LABOUR RELATIONS—NATURE OF THE EMPLOYER-EMPLOYEE RELATIONSHIP—EFFECT OF A STRIKE—RIGHT TO STRIKE.—What happens to the employer-employee relationship when a worker goes on strike? The answer to this question becomes important in the recent Ontario case between the striking employees of the Royal York Hotel and its owner, the Canadian Pacific Railway.[1]

Magistrate Elmore rocked the labour world with his decision that where no collective agreement exists, a strike is not legal unless the striker gives proper notice, as required by the law of Master and Servant, to terminate the individual employer-employee contract. This is a complete antithesis to the long held contention of labour,[2] that a worker does not cease to be an employee during a strike.

Sixty days prior to the expiration of the existing collective agreement, the complaining Local notified the Hotel that it wished to negotiate a new agreement. Eight months after the expiration of the old collective agreement, collective bargaining and conciliation having failed, the union commenced a strike which in no way offended the *Ontario Labour Relations Act*.[3] It was in these circumstances that the learned Magistrate held that the employees had:

> . . . no right to strike and cease work as they did, and by so doing they ceased to be employees of the accused, or in any event subjected them [sic] to being discharged in the manner in which they were.[4]

This decision arose out of the Magistrate's view of the law.

> At the time of the commencement of the strike and the cessation of work, it is my opinion that the employees named in the informations were working under individual, express contracts or such as the law would presume from their working and receiving wages.
>
> I cannot find where the Act,[5] in adopting the common law with the amendments it has made, has in any way altered the common law requirement of the servant to terminate his individual contract before ceasing to work.[6]

The progression from the *status* of the serf in feudal times, to the position of the present day employee under the collective bargaining regime seems to be a natural development. A question which must be answered is, how far has this development gone? Has society progressed past the stage of the master and servant contractual relation which developed during the *laissez-faire* period? One writer[7] foresees a return to *status* under labour relations legislation. Other scholars would seem to feel that the collective bargaining system has done away with the old master-servant relationship and an entirely new relationship is present. Bora Laskin and Drummond Wren, authors of the majority opinion in an arbitration board report in Ontario,[8] put it this way:

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[1] *Local 299, Hotel and Club Employees Union, A.F.L.-C.I.O.-C.L.C. of the Hotel and Restaurant Employees and Bartenders International Union v. The Canadian Pacific Railway*, (1951) C.C.H. Canadian Labour Law Reporter 12,326.

[2] Noticed by G. A. McAllister in a case comment on *Swansea Construction Co. Ltd. v. Royal Trust Co. and Marshall Development Co.*, (1956) 2 D.L.R. (2nd) 336, in 34 C.B.R. 587 at 588. He cites American authorities, notably Corpus Juris Secundum. See 88 C.J.S. 536-8.

[3] R.S.O. 1960, c. 202, s. 54.

[4] *Local 299, etc. v. C.P.R.*, op. cit., 12, 328.

[5] *Labour Relations Act*, R.S.O., loc. cit.

[6] *Local 299, etc.*, loc. cit.

[7] F. R. Batt, *The Law of Master and Servant*, 5th. ed., J. C. Vaines ed., (London 1950).

[8] *Re United Electrical Radio and Machine Workers of America; Re Peterborough Rock Mfg. Co.*, (1954) 4 Labour Arbitration Cases 1499.

> The change from individual to Collective Bargaining is a change in kind and is not merely a difference in degree. The introduction of a Collective Bargaining regime involves the acceptance by the parties of assumptions which are entirely alien to an era of individual bargaining. Hence, any attempt to measure rights and duties in employer-employee relations by reference to pre-collective bargaining standards is an attempt to re-enter a world which no longer exists.[9]

This view did not go unchallenged, however, as the minority report hastened to add its disagreement.[10] There was a change, it conceded, but it was merely one of degree such that:

> The ordinary rules of the common law applicable to any changing contractual relationship still apply.[11]

Although the matter before the Arbitration Board was not the same as the present problem, this decision[12] is effective in pointing up the conflict which exists in this area of the evaluation. Since the change in "substance" view is the more recent and is unsupported by judicial pronouncement, A. C. Crysler[13] concludes that the latter is the better view:

> . . . it is unlikely the court would go so far as to abolish the residuum in the law of master and servant over and above labour relations legislation and collective agreements so long as labour relations continues to be operated in fact and under statute law wihin the ambit of the employer-employee relationship.[14]

Whereas Crysler is likely correct for the time being,[15] it cannot be denied that a new concept of the nature of the employer-employee relationship is evolving. The characteristics of this new relationship are difficult to postulate, but certainly, it being the progeny of the collective bargaining regime, the effect of a strike would not be to repudiate the relationship. Most likely a strike would only be a different facet of a continuing relationship.

It must be concluded therefore that the employer-employee relationship which is created today by a contract of hiring insofar as it is not modified by a collective agreement is of the same or similar nature to that individual contractual relationship which exists under the law of master and servant. That being so, it becomes necessary to examine the effect of a strike on such a relationship. But first, what is a strike?

> A strike is properly defined as 'a simultaneous cessation of work on the part of the workmen,' and its legality or illegality must depend on the means by which it is enforced, and on its objects.[16]

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[9] *Ibid.* 1502.

[10] *Ibid.* 1503, per E. MacCauley Dillon.

[11] *Ibid.* 1054.

[12] The board was sitting to decide whether a company was free to change the mode of calculating pay for a specific job from an incentive rate to a day rate where the existing collective agreement contained no prohibition against such a change. The board decided against the company.

[13] *Handbook in Canadian Labour Law*, (Toronto, 1957).

[14] *Ibid.* 223.

[15] Employment contracts are treated as existing separate entities from collective agreements. (*Caven* v. *C.P.R.* [1925] 3 W.W.R. 32) and the contract of employment is the only one which is capable of sustaining legal action. (*Young* v. *Canadian Northern Railway*, [1931] W.W.R. 49). Again, though, a different trend is indicated. (*Wright* v. *Calgary Herald* [1938] 1 D.L.R. 111) which would make the collective agreement binding on the parties to it. See also *Bertrand* v. *C.N. Telegraph Co.* [1948] k D.L.R. 209, where the Saskatchewan Court of Appeal held that a worker must exhaust his extra-judicial remedies under a collective agreement before he can bring an action for wrongful dismissal in court.

[16] *Farrer* v. *Close* [1869] L.R. 4 Q.B. 602, per Hannen J. at 612.

This "classic" definition of a strike is one which is adopted in part by most legislation. The *Ontario Labour Relations Act* defines strike in this manner:

> 1(1)(i) "Strike" includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert in accordance with a common understanding . . . .[17]

From these definitions it would seem that collective action is an essential characteristic of a strike.[18] Indeed, "strike" as used in the *Ontario Labour Relations Act* has been judicially defined as having a meaning of plurality and involving cessation of work by more than one employee.[19]

Magistrate Elmore states in his judgment that the right to *strike* is not expressly given in the statute under consideration.[20] His opinion is that the statute by limiting the right to strike[21] presupposes an existing right to strike at common law. Since, then, the charge against the C.P.R. is framed in the terms of ss. 50(a) and 50(c)[22] which contain the words "rights *under* this Act" and s. 3 expressly gives the right to participate in the "lawful" activities of a trade union, it becomes necessary to discover whether or not the strike was "lawful" at common law.

Whether or not a strike is legal depends on the methods employed and the objects which it intends to achieve.[23] It is not illegal *per se*[24] but may be illegal if it amounts to an actionable conspiracy or if it involves breaches of contract or other criminal acts.[25] The right to strike is usually conceded, but the nature of that right does not often come under the close examination of the courts. In *International Ladies' Workers' Union* v. *Rother* however,[26] Greenshields J. in his judgment had this to say:

> So far as the right to strike is concerned . . . a man may work when and for whom he chooses, and for what wage and under what conditions as to him seem best, and having this right to choose the work, he has an equal right to refuse or refrain, from labouring, unless his refusal to work could detrimentally affect someone who is entitled by law to the whole or part of the product of his labour . . .[27]

The Court equates a man's right to strike to his right to quit, and imports, therefore, to a strike the same effect as would Magistrate Elmore: the severance of the contractual employer-employee relationship. While this may have been true in the early history of the "strike," surely time and usage must have brought about a change as the strike has become to be regarded as an essential element in the collective bargaining process.

It has already been noted that the relationship between employer and employee is still a master and servant type of contract. That being so, a strike must have some effect on that contract as it presupposes that

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17 R.S.O. 1960, c. 202, s.1.ss. 1(i).

18 *Corpus Juris Secundum* lists "concerted action" as one of the characteristics of a strike; 83 C.J.S.5 42.

19 *Thomas Fuller Co.* v. *Rochon et al*, (1957) 10 D.L.R. (2nd) 670. But see *Swansea Construction* v. *Royal Trust supra*, and comment by G. A. McAllister, *supra*.

20 *Local 299, etc.*, 10c. cit., 12,327.

21 See Annex "A" s. 54.

22 *Ibid.*

23 Note 16. *supra*.

24 *Gozney* v. *Bristol Trade and Provident Society*, 1909 1 K.B. 901 at 923, per Fletcher-Moulton L.J.

25 32 Hals. (2nd) 461.

26 1923 3 D.L.R. 768.

27 *Ibid.*, 772-3.

the worker will remain at his job. When a group of employees leave their work in protest over the conditions of their employment, the contract of employment must, therefore, be either repudiated or suspended thereby. If the contract is merely suspended, then the cessation of work cannot be in breach of that contract and cannot, therefore, be unlawful for that reason. If, on the other hand, a strike repudiates the contract, then the common law requirement of notice to terminate a contract of employment may render unlawful a cessation of work in breach of that requirement.

> There is a repudiation of the contract of service where the servant leaves the service without justification, or where the acts of a party evince an intention no longer to be bound by the contract.[28]

In 1912, the House of Lords would have applied the above considerations to a concerted refusal to work in order to hold it unlawful.

> If this concerted succession is in breach of contract, then it could not be said to be within the law any more than could a breach of contract by a single workman.[29]

Likewise in 1906, the Court of Appeal would not allow the fact that the refusal to work was a concerted action to prevent them from holding it a breach of contract, since none of the workmen had delivered the fourteen days notice required by the individual contracts of service.[30] Common sense cries out against this decision in the present day situation. The employee on a strike leaving his work does not intend to terminate his contract[31] any more than the employer in a lockout intends to terminate the contracts of his employees. Both are measures by one to bring the other to agreement with a demand for a change in conditions of an existing relationship. There may be an alteration or a suspension of the contract, but only for the duration of the strike. Surely a "strike" is an action of employees, not former employees.[32] The employee on strike "intends" to return to his job.

There can be no doubt as to the American position in this regard. A worker on strike is referred to as a "striking employee,"[33] which indicates that the person is technically not an employee, but that the strike does not completely terminate the employer-employee relationship. A new status arises which is described as the employer-employee relationship in "belligerent suspension."[34] This position would seem to be supported by the statutory provision which states that,

> 1(2) For the purposes of this Act, no person shall be deemed to have ceased to be an employee by reason only of his ceasing to work for his employer as the result of . . . a strike . . .[35]

In the alternative to the proposition that a strike merely effects a suspension of the contract of service and not a complete repudiation

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28Diamond, *Law of Master and Servant*, 203.
29*Russell* v. *Amalgamated Society of Carpenters and Joiners*, [1912] A.C. 422, per Lord Shaw of Dunfermline at 435-6.
30*Denaby* v. *Yorkshire* 1906 A.C. 384 per Lord James at 305.
31This is the American position. "It is an ingredient of a strike that there exist an intention on the part of the employees to return to work when their aims are accomplished, and an intention on the part of the employer to re-employ the same men, or men of a similar class when the demands are acceded to, or withdrawn, or otherwise adjusted. . ." 83 C.J.S 537.
32See the comments of McRuer C.J. on the appeal of *Local 299, etc.*, v. C.P.R. reported in the *Globe and Mail*, Dec. 9th, 1961, number 34, 944, p. 3. "It is not a strike at all if the employees must first terminate their contract of employment."
The Chief Justice reserved his decision.
33*83 C.J.S. 539.*
34*Ibid.* 538.
35Labour Relations Act, *supra*. See also the Dominion Act. s. 2(2) for a similar provision.

thereof, one might argue that "reasonable notice" is not required in the case of a strike. The doctrine of reasonable notice,

> . . . is a peculiar incident of the relationship of master and servant based largely on custom.[36]

The right to strike has long been recognized by custom in Canadian jurisdictions and the doctrine of reasonable notice should not therefore apply to concerted refusals to work. Hence in the absence of an express term in a contract of employment requiring notice for its termination, a group of employees could terminate their contracts of employment without notice by walking off the job in a concerted refusal to work; in other words by going on strike.

The strike has existed too long for the courts to deny its existence by refusing to distinguish its effect from that of an individual quitting his employment. Judicial opinion has advanced sufficiently to recognize that conditions have changed in the past half-century,[37] and doubtless the decision of Magistrate Elmore will be reversed. Canadian courts will likely follow the American lead and hold that a strike merely works a "belligerent suspension" of the employer-employee relationship and cannot be equated to the situation of employees quitting their jobs.

[36] *Carter* v. *Bell and Sons Ltd.*, 1936 O.R. 290 (CA) at 297.
[37] Indicated in the statements of McRuer C.J.H.C. loc. cit.

NOTE:

The foregoing comment was written prior to the appeal decision of McRuer, C.J.H.C. in *Regina* v. *Canadian Pacific Railway Co.* (1962) 31 DLR (2nd) 209. Whereas the article recommends a common law recognition of the realities of the collective bargaining system, the decision of the Chief Justice is based largely on interpretation of the effect of s. 1(2) of the *Ontario Labour Relations Act*[1] (quoted in the body of the article). As a result, perhaps the reasoning of the article can provide a more complete answer to the question raised by counsel for the C.P.R. quoted on the last page of the judgment.

Mr. Jackett asked "What is the legal position where a strike is never concluded by a settlement?"[2] The question may be rephrased in this manner: "When, if ever, does a striker cease to have the status of a "striking employee"? In answer, McRuer, C.J.H.C. suggested four instances which did not arise "by reason only of (the striker) ceasing to work for his employer as the result of . . . a strike"[3] . . . A striker ceases to be *deemed* an employee where he has "either gone back to work, taken employment with other employers, died, or become unemployable."[4] These four instances suggest a test which accords with the concern in the article for the "intention" of a striker to return to his work. It is submitted that a person leaving his work in a concerted protest, remains in the position of a "striking employee" so long as he has not returned to work, but still possesses the present ability and the intention to do so whenever the protested circumstances are corrected. Thus it is postulated that intention and present ability to return to work are essential to support the status of "striking employee."

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[1] 31 D.L.R. (2nd) 219.
[2] Ibid., 220.
[3] *Ontario Labour Relations Act* s. 1(2).
[4] 31 D.L.R. (2nd) 220.