THE LABOUR INJUNCTION IN CANADA: A CAVEAT

Instances in the law are legion in which the settled practice of years has foreclosed the analytical examination of a principle or the weighing of its social consequences.[1] In a legal regime where *stare decisis* holds sway, this is perhaps inevitable. There is more reason, therefore, why courts must be astute in discerning that they are dealing with a new situation, and that great caution must be exercised and pains taken to lay bare the doctrines upon which they proceed. The labour injunction in Canada does not yet stand in the relation of an *amicus curiae*. Resort to it as a coercive weapon in labour disputes has been relatively infrequent.[2] The possibilities of its abuse demand that before its issuance attains the informality of a decree for specific performance of a contract for the sale of land, or of a grant of leave to amend pleadings, its social implications in the field of industrial strife be fully considered.[3] The recent decision of the Ontario Court of Appeal in *Bassel's Lunch Ltd.* v. *Kick et al.*[4] gives cause for inquiry into the matter.

The labour injunction has been termed "America's distinctive contribution in the application of law to industrial strife".[5]

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[1] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, pp. 152 - 158, and at p. 151: "There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the years." GOODHART, ESSAYS IN JURISPRUDENCE AND THE COMMON LAW, *Case Law in England and America*, 50 at p. 55. See ALLEN, LAW IN THE MAKING, pp. 180*ff.*, where he discusses the doctrine of *communis error facit jus*. Pound, *The Theory of Judicial Decision* (1923), 36 Harv. L.R. 641, 802, 940. The criticism that Pound makes of an analytical-historical "jurisprudence of conceptions" is pertinent in this connection.

[2] In Canada, as in England, those who have felt themselves aggrieved as the result of labour disputes, have resorted to the criminal law for their remedy. A perusal of the reported cases in the Ontario and Western Weekly Reports for the ten year period from 1925 to 1935 reveals one instance in which a labour injunction issued, *Schuberg* v. *Local International Alliance*, [1926] 2 W.W.R. 254, [1927] 1 W.W.R. 548; what few labour disputes did come before the courts in that period were generally decided under the criminal law. However, besides the injunction involved in the *Bassel Case*, [1936] O.R. 445, mention may be made of *Allied Amusements Ltd.* v. *Reaney et al.* and *Kershaw Theatres Ltd.* v.*Reaney et al*, [1936] 3 W.W.R. 129, jointly reported, in which injunctions issued.

[3] The difficulties in the way of applying the injunction to labour disputes are admirably presented in FRANKFURTER AND GREENE, THE LABOR INJUNCTION, pp. 199 *ff.*; they say, at p. 201: "In labor cases . . . . the injunction cannot preserve the so-called status quo; the situation does not remain in equilibrium awaiting judgment upon full knowledge. The suspension of activities affects only the strikers; the employer resumes his efforts to defeat the strike, and resumes them free from the interdicted interferences."

[4] [1936] O.R. 445.

[5] FRANKFURTER AND GREENE, THE LABOR INJUNCTION (1930), 53. See Sayre, *Labor and the Courts* (1930), 39 Yale L.J. 682, for a short treat-

It achieved national prominence in the United States with *In re Debs.*[6] The words of a federal district judge in 1923 well describe its subsequent development: "During the thirty years that courts have been dealing with strikes by means of injunctions, these orders have steadily grown in length, complexity, and the vehemence of their rhetoric. They are full of the rich vocabulary of synonyms which is a part of our English language. They are also replete with superlative words and the superlative phrases of which the legal mind is fond. The result has been that such writs have steadily become more and more complex and prolix".[7] The complaints that have been levied against the injunction,[8] particularly of the interlocutory type, may be shortly summarised: (1) They are granted upon affidavit evidence; there is no examination and cross-examination of witnesses or the careful sifting of facts, but the judge, sitting without a jury, is asked to choose between conflicting documentary statements, in which both sides strain the truth, to say the least;[9] (2) They

ment of the various legal categories which have to do with employer-employee relations. *Cf.* Fraenkel, *Recent Statutes Affecting Labor Injunctions and Yellow Dog Contracts,* (1936) 30 Ill. L.R. 854. There was a veritable flood of articles on "Government by Injunction", in the United States, following *In re Debs, infra,* note 6. Most of them are collected, for reference, in LANDIS, CASES ON LABOR LAW, note, at p. 511.

[6] (1895), 158 U.S. 564. The case grew out of the Pullman Strike of 1894 in which Eugene V. Debs and his recently-formed American Railway Union participated. The smashing of the strike shattered the union completely. See YELLEN, AMERICAN LABOR STRUGGLES, pp. 101 - 135. A bill for an injunction against the officers of the American Railway Union was filed at the instance of Attorney General Olney under the authority of the Sherman Anti-Trust Act of 1890, section 4. The injunction was granted; in effect, it restrained (1) violence to property and forcible interference with the running of trains; (2) inducing men not to work, by threats, intimidation, force, violence or persuasion. Some days after the defendants had been served with the injunction order, they were cited for contempt, found guilty and sentenced to imprisonment (64 Fed. 724). The Supreme Court of the United States denied a petition for a writ of habeas corpus. For an account of the earlier use of the labour injunction, see Bonnett, *The Origin of the Labor Injunction,* (1931) 5 So. Cal. L.R. 105.

[7] *Great Northern Railway Co.* v. *Brosseau* (1923), 286 Fed. 414, per Amidon J. at p. 415.

[8] The complainant's bill in equity for an injunction must, of course, make out a case for the extraordinary intervention of equity. A stereotyped formula has been developed, as follows: unlawful acts have been threatened or committed in violation of the complainant's rights; such unlawful acts appear likely to continue; the damage to the complainant will be irreparable; the remedy at law is inadequate; the defendants are unable to respond in damages because of their pecuniary irresponsibility; relief in equity will avoid a multiplicity of suits.

[9] *Long* v. *Bricklayers, etc. Union* (1908), 17 Pa. Dist. 984, 985: "Hardly anything of greater private or public gravity is ever presented to the court, and yet these matters are constantly receiving adjudication without a single witness brought before the judge. It is a bad practice. I confess my inability to determine with any satisfaction from an inspection of inanimate manuscript, questions of veracity." *Pacific Coast Co.* v. *District No. 16, U.M.W.A.* (1922), 122 Wash. 422, 435: "In this case no witnesses have been heard. All that has been done is to read affidavits of divers

are prepared by the complainant's counsel and accepted by the court with very little ceremony;[10] (3) They prejudge the issues involved in a dispute by acting as strike-breakers;[11] (4) They are couched in broad language and in such far-reaching terms that they implant a fear in men more potent than does the criminal law;[12] (5) They endow the owner of a business or of property with a militant power, little short of sovereignty;[13]

persons without testing their knowledge, or intelligence, or credibility, by cross-examination and by observing their conduct and demeanor." *Carter* v. *Fortney* (1909), 172 Fed. 722, 729: "It is impossible to reconcile the statements of these conflicting affidavits. It cannot be done. There is clear perjury somewhere and it should be sifted out and prosecuted."

[10] FRANKFURTER AND GREENE, THE LABOR INJUNCTION, at p. 106: ". . . . . two remarks may be made concerning the form of the injunction. Phrases, and sometimes whole paragraphs, are stereotyped and transferred verbatim from case to case, without considered application by the court to the peculiar facts of each controversy. The language is prolix, implying a rhetorical theory that repetition of jargon makes for meaning." *United States* v. *Railway Employees' Dep't. of the American Federation of Labor* (1923), 290 Fed. 978, 983: "Counsel for complainant have submitted a draft of a decree for a permanent injunction, whose provisions are the same in all substantial respects as those of the temporary injunction." *Seattle Brewing and Malting Co.* v. *Hansen* (1905), 144 Fed. 1011, 1015: "My conclusion . . . . . is that this restraining order shall be continued as a temporary injunction . . . . . and that the form of it may be substantially as has already been issued in a temporary restraining order: but I point you to the writ of injunction in the case referred to in the case of *D. E. Loewe et al.* v. *California State Federation of Labor* (139 Fed. 71) . . . . . I therefore commend to you, in preparing the form of the writ to consult the one to which I have referred. I think it is substantially about what you have already prepared in the present case."

[11] There is, of course, much debate on this point. See FRANKFURTER AND GREENE, THE LABOR INJUNCTION, Appendix VIII. Testimony of Eugene V. Debs, United States Strike Commission, Report on the Chicago Strike, (1895) 143 - 144: "It was not the soldiers that ended the strike; it was not the old brotherhoods that ended the strike; it was simply the United States courts that ended the strike." *Puget Sound Traction Light and Power Co.* v. *Whitley* (1907), 243 Fed. 945, 947: "The court may not be used as a strike-bearer by either party, by witholding from one party orders or decrees to which it is clearly entitled, or granting orders ex parte, where it is not made clearly to appear that the rights of the complainant are being infringed by the defendants." WITTE, THE GOVERNMENT IN LABOR DISPUTES, discusses the problem at pp. 120 *ff.*, under the heading, *Injunctions and the Outcome of Strikes.*

[12] The classical example of this in United States is the injunction issued by Judge Wilkerson in *United States* v. *Railway Employees' Dept. A. F. of L.* (1923), 290 Fed. 978; it is reprinted in FRANKFURTER AND GREENE, THE LABOR INJUNCTION, Appendix IV. Further illustrations may be seen in *Hitchman Coal Co.* v. *Mitchell* (1917), 245 U.S. 229; *American Steel Foundries* v. *Tri-City Central Trades Council* (1921), 257 U.S. 184; *Jonas Glass Co.* v. *Glass Bottle Blowers' Association* (1910), 77 N.J. Eq. 219. A complete discussion of the "vague and harassing significance" of injunctions framed in wide terms will be found in FRANKFURTER AND GREENE, *op. cit.*, at pp. 89 - 105. See remarks by Cardozo Ch. J. in *Nann* v. *Raimist* (1931), 255 N.Y. 307, 316; and *cf.* the following by Amidon J. in *Great Northern Railway Co.* v. *Brosseau* (1923), 286 Fed. 414, 415: "Injunctions are addressed to laymen. They ought to be so brief and plain that laymen can understand them. They ought to be framed in the fewest possible words."

[13] *Truax* v. *Corrigan* (1921), 257 U.S. 312, Brandeis J. dissenting, at p. 368.

(6) They place the judiciary, so far as the labourer is concerned, in the ranks of the employers;[14] (7) They arouse a resentment and antagonism that often leads to active violence where there was none before;[15] (8) They circumscribe union activity far beyond the needs of the particular case;[16] (9) They generally issue *ex parte*,[17] and quite perfunctorily,[18] on a false analogy to

[14] Witte, *Social Consequence of Injunctions in Labor Disputes* (1930), 24 Ill. L.R. 772, 783: "It is against the 'injunction judge' that labor's resentment is most bitter. The judge who issues an injunction, although he may be duty bound to do so under the decisions of the higher courts, is blamed personally for his action. He is denounced at protest meetings and in the labor press." At p. 784: "Preservation of . . . . . confidence in the courts is a matter of serious social moment, and no consequence of injunctions is more significant than the weakened prestige of the judiciary."

[15] The resentment is caused to a great extent by reason of the fact that the issue of a temporary injunction against labour brands it, in the eyes of the public, as a wrongdoer; and since so many cases never reach trial on the merits, the stigma attached by the injunction remains. Instances of violence consequent upon an injunction have not been infrequent; see Witte, *Social Consequences of Injunctions in Labor Disputes* (1930), 24 Ill. L.R. 772, 775 *ff*.

[16] FREY, THE LABOUR INJUNCTION, is a statement of labour's attitude to the injunction; at p. 29: ". . . . . practically everything which trade unionists have done to protect their organizations from being destroyed by employers, or in connection with an industrial dispute resulting in a strike has been restrained by some court of equity;" at p. 81: "The wage-earner's hands are shackled, his mouth gagged, and so far as the court of equity may do so, he is rendered incapable of doing anything for his self-protection." *Cf. Great Northern Railway Co.* v. *Brosseau* (1923), 286 Fed. 414, 415: "All of this [prolixity of injunctions] is foreign to their legitimate purpose. They, like the proper bill in such cases, ought to arise out of the facts of each specific case." There has been a tendency of late, illustrated by the decree in the case just cited, to delineate not only what the defendants to a successful bill for an injunction are prohibited from doing, but also what they may lawfully do. See also the injunction decree in *Pittsburgh Terminal Coal Corp.* v. *United Mine Workers of America* (1927), W. Dist. Pa., reproduced in LANDIS, CASES ON LABOR LAW, 258.

[17] See Note (1930), 30 Col. L.R. 1184, *The Abolition of Ex Parte Injunctions in New York;* also, Note (1932), 1 Brooklyn L.R. 101, *Ex Parte Injunctions.* As a result of the Supreme Court's 5 to 4 decision in *Truax* v. *Corrigan* (1921), 257 U.S. 312, it appeared that state legislation denying injunctive relief in labour disputes was a denial of "equal protection" within the meaning of the 14th Amendment to the American Constitution; that the labourer could not be singled out for an exemption not granted to others. Hence it was that New York's abolition of ex parte injunctions applied to all sections of the community, imposing a manifest hardship in many situations outside the realm of labour disputes. It is quite absurd today, and it was in 1921 as well, to suggest that legislation directed to employer-employee relations does not deal with a reasonable classification so as to come within the "equal protection" clause.

[18] Pepper, *Injunctions in Labor Disputes* (1924), 49 Am. Bar Association Rep. 174, 179: ". . . . . during the shopmen's strike in 1922, nearly every one of the 261 'class 1' railroads and a number of short-line railroads applied for injunctions in the various federal courts. No applications were denied. In all nearly 300 were issued." *Gevas* v. *Greek Restaurant Workers' Club* (1926), 99 N.J. Eq. 770, 782; "Nor have I been able to find any reported New Jersey Case where picketing has been the subject of the complaint and where an injunction has not issued." FRANKFURTER AND GREENE, THE LABOR INJUNCTION, at p. 49: "Of the reported cases in the federal courts since 1901, there are one hundred and eighteen applications for injunctive relief, of which one hundred were successful. But this affords no index of the extent of such equitable intervention. For only decrees that are

cases involving real property,[19] in which, on occasion, prompt action may well be necessary.

That these complaints have not been without foundation is implicit in the strenuous efforts that have been made in the United States to prescribe limits to the resort to the injunction.[20] In the federal field, it took twenty years of agitation following *In re Debs*[21] to secure the passage of the Clayton Act in 1914. The hopes that it raised in labour[22] were dashed to the ground by an interpretation of its provisions as being merely declaratory of the common law.[23] The imprimatur of the Supreme Court of the United States commanded more attention than did the indignation expressed in the words that "such actions by courts is a gross abuse of judicial power, and a direct refusal on their

challenged by motions for discontinuance, on appeal or through contempt proceedings, normally find their way into the reports. An independent search of the files of the eighty odd district courts in the federal system would alone furnish a complete table of cases in which injunction orders were issued." See also, p. 64.

[19] *Truax* v. *Corrigan* (1921), 257 U.S. 312, per Holmes J. dissenting, at p. 342: "The dangers of a delusive exactness . . . . . have been adverted to before now. Delusive exactness is a source of fallacy throughout the law. By calling a business 'property' you make it seem like land . . . . . An established business no doubt may have pecuniary value and commonly is protected by law against various unjustified injuries. But you cannot give it definiteness of contour by calling it a thing. It is a course of conduct and like other conduct is subject to substantial modification according to time and circumstances both in itself and in regard to what shall justify doing it a harm".

[20] In truth, so much attention was directed to the injunctive remedy that the controversy over it obscured "the question of the relative substantive rights of the parties"; Brandeis J. in *Truax* v. *Corrigan* (1921), 257 U.S. 312, 366.

[21] (1895), 158 U.S. 564.

[22] Mr. Samuel Gompers wrote an article in 21 Federationist entitled *The Charter of Industrial Freedom—Labor Provisions of the Clayton Anti-Trust Law;* he said at p. 957: "The labor sections of the Clayton Anit-Trust Act are a great victory for organized labor. In no country in the world is there an enunciation of fundamental principles comparable to the incisive, virile statement in section 6." Section 6 reads in part, "That the labor of a human being is not a commodity or article of commerce." See, Mason, *The Labor Clauses of the Clayton Act* (1924), 18 Am. Pol. Sci. Rev. 489.

[23] The ultimate interpretation of the act was foreshadowed by W. H. Taft, when, in delivering his presidential address to the American Bar Association, he said of the Clayton Act: "All these provisions have been called the charter of liberty of labor . . . . . the changes from existing law they made are not broadly radical and . . . . . most of them are declaratory merely of what would be law without the statute . . . . . I fear that when the statute is construed by the courts it will keep the promise of the labor leaders to the ear and break it to the hope of the ranks of labor"; (1914), 39 Am. Bar A. Rep. 359, 380. It is not surprising therefore to find that, as Chief Justice Taft, delivering the judgment of the Supreme Court in *American Steel Foundries* v. *Tri-City Central Trades Council* (1921), 257 U.S. 184, he said at p. 203: "[The Clayton Act] introduces no new principle into the equity jurisprudence of [the federal] courts. It is merely declaratory of what was the best practice always. Congress thought it wise to stabilize this rule of action and render it uniform."

part to obey a statute which was intended to limit their power.[24] It took another decade to secure the passage of the Norris-LaGuardia Act of 1932, and while its strict circumscription of the equity powers of federal courts has been held to be constitu-tional,[25] judicial ingenuity in dodging its provisions has not been lacking.[26]

Both the Clayton Act and the Norris-La Guardia Act attempted to deal with the question of contempt of injunction decrees. The judicial power to punish for contempt cannot be lightly regarded in relation to labour disputes. In the exercise of the combined functions of judge, jury and prosecutor, it lies in the discretion of a single person to deprive another of personal liberty — a criminal power, without the ordinary safeguards of the criminal law, and this, before the merits of the dispute have been resolved. The Clayton Act provided that where the act in contempt was also a criminal offence, trial may be by the court or, upon demand of the accused, by a jury.[27] Punishment was limited to a maximum fine of $1000 or six months' imprisonment, or both. This slight concession did not apply however to "contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice", nor to contempts of decrees entered in suits brought on behalf of the United States.[28] Even so, a claim of unconstitutionality was levied, because the statute, by making a trial by jury for contempt mandatory on the demand of the accused, interfered with a presumed inherent power of the courts to punish for contempt;[29] the claim, however, was not vindicated.[30] It has

[24] *Great Northern Railway Co.* v. *Brosseau* (1923), 286 Fed. 414, per Amidon J. at pp. 420, 421.

[25] *Levering and Garrigues Co.* v. *Morrin* (1934), 71 Fed. (2d) 284. Since the Clayton Act had been considered merely declaratory of the common law, the question of its constitutionality did not have to be decided in the *American Steel Foundries Case, supra,* note 23.

[26] *United Electrical Coal Co.* v. *Rice* (1935), 80 Fed. (2d) 1; *Laclede Steel Co.* v. *Newton* (1935), 80 Fed. (2d) 636; *Lauf* v. *Shinner* (1936), 82 Fed. (2d) 68; *Scavenger Service Corp.* v. *Courtney et al.* (1936), 85 Fed. (2d) 825; *cf. Safeway Stores* v. *Retail Clerks' Union* (1935), 51 Pac. (2d) 372. Senator Norris discusses the Norris-La Guardia Act in an article in (1932), 16 Marquette L.R. 157, *Injunctions in Labor Disputes.*

[27] (1914), U.S. Statutes at Large, Vol. 38, Part 1, Public Laws, c. 323, sections 21, 22. The statute provides that a formal charge, based on reasonable grounds for a belief that there has been a contempt, must be presented. The defendant is given an opportunity to purge his contempt. He is to be arrested only after refusal to answer, and pending the disposition of the charge, may be allowed out on bail. By sec. 25, proceedings for contempt were to be instituted within one year after the date of the act complained of.

[28] *Ibid.*, sec. 24.

[29] *In re Aichison* (1922), 284 Fed. 604, and *Michaelson* v. *U.S.* (1923), 291 Fed. 940, upheld the claim of unconstitutionality. The motion of an inherent judicial power to punish for contempt, supported by the doctrine of the separation of powers, seems to persist in state courts. See FRANKFURTER AND GREENE, THE LABOR INJUNCTION, 195 - 197.

now been quite definitely revealed that there is no basis to the contention for an inherent judicial power to punish for contempt in a summary manner, which is beyond the reach of the legislature.[31]

The contempt provisions of the Norris-La Guardia Act make the right to a trial by jury unequivocal and mandatory "in all cases arising under (the) act in which a person shall be charged with contempt in a court of the United States".[32] The exception in the Clayton Act of contempts in the presence of the court is limited here, in the following language: "That this right (to trial by jury) shall not apply to contempts committed in the presence of the court or so near thereto as to interfere *directly* with the administration of justice."[33] The insertion of the word "directly" was designed to check any tendency the courts might have to give a wide interpretation to the conception of the so-called "constructive" contempt.[34] No constitutional objection can be offered to the scope of the contempt provisions of the Norris-La Guardia Act because, in accordance with the *Michaelson Case*,[35] it makes no attempt to interfere with the power of courts to punish for contempts committed in their presence.[36]

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[30] *Michaelson* v. *U.S.* (1924), 266 U.S. 42, found the provision for trial by jury unobjectionable.

[31] Frankfurter and Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts* (1924), 37 Harv. L.R. 1010. Fox THE HISTORY OF CONTEMPT OF COURT. SWAYZEE, CONTEMPT OF COURT IN LABOR INJUNCTION CASES.

[32] (1932) 47 U.S. Stat. 70, c. 90, sec. 11. Sec. 12 permits the accused to demand the retirement of the judge sitting in the proceeding, if the contempt arises from an attack upon the character or conduct of such judge and if the attack occurred elsewhere than in the presence of the court or so near thereto as to interfere directly with the administration of justice. The judge must retire from the case upon such demand filed prior to the hearing in the contempt proceeding.

[33] *Ibid.*

[34] See Laski, *Procedure for Constructive Contempt in England* (1928), 41 Harv. L.R. 1031, 1040 *ff.* FOX, THE HISTORY OF CONTEMPT OF COURT, 36, 37, 42, 115. See on this matter the recent cases of *Re Rex.* v. *Solloway, Ex. p. Chalmers*, [1936] O.R. 482. The possibilities to which such a nebulous doctrine as "constructive" contempt can extend are exemplified in *Woodbury* v. *Commonwealth* (1936), N.E. (2d) 779. Here a member of a union was indicted for assault. A defence committee was formed to raise funds and it circulated letters and pamphlets to fellow unionists suggesting the indictment was the result of a "frame-up" by a rival faction; no allusion was made to the court. Those responsible for the distribution of the circulars were nevertheless punished for contempt because their conduct was considered to be prejudicial to a fair trial in that it tended to disparage the prosecution. The implications of this decision as affecting defence committees generally, are self-evident. See note in (1936), 50 Harv. L.R. 355.

[35] (1924), 266 U.S. 42, *supra*, note 30.

[36] Fraenkel, *Recent Statutes Affecting Labor Injunctions and Yellow Dog Contracts* (1936), 30 Ill. L.R. 854, 877.

The facts in *Bassel's Lunch Ltd.* v. *Kick et al.*[37] reveal a novel situation that may be added to the numerous others that have issued out of the employer–employee relations. The plaintiff's restaurant was conducted on an open shop basis. His employees were engaged under individual contracts of employment, the terms of which seem decidedly relevant in relation to the issues raised by this case. It does not appear in the case whether any definite term of employment was agreed upon or whether the employment was at will; this is not, however, of very grave importance under the circumstances. The employee agreed, in return for employment, that neither he nor anyone on his behalf would, *at any time hereafter*, either on his own account or that of a trade union with which he was connected, utter or publish by any means, any statement respecting the employer to any of the following effects, *inter alia*,

(a) that there is a strike or lockout at the employer's premises;
(b) that there ever was a strike or lockout or that any person or persons ever were fired;
(c) that there was or is discrimination at the said premises;
(d) that there was or is an unfair condition at the said premises;
(e) that low wages were paid there;
(f) that the said premises were or are not a union shop or anything that may be likely to cause persons to refrain from dealing with the employer or to think there is any labour trouble or any trade dispute in existence at the employer's premises; and,
(g) without limiting the generality of the foregoing, the employee is to make no statement or representation of fact or of matters in the future concerning the employer, which might reasonably be deemed prejudicial to the interests of the employer; and further, that neither he nor anyone on his behalf or with his knowledge or at his instigation would *at any time hereafter*, either on his own account or that of a trade union with which he is connected,
    (i) loiter or parade;
    (ii) carry signs or banners;
    (iii) distribute circulars or handbills; or
    (iv) beset or watch or picket (peacefully or otherwise), in the vicinity of the business premises of the employer for the purpose of
        (a) uttering or publishing any of the statements aforesaid, or
        (b) giving any information to members of the public or to customers or prospective customers or employees of the employer, or
        (c) making known to anyone any of the statements or representations aforesaid, or,

[37] [1936] O.R. 445.

(d) for any other purpose that may likely cause customers, actual or prospective, or prospective employees of the employer to refrain from dealing or working with the employer, or

(e) for any other purpose that might reasonably be deemed prejudicial to the interests of the employer.

One would surmise that the employer expected the foregoing to operate merely *in terrorem;* it is difficult to imagine that such attempted perpetual suppression of opinion could be countenanced under any democratic regime of law. If anything, the contractual restraint in the instant case is more drastic than the restraint which was declared void in *Attwood* v. *Lamont;*[38] it is no reasonable ground of distinction that there the restraint was in respect of trade, and that here it was in relation to the expression of opinion connected with one's livelihood. In that case, Younger L.J. made the following declaration :

> We are here dealing with a branch of the law which has at all times been peculiarly susceptible to influence from current views of public policy. Its modern developments have grown up under the shadow of the "laissez faire" school of economics, and until recently, have, in consequence, been uniformly in the direction of extending the principle of freedom of contract in relation to such bargains, a tendency that has not yet ceased to be operative when the covenant in question is one exacted from a vendor on the sale of the goodwill of his business. But current opinion on the relations between employers and employed has moved rapidly in recent years, and thus it is that the House of Lords, itself bound by comparatively few of the numerous previous decisions on the subject, took the opportunity in 1913,[39] when the validity of a restrictive covenant entered into by an employee came in question before it, to examine the whole problem afresh, with the result that the supreme tribunal, for the guidance of every court, has now placed upon the permissibility of such covenants a limit which the general interest, including, of course, that of employees themselves, had not previously seemed to require. In consequence it must now, I think, be recognized in all courts that there is every difference in the matter of its validity between such a covenant as we find here embodied in a contract of service and the same covenant when found in an agreement for the sale of goodwill; and the dispute between the

[38] [1920] 3 K.B. 571. The covenant here was that the employee would not, *at any time thereafter,* carry on certain lines of business within a radius of ten miles of the place in which the employer had his business.

[39] *Mason* v. *Provident Clothing and Supply Co.*, [1913] A.C. 724. In referring to covenants introduced into contracts of employment, Lord Haldane said, at p. 734: "It is no doubt as a general rule wise to leave adult persons to make their own agreements and take the consequences, but in the present class of case considerations of public policy come in and make it necessary for the court to scrutinize agreements like the one before your Lordships jealously. *The practice of putting into these agreements anything that is favourable to the employer is one which the courts have to check.*"

> parties to this action must be decided with due regard to that difference. This declared difference is, as I have said, a matter of recent development, and although it has not been put forward by the House of Lords as a new departure, its effect upon previously accepted views has already been as complete as if it were. Moreover, *it may be doubted whether all its incidental* consequences have even now become apparent.[40]

There is reasonable ground for believing, accordingly, that the contract involved in the *Bassel Case* was not only unenforceable but void. Conceding however that the law will give formal recognition to such an attempt to reduce a workman to peonage, should equity intervene to grant specific relief to the employer?

The defendants in the *Bassel Case* were employees who had individually subscribed to the contract of employment. Differences arose, and the allegation is that they broke their contracts, left the plaintiff's employ and picketed his restaurant. A temporary restraining order was made, which was subsequently continued to the trial of the action, enjoining all picketing activities. The injunction was based on the alleged breach of contract for there is no allegation that the picketing was other than peaceful. "The law in Ontario is reasonably clear," said Kingstone J., "and does not forbid peaceful picketing as such . . . . . Had the defendants not signed or had not been . . presumed to have signed these agreements, no interim injunction in the first instance would probably have been granted here."[41] A similar situation to that presented in the *Bassel Case* was involved in the New York Case of *Interborough Rapid Transit Co.* v. *Green*,[42] itself the culmination of a line of decisions.[43] In that case, the individual employee entered into a definite term contract of two years with the employer to observe the rules and remain a member of a company union during his employment. Wide powers of discharge were retained by the employer in addition to committing the employee to abstain from having any trade union affiliation. It should be observed that the employee's covenants were coextensive with the period of employment, differing from the perpetual suppression attempted in the *Bassel Case*. "Whatever the status of the contract at law," said the court, "the provisions . . . . . are, to say the least, inequitable."[44] Because, aside from the provisions of the con-

[40] [1920] 3 K.B. 571, 581.

[41] [1936] O.R. 445, 447. See also, *Robinson* v. *Adams* (1924), 56 O.L.R. 217; *R.* v. *Baldassari*, [1931] O.R. 169; *Dallas* v. *Felek*, [1934] O.W.N. 247.

[42] (1928), 227 N.Y. Supp. 258, 131 Misc. 682.

[43] *Cf. Exchange Bakery* v. *Rifkin* (1927), 245 N.Y. 260, 157 N.E. 130; *Interborough Rapid Transit Co.* v. *Lavin* (1928), 247 N.Y. 65, 159 N.E. 863; and note, *Stillwell Theatre* v. *Kaplan* (1932), 259 N.Y. 405, 182 N.E. 63, and *Steinkritz Amusement Corp.* v. *Kaplan* (1931), 257 N.Y. 294.

[44] (1928), 227 N.Y. Supp. 258, 262; 131 Misc. 682, 687.

tract, there was no basis for equitable interference established, the specific relief sought, an injunction *pendente lite*, was refused.

The aftermath of the grant of the interim injunction in the *Bassel Case* may be shortly recounted. The defendants were soon afterwards adjudged guilty of a contempt, but the court was satisfied to administer a severe reprimand, so that the contempt may be considered as purged; there were no later violations of the injunction by defendants. Six other persons, members, as were the defendants, of a trade union, began to picket the plaintiff's premises with strike banners, under the direction of the business agent of the union. They were served with copies of the injunction order but did not desist from picketing. A motion for writs of attachment for contempt of court were thereupon launched by the plaintiff against the picketers and the business agent of the union. Mr. Justice Kingstone dismissed the motion on the grounds, (1) that the parties named on this motion did not sign the employment agreements, and presumably therefore, when they picketed on behalf of the union, any remedy against them must be sought under the Criminal Code;[45] the injunction decree was not addressed to them as principals; (2) that they could not be charged with aiding or abetting the defendants to evade the injunction decree, because the defendants were not before the court as being guilty of any wrongdoing.

The second ground of the decision seems fairly clear. The first ground taken by Kingstone J., involves the question whether persons, not parties to an action in which an injunction is granted, are in contempt of court when, being aware of its provisions, they do an act forbidden by the injunction, ostensibly however, not in the interests of the party defendants, but in the interests of a collectivity, a trade union, of which the defendants are members. Mr. Justice Riddell speaking for the Ontario Court of Appeal, which allowed the plaintiff's motion reversing Kingstone J., had little difficulty in concluding that strangers to an injunction decree, knowing of its terms, are guilty of contempt, when they do any act forbidden by it, "for any purpose whatever".[46]

It is patent that the theory upon which the Court of Appeal must be deemed to have proceeded is not, that there was a

[45] R.S.C. 1927, c. 36, sec. 501 (f) and (g), as amended by 1934, c. 47, s. 12.

[46] [1936] O.R. 445, 456: "Cases such as *Lord Wellesley* v. *The Earl of Mornington* (1848), 11 Beav. 180, show that one who knows of an injunction order forbidding anyone doing a specific act, and himself acts 'in contravention of the injunction' can be committed 'for his contempt in intermeddling with these matters', per Lord Langdale M.R., at p. 183."

breach of the injunction, because the persons held liable were neither parties to the action, nor had they acted in aid of party defendants who were in breach of the injunction.[47] What appears to underlie the contempt finding is an assumed interference with the administration of justice, a "constructive" contempt. In *Seaward* v. *Paterson,* Lindley L.J. made the following distinction:

> A motion to commit a man for breach of an injunction, (which is technically wrong unless he is bound by the injunction), is one thing; and a motion to commit a man for contempt of court, not because he is bound by the injunction by being a party to the cause, but because he is conducting himself so as to obstruct the course of justice is another and totally different thing . . . . . In the one case the party who is bound by the injunction is proceeded against for the purpose of enforcing the order of the court for the benefit of the person who got it. In the other case the court will not allow its process to be set at naught and treated with contempt.[48]

The vital question in the *Bassel Case* then, is whether what the picketers did, reflected on the prestige of the court, for "the court ought to be very chary in committing people for contempt, particularly in cases of fanciful contempt".[49] There is some opinion in United States that the prestige of the court is not involved at all where strangers to a decree, with notice thereof, act in violation of its terms. The argument is, that, inasmuch as the court has not addressed any command to the stranger, nor has he aided the defendants to whom the decree is addressed to violate its terms,[50] he cannot be deemed to be acting in defiance of the command of the court or interfering with the execution of that command against those to whom it was addressed.[51] The *Bassel Case* affords ample support for this argument. The decree was given, not against the members of a trade union through a representative action,[52] nor against a

[47] *Seaword* v. *Paterson,* [1897] 1 Ch. 545, was such a case.

[48] *Ibid.,* at p. 555.

[49] *Ibid.,* at p. 553.

[50] This appears to be what Kingstone J. thought in the principal case; the picketers could not be considered as aiding the defendants, if the defendants themselves were not guilty of any violation of the decree.

[51] *Berger* v. *Superior Court* (1917), 175 Cal. 719, per Angellotti C.J. at pp. 720, 721; also, *Rigas* v. *Livingston* (1904), 178 N.Y. 20; *Strawberry Island Co.* v. *Cowles* (1912), 140 N.Y. Supp. 333. There is, on the other hand, a good deal of opinion holding a stranger with notice, who acts in violation of an injunction decree, guilty of contempt. See, *In re Lennon* (1897), 166 U.S. 548; *Puget Sound Traction* v. *Lowrey* (1913), 202 Fed. 263; *State* v. *Bittner* (1926), 102 W. Va. 677; *O'Brien* v. *People* (1905), 216 Ill. 354; *State* v. *Grady* (1921), 114 Wash. 692.

[52] In such a case all members of the union are technically parties to the action and it seems to be taken as well settled in the United States that any party knowing of an injunction who violates it is liable whether he has any legal service upon him or not. See *Seattle Brewing and Malting Co.* v. *Hansen* (1905), 144 Fed. 1011; *Illinois Central Railroad Co.* v. *International Association of Machinists* (1911), 190 Fed. 910.

class of persons engaged in concert in doing unlawful acts.[53] It was a decree against specific persons to force them to abide by the terms of a presumably valid contractual undertaking pending the outcome of a trial of the issues between the contracting parties. Is there any obstruction to the administration of justice when a union sends its members to picket the premises of an employer who has refused to negotiate with the union, (as he is undoubtedly entitled to), and has further attempted to undermine the influence of unionism by using his superior bargaining power against individual employees in the imposition of anti-union employment conditions? The issue concerning the individual employee's breach of contract is distinct from the issue of the union's privilege to show its displeasure of the employer's conduct against unionism by engaging in peaceful picketing.[54] The question is too, whether a person who obtains an injunction decree is to be allowed, by giving such decree wide publicity, to enforce, in effect, a rule of conduct on the community at large. In other words, having obtained an injunction in protection of a private right, the plaintiff seeks to turn it into a public criminal prohibition against the whole community, on the ground that there would be otherwise a flouting of the due course of justice. Can it be doubted that the proposition carries its own condemnation? It is indeed an ingenious argument for securing the aid of the criminal powers of an equity court against any persons whom the court can be induced to regard as having affronted its dignity or having interfered with the due performance of its functions.

The series of occurrences that eventuated in the case of *Bassel's Lunch Ltd.* v. *Kick et al.*[55] exemplify the results of oversimplification. The real issues in the case cut under the whole field of industrial strife. There is the attempt of the employer to avoid the necessary interference in management that union recognition involves, by a rigid contractual suppression of his individual employees; there is the chafing of the union at this subtle attack upon it through pressure on the necessity of the worker to provide for dependents; there is the resort by the employer to the extraordinary powers of equity in order to compel the worker to obey the employer's contractually-imposed

[53] *Shaughnessy* v. *Jordan* (1915), 184 Ind. 499, where members of a class, enjoined as such, through the representation device, were held for violation of the injunction even though they had no notice of it.

[54] See Note, *Contempt Proceedings Against Persons not Named in an Injunction* (1933), 46 Harv. L.R. 1311 at p. 1317: "Except for [a few] decisions, it sems well settled that third persons acting independently may not be held for contempt."

[55] [1936] O.R. 445.

social ethics; there is the resentment of the collective trade union at this interference with its control over its membership. How can the gravity of these factors be reconciled with the perfunctory grant of a preliminary injunction and the seeming complacency with which the Court of Appeal concluded that seven members of a union must go to gaol for ten days because they had done an act forbidden by a decree, of which they were aware to be sure, though the decree was not addressed to them and the act was one which ordinarily the law permitted unions to do?

The inability of courts in the United States to recognize that the differences between capital and labour cannot be settled by an application of rules suitable to the disposition of a suit concerning realty necessitated legislative intervention in the matter of granting preliminary injunctions[56] and in the method of disposing of charges of contempt.[57] There can be little doubt that Canadian courts will find themselves similarly circumscribed by legislative enactments if they fail to infuse their equitable jurisdiction in labour injunction decrees and contempts, with a spirit of social understanding. There is much that can be learned from the following remarks of Mr. Justice Holmes :

> I cannot but believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that they were taking sides upon debatable and often burning questions.[58]

* * * * *

Since the above was written, another motion in *Bassel's Lunch Ltd.* v. *Kick et al.* to commit strangers to the injunction for contempt came before the Ontario Court of Appeal.[59] Kingstone

[56] See *supra*, note 25. The Norris-La Guardia Act provides that no injunction shall issue except upon oral testimony with opportunity for cross-examination and on a showing that (1) unlawful acts will be committed; (2) there will be irreparable damage otherwise; (3) greater injury will be inflicted on the plaintiff by the denial of the injunction than on the defendant by granting it; (4) there is no adequate remedy at law; (5) public officers are unable or unwilling to furnish adequate protection; and notice must be given to all defendants and to the public officers of the locality. There is a proviso that in an exceptional case a temporary injunction may issue upon testimony under oath (affidavit evidence) without notice, but for five days only. In any event, the plaintiff must furnish adequate security. A plaintiff who has failed to make reasonable efforts to settle the dispute by negotiation or by invoking the aid of available governmental machinery will be denied an injunction. Finally, an injunction may not issue except on findings of fact actually made, on which alone, it shall be based.

[57] *Supra*, note 32.

[58] Quoted in FRANK, LAW AND THE MODERN MIND, 257.

[59] [1937] 1 D.L.R. 235.

J. refused a committal order here, as he did in the principal case discussed. Macdonnell J.A. (sitting with Latchford C.J. and Fisher J.A.) who had sat in the principal case with Riddell J.A. and Henderson J.A., affirmed, on behalf of the Court of Appeal, the dismissal of the motion in a short judgment. Whether the persons charged with contempt were intermeddling or acting independently[60] was considered to be a "mere question of fact; and the finding of fact determines the matter".[61] Macdonnell J.A. stated :

> If the learned judge who heard the motion had concluded that the respondents were not acting independently, and so had found them guilty of contempt, I should have seen no reason for disagreeing; the material is, in my opinion, sufficient to justify such a conclusion. But after great consideration of the matter, he did not reach this conclusion; and it seems to me impossible to say that he was wrong.[62]

But it did not seem impossible for the Court of Appeal speaking through Riddell J.A. under similar circumstances, to say the judge of first instance was wrong. To attempt a reconciliation of the two judgments would overtax one's powers of ingenuity. Perhaps different results in similar situations is a necessary penalty of having a court sit in divisions as does the Ontario Court of Appeal.

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[60] Citing *Bassel's Lunch Ltd* v. *Kick et al.*, [1936] O.R. 445.
[61] [1937] 1 D.L.R. 235, 236.
[62] *Ibid.*

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