SOME POINTS FOR THE ROYAL COMMISSION ON TRADE UNIONS

J. Mortimer

[*This article deals only with a limited number of issues and some of the things I suggest may be regarded as very questionable, but my article is no more than a contribution to discussion and the important thing is to stimulate discussion.*—J. Mortimer.]

THE Royal Commission on trade unions and employer's associations has now been established. It will shortly begin its work. So far, all the indications are that the initiative in pressing for changes rests with people who, in the main, wish to impose new obligations on the trade unions and who complain of the unions being very much out-of-date in their attitudes and activities. The complaint that the unions are out-of-date is not usually motivated by a desire to strengthen them as agents of workers' interests but by a desire to divert them into channels of activity which do not challenge the power and profits of the employers.

Within the labour movement there is very much a defensive attitude towards any discussion of trade union rights and the future rôle of the trade union movement. This is generally as true of people on the left wing as of people on the right wing of the movement. Most of our colleagues are concerned to defend the rights contained in the 1906 Trade Disputes Act and to uphold the autonomy of the unions against State interference. Very few positive suggestions have been forthcoming for changes which might help the unions in their work.

It is not the purpose of this article to argue against the suspicion with which trade unionists regard many of those who, from outside the movement, are pressing for change. This suspicion is often justified. Nor is its purpose to suggest that, in the ultimate, there is any other basis for trade union strength than the consciousness and voluntary support of millions of working people. Nevertheless, trade unions do not exist in a social vacuum. The legal framework within which their activities are conducted can and does materially influence the effectiveness of the movement. Moreover, the British trade union movement is neither as strong nor as effective as it should be, and its resistance to those who wish to weaken it should not lead to complacency or opposition to *any* proposals for change.

There are many indications of trade union weakness in Britain (there are also many indications of trade union strength, but for the

purpose of this article it is the weaknesses which deserve attention). Three of them are:

1. Less than half of Britain's workers are members of trade unions.
2. The standard of living and conditions of employment of workers in many British industries have improved more slowly since 1945 than in many other industrialised countries. There are many factors which have contributed to this slow improvement, but one of them is the modesty of trade union claims and the lack of vigour with which they have sometimes been pressed.
3. There are many unions which, to a considerable extent, have been unresponsive to modern needs. They have not developed or encouraged workplace representation, their means of communications are deficient, their finances are limited, and their educational and research facilities are primitive.

True enough, a Royal Commission is not going to solve these problems. But those who want to see them solved can use the opportunity for public discussion which the appointment of the Royal Commission has provided. The public forum should not be occupied only by those who wish to weaken the unions.

Trade unions, it is often said, have a privileged position in British law. Efforts will, no doubt, be made in evidence to the Royal Commission to curtail these so-called privileges. In my view the trade unions in Britain are not privileged; they are under-privileged. This ought to be said publicly and loudly. The impression of privilege is given by the manner in which trade union law has developed in Britain. The unions have had to fight, stage by stage, for immunities against common law doctrines and judge-made liabilities. These immunities are then regarded as privileges. In reality, they are not privileges at all. They are a partial assertion of what ought to be full social rights: namely, the right to organise, the right to bargain collectively, the right to strike and the right to conduct trade union activities at the place of employment. None of these are affirmatively protected by British law. It is still legal in Britain for an employer to intimidate a worker against joining a trade union or participating in trade union activities and exercising his rights as a trade union member. It is still legal for many big engineering firms to sponsor an organisation—and to recruit tens of thousands of staff workers into its membership—which expressly forbids members from belonging to a trade union. It is still legal for an employer to seek to deny collective bargaining to his workers even though they are members of a union and want to negotiate.

In many other countries these acts would be unlawful. They ought also to be unlawful in Britain. These anti-social privileges enjoyed

by employers are an anachronism and an affront to democracy. It is sometimes suggested that the introduction of these new affirmative social rights might encourage breakaway unions or might enable them to win recognition. There is no reason why this should be so. Claims that the right to organise or the right to bargain collectively were being violated could, if not otherwise resolved, be referred to the Industrial Court. The Industrial Court is not a court of law but a body consisting of persons with wide experience of industrial relations. It could be expected in its findings not to encourage breakaway organisations, and could be endowed with a variety of powers to resolve claims referred to it about the right to organise and the right to bargain collectively. It could employ conciliation, it could 'enquire and report' or, as a last resort, it could issue an award stating that the right to organise or to bargain collectively had been violated and that the violation should cease. Such an award could be made legally enforceable. Whenever possible, however, the purpose of the machinery would be to promote by voluntary means the universal observance of the right to organise and to bargain collectively. Nothing should impair the right of unions to enforce recognition by normal trade union procedure, including strike action.

The law in relation to the right to strike is also unsatisfactory. According to the Minister of Labour, Mr. Ray Gunter, in his speech on the second reading of the new Trade Disputes Bill, a strike is a concerted withdrawal of labour in breach of contract. This implies that all strikes are in breach of contract. The only way, according to Mr. Gunter, in which workers in a dispute can avoid breaking their contracts is by giving notice to terminate their employment, with whatever loss of pension rights or other long-service rights this might involve. If Mr. Gunter's definition of a strike is to be accepted it leaves all sorts of problems unresolved in relation to the existing law. There are a number of court decisions which indicate that if a worker breaks his own contract of employment in furtherance of a trade dispute he can be liable for damages. Protection is only given if, in furtherance of a trade dispute, a person induces others to break a contract of employment (Section 3 of the Trade Disputes Act, 1906). Under the new Trade Disputes Bill a person will also be protected if in furtherance of a trade dispute he *threatens* to break a contract of employment. If, however, a worker actually breaks his own contract of employment in a trade dispute his liability remains. The fact that in the great majority of cases employers do not take legal action does not alter the position that according to the law

the worker has committed a civil wrong which can give rise to legal proceedings. Thus, under Mr. Gunter's definition of a strike, it is very doubtful if the right to strike has any firm legal foundation at all. Moreover, no one can really be certain what constitutes a strike 'in breach of an employment contract'. To strike without giving proper notice would almost certainly be held to be in breach of contract. Proper notice will be determined according to the custom of the trade, or the written terms of employment, or the Contracts of Employment Act. Some lawyers and some employers' representatives, however, have argued that a strike which takes place before the negotiating procedure has been exhausted, even though a week's notice may have been given, is still 'in breach of contract'. They claim that an important implication of the House of Lords' judgement in the *Rookes versus Barnard* case was that the terms of a negotiating procedure agreement between an employer or employers' organisation and a union or unions form part of the contract of employment of each worker covered by the agreement. Thus, on this interpretation, any breach of procedure is not just a breach of a voluntary agreement without legal liability; it is a breach of contract which renders those who have committed it, liable to legal action. This, if accepted, could have dangerous consequences.

Mr. Gunter's definition of a strike as a concerted withdrawal of labour in breach of contract appears to be at variance with the provisions of the Contracts of Employment Act, 1963. This Act recognises that *some* strikes are in breach of contract but that others are not. If a worker participates in a strike which is not in breach of contract his continuity of employment is maintained and his entitlement, if any, to extended notice is preserved. This provision was inserted at the request of the trade union movement. It seems likely, as a result of the new Redundancy Payments Bill, that in order to protect strikers from losing their entitlement to severance pay it will be necessary to repeal that part of the Contracts of Employment Act, 1963, which made striking in breach of a contract of employment count as a break in the continuity of employment. The best way to remove all these uncertainties would be to protect affirmatively by law the right to strike whether in breach of an employment contract or not. The only exceptions should be strikes in breach of contract which endanger life, may cause serious bodily injury or serious damage to property, or may endanger, in substantected. The workers employed in the public utility industries should, tial measure, the public supply of gas, water or electricity. In such cases the right to strike in breach of contract ought not to be pro-

however, have a legal right to strike by giving proper notice. Provision is already made for a distinction of this kind in the Conspiracy and Protection of Property Act, 1875. This Act does not outlaw strikes in gas, water and electricity but it makes a breach of contract of employment in these services a criminal offence.

Evidence is likely to be heard by the Royal Commission on the question of individual rights in relation to trade union membership. So far, attention has been focussed mainly on the issue of whether or not a worker should have a statutory right to join his appropriate trade union. There is, however, in my view a far more important issue affecting the rights of individual workers. It is that members of a trade union should not be denied the right to stand for office under the rules because of their political affiliation, religion or racial origin. Members ought not to be denied the right to stand for office except on grounds of age, or length or class of membership, or except as a penalty for a specific individual act harmful to the union. This penalty should be imposed only after proper enquiry—with a right of defence—under 'due process' of the union's constitution. In other words, any rule which prohibits members of any political group—from right to left—from eligibility for office is, in my view, wrong and incompatible with trade union democracy. Members ought not to be denied the right to stand for office because of their views; the process of union election or selection provides the opportunity for a choice to be made between those who offer themselves for office. A limited provision against discrimination is contained in Section 3(b) of the Trade Union Act, 1913. This stipulates that a member who does not contribute to the political fund of a trade union should not be placed under any disability or disadvantage in comparison with other members of the trade union, except in relation to the control or management of the political fund. If this principle is valid, there is even less justification for permitting discrimination on political grounds, in relation to eligibility for office, against members who satisfy the full obligations of membership.

There is, of course, much else to be considered for the submission of evidence to the Royal Commission. Nothing has been said in this article, for example, on trade union structure, the importance of workplace organisation and representation, the one-sided nature of many procedure agreements and of the functions of the T.U.C. The important thing, however, is not to leave the initiative to those who wish to weaken trade unionism. There is much to be done to strengthen trade union rights and to help the trade union movement.

ESCALATE PEACE!

Ivor Montagu

MAY 1965 sees a crisis in the peace battle. The sky is black. The forces of war are strong and grow in daring.

In Vietnam the years of struggle and suffering are reaching their climax. Unable to subdue the Vietnamese people, the American military are intensifying their slaughter in every direction. Their air strikes creep ever northward toward Hanoi and the frontier of China. The escalation appears inexorable; nuclear blackmail is already being summoned to play its rôle and the world is on the verge of having to pay a heavy price for its past indifference to the 'far-off'. The disarmament negotiations, after years of wrangle, have reached an impasse. The Western alliance with Hitler's heirs in Bonn is beginning to bear its fruit of renewed provocation in Berlin. Negotiation is moribund.

Johnson, granted by the American people the greatest majority in U.S. electoral history in order to save peace and keep out Goldwater, has stolen the clothes of his rival—where the one proposed defoliating jungles by nuclear explosion, the other is doing the job with 'Lazy Dog', poison gas and napalm. Wilson, elected to end the long rule of Toryism and adopt an independent peace policy oriented on Britain, strikes at the working-class pocket to maintain and increase British military expenditure and proclaims support without reservation both for U.S. policies in South Vietnam and U.S. extension of hostilities against the North. In the House of Commons Vietnam debate *The Times* can find no point of difference between Michael Stewart and Sir Alec Douglas-Home. The Labour front bench talks of John Strachey's dream-child, Malaysia, and Britain's peace-keeping-responsibility 'East of Suez' in the accents of Kipling brought up to date; mothers a second abortive fiction 'the South Arabian Federation' in language that would have suited the Indian North-West Frontier in the 1880s; and practices co-existence with undemocratic régimes or systems in British Guiana and North Rhodesia which, out of office, Labour denounced as a swindle and an abomination. No wonder there is a temptation for the anxious womenfolk and the hopeful youth, who have been the backbone of peace activity in Britain in the past several years, to despair.

But this picture we have outlined is only one side of the medal.

It is a time far too grave for false optimism. Despair *could* doom humanity. The threat carried by the leaden, brutal clouds is real