not so evenhanded as the language might suggest, and "during the whole epoch of repression, whilst thousands of journeymen suffered for the crime of combination, there is absolutely no case on record in which an employer was punished for the same offence."[14]

This approach to dealing with trade unions, whatever its intrinsic merits, has at least the advantage of simplicity and singleness of purpose. Present day difficulties with trade unions do not spring from this soil; they flow instead from the results made possible by the enactment of the Combination Act, 1824[15] and the Combination Act, 1825.[16]

The former statute, although it completed an about-face on the oppressive laws of 1800 and the other earlier laws against trade combinations,[17] at the same time preserved the unadorned and direct approach

of the Act of 1800. There was to be free trade in labour as in everything else,[18] and the statute allowed "freedom of combination for trade purposes, both to men and masters, in the very widest terms."[19] Penalties were imposed for the use of threats, violence or intimidation for the more or less definite purposes set out in the Act.[20]

The act in practice was a rude shock to virtually everyone. After a wave of strikes, violence and general disruption, the particulars of which have been well catalogued elsewhere,[21] it was repealed and replaced by the Combination Act, 1825.[22] Referring[23] to the failure of the Act of 1824 to secure "free employment of capital and labour"; and to "combinations injurious to trade and commerce, dangerous to the tranquility of the country, and especially prejudicial to the interests of all who are concerned in them;" this Act went on to retrench on the steps taken by that piece of legislation. But the manner chosen to accomplish this result sowed the seeds of an ambiguous dualism that in the event has significantly affected the basic issues of trade union law to this day. The Combination Act, 1825 contains two distinct points of view that are potentially in conflict at a primary level.

In the first place, it attempted to stifle combinations and the overt resort to force by trade union members which, it was thought, had come about because of the 1824 Act. The Act of 1825 extended the pro-

hibition on the use of force both in its meaning and in the extent of its application. It included a much wider and more general range of activity than its predecessor. That the addition of the vague terms "molesting" and "obstructing" to the trio of "violence, threats and intimidation" as the possible means of committing the offences created by the Act, left ample room for an oppressive interpretation, was something of which trade unionists were very well aware.[24] Additionally, the common law of criminal conspiracy as it related to trade combinations was roused from its short sleep and once more applied to their suppression.

At the same time, however, the Act of 1825 indirectly conferred upon workmen a limited right of association for trade purposes by freeing from the threat of prosecution those who should meet together "for the sole purpose of consulting on and determining the rate of wages and prices...for his or their work, or the hours of time for which he or they shall work...or who shall enter into any agreement... among themselves for the purpose of fixing the rate of wages or prices... or the hours for which he or they will work."[25]

The lack of coherent principle underlying the Act of 1825 has been noted. It "was built on an indefensible distinction between combinations and strikes relating to wages and hours...and those relating

to other questions...the distinction is untenable, because all combinations and strikes are intended, directly or indirectly, to better the conditions of the parties to them."[26] Dicey tells us that "its provisions caused dissatisfaction", and that "the Liberals of the day ...could provide no clear principle for its amendment."[27] The practical effect of this ambiguity is two fold. It is first to involve the law on a deeper level, by providing the basis upon which to shift the emphasis, from an absolute refusal to countenance trade unions at all, to the necessity of making a choice between the various specific purposes for which a combination was formed, or for which it acted, and characterizing it or them as "legal" or "illegal".

These are terms which are practically significant only in a context which presupposes an intention to exercise, and the possibility of exercising, effective control. This dichotomy between "legal" and "illegal" trade union purposes, with its clear implications of control, accordingly becomes institutionalized as a necessary and basic part of the orthodox legal vocabulary of trade union law. This dualism is implicit in the notion of a functioning legal system, but it is of particular importance in trade union law. This is because the factual basis upon which it rests - the effective state control which is usually, and usually correctly, assumed to exist - has itself always been the great and unresolved root

issue upon which "trade union law" has been somewhat precariously erected. The second practical effect of the Act of 1825 was that, at the same time it encouraged this sophistication, in the approach of the law, the policy of abstention from trade union affairs that it manifested [27A] voluntarily kept the courts out of a position to control trade union affairs. This prevented the actual imposition of the very control implied by the act, and, in retrospect, required by the presence of a growing and unregulated power in the state. Under these conditions trade union power slowly waxed. This division, with its implications or control, combined with the results of the failure to exercise it, is never far from the surface in trade union law. The taint of criminality, for example, disappeared completely with section 2 of the Trade Union Act, 1871,[28] but the "legal-illegal" characterization resurfaced again on the civil side when in 1876 the definition of 'trade union' was altered[29] to suggest that some 'trade unions' may not offend the doctrine of restraint of trade. A series of cases[29A] operated on this amended definition in significant fashion.

Professor Kahn-Freund has indicated both[30] the possibility opened by this: "whatever may have been the object of this amendment...it opened the way towards a separation between two questions" 'What is a trade union?' and 'Is a trade union unlawful for being in restraint of

trade?'"[31]; and the use made of it by the courts: "The...cases discussed....vividly demonstrate how the courts - previously determined to place hors de la loi the unions and their agreements - began to show themselves anxious to establish the closest possible contact between the unions and the law."[32]

The results which will flow from the mixture of freedom, control and power contained in the terms "legal" and "illegal" can be assessed only in terms of the "cash value", as it were, of certain key assumptions at any given point in time. In this case, the basic hypothesis underlying the Act of 1825 must be this: that two organized groups, namely, the state and the unions, both of which depend ultimately upon the use of coercive force for their effectiveness; both of which operate at least partly in the same areas for the achievement of often inconsistent purposes; and both of which compete for the loyalties of the same people, can either co-exist without conflict, or one of them is powerful enough to contain the conflict which does arise, and to manage it within acceptable levels.

An acknowledgement that the second alternative is the more likely seems in this context to be both historically accurate and rationally sound. The partial legalization, or recriminalization if you like, which took place with the passage of the Act of 1825 can therefore be seen as

an assertion about the strength of the state power. This way of looking at things reminds us that power relationships are fluid and dynamic. They have long and short term possibilities and they can and do change.

Moreover, from the standard accounts of the history of the period,[33] it would appear reasonably clear that the matter was at the time appreciated as being in the nature of a problem in power distribution. To the trade unionists, the securing of the right to bargain collectively, involving the right to withhold labour from the market by concerted action, was a first, minimum and indispensible condition of effective trade union action.[34] Even when this was won over determined opposition, strenuous attempts were made by the employers, resisting anything but a return to the pre-1824 status quo, to secure the inclusion in the new bill of those specific methods by which these combinations were to be subjected to the state: independent judicial audit of funds, prohibition, accompanied by severe punishment, for the diversion of money raised for 'friendly society' purposes, and a strict prohibition of all "federal or combined action" by trade unions.[35]

Dicey has argued convincingly[36] that the two acts were really different applications of the laisser-faire individualism that was the chief article of faith in the ultilitarian creed, and that "the best and wisest of the judges who administered the law...during the fifty years

which followed 1825 were thoroughly imbued with Benthamite Liberalism."[37]

The truth of that proposition, may readily be conceded; the more important points for our purposes are that the courts had voluntarily limited their scope here, and that the content of the belief in individualism and freedom of trade in practice, was subtle to the point of unintelligibility. It was invoked, indeed, with equal fervour by both sides, as far apart as they were, in support of completely opposed results. For the employers, it served as the basis for an argument in favour of state interference against combinations which in any way schackled the individual in the employment of his labour and skill, or the employer in the management of his trade. The labour movement, for its part, contended that the state should not interfere with that co-operation among workmen which was but an expression of their individual liberty.[38]

Placing these alternatives before a court really amounts to a request that the courts make the policy as well as administer it in the decision of issues. This they proceeded to do. There is no mechanical relationship between social position and social ideas, but the two are, not without reason, closely associated. The views expressed by the courts within the assumption of the value of laisser-faire as a living political philosophy were, accordingly, much as might be ex-

pected. There is no lack of instances in which the pejorative emphasis of the judiciary on the coercive nature of trade unions is clear. In the case of Hilton v. Eckersley which is generally credited with the introduction of the doctrine of restraint of trade to the purposes of trade unions, (although it in fact dealt with a suit on a bond to which a group of manufacturers were party, and not with a combination of workmen at all), Crompton J. is reported as follows:

> If this bond is legal, in the sense of being enforceable at law, a promise of any workmen not to retire from the strike, or to pay a weekly subscription to it, or to pay a penalty if he went to work without the leave of the majority..., or disobeyed the dictation of the delegates, would be binding on him: and no workman would be able to free himself from...such dictation, whatever might be the state of his family, however reasonable he might think the offer...and although he might be...satisfied...that the...strike was ruining himself, and his fellow workmen, and was doing incalcuable injury to the public.[39]

There are other cases and comments in a similar vein.[40]

Of course, the courts were not operating in a vacuum. While in general they preferred an interpretation of policy that trade unionists could not but regard as hostile and antagonistic, the fact was that at large trade unions gradually flourished free from the control of the law, and even where the law intervened, behind these authoritative expressions of "public policy", conflicting and fundamentally opposed assumptions both as to its validity and true meaning were still seething

very close to the surface.

As time wore on the factual basis for the public policy of 1825 eroded. The courts were being called upon to decide cases by means of the invocation of a particular interpretation of a legal tradition that depended upon the declining power of an increasingly provocative political philosophy. As 1871 approaches, it can be seen that some judges recognised this and resented the role that was being thrust upon them. The reasons for judgement of Campbell, C.J. In Hilton v. Eckersley are really a single expression of this distaste. Of "public policy" he said: "I enter upon such considerations with much reluctance, and with great apprehension, when I think how different generations of judges, and different judges of the same generation, have differed in opinion upon questions of political economy and other topics connected with...such cases."[41]

Hannen J. in a dissenting[42] judgement in Farrer v. Close,[43] made his position even plainer:

> I can see that the maintenance of strikes may be against the interest of employers...but I have no means of judicially determining that this is contrary to the interest of the whole community; and I think that in deciding that it is, and therefore, that any act done in furtherance of it is illegal, we should be basing our judgement, not on recognised legal principles, but on the opinion of one of the contending schools of political economists.[44]

The point I wish to make is that the public policy content of the law

on workmens combinations, although generally (and for the most part correctly) interpreted as hostile to trade unions, was in fact never allowed to settle comfortably, even among a conservative judiciary. Its substance was always an issue and it was never successfully stabilized and institutionalized.

The legislation of 1871, to a consideration of which we can shortly move, put matters on a new and quite distinct basis. First, however, we should have regard to the run-up which led to the passage of that legislation.

Professor Kahn-Freund says that from 1825 onwards, the attitude of the law toward trade unions passed from a stage of oppression to one of abstention.[45] By this I do not understand him to mean that the law had no policy toward trade unions. The courts, rather, by the extension of the doctrine of unreasonable restraint of trade to them, turned a blind eye in the sense that they would not intervene positively even to protect union funds and property which had clearly been subject to breaches of the general law.[46] This meant that the considerable funds amassed by a 'new model' trade unionism of "well organized and centralized craft unions with an elaborate system of benefits and a cautious strike policy" were left unprotected,[47] even by the criminal law.[48] In this respect the position of trade unions by the 1860's was

intolerable. The object of attaining the protection of the law for these funds, the possession of which was directly related to union power, was clearly an important one. Of the passage of the Trade Union Act, 1871, the Webbs say: "Trade societies became for the first time legally recognised and fully protected associations...The Secretaries of the Amalgamated Societies...had, indeed, attained the object which they personally had most at heart. The great organizations for mutual succour, which had been built up by their patient sagacity, were now, for the first time, assured of complete legal protection."[49]

With respect, however, too much must not be made of this. This emphasis on the benefit or 'friendly society' aspect of trade unionism is at the expense of ignoring the militant side, which is the specific differentium of the trade union, and through it we may lose sight of what for our purposes is more important. There was indeed pressure on the trade unions to seek out the protection of the law, but there were also forces operating on the state machinery which must be kept to the fore. In the first place, the "policy of abstention" noted by Kahn-Freund was to a large extent mutual. If the law wanted nothing to do with trade unions, most trade unionists wanted still less to do with the law: "The great mass of trade unionists were not yet converted

to the necessity of obtaining for their societies a recognised legal status. There were even many experienced officials...who deprecated the action...on the express ground that they objected to legalization 'The less working men have to do with the law the better'"[50]

This would not have been such a serious matter if the unions had obliged the policy of abstention by going away when ignored. Instead, "in spite of the lawyers and the law"[51] they continued to grow in importance.[52] Their accumulated funds represented a counterweight to the economic and political power that was the employers' by virtue of their ownership of the means of production. The unions were a growing, functioning and increasingly important force in the economic life of the country, and they were in the main alienated from both the spirit and letter of the law. Moreover, they viewed the situation as being generally satisfactory. They had grown strong outside the law, and their power was independent. So secondly, we must note that for the state, but not the unions, the policy of abstention was a total failure if it is considered and valued in terms of diminishing trade union influence and importance. It was, again, a potentially dangerous failure. The combination of de facto power centered in the vitals of the modern state, coupled with a substantial lack of responsibility to the coercive machinery of the state for the use of that power, is

clearly not a situation that can be viewed with equanimity. In the result, it must be seen to be advisable, if it was indeed not actually necessary, for the state to wish to exert some control over that which it had been unable to suppress.

This, broadly drawn, seems to have been the situation at the time of the appointment of the Royal Commission which preceded the legislation of 1871.

PART III

CHAPTER THREE: NOTES

1. Citrine, p. 5

2. The Webbs, History, p. 58; R.Y. Hedges and Allan Winterbottom, The Legal History of Trade Unionism (1930), at p. 28, hereinafter referred to as "H. and W."; D. F. MacDonald, The State and the Trade Unions (1960), at p. 19, hereinafter referred to as "MacDonald, The State and the Trade Unions"; Citrine, p. 5

3. H. and W., pp. 11-12, Citrine, pp. 4-5; The Webbs, History, at pp. 60-62

4. H. and W., pp. 17-18, W. Milne-Bailey, Trade Unions and the State (1934), C. 141 "Freedom of Association Before the 19th Century", passim, sp. at pp. 170-171, hereinafter referred to as "Milne-Bailey"; and see: Mogul Steamship Company, Limited v. McGregor, Gow and Co. and Others, [1892] A.C. 25 (H.L.), affirming (1889), 23 Q.B.D. 598 (C.A.), at pp. 39, 42, 46, 51, 57, 58, where the House of Lords unanimously repudiated a dictum of Crompton J. to this effect in the case of Hilton v. Eckersley (1855), 6 El. and Bl. 47; 119 E.R. 781 (Q.B.); affirmed 6 El.and Bl. 66; 119 E.R. 789 (Exch. Ch.); Reg. v. Stainer (1870), 11 Cox C.C. 483 (C.C.A.)

5. H. and W., p. 11; The Webbs, History, pp. 58-60; Citrine, p. 5

6. H. and W., p. 19; The Webbs, History, p. 64

7. H. and W., p. 19

8. 39 Geo. 3, c. 81

9. 39 and 40 Geo. 3, c. 106

10. A. V. Dicey, "The Combination Laws as Illustrating The Relation Between Law and Opinion In England During The Nineteenth Century" (1904), 17 Harv. L. Rev. 511 at p. 515, hereinafter referred to as "Dicey, 'Law and Opinion'."

PART III

CHAPTER THREE: NOTES

11. H. and W., p. 19; The Webbs, History, pp. 64-65; Dicey, "Law and Opinion", pp. 516, 518-519.

12. Dicey, "Law and Opinion", at p. 516

13. ibid, pp. 518-519, and statutes there collected.

14. The Webbs, History, p. 64; see also Milne-Bailey, c. 15: "Freedom of Association in the 19th Century", passim.

15. An Act to Repeal the Laws Relative To Workmen, and for other Purposes Therein Mentioned, 5 Geo. 4, c. 95. Also referred to as "the Act of 1824"

16. An Act to Repeal the Laws Relating to the Combination of Workmen And to Make Other Provisions in Lieu Thereof, 6 Geo. 4, c. 129. Also referred to as "the Act of 1825".

17. Combination Act, 1824, s. 1

18. ibid, ss. 2,3

19. ibid, and see Dicey, "Law and Opinion", at p. 521

20. ibid, see e.g. , s. 5: "...wilfully or maliciously force another to depart from his work...return his work before the same shall be finished, or demnify, spoil or destroy any machinery, tools, goods, wares or work...."

21. see, e.g. Dicey, "Law And Opinion", at pp. 523-526; The Webbs, History, pp. 92-97; H. and W., pp. 34-37.

22. supra, fn. 16

23. in the preamble to s. 1

24. see The Webbs, History, pp. 96, and compare s. 5 of the Combination Act, 1824, with s. 3 of the Combination Act, 1825.

PART III

CHAPTER THREE: NOTES

25. Combination Act, 1825, s. 4. See also s. 5, where similar provision is made for masters; see also, Dicey, "Law and Opinion", at pp. 521-522; H. and W., pp. 37-40

26. H. and W., p. 60

27. Dicey, "Law And Opinion", at p. 526

27A. O. Kahn-Freund, "The Illegality of a Trade Union" (1943), 7 Mod. Law, Rev. 192 (hereinafter referred to as "Kahn-Freund, 'Illegality of a Trade Union'") at 192-193.

28. 34 and 35 Vict., c. 31. Also referred to as "the Act of 1871"

29. by s. 16 of the Trade Union Act Amendment Act, 1876 (Also referred to as "the Act of 1876"), 39 and 40 Vict., c. 22.

29A. The three cases usually singled out for discussion in this context are the decisions of the court of appeal in Swaine v. Wilson and Others (1889), 24 Q.B.D. 252; Gozney v. Bristol Etc. Trade And Provident Society, [1909] 1 K.B. 901; and Osborne v. Amalgamated Society of Railway Servants, [1911] 1 Ch. 541; hereinafter referred to respectively as Swaine v. Wilson, Gozney's Case and the Second Osborne Case. The tendency of the courts, so pronounced in this trio of cases, it must be noted, did not have the field to itself. In many cases, the principle for saving the common law legality of a trade union first put forward in Swaine v. Wilson was argued and rejected on the ground that the objects of the association were in unreasonable restraint of trade: see Old v. Robson (1890), 62 L.T. 282 (Q.B.D.-Div. Ct.); Sayer v. Amalgamated Society of Carpenters and Joiners (1902), 19 T.L.R. 122 at p. 123 (K.B.D.); Cullen v. Elwin and Others (1904), 90 L.T. 840 (C.A.); Burke v. Amalgamated Society of Dyers [1906] 2 K.B. 583 (Div. Ct.) per A.T. Lawrence and Kenneddy, JJ.; Russell v. Amalgamated Society of Carpenters and Joiners and Others, [1910] 1 K.B. 507 (C.A.); 1912 A.C. 421 (H.L.); Thomas v. Portsmouth "A" Branch of the Ship Constructive Etc., Association (1912), 28 T.L.R. 372 (Div.Ct.)

PART III

CHAPTER THREE: NOTES

30. O. Kahn-Freund, "Illegality of a Trade Union", supra, fn. 27A, at pp. 192-193.

31. ibid, at p. 195

32. ibid, at p. 202

33. see, e.g. The Webbs, History, at pp. 94-97; Dicey, "Law And Opinion", at pp. 519-525.

34. see The Webbs, History, pp. 97, 74

35. ibid, p. 97

36. See Dicey, "Law And Opinion", at pp. 523-526

37. ibid, at p. 525

38. see H. and W., at p. 34; Dicey, "Law And Opinion", at p. 529

39. supra, fn. 4, at p. 785 E.R.

40. see e.g. Rigby v. Connol (1880), 14 Ch. 482 (Ch. D) at pp. 490-491; Russell v. Amalgamated Society of Carpenters and Joiners And Others, [1912] A.C. 421 (H.L.), (hereinafter referred to as "Russell's Case"), at pp. 440-442 per Lord Robson; Farrer v. Close, (1869), L.R. 4 Q.B. 602, at p. 609, per Cockburn, C.J., and at p. 612, per Hannen J.; Reg. v. Druitt, Lawrence, Adamson And Others (1867), 10 Cox. C.C. 592 at p. 600 (N.P.); and see also on this: Citrine, pp. 107, 122; Kahn-Freund, "Illegality of a Trade Union", supra, fn. 30, at p. 198; Sir William Erle, The Law Relating To Trade Unions (1869), at pp. 12, 19, 23-24, 42, hereinafter referred to as "Erle, Trade Unions"; H.and W., at pp. 44-45, 48-49; Dicey, "Law And Opinion", at p. 525

PART III

CHAPTER THREE: NOTES

41. supra, fn. 4, at p. 788

42. Hannen J. dissented in an evenly divided court. His judgement has been referred to as "in some ways a landmark in the legal history of trade unionism" (by Kahn-Freund, "Illegality of a Trade Union", supra, fn. 30, at p. 198) and may be taken to represent the present state of the law.

43. supra, fn. 40

44. ibid, at p. 613. See also Hayes, J., concurring (dissenting) similarly, at ibid., p. 616

45. supra, fn. 30, at pp. 192-193

46. see, e.g. HORNBY v. CLOSE (1867) L.R. 2 Q.B. 153 (Q.B.D.), and FARRER v. CLOSE, supra, fn. 40

47. Kahn-Freund, "Illegality of a Trade Union", supra, fn.30, at p. 192

48. supra, fn. 46

49. History, p. 266

50. The Webbs, History, at pp. 256-257; see similarly Kahn-Freund, "Illegality of a Trade Union", supra, fn. 30, at p. 192: "if the courts were reluctant to recognise the legal existence of the unions, the unions were even more hesitant to take their affairs into the courts."

51. Webbs, History, at p. 254

52. see ibid, chs. 4, 5, for the history of this period.

PART III

CHAPTER FOUR: ANOTHER BASIS FOR THEORY

Part I - The Legislation of 1871-1875

The legislation of 1871-1875[1] was, on any account, an important event, or series of events, in the legal history of trade unionism. We usually discuss it in language agreeable to its legal form. That form, however, I believe to be misleading as to the substance of what these statutes represent. They point unequivocally to the undifferentiated integration of trade unions into the state institutional structure.

The legislation was of course passed by Parliament in the normal manner and the acts bear all the formal marks and expressions of duly enacted statute law. Nevertheless, I think the substance of these acts, and the roots and inadequacies of the legal theory of trade unions, all become clearer if they are assimilated to the case or analogy of a treaty between parties rather than approached on the traditional basis of Acts of a sovereign state. Using this basis, the Trade Union Act, 1871 becomes, itself, not so much an ordinary part of our law, as it is

a foundation for the future application of law. It lays down, in a general fashion, the rules to be followed by the parties. Again, it is evidence of an important shift of behavior, and what is built upon it - what we call "trade union law" - is the result of the more or less technical task of fitting this organization into the framework of the national legal order in a way which is generally in accord with the political accommodation or settlement represented by the acts. This is a view which I think can be supported both by evidence of the circumstances surrounding the enactments, the substance of the acts themselves, and the subsequent development of the law.

In the previous chapter, we saw the pressures pushing both state and union to an accommodation. A period of industrial strife in the 1860's[2] provided the impetus for the appointment of the Royal Commission of 1867.[3] Two pieces of legislation followed the report of the Commissioners[3]: the Trade Union Act, 1871, and the Criminal Law Amendment Act, 1871. A full account of the events leading to the enactment of these Acts can be found elsewhere[4]; a brief sketch will be sufficient for our purposes.

The first task of the trade unions when the Commission was announced, was to secure the appointment of some of its partisans to it.

This was successfully completed. The unions' case before the Commission can, depending upon one's point of view, can be regarded either as a masterful exercise in public relations, or a serious misrepresentation of the true nature of trade unionism. Overdeveloped stress on the 'responsible' benefit side of trade unionism by the large Amalgamated unions submerged the more militant aspect of the movement in a tide of aspiring respectability. The employers found themselves almost entirely outmanouevered. These national friendly societies, with their large funds, cautious industrial policy, and middle class friends and adherents, were successfully presented to the Commissioners as the new face of trade unionism: "it was impossible for the Commissioners to resist the conclusion that they had, in the Amalgamated Engineers and Carpenters, types of a far less agressive trade unionism than such survivals as the purely trade societies of the brick makers or the Sheffield industries."[5]

This was a view of trade unionism, as the Webbs point out in many places,[6] which was fundamentally at odds with the traditional trade union militantcy that is the distinguishing mark of the trade union. Unfortunately, from the point of view of satisfying this quite different type of trade unionism the job before the commission

was done a little too well. The Commission majority obliged the evidence with recommendations which, however well they may have accorded with the middle class view of the proper position in society for a benefit association, stopped well short of anything the unions wanted or could accept.[7]

The stigma of illegality from restraint of trade was to be removed from all associations except those formed "to do acts which involved breach of contract and to refuse to work with any particular person." On the major union point of protection for union funds, the report was even less acceptable. Protection would come with registration, but that would only be granted to unions the rules of which were free of certain restrictions which were of basic importance to unions: e.g. no limitations on the number of apprentices, on the use of machinery, no prohibitions on piecework or subcontracting. In addition, as if this were not enough, societies whose rules authorized the support of the disputes of other trades were to be refused permission to register with the result that their funds remained unprotected. Of this irrelevant majority report we hear no more.

The real issues at stake were presented by the minority report of the Commission, wherein the trade union partisans, joined by one another, put the trade union case to the government. It amounted in effect to a set of terms for negotiation. It formed the basis for a

private member's bill, drafted by the same person who had written the report, which was introduced to the House of Commons by sympathetic members elected with strong trade union support during the expanded suffrage elections of 1868. It was promoted vigourously both in and out of Parliament. A hostile government, forced to a stand on the issue, gave interim relief to union funds by the passage of The Trades Union Funds Protection Act[8] in 1869, and undertook to introduce a new bill of its own the following year.

The unions wanted protection for their funds, but they wanted it without having to abandon the rules the law found so objectionable. They desired their funds to remain "massed" - undifferentiated according to purpose - and ready for deployment for any of their ends, objectionable or otherwise. With this protective exception, they wanted to remain a law unto themselves.[9] The unions were aware that there were the soundest practical reasons for avoiding, and they sought to avoid at all costs, the simple legalization which would have exposed them to the full reach of the law: "subjected them to constant and harrassing interference from the courts";exposed them to "the danger of any member having the power to take legal proceedings, to worry them by litigation and cripple them by legal expenses;" to bring them "within the scope of the insolvency and bankruptcy law; to place "the most formidable weapon in the hands, of unscrupulous employers."[10] In a word, to control by the state.

Their solution to the problem was as follows: "...Mr. Harrison proposed the ingenious plan of bringing the trade union under the Friendly Societies Acts, so far as regards the protection of its funds against theft or fraud, whilst retaining to the full the exceptional legal privilege of being incapable of being sued or otherwise proceeded against as a corporate entity."[11] In addition, they further sought the repeal of all special legislation relating to labour contracts on the principle "that no act should be illegal if committed by a workman unless it was equally illegal if committed by any other person; and that no act by a combination of men should be regarded as criminal if it would not have been criminal in a single person."[12]

This latter point is now part of the conventional wisdom. However, then as now, we must note that it conveniently ignores the fact that the law was aimed specifically at the activities of the men as workmen because the fact that they were workmen was itself the reason for the commission of the prohibited acts. On the whole, these trade union proposals may be regarded as the first comphrehensive formulations of the demand, repeated to this day, that trade unionism should exist outside the law.

A reluctant government gave way on the first point. On the second matter, however, it codified and included in its bill some of the most hated items available in the varied legal armoury for use against work-

men.[13] All of the vague words that had made the Act of 1825 such a burden were repeated without limitation or definition. Additionally, the Act of 1859[14] which, to overcome the decisions in Reg. v. Duffield And Others[15] and Reg. v. Rowlands and Others[16], had expressly made lawful peaceful persuasion to join lawful combinations, was to be repealed.[17]

This unpalatable choice, by which the state seemed to be taking away with one hand that which it purported to give with the other, brought to the surface the always strong union tendency, so well papered over before the commission, to go it alone. Delegates to a national congress called to consider the legislation very nearly decided to oppose it entirely.[18] In the result, however, it was resolved to make the best deal possible and to campaign against the inclusion of those matters which they regarded as unsatisfactory. All that could be extracted from the government, was the "illusory concession" of the separation of the criminal clauses into a separate bill. After this was made even more stringent in the House of Lords, it passed into law as the Criminal Law Amendment Act, 1871.[19] The remaining provisions, of course, became the Trade Union Act, 1871.[20] Immediately the bills became law, the unions commenced a continuous agitation for the repeal of the criminal statute; an effort which was rewarded with success in an

unexpectedly short time: "Rarely has a political agitation begun under such apparently unpromising circumstances, and carried so rapidly to a triumphant issue."[21] The Criminal Law Amendment Act, 1871 was unconditionally repealed by the Conspiracy, and Protection of Property Act, 1875.[22]

The net result of these legislative actions was an impressive gain for the trade unions. By the Act of 1871, union funds were to remain "massed" and they were to be protected by law.[23] Members of trade unions are exempted from criminal prosecution if the criminal nature of their activities depends merely on the purposes of the combination being in restraint of trade.[24] On the civil side, the act exempts from the operation of the doctrine of restraint of trade purposes of the combination hitherto objectionable on those grounds, so that agreements and trusts which formerly would have perished should now be valid.[25] It is section 4 of the Act which for our purposes is the most remarkable and significant.

It severely limits the jurisdiction of state courts vis a vis the unions, to this effect: the unions are left to determine the nature and extent of their own restrictive practices on the vital subjects set out in section 4, and to determine and apply their own sanctions to discipline

departures from these practices and agreements. It is often said[26] that section 4 is necessary, or at least advisable, if the courts were to avoid being inundated by litigation involving the enforcement of agreements otherwise in restraint of trade. There is doubtless much to be said for this view, but it must at the same time be noted that it was the unions, and not the government, which proposed the substance of section 4, and that their reasons had very little to do with inconsistencies engendered by adherence to the abstract doctrine of restraint of trade. The Trade Union Act, 1871 must be seen as a major recession from the centuries old proposition that, prima facie, nothing is deemed to be outside the jurisdiction of a superior court unless it is expressly shown to be so;[27] a proposition I take as merely a manifestation of the fundamental idea that the state "is" the effective extension of the legal order.

These major concessions, and the resiling from fundamental legal notions they involve, were not freely given. They were extracted from an unwilling state, the machinery of which was almost exclusively in the hands of persons not well disposed to trade union aims and policies. These changes in the law could not very well be said to represent their views on a desirable state of affairs. The legislation of 1871-1875 then, can be seen as the formal representation of an accommodation reached be-

tween two organized groups. It involved the partial co-opting of trade unions into the legitimate political system, but mainly on their terms. The extension of state power over the organization that would normally accompany this was in fact sharply limited: the most important areas of trade union activity were exempted from the operation of the state coercive order. This has affected legal theory in significant ways, which we can now begin to explore.

Part II - The Settlement and the Theory

The most significant feature of this settlement was, at the time of the legislation, mainly hidden from view. Although much of the substance of state authority implied by the embodiment of this accommodation in an Act of Parliament, was lacking, the legislation nominally legitimized and brought an organized force under the scrutiny of the law. This involves the proposition that the working out of unreconciled state-union tension will occur in the context of the formal state institutional structure - that is, Parliament and the courts. Both of these assume and depend upon the existence of sufficient power to ensure that the law is carried out. Had matters gone as planned for the unions, a growing political influence in the former could be looked to, to

adequately protect union interests there, while the ouster of the courts' justification achieved by section 4 of the Act should have reduced their role to that of a minor irritant. It is one of the characteristic functions of a court however, that it resist attempts to bar access to its arbital powers. It should not therefore be surprising that they managed in the result of parley a slender foothold in trade union affairs into something altogether more substantial than the unions had anticipated.

Our concern with this is that it creates a situation of considerable tension which becomes more or less important in some relation to the actual strength of the unions. To the extent that the courts presume to act as authoritative arbiters in trade union affairs, then trade unions, like any other subject to the power of the court, effectively lose the power to characterize these disputes and determine them as they see fit. The characterization of the dispute is at least in part the choice of its solution. What is regarded by the union, for example, as a breach of brotherly solidarity justly punished by expulsion, becomes for a court the "breach" of a non-existent "contract" between the member and a non-existent "entity" that results in very real and unpleasant consequences to the union. The difference here, of course, is that trade unions are not just like "other people". They

not only have their own way of doing things - it must always be considered a standing possibility that they also have the power to make that choice of procedure effective. As a result of the accommodation of 1871, moreover, they can not unreasonably go forth against the rulings of the courts with some feeling of legitimacy and right when the courts in the process of adjudication appear to them to make inroads on territory thought to be forbidden ground by the statute that represents their bargain with the state. A very real conflict situation thus opens up. This situation has two effects on the legal theory of trade unions.

In the first place, the existence of this accommodation, by settling state-union matters to a degree, has provided the basis that has made theorizing on the "nature" of a trade union possible. That theorizing, however, takes place within the bounds of an assumption of state supremacy. By its terms, however, important areas of trade union activity ostensibly remained outside the reach of the law. The value-conflicts which led to this compromise were to some extent subsumed in the settlement, but they were not and have never been reconciled. So, in the second place, ironically, that same accommodation which makes the theories possible, to the extent that it is honoured, ensures that they will never be important in terms of inspiring belief. This is

because access to, and therefore control of, the most important aspects of the operation of unions is denied to a tribunal which can only erect theories within the bounds of an assumption that cannot extend to the comphrehension of a power independent of the power and authority of the sovereign state.

This is important, because it means that the theories always fall short of accounting for a gap in effective state power. The effective, rule-making, consequence-producing activities of trade unions, considered in their own sphere of operation, and in the absence of the assumption of a superior national legal order, leave little to distinguish them from a legal order, creating "laws", "rights" and "duties". This characterization, which emphasizes the independent, consequence-producing activity of the unions, is not,for that reason, a generally acceptable use of those terms, except if they are used analogously, in a context in which the power so exercised is regarded as in some way derivative from a superior state.[28]

In the legal world, where "effects take place according to the law with infallible regularity,"[29] there is only one normative order by which the community is to be defined - "the relatively centralized coercive order which is the national legal order."[30] To admit the usage mentioned as proper and in fact correct would strike at the very roots of English legal theory and would be thought of as perhaps involving a

contradiction in terms - the existence, pro tanto, of a politically and legally non-sovereign state. Laski and other political pluralists were able to argue convincingly that state sovereignty "in its Austinian formulation, was sociologically unreal and ethically objectionable" but "what it could not do was construct a plausible theory of the non-sovereign state."[31] This is obviously true where the matter is seen as being ultimately based upon consent,[32] but if it is conceived as one of power relations, the possibility must be admitted. It is truly an extraordinary situation, but it would appear to be one in which an organized group, in some senses undoubtedly "within" the state, has, as such, and by virtue of its independent and organized power, made good a claim to be put beyond the 'sovereign' power, politically and legally.

On this analysis, it would be a mistake to require of trade union theory that it describe trade unions "in the round." It must indeed be at least doubtful whether the present legal vocabularly, grounded as it is in the assumption of a single, effective national legal order, would be equal to the task of rendering this state of affairs in "legal" terms. What trade union theory relates to in fact, and all that perhaps it should ever have related to (for we shall see that the two are not the same), are those bits and pieces of trade union activity that, as

a result of the accommodation of 1871-1875, are allowed to break the legal surface.

Legal theory proceeds on the basis that the accommodation of 1871-1875 is correctly assimilated to a concession from a superior state. It not only treats this superior-inferior scheme as being stable, but regards it with the equanimity usually reserved for the occurance of a natural event. Following back from this, we can see that the legal theory is itself underpinned by the supposition that the balance of the political accommodation will not change - i.e. that both parties will stay in the same power positions relative to one another. The classification of the matter in this way, with its concommittant failure to examine what are really dynamic power relations, has the effect of progressively emptying from the theories of the little empirical content they had originally. This, as we shall see, is carried to a point where they do not refer to anything, and every point of contact between fact and theory, save that of fortune, is gone. That is why no one really believes in them.

A good example of this progressive erosion of the contact between fact and theory can be found in the provisions of the Trade Union Act, 1871, itself.

That legislation made possible "trade union law" as we know it. By doing so through the exemption of trade unions from the doctrine of

restraint of trade, however, the Act excised at a stroke the public policy foundation for, and hence the relevance of, the question that in one form or other had hitherto characterized the law in this area: "does this organization have purposes which are illegal for being in unreasonable restraint of trade." It is to the purposes of the combination that sections 2 and 3 of the Act relate. At the time the Act was passed, the illegality of the purposes of the combination vitiated all its agreements and was an inseverable part of its definition: "Nothing could have been more surprising to the learned lawyers who wrote the reports of the Royal Commission of 1869 than to be told that there could be any domestic union agreements, etc., which a court of law would not have to consider as contracts in restraint of trade at common law."[33]

Once the purposes were legalized, a whole dimension of the question would have been lost. The question of how to define a 'trade union' presented real problems. In view of the unusual and privileged position unions were about to assume, precision was a real need. In the result, however, the term was given a meaning that was almost guaranteed to become less relevant and more meaningless with the passage of time. It was tied to the fact of the pre-Act legal situation, which, of course, was dead and gone the moment the statute came into effect. A trade union was defined (inter alia) as that combination "as would, if this

act had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade."[34]

This has a significance that must be explored on two levels. Although the Trade Union Act, 1871, has been spoken of as having "grafted an exception" on the general law of restraint of trade,[35] it would be more accurate to say that this aspect of public policy as it related to trade unions was actually "frozen", as it were, as it existed in 1871, and the unions forgiven their trespasses upon it. Because the answer to the question "is this combination a trade union?" is made a matter of public policy, it becomes not a question of fact, but one of law, as are all such questions.[36] The only evidence permitted the judge in making this determination is the written rules and objects of the union, and evidence of the way these are actually employed is generally inadmissible.[37]

At the same time however, it is a most peculiar question of public policy, because those rules, must be interpreted in the light of the public policy on restraint of trade as it was in 1871. Since it is generally admitted that public policy in fact changes over time, this becomes, and, indeed, in 1871 was already on the way to becoming,[38] less of a living political philosophy than a matter of legal tradition, of which the courts were the sole guardians and propounders. We thus have

a situation in which the present rules of the union, which may or may not reflect actual practice, are interpreted in the context of a legal situation that was history before it was ever relevant in this behalf, to yield a view of matters that must become more and more detached from reality with the passage of time. The narrowness and artificiality of this approach has been the subject of some judicial comment:

> In...the...application of the doctrine of restraint of trade...the English courts are conceivably constrained to give effect to the doctrine in its most restrictive sense by reason of the Trade Union Act, 1871....It would appear that this statute at the same time it relieved trade unions from the disability of being unable to enforce their trusts and agreements...fettered the courts from interpreting the common law in relation to...restraint of trade except in accordance with the common law view as it then stood.[39]

While it is true that to have examined the definition in the light of modifications in the law of restraint of trade would have put the courts at cross-purposes with the Act to the extent that public policy might resile from its position on trade unions, we shall see later[39A] that this quirk has been made to serve a quite different purpose.

More generally speaking both the original and the subsequently developed technical narrowness of the range permitted to the courts through legislation is in conflict with the basic tendency of the law to extend its dispute-solving function without limit. The result is

that a very wide vocabulary of legal control is crammed into a very limited number of legal issues. When these stunted hypotheses are applied to a wide variety of states of affairs, this makes for legal characterizations of factual situations that can be grotesque.[39B] They grossly denature the facts and are largely irrelevant to any purpose other than giving effect to the basic assumption of state control. The power of these theories to spark controversy has grown with the passage of time. This is because the courts, locked into this assumption of state supremacy, have continued in their attempts to intrude, in an authoritative and interpretative way, upon the dynamic reality of a power situation that has in fact developed to provide a healthy increment to the strength of the unions. When these intrusions are resisted, the inadequacy of extant theory becomes manifest. The courts attempt in their usual fashion to satisfy competing claims, when, in some cases, forces which are beyond the boundaries of the theory within which settlement takes place, make the ostensible issue only apparent. In substance, it is sometimes one of adjudicating between two rival powers, both with irreconcilable claims, relating less to the immediate matter at hand than to the power of the state to exercise control, and both implicitly backed with enormous power to influence events. Not the least ironic aspect of this is that the legal intrusions which have been most objectionable to the unions have been made possible by

the very terms insisted upon by the unions in 1871 in their attempts to isolate themselves from the general law of the state. The removal of trade unions from the development of public policy has meant that the law has become almost totally divorced from the facts. This is a made to order situation for a conservative judiciary, and would seem to account in part at least for the recurring situation in trade union law matters in which the courts seem almost continuously at odds with Parliament. The constitutional convention of the independence of the judiciary, whatever its other virtues,[40] only exacerbates a bad situation: it is a structural impediment against a regular flow of political pressure and organized information to the courts. Its effect is to allow the courts to preserve an Austinian unity out of what everyone agrees is in fact diverse. A court serves a doctrine of sovereignty which is a seamless whole, undivided and indivisible. Even Jennings, who disagreed with Dicey's formulation, agreed that Parliamentary sovereignty or supremacy, was at least "A legal concept, a form of expression which lawyers use to express the relations between Parliament and the courts."[41]

It follows from what I have said, of course, that if and when the assumptions that underpin the legal theory of trade unions are correct, then I am at one with the view that the matter is of little practical consequence. While that situation obtains, it is of small

moment, outside the bounds of a particular case, whether a trade union "is" or is not, a "legal entity." The matter does become important, however, when the political status quo changes or is challenged in a significant manner. Then, these theories may drag more or less of the "real" situation into the legal machinery than is either necessary or desireable. Because the choice of theory is in some measure a choice of result, and because the theories have come to be divorced from almost every contact with reality, those results may be grotesquely inadequate and very damaging. The problems thus posed by these theories may be acute. Their overly formalistic analysis, because a shift of power to the unions, has eroded its base, seems presently to be linked to a social and political situation that many would say has become notional. This is the juncture at which the theoretical and the practical become one. The accommodation that supports the validity of theory must either be restated, or the existing situation must be altered to restore the necessary relationship between fact and theory. That of course is a problem for the future, and, although certain things are clear in broad outline, a full treatment of that is beyond the scope of this effort. I wish now to turn to a consideration of the more important trade union "legal personality" cases, to determine what support they provide for the analysis presented to date.

PART III

CHAPTER FOUR: NOTES

1. In this expression I include the following: the Trade Union Act, 1871, 34 and 35 Vict., c. 31; the Criminal Law Amendment Act, 1871 (An Act to Amend the Criminal Law Relating to Violence, Threats and Molestation), 34 and 35 Victoria, c. 32; and the Conspiracy, and Protection of Property Act, 1875, 38 and 39 Vict., c. 86.

2. The Webbs, History, at pp. 238-242. I have depended mainly upon this work for an account of the events of this period.

3. see: Eleventh and Final Report of the Royal Commissioners Appointed to Inquire Into the Organization and Rules of Trade Unions and Other Associations (1869), C04123 (this report does not appear to be in the library).

4. see, e.g., the Webbs, History, at pp. 246 ff.

5. ibid, at p. 251

6. ibid, at pp. 238-244, 256-257, 276-283, 306-307, 324-327, 337

7. ibid, pp. 253-254

8. 32 and 33 Vict., c. 61

9. The Webbs, History, at p. 257

10. ibid, at pp. 254-255

11. ibid, at p. 255

12. ibid, at p. 254

13. ibid, at pp. 260, 261-263

14. An Act to Amend And Explain An Act of the Sixth Year of the Reign of King George the Fourth, To Repeal the Laws Relating to the Combination of Workmen And To Make Other Provisions in Lieu Thereof, 22 Vict., c. 34, usually referred to as the "Molestation of Workmen Act."

PART III

CHAPTER FOUR: NOTES

15. (1851), 5 Cox C.C. 404 (N.P.)

16. (1851), 5 Cox C.C. 436 (N.P.); 466 (Q.B. in banco)

17. see The Webbs, History, at pp. 260.

18. ibid, p. 265

19. supra, fn 1

20. supra, fn 1

21. The Webbs, History, at p. 269.

22. supra, fn. 1. For an account of this agitation, see The Webbs, History, pp. 274-275.

23. Trade Union Act, 1871, supra fn. 1, ss. 8, 9, 10, 11, 12

24. ibid, s. 2

25. ibid, s. 3

26. see, e.g., Lord Robson, in Russells Case, supra, Ch. III, fn.40, at pp. 440-441.

27. see Peacock v. Bell and Kendall (1667) 1 Wm. Saunders 69, 73; 85 E.R. 81, 84; Rex v. Chancellor of St. Edmonsbury and Ipswich Dioscese, Ex Parte White, [1948] 1 K.B. 195 (C.A.) at pp. 205-206, per Wrottesley, L.J.

28. There are many examples of this, and some of them are collected in the Chapter on the Taff Vale Case, infra. See, e.g., Denning, L.J. in Bonsor's Case, 1954, 1 Ch. 479 at p. 485 (C.A.)

29. Olivekrona, Law As Fact, p. 251

30. Kelsen, Pure Theory, at p. 287.

PART III

CHAPTER FOUR: NOTES

31. Leicester C. Webb, "Corporate Personality and Political Pluralism", in Legal Personality, p. 45 at p. 63

32. see Laski, Problems of Sovereignty, at pp. 13 ff.

33. Kahn-Freund, "Illegality of a Trade Union", at p. 194

34. Trade Union Act, 1871, supra, fn. 1, s. 23

35. By Lord Robson, in Russell's Case, at pp. 440-441. See also Citrine, pp. 107, 122

36. Halsbury's The Laws of England (3rd ed.; Lord Simonds, general ed., 1954) (hereinafter referred to as "Hals" preceded by the volume number, and followed by the page reference) vol. 8, p. 131: "The question of whether a particular agreement is contrary to public policy is a question of law; see also Lord Bramwell, in the Mogul Case, p. 440; Lord Parker, ibid., at p. ; Thompson v. New South Wales Branch of the British Medical Association, [1924] A.C. 764 (P.C.) per Lord Atkinson at p. 770.

37. see e.g. Fletcher Moulton, L.J. in Gozneys Case, [1909] 1 K.B. 901 at p. 919; Lindley, L.J. in Swaine v. Wilson (1889), 24 Q.B.D. 252 at p. 261; Farwell, L.J., in Russell's Case, [1910] 1 K.B. 507 at pp. 520, 521; Fletcher Moulton, L.J. in the Second Osborne Case [1911] 1 CH. 541 at p. 565; Coleridge, J. in Mudd v. General Union of Operative Carpenters and Joiners (1910), 103 L.T. 45 (K.B.D.) at p. 46; Diplock, L.J., in Faramus v. Film Artistes' Association [1963] 2 Q.B. 527 at p. 558. See also Citrine, at p. 49: "The manner in which the rules have been applied in practice is not relevant to the question of their construction." There seems to be only one clear instance to the contrary - Farrer v. Close (1869), L.R. 4 Q.B. 602 (Q.B.D.) at pp. 608, 609, per Cockburn, C.J.- and that was expressly disapproved by Farwell L.J. in Russells Case, supra, at pp. 522, 524, 525. See also, however British Association Of Glass Bottle Manufacturers (Limited) v. Nettlefold (1911), 27 T.L.R. 527 (K.B.D.) where practice was looked at, albeit in peculiar circumstances, and see Parr v. Lancashire and Cheshire Miners Federation [1913] 1 Ch. 366 (C.A.), where the court did step in to interfere with an attempt to circumvent the decision in Amalgamated Society of Railway Servants v. Osborne, [1910] A.C. 87 (H.L.), (hereinafter referred to as the "First Osborne Case").

PART III

CHAPTER FOUR: NOTES

38. see H. and W., at p. 60

39. Chase et al. v. Starr [1923] 4 D.L.R. 103 (Man.C.A.), per Trueman J.A., at p. 133; aff'd sub nom Starr v. Chase et al., [1924] 4 D.L.R. 55 (Sup. Ct. Can.) but with no discussion of this point.

39A. see infra, Ch. 6, pp. 95-96.

39B. see infra, Ch. 8, pp. 141-143

40. See Dicey, Law of The Constitution, at pp. 409-410; Phillips, Constitutional Law, c. 32: "The Administration of Justice", at p. 555 sp. at p. 556-563.

41. Jennings, Law And The Constitution, at p. 149

PART III

CHAPTER FIVE: LEGAL PERSONALITY AND THE TAFF VALE CASE[1]

A discussion of the question of legal personality and trade unions in the courts is usually and conveniently commenced with the Taff Vale Case.[1] The plaintiff railway company sued the defendant trade union (inter alia) in its registered name claiming an injunction and other relief in respect of a strike then in progress. The trade union took out a summons to have their name struck out as defendants, on the ground that the action could not be maintained against them in their registered name. The case is a particularly clear example of one of the significant characteristics of the "legal personality" cases: the result in the particular case turns upon the answer to the more general question of whether the actions of certain individuals, themselves not often a matter of dispute, can be imputed to an association of which they are members. The course of the reasoned decisions through the judicial structure is remarkable for the almost entire lack of reliance on anything but the "surely" argument. Both sides of the argument could not unfairly be summed up: "surely" the Legislature did [or did not], in view of the language used in the

statute, have anything else in mind than that a trade union could [or could not] [do or have done to it the matter in question]. What this amounts to saying is that in the "legal personality" cases, the recourse to the courts is made to authority, and what they say must therefore be interpreted not as discovery, but merely as decision. Our task will be to interpret the considerations which inform that decision.

In the Taff Vale Case, the question for decision was whether a trade union could be sued in its registered name. The view that it could not found favour only in the Court of Appeal. In the court of first instance, and in the House of Lords, the decision went the other way. What is of interest to us, however, are the forms taken by the argument.

It was pointed out in the Court of Appeal, with unassailable logic,[2] that the provisions of the statutes were inconsistent with the inference of a legislative intent to incorporate registered unions. Therefore, it was held, the analogy to a corporation that would permit the suit in the registered name of the union, and make its funds generally liable was not, on the statute, to be made available.[3] At trial, and in the House of Lords, the judges all held the union liable to suit in its registered name, and without exception they did so on the

somewhat rhetorical grounds that where there are rights, there must also be corresponding responsibilities.

In Taff Vale, we witness the trade unions paying the first, most important installment of substance on the price of the formal submission to the state legal order implied by the Trade Union Act, 1871. The House of Lords to a man[4] echoed the query implied by these words of Farwell, J., in the Court of Queen's Bench: "If the contention of the defendant society were well founded, the legislature has authorized the creation of numerous bodies of men capable of owning great wealth and of acting by agents with absolutely no responsibility for the wrongs that they may do to other persons by the use of that wealth and the employment of those agents."[5] - and to a man they gave it the answer it so clearly invited.

By casting the matter in terms such as "capacity" to "own" great wealth and to "act" by agents and the like, the judges treated the trade union like any other defendant. While this was perhaps inevitable, we must bear in mind the altered view of the factual state-union relationship set up for the purposes of this paper, and note that these are loaded expressions which presuppose, and which sooner or later ask to be related up to, the "existence" of some "body" in which these attributes will inhere. This is the root of the "legal entity" theory.

It is clear enough, even from the judgement of the Court of Appeal[6] (and clearer still in retrospect) that what is too horrible for the House of Lords to imagine may nevertheless, for all that, be true.[6] The answer to the generalized rhetocical question, of course, as with every question of statutory interpretation, is that to be intelligible in anything other than policy terms, it must address this question, or that question. The answer then depends, not on the possibility or necessity of deducing a responsibility where one finds a right, but on what the statute has provided in that behalf. Because of the legal history of trade unions at common law, the legal aspect of the Taff Vale Case was necessarily served up as a question of statutory interpretation. The case is peculiar, however, in that the very question in it fell to be decided, not on a single section of the Act, for on this point it was silent, but on an inference to be drawn from the act as a whole. That is, the decision was purely a matter of implication.

Despite this, however, it is important to see that even here the Court is limited in the sweep of its approach. The unitary legal concept of sovereignty ensures that the Court is bound to see in the form of the statute the representation of a sovereign and efficaceous will. Whatever the meaning of any act may be in fact, the Court must work its way

to its conclusions on arguments that start from this basic premise, and which characterize problems in language which is appropriate to it. Ordinarily, this raises no problems, because usually the state organization, whatever the exact locus of effective power, is vis a vis the Courts, efficaceous in fact.

These considerations, applied to Taff Vale, left the courts with two basic alternatives. The first, to which the judgement of the Court of Appeal most closely conforms, is, relatively speaking, to isolate the problem, to consider the Act on its own merits, and accept the results. The second method is virtually to turn the first on its head. The Act, it is assumed a priori, must have been intended to fit consistently into the scheme of the general law, one basic constituent of which is a theory of reciprocity of rights and obligations. The two may give quite different results; both are commonly used legal techniques.

Historically, and on the face of the statute, it would seem to be clear that there were areas in which trade unions were, in Lord Mac Naughton's emotive phrase, to be "above the Law." They were exempted, for example from the operation of the doctrine of restraint of trade. The jurisdiction of the courts was excluded from many aspects of their domesticaffairs which in ordinary circumstances would give rise to

serious legal consequences. Nevertheless, the House of Lords chose to treat the matter in gross, as it were, and came, not surprisingly, to the conclusion that where there is a right, or capacity, as in Taff Vale, a corresponding duty is to be implied. Ergo, the unions were to be subject to the law. Once this decision is taken, the matter becomes the technical one of deciding how it is to be done: "Then, if trade unions are not above the law, the only remaining question...is one of form."[7] Lord Lindley spoke similarly:

> For such violation, the property of trade unions can unquestionably...be reached by legal proceedings properly framed...in strictness the only question for determination by your Lordships now is whether the Court of Appeal was right in holding that the name of the trade union ought to be struck out of the writ.... If I am right in what I have already said, this question is of comparatively small importance; it is not a question of substance, but of mere form.[8]

These remarks are the sources of the so-called procedural rule theory.[9] But this theory, it is to be noted, comes only after, and stands upon, the decision that the union is to be amenable to the court at all. The necessity to make this choice at all tends to be hidden by the almost invariable factual correctness of the general assumption that "everyone" is subject to the law. That, however, was the real issue in Taff Vale, and that was the question answered in the affirmative by Farwell J., and a unanimous House of Lords. The 'legal entity' theory, as we shall see,[9A] stands on a related, but not identical footing: it

is one theoretical justification of the basis upon which the procedural rule theory itself rests. It is logically anterior to the latter, but neither is necessary, nor do they necessarily conflict.[9A] Of all the judges, only Lord Brampton[10] used the term, and then only in a highly ambiguous sense.[11]

Much of the difficulty in this area of the law can be traced to analyses of the cases in terms of these two theories considered as relevant in themselves, outside the context of what I have called the proto-or pre-legal problem of trade unions and state authority. The court in Taff Vale was considering the effect of the Act of 1871. We have taken the position throughout that this statute in fact represents a political settlement akin to a system of promises governing the future relations of state and union. Compromise is a characteristic of such agreements. Besides issues which are simply not forseen, contentious issued which cannot be resolved with exactitude are often deliberately fudged and left to lie over for working out in particular cases, lest disagreement on them bring the entire operation to a premature end. The extremely sensitive question of the precise degree of penetration to be allowed the state coercive machinery into union affairs (or, if you like, of the exemption of unions from the law), is one such matter. There was a widely held opinion at the time of Taff Vale[11A] that a trade union could not be sued in its registered name, but the question,

(perhaps partly because of this), had not come before any court.

Both of the theories figure in the collection of trade union legal personality cases. The legal entity theory directly addresses matters of substance that are only with difficulty crammed within the boundaries of the procedural rule theory,[12] while the latter has the advantage of not having to attempt the primary task of the first theory: that of building a "legal entity" out of admittedly scanty materials. Nevertheless, there is a level of common ground between the two which is directly relevant to our enquiry. Both theories draw entirely upon the application of a generalized, regular, functioning legal status quo to trade unions in spite of the fact that most evidence suggests that in several important respects at least, unions are outside its purview. In these circumstances, it is more difficult than usual to predict the acceptance of the court's authority than it would be in the case of the "ordinary" legal situation. The inability of the courts to formulate theory that accords with, and accounts for, the substantial independent power of the trade unions, combined with the convention of judicial independence and the connection many are prepared to make between the social background, and the view of the law, propounded by the judges, is a situation damaging to the notion of faith in the law. It can lead to a view which sees the legal system as a hostile, yet authoritative, arm of the state sealed

off from the influence unions have in the political forum. Cases like Taff Vale plainly contribute to that notion.

What the case did was to give some substance to the formal submission of trade unions to the state legal order by dealing with the trade union as such[13] rather than with the collection of individual members. It decided, as judicial policy at the highest level, and as it was bound to do, that these associations would be made to fit the existing structures of the legal system, and not vice versa. Only in this way is there the possibility of control implicit in the judgement of a court: "Legal norms have their social effect through legal sanctions, and sanctions cannot be applied to counteract the spontaneous conduct of amorphous masses. They can, however, be applied to regulate the conduct of organizations. The scope of the law grows as organization supplants spontaneity."[14]

The theory of assimilation to the general law that is at the basis of Taff Vale, however, was seriously at odds with the real situation, as we can see by the result of the political storm which followed the case: the remarkable Trade Disputes Act, 1906.[15] It has been pointed out[16] that this legislation was quite contrary to the tendencies of the day. At a time when the state was taking large steps to intervene positively in the life of the community, it was a laissez-faire statute quite without parallel.[17] It flew in the face of the majority report of

the Royal Commission on Trade Disputes and Trade Combinations (1906) which had been set up to enquire into this and other matters.

The decision of the House of Lords in Quinn v. Leatham[18] was jettisoned: No concerted act was to be actionable unless it would be actionable if done by an individual.[19] This completed on the civil side the task done for the criminal law with the Conspiracy, and Protection of Property Act, 1875.[20] Peaceful picketing was legalized[20A] without reservation, this reconciling in favour of the unions the conflicting Court of Appeal decisions in J. Lyons and Sons v. Wilkins[21] and Ward, Lock and Co. (Limited) v. The Operative Printers' Assistants Society and Another.[22] Inducing breach of contract of employment, or interfering with the trade, business or employment of another person or with the right of another person to make his own disposition of his capital or labour, in contemplation or furtherance of a trade dispute, was no longer to be actionable.[23]

Section 4(1), however, has first claim to our attention. It quite literally took the answer invited by Farwell J's rhetonic, and given it by a unanimous House of Lords, in Taff Vale, and stood it on its head: "An action against a trade union...or against any members or officials thereof on behalf of themselves and all other members...in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained in any court."[24] Dicey said of

section 4:

> This enactment...confers upon a trade union a freedom from civil liability for the commission of even the most heinous wrong by the union and its servants, and in short confers upon every trade union a privilege and protection not possessed by any other person or body of persons, whether corporate or unincorporate ....This is assuredly a very extraordinary state of the law....It makes a trade union a priveleged body exempted from the ordinary law of the land. No such priveleged body has ever before been deliberately created by an English Parliament.[25]

Nevertheless, it must be noted that the terms of this enactment were not so wide as the theory had assimilated trade unions to the general law in the Taff Vale case. While it did roll back the law on actions involving the specific class of wrong upon which Taff Vale had turned, it did nothing to loosen the hold of the more basic principle established by the case: unions were to be, in substantive, but as yet undefined ways, assimilated to, and controlled by, the general law. This was the enduring significance of the case, and the foundation upon which later trade union case law in this area was to be built.[26] Indeed, by eliminating tort and cramming this basic, unchanged assertion of control into a yet narrower range, the Act paved the way for later characterizations of states of affairs that were even more artificial than before.[27]

Succeeding cases built a gloss upon the principle thus established- the courts came to discuss the effect of the Act of 1871 in a standardized

vocabulary in which state control is implied as the quid quo pro of state recognition: "charter of legal existence"[28] "freed from illegality";[29] "authorized the creation";[30] "created a thing";[31] "this statute...gives the charter for all such 'combinations'"[32] are examples. Others are not difficult to find,[33] and exceptions are few,[34] and related to the way in which this view denatures the facts.[34]

Between Taff Vale and Bonsors Case,[35] which sees the full fruition of the principle established in Taff Vale, the way is marked with a series of cases which must be first considered. In this line of cases the First Osborne Case[36] is prominent, but because it presents the theoretical issues involved in this discussion so clearly I propose to discuss it separately and in some detail, and then to follow the other "legal personality" cases through to Bonsor's Case.

PART III

CHAPTER FIVE: NOTES

1. The Taff Vale Railway Company v. The Amalgamated Society of Railway Servants, [1901] A.C. 426 (H.L. and Q.B.D.); reversing [1901] 1 Q.B. 170 (C.A.), hereinafter referred to as the "Taff Vale Case" or simply as "Taff Vale".

2. so says Citrine, p. 16

3. [1901] 1 Q.B. 170 at pp. 175-176; see also Citrine, p. 16

4. Lord Halsbury, at p. 436; Lord MacNaughton, at p. 438; Lord Shand, at p. 441; Lord Brampton, at p. 442; Lord Lindley at pp. 443-444; [1901] A.C.

5. supra, fn. 1, at p. 430

6. "...if a trade union can be sued in the manner proposed, ...the funds of the union will be liable...whether this ought to be so or not...I have not to enquire; whether it is so...is another matter." [1901] 1 Q.B. 171 at p. 173, per A.L. Smith, M.R., for the Court of Appeal.

7. supra, fn. 1, per Lord MacNaughton at p. 438

8. ibid, at p. 444

9. It is of interest to note that Lord Brampton, the only judge who found it necessary to introduce the term "legal entity" to the discussion, seems to have expressed a similar view: "The lawless acts....were done by...agents of the society...the society is responsible for them. Whether it is so responsible in and by its registered name is the only remaining question. I see no reason why this question should not also be answered in the affirmative." ibid, at pp. 441-442.

9A. see infra, Ch. 8

10. supra, fn. 1, at p. 442

PART III

CHAPTER FIVE: NOTES

11. supra, fn. 9

11A. see, e.g. the Webbs, History, at p. 255

12. Judgement is obtained against the common property of the association and can be executed only against that property; the principles of of liability applied by the court are the same as those applied in the case of a corporation in the same circumstances, as fluctuating membership is immaterial - the union is taken to stand for all members, past, present and future regardless of their personal capacities and peculiarities. If the matter is to be dissected into the categories of substance and procedure, it is difficult to argue that the problems facing the procedural rule theory after the strictly procedural question have been answered are not questions of substantive law. It is similarly difficult, to be sure, to erect a "legal entity" to cater to these substantive questions from the material available. On these matters, see "Hickling", at p. 12; K.W. Wedderburn, "The Bonsor Affair: A Postscript" (1957), 20 Mod. Law Rev. 105 at p. 109; Dennis Lloyd, "Damages For Wrongful Expulsion From A Trade Union: Bonsor v. Musicians' Union" (1956), 19 Mod. Law Rev. 121 at pp. 129-130.

13. Even Lord MacDermott in Bonsor's Case [1956] A.C. 104, at p. 145, whose speech in the House of Lords is certainly the best exposition of the view that the union is not a legal entity, but an unincorporated society, had to return to the notion of the "union" as an "organized combination" in order to be intelligible (if inconsistent) on the question of liability and sanctions.

14. O. Kahn-Freund, "Trade Unions, the Law and Society" (1970) 33 Mod. Law Rev. 241; see also W. Jethro Brown, "Statutory Prohibition of Strikes In Relation To Common Law Rights" (1920), 36 Law Q. Rev. 378 at p. 382; see Lord MacDermott, quoted supra, fn. 13.

15. 6 Edw. 7, c. 47

PART III

CHAPTER FIVE: NOTES

16. by D. F. MacDonald, The State and the Trade Unions (1960), at pp. 62-63

17. A. V. Dicey, Lectures On the Relation Between Law and Opinion in England During the 19th Century (2nd ed.) (1914, 1962 reprint), intro., pp. xxix, xxxi

18. [1901] A.C. 495 (H.L.)

19. 6 Edw. 7, c. 47, s. 1

20. 38 and 39 Vict., c. 86

20A. 6 Edw. 7, c. 47, s. 2

21. [1896] 1 CH. 811 (C.A.)

22. (1906), 22 T.L.R. 327 (C.A.)

23. 6 Edw. 7, c. 47, s. 3

24. ibid, s. 4(1). For cases on this section, which generally was interpreted to mean what it says, see Bussy v. The Amalgamated Society of Railway Servants and Bell (1908), 24 T.L.R. 437 (K.B.D.); Vatcher and Sons, Limited v. London Society of Compositors, [1913] A.C. 107 (H.L.); Parr v. Lancashire and Cheshire Miners Federation [1913] 1 Ch. 366 (C.A.); Ware and DeFreville, Limited v. Motor Trade Association and Others, [1921] 3 K.B. 40 (C.A.); see also Citrine, pp. 591, 593.

25. supra, fn. 17, at introduction, p. xlv-xlvi. This work will be hereinafter referred to as "Dicey, Lectures on Law and Opinion (2d)" to distinguish it from the article of similar name cited Chapter III, fn. 10.

PART III

CHAPTER FIVE: NOTES

26. Lord MacDermott said of the Taff Vale Case, in Bonsors Case [1956] A.C. 104 (H.L.) where that first decision was of crucial importance, that "though its practical importance has been much reduced by the Trade Disputes Act, 1906, the principle it established stands and must be respected in considering the effect of the material statutes." (p. 139)

27. see infra, Ch. 8, pp. 141-143 - the "contract" characterization in Bonsor's Case 1956 A.C. 104(H.L.).

28. Yorkshire Miners Association and Others v. Howden and Others [1905] A.C. 256 (H.L.) per Lord James (dissenting in the result, but not on this point) at p. 275 (hereinafter referred to as "Howden's Case")

29. ibid, per Lord Lindley, at p. 279; see also, similarly, in this case Lord Halsbury, at p. 263; Lord MacNaughton, ibid, "Concession"; "relief".

30. Taff Vale, [1901] A.C. 431, per Farwell J.

31. ibid, per Lord Halsbury, at p. 436.

32. First Osborne Case, [1910] A.C. 87, at p. 93, per Lord Halsbury (H.L.)

33. see, e.g. Thomas Wilson v. The Scottish Typographical Association and Others, [1912] S.C. 534, at p. 540, per the Lord Ordinary; National Union of General and Municipal Workers v. Gillian and Others, [1946] K.B. 81 (C.A.) at pp. 84-85, 89; Bonsor's Case [1956] A.C. 104 (H.L.), per Lord Morton, at p. 127, approving the comments of Scott, L.J. in Gillian; per Lord Porter, at p. 131, and per Lord MacDermott, at p. 140; J. Lyons and Sons v. Wilkins, [1896] 1 CH. 811, per A.L. Smith M. R., at p. 833 (C.A.)

34. see, e.g., The First Osborne Case, supra, fn. 33, at pp. 107-108, per Lord Shaw, and at pp. 98-99, per Lord James.

35. [1901] A.C. 104 (H.L.)

36. [1910] A.C. 87 (H.L.)

PART III

CHAPTER SIX: THE FIRST OSBORNE CASE[1] AND THE ANALOGIES OF CONTROL

It must have been obvious that co-opting trade unions into the state institutional structure would invite increased participation by them, as such, in the political life of the country.[2] Their legitimation added a dimension to the problem of state control which had not been present when the unions were decriminalized in 1825. The relationship of superior to inferior implicit in the notion of the state as sovereign creates a need for the state to define the limits to which trade union involvement in the life of the country would extend. The First Osborne Case[1] overtly involved the courts in the do's and dont's of electoral politics, a topic inseparably connected in this country with the idea of legitimacy in the attainment, possession and use of state power. Because of this, the case brought the issues in the state-union conflict more clearly into view than any case before or since. Accordingly, and not withstanding the fact that the case provoked 'remedial' legislation, I propose to discuss it and the issues it raises in some detail.

Questions on the limits of trade union power had, of course, arisen prior to Osborne, but usually in a vague and oblique fashion. In

Linaker v. Pilcher and Others,[3] trustees of a union, sued for an alleged libel in a union newspaper, argued that the definitions of 'trade union' in the 1871[4] and 1876[5] Acts cut down the rights and powers of the society so as to engage the principle of ultra vires with respect to the running of the newspaper. Accordingly, it was said, the trustees could not be sued, or, if they could, not so as to bind the funds and property of the union. The Court rejected this argument. It held that nothing in the Acts precluded a trade union from running a newspaper, if its constitution provided for this, which, in Linaker v. Pilcher, it did.[6] There were several other cases in which an opportunity for comment on this problem was available,[7] but the matter first came squarely before the courts in the case of Steele v. South Wales Miners Federation and Others,[8] with the last word on the matter in the courts coming from the House of Lords in the First Osborne Case.[9] Both of these last two cases deal with the meaning to be given to the definition of the term 'trade union' contained in the Trade Union Act, 1871,[10] as amended by the Trade Union Act Amendment Act, 1876.[11] Is that definition, (which, as we have seen,[12] catches up "evidence" of the "existence" of the "union") to be construed as exhaustive and limiting, or as merely descriptive?

Mr. Steele was a member of the defendant association, a registered trade union. Because he objected to the use of union funds for the

purpose of financing the election to, and maintenance in, office of certain members of Parliament, he sought an injunction and a declaration accordingly. It was argued for him that the trade union could not lawfully pursue this object. Both Darling and Phillimore, J.J., held otherwise. They stuck to the text of the definition in the Acts, to hold that the clause was not a limiting one.[13] Darling J. was additionally of the opinion that this provision of funds constituted a mode of regulating relations between workmen and masters, and was, therefore, in any event, within the words of the statutory definition.[14] On this point Phillimore J. Preferred to express no opinion.[15] Both regarded it as significant that the statutory formula made no mention of the provision of benefits to members, an important trade union function long regarded as legitimate. From this omission, they concluded[16] that the statutory definition was not exhaustive so as to preclude the trade union from doing acts other than those specifically enumerated in the definition. In other words, once the Acts had legitimized the purposes of the trade unions, the association could lawfully do whatever any other lawful association could do, so long as the act done, or the means used to achieve the purpose, were not in themselves illegal.

Steele's Case was overruled on this point by the First Osborne Case.[17] Mr. Osborne, like Mr. Steele, objected to a compulsory levy

by his registered trade union to be used for political purposes to which he did not personally subscribe. He, too, sought the appropriate declaration and injunction. There was no dispute over the facts, and the case reveals the same selection of approach as in the Taff Vale Case.[18] The particular issue ("can a trade union do this?") is related to a more general question ("what is a trade union?") and the answer to that particular question is deduced from the answer to the more general one. That is, the question "can a trade union do this?" really means, on this approach, "is this included in the definition?"[19] As in Taff Vale, this general question is answered in the "if-then" terms of "rights" and "privileges" given to "it" by the statute, thus opening the way for the inference of duties and responsibilities. In Osborne, of course, the purpose of the exercise is the reverse of what it was in Taff Vale. In that case, a 'right' was set up in order to infer a 'corresponding' duty therefrom, and so engage the liability of the union. In Osborne, the inferences are made to close the circle, as it were, and exclude the undesireable activity. The primary characterization of the problem is put as a matter of "capacity", rather than of "liability", as in Taff Vale, but the important point to notice is that the effect of each characterization is an extension of the state power over the affairs of trade unions.

In the First Osborne Case, the significance of the fact that the important benefit side of trade unionism was not mentioned in the text of the statutory definition was diffused in two ways. First, the Court moved away from the actual words of the definition to the broader grounds of the whole act. By relating to the definition, other bits and pieces referring to benefits, it was shown that the provision of benefits was inter alia, one of a series of "collateral or ancillary purposes" which were clearly in the contemplation of the legislature and which, accordingly, were not really outside the definition at all.[20] In the event that doubt should be expressed on this point, however, Fletcher Moulton and Farwell, L.J.J. went the further step of calling into aid against the union that peculiar extraction of trade unions from the development of public policy which was mentioned earlier.[21] In addition to the ground above, it was suggested, with respect to these "collateral or ancillary purposes", that it was "immaterial whether we consider that their inclusion arises from their being in the contemplation of the legislature means for regulating the relations specified in the definition, or whether we take it that they are impliedly brought in by the use of the well known word 'trade union' with all its associations."[22] The possibility, suggested by this view, of further development of this "well known word,"

was sealed off as soon as it had allowed the learned Lord Justice to pass in safety.'Trade union' meant trade union in 1871: "I cannot think that the legislature intended that objects not at the time recognised as trade union objects, and not coming within the objects specified in the definition, might form part of the legitimate objects of a trade union within the purview of the Acts."[23] The definition, then, with its motley accompaniment of scattered phrases and historical interpretation, was held to be restrictive, exhaustive and limiting. In the House of Lords, the decision of the Court of Appeal was affirmed.

While the issue in the case did not receive a uniform characterization by the court, we will see that the apparent diversity in the judgements can profitably be reconciled at the level which is common to them all: all of them regard the case as requiring a decision on the extent to which the state could or would permit the unions to bring their coercive power to bear in order to secure the ends of their supposedly 'voluntary' association. Three of the judgements in the House of Lords[24] turn on the narrower issue of the application of the doctrine of ultra vires the statute to trade unions, and this was also common to all of the judgements in the Court of Appeal.[25] Lord Shaw decided the case on the wider, so-called "constitutional" issue,[26]

which turned upon members of Parliament accepting financial contributions "under obligations inconsistent with our parliamentary constitution and contrary to public policy."[27] Lord James leans to a policy limit on the power of trade unions that is more consistent with the generalized position adopted by Lord Shaw than it is to the ultra vires judgements, although he declines to be placed in either camp.[28]

We can begin by examining the structure of those decisions in the Court of Appeal, and in the House of Lords, which turn on the ultra vires point.

The first point to notice is that the question of compulsion in these judgements is related primarily to the power of the trade union to compel its own members, and that ultimate control of that power is in turn linked to basic legal notions of the position of the state. This can be contrasted to the decisions of Lord James and Lord Shaw, where the emphasis is placed upon the compulsion potentially exercised on the members of Parliament concerned in the scheme under consideration.

In the second place, all of the ultra vires judgements work from given premises; - in this case, section 16 of the Trade Union Act Amendment Act, 1876, and the other provisions which were related to it

by the judges. This is treated as a true definition; a true given premise, and no matter for argument: it is a way of stating compendiously what a trade union "is" but that word is not used in its obvious sense. This "is" has nothing to do with describing any situation that actually obtains in fact. A trade union, in fact, "is" whatever it is, and definitions have nothing to do with that. In Osborne, there is an actual organization, actually regulating relations between employers, and employees, actually providing benefits to members, and actually contributing to the support and maintenance of members of Parliament.

So the judicial statements on what a trade union "is" bear no relationship to what the union could do, and was in fact, doing. Indeed, it was the very fact that certain activity was actually occurring that called these statements forth in the first place. The statements of what the union "is" are only intelligible as a method of stating compendiously what the trade union is to be permitted to "do": "A definition which permitted them to do the particular things named and in addition all things not in themselves illegal would be no definition at all."[29] Permission, and the power it implies to withhold it, are questions solely of authority.

This necessarily involves resolving the issues with legal devices

to be found within the boundaries of the legal theory which underpins the authority of the court. This is the assumption of state sovereignty, because, for a court, effective power and legitimate authority is supposed to be unified in, and exclusive to, the state. The ultra vires judgements develop the implications of this hypothesis along one very restrictive line. For our purposes, two aspects of this development are important enough to require comment: the significance of the court's choice of analogy, and the effect that it has on the legal theory of trade unions.

The characterization, in the ultra vires judgements, of the legal position of a trade union was not the only, and perhaps not even the most appropriate, choice available from the law of corporations. The principle of ultra vires the statute does not, for example, apply to a chartered corporation. That entity, created by the executive act of the sovereign, has all the powers of a natural person, insofar as it is capable of exercising them.[30] The linchpin of the ultra vires majority in Osborne was the deliberate and debatable choice of the doctrine previously laid down by the House of Lords in The Directors, Etc., Of The Ashbury Railway Carriage and Iron Company (Limited) v. Hector Riche.[31] This case held that a company created a corporation under the Companies Acts, or by a special act of Parliament, took

only that which was given by the enactment - what was not permitted it within the ambit of the statute was prohibited, or ultra vires the corporation. By choosing this analogy the House of Lords selected as appropriate the most restrictive tool available from the law of corporations, an area of the law which is itself inseparably linked in modern legal theory to the supremacy of the state. The analogy articulates the claim of the state to control its creatures, and the relationship of the ultra vires judgements to the others can be found in a brief look at the origins and purposes of this doctrine.

An aspect of the law of corporations, the principle of ultra vires the statute stands upon two legs. As a matter of constitutional law, Parliament, as the sovereign power, does not grant to delegated bodies the exercise of more power than it has authorized. It can limit the potential activities of its creatures in any way it pleases.[32] Secondly the rule was considered necessary as a protection both to creditors and investors.[33] Clearly this second justification has no application to the Osborne situation. The application of the theory there depends upon ideas of permission and power which presuppose the effective control, and the limitations, set by a sovereign state: "Corporate life and form...cannot exist without the permission of the state, express, presumed or implied."[34]

In modern legal theory, the doctrine has its roots in the so-called concession theory of corporations, an illiberal principle inimical to the exercise of the right of free association; and in the modern fiction theory of corporations, which, because of the factual hegemony of the modern state, is supported by the concession theory.[35]

Maitland said of the fiction theory, its connection to the idea of state power, and the implications this has for the notion of free association:

> If the personality of the corporation is a legal fiction, it is the gift of the prince. It is not for you and me to feign and to force our fictions upon our neighbours. ....An argument drawn from the very nature of fictions thus came to the aid of less questionably Roman doctrines about the illicitness of all associations, the existence of which the prince has not authorized....A dogma is of no importance unless and until there is some great desire within it. But what was understood to be the Roman doctrine of corporations was an apt lever for those forces which were transforming the medieval nation into the modern state....No longer can we see the body politic as ...a system of groups, each of which in its turn is a system of groups. All that states between the state and the individual has but a derivative and precarious existence....we may see the pulverizing, macadamizing tendency in all its glory, working from century to century, reducing to impotence, and then to nullity, all that intervenes between man and the state.[36]

And in words which in our context are especially apt, Holdsworth made the same point, from the opposite point of view,

> The same reasons which make it necessary for the law to recognise the crime of conspiracy, make it necessary to regulate these groups of men, who, when they act in combination, have far more power for good or evil than any single man. The failure to recognise this principle in the case of trade unions of workmen or masters, and the abandonment by the state of any control over their activities have shown that...the abandonment by the state of its sovereignty has in effect set up a new feudalism, which is every whit as retrogressive in its ideas, and as mischievious, as the feudalism of the moddle ages. Our modern experience is a striking illustration of the political wisdom of the Roman lawyers when they taught the expediency of 'keeping the corporate form under lock and key.' In fact, creation by and subordination to the state are the only terms upon which the existence of large associations of men can be safely allowed to lead an active life.[37]

If the reasons for the selection of the ultra vires principle are not difficult to find, in the interests of pinpointing one of the causes of the inadequacy of trade union legal theory, we must attend to the price which has to be paid for this choice of analogy. The assimilation of the legal position of trade unions to that of the most restricted of the state's corporate creatures, while it attains the goal of theoretical justification for the exercise of control, opens a chasm between theory and the facts of which it purports to give an account. It severely distorts actual power relationships.

Unlike the derivative creations of the legislature, it was obvious that, in fact, the state had neither created trade unions by its fiat, nor even initially provided the conditions in which they could

develop. The opposite was more nearly the case. The power of the unions was independent of the state, and had flourished in spite of the law. That is, to a substantial extent, the usual factual nexus (the grant of a derivative, dependent power) between state and union which is the basis for the ultra vires theory, was, in fact, missing. Nevertheless, to gloss this over, and to provide a basis for the application of the ultra vires doctrine, the Act of 1871,[38] which in fact represented a settlement between state and union, came to be expressly assimilated to an act of legislative creation, a manifestation of state power.[39] This largely baseless supposition, one of the great items of received wisdom in trade union law,[40] is very damaging to belief in theory, just because it is so at odds with the facts.

In order to avoid it, however, the cutting edge of decision must be brought closer to the overt application of fundamental political valuations than most courts are wont to take it. Lord James and Lord Shaw both baulked at the manifest factual distortion involved in the inference of such complete state control from the bare fact of state recognition. Lord Shaw expressed himself as follows:

> Long before the statutes of 1871 and 1876...trade unions were things in being, the general features of which were familiar to the public mind....Statute did not set them up, and...I have some hesitation in so construing language of statutory recognition as a definition imposing such hard and fast restrictive limits as would cramp the development and energies and destroy the natural movements of the living organism.[41]

Similarly, Lord James could not accept that the definition was a restrictive charter of existence: "the objects and limits of action of a properly qualified trade union are not dealt with by the section."[42]

The various theories on the nature of a trade union are significant primarily in terms of the purposes they serve, and they persist because they are from time to time called upon to fulfill them.[43] The concept of ultra vires the statute is derivative from the basic modern legal concept of the supremacy of the state and it constitutes a particular and very restrictive articulation of it. The ultra vires doctrine proved a useful tool in the trade union context in Osborne, but if the general question at the root of the discussion is itself tackled, what is left for discussion is the more or less unadorned assumption itself. This is what we have in the so-called "constitutional" issue, and in the judgement of Lord James.

This issue makes manifest all that is implicit in the judgements that turned on the point of ultra vires: it is the artuculation of the assumption upon which the ultra vires judgements rest. The difference between them amounts only to the level at which the same problem is resolved. The two approaches are not exclusive, but complementary: "the selection between them is not governed by any canon of logic, but is optional."[44] The problem faced is one of the proper

distribution of state power, and at the level of the wider issue, it has nothing to do with trade unions directly, but only incidentally, as they might by their activities work a transfer of the substance of state power out of the hands of those constitutionally supposed to weild it.

The "constitutional" issue was raised in the Court of Appeal for the first time, and raised, it would appear, not by the plaintiff, but by the court.[45] The issue was this: was it lawful to subscribe funds to secure the election to Parliament, and to continue to support while there, a member who by accepting the money would be bound to vote in a certain manner. On this matter, the Master of the Rolls expressed no opinion. Fletcher Moulton L.J., and Farwell, L.J., however, were emphatically of the view that, quite apart from anything peculiar to the law of trade unions, such an agreement was beyond contest "utterly unconstitutional" and void as being contrary to public policy.[46] Such a compact smacked of bribery,[49] breach of trust,[50] undue influence,[51] and disenfranchesement of the minority.[52] All of these are rooted in the refusal of the court to sanction the use of this sort of compulsion on the presumed seat of effective power, whether from a voluntary association or from any other source. In the House of Lords, Lord James,[53] and more clearly, Lord Shaw[54] found

such an arrangement to be contrary to public policy.

Once more the courts proved to be spectacularly out of touch, and the Legislature with the passage of the Trade Union Act, 1913[55] retrieved the position of the trade unions "By almost entirely excluding the application to trade unions of the principle of ultra vires the statute."[56] By providing that a trade union, so long as its trade union objects are primary, may be endowed with any other object or power provided in the rules, the act places the powers of the trade unions on the contractural footing of an agreement among members, and out of the reach of the courts. Dicey said of this act that "every objection that lies against the Trade Disputes Act has received increased force from the passing of the Trade Union Act, 1913."[57]

I think this view is preferable to that which sees the Act as a compromise between those who wanted the retention of the Osborne ratio, and those who wanted to abolish it altogether.[58] Unions were permitted to pursue political objects, but only with the funds of those who were willing to contribute. Yet, if this is a compromise, it is one with a very sharp edge in favour of the unions, especially in view of the Osborne decision, for which there are very sound practical reasons. Providing for, and legitimizing, trade union political

participation was a large step in itself and one which compromises only the state. Again, it is clearly a major concession that section 4(1) of the Trade Disputes Act, 1906[59] was to apply not only to the "trade union" activities of the unions, but to all their lawful objects, thus removing still more of their activities from the reach of the law. Thirdly, emphasis on the fact that only those wishing to contribute to union political purposes were required to do so veils the concession to the unions of a practical advantage of enormous importance. The manner in which the number of those willing to contribute was made aids and abets the union coercion on its members that was the focus of judicial disapproval in the Osborne decision. The majority of members voting (which may not be the majority of members) first had to approve the pursuit of these objects, it is true, but in what must be the largest, if not the only, inertia-selling scheme ever incorporated by Act of Parliament, a member would be excused from contributing only if he contracted out.[60]

The importance of having the contribution scheme arranged in this way may be seen by the fact that a post-Osborne, pre-Act of 1913 appeal for voluntary contributions was given a desperately poor response. The Amalgamated Society of Engineers, for example, with 107,000 members, could secure a one shilling contribution from only about 5000 of its

members.[61] Nor was its significance lost on the government: when the harsh and restrictive Trade Disputes and Trade Unions Act, 1927[62] was passed in the wake of the General Strike, this situation was reversed so that members had to contract in.[63]

The Osborne decision bore directly and adversely on the major source of finance of the growing Labour Party. If it was in line with a general legal theory which presupposes an exclusively efficaceous state, in practical terms it offered only the questionable solution of repression of an existing and widespread practice. The legislation which followed Osborne clearly enough represented a further resiling in fact by the state from its theoretical claim to exercise effective control of all groups within it. If the courts are to function, it is obvious that they cannot concern themselves with politics at that level. But again, if the legislation is outside the boundaries of basic theoretical suppositions, it appears to have been required by the existence of real limits on that state power which is the basis of the theories themselves. It is the distance between the theoretical and actual power of the state in relation to trade unions that is the measure of the inadequacy of the legal theories to account for them.

PART III

CHAPTER SIX: NOTES

1. Osborne v. Amalgamated Society of Railway Servants, [1909] 1 Ch. 163 (C.A.); aff'd sub nom Amalgamated Society of Railway Servants v. Osborne, [1910] A.C. 87 (H.L.)

2. As early as Hilton v. Eckersley (1855) 6 El. and Bl. 47; 119 E.R. 781; aff'd 6 El. and Bl. 66; 119 E.R. 789, Campbell, C.J. was uneasy at the implications of the "fantastic and mischievious notion of a labour parliament", which might come from recognising the legitimacy of trade unions (p. 789).

3. (1901), 84 L.T. 421 (K.B.D.), hereinafter referred to as "Linaker v. Pilcher". The point is not developed in either argument or judgement.

4. Trade Union Act, 1871, 34 and 35 Vict., c. 31, s. 23

5. Trade Union Act Amendment Act, 1876, 39 and 40 Vict., c. 22, s. 16

6. supra, fn. 3, at p. 426, per Matthew J.

7. see, e.g. Strick v. Swansea Tin-Plate Company (1887), 36 Ch. 558 (Ch.D.); Mineral Water Bottle Exchange And Trade Protection Society v. Booth (1887), 36 Ch. 465 (Ch.D. and C.A.); Chamberlains Wharf, Limited v. Smith, [1900] 2 CH. 605 (C.A.)

8. [1907] 1 K.B. 361 (Div. Ct.); hereinafter referred to as "Steele's Case".

9. supra, fn. 1.

10. supra, fn. 4

11. supra, fn. 5

12. see, supra, CH. 1, p. 12

13. supra, fn. 8, at pp. 367, 369, respectively

PART III

CHAPTER SIX: NOTES

14. ibid, at p. 367

15. ibid, at p. 369

16. ibid, per Darling J., at p. 367; per Phillemore, J. at p. 369

17. supra, fn. 1.

18. [1901] A.C. 426 (H.L.)

19. This is Hart's analysis from "Definition". I think it is an accurate representation of a common judicial approach, but I think also that it emphasizes the role of deduction at the expense of considering its use as a part of a "result-selected" process. For reasons which appear below, I think this is closer to the mark in these cases.

20. see [1909] 1 CH. 163 at pp. 174-175, per Cozens-Hardy, M.R.; at p. 184, per Fletcher Moulton L.J.; and at p. 191, per Farwell, L.J.

21. see Ch. iv, supra, at pp. 69-72

22. supra, fn. 20, at pp. 184-185 per Fletcher Moulton, L.J.

23. ibid, at p. 185; Farwell L.J. said to similar effect at p. 189: "These and such as these were the proper functions of a trade union in 1871." And see also [1910] A.C. 87 at p. 98, per Lord MacNaughton.

24. see [1910] A.C. 87 at pp. 92-93, per Lord Halsbury; at pp. 94-95, 96-97, per Lord MacNaughton; sp. at pp. 103-105, per Lord Atkinson. I will refer to these as the "ultra vires judgements"

25. [1909] CH. 163 at p. 176, per Cozens-Hardy, M.R.; at p. 186 per Fletcher Moulton, L.J., and at p. 199, per Farwell, L.J. See also Citrine, at p. 18.

PART III

CHAPTER SIX: NOTES

26. [1910] A.C. 87, at p. 108 ff.

27. ibid, at p. 108

28. ibid, at p. 98-99. He agrees that the definition clause is not one of limitation, but at the same time wishes to sure that his silence on the comments of Fletcher Moulton L.J. and Farwell, L.J. in the Court of Appeal not be taken as denoting agreement with them on the constitutional point. But again his holding is clearly related to some sort of inarticulate general policy limit on agreements requiring M.P.'s to forgo their own independence.

29. [1910] A.C. 87, at pp. 102-103, per Lord Atkinson

30. Suttons Hospital Case (1613), 10 Co. Rep. 1a, 23a; 87 E.R. 937, 960; see L.C.B. Gower, The Principles of Modern Company Law (1967, 3rd ed., K.W. Wedderburn, O. Weaver, A.E.W. Park, eds.) at pp. 83-84, and the authorities collected in note 5; Clive M. Schmitthoff and James H. Thompson, Palmer's Company Law (21st ed., 1968) at p. 73, 826, referred to hereinafter as "Gower, Company Law" and "Palmer's Company Law" respectively; 9 Hals. 24, para. 37; p. 59, para. 124; p. 62, para 128; Bonanza Creek Gold Mining Company, Limited v. The King and Attorney-General for the Province of Quebec and Others [1916] A.C. 566 (P.C.) at p. 577-578. For a critical view of this, see E.J. Mockler, "The Doctrine of Ultra Vires in Letters Patent Companies", in Studies in Canadian Company Law (1967, ed. J. Ziegel)

31. (1875) L.R. 7 H.L. 653 (H.L.); hereinafter referred to as the "Ashbury Carriage Case". See [1910] A.C. 87 at pp. 92-93 per Lord Halsbury; at pp. 94-95 per Lord MacNaughton; and at pp. 103-105, per Lord Atkinson, on the adoption of this view.

32. Gower, Company Law, at p. 85; Palmer's Company Law, at p. 73

PART III

CHAPTER SIX: NOTES

33. Gower, Company Law, at pp. 84, 86; Palmer's Company Law, p. 73

34. H.E.L., ix, at p. 48

35. Freidmann, Legal Theory, at p. 556

36. Maitland, "Moral Personality and Legal Personality" in S.E., p. 223 at p. 228; see also this article, passim; Introduction to Gierke, at pp. xxx-xxxi; xxxvii ff.; David P. Derham, "Theories of Legal Personality", in Legal Personality, at p. 1, sp. at pp. 9-10; S.J. Stoljar, "The Corporate Theories of Frederick William Maitland" in Legal Personality, p. 20, sp. at pp. 38-44; Martin Wolff, "On the Nature of Legal Persons" (1938), 54 Law Q. Rev. 494 at pp. 508-511; Friedmann, Legal Theory, c. 34: "Corporate Personality in Theory and Practice", sp. at p. 556-557.

37. H.E.L., ix, pp. 46-47. See pp. 45-62 passim, for an excellent survey of these issues.

38. 34 and 35 Vict., c. 31

39. [1910] A.C. 87 at p. 92 per Lord Halsbury: "The Act is, as it were, the charter of incorporation...."and see similarly Lord MacNaughton, at pp. 94-95, and per Lord Atkinson, at pp. 102-104.

40. see supra, CH. 5, p. 89 and authorities cited in fn. 33, CH. 5. It runs like a thread through the cases, especially those dealing with "legal personality".

41. [1910] A.C. 87 at pp. 107-108.

42. ibid, at pp. 98-99

43. see Geoffrey Sawer, "Government As Personalized Legal Entity", in Legal Personality, p. 158, at p. 161: "when personalizing legal entities, lawyers are likely to be seeking several advantages, singly or in combination. The different theories of the corporation may be looked at as merely stressing a particular advantage...." See also Friedmann, Legal Theory, at p. 557

PART III

CHAPTER SIX: NOTES

44. [1910] A.C. 87, at p. 107. In the Court of Appeal, Fletcher Moulton L.J. and Farwell, L.J. dealt with both options.

45. [1909] 1 Ch. 163 at p. 170: in argument for the defendants: "It is not suggested that a levy for parliamentary representation is unlawful in itself or against public policy."

46. see ibid, per Fletcher Moulton L. J. at pp. 187, 186; per Farwell, L.J. at pp. 193-198.

47. There is no note 47

48. There is no note 48

49. [1909] 1 CH. 163, per Fletcher Moulton L. J. at p. 187; per Farwell, L.J. at p. 194.

50. ibid, per Fletcher Moulton L.J. at pp. 187-188; per Farwell, L.J. at p. 195.

51. ibid, per Farwell, L.J. at pp. 193-194.

52. ibid, per Farwell, L.J. at p. 196.

53. [1910] A.C. 87 at p. 99

54. ibid, at p. 114

55. 2 and 3 Geo. 5, c. 3. Also referred to as "the Act of 1913"

56. Citrine, p. 378

57. Dicey, Lectures on Law and Opinion (2d), at p. xlviii, introduction. See CH. 5, p. 88 supra, for Dicey's comments on the 1906 Act.

58. see, e.g. Citrine, at p. 377

PART III

CHAPTER SIX: NOTES

59. 6 Edw. 7, c. 47

60. Trade Union Act, 1913, supra, fn. 55, s. 3(1)(a)

61. see D. F. MacDonald, The State and the Trade Unions (1960), at p. 65.

62. 17 and 18 Geo. 5, c. 22

63. ibid, s. 4

PART III

CHAPTER SEVEN: BETWEEN OSBORNE[1] AND BONSOR[2]

To the Taff Vale Case[3] as the foundation of the law on trade unions and legal personality have been traced the origins of the two main lines of theory that have become the alternative, characteristic descriptions of the legal relationship between the state and the unions.[3A] The "procedural rule" theory has usually been relied upon by unions, possibly because its development implies a practical means of reducing union responsibility to the vanishing point. This view interprets Taff Vale in its narrowest sense. The union as such is seen as unincorporated, amorphous and voluntary, a legal anomaly outside the usual analogies of contract and almost untouchable. With tort actions totally barred by statute,[4] and the jurisdiction of the courts heavily circumscribed by s. 4 of the Trade Union Act, 1871, the advantages of further diffusing contractural responsibility are obvious.

The "legal entity" theory on the other hand, sees the union as a "legal creation", possessing some sort of juridicial personality. While the expressions of the content of this "personality" tend to be quite vague, their meaning in the development of the law has been quite

clear. Heavily larded with analogies drawn from the law of corporations, they draw the activities of the reluctant unions closer and closer to a position of assimilation to and control by, the general law. Perhaps partly because of this, the theory has seldom been used by unions.[6]

The hopes for the results which it was thought might flow from the former theory were in substance finally dispelled by Bonsor's Case,[7] but the approach characterized by that hypothesis had one significant, anomalous, success that for forty-odd years achieved in the field of contract what section 4 of the Trade Disputes Act, 1906[8] had produced in the law of tort. In Kelly v. National Society of Operative Printers Assistants[9] a union member who alleged that he had been wrongfully expelled from his union sued for a declaration, for an injunction and for damages, necessarily[10] characterized as a claim for damages for breach of contract.

The Court of Appeal saw no difficulty in the way of granting the first two items,[11] but on the question of damages the court held unanimously against the plaintiff. The situation in Kelly (expulsion from membership) was one for which the law of corporations provides no ready analogy, as does the use of a name for purposes of suit. The court were accordingly obliged to look elsewhere if the action was to

get off the ground at all.

In the event, all three Judges linked the act of expulsion by analogy to an act of expulsion from a club.[12] When they found that no power of expulsion existed in the rules of the union, the consequences which flowed from that gave the plaintiff his declaration and injunction. The characterization of the union as a club, however, lead their Lordships to a conclusion on the damages question that only a trade union could love, and only a lawyer -(and not all of those[13])- could understand. Two of the judges[14] held that the plaintiff's contract was one between the plaintiff and all other individual members of the union, while the tenor of the decision of Swinfen-Eady, L.J. suggests that the registered name of the union is merely being used as a convenient designation for the individual members. Certainly none held that the contract was with the union itself. The ratio common to all three judges was that the officers of this voluntary, unincorporated association are agents for all members, including the plaintiff. So, when the plaintiff sued the trade union in its registered name for what was done to him, he is in substance suing all the members of the voluntary body, including himself.[15]

The next case which is of interest, chiefly because of remarks made about it in Bonsor's Case,[16] is that of Braithwaite and Others v. Amalgamated Society of Carpenters, Cabinet Makers And Joiners.[17] The

plaintiffs claimed an injunction and declaration to restrain their prospective expulsion from membership in a registered trade union. For the union it was argued that the plaintiffs were demanding the direct enforcement of an agreement among members of a trade union as such, concerning the conditions upon which members should be employed, which was a matter outside the jurisdiction of the court by section 4 of the Act of 1871.[18] The rule under which expulsion was to be made provided that avoidance of those certain types of working conditions specified in the rule was a condition of membership. In the House of Lords, the argument was expanded to include an argument not available in the courts below because of the decision in the Second Osborne Case[19]: namely, that the plaintiffs were also in substance demanding the direct enforcement of an agreement for the application of the funds of a trade union.[20]

A unanimous decision of the Court of Appeal that the matter was not one of "directly enforcing" within section 4 was upheld by a unanimous House of Lords, following the lead of the Second Osborne Case[21] in the Court of Appeal. It was reasoned that to place a man by a declaration and injunction in a position in which he had certain unenforceable rights could not be said to be directly enforcing those rights.[22]

In 1929, the question of characterizing the relationship between

the union and its members was once again before the court in the case of Cotter v. National Union of Seamen.[23] Cotter brought an action for a declaration that a meeting at which a resolution providing for the making of a loan to a 'non-political' miners' union, from the defendant union, was not lawfully held, and for an injunction accordingly. The question before the court in which we are interested is this: who is the beneficial owner of the property of the union. By section 8 of the Trade Union Act, 1871,[24] all property is vested in trustees "for the use and benefit of such trade unions and the members thereof."

The court was presented with a clearly articulated choice of alternatives. The options argued before the court were as follows: Each member of the union could be regarded as a cestui que trust, which draws the union to the analogy of the club, with each member having (perhaps concurrently with the union) a proprietory interest and the concommittant right to defend it.[25] Alternatively, the property could be regarded as belonging beneficially to the union, rather than to its members, with the corresponding limitations on legal action by members to restrain dealings with it. This second view is a short step away from the attribution of legal personality to the union, and it pulls in the direction of the law of corporations.

In the result, the court chose the corporate analogy and held that

the rule in Foss v. Harbottle[26] applied to trade unions:[27] the proper plaintiff in an action for a wrong alleged to have been done to an association of persons is, prima facie, the association itself, and if the wrong is a transaction which might be made binding on the association and all its members by a simple majority, no individual member is allowed to maintain an action in respect of that wrong.[28] Only Lord Hanworth, M.R. referred to the union as a legal entity,[29] but it is clear from the opinions of Lawrence and Russell, L.J.J., that they rested their decisions on the same basis.[30]

The application of the rule in Foss v. Harbottle[31] by analogy from the rules which govern the internal affairs of corporations was foreshadowed by Howden's Case when it was in the Court of Appeal[32] and was confirmed by the later case of Edwards and Another v. Halliwell and Others,[33] which applied the reasoning in Cotter's Case. Citrine says that "the application of the rule in this form has been used to support the view that a registered trade union is a legal entity in the fullest sense."[34] It is a development which is consistent with the general trend of the courts to assimilate the legal position of trade unions in theory to that of a carefully circumscribed group within the state.

The last case we have to consider before moving on to Bonsor's Case is Gillian's Case.[35] This was an action for libel damages taken

by a trade union in its registered name, against the general secretary of another trade union and a printing firm. It was objected by the defendants as a preliminary point that the action was not maintainable by the union suing as such. This was the other side of the Taff Vale[36] coin: could a trade union sue in tort, by its registered name, as well as being sued.

The general tendency of the courts to set up reciprocity of rights and duties would almost serve as a definition of the legal system, and in the light of Taff Vale, would suggest that the implication of a right to sue in the registered name of the union, would be a logical and not surprising extension of the principle of that decision. The Taff Vale Case, however, can and has been explained by the narrow view that the use of the registered name is merely a procedural device which creates no rights and alters no duties.[37] This may be an adequate explanation: at least, in the actual Taff Vale decision, only Lord Brampton found it necessary to introduce the term "legal entity" into the discussion in the House of Lords,[38] whatever may have been in the minds of the other judges. In Kelly's Case,[39] again, for example, the procedural nature of the suit against the union in its registered name was sufficient for the purposes at hand, and clearly was uppermost in the minds of all members of the court in that case.

The notion of the suit against the union as a matter of procedure, however, would not have been sufficient in Gillian's Case.[40] It was an action for libel, and that is a tort which presupposes the existence of a reputation to be damaged.[41] Since it was never suggested that the individual reputations of the members of the union had been compromised, the court in Gillian, had to decide in effect whether the "union" "had" a "reputation" which it was entitled to protect from disparagement made without lawful justification or excuse.

This was a clear invitation to the court to take up the "creation of a legal entity" theme that was so pronounced in the First Osborne Case.[42] This it did![43] Gillian's Case is cited in Phillip's Constitutional Law as an authority illustrating the doctrine of the supremacy of Parliament.[44]

Once this tack is taken, the resulting situation can be linked easily by analogy to the corporate rule in similar situations, and the trade unions thereby brought more closely into line with the general law.[45]

Kelly's Case[46] and Gillian's Case[47] were clearly inconsistent precedents on the level at which we are concerned. It does not appear that the former was brought to the attention of the court in Gillian. Kelly's Case depends upon the diffusing analogy of the club; Gillian on that of the centralized, and theoretically malleable corporation.

In the field of contract, the only area in which unions were left open to suit, the varying choices of characterization had produced very different results. This was the state of the law at the time Bonsor's Case arose, and we are now in a position to move to a consideration of this important decision.

PART III

CHAPTER SEVEN: NOTES

1. [1910] A.C. 87 (H.L.)

2. [1956] A.C. 104 (H.L.)

3. [1910] A.C. 426 (H.L.)

3A. see supra, CH. V, pp. 78-79, 82-83

4. Trade Disputes Act, 1906, 6 Edw. 7, c. 47, s. 4

5. 34 and 35 Vict., c. 31

6. Exceptions are Linaker v. Pilcher (1901), 84 L.T. 421 (K.B.D.) and National Union of General and Municipal Workers v. Gillian and Others [1946] 1 K.B. 81 (C.A.), where the plaintiff union used it, but the defendant was in reality another union. (hereinafter referred to as "Gillian" or "Gillian's Case")

7. supra, fn. 2

8. supra, fn. 4

9. (1915), 113 L.T. 1055 (C.A.); hereinafter referred to as "Kelly" or "Kelly's Case"

10. see Trade Disputes Act, 1906, supra, fn. 4, s. 4(1)

11. supra, fn. 9; per Swinfen Eady, L.J., p. 1058; Phillemore, L.J. at p. 1060; per Bankes L.J. at p. 1062

12. ibid, per Swinfen Eady, L.J., at p. 1057: "a power to expel will not be implied...there is no inherent power in any society or club to alter its rules so as to introduce such a power;" per Phillemore L.J., at p. 1059: "a power of expulsion is not inherent in a voluntary association"; per Bankes L.J.; at p. 1062: "there is no inherent or implied power of expulsion in a voluntary association such as this."

PART III

CHAPTER SEVEN: NOTES

13. see the heavy criticism of the decision on this point in The King v. Cheshire County Court Judge and United Society of Boilermakers, Ex parte Malone [1921] 2 K.B. 694 (C.A.) at pp. 702, per Lord Sterndale M. R., at pp. 709-710 per Scrutton, L.J.; and at p. 712, per Younger L.J., and see Bonsor's Case, supra, fn. 2, per Lord MacDermott, at p. 149: "quite out of keeping with reality".

14. Phillimore and Bankes, L.J.J.

15. supra, fn. 9, per Swinfen Eady, L.J. at p. 1058; per Phillimore L.J., p. 1060; per Bankes L.J., p. 1062.

16. supra, fn. 2, per Lord Morton, at p. 120; per Lord Porter, at p. 132.

17. [1921] 2 Ch. 399 (C.A.) aff'd sub nom Amalgamated Society of Carpenters, Cabinet Makers and Joiners v. Braithwaite and Others, [1922] 2 A.C. 440 (H.L.); hereinafter referred to as "Braithwaite" or "Braithwaite's Case".

18. 34 and 35 Vict., c. 31

19. [1911] 1 Ch. 540 (C.A.)

20. see [1922] 2 A.C. 440 at p. 443

21. supra, fn. 19

22. [1922] 2 A.C. 440 at pp. 450-451, per Lord Buckmaster (Lord Carson concurring, pp. 464-465); at pp. 454-455 per Lord Atkinson; at pp. 467-470, per Lord Wrenbury (who had sat as Buckley, L.J. in the Second Osborne Case); Lord Summer concurred on this point without reasons, see p. 466.

23. [1929] 2 Ch. 58 (C.A.) hereinafter referred to as "Cotter" or "Cotter's Case".

PART III

CHAPTER SEVEN: NOTES

24. 34 and 35 Vict., c. 31

25. see Sir Henry Slesser in argument, at pp. 88-90, 92

26. (1843) 2 Hare 461; 67 E.R. 189

27. see supra, fn. 23, per Romer J. at p. 71; Lord Hanworth, M.R., at pp. 103-104; Lawrence L.J. at p. 109; Russell, L.J. at P. 111.
28. ibid, per Romer J. at p. 71; Lord Hanworth, M.R. at pp. 103-104.
29. ibid, at pp. 103-104; Hickling's statement, "Hickling", p. 34 that "all three members of the Court of Appeal described the union as a legal entity" appears to be mistaken.

30. ibid, see p. 108-109 per Lawrence L.J.; pp. 110-111, per Russell, L.J.

31. supra, fn. 26

32. [1903] 1 K.B. 308 (C.A.) at pp. 328-329, per Vaughan Williams L.J.; at pp. 336-337 per Stirling L.J.; and at pp. 347-348 per Matthew, L.J. This case does not mention the case of Foss v. Harbottle, supra, fn. 26

33. [1950] 2 All E.R. 1064 (C.A.), sp. per Jenkins, L.J. at pp. 1066-67.

34. at p. 387

35. supra, fn. 6

36. supra, fn. 3

37. see, e.g. Evershed, M.R., in Bonsor's Case, [1954] 1 Ch. 479 at pp. 497-498.

38. supra, fn. 3, at p. 442

PART III

CHAPTER SEVEN: NOTES

39. supra, fn. 9

40. supra, fn. 6

41. see 24 Hals. 1, para. 1

42. [1910] A.C. 87 (H.L.)

43. supra, fn. 6, per Scott L.J. at pp. 85-86, 87; Uthwatt, L.J. 87-88; MacKinnon, L.J., concurring, at p. 87.

44. (2nd edn. 1957), at p. 45

45. Gillians Case was followed in Willis and Another v. Brooks and Others [1947] 1 All E.R. 191 (K.B.D.), where at p. 192, Oliver J. said of it: "...the Court of Appeal have decided in Gillian's Case that there is no difference in this matter between a trade union and a limited company, and that the entity of a trade union cannot be divided into different parts consisting of various of its members so as to deprive it of its right to sue if it is libelled." Citrine, at p. 174, fn. 29, that Gillian was by no means the first action for defamation by a trade union, and cites a lengthy list of cases reported in the Times. Gillian and Willis, supra, however, appear to be the only cases which are to be found in the regular reports.

46. supra, fn. 9

47. supra, fn. 6

PART III

CHAPTER EIGHT: BONSOR v. MUSICIANS' UNION[1] - THE END OF THE ROAD

Part I - Bonsor's Case

Bonsor's Case pulls together all the threads woven by the other trade union cases we have examined and is accordingly an appropriate point at which to sum up argument. The plaintiff Bonsor alleged that he had been wrongfully expelled from his registered trade union. He sought a declaration to that effect, an injunction, and damages for wrongful expulsion. He was successful on the first two points at trial and in the Court of Appeal, but failed to secure his damages. Both lower courts held, Denning L.J. (as he then was) dissenting, that they were bound by the Court of Appeal decision in Kelly's Case.[2] By the time the case reached the House of Lords, the points upon which Bonsor had been successful in the courts below were academic, Bonsor having died the day prior to the rendering of judgement in the Court of Appeal. The only question before the House of Lords, then, was Bonsor's widow's cross-appeal on the refusal to award damages. Because of section 4(1) of the Trade Disputes Act, 1906,[3] this claim was necessarily characterized as one for damages for breach of contract.

Bonsor's Case[4] was significant in more than one respect. In a sense, it could be considered the end of a legal era. In it we see the courts moving into the last great common law preserve of de facto trade union immunity. On the political side, the trade unions took a very dim view, and considered the decision to be of serious enough consequence to consider seeking legislation to set it to rights.[5] The case is important for our purposes for what it can tell us about the methods and motives of the court, in line with the general discussion we have been pursuing.

The case presents in fully developed form the competing theories of the legal nature of a trade union. At the same time, it shows clearly enough that neither of these views is either necessary or wholly satisfactory. In the midst of controversy over which is correct, we have in Bonsor's Case the somewhat curious situation in which two competing hypotheses produce identical results satisfactorily accounted for by neither. If this can be satisfactorily explained, then we shall be some of the way to an understanding of the problems which face any attempt to satisfactorily formulate the legal position of a trade union. We can begin by an analysis of the issues raised in Bonsor.[6]

The appreciation or assessment of issues is, at least in part, a function of perspective, and in Bonsor's Case different vantage points

show that the issues are distributed on three levels. The narrowest, lowest-keyed question that can be taken from the case is whether or not Mrs. Bonsor will get her damages. From her point of view, this is a yes-no matter. It does not involve the positing of legal entities or other hypothetical manifestations. Because this question is to be answered by a court, which provides the solution according to certain rules, the answer to this narrow question depended upon the response to a second, and slightly wider issue - which I will call the lawyer's issue - which was whether Kelly's Case[7] had been correctly decided. In the House of Lords, that is a matter purely for the exercise of judgement. The decision there shows plainly that disposing of Kelly's Case does not necessitate the laying down of any legal fictions. That is a step which is merely serviceable.

Kelly's Case[8], however, in the context of our discussion, was no ordinary decision. It was a self-inflicted and serious limitation on the effective power of the courts to control trade union affairs by the application of the ordinary sanction of the law. Its effect was to diffuse to the vanishing point what remained of trade union contractural responsibility after section 4 of the Trade Union Act, 1871.[9] Taken in conjunction with the blanket exclusion of judicial jurisdiction in tort achieved by section 4(1) of the Trade Disputes Act, 1906,[10] this

meant exclusion of the courts from the most promising area for the development of their policy of assimilating trade unions to the general law.

Ordinarily, our commonly held values and assumptions make it unnecessary for lawyers to go beyond the lawyers issue in a case. The substance of Bonsor's Case,[11] however, touches upon fundamental matters that exceptionally, in the case of trade unions, do not serve their usual function of accepted points of departure for argument, but are themselves sources of conflict. The third and, most general level of Bonsor's Case is concerned with the resolution of the conflict between the tendency of the ideal power of the legal system to realize itself, and the interest of trade unions in maintaining intact their independent posture outside the law. The case may be regarded as another manifestation of the perennial problem of state power; that is the root issue in Bonsor,[12] and from it, the others are derived. If the theories put forward in Bonsor to answer the lawyers issue which arose on Kelly's Case[13] are to be rendered intelligible at all, it is with reference to this conflict.

According to Kelly, a member of a registered trade union who was wrongfully expelled could not obtain damages. Bonsor's Case decided

whether this ought to be so.[14] In sofar as the authorities other than Kelly, bore upon this point, they did so only indirectly, to be sure, but their relevance lies in the stress they placed on the availability of the normal legal processes to an aggrieved union member. From this point of view, the answer to the lawyer's question in Bonsor, in retrospect, seems to be clear enough. A line of cases from the foundation case of Taff Vale, broken only by the solitary and anomalous exception of Kelly's Case, displayed a decided and continuing tendency on the part of the courts to bring as much of the affairs of the trade unions under the general law as was possible. This trend was strong enough to provoke some unprecedented legislation to prevent it. While the court in Kelly[15] was, on the damages question, more or less hoist on its own choice of analogy, the basic issue in Bonsor[16] was placed by all their Lordships[16] as a variant of the point decided in Taff Vale,[17] which was pregnant with quite another kind of analogy. That case is the foundation for the progressive regularizing of the control of the courts over the affairs of trade unions through control of the organization rather than of the individuals composing it. Lord MacDermott said of the reasoning in Taff Vale:

> ...although parliament has not gone far enough to make the registered union other than an association of individuals, it has legalized its purposes and endowed it with powers and qualities to such an extent that an intention to fix it with corresponding responsibilities ought to be implied.[18]

Even though Lord MacDermott ultimately found that the registered trade union was not a juridicial person, he must return, in his discussion of the "procedural consequences" of Taff Vale, to the notion of the union as organized efficient cause. While Taff Vale[20] removed a "formidable problem" of procedure by holding that a registered trade union could be sued in its registered name, "the party suing, if he is to succeed, has still...to show that the union concerned is, as an organized combination, responsible for the act of which he complains."[19]

Trade union cases prior to Bonsor had affirmatively, if vaguely, classified the relationship "within" a trade union as contractural. It was admitted in Bonsor both that the relationship was contractural and that the contract had been broken.[21] With the exception of Kelly's Case,[22] however, it had not heretofore been necessary for the courts to articulate the exact nature of that contractural connection. Kelly's Case is thought to be an anomaly to lawyers if not to trade unionists, because when the reasoning upon which it is based is applied to a situation in which this 'contractural' relationship has been, without legal justification, severely disturbed or even terminated, the injured party seeking redress is said in some sense to end up suing himself. Accordingly, the legal results are not wholly what lawyers would consider appropriate to an action characterized as one in 'contract'.

The assimilation of Bonsor's Case[23] to the Taff Vale[24] principle implies a decision that the 'normal' incidents of breach of contract will henceforth flow from the 'breach' of a 'contract' of membership in a registered trade union. The court, in effect, decided that it was desireable to interpret the "corresponding responsibilities"[25] spoken of by Lord MacDermott widely enough to include damages for breach of contract resulting from a 'wrongful' expulsion from a registered trade union. It necessarily follows that Kelly's Case[26] on the question of damages, must be taken to have been wrongly decided, as all five Law Lords found.[27] The question which now becomes important for the narrow compass of orthodox theory, and the only matter upon which their Lordships differed, was how wrongly it had been decided. The answer to that question foccusses on choosing a method by which the agency problem first adumbrated by Kelly can be made to go away.

We can now look at the mechanics of resolving this problem. This can be organized around the various views taken of Taff Vale, since all "applied" it.

The speech of Lord MacDermott seems the most convincing analysis. Since entities are not to be multiplied beyond necessity, and since his approach gives the same results as that of the "legal entity" judgements

of Lord Porter and Lord Morton, it seems also to be the most economical. Lord MacDermott was content to interpret Taff Vale[28] at its lowest level: "a registered trade union may be sued in its registered name", and to him it was "clear that the decision was not founded on the proposition that a registered union is a juristic person."[29] He held that the burden of the decision in Taff Vale had fallen on determining the intention of the legislature, and had no difficulty in finding a clear majority in favour of this restricted view:[30] "Lord Brampton alone took the view contended for by the Appellant."[31] Accordingly, the explicit comments of Lord MacNaughton and Lord Lindley to the effect that the registered name of the union was only a collective name for all the members, take on the coloration, not of the "minority view" attributed to them by Lord Morton and Lord Porter,[32] but are seen as expressing the opinion of the majority of the court.[33]

This appreciation of the Taff Vale[34] case is reflected in Lord MacDermott's assessment of other cases in point. Similar remarks of Lord Lindley in Bowden's Case[35] are cited approvingly. Dicta of Lord Halsbury[36] and of Lord Atkinson[37] in the First Osborne Case,[38] and a dictum of Farwell, L.J. in the Second Osborne Case,[39] cited by the appellants, are interpreted as recognising only "that the legislature has conferred on such unions some of the characteristics of a judicial

person, but they do not go the length of saying that the effect of the relevant legislation has been to give...a new status amounting to a legal personality distinct from their membership."[40] Gillian's Case, with its explicit personification of the trade union, was accordingly disapproved.[41] As far as Kelly's Case[42] was concerned, Lord MacDermott was content to accept its initial premise (that the union member contracts with all other members of the union) while attacking the reasoning that is erected upon it. The appreciation of Kelly's Case is therefore slanted away from the question "with whom did the plaintiff contract?" and it is interpreted as having been decided on the agency point: when the committee expelled Kelly, they were acting as his agents,[43] as much as they were agents for the other members. Adopting the reasoning of Denning, L.J. in the Court of Appeal[44] - when the committee were expelling Kelly they were acting against him, not for him - the reasoning that led to the result in Kelly's Case[45] was discarded in a most cursory fashion. It was termed "an unwarranted extension of the agency and quite out of keeping with reality."[46] In this he was supported by both Lord Somervell[47] and Lord Keith.[48]

Lord Porter, on the other hand, chose to interpret Taff Vale[49] in its widest sense as having decided that Parliament had by statute

"created" an "entity recognised by the law and distinct from the individual members thereof."[50] Accordingly, he relied on those passages in the case in which this aspect of the matter was emphasized. The law through "recognition"[51] had "legalized"[52] or perhaps even "created"[53] trade unions as a "legal entity."[54] He was perforce obliged to reject as a "minority view" those comments of Lord Mac Naughton and Lord Lindley which suggested that an action against the union in its registered name was in the nature of a suit against the union, which had been made in Taff Vale[55] and elsewhere.[56]

Other relevant authority was treated as butressing this wide interpretation of Taff Vale. The so-called "declaration and injunction" cases were called into aid. Of Howden's Case,[57] Lord Morton said: "its importance for the present purpose lies in the fact that a member of a registered trade union got judgement against his union."[58] Similar comments are made about the First Osborne Case[59] and it is pointed out that the Second Osborne Case[60] "carried the matter a stage further, where the plaintiff was asserting his own rights as a member against his union."[61] Braithwaite's Case,[62] which approved the Second Osborne Case, it was said, "is really decisive of the present case. The action was based on a breach of contract between the plaintiffs and their respective unions, and a threatened breach of that

contract was restrained. If the breach had actually taken place, I see no reason why damages should have been refused."[63] Gillian's Case[64] in so far as it held that the union was "recognised by the law as a body distinct from the individuals who from time to time compose it", was naturally approved.[65]

The judgement of Lord Porter followed that of Lord Morton in approach and result. Although he wished to refrain from reliance on the Second Osborne Case,[66] Howden's Case[67] and Braithwaite's Case,[68] because they might be explained on the ground that the action restrained was ultra vires the union, he does point out that in his view, these cases "establish the right of a member to sue his own union."[69] On the question of Kelly's Case,[70] both Lord Morton and Lord Porter overruled it, and solved the agency problem it raised by attacking the basic premise of the case. They held that the ratio and hence the mistake in Kelly's Case turned not on the agency point, but on a false conclusion drawn by the Court of Appeal in holding that the plaintiff's contract was with his fellow members and not with the union as "an entity recognised by the law and distinct from the individuals thereof."[71] The effect of this finding is that the foundation for the refusal to award damages is gone.[72] The committee or other representative acts for the entity, and not for the individual members of the

union, against the member concerned, and not for him.

With two of their Lordships contending that the union is a legal entity, and two saying it is not, the fifth judgement, of Lord Keith, is usually seen as both pivotal and inconclusive. For the reasons given by Hickling in his article,[73] I think Lord Keith's judgement is closest to those of Lord MacDermott and Lord Keith. I think also, however, from our point of view, which will now be developed, that the exact theoretical position of Lord Keith is not a matter of great importance.

Part II - Some Conclusions on the Structure and Direction of Theory

It is the common disadvantage of the mainstream theoretical analysis to characterize the cases within the narrow range of responses to the issue of whether a trade union is, or is not, a "legal entity". This is a notion which, as we have seen in our discussion of the First Osborne Case,[74] is in modern legal theory very closely connected to the idea of state control and state supremacy. The focus of discussion in both theories is therefore on the mechanics of applying an assumed control over the unions when, again as we have seen, it is the existence of that control which is itself in issue. The approach, I think, is for that reason too restrictive. Reliance on this unexamined and possibly erroneous assumption of state supremacy as a basis

for theory means that the significance of the theories it sponsors is being assessed without reference to the actual power relations of which the theories purport to be an expression. If these hypotheses are not to float like disembodied spirits, with no apparent connection to anything, they must be related to some notion of the facts to which they are related - that is, to the power relations of the state with its unions.

The difficulty which faces legal theorizing in this area is that these facts will not always fit theories which have an assumption of state supremacy as one of their boundary conditions. Trade unions are not like other associations, or, if they are, they are more so. They weild power but it is an independent, and not a derivative power. They survived their attempted suppression by the state, and a large part of their operations, which would normally result in serious legal consequences, are at their own wish conducted outside the confines of the national legal order which is the source of, and justification for, those consequences. At the same time, for reasons already canvassed, the management of some of the tension generated between these two power centres takes place in the courts, which are an integral part of that national legal order, and which by definition seek the extension of that order to areas outside its reach. One of the general, important,

ways in which this is done is through the regularized use of language, by an arbiter generally recognised as authoritative, for the purpose of characterizing disputes "within" the legal order. This is true in the trade union context as in others, but this language, like the notion of 'court' itself, depends upon the assumption that the state is actually supreme. In the case of trade unions, the factual basis for that assumption is to an extent eroded, and to that extent the ability of trade union theories to be related significantly to an actual factual situation is compromised, with the loss of belief in, and the sense of irrelevance of, these theories, that is thereby entailed.

We have seen that the Taff Vale Case,[75] to which Bonsor's Case[76] was assimilated, achieved its result by setting up, against the background of generally accepted valuations, an "if-then" reciprocity of the following form:

> If a trade union can do A, then it ought to be held correspondingly responsible for A.

The second arem of this statement seems a consequence, given certain obvious values, of the first. Nevertheless, it must not be overlooked that the court in Taff Vale made an affirmative decision on a question of trade union capacity (i.e. that a trade union has the power or will be permitted to "act by agents"), as well as on the more prominent

question of liability: "the legislature has authorized the creation of numerous bodies of men capable of owning great wealth and of acting by agents."[77] This matter of capacity it may be seen, is tied in with the notion of authorization, or permission, by the state, and the question of liability arising from this capacity is directly assimilated to the corporate analogy. As we have seen, this is also heavy with overtones of state control: "The principle upon which corporations have been held liable in respect of wrongs committed by its servants or agents...is as applicable to the case of a trade union as to that of a corporation."[78] The decision on capacity is a condition precedent to any discussion on the question of liability. That this legal decision, involving once again the employment of the notion of state supremacy, is necessary, tends to be obscured in Taff Vale[79] because in fact the actions complained of were traditionally militant trade union activities which presented no difficulties of ascription to the union.

In the First Osborne Case,[80] this question of capacity was itself the very issue. The negative answer to it in that case shut off future consideration of the possibility questions of liability that might arise. So "can", in our proposition, in law means "will be permitted to"[81] and the "if-then" schema, in the legal world, and expressed in

terms of basic legal assumptions on control, should read:

> [A trade union can lawfully do only what is permitted by the law.] If a trade union is permitted by law to do A, then it ought to be held correspondingly responsible for A.

The trade union legal personality cases focus on one or another of these propositions, against this general background of permission, although both are always involved. In Bonsor, however, differences of opinion among the judges as to the importance to be placed upon each arm or branch caused this usual primary focus to be diffused. The trade union was in fact the foundation or mutual substantial connection upon which a network of consequence producing relationships were posited. At the same time, if this was to be permitted in law, then the clear tendency of the law would be to link this legal permission to act to the relationships in the usual way: responsibility in damages for the unlawful disruption of the relationship. The theories articulate the differences of opinion on how this is to be done, but the important thing for us to notice about them is the way both views are related to the exercise of power and control.

The question of whether the union could be, or was, a 'party' to the 'contract', in view of the absurdly contrived nature of the agreement, is well-nigh unintelligible on any other view. Denning, L.J. said of it in the Court of Appeal:

> ...the rules...constitute the contract between the member and the union...these rules are more a contract in theory than a contract in fact. In order for there to be a true contract, there must be the agreement of parties freely made with full knowledge and without any feeling of constraint. That was not so here....He had no option but to sign... the rules are not so much a contract...but they are more a legislative code....They are more like by-laws than a contract.[82]

There is, of course, no empirical state of affairs corresponding to the phrase "contract in fact", any more than there is to "contract in Theory". "Contract" is a word that refers to nothing that actually exists. It is a word which in its legal aspect denotes an inference or conclusion of law, usually drawn from some empirical evidence of a course of dealing, and according to certain rules. The significance of the word lies in its regular use by the courts. Their pretensions are usually lived up to in fact. Certain actual effects are seen ostensibly to flow from the use of this term by the courts. Denning's distinction amounts to this: "contract in theory" denotes an inference of law which has virtually no basis in fact. The connection is so tenuous that the extension of the analogy of contract, the method by which the law pulls itself along from situation to situation, must be justified on considerations other than those normally used. It means that there is no contract at all with anyone, but that there is a decision that a contract ought to be implied, and the decision conse-

quent upon that, that sanctions for its "breach" ought to be enforced. In the context of this case, it has been pointed out that "most 'implied term' agreements...do little more than assert that the plaintiff shall have damages;"[83] they amount to "no more than a device for making law."[84] It is this more-than-usually aenemic contractural fiction that in Bonsor's Case[85] characterizes the consequence-producing relationship between a union and its members. This is a prime example of the grotesque results and characterizations which come from confining a theoretically unlimited control and dispute solving function in an unnaturally narrow and artificial channel.[85A]

In these circumstances, it is obviously impossible to use language like "true" or "false" to describe the various points of view in Bonsor's Case, since the choices are descriptive not of matters of fact, but of assumptions which may or may not tally with matters of fact. Since both yield the same practical results in terms of those assumptions, and since accordingly, neither view can be considered necessary to the achieving of those results, it is just as difficult to point to one view as being entirely appropriate. But how far apart are they? I think it can be shown that the "conflict" is only apparent, because the theories do not, I think, offer conflicting expositions of the same states of affairs. The notion of conflict between them arises with the adoption of the narrow view that the theories have a significance which is independent of the common basic assumption upon which both are erected.

The difference between them seems to amount of just this: within a common boundary, each theory spends its energy in seeking to establish a position that the other assumes. The individual trade union 'legal personality' cases can be regarded as particular aspects of a general issue of the extent of state penetration into, and control of, associations within the state. In the case of trade unions, the issue remains unresolved.

The courts have no language appropriate to express these actual gradations of power, and accordingly, they are poor choices to deal with the tensions they produce. These power relations, to the courts, are proto-legal matters which are outside the boundaries of the theory by which the courts define themselves. The very notion of a court requires the invariable assumption of one source of 'law' in the legal order, and the legitimacy of the use of only one source of power. Any theory of associations rooted in the concept of a sovereign national legal order must commence from the premise that any particular association, or set of associations, relative to the state organization, is in all respects, in a permanent position of inferior to superior. The notion of a non-sovereign state has not been made legally intelligible.

The term "legal" prefixed to phrases such as "legal entity" and "legal personality", of course, are an important part of the court's vocabulary of control. "Legal" has no meaning apart from the perimeters

of the national legal order, which are themselves set by the effective extension of state power. In the context of actual disputes, we have seen that this imputation of the various incidents of "legal personality" has always taken place within an "if-then" schema establishing a reciprocity which assimilates the position of the association as closely to the control of the general law as possible. So far, both theories run along the same track.

If, however, that general assumption of superiority is articulated for a certain set of associations, then devices which serve it more or less directly, such as the so called legal-entity theory in trade union law, or the legal fiction theory in the law of corporations, make their appearance. They provide an appropriate form, an empty vessel, as it were, the precise contents of which will be determined as circumstances require.

The "legal entity" theory seeks to establish, in an explicit manner, the position that a "legal personality" or "legal entity" has been "created" out of the fullness of state power. It is generally understood to be such a device. Legal results of a certain and expected type (i.e. more control) flow as an incident natural to the exercise of the control implicit in this "finding". In Bonsor's Case,[86] in the decisions of Lord Morton and Lord Porter, the argument which will best achieve the assimilation of trade unions to the general law of contract

(i.e. that the union is a legal entity and therefore has the ability to contract) also serves to establish the particular result. There is in these judgements a real vagueness, a lack of connection, between the determination of the legal capacity of the union, and its actual activity. The question of whether the union in fact contracted is not canvassed at all.[87] After the finding that the union was a legal entity with the capacity to contract there is simply this bald statement: "(ii) when Mr. Bonsor applied to join the respondent union, and his application was accepted, a contract came into existence between Mr. Bonsor and the respondent...."[88] Lord Porter also saw only one issue: "My Lords, the matter for your Lordships consideration in this case is to determine the status of a registered trade union."[89] Once that was decided, it was taken as read that this finding would of itself resolve the 'factual' issue.

The reasons for judgement of Lord MacDermott and Lord Somervell are in this respect quite distinct in emphasis. The same assumption of state sovereignty is at the basis of these speeches, but they differ from those of Lord Porter and Lord Morton in that it is never made articulate. It does not form part of the theoretical structure itself. Instead, the foundation of the principle of state control of unions through the courts was taken to have been settled as a matter of authority in the Taff Vale Case,[90] of which Lord MacDermott said:

"though its practical importance has been much reduced by the Trade Disputes Act, 1906, the principle it established stands and must be respected....not only may a registered trade union...by...the Act of 1871, sue and be sued concerning its property in the names of its trustees or authorized officers, it can be sued also in its registered name and in respect of claims which lie outside the scope of that section."[91] This is as close as one is likely to come to finding an overt judicial recognition of the fact that the Taff Vale Case worked, as a matter of legal principle, a blanket extension of the authority of the law that went quite beyond anything for which provision had been made by statute.

Lord MacDermott[92] and Lord Somervell[93] were unable to conclude affirmatively on the initial question of capacity. We have seen, in the First Osborne Case[94] that a negative finding on the first arm of the "if-then" schema precludes further discussion founded upon a finding that such capacity did "exist". Because of the way in which the facts characterized[95]- there was a 'contract' - however, it remained to consider the legal effects of the 'breach' of a 'contract' between the members. Lord MacDermott and Lord Somervell are thus brought squarely to face the question of the very reasoning in Kelly's Case. Since there is no question that members have the capacity to contract inter se,[96] the focus of both of these judgements shifts off the first arm of our "if-then" proposition, to the second arm, dealing

with liability, which is dealt with as one might expect. The normal incidents of contract law are implied as flowing from the breach, and the superior authoritative position of the House of Lords makes short work of the reasoning in Kelly's Case[97]: it involved "an unwarranted extension of the agency" and was "quite out of keeping with reality."[98]

If I am correct in seeing the distinctions between the two theories as consisting in the strength of the emphasis placed on articulating the assumption common to them both - continuing, extended state control of trade unions - then the practical importance of the exact theoretical position of Lord Keith is greatly reduced, and need not detain us here.

To sum up, then: the 'legal entity' theory is chiefly concerned with serving the common underlying notion of state control by means of establishing a special (in the sense of 'tailored to fit a specific set of associations') theoretical basis for it. From that general position, which has well defined links to other well established analogies of control, particularly in the law of corporations, the results of the particular case flow. Because of this, these results are always bearing in the direction of assimilating the association to the general law.

The 'procedural-rule' theory assumes, without further articulation, the state control it is the main task of the legal entity theory to establish. It deals with the specific problem on an individual (as

opposed to a more generalized) basis, and decides whether the law given that assumption, ought to be so. Because the problem is resolved within the same boundaries (of the assumption of state control) as those of the legal entity theory, the procedural rule theory will also tend to produce results which move in the direction of conformity to the general law.

That is, the effect of the assumption common to them both is to limit the effective range of the possible results generated by each theory, and to pull them to a position in which both are functionally in accord with the demands of that assumption. In the real world, however, power relations between state and union are volatile enough that the possibility of a serious gap between theories, and the facts of power of which the theories purport to give an account, must always be considered. In these circumstances, it is unsafe to assume a firm enough factual basis for the successful application of controls and sanctions derived from theories based ultimately on the factual superiority of the state organization. The problem for the law and the trade unions, if trade unions are to continue to be talked about in legal terms at all, is not the reconciliation of competing theories based on the same questionable assumption, but the elimination of the instability at the basis of theory itself.

There would appear to be two basic options which could contri-

bute to this result. Exploration of either is far beyond the scope of this paper, but some comment is called for.

The first is that legal theories can be recast to fit the existing factual situation. The extant theory, however, is inseparably connected with the prevailing notion of the sovereign state, and its reconsideration, accordingly, would be a tremendous exercise in the fundamentals of legal theory. Among others, the task that defeated the pluralists - the notion of a non-sovereign state - would not only have to be faced - it would have to be mastered, expressed, and made to work.

The other and alternative course is that the legal theories be rendered believeable by making the actual power relations between state and union as static in favour of existing theory as that theory requires and presently assumes. Even more overtly than the first, this alternative would pull into its orbit an explicit consideration of what we have come to think of as our basic freedoms, against the background of what would certainly be a substantial increment in the power of the state.

Lest these options appear to involve the tail wagging the dog, it must be borne in mind that short of a breakdown in the national

legal order, the courts are and will be the forum in which these disputes are decided. This whole area is one where politics and law intersect, and here it is the task of the legal order to provide an explanation of a complex state of affairs in a manner that does not invite a complete withdrawal of confidence in the method and its results.

Unless the task outlined is attempted, and the possibilities opened up by these alternatives explored, trade union legal theory, and the results that can flow from its application remain tied to actual states of affairs only by the link of fortune. The courts are coercive institutions by definition. If nothing is done, they will continue to reach socially important decisions within the confines of the truncated and apparently invalid assumptions that underpin the present theories. The volatility of relationships in this area in the past, and the present climate of uncertainty in the state-trade union power balance suggest that this may be perilous work indeed.

This is truly the area in which the academic has become the practical. A new accommodation is needed; the old shell has been broken. This paper is a small part of the case for a fresh beginning.

PART III

CHAPTER EIGHT: NOTES

1. [1956] A.C. 104 (H.L.) reversing [1954] Ch. 479 (C.A.) hereinafter referred to as "Bonsor's Case" or "Bonsor".

2. (1915), 113 L.T. 1055 (C.A.)

3. 6 Edw. 7, c. 47

4. supra, fn. 1

5. see K.W. Wedderburn, "The Bonsor Affair: A Postscript" (1957), 20 Mod. Law Rev. 1[illegible] at pp. 118-123, and notes thereto, hereinafter referred to as "Wedderburn, 'The Bonsor Affair'".

6. supra, fn. 1

7. supra, fn. 2

8. ibid

9. 34 and 35 Vict., c. [illegible]

10. 6 Edw. 7, c. 47

11. supra, fn. 1

12. supra, fn. 1

13. supra, fn. 2

14. see [1956] A.C. 104, at p. 155, per Lord Somervell: "this appeal raises two questions. First, has a member of a registered trade union who is wrongfully expelled a right to claim special damage...."

15. supra, fn. 2

16. supra, fn. 1, at p. 125, per Lord Morton; at pp. 129-131, 132, per Lord Porter; at p. 145, per Lord MacDermott; at p. 151, 153, per Lord Keith; at p. 157, per Lord Somervell.

PART III

CHAPTER EIGHT: NOTES

17. [1901] A.C. 426 (H.L.)

18. [1956] A.C. 104 at p. 140

19. ibid, at p. 145

20. supra, fn. 17

21. [1956] A.C. 104, at p. 128 per Lord Porter

22. supra, fn. 2

23. supra, fn. 1

24. supra, fn. 17

25. [1956] A.C. 104 at p. 140 per Lord MacDermott, see supra, fn. 18

26. supra, fn. 2

27. [1956] A.C. 104, at p. 121, per Lord Morton; at p. [illegible] per Lord Porter; at p. 149 per Lord MacDermott; at p. 154 per Lord Keith; at p. 156, per Lord Somervell.

28. supra, fn. 17

29. [1956] A.C. 104 at p. 139

30. ibid, at pp. 140-141

31. ibid, p. 141.

32. ibid, at pp. 124, 125

33. ibid, see pp. 140-141

34. supra, fn. 17

PART III

CHAPTER EIGHT: NOTES

35. [1905] A.C. 256 (H.L.)

36. [1910] A.C. 87 at p. 93, cited [1956] A.C. 104 at p. 142

37. ibid, at p. 102, cited 1956 A.C. 104 at p. 142

38. supra, fn. 36

39. [1909] 1 Ch. 163 at p. 191, cited 1956 A.C. 104 at p. 142

40. [1956] A.C. 104 at p. 142

41. ibid, at p. 143

42. supra, fn. 2

43. [1956] A.C. 104 at p. 147, 148

44. [1954] Ch. 479 at p. 513

45. supra, fn. 2

46. [1956] A.C. 104 at p. 149

47. ibid, at p. 157: "...it cannot be right to identify the plaintiff in such a case with those of whose acts, he complains, so as to deprive him of his ordinary remedies."

48. ibid, at p. 153: "If the expulsion takes place on the initiative of the union officials it appears to me that it reduces the position to an absurdity to say that the officials were acting as the expelled member's agents in the matter of the expulsion."

49. supra, fn. 17

50. [1956] A.C. 104 at p. 121

PART III

CHAPTER EIGHT: NOTES

51. ibid

52. ibid, at p. 123, quoting Farwell J., [1901] A.C. 426 at 428

53. ibid, p. 123, quoting Lord Halsbury, [1901] A.C. 426 at p. 436

54. ibid, p. 123, quoting Lord Brampton, [1901] A.C. 426 at p. 442

55. [1901] A.C. 426, at pp. 436-437, cited [1956] A.C. 104 at p. 124, per Lord MacNaughton; and at p. 444-445, cited [1956] A.C. 104 at p. 124

56. Russell's Case, [1912] A.C. 421 (H.L.) at p. 429, cited [1956] A.C. 104 at p. 125 per Lord MacNaughton; Howden's Case [1905] A. C. 256 (H.L.) at p. 280, cited [1956 A.C.] 104, at p. 125, per Lord Lindley.

57. [1905] A.C. 256 (H.L.)

58. [1956] A.C. 104 at pp. 125-126

59. [1910] A.C. 87 (H.L.)

60. [1911] Ch. 540 (C.A.)

61. [1956] A.C. 104 at p. 126. The Second Osborne Case, supra, fn. 60, has in another context, been referred to as the high water mark of a line of cases displaying an unmistakeable judicial tendency to interfere directly in trade union matters: see Kahn-Freund, "Illegality of a Trade Union" (1944), 7 Mod. Law Rev. 192.

62. [1922] 2 A.C. 440 (H.L.)

63. [1956] A.C. 104, at p. 126

64. [1946] 1 K.B. 81 (C.A.)

PART III

CHAPTER EIGHT: NOTES

65. [1956] A.C. 104 at p. 126

66. [1909] Ch. 540 (C.A.)

67. [1905] A.C. 256 (H.L.)

68. [1922] 2 A.C. 440 (H.L.)

69. [1956] A.C. 104 at p. 132

70. supra, fn. 2

71. [1956] A.C. 104 at p. 121, per Lord Morton; see Lord Porter at pp. 130-131; and Denning L.J. [1954] Ch. 479 at pp. 510-511, 512

72. [1956] A.C. 104, at p. 121 per Lord Morton; at pp. 131 per Lord Porter; see p. 134, where Lord MacDermott agrees that this result follows if the contract is with the union. See also Denning, L. J., [1954] Ch. 479 at pp. 511-512

73. "Hickling", supra, Ch. I, Part I, fn. ; at 43-45

74. [1910] A.C. 87 (H.L.), supra, Ch.

75. supra, fn. 17

76. supra, fn. 1

77. [1901] A.C. 426 at p. 430 per Farwell, J. (emphasis added)

78. ibid

79. ibid

80. [1910] A.C. 87 (H.L.)

81. see p. 99, Ch. 6, supra

PART III

CHAPTER EIGHT: NOTES

82. [1954] Ch. 479 (C.A.) at p. 485. See also, similarly, at p. 511.

83. Wedderburn, "The Bonsor Affair" (1957), 20 Mod. Law Rev. 105 at p. 116, fn. 67

84. ibid, p. 118, fn. 73

85. supra fn. 1

85A. see supra, Ch. IV, at pp. 72-73

86. supra, fn. 1

87. The "evidence" at any rate, was completely equivocal. See [1956] A.C. 104 at p. 134, per Lord MacDermott, and at pp. 156-157, per Lord Somervell

88. ibid, at p. 127, per Lord Morton

89. ibid, at p. 128

90. supra, fn. 17

91. [1956] A.C. 104 at p. 139. See, similarly, ibid, at p. 154-155 per Lord Keith

92. [1956] A.C. 104, at pp. 138, 144

93. ibid, at pp. 157-158, where Lord Somervell concurred with Lord MacDermott on the question of union capacity.

94. [1910] A.C. 87 (H.L.). See also supra, pp. 138-140, sp. at p. 140

95. The case proceeded on the admission that there was a contract and that it had been breached - see [1956] A.C. 104, at p. 128, per Lord Porter.

PART III

CHAPTER EIGHT: NOTES

96. Although it may be a nice question to decide if there can be a first member with whom other members contract, without once again becoming involved in hypostatizing the "union".

97. supra, fn. 2

98. [1956] A.C. 104, at p. 149, per Lord MacDermott. See also, similarly, at p. 153 per Lord Keith; p. 157 per Lord Somervell.