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properly could act on the Minister's behalf and this was proved to the standard required in a criminal trial. A

Accordingly this appeal fails and must be dismissed.

Appeal dismissed.

Solicitors: *Registrar of Criminal Appeals; Solicitor, Metropolitan Police.* B

L. N. W.

[COURT OF APPEAL] C

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LORD DENNING M.R., DAVIES and RUSSELL L.JJ.

MORGAN *v.* FRY AND OTHERS

[1964 M. No. 2911]

Contract—Procuring breach—Strike notice—Whether threat of breach of contract—Whether strike notice of proper length lawful. D

Intimidation—Ingredients of tort—Threat to induce breach of contract—Trade dispute—Trade union official's strike notice unless workman rejoins union—Employers' dismissal of workman by notice under contract of service—Whether strike notice threat of breach of contract—Whether strike notice of proper length lawful—Whether intimidation—Whether protected by section 3 of the Trade Disputes Act, 1906*—Whether "induces" includes threat to induce—Trade Disputes Act,* 1906 (6 *Edw.* 7, *c.* 47), *s.* 3. E

Master and Servant—Contract of service—Implied term—Whether implied term that strike notice of proper length lawful—Whether trade union official's strike notice unless workman rejoins union lawful.

Master and Servant—Contract of service—Strike—Strike notice—Whether notice of proper length lawful. F

Trade Dispute—Act in furtherance of—Threat to break a contract—Trade union official's strike notice unless workman rejoins union—Employers' dismissal of workman by notice under contract of service—Whether strike notice of proper length lawful—Whether honest actions in interests of union conspiracy—Whether "induces" includes threat to induce—Trade Disputes Act, 1906, *s.* 3. G

Trade union membership was not a condition of employment among lockmen employed by the Port of London Authority, but the authority found it convenient to be able to negotiate with a single union, A, on behalf of the lockmen, of whom most were members of that union. The plaintiff, a lockman employed

by the authority, was a member of a recently formed breakaway union, B, of whom the members were formerly members of union A. The regional secretary of union A had the conviction that union B menaced the trade union movement and industrial peace and had to be stamped out. A district organiser of union A within his region who had no feelings or bias against the plaintiff reported, inter alia, that members of union A desired to eradicate union B and that the possibility of a dispute to obtain that result could not be dismissed. At meetings with the Authority the regional secretary maintained that members of union B should rejoin union A; he did not oppose the Authority trying persuasion, but insisted that, if it failed, union A would resort to strike action to enforce removal of members of union B from the port. The district organiser was present at the meetings and supported the regional secretary, whose actions he commended to branches of union A. The regional secretary obtained plenary powers from the general executive council of union A to direct its members not to work with members of union B and other non-trade unionists, and on March 14, 1963, without obtaining the formal backing of the members affected, but satisfied that he could carry them with him, he notified the Authority that on and from April 1, 1963, members of union A would be instructed not to work with members of union B and non-trade unionists. The decision to give the notification was his alone, and he did not intend to injure the plaintiff or secure his removal, but did intend to secure the removal of such men as insisted on remaining in union B. He had no personal animosity against the plaintiff. On receiving the notification the Authority interviewed the plaintiff but he refused to rejoin union A, and, by lawful notice in accordance with his contract of service, the Authority dismissed him in order to avoid the action threatened by the regional secretary. The plaintiff brought an action for damages against the defendants, F. and H., the regional secretary and the district organiser respectively of union A and two other local union officials, claiming that his dismissal resulted from an unlawful conspiracy or unlawful intimidation by the defendants, threatening the authority that a breach of contract by the lockmen would be induced.

Widgery J. gave judgment for the plaintiff against F. and H., with half costs, holding, inter alia, that although the defendants acted in contemplation or furtherance of a trade dispute within the meaning of sections 3 and 5 of the Trade Disputes Act, 1906,[1] F. was not protected by section 3 of that Act, the cause of action being based on intimidation.

[1] Trade Disputes Act, 1906, s. 3: "An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills."

S. 5: "(3) . . . the expression 'trade dispute' means any dispute between employers and workmen, or between workmen and workmen,

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On appeal by the plaintiff and cross-appeal by the defendants:—

Held, dismissing the appeal and allowing the cross-appeal, that, on the facts, the defendants did not use any unlawful means to achieve their aim; as they had given a strike notice of proper length, they were not guilty of intimidation; and they were not guilty of conspiracy to injure since they acted honestly and sincerely in what they believed to be the true interests of their union. Accordingly the plaintiff's claim failed.

Allen v. *Flood* [1898] A.C. 1, H.L. and *White* v. *Riley* [1921] 1 Ch. 1, C.A. applied.

Rookes v. *Barnard* [1964] A.C. 1129; [1964] 2 W.L.R. 269; [1964] 1 All E.R. 367, H.L.(E.) distinguished.

J. T. Stratford & Sons Ltd. v. *Lindley* [1965] A.C. 269; [1964] 2 W.L.R. 1002; [1964] 2 All E.R. 209, C.A.; [1965] A.C. 269; [1964] 3 W.L.R. 541; [1964] 3 All E.R. 102, H.L.(E.); *Cooper* v. *Millea and Ors.* [1938] I.R. 749; and *Riordan* v. *Butler and Ors.* [1940] I.R. 347 considered.

Per Lord Denning M.R. and Davies L.J. Workmen have a right to strike, including a right to say they will not work with non-unionists, provided they give sufficient notice before hand; and a notice is sufficient if it is at least as long as the notice required to terminate the contract (post, pp. 725E, 733E–F).

Per Lord Denning M.R. The essential ingredients of the tort of intimidation are that there must be a threat by one person to use unlawful means, e.g., violence or a tort or a breach of contract, so as to compel another to obey his wishes; and the person so threatened must comply with the demand rather than risk the threat being carried out (post, p. 724C). It is an implication read into the modern law of trade disputes that each side is content to accept a strike notice of proper length as lawful (post, p. 728B). The word "induces" in section 3 of the Trade Disputes Act, 1906, includes a threat to induce (post, pp. 728G—729A).

Per Russell L.J. I would not go so far as to say that a strike notice, provided the length is not less than that required to determine the contracts, cannot involve a breach of those contracts (post, p. 738G).

Decision of Widgery J. [1968] 1 Q.B. 521; [1967] 3 W.L.R. 65; [1967] 2 All E.R. 386; 2 K.I.R. 264 reversed.

APPEAL from Widgery J.[2]

The plaintiff, James Patrick Morgan, appealed from so much of the judgment of Widgery J.[2] on March 17, 1967, as adjudged that his dismissal from his employment by the Port of London

which is connected with the employment or non-employment or the terms of the employment, or with the conditions of labour, of any person . . ."

[2] [1968] 1 Q.B. 521; [1967] 3 W.L.R. 65; [1967] 2 All E.R. 386; 2 K.I.R. 264.

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Authority had not been procured by an unlawful conspiracy to which the defendants, all officials or officers of the Transport and General Workers' Union, Bert Fry, regional secretary of the No. 1 London and Home Counties region, Ernest Harrall, full-time organiser of a district within No. 1 region, Sidney Bilson, chairman, and Leslie Mehegan, secretary of the No. 1/108 Poplar branch within the district of which Harrall was organiser, were parties, but had been procured without conspiracy as a result solely of the intimidation of the Port of London Authority by the defendants Fry and Harrall for which £425 damages and half the costs were awarded. The grounds of appeal were, inter alia, that the judge misdirected himself in holding that the plaintiff's dismissal was not the result of an unlawful conspiracy between the said defendants or any one of them.

By a notice of cross-appeal, the defendants, Bert Fry and Ernest Harrall, contended that the judgment of Widgery J.[2] should be varied and that judgment should be entered for all the defendants with costs. The grounds of the cross-appeal were that the judge misdirected himself in holding (i) that the defendants, Fry and Harrall, had been guilty of the tort of intimidation; and (ii) that a strike after due notice would, in the circumstances of the case, have amounted to a breach by the lockmen of their contracts with the Authority; and (iii) that he was bound by the decision in *Rookes* v. *Barnard*[3] and that accordingly the defendants Fry and Harrall were guilty of the tort of intimidation.

The facts are fully stated in the judgments of Lord Denning M.R. and of Widgery J.[4] in the court below and also in the report of that judgment.[5]

W. L. Mars-Jones Q.C. and *Jonathan Sofer* for the appellant plaintiff. As the cross-appeal attacks the whole basis of the judgment of Widgery J.[6] and if it succeeds the plaintiff must fail, the sensible course is to hear the cross-appeal first. The plaintiff's case before the judge was put in three alternative ways, relying on the same facts: (1) conspiracy to procure his dismissal by unlawful threats to his employers; (2) joint guilt by the defendants of the tort of intimidation; (3) unlawful interference with his contract in that he was given notice as a result of threats to his employers. The plaintiff succeeded only on (2) and was given £425 damages

[3] [1964] A.C. 1129; [1964] 2 W.L.R. 269; [1964] 1 All E.R. 367, H.L.(E.).

[4] [1968] 1 Q.B. 521, 532.

[5] [1968] 1 Q.B. 521.

[6] [1968] 1 Q.B. 521.

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and half costs, so that his appeal on (1) and (2) is for the purpose of reversing the order as to costs.

J. D. Stocker Q.C. and *M. Stuart-Smith* for the defendant respondents. The crucial question is whether a "strike notice," given sufficiently in advance to determine the contracts of employment, in fact determines the contracts, as Widgery J. decided.[7] If he is right, it produces the disturbing result that strikes are illegal; and that whether due notice is given or not makes no difference to the legality of a "strike notice," which depends on the language in which it is couched. It also means that there is no way in which a trade union can try to rid itself of a potential rival without running the risk of having to pay damages to every individual member of a rival union affected by such action. If the "strike notice" does indeed determine the contracts of employment, assuming proper notice is given, it has grave consequential social and legal effects on insurance and pensions rights, and rights under the contracts of Employment Act, 1963, and the Redundancy Payments Act, 1965. The decision is a radical development of *Rookes* v. *Barnard*,[8] which was sufficiently disturbing industrially. In any event *Rookes* v. *Barnard* [8] is distinguishable, since with the possible exception of Lord Devlin, all the speeches in that case,[8] were based on the existence of a "no strike" clause in the contracts of employment.

In view of the far-reaching industrial effects, the court might treat a "strike notice" which imposes conditions as a notice of variation of an existing contract, or alternatively, find an implied term in the general contract that the union will, while using its bargaining powers to get a peaceful settlement, use the ultimate sanction of a "strike notice" without breaking existing contracts of employment.

Until the House of Lords decision in *Rookes* v. *Barnard*,[8] no tribunal had ever held that threat of a breach of contract in the form of a strike was capable of being an unlawful act such as to constitute the tort of intimidation. So none of the earlier cases assist on this point. In *White* v. *Riley*,[9] which is indistinguishable from the present case on the facts, the court held that a strike after due notice was lawful. That has been the undoubted belief of lawyers, trade unions and employers for over 75 years.

There is not and cannot be anything unlawful in threatening

[7] [1968] 1 Q.B. 521, 546, 547.
[8] [1964] A.C. 1129; [1964] 2 W.L.R. 269; [1964] 1 All E.R. 367, H.L.(E.).
[9] [1921] 1 Ch. 1.

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to serve notice to determine employment even though the purpose is to get another person dismissed. That has been the accepted position ever since *Allen* v. *Flood*.[10] A threat to combine in order to get better terms in accordance with an existing contract of employment cannot be unlawful so as to bring the contract to an end. Although employers may not want a strike, they want still less the situation in which they are deprived of their whole labour force.

It is still lawful to threaten to break contracts of employment, with or without giving the appropriate notice, without bringing the contract to end. The threat to strike may be said to give the employer an option to determine the contract; and if he does not exercise it, he will have no grounds for an action for breach of contract. Strikes are part of modern industrial society. [Reference was made to *Cooper* v. *Millea and Ors*[11]; *Riordan* v. *Butler and Ors*.[12]; *Santen* v. *Busnach*[13]; and *Wolstenholme* v. *Amalgamated Musicians' Union*.[14]]

Although the present case is not assisted by the Trades Disputes Act, 1965, which was passed with the object of restoring the law to the pre-*Rookes* v. *Barnard*[15] position, it is doubtful if, in view of the view of Pearson L.J. in *J. T. Stratford & Son Ltd.* v. *Lindley*[16] and of the House of Lords in the same case,[17] the intention of that Act has been achieved, because it gives no protection against an action brought by a dismissed man. [Reference was made to Salmond on Torts, 14th ed. (1965), p. 533, and Grunfeld on Modern Trade Union Law.]

Finally, Widgery J. held that the defendants' conduct could not be justified[18]; but his reasoning was contrary to the authorities on what constitutes justification: see *Glamorgan Coal Co.* v. *South Wales Miners' Federation*[19] and *Brimelow* v. *Casson*.[20]

An alternative submission is that section 3 of the Trade Disputes Act, 1906, covers and protects a person whose acts threaten to induce a breach of contract. Nothing in *Rookes* v. *Barnard*,[21] indicates that the threat to strike after lawful notice constitutes intimidation. The main emphasis was on the "no strike" clause

[10] [1898] A.C. 1, H.L.
[11] [1938] I.R. 749.
[12] [1940] I.R. 347.
[13] (1913) 29 T.L.R. 214, C.A.
[14] [1920] 2 Ch. 388.
[15] [1964] A.C. 1129.
[16] [1965] A.C. 269, 289; [1964] 2 W.L.R. 1002; [1964] 2 All E.R. 209, C.A.
[17] [1965] A.C. 269; [1964] 3 W.L.R. 541; [1964] 3 All E.R. 102, H.L.(E.).
[18] [1968] 1 Q.B. 521, 548.
[19] [1905] A.C. 239, H.L.(E.).
[20] [1924] 1 Ch. 302.
[21] [1964] A.C. 1129.

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in the contract of employment with B.O.A.C. The defendants here can rely upon section 3 as giving them protection.

W. L. Mars-Jones Q.C. and *Jonathan Sofer* for the plaintiff. Widgery J.'s reasons for depriving the plaintiff of half his costs were (1) the fact that he discontinued his action against the organisers of the meeting at which the defendant Fry's action was ratified, and (2) that a lot of time was spent on the issue of conspiracy to injure. But the plaintiff never alleged conspiracy to injure but only to do an unlawful act, the joint tort of intimidation which is quite different.

The plaintiff and his fellow workers were free men. They could or could not join the Transport and General Workers' Union or any other union. It was an indictment of that union that it had not been militant enough. That was the main reason for breakaway unions. Both employers and trade unions were committed to the principle of no "closed shop." The defendant Fry's methods were rightly found by the judge to be wholly unjustified. He initiated the "strike notice" on his own responsibility.

There is not one case which supports the proposition that a "strike notice" which does not terminate the contract of service can lead to anything but an unlawful strike.

In 1871 Parliament made trade unions lawful and not a criminal conspiracy: the Trade Union Act, 1871, s. 2, and see the Conspiracy, and Protection of Property Act, 1875, s. 3. From 1875 onwards, what had formerly been held to be criminal, was held to be lawful. The common law basis for a lawful strike is the termination of the contract by due notice before the employees withdraw their labour. The speeches of the majority in the House of Lords in *Allen* v. *Flood* [22] depend upon the basis that the workers were entitled to terminate their contracts at the end of any given day: see *per* Lord Watson,[23] Lord Henshall [24] and Lord Macnaghten.[25] The old cases were decided on the basis that the workers did not have a contract of employment.

In *Denaby and Cadeby Main Collieries Ltd.* v. *Yorkshire Miners' Association* [26] it was held unlawful to strike without termination of contract by lawful notice. That case shows that a strike would only be lawful if notice were properly given. The position with regard to continuity of service is very different to what it was before the General Strike in 1926. Cozens-Hardy M.R.

[22] [1898] A.C. 1.
[23] Ibid. 99.
[24] Ibid. 130.
[25] Ibid. 148.
[26] [1906] A.C. 384, H.L.

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in *Gozney* v. *Bristol Trade and Provident Society*[27] showed the state of the law: "there is nothing illegal in a strike, although it may be attended with circumstances, such as breach of contract or intimidation, which make it illegal."[26] *Bowes and Partners, Ltd.* v. *Press*[28] is close to the present case as regards the actual notice given by Fry.

It is understood in trade union circles that you cannot give notice to determine men's contracts without the express authority of the men: see Wedderburn's Cases and Material on Labour Law, pp. 525, 526.

White v. *Riley*[29] was decided on a very narrow point. There was a threat to stop work on a certain day[30] which could be construed as a notice to determine the contract. It was like *Bowes and Partners, Ltd.* v. *Press*[31] and is distinguishable from the present case where the question whether Fry was threatening was extensively canvassed and Widgery J. found in the plaintiff's favour.[32]

The provisions of the contracts of Employment Act, 1963, s. 1 and Sch. 1, paras. 6 and 7 recognised, the distinction between a strike that was lawful and one that was in breach of contract; and see the Redundancy Payments Act, 1965, s. 37. So in 1963 the legislature recognised a person being on strike in breach of his contract of employment. Here there was clearly a threat to break the contract of employment.

In *Rookes* v. *Barnard*,[33] only Lord Evershed attached importance[34] to the "no strike" clause. The following passages in *Rookes* v. *Barnard*[35] are relied upon: *per* Lord Reid,[36] Lord Devlin,[37] Lord Pearce.[38] It was suggested that an implied term as to the right to strike should be read into these contracts. This was argued in *J. T. Stratford & Son Ltd.* v. *Lindley*[39] and was rejected: see *per* Lord Reid[40] and Viscount Radcliffe.[41] Such an implied term would be unlawful. There could be no term that the union could strike in order to effect a "closed shop," upon which Fry was trying to insist. Here there was the threat of an unlawful strike by means of which the plaintiff would be dismissed. In *Rookes* v. *Barnard*,[42] Silverthorne was found guilty

[27] [1909] 1 K.B. 901, 916, C.A.
[28] [1894] 1 Q.B. 202, 203.
[29] [1921] 1 Ch. 1.
[30] Ibid. 4.
[31] [1894] 1 Q.B. 202, 203.
[32] [1968] 1 Q.B. 521, 541, 542, 544.
[33] [1964] A.C. 1129.
[34] Ibid. 1181.
[35] [1964] A.C. 1129.
[36] Ibid. 1166, 1177.
[37] Ibid. 1204, 1218.
[38] Ibid. 1234.
[39] [1965] A.C. 269, 315.
[40] Ibid. 324, 325.
[41] Ibid. 327.
[42] [1964] A.C. 1129.

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of conspiracy and was not protected by section 3 of the Act of 1906. Fry's position is much weaker. If Silverthorne was not protected by section 3, no more is Fry. Under the Trade Disputes Act, 1965, Silverthorne would still be liable, unless he is covered by the words " whether one to which he is a party or not." The Act of 1965 introduces the word " threatening "; it was intended to cover the trade union official who was not an employee. It does not protect anyone in the position of Fry. There is no room in construing section 3 of the Act of 1906 for implying the words " threaten to."

The number and nature of Fry's threats must be considered. Fry conveyed to the Port of London Authority a threat to strike in breach of contract, a threat of total strike action, the withdrawal of labour. In the tort of intimidation, the plaintiff has to prove that the threat was aimed wholly or in part at the actual damage suffered.

As to the defence of justification, it is no defence that the acts were done to protect the legitimate interests of the union: see *per* McCardie J. in *Pratt and Ors.* v. *British Medical Association and Ors.*[43] It is doubtful whether justification is a defence to the tort of intimidation. [Reference was made to Citrine's Trade Union Law, 3rd ed. (1967), pp. 74, 75.] Here Widgery J. held [44] that none of the facts relied on in the defence could amount to justification.

On the plaintiff's appeal, (1) the judge misdirected himself as to the nature of the conspiracy alleged and made no express finding as to that conspiracy which was covered by the tort of intimidation. (2) Widgery J. misdirected himself as to whether Bilson and Mehegan were joint tortfeasors.[45] He applied the test, did they play a sufficiently active role to make them joint tortfeasors? He overlooked the agency point, that a principal may be a joint tortfeasor if he authorised the tort. The law as to joint tortfeasors is accurately dealt with in Salmon on Torts 14th ed. pp. 632–642. Active participation is only one way of being a joint tortfeasor. (3) The judge took into account the irrelevant considerations that the plaintiff had originally sued the defendants Crone and Crispin and had discontinued against them,[46] that he had failed against the defendants Bilson and Mehegan and had failed on conspiracy. There was a denial of any threat or any conspiracy on the pleadings

[43] [1919] 1 K.B. 244, 266–268.
[44] [1968] 1 Q.B. 521, 548.
[45] Ibid.
[46] Ibid. 526.

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Sofer followed on the pleadings.

Stocker Q.C. on the appeal. The judge had a picture of the whole case before him when he reached his decision on costs. It could not be said that Bilson and Mehegan were joint tortfeasors. In negligence each of the joint tortfeasors had to cause or contribute to the damage which resulted. It was a more difficult question in the tort of intimidation which was in a new form. Not everyone concerned at every stage was a joint tortfeasor. It would be a very amorphous tort which could not identify the persons who took part in it. Bilson and Mehegan were part of an articulate minority. It was a legal question whether justification arose on the tort of intimidation.

Mars-Jones Q.C. in reply on the appeal. Bad motive is fatal to justification which is highly material on conspiracy. All the circumstances and facts had to be investigated to see if justification could arise. A trade union official when threatening strike action could only act as agent.

Stocker Q.C. in reply on the cross-appeal. It is curious, if it should make no difference to the legality of a strike or to the threat of a strike whether proper notice to determine the contract is given or not. In practical terms, notice of the termination of the contract is impossible if a notice of termination cannot be served by a trade union official and the only way a man's service can be terminated is by all the men serving notice. If that be so, there is no way of collectively enforcing the benefit of collective bargaining.

It is contended that the position of Fry here was the same as that of Silverthorne in *Rookes* v. *Barnard*,[47] but that was a jury action with certain specific answers to specific questions: see *per* Lord Reid,[48] the basis of whose decision was the breach of the "no strike" clause. A strike notice, after full notice, is not a breach of contract; if it is, it will not support an action for intimidation. The calling of a strike after proper notice is not unlawful: see *per* Donovan L.J. in the Court of Appeal[49] and *per* Lord Evershed,[50] Lord Hodson[51] and Lord Devlin.[52] In this modern age, contracts of employment are sui generis and cannot have the strict legal analysis of ordinary contracts applied to them. Salmond J. in *J. T. Stratford & Son Ltd.* v. *Lindley*[53] suggested that a strike notice may be given on the implicit assumption that

[47] [1964] A.C. 1129.
[48] Ibid. 1165.
[49] [1963] 1 Q.B. 623, 675, 682.
[50] [1964] A.C. 1129, 1180, 1181.
[51] Ibid. 1201.
[52] Ibid. 1204, 1218.
[53] [1965] A.C. 269, 306, 307.

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the contract of employment will be determined by lawful notice to be followed by a new engagement. There is an implied term in collective bargaining that a " strike notice " of the proper length is lawful. [Reference was made to *Denaby and Cadeby Main Collieries Ltd.* v. *Yorkshire Miners' Association* [54] and Fletcher-Moulton L.J.'s analysis of strikes in *Gozney* v. *Bristol Trade and Provident Society*.[55]]

There is nothing startling, or other than an application of common sense, in the proposition that two parties may suspend the operation of the terms of their relationship but keep that relationship in effect. By usage and experience in the context of industrial employment there must be an implied term that, provided proper notice be given, in the event of an industrial dispute, there can be a cessation of mutual obligation without a cessation of the relationship. The definition of strike in the Contracts of Employment Act, 1963, Sch. 1, para. 11 (1) clearly implies that a strike can be lawful; and see para. 7. So there can be a strike which is not in breach of contract. The Redundancy Payments Act, 1965, s. 56 (1) gives the same definition of " strike." So both these Acts have implicit in them the fact that a strike may not involve a breach of contract of employment. To a layman the position is quite clear: in a strike, the men do no work and the employers pay no wages. Where a strike notice of the appropriate length is served, the object is to comply with the contract and not to break it. *Rookes* v. *Barnard* [56] never said that every strike is a breach of the contract of employment. A " strike notice " of due date does not involve intimidation.

If the argument for the defendants so far be correct, the effect of section 3 of the Act of 1906 does not fall to be considered. *Rookes* v. *Barnard* [56] is not authority for the propositions put forward by Pearson L.J. in *J. T. Stratford & Son Ltd.* v. *Lindley* [57]: see *per* Lord Denning M.R.[58] and Salmon L.J.[59] " Strike notices " have never been held to be unlawful because they were not protected by section 3. What the parties are trying to do by giving the notice is to comply with the contract. *White* v. *Riley* [60] was approved by Lord Evershed in *Rookes* v. *Barnard* [61] and there was no disagreement on this. In *Rookes* v. *Barnard* [61] the jury found that Silverthorne had threatened a breach of contract. Both Lord Reid [62] and Lord Devlin [63] were saying in effect that a

[54] [1906] A.C. 384, 387.
[55] [1909] 1 K.B. 901, 922, 923.
[56] [1964] A.C. 1129.
[57] [1965] A.C. 269, 289.
[58] Ibid. 285.
[59] Ibid. 304.
[60] [1921] 1 Ch. 1.
[61] [1964] A.C. 1129.
[62] Ibid. 1164.
[63] Ibid. 1203.

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strike with due notice was not unlawful. Until *Rookes* v. *Barnard*,[64] section 3 of the Act of 1906 would have been held to have protected Fry.

Cur. adv. vult.

June 27. The following judgments were read.

LORD DENNING M.R. 1. THE FACTS.

In 1962 in the ports of London and Tilbury there were only 650 lockmen, but they held a key position. Without them the ports could be brought to a standstill. They were members of the Transport and General Workers' Union (the "Transport Union"), as were all the other workers in the ports. In 1962 the lockmen claimed that they should have a 5d.-an-hour shift allowance. The officials of the union entered into negotiations with the employers (the Port of London Authority) to try to secure this increase. After much discussion, the employers offered 3d. an hour. The union officials thought it was the best obtainable and recommended the lockmen to accept it. At a mass meeting of the Poplar branch the men accepted this recommendation by a majority of 84 votes to 43. But there was a dissentient minority who were very dissatisfied. The dissentients were led by a man called Hammond, who was said to be a troublemaker. They thought that the union had not pressed this claim of the lockmen strongly enough. They felt that the union should have stood out for 5d. an hour and, if it were not obtained, they should call a strike of all the men employed in the port, and thus bring the port to a standstill. They felt this so strongly that on November 1, 1962, about 30 of them decided to leave the Transport Union and to form a breakaway union called the Union of Port Workers. Four of them worked at a lock in the London port, called the Blackwall Entrance. These four included Hammond, the supposed troublemaker, and also Mr. Morgan, the plaintiff.

The formation of this breakaway union caused great concern to the officials of the Transport Union and to many of its members. In particular to the regional secretary, Mr. Fry, the first defendant. The judge said [1] that he was

> "an honest and sincere man. . . . A lifetime of experience and training in the trade union movement has taught him that

[64] [1964] A.C. 1129.

[1] [1968] 1 Q.B. 521, 537; [1967] 3 W.L.R. 65; [1967] 2 All E.R. 386; 2 K.I.R. 264.

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small breakaway unions must be stamped out immediately . . . [because] they are injurious to the preservation of peace in the docks."

Mr. Fry wanted the breakaway men to come back into the Transport Union. But if they persisted in their breakaway, he wanted their employers to dismiss them: and to achieve this result he was ready, if need be, to call a strike. Mr. Harrall was the district organiser of the union. He, too, was a full-time paid official. He supported what Mr. Fry did. The actions of the paid officials were supported by several members in the Poplar branch. In particular by the chairman, Mr. Bilson, and the secretary, Mr. Mehegan. These last two were not paid officials. They were workmen employed by the Port of London Authority and were unpaid officers of the branch.

In January and February, 1963, the union officials had meetings with the officers of the Port of London Authority. They told the employers that the loyal members of the Transport Union were pressing for action to be taken against the breakaway union. Mr. Fry said that he had it in view to instruct his members not to work with the four known members of the Union of Port Workers at the Blackwall Entrance. The union officials made it pretty clear that they wanted the four men dismissed.

On March 14, 1963, Mr. Fry gave a notice to the Port of London Authority. This whole case depends on it. It was a "strike notice" giving more than two weeks' notice in these words:

> "I have to advise you that on and from Monday, April 1, 1963, the members of this organisation [the Transport Union] employed as lockmen at Blackwall and South-West India Dock will be instructed not to work with the Union of Port Workers and other non-trade unionists."

It was clearly implied in that notice that if the Authority wanted the men of the Transport Union to work at the lock, they would have to dismiss the others.

On March 19, 1963, the staff relations officer interviewed three of the men (but Mr. Morgan was not there as he was sick). The record says:

> "Each of the three lockmen was told at the interview that he would be given one week to come to a decision. If he decided against joining or rejoining the Transport Union, he would be given written notice terminating his services with the Authority."

On March 28, 1963, Mr. Morgan was seen. The record says:

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"During the afternoon of March 25, the assistant to the staff relations officer interviewed lockman J. P. Morgan (age 27 years: service, three years) and, after explaining the Authority's position, similarly warned him that his services would be terminated unless he agreed to rejoin the Transport Union. Morgan said he was satisfied with his pay and conditions and was anxious to remain in the Authority's service. He was, however, determined not to rejoin the union, who he considered had failed in their duty to their members employed at the various locks and entrances. He was also indignant that an employer and a trade union should conspire together to bring to an end the employment of a number of men who had committed no offence and who merely wished to be allowed to belong to a union of their own choice. He also maintained that the members of the union were not in favour of the action which had been taken in their name by the officials of the union.

"The assistant to the staff relations officer pointed out that the difficulties were not of the Authority's making and that they had given ample warning of the unfortunate position in which they would be placed if a major stoppage became imminent, as it now had. The Authority had no alternative but to treat the union's formal communication as a serious threat to the working of the port. In the circumstances there could be no deflection from the course of action which had been outlined, and Morgan was told that he had until March 29 to make a decision."

On March 29, 1963, the union put off their instruction from April 1 to April 8 so as to enable the Authority to give a week's notice to the four men. On that same day, March 29, 1963, the Authority gave notice to Mr. Morgan to end his employment with the Authority on April 6, 1963. He was out of work for six weeks and eventually became a collector for a Gas Board of moneys put into gas meters. He earned less salary than he did in the docks. He now brings this action claiming damages for intimidation against the defendants, Mr. Fry and Mr. Harrall, the fulltime officials of the union, and Mr. Bilson and Mr. Mehegan, the chairman and secretary of the local branch.

Widgery J. found [2] in favour of Mr. Morgan against the two officials and awarded damages of £425 against them. But he dismissed Mr. Morgan's claim against the officers of the local branch. In consequence, he awarded Mr. Morgan only half his costs. Mr. Morgan then put in a notice of appeal, saying that his claim should have succeeded against the officers of the local branch and that he should have all his costs. The officials of

[2] [1968] 1 Q.B. 521.

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the union put in a cross-appeal saying that the claim should have failed against them.

2. THE STRIKE NOTICE.

The root question is whether the "strike notice" on March 14, 1963, was an act of intimidation. It gave two and a half weeks' notice—afterwards extended to three and a half weeks—far longer than the week's notice necessary to terminate the employment altogether. But it was not a notice of termination. It was only a notice that the men would not work with non-unionists. Was it unlawful?

According to the decision in *Rookes* v. *Barnard* [3] the tort of intimidation exists, not only in threats of violence, but also in threats to commit a tort or a breach of contract. The essential ingredients are these: there must be a threat by one person to use unlawful means (such as violence or a tort or a breach of contract) so as to compel another to obey his wishes: and the person so threatened must comply with the demand rather than risk the threat being carried into execution. In such circumstance the person damnified by the compliance can sue for intimidation.

The new point in *Rookes* v. *Barnard* [3] was that the threat of a breach of contract was held to be "unlawful means." The breach of contract in that case was of a flagrant kind. The men had given a pledge to their employers that they would not come out on strike. In breach of that pledge, they threatened the employers—on three days' notice—to come out on strike unless Rookes was dismissed. The employers submitted to the threat and dismissed Rookes. That was held to be intimidation which gave to Rookes a right of action for damages.

If *Rookes* v. *Barnard* [3] is carried to its logical conclusion, it applies not only to the threat of a flagrant breach of contract, such as occurred in that case, but also to the threat of any breach of contract—so long as it is of sufficient consequence to induce the other to submit. It applies to the strike notice in this present case if—and this is the point—it was the threat of a breach of contract.

This brings me, therefore, to the crux of the case: was the "strike notice" in this case the threat of a breach of contract? If it had been a full week's notice by the men to terminate the employment altogether, it would not have been a threat to commit a breach of contract. Every man was entitled to terminate his contract of employment by giving a week's notice. But the "strike

[3] [1964] A.C. 1129; [1964] 2 W.L.R. 269; [1964] 1 All E.R. 367, H.L.(E.).

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notice" in this case was not a notice to terminate the employment. It was a notice that they would not work with non-unionists. That looks very like a threat of a breach of contract: and, therefore, intimidation. In *Stratford (J. T.) & Son Ltd.* v. *Lindley*[4] I stated the argument in this way [5]:

> "Suppose that a trade-union officer gives a 'strike notice.' He says to an employer: 'We are going to call a strike on Monday week unless you . . . dismiss yonder man who is not a member of the union.' . . . Such a notice is not to be construed as if it were a week's notice on behalf of the men to terminate their employment, for that is the last thing any of the men would desire. They do not want to lose their pension rights and so forth by giving up their jobs. The 'strike notice' is nothing more nor less than a notice that the men will not come to work"—or, as in this case, that they will not do their work as they should—"In short, that they will break their contracts. . . . In these circumstances . . the trade-union officer, by giving the 'strike notice,' issues a threat to the employer. He threatens to induce the men to break their contracts of employment unless the employer complies with their demand. That is a threat to commit a tort. It is clear intimidation. . . ."

It is difficult to see the logical flaw in that argument. But there must be something wrong with it: for if that argument were correct, it would do away with the right to strike in this country. It has been held for over 60 years that workmen have a right to strike (including therein a right to say that they will not work with non-unionists) provided that they give sufficient notice beforehand: and a notice is sufficient if it is at least as long as the notice required to terminate the contract.

There have been many cases where trade-union officials have given "strike notices" of proper length, and no one has suggested there was anything illegal about them. And not a few of them have found their way into the Law Reports. In the great case of *Allen* v. *Flood* [6] the boilermakers objected to two shipwrights working alongside them. The trade-union official went to the manager and gave a "strike notice." He said that all the members of the boilermakers' society would be called out unless the two shipwrights were dismissed. Thereupon the manager dismissed the two shipwrights. The House of Lords held that the trade-union official had done no wrong. The "strike notice" there

[4] [1965] A.C. 269; [1964] 2 W.L.R. 1002; [1964] 2 All E.R. 209, C.A.; [1965] A.C. 269; [1964] 3 W.L.R. 541; [1964] 3 All E.R. 102, H.L.(E.).

[5] [1965] A.C. 269, 285.

[6] [1898] A.C. 1, H.L.(E.).

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was very short, it was only a day—but it was long enough, because they were only employed by the day. Lord Macnaghten said [7]:

> "There was nothing wrong in his (the trade-union official) telling the manager that . . . (the union men) would leave their work unless the two shipwrights against whom they had a grudge were dismissed, if he really believed that that was what his men intended to do. As far as their employers were concerned . . . (the union men) were perfectly free to leave their work for any reason, or for no reason, or even for a bad reason."

Then in *White* v. *Riley* [8] some workmen who were members of the curriers' union wanted one of their fellow-workmen called White to join their union. He refused. The men then gave a "strike notice" to the employers of a full week: "We hereby give you notice that we shall cease work on Friday next unless E. White either joins our Society or leaves your employment." White did not do so. So the employers, rather than have a strike, dismissed White. White brought an action for damages. The Court of Appeal dismissed it. Lord Sterndale M.R. quoted *Allen* v. *Flood* [9] and said [10]:

> "I think it is quite clear that the mere statement to an employer by a number of workmen that they will not work with another workman, and that, if that workman is retained in the employer's service, they will strike, is not of itself actionable."

Those two cases (and there are several others) show quite clearly that a "strike notice" of proper length is not unlawful. But if the "strike notice" is not of proper length—if it is shorter than the legal period for termination—then it is unlawful That appears from the Irish cases of *Cooper* v. *Millea and Ors.* [11] and *Riordan* v. *Butler and Ors.* [12] In the latter case the plaintiff was a plasterer but he was not a member of the Plasterers' Union. His fellow-workmen threatened to cease work *immediately* unless he was dismissed. Thereupon his employer dismissed him. He was held to have an action against them. O'Byrne J. said [13]:

> "Did the defendants adopt illegal means for the purpose of effecting their purpose? . . . There was, as it seems to me, the clearest indication that the defendants would break their contracts with . . . (their employer). They were employed by the week, and they were bound to give one week's notice

[7] [1898] A.C. 1, 148.
[8] [1921] 1 Ch. 1, C.A.
[9] [1898] A.C. 1.
[10] [1921] 1 Ch. 1, 13.
[11] [1938] I.R. 749.
[12] [1940] I.R. 347.
[13] Ibid. 353.

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> for the purpose of terminating their employment. . . . The three defendants could have adopted that course, and, if they did so, it seems to me that a plaintiff would not have any right of action against them. But they did not. Their threat, and I use the word in its broadest sense, was that they would walk off the job, that they would cease work immediately in breach of their contract. Was that an unlawful means? It seems to me . . . that it was."

Those cases were all before the House of Lords in *Rookes* v. *Barnard*.[14] None of their Lordships threw any doubt on them. Lord Evershed [15] clearly approved them and none of the others said Nay. He said [16]:

> ". . . it has long been recognised that strike action, or threats of strike action . . . in the case of a trade dispute do not involve any wrongful action on the part of the employees, whose service contracts are not regarded as being or intended to be thereby terminated."

I think the other Law Lords must have thought the same. It is to be noticed that the "strike notice" in *Rookes* v. *Barnard* [17] was too short. The men did not give a full week's notice; they only gave three days from January 10 to January 13. The withdrawal of labour after three days would be a breach of contract. Yet none of their Lordships relied on that breach as the basis of the intimidation. They relied on the pledge not to strike. Lord Devlin made that clear when he stressed [18] that the substantial illegality on the part of the men was their flagrant violation of a pledge not to strike [18]: "It is not just a technical illegality, a case in which a few days' longer notice might have made the difference." I read that sentence as meaning that if in *Rookes* v. *Barnard* [19] there had been no pledge against a strike, then the giving of three days' notice instead of seven days' notice would be a technical illegality: and that seven days' notice would have made all the difference. In other words, a "strike notice" of proper length is not even a technical illegality. It is perfectly lawful.

What then is the legal basis on which a "strike notice" of proper length is held to be lawful? I think it is this: The men can leave their employment altogether by giving a week's notice to terminate it. That would be a strike which would be perfectly lawful. If a notice to terminate is lawful, surely a lesser notice is lawful: such as a notice that "we will not work alongside a

[14] [1964] A.C. 1129.
[15] Ibid. 1179.
[16] Ibid. 1180.
[17] [1964] A.C. 1129.
[18] Ibid. 1218.
[19] [1964] A.C. 1129.

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non-unionist." After all, if the employers should retort to the men: "We will not accept this notice as lawful," the men can at once say: "Then we will give notice to terminate." The truth is that neither employer nor workmen wish to take the drastic action of termination if it can be avoided. The men do not wish to leave their work for ever. The employers do not wish to scatter their labour force to the four winds. Each side is, therefore, content to accept a "strike notice" of proper length as lawful. It is an implication read into the contract by the modern law as to trade disputes. If a strike takes place, the contract of employment is not terminated. It is suspended during the strike: and revives again when the strike is over.

In my opinion, therefore, the defendants here did not use any unlawful means to achieve their aim. They were not guilty of intimidation: because they gave a "strike notice" of proper length. They were not guilty of conspiracy to use unlawful means: because they used none. They were not guilty of conspiracy to injure: because they acted honestly and sincerely in what they believed to be the true interests of their members. That is enough to decide this case: but in case I am wrong, I will mention quite shortly the other points.

3. TRADE DISPUTES ACT, 1906.

The question is whether in any case the defendants are protected by section 3 of the Trade Disputes Act, 1906. The section says:

> "An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills."

Apart from authority, I should have thought that the last two limbs would cover this case. The only ground of the action is that it is an act of intimidation which interferes with Mr. Morgan's employment or with his right to dispose of his labour as he wills. But the House of Lords in *Rookes* v. *Barnard* [19] held that the last two limbs do not apply when the interference is brought about by intimidation or other illegal means. So I cannot rely on the last two limbs. But I think this case is covered by the first limb. The words exactly cover it, so long as "induces" includes "a threat to

[19] [1964] A.C. 1129.

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induce," which I think it does: see *Stratford* v. *Lindley*,[20] by Salmon L.J.[21] and myself.[22] The Trade Disputes Act, 1965, now makes it clear for the future.

There are, however, two arguments to the contrary:—First, Lord Pearce in *Stratford* v. *Lindley*[23] expressed the view that the section only protects the trade union official from an action *by the employer*: and that it does not protect him from an action by a third party, such as Rookes, or, in this case, Morgan. I am afraid I do not agree. The words are "shall not be actionable" without qualification. I see no justification for inserting the words "by the employer."

Secondly. It is said that the trade-union officials here are not protected: because of the decision in *Rookes* v. *Barnard*[24] where the trade-union official Silverthorne (who had threatened to induce a breach of contract of employment) was not protected by the section. I find it difficult to see why Silverthorne was not protected. The speeches do not make it clear: but I think the reason must have been because on the findings of the jury Silverthorne was a party to a conspiracy to which the three defendants were parties, and that no distinction was to be drawn between them: see what Lord Reid said.[25] So all of them were guilty of threats actually to break contracts of employment (as distinct from threats to induce) and were accordingly not protected

In my opinion, therefore, the defendants are protected by section 3.

4. JUSTIFICATION.

If I am wrong about this point also, there still remains the contention that Mr. Fry and the others were justified in what they did. The courts have not yet been called upon to consider what part, if any, justification plays in the tort of intimidation: see *Rookes* v. *Barnard*.[26] So I hesitate to say anything about it. But I must say that if Hammond and his friends were really trouble-makers who fomented discord in the docks, without lawful cause or excuse, then Mr. Fry and his colleagues might well be justified in saying the men would not work with them any longer.

It is not necessary for me to go into these matters any further: because the action fails on the first point—that the strike notice was not unlawful.

[20] [1965] A.C. 269.
[21] Ibid. 304.
[22] Ibid. 285.
[23] Ibid. 336.
[24] [1964] A.C. 1129.
[25] Ibid. 1166.
[26] Ibid. 1206.

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5. CONCLUSION.

If the arguments submitted to us in this case were right, it would mean that the decision in *Rookes* v. *Barnard* [27] had reversed the whole of the labour law in this country as it had been understood for sixty years. I decline to give the decision that effect. It should be confined to cover when there is a pledge not to strike.

I would, therefore, allow the cross-appeal and dismiss the action with costs here and below.

DAVIES L.J. The interesting and helpful arguments in this case have covered a very wide area and have involved an abundant citation of authority. But essentially the main question is, as my Lord has said, whether the notice given by Mr. Fry to the Port of London Authority on March 14, 1963, as amended by the subsequent postponement of its effective date to April 8, was an illegal act of intimidation and so actionable at the suit of the plaintiff. That involves the question whether such a notice, viz., that the men will not work in accordance with the terms of their existing contracts after the expiration of a proper period of notice, is a notice of an intention to commit a breach of contract and thus illegal, and whether, as Mr. Mars-Jones suggests, no such notice can ever be legal unless it amounts to a notice completely to terminate the contract of employment.

The notice, so far as material, was in these terms:

> "Union of Port Workers and other non Trade Unionists—Lock Staff.—Arising therefrom, I have to advise that on and from Monday, April 1, 1963, the members of this organisation employed as lockmen at Blackwall and South-West India Dock will be instructed not to work with the people in the above category. They are to carry out their duties as far as possible without the assistance of these people."

It is, I think, not unimportant to note that Mr. Fry did not ask the Port of London Authority to act illegally towards or in breach of contract with the plaintiff, and that in the event the Port of London Authority did not do so, since they terminated the plaintiff's employment by proper notice. And it is conceded by the plaintiff that had the notice given by Mr. Fry been a notice on behalf of the men to terminate the contracts of employment it would have been perfectly legal; but what is said is that it was a notice not of termination but of an intention to act, as from

[27] [1964] A.C. 1129.

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A the given date, in breach of the terms of the contract of employment and so illegal.

At first sight it does appear strange that while a proper notice to terminate is not illegal and cannot amount to intimidation, a notice of what may be called a lesser intention is illegal and can therefore constitute the tort. It was aptly pointed out by Mr. B Stocker that the notice in the present case was designed to cause as little inconvenience and interruption of work as possible and therefore might well be said to be likely to exert less pressure on the employers than would a notice of termination. The employer can, of course, refuse to accept a notice such as that given in the present case, in which event, no doubt, the employer or the men C could terminate the contracts of employment, which, of course, would be the last thing that either side would desire.

It is indeed a startling proposition that, in these days of collective bargaining, a concerted withdrawal of labour, or the threat of such, provided always that a proper period of notice is given, can be held to be illegal. As the Master of the Rolls has said, D it is not altogether easy to see the logical reason in law why, if the men tell the employers that, if the latter do not terminate the employment of X, they (the men) will not work according to the terms and conditions of their existing contracts, that does not amount to a breach or to a declaration of intention to breach their contracts. This point was dealt with by my Lord in *Stratford (J. T.) & Son Ltd.* v. *Lindley*[28] E in the passage which he has quoted in his judgment in the present case. But it seems to me that it may well be that the proper analysis of such a situation as that in the present case is that the men, or the union on their behalf, in effect are saying: "As from the appropriate date we are not prepared to go on working on the present terms, that is to F say, alongside the non-union men. If you get rid of them, then all will be well; if not, then we shall not work." It is to be noted that the notice here stated that the men were "to carry out their duties as far as possible without the assistance of such people." The meaning of this obviously was that if the non-unionists were not there the men would work but that if the non-unionists were G there the men would not work. In a sense this does amount to a termination of the existing contract and an offer to continue on different terms. In the present case this was accepted by the Port of London Authority who, as I have said, did not break their contract with the plaintiff but terminated it by lawful notice. This

[28] [1965] A.C. 269, 285.

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conception does not, in my view, conflict with the observations made by Lord Donovan in *Stratford* v. *Lindley* [29] on the particular facts of that case.

Whether or not the approach above suggested be correct, there is abundant authority for the proposition that it is not unlawful for workmen to inform their employers that they will not work with a particular man or set of men. My Lord has referred to the judgment of Lord Sterndale M.R. in *White* v. *Riley* [30] and I would venture to add another citation from that judgment [30]:

> ". . . if a set of men object to work with another man or another set of men they have a perfect right to say that they will not work with him any longer, and, more than that, they have a perfect right to tell their employer what they are going to do. It is sometimes expressed by saying that they have a right to give him a warning but they have not a right to threaten. Of course both of those words are difficult to define, and I prefer to say that they have a right to make the statement to him that they are going to do it, and that, whatever epithet or substantive you may apply to it, if they do not go beyond that there is no cause of action."

That statement of principle, aptly illustrated as it is by the two converse Irish cases to which my Lord has referred [31] has never been doubted. And in connection with those two cases [31] it should be pointed out that the result of the plaintiff's argument here would be that there is no difference in point of legality between on the one hand a strike notice of proper length and on the other hand a lightning strike upon no or no adequate notice.

Many other statements to the same effect as that enunciated in *White* v. *Riley* [32] are to be found in the authorities. There is the clear statement to that effect by Fletcher-Moulton L.J. in *Gozney* v. *Bristol Trade and Provident Society*.[33] And, of course, Lord Reid in *Rookes* v. *Barnard* said [34]:

> ". . . there is no doubt that men are entitled to threaten to strike if that involves no breach of their contracts with their employer and they are not trying to induce their employer to break any contract with the plaintiff."

It is true that neither of those passages is expressly directed to the suggested distinction between a proper notice of complete termination and a proper notice of intention to withdraw labour or not to work in accordance with the terms of the existing

[29] [1965] A.C. 269, 342.
[30] [1921] 1 Ch. 1, 13.
[31] Ante, p. 9.
[32] [1929] 1 Ch. 1.
[33] [1909] 1 K.B. 901, 922, 923.
[34] [1964] A.C. 1129, 1167.

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A contracts. But in fact no support for such a distinction is to be found in the decided cases.

In the course of the argument reference was made by both sides to paras. 6 and 7 of Sch. I to the Contracts of Employment Act, 1963, and to the definition of "strike" in para. 11. It may well be that these paragraphs do not assist as to the position at com-
B mon law or to the decision of the present case. But it is nevertheless clear that the legislature were contemplating that in certain circumstances a contract of employment should be deemed to continue even though the employee was on strike.

Rookes v. *Barnard* [35] does not, in my judgment, decide that the employees or the union on their behalf may not by a proper
C period of notice give notice of withdrawal of labour or of an intention not to be bound by the existing contractual conditions. I agree with Mr. Stocker's submission that that case really turned upon the fact that it was admitted there that the "no-strike" clause was incorporated into each individual contract of service; consequently a strike or a threat to strike was clearly
D illegal, a flagrant violation, as Lord Devlin termed it,[36] of a pledge not to strike. There was also, of course, in that case the fact that the notice given was of three days only, instead of the necessary minimum of seven days. This was referred to by Lord Devlin [37] as a technical illegality. One does not, of course, know whether, had there been no "no-strike" clause, the result of the
E case would have been the same. But in the present case there is no such technical illegality, since the notice given was of the proper length.

It will be seen, therefore, that on this, the main part of the case, I am in respectful agreement with the judgment of the Master of the Rolls. The notice given by Mr. Fry was not an illegal
F notice nor did it amount to a threat of illegal action. It was a statement that in default of action by the Port of London Authority which it might lawfully take the men would withdraw their labour, which in effect I suppose would mean that the obligations under the contract would be mutually suspended.

In the result, therefore, I agree that the judge ought to have
G found in favour of the defendants and the action should have been dismissed.

The other two points, viz., the application of section 3 of the Trade Disputes Act, 1906, and the suggested defence of justifica-

[35] [1964] A.C. 1129.
[36] Ibid. 1218.
[37] Ibid. 1204, 1218.

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tion, do not, therefore, arise and I prefer to say nothing about them, save that in the light of *Rookes* v. *Barnard* [38] and *Stratford* v. *Lindley* [39] it would, in my view, be very difficult for this court to hold that had the defendants been otherwise liable they would have been entitled to the protection of the Act.

In the result, therefore, I agree that the defendants' cross-appeal succeeds and the plaintiff's appeal should be dismissed.

RUSSELL L.J. The plaintiff's case is based upon the allegation that there has been committed against him what is called the tort of intimidation, consisting of a threat to employ against his employer unlawful means, which threat was designed to interfere if necessary with the plaintiff's employment, and which did so interfere to his detriment and damage, although his contract of employment was duly determined according to its terms.

The threat to the common employer was that, although the Transport and General Workers' Union members who were lockmen would at the expiration of seven days, later extended, continue in general to carry out their allotted contractual tasks at the lock, they would not do so in so far as the employers required them to do so (as the employment contract entitled the employers to require) in co-operation with the plaintiff, unless he rejoined their union. It seems to me quite plain that this was a threat (in the sense of an intimation of intention) that the Transport and General Workers' Union lockmen would after seven days in certain circumstances and in certain respects breach their contractual obligations. Had the employers retained the plaintiff at the lock and ordered the lockmen including the plaintiff to carry out together one of their normal tasks, refusal to carry out the task by the other lockmen would obviously have been a breach of their contractual obligations: see also *Bowes & Partners Ltd.* v. *Press*.[40]

The threat or intimidation was therefore of breach of contract: and the first question is whether it necessarily follows from this in law that the tort of intimidation is involved, bearing in mind that *Rookes* v. *Barnard* [41] establishes authoritatively that breach of contract can constitute unlawful means in this field.

Before looking at the cases I remark that the workmen were on seven days' notice terms, and had the statement been in terms that they would quit their employment, with a proviso that they would be prepared to continue in it if the plaintiff rejoined their

[38] [1964] A.C. 1129.
[39] [1965] A.C. 269.
[40] [1894] 1 Q.B. 202, C.A.
[41] [1964] A.C. 1129.

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union or on terms that he was not put to work with them, it could not involve any breach of contract.

White v. *Riley* [42] was a case in which the notice to the employer was that the workmen "will cease work" at the end of a week unless the plaintiff joined their union or left his employment. This was regarded not as a threat to breach their contracts but to terminate those contracts—it would appear that they were on weekly notice terms. Younger L.J. in terms refers [43] to the notice as intimating to the employers that the workmen "would leave the employers' service at the end of the week." This case cannot, therefore, be regarded as authority for the proposition that breach of contract is not always unlawful means for the purposes of the tort now under consideration *Santen* v. *Busnach* [44] was another case in which a strike warning was treated as indicating an intention to terminate the employment contracts.

In *Cooper* v. *Millea* [45] the threat by the workmen, who were on weekly contracts, was that they would *immediately* "withdraw their labour" if the plaintiff were allowed to take up duty. This would, of course, involve breach of their contracts. Gavan Duffy J. decided on a point of absolute principle that since a threatened breach of contract was involved unlawful action was threatened and the tort of intimidation was therefore constituted. *Riordan* v. *Butler* [46] was in substance the same case, and O'Byrne J. followed *Cooper* v. *Millea*.[47] In so doing he expressly noticed that the workmen could have achieved substantially the same result by giving a week's notice to terminate their contracts in a perfectly lawful way: but that they did not adopt that course, and the tort of intimidation was constituted by the fact that they adopted a course involving short notice and therefore breach of contract. The judge distinguished *White* v. *Riley* [48] on the ground that there a week's notice of intention to cease work was given. Clearly the view was taken that "withdrawal of labour" or "ceasing work" pointed to termination of contract.

In *Rookes* v. *Barnard* [49] the employees were on weekly notice terms, and that which was threatened was "a withdrawal of labour" in three days' time. There is no doubt that the decision that unlawful means were involved was based on breach of a "no strike" clause incorporated in the terms of employment, and even if that which was threatened had been concerted termination

[42] [1921] 1 Ch. 1.
[43] Ibid. 29.
[44] (1913) 29 T.L.R. 214.
[45] [1938] 1 I.R. 749.
[46] [1940] I.R. 347.
[47] [1938] I.R. 749.
[48] [1921] 1 Ch. 1.
[49] [1964] A.C. 1129.

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of contracts on a full seven days' notice, such termination would have been a breach of the "no strike" clause. The speeches and indeed the arguments as reported refer but little to the question whether "withdrawal of labour" meant termination of the contractual nexus, or to the fact that even if it did three days was too short. Lord Reid referred only to breach of the "no strike" clause: but he made no reservations to his general approach that breach of contract involved relevantly unlawful means: he said that [50] "men are entitled to threaten to strike if that involves no breach of their contracts . . ." which seems to refer to "strike" in the sense of concerted due termination of their contracts of service. Lord Evershed in terms indicated [51] that without the "no strike" clause there would have been no tort of intimidation. He accepted [52] the views of Donovan L.J. in the court below [53] that nowadays workmen giving notice of a strike have no intention of terminating their contracts and, though presumably this means that they intend to maintain and breach their contracts, he said that this involved no wrongful action. Moreover, he cited the two Irish cases [54] without disapproval as indicating that in this branch of tort breach of contract is unlawful means: yet he did not refer to the fact that the short three-day notice taken by itself made *Rookes* v. *Barnard* [55] indistinguishable from those cases. Lord Hodson treated [56] breaches of contract in general terms as unlawful means: he remarked [57] that the employees had not only agreed to a fixed period of notice for termination of the employment but also to the "no strike" clause: he did not refer to the length of notice in fact given: he did mention the two Irish cases as persuasive authority that breach of contract was relevantly unlawful means, but also without saying that the three-day short notice taken alone made them indistinguishable. Lord Devlin [58] relied "in the second place" upon breach of the "no strike" clause as unlawful means. But he also shared the view of Donovan L.J. [59] that if without the "no strike" clause the employees had given seven days' notice of "withdrawal of labour" that ought not to be regarded as notice to determine their contracts but rather as notice that they would withhold labour under a continuing contract of service, which would mean breach of contract and unlawful means. (This view would be contrary, it seems to me, to the views of this court in *White* v.

[50] [1964] A.C. 1129, 1167.
[51] Ibid 1180, 1181.
[52] Ibid. 1180.
[53] [1963] 1 Q.B. 623, 675, 682.
[54] Ante, p. 9.
[55] [1964] A.C. 1129.
[56] Ibid. 1200.
[57] Ibid. 1197.
[58] Ibid 1204.
[59] [1963] 1 Q.B. 623, 675.

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A *Riley* [60] except that the "short" notice in *Rookes* v. *Barnard* [61] might point to a general contract-breaking attitude.) If, on the other hand, notice of withdrawal of labour ought to be taken as notice of intention to destroy the contractual nexus by termination, Lord Devlin considered [62] that it might be too technical an approach to hold that a few days short in the notice made the B difference between unlawful and lawful means, the pressure being the prospect of indefinite loss of the labour force and not the precise date on which it was to start: though he did not in this connection refer to the Irish cases. (I think that the above is a correct summary of the effect of the passages [63] of the report which were a good deal canvassed in the course of argument.) C Lord Pearce [64] in general terms held that unlawful means for the purposes of this tort included breach of contract and referred to the two Irish cases as indicating this, without discussing the particular breach or breaches in *Rookes* v. *Barnard*.[65] What then is the impact on the present case of *Rookes* v. *Barnard* [65] as authority? The main battle was whether breach of contract *could* D be relevant unlawful means. It could not be doubted that if that battle was lost by the defendants the breach of the "no strike" clause was in the context of the particular tort highly relevant unlawful means, because the pressure or intimidation could not have been applied without breach of that clause, preventing as it did concerted due termination of contracts and requiring as it E did that disputes should be dealt with as provided in the constitution of a National Joint Council. Given the breach of the "no strike" clause it would not have served the defendants to argue what the position in law might be if it had not been present. It did not consequently arise for decision whether in this branch of tort any and every breach of contract was a sufficient unlawful F means: nor whether, as Lord Devlin thought,[66] a seven-day notice of withdrawal of labour should nowadays be regarded not as notice to determine the contract but as notice of intention to maintain and breach it: nor whether, as Lord Evershed thought,[67] there would even so be nothing wrongful about that: nor whether, as Lord Devlin thought,[68] a short notice of termination of a weekly G notice contract might perhaps not be regarded as unlawful means. Nor, more importantly for present purposes, did it arise for decision whether when that which is threatened is undoubtedly

[60] [1921] 1 Ch. 1.
[61] [1964] A.C. 1129.
[62] Ibid. 1218, 1219.
[63] Ibid. 1204, 1218, 1219.
[64] Ibid. 1234.
[65] Ibid.
[66] Ibid. 1204.
[67] Ibid. 1180.
[68] Ibid. 1204.

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a refusal to comply with the terms of a continuing contract in certain circumstances and in certain respects, but exactly the same or greater pressure could have been applied by a threat of concerted due termination of the employment contracts, the adoption of the first method must commit the defendants to the tort of intimidation.

Consequently, in spite of the generality of the language of the majority in *Rookes* v. *Barnard*,[69] and encouraged by the attitude of Lord Devlin [70] (as I see it) to a case where the only breach would be a few days missing from due notice of termination, I consider that we are not bound by precedent to hold in the present case that the tort of intimidation has been committed.

What then should we hold? What ought the law to be? There is no doubt that if the workmen in concert had given notice in terms terminating their contracts of employment, unless by the expiration of the notice the plaintiff had either rejoined the union or been removed from the lock, the result and the effect upon the plaintiff would have been exactly the same: the pressure would have been as strong or stronger, and pressure is at the heart of this branch of tort. Further, viewing the question of wrongful or unlawful conduct as between the employer and the lockmen, while it is perfectly true that abstention from work without determining their contracts is clearly the preferable course for the strikers, it is also the preferable course for the employer, who retains his labour force on his books and has the continued existence of the contracts as the background for negotiation unless and until he wishes to accept a repudiatory breach.

I would not wish in this branch of the law to establish as a proposition applicable to every case that the tort of intimidation is the intended interference with a man's employment by threat of breach of contract with his employer. I would exclude a case such as the present where exactly the same or even greater pressure could be exerted by a threat of concerted due termination of such contract, and where the carrying out of the threatened breach would be preferred by the threatened party to the carrying out of a threatened termination of the contract.

On the more general question of a "right to strike" I would not go so far as to say that a strike notice, provided the length is not less than that required to determine the contracts, cannot involve a breach of those contracts, even when the true view is that it is intended while not determining the contract not to comply with the terms or some of the terms of it during its continuance.

[69] [1964] A.C. 1129. [70] Ibid. 1218, 1219.

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I have already mentioned *White* v. *Riley* [71] as a case of termination of the contract. *Allen* v. *Flood* [72] was, I think, another such. In *Riordan* v. *Butler*,[73] O'Byrne J. would have similarly so regarded the notice of intention to withdraw labour had it been a seven-day notice. It follows that I would not agree that in the present case withdrawal of labour only in limited circumstances or respects, being less than total withdrawal, would a fortiori not be a breach of contract. On the other hand, if "short" notice of true concerted termination of the contract were the only breach involved I doubt (with, I think, Lord Devlin [74]) whether for the purposes of the tort of intimidation it should be regarded as the employment of unlawful means: the pressure is the threat to withdraw from the employment, and ordinarily it would make no real difference to the effectiveness of the pressure whether the threatened withdrawal was to begin on D plus 3 or D plus 7. For that reason I am not satisfied that the Irish cases [75] are necessarily correct: though there may have been reasons in those cases for saying that the pressure exerted by a threat of immediate termination was greater than would have been exerted by a seven-day notice. These are, however, somewhat general observations.

On this particular case I am for the reasons given of opinion that the threat or notification, albeit involving envisaged breach of contract, ought not to be regarded for the purposes of this tort as involving unlawful means. In consequence, I would allow the cross-appeal by the defendants and dismiss the appeal by the plaintiff on a question involving costs which I have not found it necessary to outline. The judgment should be set aside and the action as against all defendants dismissed.

In those circumstances I do not propose to consider whether in this or any case defendants may establish justification for committing this tort, nor whether if the defendants were prima facie guilty of the tort they would be protected by the Trade Disputes Act.

Appeal dismissed. Cross-appeal allowed. Action dismissed with costs in Court of Appeal and below.

Leave to appeal to House of Lords.

Solicitors: *Lawford & Co.; Pattinson & Brewer.*

A. H. B.

[71] [1921] 1 Ch. 1.
[72] [1898] A.C. 1.
[73] [1940] I.R. 347.
[74] [1964] A.C. 1129, 1204.
[75] Ante, p. 9.

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