COMMENTS
COMMENTAIRES

LABOUR LAW—SECONDARY PICKETING—PER SE ILLEGALITY—PUBLIC POLICY.—The Ontario Court of Appeal has recently canvassed the tort law of picketing for the first time since the 1930's,[1] having during that period only rarely touched upon the whole field of labour torts.[2] Unlike Rip Van Winkle who woke from his twenty-year slumber to a strange new world, the Court of Appeal appears to have found matters very much as it left them: picketing is tortious.

In *Hersees of Woodstock* v. *Goldstein*[3] the court was faced squarely with the issue of the legality of secondary picketing intended to procure a consumer boycott. Employees of Deacon Brothers Sportswear Ltd. in Belleville, Ontario, were organized by the Amalgamated Clothing Workers of America. Following certification the union attempted, unsuccessfully, to negotiate a collective agreement on their behalf. After exhausting the conciliation procedures required by law the union was free to call a strike, but chose instead to engage in an "educational campaign" designed to persuade potential purchasers of Deacon products to divert their custom to goods manufactured under union working conditions, as evidenced by a "union label". The defendants, union officers, approached retailers to enlist their support in ceasing to deal in Deacon products. Hersees, a menswear store in Woodstock, Ontario, refused, and two pickets appeared in front of Hersees bearing placards which read:

ATTENTION SHOPPERS
DEACON BROS. SPORTSWEAR LTD.
sold at
HERSEES
made by NON-UNION LABOUR
Protect your own standard of living,
look for the Amalgamated
Union Label when you buy men's and
boy's apparel

[1] *Dallas* v. *Felek*, [1934] O.W.N. 247 (C.A.), was the last reported instance.

[2] *Fokuhl* v. *Raymond*, [1949] O.R. 704; *Newell* v. *Barker*, [1949] O.R. 85; *Body* v. *Murdoch*, [1954] 4 D.L.R. 326.

[3] [1963] 2 O.R. 81 (C.A.), rev'g. [1963] 1 O.R. 36.

The reverse of the placard bore the legend: "The Woodstock-Ingersoll & District Labour Council Supports this Campaign", together with a list of ten local unions. There was no allegation of violence, of threats or of the commission of any nominate tort; no employees of Hersees ceased work. On these facts McRuer C.J.H.C. had held the picketing lawful. The Court of Appeal unanimously reversed.

On the facts as found by McRuer C.J.H.C., (i) the plaintiff failed to prove a conspiracy to induce a breach of his contract with Deacon Bros.;[4] (ii) the plaintiff failed to prove a conspiracy to injure the plaintiff in his trade by establishing a picket line which some customers of the plaintiff would not cross,[5] (iii) the plaintiff failed to establish nuisance.[6] The first and second of these findings of fact were rejected by the Court of Appeal. Finally, as a matter of law, McRuer C.J.H.C. enunciated an analysis of the picketing which was also rejected in the higher court:

> The defendants were exercising a common law right to peacefully communicate information by causing a man to carry a placard with a simple statement of fact on it and an implied invitation to those in sympathy with organized labour to buy only goods bearing the union label.[7]

The Court of Appeal, on the other hand, held secondary picketing to be illegal *per se*.

An understanding of the Court of Appeal's position requires an analysis of each of the points of difference between that court and the court below. Following as it does so closely upon the thorough discussion of the law of secondary picketing by Professor Carrothers,[8] this comment will be confined to the issues raised by the *Hersees* decision rather than to a systematic survey of the entire area.

(i) *Inducing Breach of Contract.*

As has been noted, McRuer C.J.H.C. found that no contract existed between Deacon and Hersees.[9] On a close analysis of the

[4] "There is no material on which I could find such a conspiracy. The plaintiff had no contract with the Deacon Company." [1963] 1 O.R. 36, at p. 38.

[5] "In fact the evidence is quite conclusive that there was no combination motivated by an intention to injure the plaintiff." *Ibid.*, at p. 39.

[6] "On the facts of this case it is not shown that the defendants did anything amounting to an actionable nuisance." *Ibid.*

[7] *Ibid.*

[8] Carrothers, Secondary Picketing (1962), 40 Can. Bar Rev. 57. This excellent article was not referred to by the court, and few of the Canadian decisions therein mentioned were discussed.

[9] *Supra*, footnote 4.

evidence, Aylesworth J.A. (with the concurrence of MacKay and McGillivray JJ.A.) found that such a contract did exist, that the defendants "acting individually at least" sought to induce Hersees to break it, and that "the chief, if not only purpose of the subsequent picketing, was to force appellant's hand in this respect".[10] No doubt because the only material before the appellate court consisted of affidavit evidence, that court was not hesitant in reversing the trial judge's findings of fact,[11] although it should be noted in passing that the language of Hersee's affidavit stopped short of an allegation that an actual contract existed.[12]

Even assuming the existence of a contract between Hersees and Deacon Bros., Aylesworth J.A.'s technique of imposing liability requires scrutiny. The often-cited[13] formula enunciated by Viscount Simon in the *Crofter* case affords a convenient point of departure:

> If C has an existing contract with A and B is aware of it and if B persuades or induces C to break the contract with resulting damage to A, this is, generally speaking, a tortious act for which B will be liable to A for the injury he has done him. In some cases, however, B may be able to justify his procuring of the breach of contract.[14]

First, and most obviously, Aylesworth J.A. has committed a serious error in "judicial algebra".[15] If "C", in the instant case, is Hersees, "B" is Goldstein, the defendant, and "A" is Deacon Bros. B (Goldstein) is thus liable not to C (Hersees) but rather to A (Deacon), if to anyone. Aylesworth J.A.'s reasoning, on this limb of the case, would have had the effect of having given Johanna Wagner a cause of action in *Lumley* v. *Gye*[16] because she yielded to the blandishments of Gye. No case of which I am aware gives the contract breaker a cause of action merely because the defendant has induced or persuaded him to break a contract; it is rather the

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[10] [1963] 2 O.R. 81, at p. 84.

[11] *Cf. Donnelly* v. *Chittick* (1953), 31 M.P.R. 240 (N.B.C.A.), where the trial judgment was based on the reading of a transcript.

[12] Paragraph 3 of the affidavit of William Hersee, manager of the plaintiff company, reads as follows: ". . . Mr. Clair [a defendant union official] asked if our firm did business with Deacon Brothers Limited of Belleville to which I replied that we did. Clair then asked me to cancel any orders we had with Deacon Brothers Limited because Deacon Brothers Limited was not co-operating with a branch of the Amalgamated Clothing Workers of America (C.L.C.). *At the time he made the request our firm had no orders with Deacon Brothers Limited of Belleville.* Clair said that if we did not so co-operate he would arrange to picket our store. I did not accede to his suggestion." (emphasis added.)

[13] See *e.g. Thomson* v. *Deakin*, [1952] 1 Ch. 646, at pp. 682, 691; *Smith Brothers* v. *Jones*, [1955] O.R. 362, at p. 369. Aylesworth J.A. relied on *Smith Brothers* v. *Jones*, see *supra*, footnote 10, at p. 85.

[14] *Crofter* v. *Veitch*, [1942] A.C. 435, at p. 442 (H.L.).

[15] *Ibid., per* Viscount Simon L.C., at p. 446.

[16] (1853), 2 E. & B. 216, 118 E.R. 749 (Q.B.).

innocent party to the contract who may then sue. On the other hand, if the defendant has, by the exertion of illegal pressures, forced (rather than induced) the plaintiff to break a contract, then the basis of relief is the tortious nature of those pressures and not "inducing breach of contract". In such circumstances, loss of contractual benefits is merely an item in the calculation of damages. In *Hersees*, however, there was no allegation that the picketing involved any tortious acts such as assault, intimidation or defamation upon which to found liability.

Moreover, Aylesworth J.A. stops short of an express finding that Hersees was actually forced to breach the contract with Deacon in the sense envisaged in the leading case of *Thomson* v. *Deakin:*

> Thus if X, with knowledge and intention, forced A to break his contract with B by depriving A of his only possible means of performing the contract (as for example by removing the only available essential tools or by kidnapping a necessary or irreplaceable servant or by persuading a necessary and irreplaceable servant to break his contract) then probably in such cases the liability of X could be proved.[17]

In *Hersees* the picketing undoubtedly had the effect of bringing some economic pressure to bear upon Hersees to cease dealing in Deacon merchandise. The placards were intended to persuade customers not to buy goods without the union label rather than to cease to deal with Hersees generally although, as Aylesworth J.A. pointed out, the visual impact of the placards might create in the careless observer the impression that Hersees itself was under attack. The real legal significance of the picketing, however, stems from "judicial notice" that a picket line is so effective to bring pressure to bear upon Hersees that it would have to yield to the union's demands and break its contract with Deacon.

> In this day and age the power and influence of organized labour is very far indeed from negligible. "Loyalty to the picket line" is a credo influencing a large portion of any community such as the City of Woodstock with its own District Labour Council and numerous member unions; nor does the matter rest there, for doubtless to many private citizens not directly interested in the labour movement the presence of pickets before business premises is a powerful deterrent to doing business at those premises . . . .[18]

But even assuming that every prospective customer of Hersees was so careless as to misread the placard, was either so sympathetic

[17] *Supra*, footnote 13, at p. 702.

[18] *Supra*, footnote 10, at p. 85. In fact, organized labour in Woodstock and vicinity does represent about ten per cent of the population. The Woodstock and District Labour Council represents some 3,500 organized workers (O.F.L. figures) in a population of 34,541 in the three towns within its jurisdiction, Woodstock, Ingersoll and Tillsonburg (1961 census).

or so timid as to respect the picket line unthinkingly, is this the sort of pressure referred to in *Thomson* v. *Deakin?* It would seem, rather, that to attract liability under the test of that case the defendant must have made performance of the contract physically impossible. Merely putting one of the parties to economic loss would not seem to suffice. Thus, Evershed M.R. stated that a defendant who deliberately purchased all the goods of the type which A was to sell to B so that A could not perform was not acting tortiously.[19] If, instead, the defendant persuaded all potential sellers of the goods not to sell to A, he likewise would prevent performance of the contract but would not be liable to B. Similarly, if the union persuaded the public to cease buying Deacon products whereby the disappearance of Hersees' retail market renders impossible (or, at least, unprofitable) performance of an agreement to order goods from Deacon, no liability should attach. That pressures, not in themselves unlawful, can lawfully be brought to bear upon one party to a business relationship with the intention of injuring the other seems clear from high Canadian authority as well.[20] There was (on this limb of the case) no allegation and no finding that an appeal to the public to withhold custom was in itself illegal means employed to interfere with the relationship between Deacon and Hersees. Such a finding, of course, would place a bar sinister on every picket sign and make even primary picketing unlawful.

Finally, Aylesworth J.A. completely ignores the issue of justification alluded to in the *Crofter* case by Viscount Simon. The traditional reluctance of the courts to find justification for inducing breach of contract[21] does not excuse a complete failure to advert to the problem. Whether, on the facts of the instant case, justification existed can best be discussed under the head of conspiracy to injure.

(ii) *Conspiracy to Injure.*

McRuer C.J.H.C. had held:

> The evidence does not establish that there was "a predominant motive in the minds" of the defendants to injure the plaintiff as distinct from the "main object of benefiting themselves" by seeking to advance the interests of their trade union (*Crofter* case, p. 436). In fact the evidence is quite conclusive that there was no combination motivated by an intention to injure the plaintiff.[22]

[19] *Supra*, footnote 13, at p. 680.
[20] *Newell* v. *Barker*, [1950] S.C.R. 385.
[21] See Arthurs, Tort Liability for Strikes in Canada (1960), 38 Can. Bar Rev. 346, at p. 375 *et seq.*; Carrothers, Secondary Picketing, *op. cit.*, footnote 8, at p. 66.
[22] *Supra*, footnote 4, at p. 39.

While Aylesworth J.A. (with whom McGillvray J.A. concurred) declined to disturb this finding, MacKay J.A. expressly held that "the actions of the defendants in this case constituted an unlawful conspiracy to injure the plaintiff in his trade".[23] MacKay J.A. believed, no doubt accurately, that although the defendants might properly have sought to persuade Hersees to sever relations with Deacon, the act of picketing was intended as a reprisal for Hersees' failure to do so. Citing Viscount Simon's definition of conspiracy to injure in *Crofter*[24] he was unable to discern in the union's conduct any legitimate self-interest:

> I find it difficult to see any benefit to the employees of Deacon Brothers in the dissemination of information to the public in the City of Woodstock and, in any case, if that could be said to be the object of the picketing, such object could have been accomplished much more effectively than by having pickets march up and down a small section of the street in front of the plaintiff's place of business.[25]

He therefore concluded that the defendants' motive was to injure the plaintiff. As a matter of law the learned judge's approach seems to be framed as a direct confrontation of Viscount Simon who had said,

> [I]t is not for a court of law to consider in this connection the expediency or otherwise of a policy adopted by a trade union.[26]

MacKay J.A. then approached the question on the basis that even if secondary picketing might be justified as furthering the interests of Deacon employees,

> I think the situation here is somewhat analogous to the rule followed by the courts in cases where relevant evidence which is of small probative value to the one party, and is greatly prejudicial to the other party, is excluded in the interests of justice and fairness . . . . [I]n my view, the benefit to the employees of Deacon Brothers would be negligible compared to the harm that would be done to the plaintiff in its business.[27]

Viscount Simon, as if with some premonition of MacKay J.A.'s judgment, rejoins:

> Neither can liability be determined by asking whether the damage inflicted to secure the purpose is disproportionately severe: this may throw doubts on the bona fides of the avowed purpose, but once the

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[23] *Supra*, footnote 10, at p. 88.

[24] *Supra*, footnote 14, at p. 443: "If . . . the real purpose of the combination is the inflicting of damage on A as distinguished from serving the *bona fide* and legitimate interests of those who so combine, then if damage results to A, the act is tortious."

[25] *Supra*, footnote 10, at p. 89.

[26] *Supra*, footnote 14, at p. 447; see also Lord Wright, at p. 472.

[27] *Supra*, footnote 10, at p. 90.

> legitimate purpose is established, and no unlawful means are involved, the quantum of damage is irrelevant.[28]

This imagined judicial dialogue across space and time merely serves to focus attention on the potential divergence of judicial approaches which makes the common law a poor substitute for legislation in the regulation of labour controversy.[29]

Conspiracies are tortious if they inflict damage upon the plaintiff by unlawful means or for an unlawful purpose. In view of his reliance upon the illegality of the defendants' purposes rather than means, MacKay J.A. is obliged to answer the same question that Aylesworth J.A. neglected to pose in dealing with inducing breach of contract: is the defendants' conduct justified?

While traditionally justification in inducing breach cases has been narrowly circumscribed, the opposite is true of conspiracy. As Lord Wright stated in *Crofter:*

> English law . . . has for better or worse adopted the test of self-interest or selfishness as being capable of justifying the deliberate doing of unlawful acts which inflict harm, so long as the means employed are not wrongful.[30]

In *Hersees* the union's "predominant" purpose[31] vis-à-vis the neutral retailer was to procure a rupture of his relationship with the primary employer, Deacon, and thereby to pressure Deacon into making concessions in collective bargaining. This tactic, it must be remembered, was employed by the union as a substitute for a strike. Collective bargaining demands, then, rather than spite motivated the union's action; collective bargaining is the cornerstone of our labour legislation. In concluding, as he does, that the union's purpose is unlawful MacKay J.A. fails to apply to the purpose limb of conspiracy the statutory yardstick which the courts have developed in evaluating the legality of means.[32] Surely liability for conspiracy, if any, would have been more securely founded had the union's means rather than its purposes been proscribed.

(iii) *Nuisance.*

Neither Aylesworth nor MacKay JJ.A. disturbed the trial judgment insofar as it related to nuisance. *Williams* v. *Aristocratic Restaurants*[33] appears to be tacitly accepted as signalling the end

[28] *Supra*, footnote 14, at p. 447.
[29] See Arthurs, *op. cit.*, footnote 21, at p. 391 *et seq.*, and Carrothers, *op. cit.*, footnote 8, at p. 75 *et seq.*
[30] *Supra*, footnote 14, at p. 472.
[31] *Ibid.*, at p. 478.
[32] See *e.g. Therien* v. *Teamsters*, [1960] S.C.R. 265; *Gagnon* v. *Foundation Maritime*, [1961] S.C.R. 435.
[33] [1951] S.C.R. 762. McRuer C.J.H.C. referred explicitly to the state-

of judicial treatment of picketing as nuisance *per se*, and as focusing attention on a factual evaluation of the conduct in each case. While the recent British Columbia decision in *Zellers'* v. *Retail Food & Drug Clerks Union*[34] may herald the renewal of judicial preoccupation with the landowner's interests as opposed to an evaluation of labour conduct, *Hersees* at least does not rest on this narrow premise.

(iv) *Picketing, Public Policy and Per Se Illegality.*

The real significance of *Hersees* v. *Goldstein* lies not in the analysis of the traditional tort doctrines, but rather in the bald assertion by Aylesworth J.A. that secondary picketing is "illegal *per se*".[35] In what can only be described as a leap of faith from social premise to legal result Aylesworth J.A. makes an extraordinary pronouncement:

> But even assuming that the picketing carried on by the respondents was lawful in the sense that it was merely peaceful picketing for the purpose only of communicating information, I think it should be restrained. Appellant has a right lawfully to engage in its business of retailing merchandise to the public. In the City of Woodstock where that business is being carried on, the picketing for the reasons already stated, has caused or is likely to cause damage to the appellant. *Therefore*, the right, if there be such right, of the respondents to engage in secondary picketing of appellant's premises must give way to appellant's right to trade . . . .[36]

There can seldom have been judicial language so pregnant with meaning as the word "therefore" which propels the learned judge across the chasm which yawns between premise and result. To bridge this chasm, he tenders two, interrelated, lines of exegesis upon his basic text "therefore".

First, he notes, that the union's right to engage in secondary picketing,

> . . . assuming it to be a legal right, is exercised for the benefit of a particular class only while [Hersees'] is a right far more fundamental and of far greater importance, in my view, as one which in its exercise

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ment of Kerwin C.J.C. at p. 780: "Picketing is a form of watching and besetting but that still leaves for decision in each case, what amounts to a nuisance." See also *Nipissing Hotel* v. *Hotel etc. Employees Union* (1963), 38 D.L.R. (2d) 675 (Ont.).

[34] (1963), 36 D.L.R. (2d) 581 (B.C.C.A.). Picketing of a retail merchant in a shopping centre was enjoined as an interference with the easement enjoyed by the plaintiff and its customers, to pass over a parking lot and passageway owned by the landlord and used by all merchants in the shopping centre.

[35] *Supra*, footnote 10, at p. 88.

[36] *Ibid.*, at p. 86 (italics added). MacKay J.A. makes a virtually identical statement at p. 90 in his discussion of conspiracy.

> affects and is for the benefit of the community at large. If the law is to serve its purpose then in civil matters just as in matters within the realm of the criminal law, the interests of the community at large must be held to transcend those of the individual or a particular group of individuals.[37]

This passage in turn poses a host of problems: is the communication of information or the exercise of the right of "free speech" through picketing in the interest only of the speaker—or as well in the interest of the public to whom the message is addressed? If, as Aylesworth J.A. noted,[38] picketing will cause members of the public to withdraw or withhold custom, is this not evidence that the public desires to be and is entitled to be apprised of the existence of a labour controversy? On the other hand, Hersees' commercial success does not necessarily coincide with "the interests of the community at large";[39] so long as menswear can easily be purchased elsewhere the community may be quite indifferent to Hersees' very existence. Finally, the notion that individual and group interests must always yield to community interest is an affirmation of totalitarian philosophy quite inconsistent with constitutional government: the protection of minorities and dissenters notwithstanding the community discomfort they engender is a cherished tradition.[40] With respect, Aylesworth J.A. does not begin to address himself to any of these questions, which may be a serious omission in view of the fact that the statement quoted seems to be equally applicable to secondary and primary picketing. This consideration apart, the use of the word "therefore" to suggest that there is a self-evident solution to these highly controversial issues can hardly be justified.

Secondly, Aylesworth J.A. cites a number of cases[41] which—although based upon "admittedly unlawful elements such as trespass, intimidation, nuisance or inducement of breach of contract"—yield evidence of "a trend toward if not a positive statement of the principle" that secondary picketing is unlawful *per se*.[42] He

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[37] *Ibid.*, at p. 86. [38] See *supra*, footnote 10, at p. 85.

[39] Aylesworth J.A., in all fairness, is not alone in identifying a particular business interest with the welfare of a community. *Cf.* the classic statement of Charles E. Wilson, former United States Secretary of Defense: "What's good for General Motors is good for the nation."

[40] See *e.g. Boucher* v. *The King*, [1951] S.C.R. 265; *Saumur* v. *Quebec*, [1953] 2 S.C.R. 299.

[41] *General Dry Batteries* v. *Brigenshaw*, [1951] O.R. 522; *Pacific Western Planing Mills* v. *I.W.A.*, [1955] 1 D.L.R. 652; *Patchett* v. *P.G.E.*, [1959] S.C.R. 271; *I.L. & W.U.* v. *Pacific Coast Terminals* (1959), 21 D.L.R. (2d) 249; *Dusessoy's Supermarkets* v. *Retail Clerks Union* (1961), 30 D.L.R. (2d) 51.

[42] *Supra*, footnote 10, at p. 87.

places particular emphasis upon *Patchett* v. *Pacific Great Eastern Railway*[43] where the Supreme Court of Canada declined to hold a railway liable for its failure to provide railway services to the plaintiff. The failure was attributable to the existence of a secondary picketline on plaintiff's private rail siding which the train crew declined to cross. Because of the tortious conduct of the pickets (including illegal trespass on the plaintiff-shipper's premises) the court was obviously justified in assuming that the picketing was illegal apart from the issue of secondary pressure: it would equally have been illegal had it been primary picketing. Nonetheless Aylesworth J.A. states:

> . . . these condemnations of the secondary picketing as being illegal do not appear in a context which suggests that they are based upon the inclusion in the picketing of the extrinsic unlawful elements . . . and I view them as declaring secondary picketing to be illegal *per se*.[44]

Since the basis of the judgment was the failure of the plaintiff-shipper to furnish the defendant-railway "reasonable means of access"[45] by removing the trespassing pickets from its rail siding, the case can hardly be viewed as authority for the broad proposition for which Aylesworth J.A. cites it.

As for the other cases cited—and several others not cited[46]—they do in fact evidence unanimous judicial antipathy to secondary pressures. Squarely put, the question then arises as to whether there is such a thing as *per se* illegality in the absence of any of the specific torts upon which each of those earlier cases rested. The conclusion on this limb of the learned judge's reasoning is that because other judges have always proscribed secondary picketing on the particular facts before them, "therefore" all secondary picketing is always unlawful. *Quaere* whether judicial antipathy outlaws conduct not otherwise unlawful?

Picketing to procure a consumer boycott is a traditional tactic which has been employed as a sanction by a variety of non-labour groups engaged in arousing public opinion for social, political, religious or economic ends.[47] The *Hersees* judgments do not appear

[43] *Supra*, footnote 41. [44] *Supra*, footnote 10, at p. 88.

[45] *Patchett* v. *P.G.E.*, *supra*, footnote 41, at p. 277, *per* Rand J. The learned judge concluded his reasons for judgment by stating: "It should not be necessary, but to prevent any misconception of implication from these reasons, I add this: the only question dealt with is the duty of the railway toward the company in the precise situation presented." *ibid.*, at p. 278.

[46] *Verdun Printing* v. *L'Union Internationale des Clicheurs*, [1957] Que. S.C. 204; *Sauvé Frères* v. *Amalgamated Clothing Workers*, [1959] Que. S.C. 341; *Bourrassa* v. *U.P.W.A.*, [1961] Que. S.C. 604; *Coles Bakery* v. *Bakery etc. Workers* (1962), 36 D.L.R. (2d) 772 (B.C.S.C.).

[47] Comment, Use of Economic Sanctions by Private Groups (1962), 30

to draw a line between the act of picketing and that of boycotting[48] and may conceivably be read as forbidding both. So to hold would not merely forbid labour unions to engage in activity frequently practised by other groups, but would also outlaw a tactic which was sanctioned in one of the earliest labour cases to come before the Ontario courts.

Schrader v. *Lillis*,[49] ironically, involved almost the exact converse of the *Hersees* dispute. In that case members of an association of cigar manufacturers had instituted a defensive boycott, and entered into an agreement to refrain from handling goods which bore a union label, and to refuse to run "union shops"; the purpose of this boycott was to bring striking cigar workers to terms. Upon breach of this agreement by one of their number, the remaining employers sued to recover the penalty provided. The defendant unsuccessfully pleaded that such boycotts were agreements in restraint of trade and consequently unenforceable as contrary to public policy. In rejecting this argument Proudfoot J. viewed the situation differently than did the court in *Hersees*. Instead of merely stating that trade was in the public interest and that any limitation on trade was necessarily illegal, he noted:

> If the manufacture of cigars be a matter of public benefit, a trade in which the public are interested, this agreement does not interfere with it, except so far as the small portion of the public comprising the [unionized] cigar makers are concerned, and they cannot complain, for they are themselves the cause of the difficulty. And even with regard to them they will not be deprived of the enjoyment of a cheap luxury, as there are other manufacturers who employ only union men and use union labels, so that the public interest would not appear to be injuriously affected by the agreement.[50]

Nonetheless, it is submitted that the approach of Proudfoot J. also leaves much to be desired in the context of contemporary labour relations. Today when the legislature has not forbidden boycotts and the parties are engaged in "subsidiary action not incompatible with express provisions" [51] of the Labour Relations Act, the judicial

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U. of Chi. L. Rev. 171; Comment, Legal Responsibility for Extra-Legal Censure (1962), 62 Col. L. Rev. 475.

[48] In *Jacobsen* v. *Anderson* (1962), 35 D.L.R. (2d) 746 (N.S.C.A.) the court similarly refused to draw the line between the act of picketing and that of striking. However, in the *Jacobsen* case it was the strike and not the picketing which was illegal, being in contravention of the provincial labour relations legislation.

[49] (1886), 10 O.R. 358.

[50] *Ibid.*, at pp. 366-367.

[51] *Williams* v. *Aristocratic Restaurants*, *supra*, footnote 33, *per* Rand J., at p. 787; appv'd. *Nipissing Hotel* v. *Hotel etc., Employees Union*, *supra*, footnote 33, *per* Spence J., at p. 693.

function is surely not to create a new code of industrial warfare. More especially where the legislature has, at least inferentially, drawn the line between permitted and forbidden conduct should the courts hesitate to intervene.

The wording[52] and legislative history[53] of section 57 of the Ontario Labour Relations Act both indicate that its sponsors intended (a) to forbid picketing in support of illegal strikes,[54] and (b) to forbid picketing directed towards employees rather than consumers.[55] Moreover, in passing section 57 the legislature apparently declined to fully pursue[56] a unanimous recommendation of the 1958 Legislative Select Committee which would have outlawed all picketing at the premises of a neutral employer.[57] Thus, the *Hersees* decision forbids picketing which contravenes neither limb of the expressed statutory policy and makes illegal *per se* what the legislature, by its silence, has declined to do.

Secondary picketing, no doubt, offends the social sensibilities of most of us as citizens. Perhaps it should be totally prohibited; perhaps it should be prohibited only where it engenders difficulties between the neutral employer and his employees. British Columbia[58] has apparently chosen the former course and Newfoundland[59] the latter. In the United States an extremely delicate balance is struck in section 8(b)(4) of the Taft-Hartley Act[60] to which exceptions

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[52] Labour Relations Act, R.S.O., 1960, c. 202, s. 57(1). No person shall do any act if he knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike or an unlawful lock-out. (2) Sub-section 1 does not apply to any act done in connection with a lawful strike or lawful lock-out.

[53] (1960), 2 Ont. Legisl. Ass. Deb. at pp. 2107-2115.

[54] See remarks of the Hon. Minister of Labour, Mr. Daley, *ibid.*, at p. 2110.

[55] *Ibid.*, at p. 2112.

[56] Insofar as secondary picketing of the premises of a neutral employer results in an illegal strike of neutral employees, section 57 was apparently intended to outlaw such activity; see the remarks of the Hon. Minister of Labour, *ibid.*, at p. 2108. However, section 57(2) specifically permits such picketing if done in connection with a lawful strike. Arguably, had the picketing, in *Hersees* caused an unlawful strike of Hersees' employees, section 57(2) would provide no exculpation because there was no strike at Deacon Bros., the primary employer; see Laskin, The Ontario Labour Relations Amendment Act, 1960 (1961-2), 14 U.T.L.J. 116, at p. 120.

[57] Report of the Select Committee on Labour Relations of the Ontario Legislature, 1958, at p. 41. See also Laskin, *op. cit.*, *ibid.*, at pp. 119-120.

[58] Trade-unions Act, R.S.B.C., 1960, c. 384, s.3(1). *Coles Bakery* v. *Bakery etc. Workers*, *supra*, footnote 46, held that employees engaged in a lawful strike were required to confine picketing to the "employer's place of business," and enjoined them from elsewhere distributing handbills or displaying placards which advised the public of the existence of the strike.

[59] Labour Relations Act, R.S.N., 1952, c. 258, (am. S.N., 1959, c. 1), s. 43A.

[60] 29 U.S.C.A., s. 141 *et seq.*; Publ. L. No. 101, 80th Cong., 1st sess. (1947). In a recent case, *Fruit & Vegetable Packers* v. *N.L.R.B.* (1962),

have been expressly provided in section 8(e) in the light of the recognized facts of industrial life in the trucking and garment industries. Merely to state the legislative longitude and latitude of secondary picketing in the United States requires some 750 carefully chosen words—a total which almost equals the sum of reasoning plus result in one of the *Hersees* judgments.

The basic criticism of the *Hersees* judgment, then is not as to the result but as to the method of reaching it. The substantive analysis of the judgments of the Court of Appeal leaves much to be desired. The bold judicial policymaking raises the gravest issues of the proper relationship of court and Commons. To decide the legality of secondary picketing in a *lis inter partes* involving only the union and the neutral retailer is to ignore the complex of competing interests which may be affected: the interest of the defendant union and its members in asserting economic pressure in the primary dispute with Deacon; the interests of members of other unions in refraining from unwittingly giving aid and comfort to Deacon by buying its products; the like interest of sympathizers who are not union members; the interest of Deacon in maintaining sales so as to withstand union pressure; the interest of Hersees *qua* employer in avoiding work stoppages of its employees, and *qua* retailer in preserving an uninterrupted flow of custom; the public interest in preserving historic channels of public persuasion through picketing, and in confining the ambit of economic warfare so as to protect non-belligerents. Each of these interests is legitimate; each deserves to be weighed in the balance of public policy by those authorized to formulate legislation.

Leave to appeal to the Supreme Court of Canada was sought and refused in the *Hersees* case.[61] The judgment of the Court of Appeal thus remains, and will likely continue to remain for many years,[62] as a reminder that common-law litigation is a poor sub-

308 F. 2d 311 (C.A.D.C.) a sharp distinction was drawn between employee-directed and consumer-directed picketing, and only the former was held to fall within the prohibition of section 8(b)(4) of the Taft-Hartley Act. *Per* Bazelon J., at p. 316: "It should be borne in mind that this type of 'do not patronize' appeal to the general public by peaceful pickets is not restricted to labour unions. . . ."

[61] April 23rd, 1963. Material was filed which showed that the union's right to represent Deacon Bros. employees had been terminated on Jan. 7th, 1963, prior to the hearing of the application for leave to appeal. The court apparently felt that this rendered the controversy moot and dismissed the application.

[62] The *Hersees* case reached the Court of Appeal because the interlocutory proceedings, on consent, were treated as a motion for final judgment on the material filed. The requirement (Judicature Act, R.S.O., 1960 c. 197, s. 25) that leave to appeal be obtained in interlocutory proceedings has proven an almost insurmountable barrier to appellate review

stitute for legislative debate in the resolution of deep-rooted social controversies.

H. W. ARTHURS*

* * *

CONSTITUTIONAL LAW—LABOUR RELATIONS—EMPLOYEES OF SUB-CONTRACTOR WORKING ON PROJECTS UNDER FEDERAL JURISDICTION.—A recent decision of the Saskatchewan Court of Appeal in *Bachmeier Diamond and Percussion Drilling Co. Ltd.* v. *Beaverlodge District of Mine, Mill and Smelter Workers' Local Union Number 913*,[1] does little toward a resolution of the continual controversy surrounding the right of a province to legislate validly in respect of workers labouring entirely within a province upon a project that extends outside that province; or upon a project which, though located entirely within a province, is of such widespread importance as to be declared by Parliament to be for the general advantage of Canada.

The litigation arose by way of an application to quash an order of the Saskatchewan Labour Relations Board made on February 22nd, 1962. The Board had ordered that all diamond drillers, runners and helpers of the applicant (but excluding all office staff, managerial personnel and foremen) constituted an appropriate unit of employees for the purpose of bargaining collectively; that the respondent union represented a majority of the applicant's employees in this unit and that the applicant must bargain with this unit.

The application was founded upon three contentions:

(1) that the Saskatchewan Board was without jurisdiction to make this order under sections 91 and 92 of the British North America Act;[2]

(2) that the applicant's work had been declared to be for the general advantage of Canada pursuant to section 18 of the Atomic Energy Control Act;[3] and

(3) that the work of the applicant was covered by section 53 (g) and other provisions of the Industrial Relations and Disputes Investigation Act.[4]

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of labour injunction proceedings in Ontario, and no doubt explains the absence of reported cases since 1934.

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[1] (1962), 35 D.L.R. (2d) 241 (Sask. C.A.).

[2] (1867), 30 & 31 Vict., c. 3

[3] R.S.C., 1952, c. 11.

[4] R.S.C., 1952, c. 152.

There can be little doubt that if the work undertaken by the applicant had been done by Eldorado itself, rather than through a contractor for its benefit, it would have been subject to federal legislation exclusively, even apart from the declaration that Eldorado's activities were for the general advantage of Canada.[5] The Saskatchewan Board, through its hearing the matter at all, must have considered the activities of the applicant sufficiently different and distinct from those of Eldorado to render the declaration by Parliament in respect of Eldorado inapplicable to the applicant. The assertion of jurisdiction in the matter by the Board was of course subject to review by a superior court, and so a certiorari application was made to the Court of Appeal.

The facts in the *Bachmeier* case were simple and straightforward. Eldorado Mining and Refining Limited, a Crown corporation of the Dominion of Canada, operates a mine in the Province of Saskatchewan for the purpose of producing, refining and treating uranium or compounds thereof. The company was incorporated pursuant to the Atomic Energy Control Act and by section 18 of this Act[6] its work is declared to be a work for the general advantage of Canada. Thus exclusive jurisdiction over Eldorado rests with the Parliament of Canada. The Bachmeier company had contracted with Eldorado to do underground diamond and percussion drilling under the direct supervision of Eldorado, for the purpose of developing presently known ore bodies and exploring for new ones.

Section 53 (g) of the Industrial Relations and Disputes Investigation Act, which according to the applicant's contention, applied to its activities in this case, reads as follows:[7]

> 53. Part I applies in respect of employees who are employed upon or in connection with the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada including, but not so as to restrict the generality of the foregoing.
>
> (g) such works or undertakings as, although wholly situate within a province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces.

Culliton J.A., giving the judgment of the Court of Appeal, characterized the issue before him as follows:[8]

[5] See *Pronto Uranium Mines Ltd.* v. *Ontario Labour Relations Board, et al* (1956), 5 D.L.R. (2d) 342 (Ont. H.C.) in which McLennan J. decided in favour of federal jurisdiction under the "peace, order and good government" head of section 91 of the B.N.A. Act in similar circumstances. See also a most interesting review of this case and its implications by Bora Laskin, Q.C., in (1957), 35 Can. Bar Rev. 101.

[6] *Supra*, footnote 3.

[7] *Supra*, footnote 4.

[8] *Supra*, footnote 1, at p. 243.

> If it can be said that the employees of the applicant company are employed upon or in connection with the operation of any work, undertaking or business of Eldorado Mining and Refining Ltd., then jurisdiction to certify the respondent union as bargaining agent rests with the Board constituted under the Dominion legislation and not with the Labour Relations Board constituted by the Trade Union Act, R.S.S. 1953, c. 259.

His lordship then remarked that simply because the Bachmeier company was under contract to Eldorado does not of itself bring the Bachmeier company under federal jurisdiction. He felt that only a company doing work which is an integral part of or necessarily incidental to the undertaking of Eldorado would be subject to federal jurisdiction, for which proposition he cited the case of *Reference re Validity of Industrial Relations and Disputes Investigation Act*.[9] The court held that the evidence before it was inadequate to justify a finding that the work of the Bachmeier company's diamond and percussion drilling activity was either an integral part of or necessarily incidental to the undertaking of Eldorado. The court did state, however, that there might well be evidence which, if presented, would show that the activities of the Bachmeier company were an integral part of Eldorado's undertaking, but such evidence had not been produced for consideration.

Culliton J.A. quoted from the affidavit of George L. Bachmeier, managing director of the applicant as to the relationship of his company with Eldorado, to the effect that the work would consist of

> . . . core and percussion drilling in the aforesaid mine . . . and for the purpose of developing present known bodies of uranium ore and exploring for present known bodies of uranium ore and exploring for presently unknown bodies of uranium ore.

With all due respect, it is difficult to conceive of such work as that outlined by Mr. Bachmeier for the account of Eldorado not meeting the test established by the court of being "an integral part of or necessarily incidental to" Eldorado's undertaking. This work could have served absolutely no other purpose and in my view, constituted the very essence of mining activities in the area in question. Clearly, mining the ore out for concentrating and milling could not proceed unless the work done by the applicant was carried out. If this work had not been done by employees of the applicant, it would most assuredly have been done by employees of Eldorado in the normal course of mining operations. Perhaps Mr. Bachmeier could have elaborated further in his affidavit upon the link between the work

[9] [1955] 3 D.L.R. 721 (S.C.C.).

done by the applicant and the work done by Eldorado, and clearly the court felt that he should have, but it would certainly appear from his affidavit that his point had been made and that there was little sense in belaboring the obvious.

The decision in this case is not compelling, since the court itself adumbrated a decision for the applicant if evidence from a responsible officer of Eldorado, or a copy of Eldorado's contract with the applicant had been submitted for consideration. It is unfortunate nevertheless that a decision in circumstances such as those in the *Bachmeier* case should raise any doubts whatever as to the application of federal legislation to them.

The applicant sought no further redress from the courts, since the Saskatchewan Labour Relations Board later became convinced that the undertaking of the applicant did in fact "form an integral part of or was necessarily incidental to the undertaking of Eldorado", and therefore rescinded its previous certification order in favour of the respondent. Thus the applicant had no cause to proceed with further litigation in the matter since it had obtained the remedy it desired from another source.

The decision of the Supreme Court of Canada in *Reference re Validity of Industrial Relations and Disputes Investigation Act*,[10] to which reference was made by Culliton J.A. in the *Bachmeier* case, involved the Eastern Canada Stevedoring Company Limited, which was incorporated under the Companies Act.[11] Its employees in Toronto were engaged in providing stevedoring services for loading and unloading ships. All of the ships owned by the companies with contracts with Eastern Canada Stevedoring worked on regular schedules between ports in Canada and ports outside of Canada. The court had to decide whether or not the stevedoring company was subject to section 53 of the Industrial Relations and Disputes Investigation Act, having regard for the functions which it performed. Subsection (a) of this section provides that the following are subject to federal control:[12]

> (a) works, undertakings or businesses operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada;

The court held that the fact that the stevedoring company was independent of the steamship companies did not affect the matter under this Act at all. No distinction could be found between the

[10] *Ibid.*
[11] R.S.C., 1952, c. 53.
[12] *Supra*, footnote 4.

employees under consideration and those doing similar work who were employed directly by any of the shipping companies whose ships ply between ports within and outside of Canada, and who are clearly within the purview of this Act and its power to control navigation and shipping.

Kerwin C.J.C., in the ruling judgment in the case, was of the opinion that:

> It is not to be presumed that Parliament intended to exceed its powers: . . . and therefore, the Act before us should not be construed to apply to employees who are employed at remote stages but only to those whose work is intimately connected with the work, undertaking or business.[13]

Rand J. disagreed with the disposition of the case proposed by the other members of the court, stating:

> But it would, in my opinion, be an unwarranted encroachment on provincial powers to extend the scope of shipping in the application of section 53 to crews of vessels engaged in strictly local undertakings or services, including fishing fleets and craft engaged primarily in intra-provincial carriage. Subject to that limitation, the Dominion authority under section 91 (10) comprehends all shipping.
>
> No attempt was made to adduce evidence that the organization of labour, either in relation to the crews of local shipping or to terminal service, had become so exclusive and consolidated, so uniform in action, and so implicated in trade and shipping as to bring about a new and dominating national interest in those matters. If that had been so, its relation to residual powers as well as to shipping would have had to be examined.[14]

Kellock J., in concurring with the conclusion reached by a majority of the court, observed:

> In my view the words "in connection with" . . . are not to be construed in a remote sense but as limited to persons actually engaged in the operation of the work, undertaking or business which may be in question.[15]

Mr. Justice Kellock went on to state that since lines of steam or other ships are under the control of Parliament pursuant to section 92(10)(a)(b) of the British North America Act and since navigation and shipping under section 91 (10) of the same Act include the loading and discharge of all shipping, the stevedoring for an inter-provincial or international shipping line, whether done by its own employees or by those of a contractor working for such a line, is under federal control because it is an integral part of the operation of steamship lines.

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[13] *Supra*, footnote 9, at p. 730.
[14] *Ibid.*, at p. 746.
[15] *Ibid.*, at p. 748.

The other side of the jurisdictional coin is shown clearly in *C.P.R.* v. *Attorney General of British Columbia, et al.*[16] In that case it was held by the Judicial Committee of the Privy Council that the Hours of Work Act,[17] which provided for an eight hour day and a forty-four hour work week, *inter alia*, did apply to employees of an hotel which, though owned and operated by the Canadian Pacific Railway in connection with its transportation system, was also open to the public generally and was not devoted exclusively or even principally to the benefit of travellers on the Canadian Pacific Railway system. The Privy Council held that the hotel was not a part of the railway works and undertaking of the railway company connecting British Columbia with other provinces within the extended meaning of head 10 (a) of section 92 of the British North America Act, so as to be excepted from provincial legislative authority and therefore brought under Dominion legislative power under head 29 of section 91, but was a separate undertaking. The Privy Council concluded that the hotel could not be considered as a part of the railway undertaking connecting British Columbia with other provinces although the operation of the hotel is within the statutory powers of the Canadian Pacific Railway. Further, there was no general declaration that the hotel was a work for the general advantage of Canada under section 92 (10)(c) of the British North America Act, and consequently the provincial legislation affecting hours of work did apply to employees of the hotel.

Boyd Co. Ct. J. for the Vancouver County Court of British Columbia, faced an issue very similar to that in the *Bachmeier* case when he decided *Cant* v. *Canadian Bechtel Ltd.*[18] The plaintiff claimed overtime pay for work done by him, pursuant to the Male Minimum Wage Act[19] and orders made thereunder. The plaintiff was employed as a rodman in the conduct of certain pipeline surveying work which he executed entirely in British Columbia. The defendant company, which employed Cant, had contracted with Trans Mountain Oil Pipe Line Co. to become the exclusive managers, designers and engineers of a pipeline project commencing in Alberta and terminating in British Columbia. Whereas Trans Mountain was clearly subject to the exclusive jurisdiction of Parliament, the plaintiff claimed that the defendant was not in the same position vis-à-vis wages and hours of work at least.

The court found, in the light of the decision of the Supreme Court of Canada in *Campbell-Bennett Ltd.* v. *Comstock Mid-*

[16] [1950] 1 D.L.R. 721 (P.C.). [17] R.S.B.C., 1936, c. 122.
[18] (1958) 12 D.L.R. (2d) 215 (B.C.Co.C.).
[19] R.S.B.C., 1948, c. 220.

western Ltd. and Trans Mountain Pipe Line Co.,[20] that the defendant's surveying activities, wherever executed on this project, were incidental to the construction of the pipeline itself and that as a consequence, the defendant was subject to federal legislation exclusively, even in respect of hours of work and wages, and the provincial Act and Orders could not apply to its employees. In effect, the court stated that even though Parliament had not legislated in respect of hours and wages as they might apply to the plaintiff, so long as he was working upon an undertaking which was found to be incidental to a matter subject to the legislation of Parliament exclusively, any existing provincial legislation in relation to hours and wages in the province in which he worked was totally inapplicable.

But the skein spun by the decisions in favor of federal jurisdiction has got to have a breaking point somewhere short of absurdity. The employees of a caterer serving coffee and lunches to the employees of an interprovincial pipeline or railway concern, are not fulfilling an undertaking which is an integral part of or necessarily incidental to a matter of federal concern, however important the victualling of pipeline or railroad workers may appear. Perhaps the same may be said for a contractor whose employees are engaged in cutting timber to be used in the construction of interprovincial highways or railways. But between the extremes of employees only remotely involved with and certainly not integral parts of undertakings subject to federal control on the one hand, and employees of a contractor intimately involved under a contract with the performance of duties which are clearly subject to federal jurisdiction on the other hand, lies a grey area of considerable breadth in which litigation can be expected to proliferate.

Is the supplier of a peculiar type of pump or compressor which can be provided only by this supplier, subject to federal legislation because his pumps or compressors are necessary to the completion of an interprovincial pipeline? Is the contractor whose employees paint the bridges on the Trans Canada Highway between two points in British Columbia, and without whose efforts the bridges would gradually fall into a state of disrepair and danger, providing a service which is incidental to a federal undertaking and thus subject to federal control himself? Is the contractor who agrees to erect the bunkhouses, power house, headframe, concentrating mill and other superstructures necessary for a mining company incorporated under the Atomic Energy Control Act, a contractor subject to the legisla-

[20] [1954] 3 D.L.R. 481 (S.C.C.).

tion of Parliament exclusively because the structures which he erects are necessarily incidental to the operation of the mine? These questions are typical of the many and varied issues that the courts may have to settle in the no-man's land between provincial jurisdiction and federal jurisdiction over contractors working upon or supplying federal undertakings in any way.

N. J. STEWART*

* * *

TORTS — GRATUITOUS PASSENGER — ONTARIO HIGHWAY TRAFFIC ACT, SECTION 105(2). — Many lawyers will no doubt think that the Ontario High Court has taken a backward step in the recent decision of *Feldstein* v. *Alloy Metal Sales Ltd. and Matthews.*[1] But they need not despair. This decision will not halt the recent surge of development in the struggle to diminish the effect of section 105(2) of the Ontario Highway Traffic Act.[2]

Mrs. Clara Feldstein, through an arrangement with Office Overload,[3] was sent to work as a stenographer for the defendant company Alloy Metal Sales Ltd. for a period of seven weeks. Her salary was paid by Office Overload, which in turn was paid by the defendant company. The hours, conditions and methods of work were dictated by Alloy. At the Alloy Metal Sales office there was an arrangement whereby a company-owned station wagon would be driven uptown and back to the defendant company's office each

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[1] [1962] O.R. 476 (Ont. H.C.), *per* Ferguson J.

[2] R.S.O., 1960, c. 172. The section reads as follows:

"(1) The owner of a motor vehicle is liable for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle on a highway unless the motor vehicle was without the owner's consent in the possession of some person other than the owner or his chauffeur, and the driver of a motor vehicle not being the owner is liable to the same extent as the owner.

(2) Notwithstanding subsection 1, the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, is not liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in, or upon, or entering, or getting on to, or alighting from the motor vehicle."

Subsection (2) was originally enacted in section 11 of S.O., 1935, c. 26; it then became subsection (2) of section 47 of R.S.O., 1937, c. 288 and later subsection (2) of section 50 of R.S.O., 1950, c. 167. Despite its ambiguity no change has been made in the language of the subsection since 1935.

[3] This is a corporation which operates in Toronto that places stenographers into offices usually on a part-time basis. Office Overload charges a fee to the employer and pays the employee an amount somewhat less than this fee after deducting income tax.

day at lunch hour if it was not engaged in other business. A person who worked at the office could use this station wagon to go uptown for shopping or other errands if he was one of the first eight people who signed a list provided for the purpose each day.[4] Mrs. Feldstein signed this list, and was allowed to use the station wagon. While on her way uptown in the station wagon she was injured when it collided with another vehicle due to the negligence of the defendant driver Matthews, who was an employee of the defendant company and who was in the course and scope of his employment. On these facts the court was faced with one seemingly simple issue: did section 105(2) bar the plaintiff from recovery? There were several different theories that could have been utilized by the court to award judgment to the plaintiff. Four of these theories were argued at the trial. All four of them were rejected in turn and the case against Alloy was dismissed.[5]

Probably the weakest argument advanced by counsel for the plaintiff was that the station wagon was a "vehicle operated in the business of carrying passengers for compensation". Thus it was suggested that the plaintiff came within the "exception within an exception" of section 105(2).[6] Although this clause appears to free from the rigour of section 105(2) only a very limited group of situations, it has been broadly construed. In a car-pool "of a commercial nature"[7] where a definite sum of money is paid in return for transportation[8] the courts have allowed recovery to passengers. Although technically this could hardly be called a "*business* of carrying passengers for compensation", in *Ouelette* v. *Johnson*,[9] the Supreme Court recently affirmed the principle of *Lemieux* v. *Bedard*[10] as follows: "One who enters into an agreement to transport other persons in his automobile on a particular journey, in return for payment of an agreed sum of money, and proceeds to

[4] See *Feldstein* v. *Alloy*, *supra* footnote 1, at p. 485.

[5] The action against Mr. Matthews was dismissed on consent at the opening of the trial.

[6] See Laidlaw J.A. in *Jurasits* v. *Nemes*, [1957] O.W.N. 166, (1957), 8 D.L.R. (2d) 659 (Ont. C.A.).

[7] See *Ouelette* v. *Johnson*, [1963] S.C.R. 96, *per* Cartwright J., at p. 100. *Csehi* v. *Dixon*, [1953] O.W.N. 238, [1953] 2 D.L.R. 202 (C.A.) was expressly disapproved. See also *Wing* v. *Banks*, [1947] O.W.N. 897 (C.A.); *Dunnigan* v. *Gareau*, [1954] O.W.N. 504 (alternative holding); *Demianiw* v. *Zinkewich*, [1953] O.W.N. 121 (Co. Ct. J., Alta.); *Smith* v. *Steeves* (1958), 41 M.P.R. 91 (N.B.C.A.) (commercial connotation).

[8] *Chote* v. *Rowan*, [1943] O.W.N. 6, [1943] 1 D.L.R. 339. But see *Turnowski* v. *Turnowski*, 226 N.Y.S. 2d 738 (Supreme Court of King's County) where payment of a brother's hotel bill in return for a drive to a resort did not amount to "*compensation*".

[9] See *supra*, footnote 7.

[10] [1953] O.R. 837, [1953] 4 D.L.R. 252 aff'g. [1952] O.R. 500, [1952] D.L.R. 421.

carry out the agreement, *makes it his business on that occasion* to carry passengers for compensation."[11] In the *Ouelette* case the amount agreed to be paid was not based on the cost of gas or oil but on an amount that one of the passengers had paid to someone else on another occasion.[12]

In a dictum Mr. Justice Cartwright disapproved of *Csehi* v. *Dixon* which disallowed recovery on the basis that the fee paid was arrived at by estimating a portion of the cost of gasoline and oil used by the defendant.[13] His Lordship said that "once it has been determined that the arrangement between the parties was of a commercial nature the manner in which the amount of the fee to be paid was decided upon becomes irrelevant".[14] This interpretation has been extended to include cases where money is paid on only one occasion[15] and even where the plaintiff himself does not pay but other passengers do.[16] If the arrangement is merely a social one or an expense-sharing one, recovery would still probably not be allowed, perhaps even when a lump sum figure was arrived at.[17]

This reasoning seems to have incorporated the contract of carriage theory which was a separate theory before *Lemieux* v. *Bedard*[18] into the exception within an exception theory. But it does seem clear that for this exception within an exception theory to apply, there must be a direct payment of money or money's worth and that this compensation must be the primary object of the defendant.[19] It is not sufficient that some economic benefit is derived by the defendant.[20] The trial judge was on sound ground when he refused to say that this station wagon came within the exception clause in that no money changed hands directly and the prime object of the transportation was not the "compensation".

[11] *Supra*, footnote 7, at p. 100.

[12] *Ibid.*, at p. 99.

[13] *Ibid.*, at p. 100.

[14] *Ibid.* But see *Turnowski* v. *Turnowski*, *supra*, footnote 8.

[15] *Lemieux* v. *Bedard*, *supra*, footnote 10, *per* Pickup C.J.O., at p. 842.

[16] *Bohm* v. *Maurer*, [1958] O.R. 249 (C.A.) aff'g. on other grounds [1957] O.W.N. 373, (1957), 9 D.L.R. (2d) 349.

[17] *Shaw* v. *McNay*, [1939] O.R. 368. See the recent decision in *Johnson* v. *Reisel* (1963), 41 W.W.R. 536 (Man. Q.B.), *per* Campbell J., where a "loose arrangement" to pay four dollars per week was held to be a "convenience acceptable to both parties but not a contract for hire" within s. 99(2) of the Manitoba Highway Traffic Act, R.S.M., 1954, c. 112. The court said that the plaintiff was not a "guest without payment" *re* s. 99(1) since that would require some "social implication". But instead of allowing recovery, it was denied. It is to be hoped that this decision will be reversed on appeal. See also *Neufeld* v. *Prior* (1963), 42 W.W.R. 129 (B.C.S.C.) *per* McInnes J., where there was a joint venture by two salesmen and an expense sharing deal and recovery was denied.

[18] See *supra*, footnote 10.

[19] *Jurasits* v. *Nemes*, *supra*, footnote 6, *per* Laidlaw J.A., at pp. 168 (O.W.N.), 665-666 (D.L.R.).

[20] *Ibid.*

It is submitted, however, that the court could have reasoned that this vehicle was normally used in the business of the defendant company for the transportation of customers and employees and in doing the errands of the company. Although there was no direct money payment in return for transportation in the station wagon there was a more direct economic benefit derived by the company from its use than there was in *Jurasits* v. *Nemes*.[21] In addition, it might fairly have been said that *Jurasits* dealt only with the case of a privately owned vehicle normally used for personal pleasure and that this vehicle was company owned and used continually on company business. Thus, it could be argued that the statement of Laidlaw J. in *Jurasits* was *obiter* dictum.[22] However, on balance, the trial judge was probably wise in refusing to decide *Feldstein* in this way. Perhaps it would have been stretching the wording of the statute too far beyond its already over-extended position.

A stronger theory that was advanced by counsel for the plaintiff was that section 124 of the Workmen's Compensation Act[23] gave Mrs. Feldstein a statutory cause of action. It reads as follows:

> Where personal injury is caused to a workman. . . . by reason of the negligence of his employer or *of any person in the service of his employer acting within the scope of his employment*, the workman . . . have an action against the employer. . . .

This section is in Part II of the Act which applies to persons whose employment is of a casual nature and to industries that are not covered by Part I of the Act.[24] Mrs. Feldstein was engaged in casual work. She was held to be a "workman" as defined in the Act.[25] Alloy Metal Sales was the "employer" of the plaintiff.[26] Mr. Matthews was clearly a "person in the service of his employer acting within the scope of his employment". Thus Mrs. Feldstein should have been entitled to recover on a literal reading of the statute. However in an enigmatic paragraph His Lordship seems to have held that since the defendant *company* was covered by Part I of the Act, Mrs. Feldstein in order to recover had to show that the accident arose out of and in the course of the *plaintiff's* employment.[27] This is clearly wrong. A Part I limitation was applied to a situation where it was not supposed to apply. Part I of the Act is administered by the Workmen's Compensation Board. Under this part, when a workman is injured during the course of his

[21] *Ibid.*
[22] *Ibid.*
[23] R.S.O., 1960, c. 437.
[24] *Ibid.*, s. 123.
[25] See *Feldstein* v. *Alloy Metal Sales*, *supra*, footnote 1, at p. 488.
[26] *Ibid.*
[27] *Ibid.*, at p. 482.

employment in an industry covered by the Act, he may recover compensation from the Board without court action;[28] indeed he is foreclosed from taking court action. Part II of the Act is administered by the courts and not by the Board. It is independent of Part I and covers industries as well as workmen not covered by Part I. Section 124 is in Part II of the Act and creates a cause of action against an employer when one person in his service negligently injures another of his employees.[29] The section does not stipulate that the *injured person* is required to be in the course of his employment. Only the *negligent person* must be in the course of his employment. Indeed, if Mrs. Feldstein was in the course of her employment, she would have been covered by Part I and would have had to claim under that part alone. It was because she was not covered by Part I that she had to commence a court action for compensation under Part II. Strangely enough although statements appear elsewhere in the decision, in which the trial judge seems to have agreed with this interpretation of section 124,[30] he failed to decide the case on this basis.

The trial judge is also clearly wrong when he hints that section 105(2) has obliterated this cause of action.[31] *Harrison* v. *Toronto Motor Car* is explicit in deciding that section 105(2) removed only the newly-created cause of action against an owner *qua* owner, but did not "bar a right of action due to some other relationship".[32] If he is liable as an employer under section 124 of the Workmen's Compensation Act, section 105(2) of the Highway Traffic Act does not extinguish that action.

The third argument advanced had even more merit. In *Dorosz and Dorosz* v. *Koch*[33] it was decided that a baby-sitter's family could recover from the baby-sitter's employer when she was killed while being driven home from work one night due to the negligence of the employer's wife. The court said that there was a term in the contract of employment with the defendant employer providing for safe carriage.[34] This argument which must be distinguished

[28] See ss. 3 and 15 of the Workmen's Compensation Act, *supra*, footnote 23.

[29] See *Humphreys* v. *City of London*, [1935] O.R. 91, *per* Kerwin J., at p. 96. See also dissenting opinion of Roach J.A. in *Kent* v. *Bell*, [1946] O.R. 743.

[30] *Supra*, footnote 1, at p. 482. "I have little doubt that if s. 50(2) [now 105(2)] . . . had not been passed by the Legislature, the plaintiff would have a cause of action against the defendant company . . . ."

[31] *Ibid.*

[32] See [1945] O.R. 1, at p. 13, [1945] 1 D.L.R. 286, at p. 294.

[33] [1962] O.R. 145, (1962), 31 D.L.R. (2d) 179 aff'g. [1961] O.R. 442. Comment, (1962), 40 Can. Bar Rev. 284.

[34] *Ibid.*, at pp. 106 (O.R.), 140 (D.L.R.). See also *Kearney* v. *Livesey*

from the exception within the exception is completely outside the statute. It had its genesis in the broad statement in *Harrison*.[35] In *Feldstein* it was submitted that there was a contract of employment between Mrs. Feldstein and Alloy, the terms of which included the right to a safe station wagon ride uptown on occasion. Thus it was submitted that *Dorosz* was applicable. This argument was rejected by the court. In distinguishing *Dorosz* the trial judge gave a classic example of a distinction without a difference. He said that the station wagon was a "form of convenience which the employees might use. It was in the same class as the use of the chairs in the lounge. It was something given voluntarily, a convenience which the defendant was *in no way required to furnish*. Nothing happened as in *Dorosz* v. *Koch*. Mrs. Feldstein did not say to Mrs. Boyd *that she would not work for the defendant unless the transportation was furnished* as Mrs. Dorosz appears to have said to Mrs. Koch".[36] This notion is a strange and novel one. It seems to require that before a specific term is included in a contract, one of the parties must *require* that the term be included and he must threaten not to enter the contract or to terminate a contract already entered into. There are no cases that require this type of evidence. The *Dorosz* case did not turn on this fact. Granted that the request is evidence of the existence of the term but not the only evidence. Other evidence should suffice. What is important for the formation of a contract is manifestation of consent,[37] not requests, demands, or threats. Often parties to contracts insert clauses for the benefit of other parties without being asked for them. They are nonetheless binding. Indeed, standard form contracts are becoming very common nowadays.[38] A party to one of these contracts might be hard pressed to show that he had required each of these clauses to be inserted or that he would not have entered the contract if any of these terms had not been included. The terms become part of the contract when it is executed. Oral contracts may have terms implied in certain cases.[39] The court should have implied one here. Although the court was entitled to say that there was no evidence that this

(1963), 38 D.L.R. (2d) 290, *per* Haines J. recently affirmed by the Ontario Court of Appeal but not yet reported.

[35] *Supra*, footnote 32 and accompanying text.

[36] *Feldstein* case, *supra*, footnote 1, at p. 485.

[37] See generally, Cheshire & Fifoot, The Law of Contract (5th ed., 1960), p. 19; Williston, A Treatise on the Law of Contracts (3rd Student's ed., 1957), p. 45.

[38] See Cheshire & Fifoot, *op. cit.*, *ibid.*, pp. 22-24; Sales, Standard Form Contracts (1953), 16 Mod. L. Rev. 318.

[39] For example in oral contracts of sale of goods. See *The Moorcock* (1889), 14 P.D. 64 and Cheshire & Fifoot, *op. cit.*, *ibid.*, p. 139 for limitations on this power.

term was part of the contract of employment and that it would not imply one, it did not and merely ignored the *Dorosz* case.

The trial judge went on to confuse the *Dorosz* case with the exception within the exception. He appears to have thought that for *Dorosz* to apply there must have been compensation paid directly in return for the transportation. But that was not done in *Dorosz*. The very importance of *Dorosz* was that the court extended the idea of recovery on a breach of contract theory to cases other than those where money was paid directly for transportation. The court in *Dorosz* found a term in a *contract of employment* providing for safe carriage. The main object of the contract was employment. Transportation was only incidental to that contract. No money was directly paid in return for the transportation. Yet recovery was allowed by the Ontario Court of Appeal. This case is not an example of the application of the exception within the exception; nor is it an example of a simple contract of carriage which was a separate theory for recovery but now may have been incorporated by the *Ouelette* case into the exception within the exception.[40] In *Feldstein* the court should have followed *Dorosz* and said that there was a term in the contract of employment providing for safe carriage and that Alloy was liable on this theory. This decision ought not to be followed by other trial judges since one trial judge cannot bind another.[41] In any event, *Feldstein* conflicts with *Dorosz* and thus *Dorosz* must stand and *Feldstein* must fall.[42]

The fourth argument was probably the most important of all. Alloy Metal Sales should have been liable as master *for* the tort of its servant, Mr. Matthews, committed in the course and scope of *his* employment. Although five different published works are unanimously agreed that this was the effect of *Harrison* v. *Toronto Motor Car*,[43] the Ontario courts have not yet seen fit to agree. However in no case to date did they have to face the issue squarely.[44]

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[40] See text accompanying footnote 18, *supra*.

[41] "Every court is bound to follow any case decided by a court above it in the hierarchy, and appellate courts are bound by their previous decisions". See Cross, Precedent in English Law (1961), p. 5. But see Wells J. in *Dominion Bridge Co.* v. *Carbno* (1961), 29 D.L.R. (2d) 507, at p. 508 where he indicates that he is bound by the Chief Justice of the High Court. It may be that *Feldstein* is *per incuriam*. See *Young* v. *Bristol Aeroplane Co.*, [1944] K.B. 718, Cross, *op. cit.*, p. 138.

[42] See Cross, *op. cit.*, *ibid.*, p. 136.

[43] Wright, (1945), 23 Can. Bar. Rev. 344; Morton, (1958), 36 Can. Bar Rev. 414; Linden, *op. cit.*, footnote 33; Brown and Ball (1962), 2 Osgoode Hall L.J. 322 (student article); Ball, (1963), 2 Osgoode Hall L.J. 530 (student note).

[44] In *Jurasits* v. *Nemes*, *supra*, footnote 6, the employer *himself* was driving and thus there was no issue of vicarious liability *for* the tort of a servant. In *Lexchin* v. *McGillivray*, [1959] O.W.N. 96, (1959), 17 D.L.R.

In *Feldstein* the court was given the opportunity to right its errors of the past but failed to do so. Again it failed to see the argument advanced by counsel and in the above articles. It formulated the argument erroneously as follows: "Section 50(2) [now (105)(2)] is not a bar to the action because the plaintiff was a servant of the defendant Alloy at the time and as a servant she has a cause of action against her master for negligence."[45] Clearly Mrs. Feldstein was not acting in the course of her employment at the time of the accident. If she were, she might have been able to rely on *Duchaine* v. *Armstrong*[46] or claim the benefit of Part I of the Workmen's Compensation Act provisions. She may not have needed the aid of the court. Indeed she would probably have been excluded from court. The argument was and is that Mr. Matthews made Alloy liable vicariously for a tort that he committed during the scope of *his* employment. It is submitted that this was the view of Gillanders J.A. in *Harrison* eighteen years ago and is the present view of all the authors.[47] The court dismissed the argument without understanding it by saying that Mrs. Feldstein was not in the course of *her* employment. This argument should not be confused with the argument based on section 124 of the Workmen's Compensation Act that requires the plaintiff to be a "workman" to come under the Act. The argument based on vicarious liability is wider and would allow recovery by non-workmen and non-employee passengers of the defendant. In the company bus situation all passengers could recover regardless of their employment status. This principle if adopted would be a major victory for the opponents of section 105(2). Therefore there is danger that the court will refuse to go this far in the absence of legislation. At least the issue should be faced. It may be that the court will limit the action to employees or "servants" of the defendant suing for the negligence of fellow servants. If so, this theory would resemble closely the theory

(2d) 408, the driver was not a *servant* of the defendant. See also *Duchaine* v. *Armstrong*, [1957] O.W.N. 251 where a new cause of action was created in favour of a servant against his master based on a misunderstanding of *Harrison*, *supra*, footnote 32.

[45] See *Feldstein*, *supra*, footnote 1, at p. 480. This argument was the one advanced in *Duchaine* v. *Armstrong*, *ibid.*

[46] *Ibid.*

[47] "If the appellant has a cause of action against her master by reason of the negligence of his servant, ss. 2 of s. 47 [now 105(2)] does not take it away even though at the time it arose she was being carried in her employer's motor vehicle", *supra*, footnote 32, at pp. 293-294 (D.L.R.). Compare the headnote relied upon by the later courts in [1945] O.R. 1 with the one in [1945] 1 D.L.R. 286. Mr. Ball argues that this is "clearly" the decision in *Harrison* but in fact it is ambiguous, since in *Harrison* the nurse was within the scope of *her* employment. Thus the statement of Gillanders J.A. could be properly limited to those facts. See footnote 43, *supra.*

advanced in connection with section 124 of the Workmen's Compensation Act. It may be merged with it. Or it may be that the court will limit this argument to the situation where the *plaintiff* is in the course of *his* employment. The court certainly had an obligation to deal with this argument when confronted with it directly.

An argument that was not advanced might have been utilized by the court to find for Mrs. Feldstein. Although the accident did not occur *in the course of* the employment it did *arise out of* the employment. This phrase was used by the court in denying recovery in *Jurasits* when it said that the accident did not occur "*in the course of or arise out of her employment*".[48] The two branches of this statement appear to have different meanings.[49] "*Arise out of*" is a broader phrase than "*in the course of*". In *Dorosz*, Schatz J. at trial held alternatively that the accident there "*arose out of*" the employment though perhaps not "*in the course of*" it[50] thus bringing these facts within the *Harrison* rule as interpreted in *Jurasits*. The Court of Appeal in *Dorosz* did not refer to this theory. It is suggested that this argument is open to the court. *Jurasits* is distinguishable on the facts from *Dorosz*. In *Jurasits* the plaintiff had not yet commenced to work for the defendant when the accident occurred. But in *Dorosz* the work had been completed for the night and had been going on for a time. In *Feldstein*, the plaintiff had already worked several days for the defendants. It is admitted that these distinctions are fine ones, but this is an area where the court seems to relish fine distinctions.[51] It might also have been decided that the *Duchaine* theory of liability *to a servant* could be extended to servants on their lunch hour when transported in company cars.[52]

In conclusion, counsel should not worry needlessly over the *Feldstein* decision. It is out of step with the development that has taken place in this area of the law of torts. In all likelihood the Court of Appeal will overrule it as soon as it gets the opportunity.[53] Other trial judges should refuse to follow this decision since it conflicts with *Dorosz*. It is safe to predict that *Feldstein* v. *Alloy*

[48] See, *supra*, footnote 6, at pp. 169 (O.W.N.), 663 (D.L.R.).

[49] *Cf.* s. 3(2) of the Workmen's Compensation Act, *supra*, footnote 23, where by definition they appear to be the same. See also *Noell* v. *C.P.R.*, [1952] 2 S.C.R. 359.

[50] [1961] O.R. 442, at p. 444. See for a discussion of the different meanings of these words, *Bowers* v. *Hollinger*, [1946] O.R. 526.

[51] See my criticism of the distinction without a difference raised by J. Ferguson in text accompanying footnote 36, *supra*.

[52] So too if on their way to work, but probably not if on their way home, see *Bowers* v. *Hollinger*, *supra*, footnote 50, at p. 532.

[53] Notice of appeal was filed but the case was settled before it was argued in the Court of Appeal.

Metal Sales Ltd. and Matthews will neither halt judicial craftsmanship from continuing to flourish in limiting the scope of section 105(2) nor will it stop the ultimate legislative abolition of the section.[54]

A. M. LINDEN*

* * *

TORTS — NEGLIGENT PUBLICATION OF FALSE STATEMENTS — NATURE OF DUTY OF CARE — PERSONS POSSESSING SPECIFIC SKILLS. — The recent decision of the House of Lords in *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*[1] will compel a re-examination of *Guay* v. *Sun Publishing Co. Ltd.*[2] as a final authority on the question of liability arising from the negligent publication of a false statement.[3] While on the facts *Guay* v. *Sun Publishing Co. Ltd.* may have been correctly decided, it is now apparent that the decision can only be justified on different grounds than those set forth in the judgments.

In *Guay* v. *Sun Publishing Co. Ltd.* the newspaper published an erroneous report that the plaintiff's husband and her children had been killed in an automobile accident. The plaintiff read the report and alleged that she had suffered injuries from grief and shock in consequence. The trial judge held the defendant liable to the plaintiff for the negligent publication of the false report on the basis of *Donoghue* v. *Stevenson.*[4]

On appeal to the British Columbia Court of Appeal the court (O'Halloran J.A. dissenting) held that *Donoghue* v. *Stevenson* had no application to a case of negligent utterance or publication of non-defamatory words. The court reversed the trial judge following *Shapiro* v. *La Morta*[5] and *Balden* v. *Shorter*,[6] both of which decisions held that honest belief in the truth of the statements was a

[54] Abolition was recently recommended in a submission to a Select Committee of the Ontario Legislature: see report of Special Committee of Law Society of Upper Canada (1962), p. 12. The Select Committee however, did not see fit to adopt this recommendation. The "loss insurance" system suggested by the Committee if adopted will however alleviate to a great extent the plight of the gratuitous passenger.

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[1] [1961] 3 W.L.R. 1225 (C.A.), [1961] 3 All E.R. 891 (C.A.), [1963] 2 All E.R. 575 (H.L.).

[2] [1951] 4 W.W.R. (N.S.) 549, [1951] 4 D.L.R. 756 (S.C.B.C.), (1952), 5 W.W.R. (N.S.) 97, [1952] 2 D.L.R. 479 (B.C.C.A.), [1953] 2 S.C.R. 216, [1953] 4 D.L.R. 577 (S.C.C.).

[3] See M. M. McIntyre, A Novel Assault on the Principle of No Liability for Innocent Misrepresentation (1953), 31 Can. Bar Rev. 770.

[4] [1932] A.C. 562, 101 L.J.P.C. 119, 147 L.T. 281 (H.L.).

[5] (1923), 40 T.L.R. 201, 130 L.T. 622 (C.A.).

[6] [1933] 1 Ch. 427, 102 L.J.Ch. 191.

defence. In closing, the court observed that on principle to hold otherwise would impose an intolerable burden on individuals as well as newspapers.

Mr. Justice O'Halloran in his dissenting judgment held that the *Donoghue* v. *Stevenson* concept of the tort of negligence was applicable and that the Court of Appeal should not disturb the decision at the trial because the trial judge had found as a fact that the newspaper owed a duty to the plaintiff not to harm her by negligent publication of the false news item.

In the Supreme Court of Canada the majority decision was in favour of the newspaper. Mr. Justice Kerwin (as he then was) cited with approval *Dickson* v. *Reuter's Telegram Co. Ltd.*[7] and held that no action can be maintained at law for a mis-statement unless that statement is false to the knowledge of the person making it. There may be a distinction, he observed, between cases such as *Candler* v. *Crane, Christmas & Co.*[8] where a person, relying on the statement, proceeds to act upon the negligent mis-statement and, as a consequence, suffers damage and other cases where the mis-statement itself directly causes the damage. There was no need to consider the decision of the English Court of Appeal in *Candler* v. *Crane, Christmas & Co.* because *Guay* v. *Sun Publishing Co. Ltd.*[9] was in the latter category of case. In any event the plaintiff was not a "neighbour" of the newspaper within the meaning of Lord Atkin's statement in *Donoghue* v. *Stevenson.* The plaintiff was not a person so closely and directly affected by the publishing of the report that the newspaper ought reasonably to have had her in contemplation as a person who might be affected injuriously.

Mr. Justice Locke in dismissing the appeal was of the opinion that Baron Parke had correctly stated the law in *Taylor* v. *Ashton*[10] when he said ". . . we are of the opinion that, independently of any contract between the parties, no one can be made responsible for a representation . . . , unless it be fraudulently made" and that *Donoghue* v. *Stevenson* did not touch upon the question to be decided.

Mr. Justice Locke examined such authorities as *Derry* v. *Peek*,[11] *Le Lievre* v. *Gould*[12] and *Nocton* v. *Lord Ashburton*[13] and summed up that innocent mis-statements of fact resulting in damage are

[7] (1877), 3 L.R.C.P. 1 (C.A.).
[8] [1951] 1 All E.R. 426, 2 K.B. 164 (C.A.).
[9] *Supra*, footnote 2.
[10] (1843), 11 M. & W. 402, 152 E.R. 860.
[11] (1889), 14 App. Cas. 337, 58 L.J. Ch. 864, 61 L.T. 265 (H.L.).
[12] [1893] 1 Q.B. 491, 62 L.J.Q.B. 353, 68 L.T. 626 (C.A.).
[13] [1914] A.C. 932, 83 L.J. Ch. 784, 111 L.T. 641 (H.L.).

to be dealt with at law on the same footing as innocent misrepresentations made in the course of contractual negotiations. *Donoghue* v. *Stevenson* had not declared the law on the question of liability for negligent mis-statements nor did it have any application to such liability. Had the Law Lords in *Donoghue* v. *Stevenson* intended to declare a principle of law inconsistent with what had been decided in the House of Lords in *Derry* v. *Peek* and *Nocton* v. *Lord Ashburton* and by the Court of Appeal in *Le Lievre* v. *Gould*, they would have said so in plain terms.

The dissenting judgment of the Chief Justice and Cartwright J., delivered by the latter, in *Guay* v. *Sun Publishing Co. Ltd.*[14] applied the principle of *Donoghue* v. *Stevenson*. There was a duty resting on the newspaper to check the accuracy of the report before publishing it. It was unnecessary to attempt to choose between the view of the court and that of Denning L.J. in *Candler* v. *Crane, Christmas & Co.*[15] for the reason that *Guay* v. *Sun Publishing Co. Ltd.* was not a case where the damage was alleged to have resulted from the plaintiff having been induced to act to his detriment on the faith of the negligent mis-statement but rather it was a case where it was alleged that damage was caused by the statement itself.

The House of Lords in *Hedley Byrne* v. *Heller*[16] was not required to acknowledge that there was a distinction between the two types of case, but it is probable that the contractual-reliance concept of the special relationship giving rise to a duty of care expressed in the speeches of the Law Lords will result in decisions, which will tend to confirm the distinction noted in *Guay* v. *Sun Publishing Co. Ltd.* However, it is to be hoped that the decisions will not proceed on any other ground than that the relationships between the parties either do or do not give rise to a duty of care. In principle, there should be no distinction between the two types of case. Duty, breach of duty, damage and causation of damage are merely questions of fact.

In *Hedley Byrne* v. *Heller* the facts were that National Provincial Bank enquired by telephone of Heller as to the financial position of Easipower Ltd. for which Heller was Banker, in respect of an advertising contract of some magnitude. For the purposes of the appeal it was assumed that the reply given by Heller was negligent.

National Provincial Bank communicated the reply to its customer Hedley Byrne, which, relying on the reference, entered into a contract with Easipower Ltd. and lost £17,000 as a consequence when the latter went into liquidation.

[14] *Supra*, footnote 2. [15] *Supra*, footnote 8. [16] *Supra*, footnote 1.

A fact which assumed considerable significance in the judgments of the Law Lords was that National Provincial Bank prefaced its request with the statement that they understood that the information was to be given in confidence and without responsibility on the part of Heller and the reply given by Heller was prefaced with the words "for your private use and without responsibility on the part of the Bank . . .".

The trial judge had held on the binding authority of *Le Lievre* v. *Gould*[17] that no action lay in the absence of contract or fiduciary relationship. The Court of Appeal followed its own previous decision in *Le Lievre* v. *Gould* and held that there could be no recovery in the absence of contract or fiduciary relationship, neither of which exceptions applied to the present case.

When counsel for Heller was called upon to argue in the House of Lords, he had in his favour the decision of the Court of Appeal (Denning L.J. dissenting) in *Candler* v. *Crane, Christmas & Co.*[18] where the intending purchaser of the business had asked for and obtained from the intending vendor's accountants a financial statement. The financial statement was incorrect and had been negligently prepared. In consequence of reliance upon the financial statement the purchaser completed the transaction and suffered loss. He brought action against the accountants.

When *Candler* v. *Crane, Christmas & Co.* came before the Court of Appeal, the court held that its earlier decision in *Le Lievre* v. *Gould*[19] and the decision of the House of Lords in *Nocton* v. *Lord Ashburton*[20] settled that a negligent mis-statement in the absence of contract or fiduciary relationship gives no right of action at law or in equity. Furthermore, *Donoghue* v. *Stevenson* was not intended to be extended to a case where damages for financial loss as opposed to physical injury, that is property damage or personal injury, are claimed.

Denning L.J. in his dissenting judgment held that *Le Lievre* v. *Gould* was open to review by the Court of Appeal by reason of intervening decisions; that there was a duty as between defendant and plaintiff in the case before him; that there had been a breach of that duty and that there was recoverable damage, there being no logical reason why physical loss could be recovered on the one hand and financial loss could not on the other.

In *Hedley Byrne* v. *Heller*[21] the House of Lords dealt directly with the question as to the circumstances under which a person

[17] *Supra*, footnote 12.
[18] *Supra*, footnote 8.
[19] *Supra*, footnote 12.
[20] *Supra*, footnote 13.
[21] *Supra*, footnote 1.

can recover damages for a financial loss suffered by reason of his having relied upon an innocent but negligent misrepresentation.

The issues in the case were:

a) Did Heller owe any duty to Hedley Byrne?
b) If so, what was the nature of the duty, that is did the duty extend beyond common honesty to a duty of care?

A further question which Lord Devlin referred to as being fundamental was whether or not there could be recovery where the loss flowing from the negligent mis-statement was not physical damage (as in *Donoghue* v. *Stevenson*), but financial damage.

In deciding that Heller was not liable the Law Lords held, in essence:

a) *Donoghue* v. *Stevenson* was not applicable. Lord Pearce expressed it that *Donoghue* v. *Stevenson* could give no help other than by affording some analogy from the broad outlook it imposed on the law relating to negligence.
b) Damages can be recovered for an innocent misrepresentation if made in circumstances such as give rise to a duty of care in the making of the statement. The dictum of Lord Moulton in *Heilbut Symons & Co.* v. *Buckleton*[22] where he said that it was of the greatest importance for the House of Lords "to maintain in its full integrity the principle that a person is not liable in damages for an innocent misrepresentation, no matter in what way or under what form the attack is made" was not impeached by recognition of the fact that if a duty exists there is a remedy for the breach. The breach of the duty is the cause of action; the innocent misrepresentation is not.
c) If there is such a duty of care and if there is a breach of that duty, it is immaterial that the loss is not in the nature of personal injuries or property damage.

In reaching these conclusions the Law Lords:

a) Explained the previous decisions of the House of Lords in *Derry* v. *Peek*[23] and *Nocton* v. *Lord Ashburton*[24] and approved without reservation the dissenting judgment of Denning L.J. in *Candler* v. *Crane, Christmas & Co.*[25]
b) Held that the Court of Appeal decision in *Le Lievre* v. *Gould*[26] proceeded on wrong grounds; and,
c) Made valuable observations as to the circumstances in which it can be said that a duty of care will arise.

[22] [1913] A.C. 30, at p. 51, 82 L.J.K.B. 245, 107 L.T. 769 (H.L.).
[23] *Supra*, footnote 11.
[24] *Supra*, footnote 13.
[25] *Supra*, footnote 8.
[26] *Supra*, footnote 11.

In explaining previous decisions the Law Lords held that *Derry* v. *Peek* had not established any universal rule that in the absence of contract an innocent but negligent misrepresentation cannot give rise to an action but rather that honest belief in the truth of a false statement is a defence to an action for deceit; *Nocton* v. *Lord Ashburton* had not excluded a cause of action in an area where the court can find a special relationship giving rise to a duty of care in the making of the statement.

In over-ruling the Court of Appeal decision in *Le Lievre* v. *Gould* the Law Lords held that Denning L.J. in his dissenting judgment in *Candler* v. *Crane, Christmas & Co.* had been correct. *Le Lievre* v. *Gould* had been decided on wrong grounds. The earlier decision in *Cann* v. *Willson*,[27] the facts of which were in *pari materia* with *Candler* v. *Crane, Christmas & Co.*, had been wrongly overruled by *Le Lievre* v. *Gould.*

In *Le Lievre* v. *Gould*[28] the defendant who was a surveyor gave a certificate to a builder who had employed him. The plaintiffs were mortgagees of the builder's interest and the defendant knew nothing about them or the terms of their mortgage. The builder without the defendant's knowledge chose to show the certificate to the plaintiffs. The certificate was in error. Lord Esher M.R. held erroneously, it now appears, that *Derry* v. *Peek* had restated the old law that in the absence of a contract an action in respect of a negligent statement cannot be maintained unless there is fraud. Lord Reid in *Hedley Byrne* v. *Heller*[29] observed that in his view the actual result of *Le Lievre* v. *Gould* was correct and could be justified on the ground that there was insufficient proximity between the defendant and the plaintiff to establish a relationship giving rise to a duty of care.

In *Cann* v. *Willson*[30] an appraiser was held liable in respect of a negligent valuation made at the request of the owner of the property for the purpose of raising a mortgage. The appraiser put the valuation before the mortgagee and told him that the valuation was moderate and not made in favour of the borrower. The plaintiff relying upon the valuation advanced money to the owner on the security of the mortgage. The owner made default in payment and the property proved insufficient to answer the mortgage. In holding the appraiser liable Chitty J. said: ". . . it seems to me that the defendants knowingly placed themselves in that position and in point of law incurred a duty towards (the plaintiff) to use reasonable care in the preparation of (the valuation)."

[27] (1888), 39 Ch. D. 39, 59 L.T. 723, 57 L.J. Ch. 1034.
[28] *Supra*, footnote 11. [29] *Supra*, footnote 1. [30] *Supra*, footnote 27.

The Law Lords gave considerable assistance in stating the circumstances under which the special relationship giving rise to a duty of care can be said to arise.

Lord Reid rejected the argument that there was not a sufficiently close relationship between Hedley Byrne and Heller to give rise to a duty but he declined to attempt to decide what kind of degree of proximity is required. It was quite immaterial that Heller did not know that the information was to go to Hedley Byrne. The case was to be treated as if the information had been given directly to Hedley Byrne. Lord Morris said that the inference was that Heller must have known that National Provincial Bank was making the enquiry for the reason that some customer of theirs was or might be entering into an advertising contract in respect of which Heller's customer might become under a liability to the party on whose behalf the enquiry was made. The fact that the name of Hedley Byrne was not mentioned to Heller and the fact that National Provincial Bank at the time did not name Heller to Hedley Byrne were not material circumstances.

Lord Morris of Borth-Y-Gest considered that if a person possessed of a special skill undertakes (outside of contract) to apply that skill for the assistance of another person who relies on such skill, a duty of care will arise. The fact that the services are to be given by means of words is immaterial. Furthermore, if in a sphere in which the person is so placed that others could reasonably rely on his judgment or his skill or on his ability to make careful enquiry, a person undertakes to give information or advice or allows his information or advice to be passed on to other persons who as he knows or should know will place reliance on such information or advice, then a duty of care will arise.

Lord Hodson referred with approval to the dictum of Lord Loughborough in *Shiells* v. *Blackburne*,[31] "if a man gratuitously undertakes to do a thing to the best of his skill where the situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence". Lord Hodson observed that it was true that proximity is more difficult to establish where words are concerned than in cases involving other acts and omissions and that mere casual observations are not to be relied on but that these are matters which went to difficulty of proof rather than to principle.

Lord Hodson was of the view that *Woods* v. *Martin's Bank*[32]

[31] (1789), 1 H.Bl. 158, 126 E.R. 94.
[32] [1958] 3 All E.R. 166, [1959] 1 Q.B. 55, [1958] 1 W.L.R. 1018.

was an example of a case involving a special relationship giving rise to a duty of care and that it was unnecessary to strain to find a fiduciary relationship on the facts of that case. In *Woods* v. *Martin's Bank* the defendant bank which had held itself out as being an adviser on investments (which was within the scope of its business), failed to give the plaintiff reasonably careful or skillful advice with the consequence that he suffered loss. Salmon J. held that the defendant was in breach of duty arising out of a fiduciary relationship and so liable in damages even though he was not a customer of the bank at the material time.

Lord Devlin was of the opinion that the categories of special relationships which give rise to a duty of care in word as well as in deed are not limited to contractual relationships or to relationships of fiduciary duty but extend to include relationships which are "equivalent to contract", that is to say, where there is an assumption of responsibility in circumstances in which but for the absence of consideration there would be a contract. The difficulty arises in discerning those cases in which the undertaking is to be implied. Absence of consideration is not irrelevant. Where there is no consideration it is necessary to exercise greater care in distinguishing between social and professional relationships, between those which are of a contractual nature and those which are not. The essence of the matter is whether there is an express or implied undertaking of responsibility, in either of which cases the duty of care will arise. Lord Devlin was of the opinion that the relationship between the parties in *Robinson* v. *National Bank of Scotland*[33] was far too remote to constitute a relationship of a contractual character.

Lord Pearce observed that if the circumstances of a case disclose a casual, social approach to the enquiry, no such special relationship or duty of care can be said to have been assumed. To impart a duty of care the representation must normally concern a business or professional transaction of a nature which makes clear the gravity of the enquiry and the importance attached to the answer. The form of the enquiry and the answer are important circumstances.

Lord Reid held that existing authority made it clear that special relationships giving rise to a duty of care extended to all those relationships where it was plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to

[33] (1916) S.C. (H.L.) 154.

do that, and where the other gave the information or advice when he knew or ought to have known that the enquirer was relying on him.

Dealing now specifically with the issue as to the nature of the duty owed by the defendant in *Hedley Byrne* v. *Heller*,[34] Lord Reid observed that it was difficult to determine just what duty beyond a duty to be honest a banker would be held to have undertaken. National Provincial Bank began the relationship by saying that they were enquiring in confidence and without responsibility on the part of Heller and Heller's reply was couched in similar terms. In consequence, if Heller's duty lay beyond that of giving an honest answer, Heller did not undertake any duty to exercise care in giving the reply.

Lord Morris was of the opinion that Heller owed a duty towards the unknown person represented by National Provincial Bank. The duty was one of honesty. The question was whether there was also a duty of care. There was no duty of care on the part of Heller because it could not be inferred that he undertook before answering the enquiry to expend time and trouble in searching records, studying documents, weighing and comparing the favourable and the unfavourable features and producing a well-balanced and well-worded report and the customer did not expect such a process. This was the kind of relationship referred to by Lord Haldane in *Robinson* v. *National Bank of Scotland*[35] when he spoke of a "mere enquiry" being made of one banker of another. In any event Heller had disclaimed effectively any assumption of a duty of care by the wording of his reply.

Lord Hodson stated that it could not be argued that Heller was seeking, as it were, to contract out of his duty by the use of language which was insufficient for the purpose. The fact of the matter was that Heller had never assumed a duty of care in the first place; Lord Devlin on this point stated that a man cannot be said voluntarily to be undertaking a responsibility if at the very moment he is said to be accepting it he declares that in fact he is not. A party claiming exemption from responsibility undertaken is one thing; a party claiming that he never undertook the duty in the first place is another.

In conclusion, there can be no doubt that this new and authoritative decision of the House of Lords is of the greatest significance. First and foremost, the decision provides a classic example of the growth of English law to meet changing situations over the years;

[34] *Supra*, footnote 1.

[35] *Supra*, footnote 33.

and, secondly, the decision makes it clear that persons possessing specific skills will face liabilities not previously contemplated.

It is apparent that the contractual concept of the special relationship adopted by the House of Lords in *Hedley Byrne* v. *Heller*[36] would enable a newspaper in a fact situation similar to the *Guay* v. *Sun Publishing Co. Ltd.*[37] to escape liability once again. However, for those who are in accord with the growing body of public opinion that newspapers should have a duty of care towards such of its readers as may be affected injuriously by the publication of a false report, there is encouragement to be found in the words of Lord Devlin:

> Cases may arise in the future in which a new and wider proposition, quite independent of any notion of contract, will be needed. There may, for example, be cases in which a statement is not supplied for the use of any particular person . . . ; and it will then be necessary to return to the general conception of proximity and to see whether there can be evolved from it, as was done in *Donoghue* v. *Stevenson*, a specific proposition to fit the case. When that has to be done the speeches of your lordships today as well as the judgment of Denning L.J. to which I have referred . . . , will afford good guidance as to what ought to be said. I prefer to see what shape such cases take before committing myself to any formulation . . . .

Newspapers in Canada now cannot rest easily on the decision of the Supreme Court of Canada in *Guay* v. *Sun Publishing Co. Ltd.*[38] for inevitably there will come a time for the courts of Canada to consider again the question of the liability of a newspaper for the negligent publication of a false statement which results in damage. The fact that the House of Lords has decided that the law is not what the Supreme Court of Canada understood it to be will enable the court to decide that such a re-consideration is possible.

ROBERT J. HARVEY*

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RULE AGAINST PERPETUITIES—OPTION TO RENEW A LEASE—DISTINCTION BETWEEN A PERPETUAL LEASE AND A PERPETUALLY RENEWABLE LEASE.—It is well established by the authorities that a perpetual lease is void for uncertainty[1] while a perpetually renewable lease is not,[2] thus providing an exception to the rule against perpetuities.

[36] *Supra*, footnote 1. [37] *Supra*, footnote 2. [38] *Ibid.*

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[1] Cheshire, Real Property (9th ed., 1962), p. 330. Halsbury's Laws of England (3rd ed., 1958), vol. 23, p. 533.

[2] Halsbury, *op. cit.*, *ibid.*, vol. 29, p. 299.

The cases show that an option to renew, given by the lessor to the lessee, comes within the exception, on the ground that such an option creates a present interest for the lessee.[3]

In *Bridges* v. *Hitchcock*,[4] where a lease was granted for twenty-one years, the lessor covenanted "that if the lessee, his executors, administrators or assigns or any of them should at any time before the expiration of the term be minded to renew and take a further lease, then, upon application, the lessor, his heirs or assigns, shall grant such further lease, under the same rents and covenants only as in this lease". It was held that the lessee was at liberty to renew as often as he should require notwithstanding that this right might be demanded from time to time continually.

In *Hare* v. *Burgess*,[5] by indenture, Paul Lord Methuen granted to Sir John Hare, his heirs and assigns, six acres of land: Habendum to Sir John Hare, his heirs and assigns, for the lives of A, B and C at yearly rent therein mentioned. The lessor covenanted with the lessee, that if upon the decease of either of them, or of A, B or C, the lessee or his heirs or assigns wished to take a renewal lease for another life, and within twelve months after such decease gave notice to the lessor or the person entitled for the time being to the reversion, the lessor, his heirs or assigns should duly execute a renewal lease subject to the same provisoes "including this present covenant". The court held the covenant enforceable as it was in effect a covenant for perpetual renewal.

Sir W. Page Wood, Vice-Chancellor, stated: "The notion of its being objectionable on the ground of tending to a perpetuity is out of the question. The moment any assign of the reversion grants a renewal lease his duty is discharged, and his assets, therefore, are free from any liability."[6]

In *Rider* v. *Ford*[7] Russell J. stated: "It is not disputed that under the authorities a covenant for what is called a renewal of the lease is outside the rule against perpetuities, even if the right to renewal is a right to call for a fresh lease, in terms different from the original."[8]

In Canadian courts a perpetually renewable lease has also been held to be valid.

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[3] Gray, Rule Against Perpetuities (4th ed., 1942), pp. 231-234.
[4] (1715), 2 E.R. 498.
[5] (1857), 70 E.R. 19.
[6] *Ibid.*, p. 24.
[7] [1923] 1 Ch. 541.
[8] *Ibid.*, at p. 546. See also *Woodall* v. *Clifton*, [1905] 2 Ch. 257, where Romer L.J. stated at p. 279: ". . . the fact that a covenant to renew should be held to run with the land has by many been considered as an anomaly, which it is too late now to question, though it is difficult to justify."

Thus in *Auld* v. *Scales*[9] by an indenture of lease the respondent leased to the appellant certain lands for ten years at a rental of twelve dollars *per* annum "provided always that at the expiration of the ten year term hereby demised this demise and everything contained herein shall at the option of the said lessee continue as a demise of the said premises to the said lessee from year to year thereafter at the same yearly rent herein reserved . . .".[10]

Kellock J. did not treat such an option as an exception to the rule against perpetuities but explained it in the following manner:

"In *London and South Western Railway Company* v. *Gomm*,[11] Jessel M.R. approved of certain passages from Lewis *on Perpetuities*, one of which is as follows:

> In other words, a perpetuity is a future limitation whether executory or by way of remainder and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests; *and which is not destructible by the persons for the time being entitled to the property subject to the future limitation*, except with the concurrence of the individual interested under that limitation.

Applying the above to the case at bar, it is clear in my opinion that the option to purchase does not offend against the rule.

> The person for the time being entitled to the property subject to the future limitation,

namely the respondent as owner, may destroy the option by terminating the lease by due notice in accordance with the relevant law without,

> the concurrence of the individual interested under that limitation,

namely the appellant or those claiming under him."[12]

The cases so far dealt with and the authorities cited refer to leases providing for options for perpetual renewals. In no case were there reciprocal covenants for such renewals that would produce, in effect, a perpetual lease and therefore infringe the rule against perpetuities.

Applying the test given by Lewis and quoted with approval by Kellock J. in such a case, the future limitation is not destructible "by the person for the time being entitled to the property subject to the limitation".

A very old authority would seem to support this proposition. In *Say* v. *Smith*,[13] William Norton granted to John Kirton a

[9] [1947] S.C.R. 543.
[10] *Ibid.*, at p. 546.
[11] (1882), 20 Ch.D. 562.
[12] *Supra*, footnote 9, at p. 549.
[13] (1530), 75 E.R. 410.

lease for ten years and it was agreed that at the end of the term the lessee was to pay to the lessor, his wife, their heirs and assigns, 10,000 tiles and by the same indenture it was further agreed that if this sum were paid at the end of ten years, William Norton covenated for himself, his heirs and assigns, that John Kirton, his heirs and assigns, should have a perpetual demise farm, from ten years to ten years continually. It was held by the justices of the Common Bench that this was a good lease for ten years only and that the renewal covenants were bad for uncertainty. Here there were mutual covenants, the lessor covenanting to renew the lease and the lessee covenanting to pay 10,000 tiles at the end of each ten year term.

Gooderham & Worts, Ltd. v. *C.B.C.*[14] also contained mutual covenants to renew. The lease was for three years and it was provided that at the expiration of the term and every succeeding term of three years the lessor would grant a new lease for a further term of three years at the same rental and the lessee covenanted to accept such a new lease, and if no new lease was entered into all terms and conditions of the old lease should continue until termination by the lessor upon one month's notice in writing to the lessee. It was specifically provided that the lessor was under no obligation to grant a new lease unless the lessee had fully observed all covenants. It was further provided that all new leases were to contain similar covenants for renewal and an option to purchase by the lessee.

In the lower court Greene J. held that these terms in the lease gave it the effect of a perpetual lease and was therefore void. On appeal, Henderson J.A. reversed the trial judge and held that this was not a perpetual lease but a lease which provided for successive renewals in perpetuity and was therefore a valid one.

In the Privy Council,[15] this judgment was upheld although it was not necessary for the Board to decide whether or not the lease term amounted to a perpetual lease. In the report it is noted in passing that: "Their lordships agree with the learned judges of the Court of Appeal that clause 12 does not technically convert the lease into a perpetual lease."[16]

In this case it should be noted that while there were covenants to renew both on the part of the lessor and the lessee, the lessor's covenant was a conditional one, dependent on the lessee fulfilling all his obligations under the existing lease. Applying the test given by Lewis to the terms of this lease, it is not entirely out of the hands

[14] [1942] 4 D.L.R. 45. [15] [1947] 1 D.L.R. 417. [16] *Ibid.*, at p. 81.

of the lessor to terminate the lease provided he can find some proof of laxity in the lessee.

In the recent case of *Re Principal Investments Ltd. and Gibson*,[17] the Ontario High Court has broken new ground by holding that even where there are reciprocal covenants to renew, each independent of any conditions, so that in effect a perpetual lease is created, the form of lease cannot be disregarded and the renewal clause falls within the exception to the rule against perpetuities.

This case involved a motion brought on behalf of Principal Investments Limited for a declaration that the covenant for renewal contained in a lease was a perpetually renewable clause and that the renewal term of twenty-one years was for an indefinite number of additional successive twenty-one year terms in perpetuity.

The clause in the lease was as follows:

> And Further that the said Lessor, his heirs, executors, administrators and assigns, will at the end or expiration of the said term hereby granted and of every subsequent term of twenty-one years granted in pursuance of these presents, and whenever the rent for said future term shall have been fixed by arbitration as aforesaid, at the cost and charges of the said Lessee, its successors, as aforesaid, make, execute and deliver unto the said Lessee, its successors and assigns, and that the said Lessee, its successors and assigns will accept a new and further Lease of the hereby demised premises with the appurtenances for the same and containing the same covenants and stipulations, including covenant for renewal, as are contained in this present Lease (save only that the yearly rent of the said premises be the rent ascertained or agreed upon as stipulated by arbitration, as hereinbefore mentioned.)

In the result a declaration was given as requested by the applicant. Fraser J. dealt extensively with the authorities but relied mainly on the case of *Gooderham & Worts Ltd.*[18] As already pointed out, that case did not call for an absolute covenant to renew on the part of the lessor and can therefore be distinguished. Moreover, the reference made by the Privy Council on this point was *obiter* dicta. Also under the definition given by Lewis such unconditional covenants would certainly infringe the rule against perpetuities and be void.

If the exception permitting the validity of perpetually renewable clauses in a lease "is anomalous and owes its existence only to its antiquity and not to any rational basis"[19] it would seem more reasonable to restrict the application of this exception rather than to extend it.

KECHIN WANG*

[17] [1963] O.R. 585. [18] *Supra*, footnote 14. [19] *Ibid.*, at p. 595.

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