

THE LEGALITY OF THE GENERAL STRIKE IN ENGLAND

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Probably no political question in England is of greater importance at the present time than the suggested reform of the law relating to strikes and to trade unions. The Prime Minister has recently stated that a Cabinet committee is now considering the problem and that a bill on the subject will shortly be introduced into Parliament.¹ This demand for a reconsideration of the various statutes dealing with trade unions enacted within the past fifty years, with special reference to the Trade Disputes Act, 1906,² is the direct result of the General Strike, which lasted for nine days from May 3 to May 12, 1926. It was strongly felt at that time that steps should be taken which would make it impossible in the future for any body of men to interrupt, by concerted action, those services which are essential to the life of the community. The sudden and dramatic collapse of the strike has made it improbable that a similar attempt will be made for many years to come, but there is no reason to think that, if once the trade unions feel they are powerful enough to win, they will refuse to use this weapon. The question whether a General Strike is legal under the law as it stands at present is therefore one of the most important—if not the most important—problem to be considered in planning new legislation.

The history of the General Strike can be told briefly. At the end of July, 1925, when a stoppage of work at the coal mines seemed imminent, the government granted a subsidy to the coal mining industry for the purpose of supporting wages to last from August 1, 1925, to April 30, 1926. On September 5, 1925, a Royal Commission on the Coal Industry was appointed to inquire into the economic position. It was hoped that the report of the Commission, which was issued on March 6, 1926,³ would furnish a basis for negotiation, but the attempts to bring about an agreement between the coal owners and the miners broke down. Shortly before the subsidy was to end, notices were posted by the owners stating that new terms, including a reduction in wages, would come into force on May 1. As no settlement was

¹ The London Times, Oct. 8, 1926.

² (1906) 6 Edw. VII, c. 47.

³ REPORT OF THE ROYAL COMMISSION ON THE COAL INDUSTRY 1925 (His Majesty's Stationery Office, 1926).

reached, the coal strike or lock-out⁴ began on that date. A Royal Proclamation under the Emergency Powers Act, 1920,⁵ declaring that a state of emergency existed was issued the same day. A few hours later the General Council of the Trade Union Congress, which had been making representations to the government, announced that a General Strike would be called beginning at midnight on May 3 "unless a settlement which the representatives of the T. U. C. can recommend the miners to accept, is previously reached." Negotiations were broken off between the government and the General Council on the morning of May 3, and that night the union men in the transport services, the printing trades and certain other productive industries went out on strike. Energetic measures were taken by the government during the following days to insure that the life of the community could be carried on. On May 6, Sir John Simon,⁶ a former attorney general and one of the most distinguished leaders of the Bar, delivered a speech in the House of Commons declaring that the General Strike was illegal and that every Trade Union leader who had promoted the General Strike was⁷ "liable in damages to the uttermost farthing of his personal possessions." On May 11 the National Sailors' and Firemen's Union, which had not joined in the General Strike, sought an injunction to restrain the officials of one of its branches from calling its members out on strike without the authority of the Executive Council of the Union.⁸ Mr. Justice Astbury granted the injunction on two grounds: (a) that the General Strike was contrary to law and the defendants were therefore acting illegally, and (b) that the defendants were acting contrary to the rules of their own union. On the same day Sir John Simon delivered his second speech in the House, further elaborating his views as to the illegality of the Strike. On May 12, the General Council of the T. U. C. called off the General Strike, although the stoppage of work in the coal industry still continued.

Was the General Strike illegal? Mr. Justice Astbury's judgment in the *National Sailors' and Firemen's Union* case is authority for holding that it was. We must remember, however, that this was an off-hand judgment given in a case where the defendants were not represented by counsel. Not a single au-

⁴ There is some doubt whether the coal dispute should be called a strike or a lock-out. It is unnecessary to consider it here as there is no question that the General Strike was a strike.

⁵ (1920) 10 & 11 Geo. V, c. 55.

⁶ Sir John Simon's two speeches in the House of Commons and a third delivered by him in Cleckheaton Town Hall on May 20 have been published in book form: *THE GENERAL STRIKE* (MacMillan and Co., London, 1926). Citations from his speeches are taken from this book.

⁷ SIMON, *op cit.* *supra* note 6, at 5.

⁸ *National Sailors' and Firemen's Union v. Reed* [1926] 1 Ch. 536.

thority is cited to support a view which would revolutionize the law relating to strikes if carried to its logical extent. Moreover, as Sir Frederick Pollock has pointed out,⁹ the comment on the illegality of the General Strike was really extra-judicial. It was unnecessary for the learned judge to consider this point as the defendants were clearly acting contrary to the rules of their own union.

Why, then, has no serious attempt been made to question the correctness of the judgment? Except for one valuable article in a popular review,¹⁰ no detailed consideration of the intricate constitutional and criminal points involved has been published. Why have the legal members of the Labour Party made little or no attempt to argue that the learned judge was wrong in holding that the strike was illegal, and, impliedly therefore, that many of the leaders of their party were guilty of a criminal offense? The explanation of this rather surprising acquiescence is that it is in the interest of the unions to argue in favour of the judgment, for if a General Strike is illegal then the most cogent reason for reforming the law relating to trade unions disappears. Professor Holdsworth emphasized this when he said:¹¹

“This is a conclusion which will no doubt be welcomed by the Trade Union leaders. But it is as well that its possibility should be envisaged. To acquiesce in Sir John Simon’s and Mr. Justice Astbury’s view of the law, to suppose that it is incontrovertible, may well be to enter into a fool’s paradise. For the assumption then that this view of the law is correct may be used as an argument against interfering with the Trade Disputes Act, the repeal of which is a condition precedent to any recovery of our trade. . . . The labour party will no doubt press this argument for all it is worth.”

To understand the present law relating to strikes and to trade unions, it is necessary to refer briefly to their history.¹² Although combinations of workmen have existed at various times in the past, the origin of trade unions in their modern form is to be found in the combinations of workmen which arose in the eighteenth century. The old machinery of fixing wages broke down at that time, and attempts were made to raise wages either by striking against the employers or by inducing Parliamentary action by other means. As a result, numerous statutes were passed dealing with separate trades, and in 1799¹³ all combin-

⁹ (1926) 12 L. Q. REV. 289, 290.

¹⁰ Harrison, *The General Strike and the Law* (June, 1926) THE ENGLISH REVIEW.

¹¹ *The Architect and Building News* (May 21, 1926) 446.

¹² The following summary is based in large part on 3 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883) c. 30; SLESSER AND BAKER, TRADE UNION LAW (2d ed. 1926).

¹³ (1799) 39 Geo. III, c. 81.

ations of workmen, for the purpose of raising wages, were declared illegal. This statute was repealed and replaced by a new act in 1800¹⁴ which contained a few alterations to facilitate its operation. Its most important provision was that any journeyman workman, or other person, who "enters into any combination to obtain an advance of wages, or to lessen or alter the hours of work,"¹⁵ is to be liable to imprisonment up to three months without hard labour, or two months with hard labour. This act remained in force until 1824 when Parliament adopted an entirely new policy. Largely owing to the efforts of Joseph Hume and Francis Place, the Combination Laws Repeal Act¹⁶ was passed which removed not only all statutory restrictions on strikes, but also limited the common law crime of conspiracy, as to the scope of which great uncertainty prevailed. The result of this act was to give a great impetus to the trade union movement, and a large number of strikes followed. As a consequence, Parliament repealed and replaced the act in 1825¹⁷ by a new act which did not make strikes illegal, but contained a section forbidding a variety of offenses such as violence to the person or property, threats and molestation. Although the act of 1825 was not repealed until 1871, the law was fundamentally affected during the next half century by a number of decisions¹⁸ dealing with the common law crime of conspiracy. The opinion (now generally held to be erroneous) became prevalent that conspiracies in restraint of trade were offenses at common law. As Mr. Justice Stephen has said:¹⁹ "It is hardly too much to say that the result of this view of the law was to render illegal all the steps usually taken by workmen to make a strike effective." The hardship created by these cases was to some extent mitigated by an act passed in 1859²⁰ dealing with "molestation" and "obstruction," but it was not until a commission was appointed in 1867 that any effective steps were taken to change the law. The recommendations of the commission led to the enactment in the year 1871 of two acts: "An act to amend the law relating to trade unions,"²¹ which is still in force, and "An Act to amend the criminal law relating to violence, threats, and molestation,"²² which was repealed in 1875. The first act, which has been called the Charter of Trade Unions, provides in section 2 that:

"2. Trade Union not Criminal.—The purposes of any trade

¹⁴ (1800) 39 & 40 Geo. III, c. 106.

¹⁵ *Ibid.* § 2.

¹⁶ (1824) 5 Geo. IV, c. 95.

¹⁷ (1825) 6 Geo. IV, c. 129.

¹⁸ See fourteen cases cited in 3 STEPHEN, *op. cit. supra* note 12, at 217.

¹⁹ 3 *ibid.* 218.

²⁰ (1859) 22 & 23 Vict. c. 34.

²¹ 34 & 35 Vict. c. 31.

²² 34 & 35 Vict. c. 32.

union shall not by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise."

The second act provided that, except in certain cases, an act restraining the free course of trade was not on that account criminal. It was commonly supposed that the ordinary strike was not legalized, but in the next year the courts applied the conception of criminal conspiracy in a new way. In *Regina v. Bunn*,²³ a case arising out of a strike of gas-stokers by which London was deprived of light, the men were indicted for a conspiracy to coerce or molest their employers in carrying on their business. In the words of Mr. Justice Stephen: ²⁴

"This case substantially decided, as far as its authority went, that, although a strike could no longer be punished as a conspiracy in restraint of trade, it might, under circumstances, be of such a nature as to amount to a conspiracy at common law to molest, injure, or impoverish an individual, or to prevent him from carrying on his business."

This decision caused great dissatisfaction, and, as a result, the act of 1871 was repealed and in its place was enacted "the Conspiracy, and Protection of Property Act, 1875."²⁵ This act is still in force, and is of primary importance when any question as to the criminal character of a strike is raised. It is, therefore, necessary to quote its most important section in part:

"3. *Amendment of Law as to Conspiracy in Trade Disputes.*—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 between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime.

"Nothing in this section shall exempt from punishment any persons guilty of a conspiracy for which a punishment is awarded by any Act of Parliament.

"Nothing in this section shall affect the law relating to riot, unlawful assembly, breach of the peace, or sedition, or any offence against the State or the Sovereign."

Section 4 provides that, in certain cases, breach of contract by persons employed in the supply of gas or water is a criminal offense, if their act will deprive the inhabitants wholly, or to a great extent, of their supply. The Electricity (Supply) Act, 1919,²⁶ deals with electrical undertakings in similar terms.

²³ 12 Cox, C. C. 316 (1872).

²⁴ 3 STEPHEN, *op. cit. supra* note 12, at 225.

²⁵ 38 & 39 Vict. c. 86.

²⁶ 9 & 10 Geo. V, c. 100, § 31.

Section 5 provides that if a person wilfully breaks a contract, knowing that this will endanger human life or valuable property, he can be fined or imprisoned for not more than three months.

Since 1875 few questions of importance dealing with the criminality of strikes have arisen. The controversies of the past fifty years have been concerned with the tortious liability of trade unions themselves or of their officials and members. The much-discussed Trade Disputes Act, 1906,²⁷ whose severely criticised section 4 exempts trade unions from tortious liability, with which we are not concerned here, contains two sections which are relevant to the question now under discussion. Section 3 reads:

“3. Removal of Liability for interfering with another Person’s Business, etc.—An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills.”

Subsection 3 of section 5 is of particular importance for it contains a definition of the words “trade dispute”:

“5. (3) In this Act and in the Conspiracy and Protection of Property Act, 1875, the expression ‘trade dispute’ means any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment, or the terms of the employment, or with the conditions of labour, of any person, and the expression ‘workmen’ means all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises; and, in section three of the last-mentioned Act, the words ‘between employers and workmen’ shall be repealed.”

Based on the above statutes the present law dealing with the criminal aspect of strikes is thus comparatively simple. Taking part in a strike is not a criminal offense if (a) the act is done in contemplation or furtherance of a trade dispute as defined by the Trade Disputes Act, 1906, and (b) if such act committed by one person would not be punishable as a crime, with particular reference to the exceptions set out in the Conspiracy, and Protection of Property Act, 1875 (riot, sedition, any offense against the State or sovereign, etc.). Whether a strike which is not in furtherance of a trade dispute, and which is therefore taken out of the protection of the 1875 Act, is ipso facto criminal will be discussed later.

In considering the question as to the legality of the General Strike it is, therefore, necessary to test it by seeing whether it

²⁷ *Supra* note 2.

fulfills the positive requirement of (a) and the negative requirement of (b). Briefly put in another way, the questions are: (1) was the General Strike in contemplation or furtherance of a trade dispute, and (2) was it an offense against the State? Sir John Simon confuses these two questions when he says: ²⁸ "A General Strike, as it seems to me . . . is an offence against the State and not a trade dispute at all." But "trade dispute" and "offense against the State" are not antitheses—an act may at the same time be in furtherance of a trade dispute and an offense against the State.

TRADE DISPUTES

Mr. Justice Astbury apparently based his judgment in the *National Sailors' and Firemen's Union* case on the ground that the General Strike was not in furtherance of a trade dispute. He stated his view in the following summary terms: ²⁹

"The so-called general strike called by the Trades Union Congress Council is illegal, and contrary to law, and those persons inciting or taking part in it are not protected by the Trade Disputes Act, 1906. No trade dispute has been alleged or shown to exist in any of the unions affected, except in the miners' case, and no trade dispute does or can exist between the Trades Union Congress on the one hand and the Government and the nation on the other. The orders of the Trades Union Council above referred to are therefore unlawful, and the defendants are at law acting illegally in obeying them, and . . . can be restrained by their own Union from doing so."

It is difficult to ascertain exactly what the learned judge meant by these words. He apparently fails to distinguish between two distinct questions: (1) Must there be a dispute between the strikers and their own employers for a strike to be considered to be in furtherance of a trade dispute? In other words, does a sympathetic strike come within the definition given in section 5 (3) of the Trade Disputes Act, 1906? (2) Does the fact that the purpose of the sympathetic strike is to bring pressure on the government preclude it from being in furtherance of a trade dispute?

If Mr. Justice Astbury intended to hold that no one was protected by the Acts of 1875 and 1906 except the immediate parties to a dispute, then his judgment is contrary to the considered views of the House of Lords and the Court of Appeal. In *Conway v. Wade*,³⁰ Lord Loreburn, L. C., said:

"I come now to the meaning of the words 'an act done in contemplation or furtherance of a trade dispute.' These words are

²⁸ *Op. cit. supra* note 6, at 5, n. 1.

²⁹ *Supra* note 8, at 539-540.

³⁰ [1909] A. C. 506, 512.

not new in an Act of Parliament; they appear in the Conspiracy and Protection of Property Act, 1875. . . . I agree with the Master of the Rolls that the section cannot fairly be confined to an act done by a party to the dispute. I do not believe that was intended. A dispute may have arisen, for example, in a single colliery, of which the subject is so important to the whole industry that either employers or workmen may think a general lock-out or a general strike is necessary to gain their point. Few are parties to, but all are interested in, the dispute."

In *Dallimore v. Williams and Jesson*,³¹ a strong Court of Appeal held that a "trade dispute" within the meaning of that expression in the Trade Disputes Act, 1906, is not confined to a dispute between the employer and his workmen or between the workmen themselves. This conclusion seems to be inevitable in view of the fact that the Trade Disputes Act, 1906, reads: "the expression 'workmen' means all persons employed in trade or industry whether or not in the employment of the employer with whom a trade dispute arises." It is difficult, therefore, to see the relevance of Mr. Justice Astbury's statement that, "no trade dispute has been alleged or shown to exist in any of the unions affected, except in the miners' case." Sympathetic strikes have been the practice for over fifty years, and to hold them illegal at the present time would constitute a revolution in what has been universally held to be the law. A strikes against B on a question of wages. Thereupon C strikes against D because he believes that his act will be in furtherance of A's trade dispute against B. Both A and C are protected under the definition in the Trade Disputes Act. The important point to remember is that the sympathetic striker is protected even though he himself has no quarrel either with the employer originally struck against or with his own immediate employer. It is clear that, except in the mining industry, there was no dispute between employers and employees. "But," as Professor Holdsworth³² has pointed out, "it does not follow that the act of striking, and all the other consequential acts, were not done *in furtherance of a trade dispute*. Obviously they were done in furtherance of a trade dispute—to wit, the dispute between the coalowners and the miners."

Does the fact that the purpose of the sympathetic general strike was to bring pressure upon Parliament preclude it from being in furtherance of a trade dispute? This is an entirely different question from the one to be discussed later whether the strike, even if it is held to be in furtherance of a trade dispute, constituted an offense against the State. Mr. Justice Astbury says, "No trade dispute does or can exist between the Trades Union Congress on the one hand and the Government and the nation on the other." No one has ever argued that there was a

³¹ 29 T. L. R. 67 (C. A. 1912).

³² *Op. cit. supra* note 11, at 446.

trade dispute between those who took part in the General Strike and the government. Nor, to be more accurate, was there a trade dispute, except in the coal mining industry, between the strikers and their employers. What is claimed is that the strike was called in furtherance of a trade dispute. If the strike was not in furtherance of a trade dispute what was it in furtherance of? The purpose of a sympathetic strike must always be to bring pressure to bear upon some third party. Can a distinction be drawn because the third party is the government? Such pressure may, perhaps, be an offense against the State, but it is nevertheless in furtherance of a trade dispute. Sir John Simon argues that under these circumstances the strike even ceases to be a strike, and becomes some sort of movement which he does not define: ³³

“Once you get the proclamation of a General Strike such as this is, it is not, properly understood, a strike at all because a strike is a strike against employers to compel employers to do something, but a General Strike is a strike against the general public to make the public, Parliament and the Government do something.”

If a strike must be “against employers to compel employers to do something” then the General Strike was not a strike, for the government was not an employer. But is there any ground for accepting Sir John Simon’s arbitrary definition? Are sympathetic strikes not to be called strikes because of their purpose? What are we to call the General Strike if it is not a strike “properly understood”? “A strike is . . . a ‘simultaneous cessation of work on the part of the workmen,’ ” ³⁴ and it remains a strike whether the purpose is to force the immediate employer or someone else to do something.

How, then, can we determine whether a strike is in furtherance of a trade dispute, for a strike “properly understood” may be for other purposes? This is a question of fact and depends upon two things: (a) whether there is a trade dispute, and (b) whether the strike has genuinely been called in furtherance of it. On the first point, Lord Sterndale, M. R., in *White v. Riley*,³⁵ in reversing the judgment of Astbury, J., in the court of first instance and disapproving his judgment in *Valentine v. Hyde*,³⁶ said:

“Now was there a trade dispute in this case? That in my opinion, is a question of fact. It has been so treated in several cases, and being a question of fact it is not easy nor indeed possible to lay down any general rule which would apply to all cases.”

³³ *Op. cit. supra* note 6, at 9.

³⁴ *Farrer v. Close*, L. R. 4 Q. B. 602, 612 (1869) per Hannen, J.; see 27 HALSBURY, THE LAWS OF ENGLAND (1913) 601.

³⁵ [1921] 1 Ch. 1, 18.

³⁶ [1919] 2 Ch. 129.

Can there be any doubt that there was a trade dispute in the mining industry? Sir John Simon himself says: ³⁷ "I am quite willing to believe that it [the General Strike] has had its origin in a trade dispute." On the second point, whether the strike is genuinely in furtherance of a trade dispute, we must again look at the facts. If the dispute is used as a cloak for some ulterior purpose it is clear that the strike would not come within the purview of the 1875 and 1906 Acts. We quote again from Lord Loreburn's judgment in *Conway v. Wade*: ³⁸

"If, however, some meddler sought to use the trade dispute as a cloak beneath which to interfere with impunity in other people's work or business, a jury would be entirely justified in saying that what he did was done in contemplation or in furtherance, not of the trade dispute, but of his own designs, sectarian, political, or purely mischievous, as the case might be. These words do, in my opinion, in some sense import motive, and in the case I have put a quite different motive would be present."

It has been suggested that the General Strike was merely a cloak for revolution. If it was called for that purpose then clearly the strike would not have been in furtherance of a trade dispute. Although Sir John Simon does not suggest any revolutionary intent on the part of the trade union leaders, he nevertheless makes great play in his second speech ³⁹ with the following quotation from Sir Henry Slessor's book, "The Law Relating to Trade Unions": ⁴⁰

"There has recently arisen for consideration the question how far a strike called for political objects—'direct action,' as the journalists have called it—that is a strike to interfere with or constrain the Government in conduct which the trade unions do not approve, can be said to be a strike in contemplation or furtherance of a trade dispute. This matter has fortunately not yet had to be decided, but I have very little doubt that such a strike would not be covered by the words in the definition in the Trade Disputes Act."

The expression "political object" is not a particularly happy one, as it can be construed to mean any object which includes action on the part of the government. It is clear, however, from the context that by "political objects" Sir Henry Slessor obviously means objects which are not in furtherance of a trade dispute. Examples would be a strike to prevent the government from declaring war, or a strike of railway men against conveying an

³⁷ *Op. cit. supra* note 6, at 15.

³⁸ *Supra* note 30, at 512.

³⁹ *Op. cit. supra* note 6, at 19.

⁴⁰ SLESSOR, THE LAW RELATING TO TRADE UNIONS (1921) 72. Sir Henry Slessor, K. C., was the solicitor general in Mr. MacDonald's labor government.

unpopular prime minister of a foreign country by rail from Dover to London. This was actually threatened in the case of Mussolini. Such strikes can easily be distinguished from a strike, the purpose of which is to force the government to intervene in a trade dispute. This has been excellently expressed by Dr. Harrison: ⁴¹

"It is idle to say that it was an attempt to coerce the Government. A purely political strike, unconnected with any trade dispute, would of course fall outside the Acts. But once granted that it was 'in furtherance of a trade dispute,' the coercion of the Government (to continue the coal subsidy or otherwise) was merely incidental."

We, therefore, believe that the General Strike was in furtherance of a trade dispute.

OFFENSES AGAINST THE STATE

But even if the General Strike fulfills the positive requirement of the Conspiracy, and Protection of Property Act, 1875, in being in contemplation or furtherance of a trade dispute, does it fulfill the negative requirement of not being an offense against the State? Does participation in a General Strike constitute such a crime? Sir John Simon speaks at various times of the strike as being "illegal," "unlawful" and "unconstitutional." The last term is used merely as an indication of general disapproval, as it clearly has no legal meaning in this connection.⁴² "Illegal" is a loose expression which can be used as a cover for general and indefinite charges.⁴³ It is unfortunate that Sir John Simon did not specify what he meant by that term nor what crime he believed the strikers and their leaders had committed. It is true that in his first speech he used the word "illegal" in such a connection that it was generally believed that he was basing his argument merely on the fact that some of the strikers had broken

⁴¹ *Op. cit. supra* note 10, at 748.

⁴² See DICEY, *LAW OF THE CONSTITUTION* (8th ed. 1915) 516: "The expression, as applied to an English Act of Parliament, means simply that the Act in question, as, for instance, the Irish Church Act, 1869, is, in the opinion of the speaker, opposed to the spirit of the English constitution; it cannot mean that the Act is either a breach of law or is void." The General Strike was unquestionably contrary to the spirit of the English constitution but this does not necessarily render it criminal.

⁴³ See an excellent short article in *THE LAW JOURNAL*, May 22, 1926, in which the learned writer points out that the term "illegality" can be used in five different senses. "We thus get five different forms of conduct which infringe against the rules of law, and are inhibited by legal sanctions. But these five differ so much from each other that it is more convenient to discard the indefinite expression 'illegality' and to employ instead 'criminality' for criminal illegality, and 'unlawfulness' for any of the forms of civil wrongful conduct which happens to arise."

their contracts of employment—a fact which was perfectly obvious to everyone. In his second and third speeches he explained that this was not what he had meant. “The big distinction does not turn merely on the point of not giving notice.”⁴⁴ And he continues: “The real distinction lies deeper. You may not believe me but the law is a far more sensible thing than some laymen imagine. It pays very little attention to the form or to the word, and a great deal more attention to the substance and the fact.” The law does, however, require a certain amount of form—a man cannot be tried in a court of law until he has been charged with a specific crime. He cannot be convicted of “illegality.” It is necessary therefore to consider the three different crimes which may have been committed by those who called the General Strike. These are as follows:

- I. Treason or treason felony.
- II. Seditious conspiracy or seditious libel.
- III. Criminal conspiracy.

TREASON

Under the Statute of Treasons, 1350,⁴⁵ it is treason “if a man do levy war against our Lord the King in his realm.” Under the Treason Felony Act, 1848,⁴⁶ it is a felony

“to levy War against Her Majesty, Her Heirs or Successors, within any Part of the United Kingdom, in order by Force or Constraint to compel Her or Them to change Her or Their Measures or Counsels, or in order to put any Force or Constraint upon or in order to intimidate or overawe both Houses or either House of Parliament.”

The expression “levying war” has, as is well-known, been given a very wide interpretation by the courts, and what is known as constructive treason is one of the least sharply defined of crimes. But although some of the interpretations have been so wide that Hallam⁴⁷ remarked that they were “repugnant to the understandings of mankind in general and of most lawyers,” nevertheless there is one element which has always been insisted upon. There is no treason unless the intention is to effect a purpose by warlike violence.⁴⁸ The feudal conception of treason, as a breach of personal faith, has been transformed into the modern one which regards it as “armed resistance, made on political grounds, to the

⁴⁴ *Op. cit. supra* note 6, at 43.

⁴⁵ (1350) 25 Edw. III, c. 2.

⁴⁶ (1848) 11 & 12 Vict. c. 12, § 3.

⁴⁷ HALLAM, CONSTITUTIONAL HISTORY (5th ed. 1847) c. 15, cited by KENNY, OUTLINES OF CRIMINAL LAW (1902) 265.

⁴⁸ See 8 HOLDSWORTH, HISTORY OF ENGLISH LAW (1925) 326.

public order or the realm." ⁴⁹ "Levying war" has been described as follows by Professor Kenny: ⁵⁰

"War . . . will include any forcible disturbance that is produced by a considerable number of persons, and is directed at some purpose which is not of a private but of a 'general' character, *e.g.*, to release the prisoners in *all* the gaols. It is not essential that the offenders should be in military array or be armed with military weapons. It is quite sufficient if there be assembled a large body of men who intend to debar the Government from the free exercise of its lawful powers and are ready to resist with violence any opposition."

Before the leaders of the General Strike could have been convicted of treason it would have been necessary to prove that they intended to use force against the government. But there is no evidence whatsoever that they planned or intended such a step; what they planned was a strike which would cause such general inconvenience throughout the country that the moral pressure would force Parliament to act. The success of the strike depended upon non-action. If enough people could have been persuaded to do nothing the strike would have been won. The intention was not to incite people to revolt, but to incite them to strike, a thing which apparently was perfectly legal. Sir John Simon himself says: ⁵¹

"It is not that the people who did it were a set of revolutionaries who wanted to break the country to pieces. It is that it has been done under some, I think, confused, but at any rate quite mistaken impression, that this was a lawful exercise of the rights of organised labour."

A confused idea that the General Strike was treasonable in its nature is fostered by frequent references to "civil war," "attack" and other martial terms in the speeches delivered during the strike. On May 4, Lord Oxford and Asquith said: ⁵²

"What distinguishes a General Strike from all others is this, that it is a blow not struck by one combatant at the other, but directed, whether in intention or not in intention, by its inevitable results at the very vitals of the whole community."

What distinguishes a General Strike is that it is more likely to succeed. If the coal strike had been successful in stopping all coal it would have been a blow at the "very vitals of the whole community."

This "blow" which is so frequently alluded to is not, of course,

⁴⁹ STEPHEN, *GENERAL VIEW OF THE CRIMINAL LAW* (1st ed. 1863) 36.

⁵⁰ *Op. cit. supra* note 47, at 268.

⁵¹ *Op. cit. supra* note 6, at 26.

⁵² Quoted by Sir John Simon, *op. cit. supra* note 6, at xii.

a physical attack. By the reiteration of such expressions we are led to think that actual violence was threatened and planned. But inconveniencing the community to however great an extent by refusing to work does not constitute levying war. A man cannot fight by merely doing nothing. No armed attack is made upon Parliament; the only pressure to be brought is the pressure exerted by the constituents. This has been best expressed by Sir John Simon himself: ⁵³

“If it succeeds, the effect is to make, not employers, but the Government, do something, Parliament do something, the community do something. If you make things sufficiently awkward, inconvenient, and dangerous for ordinary people, who are not employers at all,—if you put people to such inconvenience that they begin to grumble, that grumble will gradually grow into a protest, and Members of Parliament will say that something must be done and they will approach the Government and the Government will say ‘Constitutionally and in a Parliamentary sense we don’t think it is right, but in view of the General Strike we throw up our hands.’”

The attempt to bring moral pressure upon Parliament may be wrong in a “constitutional and Parliamentary sense” but it does not amount to the legal crime of treason. It is difficult to see under what criminal category “inconveniencing the community” can be brought. If such inconveniencing is a crime then every strike in an important industry must be criminal also. In this connection it is important to remember that the original Royal Proclamation issued on May 1 under the Emergency Powers Act,⁵⁴ refers not to the General Strike but to the cessation of work in the coal mines. It was this cessation which threatened “to deprive the community of the essentials of life.” By this cessation it was also intended to bring pressure upon Parliament. If the leaders of the General Strike were guilty of treason then the leaders of the coal strike must have been guilty of the same

⁵³ *Op. cit. supra* note 6, at 45.

⁵⁴ The Emergency Powers Act, 1920, *supra* note 5, reads in part as follows:

“1—(1) If at any time it appears to His Majesty that any action has been taken or is immediately threatened by any persons or body of persons of such a nature and on so extensive a scale as to be calculated, by interfering with the supply and distribution of food, water, fuel or light, or with the means of locomotion, to deprive the community, or any substantial portion of the community of the essentials of life, His Majesty may, by proclamation (hereinafter referred to as a proclamation of emergency), declare that a state of emergency exists.

“2—(1) Providing that nothing in this Act shall be construed to authorize the making of any regulations imposing any form of compulsory military service or industrial conscription:

“Provided also that no such regulation shall make it an offence for any person or persons to take part in a strike, or peacefully to persuade any other person or persons to take part in a strike.”

crime. It is as fatal for the community to freeze to death, as it is for it to freeze and starve at the same time. The purpose of the coal strike was to force Parliament to take some action, for the owners of the mines would be only slightly affected by a strike, their capital—the coal—remaining, of course, intact, however long the dispute lasted. That no distinction can be made, either in purpose or in danger to the community, between a General Strike and a coal strike is well brought out in the following extract from a speech delivered by Lord Robert Cecil (now Lord Cecil of Chelwood) during the coal strike of 1920: ⁵⁵

“I am not sure that my hon. Friends on the Labour Benches always realise that a general strike is really different in kind from the old industrial disputes. It is not the same kind of thing at all. Take a general coal or railway strike. The object is not to hit the owners of the coal mines or the owners of the railways. The old industrial dispute was this. The owners did something or failed to do something which their employés thought was an injustice. Thereupon the employés said, ‘You shall not make any profit out of your undertaking until you agree to remedy this injustice.’ That was the substance of the old strike and that was the purely industrial dispute. When you come to so big a thing as a general strike, you do a great deal more than that. What you really do is to say, ‘We will inflict great inconvenience or hardship on the whole community unless our particular demands are conceded.’”

There is only one possible ground for suggesting that the leaders of the General Strike were guilty of treason. If, by stopping work, they intended to create a situation which would directly encourage others to warlike attempts to overthrow Parliament, then their act in calling a strike might be considered an essential stage in a treasonable undertaking. All the evidence, however, is against this conclusion. The intention was to bring moral pressure upon Parliament which is an entirely different thing from attempting to destroy the State. However overwhelming this pressure might be, it could not be described as violence. The orders issued to the strikers showed that the leaders intended this pressure to be peaceable. That these orders were honestly intended and were effective is proved in part by the fact that there was comparatively little disorder during the nine days of the strike.

We may, however, go even further and say that, entirely apart from intention, the leaders in the General Strike would be guilty of treason if their acts would inevitably lead to an attack on the State. “People in this world,” says Sir John Simon,⁵⁶ “have to be judged not by the motives which some of them may have in deciding upon very serious action, but upon the quite obvious

⁵⁵ 133 PARLIAMENTARY DEBATES (5th Series, Hansard, 1920) col. 1431.

⁵⁶ *Op. cit. supra* note 6, at 22.

results which the action, when determined upon, is bound to produce." But what was the "obvious result" of a successful strike? The natural consequence would have been that Parliament would have granted the subsidy which the coal miners desired. This was what had happened nine months before, and was what many people believed would happen again. To force Parliament by peaceable means, however effective they may be, to pass a certain Act or to compel the government to take a certain course does not amount to treason in English law.

SEDITIONOUS OFFENSES

Although the word "sedition" is generally used, no such offense is known to English law.⁵⁷ Seditious offenses are seditious words, seditious libel and seditious conspiracy. These crimes are so vague that an accurate definition of them is impossible. The following lengthy description by Mr. Justice Stephen, the greatest authority on the subject, is generally accepted as a correct statement of the law:⁵⁸

"ART. 91. SEDITIOUS WORDS AND LIBELS. Every one commits a misdemeanour who publishes verbally or otherwise any words or any document with a seditious intention. If the matter so published consists of words spoken, the offence is called the speaking of seditious words. If the matter so published is contained in anything capable of being a libel, the offence is called the publication of a seditious libel.

"ART. 92. SEDITIOUS CONSPIRACY. Every one commits a misdemeanour who agrees with any other person or persons to do any act for the furtherance of any seditious intention common to both or all of them. . . .

"ART. 93. SEDITIOUS INTENTION DEFINED. A seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against the person of Her Majesty, her heirs and successors, or the Government and Constitution of the United Kingdom, as by law established, or either House of Parliament, or the administration of justice, or to excite Her Majesty's subjects to attempt otherwise than by lawful means the alteration of any matter in Church or State by law established, or to raise discontent or disaffection amongst Her Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of Her Majesty's subjects.

"An intention to show that Her Majesty has been misled or mistaken in her measures, or to point out errors or defects in the Government or Constitution as by law established, with a view to their reformation, or to excite Her Majesty's subjects to attempt by lawful means the alteration of any matter in Church or State

⁵⁷ 2 STEPHEN, *op. cit.* *supra* note 11, at 298.

⁵⁸ STEPHEN, *DIGEST OF THE CRIMINAL LAW* (1873) 60-61. These articles were adopted almost *verbatim* by the Criminal Code Commission in their Draft Code. Mr. Justice Cave followed them in *Regina v. Burns*, 16 Cox, C. C. 355 (1886).

by law established, or to point out, in order to their removal, matters which are producing or have a tendency to produce feelings of hatred and ill-will between different classes of Her Majesty's subjects is not a seditious intention."

As this definition is so vague it is necessary to consider the various types of seditious intention separately.

Did the General Strike constitute an attempt to bring the government and the Constitution or either House of Parliament into hatred or contempt? It is unnecessary to refer here to the earlier and controversial history of seditious libel when prosecutions were used as a means of crushing, as far as possible, any criticism of the government, for the cases in the 19th century show that a new point of view has been developed. "It is not seditious," says Russell,⁵⁹ "candidly, fully and freely to discuss public matters or criticise the Government, unless the discussion or criticism is under circumstances calculated or intended to create tumult, or statements are made inciting to violence." In *Regina v. Sullivan*,⁶⁰ Fitzgerald, J., described the fundamental principle of sedition:

"Sedition in itself is a comprehensive term, and it embraces all those practices, whether by word, deed or writing, which are calculated to disturb the tranquillity of the State, and lead ignorant persons to endeavour to subvert the government and the laws of the empire. The objects of sedition generally are to induce discontent and insurrection, and to stir up opposition to the Government, and bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion."

There is no evidence that the purpose of the General Strike was to promote tumults or the use of force against the government. It is true that the Manifesto of the General Council of the T. U. C., issued on May 2, stated that the situation was due to "the failure of Government to make any acceptable proposals to enable the industry to continue without any further degradation of the standards of life and labour in the coal-fields," but it did not suggest that violence should be used in opposing the government. The General Strike was to be a peaceable means, not for overthrowing Parliament, but for inducing it to take certain steps. As Mr. Justice Stephen has said: ⁶¹

"The question would be whether the writer's object was to procure a remedy by peaceable means, or to promote disaffection and bring about riots."

⁵⁹ 1 RUSSELL, CRIMES (8th ed. 1923) 156, n. (g).

⁶⁰ 11 Cox, C. C. 44, 45 (1868).

⁶¹ 2 STEPHEN, *op. cit. supra* note 11, at 381.

Was the General Strike an attempt otherwise than by lawful means to alter a matter by law established? It is undisputed that an ordinary strike is lawful, and therefore it would not be seditious to attempt the alteration of the law by means of such a strike. Wherein does the peculiar unlawfulness of the General Strike consist? We must consider briefly four out of the large number of vague grounds which have been suggested—the danger to the life of the community; its generality; its purpose; the fact that it involved breaches of contract.

An act which is peculiarly harmful or dangerous to the State is not *ipso facto* unlawful. The only legal remedy is for Parliament to alter the law by declaring the act to be criminal. Because the General Strike was exceptionally dangerous to the life of the community, it does not follow that it was illegal. A lawful act, however injurious to the State, cannot be seditious. As Mr. Shortt, K. C., the then Home Secretary, said during the 1920 coal strike: ⁶²

“But the mere fact that there is a strike on a railway or a strike in a mine, and that causes a state of emergency, does not make a strike illegal any more than if you have financial operations which starve the community.”

The generality of the strike, apart from the point discussed above, whether a general sympathetic strike can be considered to be in furtherance of a trade dispute, can hardly affect the question. The generality of the strike would make it more probable that the strike would succeed, but probability of success is not a ground for liability. Having once granted that a sympathetic strike is legal we cannot draw a line between the number of sympathetic strikes which are legal and those which are not. At one time an attempt was made to unite all unions into one super-union.⁶³ If that were done at the present time would a strike by that union be illegal?

Does the purpose of the strike render it an unlawful means? Admittedly the purpose of the General Strike was to bring pressure upon Parliament, but such pressure is not unlawful. If pressure is to be brought to change or make a law, where better can it be brought than upon members of the House of Commons? Of course if physical threats are made against Parliament—if armed men, for example, were to congregate in Parliament Square—there is a seditious conspiracy, but moral pressure has never been called unlawful. Recently the bookmakers struck as a protest against the betting tax. They were trying to bring moral pressure to bear upon Parliament, but has any one suggested that this was unlawful and seditious? The only way in

⁶² *Op. cit. supra* note 55, at col. 1854.

⁶³ The Grand General Union, described by SLESSER, *TRADE UNIONISM*, 11.

which the pressure of the General Strike can be distinguished from the pressure brought at other times by concerted action is that the General Strike was more likely to prove successful in its purpose.

Does the fact that the General Strike involved breaches of contract make it illegal? In a recent article Sir Lynden Macassey, K. C.,⁶⁴ suggested that it was this failure to give proper notice which rendered it unlawful. He pointed out⁶⁵ that a General Strike need not necessarily involve such breaches, and that it would then be lawful. But even if contracts were broken by the order of the trade union leaders this did not make the strike seditious. Breaking a contract is not a crime if it is "committed by one person," except in the special cases of gas, water and electricity undertakings, and therefore under section 3 of the 1875 Act it is not a crime when done by two or more persons. Section 3 of the 1906 Act removes the tortious liability for inducing such a breach.

None of the above grounds render the General Strike an unlawful means by which to alter the law. It was, therefore, not seditious under this heading.

Was the General Strike an attempt to incite any person to commit a crime in disturbance of the peace? The negative answer is so obvious that it is unnecessary to discuss this point.

Finally, was the General Strike an attempt to raise discontent or disaffection or to promote feelings of ill-will and hostility between the different classes? These words are so indefinite and are capable of such unreasonable extension that it is necessary to consider the spirit in which they have been interpreted. In the citations given above it is clear that the discontent and the ill-will, whether against the government or a particular class, must be such as will tend to violence. But, as we have said before, the leaders of the General Strike only urged their followers to stop work; they emphatically warned them against riots and tumults. It is difficult to see how a deliberate refusal to work can constitute violence. We can only suggest violence by arguing that a General Strike would inevitably lead to disorder either by the strikers themselves or by other persons. The first and conclusive answer to this is that such disorder was not inevitable. There have been many strikes unaccompanied by violence, and in the case of the General Strike itself no general disorder took place even though the strike lasted for nine days.

⁶⁴ *Sedition, Privy Conspiracy and Rebellion* (1926) 247 QUARTERLY REV. 120.

⁶⁵ *Ibid.* 122: "All workmen employed on the services vital to the community can, at any time, combine together, put forward a 'national programme,' and, after giving proper notice, withdraw their labour and hold up the national life. Against such a legal strike the community has no protection or redress. The effects of a legal strike may be just as disastrous to the people as those of an illegal strike."

The second answer is that if men have a right to strike, they are not committing a crime by doing so even if they know that other persons may thereby be induced to break the law. The principle is well stated by Field, J., in *Beatty v. Gillbanks*:⁶⁵

“The finding of the justices amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition.”

The General Strike, therefore, does not come under any of the various kinds of seditious intention. It is only because there is a mistaken idea that all acts which are harmful to the State must be seditious, that it is possible to suggest that the leaders of the General Strike were guilty of this crime.

CRIMINAL CONSPIRACY

A treasonable or a seditious conspiracy is clearly criminal but if the arguments we have advanced are valid then a General Strike is neither treasonable nor seditious. The question whether a strike can constitute a criminal conspiracy in some other way depends in part upon the determination of the fact whether it is in furtherance of a trade dispute. We have argued above that the General Strike was in furtherance of a trade dispute even though the purpose was to bring pressure upon the community rather than to injure the employers. If we are right in this then the Conspiracy, and Protection of Property Act, 1875, applies, and under section 3 of that Act the General Strike is not a criminal conspiracy.

If, on the other hand, the strike is held not to have been in furtherance of a trade dispute, then the question arises whether and under what circumstances such strikes are criminal conspiracies. There is authority in the nineteenth century for holding that strikes in restraint of trade and strikes “to molest, injure, or impoverish an individual, or to prevent him from carrying on his business” are criminal conspiracies. Apparently this was the view accepted by Mr. Justice Astbury for, having found, as we think erroneously, that there was no trade dispute, he then reached the conclusion that the strike was “illegal and contrary to law.” The weight of modern authority is, however, against the view that mere combination can make an act, otherwise lawful, unlawful. Cozens-Hardy, M. R., said in *Gozney v. Bristol Trade and Provident Society*,⁶⁷ “Now, there is nothing illegal in

⁶⁵ 9 Q. B. D. 308, 314 (1882).

⁶⁷ [1909] 1 K. B. 901, 916. See Lord Justice Fletcher Moulton's judgment at 922: “But the real fallacy of the argument on the part of the defendants lies deeper. It proceeds on the proposition that strikes are per se illegal or unlawful by the law of England. In my opinion there is no foundation

a strike, although it may be attended with circumstances, such as breach of contract or intimidation, which make it illegal." A General Strike does not necessarily involve breach of contract or intimidation, and it is, therefore, doubtful whether it can, without additional facts, be held to be a criminal conspiracy. It is true that the definition of a criminal conspiracy is so wide that it seems to offer an easy way of dealing with a situation of which we disapprove. The following words of Chief Justice Marshall are, therefore, particularly apposite here: ⁶⁸

"It is more safe that punishment in such cases should be obtained by general laws, formed upon deliberation, under the influence of no resentments, and without knowing on whom they were to operate, than that it should be inflicted under the influence of those passions which the occasion seldom fails to excite, and which a flexible definition of the crime, or a construction that would render it flexible, might bring into operation."

If the General Strike did not constitute either treason, seditious conspiracy or ordinary criminal conspiracy then it is impossible to say that it was illegal. By using vague terms, by being careful to avoid specifying the particular crime committed, it has been possible to obscure the various questions involved.

We are strengthened in our view that the General Strike was not illegal by the debates in the House of Commons on the Emergency Powers Act, 1920. Sir John Simon has said ⁶⁹ that it is quite certain that "what Parliament had in mind in 1906 when it spoke of a 'trade dispute' and guaranteed immunity for Trade Union funds, was a strike of a lawful character." It is even more certain that Parliament in 1920 believed that a General Strike was legal. The Act was passed during the coal strike of that year and immediately after the railwaymen had threatened a lightning sympathetic strike. Mr. Bonar Law on the second reading referred to this threatened General Strike but did not suggest that it was illegal.⁷⁰ It was because such a strike was not criminal that the additional powers were needed by the government. When the bill was considered in committee, Mr.

for such a proposition. It is true that occasional dicta are to be found to the effect that combinations to better the conditions of labour are unlawful at common law, but the Courts have never accepted the law thus laid down, and eminent judges have expressed views to the contrary." And see Lord Bramwell, in *Mogul Steamship Co. v. McGregor Gow and Co.* [1892] A. C. 25, 47: "I have always said that a combination of workmen, an agreement among them to cease work except for higher wages, and a strike in consequence, was lawful at common law; perhaps not enforceable interest, but not indictable. The Legislature has now so declared."

⁶⁸ *Ex parte Bollman*, 4 Cranch, 75, 127 (1807) (cited by Professor Kenny, *op. cit. supra* note 47, at 291).

⁶⁹ *Op. cit. supra* note 6, at 8.

⁷⁰ *Op. cit. supra* note 55, at col. 1401.

Shortt, the Home Secretary, himself proposed the following amendment:⁷¹

“ ‘Provided that no such Regulation shall make it an offence for any person or persons to take part in a strike or peacefully to persuade any other person or persons to take part in a strike.’ ”

The purpose of these words was to make it clear that “the right to strike and the right to lead a strike” was preserved even during such an emergency as a General Strike.

This article has been limited to a discussion of the question whether the leaders of the General Strike were guilty of a criminal offense. We have not discussed the further question whether they were liable in tort. But if we are correct in our view that the General Strike was in furtherance of a trade dispute and that it was not criminal, then it follows that section 3 of the Trade Disputes Act, 1906, applies, and the leaders were, therefore, not liable civilly.

By arguing that the General Strike is legal under the law as it stands at present we do not mean that we favor the continuation of such an unlimited right to strike. The Emergency Powers Act, 1920, ought to be strengthened so that the State would in the future be in a position not only to cope with such an intolerable situation but also to prevent its arising. It is not until we realise how legally defenseless the public is at present that we can hope for adequate legislation. Vague suggestions of “illegality” are apt to prove misleading when reform in the law is under consideration.

⁷¹ *Ibid.* col. 1814.