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Methods of Trade Union Action : Part III. Boycott and Some General Conclusions

by

S. R. De Silva
Employers' Federation of Ceylon.

BOYCOTT

Nature

IN simplest terms boycott is a refusal to deal with or patronize a business. This is known as a primary boycott and would therefore include a strike. But the form of boycott which has been the greatest source of debate is the secondary boycott. The distinction between a primary and secondary boycott, familiar to American jurisprudence, was stated thus by the Supreme Court of the United States:[1]

> "The substance of the matters here complained of, is an interference with the complainant's interstate trade, intended to have coercive effect upon complainant, and produced by what is commonly known as a 'secondary boycott', that is, a combination not merely to refrain from dealing with complainant, or to advise or by peaceful means persuade complainant's customers to refrain ('primary boycott'), but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it."

A secondary boycott is a boycott of a person not involved in the primary dispute, generally intended to compel such third person to break off business relations with the employer in dispute. As stated by another American Court, a secondary boycott is one

> "....where many combine to injure one in his business by coercing third persons against their will to cease patronizing him by threats or similar injury."[2]

A secondary boycott may take place even where the employees of the 'innocent' third party do not threaten him if he does not cease relations with the employer in dispute. The employees of such third party may merely refuse to handle goods relating to the employer in dispute. Generally speaking, a secondary

1 *Duplex Printing Co. v. Deering* 254 U. S. p. 443.

2 *Traux v. Corrigan* 257 U. S. p. 312.

boycott has two characteristics. Firstly, the action is directed against a 'neutral' party in a dispute between the union and another employer. Secondly, it is intended to bring the employer in dispute to terms with his union by compelling the 'neutral' third party to cease business relations with the employer in dispute and thereby affecting the latter's trade. As distinguished from 'sympathetic' action where the employees merely act as a gesture of accord with the employees in another establishment, a secondary boycott involves a demand against the neutral party to cease business relations with the employer in dispute.

Legality

While there is no country where the boycott problem has been so marked as in the United States, there is an increasing tendency in Ceylon to resort to the secondary boycott, particularly by certain employees in the Port where the boycott has taken the form of refusing to handle goods belonging to an employer with whom the union has a dispute. It need hardly be emphasized that the adoption of a boycott in the Port can result in cutting off essential supplies from consumers and preventing the export of our agricultural produce, and for this reason alone the problem is of vital concern to Ceylon's economy.

American law has recognized the legality of a primary boycott but not of a secondary boycott.[3] In 1947 the Taft–Hartley Act outlawed the secondary boycott in the United States. Section 8 (*b*) (4) prohibited a strike or refusal to handle goods or to induce or encourage the employees of an employer to do so, for the purpose of forcing an employer to cease using, selling or transporting the products of another employer or to cease doing business with any other person. However, powerful unions were able to obtain concessions from employers in agreements, known as 'hot cargo' clauses, enabling them to resort to the technique of secondary boycott. Consequently, amending legislation was passed in 1959 to strengthen the provisions of the 1947 Act and to ban 'hot cargo' clauses.

In Ceylon, labour courts have held that boycott is an unfair labour practice. In *The Petroleum Service Station Workers' Union v. P. R. Perera*[4] the Industrial Court characterized boycott as 'an unfair labour practice', 'illegal' and the union's conduct as 'highly reprehensible' savouring of 'malice and vindictiveness.' In *The All-Ceylon Oil Companies Workers' Union v. The Standard Vacuum Oil Co.*[5] the Union had instructed the employees of the Company to refuse to transport petrol to a dealer in order to support a strike of the employees at the dealer's depot. The Court held:[6]

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[3] See Ludwig Teller *Labour Disputes And Collective Bargaining* (Baker, Voorhis & Co., N. York, 1940) Vol. I, Chapter 9.

[4] Industrial Dispute 228, Ceylon Government Gazette 12,002 of 11 th December 1959.

[5] Industrial Dispute 237, Ceylon Government Gazette 12,034 of 8 th January 1960.

[6] Ibid. at paragraph 4.

"Upon the admitted facts it is manifest that the dispute now existing between Mr. J. S. A. Fernando (the dealer).....and his workmen does in no way affect or concern the workmen of this Company. The workmen concerned continue in their employment and draw their wages. It is the undoubted duty of these employees while they are so employed and receive their wages to obey all lawful orders and carry out the instructions of their employer in the performance of their normal duties. Refusal to do so is subversive of discipline and will amount to misconduct. An employer can, therefore, take disciplinary action for such misconduct against his employees.....It is legitimate for a body of workmen to go on strike and refuse to work and during that period draw no salary or wages, the strike being considered a legitimate weapon to obtain satisfaction of their demands. But it is an unfair labour practice amounting to misconduct for a workman to draw his pay and decide for himself what portion of the duties assigned to him he will perform and what he will not.....This technique which was aimed at forcing the dealer J.S.A. Fernando into submission should not have been resorted to thereby causing hardship and detriment to the Company which is under a contract to supply pertoleum products to him.....the action taken by these employees to refuse to carry out the orders of the employer cannot be justified even on the so-called high level of trade union principles."

Trade Unions Ordinance

The question of liability in tort of trade union officials in a secondary boycott has assumed considerable importance in view of the decision of the House of Lords in *Rookes V. Barnard.*[7] Section 3 of the English Trade Disputes Act (1906) enacts:

"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."

In Ceylon Section 26 of the Trade Unions Ordinance[8] is the same in all material particulars:

"No action or other legal proceeding shall be maintainable in any civil court against any registered trade union or any officer or member thereof in respect of any act done in contemplation or in furtherance of a trade dispute to which a member of the trade union is a party on the ground only that such act induces some other person to break a contract of

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7 (1964) 1 All England Reports p. 367.

8 1935, Chapter 138 Legislative Enactments of Ceylon (1956).

employment, or that it is in 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 of his labour as he wills."

Prior to the decision of the House of Lords in *Rookes v. Barnard*[9] it was generally assumed that a union exercising pressure on an employer by threats directed towards persons who have dealings with such employer would be protected by Section 3 of the Trade Disputes Act. But the decision of the House of Lords undermined this assumption so fundamentally that it resulted in immediate legislation. In this case the B.O.A.C. had a closed-shop agreement with their union. Rookes, a draughtsman employed by B.O.A.C resigned from the union, whereupon the union passed a resolution to the effect that B.O.A.C. should be informed that all members of the union would withdraw their labour if Rookes' services were not terminated by a certain time on a specified date. In view of this resolution, which was communicated to B.O.A.C., the latter lawfully terminated Rookes' services. Rookes brought an action against two fellow employees who favoured the resolution and a Divisional Organiser of the Union. The House of Lords held for Rookes in damages against the three defendants on the ground that the tort of intimidation had been committed and that Rookes' right of action was not defeated by either Sections 1 or 3 of the Trade Disputes Act. The defendants were held liable for damages caused to Rookes since they had obtained Rookes' dismissal by unlawful threats against B.O.A.C. According to Lord Evershed[10] the problem before the House could be resolved into three questions. It will be conveient to cosider each of them in turn.

The first question posed by Lord Evershed was whether there is a tort or wrong known to 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. Their Lordships were unanimous in answering this question in the affirmative, as did the Court of Appeal and the judge of first instance. Lord Evershed said:[11]

"... 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 charactor 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."

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9 *Op. Cit.*

10 Ibid., at p. 383.

11 Ibid., at p. 383.

The second question posed by Lord Everhed was that if the answer to the first question is in the affirmative, 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 in particular breaches of contract? Their Lordships answered this question in the affirmative and their view is fairly reflected in the following words of Lord Reid:[12]

> "I can see no difference in principle between a threat to break a contract and 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 unlawful weapon against him–intimidation of another person by unlawful means .... 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.... 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 most effective means. Now that subtler means are at least equally effective, I see no reason why the law should have to turn a blind eye to that. We have to tolerate intimidation by means which have been held to be lawful, but there I would stop."

It would appear that the position in Roman-Dutch Law is the same and *R. G. Mckerron*,[13] referring to the decision of the House of Lords states:

> "If the interference is by means of an act which in itself constitutes a wrong to the plaintiff, for example, injurious falsehood or inducement of breach of contract, the plaintiff will, of course, have a course of action in respect of the wrong committed. But even if the interference involves no act which in itself constitutes a wrong to the plaintiff, the defendant will neverthless be liable if he procures his object by the use of illegal means. By illegal means is meant means which in themselves are civil wrongs or in the nature of civil wrongs. To procure one's object, therefore, merely by threatening to do what one may lawfully do, is not actionable. Thus, since apart from contract or statute no one is bound to supply goods to

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12 Ibid., at pp. 374-5.

13 *Law of Delcit* (6th Ed,. 1965, Juta, S. Africa) in the chapter entitled 'Interference With Trade, Business Or Employment'.

another, in the absence of proof of malice, X has no cause of action against Y, if Y, by threatening to refuse to supply Z with goods induces Z to discontinue dealing with X. On the other hand X will have a good cause of action against Y, if Y effected his object by threatening to publish defamatory matter concerning Z, or to induce his employees to break their contracts with him (Rookes v. Barnard) or to institute vexatious legal proceedings against him."

Further, the principles of the Lex Aquilia in the modern law of delict are wide enough to include a case where a person by wilful and conscious wrongdoing (dolus) has caused pecuniary loss to another.

It must be borne in mind that the decision of the House of Lords did not turn on the fact that damage was inflicted, or that the *purpose* was unlawful, but on the fact that the damage was caused by unlawful *means*.

If the answer to the second question is in the affirmative as it was, the third question posed dy Lord Evershed was whether the plaintiff's common law right of action was defeated by Sections 1 or 3 of the Trade Disputes Act. The answer depended on the construction of the words 'on the ground only that ....' in Section 3. According to their Lordships the question was whether the acts complained of are, as such, wrongful *only* on the ground that they are in interference with a person's employment or trade or business or right to dispose of his capital as he wills. Their Lordships thought that the acts complained of were not wrongful *only* on that ground, but they were also wrongful on the ground that they amounted to the tort of intimidation. In the words of Lord Reid:[14]

"... I would hold that s. 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 s. 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 s. 3 should apply only so long as no illegal means, such as intimidation, were used to achieve the breach of contract or interference with trade, business or employment, or Parliament might have enacted that the protection should extend to all cases, no matter how illegal may have been the means employed. But to draw a distinction and to restrict protection of inducement of breach of contract to cases where no illegal means are employed, while extending protection of interference to all cases no matter how unlawful the means employed is something that I cannot think that Parliament could have intended and therefore is a construction of the section which I would accept only if its words are incapable of any other. In my judgement, it

[14] *Op. Cit*,. at p. 380.

is clear that s. 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."

The first part of Section 3 protects *inducements* of breaches of contracts of employment, so that the protection is not available to persons who break contracts, as opposed to persons who induce their breach.

Section 1 of the Trade Disputes Act states :

"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." [15]

It was the position of the defendants that since a threat by one employee to break his contract would not have led B.O.A.C. to dismiss Rookes and would therefore not have been actionable, the combined action in this case was protected by Section 1. Their Lordships did not agree and, as pointed out by *L. H. Hoffmann* this argument would have the absurd consequence that "if, in the course of a trade dispute, two employees decided to blow up their employer's factory with a device which neither could operate without the assistance of the other, their combine act would not be ..... a tort."[16] As *Hoffmann* says:[17]

"The section says that an act done in combination is not to be actionable unless the 'act' would have been actionable without such combination. It does not require that the acts of any particular members of the combination should have been actionable in themselves. It requires the court to suppose that the very act done by the combination, in all its force and detail, had been done by a single person. On this view it is clear that the defendants' combined act would have been actionable if done by a single person. Once this is established it is irrelevant that the threats of individuals to break their contracts would have been ineffective or that one member of the conspiracy–Silverthrone–could not individually have threatened breach of contract at all."

It follows that to found a cause of action the unlawful act must result in damage to the plaintiff.[18] Thus it is essential that the person threatened should submit to the threats, for if he resists the threats the plaintiff would

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15 There is no corresponding section in the Trade Unions Ordinance in Ceylon.

16 L. H. Hoffmann 'Rookes v. Barnard' in 1965(81) *Law Quarterly Review* p. 116 at p. 135.

17 Ibid. at p. 135.

18 *Rookes v, Barnard, Op. Cit.* per Lord Devlin at p. 399.

not have suffered damage. It was a crucial fact in *Rookes v. Barnard* that B.O.A.C. submitted to the threats and dismissed the plaintiff. Lord Devlin pointed out :[19]

> "So if in the present case (the Union) 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 (the Union's) threat. express or implied, to continue on strike until the appellant was got rid of."

In each case it would depend on the circumstances and the language used whether there has been a threat or only a warning[20] for, in the latter event, no action would lie.

It must be noted that in *Rookes v. Barnard* the strike would have been in breach of contract because it was in breach of a no-strike agreement which both parties conceded had become incorporated in each employee's contract of employment. Even otherwise, since only three days' notice was given, in the event of a strike the strikers would have been in breach of their contracts of employment. According to Lord Denning in *Morgan v. Fry*[21] the House of Lords in *Rookes' Case* relied on the no-strike clause and not on the fact that the notice was too short in terms of the contract of employment. But since the notice in *Morgan v. Fry* was longer than that required to terminate the contract of employment and there was no no-strike clause, there was no use of unlawful means for the purposes of the tort of intimidation.

The decision of the House of Lords in *Rookes v. Barnard* has come in for severe criticism both from text writers and trade unions.[22] Only some of them will be touched upon here. From the point of view of industrial relations it has been argued that since some of their Lordships took the view that a threat to strike is not a threat to terminate their contracts–which is legal–but a threat to break the contract (irrespective of the no-strike agreement in this case), the decision constitutes a fundamental threat to the right to strike. Since the legality of a 'closed-shop' was not in issue–it was a lawful trade union objective–in legal terms this decision was 'a case about

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19 Ibid.

20 For the distinction see *Sorrell v. Smith* 1925 Appeal Cases p. 700 at p. 730 and *Crofter Handwoven Harris Tweed Co. Ltd. v. Veitch* 1942 Appeal Cases p. 435.

21 (1968) 3 All England Reports p. 452 at p. 457.

22 See K. W. Wedderburn 1965 (28) *Modern Law Review*, 1964 (27) *Modern Law Review*, 1961 (24) *Modern. Law Review*, K. W. Wedderburn *The Worker And The Law* (Penguin, London, 1965) pp. 261-75, Clive Jenkins and J. E. Mortimer *The Kind of Laws The Unions Ought To Want* (Pergamon, England, 1968) pp. 20-6.

the 'right to strike', not just about the 'closed shop.' What was said in this case about the illegality of this threat to strike was going to affect most other threats to stike for other lawful trade union objectives–for higher wages; for the boycott of employers who refuse union membership to workers ..... It was not the 'closed shop' that vitiated the strike threat in *Rookes v. Barnard.* Indeed, in legal terms the case is nothing to do with the closed shop. It is about the right to threaten and organize strikes.[23] Although there is merit in some criticisms made regarding this decision,[24] from the point of view of industrial relations this particular criticism has perhaps been overstated. It is misleading because it does not take account of the fact that in the absence of a no-strike agreement all that the union has to do is to give due strike notice. Where there is no-strike agreement which is legally binding due to its incorporation in the contract of employment, it is difficult to see why a strike in breach of it should not constitute an unlawful means. A legally binding obligation is meant to be honoured and not breached. As far as Ceylon is concerned, since violation of a 'no-strike' clause in a collective agreement would be an offence under the Industrial Disputes Act, there is all the more reason for saying that a threatened strike in the circumstances in *Rookes v. Barnard* would constitute an unlawful means. Thus the answer of the House of Lords to the third question posed by Lord Evershed has considerable merit. To the suggestion that in consequence of the decision unions would be 'less eager to enter so readily into 'no strike' or 'procedure' agreements if those obligations can be translated into their members' individual contracts,' [25] the short answer is that it is difficult to see why unions should agree to such terms if they do no intend to honour them. Their Lordships themselves were aware of some of these problems.[26] Perhaps the decision in *Rookes v. Barnard* is not so objectionable at a time when trade unions can hardly be described as weak and when the legislature is readily willing to step in, as it did in this case, to protect the interests of labour. As *Hoffmann* points out:[27]

> "The trade unions are a powerful pressure group who can have little difficulty in securing the passage of any legislation reasonably necessary to protect their interests. It is the isolated individual whom the common law has to protect."

The decision has been criticised on the grounds that it revived the long forgotton tort of intimidation and did violence to the requirement of privity

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23 K. W. Wedderburn *The Worker And The Law*, *Op. Cit.*, pp. 263-4.

24 For which see the authorities cited in footnote 22.

25 K. W. Wedderburn *The Worker And The Law*, *Op. Cit.* p. 266.

26 See Lord Devlin at pp. 405-7.

27 *Op. Cit.* at p. 139.

of contract. As long ago as 1907 Sir John Salmond[28] formulated the tort of intimidation in the following terms :

> "The wrong of intimidation includes all those cases in which the harm is inflicted by the use of unlawful threats whereby the lawful liberty of others to do so as they please is interfered with. This wrong is of two distinct kinds, for the liberty of action so interfered with may be either that of the plaintiff himself, or that of other persons with resulting damage to the plaintiff. In other words, the defendant may either intimidate the plaintiff himself, and so compel him to act to his own hurt, or he may intimidate other people and so compel them to act to the hurt of the plaintiff."

It can hardly be said that the decision of the House of Lords in this respect was an example of judicial law making.[29] The privity argument proceeds on the basis that there was no privity of contract between Rookes and the defendants so that Rookes could have no cause of action against them. The statement of Lord Reid quoted earlier[30] is the complete answer to the privity argument. It is important to remember that Rookes was not suing *on the contract* between the defendants and B.O.A.C. but on the basis that the means used by the defendants to inflict damage on Rookes was unlawful because it involved wrongful conduct towards a third party. Lord Devlin[31] meets the privity argument by saying that in cases of intimidation the loss is caused not by *breach* of contract but by the third party's submission to an *unlawful threat*, so that the doctrine of privity has no application. L. H. Hoffmann[32] quite rightly expresses preference for Lord Reid's argument.

Trade unions may still exert economic pressure on employers by sealing off their source of supplies and outlets for sales provided they adopt lawful means. The position was summarised by the Royal Commission On Trade Unions And Employer's Associations (1965-68)[33] and is worth quoting in full:

> "(1) Mere advice is not inducement; so that a trade union official who advices a customer of the employer in dispute that he should consider his

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[28] *Law Of Torts* (1st Ed., 1907) p. 439. The passage is the same in the 13th Edition at p. 697.

[29] L. H. Hoffmann, *Op. Cit.*, says that 'causing loss by unlawful means' is a wider tort than intimidation as set out by Salmond, that the facts of *Rookes v. Barnard* fell within the narrower tort of intimidation and that the wider tort was recognized by Lord Reid and Viscount Redcliffe in *Stradford v. Lindley* (1964) 3 All England Reports, p. 102.

[30] *Supra* at footnote 12.

[31] at p. 399.

[32] *Op. Cit.* at pp. 124-8

[33] Paragraph 891. This Report will hereinafter be referred to as the British Royal Commission.

business relations with that employer in the light of the dispute commits no tort even if in consequence of such advice the customer breaks his contract.

(2) Such advice will not constitute an inducement to break a contract even if it calls attention to the possible dangers for the customer of continuing to deal with the employer in dispute.

(3) If, however, a trade union official threatens a customer of the employer in dispute that, unless he ceases to deal with him, the customer's own employees will be called out on strike, and in consequence the customer breaks his contract with the employer in dispute, the trade union official commits the tort of inducing the breach of such contract.

(4) If the trade union official ignores the customer altogether and goes directly to the customer's employees and persuades them to come out on strike without giving due notice under their contracts of employment to cease work, and this is done successfully in order to persuade the customer to cease to deal with the employer in dispute, the latter may sue the trade union official for inducing the customer's breach of contract. This is a case of 'indirect inducement' or 'procuring' and is actionable because unlawful means were counselled and employed, to wit the breach of their contracts of employment by the customer's employees.

(5) If in the last instance, however, the trade union official had persuaded the customer's employees first to give the due notice under their contracts of employment, and to strike only when such notice had expired, the employer in dispute could not sue the official if the customer gave in and broke his contract. The reason is that no unlawful means have been counselled or used. The strikers were entitled to cease work on giving due notice, and the exercise of a legal right gives no cause of action to a person injured by the exercise."

Methods (1), (2) and (5) would not involve a tort.

Prior to the decision of the House of Lords in *Stratford v. Lindley*[34] it was assumed that breach of any type of contract was protected by Section 3 of the Trade Disputes Act, but the position was held to be otherwise by the House of Lords. Section 3 affords protection against an action or other legal proceeding in respect of any act done in contemplation or in furtherance of a trade dispute on the ground *only*

(*a*) that such act induces some other person to break a *contract of employment*, or

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[34] (1964) 3 All England Reports p. 102.

(*b*) that it is in interference with the trade, business or employment of some other person, or

(*c*) with the right of some other person to dispose of his capital or of his labour as he wills.

According to the House of Lords in *Stratford's Case* (*b*) does not afford protection if the act leads to the breach of a specific contract other than that of employment causing damage. Their Lordships thought that (*b*) significantly omits the word 'contract' and if it was intended to protect acts causing breaches of specific contracts resulting in damage, then (*a*) would be redundant and (*b*) would have specifically used the word 'contract'. In other words, an action lies where, for instance, as a result of a secondary boycott, a contract other than one of employment with the employer is breached causing damage. In this case Stratford and his wife formed two companies, one 'Stratford's' and the other 'Bowker and King'. Stratford's owned barges which it hired out and the hirers employed lightermen, the majority of whom were members of union A to work the barges. Bowker and King owned and operated motor barges. Only three of its employees belonged to union A while the rest were members of union B. When Bowker and King entered into a collective agreement with union B, union A struk work at Bowker and King. But since union A had only three members at Bowker and King, they brought Stratford's to a standstill by instructing their members employed by the customers of Stratford's to refuse to work barges hired from Stratford's back to their moorings. Stratford's asked for and obtained an injunction against the officials of union A. The House of Lords held that union A had, in inducing their members to break their contracts of employment with the customers of Stratford's, caused a breach of commercial contracts between Stratfords and its customers which was not protected by Section 3.

The British Royal Commission[35] has recommended that the protection given by Section 3 should be extended to cover all types of contracts, and it was pointed out that this object can be achieved by deleting the words 'of employment' from the first limb of Section 3.

In consequence of the decision in *Rookes v. Barnard*, the Government enacted the Trade Disputes Act (1965) to cover the situation which arose in that case. This legislation enacted[36]

> "an act done....by a person in contemplation or furtherance of a trade dispute....shall not be actionable in tort on the ground only that it consists in his threatening....that a contract of employment (whether one to which he is a party or not) will be broken."

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[35] *Op. Cit.*, at p. 893.

[36] Section 1 (1) (a).

It will be seen that this amendment does not cover the situation in S*tratford v. Lindley*.[37]

In the absence of any amending legislation on the lines of the 1965 Act, the decision in *Rookes v. Barnard* would apply in Ceylon since the corresponding provision in the Trade Unions Ordinance is the same as Section 3 of the Trade Disputes Act in all material particulars. Similarly, it is probable that *Stratford v. Lindley* would be followed by our courts if the matter came up for interpretation.

Conclusions

The main argument against the secondary boycott centres round the fact that it usually takes the form of pressure being exerted on an innocent third party. Further, when boycott takes the form of refusal to handle goods the workmen continue to draw their wages while deciding for themselves what part of the work they would do and what lawful instrutions they would obey. The argument based on the innocent third party, however, has not gone unchallenged. Unions have sometimes argued that the third party is in a sense an ally of the employer in dispute so that strictly he is not a neutral party. It has further been argued that when unionists handle goods belonging to an employer with whom the union has a dispute, it would amount to strike-breaking. Some have even seen boycott as a necessary consequence of the right to combine. It is strange that boycott in business affairs is legal but is not justified when resorted to by labour, so that it has been suggested that one set of laws for the master and another for workers cannot be justified.

The little authority there is in Ceylon is certainly against boycott as a legitimate weapon by trade unions. This view is understandable, particularly in the context of the fact that the boycott in Ceylon has generally taken the form of a refusal to handle goods in the Port of Colombo and it is not difficult, as stated earlier, to envisage the consequences to the country if this technique was extended to prevent the import of essential foodstuffs and the export of those products upon which the country's balance of payments depends.

Some General Conclusions

We have examined the various methods adopted by trade unions of workers, and one method employed by employers to bring pressure upon the other party to accede to certain terms. No attempt has been made here to examine the various sociological and economic causes of industrial conflict since it is outside the scope of this study. It remains to consider what general conclusions, if any, could be drawn from this study,

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37 *Op. Cit.*

All societies have not approached the question of industrial conflict in the same way, so that varying degrees of recognition have been accorded by different industrial relations systems to the various methods of industrial warfare. But if almost universal recognition to a greater or lesser extent has been accorded to any one method of trade union action, it is to the strike weapon. On the other hand, many other forms of trade union action such as go-slow and the secondary boycott have often been denied recognition as legitimate trade union weapons. While no common reason can be advanced for this latter tendency, it may fairly safely be said that go-slow has been regarded as an 'insidious' labour practice because the employees continue to draw their full wages while giving to the employer less than their minimum. Similarly, in the case of boycott it is quite easy to visualize situations where employees come to work, draw their wages and yet decide that some aspect of the employer's work will not be done by them. It is otherwise in the case of a strike where the employees voluntarily face unemployment for the period of the strike and both parties to the conflict invariably bear a loss – the employees their wages and the employer his production or profits.

The function of the law[38] in industrial conflict has, by and large, been to determine the areas of permissible action, to impose sanctions on certain types of behaviour and to provide, as far as possible, peaceful methods for the settlement of disputes. For instance, while the strike is generally a permissible weapon in industrial conflict, not only are limits placed upon its use but it may also be prohibited in certain circumstances as in the case of the Police and the Armed Forces. Or the law may require observance of a pre-determined procedure before resort to strike action such as notice in essential industries. The law's function in industrial conflict has not been to improve the relations between the disputants, and indeed it is doubtful whether the law could assume such a role. The law has sometimes, as in Ceylon, shown a preference for more peaceful methods of settling industrial disputes which is evident from the existence of Industrial Court, Arbitration and Conciliation procedures. The State can compel disputants to lay their claims before these bodies, in which event the status quo must be restored and resort to trade union action suspended. In this way the State seeks to keep the outward manifestations of industrial conflict to a minimum. Whatever may be the merits or demerits of leaving parties to work out their own arrangements in other areas of industrial relations such as collective bargaining, certainly in the area of industrial conflict the repercussions on the parties and the community are such that the parties cannot be allowed to work out the permissible areas of action. Nor would it be satisfactory to leave it to the Courts because the public interest is not represented in proceedings before

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[38] On this point see S. R. de Silva 'The Law And State In Industrial Relations' in 1970 *Colombo Law Review*.

the Courts but only the private interests of the parties. The State should therefore prescribe with greater clarity the boundaries of action in this area of industrial relations.

Where there is excessive industrial conflict a policy of repression and removal of the strike weapon would not remove the causes of industrial conflict. It is doubtful whether, in any event, absence of strikes always indicates the existence of good industrial relations and *vise versa.* Strikes may sometimes be due to causes not directly concerned with bad relations such as government policy and inter–union rivalry. Similarly, there may be no strikes inspite of the existence of bad relations, due to various factors such as the workers not being sufficiently organized.[39] Thus

> "There are clearly limitations..... on the strike as an indicator of the state of industrial relationships, and perhaps other more suitable ones should be sought. It has been suggested that a high rate of labour turnover, absenteeism, inefficiency, a high incidence of accidents or even intense political activity or habitual pilfering, can all supply evidence of unsatisfactory relationships. However, for all their disadvantages, strikes do probably provide the best quantitative indicator."[40]

No industrial relations system has recognized an *unlimited* right to resort to trade union action, even of strike. Fundamental though the right to strike may be, it is misleading to assume that it is a fundamental human right or that it is unlimited. The degree of freedom to resort to trade union action must necessarily depend on various factors such as the categories and types of employees under consideration, the alternative methods available for the settlement of disputes, the state of the country's economy and so on. That is why the tendency today, particularly in developing countries, is to restrict rather than enlarge the right to strike which, if unfettered, is a luxury which a State in a hurry to achieve development goals can ill–afford. There is little to be gained, therefore, from taking any particular industrial relations system as a model to be emulated regardless of circumstances. In fact, there is no ideal system of industrial relations. In any event, no system of industrial relations is likely to receive the approval of both sides of industry.

In the now independent colonies, the strike was a weapon of protest against the foreigner. This traditional role of the strike survives today, even in Ceylon, in the form of political strikes. Such strikes, though not openly for political purposes, are called and timed to embarass the government. Such strikes are the outcome of the political involvement of trade unions, both in

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39 See K. G. J. Knowles, *Strikes: A Study In Industrial Conflict* (Blackwell, Oxford, 1952).

40 N. Robertson & J. L. Thomas, *Trade Unions And Industrial Relations* (Business Books Ltd., England, 1968) pp. 153-4.

Ceylon and other developing countries. It would be fruitless to suggest legislation since strikes with political overtones would practically always fall outside the *letter* of the law. Political involvement of trade unions is too deep rooted to be removed by legislation.[41]

In the first part of this study[42] we saw that in English law notice of a strike terminates the contract of employment.[43] It is clear that English law has not accepted the view that during a strike the contract of employment is suspended. A third view, supported by K. W. Wedderburn[44] and by L. H. Hoffman[45] is that where notice of a strike is given, it does not always amount to a notice to terminate the contract but may amount to a breach of contract, giving the employer the right either to treat the breach as a fundamental one and therefore as a repudiation of the contract or else hold the employees to their contracts notwithstanding the breach. This view appears to be supported by certain dicta in *Rookes v. Barnard*[46] where Lord Devlin said:[47]

> "It is true that any individual employee could lawfully have terminated his contract by giving seven days' notice....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 so long as the employers would tolerate the breach without exercising their right of rescission."

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41 While in some countries, such as the United States, most strikes arise from renegotiation of agreements which have expired or are expiring, in Ceylon, due to the paucity of collective agreements, strikes arising from negotiation or renegotiation of agreements are comparatively rare. Statistics in Ceylon show that between 1963 and 1967 dismissal, loss of employment in any way or failure to provide work, account for 31% of the strikes, while wages and connected matters account for only about 15% to 25% of strikes: *Administrative Report of The Commissioner of Labour*, 1966-7.

42 Vidyodaya: J. Arts, Sci., Lett., Vol. 2, No. 1, January 1969.

43 Cyril Grunfeld *Modern Trade Union Law* (Sweet & Maxwell, London, 1966) pp. 330-1 and the cases cited in Footnote 40 p. 330.

44 *Cases And Materials On Labour Law* (Cambridge, England, 1967) pp. 525-6. He agrees however, that strike notice 'cannot normally be given merely to 'suspend' the contract unilaterally', and the impossibility of unilateral suspension was also accepted by the British Royal Commission, *Op. Cit.*, at paragraph 946.

45 1965 (81) *Law Quarterly Review*, *Op. Cit.*, at p. 137.

46 *Op. Cit.*

47 Ibid. pp. 396-7. Also Lord Evershed, ibid., p. 381: '.... it has long been recognised that strike action or threats of strike action ..... in the case of a trade dispute do not involve any wrongful action on the part of the employees, whose service contracts are not regarded as being or intended to be thereby terminated.'

The British Royal Commission did not understand the dicta in this way, and stated:[48]

> "It has also been suggested that the effect of certain dicta in the cases of *Rookes v. Barnard* and *Stratford v. Lindley* is that every notice of intended strike action is a notice of intended breach of contract and cannot be regarded as a notice of termination of the contract. We have referred to those dicta, which do not seem to us to support the construction thus put up on them; and we have reason to believe that their authors disavow the interpretation in question."

While it is clear that a strike notice does not unilaterally suspend the contract of employment, where the contractual notice is given it would appear that the effect of such notice is to terminate the contract and not to result in a breach of contract. Failure to give the requisite notice of strike would place the workmen in breach of their contracts of employment.[49] There seems to be no justification at all in treating a notice which is long enough to terminate the contract as a breach. If it amounts to a breach, it is difficult to understand the purpose of giving the contractual notice, as opposed to giving no notice or inadequate notice. From an industrial relations point of view, it appears to matter little whether due notice is a termination or a breach entitling the employer to rescission. In either case the employer does not generally wish to get rid of his employees. If he wanted to, and the effect of due strike notice is to place the workmen in breach of their contracts, the employer could exercise his option to treat the notice as a repudiation of the contract. It is submitted that the current legal position in England is that where due notice is given

> "the employee *does* wish to put an end to the existing contract, even though he remains ready to conclude another on terms more favourable to him; and the employer has no choice but to accept the situation that the old contract is at an end, however much he may wish to retain his employee's services."[50]

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[48] *Op. Cit.* at paragraph 949. At paragraph 948 the Commission pointed out that if a strike notice by an employee 'were to be construed merely as a notice that he was about to break his contract, serious difficulties might arise under sections 4 and 5 of the Conspiracy and Protection of Property Act 1875, which make certain breaches of contract criminal offences. It has always been assumed, we think, that no criminal liability can attach under those sections if the employee gives due notice to terminate his contract and discontinues work only when the notice has expired. It would seem to us to be an impossible situation that such an employee should be liable to criminal penalties on a construction of his notice which contradicts its plain terms.'

[49] c. f. Lord Denning in *Morgan v. Fry* (1968) 3 All England Reports 452 at p. 457: 'but if the 'strike notice' is not of a proper length – if it is shorter than the legal period for termination – then it is unlawful.'

[50] The British Royal Commission Report, *Op. Cit*, paragraph 948.

The view that strike notice suspends the contract appears to derive some support from *Morgan v. Fry*[51] where the notice of strike was longer than the notice required to terminate the employment contract. Lord Denning thought that "it was not a notice of termination. It was only a notice that the men would not work with non-unionists."[52] The notice was not regarded as a breach of contract and to this extent does not support the view that due strike notice is a breach of contract.[53] Lord Denning concluded that the effect of a strike notice of proper length is to suspend the contract of employment :

> "What then is the legal basis on which a 'strike notice' of proper length is held to be lawful ? I think that it is this. The men can leave their employment altogether by giving a week's notice to terminate it. That would be a strike which would be perfectly lawful. If a notice to terminate is lawful, surely a lesser notice is lawful : such as a notice that 'we will not work alongside a non-unionist.' After all, if the employers should retort to the men : 'we will not accept this notice as lawful', the men can at once say : 'then we will give notice to terminate.' The truth is that neither employer nor workmen wish to take the drastic action of termination if it can be avoided. The men do not wish to leave their work for ever. The employers do not wish to scatter their labour force to the four winds. Each side is, therefore, content to accept a 'strike notice' of proper length as lawful. It is an implication read into the contract by the modern law as to trade disputes. If a strike takes place, the contract of employment is not terminated. It is suspended during the strike : and revives again when the strike is over."[54]

The foregoing survey of the methods of trade union action indicates the wide variety of weapons available to labour to bring pressure upon employers. From the employer's point of view the technique of lock-out has, particularly in societies where there is full employment, lost its effectiveness. Resort to the law by employers is both an expensive and laborious process and is hardly an effective instrument of pressure due to the delays inherent in it. Dismissal is hardly appropriate and in any event ineffective where there is full employment and impossible in a country such as Ceylon were the employer's power to dismiss is strictly circumscribed by the extra-judicial bodies set up under the Industrial Disputes Act.

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51 *Op. Cit.*

52 Ibid., p. 455, See also p. 456.

53 Ibid., at p. 457 : '..... a 'strike notice' of proper length is not even a technical illegality. It is perfectly lawful.'

54 Ibid., at p. 458.