LAMBERT RENERS.. .. ..APPELLANT; 1926

AND *May 14. *June 14.

HIS MAJESTY THE KING.. .. ..RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Criminal law—Strike—Picketing—Besetting and watching "wrongfully and without lawful authority"—Section 501 (f) Cr. C.

By s. 501 (*f*) of the Criminal Code everyone is guilty of an offence who "wrongfully and without lawful authority, with a view to compel any other person to abstain from doing anything which he has a lawful right to do, or to do anything from which he has a lawful right to abstain * * * besets or watches the house or other place where such other person resides or works or carries on business or happens to be."

The conviction of defendant thereunder for conduct in the "picketing" of coal mining premises in the course of a strike by certain mine workers, which conviction was affirmed by the Appellate Division of the Supreme Court of Alberta (Clarke J.A. dissenting), was affirmed by the Supreme Court of Canada, which held that there was evidence at the trial that the besetting and watching in which defendant was engaged was "wrongful and without lawful authority" within the meaning of the section.

Defendant's acts were wrongful and unlawful if the besetting and watching in which he, in common with his comrades or associates, was engaged, amounted to a nuisance or a trespass, or if the men who were besetting and watching constituted an unlawful assembly, and the conduct in question (discussed in the judgments) afforded evidence of each of these particulars.

While apparently the hill occupied by the party to which the defendant belonged was somewhat outside the mining property, the hills surrounding the mine in other directions belonged to the mine owners and the groups stationed there were trespassers, and since the picketing was carried on in pursuance of a common design or project to which all the strikers including defendant were parties, he must be held responsible for the trespasses equally with those who actually occupied the mine owners' property.

Per Idington J.: The section clearly forbids anyone from besetting another's house or place of business with a view to compel him to abstain from doing anything which he has a lawful right to do. Such an act, which at common law might be the basis of a civil action, was always at common law wrongful, and is in itself "wrongful and without lawful authority" within the meaning of the section unless some lawful authority (e.g., as often there might be with a sheriff, etc.) exists.

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*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

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APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), affirming (Clarke J. A. dissenting) the conviction of defendant under s. 501 (*f*) of the Criminal Code on a charge of wrongfully and without lawful authority besetting and watching the mine of a certain coal mining company with a view to compel the company to abstain from engaging or employing or continuing in its employment miners and employees other than those belonging to a certain trade union to which the defendant belonged. The charge is set out in full in the judgment of Idington J.

C. C. Robinson, K.C. and *H. A. F. Boyde* for the appellant.

W. S. Gray and *J. J. Frawley* for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.) was delivered by

NEWCOMBE J.—The appellant, with five others, was charged in two counts, under section 501 (*f*) of the Criminal Code, with the offence of wrongfully and without lawful authority besetting and watching the mine of the Alberta Block Coal Company, Limited, where the company carried on its business, with a view to compel the company to abstain from engaging or employing, or continuing in its employ, miners or employees other than those belonging to a trade union, known as the Red Deer Valley Miners' Union, to which the accused belonged. It will be convenient to set out the material part of the section, which is as follows:—

S. 501 (*f*): Every one is guilty of an offence punishable, at the option of the accused, on indictment or on summary conviction before two justices, and liable on conviction to a fine not exceeding one hundred dollars, or to three months' imprisonment with or without hard labour, who, wrongfully and without lawful authority, with a view to compel any other person to abstain from doing anything which he has a lawful right to do, or to do anything from which he has a lawful right to abstain,

* * * *

(*f*) besets or watches the house or other place where such other person resides or works, or carries on business or happens to be.

(1) 22 Alta. L.R. 81; [1926] 1 W.W.R. 810.

The case has been tried twice. At the first trial there was a jury, and all the accused were convicted, but upon appeal the conviction was set aside upon purely legal grounds, as we are informed, and, at the new trial, the accused, other than the appellant, pleaded guilty, and the latter, electing to be tried without a jury, was tried before McCarthy J., and again convicted. From this conviction he appealed to the Appellate Division of the Supreme Court of Alberta, where the appeal was heard and the conviction upheld by the judgment of the court, pronounced by the Chief Justice. Clarke J. however dissented, the court considering it convenient that his judgment should be pronounced separately, and it is the question of law involved in his dissent that is now presented upon the appeal to this court.

The Alberta Block Coal Company of Drumheller, in the Province of Alberta, belonged to an association of coal operators which negotiated an agreement with the executive of the United Mine Workers of America regulating working conditions, including the rate of wages to be paid to the miners. This agreement went into operation, but was subsequently amended by the parties in a manner to effect a reduction of 15% in the rates stipulated. The reduced rates were not acceptable to the majority of the Company's employees, and became the cause or occasion for a strike. The striking miners belonged to the Union of the United Mine Workers of America; they were dissatisfied with the reduction of the rates to which the executive of their union had agreed, and in consequence they decided to withdraw from it, and to set up a new union, which is known in the case as the Red Deer Valley Miners Union. Some of the company's employees however did not join in the agitation, but continued to work for the company as formerly, and the strikers established what they call pickets at the mine with a view, as they say, peacefully to persuade the miners who adhered to the company's service to cease work.

The locality of the mine is not as clearly described by the transcript of the evidence produced as might be desired, but there is in proof a plan of a limited area, and some of the witnesses give descriptions from which it would appear that the mine is situated in a narrow valley or coulee bordered by hills of considerable height, about 100 ft. to

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150 ft. above the level. The shaft is sunk on the property of the company, and in the neighbourhood is a power house, machine shop, wash house, offices, some dwelling houses and outbuildings, and, a few hundred feet distant, a store house and powder house. These buildings are all upon the property of the company, which is approached from the north by a waggon road, and by a railway spur or siding from the line of the Canadian National Railways. The disturbances began on 23rd June, 1925, and the offence is charged to have been committed between the 22nd and 27th days of June. The evidence is however directed particularly to the occurrences on the night of the 25th and the early morning of the 26th. On the 23rd a large delegation of the strikers went to the mine and there was some discussion. McDonald, who was one of them, says that they found men there wearing their working clothes and carrying their lunch buckets and he talked with several of these men about quitting work, but that they were not prepared to quit and went down to the mine. The following information is elicited from him:

A. I spoke to about ten or eleven, they were in line. Thomson and Fernet, I think I remember them all right, I don't remember the others.

Q. These men apparently were not on the 23rd prepared to quit work and join your union, is that right?

A. On the 23rd, they went down to the mine on the 23rd.

Q. They listened to your representations and then they decided to work, is not that the situation, or rather continue work?

A. Oh yes, they did, because, naturally enough, their boss, Jesse Gouge, who was standing there over them, and he tried to drive me away and I insisted I wanted to speak to the men and talk to them.

Q. You had the opportunity to speak to them?

A. Yes, I spoke to them.

The pickets were divided into groups and took their positions at places convenient for their purpose about the mine, from whence they continued to watch and beset the premises for several days. At night they occupied the hills surrounding the mine and overlooking the avenues of approach. Here they lighted wood fires which were kept burning throughout the night, and about which the men gathered, and where they were relieved at intervals. Inspector Nicholson of the provincial police, who was stationed at Drumheller, says:

Q. You have told us that these men had a smudge or fire there?

A. Yes.

Q. And that there were other smudges or fires on neighbouring hills around?

A. Yes.

Q. Were these hills around the A.B.C. Mine?

A. They practically surrounded it, yes.

He says, moreover, that:

A. These men were on the different hills in bunches of individuals and each bunch or crowd on each hill had a fire, a little bonfire or smudge. One of these hills was immediately behind the buildings at the A.B.C. premises, that would be immediately north. On account of a complaint received earlier on the 25th and on account of noises which I had heard in the vicinity of a powder house belonging to the A.B.C. Mine on the night of the 25th, I decided to remove the men on this particular hill that I speak of.

Asked whether there was any means of communication between the various parties on the hills, the witness answers that

they continued to shout to one another from one hill to another. One party would shout to one hill and it would be answered, and the call would go practically round all of the crowd.

Inspector Nicholson sent three of his constables at about, or shortly after, midnight of the 25th, to occupy separate positions along the roadway at the foot of the hill immediately to the north. When these constables, or two of them, were perceived by the men on the top, they were greeted with insult, curses and threats. They made no response, but remained in their respective positions, and immediately afterwards five of those on the top were taken into custody by Inspector Nicholson and other constables who had approached under cover of the darkness from the rear. The appellant however ran down the hill where he stoned one of the constables stationed below, who pursued him calling upon him to stand, and was arrested after he had been wounded by a shot from the constable. During the night previous to the coming of the police, there had been ten or fifteen men upon this particular hill, but apparently the six men charged were the only ones there at the time of the arrest.

The trial judge, in convicting the appellant, delivered a somewhat lengthy judgment. He referred to the cases of *Reg.* v. *Hibbert* (1), and *Reg.* v. *Bauld* (2). He said that in his view the conduct of the accused and the men with

(1) 13 Cox's Cr. C. 82.

(2) 13 Cox's Cr. C. 282.

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whom he was associated went far beyond the conduct of the men concerned in these cases, and that

I cannot look on his conduct as peaceful picketing, having regard to all the surrounding circumstances and certainly the conduct was such as to operate in the mind of the men who were going to work and to operate on the mind of the operators as to whether or not to carry on the work in the mine.

The learned Chief Justice, pronouncing the judgment of the Appellate Division, relied upon *J. Lyons & Sons* v. *Wilkins* (1), and the same case, as reported upon appeal after the trial (2), and he considered the case of *Ward, Lock & Co.* v. *The Operative Printers' Assistants' Society* (3), which, it had been argued, was not in complete accord with the *Lyons Case*. In conclusion, however, he said that

a picketing effected in the way this was—to constitute a menace and practical compulsion by moral force, even if no physical force were contemplated, as to which one might have doubts, would not be such a picketing as would be warranted and, therefore, would be wrongful.

He quoted the finding of the learned trial judge and he said

with this finding, which in my opinion, is quite justified, the case does not seem to fall within the qualifications suggested in the *Ward, Lock Case* (3).

Clarke J., the dissenting judge, agreed

that the defendant should be held responsible as one of the watching and besetting party, engaged in what is commonly called picketing, and that he, with the others charged, did, with a view to compel another person to abstain from doing something which he had a lawful right to do, or to do something from which he had a lawful right to abstain, beset or watch the place where such other person works or carries on business within the meaning of s. 501 (*f*).

But he found difficulty in saying that such picketing was wrongful or without lawful authority; or, as he puts it, "in other words that peaceful picketing is wrongful". He reviewed the evidence, as to which he appears to take a view more favourable to the appellant than that which seems to be held by the majority of the court. He said that the *Ward, Lock Case* (3) as applied in the later case of *Fowler* v. *Kibble* (4), seems to cast considerable doubt upon the correctness of the decision in the *Lyons Case* (2) and therefore he concluded, adopting what he takes to be the result of the *Ward, Lock Case* (3), that the element of wrongfulness is lacking in the present case, and he would therefore allow the appeal.

(1) [1896] 1 Ch. 811.
(2) [1899] 1 Ch. 255.
(3) [1906] 22 T.L.R. 327.
(4) [1922] 1 Ch. 487.

In view of the nature of the dissent and seeing that the jurisdiction of this court in criminal appeals is limited to questions of law, which are the subject of difference below, the point which this court has now to determine is in reality whether there was evidence at the trial that the watching and besetting in which the appellant was engaged was wrongful and without lawful authority. Upon this point I entertain no doubt.

In the *Lyons Case* (1) the Court of Appeal upon both occasions considered the interpretation of s. 7, subs. 4 of the Conspiracy and Protection of Property Act, c. 86 of 1875, which corresponds, with unimportant variations, with s. 501 (*f*) of the Criminal Code, upon which the present charge is laid. It is explained by the concluding clause of s. 7 of the *Conspiracy and Protection of Property Act* that

> 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.

But this clause is not embodied in the Criminal Code, and for that reason, as well as because of the facts in proof, it has no application to the case now under review.

The Master of the Rolls (Lord Justice Lindley) considered that to watch and beset in order to compel caused a nuisance, and he found upon the evidence that there was a nuisance. But in the *Ward, Lock Case* (2) Moulton L.J. was of the opinion that there might be a sort of compulsion which would not be wrongful or illegal and therefore that the conclusion of the Master of the Rolls was too broad; he did not however deny its application to the particular case which the Master of the Rolls had in hand, and these great judges were in perfect agreement that it was necessary to establish, in one way or another, that the watching and besetting was done wrongfully and without legal authority.

In the *Ward Lock Case* (2) the defendant had stationed pickets to watch the plaintiffs' printing works for the purpose of inducing the workmen employed by the plaintiffs to join the union, and then to determine their employment by proper notices, the object being thereby to compel the plaintiffs to become employers of union men, and to ab-

(1) [1899] 1 Ch. 255. (2) 22 T.L.R. 327.

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stain from employing non-union men; the report states that this was carried out without causing, by violence, obstruction or otherwise, a common law nuisance. Moulton L.J. said, as reported:—

> In my view that which decides the question is that there is no evidence of any improper or illegal acts, or, indeed, of any acts whatever, by any of the pickets sent by the defendants * * *. I wish to add that, in my opinion, there is throughout a complete absence of evidence of anything in the nature of picketing or besetting which could constitute a nuisance. It appears that the discharged workmen loitered about for a day or two after leaving work, a thing which is not unlikely to happen, and that they were at times joined by others, but there is no suggestion even by the plaintiffs' witnesses that any annoyance or molestation took place, and the evidence to the contrary is overwhelming.

He referred to the fact that, at the request of the plaintiffs, the police had placed special patrols outside their premises during the period of the dispute, but that none of the police had been called as witnesses by the plaintiffs, and that the inspector and a sergeant, called by the defendants, had shown that there was nothing which could give any ground for complaint. This decision is referred to and followed as an important one in *Fowler* v. *Kibble* (1), but, for the purposes of the present case it decides no more than I think was decided by the Master of the Rolls in the *Lyons Case* (2). The judgments concur in the view that watching or besetting, if carried on in a manner to create a nuisance, is at common law wrongful and without legal authority. In the *Lyons Case* (2) the Court of Appeal found the essential facts to constitute a common law nuisance. In the *Ward Lock Case* (3) they found that the sort of picketing there in proof afforded no evidence of a nuisance, and these cases do not really assist in the determination of the present question, which depends upon its own facts, except in so far as they affirm, what is evident by the statute itself, that if picketing be carried on in a manner to create a nuisance, or otherwise unlawfully, it constitutes an offence within the meaning of the statute.

Coming now again to the facts in the present case, the acts with which the appellant is charged were wrongful and unlawful if the watching and besetting in which he, in common with his comrades or associates, was engaged amounted to a nuisance or to a trespass, or if the men who

(1) [1922] 1 Ch. 487. (2) [1899] 1 Ch. 255.
(3) 22 T.L.R. 327.

were watching and besetting constituted an unlawful assembly, and there is evidence as to each of these particulars which ought not to be overlooked.

There was a large number of men engaged; a crowd was assembled at the Atlas crossing to the north of the company's works; pickets in considerable numbers were stationed at every avenue of approach; they remained in position with reliefs uninterruptedly by night as well as by day; they lighted fires on hilltops surrounding the mine, shouting back and forth from one group to another. On one occasion at the very entrance to the mine one of these men, according to his own testimony, insisted upon his endeavour to persuade workmen, who were there in their working clothes and with their lunch baskets, from going into the mine, notwithstanding that their foreman was present and tried to drive him away.

To the southeast of the shaft and the power house at a distance of about 800 feet is the powder house, situated in a narrow spur or offshoot of the coulee to the southward of the railway. This building is at the base of one of the surrounding hills, and if, as Inspector Nicholson testifies, the hills on which the fires were lighted practically surrounded the mine, some of them must have been very near to the powder house. He tells us that crowds of men continued on these hills throughout the whole of the 25th from seven o'clock in the morning, and that it was because of a complaint and noises which he heard in the vicinity of the powder house that he decided to remove the men from the hilltops. He says he intended to remove "all these different crowds of men," but to begin at the particular hill where he found the appellant. It will, of course, be realized that, as these hills were at considerable distances, the shouting from one hill to another must have been vociferous, and moreover the danger of open wood fires in the neighbourhood of the powder house and other buildings of the company was in itself a cause for apprehension.

Now while apparently the hill which was occupied by the party to which the appellant belonged was somewhat to the northward of the northern limit of the company's property, the hills surrounding the mine in other directions belonged to the company and the groups stationed there were trespassers, and, since the picketing was so carried

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on in pursuance of a common design or project to which all the strikers including the appellant were parties, he must be held responsible for the trespasses equally with those who actually occupied the company's property.

Moreover, while it is explained, with remarkable agreement on the part of the striking miners, that the purpose of their assembly at and about the mine was peacefully to endeavour to persuade the miners who continued to work to quit the service of the company and to join the new union, in order, as it is said, to maintain the standard of living, the character and purpose of this assembly is, I think, better evidenced by its acts and course of conduct than by the statements of its members as to what their intention was; and the numbers of men who assembled, their distribution about the premises, including the company's property, their attendance there by day and by night, the fires, the shouting, their reception of the police, their threats and conduct when the police approached, afford cogent evidence, not only of a nuisance, but also of an unlawful assembly, Hawkins Pleas of the Crown, 8th ed., Bk. 1, c. 28, ss. 4, 5 and 9; *Reg.* v. *Vincent* (1); *Reg.* v. *Neale* (2).

It is not for this court to judge the evidence, except to determine whether there be any. The appellant's case fails if evidence be found which the trial judge was bound to consider tending to shew that the watching and besetting, which is conclusively found to have taken place, was wrongful and without lawful authority, and I think there is such evidence in each of the aspects to which I have referred.

It was suggested also that the pickets were endeavouring to induce the company's workmen to break their contracts of service, but the evidence does not, in my opinion, go far enough to justify a finding that there were such contracts.

I would dismiss the appeal.

IDINGTON J.—This is an appeal from the judgment of the Appellate Division of the Supreme Court of Alberta maintaining the conviction of the appellant who was tried before Mr. Justice McCarthy without a jury and found guilty of the following charges laid against him and five others, that is to say that they did at Newcastle in the Judicial District of Calgary

(1) 9 C. & P. 91, 109.

(2) 9 C. & P. 431, 435.

between the 22nd and the 27th days of June, 1925, wrongfully and without lawful authority with a view to compelling another person, The Alberta Block Coal Company Limited, a body corporate, to abstain in the carrying on of its business from engaging or employing or continuing in its employment miners and employees other than those belonging to the Red Deer Valley Miners Union, or to such union as the defendants themselves belonged. The Alberta Block Coal Company Limited then having a lawful right to engage or employ or continue in its employment miners or employees without restriction as to their membership in the union or unions aforesaid, or to compel the said company to engage and employ and continue in its employment only such miners and employees as belonged to said union, which members the said company had a lawful right to abstain from employing, did beset and watch the place where the said company carries on business, to wit: the mining premises of the said company.

And further stand charged that they at the same time and place wrongfully and without lawful authority with a view to compel Tom Fernet, William Hopkins, Joseph Thompson, Robert Brownell, and others, to abstain from doing what they had a lawful right to do, to wit: to work for the Alberta Block Coal Company Limited, did beset and watch the place where the said Tom Fernet, William Hopkins, Joseph Thompson, Robert Brownell and others worked, to wit: the premises of the Alberta Block Coal Company Limited's mine.

The accused parties had been tried before Mr. Justice Boyle with a jury and found guilty but for some reason or other a new trial was directed.

The others then pleaded guilty but the present appellant elected to be tried before Mr. Justice McCarthy without a jury.

The said charges were laid under section 501, subs. (*f*) of the Criminal Code.

The said section 501 reads as follows:—

501. Every one is guilty of an offence punishable, at the option of the accused, on indictment or on summary conviction before two justices and liable on conviction to a fine not exceeding one hundred dollars, or to three months imprisonment with or without hard labour, who, wrongfully and without lawful authority, with a view to compel any other person to abstain from doing anything which he has a lawful right to do, or to do anything from which he has a lawful right to abstain,

(*a*) uses violence to such other person, or his wife or children, or injures his property; or

(*b*) intimidates such other person, or his wife or children, by threats of using violence to him, her or any of them, or of injuring his property; or,

(*c*) persistently follows such other person about from place to place; or,

(*d*) 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,

(*e*) with one or more other persons, follows such other person, in a disorderly manner, in or through any street or road; or,

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(*f*) besets or watches the house or other place where such other person resides or works, or carries on business or happens to be. 55-56 V, c. 29, s. 523; 4-5 Ed. VII, c. 9, s. 3.

The essential parts thereof to be considered herein are the following lines:—

> who, wrongfully and without lawful authority, with a view to compel any other person to abstain from doing anything which he has a lawful right to do, or to do anything from which he has a lawful right to abstain, * * *
>
> (*f*) besets or watches the house or other place where such other person resides or works, or carries on business or happens to be.

This seems to me a clear and explicit expression in plain English forbidding anyone from besetting another's house or place of business with a view to compel him to abstain from doing anything which he has a lawful right to do.

Each of the preceding subsections from (*a*) to (*e*) inclusive, implies violence or improper conduct towards another of some kind for which the party so doing might be punishable otherwise in law. But there is no such necessary implication in simply watching a house.

These men were, clearly as noon-day, doing what the subsection (*f*) forbids, unless in the case of one having lawful authority to beset or watch. For example, the sheriff or his officers often have lawful authority to go very far in discharging their duty—even to the extent of besetting or watching a house. No pretence of authority is shewn here. None existed. Indeed the accused were in fact trespassers, I imagine, on the property of the coal company. And surely the company in question carrying on business in and on the premises in question, had a perfect right to refuse to employ men belonging to the Red Deer Valley Miners' Union.

And can there be a shadow of doubt that the men taking part in the besetting and watching complained of were doing so with a view to compel said company to abstain from pursuing their business without the aid of workmen belonging to the said Red Deer Union.

Compel is a word of various shades of meaning, for example, the Century Dictionary gives some five different shades, but let us select no. 1, which reads as follows:—

> 1. To drive or urge with force or irresistibly; constrain; oblige; coerce, by either physical or moral force: as, circumstances *compel* us to practise economy.

Or, let us turn to Murray's New English Dictionary, and we find a different application of it and select no. 2 b, which reads as follows:—

> b. To constrain (an action); to bring about by force, constraint or moral necessity; to exact by rightful claim; to demand.

Surely either one or other of these expressions can be acted upon herein, and was intended to be acted upon and applied in cases such as herein presented if we leave aside all other features than the proof of besetting and watching.

It does not in either necessarily imply physical violence as the means of compulsion.

Ever since the effect of said section as it appeared in the R.S.C. 1886, was changed by dropping subs. 2 of s. 12 of c. 173, in which the words were as follows:—

> 2. Attending at or near or approaching to such house or other place as aforesaid, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section.

the law has been simplified and I respectfully submit made clear.

On the other hand in the English Act from which in its original state our Act was first taken there was a provision very similar to the said section 2, almost identical, which continued part of the English Act and hence renders English cases turning thereon (save and except *Lyons* v. *Wilkins* (1), I am about to refer to) of very little service to any Canadian case since our Criminal Code of 1892 was framed and, as already stated, the above quoted section dropped out.

In 1906 the English *Trades Disputes Act* was passed and distinctly enacted as follows, in the second section thereof:—

> 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.

Other provisions of the same Act tended still more to render it impossible to make any English case such as herein in question of any helpful service.

(1) [1899] 1 Ch. 255.

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I must also say that a criminal intent and object might well be suspected in much presented to us in the evidence but as I understand the ground of Mr. Justice Clarke's dissent, which is the ambit of our jurisdiction herein, it is quite unnecessary to enter into that feature of this case to which I have just referred.

In the judgment of Mr. Justice Clarke, so far as dissenting, he makes clear what he means as follows:—

> I think the real difficulty in this case consists in the interpretation of the words in s. 501 "wrongfully and without lawful authority."
>
> I agree that the defendant should be held responsible as one of the watching and besetting party engaged in what is commonly called picketing and that he with the others charged did with a view to compel another person to abstain from doing something which he had a lawful right to do or to do something from which he had a lawful right to abstain, beset or watch the place where such other person works or carries on business within the meaning of s. 501 (*f*) but my difficulty is in saying that such picketing is wrongful and without lawful authority, or in other words that peaceful picketing is wrongful.
>
> If it is not wrongful then, in my opinion, the conviction cannot be supported upon the evidence. There is no evidence that during the night when the conduct of the defendant is complained of there was any interference with either the mining company or its workmen, or any violence, intimidation or threats; Lewis McDonald was called as a Crown witness and the trial judge states the situation upon which he apparently bases his judgment as follows: "Lewis McDonald in his evidence tells us that the so-called Canadian Union proposed to picket the A.B.C. Mine to tell the miners it was their duty to try to persuade the mine workers not to go to work so as to not reduce the standard of living. He testifies that during the time the accused and others were picketing the A.B.C. Mine he was on the picket during the 23rd and on the morning of the 24th of June, 1925. The purpose of the picket was to interview the men employed in the A.B.C. Mine and persuade them not to go to work. He admitted interviewing some of them himself. Cecil Terris, in his evidence, says they were supposed to go down to the mine and if they met anybody going down to work to ask them to join the new union. * * * So that apparently the accused were there to persuade the miners not to go to work or to prevent the A.B.C. Company from employing men who did not belong to the new union and to prevent them from hiring men who belonged to the United Mine Workers of America."
>
> If the picketing itself, that is, the watching or besetting was not unlawful I cannot see that the fact of the picketers being distributed in different places and having bonfires on a dark night can make the watching wrongful.

In *Rex ex rel Barron* v. *Blachsawl; Rex ex rel Barron* v. *Hangsjaa* (1), where the conviction of the appellant on a similar charge was affirmed by this court, *Lyons & Sons* v. *Wilkins* (2), was strongly relied upon. I understand the court there held that watching and besetting, however peaceable, was a common law nuisance and, therefore, wrongful and that the qualifying words in s. 7 as to obtaining and communicating information alone rendered it rightful. If that decision stood unchallenged I would not hesitate to say it was conclusive of the present appeal in favour of the Crown not only by reason of the absence of the qualifying words in our section 501 but because if they were still in the Act they do not extend to persuading which was part of the plan here.

The later case of *Ward, Lock & Co.* v. *The Operative Printers' Assistants' Society,* February, 1906 (3), applied in *Fowler* v. *Kibble* (4), seems to me to cast considerable doubt on the correctness of the decision in *Lyons* v. *Wilkins* (2). It was not referred to in the *Blachsawl Case* (1), and it is said that it was not brought to the attention of the court which I think is correct. I gather from that case that peaceable picketing was not considered to be wrongful at common law and was not made illegal by section 7 of the Imperial Act and if that be correct it can scarcely be wrongful under our s. 501. But for the fact that owing to the general importance of the question the defendant is desirous of obtaining the opinion of the Supreme Court of Canada, I would say that the question is determined by our former decision but considering it a proper case for an appeal I have decided to dissent from the judgment of the majority and adopting what I take to be the result of the *Ward, Lock Case* (3) would hold that the element of wrongfulness is lacking in this case and would, therefore, allow the appeal and quash the conviction.

The foregoing quotation from his judgment shows that all involved in this appeal, by reason of the dissent of Mr. Justice Clarke, is the doubt he has as to the meaning of the words "wrongfully and without lawful authority" in the part of section 501 which I have quoted above.

He suggests, as had been suggested long ago by others, that "besetting and watching" a house or premises is not in law wrongful, and hence the basis of the said subsection (*f*) renders it absolutely inoperative.

The answer to such an objection is that we must, if possible, give it some efficacy, and to do that we must ask ourselves if it is correct that the act of so besetting and watching never was, in law, wrongful.

I answer that such a course of conduct always was at common law wrongful, and might be the basis of a civil action, and hence clearly wrongful.

(1) 21 Alta. L.R. 580.
(2) [1899] 1 Ch. 255.
(3) 22 T.L.R. 327.
(4) [1922] 1 Ch. 487.

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Such was the holding of the court in the case of *J. Lyons & Sons* v. *Wilkins* (1), and the judgment of Lord Justice Lindley, M.R., at pages 266 and 267, deals with exactly what has troubled Mr. Justice Clarke herein and, I submit, the passage therefrom on page 267, which reads as follows:—

> But it is not necessary to shew 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. This is the principle always applied in criminal prosecutions in which the words "feloniously," "wrongfully," or "maliciously" are introduced into the charge, and have to be proved before the person accused can be properly convicted: see Archbold's Criminal Pleadings and Evidence, 19th ed. pp. 64-7. That this is the correct method of construing and dealing with the words "wrongfully and without lawful authority" in s. 7 is, in my opinion, perfectly plain if attention is paid to sub-heads 1, 2, 3, and 5, to which those words are as applicable as they are to sub-head 4. If the overt acts mentioned in sub-head 1, for example, i.e., using violence or intimidation, are proved, and it is proved that they were done with a view to compel, etc., and there is no reasonable ground for justifying them, it is unnecessary to give further evidence to prove that they were committed "wrongfully and without legal authority"; see *Reg.* v. *McKenzie* (2). If this be true of all the sub-heads except 4 (watching and besetting), I can discover no justification for giving the words "wrongfully and without lawful authority" any different meaning or effect when applied to 4—namely, "watching or besetting."

Others in like manner in same case and in a further appeal refer to this and express analogous opinions, and such was taken to be the law until the case of *Ward, Lock & Co.* v. *The Operative Printers' Assistants' Society et al* (3), in 1906, 26th February. Even in that Stirling J. expresses himself as if the court were in accord with what Lord Justice Lindley had said in the *Lyons Case* (1). It was the provision of exception that created the difficulty.

By our Canadian courts, cases were decided in Manitoba and Alberta adopting the law as settled by *Lyons* v. *Wilkins* (1) and other cases.

This I accept as good law yet, and more especially so when the subsequent paragraph above referred to had been eliminated in framing our Criminal Code in 1892.

It became increasingly more difficult to do so in England by reason of the *Trades Disputes Act,* to which I refer above. Indeed that rendered it almost quite impos-

(1) [1899] 1 Ch. 255.

(2) [1892] 2 Q.B. 519, at pp. 521-3.

(3) 22 T.L.R. 327.

sible for us to follow the later English decisions. I imagine said Act was a result of the *Ward, Lock Case* (1).

I need not elaborate further but submit the foregoing considerations remove all doubts such as in question, and therefore am of the opinion that this appeal should be dismissed.

I may add, however, that having read the entire case I find there is evidence of actual violence, trespass and abusive and vile language, even in the presence of policemen keeping guard, which removes all doubt in law and in fact of the guilt of the appellant, who ran away on hearing someone approach. Why, if innocent, do so?

I have out of respect to the learned judge below, dissenting, tried to confine the expression of my opinion above to the point in which he expresses doubt, but, if others think we should go beyond, I think it as well to state concisely my conclusions if needed.

Appeal dismissed.

Solicitors for the appellant: *McIntyre & Sandercock.*

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