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In the following pages an attempt will be made to consider not only the legal position of strikes, but also the law with regard to picketing in Caricom countries.[1] Prior to the enactment of labour law statutes in Caricom countries,[2] any agreement to persuade workmen to break their contract with their employer was an offence of criminal conspiracy. These statutes for the first time granted to workers' organisations the right to declare strikes and to do certain things in furtherance of trade disputes. They are based to a considerable extent on the English trade union statutes which were in operation prior to the Trade Disputes Act, 1906. Thus, it seems appropriate to trace the development of the law of strikes and picketing both in England and in Caricom countries.

STRIKES

Discussing the subject of strikes and agreements to strike prior to the passing of the Trade Union Act, 1871,[3] in relation to the law of conspiracy, Sir William Erle stated: "The tendency to combine for the purpose of raising or lowering wages appears from the manifold statutes passed for the purpose of adjusting a current rate of wages on some basis other than free competition. These statutes have long since been repealed. While they were in force, they tended to prevent a resort to the common law remedy for conspiracy, and the records of proceedings under the common law against conspirators for the purpose of restraining freedom for labour are not numerous; but still there are authorities sufficient to show what the law is in this matter."[4]

The case of *Walsby v. Anley*[5] has a bearing on this point. Walsby combined with other workmen to leave the employ of Anley simultaneously unless he discharged certain workmen. They thus conspired to coerce

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Anley's will in the exercise of his right to a free course of trade in respect of hiring and discharging employees. Crompton and Hill, JJ. held that this was a conspiracy indictable at common law. The question was raised by an appeal against a conviction for endeavouring by threats to force the employer to limit the number of his workmen. The words of the alleged threat were "Unless the men who are working under the declaration be discharged, we cease to work immediately." The objection to the conviction was that it was no threat because each had a right to leave singly, and it was contended that it followed that all had a right to leave simultaneously. The objection was overruled by all judges but on different grounds: by the Chief Justice on the ground that a notice of an intended simultaneous work stoppage with the prohibited intent was a criminal threat within the statute (*i.e.*, Section 3 of the Combination Act, 1825). But Crompton and Hill, JJ. held that the threat must be of an illegal act and that a combination for a simultaneous work stoppage was an obstruction of the free course of trade and a crime. Crompton, J. referred to his judgment in *Hilton v. Eckersley* that combinations of workmen "were illegal and indictable at common law, as tending directly to impede and interfere with the free course of trade and manufacture"[6] and affirmed its correctness.

From the aforesaid authorities it appears that the crime of conspiracy consists of two elements — namely, an intention and an agreement by two or more to execute it. An intention to use such coercion as is described above to be unlawful, against any person in the exercise of his right to freedom to trade is sufficient as to the first element of conspiracy; the making of the agreement to execute the intention completes the offence. The mere intention, without some act equivalent to an attempt to execute it, does not suffice, but the outward act by which mutual consent to an agreement is interchanged is sufficient to complete the offence. If this reasoning is correct, the common law in force since the Combination Act, 1825, secures to every person freedom to follow his own will as to working and employment and also as to combining with others in respect of wages and hours, and for all other lawful purposes; but he has no right, either by himself or in combination with others, to use unlawful means in order to coerce the will of another party to prevent him from working or employing as he may choose. One may also add that probably he has no right to apply the power of combination for the purpose either of malicious damage or of unjust extortion, although he uses no unlawful means except combining to obstruct the free course of trade in order to effect such purpose.

In the case of *Sorrell v. Smith*,[7] there are dicta which tend to support the view that the element of motive is material in the case of conspiracy. That case deals with the law of conspiracy as it affects the relationship between traders and therefore cannot be quoted as a precedent in a case in which the relationship is that between employer and employees. Besides, what was discussed in that case was civil conspiracy and not criminal conspiracy. Nonetheless, in a general discussion on the crime of conspiracy at common law the dicta referred to are instructive and suggestive. Lord Dunedin observed: " . . . Now, the result of those cases,[8] in my mind, is this: In the first place, every one has the right to conduct his own business upon his own lines, and as suits him best, even although the result may be that he interferes with other people's business in so doing. That general proposition, I think, may be gathered from the *Mogul case*. Secondly, an act that is legal in itself will not be made illegal because the motive of the act may be bad. That is the result, I think, of *Allen v. Flood*. Thirdly, even although the dominating motive in a certain course of action may be the furtherance of your own business or your own interests, as you conceive those interests to lie, you are not entitled to interfere with another man's method of gaining his living by illegal means, and illegal means may either be means that are illegal in themselves or that may (become illegal because of conspiracy where they would not have been illegal if done by a single individual). I think that is the result of *Quinn v. Leatham* . . ."[9]

Concurring with what was said by Atkin, L.J. in *Wade and de Freville*,[10] Lord Dunedin stated: "It appears to me," he says, "to be beyond dispute that the effect of the two decisions in *Allen v. Flood* and *Quinn v. Leatham* is this: that on the one hand a lawful act done by one does not become unlawful if done with an intent to injure another, (whereas an otherwise lawful act done by two or more in combination does become unlawful if done by two or more in combination with intent to injure another) . . ."[11] Lord Dunedin continued: ". . . My Lords, it may seem self-confident to be positive when so many learned persons have expressed other views, but candidly I never held a clearer opinion than the one I now express, that the effect of *Allen v. Flood* and *Quinn v. Leatham* is to settle beyond dispute that in an action against an individual for injury he has caused to the plaintiff by his action, the whole question is whether the act complained of was legal, and the motive or intent is immaterial; but that in an action against a set of persons in combination, a conspiracy to injure, followed by actual injury, will give a good cause for

action, (and motive or intent when the act itself is not illegal is of the essence of the conspiracy)."[12]

Lord Dunedin suggested that the reason why motive was immaterial in the case of an action done by one person and became material when the act was done by two or more in combination was that the essence of conspiracy on which civil action is founded is a criminal conspiracy. Discussing this point, his Lordship stated "I would like to add that to say that a conspiracy to found the civil action must be criminal, i.e., an indictable conspiracy, is not tantamount to saying that in each and every case you might expect a jury if the case were tried in a criminal court to return a verdict of guilty. In many cases they might and probably would think that the civil remedy was sufficient."[13]

In the case of *Regina v. Bunn*[14] Lord Esher, commenting on the legal status of a strike which inflicts hardship on the public, said: "You must not allow yourselves to be influenced in coming to a conclusion whether these defendants are guilty or not by the view that from there being an agreement between the defendants to cease work it would have had a most lamentable effect upon City and public. I entirely agree that so far as these men were the servants of the gas company, they had no obligation whatever with regard to the public. . . . They had entered into no agreement with the public, the public paid them nothing for their labour, and they were under no further obligation to the public than any other of the Queen's subjects."

It is said that the correctness of the law as stated in the aforesaid passage was never questioned, though some of Lord Esher's dicta in that case were disapproved in the case of *Gibson v. Lawson*[15].

There is, therefore, authority for saying that a strike, the purpose or motive of which is the infliction of malicious injury or possibly of wanton damage, may be illegal conspiracy at common law, but that the mere fact that the result of a strike is, or may reasonably be expected to be, the infliction of injury on the community or any individual or individuals does not make a strike an illegal conspiracy. The motive or purpose of any given strike is, of course, a question of fact or, as Lord Dunedin expressed it, "a piece of evidence." If the "real root" of a strike was the infliction of malicious injury, it might be illegal at common law. If, however, the "real root" was to further a trade dispute, the strike would not be illegal.

There seems to be no direct authority that any other type of strike is illegal at common law, but any strike which amounts to a conspiracy to commit a crime will, of course, be a criminal conspiracy at common law, and the participants in it will be liable to indictment. For example, though it is not very probable, a strike might be a conspiracy to commit treason; further, in very exceptional circumstances, it might constitute a seditious conspiracy. One may add that a strike cannot be used as a cloak for acts which are otherwise criminal. Accordingly, strikers who, as a result of a strike or in furtherance of it, commit breaches of peace or become parties to a riot or an unlawful assembly, are liable to punishment in the same way as any other individuals.

The Conspiracy and Protection of Property Act, 1875, was the first piece of legislation in England to make the law of criminal conspiracy as such entirely inapplicable to trade union activities. In particular, section 3 of the Act provided:

"An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute . . . shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime . . . "

Section 1 of the Trade Disputes Act, 1906 (U.K.), added the following new paragraph after the above-mentioned paragraph of Section 3 of the Conspiracy and Protection of Property Act, 1875:

"An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable."

The aforesaid provisions are included in the first and second paragraphs of Section 5 of the Trade Union Act, 1963 (Barbados), Section 8 of the Trade Unions Ordinance (Guyana), Section 6 of the Protection of Property Law (Jamaica) and Section 7 of the Trade Disputes and Protection of Property Ordinance (Trinidad & Tobago).

The first paragraph of the above sections protects trade unionists from prosecution for criminal conspiracy where the agreement into which they have entered is not an agreement to commit an offence. Accordingly, a distinction is made between trade combinations and other combinations, by virtue of which it is not a criminal conspiracy if "in contemplation or furtherance of a trade dispute" a number of persons

combine to do a particular thing, that is, to break a contract. But if a group of persons combines to break a contract in furtherance of some other object, it might well be a criminal conspiracy.

One may paraphrase the second paragraph of these sections by stating that strikes or combinations to induce strikes are not to be civilly actionable unless the acts of strikers or of the persons inducing others to strike would be actionable if done by a single person.

Summing up the effect of these sections, it may be said that so long as a strike is "in contemplation or furtherance of a trade dispute" and does not constitute a conspiracy for which a punishment is awarded by law or renders the participants in it liable to punishment in respect of such a conspiracy or in respect of the crimes of rioting or breach of the peace or of any offence against the State or the Sovereign, it is neither indictable nor actionable.

Strikes not in contemplation or furtherance of a trade dispute will be considered next. A trade dispute means any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment vel non, the terms of the employment, or the conditions of labour, of any person.[16]

The limits within which acts can be held to be done in contemplation or furtherance of a trade dispute were discussed in *Conway v. Wade*.[17] So far as that case purports to determine what acts are done in contemplation or furtherance of a "trade dispute" as defined in section 5(3) of the 1906 Act, it is equally applicable to Section 3 of the 1875 Act. In that case the trouble arose from an attempt of a union official to compel a recalcitrant member to pay a fine imposed by the union for breach of its rules and to punish him for not paying it. The House of Lords held that there was no trade dispute. Lord Loreburn, with whom Lords Gorrell and Macnaghten concurred, stated: "A mere personal quarrel or a grumbling or an agitation will not suffice. It must be something fairly definite and of real substance.[18] Lord Loreburn also pointed out that Section 5(3) of the 1906 Act did not apply unless a trade dispute was in existence or imminent, and further, that it applied only to acts done by persons interested in the dispute. The acts of a mere meddler were not protected.

The case of *Conway v. Wade* has always been taken as authority for establishing that the immunity formula in the 1906 Act covered any dispute over the usual subjects of industrial disagreement including a

"sympathetic strike", *e.g.*, a strike of workmen employed by one employer in support of workmen engaged in a dispute with another employer. In any event, the meaning of the word "workman" as used in the definition of "trade dispute" makes it reasonably clear that a sympathetic strike is an act done in contemplation or furtherance of a trade dispute, and as such comes within the protection of the Act. That being so, the only strikes which are not acts done "in contemplation or furtherance of a trade dispute" are strikes quite unconnected with trade disputes.

It appears that in the aforesaid case Lord Loreburn's "meddler" and the requirement of "workmen" as essential parties to a "trade dispute" proved to be a dangerous combination in the hands of courts which still regarded unions as meddlers inclined to take advantage of, rather than act for, workers.[19] However, that line of argument was put to rest by Lord Wright in 1943 when he stated in the course of his judgment in *N.A.L.G.O. v. Bolton Corporation:* "It would be strangely out of date to hold, as was argued, that a trade union cannot act on behalf of its members in a trade dispute, or that a difference between a trade union acting for its members and their employers cannot be a trade dispute.[20]

Support for Lord Wright's above-mentioned views is to be found in the judgment of the Privy Council in *Bird v. O'Neal,*[21] a case from the Leeward Islands. To the present purpose the relevant facts were that a woman clerk at the respondent's drug store, employed on a weekly basis, was summarily dismissed with a week's wages in lieu of notice. In determining the legal status of the picketing that supervened, one of the questions arising was whether there was a trade dispute in furtherance of which the pickets had acted. It was argued that "there can be no trade dispute between a dismissed employee and a dismissing employer if the dismissal was lawful (i.e., if the period of notice required by law is given or payment in lieu thereof made).[22] This contention was rejected by the trial judge, but was upheld by the West Indian Court of Appeal. However, the Judicial Committee of the Privy Council, relying on the *N.A.L.G.O.* case said: "Their Lordships . . . agree with the trial judge's rejection of submission that the lawful dismissal of a workman cannot be the subject of a trade dispute."[23]

Somewhat the same issue was raised in *Beetham v. Trinidad Cement Ltd.*[24] In that case the respondent company employed three hundred or so men in a factory in Trinidad. The Federated Workers' Trade Union had been successful in organising two hundred of these men. The respondent company dismissed two union employees and ignored all re-

quests of the union to discuss the dismissal. At this point, the basis of the difference between the union and company, originally confined to the question of *ad hoc* recognition of the union for the purpose of acting on behalf of the dismissed men, was widened. The union claimed general recognition to bargain on behalf of the company's manual workers, but the company refused absolutely to give any recognition to the union. A Board of Inquiry was set up to inquire into a trade dispute. Before the inquiry could proceed, its jurisdiction was successfully challenged on the ground that there was no trade dispute. In its turn, however, the Judicial Committee of the Privy Council said that the recognition dispute was a "trade dispute" and rejected the argument that a recognition dispute was a dispute between an employer and the union seeking recognition, rather than between "employers and workmen" within the terms of the Act.

The ruling of the Privy Council in *Beetham's* case that a recognition dispute is a "trade dispute" was subsequently approved *obiter* both by the Court of Appeal and the House of Lords in *Stratford & Son Ltd. v. Lindley*.[25] In the latter case officials of the Watermen's Union told their members not to handle barges belonging to or being repaired by the plaintiff, because he had concluded a collective agreement with a rival union. The officials were held by the House of Lords not to have been acting "in contemplation or furtherance of a trade dispute". In the Court of Appeal, Lord Denning, with whom the other members of the court concurred, said: "[W]henever a trade union claims recognition (or negotiation rights, as it is sometimes called) on behalf of its members, and an employer declines to recognize that claim, there is a trade dispute within the Act."[26] However, the House of Lords considered it important that the union did not make any formal claim for rights on the plaintiff before the embargo was imposed. Having failed to do so, the union could not purport to have taken action in contemplation or furtherance of a dispute over the plaintiff's failure to accede.

From the above discussion it may be concluded that the only strikes which are not acts done "in contemplation or furtherance of a trade dispute" are strikes quite unconnected with trade disputes. It does not seem easy to classify such strikes, but perhaps the following categories would include most types of strikes which are at all likely to occur:

1. A strike conducted for the purpose of causing malicious damage. Such a strike is illegal.

2. A strike which constitutes well-recognised crimes against the State. Such a strike includes seditious conspiracy and is illegal.

3. A strike for political purposes. Such a strike, if it does not come within category 2, is probably legal.

4. A strike for purely personal motives. If such a strike does not fall into category 1, it is probably legal.

PICKETING

The term "picketing" though familiar to most people is rarely defined. In statutes which deal with the subject, it is used only once and then only in a sidenote. The Jamaican Trade Union Law defines "picketing" as "attendance at or near any house or place in contemplation or furtherance of a trade dispute for the purpose of peacefully obtaining or communicating information or of peacefully persuading any person to work or not to work."[27]

In *Larkin v. Belfast Harbour Commissioners*, [28] Madden, J. observed that the more accurate expression is said to be "watching and besetting"; but picketing in the popular sense has always been understood to mean the attempt by trade unionists and others to induce workmen to stop work. In the case of strikes, the attempt is made by posting a "picket" of one or more persons, outside the works against which the strike is in progress, for the purpose of getting in touch with men who remain at work when these men are coming or going from their work. Other activities such as visiting the houses of men who remain at work or following them through the streets, are also resorted to at times with the same object.

In England, the law with regard to picketing is found in section 7 of the Conspiracy and Protection of Property Act, 1875, and the second section of the Trade Disputes Act, 1906. These will be dealt with after considering the terms of earlier enactments on the subject, as they give some assistance in construing section 7 of the 1875 Act. Section 7, except insofar as it is modified or repealed by section 2 of the 1906 Act and by the 1927 Act, is still in force.

The earlier enactments are section 3 of the Combination Laws Repeal Act Amendment, 1825,[29] the Molestation of Workmen, 1859,[30] and section 1 of the Criminal Law Amendment Act, 1871.[31]

Section 3 of the Combination Laws Repeal Act Amendment, 1825[32] may be summarised by saying that it is an offence:

(1) to use violence to person or property;

(2) to threaten or intimidate person or property;

(3) to molest or obstruct persons with any one of the following purposes —

(a) to force workmen in employment to cease working or to force such as are not employed to refuse employment.

(b) to induce workmen to join certain associations or to pay certain fines as a penalty for not doing so or for failure to conform to certain regulations relating to work or wages or kindred matters.

It is said that the effect of section 3 of the Combination Laws Repeal Act Amendment, 1825,[33] seems to have been to convert into crimes certain acts which were previously torts, when these acts were done for certain specified purposes. For instance, violence to a person was a crime when the Act was passed, and violence to property was a tort.

The expressions "molest" and "obstruct" were too indefinite to be satisfactory. On a strict interpretation of the words, the section might have been held to make all persons attempting, by any means, however innocent, to induce others to join in a strike, guilty of a crime. In order to avoid this result, the Molestation of Workmen, 1859[34] was passed. It reads as follows:

> No workman or other persons, whether actually in employment or not, shall, by reason merely of his entering into an agreement with any workman or workmen, or other person or persons, for the purpose of fixing or endeavouring to fix the rate of wages or remuneration at which they or any of them shall work, or by reason merely of his endeavouring peaceably, and in a reasonable manner, and without threat or intimidation, direct or indirect, to persuade others to cease or abstain from work, in order to obtain the rate of wages or the altered hours of labour so fixed or agreed upon, shall be deemed or taken to be guilty of 'molestation' or 'obstruction' within the meaning of the said Act (Combination Laws Repeal Act Amendment, 1825), and shall not therefore be subject or liable to any prosecution or indictment for conspiracy, provided always that nothing

therein contained shall authorise any workmen to break or depart from any contract or authorise any attempt to induce any workman to break or depart from any contract.

Even after the passing of this Act, the position was not considered satisfactory. Ultimately the Criminal Law Amendment Act, 1871, was passed in which some attempt was made to explain the terms "molest" and "obstruct" and to define the expression "threaten or intimidate".

As in the Combination Laws Repeal Act Amendment, 1825, violence, threats, intimidation, molestation and obstruction are dealt with, but with the difference that in the 1871 Act violence, threats and intimidation (within the limits specified by the Act) are made criminal regardless of the object for which they are used. It may be doubted that this portion of the Act made any alteration in common law.

Molestation and obstruction are made criminal under somewhat similar circumstances as under the Combination Laws Repeal Act Amendment, 1825. The explanation of the terms "molestation" and "obstruction", however, is important. They include:

(1) persistently following persons about;

(2) hiding tools, clothes, etc.;

(3) watching or besetting houses or other places where persons work.

Discussing the above-mentioned enactments in the case of *Larkin v. Belfast Harbour Commissioners*,[35] Madden, J. pointed out; "The dangers arising from trade combination as a possible cause of molestation were realised from the time at which they were rendered lawful.[36] Act 5 Geo 4, C. 95 (Combination Laws Repeal, 1824) was shortly afterwards replaced by 6 Geo. 4, C. 129 (Combination Laws Repeal Act Amendment, 1825), which provides a summary remedy in cases of molestation or obstruction. Afterwards, in order to remove doubts which had arisen as to the meaning of the words "molestation" and "obstruction" it was enacted by 22 Vict. C. 34 (Molestation of Workmen, 1859) that no person by reason merely of his endeavouring peaceably and in a reasonable manner, and without threats or intimidation, direct or indirect, to persuade others to cease or abstain from work, in order to obtain the rate of wages or altered hours of labour, agreed to by him and others, should be deemed to have been guilty of "molestation" or "obstruction". This statute, which recognised to a certain extent the position of the peaceful picketer, was repealed by the Criminal Law Amendment Act of 1871 . . . (which) was in its turn

replaced by the Conspiracy and Protection of Property Act of 1875, which was the governing statute until the passing of the Act of 1906."

Section 7 of the Conspiracy and Protection of Property Act, 1875, runs as follows:

> Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority —
>
> (1) Uses violence to or intimidates such other person or his wife or children, or injures his property; or
>
> (2) persistently follows such other person about from place to place; or
>
> (3) hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or
>
> (4) watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place; or
>
> (5) follows such other person with two or more persons in a disorderly manner in or through any street or road, shall on conviction thereof by a Court of summary jurisdiction, or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour.
>
> Attending at or near the house or place where a person resides or works or carries on business or happens to be or the approach to such house or place in order merely to obtain or communicate information shall not be deemed a watching or besetting within the meaning of this section.

Provisions similar to those contained in section 7 of the Conspiracy and Protection of Property Act, 1875, except its last paragraph, are incorporated in Section 40 of the Trade Union Act, 1963 (Barbados), Section 27(1) of the Summary Jurisdiction (Offences) (Guyana), Section 30(1) of the Trade Union Law (Jamaica), and Section 4 of the Trade Disputes and Protection of Property Ordinance (Trinidad & Tobago).

Section 7 of the Conspiracy and Protection of Property Act, 1875 (U.K.), was discussed in *Lyons & Sons v. Wilkins*.[37] In that case the defendant unionists had given the plaintiff, their employer, proper notice, left their jobs and proceeded to picket his works in furtherance of their dispute with him. They carried placards and tried to persuade others not to go into the works. On one occasion some of the pickets stopped an errand boy and opened the bag which he carried, and, on another, followed people into the works.

In the Court of Appeal, Lindley, L. J. held that the pickets were at Mr. Lyon's works to put pressure on him, not merely to communicate information. Lord Lindley, M. R. pointed out: "It would be wrong to post people about a place of business or a house under pretense of merely obtaining or communicating information, if the object and effect were to compel the person so picketed not to do what he has a perfect right to do."[38]

In 1899, an action was taken to have the injunction made perpetual. Lord Lindley, M.R. once again delivering the judgment said: "This section (i.e., S. 7 of the 1875 Act) is a penal section, and the words wrongfully and without legal authority must be inserted in an indictment or information framed on the enactment, and the specific acts which the complainant was to be compelled to do or not to do ought also to be specified in a conviction by a magistrate . . . Moreover, if on the trial the evidence before the court is consistent with the legality of the acts complained of, this reasonably possible legality must be excluded by evidence before the accused can be properly convicted. But it is not necessary to show the illegality of the overt acts complained of by other evidence than that which proves the acts themselves, if no justification or excuse for them is reasonably consistent with the facts proved . . . That this is the correct method of construing and dealing with the words wrongfully and without lawful (sic) authority in S. 7 is, in my opinion, perfectly plain."[39] Lord Lindley continued: "The truth is that to watch or beset a man's house with a view to compel him to do or not to do what is lawful for him not to do or to do is wrongful and without lawful authority unless some reasonable justification for it is consistent with the evidence. Such conduct seriously interferes with the ordinary comfort of human existence and ordinary enjoyment of the house beset, and such conduct would support an action on the case for a nuisance at common law."[40]

Chitty, L.J. agreed with Lindley, M.R. as to the manner in which the section should be construed. His Lordship also agreed that the watching

and besetting proved in the case was wrongful at common law as constituting a nuisance. He stated further that in his opinion the words "wrongfully and without legal authority" were inserted to provide for the case where there is some unexpected legal justification for the act. Accordingly, he considered all watching and besetting to be illegal except where it came within the proviso allowing for the communication of information, and in his view attending in order to persuade is not within the proviso.[41]

In *ard, Lock and Co. v. Operative Printers Assistants' Society*,[42] however, the Court of Appeal took a different view. In that case the defendants had stationed themselves around the plaintiff's works with the object of persuading his workmen to join the union and then determine their employment by proper notice. Their aim was to compel the plaintiff to stop employing non-unionists. An action was brought for damages and an injunction to restrain pickets from inducing breaches of contract, committing nuisance and watching and besetting contrary to Section 7(4) of the 1875 Act. The Court of Appeal held that there was not sufficient evidence to support a finding of nuisance, and that the pickets had not invited the men to break their contracts.

Vaughan Williams, L.J. said: "I think there is evidence that the defendants both induced workmen to join the union, and employed pickets to watch and beset the printing premises with a view to compel the plaintiffs to become employers of unionists, and to abstain from employing non-unionists. The evidence shows this to have been done without causing violence, obstruction, or otherwise a common law nuisance... and there is no evidence of the pickets having incited workmen to break their contracts. The question therefore arises, assuming that there is evidence that the defendants employed the pickets in furtherance of a purpose of view such as I have mentioned, but proposed to carry it out by inducing workmen to join the union and then to determine their service by a seven days' notice as provided in the contract, unless the plaintiffs would consent to raise their wages, would this give the plaintiffs, if the case be proved, a good cause of action? ... in my opinion, such conduct as I have described ... does not constitute a criminal offence within sub-section 4 (of section 7 of the 1875 Act). When the Act of 1875 was passed, the employers had a good cause of action for various forms of nuisance. The Legislature, by the Act of 1875, gave in respect of some of these nuisances, as to which there was a civil remedy, a summary remedy... And it seems to me that the words in the first clause of the section 'wrongfully and without legal

authority' were introduced for the very purpose of limiting the remedy by criminal prosecution to cases so tortious as to give a civil remedy."[43]

Moulton, L.J. agreed, saying: "I cannot see that this section affects or is intended to affect civil rights or civil remedies. It legalises nothing, and it renders nothing wrongful that was not so before. Its object is solely to visit certain selected classes of acts which were previously wrongful, i.e. were at least civil torts, with penal consequences capable of being summarily inflicted."[44]

The inconsistency between *Lyons and Sons v. Wilkins* and *Ward, Lock & Co. v. O.P.A.S.* was never completely cleared up, in the sense that no court had to decide finally between the two views.[45] The judicial conflict was avoided by the introduction of section 2 of the Trade Disputes Act, 1906 (U.K.), which repealed the last paragraph of section 7 of the Conspiracy and Protection of Property Act, 1875 (U.K.), and enacted in its stead:

> 2(1) It shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union or of an individual employer or firm in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information or of peacefully persuading any person to work or abstain from working.

Section 2(1) contains the germ of "lawful picketing". It enacts that attending at or near the house or place where a person resides or works or carries on business or happens to be in order merely to obtain or communicate information, is not to be regarded as watching or besetting. Its sole effect therefore is to protect pickets in the circumstances therein specified from the penal consequences imposed by the section on watching or besetting. The other actions which are made criminal offences by virtue of section 7 (i.e. violence or intimidation, persistent following, hiding of tools and following persons in a disorderly manner) are not legalised in any way. Stating the extent to which watching and besetting are legalised, in the case of *Larkin v. Belfast Harbour Commissioners*,[46] Madden, J. observed: "The 7th section of the Act of 1875 provided, or rather continued in operation, a summary procedure by which watching or besetting could be punished, if carried into effect... with a view to compel any other persons to abstain from doing so or to do any act which such other persons had a legal right to do or abstain from doing... Picketing of this

class was always regarded as an offence against the criminal law, punishable on indictment . . . By a paragraph in the same section of the Act of 1875, the Legislature dealt with — watching or besetting — in these words, "attending at or near the house or place where a person resides or works, carries on business or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section." It will be observed that watching or besetting, for the purpose of obtaining or communicating information, is not by these words rendered lawful for all purposes; as, for example, in its relation to the law of nuisance; but only for the purposes of the section in which this provision occurs.

Provisions substantially identical with those in section 2(1) of the Trade Disputes Act, 1906 (U.K.) are found in the Barbados Trade Union Act, 1963,[47] the Guyana Summary Jurisdiction (Offences),[48] the Jamaica Trade Union Law,[49] and the Trinidad & Tobago Trade Disputes and Protection of Property Ordinance.[50]

Dealing with section 2(1) of the Trade Disputes Act, 1906 (U.K.), in *Larkin v. Belfast Harbour Commissioners*,[51] Madden, J. said: "The effect of this section is, in my opinion, perfectly clear. It legalised for the first time, by positive enactment, a course of action which might otherwise, if carried out in a certain manner, have amounted to a nuisance at common law, provided such course of action is resorted to merely for effecting certain specified peaceful purposes . . . Watching might so be carried out as not to involve a nuisance, but the word 'beset' almost necessarily connotes an interference with the common law right of the owner of the house or business premises beset, to the enjoyment of his property."

Larkin's case decided that section 2(1) of the Trade Disputes Act, 1906, did not legalise trespass. The decision was unanimous, but it must be added that Madden, J. was the only member of the Court who found it necessary to say that the sub-section legalised nuisance. That learned judge found in effect that the object of the section was to legalise nuisance within certain limits and not to legalise trespass. "It sounded in nuisance and not in trespass." The other learned judges, including Lord O'Brien, L.C.J. based their decision on the somewhat narrow ground (in which Madden, J. concurred) that the words used in the sub-section were "at or near" and not "in or upon."

It appears therefore that the statutory authority given by the abovementioned sections (i.e., section 2 of the British Trade Disputes Act, 1906,

section 39 of the Barbados Trade Union Act, section 27 of the Guyana Summary Jurisdiction (Offences), section 31 of the Jamaica Trade Union Law, and section 3 of the Trinidad and Tobago Trade Disputes and Protection of Property Ordinance) for pickets to attend at or near the place where a person works or resides in contemplation or furtherance of a trade dispute, is confined to immediate proximity of the place and does not permit or authorize an entry into the house or place of business, against the will of the owner, for such purpose. The pickets may meet the workman when he is going to his place of work or coming away from it; and they may succeed in peacefully persuading him to go to work or to strike as the case may be. But the provisions of these sections fall short of giving authority to enter the house or place. They do not permit any right to commit trespass which is an offence at common law.

Although the aforesaid sections do not legalise trespass, they neutralise trespass to the highway.[52] But where the pickets by their size or conduct obstruct the general use of the highway, they will be criminally guilty of obstruction to the public highway[53] and of public nuisance; and a police officer who, in the course of a trade dispute, reasonably anticipates a breach of peace may restrict the number of pickets.[54] If intimidation or violence is used, then criminal and civil liabilities may arise.

A question arises whether picketing suppliers in an effort to persuade them to stop supplies to the employer in dispute or customers to dissuade them from going into a shop, theatre or restaurant in dispute, falls within the purview of the above-mentioned sections. In relation to such picketing those sections cover only "peacefully obtaining or communicating information." Peaceful persuasion of suppliers or customers does not seem to fall within those sections.

Although peaceful persuasion does not in itself turn picketing into an actionable nuisance or crimes of "intimidation" or "watching and besetting,"[55] in the case of picketing suppliers, peaceful persuasion of an incoming truck-driver at the factory gate to go back in breach of his contract of service may implicate the pickets in liability for indirectly procuring a breach of the commercial contract between the employer of the truck-driver and the employer in dispute.[56] Inducing breach of the truck-driver's own contract of service, if done in contemplation or furtherance of a trade dispute, does not itself involve the pickets in liability.

In relation to picketing customers, where the persuasion or communication attains a point of aggressiveness or obstruction such that access to the picketed premises may be considered to be unreasonably blocked, the

torts of nuisance, individually and collectively, and of conspiracy in its narrow form will be employed. Furthermore, any additional acts of a tortious or criminal nature accompanying the method of picketing may involve the responsible person in liability.

The question of the legality of picketing was discussed in *Ryan v. Cooke & Quinn.*[57] In that case the defendants, on behalf of the Irish Union of Distributive Workers and Clerks, sought and obtained permission from the plaintiff, Mrs. Ryan, the owner of a chain of twenty-one shops in the retail dairy and creamery business in Dublin (including the "Monument Creamery"), to canvass her assistants to become members of their trade union. Notwithstanding their efforts, no members of Mrs. Ryan's staff joined the union. Two years later the union wrote to Mrs. Ryan asking her for an assurance that she would only employ trade union labour and would observe trade union conditions. As no reply was received to this effect, pickets were placed on the premises. The pickets displayed placards bearing gross misrepresentations that "the Monument Creamery refuses to employ trade union staff." There was no evidence to show any awakening of interest in the union among the Creamery's assistants.

Johnston, J. held that the dissemination of such falsehoods was wrongful and harmful, and that this was not peaceful picketing since the picketing was being conducted by unlawful means. He further held that on the evidence there was no "trade dispute" within the meaning of the statute in existence[58] and that the plaintiff was entitled to an injunction restraining the defendants from picketing the premises on the ground of nuisance.

The decision in the aforesaid case was followed in *Brendan Dunne Ltd. v. Fitzpatrick.*[59] The facts of that case were that prior to the year 1956, Brendan Dunne carried on the business of an interior decorator, furniture designer and furniture salesman in Dorset Street, Dublin. He employed a staff who were paid a basic wage and, in addition, received a bonus calculated on the yearly profits of the business. In the month of May, 1956, Mr. Dunne's employees suggested to him that the premises should remain open after the usual business hours on Thursday evenings each week for the purpose of facilitating the public and with a view of improving business. Mr. Dunne agreed to the suggestion and thereafter the premises opened for business on Thursday evenings from 7.30 p.m. to 10 p.m. Later in the year 1956, the business was transferred to premises in Dawson Street and was made into a limited company. The arrangement as to late hours of trading on Thursdays was continued. Mr. Fitzpatrick,

the Secretary of the Irish Union of Distributive Workers & Clerks, requested the company that the practice of late openings on Thursdays be discontinued. The company refused to comply with his request, whereupon a large number of union members grouped together and paraded in Dawson Street on Thursday evenings until 10 p.m. Some of the members of these groups carried placards which read: "Support Shops which open at 9 a.m. and close at 5.30 p.m."; "You can buy contemporary furniture in trade union shops"; "Trade Union shops open from 9 to 5.30"; "Contemporary furniture? Contemporary closing 5.30 p.m.!" Mr. Fitzpatrick, on behalf of workers in the furiture trade who were members of the union, wrote to the staff of the company requesting them to refuse to work during hours outside those generally recognised by the trade, but without success. The parades were continued; the number of persons taking part in the parades varied, on occasions exceeding sixty, and generally exceeding twenty.

It was held that the parades constituted a form of picketing which was unlawful unless justified by the Trade Disputes Act, 1906 (U.K.). Budd, J. further pointed out that the picketing was unlawful in that (i) the premises had been picketed by unreasonable numbers of persons and that (ii) some of the placards carried by the members of the picket invited or recommended the public to support concerns other than those of the company.

The legality of picketing was also discussed by the Judicial Committee of the Privy Council in *Bird v. O'Neal.*[60] In that case Miss Averyl Winter, a clerk employed on a weekly basis at a drug store run by Miss O'Neal, was lawfully dismissed without reason with a week's wages in lieu of notice. An official of the Antigua Trades and Labour Union of which Miss Winter was a member, sought to mediate with a view to obtain her reinstatement or compensation. Miss O'Neal refused either to reinstate or compensate Miss Winter. When efforts to secure for Miss Winter reinstatement or compensation through government conciliation and inquiry machinery proved to be ineffective, the executive committee of the union decided to picket the premises of the drug store. Six persons were paid to engage in picketing, among them the defendants Samuel (chief picket) and Joseph (the organizer). The pickets were led to their posts by Joseph and instructed to shout behind customers entering the store "Don't buy from O'Neals Drug Store." Pickets also threatened customers with violence. Samuel told customers that they would get into trouble if they entered the store, and to one he said, "Nelson, don't you hear you must not go in there to buy — you is a dog." All the time the pickets tried, by

threats and shouting, to "hold the line," which Samuel explained meant that nobody was to go into the drug store.

The Judicial Committee of the Privy Council held that the concurrent findings of facts established beyond doubt that intimidation and threats of violence were used by the pickets to an extent which amounted to an actionable nuisance. It further held that evidence showed that Joseph and Samuel were present and actively assisting in picketing which constituted a nuisance and had caused damage to Miss O'Neal's trade, and that they were therefore each responsible for the tort in the commission of which they had assisted and were liable in damages for £80, and subject to an injunction against the continued commission of the nuisance.

A critic of the statutory provisions[61] which authorize picketing for the purpose of peacefully obtaining or communicating information or of peaceful persuasion may argue that:

1. These provisions, by giving positive legality to attendance for a specified purpose, can be used in such a manner that even nuisance and trespass would be authorized;

2. The presence of pickets, especially in large numbers, is likely to raise the passions of both the pickets and the picketed; and

3. It may be a serious annoyance and obstruction to persons whose premises are picketed.

One may set at rest the fears expressed in argument (1) by referring to *Larkin v. Belfast Harbour Commissioners*, where the judgment shows that any fears as regards trespass have not been realised. The statutory provisions have legalised what would at common law be a nuisance. As to arguments (2) and (3), one may say that the ruling in *Brendan Dunne Ltd. v. Fitzpatrick* shows that the presence of pickets, in large numbers, is not necessary for the mere purpose of peaceful persuasion and will not be tolerated by the law.

CONCLUSION

The statutory law as to industrial relations in Caricom countries discloses a policy of abstention of the law which is revealed in the Barbados Trade Union Act, the Guyana Trades Unions Ordinance, the Jamaica Trade Union Law, and the Trinidad & Tobago Trade Unions Ordinance and the Trade Disputes and Protection of Property Ordinance. When industrial conflict occurs, on failure to achieve settlement, the right

to strike exists in these countries, and strikers are protected from prosecution or civil actions on the grounds specified in these statutes.

However, in so-called essential services no such right to strike is guaranteed. The main issue relating to collective bargaining in essential services is that of the status of strikes whereby public access to these services is curtailed or interrupted. The notion of essentiality for these purposes goes beyond the concept of convenience or economic interest to a more importunate set of services, curtailment of which may involve the destruction of property or risk to the physical health or safety of members of the public. If this notion were to be expanded to embody inconvenience and economic interests, the concept of strikes as an instrument of dispute settlement would be displaced. However, in some services, such as fire and hospital, interruption of which involves too great a risk of public detriment to justify its value as a dispute settlement device, prohibition of work stoppages may be justified. But in most other services which are at present listed as essential services in the statute books of some of the above-mentioned countries such as water supply, electricity, transportation, communication, etc., it does not seem necessary to designate by law a prohibition against strike action. In this area, if a strike leads to serious interruption of services which involves severe hardship to the public, government may take *ad hoc* legislative action to direct the termination of the strike and the setting up of alternative dispute settlement machinery, such as a tripartite board, to arbitrate the issues in dispute.

Under Caricom countries' trade union statutes, picketing in the strict sense of the term — *i.e.*, watching and besetting — if legalised at all, is legalised only to the extent that it is made lawful for those engaged in it to do acts which would otherwise have constituted nuisances at common law, provided they do no more than attend at or near a house or place where a person resides or works or carries on business, etc., "for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working." Certain acts, such as persistently following a person, hiding his tools, or following him in a disorderly manner to compel him to take a course of action that he has a right not to take, are made statutory offences punishable by fine or imprisonment.

Recently, the subject of picketing has been examined by the Royal Commission on Trade Unions, 1968, in the United Kingdom, and the Royal Commission Inquiry Into Labour Disputes, 1968, in Ontario, Can-

ada. The Royal Commission in the U. K. concluded that the law of picketing was satisfactory, and in 1971 the government also adopted that view.[62] The Royal Commission in Ontario, Canada,[63] however, has recommended greater control including:

1. The Appointment of A Picket Captain. He is to have authority and the duty to make every reasonable effort to maintain lawful conduct on the picketing line.

2. Pickets and Placards. Persons who are not members of the unit of employees on strike or officials of the union are not to act as pickets. Pickets may carry only appropriate placards with legitimate information.

3. Mass Picketing. The number of pickets must not be greater than what is reasonably adequate for the purpose.

4. Ally Picketing. Where an employer, in order to offset the economic impact of a work stoppage, makes any form of arrangement by which the work of the industry is in any substantial degree carried on by another employer and the established relations of the struck employer with his customers or correspondents are thus maintained, the strikers would be entitled to picket the work-place of such co-operator. However, such picketing must not affect the employees of the co-operator and their relations to him.

These recommendations are, with respect, sound ones in the context of the law of picketing.

It may also be pointed out that, as the law stands, statutes do not afford protection to an employee who respects a lawful picket line and in so doing fails to perform his assigned work. It would seem to be clear that if the right to strike and the right to picket in support of it is guaranteed, then, without fear of penalty, such as discharge or other disciplinary action, an employee should be entitled to refuse to cross a picket line to perform the work of another employee who is engaged in a strike.

NOTES

[1]Barbados, Guyana, Jamaica and Trinidad & Tobago.

[2]Trade Union Act (Barbados); Trade Unions Ordinance (Guyana); Trade Union Law, The Protection of Property Law (Jamaica); Trade Disputes & Protection of Property Ordinance, Trade Unions Ordinance (Trinidad & Tobago).

[3]34 & 35 Vict. C. 41.

[4]Erle, Sir William: *Memorandum on the Law Relating to Trade Unions*, London (1869) p. 37.

[5](1861) 3 E & E 516.

[6](1855) 119 E.R. 781, at p. 784.

[7](1925) A.C. 700.

[8]*Mogul Steamship Co. v. McGregor* (1892) A.C.; 25. *Allen v. Flood* (1898) A.C. 1; *Quinn v. Leatham* (1901) A.C. 495.

[9]*Sorrell* v. *Smith* (1925) A.C. 700; at pp. 718, 719.

[10](1921) 3 K.B. 40, at p. 90.

[11]*Sorrell* v. *Smith* (1925) A.C. 700, at p. 719.

[12]Ibid, at pp. 723-724.

[13]Ibid, at p. 726.

[14](1872) 12 Cox C.C. 316, 338.

[15](1891) 2 Q.B. 545.

[16]Trade Disputes Act, 1906, S. 5(3)(U.K.); Trade Union Act, 1963, S. 2(1) (Barbados); Trade Unions Ordinance (Guyana); Trade Union Law, S. 2 (Jamaica); Trade Disputes and Protection of Property Ordinance, S. 2 (Trinidad & Tobago).

[17](1909) A.C. 506; see also, *Huntley v. Thornton* (1951) 1 All E.R. 234.

[18]Ibid, p. 510.

[19]*Valentine* v. *Hyde* (1919) 2 Ch. 129.

[20](1943) A.C. 166, 189.

[21](1960) A.C. 907 (P.C.)

[22]Ibid, at p. 924.

[23]Ibid, at p. 925.

[24](1960) A.C. 132 (P.C.)

[25](1965) A.C. 269.

[26]Ibid; at p. 281 and pp. 289 and 300.

[27]Section 31(5).

[28](1908) 2 I.R. 214.

[29]6 Geo. 4 C. 129.

[30]22 Vict. C. 34.

[31]34 & 35 Vict. C. 32.

[32]6 Geo. 4 C. 129.

[33]Ibid.

[34]22 Vict. C. 34.

[35](1908) 2 I.R. 214, 223.

[36]Act 5 Geo. C. 95.

[37](1898) 1 Ch. 811.

[38]Ibid, at pp. 825-26.

[39](1988) 1 Ch. 255, 266.

[40]Ibid, at p. 267.

[41]Ibid, at pp. 270-71.

[42](1906) 22 T.L.R. 327 (C.A.)

[43]Ibid, at p. 329; see also *Fowler* v. *Kibble* (1922) 1 Ch. 487 (C.A.)

[44]Ibid.

[45]In *Fowler* v. *Kibble* (1922) 1 Ch. 487, the Court of Appeal adopted the Ward, Lock treatment in a case dealing with another sub-section of S. 7 of the 1875 Act.

[46](1908) 2 I.R. 214, 224.

[47]Section 39.

[48]Section 27(2). It may be pointed out that this section only allows one or more persons, but not more than three, in any one place at any one time for peaceful picketing.

[49]Section 31. This section also lays down that it is not lawful for pickets to attend in such numbers or otherwise in a manner calculated to intimidate any person or to obstruct the approach to any premises or to lead to a breach of the peace. It also provides that pickets are limited to employees or ex-employees (employed within the previous twelve months) and not more than 8 trade union officials.

[50]Section 3.

[51](1908) 2 I.R. 214, 225.

[52]*Ferguson Ltd.* v. *O'Gorman* (1937) I.R. 620.

[53]*Ferguson Ltd.* v. *O'Gorman* (1937) 1 Q.B. 91.

[54]*Piddington* v. *Bates* (1960) 3 All E.R. 660.

[55]*Ward, Lock & Co.* v. *Operative Printers' Assistants' Society* (1906) 22 T.L.R. 327.

[56]See *Thomson* v. *Deakin* (1952) Ch. 646.

[57](1938) I.R. 512.

[58]The Trade Disputes Act, 1906 (U.K.).

[59](1958) .IR. 29.

[60](1960) A.C. 907; see also *Toppin* v. *Feron* (1909) 43 I.L.T.R. 190.

[61]Section 2, Trade Disputes Act, 1906 (U.K.); Section 39, Trade Union Act (Barbados); Section 27, Summary Jurisdiction (Offences)(Guyana); Section 31, Trade Union Law, (Jamaica); Section 3 Trade Disputes & Protection of Property Ordinance (Trinidad & Tobago).

[62]The government White Paper "In Place of Strife", 1969, Cmnd. 3888 also suggests this.

[63]Report of the Royal Commission Inquiry Into Labour Disputes, Ontario, Canada, 1968, pp. 76-78.