

Rookes (A.P.) Vs. Barnard and Others

Rookes (A.P.) Vs. Barnard and Others

SooperKanoon Citation : sooperkanoon.com/945020

Court : House of Lords

Decided On : Jan-21-1964

Judge : Lord Reid, Lord Evershed, Lord Hodson, Lord Devlin, Lord Pearce

Appeal No. : No.

Appellant : Rookes (A.P.)

Respondent : Barnard and Others

Judgement :

LORD REID

MY LORDS.

The appellant is a farm griever in Islay. While on the mainland in October 1960, he asked his brother-in-law, Mr M'Sporran, a farmer in Islay, to have his car sent by the respondents to West Loch Tarbert. Mr M'Sporran took the car to Port Askaig. He found in the respondents' office there the purser of their vessel Lochiel, who quoted the freight for a return journey for the car. He paid the money, obtained a receipt and delivered the car to the respondents. It was shipped on the Lochiel, but the vessel never reached West Loch Tarbert. She sank, owing to negligent navigation by the respondents' servants, and the car was a total loss. The appellant sues for its value, agreed at 480.

The question is, what was the contract between the parties The contract was an oral one. No document was signed or changed hands until the contract was completed. I agree with the unanimous view of the learned Judges of the Court of Session that the terms of the receipt which was made out by the purser and handed to Mr M'Sporran after he paid the freight cannot be regarded as terms of the contract. So the case is not one of the familiar ticket cases where the question is whether conditions endorsed on, or referred to in, a ticket or other document handed to the consignor in making the contract are binding on the consignor. If conditions not mentioned when this contract was made are to be added to, or regarded as part of, this contract, it must be for some reason **Lord Reid**

MY LORDS,

The Appellant was employed for many years by B.O.A.C. as a skilled draftsman in their drawing office at London Airport. He was a member of, a Trade Union, the Association of Engineering and Shipbuilding Draughtsmen (A.E.S.D.) to which all who were employed in that drawing office belonged. He and another man, Unwin, became dissatisfied with the conduct of the Union and resigned from it. The Union were very anxious to preserve the position that no non-member should be employed in that office and they took energetic steps to get these two men to rejoin. Unwin agreed to rejoin, but the Appellant refused. As a result of steps taken by the Union and its members, B.O.A.C. were induced first to suspend the Appellant and then to terminate his employment after giving him due notice. The Appellant has no remedy against B.O.A.C. They neither broke their contract with him nor committed any tort against him. In this action the Appellant seeks a remedy against two members and an official of the Union on the ground that they wrongfully induced B.O.A.C. to act as they did. The action was tried by Sachs J. with a jury, and the Appellant was awarded 7,500 damages. The Court of Appeal held that the Respondents had not committed any tort, and the first question in this appeal is whether the Respondents' actions were tortious. If that question is answered in the affirmative, a second question arises whether the Respondents are absolved from liability by the provisions of the Trade Disputes Act, 1906: it is admitted that the Respondents' acts were done in furtherance of a trade dispute.

Certain agreed questions were put to the jury and their answers are not challenged. The questions are not entirely free from ambiguity and, in order to understand them, we can look at the summing-up of the learned judge. But we cannot go beyond the questions so explained and the jury's answers. The questions are as follows: -

Questions Answers

1. Was there a conspiracy to threaten strike action by the members of A.E.S.D. against B.O.A.C. to secure the withdrawal of the Plaintiff from the Design Office ...
... .. There was

If so:

Was Barnard a party? He was

Was Silverthorne a party? He was

Was Fistal a party? He was

2. Was a threat to take strike action against

B.O.A.C. to secure the withdrawal of the Plaintiff from the Design Office made by Barnard It was Silverthorne? It was

1. Fistal? It was

2. 3. Did threats of strike action by members of A.E.S.D. cause

(a) the suspension of the Plaintiff was his work at B.O.A.C.?

They did The dismissal of the Plaintiff from B.O.A.C. They did

Questions Answers

4. (a) What damages should be awarded to the Plaintiff if the threats of strike action caused the Plaintiff's dismissal 7,500

(b) What damages should be awarded to the Plaintiff if the threats of strike action caused the Plaintiff's suspension (but not his dismissal)? (Not answered)

Barnard was the chairman of the local branch of the Union and Fistol was a shop steward. Silverthorne was an official of the Union but not a member of it. There was negotiations which I need not deal with. The matter was brought to a head by a meeting of the members on 10th January, 1956, which resolved unanimously: We, the members of the A.E.S.D., inform B.O.A.C. that if the Non-Unionist Mr. D. E. Rookes is not removed from the Design Office by 4 p.m., Friday, 13th January, 1956, a withdrawal of labour of all A.E.S.D. Membership will take place . If the Members had ceased work or come out on strike at that time they would have done so in breach of their contracts with B.O.A.C. An agreement had been made in 1949 between the Employers' and Employees' sides of the Draughtsmen's, Planners' and Tracers' Panel of the National Joint Council for Civil Air Transport which contained an undertaking that no lockout or strike would take place, and provided that any dispute should be dealt with as provided for in the constitution of the Joint Council. It is admitted that the provisions of that agreement had been made a term of all the contracts of employment of the men who took part in the meeting of 10th January, and that if they had withdrawn their labour on 13th January they would have been in breach of their contracts with B.O.A.C.

When this resolution was presented to B.O.A.C. they suspended the Appellant and removed him from the Design Office, as the resolution required. There was considerable argument about the parts played by the three Respondents but we must take it from the jury's answers that the presentation of this resolution to B.O.A.C. was in pursuance of a conspiracy to which the three Respondents were parties, that it was a threat of strike action, and that this threat caused B.O.A.C. first to suspend and then to dismiss the Appellant. This was not a case of the Respondents merely informing B.O.A.C. that the men would strike if their terms were not accepted ; no questions were put to the jury suggesting any defence based on that ground.

This case, therefore, raises the question whether it is a tort to conspire to threaten an employer that his men will break their contracts with him unless he dismisses the plaintiff, with the result that he is thereby induced to dismiss the plaintiff and cause him loss. The magnitude of the sum awarded by the jury shews that the Appellant had every prospect of retaining his employment with B.O.A.C. if the

Respondents and other conspirators had not interfered: leaving the Trade Disputes Act out of account, if B.O.A.C. had been induced to dismiss the Appellant in breach of their contract with him then there is no doubt that the Respondents would have committed a tort and would have been liable in damages (*Lumley v. Gye* 2 E. and B., 216). Equally, 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. The question in this case is whether it was unlawful for them to use a threat to break their contracts with their employer as a weapon to make him do something which he was legally entitled to do but which they knew would cause loss to the plaintiff. The first contention of the Respondents is very far reaching. They say there is no such tort as intimidation. They would mean that, short of committing a crime, an individual could with impunity virtually compel a third person to do something damaging to the plaintiff which he does not want to do but can lawfully do the wrongdoer could use every kind of threat to commit violence, libel or any other tort, and the plaintiff would have no remedy. And a combination of individuals could do the same, at least if they acted solely to promote their own interests. It is true that there is no decision of this House which negatives that argument. But there are many speeches in this House and judgments of eminent judges where it is assumed that that is not the law and I have found none where there is any real support for this argument. Most of the relevant authorities have been collected by Pearson, L.J. and I see no need to add to them. It has often been stated that if people combine to do acts which they know will cause loss to the plaintiff, he can sue if either the object of their conspiracy is unlawful or they use unlawful means to achieve it. In my judgment, to cause such loss by threat to commit a tort against a third person if he does not comply with their demands is to use unlawful means to achieve their object.

That brings me to the second argument for the Respondents which raises a more difficult question. They say that there is a distinction between threats to commit a tort and threats to break a contract. They point out that a person is quite entitled to threaten to do something which he has a legal right to do and they say that breach of contract is a private matter between the contracting parties. If the plaintiff cannot sue for loss to him which results from an actual breach of a contract to which he is

not a party, why, they ask, should he be entitled to sue for loss which results from a threat to break a contract to which he is not a party?

A somewhat similar argument failed in *Lumley v. Gye*. The defendant had induced a singer to break her contract with the plaintiff and he knew that this would cause loss to the plaintiff. The plaintiff had his action against the singer for breach of contract and he was held also to have a cause of action against the defendant for the tort of unjustifiably interfering so as to cause him loss. The fact that the direct cause of the loss was a breach of the contract to which the defendant was not a party did not matter. So, too, the plaintiff's action in the present case does not sound in contract: in fact there was no breach of contract because B.O.A.C. gave in. The Appellant in this case could not take a benefit from contracts to which he was not a party or from any breach of them. But his ground of action is quite different. The Respondents here used a weapon in a way which they knew could cause him loss, and the question is whether they were entitled to use that weapon—a threat that they would cause loss to B.O.A.C. if B.O.A.C. did not do as they wished. That threat was to cause loss to B.O.A.C. by doing something which they had no right to do, breaking their contracts with B.O.A.C. I can see no difference in principle between a threat to break a contract and a threat to commit a tort. If a third party could not sue for damage caused to him by the former I can see no reason why he should be entitled to sue for damage caused to him by the latter. A person is no more entitled to sue in respect of loss which he suffers by reason of a tort committed against someone else, than he is entitled to sue in respect of loss which he suffers by reason of breach of a contract to which he is not a party. What he sues for in each case is loss caused to him by the use of an unlawful weapon against him—intimidation of another person by unlawful means. So long as the defendant only threatens to do what he has a legal right to do he is on safe ground. At least if there is no conspiracy he would not be liable to anyone for doing the act, what-ever his motive might be, and it would be absurd to make him liable for threatening to do it but not for doing it. But I agree with Lord Herschell (*Allen v. Flood* [1898] A.C. 1 at p. 121) that there is a chasm between doing what you have a legal right to do and doing what you have no legal right to do, and there seems to me to be the same chasm between threatening to do what you have a legal right to do and threatening to do what you have no legal right to do. It must follow

from Allen v. Flood that to intimidate by threatening to do what you have a legal right to do is to intimidate by lawful means. But I see no good reason for extending that doctrine.

Threatening a breach of contract may be a much more coercive weapon than threatening a tort, particularly when the threat is directed against a company or corporation, and, if there is no technical reason requiring a distinction between different kinds of threats, I can see no other ground for making any such distinction.

I have not set out any of the passages cited in argument because the precise point which we have to decide did not arise in any of the cases in which they occur, and it does not appear that any of the authors of these passages had this point in mind. Sometimes the language seems to point one way and sometimes another and it would, I think, be wrong in such circumstances to use a judge's language as authority for a proposition which he did not have in mind. The Court of Appeal in this case were unwilling to go beyond existing authorities. Sellers L.J. said Unless authority requires it, I would resist enlarging the tort of intimidation in the manner sought before and accepted by the judge , and Pearson L.J. said Should this obscure, unfamiliar and peculiar cause of action, which has its roots in cases of physical violence and threats of violence, be extended to cover a case in which there is only a threat to break a contract? . I am afraid I take a different view. Intimidation of any kind appears to me to be highly objectionable. The law was not slow to prevent it when violence and threats of violence were the most effective means. Now that subtler means are at least equally effective I see no season why the law should have to turn a blind eye to them. We have to tolerate intimidation by means which have been held to be lawful but there I would stop. Accordingly, I would hold that on the facts found by the jury the Respondents' actions in this case were tortious. It is now necessary to consider whether the Respondents are absolved from liability by any of the provisions of the Trade Disputes Act, 1906. The sections on which the Respondents rely are sections 1 and 3, which are as follows: -

1. The following paragraph shall be added as a new paragraph after the first paragraph of section three of the Conspiracy and Protection of Property Act, 1875:-

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

... ..

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.

Before dealing with these sections I must say a word about what the law was, or was thought to be, in 1906. The older law bore very heavily on workmen who combined to seek concessions from employers, and Acts passed to amend it had been strictly construed. Matters were brought to a head by two decisions of this House, the Taff Vale case, [\[1901\] A.C. 426](#), and *Quinn v. Leathem*, [\[1901\] A.C. 495](#). These were followed by a Royal Commission over which Lord Dunedin presided. The main objects of the 1906 Act are clear enough, to protect Trade Union funds and to exclude conspiracy from being an element in future cases. The former does not arise in the present case. One of the difficulties facing Parliament was the uncertain state of the law with regard to liability for interfering with a person's trade or employment. It is exceedingly difficult to determine just what was decided in *Quinn v. Leathem*, and I neither need nor intend to embark on that vexed subject. But there were at least two theories about what the law really was. One was that an individual was free to take any steps he chose so long as he used no means to achieve his end which were not unlawful for some reason other than that they interfered with some other person's trade or employment; and that a combination had the same freedom, provided that their conduct was not dictated by a desire or intention to injure the Plaintiff. The other theory was that any action

intended or known to be likely to interfere with the trade or employment of another person was unlawful unless it could be justified in some way. I might note that so late as 1908 Sir F. Pollock wrote in his Law of Torts (8th edition pp. 325-6)-

The present writer confesses to great difficulty in understanding why in *Quinn v. Leatham* before the House of Lords ... it was necessary to say so much about conspiracy: for the cause of action was in effect ruining the Plaintiff's business by coercing his customers not to deal with him which is well within a line of old authorities It is submitted that the discussions would be materially simplified if it were understood that all damage wilfully done to one's neighbour is actionable unless it can be justified or excused. So it is reasonable to suppose that the intention was to draft the 1906 Act so that it would be equally effective whichever theory ultimately prevailed.

The only difficulty about section 1 is to discover what is meant by unless the act, if done without any such agreement or combination, would be actionable . In the present case, and I have no doubt in many others, the precise act complained of could not have been done without previous agreement. The act complained of in this case was presenting to B.O.A.C. a resolution of all the members of the Union to which the Respondents were parties. There was an argument that the section requires us to suppose that each Respondent merely told B.O.A.C. that he would himself cease work if they did not get rid of the Appellant. But that would have been an entirely different act and probably quite ineffective as a threat. The section cannot reasonably be held to mean that no action can be brought unless the precise Act complained of could have been done by an individual without previous agreement or combination. In my view, the section requires us to find the nearest equivalent act which could have been so done and see whether it would be actionable. In the present case I think we must suppose that one of the Respondents had said to B.O.A.C. I am acting alone but I think I can and I intend to induce the men to break their contracts and strike if you do not get rid of Mr. Rookes . If the opinion which I have already expressed is right, that would have been actionable if B.O.A.C. had succumbed to that threat and got rid of the Appellant in the way they did. So section 1 does not help the Respondents. Section 3 deals with two classes of acts done by individuals, and, by virtue of

section 1, the immunity given by section 3 to individuals must also extend to combination or conspiracies. The classes of acts permitted (if done in contemplation or furtherance of a trade dispute) are, (1) inducing a breach of a contract of employment and, (2) interfering with a person's trade, business or employment or right to dispose of his capital or labour as he wills. The facts in this case fall within the second class: if B.A.O.C. had not safeguarded themselves by giving notice to the Appellant but had dismissed him summarily the case would have come within the first class. In considering the proper construction of this section I think it makes for clarity to take the first class first. The first class of acts are those within the principle in *Lumley v. Gye*, and there can be no doubt that if no more than mere persuasion is used to induce a breach of contract this section ousts the principle in *Lumley v. Gye*. But suppose that the Defendant had to go further than mere persuasion and told deliberate lies or used intimidation to induce the breach of contract-is he then still protected by section 3?

Section 3 provides that the act complained of shall not be actionable on the ground only that it induces a breach of contract. That is a very difficult phrase to construe. An Act which induces one party to a contract to break it is never actionable at the instance of the other party to the contract merely on that ground. In addition, the Plaintiff must at least allege and prove that the Defendant intended to cause him loss, or at least knew that his intervention would cause him loss, and that he has suffered loss. In this context it appears to me that actionable on the ground only can only have one or other of two meanings. It could mean shall not be actionable if the Plaintiff cannot succeed in his action without alleging and proving inducement of breach of contract. Or it could mean shall not be actionable if the act done by the Defendant is only unlawful or actionable because, or on the ground that, it induces the breach of contract. These two meanings lead to entirely different results. Whether the weapon used to induce the third party to break his contract with the Plaintiff be mere persuasion or an extreme form of deceit, slander or intimidation the Plaintiff

cannot succeed without proving that it caused or induced the breach of his contract. So if the first meaning be the right one this section gives a general immunity or licence however illegal the means used to induce the breach of

contract. That was not and could not be denied by the Respondent's counsel. But, on the other hand, if the second meaning is correct, then the immunity or licence only applies so long as the Defendant has not used any unlawful means to induce the breach. If the Defendant had used slander or intimidation, which are in themselves tortious, the Plaintiff would sue on that ground, although he would still have to prove the damage resulting from his dismissal.

It was argued for the Respondents that Parliament must have intended to extend immunity to all ordinary methods of inducing breach of contract used in strikes or other trade disputes, and that the use of methods such as these Respondents used were commonplace. But it was not suggested that the use of deceit, slander or more extreme methods of intimidation were or are in general use, and it was hardly suggested that Parliament must be supposed to have intended to license them. And I cannot find any general indication of intention favourable to the Respondents in other sections of the Act. Section 2 licenses picketing merely for the purpose of peacefully persuading, so there is no extensive licence there. Section 4 does give general immunity to trade unions, as distinct from their members. But there the language is very different- an action against a trade union ... in respect of any tortious act. . . shall not be entertained by any court. The protection of individual members is left to section 3. So we are thrown back to the language of section 3 itself without any very clear guidance either from the nature of the mischief which Parliament had to remedy by the Act or from other sections of the Act.

The only important authority is in the speech of Lord Loreburn in *Conway v. Wade* [1909] A.C. 506. I shall have to deal with this case at some length when I come to the second half of section 3. He said: It is clear that, if there be threats or violence, this section gives no protection . . . If the inducement be to break a contract without threat or violence, then this is no longer actionable . Counsel had to argue that this was wrong, and he was quite entitled so to argue because the whole passage was obiter. But there was no dissent from this by any other member of the House, and, as Lord Loreburn was Lord Chancellor when the 1906 Act was passed, he must have been well acquainted with its provisions. His speech has been quoted with approval in a number of later cases but I do not set great store

by that because the matter never seems to have been fully argued.

I would hold that what I have called the second meaning of this part of section 3 is the right one—that it does not protect a person who induces a breach of contract by tortious means—both on the authority of Lord Loreburn and because it appears to me to be the better construction. The words on the ground only are clearly intended to limit the scope of the section, and if the first meaning for which the Respondents contend were right, there would be hardly any limit to its scope. It would give immunity in almost every case of inducing a breach of contract that seems likely to arise in connection with a strike or threatened strike. Section 4 makes it quite clear that there is complete immunity for the trade union itself, and I cannot believe that the very guarded language of section 3 would have been used if it had been intended to give in addition almost complete immunity to all individuals acting in contemplation or furtherance of a trade dispute.

I have dealt at some length with the interpretation of the first part of section 3 because I have come to think that it throws a great deal of light on the second part. The second part is much more difficult to construe. I must admit that on a consideration of the second part by itself I was inclined to think that it was applicable to the present case. If the second part of the section had to be construed in light of the law as we now know it to be and without reference to the first part I would still be inclined to construe it in the way for which the Respondents contend. But I do not think that it is proper to approach the problem in that way. In construing an Act of Parliament we are attempting to find the intention of Parliament. We must find that intention from the words which Parliament has used but these words must be construed in the light of the facts known to Parliament when the Act was passed. One assumes that Parliament knows the law, but if the law is notoriously uncertain we must not attribute to Parliament prescience of what the law will ultimately be held to be. In 1906 the law with regard to lawful and unlawful interference with a person's trade, business or employment was quite uncertain. By 1925 Lord Dunedin was able to speak of one view as the leading heresy (*Sorrell v. Smith* [1925] A.C. 700 at p. 719). But there were still some doubts. As Lord Maugham pointed out in *Crofters Harris Tweed v. Veitch* [1942] A.C. 435 at p. 450, Lord Dunedin had taken a somewhat different

view from that of the majority in *Sorrell v. Smith*. It often takes a long time to determine what is heresy and what is orthodoxy, and there can be no better witness about what was thought to be the law in 1906 than Lord Loreburn who was Lord Chancellor when the Trade Disputes Act was passed. He said in *Conway v. Wade* [1909] A.C. 506 at p. 510- It is necessary to consider how the law stood before 1906 ... it is material to see in what circumstances an individual could be sued for inducing someone not to employ or not to serve another ... I think on that point the law stood as follows. If the inducement was accompanied by violence or threats (always remembering that a warning is one thing and a threat is another) there was a good ground of action. I next suppose there was no violence and no threat, and yet the inducement involved a breach of contract. There also it was established, after a long controversy beginning with *Lumley v. Gye* in 1853 that an action could be maintained, unless at all events some sufficient justification could be made good. But suppose one person simply induced someone not to employ another or not to serve another, without violence or threat or breach of contract, would an action lie, and in what circumstances, in such a case? I believe there has not been an exhaustive answer to that question. The further difficulty arises, what is a sufficient justification? Is it supplied by self-interest, or by trade competition, or by what other condition or motive? No answer in general terms has ever been given, and perhaps no answer can be given. A parallel difficulty arises where the inducement is by two or more persons acting together. If that is a correct statement of the position in 1906-and I think it is- there were three classes of inducement which Parliament had to consider, (i) inducement accompanied by violence or threats (ii) inducement involving a breach of contract, and (iii) mere inducement alone. As regards (i) and (ii) the law was thought to be clear, as regards (iii) it was not. Section 3 is silent as to (i), so one might think that it leaves the existing liability unaltered. It deals with (ii) and (iii). I have stated my opinion as to how it deals with (ii); it confers immunity, provided that there is no further element of illegality, such as intimidation. The question is how it deals with (iii). Does it there go farther and confer immunity even where there is intimidation. The general plan of the section appears to be to treat (ii) and (iii) in precisely the same way, and it would seem a strange result if the liability of the present defendants depended on the method which B.O.A.C. adopted in acceding to their demands

that the Appellant should be removed from the Design Office within a few days. If they had summarily dismissed him the case would have fallen under head (ii), and the defendants would have been liable. But can it be said that the fact that B.O.A.C. chose only to suspend him and then give him notice, which puts the case within head (iii), makes all the difference and saves the Respondents from any liability to him? That may be the necessary result of the way in which the section is drafted, but it could hardly have been the intention of Parliament. I must now return to what Lord Loreburn said in *Conway v. Wade*. It is true that all this was obiter as regards section 3, because it was held that there was no trade dispute. Until the case reached this House there were only two issues-whether the jury's findings could be supported, and what was meant by in contemplation or furtherance of a trade dispute. Wade had acted as mischief-maker in order to injure the plaintiff from unworthy motives (per Lord Loreburn at p. 509) by procuring his dismissal. He had threatened that he would call out the other men when he had neither the power nor the right to do that, and the employers gave way to this deceitful threat. It was argued for the first time in this House that, apart from the statute, Wade was guilty of no actionable wrong. This House had no difficulty in holding that he was, and they held, reversing the Court of Appeal, that he had not acted in contemplation or furtherance of a trade dispute. So *Conway* won his appeal. Lord Loreburn, after quoting section 3, said :

Let me see how this alters the pre-existing law. It is clear that, if there be threats or violence, this section gives no protection, for then there is some other ground of action besides the ground that 'it induces ' some other person to break a contract,' and so forth. So far there is no change. If the inducement be to break a contract without threat or violence, then this is no longer actionable, provided always that it was done ' in contemplation or furtherance of a trade dispute '. What is the meaning of these words I will consider presently. In this respect there is a change. If there be no threat or violence, and no breach of contract, and yet there 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' there again there is perhaps a change. It is not to be actionable, provided that it was done ' in contemplation or furtherance of ' a trade dispute.' So there is no longer any question in such cases, whether there was ' sufficient justification '.

or not. The condition contained in these words as to trade dispute is made sufficient. Lord Loreburn had no doubt that section 3 affords no protection if there are threats or violence. If a threat to break a contract amounts to unlawful intimidation, that covers the present case, for he draws no distinction between the two classes of acts covered by section 3. His opinion was obiter and he may have been wrong, but Lord MacNaghten and Lord Gorell concurred with him and I find no suggestion in other speeches to the contrary. It can be argued that the reason which he gave is wrong in part. The argument is that, although he may have been right in saying that where there are threats or violence, there is some other ground of action when the act complained of is inducing a breach of contract, he was wrong when the act complained of is mere interference with the plaintiff's trade, business or employment. But Parliament had to provide for the possibility that mere interference, if no legal justification were proved, would be held to be a tort, and I think that what Parliament did in enacting the second part of section 3 was to put in a provision which would be necessary to achieve their object if the law should go one way but unnecessary if it went the other way. So I would hold that section 3 means that if mere interference is or can be a tort then there shall be no liability, where a trade dispute is involved, on the ground only of that interference.

If that is right then the protection given by section 3 is no wider in scope as regards acts within the second half than it is with regard to acts within the first half. Parliament might have enacted that the protection given by section 3 shall only apply so long as no illegal means such as intimidation are used to achieve the breach of contract or interference with trade, business or employment, or Parliament might have enacted that the protection shall extend to all cases, no matter how illegal may have been the means employed. But to draw a distinction and restrict protection of inducement of breach of contract to cases where no illegal means are employed, but extend protection of interference to all cases no matter how unlawful the means employed is something that I cannot think Parliament could have intended and therefore a construction of the section which I would only accept if its words are incapable of any other.

In my judgment, it is clear that section 3 does not protect inducement of breach of contract where that is brought about by intimidation or other illegal means and the

section must be given a similar construction with regard to interference with trade business or employment. So, in my opinion, the section does not apply to this case because the interference here was brought about by unlawful intimidation. I would therefore allow this appeal.

But that does not end the case, because the Respondents maintain that, by reason of misdirection of the trial judge in the matter of damages, the jury's award of 7,500 cannot stand and there should be a new trial on amount of damages. There is no doubt that the jury were directed that it was open to them to award punitive or exemplary damages, and indeed they might fairly assume from the summing up as a whole that that would be their proper course if they did not accept the Respondents' case on revocation. As they awarded a single sum we do not know how much they intended to award in respect of financial loss or how much they added on as punitive damages, but it is fairly obvious that they must have added a considerable sum. The Respondents contend that there is nothing in the facts of this case to justify any award of punitive damages and that the trial judge ought to have directed the jury to that effect.

It appears that at the trial counsel for the Respondents did not take the point that exemplary damages could not be awarded in this case: he merely argued to the jury that for various reasons they should not award any. So the Appellant now submits that it is too late to take the point now. In many cases it would be wrong to allow a new and belated point to be argued. But here there is no question of the point not being open on the pleadings and I have been unable to see that the Appellant can have been in any way prejudiced in the presentation of his case by the point not having been taken. It is not a case in which it can be said that the course of examination and cross-examination of witnesses might have been different. This seems to me to be a pure point of law which we could properly admit in our discretion.

I have read and considered the speech of my noble and learned friend Lord Devlin and I am in full agreement with his treatment of the subject of exemplary damages. I would therefore allow this appeal and order a new trial on the question of damages. In the whole circumstances I think that the costs of the previous trial

ought to abide the result of the new trial and be dealt with by the trial judge, and that the Appellant should now be awarded his costs in this House and in the Court of Appeal.

Lord Evershed

MY LORDS,

As I begin to apply myself to the task of formulating my opinion in this important and difficult case, I have much in mind the observations of Scrutton L.J. when delivering his judgment in the Court of Appeal in the analogous case of *Ware and de Freville, Ltd. v. Motor Trade Association* [1921] 3 K.B. 40 at p. 66. That most learned Judge then referred to the mass of authorities and dicta, many of them contradictory, contained in ten House of Lords cases and many cases in the Court of Appeal and to the able and conscientious attempts by judges of first instance to state the results of decisions by which they are bound, and by which they should be enlightened ; and he went on to state that the only tribunal which could bring order into chaos was your Lordships' House. There have since been the two important decisions of the House in *Sorrell v. Smith* [1925] A.C. 700, and *Crofter Hand Woven Harris Tweed Company, Ltd. v. Veitch* [1942] A.C. 435 ; and so in the present case the attention of your Lordships has been drawn to the important speeches in these two cases as well as to all the speeches and dicta in the earlier cases to which Scrutton L.J. referred, and I cannot maintain any confident hope that in the present case order will have been so brought into chaos that, upon some future occasion, it will not be found necessary to refer to the opinions now being expressed in addition to all those that have gone before. Such, indeed, is the importance of the questions now presented to your Lordships and such is the difficulty which the history of the relevant law and the language of the Trade Disputes Act, 1906, has attached to their solution. The essential facts of the present case may be shortly stated. The Appellant before your Lordships' House, the Plaintiff in the present proceedings, having been for some years employed by British Overseas Airways Corporation (hereafter called B.O.A.C. in the year 1955 quarrelled with the Trade Union known as the Association of Engineering and Shipbuilding Draughtsmen (hereafter called A.E.S.D.) to which he had belonged

and of which indeed he had been an officer. In the result, he resigned from the Union, and efforts made at the end of the year to make him rejoin were without effect. In the result, in the month of December, 1955, and January, 1956, the three Defendants to the action-the Respondent, Mr. Barnard, Mr. Silverthorne and the Respondent, Mr. Fistal-(of whom the second, Mr. Silverthorne, died since the proceedings commenced and has been replaced by his personal representative, the second Respondent)-being all officials of the A.E.S.D. proceeded to make communications to B.O.A.C. to the effect that, unless the services of Mr. Rookes were determined by B.O.A.C. all their other employees in the same department, in number about 70 and all members of the A.E.S.D., would come out on strike-and possibly other servants of B.O.A.C. as well. I have so far deliberately used imprecise language; but the effect was that (as has been conceded throughout by the Appellant) a trade dispute within the meaning of the Trade Disputes Act, 1906, had arisen. B.O.A.C. thereupon at first suspended the Appellant and later, by appropriate notice, determined his contract of service. It is to be noted that there was no breach by B.O.A.C. of the Appellant's service agreement. If the matter rested only upon the facts as I have stated them, the answer to the Appellant's claim would have been short and simple. As I have

said there was no breach of the Appellant's contract and it has long been recognised that strike action or threats of strike action (however those terms be interpreted-and I have in mind what fell from Donovan L.J. in his judgment in the Court of Appeal) 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. So much was stated by Lord Watson in his speech in *Allen v. Flood* [1898] A.C. 1 at p. 99 and has, as I believe, been since consistently followed-see e.g. per Lord Sterndale, M.R. in *White v. Riley* [1921] 1 Ch. 1 at p. 15. Moreover, such action on the part of the members of the A.E.S.D. would, to say the least, not be surprising since there was a recorded understanding between B.O.A.C. and the several unions, members of which were in the service of B.O.A.C., that if in any section of B.O.A.C.'s work 100 per cent, membership of the relevant union was achieved, then B.O.A.C. would not employ in that section any non-union labour. But the circumstances of the present case are distinguished by one very important fact. On the 1st April, 1949, an agreement

in writing was made between the Employers' and Employees' sides of the Draughtsmen, Planners and Tracers Panel, clause 4 of which provided that in the event of any relevant trade dispute, there should not be a strike or a lock out but that the dispute should be resolved in the manner therein indicated. It has been conceded throughout these proceedings on the part of the Defendants and Respondents that the terms of this clause should be regarded as incorporated in and forming part of the contract of service with B.O.A.C. of every member of the A.E.S.D. It follows accordingly that strike action or threats of strike action by employees of B.O.A.C. who were members of the A.E.S.D. would constitute breaches or threats of breaches by them of their service contracts. So it is of the essence of the Appellant's case that the acts of which he has complained constituted threats of wrongful acts, that is, of breaches of contract, aimed and directed at the Appellant's employment, so as to cause, as they did, its determination; and that such acts were therefore actionable at the Appellant's suit. I was for myself somewhat troubled in the course of the argument by the question, what precisely were the threats on the part of the three Defendants of which the Appellant complained. The answer to the question is, however, as I conceive, to be found in the form of the second question put to the jury by Sachs J. and the jury's answer thereto-the form of such question having, as your Lordships were informed, been agreed by the learned counsel appearing on both sides before the learned Judge. The question was as follows: Was a threat to take strike action against B.O.A.C. to secure the withdrawal of the Plaintiff from the Design Office made by each of the three Defendants?-and the jury gave an affirmative answer in each case. I am satisfied that the form of the question and the answer given must be taken to have meant that each Defendant threatened that strike action would in fact be taken by all the members of the A.E.S.D. unless the Appellant's services were terminated. The threat, therefore, made by each Defendant was not merely that he himself would go on strike (for the coercive effect of such a threat standing by itself would be negligible-and the second Defendant Mr. Silverthorne was not himself in fact in the service of B.O.A.C.); nor was it, on the one hand, mere information that a strike would or might occur or, on the other, a threat to procure such strike action. It was, as the words of the question implied, a threat that strike action on the part of all the A.E.S.D. men would in fact occur unless the Plaintiff

were withdrawn from the Design department. And since all three Defendants were officials of the Union there can be no doubt that they could effectively so threaten and were understood by B.O.A.C. so effectively to threaten. It may, moreover, be added that on the 10th January, 1956, a resolution to that effect had been passed by the Union men and a written copy of the resolution was immediately afterwards handed by the third Defendant to a representative of B.O.A.C. Assuming, therefore, (1) that each Defendant did so threaten and effectively threaten, (2) that, because of the special term deemed to be incorporated in each union man's service contract, the threat was of unlawful action on the part of all these men in the sense of constituting a threat to commit a breach of their service contracts and, (3) that the threats were directed at the Appellant, being designed to cause an end of his employment with B.O.A.C.; can the Appellant successfully sue the Defendants for the damage he thereby suffered? This single problem has inevitably been dissected into three separate questions, viz., (1) Is there a tort or wrong known to the English law as the tort of intimidation such that, although the party intimidated is not the party claiming to recover, the last mentioned party can sue the persons who did the intimidating on the ground that their object was to damnify him, as they did? (2) If so, are the wrongful acts which the person or persons threatened, by way of intimidation, to do confined to acts in themselves criminal or tortious or do they extend to other so-called wrongful acts including particularly breaches of contract? (3) If the tort of intimidation does so extend, then is the Appellant's common law right of action defeated by the terms of either section 1 or section 3 of the Trade Disputes Act, 1906, seeing that, as is here conceded, the acts of intimidation of which the Appellant complains were done in the course of furtherance of a Trade Dispute within the meaning of that Act?

Upon the first of these three questions which I have formulated all the members of the Court of Appeal, after a careful consideration of the many authorities and dicta upon the subject, agreed with Sachs J. in giving to it an affirmative answer. My Lords, it seems to me that in the year 1963 it is not sensible or possible to deny such a wrong, at any rate where the illegal acts threatened are criminal or tortious in character and where the threats are sufficiently substantial and coercive to cause real damage to the person against whom they are aimed and directed ; and the person entitled to recover may be either the party intimidated or may be a third

party where the intention and effect of the threat is to injure such third party. I do not in the circumstances propose for myself to go again through all the authorities. I am content to start with the citation (quoted by Pearson L.J. in the Court of Appeal) from the well-known judgment of Bowen L.J. in the case of the *Mogul Steamship Co., Ltd. v. McGregor, Gow and Co.*, 23 Q.B.D. 598, and to add only citations from the speech of Lord Watson in *Allen v. Flood* (sup.) and from the speech of Lord Dunedin in *Sorrell v. Smith* (sup.).

In the *Mogul Steamship* case, Bowen L.J. said (see p. 614): No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction and molestation are forbidden ; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it. The intentional driving away of customers by shew of violence . . . the impeding or threatening servants or workmen; the inducing persons under personal contracts to break their contracts ; all are instances of such forbidden acts . My citations from Lord Watson are as follows (see [1898] A.C. pp. 96, 97 and 98):

There are, in my opinion, two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly and for his own ends induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party ; and in that case, according to the law laid down by the majority in *Lumley v. Gye*, the inducer may be held liable if he can be shewn to have procured his object by the use of illegal means directed against that third party. Again later: Assuming that the *Glengall Iron Company*, in dispensing with the further services of the respondents, were guilty of no wrong, I am willing to take it that any person who procured their act might incur responsibility to those who were injuriously affected by it, if he employed unlawful means of inducement directed against them. According to the decision of the majority in *Lumley v. Gye*, already referred to, a person who by illegal means, that is means which in themselves are in the nature of civil wrongs, procures the lawful act of another, which act is calculated to injure, and does

injure, a third party, commits a wrong for which he may be made answerable. So long as the word ' means' is understood in its natural and proper sense that rule appears to me to be intelligible ; but I am altogether unable to appreciate the loose logic which confounds internal feelings with outward acts, and treats the motive of the actor as one of the means employed by him.

I turn finally to the speech of Lord Dunedin in *Sorrell v. Smith* (sup.). The noble Lord first quoted (see pp. 718, 719) from a judgment which he had delivered in the Scottish case of *Mackenzie v. Iron Trades Employers' Insurance Association*, 1910 S.C., 79, and which he thereby affirmed. Then, after referring to numerous other cases, including that of *Ware and de Freville, Ltd. v. Motor Trade Association* (sup.), he said, at p. 730 of the Report :

Expressing the matter in my own words, I would say that a threat is a pre-intimation of proposed action of some sort. That action must be either per se a legal action or an illegal, i.e., a tortious action. If the threat used to effect some purpose is of the first kind it gives no ground for legal proceeding; if of the second, it falls within the description of illegal means, and the right to sue of the person injured is established.

I shall have something to say hereafter about the use by Lord Dunedin of the phrase i.e., a tortious action . But for the purpose of answering the first of the questions which I have posed, I think that the citations which I have made must now be accepted as correctly stating the law; and I add only my acknowledgment of the judgments and reasoning upon this question of Sellers, Donovan and Pearson L.JJ., in the Court of Appeal, and particularly the analysis of the growth of the tort of intimidation stated in Pearson L.J.'s judgment, which I respectfully and gratefully adopt. I therefore agree with the view expressed by the Court of Appeal that there has been established as a wrong and as part of the English law the tort of intimidation. I am willing to concede that the tort is one of relatively modern judicial creation (though Pearson L.J. in the course of his analysis referred to some authorities of respectable antiquity) and that its full extent and scope have not (at least before the present case) been authoritatively determined and may well, indeed, even by your Lordships' judgments in this case, still not have been finally

stated. But that is, after all, in accordance with the well-known principles of our law, one of the characteristics of which is (as has been pointed out by many eminent legal scholars, including Cardozo, C.J.) that its principles are never finally determined but are and should be capable of expansion and development as changing circumstances require, the material subject matter being tested and retested in the law's laboratories, namely the courts of justice.* Moreover, as observed by Professor Holdsworth in his history of the Law of England, volume 8, pages 392ff, the tort of conspiracy, as now understood, is also one of relatively modern exposition differing from the ancient tort of conspiracy (which as Professor Holdsworth points out is in reality now equivalent to malicious prosecution) and has arisen out of the circumstances of modern industrial relations. So also, as I conceive, has the tort of intimidation. Mr. Gardiner forcibly argued, upon an analysis of the various cases in which the alleged tort has arisen, that it was in truth originally and still is no more than an aspect of the law or tort of nuisance. According to Mr. Gardiner, it was in truth invented by Sir John Salmond. But, with all respect to Mr. Gardiner's argument, it is now, as I have said, in my opinion too late to deny the reception of the tort of intimidation into the company of English wrongs. So far, I have agreed with the Court of Appeal. But I respectfully differ from the Court of Appeal in thinking [that the wrong of intimidation must stop short so as to comprehend only threats of criminal or tortious acts and thus to exclude threats of breaches of contract. I am aware that the only direct authorities for such an extension of the wrong are the two Irish cases of *Cooper v. Millea and others*, 1938 I.R. 749 before Gavan Duffy, J. and *Riordan v. Butler and others*, 1940 I.R. 347 in which O'Byrne, J. followed Gavan Duffy, J. I am aware also that in the former case the learned Judge erred in attributing a dictum in support of his view to Lord Dunedin in *Sorrell v. Smith* and that in fact the noble Lord in that case used the words which I have quoted ... that action must be either per se a legal action or an illegal, i.e., a tortious action. I cannot, however, think that by his use of the formula *id est* Lord Dunedin was intending to lay it down that only threats of tortious actions would constitute the wrong of intimidation. The attention of your Lordships was also properly drawn to all the relevant dicta that have fallen from the judges since that of Bowen, L.J. in the *Mogul Steamship* case down to the present time, and I would concede that upon the face of them these dicta may

tend more to support the restriction of the tort than its extension so as to include threats of breach of contract though they cannot be said in that respect to be uniform; see, for example, the use of the word unlawful by Lord Lindley in *South Wales Miners' Federation v. Glamorgan Coal Company, Limited*, [1905] A.C. 239, at 253. To break a contract is an unlawful act, or, in the language of Lord * Nature of the Judicial Process (published by Yale University Press) p.23.

Watson in *Allen v. Flood*, 'a breach of contract is in itself a legal wrong'. ... A breach of contract would not be actionable if nothing legally wrong was involved in the breach. To this last citation Lord Justice Donovan referred in his judgment in the present case. I venture, like Lord Lindley, to refer to Lord Watson's speech in *Allen v. Flood* where (at page 94 of the report) the noble Lord cited and adopted the language of Bowen, L.J. in the *Mogul Steamship* case ... the term 'wrongful' imports in its term the infringement of some right. But in none of the reported cases (except the Irish cases) was the question with which your Lordships are now concerned raised as relevant for decision, and the language in the many judgments to which your Lordships have been referred was, as I conceive, intended to be but illustrative and was in any event upon the present question obiter.

I feel therefore free to approach the question as a matter of principle; and so approaching it, I cannot for my part see any persuasive basis for drawing the line so as to exclude from the wrong of intimidation threats of breaches of contract. I cannot find in accordance with logic, reason or common sense anything between threats to do tortious or criminal acts, on the one hand, and threats to break contracts, on the other, which amounts in the simile used by Lord Herschell in *Allen v. Flood* (sup. at page 121), to a chasm. It is no doubt true that in attempting to extract the principle from the present case there is some obscurity caused by the circumstances with which we are concerned, first, by the actual nature of the alleged threats and, second, by the presence in the background of the Trade Disputes Act, 1906. I therefore consider other illustrations of threats to break contracts. Suppose the case of one who carries on upon premises which he has leased from another a business or profession, and that the landlord, intent on damaging his tenant's business or profession, threatens to commit breaches of his

covenant of quiet enjoyment; or suppose the case of one whose business depends upon the exploitation of a licence granted by a patentee and the patentee (let us say) out of spite for the licensee or dislike of his methods threatens him with breaches or revocation of the licence. I find, for my part, great difficulty in thinking that in such cases as I have mentioned there would be no cause of action based on intimidation whereas such a cause of action would arise if the landlord or the patentee threatened personal assault or other tortious act. Nor, for my part, can I regard as conclusive the argument which clearly appealed strongly to Pearson, L.J. that if threats of breaches of contract amounted to intimidation there would be an unnatural and anomalous distinction between threats to break a contract, on the one hand, and breaches of the contract, on the other. It is an undoubted but established and perhaps peculiar feature of the English law that only parties to a contract can sue for breaches of that contract notwithstanding that some third party may be damnified by the breach and intentionally so damnified. Such, however, has long been the established rule in English law though (as some have thought) the restriction now should be somewhat relaxed. Let it, however, be supposed that A breaks his contract with B and that B, under the pressure of the breach of contract, dispenses with the services of C-dispenses, that is to say, without breaking his contract with C. If those are the only facts, then it is no doubt true that C cannot prefer any claim against A. But as a practical matter of fact what in truth in such a case happens? If (as we are to suppose) the object of A's breach of contract with B was to cause B to dispense with the services of C, then, B having done so, does A proceed to renew his contractual relations with B? And, if so, does he do so upon the terms, well understood by B, that, if B should attempt again to re-engage C, A would once more break his contract? If such were the true facts, then it would appear to me not seriously in doubt that C could maintain a cause of action against A for continuing to threaten further breaches of his contract. It seems, therefore, to me that the cases in which the employment of one party is interfered with by a breach of the contract with his employer by another but without any further threats expressed or implied must indeed be rare. Indeed, in practice I conceive a parallel would not be other than close with the case of one who, instead of breaking a contract with the employer, in fact assaulted him and as a result (as was intended by the assaulting party) the employer disposed of the

services of his servant. As in the case of the broken contract, the inference would no doubt be that unless the employer permanently severed his relations with his servant the third party would assault the employer again: and so a cause of action would fairly arise from the implied intimidation rather than from the actual assault. But however that may be, for reasons which I have given, I cannot be persuaded that there is in the constitution of the tort of intimidation an essential difference between tortious or criminal acts, on the one hand, and unlawful acts consisting of breaches of contract, on the other, or threats of such breaches which make it necessary for us now to say that the tort of intimidation can never extend to cover threats of breaches of contract. So far, therefore, I agree with the learned Judge, Sachs J., in my answer to the second question which I have above formulated, and think that the plaintiff here had established a good cause of action at law unless his rights are defeated by sections 1 and 3 of the Trade Disputes Act, 1906. It becomes then necessary, as it was strictly unnecessary for the Court of Appeal, for the House to reach a conclusion upon the third of the questions which I have formulated, namely, upon the effect in the present case of sections 1 and 3 of the Trade Disputes Act, 1906. Section 1 reads as follows: -

The following paragraph shall be added as a new paragraph after the first paragraph of section three of the Conspiracy and Protection of Property Act, 1875:-'An act done in pursuance of an agreement ' or combination by two or more persons shall, if done in contemplation ' or furtherance of a trade dispute, not be actionable unless the act, if ' done without any such agreement or combination, would be actionable ' .

I believe that all your Lordships are agreed that, in the circumstances of the present case, section 1 cannot be successfully invoked by the Respondents. I am also of that opinion although, as later appears, I am not sure that my concurrence with your Lordships' conclusion upon this point rests upon a complete concurrence of reasoning. To my mind, the essential question may be thus stated: was the quality of the acts done by each of the Defendants such that those acts (being, as it is conceded, done in furtherance of a trade dispute), would give to the Appellant a cause of action if done by each Defendant upon his own, without collaboration with the other Defendants? For reasons already given, I have concluded that a

threat to do an act unlawful in the sense of constituting a breach of contract may qualify as falling within the tort of intimidation. No doubt if all that Mr. Barnard did (to take his case as an example) was to threaten B.O.A.C. to break his own contract of service unless B.O.A.C. gave notice to Mr. Rookes, its coercive effect would (as I have earlier indicated) be negligible, if indeed at all existent. But Mr. Barnard was an official of the Union and his threat was (and clearly understood to be) that he in common with all his Union colleagues would break their service contracts unless Mr. Rookes' services were determined. Although therefore the threat was not one to procure breaches of their service contracts by the other Union men, nevertheless the threat, properly understood as it was intended to be understood in the light of the resolution of the 10th January, 1956, had a real and substantial coercive force. As such, and apart from the combination with him of the other Defendants, such threat itself constituted a cause of action on the Appellant's part. It follows therefore, in my opinion, that section 1 of the Act provides no answer to the Appellant's claim. Section 3 however has caused far greater difficulty. Its language is as follows:-

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. Nothing in the present case turns upon the first part of the section, since there was here no breach of the Appellant's contract procured by the acts of the Defendants. It is with the second part of the section that your Lordships are concerned and it will, I hope, be useful to repeat the relevant words. They are: An act done by a person in ... furtherance of a trade dispute shall not be actionable on the ground only that ... it is an interference with the employment of some other person. I believe that all your Lordships have in the end reached the conclusion that upon their true construction and in light of the relevant law as it was understood at the date of the passing of the Trade Disputes Act the words which I have repeated cannot protect the Respondents in the present case. The problem, upon its face, is simple enough: what is meant by the few- and the simple-words An Act . . . shall not be actionable on the ground only that . . . As I believe all your Lordships are agreed, the answer to the problem is to

be found by enquiring whether the acts complained of are, as such, wrongful only upon the ground (in such a case as the present that they constitute or result in an interference with some person's employment. If this be the correct nature of the enquiry, then the answer in this appeal is that the acts complained of are not wrongful only upon the ground that they interfered with the Appellant's employment; for they are also wrongful on the ground of constituting the tort of intimidation. The alternative analysis which has, I confess, appealed to me places perhaps greater emphasis upon the word actionable so that the essential question posed by the statutory language is, whether the acts complained of are actionable on the part of some particular person on the ground only that they interfered with that person's employment. Applying such a test to the present case the question then is resolved thus: were the acts of the Defendants actionable at the suit of the Plaintiff upon the ground (and only upon the ground) that they interfered with his employment? And if that be the right question then, as I conceive, the answer must be in the affirmative since the Plaintiff was not himself intimidated and the only ground upon which he can complain of the Defendants' acts is that they resulted (as they were intended to do) in an interference with his (the plaintiff's) employment with B.O.A.C.

Let me say at once that I do not at all differ from your Lordships in thinking that the same principle of interpretation must be applied to the first part as to the second part of section 3 ; for the essential formula- shall not be actionable on the ground only that -is equally applicable to both parts of the section. So if the test which has appealed to me is applied where the first part of the section is involved, that is in a case where there has been a breach of the contract of service of someone in the Plaintiff's position, it would follow that protection is equally given, where there exists a trade dispute, whether the acts which brought about the breach of contract were as regards the employer wrongful (e.g. constituted the tort of intimidation) or consisted merely of persuasion without any threat or any other unlawful act. It is, however, as I understand, the view of all your Lordships that if the case supposed were one where the breach of contract of service were brought about by threats or other unlawful acts, then no protection would be afforded by the first part of the section.

My Lords, I am indeed conscious of the fact that the view upon the supposed case entertained by your Lordships appears to have the support of no less an authority than that of Lord Loreburn, who was Lord Chancellor at the time of the passing of the Trade Disputes Act, 1906. I have in mind the celebrated passage in his speech in *Conway v. Wade*, [1909] A.C. 506 at p. 511.

It is clear that, if there be threats of violence, this section gives no protection, for then there is some other ground of action besides the ground that 'it induces some other person to break a contract', and so forth. So far there is no change. If the inducement be to break a contract without threat or violence, then this is no longer actionable, provided always that it was done 'in contemplation or furtherance of a trade dispute'. . . . In this respect there is a change. If there be no threat or violence, and no breach of contract, and yet there 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', there again there is perhaps a change. It is not to be actionable, provided that it was done 'in contemplation or furtherance of a trade dispute'. I shall, I hope, be excused from quoting further at length from Lord Loreburn's speech.

It is said indeed with force that the first part of the language which I have quoted shows that Lord Loreburn's view was that no protection would be given by the section where the wrong of intimidation done to an employer had the effect of inducing him to break his service contract. It is therefore said that (in Lord Loreburn's view) the first part of the section was only intended to give relief where the breach of contract was procured by persuasion unaccompanied by any wrongful acts—in other words, to give relief only in cases which were in the year 1906 thought to fall strictly within the scope and authority of *Lumley v. Gye* 2 E and B. 216: though as regards the second part of the section, Lord Loreburn was careful to express no concluded view. I must also add that in no subsequent case has there been any doubt or qualification expressed in regard to Lord Loreburn's statement of the effect of the first part of the section; though it is also true that the particular point which your Lordships are now asked to resolve has never, in fact, come before the courts for decision. Having regard to the unanimity of your Lordships' view upon this matter I have not thought it right formally to dissent.

Nonetheless, I have not felt able to resolve the doubts which I have felt in favour of your Lordships' views and in case the section should hereafter come before Parliament for review I have thought it right to express more fully the argument which has appealed to me in favour of the alternative view of the construction of section 3, namely that the acts of the defendants of which the Appellant complains are actionable at his suit because (and only because) they have constituted and resulted (as they were intended to do) in an interference with the Appellant's employment by B.O.A.C. I do not forget that in construing the material language of section 3 regard should properly be had to the state of the law as it should be taken to have been (and to have been understood by Parliament to be) in 1906. It is also no doubt true that in 1906 the leading heresy in Lord Dunedin's language-see *Sorrell v. Smith* at page 719-had not been exposed and dissipated, viz., that acts which were in themselves lawful might nonetheless be actionable if it were shewn that they were maliciously directed against another person, i.e., were deliberately intended to damage such other person particularly in his employment; and it may indeed be that such heresy has been entertained until the present time. I here make the point, however, that the first part of the citation from Lord Loreburn may have been directed to the position of the person who (unlike the Appellant in the present case) is himself intimidated and who may well therefore (like one who sues another for the tort of negligence) have a cause of action against the wrong-doer altogether distinct from the damage by way of loss of employment which he may suffer from the wrong. I do not, however, fail to appreciate the point that Parliament may, in enacting the second part of section 3 of the Act of 1906, have intended to resolve the heresy above mentioned in favour of the Trade Union when the (lawful) acts complained of were done in furtherance of a trade dispute; though the result would be, in light of later judicial decisions, to make that part of the section (unlike its initial part) merely declaratory of the law and therefore, in effect, nugatory. But whatever may have been (or may be assumed to have been) the Parliamentary intention in 1906 the question before your Lordships must be to construe, according to the ordinary sense of the language used, the terms of the enactment. So much has been forcibly and authoritatively stated by Lord Macnaghten (and the other noble Lords) in the case of *Vacher and Sons Ltd. v. London Society of Compositors* [1913] A.C. 107. Lord Macnaghten at pp. 117 and

118 of the Report said:

Now it is 'the universal rule', as Lord Wensleydale observed in *Grey v. Pearson*, that in construing statutes, as in construing all other written instruments ' the grammatical and ordinary sense of the word is ' to be adhered to, unless that would lead to some absurdity, or some ' repugnance or inconsistency with the rest of the instrument, in which ' case the grammatical and ordinary sense of the words may be ' modified, so as to avoid that absurdity and inconsistency, but no ' further'. Acts of Parliament are, of course, to be construed ' according to the intent of the Parliament' which passes them. That is ' the only rule ' said Tindal C.J., delivering the opinion of the judges who advised this House, in the *Sussex Peerage Case*. But his Lordship was careful to add this note of warning: ' If the words of ' the statute are in themselves precise and unambiguous, then no more ' can be necessary than to expound those words in their natural and ' ordinary sense. The words themselves alone do, in such case, best ' declare the intention of the lawgiver'. Nowadays, when it is a rare thing to find a preamble in any public general statute, the field of inquiry is even narrower than it was in former times. In the absence of a preamble there can, I think, be only two cases in which it is permissible to depart from the ordinary and natural sense of the words of an enactment. It must be shewn either that the words taken in their natural sense lead to some absurdity or that there is some other clause in the body of the Act inconsistent with, or repugnant to, the enactment in question construed in the ordinary sense of the language in which it is expressed. Applying then this test, the question persists, notwithstanding any heresy formerly entertained, what acts are actionable at the suit of any person, only on the ground that they interfere with that person's employment? And if that test is applied to the present case the conclusion would be that the acts of which the Appellant here complains are not otherwise, at his suit, actionable.

We are here concerned with acts, that is to say unlawful threats constituting intimidation not of the Appellant himself but of the Appellant's employers aimed and intended to interfere with the Appellant's employment. As I have more than once observed, the Appellant was not himself intimidated ; but if I am right in thinking that the unlawful acts complained of comprehend threats of breaches of

contract as well as threats of tortious actions, then, according to the law as I think it has emerged, the Appellant would undoubtedly have a good cause of action, unless the acts complained of had been done in furtherance of a trade dispute. It is however relevant, upon this view of the effect of section 3 of the Act of 1906, to consider also the case of the person who is directly intimidated. The attempt to extract the relevant principles from the present case is, as I have already intimated, to some extent bedevilled by the circumstances of the case, including the possible difficulty in properly stating the nature of the threats of the defendants and the admitted fact that whatever was done by the defendants was done in truth in furtherance of a trade dispute. I take, therefore, by way of example the simple case of one who intimidates another by threats of personal violence. I take the case of A, engaged in some profession or business. I assume that B, from motives of intense personal dislike of A, uses threats of personal violence to A of real coercive force intended (and effective) to interfere with A's business. If, as a result of B's threats, A is compelled to abandon his business or profession he will, according to the view of the Court of Appeal as well as of your Lordships, have a cause of action against B and such cause of action will be founded upon the tort of intimidation. If the only effect of the intimidation is to interfere with A's business-if, that is to say, the only *damnum* suffered by A from B's *injuria* is damage to A's business-then the question remains whether, if the acts of intimidation were done in furtherance of a trade dispute, section 3 of the Act of 1906 would provide a good defence to A's claim. Upon this question I express no view. But clearly the damage to A might not be so confined-he might well, as a consequence of B's intimidation, suffer in many ways including health, and, if he did, then, as I conceive, his cause of action against B would be founded on the tort of intimidation and would not be confined, by reference to the damage suffered, to interference with his business. I take by way of analogy the case where B, by careless driving of his motor car, seriously injures A. In such a case the damage suffered by A may comprehend the fact that, as a result of his injuries, he is unable to continue to carry on his business or profession. Nonetheless his cause of action against B would be founded on B's negligence and plainly it could not fairly be said that the only ground upon which, at A's suit, B's acts were actionable was that they interfered with A's business. Does not similar reasoning apply in the case where the person

complaining of the tort of intimidation is the person himself intimidated? In a case therefore in which, pursuant to a trade dispute, threats were made -say by members or officials of a trade Union-direct to one who was not a member of the Union, it should follow that the person threatened could properly claim redress on the ground of intimidation since the damage suffered by him was not limited to and dependent upon interference with his employment. That question if and when it arises will be decided upon the particular facts of the case. Where, however, as in the present case, the complainant has not himself been -intimidated, his cause of action must depend, and must depend exclusively, upon his claim that the threats to a third party (namely, his employers) were made with the deliberate intent of affecting his own job. If they were, then (apart from section 3 of this Act of 1906) he would have a cause of action; but if the threats were made in fact in furtherance of a trade dispute the result is, upon the alternative view of construction which has appealed to me, that his cause of action, his right to complain, is necessarily and inevitably destroyed by what I take to be the plain meaning of the words of the section.

I should add here that I have been somewhat troubled by the words ... is an interference ... in the section ; since the acts complained of may fairly be said not themselves to be, but rather to have resulted in, such an interference. But the difficulty arises whichever view is taken of the construction of section 3, and I have felt bound to conclude that the word is must in its context mean and comprehend the effect of the acts of which complaint is made. Were it otherwise, indeed, the section would be incompetent to cover the case of acts in themselves lawful but by their effect intended to damage the business or employment of the complainant. In other words, if by the use of the word is Parliament intended to confine the operation of the section to cases in which the acts in question of themselves operated as an interference with the business or employment of another, the section would, so far as I can see, have been inevitably without practical effect. I therefore have felt compelled to the view that by the word is Parliament meant and intended is by its effect or intention . I should add that, with all respect to the opposite view, it does not seem to me that any assistance one way or the other is to be derived from section 4 of the Act, which in terms gives absolute immunity to Trade Unions themselves ; for, on the alternative view of its effect which has

appealed to me,

section 3 falls far short of giving a corresponding immunity to those whose acts procure a breach of some person's contract or interfere with his employment. Nor does it seem to me that the alternative view can be said to involve giving wholly unreasonable licence to persons doing wrongful acts in contemplation of furtherance of a trade dispute: for as I have endeavoured to illustrate, the person (i.e., in the ordinary case, the employer) is not deprived of the right to invoke the jurisdiction of the courts where he has been the victim of the wrongful acts except at any rate in a case where his only ground for complaining of the wrongful acts- the only damnum suffered by him as their result- was that they interfered with his business.

After all, on any view the only persons against whom proceedings could be taken by anybody in respect of acts done in contemplation or furtherance of a trade dispute would (except perhaps in very rare cases indeed) be individuals like the defendants in the present case whose ability to pay damages would be greatly limited. Moreover, in cases of the kind which I have in mind I hope and believe that the Trade Unions in our country are sufficiently responsible and influential to see that acts done by their members in the course of trade disputes are not wholly irresponsible. I have, for the reasons earlier stated, attempted to set down fully the grounds which appear to me to support the alternative view of the construction of section 3. I add only that, as I have felt, the vital word may be said to be actionable and not, for example, wrongful or capable of giving rise to a cause of action . The use of the word actionable inevitably provokes the question actionable on whose part?: and the alternative answer to the question involves only that there should be read into the section such words as on the part of any person which the use of the word actionable may be said inevitably to require. Nonetheless, having attempted to express my doubts and the reasons for them I do not upon this matter formally dissent from your Lordships. There remains the final question fully argued upon the resumed hearing of the appeal, namely, whether, assuming the Appellant to be entitled to succeed in his action, he could claim what are called exemplary damages . Upon this difficult question, falling how to be considered for the first time by your Lordships' House, I have had the advantage of reading the opinion

prepared by my noble and learned friend, Lord Devlin, who, at the end of it, dealt exhaustively with this subject. For the reasons which Lord Devlin gives, I agree entirely with his conclusion that awards of exemplary damages ought to be strictly limited to the two classes of case specified by him, neither of which comprehends the present case ; and I share my noble friend's opinion that your Lordships should now overrule the decision of the C.A. in the case of *London v. Ryder* [1953] 2 Q.B. 202.

In all the circumstances I agree that the House should now make an order in the form proposed by my noble and learned friend Lord Reid.

Lord Hodson

MY LORDS,

The Appellant worked as a draughtsman for B.O.A.C. at London Airport where, from 1951, the Union called the Association of Engineering and Shipbuilding Draughtsmen (A.E.S.D.) had an informal 100 per cent, membership agreement with the employers. On 1st April, 1949, the employers' and the employees' sides entered into an agreement in writing, which provided by clause 4 that no lock-out or strike should take place and that, if a dispute occurred, arbitration procedure should be followed. In 1955 the Appellant, who had disapproved of the policy of the Union, resigned his membership. The Respondents Barnard and Fistal, branch chairman and local shop steward, and Silverthorne, who was a paid official of the Union, advocated strike action if the Appellant remained in his employment as a draughtsman.

A resolution was passed and communicated to B.O.A.C. that if the Non-Unionist Mr. D. E. Rookes is not removed ... a withdrawal of labour of all A.E.S.D. Membership will take place . In face of this threat B.O.A.C. first suspended and later dismissed the Appellant, after giving him due notice which expired on the 16th March, 1956. The Appellant brought his action on the 25th June, 1957, for damages for the injury which the Respondents had caused him by threatening B.O.A.C. in the manner indicated, so that B.O.A.C. had been induced to terminate his services. It was agreed by both sides that the terms of the 1949 agreement

formed so far as applicable part of the contract employment of A.E.S.D. members at the London Airport office. It was also agreed that a trade dispute existed at all material times concerning the continuation of the Appellant in the employment of B.O.A.C. while he was not a member of A.E.S.D., and that all the acts of the Respondents were done in furtherance of that trade dispute.

The jury found that there was a conspiracy to threaten strike action to secure the withdrawal of the Appellant and that all three Respondents were parties, that all three had threatened to take strike action directed to the same end, and that, their threats having caused the dismissal of the Appellant, he should be awarded 7,500 damages. The learned Judge held that the tort of intimidation had been committed by each defendant, that the threats to do unlawful acts, i.e., to break contracts of employment by departing from the terms of the 1949 agreement, resulted in reasonably foreseeable damages to the Appellant. The Respondents have throughout maintained that the action is mis-conceived, in that there is no such tort as intimidation and, further, that if (here is such a tort it does not extend to cover this case involving, as it does, no threat of violence or of any criminal or tortious act, but a mere threat to break a contract, that is, a breach of obligations undertaken by private treaty between two persons. Such a threat, it is said, ought not to give a remedy to an outsider.

The Court of Appeal reversed the decision of the learned Judge, holding that, although the tort of intimidation existed, it did not cover the case of a threat to break a contract.

No doubt many of the old cases in which a plaintiff has been held entitled to recover damages from a defendant who has intimidated a third party can be explained on the ground of nuisance, or some other recognized tort, but some cannot, and I think that, of these, *Garret v. Taylor* (Cro. Jac. 567) and, more particularly, *Tarleton v. M'Gawley* (1Peake 270) cannot be so explained, and I agree with your Lordships that the existence of this tort is established by authority.

The main argument of the Respondents has been directed to persuade your Lordships that this tort is of a restricted nature, having its roots in violence and threats of violence, and should not be extended to cover the case of workmen who

threaten to break their contract with their employers if they, the employers, refuse to terminate the employment of an individual workman, as happened in this case. It cannot be disputed that the limited view of the tort which commended itself to the Court of Appeal finds support in authority which does not appear to have contemplated that breach of contract was within the field of unlawful acts giving rise to the tort of intimidation. Donovan L.J., pertinently referred to the Criminal Law Amendment Act, 1871, which makes it an offence to use violence, threats, intimidation, molestation or obstruction with a view, among other things, to coercing an employer into ceasing to employ a workman. The threats and intimidation had to be acts such as would justify a justice of the peace in binding over the person so threatening or intimidating to keep the peace. This Act did not accordingly make it unlawful to threaten to strike. It was repealed in 1875 by the Conspiracy and Protection of Property Act, 1875, and in 1891 it was decided, in two cases cited by the learned Lord Justice, that the word intimidation could not be construed more severely than as defined by the Act of 1871 (see *Gibson v. Lawson* [1891] 2 Q.B. 545 and *Curran v. Treleaven* [1891] 2 Q.B. 553). Subject to specific exceptions, such as breaches of contracts of service by employees of municipal gas and water undertakings and breaches of contract involving danger to life, risk of serious bodily injury and destruction of or serious injury to valuable property, a threat to break a contract is no longer unlawful in the sense of being criminal.

In the past there has been much discussion in the conspiracy cases about the word threat, but there is now no necessity to be careful to distinguish between a threat and a warning on the basis that one is a threat to do an illegal act and the other a warning to do something lawful. As Lord Dunedin put it in *Sorrell v. Smith* [1925] A.C. 700 at p. 730 A threat is a pre-intimation of proposed action of some sort. That action must be either per se a legal or an illegal, i.e., a tortious, action. If the threat used to effect some purpose is of the first kind, it gives no ground for legal proceeding; if of the second, it falls within the description of illegal means, and the right to sue of the person injured is established. This language, while making clear that the word threat of itself is neutral, does nothing to support the contention of the Appellant that breach of contract was the kind of unlawful act which could be envisaged by the tort of intimidation. Illegal is treated as equivalent

to tortious by the use of the link id est. In the Crofter's case [1942] A.C. 435, Lord Wright said: There is nothing unlawful in giving a warning or intimation that if the party addressed pursues a certain line of conduct, others may act in a manner which he will not like and which will be prejudicial to his interests so long as nothing unlawful is threatened or done. It is clear that the threat must be a threat to do something independently unlawful. Breach of contract is unlawful and Sachs J., in rejecting the Respondents' contention that this was outside the scope of intimidation, followed the persuasive authority of two Irish cases, *Cooper v. Millea and others* 1938 I.R. 749 and *Riordan v. Butler and others* 1940 I.R., 347, in the earlier of which reliance was placed by Gavan O'Duffy on the speech of Lord Dunedin in *Sorrell v. Smith* which does not, however, support the proposition that a threat to strike in breach of contract is unlawful and constitutes unlawful means.

In *Huntley v. Thornton* [1957] 1 W.L.R. 321 at p. 344, Harman J. said, in relation to employees who threatened to strike: If, however, their actions amount to threats of illegal strike action-that is to say, action to withdraw labour in breach of contract-then those acts were tortious and illegal. As Sachs, J. pointed out, this observation of Harman, J. was obiter.

The argument which seems to have carried the greatest weight in the Court of Appeal in this case is that which may be called the privity of contract argument. As Pearson L.J. put it if the extension contended for by the Appellant were made it would overturn or outflank the elementary principles of contract law. These, speaking broadly, exclude the *jus tertii* and restrict the rights and obligations of a contract to the parties thereto. See two decisions of your Lordships' House, viz., *Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge and Co., Ltd.* [1915] A.C. 847 and *Midland Silicones, Ltd. v. Scruttons, Ltd.* [1962] A.C. 446. Various examples have been given shewing the apparent absurdity of giving relief to someone in the position of the Appellant when breach of contract is threatened and denying relief when the contract is in fact broken.

As my noble and learned friend, Lord Devlin, points out in the speech which I have had the privilege of reading, there is really no absurdity in the instances given. The vice of the Respondents' action is the threat to break and not the breach itself,

which would not have the adverse effect on the Appellant which was caused by the threat to break. Much of the argument which seeks to restrict the rights under a contract to the parties to it in a situation such as the present can be found in the powerful dissenting judgment of Coleridge C.J., in *Lumley v. Gye*, but this judgment does not represent the law, and the view of the majority that a party injured by breach of contract has his remedy against one who has induced the breach is now part of our law-subject to any defence there may be by way of justification or under the Trade Disputes Act, 1906, to which I must refer later. I would therefore reject the privity of contract argument. It would, I think, to-day, be more anomalous to draw the line short of breach of contract than beyond it. In the old days the question of breach of contract by workmen simply did not arise for the reason that they did not have contracts of employment, as a rule, to break. Now the situation is different, and in this case the employees not only agreed to a fixed period of notice on either side for termination of the employment but also not to strike, which I take it means not to take part in any concerted withdrawal of labour, with or without notice.

It would be strange if threats of violence were sufficient and the more powerful weapon of a threat to strike were not, always provided that the threat is unlawful. The injury and suffering caused by strike action is very often widespread as well as devastating, and a threat to strike would be expected to be certainly no less serious than a threat of violence. That a breach of contract is unlawful in the sense that it involves the violation of a legal right there can be no doubt. Lord Herschell in *Allen v. Flood* [1898] A.C. 1, at p. 121, emphasized this point in the passage where he expressed the opinion that there was a chasm between maliciously inducing a breach of contract and maliciously inducing a person not to enter into a contract. The one is unlawful and the other is lawful. I do not think your Lordships are laying down any new principle in including a threat to break a contract under the head of intimidation. It is no more than an application of the existing principle to a case which has not been before considered, and I would therefore accept the Appellant's argument that the tort of intimidation would be available to him but for the effect of the Trade Disputes Act, 1906. Section 1 of the Act reads -

An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable. I agree with the learned Judge that, once it is accepted that the threat to act in breach of the 1949 agreement constitutes intimidation and is actionable as a tort, if it is likely to harm the Appellant and is followed by reasonably foreseeable damage, it is not open to the Respondents to rely on this section by saying in effect that the damage cannot be attributed to any particular act of the Respondents and therefore the act done is not actionable without the element of combination. Section 1 therefore provides no defence. Section 3, however, is in a different category. It reads:-

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. It is upon the construction of this section that the most difficult question falls to be decided.

There is a material contrast between sections 3 and 4. The latter prevents actions of tort being instituted against Trade Unions in any circumstances, and may be said to place Trade Unions outside the law. The former is not so framed as to give carte blanche to those acting in contemplation or furtherance of a trade dispute. Actions are not forbidden to be entertained but certain acts done are not to be actionable on the ground only that etc. If the end result of both limbs of the section, inducement of some other person to break a contract on the one hand, 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 wishes on the other hand, had alone to be taken into consideration, a result not unlike that reached by section 4 would follow, for whatever the nature of the tort the ground of action would be either the inducement or the interference .

It would seem therefore at any rate very unlikely that in wording section 3 in the way it did, in contrast to the general words conferring immunity to be found in

section 4, Parliament could have intended to go so far as to give protection to members of a trade union in every case where the consequences of the act, whether the act itself is lawful or unlawful, were that a breach of contract has been induced or that a person's employment had been interfered with.

Further support for what I may term the limited, as opposed to the licentious, scope of section 3 is to be found in section 2 of the Act, which licenses picketing but only for the purposes of peaceful persuasion. As my noble and learned friend, Lord Reid, has pointed out, the general plan of section 3 is to treat both limbs in the same way, and I will not detain your Lordships by repeating in my own language the reasons which he gives, and with which I respectfully agree, for holding that on principle and authority section 3 affords no protection if there are threats or violence and if, as your Lordships all hold, the threat to break a contract amounts to unlawful intimidation. The dictum of Lord Loreburn in *Conway v. Wade* [1909] A.C. 506 has strong persuasive authority and has been accepted, I think rightly, in a number of cases to which your Lordships have been referred down to the present time. The intimidation is actionable, and the Plaintiff is entitled to sue on that ground, not on the ground only that his employment has been interfered with. This last is the damage which he has suffered, it is not the only ground of his action. I would allow the appeal, but there must be a new trial on the question of damages for the reasons to be given by my noble and learned friend. Lord Devlin.

Lord Devlin

MY LORDS,

On 16th March. 1956, the Appellant's employment, which had lasted nine years with B.O.A.C., was lawfully determined by notice. The reason why it was terminated was because on 10th January, 1956, the members of the A.E.S.D.. a trade union to which the Appellant belonged and from which he had resigned, served notice on B.O.A.C. that if the non-unionist Mr. D. E. Rookes, is not removed from the Design Office by 4 p.m. Friday, 13th January, 1956. a withdrawal of labour of all A.E.S.D. membership will take place. On 13th January the Appellant was suspended from his employment and the strike thereby averted ; and thereafter notice terminating his employment altogether was given to him, as

I have said. The three Respondents were officials of the union and two of them were employed by B.O.A.C.

It is not disputed that the notice constituted a threat of breach of contract by the members of A.E.S.D. It is true that any individual employee could lawfully have terminated his contract by giving seven days notice and if the matter is looked at in that way, the breach might not appear to be a very serious one. But that would be a technical way of looking at it. As Donovan, L.J. said in the Court of Appeal, the object of the notice was not to terminate the contract either before or after the expiry of seven days. The object was to break the contract by withholding labour but keeping the contract alive for as long as the employers would tolerate the breach without exercising their right of rescission. In the second place, there was an agreement in force between A.E.S.D. and B.O.A.C. in which the former undertook that no strike of its members would ever take place; and it is admitted that that term formed part of the contract of service of each member with B.O.A.C. I agree with the submission made by Mr. Silkin for the Appellant that a strike means a concerted withdrawal of labour in furtherance of a trade dispute, whether or not the withdrawal is effected after proper notice has been given. It is common ground that the issue whether a non-unionist should continue to be employed creates a trade dispute.

It is not therefore denied that the service of the notice was an infringement of B.O.A.C.'s rights. But the question is whether the Respondents thereby infringed any right of the Appellant. Since all that the Respondents did was admittedly done in the furtherance of a trade dispute, it is idle to enquire what possible causes of action there are available to the Appellant at common law without enquiring at the same time to what extent they are curtailed by statute. Conspiracy, which suggests itself at once as a possible cause of action, is covered by section 1 of the Trade Disputes Act, 1906. There are, as is well known, two sorts of conspiracies, the *Quinn v. Leathem* type which employs only lawful means but aims at an unlawful end, and the type which employs unlawful means. Section 1 of the Act contains the formula which negatives the first type as a cause of action where there is a trade dispute. In the latter type, which in my opinion is not affected by the section, the element of conspiracy is usually only of secondary importance

since the unlawful means are actionable by themselves. Section 3 provides a second barrier for the Appellant to surmount. It grants immunity in respect of certain acts which include, it is said, (I shall have later to examine carefully the language in which the immunity is granted) an inducement of some other person to break a contract of employment and an interference with the trade business or employment of some other person .

The Appellant's choice of remedies being restricted in this way, the only wrong which he asserts as having been committed by the Respondents is the tort of intimidation. On this the Respondents say, first that there is no such tort; secondly, that if there is, the Respondents did not commit it; and thirdly, that if they did commit it, they are given immunity by section 3 because the intimidation resulted in an interference with the employment of the Appellant by B.O.A.C. My Lords, in my opinion there is a tort of intimidation of the nature described in chapter 18 of Salmond on Torts, 13th edition, page 697. The tort can take one of two forms which are set out in Salmond as follows:

(1) Intimidation of the Plaintiff himself Although there seems to be no authority on the point, it cannot be doubted that it is an actionable wrong intentionally to compel a person, by means of a threat of an illegal act, to do some act whereby loss accrues to him: for example, an action will doubtless lie at the suit of a trader who has been compelled to discontinue his business by means of threats of personal violence made against him by the Defendant with the intention.

(2) Intimidation of other persons to the injury of the Plaintiff In certain cases it is an actionable wrong to intimidate other persons with the intention and effect of compelling them to act in a manner or to do acts which they themselves have a legal right to do which cause loss to the Plaintiff: for example, the intimidation of the Plaintiff's customers whereby they are compelled to withdraw their custom from him, or the intimidation of an employer whereby he is compelled to discharge his servant, the Plaintiff. Intimidation of this sort is actionable, as we have said, in certain classes of cases; for it does not follow that, because a Plaintiff's customers have a right to cease to deal with him if they please, other persons have a right as against the Plaintiff to compel his customers to do so. There are at least two cases

in which such intimidation may constitute a cause of action: -

- (i) When the intimidation consists in a threat to do or procure an illegal act;
- (ii) When the intimidation is the act, not of a single person, but of two or more persons acting together, in pursuance of a common intention.

As your Lordship are all of opinion that there is a tort of intimidation and on this point approve the judgments in both courts below, I do not propose to offer any further authorities or reasons in support of my conclusion. I note that no issue on justification was raised at the time and there is no finding of fact upon it. So your Lordships have not to consider what part, if any, justification plays in the tort of intimidation.

Your Lordships are here concerned with the sort of intimidation which Salmond puts into the second category, and with the first of Salmond's two cases. The second case is, so Salmond later observed, one form of the tort of conspiracy. That form is the *Quinn v. Leathem* type, so that it is no use to the Plaintiff here. He relies upon a threat to do or procure an illegal act, namely, a breach of contract. Doubtless it would suit him better if he could rely on the procuring of a breach of contract, for that is a tort; but immunity from that is guaranteed in terms by section 3. So he complains only of the threat to break the service contracts and the breach would undoubtedly be an act actionable by B.O.A.C. though it is neither tortious nor criminal. He does not have to contend that in the tort of intimidation, as in the tort of conspiracy, there can be, if the object is injurious, an unlawful threat to use lawful means. I do not think that there can be. The line must be drawn according to the law. It cannot be said that to use a threat of any sort is per se unlawful; and I do not see how, except in relation to the nature of the act threatened, i.e., whether it is lawful or unlawful, one could satisfactorily distinguish between a lawful and an unlawful threat.

This conclusion, while not directly in point, assists me in my approach to the matter to be determined here. It is not, of course, disputed that if the act threatened is a crime, the threat is unlawful. But otherwise is it enough to say that the act threatened is actionable as a breach of contract or must it be actionable as

a tort? My Lords, I see no good ground for the latter limitation. I find the reasoning on this point of Professor Hamson (which Sellers, L.J. sets out in his judgment though he does not himself accept it) very persuasive. The essence of the offence is coercion. It cannot be said that every form of coercion is wrong. A dividing line must be drawn and the natural line runs between what is lawful and unlawful as against the party threatened. If the defendant threatens something that that party cannot legally resist, the Plaintiff likewise cannot be allowed to resist the consequences ; both must put up with the coercion and its results. But if the intermediate party is threatened with an illegal injury, the Plaintiff who suffers by the aversion of the act threatened can fairly claim that he is illegally injured.

Accordingly, I reach the conclusion that the Respondents' second point fails and on the facts of this case the tort of intimidation was committed. I do not share the difficulties which the Lords Justices felt about the idea of admitting breach of contract into the tort of intimidation. Out of respect to them I must state what those difficulties are and how in my opinion they can be satisfactorily resolved.

I think that in one form or another they all stem from the error that any cause of action by the third party, that is the Appellant, must in some way be supplemental to or dependent upon a cause of action by B.O.A.C. Thus, it is said to be anomalous that on the facts of this case the Appellant should be able to sue the Respondents when B.O.A.C. could not. The best way of answering that is to grant that B.O.A.C. would not be able to sue and to assert, as I shall seek to show, that there is nothing anomalous about it. But there were introduced into the argument a suggestion that B.O.A.C. could in fact have sued because although there was no actual breach of contract, one was threatened and therefore there was an anticipatory breach. Against that, it was said that B.O.A.C. could not have sued for an anticipatory breach unless they first elected to rescind, which they never did. I dare say that is right, but I do not think it matters at all whether B.O.A.C. could sue or not. The two causes of action-B.O.A.C.'s and the Appellant's -are in law quite independent; and in fact they are virtually alternative because it is difficult to visualise (except in one case) a set of facts on which both could sue. This last statement is best examined in relation to a threat of physical violence which would unquestionably constitute intimidation. If A threatens B with physical violence

unless he harms C, B can either resist or comply. If he resists, B might obtain an injunction against A (as he could also in the case of a threatened breach of contract if the contract were of a kind that permitted that remedy); or if A carries out his threat, B can sue for assault and obtain damages. In neither case can C sue because he has suffered no harm. If B complies with the threat, B cannot sue for damages because *ex hypothesi* there has been no assault; and he is not likely to obtain an injunction against the execution of a threat which he has already taken other means to avoid. But C will be able to sue because through B's compliance he has been injured. There is no anomaly about this; and if one substitutes breach of contract for physical violence, the position is the same. The only case in which B and C are both likely to sue is if they both sue for the tort of intimidation in a case in which B has harmed himself by also harming C.

Then it is said that to give C a cause of action offends against the rule that one man cannot sue on another's contract. I cannot understand this. In no circumstances does C sue on B's contract. The cause of action arises not because B's contract is broken but because it is not broken; it arises because of the action which B has taken to avert a breach. Then it is asked how it can be that C can sue when there is a threat to break B's contract but cannot sue if it is broken without a threat. This means, it is argued, that, if A threatens first, C has a cause of action; but if he strikes without threatening, C has no cause of action. I think that this also is fallacious. What is material to C's cause of action is the threat and B's submission to it. Whether the threat is executed or not is in law quite immaterial. In fact it is no doubt material because if it is executed (whether it be an assault or a breach of contract) it presumably means that B has not complied with it; and if B has not complied with it, C is not injured; and if C is not injured, he has no cause of action. Thus the reason why C can sue in one case and not in the other is because in one case he is injured and in the other he is not. The suggestion that it might pay A to strike without threatening negatives the hypothesis on which A is supposed to be acting. It must be proved that A's object is to injure C through the instrumentality of B. (That is why in the case of an innocent breach of contract, which was remarked upon by Sellers, L.J., that is, one into which A was forced by circumstances beyond his control, there could never be the basis of an actionable threat.) If A hits B without telling him why, he can hardly hope to achieve his

object. Of course A might think it more effective to hit B first and tell him why afterwards. But if then B injures C, it would not be because B had been hit but because he feared that he might be hit again. So if in the present case A.E.S.D. went on strike without threatening, they would not achieve their object unless they made it plain why they were doing so. If they did that and B.O.A.C. then got rid of the Appellant, his cause of action would be just the same as if B.O.A.C. had been threatened first, because the cause of the injury to the Appellant would have been A.E.S.D.'s threat, express or implied, to continue on strike until the Appellant was got rid of. Finally, it is said that if a threat of breach of contract constitutes intimidation, one party to a contract could be sued for intimidation if he threatened reprisals. Suppose, for example, A has agreed to deliver goods to B in monthly instalments but has not made payment for the first a condition precedent to delivery of the second. If he threatens to withhold the second until payment has been made for the first, is he intimidating B? I doubt it But the case introduces questions not in issue here-whether a threat in such circumstances would be justifiable and whether it is intimidation to try to force a man into doing what the law, if invoked, would compel him to do.

I find therefore nothing to differentiate a threat of a breach of contract from a threat of physical violence or any other illegal threat. The nature of the threat is immaterial, because, as Professor Hamson points out, its nature is irrelevant to the plaintiff's cause of action. All that matters to the plaintiff is that, metaphorically speaking, a club has been used. It does not matter to the plaintiff what the club is made of-whether it is a physical club or an economic club, a tortious club or an otherwise illegal club. If an intermediate party is improperly coerced, it does not matter to the plaintiff how he is coerced.

I think therefore that at common law there is a tort of intimidation and that on the facts of this case each of the Respondents has committed it, both individually (since the jury has found that each took an overt and active part) and in combination with others. I must add that I have obtained no assistance from the numerous dicta cited to show what constitutes unlawful means in the action of conspiracy. In some of the dicta the language suggests that the means must be criminal or tortious and in others that breach of contract would do; but in no case

was the point in issue. Moreover, while a decision on that point might have been most illuminating, it is not the point I have been considering. I have not been considering what amounts to unlawful means in the tort of conspiracy. I am not saying that a conspiracy to commit a breach of contract amounts to the tort of conspiracy ; that point remains to be decided. I am saying that in the tort of intimidation a threat to break a contract would be a threat of an illegal act. It follows from that that a combination to intimidate by means of a threat of a breach of contract would be an unlawful conspiracy; but it does not necessary follow that a combination to commit a breach of contract simpliciter would be an unlawful conspiracy. I have now reached the Respondents' third defence and must consider whether the Trade Disputes Act provides them with a good defence. The Respondents have advanced two separate statutory defences, the first based on section 1 and the second on section 3. The argument on section 1 is that in order to find on the facts of this case sufficient proof of the tort of intimidation, it is necessary, so it is said, to bring in agreement or combination by the back door; and that is for-bidden by section 1. The argument is applied in particular and in general. In particular, it is applied in the case of Silverthorne, the Respondent who is not an employee. He had therefore no contract to break ; he cannot be sued (this is admittedly plain from section 3) for procuring a breach by others; therefore the only cause of action against him is conspiracy or joint intimidation, involving either agreement or combination. In general, the argument is applied in the following way. To sustain the tort of intimidation, it must be shown that there was an operative threat. Damage is an essential part of the cause of action and it must be shown that the damage was caused by the threat. The threat of any single man to stop work would not have influenced B.O.A.C. It was the power of the combination that did that; and that makes proof of the combination (which section 1 will not allow) an essential part of the Appellants' cause of action against all three Respondents. The first part of this argument, i.e. its application in particular to Silverthorne, in my opinion reads too much into section 1. To establish a cause of action of any sort a Plaintiff must show an injurious act. If the act that injures him is not by itself actionable, the Plaintiff can succeed at common law only if he shows that it was done in pursuance of an agreement or combination to injure him. He is then setting up a *Quinn v. Leathem* cause of action and if that is his position,

section 1 prevents him from suing. But if the injurious act is actionable without the allegation of conspiracy, that is, if it is by itself unlawful, section 1 does not apply at all. It does not prevent the Plaintiff from suing the doer of the act and the conspirators, if any, as well. Section 1 does not prevent actions of conspiracy altogether; it restricts them. I turn now to the second part of the argument. It is true that the tort of intimidation cannot be committed unless the intimidator has or is believed by the party threatened to have the coercive power which is of the essence of the tort. It may be that the power belongs to someone else who has placed it at the disposal of the intimidator and will himself do what the intimidator says: it is then the intimidator who is in control. Or it may be that an intimidator will employ an agent to convey the threat and then such a person may be a tortfeasor as well. Or it may be that the coercive power is dispersed among many, no single man being strong enough by himself. All these three alternatives involve agreement or combination and then, however the act is done, it is done pursuant to an agreement or a combination. When the tort is committed by a single man, that man must be a man with enough coercive power to achieve his object. If the necessary coercive power is dispersed, there must be agreement or combination before it can be effectively used. If this is accepted, as I think it should be, as a correct analysis of the tort, the question becomes one of the true interpretation and effect of the language of section 1. It turns on what exactly is meant by actionable and what is the test of actionability to be imposed. The section may mean that in the particular case to which it is being applied, the action will fail unless the Plaintiff can prove that a single person has in fact committed the tort of intimidation. Or it may mean that the nature of the act must be such as to make it actionable even if done without any agreement or combination. If the former view is right, then on the assumption of fact that, as is probable, B.O.A.C. would not have been coerced by any individual threat, this appeal must fail. If the latter is right, it is sufficient that intimidation is not of its nature a tort that cannot be committed by a single person and therefore it is of its nature actionable if done without agreement or combination. After doubt and hesitation I have reached the conclusion that the second interpretation should be preferred. This is consistent with the view I have already expressed about this section, namely, that its object is to exclude *Quinn v. Leathem* conspiracies in trade disputes. It is distinguishing

between wrongs that can be committed singly and those that cannot. The defence based on section 3 is also one about which I have had much doubt and hesitation. It also turns on the interpretation and effect of the section, the material words being actionable on the ground only that . There are two limbs in the section and I agree that only covers both. The second limb can for the purposes of this case be expressed shortly as an interference with employment. Thus the effect of the section can be stated as follows: an act is not to be actionable on the ground only (a) that it induces a breach of contract of employment, or (b) that it interferes with employment. The problem of interpretation to which this section gives rise is, I think, broadly similar to the problem created by section 1. Is it dealing with the requisites of a cause of action in a given case or is it dealing with the nature of the tort which it is designed to exclude? I invite your Lordships to consider this problem first in relation to the first limb of section 3. What are the requisites for a cause of action for inducing a breach of contract? There must be, besides the act of inducement, knowledge by the defendant of the contract in question and of the fact that the act induced will be a breach of it; there must also be malice in the legal sense, that is, an intention to cause the breach and to injure the plaintiff thereby and an absence of justification ; and there must be special damage, i.e. more than nominal damage, caused to the plaintiff by the breach. These three elements or requisites are the grounds on which an action for inducing a breach of contract must be based. If any one of them is missing, there is no cause of action.

If then one treats the section as dealing with the requisites of a cause of action, one finds oneself in difficulties with the cardinal phrase action- able on the ground only that, This speaks of a sole ground. The tort of inducing a breach of contract- and this is true of most torts- is not based on a single ground. An act of inducement is not by itself actionable. One man may induce another to take a certain course without the least idea that the other had pledged himself not to take it: that is not actionable at common law and needs no absolution from the statute. What are the ways around this difficulty? One way is to refuse to recognise it at all and to insist upon the statute being taken literally. No one would suggest that in the present state of the common law mere inducement could be actionable. It might perhaps be suggested, not very convincingly, that at one time it was thought that it might be. At any rate it can be argued that on its literal construction this is

what the statute clearly implies. From this it would follow that if you can add any other element to inducement, such as knowledge or intention or malice, the act is not brought only on the ground of inducement and therefore is not barred by the section. This would have the startling result that an action for inducing a breach of contract in a trade dispute could be brought notwithstanding the section. This is an approach to the section which would certainly suit the Appellant in the present case. For then he could say that if the addition of an element such as knowledge, intention or malice excluded the operation of the section, so must the addition of an element of intimidation. But if the addition of intimidation to inducement excludes the operation of the first limb, it must follow that the addition of intimidation to interference excludes the operation of the second limb; and that is the result the Appellant wants to achieve. I do not think the Appellant can succeed as easily as that because I do not think that, If the section is dealing with the requisites of a cause of action, it can possibly be given a literal meaning.

What alternative is there,-still on the assumption that the section is dealing with the requisites of a cause of action? An alternative is to treat the only ground as meaning an essential ground. This reading means that if a plaintiff cannot establish a cause of action without setting up as part of it an act of inducement, the action is barred by the section. If this reading is applied to the second limb, it is fatal to the Appellant here since an essential part of his cause of action is injury done to him by interference with his employment.

If the section has to be interpreted on the assumption that it is dealing with the requisites of a cause of action, this reading of it is, I think, preferable to a literal reading. But undoubtedly it is straining the language to read the section as if for the words on the ground only there was substituted if it is an essential ground . The two phrases are quite different in their import and would produce quite different results in their application to the first limb. Suppose that a defendant slandered a plaintiff so as to induce the plaintiff's employer by that means to dismiss him. It seems extremely unlikely that Parliament intended to authorise the use of foul means in the furtherance of a trade dispute. It is natural to think that the use of slander would enable the plaintiff to sue. But if the only ground means an essential ground the action would be prevented. For unless by chance there were

some other and unintended item of special damage arising from the slander, it would in 1906 have been an essential ground of the plaintiff's claim that the words used by the defendant had caused or induced his dismissal. In the light of these considerations and having found that the proper construction of section 1 requires one to read it as dealing with the nature of the act and not with the requisites of a cause of action in a given case, it is natural to ask whether actionable should not be given the same sort of meaning in both sections; and whether section 3 also should not be interpreted as dealing with the nature of the tort.

On such a reading the ground is not used to define an ingredient in a tortious cause of action but to define the whole tort by reference to the essential ground by which the tort is usually described. Inducing a breach of contract is descriptive of a tort which comprises all the elements of knowledge, malice, inducement and damage. If the means of inducement are honestly persuasive and nothing more, the inducer commits the tort of inducing a breach of contract and nothing more. But if the means are slanderous or deceitful, he may commit also the tort of defamation or of deceit. Then if an action is brought, it will not be only on the ground of inducing a breach of contract but also on the ground of slander or deceit, and the section will not prevent it. So if the means used are intimidatory, and since it is now clear that there is in law a tort of intimidation which is just as much separate from the tort of inducing a breach of contract as are slander and deceit, an action is not prevented by the section. This is the meaning that was clearly given to the section by Loreburn L.C. in *Conway v. Wade* [1909] A.C. 506 and although the passage is obiter, it is entitled to great weight. He said: It is clear that, if there be threats or violence, this section gives no protection, for then there is some other ground of action besides the ground that 'it ' induces some other person to break a contract', and so forth. So far there is no change. If the inducement be to break a contract without threat or violence, then this is no longer actionable, ... In this respect there is a change.

I think that this is the way in which the section in its first limb deals with the tort of inducing a breach of contract. Standing alone the tort is insufficient where there is a trade dispute; but if the defendant has also committed the tort of intimidation, he can be sued. It does not matter that what was achieved by the intimidation was a

breach of contract. The same reasoning must, I think, be applied to the second limb, if it is assumed (as I shall start by assuming) that there is a tort of malicious interference with trade, business or employment. The section must be designed to deal with both torts in the same way. If as a result of the Respondents' action B.O.A.C., instead of giving the Appellant lawful notice had dismissed him summarily, it would follow that he could have sued the Respondents for intimidation, though not for inducing a breach of contract, and it would be no answer to say that the damage was done by means of a breach of the contract of employment. As they gave him lawful notice, it must follow that the Appellant can sue for intimidation, though not for malicious interference; and likewise it is no answer to say that the damage was done by means of interference with his employment. What is said to be fatal to this reasoning is that there is in law no such tort as the tort of malicious interference done by a single person. Parliament, it is argued, cannot have intended to take away by statute a right of action that does not exist at common law. So the second limb, notwithstanding that there is no hint in the section of any different approach to it, cannot be construed in the same way as the first, and some other meaning must be found for it. What is suggested is, that since interference is not by itself actionable at common law, you must find some other element that added to interference makes it actionable at common law, and then you must give effect to the section by construing it as taking away that right of action. This other element is intimidation. One might comment that the other element might as well be said to be deceit or slander. For since your Lordships have decided that intimidation is as much an independent tort as deceit or slander, there seems no reason for selecting it alone as the cause of action that is negatived. But perhaps because it is more closely connected with interference than deceit or slander is, it is the one that the argument in fact selects.

In order to weigh the merits of this argument, I do not think that it is necessary for the House to decide whether or not malicious interference by a single person with trade, business or employment is or is not a tort known to the law. But I must at least say what I mean by such a tort. I mean, putting it shortly, *Quinn v. Leathem* without the conspiracy. If one man, albeit by lawful means, interferes with another's right to earn his living or dispose of his labour as he wills and does so maliciously, that is, with intent to injure without justification, he is, if there is such a

tort, liable in just the same way as he would undoubtedly be liable if he were acting in combination with others. The combination aggravates but is not essential. As I say, I do not think your Lordships need decide this point. You are considering the construction of a statute passed in 1906 and endeavouring to interpret it in the light of what Parliament must be taken to have intended. If men were to be fully protected when they acted in furtherance of a trade dispute, they must be protected against what might well happen to them if they acted in a certain way as well as against what inevitably would happen to them. Your Lordships do not therefore have to consider what the law is but what in 1906 Parliament might reasonably have thought it to be. Parliament, there can be no doubt at all, intended that *Quinn v. Leathem* should not apply to trade disputes. If it was perfectly clear in 1906 that the decision in *Quinn v. Leathem* depended on the element of conspiracy, section 1 of the Act got rid of it. But if conspiracy was not essential to the decision, something more was necessary: and that something more is supplied by the second limb of section 3. Moreover, the method chosen is that which one would expect Parliament in such circumstances to use. Statutes are not in this respect expressed conditionally. The draftsman cannot be expected to say by way of preface: If it be held that interference is wrongful. He would assume for the purpose of the enactment that it was. If it was not, the enactment would be otiose but harmless; if it was, the enactment would achieve the object desired.

I am not at all sure that it can be said even now with certainty what *Quinn v. Leathem* decided; but I am quite sure that in 1906 the matter was still in doubt. This can be shewn by citations from three cases in this House, *Conway v. Wade*, *Sorrell v. Smith* [1925] A.C. 700, and *Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch* [1942] A.C. In *Conway v. Wade* Lord Loreburn L.C., speaking of the second limb of section 3 and following on the passage I have already cited from his speech, said: If there be no threat or violence, and no breach of contract, and yet there 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 will,' there again there is perhaps a change. It is not to be actionable, provided that it was done 'in contemplation or furtherance of a trade dispute'. The material words in this passage are perhaps a change. Lord Loreburn

is there saying that interference without threat or violence or breach of contract, might perhaps have been actionable at common law ; and if so, the statute takes the right of action away.

In *Sorrell v. Smith* three of your Lordships treated the point as doubtful. Cave, L.C., with whom Lord Atkinson concurred, said at p. 713 :- It does not necessarily follow that the existence of a combination is essential to the commission of the offence. There is some authority for the view that what is unlawful in two is not lawful in one.. Lord Sumner at p. 739 said: - As to the part which combination or concerted action plays in an alleged tort of this kind, I think that this is not the occasion for expressing any decided opinion . He went on to indicate that there was a good deal to be said for thinking that combination in such a connection was really only a particular form of intimidation.

Lord Dunedin on the other hand at 719. approving what Atkin, L.J. had said in *Ware and de Freville v. Motor Trade Association* [1921] 3 K.B. 40 was quite clear that a lawful act done by one did not become unlawful if done with intent to injure, whereas an otherwise lawful act done by two or more did become unlawful if done with that intent. He said that conspiracy was the very gist and essence of the decision in *Quinn v. Leathem*. But, he said, the contrary view had not only been stated but had gained many adherents ; and indeed he described it as the leading heresy .

In the *Harris Tweed* case at 487 Lord Porter said: - More difficulty is to be found in explaining *Quinn v. Leathem*. Why should a combination to injure be actionable, whilst action taken by a single person for that purpose, and for that purpose only, is permissible? In *Sorrell v. Smith*, Cave, L.C., thought the point an open one and Lord Sumner considered it at least not free from doubt, but the view that a combination to do acts injurious to others is actionable, whereas the act of a single individual is not, is, I think, supported by the greater weight of authority . I have therefore reached the conclusion that the true effect of section 3 is that in a trade dispute it deprives the Plaintiff of any cause of action he may have on the facts for inducing a breach of contract and any cause of action he may have on the facts or in law for interference with his employment by lawful means; but that in neither

case does it countenance the use of tortious means. So the Plaintiff's cause of action in intimidation is not barred by the statute. This leads to the conclusion that this appeal should succeed. But there is one argument, or at least one consideration, that remains to be noticed. It is that the strike weapon is now so generally sanctioned that it cannot really be regarded as an unlawful weapon of intimidation; and so there must be something wrong with a conclusion that treats it as such. This thought plainly influenced quite strongly the judgments in the Court of Appeal. To give effect to it means either that illegal means ought not to include a breach of contract; or that the statute ought to be construed as wide enough to give protection. The Court of Appeal tended, I think, to apply the argument to both points indiscriminately. I see the force of this consideration. But your Lordships can, in my opinion, give effect to it only if you are prepared either to hobble the common law in all classes of disputes lest its range is too wide to suit industrial disputes or to give the statute a wider scope than it was ever intended to have.

As to the former alternative, I cannot doubt that the threat of a breach of contract can be a most intimidating thing. The present case provides as good an example of the force of such a threat as could be found. A great and powerful corporation submits to it at once, for it was threatened with the infliction of incalculable loss and of grave inconvenience to the public which it serves. The threat is made by men who are flagrantly violating a pledge not to strike, at least until constitutional means of resolving the dispute have been exhausted. It is not just a technical illegality, a case in which a few days longer notice might have made the difference. Because of the damage that would ensue from a strike, B.O.A.C., no doubt in return for corresponding benefits, secured the pledge not to strike; and it is that pledge that is being broken. Granted that there is a tort of intimidation, I think it would be quite wrong to cripple the common law so that it cannot give relief in these circumstances. I think it would be oldfashioned and unrealistic for the law to refuse relief in such a case and to grant it where there is a shake of a fist or a threat to publish a nasty and untrue story. I said that I thought it would be wrong to cripple the common law in such a case, but that does not mean that I am necessarily criticising the policy of the Trades Disputes Act. It is easy now to see that Parliament in 1906 might have felt that the only way of giving labour an equality of bargaining power with capital was to give it special immunities which

the common law did not permit. Even now, when the scales have been redressed, it is easy to see that Parliament might think that a strike, whether reprehensible or not, ought not to be made a ground for litigation and that industrial peace should be sought by other means. It may therefore as a matter of policy be right that a breach of contract should not be treated as an illegal means within the limited field of industrial disputes. But can your Lordships get that out of the words of the Act? Section 3 gives immunity from action for procuring a breach of contract but not for the breach itself. In the Court of Appeal Donovan L.J. said with great force: - If one may procure the breach of another's contract with impunity in a trade dispute, it is certainly odd if one cannot even threaten to break one's own . The section could easily have read- shall not be actionable on the ground only that it is a breach of contract or induces some other person etc.; but it is not so written. It may be that, as Mr. Gardiner suggests, Parliament thought it very unlikely that an employer would resort to action against workmen individually for breaches of contract and that he would get very little from it if he did: see on this point *National Coal Board v. Galley* [1958] 1 W.L.R., 16, at 27. Or it may be that Parliament did not anticipate that a threat of breach of contract would be regarded as an intimidatory weapon. Whatever the reason, the immunity is not in the Statute; the section clearly exempts the procurer or inducer and equally clearly does not exempt the breaker. It is not suggested that the House can remove the oddity by reading words into the Act that are not there.

So your Lordships cannot construe the Act to give protection in the ease of a threat of a breach of contract unless you also make it wide enough to protect the threatener of physical violence. The Act was no doubt intended to give immunity for all forms of peaceful persuasion, but I am sure-and Loreburn, L.C. in the passage I have cited from *Conway v. Wade* says as much-that it was not intended to give protection from violent persuasion. I do not think it would be right so as to construe it. It would mean that under the licence of a trade dispute one man could force another out of his job by threats of violence; and since such threats would not be actionable, I doubt if an aggrieved party could even get an injunction to restrain their constant repetition.

The essence of the difficulty lies in the fact that in determining what constitutes the tort of intimidation your Lordships have drawn the dividing line not between physical and economic coercion but between lawful and unlawful coercion. For the universal purposes of the common law, I am sure that that is the right, natural and logical line. For the purpose of the limited field of industrial disputes which is controlled by statute and where much that is in principle unlawful is already tolerated, it may be that pragmatically and on grounds of policy the line should be drawn between physical and economic pressure. But that is for Parliament to decide. What the House said in *Vacher and Sons, Ltd. v. London Society of Compositors* [1913] A.C. 107, especially per Lord MacNaghten at 118, is a very clear warning, if one be needed, against the interference of the courts in matters of policy in this branch of the law.

In my opinion therefore the appeal should succeed and the judgment of Sachs. J. on liability should be restored. Mr. Gardiner has submitted that it ought not to be restored in its entirety. He asks for a new trial on damages on the ground that the learned judge misdirected the jury on this issue. The cardinal feature of the summing-up on this part of the case was a direction to the jury that they might (Mr. Gardiner submits that it amounted almost to must) award exemplary damages and your Lordships have therefore listened to a very penetrating discussion about the nature of exemplary damages and the circumstances in which an award is appropriate. The Court of Appeal, having found for the Respondents on liability did not consider this issue, so your Lordships must begin at the beginning.

Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. It may well be thought that this confuses the civil and criminal functions of the law; and indeed, so far as I know, the idea of exemplary damages is peculiar to English law. There is not any decision of this House approving an award of exemplary damages and your Lordships therefore have to consider whether it is open to the House to remove an anomaly from the law of England. It must be remembered that in many cases of tort damages are at large, that is to say, the award is not limited to the pecuniary loss that can be specifically proved. In the present case, for example, and leaving aside any

question of exemplary or aggravated damages, the Appellant's damages would not necessarily be confined to those which he would obtain in an action for wrongful dismissal. He can invite the jury to look at all the circumstances, the inconvenience caused to him by the change of job and the unhappiness maybe by a change of livelihood. In such a case as this, it is quite proper without any departure from the compensatory principle to award a round sum based on the pecuniary loss proved. Moreover, it is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride. These are matters which the jury can take into account in assessing the appropriate compensation. Indeed, when one examines the cases in which large damages have been awarded for conduct of this sort, it is not at all easy to say whether the idea of compensation or the idea of punishment has prevailed. But there are also cases in the books where the awards given cannot be explained as compensatory, and I propose therefore to begin by examining the authorities in order to see how far and in what sort of cases the exemplary principle has been recognised. The history of exemplary damages is briefly and clearly stated by Professor Street in his recent work on the law of damages at page 28. They originated just 200 years ago in the cause celebre of John Wilkes and the North Briton in which the legality of a general warrant was successfully challenged. Mr. Wilkes' house had been searched under a general warrant and the action of trespass which he brought as a result of it is reported in *Wilkes v. Wood* (1763) Lofft, 1. Serjeant Glynn on his behalf asked at page 3 for large and exemplary damages since trifling damages, he submitted, would put no stop at all to such proceedings. Pratt, C.J., in his direction to the jury said at 18:-

Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself. The jury awarded 1,000. It is worth noting that at page 19 the Chief Justice referred to office precedents which, he said, were not justification of a practice in itself illegal, though they might fairly be pleaded in mitigation of damages. This particular

direction exemplifies very clearly his general direction, for a consideration of that sort could have no place in the assessment of compensation.

In *Huckle v. Money* (1763) 2 Wils. K.B. 205 the plaintiff was a journeyman printer who had been taken into custody in the course of the raid on the North Briton. The issue of liability having already been decided the only question was as to damages and the jury gave him 300. A new trial was asked for on the ground that this figure was most outrageous. The plaintiff was employed at a weekly wage of one guinea; he had been in custody for only about 6 hours and had been used very civilly by treating him with beefsteaks and beer. It seems improbable that his feelings of wounded pride and dignity would have needed much further assuagement; and indeed the Chief Justice said that the personal injury done to him was very small, so that if the jury had been confined by their oath to consider mere personal injury only, perhaps 20 would have been thought sufficient. But they had done right in giving exemplary damages. The award was upheld.

In *Benson v. Frederick* (1766) 3 Burr. 1845 the Plaintiff a common soldier, obtained damages of 150 against his Colonel who had ordered him to be flogged so as to vex a fellow officer. Mansfield C.J. said that the damages were very great, and beyond the proportion of what the man had suffered. But the sum awarded was upheld as damages in respect of an arbitrary and unjustifiable action and not more than the defendant was able to pay.

These authorities clearly justify the use of the exemplary principle; and for my part I should not wish, even if I felt at liberty to do so, to diminish its use in this type of case where it serves a valuable purpose in restraining the arbitrary and outrageous use of executive power. Some considerable time elapsed thereafter before the principle *eo nomine* was extended in other directions. Six cases, decided in the course of the next century, have been cited to your Lordships but in none of them was there any clear ruling. They are *Tullidge v. Wade* (1769) 3 Wils. K.B. 18, *Leith v. Pope* (1779) 2 Black. W. 1327, *Merest v. Harvey* (1814) 5 Taunton 442, *Sears v. Lyons* (1818) 2 Stark. 317, *Williams v. Curry* (1845) 1 C.B. 841 and *Emblen v. Myers* (1860) 6 H and N 54. They cover seduction, malicious prosecution and trespass.

It is only in the first and last of these six cases that there is any express reference to the exemplary or punitive principle. In the first of them, the seduction case, *Wilmot*, C.J. said that actions of this sort were brought for example's sake. In the last of them, *Wilde*, B. at the trial directed the jury that they might find exemplary damages; and in the argument on the rule nisi a dictum of *Church*, J. in the Supreme Court of the United States was used in which he said: - There is no principle better established, and in practice more universal, than that vindictive damages or smart money may be and is awarded by the verdict of juries. But the verdict was upheld without recourse to the principle. The other four cases are cited because they show that the jury was permitted to consider matters which would not ordinarily be admissible in assessments of compensation; and in at least two of them, *Leith v. Pope* and *Merest v. Harvey*, the sums awarded were so large as to suggest that they were intended to be punitive.

It is not until *Bell v. Midland Railway Company* (1861) 10 C.B. (N.S.) 287, that there is a clear dictum. The plaintiff brought an action against the railway company for wrongful obstruction of access from the railway to his wharf. It does not appear that at the trial exemplary damages were asked for, and it appears at 295 that *Erle* C.J. at the trial told the jury to confine the damages to pecuniary loss proved. The jury appears to have gone beyond that and awarded 1000. In the argument on the rule nisi *Erle* C.J. said at 304 that when the company's conduct was looked at, careless whether they were doing right or wrong, they prevented all access to the plaintiff's wharf for the purpose of extinguishing his trade and advancing their own profit. He was therefore entitled to ample compensation and 1000 was very temperate. *Willes* J. said at 307:-I must say, that, if ever there was a case in which the jury were warranted in awarding damages of an exemplary character, this is that case. The defendants have committed a grievous wrong with a high hand and in plain violation of an Act of Parliament; and persisted in it for the purpose of destroying the plaintiff's business and securing gain to themselves. If it were necessary to cite any authority for such a position, it will be found in the case of *Emblen v. Myers* which I cite only for illustration. In more recent times there are three obiter dicta of importance in the Court of Appeal in which the principle has been recognised, namely, *Bowen* L.J. in *Whitham v. Kershaw* (1885) 16 Q.B.D. 613 at 618 and in *Finlay v. Chirney* (1888) 20 Q.B.D. 494 at 504 and by *Scott* L.J.

in *Dumbell v. Roberts* [1944] 1 All E.R., 326, at 330. McCardie J. in *Butterworth v. Butterworth* [1920] p. 126 also obiter, expounded the principle. There are three cases in the Court of Appeal in which the principle has been stated and applied.

In *Owen v. Reo* (1934) 151 L.T. 274 the plaintiff, a motor dealer, had on his premises for display a chassis belonging to the defendants which they were at liberty to remove at any time except that it was specially provided that if the plaintiff had constructed a body on the vehicle he should be at liberty to dismantle it before removal. The defendants without notice to the plaintiff entered his garage, took the chassis and dismantled the body in the street, the process being observed by some members of the public including one of the plaintiff's creditors. It does not appear that any injury was done to the plaintiff's property but the Court of Appeal said it was a case for exemplary damages and awarded 100.

Loudon v. Ryder [1953] 2 Q.B. was a case of trespass and assault. The plaintiff was a young girl and the defendant broke into her flat and tried to turn her out. Her injuries were comparatively trivial but his behaviour was outrageous. The jury awarded her 1500 damages for trespass, and a 1000 for assault; and 3000 as exemplary damages, making 5500 in all. This award was upheld in the Court of Appeal. In *Williams v. Settle* [1960] 1 W.L.R. 1072 the defendant was a professional photographer who had taken photographs of the plaintiff's wedding, the copyright being vested in the plaintiff. Two years later, when an event had occurred which caused the plaintiff to be exposed to publicity, the defendant sold the photographs to two national newspapers and their publication caused the plaintiff great distress. The County Court judge awarded the plaintiff 1,000 damages for breach of copyright. This award was upheld in the Court of Appeal and in both courts it was described as one of exemplary damages. The Court of Appeal considered that exemplary damages could have been awarded at common law but they relied also on the Copyright Act, 1956, sec. 17 (3) which provides that the court may have regard to the flagrancy of the infringement and to any benefit shewn to have accrued to the defendant by reason of the infringement and if satisfied that effective relief would not otherwise be available to the plaintiff may award such additional damages as it considers appropriate. My Lords, I express no view on whether the Copyright Act authorises an award of exemplary, as

distinct from aggravated, damages. But there are certainly two other Acts of Parliament which mention exemplary damages by name. The Law Reform (Miscellaneous Provisions) Act, 1934, sec. 1 (2) (a) provides that where a cause of action survives for the benefit of the estate of a deceased person, the damages recoverable shall not include any exemplary damages. The Reserve and Auxiliary Forces (Protection of Civil Interests) Act, 1953, sec. 13 (2) provides that in any action for damages for conversion in respect of goods falling within the statute the court may take into account the defendant's conduct and award exemplary damages.

These authorities convince me of two things. First, that your Lordships could not without a complete disregard of precedent, and indeed of statute, now arrive at a determination that refused altogether to recognise the exemplary principle. Secondly, that there are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal. I propose to state what these two categories are ; and I propose also to state three general considerations which in my opinion should always be borne in mind when awards of exemplary damages are being made. I am well aware that what I am about to say will, if accepted, impose limits not hitherto expressed on such awards and that there is powerful, though not compelling, authority for allowing them a wider range. I shall not therefore conclude what I have to say on the general principles of law without returning to the authorities and making it clear to what extent I have rejected the guidance they may be said to afford.

The first category is oppressive, arbitrary or unconstitutional action by the servants of the government. I should not extend this category, -I say this with particular reference to the facts of this case, -to oppressive action by private corporations or individuals. Where one man is more powerful than another, it is inevitable that he will try to use his power to gain his ends ; and if his power is much greater than the other's, he might perhaps be said to be using it oppressively. If he uses his power illegally, he must of course pay for his illegality in the ordinary way ; but he is not to be punished simply because he is the more powerful. In the case of the

government it is different, for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service. It is true that there is something repugnant about a big man bullying a small man and very likely the bullying will be a source of humiliation that makes the case one for aggravated damages, but it is not in my opinion punishable by damages.

Cases in the second category are those in which the Defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff. I have quoted the dictum of Erle C.J. in *Bell v. The Midland Railway Company*. Maule J. in *Williams v. Curry*, at page 848, suggests the same thing; and so does Martin B. in an arbiter dictum in *Crouch v. Great Northern Railway Company*, [1856] 11 Ex. 742, at 759. It is a factor also that is taken into account in damages for libel; one man should not be allowed to sell another man's reputation for profit. Where a Defendant with a cynical disregard for a Plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not confined to moneymaking in the strict sense. It extends to cases in which the Defendant is seeking to gain at the expense of the Plaintiff some object,- perhaps some property which he covets,-which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay.

To these two categories which are established as part of the common law there must of course be added any category in which exemplary damages are expressly authorised by statute. I wish now to express three considerations which I think should always be borne in mind when awards of exemplary damages are being considered. First, the Plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour. The anomaly inherent in exemplary damages would become an absurdity if a Plaintiff totally unaffected by some oppressive conduct which the jury wished to punish obtained a windfall in consequence.

Secondly, the power to award exemplary damages constitutes a weapon that, while it can be used in defence of liberty, as in the Wilkes cases, can also be used against liberty. Some of the awards that juries have made in the past seem to me to amount to a greater punishment than would be likely to be incurred if the conduct were criminal ; and moreover a punishment imposed without the safeguard which the criminal law gives to an offender. I should not allow the respect which is traditionally paid to an assessment of damages by a jury to prevent me from seeing that the weapon is used with restraint. It may even be that the House may find it necessary to follow the precedent it set for itself in *Benham v. Gambling*, and place some arbitrary limit on awards of damages that are made by way of punishment. Exhortations to be moderate may not be enough. Thirdly, the means of the parties, irrelevant in the assessment of compensation, are material in the assessment of exemplary damages. Everything which aggravates or mitigates the Defendant's conduct is relevant. Thus a case for exemplary damages must be presented quite differently from one for compensatory damages ; and the judge should not allow it to be left to the jury unless he is satisfied that it can be brought within the categories I have specified. But the fact that the two sorts of damage differ essentially does not necessarily mean that there should be two awards. In a case in which exemplary damages are appropriate, a jury should be directed that if, but only if, the sum which they have in mind to award as compensation (which may of course be a sum aggravated by the way in which the Defendant has behaved to the Plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then it can award some larger sum. If a verdict given on such direction has to be reviewed upon appeal, the appellate court will first consider whether the award can be justified as compensation and if it can there is nothing further to be said. If it cannot, the court must consider whether or not the punishment is in all the circumstances excessive. There may be cases in which it is difficult for a judge to say whether or not he ought to leave to the jury a claim for exemplary damages. In such circumstances and in order to save the possible expense of a new trial, I see no objection to his inviting the jury to say what sum they would fix as compensation and what additional sum, if any, they would award if they were entitled to give exemplary damages. That is the course which he

would have to take in a claim to which the Law Reform Act, 1934 applied I must now return to the authorities I have already reviewed and make quite plain what it is that I have not accepted from them. As I have said, damages that are at large can always be fixed as a round sum. Some juries have in the past been very liberal in their ideas of what a round sum should be and the courts which have always been very reluctant to interfere with awards of damages by a jury, have allowed very liberal awards to stand. *Williams v. Curry* might on one view be regarded as a rather extreme example of this. It would not be right to take the language that judges have used on such occasions to justify their non-intervention and treat their words as a positive formulation of a type of case in which exemplary damages can be awarded. They have used numerous epithets-wilful, wanton, high-handed, oppressive, malicious, outrageous-but these sorts of adjectives are used in the judgments by way of comment on the facts of a particular case. It would on any view be a mistake to suppose that any of them can be selected as definitive and a jury directed, for example, that it can award exemplary damages whenever it finds conduct that is wilful or wanton. But when this has been said, there remains one class of case for which the authority is much more precise. It is the class of case in which the injury to the plaintiff has been aggravated by malice or by the manner of doing the injury, that is, the insolence or arrogance by which it is accompanied. There is clear authority that this can justify exemplary damages, though (except in *Loudon v. Ryder*) it is not clear whether they are to be regarded as in addition to, or in substitution for, the aggravated damages that could certainly be awarded.

It is not, I think, authority of great antiquity. The older group of six cases which I have cited, beginning with *Tullidge v. Wade*, discloses no statement of principle. In my opinion all these cases can best be explained in principle as cases of aggravated damage, though I am not saying that in all the cases the sums awarded can be taken as an example of what compensatory damages ought to be. The direct authority for exemplary damages in this category of case lies in the three modern decisions of the Court of Appeal.

I think that your Lordships, if you agree with my conclusion, are bound to express your dissent from most of the reasoning in all of them. *Owen v. Reo* and *Williams*

v. Settle, even if the latter is considered apart from the Copyright Act, can be justified in the result as cases of aggravated damage ; and indeed the sums awarded could, to my mind, more easily be justified on that ground than on the ground that they were exemplary. *Loudon v. Ryder* ought, I think, to be completely overruled. The sums awarded as compensation for the assault and trespass seem to me to be as high as, if not higher than, any jury could properly have awarded even in the outrageous circumstances of the case ; and I can see no justification for the addition of an even larger sum as exemplary damages. The case was not one in which exemplary damages ought to have been given as such. This conclusion will, I hope, remove from the law a source of confusion between aggravated and exemplary damages which has troubled the learned commentators on the subject. Otherwise, it will not, I think, make much difference to the substance of the law or rob the law of the strength which it ought to have. Aggravated damages in this type of case can do most, if not all, of the work that could be done by exemplary damages. In so far as they do not, assaults and malicious injuries to property can generally be punished as crimes, whereas the objectionable conduct in the categories in which I have accepted the need for exemplary damages are not, generally speaking, within the criminal law and could not, even if the criminal law was to be amplified, conveniently be defined as crimes. I do not care for the idea that in matters criminal an aggrieved party should be given an option to inflict for his own benefit punishment by a method which denies to the offender the protection of the criminal law.

Finally on this point I think that the conclusion which I have expressed obtains strong support from the speech of Lord Atkin in *Ley v. Hamilton* (1935) 153 L.T. 384 at 386. Speaking of damages for defamation Lord Atkin said that they were not arrived at by determining the ' real' damage and adding to that a sum by way of vindictive or punitive damages. It is precisely because the ' real' damage cannot be ascertained and established that the damages are at large. It is impossible to track the scandal, to know what quarters the poison may reach; it is impossible to weigh at all closely the compensation which will recompense a man or a woman for the insult offered or the pain of a false accusation. No doubt in newspaper libels juries take into account the vast circulations which are justly claimed in present times. The ' punitive ' element is not something which is or can be added

to some known factor which is non-punitive .

I do not think that Lord Atkin means that a sum awarded as punishment can be arrived at in just the same way as a sum awarded as compensation. Clearly they are different and, as the authorities I have cited on means and mitigation show, must be arrived at in different ways. Lord Atkin puts punitive in inverted commas. So-called punitive is what I think he means ; and read in that way the passage is strong authority for the view that insult offered and pain given are matters for compensation and not for punishment.

I turn at last to the summing-up in this case. In the light of the general principles which I have endeavoured to state, I think it is plain that the summing-up can be extensively criticised. This is not the fault of the learned judge. It does not appear that any argument was addressed to him about the principles on which exemplary damages ought to be awarded and anyway he would have felt himself bound by authorities which do not tie your Lordships. It may be that the judge who presided at the trial of *Loudon v. Ryder* can be exculpated on the same ground. In this House the submissions have been so far ranging that I think your Lordships might well have refused to have listened to them. But there were also submissions about points of detail which the defendants was undoubtedly entitled to make. If they succeeded, the House could give effect to them only by ordering a new trial on the issue of damages. In that event the House would have had to have given some guidance to the judge at the new trial as to the principles on which he should direct the jury. Your Lordships therefore thought it wise to open up the whole matter for argument and to deal by means of an appropriate order as to costs with the plaintiff's complaints that the defendants' submissions of law before the House were far wider than anything that was addressed to the learned judge. I may observe that the House is dealing only with points of law. Your Lordships have not had to consider the evidence. The question is simply whether or not on the facts so far as they emerge from the summing-up the learned judge misdirected the jury in law.

The basis of the summing-up was a direction that any deliberate illegality might be punished by exemplary damages. Here the defendants had deliberately and

knowingly broken their contracts with B.O.A.C. The case against them was that they had sought to achieve their ends by a wildcat strike-a flagrant use of illegal force. Their answer was that they were provoked into this by the conduct of the plaintiff in endangering their closed shop understanding with B.O.A.C.

It is unnecessary to quote numerous extracts from the summing-up. The direction to the jury is crystallised in one passage at the end of it as follows. There it is. You have to consider, in relation to exemplary damages, whether this was a deliberately engineered unofficial 'wildcat' strike, forced by these three to use, at all costs, an illegal pressure, and whether on the other hand there was provocation, which could be reasonably regarded as provocation for that line of conduct.

My Lords, it must be plain from what I have said already that I regard this direction as far too wide. If it does not mean that exemplary damages can be given for every act of deliberate illegality, it certainly means that the tort of intimidation is always punishable in that way. Mr. Gardiner has submitted that it was virtually a direction to the jury that, the tort of intimidation having been proved, the jury was bound to give exemplary damages unless they thought that the Appellant by his provocative conduct had brought it all on himself. I think that this criticism is substantially justified.

There is nothing to bring the case within the first category I have mentioned. In my opinion, the facts disclosed in the summing-up do not show any case for exemplary damages. It may be said by those who have no sympathy with their actions that the Respondents and their supporters acted oppressively but, for the reasons I have given, this is not the sort of oppression that comes within the first category. I doubt whether the facts disclosed in the summing-up show even a case for aggravated damages ; a different impression may be obtained when the facts are fully displayed upon a new trial. At present there seems to be no evidence that the Respondents were motivated by malevolence or spite against the Appellant. They wronged him not primarily to hurt him but so as to achieve their own ends. If that had not been their dominating motive, then what they did would not have been done in furtherance of a trade dispute and the whole case has been fought on the

basis that it was. It is said that they persisted in believing that their closed shop position was endangered by the Appellant's conduct even when their official leaders told them that it was not. Be it so; pig-headedness will not do. Again, in so far as disclosed in the summing-up there was no evidence of offensive conduct or of arrogance or insolence. It was, I think, suggested that some impolite observations were made about the Appellant, but that is not enough ; in a dispute of this sort feelings run high and more than hard words are needed for aggravated damages. Mr. Silkin relied strongly on the flagrant breach of contract with B.O.A.C., and the Respondents' open disregard of their pledges and their lack of consideration. But this was not conduct that affected the Appellant. He was no more distressed or humiliated by it than any of B.O.A.C.'s passengers whose convenience, it might be said, and interests were brushed aside by the Respondents in their determination to secure their object. In short, I think it might very well be that if your Lordships had had the whole of the evidence in front of you, you would have been able to declare that on a new trial the judge should direct the jury to give no more than that rounded figure which I have already described. I have said as much as this because I feel that saying it may help the parties at the end of these protracted proceedings to agree upon a figure of damage. But I have not intended to say anything that would in any way prejudice the character of the directions about aggravated damages which the judge upon a new trial, if there has to be one, thinks it right to give when he has all the material before him. I agree with the order proposed by the noble lord on the Woolsack.

Lord Pearce

My lords,

I agree with your Lordships and with the Courts below that the tort of intimidation has been shewn to exist both on principle and on the authorities which are fully set out in the judgment of Pearson L.J. There would be a strange gap in the Common Law if it provided no such remedy. The more difficult problem is whether the threat of a mere breach of contract can suffice to support that tort. Lord Dunedin in *Sorrell v. Smith* [1925] A.C. 700, at 718 resolved certain disharmonies of the famous trio of cases as follows :-

In the first place, everyone has the right to conduct his own business upon his own lines, and as suits him best, even although the result may be that he interferes with other people's business in so doing. That general proposition, I think, may be gathered from the *Mogul* case. Secondly, an act that is legal in itself will not be made illegal because the motive of the act may be bad. That is the result, I think, of *Allen v. Flood*. Thirdly, even although the dominating motive in a certain course of action may be the furtherance of your own business or your own interests, as you conceive those interests to lie, you are not entitled to interfere with another man's method of gaining his living by illegal means, and illegal means may either be means that are illegal in themselves or that may become illegal because of conspiracy where they would not have been illegal if done by a single individual. I think that is the result of *Quinn v. Leathem*. The question whether means that are illegal in themselves include threats of breach of contract is not directly covered by authority except in the two Irish cases *Cooper v. Millea* 1938 I.R 749 and *Riordan v. Butler* 1940 I.R 347, which held that a threatened breach of contract constituted illegal means. In your Lordships' House there have been dicta which each side has called in aid but there has been no dictum which was, I think, intending to give an answer to this particular question. In *Allen v. Flood* [1898] A.C. 1 at 121 Lord Herschell pointed out that there was a chasm between cases where the act induced was a breach of contract and cases where that act was the not entering into a contract. If a breach of contract must be classified as either lawful or unlawful in this context, it lies less uneasily in the latter class than in the former. As between the parties a breach of contract is an unlawful act and creates a legal wrong; a party has no right to break his contract even if he offers to pay damages (unless, of course, the contract so provides). See per Lord Lindley in *South Wales Miners' Federation v. Glamorgan Coal Company* ([1905] A.C. 239 at 253) and Lord Watson in *Allen v. Flood* ([1898] A.C.1 at 96).

Somewhere one must draw the line between pressure or coercion that may be permitted and that which may not. It is logical for the law to say that while a man may threaten to use all the means to which he is strictly entitled by law in order to encompass another's injury deliberately, yet he shall not threaten to use any means to which he is not so entitled. It is less logical to say that in order to injure another he may with impunity use all means to which he is strictly entitled and may

with impunity also threaten to break a contract which he is not by law entitled to do, but that he shall not threaten to commit any tort. Moreover, to draw the line at that point, namely between contract and tort, seems to me inconsistent with the principle that underlies *Lumley v. Gye* (2 E. and B. 216).

Businesses are run on the basis of contracts. The threat by an important supplier to withhold the supplies under a long term contract on which a manufacturer relies might be tantamount to a threat of ruin and compel him to accede to the supplier's demands. It would seem strange if the law, should disregard intimidation by such potent contractual weapons, while taking cognisance of intimidation by less potent tortious weapons. Nor do I think that the principle of *Dunlop v. Selfridge* ([1915] A.C. 847) leads to such a conclusion. To sue in respect of a contract to which the Plaintiff is not a party is very different from suing for injury deliberately caused to the Plaintiff by improper pressure and abuse of such a contract. In estimating whether pressure by a threat is permissible or not it is the relationship between the threatened and the threatener which has to be considered although it is the Plaintiff who will suffer by the wrong if the threats are effective. In my opinion, therefore, a threat to break a contract may, like a threat to commit a tort, be the foundation for an action of intimidation. In the case of trade disputes, section 1 of the Trade Disputes Act, 1906. was intended to give immunity to concerted action which, though it used means which would be lawful if done by an individual might yet be held to be conspiracy within the principles of *Quinn v. Leathem*. The present case, however, was not founded on *Quinn v. Leathem*, and I agree with your Lordships that if, on other grounds, the Plaintiff can succeed in this case, section 1 gives no protection to the Defendants.

Does section 3 protect the Defendants'?

Certain intentions of the Act as a whole with regard to acts done in contemplation or furtherance of a trade dispute are clear. To the Trade Unions themselves it gave, by section 4, total immunity from actions in tort. To the members it gave only a partial protection. No general immunity in tort was given to them; nor were they protected from breaches of their own contract. One cannot start with any assumption that they were or were not intended to be protected from tortious

abuse of their own contracts.

Partial protection in the area covered by *Quinn v. Leathem* was provided by section 1; and section 3 was clearly intended to give partial protection in a different area. Unfortunately the limits of the protection in section 3 are far from clear. Did it intend to protect all tortious acts that might result in inducement of breach of a contract of employment or interference with employment, or did it intend to protect only the tort of inducing a breach of contract of employment and the tort (on the assumption that it existed) of interfering with employment? According to the Respondents it intended the former, and protects all tortious conduct of whatever kind, provided that it needs special damage to support it and that the only special damage arising is damage by an induced breach of contract of employment or by interference with trade, business or employment. It may be said that since interference with employment is not as such actionable, the latter half of the section would be pointless unless it protected tortious acts which resulted in such interference. But that argument must go to the length of holding that the section intended to protect all tortious conduct, however grave, provided that it caused no actionable damage other than interference with employment. It would be surprising if Parliament so intended. And if it did so intend, it would be strange that the intention is not more clearly expressed. Moreover, such a reading would make the word only otiose whereas the impression is created by the section that the word only is intended to have some definite limiting effect. At first sight, there is compelling force in the Respondents' argument that Parliament cannot have intended the second limb to be merely declaratory that interference with employment (which is not a tort) shall not be actionable. But at the date when the Act was passed the law was in some confusion. It was thought by some well informed opinion that there was a tort of mere unjustifiable interference with trade. This appears from the Report of the Royal Commission which preceded the Act. On this view of the law (which was subsequently shewn to be wrong) it would be reasonable for Parliament to enact the second limb of section 3 for the purpose of ensuring that no conduct should be unlawful on the ground only that it interfered with trade-meaning that it was protected if it was tortious for that reason and for no other reason. The section would then have the effect of limiting the protection to conduct which was not tortious in any other respect save that it induced a breach

of contract or interfered with employment. Lord Loreburn, who was the Lord Chancellor at the time of the passing of the Act, thought that this was the intention of the Act. His dicta in *Conway v. Wade* ([1909] A.C. 506 a 510) which my noble and learned friend, Lord Reid, has cited are, in my opinion, inconsistent with any other view. The textbook writers and the two Irish cases have taken a similar view of the section's meaning. The reading for which the Respondents contend would be an extension of the meaning which has hitherto been given to the section.

A strong argument (to which Donovan L.J. in his forceful judgment subscribed) is urged on the Respondents' behalf to the effect that threats of lawful action (i.e. by giving notice) as opposed to threats of unlawful action (i.e. by stopping work in breach of contract) are inconvenient and unsuited to modern industrial disputes, since neither side wishes the contracts to be determined and the termination of contracts would give rise to confusion in respect of superannuation schemes and other matters. I see the force of this, as a matter of convenience, but I feel some doubt as to how far it is a useful argument as to what Parliament intended in 1906 under the then existing conditions. It is further contended by the Respondents that to limit the protection of section 3 to the torts specifically referred to in the section, namely, the tort of inducing a breach of contract and the tort (as it was then thought) of interference with trade or employment would be to drive a coach and four through the protection afforded to trade unionists by the Act. The Appellant retorts that the opposite construction would, by licensing all forms of tort, contrary to the views of the Act expressed by Lord Loreburn and textbook writers alike, drive a coach and four through the protection of the common law which the Act intended to retain for the community. I do not find such an argument helpful. The Act was intending to give a partial protection, holding a balance between conflicting interests, and the question before us is where Parliament intended the boundary of protection to run.

One cannot read the words of the section literally as defining the components of a cause of action since in that case the protection against an action on the ground only that it induces some other person to break a contract of employment is meaningless. For no action could ever lie on that ground only ; it would need the addition of knowledge and damage. I see the attractions of paraphrasing the

section as referring to the substantial essential requirements of an action. One might, for instance, so read a section that said no spoken words shall be actionable on the ground only that they refer to a man in the way of his trade. True, the additional grounds of publication and defamation would be needed, but one might well argue that the statute assumed their existence. This would, however, be a very loose and unsatisfactory method of expression in a statute where one would expect precision in drafting the dividing line between what may or may not be done with impunity, and I find myself unable to accept it.

I have felt considerable difficulty in this case, but having had the advantage of reading the opinions of my noble and learned friends, Lord Reid and Lord Devlin, I agree with their observations on the construction of the section. I would allow the appeal.

On the cross appeal as to damages I agree with the opinion of my noble and learned friend Lord Devlin.

Different from those principles which are now well settled in ticket cases. If this oral contract stands unqualified, there can be no doubt that the respondents are liable for the damage caused by the negligence of their servants. The respondents' case is that their elaborate printed conditions form part of this contract. If they do, then admittedly they exclude liability in this case. I think that I can fairly summarise the evidence on this matter. The respondents exhibit copies of these conditions in their office, but neither the appellant nor his agent Mr M'Sporran had read these notices, and I agree that they can play no part in the decision of this case. Their practice was to require consignors to sign risk notes, which included these conditions, before accepting any goods for carriage, but on this occasion no risk note was signed. The respondents' clerkess, knowing that Mr M'Sporran was bringing the car for shipment, made out a risk note for his signature, but when he arrived she was not there and he dealt with the purser of the Lochiel, who was in the office. He asked for a return passage for the car. The purser quoted a charge of some six pounds. He paid that sum, and then the purser made out and gave him a receipt which he put in his pocket without looking at it. He then delivered the car. The purser forgot to ask him to sign the risk note.

The Lord Ordinary believed the evidence of Mr M'Sporran and the appellant. Mr M'Sporran had consigned goods of various kinds on a number of previous occasions. He said that sometimes he had signed a note, sometimes he had not. On one occasion he had sent his own car. A risk note for that consignment was produced, signed by him. He had never read the risk notes signed by him. He says:

I sort of just signed it at the time as a matter of form.

He admitted that he knew he was signing in connexion with some conditions, but he did not know what they were. In particular, he did not know that he was agreeing to send the goods at owner's risk. The appellant had consigned goods on four previous occasions. On three of them he was acting on behalf of his employer. On the other occasion he had sent his own car. Each time he had signed a risk note. He also admitted that he knew there were conditions, but said that he did not know what they were.

The respondents contend that, by reason of the knowledge thus gained by the appellant and his agent in these previous transactions, the appellant is bound by their conditions. But this case differs essentially from the ticket cases. There the carrier in making the contract hands over a document containing or referring to conditions which he intends to be part of the contract. So if the consignor or passenger, when accepting the document, knows, or ought as a reasonable man to know, that that is the carrier's intention, he can hardly deny that the conditions are part of the contract, or claim, in the absence of special circumstances, to be in a better position than he would be if he had read the document. But here, in making the contract, neither party referred to, or indeed had in mind, any additional terms, and the contract was complete and fully effective without any additional terms. If it could be said that, when making the contract, Mr M'Sporran knew that the respondents always required a risk note to be signed and knew that the purser was simply forgetting to put it before him for signature, then it might be said that neither he nor his principal could take advantage of the error of the other party of which he was aware. But counsel frankly admitted that he could not put his case as high as that.

The only other ground on which it would seem possible to import these conditions is that based on a course of dealing. If two parties have made a series of similar contracts each containing certain conditions, and then they make another without expressly referring to those conditions, it may be that those conditions ought to be implied. If the officious bystander had asked them whether they had intended to leave out the conditions this time, both must, as honest men, have said Of course not. But again the facts here will not support that ground. According to Mr M'Sporran, there had been no consistent course of dealing; sometimes he was asked to sign and sometimes not. And, moreover, he did not know what the conditions were. This time he was offered an oral contract without any reference to conditions, and he accepted the offer in good faith.

The respondents also rely on the appellant's previous knowledge. I doubt whether it is possible to spell out a course of dealing in his case. In all but one of the previous cases he had been acting on behalf of his employer in sending a different kind of goods and he did not know that the respondents always sought to insist on excluding liability for their own negligence. So it cannot be said that, when he asked his agent to make a contract for him, he knew that this or, indeed, any other special term would be included in it. He left his agent a free hand to contract, and I see nothing to prevent him from taking advantage of the contract which his agent in fact made. The judicial task is not to discover the actual intentions of each party; it is to decide what each was reasonably entitled to conclude from the attitude of the other. In this case, I do not think that either party was reasonably bound or entitled to conclude from the attitude of the other as known to him that these conditions were intended by the other party to be part of this contract. I would therefore allow the appeal and restore the interlocutor of the Lord Ordinary.

LORD HODSON.

The decision of the Second Division of the Inner House in favour of the defenders seems to me to involve an extension of the application of the doctrine of course of dealing which is not warranted by the facts of this case.

Assuming in favour of the defenders that the experience of the pursuer and his brother-in-law, who acted as his agent, would establish that on previous occasions

the defenders' risk note embodying conditions absolving them from the consequences of negligence had been regularly signed, this does not establish that the legal situation was the same on 8th October 1960 when the pursuer's car was shipped by his brother-in-law on his behalf without the risk note being signed. No question of fraud or mistake arises, and the only question is whether in some way the defenders can establish their immunity by incorporating in the contract of carriage the conditions which were present in earlier transactions, but absent on the relevant occasion.

The course of dealing on earlier occasions is often relevant in determining contractual relations, but does not assist when, as here, there was on the part of the defenders a departure from an earlier course in that they omitted to ask the pursuer's agent to sign the document by which they would have obtained protection.

If the only question had been whether the pursuer or his agent had notice of the conditions sought to be imposed, the observations of Baggallay, L.J., in *Parker v. South-Eastern Railway Company*, at p. 425, would be material. That case, affirmed in *Hood v. Anchor Line*, established that the appropriate questions for the jury in a ticket case were: (1) Did the passenger know that there was printing on the railway ticket (2) Did he know that the ticket contained or referred to conditions and (3) Did the railway company do what was reasonable in the way of notifying prospective passengers of the existence of conditions and where their terms might be considered. It was in this connexion that Baggallay, L.J., after stating the liability of the company in the conduct of their cloakroom business as bailees for reward in the absence of a special contract, constituted by the delivery and acceptance of a ticket or otherwise, proceeded to say—The question then remains whether the plaintiffs were respectively aware, or ought to be treated as aware, of the intention of the company thus to modify the effect of the ordinary contract. Now as regards each of the plaintiffs, if at the time when he accepted the ticket, he, either by actual examination of it, or by reason of previous experience, or from any other cause, was aware of the terms or purport or effect of the endorsed conditions, it can hardly be doubted that he became bound by them.

These observations do not assist the defenders. No effort was made to get the risk note signed, or otherwise to make the conditions therein contained a term of the contract of carriage. In short, the defenders did not seek to impose any conditions. This is a vital distinction between this case and Parker's case, and a decision in favour of the defenders would involve an extension and expansion of what was said by Baggallay, L.J., which seems to me to be un-supported by authority and undesirable on principle.

The law, as it stands, appears hard on the holders of tickets who, unless they are exceptional persons, will not take pains to make an examination of a ticket offered to them to see if any conditions are imposed. It would be scarcely tolerable to take the further step of treating a contracting party as if he had signed and so bound himself by the terms of a document with conditions embodied in it, when, as here, he has done no such thing, but may be supposed, having regard to his previous experience, to have been willing to sign what was put before him if he had been asked.

The defenders seek to have the interlocutor appealed against affirmed on two other grounds, both of which were rejected in the Scottish Courts. First, they claim that the freight invoice, on which the receipt was placed, acknowledging the payment of six pounds five shillings, was a contract document containing a sufficient reference to the conditions and was accepted by the pursuer's agent on his behalf and the pursuer was therefore bound by them. In the second place, they claim that by posting four copies of the conditions on the Port Askaig pier and three copies on board their vessel Lochiel they took sufficient steps to give notice of the conditions so as to bind the pursuer. The receipt was handed over, as the Lord Justice-Clerk pointed out, after the contract was completed and cannot be treated as an offer. It played no part in the formation of the contract, and there was no reason to suppose that it referred to conditions.

On both these grounds I agree with the learned Judges in the Scottish Courts that the defenders failed to show that they did what was reasonably sufficient to bring to the notice of the pursuer or his agent the conditions upon which they found.

I would allow the appeal.

LORD GUEST

This appeal raises a novel point in regard to the exemptions which can be claimed from a carrier's liability, namely, whether, in the absence of any contractual document, a consignor of goods can by a course of previous dealing be bound by conditions of which he is generally aware but of the specific terms of which he has no knowledge. The judgment of the Second Division appears to be based on this statement of the law by the Lord Justice-Clerk:

It is, I think, well settled that, if A contracts with B for the carriage by B of A's goods in the knowledge, gained through previous experience of similar transactions, that B carries goods subject to conditions, A is bound by these conditions under this later contract, if it is of a similar nature to those which have gone before, in the absence of agreement or information to the contrary. This applies even if A, knowing that there are conditions, does not take the trouble to ascertain precisely what these conditions are. If, however, the later transaction is carried out in different circumstances and, because of that difference, A believes that the conditions attached to the earlier transactions are not intended to apply, then the conditions will not be held to be binding upon him merely because of his previous knowledge. In each case, the question of the extent of A's knowledge is a question of fact.

Although the Lord Justice-Clerk quotes no authority for these propositions, it is, I think, apparent from the observations of Lord Mackintosh to the same effect, which are said to result from the judgment of Baggallay, L.J., in *Parker v. South-Eastern Railway Co.*, that the Lord Justice-Clerk was relying on Parker's case. In my view, Parker, which has been accepted as the standard authority on what are known as ticket condition cases-see *Hood v. Anchor Line* -was a different case. The observations of Baggallay, L.J., at p. 425, relied on were made with reference to the ticket cases. In a ticket case the offer is made by the company to carry the passenger or goods on the conditions referred to on the ticket, and the passenger or consignor, by purchasing the ticket, accepts the offer with the conditions thereon incorporated. The ticket thus becomes a contractual document containing the conditions, and the passenger is bound by the conditions. It is, in my view, not

legitimate to apply the tests of incorporation of conditions in such cases to a case like the present where there is no contractual document. In the present case, it is incorrect to assume that the offer of carriage is made by the respondents on what are described as standard conditions. The verbal contract is made by the consignor tendering the goods and by the carrier accepting them. A simple contract of carriage is thereby created. In this situation, the respondents, upon whom lies the onus to escape liability, would have to show that exempting conditions have been incorporated into the contract. They cannot do this merely by evidence of a previous course of conduct. All that the previous dealings in the present case can show is that the appellant and his agent knew that the previous practice of the respondents was to impose special conditions. But knowledge on their part did not, and could not, by itself import acceptance by them of these conditions, of the exact terms of which they were unaware, into a contract which was different in character from those in the previous course of dealing. The practice of the respondents was to insist on a written contract incorporated in the risk note. On the occasion in question a verbal contract was made without reference to the conditions.

No case was referred to by the respondents in which it has been held that a carrier, in circumstances such as the present, was entitled to avoid liability, and their counsel was constrained to admit that the decision of the Second Division would be a novel departure. It would, in my view, be undesirable to extend the doctrine of the applicability of conditions any further than at present. I agree with the Lord Ordinary that it is impossible to hold that M'Sporran as agent for the appellant agreed to any conditions. I would allow the appeal.

LORD DEVLIN

When a person in the Isle of Islay wishes to send goods to the mainland, he goes into the office of Macbrayne (the respondents) in Port Askaig which is conveniently combined with the local post office. There he is presented with a document headed Conditions containing three or four thousand words of small print divided into twenty-seven paragraphs. Beneath them there is a space for the sender's signature, which he puts below his statement, in quite legible print, that he thereby

agrees to ship on the conditions stated above. The appellant, Mr M'Cutcheon, described the negotiations which preceded the making of this formidable contract in the following terms:-

(Q.) Tell us about that document; how did you come to sign it (A.) You just walk in the office and the document is filled up ready and all you have to do is to sign your name and go out. (Q.) Did you ever read the conditions (A.) No. (Q.) Did you know what was in them (A.) No.

There are many other passages in which Mr M'Cutcheon and his brother-in-law, Mr M'Sporran, endeavour more or less successfully to appease the forensic astonishment aroused by this statement. People shipping calves, Mr M'Cutcheon said (he was dealing with an occasion when he had shipped thirty-six calves) had not much time to give to the reading. Asked to deal with another occasion when he was unhampered by livestock, he said that people generally just tried to be in time for the boat's sailing; it would, he thought, take half a day to read and understand the conditions, and then he would miss the boat. In another part of his evidence, he went so far as to say that, if everybody took time to read the document, MacBrayne's office would be packed out the door. Mr M'Sporran evidently thought the whole matter rather academic, because, as he pointed out, there was no other way to send a car.

There came a day, 8th October 1960, when one of the respondents' vessels was negligently sailed into a rock and sank. She had on board a car belonging to Mr M'Cutcheon which he had got Mr M'Sporran to ship for him, and the car was a total loss. It would be a strangely generous set of conditions in which the persistent reader, after wading through the verbiage, could not find something to protect the carrier against any loss...wheresoever or whensoever occurring; and condition 19 by itself is enough to absolve the respondents several times over for all their negligence. It is conceded that, if the form had been signed as usual, the appellant would have had no case. But, by a stroke of ill luck for the respondents, it was upon this day of all days that they omitted to get Mr M'Sporran to sign the conditions. What difference does that make ?

If it were possible for your Lordships to escape from the world of make-believe which the law has created into the real world in which transactions of this sort are actually done, the answer would be short and simple. It should make no difference whatever. This sort of document is not meant to be read, still less to be understood. Its signature is in truth about as significant as a handshake that marks the formal conclusion of a bargain.

Your Lordships were referred to the dictum of Blackburn, J., in *Harris v. Great Western Railway Company*. The passage is as follows:

And it is clear law that where there is a writing, into which the terms of any agreement are reduced, the terms are to be regulated by that writing. And though one of the parties may not have read the writing, yet, in general, he is bound to the other by those terms; and that, I apprehend, is on the ground that, by assenting to the contract thus reduced to writing, he represents to the other side that he has made himself acquainted with the contents of that writing and assents to them, and so induces the other side to act upon that representation by entering into the contract with him, and is consequently precluded from denying that he did make himself acquainted with those terms. But then the preclusion only exists when the case is brought within the rule so carefully and accurately laid down by Parke, B., in delivering the judgment of the Exchequer in *Freeman v. Cooke*, that is, if he 'means his representation to be acted upon, and it is acted upon accordingly; or if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true.'

If the ordinary law of estoppel was applicable to this case, it might well be argued that the circumstances leave no room for any representation by the sender on which the carrier acted. I believe that any other member of the public in Mr M'Cutcheon's place-and this goes for lawyers as well as for laymen-would have found himself compelled to give the same sort of answers as Mr M'Cutcheon gave; and I doubt if any carrier who serves out documents of this type could honestly say that he acted in the belief that the recipient had made himself acquainted with the contents. But Blackburn, J., was dealing with an unsigned document, a cloakroom

ticket. Unless your Lordships are to disapprove the decision of the Court of Appeal in *L'Estrange v. F. Graucob, Ltd.* -and there has been no suggestion in this case that you should-the law is clear, without any recourse to the doctrine of estoppel, that a signature to a contract is conclusive.

This is a matter that is relevant to the way in which the respondents put their case. They say that the previous dealings between themselves and the appellant, being always on the terms of their risk note, as they call their written conditions, the contract between themselves and the appellant must be deemed to import the same conditions. In my opinion, the bare fact that there have been previous dealings between the parties does not assist the respondents at all. The fact that a man has made a contract in the same form ninety-nine times (let alone three or four times which are here alleged) will not of itself affect the hundredth contract in which the form is not used. Previous dealings are relevant only if they prove knowledge of the terms, actual and not constructive, and assent to them. If a term is not expressed in a contract, there is only one other way in which it can come into it and that is by implication. No implication can be made against a party of a term which was unknown to him. If previous dealings show that a man knew of, and agreed to, a term on ninety-nine occasions, there is a basis for saying that it can be imported into the hundredth contract without an express statement. It may, or may not, be sufficient to justify the importation-that depends on the circumstances; but at least, by proving knowledge, the essential beginning is made. Without knowledge there is nothing.

It is for the purpose of proving knowledge that the respondents rely on the dictum of Blackburn, J., which I have cited. In spite of the great authority of Blackburn, J., I think that this is a dictum which some day your Lordships may have to examine more closely. It seems to me that, when a party assents to a document forming the whole or a part of his contract, he is bound by the terms of the document, read or unread, signed or unsigned, simply because they are in the contract; and it is unnecessary and possibly misleading to say that he is bound by them because he represents to the other party that he has made himself acquainted with them. But, if there be an estoppel of this sort, its effect is, in my opinion, limited to the contract in relation to which the representation is made; and it cannot (unless of course

there be something else on which the estoppel is founded besides the mere receipt of the document) assist the other party in relation to other transactions. The respondents in the present case have quite failed to prove that the appellant made himself acquainted with the conditions they had introduced into previous dealings. He is not estopped from saying that for good reasons or bad he signed the previous contracts without the slightest idea of what was in them. If that is so, previous dealings are no evidence of knowledge and so are of little or no use to the respondents in this case.

I say of little or no use because the appellant did admit that he knew that there were some conditions although he did not know what they were. He certainly did not know that they were conditions which exempted the respondents from liability for their own negligence, although I suppose, if he had thought about them at all, he would have known that they probably exempted the respondents from the strict liability of a carrier. Most people know that carriers exact some conditions, and it does not matter in this case whether Mr M'Cutcheon's knowledge was general knowledge of this sort or was derived from previous dealings. Your Lordships can therefore leave previous dealings out of it and ask yourselves simply what is the position of a man who, with that amount of general knowledge, apparently makes a contract into which no conditions are expressly inserted ?

The answer must surely be that, either he does not make a contract at all, because the parties are not ad idem, or he makes the contract without the conditions. You cannot have a contract subject to uncommunicated conditions the terms of which are known only to one side.

It is at this point, I think, that their Lordships in the Second Division fell into error. The Lord Justice-Clerk said:

It is, I think, well settled that, if A contracts with B for the carriage by B of A's goods in the knowledge, gained through previous experience of similar transactions, that B carries goods subject to conditions, A is bound by these conditions under this later contract, if it is of a similar nature to those which have gone before, in the absence of agreement or information to the contrary. This applies even if A, knowing that there are conditions, does not take the trouble to ascertain precisely

what these conditions are.

Similarly Lord Mackintosh said:

In these circumstances, I am of opinion, following what I understand to be the law as laid down in the Parker case, and particularly by Baggallay, L.J., at the foot of p. 425, that the pursuer, being aware by reason of his own previous experience, and of that of the agent who happened to be acting for him in the present transaction, that goods were carried on the defenders' vessels subject to certain conditions, and having been given no reason to think that these conditions were not still operative on 8th October 1960, was bound by the conditions, although, as was proved to have been the case, he had never at any time acquainted himself with their purport.

I think, with great respect, that this is to introduce a new and fundamentally erroneous principle into the law of contract. There can be no conditions in any contract unless they are brought into it by expression, incorporation or implication. They are not brought into it simply because one party has inserted them into similar transactions in the past and has not given the other party any reason to think that he will not want to insert them again. The error is based, I think, on a misunderstanding of what are commonly called the ticket cases; I say this because the single authority cited for the proposition is one of the leading ticket cases, *Parker v. South-Eastern Railway Company*. The question in these cases is whether or not the passenger has accepted the ticket as a contractual document. If he knows that it contains conditions of some sort, he must know that it is meant to be contractual. If he accepts it as a contractual document, then prima facie (I am not dealing with questions of reasonable notice) he is bound by the conditions that are printed on it, or incorporated in it, by sufficient reference to some other document, whether he has inquired about them or not. That is all that Baggallay, L.J., is saying in *Parker v. South-Eastern Railway*.

In the present case there is no contractual document at all. There is not so much as a peg on which to hang any terms that are not expressed in the contract nor a phrase which is capable of expansion. It is as if the appellant had been accepted as a passenger without being given a ticket at all. There is then no special contract

and the contract is the ordinary one which the law imposes on carriers. As Baggallay, L.J., said, at p. 424:

This clearly would be the nature of the contract if no ticket were delivered, as occasionally happens.

If a man is given a blank ticket without conditions or any reference to them, even if he knows in detail what the conditions usually exacted are, he is not, in the absence of any allegation of fraud or of that sort of mistake for which the law gives relief, bound by such conditions. It may seem a narrow and artificial line that divides a ticket that is blank on the back from one that says For conditions see time-tables, or something of that sort, that has been held to be enough notice. I agree that it is an artificial line and one that has little relevance to everyday conditions. It may be beyond your Lordships' power to make the artificial line more natural: but, at least, you can see that it is drawn fairly for both sides, and that there is not one law for individuals and another for organisations that can issue printed documents. If the respondents had remembered to issue a risk note in this case, they would have invited your Lordships to give a curt answer to any complaint by the appellant. He might say that the terms were unfair and unreasonable, that he had never voluntarily agreed to them, that it was impossible to read or understand them and that, anyway, if he had tried to negotiate any change, the respondents would not have listened to him. The respondents would expect him to be told that he had made his contract and must abide by it. Now the boot is on the other foot. It is just as legitimate, but also just as vain, for the respondents to say that it was only a slip on their part, that it is unfair and unreasonable of the appellant to take advantage of it, and that he knew perfectly well that they never carried goods except on conditions. The law must give the same answer: they must abide by the contract they made. What is sauce for the goose is sauce for the gander. It will remain unpalatable sauce for both animals until the Legislature, if the Courts cannot do it, intervenes to secure that when contracts are made in circumstances in which there is no scope for free negotiation of the terms, they are made upon terms that are clear, fair and reasonable and settled independently as such. That is what Parliament has done in the case of carriage of goods by rail and on the high seas.

I have now given my opinion on the main point in the case and the one on which the respondents succeeded below. On the other points on which the respondents failed below and which they put forward again as grounds for dismissing the claim, I have nothing to add to what your Lordships have already said. In my opinion, the appeal should be allowed.

LORD PEARCE

At common law the defenders had a duty of care to the pursuer and a liability for negligence, unless by some special contract they have excluded that duty or liability. Usually such a special contract is achieved by the carrier producing a written contract which the customer signs, or by the carrier printing and displaying regulations to which reference is made on the ticket which the customer buys. In such a case the customer is bound by the conditions embodied in the written contract, or in the printed conditions to which the ticket refers, even if he does not read them and does not know their import, always provided that the carrier shows that he has taken reasonable steps to bring the conditions to the customer's notice—*Parker v. South-Eastern Railway Company*; *Hood v. Anchor Line*. In the present case, however, there was no written contract or ticket. Therefore the foundation on which the ticket cases rest is absent.

A special contract may also be made orally in express terms which set out the exclusion of liability or incorporate by reference conditions that do so. But no such express oral contract is suggested here.

It follows that the defenders must seek to rely on some implied special contract. In this they are hampered by the fact that the common law already implies a contract between carrier and customer (in default of other agreement) to the effect that a carrier will be entitled to a reasonable reward, and that he must carry the goods with care and will be liable for negligence. No special contract can be inferred from the basic facts that the pursuer's agent handed over the car for carriage and paid to the defenders a sum for the freight. For the normal inference is that an ordinary common law contract for carriage of goods was intended. What other facts, then, can the defenders adduce which will show that the normal inference is erroneous and that in truth a special contract should be implied?

The defenders rely on the course of dealing. But they are seeking to establish an oral contract by a course of dealing which always insisted on a written contract. It is the consistency of a course of conduct which gives rise to the implication that in similar circumstances a similar contractual result will follow. When the conduct is not-consistent, there is no reason why it should still produce an invariable contractual result. The defenders, having previously offered a written contract, on this occasion offered an oral one. The pursuer's agent duly paid the freight for which he was asked and accepted the oral contract thus offered. This raises no implication that the conditions of the oral contract must be the same as the conditions of the written contract would have been had the defenders preferred one.

Recourse is then sought to knowledge and intention. This is not a case where there was any bad faith on the part of the pursuer or his agent. Had the pursuer's agent snatched at an offer that he knew was not intended, or deliberately taken advantage of the defenders' omission to proffer their usual printed form for his signature, the situation would be different and other considerations would apply. But neither the pursuer nor his agent gave any thought to conditions. Nor had they any knowledge that clause 11 would contain, wrapped in thirty lines of small print and in language intelligible only to a lawyer or a person of education and perspicacity, a total exclusion of liability for almost every conceivable act of the defenders that might damage the pursuer's goods.

The defenders never intended to offer to make any oral contract on the terms of the printed conditions. They intended to offer a written contract and by mistake they offered an oral one. The pursuer was unaware of the mistake. He accepted an oral contract, but he never intended to accept an oral contract on the printed conditions. He knew that he usually had to sign a form which he supposed contained some conditions. When he was offered an oral contract without conditions he accepted, with no thought about its terms. Why should such intentions or knowledge on the part of the contracting parties lead the Court to create a contract which neither intended The furthest to which this argument of the defenders could lead is to the conclusion that the parties were never *ad idem*; in which case there was no special contract and the common law contract prevails.

Some reliance was placed on the fact that the pursuer and his agent were in no wise misled nor suffered from the absence of the written form since they would not have read it or paid any attention to it in any event. This argument has a cynical flavour. It really amounts to saying that because the pursuer would have been bound by a harsh condition, of which he did not know, if the defenders had taken the proper legal steps, he should be likewise bound when they neglected to take those steps. The law inflicts some hardship on ignorant or careless pursuers who accept a ticket or sign a printed form in that it holds them bound by printed conditions which they have not read and of which they know nothing. The reasons for this are given in *Parker v. South-Eastern Railway Company*. If the defenders are to have the benefit of the reasoning in *Parker's* case they must take the necessary steps. To decide in the defenders' favour on the facts of this case would be a further extension of the protection afforded to defenders by the ticket cases. Such an extension seems to me very undesirable.

With all respect to the contrary view of the Inner House, I agree with the reasoning and conclusions of the learned Lord Ordinary. I would therefore allow the appeal.

Lord Reid

MY LORDS,

I beg to move that the Report of the Appellate Committee be agreed to.

Questions Put:

That the Report of the Appellate Committee be agreed to.

The Contents have it.

That the Order appealed from be Set Aside.

The Contents have it.

That the Judgment of Mr. Justice Sachs be Set Aside except so far as regards damages and costs.

The Contents have it.

That the Cause be remitted to the Queen's Bench Division with a direction that a new trial be had on the question of damages only.

The Contents have it.

That the Respondents do pay to the Appellant his Costs here and in the Court of Appeal.

The Contents have it.

That the Costs already incurred before Mr. Justice Sachs, and the costs to be incurred in the new Trial be disposed of by the trial Judge after the further Trial in the Queen's Bench Division.

The Contents have it.

That the Costs of the Appellant here and in the Court of Appeal be taxed in accordance with the provisions of the Third Schedule to the Legal Aid and Advice Act, 1949, as amended by the Legal Aid Act, 1960.

The Contents have it.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com