THE RIGHT TO STRIKE:
FROM THE TRADE DISPUTES ACT 1906
TO A TRADE UNION FREEDOM BILL 2006
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Thanks to RMT for a picture of the original Taff Vale cheque.
Thanks to the National Working Class Movement Library
for the copy of the banquet invitation.
THE RIGHT TO STRIKE:
FROM THE TRADE DISPUTES ACT 1906
TO A TRADE UNION FREEDOM BILL 2006

EDITED BY K D EWING

THE INSTITUTE OF EMPLOYMENT RIGHTS
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Latest IER publications
The law in Britain on trade disputes is today more restrictive on trade unions than it was 100 years ago after the passing of the Trade Disputes Act 1906. There is now growing pressure for change. New legislation is long overdue.

This is the background to the publication of this book and explains why it is of special importance. It is scholarly in content but also very practical in its advocacy.

Trade union rights are human rights. A state that fails to uphold these rights – at least to good international standards – is not a fully democratic society. In Britain we have fallen behind good international standards. The time for change is now.

The special significance of this book is that it argues the case for new legislation, both informatively and persuasively. A number of outstanding scholars, lawyers and active trade unionists collaborated in the discussion and preparation of the contents of the book.

The various chapters demonstrate that the struggle for trade union rights has a long history. The unions emerged from total illegality less than 200 years ago. Stage by stage they established certain limited rights, only to see some of them taken away either by statute or by decisions of the courts. The struggle never ceases and there is no final and assured victory.

There is, nevertheless, plenty in this history of struggle to provide confidence that progress can and will be made. The campaign for the 1906 Act was one of the most successful in British history. Its roots were in the trade union movement. It won support not only amongst working class people but among others in the electorate who were persuaded that trade unionists were suffering an injustice. The successful campaign was a testimony to democratic action and to the potentiality of Parliamentary power. It was a major influence in the establishment of the Labour Party and its early electoral growth.

There have been a number of occasions since 1945 when Parliament, in response to campaigns by trade unionists and the votes of the electorate, swept away restrictions imposed by statute or decisions of the courts. The first was under the Labour government of 1945 when the Trade Disputes and Trade Union Act 1927, carried by a Conservative majority after the general Strike of 1926, was totally repealed. A second example was provided by the Labour government of 1974, when it repealed restrictive legislation introduced by the preceding Conservative government and replaced it with legislation to restore the previous rights of unions and to extend new rights to working people in the Employment Protection Act 1975.

A new piece of legislation is now required and this book charts the way forward.

J E Mortimer
Preface

On 21 December 1906, the Trade Disputes Act 1906 received the Royal Assent. On the eve of its final stages in the House of Lords a ‘complimentary banquet’ was held by the TUC, the GFTU and the Labour Party, ostensibly to honour David Shackleton MP for his ‘tact, judgement and ability’ in piloting the Trade Disputes Bill through the House of Commons. A number of speeches were made at the banquet, with the toast to Shackleton being proposed by Keir Hardie. All the speakers emphasised the injustice of the Taff Vale decision of 1900, its importance in generating a determination in the ranks of the Labour movement to have the decision reversed, and the unity demonstrated by Labour in Parliament to see that determination realised.

In his response to Hardie’s warm words, David Shackleton reinforced the sense that ‘the Taff Vale decision’ was a ‘serious blow’ undermining the ‘usefulness’ of trade unions ‘for the future’. For his part, the veteran Charles Fenwick MP concluded that the Trade Disputes Act was evidence that ‘out of evil sometimes did come good’. However, that ‘good’ came only after a sustained and dramatic political struggle, both in Parliament and in the country, with the historian of the miners’ union noting not only that Taff Vale was the ‘making of the Labour Representation Committee’, but that ‘the complete reversal of the Taff Vale judgment was made a test question for candidates’ at the 1906 General Election (R Page Arnot, The Miners (1949), p 347).

This book tells the story of the Trade Disputes Act 1906, in celebration of its centenary. It was one of the most important pieces of labour legislation ever passed by a British Parliament. As such, it provided very simple legal protection for the right to strike for sixty-five years, and left a legacy which is found on the statute book to this day. The substance of the current law is, however, far removed from the position established in 1906, and is the subject of the proposed amendments in the Trade Union Freedom Bill, designed to address some of the worst injustices of the Thatcher bequest. There are many lessons to be learned from the campaign for the 1906 Act in the campaign for the Trade Union Freedom Act.

Many people have been involved in this project since it was launched by Jim Mortimer’s lecture on The Trade Disputes Act 1906, held in the House of Commons on 8 December 2004. I would like to pay a warm tribute to Jim, not only for kindly agreeing to provide the Foreword, but also for his unequivocal support for the Institute and the work that we do. I would also like to thank the participants in our consultative conference in May 2006, and the contributors to this volume for their com-
mitment and for producing such fine papers. A special thanks to Dave Lyddon who was unable to attend the conference because of illness, but who has been an important source of advice and guidance throughout.

Finally, I would like to thank the sponsors of this project for their generous financial contributions. These reveal a deep interest not only in labour history, but also the need for labour law reform. I would also like to thank my colleagues in the Institute: the Executive Committee for supporting this project; John Hendy QC for his work on the Trade Union Freedom Bill and for his unfailing commitment to the cause of trade union rights; Geoff Shears, for a similar commitment combined in his case with an unerring ability to keep us on the financial straight and narrow; and above all Carolyn Jones and Phelim Mac Cafferty, without the dedication of whom there would be no Institute of Employment Rights.

KDE
21.12.06
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Part I

Introduction
Part 1: Introduction
It is questionable whether in the history of recent politics an instance is to be found which more conclusively proves the advantage of concentration upon a well-defined object than does that of the Trade Disputes Bill.  

2006 is the centenary of three overlapping events – the Liberal landslide government, a great reforming administration; the emergence of the Labour Party from the embryo of the Labour Representation Committee; and the enactment of the Trade Disputes Act, vindicating the importance of trade union political action. Described as Labour’s Magna Carta, the Trade Disputes Act 1906 was a seminal measure designed to keep the courts out of industrial relations. Seen by Keir Hardie as the latest in a number of milestones ‘on the rough and thorny path’ along ‘the journey from serfdom to freedom’, it survived on the statute book for 65 years. Yet although the Trade Disputes Act (‘the final and definite legalising of the right of combination’) was repealed by Ted Heath’s Industrial Relations Act 1971, the substance of the 1906 settlement was re-instated by the Wilson and Callaghan governments.
between 1974 and 1976, before being gradually dismantled by the Thatcher and Major governments in the 1980s and 1990s. Indeed, despite a different regulatory environment, some of its core provisions survive to this day, albeit in a heavily qualified form.

The 1906 Act in Outline

The Trade Disputes Act 1906 was passed in order to reverse decisions of the courts, most notably the famous *Taff Vale Railway* case where the House of Lords decided that a trade union could be held liable for the losses suffered by an employer in a strike. In that case liability was assessed at £23,000. On top of that, the union also had to pay another £19,000 in legal fees. Today that amount of money would be equal to £2,430,000. The other significant decision which the Act addressed is *Quinn v Leathem*, in which the House of Lords famously established liability in tort where trade unions used industrial action to put pressure on an employer, in the process apparently contradicting the decision in *Allen v Flood* only three years earlier. Both of these cases are considered in some detail by Graeme Lockwood and John McIlroy in chapters 2 and 3 respectively.

In providing an anchor for the freedom to strike, the 1906 Act was a model of simplicity and precision, as was pointed out by Jim Mortimer in a lecture delivered in the House of Commons in December 2004. It gave the unions and their officials an immunity from known liabilities for organising industrial action, where the action was done ‘in contemplation or furtherance of a trade dispute’, a phrase that was lifted from an Act of 1875 and one that remains an aspect of today’s law. The 1906 Act gave legal protection for the right to picket, with no restriction as to place or numbers, and gave solid protection for trade union funds. The story behind the enactment of the 1906 Act is told in chapter 4 by John Saville who considers the implications of the great increase in the number of Labour MPs in 1906 and examines the politics which led to the enactment of the 1906 Act in a form which met the approval of the contemporary trade union movement.

The 1906 Act was a long way in advance of where we are today. As Jim Mortimer also pointed out, it ‘was both a landmark and an achievement in the history of British trade unionism’, the outcome of ‘one of the most successful campaigns ever generated from within the trade union movement’. It was not long, however, before attempts were made to restrict its scope in the courts, with the first legal challenge taking place within a year of its enactment. The story of that case – the *South Shields* case as it was known at the time – is told in chapter 5. That case ended up in the House of Lords, reported as *Conway v Wade*. Chapter
6 by Douglas Brodie is concerned with an examination of the second
House of Lords case following the enactment of the 1906 Act. This is
the Scottish decision in *Crofter Hand Woven Harris Tweed v Veitch*, in
which the union won what may be seen as a Pyrrhic victory. In that case
it was held that the trade dispute immunity did not apply, though it was
also held that the action of the defenders was not tortuous.

**Judicial Attacks**

Although the 1906 Act ‘compares very favourably with what exists
today’, it never provided a very secure basis for the freedom to strike.
As trade unions grew in strength at different periods in the twentieth
century, so employer resistance grew, as shown by Dave Lyddon and
Paul Smith in chapter 7. Employers were never reconciled to the Act,
and used both parliamentary and judicial means to restrict its scope,
with considerable success. Lyddon and Smith consider in some detail
the much neglected and the much under-estimated Trade Disputes and
Trade Unions Act 1927, which included important restraints on picketing
for which employers had long lobbied. Judicial resistance to trade
unionism grew more intense in the second half of the twentieth century,
with a number of landmark decisions extending the boundaries of com-
mon law liability. These included *Rookes v Barnard*, *J&T Stratford &
Son v Lindley*, and *Torquay Hotel Co Ltd v Cousins*. The re-intro-
duction of the immunities in 1974 following the brief interlude of the
Industrial Relations Act 1971 saw a new phase of judicial restraint based
on a narrow interpretation of the critical words of the statute giving
immunity for ‘acts done in contemplation or furtherance of a trade dis-
pute’.

These latter developments are fully addressed by Bob Simpson in
chapter 8 (which examines the operation of the 1906 Act since the
1950s), and by Roger Welch in chapter 9. The latter emphasises how
attacks on trade unions were made easier as a result of the form in which
the 1906 Act was drafted, allowing judges to paint trade unions as priv-
ileged bodies in the eyes of the law because they had been given an
immunity from existing legal liability. Judges did not stop to question
this simplistic reasoning. Trade unions had immunities from common
law liabilities that had been applied to deal with trade unions and which
in practice applied only to trade unions. How many people, other than
trade unionists engaged in an industrial dispute, found themselves as
defendants in legal proceedings for conspiracy to injure, or for inducing
breach of a contract of employment? The short answer is very few, if any,
until more recent times. Welch also reveals a continuity of approach and
attitude on the part of the common law to trade unions, with deep roots
in the 19th century. Since 1900, the courts have had two concerns, which run like an unbroken thread through the relationship between trade unions and the courts for the entire 20th century.

The first concern of the courts throughout this period was the closed shop, with a number of famous disputes being concerned with the anxiety of trade unionists where work was being done by non-members. Industrial action to enforce the closed shop was clearly protected by the 1906 Act, and a closed shop dispute fell within the statutory definition of a trade dispute. But the courts wriggled by saying first that such disputes were not genuine trade disputes with the result that the immunity did not apply, or that they involved the commission of unlawful acts for which there was no immunity. The second concern of the courts was with secondary and sympathy action. It is true that in the early cases the House of Lords reluctantly acknowledged that some forms of secondary action were protected by the immunity, as being action in furtherance of a trade dispute. But this was to be short-lived, as the courts found ways of shutting down secondary action as well, even where the secondary action was directed to securing trade union recognition. Here too, the courts interpreted the immunity narrowly and invented other new heads of legal liability to control secondary action.

**Lessons from the 1906 Act**

It is true that the 1906 Act was revised and strengthened in 1974 and 1976 in the light of these judicial attacks, when a Labour government attempted to restore the freedom that a Liberal government had tried to create in 1906. But that too failed, as union after union found itself on the wrong side of attacks from the Court of Appeal in particular, in clear breach of Parliament’s intention. The unions included the broadcasting union, the print unions, the ISTC, the ITF, and the NUJ. The main thrust of this attack was secondary action, though other action was also caught, including industrial action aimed at the apartheid regime in South Africa, and industrial action organised by the TUC to protest against the Tory government’s labour law restrictions. In these cases the Court of Appeal was at its most inventive in diminishing the freedom to strike as a mere immunity, and in creating new qualifications which had to be met before the immunity could apply. It is also true that several of these important decisions were undone on appeal by the House of Lords, which delivered a series of powerful judgments restoring the immunities to where they had been intended by Parliament.

But by then it was too late and the damage had been done. A Conservative government was in power pledged to clip the wings of the unions and to rewrite the immunities. Given the previous form of the
House of Lords on the trade union question, there is no reason to believe that they would have been so liberal had Labour and not the Conservatives won the election in 1979. The unfolding nature of that legislation is also dealt with by Bob Simpson in chapter 8. As Simpson points out, little has been done since 1997 by the incoming Labour government to address the harsh features of the anti-trade union laws gradually introduced since 1980. Yet as John Hendy and Gregor Gall remind us (chapter 11 below), recent events at places as different as Gate Gourmet and Friction Dynamics remind us of the importance of this freedom as an essential weapon of trade unionism. Recent events also remind us that it is a weapon that trade unions are prepared to use sparingly and responsibly. The changing global economy makes its existence and possible use all the more important than in the past as workers and their unions must now confront huge trans-national corporations of a kind never contemplated in 1906.

But as we celebrate the centenary of the great Liberal landslide, the election of a corps of MPs under the Labour Party banner, and the Trade Disputes Act 1906, we should also acknowledge the limitations of that great statute. It was hobbled from birth by casting the freedom to strike in the form of an immunity rather than a right, and by creating an immunity from known liabilities, failing to anticipate the possibility that new liabilities would arise in the future. Parliament seriously underestimated the power of the judiciary which danced to a different tune, and which eventually produced a script that Parliament itself adopted during the Thatcher years. That script has been adopted by the Blair government. One of the key lessons of the 1906 Act is that trade unions should not be treated as second class citizens by the legal system. Employers large and small, public and private, all have rights. These rights are the source of great power. Trade unions should also have rights which empower them and their members. These rights should be clear and unequivocal, and they should properly equip trade unions as autonomous bodies to act within the boundaries of international labour standards to protect the interests of their members. That means a right to organise, a right to bargain and a right to strike in a new legal settlement for British trade unions to deal with the sharp practices of globalisation.

Conclusion

A possible agenda for the future of the right to strike in British law is considered in chapters 10, 11 and 12. In chapter 11, Brian Bercusson considers the litigation on the right to strike taking place in the European Court of Justice at the time of writing, and its implications for
domestic law. Here Bercusson also draws important comparisons between the Trade Disputes Act and the forms of legal protection for the right to strike in other European countries, drawing attention also to the many international treaties which address the position. This is followed in chapter 11 by the consideration by John Hendy and Gregor Gall for a Trade Union Freedom Bill, an initiative which now has the support of the TUC. Rooted in controversial industrial disputes, chapter 11 examines the case for such an initiative and explains the content of the proposed Trade Union Freedom Bill. The case for the Bill is picked up in the last chapter by Simon Deakin and Frank Wilkinson where an argument based on considerations of legality under international law and social justice is complemented by an economic argument in favour of removing the legal chains that continue to bind organised labour, in the tenth year of a Labour government.
Notes

1 This is an expanded version of an article which first appeared in Federation News, September 2006.


3 TUC Report 1907, p 62 (Report of the speeches at the celebration banquet on 19 December 1906 – see cover of this volume).

4 W Stewart, J Keir Hardie (1922), p 227.

5 Taff Vale Railway Co Ltd v Amalgamated Society of Railway Servants [1901] AC 426 (Graeme Lockwood, ch 2 below).

6 [1901] AC 495 (John McIlroy, ch 3 below).

7 [1898] AC 1.


9 Ibid.

10 [1909] AC 506.


12 Jim Mortimer, above, p 5.

13 [1964] AC 1129 (Bob Simpson, ch 8 below; Roger Welch, ch 9 below).

14 [1965] AC 269 (Bob Simpson, ch 8 below; Roger Welch, ch 9 below).

15 [1969] 2 Ch 106 (Bob Simpson, ch 8 below; Roger Welch, ch 9 below).


17 In addition to the cases already cited, see Express Newspapers Ltd v Keys [1980] IRLR 247.

18 Express Newspapers Ltd v McShane [1980] ICR 42; Duport Steels Ltd v Sirs, above.
from some very old case law in a form that placed virtually all if not all strike threats at risk of legal restraint initiated by those against whom the strike was directed. Against this liability, the existence of which was not appreciated in 1906, the Trade Disputes Act provided no defence.

The significance of this decision in the history of the Trade Disputes Act cannot be overemphasised, as the commentaries of the two most distinguished labour lawyers of the time show. 1964 also saw a change of government after the October General Election and the new Labour government sought to repair the damage through the Trade Disputes Act 1965 which was intended to do no more than restore the law to what it had generally been thought to be before the decision in *Rookes v Barnard*. It added a new section to the protections against civil liability for the economic torts in sections 1 and 3 of the 1906 Act, which provided that an act in contemplation or furtherance of a trade dispute would not be actionable in tort on the ground only that it consisted of a threat that a contract of employment would be broken or that the defendant would induce another person to break a contract of employment. The second limb covered union officials who organise strikes who are generally understood to be, in legal terms, inducing workers to break their contracts of employment; but for the second limb of section 1 of the 1965 Act they might have been denied the protection of section 3 of the 1906 Act on the ground that at some stage in a dispute they were threatening to induce workers to break contracts of employment (which the 1906 Act did not expressly protect), rather than inducing workers to break their contracts of employment (which section 3 of the 1906 Act did protect).

The Trade Disputes Act 1965 was presented as something of an interim measure, with the whole of the law, including the 1906 Act, under review by the Donovan Commission which deliberated from 1965 to 1968. The Donovan Report’s comments on and recommendations for changes in this aspect of the law were, however, directed at what had become a moving target as judicial activism in the late 1960s called into question the integrity of the 1906 settlement. A full review of the case law of the 1965-69 period is beyond the remit of this chapter. It is sufficient to refer to three or four decisions to demonstrate the judicial willingness – in Scotland as well as England – to grant employers labour injunctions to restrain unions and workers from proceeding with industrial action which at first sight fell within the scope of the protection of the 1906 Act.

In *J T Stratford & Co Ltd v Lindley* the defendants were officials of the Watermen’s Union which had had previous requests for recognition by Bowker & King, a company like the plaintiff, Stratford & Co, con-