

Workers' Conspiracies in Toronto, 1854-72

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Workers' Conspiracies in Toronto, 1854-72

Paul Craven

EVERY STUDENT OF CANADIAN labour history knows that when Toronto's typographers went on strike for the nine-hour day in 1872, George Brown and the Master Printers' Association had their leaders arrested on criminal warrants. The charges were laid on the strength of R.A. Harrison's opinion that combinations of workers to regulate wages or hours of labour were criminal conspiracies at common law. With the passage of the Trade Unions Act, Ontario's Attorney-General abandoned the prosecution, and so Harrison's opinion remained untested by the courts.¹ Nonetheless, it was accepted by the historians.² My purpose in this essay is to show that Harrison was wrong.

My thesis is essentially a negative one: that trade unions were not unlawful in Canada before the passage of the Trade Unions Act. There are two branches to the argument. The first turns upon what the courts in Toronto did when they were confronted with evidence that would have warranted convictions if unions were criminal conspiracies. The second turns upon an analysis of the English case-law, including the cases Harrison relied upon in stating his opinion. In other words, I argue first that the courts in Toronto behaved as though combinations to raise wages or lessen hours were not criminal conspiracies, and second that this behaviour did not flow from a misapprehension of what the law required. Finally, I review the proceedings in the 1872 typographers' case to explain why, notwithstanding all this, it was possible for the police magistrate to send the printers to trial on a "wages" conspiracy alone.

¹ Ontario Archives, York County, Criminal Assize Clerk's case files, 1872, McMillan *et al.* The reverse of the file is marked "Prosecution abandoned by authority of Attorney General."

² Cf. R.H. Coats, "The Labour Movement in Canada," in A. Shortt and A.G. Doughty, eds., *Canada and its Provinces*, IX (Toronto 1914), 294-6; J.M. Connor, "Trade Unions in Toronto," in J.E. Middleton, *The Municipality of Metropolitan Toronto: A History*, II (Toronto 1923), 561-2; Margaret Mackintosh, *Trade Union Law in Canada* (Ottawa 1935), 17; H.A. Logan, *Trade Unions in Canada: Their Development and Functioning* (Toronto 1948), 40-2; Donald Creighton, *John A. Macdonald: The Old Chiefain* (Toronto 1955), 124; Bernard Ostry, "Conservatives, Liberals and Paul Craven, "Workers' Conspiracies in Toronto, 1854-72," *Labour/Le Travail*, 14 (Fall 1984), 49-70

This essay is necessarily quite technical. Its principal justification is its claim to correct a widely-shared misconception about nineteenth-century labour law. While the argument has broader implications for explaining the role of the law in Canadian labour relations in the period, to interpret them here would take us far beyond the topic of criminal conspiracy and the narrow purpose of this paper. The broader interpretation is better left for another day.

The period of the essay is 1854-72. The rationale for the latter date should be self-evident: it is the year that Parliament declared trade unions not to be criminal conspiracies, and thereby disposed of the narrow issue considered here. The beginning date, 1854, was chosen simply because it is the year of the earliest Toronto trade union conspiracy case located so far.

There is not a single case of criminal conspiracy to raise wages (or lessen hours) in the Canadian law reports or digests in the period. This in itself is of some significance for my argument. My evidence about what the courts did is based on local police and court records and newspaper accounts, all from Toronto.³ It seems reasonable to assume that the courts in Toronto would be at least as familiar with what the law required as those elsewhere, and there was certainly no shortage of lawyers to keep them informed about what courts everywhere were up to. Nonetheless, the focus on Toronto is a limitation in that it is possible, although perhaps unlikely, that courts elsewhere in the province proclaimed the law differently.

I

CONSPIRACY IS BY DEFINITION a collective offence: like rioting and mutiny its commission requires two or more offenders. As one of the magistrates' manuals put it, "a conspiracy must be by two persons; one cannot be convicted

Labour in the 1870's" *Canadian Historical Review*, 41 (1960), 99-111; J.M.S. Careless, *Brown of the Globe*, 11 (Toronto 1963), 294-6; Charles Lipton, *The Trade Union Movement of Canada, 1827-1959* (Toronto 1967), 30-2; Jack Williams, *The Story of Unions in Canada* (n.p. 1975), 17-8; G.S. Kealey, *Toronto Workers Respond to Industrial Capitalism, 1867-92* (Toronto 1980), 133-4; Desmond Morton with Terry Copp, *Working People: An Illustrated History of Canadian Labour* (Ottawa 1980), 24-5; S.F. Zerker, *The Rise and Fall of the Toronto Typographical Union, 1832-1972* (Toronto 1982), 84; Eugene Forsey, *Trade Unions in Canada, 1812-1902* (Toronto 1982), 98-9; and (mea culpa) Paul Craven, 'An Impartial Umpire: Industrial Relations and the Canadian State, 1900-11' (Toronto 1980), 167-9. References are to pages dealing with the printers' arrest and "trial." Bryan Palmer has recently added to the confusion by implying that the British combination acts were in force in Canada: see his *Working-Class Experience: The Rise and Reconstitution of Canadian Labour, 1800-1980* (Toronto 1983), 37 and 69.

³ The chief primary sources were the records of the Toronto police court, housed at the Toronto City Archives and the Toronto Police Museum, and the Criminal Assize Clerk's case files at the Ontario Archives. The *Toronto Globe* and *Leader* were read for the entire period and other local newspapers were examined for specific dates.

of it, unless for conspiring with persons unknown, or who have not appeared, or are since dead."⁴ While the legal texts have it that the combination itself is the "gist of the offence,"⁵ it is plain that combinations become conspiracies only when their objects or their means are offensive to the law. When the object of the combination is the commission of a crime — extortion, for instance — the combination is a criminal conspiracy. When the object is a tort — for example, procuring breach of contract — the combination is a civil conspiracy.⁶ When the means employed by the combination to achieve even lawful ends are criminal in themselves — the obvious examples are those involving violent means — the combination is a criminal conspiracy.

All these instances in which either the means or the ends would be sanctionable, whether pursued by an individual or by a combination, are quite straightforward. A complication arises, however, if the law considers ends or means pursued by a combination to be sanctionable although the same means or ends pursued by an individual would be innocent. The classic example is the workers' combination for increased wages. Leaving aside special statutes fixing wage rates in particular trades, the law did not prohibit individual wage bargaining. As will be seen, however, some nineteenth-century British judges held that combinations to raise wages amounted to criminal conspiracies, not because the attempt to bargain over pay was individually criminal, but because the combination in itself offended against their notion of what constituted "public policy." The first question to address here is whether judges in Toronto put such views into practise. Later it will be necessary to analyze the

⁴ John McNab, *The Magistrates' Manual* (Toronto 1865), 184. Some of the magistrates' manuals claimed that combinations to raise wages were criminal, but these texts (which were for the most part more or less conscientious adaptations of English models) were without authority and must be used with care. McNab's passing reference to wages conspiracies (*ibid.*, 183) probably had its origin in an English text, and in a reference to a statute not in force in Canada. For a discussion of the Ontario reception of the English labour statutes see my "The Law of Master and Servant in Mid-Nineteenth-Century Ontario," in D.H. Flaherty, ed., *Essays in the History of Canadian Law*, I (Toronto 1981), 181-7. Sir William Holdsworth's claim that combinations to raise wages were criminal conspiracies is advanced in the context of a discussion of the wage-regulation statutes (XI *History of English Law* 477ff).

⁵ *R. v. O'Connell* (1844), 8 *English Reports* (H of L) at 1092 (and see below).

⁶ Yet because of the public policy doctrine (discussed in the next paragraph), the boundary between criminal and civil conspiracy is not so clearly drawn: where judges determine that private wrongs are public wrongs as well, torts may become crimes. Cf. Sidney and Beatrice Webb, *Industrial Democracy* [1897] (New York 1965), 857: "The case in doubt is that in which a combination for lawful purposes, contemplating and using only lawful means, violates some actionable private right. Such a combination, besides giving ground for a civil action, might, in the opinion of some authorities, be indictable as a criminal conspiracy, if the private right is one in which the public has a sufficient interest." For a brief discussion of civil liability in Canada in the same period, see my *An Impartial Umpire*, 197-205.

English cases to show that they did not require the Canadian courts to characterize trade unions as criminal conspiracies.

Table 1 lists eleven conspiracy prosecutions arising out of workers' collective action in Toronto between 1854 and 1872. With the exception of the first case listed (about which more below), the Table is based on newspaper accounts in the *Globe* and the *Leader*, supplemented in the few instances where they survive by official court records. It is evident at once that conspiracy prosecutions were by no means so unusual in Toronto's mid-nineteenth-century labour relations as some of the literature suggests.

The first case listed is one that has been fairly widely noticed, albeit in passing, by historians of the 1872 affair. It is said that George Brown had used the conspiracy law once before in attacking an 1854 strike, and that the accused had been convicted but sentenced to pay only a token fine of a penny each. But the 1854 printers' conspiracy seems, on the evidence available, not to have happened. There is no reference in the newspapers of that year to such proceedings, beyond this comment in the *Leader* (which, in 1854, was committed to common cause with the other master printers): "The *Colonist* apprentices, too, it seems, have been enticed away. If proof of this be obtained a criminal case of conspiracy will be made out." But there is no contemporary evidence that this threat was carried out.⁷

Two sources are usually given for the 1854 conspiracy. The first is the *Leader* for 1 April 1872, during the contest of that year. But the paper did not claim that Brown had resorted to conspiracy prosecutions before. It published a letter from "An Old Reformer," tracing the history of the Toronto printers' organization since 1832, and saying that during a past strike (probably, by context, the 1854 strike), the printers had been "assailed by the Browns as disreputable characters and conspirators . . . he denounced the journeymen as conspirators." The *Leader* conveniently ignored its own role in the 1854 strike, of course, but it did not state explicitly that criminal charges had been laid. It is difficult to see what difference there is between Brown "denouncing" strikers as conspirators, and the *Leader* threatening that criminal charges were to be laid.

The second source cited for the 1854 conspiracy is J.M. Connor's brief account of "The Early Printers' Unions of Canada," published in the International Typographical Union's convention souvenir for 1924. Connor stated, without references, that "The first strike of the printers of Toronto occurred in a newspaper office. That was in the year of 1854. Some were arrested for conspiracy, because they belonged to a society, and they were fined in the sum of one penny each. In the end the newspapers were unionized." This seems to be the source from which all later references to the token fine have sprung. Connor was wrong about many things — including his assertion that the 1854 strike was the first — and in the absence of any other evidence whatsoever

⁷ *Leader*, 6 June 1854.

TABLE I Toronto Conspiracy Prosecutions, 1854-72

Month/ Year	Complainant	Defendants	Object of Combination	Outcome
06/54?	George Brown?	Printers?	Entice apprentices away?	Fines of a Penny each? ¹
07/54	Thomas Hutchinson	21 journeymen tailors	Prevent journeymen working	7 committed for trial; 6 convicted and fined £5 or jail in default
01/58	Joseph James	8 shoemakers	7 counts, including prevent complainant from working	All committed for trial; acquitted
10/58	H.B. Williams	14 cabmen	willfully destroying complainant's omnibuses	insufficient evidence to commit: 3 convicted of threatening
04/59	Councilman Finch	Several tailors	Refusal to work and coercing others not to work	withdrawn
05/66	Mr. Augustin	8 workers at Toronto Rolling Mills	preventing parties from working by means of threats	withdrawn; ringleader fined \$4 and costs
08/69	Captain Prince	4 or 5 cabmen	threatening to destroy an omnibus during strike	uncertain
01/71	Edward Gurney	2 moulders	Intimidate fellow workmen by threats to induce them to leave employment	committed and found guilty with recommendation for leniency
07/71	Beard Brothers	10 apprentice moulders	Desert service unless wages increased	Committed; Convicted at Assizes but reversed on reserved point
04/72	Messrs. Walsh & Lovey	9 sawmill workers	refusal to work, threatening other workers, damage mill	committed to trial
04/72	Master Printers' Association	22 printers	10 counts, including lessen hours of work	14 committed to trial

¹It is argued in the text that this case, which has been widely noticed in the literature, is apocryphal.

there seems no reason to believe that he was right about the conspiracy. It is worth noting that an earlier ITU convention souvenir, that for 1905, had carried a "Sketch of the Early History of No. 91" — the Toronto local — by John Armstrong, who had been one of the defendants in the 1872 prosecution. He mentioned the 1854 strike, but said nothing of conspiracy in connection with it. Unless new evidence emerges, it seems most likely that the 1854 conspiracy is itself no more than an element in the mythology of the 1872 strike.⁸

The other 1854 case is much better attested: perhaps the story of a printers' conspiracy arose from a confused memory of this one. Thomas Hutchinson, a master tailor, prosecuted 21 striking journeymen for conspiring to intimidate as many as 100 of his out-workers and for paying men to watch his premises and follow him about as he distributed the work. Seven tailors were committed for trial at the fall assizes, where the jury shortly returned a verdict of guilty against six (or possibly all seven) of them, who were then fined £1 each by Mr. Justice Burns. The verdict seems to have been reached on evidence of specific acts of intimidation rather than on the mere existence of a trade union: in his summing up, the prosecutor listed the acts complained of and said, "What had that to do with the Society. So far as he had looked at the rules of that Society it was a very praiseworthy one. Yet no one would say that the conduct of which these persons have been guilty of [sic] ought for one moment to be tolerated." The judge's charge to the jury was not reported, however, and no case-file has survived.⁹

A few weeks after this case was decided, a shoe manufacturer, John Polson, charged a former employee, William White, with assault. Some days after Polson discharged him, White had returned to the shop in order to talk to the

⁸ James McArthur Connor, "The Early Printers' Unions of Canada," *Souvenir Book of the 69th Annual Convention of the International Typographical Union, Toronto, August 11-16, 1924*; John Armstrong, "Sketch of the Early History of No. 91," *Souvenir Book of the 51st Annual Convention of the International Typographical Union, Toronto, August 14-20, 1905*. See also Armstrong's account of the 1872 affair in a 1907 letter to Edmund Bristol, published in R.H. Babcock, "A Note on the Toronto Printers' Strike, 1872," *Labour/Le Travailleur*, 7 (Spring 1981), 127-9, in which he made no mention of the 1854 strike but characterized the 1872 charges as having come "under the obsolete conspiracy Act." Connor's drafts are in the J.S. Woodsworth Memorial Collection, Fisher Library, University of Toronto. Box 7 contains a draft chapter on "the early trade unions," and the notes to this chapter appear to be those in a file labelled "Orders in Council." Note 'O' in this file is: "The Printers quit work, and Mr. Brown had them arrested for conspiracy because they belonged to a Trade Union, and they were fined in small sums (a penny each). In the end Mr. Brown was beaten for he was obliged to pay the enhanced price and employ union men." Connor's authority for this was the *Hamilton Spectator*, quoted in the *Toronto Leader*, 11 July 1872. Sally Zerker has anticipated my conclusion that the 1854 printers' conspiracy is apocryphal: *Rise and Fall* 343, n. 55.

⁹ *Leader*, 11 July, 13 July, 1 November, 6 November 1854; *Globe*, 17 July, 30 October, 4 November 1854.

men working there. Polson ordered him out, "as White was a member of the Shoemaker's Society, and he had reason to believe that his only business on the premises was to tamper with the workmen." A shoving match ensued, and Polson received a black eye. In fining White twenty shillings plus costs, and ordering him to find securities for good behaviour or go to jail, the Police Magistrate "made a few remarks upon the illegality of such combinations, and cited the recent verdict at the Assizes, on the Tailors' conspiracy, as a case in point." This left it somewhat unclear, then, whether the tailors were convicted on a conspiracy that was unlawful in its purposes or in the ends adopted to achieve them, a distinction which will become critical in assessing the status of the law.¹⁰

The shoemakers' prosecution of 1858 arose out of a strike, and began with the complaint of one journeyman, Joseph James, that eight of his fellow tradesmen "conspired together to overawe the complainant and to prevent him from working at his legitimate business; and that [they] did riotously assemble at the complainant's house, and . . . did then and there fire several shots through his house, and . . . break several panes of glass, and do other injury and damage to complainant's property." Police Magistrate Gurnett "pointed out the danger to the welfare of the city from such societies, alike ruinous to employers and employed," and sent them to the assizes, where the Grand Jury returned true bills. There were seven counts in the indictment: conspiracy to raise wages and assault James; assault in pursuance of a conspiracy to raise wages; riot and assault; riot and tumult; molesting workmen; intimidating workmen; and threatening workmen.

At their trial, the shoemakers proved alibis for the night of the riot, and they argued that they had put a watch on the strikebound shops merely to identify members of the union who were violating the strike, in order to expel them from membership. Mr. Justice Burns' charge was not reported, but the jury returned a verdict of not guilty. This seems to indicate that the mere existence of a combination to regulate wages was not considered to evidence a criminal conspiracy, for there was no doubt that the accused belonged to the society: it was their involvement with the unlawful means, the assault and riot, which was not proved.¹¹

The cabmen's conspiracies of 1858 and 1869 are on the margin of our theme: the accused were not employees of the prosecutor, but the issues at stake involved organized resistance to economic pressure as the city's cabmen vied with the omnibus companies. These incidents demonstrated once again the currency of the notion of unlawful combination in such circumstances. During the 1858 prosecution, Police Magistrate Gurnett complained about the "baneful effects of combinations," but the trade union element was not central to the

¹⁰ *Globe*, 10 November 1854.

¹¹ *Leader*, 12 January, 13 January, 15 January 1858; *Globe*, 11 January, 13 January, 15 January, 20 January, 23 January, 26 January 1858.

charges then or in 1869. Both cases turned on a conspiracy to commit a crime — threatening, assault, willful damage — rather than to effect a result that, bar the conspiracy, would have been lawful, although Gurnett's comment about "combinations" might have blurred the distinction.¹²

Councilman Finch charged several of the tailors whom he employed with refusing to work "unless he consented to certain terms dictated by them," and with using threats and intimidation to coerce others who were willing to work for him. When the case came to trial Finch withdrew the charges, stating that "the men having acknowledged they were in the wrong, he would not pursue the matter." Nevertheless, the Police Magistrate felt called upon to issue another warning about combinations:

Mr. Gurnett said that had the matter been followed and proved to his satisfaction he would have been under the necessity of sending it for decision to another tribunal. The law relative to combination or conspiracy among workmen was very severe. He trusted that he would hear no more of the matter and that in future, harmony would exist between Mr. Finch and his men.

The charge in the 1866 prosecution of eight workers at the Rolling Mills was similar: "confederating to prevent parties from working." The *Globe* explained the background, and in doing so affirmed the distinction between the two types of combination: "They had struck for higher wages — an act legitimate enough — but they went further, and by intimidation sought to prevent others from exercising their undoubted right to accept the wages refused by the malcontents." The charges against all but one were subsequently withdrawn. Samuel Boyd, "the chief of the party," pleaded guilty, "but said he was drunk at the time." Police Magistrate MacNabb fined him \$4 and costs, "remarking that the lightness of the punishment was in a great measure owing to the fact that the employers did not wish to prosecute, but rather that the offenders should be taught to conduct themselves properly in the future." The inference is that Boyd was convicted of threatening or assault; he could not have been convicted of conspiracy by himself. In any event, MacNabb lacked jurisdiction to try such a charge: as Gurnett had pointed out in the Finch case, that was a matter for another tribunal.¹³

Boyd's conviction, then, paralleled the convictions of two cigarmakers for assaulting a third in the course of a strike in 1867. The strikers were not charged with conspiracy but during the assault trial MacNabb felt called upon to offer some obiter comments:

The magistrate stated that he believed there was a union or society of cigar makers in the city which had fixed upon a certain scale of wages to be paid to cigar makers by their

¹² *Leader*, 1 November, 3 November 1858; *Globe*, 30 October, 1 November 1858. Cf. *Leader*, 22 October 1856, alleging a "conspiracy" of cabmen not to drive magistrate Gurnett or his household, on the supposition that he had informed against some of their number to the licence inspector. *Globe*, 18 August, 21 August, 30 September 1869.

¹³ *Globe*, 22 April, 26 April 1859, 9 May, 10 May, 11 May 1866; *Leader*, 10 May, 11 May 1866.

employers, under which workmen would not be allowed to work, without being considerably harassed by their fellow workmen. This, he explained, was illegal and rendered parties so offending liable to severe punishment. He said that any man, or number of men, may demand whatever price they choose for their labour, and refuse to work for less, but the moment any of them interfered with others who work for less wages, the law made it a conspiracy and imposed a severe punishment.

Thus MacNabb took the view, five years before the printers' case, that confederating to raise wages was not a criminal conspiracy unless attended by unlawful means. This was the understanding implied in the *Globe's* comment on the Rolling Mills case. MacNabb introduced a further refinement in suggesting that while there was no crime in a group of workers settling on a minimum rate, as soon as *one* of them, perhaps acting unilaterally, used unlawful means to achieve the lawful purpose, the whole group became liable to a charge of conspiracy. But if the notion that the gist of the offence of conspiracy is in the combination is to mean anything, this must have been bad law. Nonetheless, this view may have influenced MacNabb's disposition of the printers' case, as will be seen below.¹⁴

John Lannan and William Graham, two moulders on strike against Edward Gurney's foundry, were indicted at the 1871 Winter Assizes on several counts of conspiracy and assault. According to the *Globe's* account of their indictment, they were charged with "conspiring to hinder by threats of violence workmen employed in Gurney's foundry," while the same paper's report of their trial said they were charged with "intimidating their fellow labourers to induce them to leave their employers." The criminal assize clerk's report gives the charge as "conspiracy," without further particulars. There were at least two or three additional charges of assault against each of them, arising out of the same incidents as the conspiracy: Gurney had brought in strikebreakers from Buffalo, and the defendants, along with other members of the Moulders Union, had accosted them on the street, called them "scabs," and thrown stones at them. The defence admitted that Graham had used the word "scab," and attempted (unsuccessfully) to supply an alibi for Lannan. Chief Justice Morrison summed up:

In his charge to the jury he strongly condemned the arbitrary rules adopted by Trades' Unions with regard to mechanics who were not members of such association. In his opinion, they were most mischievous combinations and if they were allowed to exist in their present form the country would probably ere long witness a repetition of the Sheffield outrages. His Lordship deprecated the action of the unions in compelling every workman to work according to the scale of wages laid down by their regulations, characterizing such a line of conduct as tyrannical in the extreme.

The jury found the men guilty on the first count of the indictment, recommending leniency. They were committed to a week in jail and a \$20 fine each, and no action was taken on a second indictment for conspiracy and assault. The Grand Jury for these assizes commented on the Moulders' Union case in its

¹⁴ *Leader*, 17 January, 19 January 1867.

presentment, saying "they feel it their duty to mark in the most emphatic terms their disapproval of such societies being introduced in our new Country; calculated as they are to interfere with Capital and Labor, cramp our Infant Manufactories, and deprive the subject of his civil liberty." Unfortunately it cannot be discovered with any certainty whether the moulders' convictions were for conspiracy or assault. But even if they were for the former, the conspiracy in question was once again a combination to use unlawful means, despite the more general burden of the Chief Justice's charge and the Grand Jury's presentment.¹⁵

The Fall Assizes for 1871 saw that year's second set of indictments for conspiracy, this time against ten apprentices at the Beard brothers' foundry, charged with unlawfully conspiring to desert their service if their masters refused to increase their wages, and with so deserting their service in a body. At their trial the apprentices argued that their indentures had been nullified when the original partnership under which they were signed was dissolved in a reorganization of the firm. Judge Gwynne reserved the point and sent the case to the jury, which found the boys guilty and recommended leniency. Bail was taken for their appearance at the next assizes, the reserved point to be determined in the meantime. When it was decided unanimously in the defendants' favour, their conviction was reversed. The significance of this is that the original conspiracy conviction must have been on a combination to desert service in breach of the Apprentices and Minors Act, and hence a conspiracy of unlawful means, rather than a combination to procure an increase in wages. If it had been the latter, the conspiracy was clearly proved in the evidence before the court (a letter from the apprentices to the Beards demanding higher wages), and the status of their indentures would have been irrelevant. (If they were not apprentices within the meaning of the Apprentices and Minors Act, they must have been servants subject to any common law prohibition of servants' combinations to raise wages.) Indeed, this case suggests more strongly than any of the others that the court would not convict on a charge of conspiring to raise wages alone.¹⁶

Finally, in April 1872, the month of the printers' case, the lumber firm of Messrs. Walsh & Lovey charged nine workers at their sawmill in King with refusing to work and threatening violence to other workers. They were alleged to have broken the windows and furniture in the sleeping shanty and to have shut off the steam; the men's case was that they had not been paid, so they shut off the steam and refused to allow the mill to run. They were committed for trial on a charge of conspiracy and released on bail, but I have been unable to find any subsequent reference in either the newspapers or the assize case-files.

¹⁵ *Globe*, 14 January, 20 January 1871; Ontario Archives, York County, Criminal Assize Clerk's case files, 1871.

¹⁶ Ontario Archives, York County, Criminal Assize Clerk's case files, 1871: *Globe*, 18 July, 16 November, 18 November, 6 December 1871; Toronto Police Museum, Registry of Warrants, 11 July 1871 (*Redden et al.*).

Perhaps the charges were dropped in the aftermath of the printers' strike. In any event, their conspiracy must have amounted to a combination to perform unlawful acts. There is no suggestion that the men wanted anything but the pay that was due them (but which, the employer claimed, was payable on demand, and they had never asked for it).¹⁷

In summary then, charges of criminal conspiracy were brought against workers in employment-related activities on eight occasions between 1854 and 1872 (disregarding the dubious printers' conspiracy of 1854 and the two cabmen's conspiracies). On six of these occasions the defendants were committed to trial. The experience of these cases suggests three points.

First, while workers were charged on a variety of counts of conspiracy, and typically on more than one at a time, no one was committed for trial on a charge of conspiring to raise wages in the absence of some other charge alleging a specific crime.

Second, although the courts had the opportunity to convict workers for combining to raise wages or otherwise alter the conditions of work on several occasions, they never did so on this count unless it was joined with specific criminal acts. Indeed, the shoemakers' acquittal in 1858 and the reversal of the Beard apprentices' conviction in 1871, in cases where there were patently combinations to raise wages, indicate at the least a definite reluctance to convict on this charge.

Third, although police magistrates, judges, grand jurors and newspaper writers expressed their distaste for trade unions in comments about "conspiracies" that sometimes muddled the distinction between combinations to commit crimes and simple combinations to raise wages, a close reading of such comments suggests that their authors knew very well that the latter were not criminal.

These cases suggest that the Toronto courts did not consider combinations to raise wages to be criminal conspiracies in the absence of some specifically criminal act associated with them. Nonetheless, a doctrinal question remains. Was the Toronto courts' view of the matter wrong in law? This leads us to the second branch of the argument, the analysis of English authority.

II

WHEN THE MASTER PRINTERS launched their case against the typographers in 1872, they did so armed with the advice of Robert A. Harrison, QC, the former chief clerk of the Crown Law Department (under Ross and Macdonald), a bencher of the Law Society, and Member of Parliament for Toronto West. In his opinion, combinations of workmen for higher wages or shorter hours were illegal in Canada, for they were criminal conspiracies at common law.¹⁸

¹⁷ *Globe*, 25 April, 27 April, 29 April 1872; *Leader* 28 April 1872.

¹⁸ Some accounts of the printers' conspiracy refer to him as Judge Harrison, but this is

Harrison's opinion was couched in a formidably learned and lengthy letter. Much of it recited the history of the English statutes bearing on workers' combinations. As Harrison correctly noted, none of these were in force in Canada. By the Quebec Act (1774) and Upper Canadian reception acts of 1792 and 1800, the law of England became the law of Canada. But English statutes passed after the reception dates formed no part of Canadian law, so the English combination acts (the first of which was enacted in 1799) were never in force in the province. Moreover, the more ancient English statutes had been declared by Canadian judges not to be in force in the province (nor were they any longer in force in England). As Harrison knew, the only provisions bearing on combinations of workers that were in force in Canada were common law provisions — the law as it stood in England before the legislature intervened. There was no reception date for common law, and judges in Canada remained bound by the common law discoveries of their English counterparts.

One such discovery was the doctrine that a combination to raise wages was a criminal conspiracy at common law. As R.S. Wright showed in 1873, this was a modern doctrine: "there is not sufficient authority for concluding that before the close of the 18th century there was supposed to be any rule of common law that combinations for controlling masters or workmen were criminal, except where the combination was for some purpose punishable under a statute expressly directed against such combinations, or was for conduct punishable independently of combination." While some writers are less categorical than Wright, there is general agreement that before the passage of the combination acts there was a "lack of convincing authority for any general principle" that trade unions were illegal per se at common law. (The first conviction for common law conspiracy in restraint of trade in a wages case occurred in 1825.) Yet in the middle third of the nineteenth century, some English judges began to discover a common law prohibition against workers' combinations.¹⁹

Harrison offered the leading cases in this new English jurisprudence as authority for his opinion. But what those cases had to say about common law conspiracy was essentially obiter — the cases were mostly decided on the words of specific statutes not in force in Canada, or on common law grounds other than the conspiracy doctrine. Consequently Harrison's authorities were far from compelling and what persuasive force they might otherwise have had was tempered by sharp disagreements among the English judges themselves. The weaknesses of Harrison's appeals to authority will be evident from a review of the cases he mentioned.

anachronistic as he was not appointed to the bench until 1875. For his opinion see the *Globe*, 30 March 1872.

¹⁹ R.S. Wright, *The Law of Criminal Conspiracies and Agreements* [London 1873], reprinted with a preface by J.M.B. Crawford (London 1980); *ibid.*, second edition (London 1887); A.H. Manchester, *A Modern Legal History of England and Wales 1750-1950* (London 1980), 331.

Harrison stated his theme with a lengthy quote from Baron Bramwell's charge to the jury in *R. v. Druitt et al.* (1867), on the subject of personal liberty. But *Druitt*, which arose out of the London tailors' strike and lockout, stood for the proposition that picketting, if "likely to have a deterring effect in the mind of ordinary persons," was not protected by the Molestation of Workmen Act (1859). It was not authority that combinations to raise wages or lessen hours were criminal conspiracies.²⁰

To buttress his view that "a combination on the part of workmen, either to raise their wages or shorten the hours of labour, is, I think, by the Common Law of England, and therefore by the law of Canada, an indictable conspiracy," Harrison sketched two cases. The first, the conspiracy of seven persons to impoverish Booth, appears to be *R. v. Eccles* (1783), discussed by Wright, who characterizes it as a decision about the sufficiency of indictment, and considers it to have turned on a combination to disturb prices (the defendants being master tailors): in his view it had no bearing on the question whether a combination to raise wages was criminal. Harrison's second case, the two journeymen shoemakers, was probably *R. v. Hammond* (1799), which Wright considered to have turned not on the criminality of a combination to raise wages per se, but on a combination to raise wages in violation of statute. Neither of the statutes in question were in force in Canada.²¹

Harrison's attempts to find eighteenth-century authority for the proposition that the common law forbade workers' combinations cannot be considered very successful. He proceeded to survey the English statutes that repealed and amended the original combination acts, before turning to the mid-nineteenth-century cases that really stood for the new discoveries of the common law. But Harrison did not have much to say about *Hilton v. Eckersley*, *Walsby v. Anley*, and *Wood v. Bowron* beyond noting that there was little agreement among the judges.

Hilton v. Eckersley (1855) turned on an agreement among mill-owners to fix wages, hours of work, and so on, in an attempt to break a union. The question at issue was not whether the agreement was criminal, but merely whether it was unlawful in the sense that the courts would not enforce it. Crompton, J., thought that such agreements, whether on the part of workers to increase wages or of employers to lower them, had been criminal conspiracies at common law before the early nineteenth century statutes had made them no longer punishable. He argued that while Parliament had repealed the criminal aspect of such agreements, they remained unlawful. Courts would not enforce them because they were against public policy, being in restraint of trade. Chief Justice Campbell agreed that the bond was unenforceable, but considered that if such agreements were once criminal, it was only by virtue of the combination acts:

²⁰ 10 *Cox's Criminal Law Cases*, 592.

²¹ Wright, *Conspiracies*, 45.

But I cannot bring myself to believe, without authority much more cogent, that, if two workmen who sincerely believe their wages to be inadequate should meet and agree that they would not work unless their wages were raised, without designing or contemplating violence or any illegal means for gaining their object, they would be guilty of a misdemeanor and liable to be punished by fine and imprisonment. The object is not illegal; and therefore, if no illegal means are to be used, there is no indictable conspiracy.

Erle, J, thought the agreement lawful and enforceable. Not only had workers' and employers' combinations not been criminal at common law, "but no principle or decided case has been adduced shewing" them to be voidable at common law either. To sum up, Crompton thought that agreements to raise wages had been criminal conspiracies, Campbell thought they had not been, and while it had been unnecessary for Erle to commit himself outright, the thrust of his reasoning strongly suggested that they were crimes by statute only. *Hilton v. Eckersley* did not furnish much authority for Harrison's proposition.²²

Crompton, J, took the view that restraint of trade made a criminal conspiracy at common law in *Walsby v. Anley* (1861), and there he was joined by Hill, J. In 1870, though, in a case that Harrison failed to note, the court unanimously repudiated his doctrine: in the words of Cockburn, CJ, "It does not follow that because rules may be against public policy, they are therefore criminal." As Harrison admitted, that judge's obiter dicta in *Wood v. Bowron* (1866) implied that the common law did not prohibit combinations to raise wages, and the charge of Lush, J, in *R. v. Shepherd* (1869) considerably moderated the force of Bramwell's dicta in *R. v. Druitt*, on which Harrison so heavily relied: peaceful persuasion did not amount to prohibited molestation or obstruction.²³

Enough has been said to show that Harrison's opinion — that combinations of workers to raise wages or lessen hours were criminal conspiracies at common law — was highly debatable, even on the authorities he cited. The proposition that the common law considered a combination to raise wages to be indictable simply on its purposes was dubious in the extreme. There was somewhat more authority for the view that such combinations might be unlawful as being in restraint of trade. Here, however, there was not only marked disagreement as to whether such a prohibition existed at all, but even among those judges who thought the doctrine sound there was the view that such combinations were not indictable, but merely unenforceable. Only Crompton

²² 119 *English Reports (KB)*, 871. Sir J.F. Stephen, *History of the Criminal Law of England*, III (London 1883), 217 points out that the six judges of the Court of Exchequer Chamber "thought that the deed was void because it was in restraint of trade, but expressed no opinion as to whether or not it was an indictable offence." Thus *Hilton v. Eckersley* hardly stands for settled law.

²³ 121 *English Reports (KB)*, 536; 2 *Law Reports (QB)*, 21; 11 *Cox's Criminal Law Cases*, 325.

sought consistently to apply the doctrine that such combinations were criminal.²⁴ On this question, as on the question whether the common law forbade a combination to raise wages, there was in fact little pressure for the English courts to declare themselves with finality. The English judges, unlike their Canadian counterparts, were operating in an environment of complex, and rapidly changing, legislative enactments. The common law was called upon to interpret statutory provisions (frequently in the attempt to limit the legal rights extended by Parliament). Parliament in turn responded, amending the legislation to counter judicial interpretation. The judges' observations about what the common law "had" been were in fact very recent discoveries, made in the thick of this fray.²⁵ In any event, and largely due to the rich statutory environment, their views about the history of the common law were simply dicta, and as such did not bind the Canadian courts.

Given the status of the English judges' comments and their inability to agree, it would appear that Harrison might have had a very difficult time convincing a Canadian court that it should indict workers for combining to achieve the first four items in his list of prohibited purposes: altering the hours of labour, raising or fixing wages, or decreasing the quantity of work. The next

²⁴ "After the Act of 1825, Crompton, J. was the only Judge who unequivocally accepted and sought to apply this doctrine." R.Y. Hedges and Allan Winterbottom, *The Legal History of Trade Unionism* (London 1930), 42. Interestingly, though, Harrison neglected to cite two related cases which supply better authority for part of his opinion. In *R. v. Duffield* and *R. v. Rowland* (both 1851), Erle, J. told the jury that while workers were free to agree among themselves not to work for less than a certain rate of wages, their agreement became a criminal conspiracy when they attempted to induce others to leave work in order to force the employer to accede to their terms. This controversial doctrine was repealed by the Molestation of Workmen Act (1859). It is unclear whether Erle's charge was based on common law or statute (*R. v. Rowlands* at any rate was decided on conspiracy to violate statute). In his 1869 *Memorandum* to the Trades Union Commission Erle argued that a combination in restraint of trade was not unlawful at common law unless its purpose was to obstruct another maliciously, that is by "some corrupt or spiteful motive," in which case it was indictable. But Erle, it appears, was alone in seeking to apply this test of malice, just as Crompton alone thought that combinations in restraint of trade were always criminal at common law: 5 *Cox's Criminal Law Cases*, 404, 436; Hedges and Winterbottom, *Legal History*, 43-5.

²⁵ The more reflective members of the bench recognized that their common law discoveries were bound to be influenced by their own political predilections. Commenting on the doctrine that agreements might be void on grounds of public policy, Campbell, CJ, complained that "I enter upon such considerations with much reluctance, and with great apprehension, when I think how different generations of Judges, and different Judges of the same generation, have differed in opinion upon questions of political economy and other topics connected with the adjudication of such cases." He would have preferred clear statutory guidance. Erle said of Crompton, "I believe that he never recognised the notion that the Common Law adapts itself by perpetual process of growth to the perpetual roll of the tide of circumstances as society advances." (Campbell in *Hilton v. Eckersley* at 788; Erle quoted in Hedges and Winterbottom, *Legal History*, 42 n. 4).

two purposes — inducing others to quit before the expiry of their time or before their work was finished — might well have been illegal, because a combination to achieve them could have been a conspiracy to procure a breach of statute, the Master and Servant Act or the Apprentices and Minors Act. "To refuse to enter into work or employment" might similarly have been the object of an unlawful conspiracy if there were valid contracts or indentures under those acts. Finally, "to persuade others not to enter into employment" might be a prohibited purpose on the same condition, or if the Bramwell doctrine was accepted without Lush's modification in *R. v. Shepherd*, or, of course, if the persuasion was by means of threats, molestation, or coercion. On the whole, it would seem difficult to procure a conviction in the absence of a violation of the Master and Servant Act or the employment of unlawful means (which would of course include a violation of statute).²⁶

This is speculation, as it must be, but it is not wholly abstract speculation. It can be grounded in a contemporary opinion, published by the *Leader* to answer Harrison's, as well as in the experience of the earlier Toronto cases.²⁷ "Lex" argued that the common law did not prohibit Harrison's first four purposes unless they were pursued by illegal means, such as coercion or intimidation. Trade unions were not in themselves illegal at common law. I have already shown that there was at least as much warrant for this view as for Harrison's in the English cases, and probably more. But my point is not so much that this opinion was right and Harrison's wrong (whatever that might mean), but that such an opinion could be enunciated by a Toronto lawyer in the spring of 1872. My analysis of the English cases is not based on hindsight entirely: it is the sort of analysis that the defence could well have argued before the court at the time.

Similarly, there is warrant in the earlier Toronto cases for saying that the Canadian courts understood this to be the law. When workers were convicted of trade union conspiracy, as were the tailors in 1854 and Gurney's moulders in 1871, they were found guilty of specific acts of intimidation, threatening, or assault. No one was tried on a charge of merely combining to raise wages. Most significantly, when workers were tried on a count jointly alleging a trade union combination and a specific criminal act — where it would have been possible in theory to return a conviction on one part of the count and not on the other — the courts did not convict them of the trade union conspiracy where they were found not guilty of the specific acts (the shoemakers in 1858; the Beards' apprentices in 1871).

Much the same point can be elicited from the various obiter dicta and other published comments. In the tailors' case the prosecution distinguished between the (praiseworthy) objects of the union and the conduct of the defendants, which amounted to intimidation. When Gurnett remarked on the "illegality of

²⁶ 10 & 11 Vict. (1847), c. 23 [UC]; 14 & 15 Vict. (1851), c. 11 [UC].

²⁷ *Leader*, 2 April 1872.

such combinations" in the Polson assault case, he referred to the James case and so, arguably, to intimidation rather than to trade unions per se. The same could be said of his comments about the effects of combinations in the James and Williams cases, which in any event did not go to illegality. His remark in the Finch case that "the law relative to combination or conspiracy among workmen was very severe" was in the context of alleged threats, intimidation and coercion. In the Rolling Mills case, even the *Globe* thought that strikes for higher wages were legitimate unless intimidation of non-strikers was involved. MacNabb's comment in the cigarmakers' assault trial turned on the illegality of harassment, and he said that strikes for wages were not themselves illegal. Morrison, CJ, gave vent to a good deal of spleen against trade unions in the Gurney case, but he did not say they were illegal. To the extent that it is possible to draw inferences from the Toronto cases and associated commentary, then, they would seem to stand against Harrison's main proposition, and for the view that a simple conspiracy to raise wages or lessen hours was an offence unknown to law.

III

BUT IF TRADE UNIONS WERE not criminal conspiracies, how was it possible for Police Magistrate MacNabb to send the typographers' Vigilance Committee to trial on the charge that they "conspired with divers others to lessen the usual time of work in the Art and occupation of Printers," in 1872? Part of the answer must lie in the magistrate's well-attested reluctance to decide points of law; if Harrison's opinion (or, rather, the prosecution's argument) was in any way plausible he would be likely to send it to trial. Another part of the answer (perhaps another way of saying the same thing) is that the magistrate's jurisdiction in indictable offences was limited to deciding whether or not a *prima facie* case had been made out against the accused: MacNabb did not have to try the case, but only to decide whether the prosecution had sufficient evidence to warrant a trial.

To see what this meant in practice, it is necessary to consider his bench notes and the (often conflicting) newspaper accounts of the proceedings. For after all, the printers were committed for trial on the evidence brought forward at the police court hearing and on the law argued there, not on Harrison's opinion. The prosecution produced documentary evidence of the typographical union's constitution, bylaws, membership, and leadership, and of the hours and wages it had demanded of the master printers. Ten witnesses were called to prove the documents and identify the defendants, and to testify about the strike.²⁸

William Parks named two union members, neither of them a defendant, who had insinuated that he would find himself on a union blacklist for returning

²⁸ Case file, *loc. cit.*, *McMillan et al.*

to work, and he testified that he knew an apprentice printer who had been paid \$1.50 out of union funds by William Lovell, one of the defendants, to support himself during the strike. Charles Winslade Hawkins and Edward Doudiet were called principally to prove some of the documents. Then Detective O'Neill testified that he had gone to London on behalf of the *Globe* to escort three printers to Toronto. He brought them to the newspaper office, where they were engaged verbally on one-year contracts, and he saw them at work over the next two days. He subsequently followed one of them to the union's rooms, and from there to the barroom of the St. James Hotel, where he saw Lovell pay the man's bill and take him to the railway station. O'Neill followed one of the strikebreakers to Paris and another to Hamilton, where he arrested him. He searched him and found a union membership certificate and a railway ticket to Chicago. Augustus Howell, foreman in the *Globe's* job room, testified that Lovell had set the type for the union's rules and regulations in his office. George Hale, an Orillia printer, testified to having received a letter from the union urging him not to take a job in Toronto while the strike was on. Thomas Richardson, a newspaper reporter, gave evidence about a mass meeting in Toronto's market square, where the defendant J.S. Williams said that "he would be the last one to counsel violence; now the Masters have taken the last step [i.e., launching the prosecution] they had better beware."

The last three witnesses were printers at the *Telegraph* who testified to the union's attempts to persuade them to join the strike. John Craig said that the defendant James Duggan had offered him four dollars a week "to work for him and do nothing but walk about the streets." Joseph Payne said that Duggan had offered to hire him for a dollar, "and then afterwards he offered me \$14 per week and my board." The final witness, John Auld, testified that he had joined the union, quit the *Telegraph* and gone to work for the *Leader* after MacMillan and others had advised him to leave the struck office and offered to find him work at the same wages in a union shop.²⁹

Counsel for the defence contended that the evidence did not establish a charge of conspiracy against anyone. The union was not itself an unlawful institution, and there was nothing criminal in the combination unless its purpose was to injure another. Nothing in the union's rules made it a combination to injure anyone, and the overt acts of individuals did not bind the organization.

The prosecution cited four English authorities. It put forward *R. v. O'Connell* (1844), a state trial for seditious conspiracy, for a definition of the offence. There, answering an objection to the form of the indictments, Tindal, CJ, had said that "the crime of conspiracy is complete if two, or more than two, should agree to do an illegal thing; that is, to effect something in itself unlawful, or to effect, by unlawful means, something which in itself may be indifferent or even

²⁹ Auld had come to Toronto as a strikebreaker, but worked at the *Telegraph* for only a day before being recruited into the union. He was arrested at the *Leader* office and imprisoned by magistrate MacNabb for deserting his employment in violation of the Master and Servant Act.

lawful . . . the gist of the offence of conspiracy, is the bare engagement and association to break the law, whether any act be done in pursuance thereof by the conspirators or not."³⁰

The prosecution's second authority, *In re Perham* (1859), arose out of the conviction of a London mason for threatening another worker in an attempt to persuade him to leave his employment. It turned entirely upon the interpretation of two statutes, neither of which was in force in Canada, in deciding upon the sufficiency of the form of conviction employed by the magistrate who tried Perham summarily.³¹

Next, the prosecution cited *Walsby v. Anley* (1861), discussed above, in which Crompton, J, joined by Hill, J, had stated his opinion that at common law all combinations of masters or workmen were illegal. But in the same case Cockburn, CJ, had declared himself "decidedly of the opinion that every workman who is in the service of an employer, and is not bound by agreement to the contrary, is entitled to the free and unfettered exercise of his own discretion as to whether he will or will not continue in that service in conjunction with any other person or persons who may be obnoxious to him. More than this, any number of workmen who agree in considering some of their fellow workmen obnoxious, have each a perfect right to put to their employer the alternative of either retaining their services by discharging the obnoxious persons, or losing those services by retaining those persons in his employment." There was no criminal combination until they attempted to coerce the employer, by threats, molestation, obstruction, or intimidation, and then it was a crime by statute.³²

Finally, the prosecution cited *Skinner v. Kitch* (1867), another threatening case under the English combination acts. Blackburn, J, followed *Walsby v. Anley*, but it was clear from his reasons and from those of Shee, J, and Lush, J, that everything turned on the wording and intent of the statute: nothing whatsoever was said of conspiracies at common law.³³ At the end of his bench notes, Magistrate MacNabb jotted a number of references to sections of the union's constitution. These were presumably sections referred to by counsel, and all of them dealt with the union's role in establishing and policing the rate of wages.

There is a suggestion in the newspaper coverage of the hearing that MacNabb took the prosecution by surprise in committing the printers for trial on the single count of conspiring to shorten the hours of labour (which, it was clear to everyone, was equivalent to raising wages), rather than on a group of counts including such specific acts as threatening and coercion. But the bench notes make it plain that whatever may have happened during the course of the hearing, by its close the prosecution was prepared to argue directly to the union's control over the scale of prices. And undeniably, on the showing of its constitu-

³⁰ 8 *English Reports* (H of L) at 1092.

³¹ 157 *English Reports* (Exchequer), 1088.

³² *Loc. cit.* at 538.

³³ 2 *Law Reports* (QB) at 393.

tion, the Toronto Typographical Union was a combination of printers for the purpose of regulating the rate of wages. This was uncontested. What was at issue was whether this purpose made the combination a criminal conspiracy.

MacNabb was not about to decide that question of law. He sat essentially as a judge of fact in determining whether there was a case to go to trial, and the fact of the union's role in setting and policing wage rates was not in dispute. It is conceivable that he was influenced by the supposition that while combinations to raise wages were not themselves unlawful, they became criminal the moment any member committed a crime in pursuit of the common end. This had been the burden of his warning to the cigarmakers in 1867. On this reading, the typographers may not have combined to intimidate non-union printers, but only to seek shorter hours. But the moment any party to the combination engaged in an act of intimidation, the whole body became liable — not for a conspiracy to intimidate, but for a criminal conspiracy to shorten hours, criminal because the endeavour was accompanied by criminal acts. (What little evidence there was about intimidation failed to implicate any of the accused directly.) While this speculation is intriguing, the more important point is that it gets the law wrong. If MacNabb adhered to this view, it was in spite of *R. v. O'Connell*.

The more interesting question may be why MacNabb did not send the printers to trial on any of the specific counts. One might speculate about the political climate and about the fact that the trade unions bill was already before the Commons, and construct a plausible explanation about why the magistrate chose to send the printers to the assizes on the wages conspiracy and not on intimidation or coercion, but it is not necessary. When the prosecution evidence on the various unlawful means is examined on the face of MacNabb's bench notes, rather than through the somewhat lurid filter of the press reports, it appears to have been remarkably thin. It is more than likely that MacNabb did not commit the printers for trial on a charge of conspiring to intimidate or to coerce because he judged that the prosecution had simply failed to establish a *prima facie* case. The evidence before him failed to link the defendants to criminal acts. For all its posturing, its legal opinions and its detectives, the Master Printers' Association was unable to prove anything beyond the unsurprising fact that the Toronto Typographical Union sought to increase the rate of wages.

IV

AND THIS, OF COURSE, brings us back to the original questions: was this illegal, and if not how was it that the charge arose? As we have seen, there are no reported Canadian cases of workers having been convicted of criminal conspiracy merely for combining to raise the rate of wages, and so far as unreported cases go, the Toronto evidence is that no one was convicted of criminal conspiracy merely for raising the rate of wages. Moreover, when

workers were charged jointly with conspiring to raise wages and to perform some criminal act in connection with it, there was no conviction on the wages conspiracy (even in the face of evidence similar to that in the printers' case) in the absence of conviction on the criminal acts.

The cases that reached trial can be interpreted in a way that makes sense of the wages conspiracy notion and of the lack of convictions upon it. Trade union purposes served as the evidence of combination to link a number of defendants together in proving a conspiracy to commit a crime like assault or threatening. The combination to raise wages was not in itself criminal, but it showed that there existed the common purposes required as an element of conspiracy, in prosecuting overt acts. On this view, then, the allegation that Smith and Brown conspired "to raise wages and to assault Jones" amounted to the charge that in pursuance of their combination to raise wages, Smith and Brown assaulted (or agreed to assault) Jones. The wages combination provided the conspiracy; the assault supplied the crime. This interpretation makes it plain why, in the absence of a conviction for the criminal means, no one was convicted for the underlying combination.

The English jurisprudence is not as relevant as first appears. In every instance, the English judges' comments as to whether or not a combination to raise wages was indictable at common law were obiter. The nineteenth-century English cases were all decided on the statutes, none of which was in force in Canada. Just as Harrison might cite some of the contemporary obiter in support of his view, so might his opponent cite others, even in the same reported cases, for the contrary position. There was no clear rule in England, nor did there need to be.

In the absence of Canadian or English precedents that clearly decided whether workers could be convicted of criminal conspiracy at common law *solely* on a combination to raise the rate of wages, the police magistrate would be most unlikely to resist the prosecutor's insistence that the matter be tried. The police magistrate's role with respect to indictable offences was not to declare law, but to enquire whether there was a case to go to trial. It was natural that MacNabb should send the case for trial. It would have been equally natural for an assize judge to have dismissed the charges because the offence was unknown to the criminal law. Of course, we shall never know for certain whether this would have been the outcome, for when the Trade Unions Act was passed, the provincial Attorney-General dropped the prosecution. The most we can say is that if a judge had convicted the typographers he would have been making new law.

Finally, it is worth noting that under the Criminal Law Amendment Act which accompanied the Trade Unions Act, all the offences in respect of which trade union members *had* been convicted of conspiracy in the two preceding decades were reaffirmed as crimes. It is arguable that in some instances the criminal law amendments may have made it even easier to acquire convictions, inasmuch as evidence of combination would no longer be necessary and the

crimes — coercion, intimidation, "watching and besetting," and so on — were specifically named. The 1872 legislation repealed no crimes: on the contrary, it may have created some new ones.³⁴ In any event, the legal position of trade unions was more or less the same after its passage as before.

Data for this paper were collected as part of a larger project on nineteenth-century Ontario labour law. The larger project has been generously supported by the Osgoode Society and the Social Sciences and Humanities Research Council of Canada, and has had the able research assistance of Rose Hutchens and Fred Ernst. An earlier version of part of this paper was presented to the annual meeting of the Society for Law and Society, Toronto, 1982. I am grateful to the discussants at those meetings, Greg Kealey and Jennifer Nedelsky, and to Harry Glusbeek, Marty Friedland, and Dick Risk for their comments on an earlier draft.

³⁴ The Criminal Law Amendment Act, 35 Vict. (1872), c. 31, confirmed, created, or explicitly defined the crimes of threatening, intimidation, molestation, intimidation, and obstruction, and supplied what was to prove an immensely broad and troublesome definition of "watching and besetting." The Act also purported to abolish the "crime" of combination in restraint of trade, and this was quite apart from the complementary provision in the Trade Unions Act, 35 Vict. (1872), c. 30. It is sometimes suggested that the Trade Unions Act was in any event a nullity for the failure of the unions to register under its provisions. This construction is open to several objections, however, and need not be pursued here.

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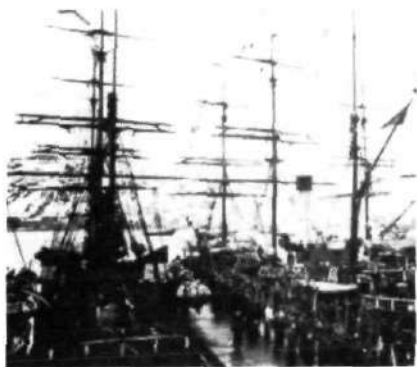
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