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C. M. Arymowicz*

Greenwood Shopping Plaza
Ltd. v. Beattie and Pettipas:
Life Masquerading as a
Contract Case

The Supreme Court of Canada held that the defendants in *Greenwood Shopping Plaza Ltd. v. Beattie and Pettipas*¹ could not claim any benefit from a contract because they were third party beneficiaries thereto. Restated, the Court permitted the insurer of a building to reach through the landlord and the tenant, and recoup itself by saddling the tenant's employees with liability for negligently performing their jobs although it could sue neither landlord nor tenant. This result is so unpalatable to both business and labour that it will be avoided, and insurers will acquiesce. In this note I will, (a) by way of introduction, comment generally on the Court's judgment and set out a framework for the subsequent discussion, (b) undertake a textual analysis of the judgment rendered at each level of litigation, (c) comment on *Greenwood* as a third party beneficiary case, and (d) show that the case might have been differently determined had it been viewed as a landlord-tenant, insurance or employee's liability case.

I. Introduction

Beattie and Pettipas negligently set fire to their employer's rented garage while welding tire storage racks. The lease between their employer, Neil J. Buchanan Ltd., and the landlord, Greenwood Shopping Plaza Ltd., contained several provisions relating to fire insurance. The landlord promised to insure the replacement cost of the building or to notify the tenant of its inability to obtain such insurance. Both landlord and tenant promised to have their respective insurers waive their subrogation rights, although they failed to identify the persons to be benefitted by the waiver or the

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1. [1980] 2 S.C.R. 228; 111 D.L.R. (3d) 257; 10 B.L.R. 234; revg. (*sub nom. Greenwood Shopping Plaza Ltd. v. Neil J. Buchanan Ltd. No. 2*) (1979), 99 D.L.R. (3d) 289; 31 N.S.R. (2d) 168 (N.S.S.C.A.D.); affg. (1978), 31 N.S.R. (2d) 1 and 34 N.S.R. (2d) 217 (N.S.S.C.T.D.) (supplementary reasons delivered July 27, 1978).

conduct to which the waiver would extend. Instead of insuring as the lease required, the landlord insured only the original cost plus a fixed percentage. The cost of reconstruction exceeded the coverage. The insurer subrogated itself to Greenwood against the tenant and its employees, and Greenwood sued both these defendants for its excess loss and for other heads of damage.

Both Trial and Appeal Divisions of the Nova Scotia Supreme Court held that the insurance provisions were to be treated as if they had been effected. Accordingly, they relieved the tenant of responsibility for the excess loss. Recent case law² made this conclusion predictable; the novelty in the case was the claim against the employees.³ The Nova Scotia courts excused the employees to the same extent as their employer. Only the employees' liability was contested before the Supreme Court of Canada. The Court reversed and permitted the insurer to subrogate itself to the landlord-insured against the tenant's employees.

The Court reached this decision through an analysis bereft of "singing reason".⁴ The Court perceived *Greenwood* as a simple contract case and perfunctorily classified the employees as third party beneficiaries of a contract. Following English authority from another legal generation unquestioningly, the Court applied the third party rule as if doctrine has a legitimate life independent of the prior transactions which gave rise to it and the subsequent transactions which it is to regulate.

Courts have accomplished much worthwhile by selectively applying black letter doctrine mechanically, but I can see only

2. The governing cases culminate with *T. Eaton Co. v. Smith*, [1978] 2 S.C.R. 749; (1977), 92 D.L.R. (3d) 425. Their *ratio* is uncertain: see *infra*, note 23. In *T. Eaton* the landlord promised to insure, and the tenant promised to repair with certain exceptions, not including waste caused by his own negligence. *Ross Southward Tire Ltd. v. Pyrotech Products Ltd.*, [1976] 2 S.C.R. 35, (1975), 57 D.L.R. (3d) 248, had the additional fact that the tenant was obliged to pay insurance premiums. The rent under the *Greenwood* lease was a fixed amount, rather than net-net. Nevertheless, *Greenwood* is a stronger case for the tenant because of the 'waiver of subrogation rights' clause.

3. The Supreme Court in *T. Eaton v. Smith* authorized a rehearing on the issue of the employee's liability. The issue was abandoned before trial, noted in *Greenwood Shopping Plaza Ltd. v. Neil J. Buchanan Ltd. No. 2* (1979), 99 D.L.R. (3d) 289 at 292 (N.S.S.C.A.D.).

4. The expression is taken from K. Llewellyn, *The Common Law Tradition: Deciding Appeals* at 183. A rule with a singing reason is one ". . . which wears both a right situation sense and a clear scope criterion on its face. . ." I have adopted some of Llewellyn's terminology and, I hope, not misused his ideas in this note.

objections to the judgment in *Greenwood*. The Court, by fixing liability on the employees, reversed, indeed perverted, centuries of progress in the common law towards making enterprises absorb the incidental costs of their existence and distributing losses over a broad base. Thus, the result ignores that negligence is an artificial concept which pretends to focus on the personal fault of the individual tortfeasor in order to serve the afore-mentioned and other ends. The joint and several liability rules work in conjunction with negligence doctrine, but under *Greenwood* the “deep pocket” can be an employee at “fault” only to the extent of 1% yet liable for the “personal faults” of co-workers. The result is even more unfair and further confounds public policy if the employer unwillingly hired or retained these co-workers because he was obliged to respect public values relating to equal opportunity or the rights of labour and subordinated optimal economic efficiency in his own business.

The parties themselves had sought to allocate the risk of loss and insure against its occurrence, but the result disrupts an attempt at private ordering, which not only would have facilitated the law’s purposes, but is in itself desirable.

Even reducing the level of analysis from broad issues of public policy to the level of the parties does not reveal a worthwhile purpose. The suit ostensibly benefits an insurer after all, not a coffeehouse bookmaker, and the principal risk insured came to fruition in the most likely way. The insurer’s subrogation action prejudices the person who paid the premium.⁵ Given the reality of collecting on judgments against employees, the subrogation right is largely theoretical; even if it were substantial, subrogation comes at an exorbitant cost. The few dollars make little difference to the insurer or to premiums, but their loss devastates the employees’ way of life, hopes and morale.

5. Pursuing the employees prejudices the employer to a varying extent by disturbing labour relations. The rule barring subrogation against the insured is narrower however. The insurer cannot subrogate against the insured himself, rather than to his prejudice. However, a court should not be astute to prejudice the insured. I argue in Part IV, *infra*, that the tenant effectively paid the premiums through his rent and therefore he is or ought to be an “insured”. However, the primary objection to the decision is not that the Court failed to consider the tenant an insured within the policy. Following the Court’s reasons, the result would not have differed if (a) the tenant had paid for the insurance through a net-net clause or even if (b) the tenant was a named insured and paid the premiums directly to the insurer. The Supreme Court implicitly accepted *Lister v. Romford Ice and Cold Storage Co.*, [1957] A.C. 555 (H.L.), see Part III, *infra*.

The decision is unjust and impractical, but the method by which the decision was reached is even more problematic than the result. Businessmen can easily avoid the result, albeit at some expense. But a judicial style based on deference to a foreign court and conceptualization divorced from any factual context has profound and unavoidable consequences should it become characteristic of a court of last resort. These matters are, however, past the scope of this note, for it will discuss primarily the doctrinal aspects of *Greenwood*.

In the face of the Court's approach one cannot disagree with Karl Llewellyn's conception of the relationship between legal rules and commercial life. Rules should manifest the continuously evolving relational equities rather than prescribe "rigid moulds"⁶ for commercial interaction. The *Greenwood* controversy arises from a transaction comprised of a number of legally recognized relationships. By shining different lights on the facts of *Greenwood*, we see a landlord-tenant, corporation, master-servant, and insurance case; if pressed, even a particular kind of contract case. That the law regulating some one of these subjects had not already prevented the result in *Greenwood* is not indicative that the law is deficient either as an institution or as a body of doctrine. The *Greenwood* facts are novel; the law's evolution can never be complete. Furthermore, the law had a substantial doctrinal basis for the requisite extensions, some of which are relatively small, all of which are welcome. The facts in *Greenwood* could have been the catalyst.

Thus, I will argue that as a matter of landlord-tenant law, the risk of loss of the premises should be borne by the party to the lease who has insurance against the risk. As a matter of master-servant law, vicarious immunity should be a rule of law rather than be effected indirectly and unreliably through legal contrivances. As a matter of corporate law, if the organic theory of corporate responsibility can vitalize a corporation with an employee,⁷ an employee should be able to shelter himself under the corporation. As a matter of insurance law, the insurer should not be able to differentiate between the business entity and its employee when it has insured the

6. The words are the Court's, (1980), 111 D.L.R. (3d) 257 at 263.

7. *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co., Ltd.*, [1915] A.C. 705 (H.L.).

business entity against liability for mere negligence.⁸ As a matter of contract law, the third party rule should be reformulated at least to the extent of sequestering "joint beneficiary" cases:

Looking at *Greenwood* variously is all very well, but at the end of the day one must come to a decision. I see *Greenwood* as, essentially, a landlord-tenant case. I will argue that in such a relationship the party who has insured against the risk should bear the loss. He, or rather his insurer as subrogee, should have some right to shift the loss, for example to a careless passerby or an arsonist, but not to someone so closely identified with a party as, for example, a careless employee acting within the course of employment.

II. *Greenwood in the Courts*

The separate liability of the employees was not argued at trial until counsel applied for the order (on judgment).⁹ Cowan, C.J.T.D., stated in his supplementary reasons for judgment:

Counsel were not able to cite any authority in support of their respective views and the point appears to be of first impression.¹⁰

Cowan denied the insurer's claim against the employees because,

. . . it follows logically that if there is no right of subrogation against the Buchanan company, in respect of the particular loss, there should be no right of subrogation against the employees of the Buchanan company for whose negligence the Buchanan company is responsible.¹¹

The employees' position was argued on appeal *inter alia*. The Nova Scotia Supreme Court, Appeal Division, appears to have seen *Greenwood* primarily as an insurance case,¹² although its reasons are not couched in terms of insurance law. The Court of Appeal affirmed in a judgment which showed sensitivity, ingenuity and a talent for purposive obfuscation. I will summarize and comment on the court's reasons because it is difficult to state its *ratio*. The

8. This position is already good law on special facts. *Morris v. Ford Motor Co.*, [1973] 1 Q.B. 792 (C.A.).

9. Most of the controversy at trial was about the fire's cause and the tenant's initial liability. Resolution of these questions takes up 37 of the 44 pages of the trial judgment.

10. (1978), 34 N.S.R. (2d) 217 at 219 (N.S.S.C.T.D.).

11. *Id.*, *Contra*, *Lister v. Romford Ice and Cold Storage Co.*, [1957] A.C. 555 (H.L.) *infra*, but see, *Morris v. Ford Motor Co.*, [1973] 1 Q.B. 792 (C.A.) distinguishing *Lister*.

12. (1979), 99 D.L.R. (3d) 289 at 294 (N.S.S.C.A.D.).

reasons either are twofold, or there is only one chain of reasoning with two steps.

First. The employees were protected by the lease because,

. . . Buchanan, in obtaining indirect insurance coverage against liability for its own negligence, must have intended to cover also its employees' liability since its negligence as a corporation only arises vicariously from its employees' negligent acts or omissions . . . Greenwood can, it seems to me, no more sue Buchanan's employees than it can sue Buchanan.¹³

The court speculated that *T. Eaton Co. Ltd. v. Smith*¹⁴ might be authority for this statement. (*T. Eaton* is an important case to which repeated reference will be made.)

Second. The court rejected appellant's contention that the employees could not benefit from the covenant to insure because they were third party beneficiaries of a contract. The employees succeeded because — for the sake of brevity and using the court's word — they were "identified" with the immune employer.

The court began this branch of its judgment by rejecting, as mistaken *dicta*, passages from *Scruttons Ltd. v. Midland Silicones Ltd.*¹⁵ which state that the plaintiff's exemption of the master does not *ipso facto* bar a suit against an employee. The court then held that in this case the third party rule did not prevent the employees from obtaining the same rights as their master,

...because the employees of the tenant . . . are not strangers to the contract. They are impliedly beneficiaries of the covenant to insure and thus fall within one of Lord Reid's exceptions . . . namely where the parties to the contract have intended the exemption from liability to extend to the alleged stranger or third party.¹⁶

The last sentence suggests that the parties' intent is pivotal to the issue. This idea is the Nova Scotia Court of Appeal's, despite the reference to Lord Reid. The Court of Appeal paraphrased Lord Reid out of context.

The court inferred from the landlord's promise to place insurance the further promises, (a) not to sue the tenant, and (b) to assume the risk itself. *T. Eaton* is authority for at least the first inferred

13. *Id.* at 293-4.

14. [1978] 2 S.C.R. 749; 92 D.L.R. (3d) 425.

15. [1962] A.C. 446 at 478 (H.L.), Lord Reid was addressing himself to what is called vicarious immunity in shorthand. Vicarious immunity will be discussed throughout the text.

16. (1979), 99 D.L.R. (3d) 289 at 294 (N.S.S.C.A.D.).

promise. But the court broke new ground in protecting the employees, because they were not signatories of the lease nor were employees defendants in *T. Eaton*.¹⁷ The court wrote:

. . . this promise (to insure) must have been intended to extend to the employees through whom and for whom the tenant was responsible.

This presumed intent to benefit the employees in my view arises from the *identification*, in this type of case of the employees with their corporate employer, an *identification* which does not occur, for example, between a shipper and an independent contractor. . . All duties imposed on the tenant by the lease are performed by the employees. . . Any right of the tenant under the lease . . . is enjoyed for the tenant by the employees and becomes a right of the employees. . .¹⁸ (emphasis added)

This passage gives rise to what counsel subsequently called the identification concept: the third party does not exist separately from the second party for the purposes of the third party beneficiary rule.

The court considered that an imposition of liability on the employees would be both impractical and surprising; it was prepared to protect the employees through other avenues if necessary.¹⁹

The court's reasons sound plausible and legal enough, but a close examination shows a lack of clarity in the reasoning, little that is recognizable doctrine, and great liberties taken with the authorities. It is even uncertain whether the second line of reasoning amplifies the first line or is an alternative. If it is distinct, it depends in part on the first line because the intent to benefit the employees is common to both.

The court brought on the difficulty by not clearly answering the threshold question, why the tenant is without responsibility.²⁰ Why the employees are irresponsible must depend, in some way, on why the tenant is irresponsible. In the course of its judgment, the court stated that through the lease (a) the tenant received indirect

17. [1978] 2 S.C.R. 749; 92 D.L.R. (3d) 425.

18. (1979), 99 D.L.R. (3d) 289 at 294-5 (N.S.S.C.A.D.).

19. The landlord consented to being injured. The landlord made a gift by deed of the implied promise not to sue the employees. *Id.* at 295. As to the former, see also, Arymowicz, *Grand Trunk Railway Company of Canada v. Robinson: Was Lord Denning Right in Midland Silicones?* (1982), 60 C.B. Rev. 467.

20. I use an archaic meaning of "irresponsible" to avoid using a word such as "exempt" or "immune" which carries with it doctrinal baggage.

insurance coverage, (b) the tenant was exempted from liability,²¹ (c) the landlord assumed the risk of loss however arising, and (d) the landlord promised not to sue the tenant. These are not alternative modes of expressing one rationale. They raise separate legal theories which, if they protect the employees, do so for reasons peculiar to each theory, or because the employees are “identified” with the tenant who is protected under one of these theories. The confusion is in part attributable to the uncertainty of the ratio of *T. Eaton*, the leading authority for relieving the tenant from liability. Consider this passage in Laskin, C.J.C.’s judgment in *T. Eaton*: the “covenant . . . runs to the benefit of the tenant, lifting from it the

21. It is clear that in *T. Eaton*, Laskin, C.J.C., writing for the majority, did not view the lease as exempting the tenant from liability, (1977), 92 D.L.R. (3d) 425 at 430 (S.C.C.). The landlord would have spoiled the insurer’s subrogation rights and voided the policy if the lease had contained an exemption clause of which the insurer had not been informed. I believe that the Chief Justice saw this problem lying in wait. He, however, did not articulate any recognizable legal theory through which the insurer would be obliged to pay on the policy and yet be deprived of common law rights against the tenant. The conventional reasons are that the tenant is a co-insured, or that the landlord had fully disclosed to the insurer that he had reduced their mutual common law rights through the lease. See *Lister v. Romford Ice and Cold Storage Co.*, [1957] A.C. 555 at 579 (H.L.) (per Viscount Simonds); *Greenwood* (1979), 99 D.L.R. (3d) 289 at 292 (N.S.S.C.A.D.) (per McKeigan C.J.); Sutton, *Insurance Law in Australia and New Zealand* (1980) at 564-8, and authorities cited therein.

In an earlier case, *Agnew-Surpass Shoe Stores Ltd. v. Cummer-Yonge Investments Ltd.* (1975), 55 D.L.R. (3d) 676 (S.C.C.), Pigeon, Dickson, Beetz and Ritchie JJ. concurring, took the lease as exculpating the tenant. Laskin C.J., Spence and Judson JJ. took the position that there never was any liability on the tenant in the first place. In *T. Eaton*, Pigeon, Dickson and Beetz JJ. concurred in Laskin C.J.’s judgment. Ritchie J. dissented.

As for the insurer’s subrogation rights, Laskin C.J.C. writes in *T. Eaton* (1977), 92 D.L.R. (3d) 425 at 429-30 (S.C.C.):

. . . as was noted in *Cummer-Yonge and Pyrotech* . . . the matter at hand is not whether the insurers are being unjustly deprived of their subrogation rights (as they would be if there was some attempt by the landlord and tenant to agree on alleviation of the tenant’s liability for fire resulting from its negligence after the fire occurred).

These cases do not discuss whether the insurer might dispute his obligation to pay on the policy. Notwithstanding the implications of the quoted passage, orthodox law makes it irrelevant whether the insured gives away his insurer’s rights before or after the accident, but see Sutton, *supra*. Laskin, C.J.C., who wrote the amorphous and innovative judgments in the cases on which *Greenwood* depends and who seems to have understood and begun to accommodate the ramifications of the fact situation, was not on the bench in *Greenwood*.

One way out is to say that the relationship as a matter of law does not admit to a cause of action against the tenant rather than a particular contract between the

risk of liability for fire arising from its negligence and bringing that risk under insurance coverage".²²

Whatever may be the Nova Scotia court's *ratio* for disposing of either the claim against the tenant or against its employees, the court's goal is clear. It is also clear that the court understood the technical objections to the employee's defence. The "identification" seems to be the key to overcoming the objections. It is the reason that the employees were intended as beneficiaries of the lease, and therefore not "strangers" to the contract, thereby sliding

landlord and tenant excludes a cause of action. This theory is antithetical to the expressed premises of the whole line of cases. *Infra*, note 56.

Another way out is to follow one of the several reasons in *Morris v. Ford Motor Co.*, [1973] 1 Q.B. 792 (C.A.) and say that: (a) the insurer's contract of indemnity in the particular case does not carry with it the usual right of subrogation or (b) this right is not available in the case because its exercise would be inequitable. However, the facts in *Morris* are highly unusual and *Morris* may depend on notice of the non-recourse arrangement between the insured (employer) and his careless employee.

I do not think that *Keefer v. Phoenix Insurance Co. of Hartford* (1901), 31 S.C.R. 144 is germane. In *Keefer* the plaintiff was the vendor of real property which he had agreed to sell under a contract for deed and keep insured to the extent of the purchase price. The fire policy was renewed in due course, but the insurer was not notified of the sale. The insurer's contention was rejected, that its obligation was only to indemnify Keefer to the extent of his limited interest, being the unpaid balance. Several ratios can be derived from the case. I do not think that the case makes the purchaser an insured so that the insurer is saddled with the negligent acts of a person unknown to the insurer, who came into possession. The issue is more poignant when the undisclosed interest is small, yet negligently destroys the entire property. I know of no case involving loss to either realty or chattels which has used *Keefer* or its chattel analog, *Waters v. Monarch Life and Fire Assurance Co.* (1856), 5 Bl. & El. 870; 119 E.R. 705 in this way. The landlord-tenant cases in the Supreme Court presented such an opportunity and have better facts than *Keefer*. The insurer, although he probably did not know the terms of the lease, undoubtedly knew of the existence of tenants. The correctness of *Keefer* has been doubted, (see Baer, *Annual Survey of Insurance Law*, (1980), 12 Ottawa L. Rev. 610 at 617-22), but *Keefer* has been applied in *Commerce and Industry Insurance Co. of Canada v. West End Investment Co.*, [1977] 2 S.C.R. 1036. This case has facts from which it is difficult to draw a doctrinal generalization. Perhaps it is noteworthy that in this case the policy named all the relevant interests, albeit inaccurately.

In *Commonwealth Construction Co. Ltd. v. Imperial Oil Co. Ltd.*, [1978] 1 S.C.R. 310; (1977), 69 D.L.R. (3d) 558, involving a builders' risk policy, the subcontractor in question was a named insured. The Court, rightly or wrongly, considered the loss to be within the policy terms. It is noteworthy that the Court recognized that the person who secured the policy had intended to insure the entire enterprise, and stated that this desire should be effected within the bounds of doctrine.

22. (1977), 92 D.L.R. (3d) 425 at 428 (S.C.C.).

over the fact that the employees were not parties to the lease. Since the employees were identified with the tenant, they did not have to provide separate consideration and are vicariously immune for negligence, as well as intentional torts. At the same time, identification is the reason for excusing the employees on whatever theory excuses the employer.

Describing the mutuality of interests and the relationship between tenant and employees as "identification" is novel.²³ The prerequisites of the association are uncertain, as is its nature. It seems to be more intense than a mere principal and agent relationship: the corporation and the employees are manifestations of each other. In other contexts "identification" is labelled as the organic theory of corporate responsibility or a piercing of the corporate veil. The identification concept may even be the *T. Eaton* idea expressed differently, or the recognition of a property right in the employees.

The Nova Scotia Court of Appeal was reversed by the Supreme Court of Canada. The Court's reasons, briefly, were that the employees were third party beneficiaries of a contract and they did not establish either of the circumstances which exclude the operation of the rule, agency or trust.

Presented with an unclear and technically erroneous judgment from the Nova Scotia Court of Appeal, the Court seems to have misunderstood both the thrust of the lower court's analysis and its specifics.

The appellant²⁴, in its rousing and skillful "elucidation" of the Court, argued in its factum that the Court of Appeal's judgment was premised on an irrelevancy, namely that the parties intended to

23. But see, *Fosbrooke-Hobbes v. Airwork, Ltd.*, [1937] 1 All E.R. 103 (K.B.); appld, *Cockerton v. Naviera Aznor S.A.*, [1960] 2 Lloyd's Rep. 450 (Q.B.). In both cases, the guest of the passenger who purchased the tickets was held bound by the exculpatory conditions. Without using the word, the court "identified" the guest with the passenger who was the contracting party. In *Cockerton*, agency was given as an alternative basis. Identification seems to slide easily into agency, see also, *Pyrene Co. Ltd. v. Scindia Navigation Co. Ltd.*, [1954] 2 Q.B. 402. In the latter case, the vendor and still owner of goods was bound by a carriage contract made by the purchaser-shipper when the goods were damaged during loading aboard ship. *Fosbrooke-Hobbes* and *Cockerton* have probably not survived *Midland Silicones*. *Pyrene* was accepted as an exceptional instance based on its facts in *Midland Silicones*, *supra*, note 15 at 471 (per Viscount Simonds). See also, *Andrews v. Home Flats Ltd.*, [1945] 2 All E.R. 698 (C.A.).

24. Appellant's factum to the Supreme Court of Canada at 24-42.

benefit the employees. The appellant then contended that the sole reason for disregarding the third party beneficiary rule which could be extracted from the judgment below was the "identification" concept. This theory could not be good law. By identifying the employees with the tenant, the Court of Appeal in effect had overturned *Salomon v. Salomon and Co. Ltd.*,²⁵ and with a vengeance! The logical consequence of disregarding the separate existence of the tenant corporation is an absurdity, that the employees are responsible for the rent. The appellant ended his factum by pointing out that the modern history of labour law has not shown that the interests of labour and management are identical.

The respondents²⁶ stated the issue broadly: were the employees entitled to the same protection pursuant to the lease as was available to the corporate tenant, their employer? The respondents continued, arguing that the courts below had found as a fact that the landlord would assume by insurance the risk of loss by fire and would not sue the tenants or tenants' employees in that event. This finding of fact was critical and should not be disturbed. The respondents attempted to give legal significance to this fact by arguing, (a) that *Midland Silicones* was distinguishable in Canada because the employees, the respondents, were claiming the benefit of a clause which protected, rather than exempted, them, (b) that the tenant contracted as agent on behalf of the employees, (c) the "identification concept" from the Court of Appeal's judgment and (d) that the landlord had vitiated his tort action by consenting in the lease to the employees' negligence.

The Court agreed that the respondents' case was based on showing that they were intended to be beneficiaries of the lease:

The respondent contended that the case turned on a finding of fact made in the courts below that the employees of the tenant were within the contemplation of the parties when the agreement regarding insurance . . . was made and they were therefore entitled to its benefit . . . the employees, if not formal parties to the contract, were nevertheless intended objects of its benefits along with the employer and accordingly the trial judgment was correct.²⁷

The Court, however, worked within the appellant's framework. The Court adopted, indeed quoted, the appellant's statement of the

25. [1897] A.C. 22 (H.L.).

26. Respondents' factum to the Supreme Court of Canada at 7-20.

27. (1980), 111 D.L.R. (3d) 257 at 262 (S.C.C.).

issue for its law and rejected the respondents' case because, in the opinion of the Court, with two exceptions privity of contract is necessary despite the contrary intent of the parties to the contract:

It is respectfully submitted that the overwhelming weight of modern authority, including an applicable series of decisions in this Court, holds that a person can in no circumstances claim the benefit of a contract in which he is not a party, unless it is a contract made on his behalf by his agent, or unless a trust has been constituted of which he is the beneficiary.²⁸

The Court showed that neither exception had been established.

The Court understood "identification" to be another way of saying that the tenant was an agent for the employees.²⁹ The Court was unable to infer a link between the employer and the employee amounting to an agency. Indeed, I suggest that such an inference would be most unrealistic.

Perhaps the Court also thought that "identification" was itself a concept and was determined to find for the Nova Scotia Court of Appeal a respectable basis for its mistaken decision. Therefore it also concluded, inconsistently, that the Nova Scotia court had found a trust relationship. But, as the Court wrote:

Upon this point, I must again conclude against the respondents. We are not referred to any evidence from which a trust could be inferred. Indeed, the issue of trust does not seem to have been argued in the courts below, and neither trust nor agency was pleaded. . . . The contracting parties could surely have altered the terms (of the lease) without the respondents' consent in this case.³⁰

Continuing in the same paragraph, the Court raised, merely to reject, the respondents' assertion of fact that the lower courts had found that the employer had intended to benefit the employees. The Court's purpose seems to have been to undercut the trust theory, but there is no trace of reliance on a trust anywhere in the lower courts' judgments or in the facts at any level. The Court could have been returning to where it began, and was rejecting the basis of the respondents' case. But the Court had already gone far past this point, for it had shown that the general intent to benefit a third party is irrelevant. In any event, the Court upset the finding because:

Courts must, in cases of this sort, be wary against drawing inferences upon vague and scanty evidence, where the result will

28. *Id.* at 263.

29. *Id.* at 264.

30. *Id.* at 265.

be to contradict the clear words of a written agreement and where rectification is not sought or may not be had.³¹

The Court then gave its decision, reversing the Court of Appeal.

One can understand the Court's hostility to an argument explicitly based on the parties' intent to benefit the third party, (although not its reluctance to make the inference), if the argument had been made. According to traditional doctrine this intent is relevant if the action were for a stay of proceedings brought by the second party against the first,³² not in the action as constituted, an attempt to exclude the rule at the insistence of the third party. Indeed, the whole point of the rule is to defeat this intent, although desire to effect the parties' intent underlies all the theories which avoid the rule.

The Court of Appeal in the course of its judgment did journey into intent *suo nomine* and tied its statements into precedent by citing Lord Reid's speech in *Midland Silicones*. Lord Reid, however, was speaking about the intent to create an agency, one of the four requirements of the agency escape.³³ Whatever else the Court of Appeal may have done, it did not call the employer an agent.

Despite, or perhaps because of, the "misreading" of authority, there is much in the Court of Appeal's judgment which commends it. The result in this area of the law is more significant than its explanation. In my opinion, the Court of Appeal's instincts for justice were right and it followed the trend of the law in restricting the scope of the third party rule. Agreed, identification is a novel

31. *Id.* at 265-6.

32. The action was denied in *Gore v. Van der Lann (Liverpool Corporation intervening)*, [1967] 2 Q.B. 31 (C.A.) and permitted in *Snelling v. John E. Snelling Ltd.*, [1973] Q.B. 87. *Beswick v. Beswick*, [1968] A.C. 58 (H.L.), permitting an action for specific performance by the second party in circumstances in which damages were inadequate may be a watershed. However, the results may have been motivated by the compulsion of the facts. See also, *Hirachand Punamchand v. Temple*, [1911] 2 K.B. 330 (C.A.), in which the court found numerous means to prevent an Indian money lender from suing his debtor, a British army officer, for the deficiency after accepting a lesser amount from his father in satisfaction of the debt, which bore interest at 27% *per annum*. Some of the reasons were that (a) the promissory note from the son had ceased to exist, (b) the creditor would receive the money as a trustee for the father, so there was no point in permitting the action, (c) the action would be a fraud on the father, (d) the action was an abuse of process. This "type transaction" is not classified as a third party beneficiary case (*Snelling, supra*, at 99), although this analysis can be run.

33. [1962] A.C. 446 at 474.

rationalization, but it is a cogent and serviceable enough concept. The court misused authority, but as an intermediate court of appeal, it has a limited role in making new law. This was not the first time that a court has masked doctrinal impediments with faulty analysis and thereby advanced the law. Nor did the prior judgments of the Supreme Court give the court much assistance in finding reasons which would better withstand a close textual analysis.

Thus, the Court of Appeal wrote a judgment which appears to be within established confines, but a closer examination shows that it does not contain any recognizable conventional doctrine. This approach to law-making has inherent dangers, and the Supreme Court succumbed to them. It failed to understand the Court of Appeal, and the appellant diverted the Court with familiar doctrine.

III. Greenwood as a Third Party Beneficiary Case

To say, as the Court did,³⁴ that C cannot derive rights enforceable against A from a contract made by A and B is to postulate a far-reaching and impractical rule which either has little moral basis or is morally offensive. The third party beneficiary rule can be stated more narrowly. But however one states the rule, it is an abstraction which at best is a bureaucratic and inexact manifestation of values. The situation sense flowing from diverse factual patterns and relationships, not doctrinal abstractions, dictates legal reality for the most part. Consequently C generally does have enforceable rights.³⁵ Ideas such as negotiation, assignment, attornment, subrogation, corporation, trust, partnership and agency came into the law prior to the third party beneficiary rule and have been perceived as existing in relative isolation.³⁶ Sight is sometimes lost

34. (1980), 111 D.L.R. (3d) 257 at 263 (S.C.C.).

35. See generally, Dowrick, *A Jus Quaesitum Tertio by Way of Contract in English Law* (1956), 19 M.L.R. 374 at 375-7.

36. There are other "anomalies" in the law. Consignees can sue on a bill of lading as if they were parties, e.g., *The Mercantile Law Amendment Act.*, R.S.O. 1970, c. 272, s.7(1); *Bills of Lading Act*, R.S.N.S. 1967, c. 22, s.1. Subsequent transferees can sue on a deed, e.g. *The Conveyancing and Law of Property Act*, R.S.O. 1970, c. 85, s. 23(3); R.S.N.S. 1967, c. 56, ss. 5(c); cf. *Law of Property Act* 1925, 15 & 16 Geo. 5, c. 20, s. 56 (U.K.). A mortgagee can sue the mortgagor's grantee on the covenant, if the grantee has assumed the mortgage, *Adair v. Carden* (1892), 29 L.R.I.R. 469 (Ch.); *The Mortgages Act* R.S.O. 1970, c. 279, s. 19. No one has argued that a bank issuing a letter of credit can defend against a beneficiary on the basis of lack of privity. A person with a limited interest in property can insure for the benefit of the remaining interests, *Keefer v. The Phoenix Insurance Co. of*

practical effect, and their relationship to the rule. Techniques such as "joint promisee" also take cases outside the rule,³⁷ as does the second party's ability to enforce the contract through an action for specific performance, a stay of proceedings, or substantial damages.

The classifications and remedies expand or contract like an accordion to give the rule a variable reach.³⁸ Sometimes

Hartford, *supra*, note 21; *Hepburn v. A. Tomlinson (Hauliers) Ltd.*, [1966] A.C. 452 (H.L.). The creditor cannot renege after accepting payment of a lesser amount from a stranger in consideration of extinguishing the debt, *Hirachand Punamchand v. Temple*, [1911] 2 K.B. 330 (C.A.).

Building schemes have been enforced for over a century. The "covenant running to the tenant" (sic) to insure in *T. Eaton v. Smith* circumvents the rule. A third party can rely on the contract to establish a status other than trespasser, *Grand Trunk Railway v. Robinson*, [1915] A.C. 740 (P.C. Can.). Deposit of goods to a bailee to hold for a third party constitutes delivery to the third party. For more examples, see also, *Alder v. Dickson*, [1955] 1 Q.B. 158, at 200 (C.A.) (per Morris L.J.).

In *Ross v. Caunters*, [1980] Ch. 297, a solicitor negligently permitted a beneficiary to witness a will. He was held liable at the suit of the disappointed beneficiary. It is tempting to say that this case stands for the proposition that the first party owes the third party a duty not to perform negligently.

It is worthwhile to consider: (a) whether the third party can stop the first party from reneging on his promise not to sue or to limit his claim despite the lack of a prior contractual nexus between the parties (see *e.g.*, *In re William Porter and Co. Ltd.*, [1937] 2 All E.R. 361 (Ch.)), or (b), whether the first party's statements will support an action in misrepresentation by the third party.

37. See, Cardozo J.'s *tour de force* in *De Cicco v. Schweizer* (1917), 221 N.Y. 431; 117 N.E. 807; Coote, *Consideration and the Joint Promisee* (1978), 37 Cam. L.J. 301, and cases cited therein. See also, *New Zealand Shipping Co. Ltd. v. A.M. Satterthwaite and Co. Ltd.*, [1974] A.C. 154 (P.C.N.Z.), another triumph of technique, featuring unilateral contract and agency.

Professor Coote contends that the "joint promisee" device should not succeed because it cannot "stand in the face of classical notions of consideration" (at 303), referring to *Dunlop Tyre Co. Ltd. v. Selfridge and Co.*, [1915] A.C. 847 (H.L.). A party to a contract is someone who is in privity and has provided consideration. Professor Coote is correct insofar as he goes. But these "classical notions" were expressed at one point in time — and quite late — in the history of the common law. They are the products of a particular *Weltanschauung* and respond to particular concerns. Also, the law has slid over greater and more obvious difficulties, see *e.g.*, *Slade's Case* (1602), 4 Co. Rep. 92b; 76 E.R. 1074 (K.B.). "Classical notions" are therefore only the starting point for discussion. See also, Corbin, *Contracts for the Benefit of Third Persons* (1930), 46 L.Q.R. 12.

38. Compare *DeCicco v. Schweizer*, *id.* with *Re Schebsman*, [1943] 2 All E.R. 768 (C.A.). In *Re Schebsman* the court found that a trust had not been created. Perhaps it is significant that it was the second party's Trustee in Bankruptcy who attempted to construe the transaction as a trust? If it were a trust, then it was imperfectly constituted, giving, it was claimed, the Trustee in Bankruptcy the right

transactions raise facts which no theory, applied *ex post facto*, can possibly encompass, but this exclusion comes from an accidental mismatch between facts and doctrine, and not from the lack of merit in the case.³⁹ Careful and imaginative draftsmen can defeat the rule, perhaps in all cases.⁴⁰ Finally, when the legislature has perceived a

to divert the payments from the wife and child to the creditors. *Green v. Russell*, [1959] 2 Q.B. 226 (C.A.) also does not present facts which should move the court's conscience towards finding a trust. See also, *In re Webb, Barclay's Bank Ltd. v. Webb*, [1941] Ch. 225; *Re Foster Clark Indenture Trusts, Loveland v. Horscroft*, [1966] 1 All E.R. 43 (Ch.).

The Court in *Greenwood* accepted the finding of a trust in *Les Affréteurs Réunis Société Anonyme v. Léopold Walford (London) Ltd.*, [1919] A.C. 801 (H.L.) at face value, but see, *Swan and Reiter, Developments in Contract Law: 1979-80 Term* (1981), 2 S.C.L. Rev. 125 at 141-4.

The Privy Council, in *New Zealand Shipping Co. Ltd. v. Satterthwaite and Co. Ltd.*, *id.* on strong facts found that the rule did not apply because the second party had contracted as agent for the third party in a unilateral contract. The cases now are about whether the facts raise the inference of agency. The third party has not had much success thus far, but this is of little consequence. The common law traditionally develops by, initially, only grudgingly finding facts to fit new theory (or to be more accurate, retreaded theory). In time the allegations become *pro forma*.

39. E.g. *Jackson v. Horizon Holiday's Ltd.*, [1975] 3 All E.R. 92 (C.A.); *Greenwood Shopping Plaza Ltd. v. Beattie* (1980), 111 D.L.R. (3d) 257 (S.C.C.). The Nova Scotia Court of Appeal showed with the "identification" idea that necessity is the mother of doctrine.

40. The *New Zealand Shipping* agency device has had a cool reception. See generally, Tetley, *The Himalaya Clause — Heresy or Genius?*, (1977-78) J. Mar. Law and Com. 111; Reynolds, *Again the Negligent Stevedore* (1979), 95 L.Q.R. 183; but see, *Port Jackson Stevedoring Pty. Ltd. v. Salmond & Spraggon (Australia) Pty. Ltd.*, [1980] 2 All E.R. 257 (P.C. Aust.). But draftsmen have not exhausted the inventory. If the second party can extract the promise to relieve the third party, he can also extract a promise that the first party will hold all insurance proceeds arising from the third parties' injury to the goods on trust for the third party. The draftsmen perhaps have worked the agency backwards thus far. The second party should not be the agent for the third party, but the agent for the first party. The terms of this agency should expressly enable the second party to contract with the third party and release him from certain obligations. Another approach is to have the second party take an assignment from the first party of certain causes of action against the third. Failing all else, the second party can constitute itself an agent of the third party and take a release under seal of rights against the third party.

Alternatively, the second party could agree to indemnify the third party and insure against this potential liability. The premium should be small, for the second party has standing to enjoin the suit against the third party and the policy can be placed with the third party's liability insurer. If the second party's suit against the first party (to which the insurer will be subrogated) is for damages, the damages will at least equal the third party's liability.

Lord Reid suggested that the second party indemnify the third and contract with the first party to release the third, telling the first party of the indemnity. Damages will

relationship as important enough, it has not been content to wait for the outcome of the war of attrition between the draftsman and the judiciary; it has enacted exceptions to the rule.⁴¹

The present limited scope of the rule makes it obsolete as a rule of general application, if it ever had such currency. Continuing the rule in its present form should not be tolerated because it does positive harm notwithstanding that it can be avoided easily. The rule obliges the parties to enter into artificial legal relationships with enormous consequences. The rule catches the unwary who are often deserving of legal protection. Making legal rights dependent on drafting gamesmanship and counsel's imagination detracts from predictability in business and weakens the law's claim for legitimacy. As for the rule's benefits in policing bargains, these can be preserved.⁴²

The Supreme Court need not have enshrined the rule in its broad form given the objections to the rule and its history. The Court

offset each other. *Scruttons Ltd. v. Midland Silicones Ltd.*, [1962] A.C. 446 at 478 (H.L.).

In all cases in which the second party takes rights in its own name, further steps need to be taken to guard against the contingency of the second party's going bankrupt. The Trustee in Bankruptcy, in liquidating the estate, would not be obliged to exercise these rights for the benefit of the third party or to pass along any proceeds to the third party. The bankrupt probably must also establish a trust of these rights, and this trust must survive the Trustee's attempts to avoid the transaction.

Assuming that the second party is and stays solvent, perhaps there is a simpler solution. Can the second party announce the day after the accident that he is holding the promise to exempt the third party on trust for the third? In the cases that come to mind, it was argued only that the second party was a trustee at the time of contracting.

Some of these approaches are discussed by Rose, *Return to Elder Dempster?* (1975), 4 Anglo-American L. Rev. 7. This excellent piece discusses the *New Zealand Shipping* case.

41. *Supra*, note 36.

42. One must take care in tinkering with something as intricate as the common law. The third party rule preserves rights as well as prevents them from arising. (a) Modern contracting practices manifesting themselves in the standard form leave the enterprise immune. The third party rule prevents the enterprise from passing on the immunity to the employees. (See e.g. *Alder v. Dickson*, *supra*, note 36). Consequently, employers often make some arrangement so that the employee does not suffer the judgment personally. Through such a convoluted rule at times produces a desirable result. (b) The rule prevents, for example, a manufacturer of goods from passing along his exculpation clauses to others in the chain of distribution. Each subsequent transferee must also devise a contract which will withstand challenge. (c) In "joint beneficiary" cases, the noncontracting party may not have the benefit of any warranties, but the burden of the exculpations does not constrain his tort action.

might have performed its function in a number of ways, even by refusing leave to appeal *Greenwood*. Having taken the case, the Court could have (a) affirmed, stretching the conventional escapes, (b) affirmed, giving no reasons or adopting the Court of Appeal's reasons, (c) re-classified the case as a landlord-tenant, etc. case and decided accordingly. Most significantly, the Court would not have been presumptuous had it (d) used the case as a vehicle to restate the third party beneficiary rule so that it would correspond with legitimate public expectations and the reality of its limited relevance. The Court instead engaged in a passive and insensitive exercise in formalism. The Court did not question the comprehensiveness of the rule; it applied the rule as if it had no history and no future, as if it had crystallized immutably, and in Westminster. Furthermore, there is no reference in its unanimous judgment to fifty years of commentators' criticism, recommendations of various law reform commissions, and the fact that life goes on in the United States with the rule substantially abrogated.⁴³

The Court viewed its course as dictated by its decision in *Canadian General Electric Co. Ltd. v. Pickford and Black Ltd.*⁴⁴ One cannot quarrel with *stare decisis* as a general precept. Adherence to *stare decisis* is a particularly wholesome practice when a case decided as recently as *Canadian General Electric* is impugned. But it would be unfortunate if the Court's passing reference in this case to *Scruttons Ltd. v. Midland Silicones Ltd.* indicates the extent that it will debate whether it should follow British courts. Ironically, British courts seem to be becoming less doctrinaire in contract cases. They are beginning to show openly

43. American law distinguishes between creditor-beneficiaries and donee-beneficiaries. The former have legal rights under the contract. *Murray on Contracts* (Indianapolis: Bobbs-Merrill, 1974) s. 278.

44. [1971] S.C.R. 41; (1970), 14 D.L.R. (3d) 372. *Canadian General Electric* is another stevedore's case. The substantial issue was whether the stevedores were negligent. But see, *Port Jackson Stevedoring Pty. Ltd. v. Salmond & Spraggon (Australia) Pty. Ltd.*, [1980] 2 All E.R. 257 (P.C. Aust.).

intolerance towards the third party beneficiary rule,⁴⁵ and creativity in contract law in general.⁴⁶

The Court seems to be following the letter and not the spirit of the British courts' judgments, and from a case more than a generation old. Such a course is particularly distressing in a time when increasingly, Commonwealth courts cannot look to British courts for leadership. The British Parliament is reforming large areas of private law. At times perhaps the British courts' decision are unreliable. Knowing that Parliament is relatively responsive, perhaps the British courts have made law passively. They have deliberately followed set doctrine so that the unpalatable results would spur Parliament into action.⁴⁷ Where will we be if the British Parliament finally intervenes and reforms the third party beneficiary rule?

The sterility of the Court's analysis is apparent if the facts are changed in a way which is doctrinally irrelevant to its reasons. Suppose, for example, that the corporate tenant is a one person corporation, and the fire was started negligently by its sole employee, the owner.⁴⁸ Or that the fire was started by the owner's spouse, who worked part time. Or the owner's child, who was helping out without pay. The Court wrote that the employees were not protected because a trust or an agency on their behalf could not be inferred. Surely in this context, the pith of the matter is the

45. *Hepburn v. A. Tomlinson (Hauliers)*, *supra*, note 36; *Beswick v. Beswick*, *supra*, note 32; *Jackson v. Horizon Holidays Ltd.*, *supra*, note 39; *Woodwar Investment Development Ltd. v. Wimpey Construction U.K. Ltd.*, [1980] 1 All E.R. 571 (H.L.).

In *Hepburn*, *supra*, at 471, Lord Reid said, "No doubt the principle preventing *jus quaesitum tertio* has been firmly established for at least half a century. But it does not appear to me a primeval or a necessary principle of the law of England. We must uphold it until it is altered. But I do not think that we are bound to be astute to extend it on a logical basis, so as to cut down an exception, if it be an exception, (of) . . . more than a century ago.

46. *E.g.*, *Woodwar Investment Development Ltd. v. Wimpey Construction U.K. Ltd.*, *id.*; *Pao On v. Lau Yui Long*, [1980] A.C. 614 (P.C.); *Johnson v. Agnew*, [1980] A.C. 367 (H.L.).

47. Two of the best examples are Crown liability and matrimonial property rights. See, Lord Denning, *Freedom Under the Law* (London: Stevens & Sons, 1949) at 73; Blom-Cooper and Drewry, *Final Appeal* (Oxford: Clarendon Press, 1972) at 307.

48. *Lee v. Lee's Air Farming Ltd.*, [1961] A.C. 12 (P.C.N.Z.).

relationships among the parties and nature of the conduct.⁴⁹ What other facts could anyone hope to adduce? To find an agency or a trust is to engage in fantasy;⁵⁰ the rule might as well be struck down openly. The tenant has no understanding of such legal concepts. He understands tires and batteries.⁵¹ After hearing a description of these concepts, it would be a surprise if he said that he intended to enter into the requisite relationships. If the tenant had had enough understanding and foresight to think of agency or trust, he also would have known not to rely on these concepts. He would have insisted that the policy name both him and his employees as insureds. As for inferring a trust from the facts, as the Court itself stated, surely the tenant could have agreed to leave the employees liable to the landlord. Who would ever advise the employees, that they, as *cestuis que trust*, could enjoin their employer from changing such a lease? If the tenant had any intent,⁵² it was to protect his employees by means of the insurance policy. How silly of the tenant to think that his desires and expectations could be fulfilled simply, directly, and without sham.

49. The bailment relationship suffices when the insurance is on goods. The bailee can insure the goods for their entire value. He holds amounts in excess of the value of his interest in trust for the other persons interested. The insurance does not depend on the bailee's acting as agent or trustee. *Waters v. Monarch Fire & Life Assurance Co.* (1856), 5 El. & Bl. 870; 119 E.R. 750; *Hepburn v. A. Tomlinson (Hauliers) Ltd.*, *supra*, note 36. The insurer must prove that the bailee did not intend to insure the other interests. *Hepburn*, *supra*, note 36 at 482 (*per* Lord Pearce).

50. *Jackson v. Horizon Holidays Ltd.*, *supra*, note 39 at 95 *per* Lord Denning. See also, *Vandepitte v. Preferred Accident Insurance Corporation of New York*, [1933] A.C. 70 at 77 (P.C. Can.) "But a contract can arise only if there is the *animus contrahendi* between the parties; there is here no evidence that Jean Berry had any conception of any contract of insurance". Also, the principal (employees) must provide consideration, *Dunlop Tyre Co. Ltd. v. Selfridge and Co. Ltd.*, *supra*, note 37.

51. To be truthful, Neil Buchanan, the principal shareholder of the tenant, is a chartered accountant. There is, however, testimony that he had a general intent to prevent litigation. Factum of the Respondent to the Supreme Court at 10.

52. The President of Greenwood stated on discovery as follows: "Our only concern, Sir, in this whole operation is to continue on in the business of what we have been doing. We are not interested in lawsuits, lawyers, and such, period." Quoted at Respondents' factum to the Supreme Court of Canada at 10. It is unrealistic to investigate intent. I suspect that the average tenant bound to a 40 page commercial lease thinks of little more than how much rent he pays, the length of his term, his permitted use, whether his use is exclusive and the like. Therefore, commentators talk about the intent that can be inferred from the transaction. It is more accurate and useful to ask what rights flow from the relationship. Stating the law in terms of intent sidetracks the issue and sends it to its ultimate derailment.

IV. *Greenwood as a Landlord-Tenant or Insurance Case*

Under orthodox doctrine the tenant is liable for its waste and the tenant is not a co-insured under the landlord's policy unless it is specifically included. The cases culminating with *T. Eaton v. Smith* emphasize provisions in leases which were previously considered irrelevant, and allocate risk of loss in a way which changes the incidents of the landlord-tenant and insurance relationships.⁵³ The judgments in these cases are confused because the results are not explicable through conventional doctrine and the courts were unwilling to give up the premises which the results contradict, namely, the tenant is liable for waste and is not a co-insured.⁵⁴ The *ratio* of *T. Eaton* need not be clear when the tenant alone is being sued, because a court can dispose of the case giving little in the way of reasons other than to say that it is applying or refusing to apply *T. Eaton*. However, the exact basis of the decision must be ascertained in at least three cases: (a) the landlord's property insurer claims contribution from the tenant's liability insurer, (b) the insurer claims that the landlord voided the policy by putting the tenant out of reach, and (c) the insurer sues the tenant's employees. The first two cases have not yet arisen. *Greenwood* is the third. The Nova Scotia

53. The principal provision is the landlord's promise to insure the building. *Ross Southward Tire Ltd. v. Pyrotech Products Ltd.*, *supra*, note 2, *Agnew-Surpass Shoe Stores Ltd. v. Cummer-Yonge Investment Ltd.*, *supra*, note 16; *T. Eaton Co. v. Smith*, *supra*, note 2.

In *United Motor Services Inc. v. Hutson*, [1937] S.C.R. 294; [1937] 1 D.L.R. 737 the landlord promised to pay insurance premiums. This case seems to be directly against the tenant. Laskin, C.J.C., in *Agnew-Surpass Shoe Stores*, *supra*, note 16 at 685 and *T. Eaton*, *supra*, note 2 at 432 distinguished *Hutson* on the basis that the effect of the provision obligating the landlord to pay the premiums was not discussed. I suggest that the Court in *Hutson* did not discuss the clause because it assumed it to be irrelevant and *Hutson* became authority on this point.

Hutson has probably been implicitly overruled. Regardless of what *Hutson* stands for, it behooved draftsmen to express their intentions fully and exactly. The landlord's promise to pay the insurance can simply be part of a detailing of the responsibility for the expenses of the building. The lease may obligate the landlord to insure in order to fund the landlord's obligation to repair the premises, with the lease terminating (for the protection of both parties) if the building cannot be repaired within a stipulated period. After the fire the parties debate the purpose of inconsistent boiler plate clauses which relate to an unlikely contingency and were substantially overlooked as the parties negotiated about the rent, term of lease and other more immediate concerns. The argument that the landlord's promise to insure was ascribable to some reason other than relief of the tenant was rejected in *T. Eaton*. Laskin, C.J.C., placed the burden on proving a different purpose on the landlord, at 429.

54. *Supra*, p. 7.

courts finessed the problem by identifying the employees with the tenant; whatever the tenant got, the employees got. The Supreme Court decided *Greenwood* as if *T. Eaton* had gone the other way: the Court unhesitatingly excluded one of the participants in the joint enterprise from the insurance coverage.

But to say, as the Court did, that the employees are third party beneficiaries to a contract begs the question: what are the relationships between the insurer, landlord and tenant, and what are their incidents? Have the principles governing the relationships changed pursuant to *T. Eaton*, so that the employees are within the principles as well? If the tenant is the equivalent of a co-insured, then *Greenwood* is *Lister v. Romford Ice and Cold Storage Co. Ltd.* in disguise, a notorious employee's liability case (which I shall discuss shortly). Should *Lister* be part of the law of Canada? If the tenant *qua* tenant is not responsible for waste, why should the irresponsibility not extend to the employees? After all, corporations cannot start fires without some intervention by their employees. If the tenant is irresponsible because it is exempt, should the law know a doctrine of vicarious immunity as the converse of vicarious liability? Only if the answers to all the questions are adverse to the employees, does a court have to consider the employees as third party beneficiaries, and unprotected, unless the court engages in the machinations associated with the third party beneficiary rule.

T. Eaton is not a difficult and confusing case if its ostensible doctrinal suppositions are rejected. What *T. Eaton* works towards is that the party with insurance coverage — in *T. Eaton* the landlord — bears the loss whether caused by the landlord or the tenant.⁵⁵ The

55. The cases thus far do depend on the landlord's promise to insure. I will argue subsequently that it is not useful to make rights depend on this promise. However, it is not surprising that the law is changing along such an avenue as the landlord's promise and that it has not abandoned the promise as yet. Change in the law is often incremental, along the path of least resistance, and confused. Only after a period is the law consolidated and put on its "true" basis, e.g., *Rylands v. Fletcher*, [1865-75] L.R. 1 Ex. 265 (per Blackburn, J.), affd., [1865-75] L.R. 3 H.L. 330; *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) (per Lord Atkin); *United States v. Bethlehem Steel Corporation* (1941), 315 U.S. 289 (per Frankfurter, J., dissenting).

See also, Baer, *The Importance of Insurance in Interpreting Exclusion Clauses* (1981), 6 Can. Bus. Law J. 97 at 103. "A more appropriate, evenhanded approach to the allocation of risk has been adopted by Laskin, C.J.C., in interpreting leases, although he has not set out in detail all of the insurance matters which would support his conclusion."

Commonwealth Construction Co. Ltd. v. Imperial Oil Ltd., supra, note 21 and *Commerce and Industry Insurance Co. et al. v. West End Investment Co.*, supra,

Court of Appeal's judgment in *Greenwood* is confusing because it ostensibly is based on the ostensible doctrine in *T. Eaton* rather than its reality. The reasons which make the change in the incidents of the landlord-tenant relationship appropriate in *T. Eaton* also lead to the conclusion that the insurer, stymied against the tenant, should not be able to assert against the employees a tort action through the landlord or an indemnity action through the tenant (at least for acts done within the scope of employment). If these changes were openly accepted into doctrine, doctrine would conform to the common desires and expectations of those whom it affects. Furthermore, it would correspond to business reality; its substance is already put into practice by the well-advised, and without argument from landlords or insurance companies.

However, businessmen must travel a tortuous path to insure that the insurance company which has received a premium for a risk will absorb the loss, rather than a participant in the insured transaction. The starting point is, of course, the black letter rule that the tenant is liable for waste caused by its negligence. The first step is a tenant's covenant to repair, excepting damage caused by fire. Such a covenant, however, does not extend to damage caused by the tenant's negligence unless negligence is specifically excepted. If the clause does not extend to negligence, the tenant should take out liability insurance; he will be indemnified. Generally, the landlord insures against fire regardless of what the lease says about the tenant's liability or whether the tenant insures. If the landlord is the named insured under the fire policy and the tenant can bring himself within the delphic judgments of *T. Eaton v. Smith*, he is irresponsible. However, the landlord has voided the policy if he destroys without the insurer's consent its subrogation rights by (a)

note 21 support the argument insofar as they are cases in which the Court has ignored basic rules of insurance law in order to make the property insurer accept the loss, thereby fulfilling the expectations of the various parties jointly engaged in a transaction involving the property. Baer points out the doctrinal difficulties in these cases in Baer, *Annual Survey of Insurance Law* (1980), 12 Ottawa L. Rev. 610 at 617-22, 656-63.

Risk of loss following insurance coverage is provided for the Uniform Commercial Code 2-509, 2-510, particularly 2-510 (2) and (3) and *The Personal Property Security Act*, R.S.O. 1970, c. 344, ss.19(2), as amended. Courts have obtained assistance from statutes in cases outside their scope, if only to tell which way the wind is blowing. See e.g. *Pettkus v. Becker* (1981), 117 D.L.R. (3d) (S.C.C.) (division of property between co-habitees), and generally, Landis, *Statutes and the Sources of Law*, *Harvard Legal Essays*, (Cambridge: Harvard University Press, 1934) at 213.

releasing the tenant from liability for negligence, (b) agreeing to deny the insurer subrogation rights, and, I suggest, even by (c) “*T. Eaton v. Smith*” clauses.⁵⁶ Of course, the landlord could have the tenant added as a co-insured. This can be done at no extra cost in many commercial policies. The complex provisions in the litigated cases suggest that this course has been overlooked.

The next step after protecting the tenant is to protect his employees. Given *Lister* and now *Greenwood*, well-advised employees or their union will bargain to vitiate the employees’ potential liability by (a) having the employer (i) waive his indemnity rights against the employees and (ii) adopt further means to protect the employees against a direct suit by the landlord, (b) having the employer agree to indemnify the employee, (c) having the employer agree to arrange for (i) full liability coverage, for himself and (ii) the insurers’ waiver of subrogation rights,⁵⁷ or (d) having the employer provide insurance coverage for the employees. Each route has its own pitfalls⁵⁸ and must be negotiated properly.

At the end of the journey the building at last is at an insurer’s risk. But without reform, the law traps the unwary and creates legal distinctions, litigation,⁵⁹ up to three premiums for one risk, and subrogation windfalls.

56. [1978] 2 S.C.R. 749; 92 D.L.R. (3d) 425.

57. See, *Morris v. Ford Motor Co. Ltd.*, [1973] 1 Q.B. 792 (C.A.).

58. In *Morris v. Ford Motor Co. Ltd.*, *id.*, the plaintiff, an employee of an independent contractor retained by Ford to clean the factory was injured by an employee of Ford. The cleaners had agreed to indemnify Ford for the negligence of Ford’s employees causing loss to the cleaner’s employees. The plaintiff, the employee of the cleaners, sued Ford, who joined in as third parties the cleaners for indemnity, who joined in as a fourth party by way of subrogation Ford’s negligent employee.

For example: (a) It is assumed that the subrogation action succeeds. Add the fact that the employer Ford agreed to indemnify the employee. How would the circle be broken? (b) Promises to be meaningful have to be backed up by an ability to pay. What if the employer-tenant promises to indemnify the employee but goes bankrupt? Insolvency is a significant risk considering the coincidence of fire and bankruptcy. (c) These alternatives are done defectively so as not to create obligations.

59. The trial judgment begins with a description of the litigations resulting from the fire, (1978), 31 N.S.R. (2d) 1 (N.S.S.C.T.D.). Imposing liability on the employees can trigger a new round of litigation depending on the arrangements that were made between the parties.

Some of the more interesting questions that can be raised from the facts are: (a) Did the landlord void the policy by vitiating subrogation rights against the tenant? (b) Did the tenant know that the landlord’s rights had been improperly affected and does such knowledge restore the insurer to his rights? (c) Can the landlord’s insurer

The rules, which are the starting points in journey, now conflict with widely held views of responsibility. The tenant's liability may have been appropriate when insurance was uncommon, tenants generally occupied the entire premises and the value of the premises was minor in comparison to the estate. These are not today's circumstances. Except in most unusual cases, the landlord has insured—and probably over-insured—the premises. Most property is mortgaged and the mortgagee always insists on an insurance policy in which he is loss payee.⁶⁰ Most often he has insisted that the face amount of the policy equal the mortgage principal, notwithstanding that the principal exceeds the value of the structures and that all the insurer will give is indemnity. Although the landlord is usually the named insured, the tenant is not a disinterested “stranger” to the policy. In reality the tenant may well have a greater interest than the landlord, because, unless the lease provides otherwise, the destruction of the premises by fire does not frustrate the lease and end the obligation to pay rent.⁶¹ Also, the tenant is vitally interested in reconstruction of the premises. Not only will he get premises, in addition to an estate, for his rent, but his goodwill and investment in the equipment, improvements and inventory may have value only if the premises are expeditiously rebuilt. The tenant may be obligated to rebuild pursuant to the lease. The tenant also is concerned that the insurer not have rights against his employees in order that he may have peace with his employees or their union. Furthermore, it is the tenant who actually pays the insurance

claim contribution from the tenant's liability insurer? (d) One would be naive to think that the tenant corporation conducted its affairs after the fire in such a way as to increase the assets exigible on execution. Can the landlord, as a creditor, claim that the tenant corporation owed it a fiduciary duty, and the corporation's actions amounted to a breach of duty? (*Rustop Ltd. Estate v. White, Bower* (1980), 36 N.S.R. (2d) 207 (N.S.S.C.A.D.); *Western Finance Co. Ltd. v. Tasker Enterprises Ltd.* (1979), 1 Man. R. (2d) 338 (Man C.A.); *Walker v. Winbourne*, [1976] A.L.J.R. 446; *Canada Business Corporation Act*, R.S.C. 1974-5, c. 33, s. 234, as amended.)

60. A common argument against permitting the insurer subrogation is that the insurer excludes subrogation recoveries in determining premiums. This argument has a greater weight when combined with the fact that insurers do not charge for a mortgagee clause. In this clause the insurer promises to pay the mortgagee, despite conduct on the part of the insured mortgagor which would void the policy against him. It is noteworthy that insurers do not assert third party beneficiary as a defence to an action based on a mortgagee clause.

61. But see, *National Carriers Ltd. v. Panalpina (Northern) Ltd.*, [1981] 1 All E.R. 161 (H.L.).

premiums, either openly if the lease is net-net or implicitly as part and parcel of the rent.

The tenants, who in the previous insurance cases established that the lease made them irresponsible, owe much of their success to the happenstance of the wording of the lease. They would have spoken to the matter directly had they thought that the wording of the lease would have the importance attributed to it by the Court. Yet they succeeded. The allocation of risk in a commercial tenancy should not depend on drafting accidents.

As for residential tenants, they are even less likely to carry liability insurance to cover loss of the entire apartment building and lost business income. Because standard form residential leases do not attempt to balance interests, they are less likely to have individually and imprecisely drawn clauses with the potential for happy surprises. Residential tenants also pay for the insurance premiums. Indeed, landlords present rent review boards with insurance bills in order to justify their proposed rent increases.

In either tenancy, it is much more likely that a tenant, rather than the landlord, will bring the risk of fire to fruition. What space does the landlord occupy in an apartment building, office building, or shopping centre? What is the nature of his activities? How often will the fire be caused by deficiencies in the construction of a modern building?

The modernization of landlord and tenant law, evident in *Highway Properties Ltd. v. Kelly, Douglas Co. Ltd.*⁶² and in the cases culminating in *T. Eaton*, should be continued. Risk of loss should rest on the party who has effective insurance coverage regardless of "fault" with a *pro rata* sharing of risk if there is multiple coverage. Any excess loss should be on the person causing the fire within the present rules. Only conduct tantamount to arson should change the result between the parties. *T. Eaton* goes a good distance to such a position.

V. Greenwood as an Employee's Liability Case

Corporations act through their employees. If contract or law make the corporate employer irresponsible, why should the irresponsibility not extend to the employees as a general rule? I will sketch how the Court might have relieved the employees of liability by some

62. [1971] S.C.R. 562; 17 D.L.R. (3d) 701, Laskin J. for the Court.

way other than changing a landlord-tenant rule or fantasizing an agency or trust.

First, assume that the Court thought that the lease exempted the tenant.⁶³ The Court could have protected the employees by accepting vicarious immunity for negligent acts. In one sense, it would not have introduced a novelty. Many of the legal contrivances which avoid the third party rule create this result indirectly and unreliably. English case law rejected such a theory erroneously, and without sufficient reflection.⁶⁴ It need not have been followed.

If, however, the lease as construed gives the tenant a positive benefit, rather than relief from liability, the question of vicarious immunity does not arise. The third party beneficiary rule substitutes. Such a characterization perhaps would go a way towards avoiding the underlying unarticulated problem, the insurer's claim against the landlord that the landlord voided the policy by spoiling the subrogation rights. However, while the characterization protects the landlord, this problem and its solution should not determine the important and independent question of the employee's liability.

If the Court were committed to the benefit characterization, it could still relieve the employees. It would first have to accept the easy inference from the facts, which the Court rejected and then assumed *arguendo*, that the tenant contracted for a benefit for both himself and his employees. With this view of the facts and the sense of the case, the Court need not have shaped the case with the "rigid mould of the concept of privity".⁶⁵ The Court could have collected and rationalized the cases in which one party contracts for performance to be rendered to both himself and another.⁶⁶ The law

63. But see *supra*, note 24.

64. I argue this point in a comment based on *Grand Trunk Railway Company of Canada Ltd. v. Robinson*, [1915] A.C. 740 (P.C. Can.), (1982), 60 C.B.R. 467.

65. (1980), 111 D.L.R. (3d) 257 at 263 (S.C.C.).

66. Examples are collected in Coote, *Consideration and the Joint Promisee* (1978), 37 Cam. L.J. 301, 303. To the list can be added holidays, *Jackson v. Horizon Holidays Ltd.*, *supra*, note 39; insurance, *T. Eaton Co. Ltd. v. Smith*, *supra*, note 2; vendors' agent's commission on sale of land to be paid to company unconnected with vendors but connected with agent, *Woodwar Investment Development Ltd. v. Wimpey Construction U.K. Ltd.*, *supra*, note 45.

Some of the unresolved questions are (a) are damages nominal? (b) is specific performance available only when the consideration has passed to the first party? (c) if the contract is to relieve the third party, is a stay of proceedings available? The

is ready for such a consolidation. I suggest that even "hard liners" on third party beneficiary would agree that "joint beneficiary" cases warrant special treatment. Courts now scramble to protect the third parties. The principal theoretical solution — an action brought by the second party to effect the contract by an order for specific performance, an injunction, a stay of proceedings or damages — exposes great deficiencies in the law of remedies.⁶⁷

views differ: note 32 *Gore v. Van der Lann (Liverpool Corporation intervening)* [1967] 2 Q.B. 31 (C.A.); *Beswick v. Beswick*, *supra*, note 32; *Snelling v. John E. Snelling Ltd.*, *supra*, note 32; *Gasparini v. Gasparini* (1978), 20 O.R. (2d) 113; 87 D.L.R. (3d) 282 (C.A.); *Jackson*, *id.*; *Woodwar*, *id.* If damages are substantial, there are further questions: (d) Can the second party keep the award? I would think that a court would interfere and oblige the money to be passed on by some theory. Damages are substantial because the third party has suffered, not the second. (e) Can the third party compel the second party to sue? Can the second sell a release to the first party? These questions can be raised on contexts which make a uniform answer unacceptable. (i) The question arises in the context of the Trustee in Bankruptcy's liquidating the second party's estate. (See *Beswick*, *supra*, note 32 at 101 *per* Lord Upjohn), who suggests that the Trustee can compromise the agreement when creditors are pressing and the agreement is onerous on the second party. Suppose, however, that the second party had performed completely, prior to the bankruptcy. (ii) The second party needs the money for proposed surgery. (iii) In cases such as *Greenwood* in which the second party has bargained for the third party's immunity, can he, regardless of the circumstances, sell that immunity back to the first party?

The basic question is why the third party should have enforceable rights or, to state the matter differently, what is the source of the rights. Conclusionary pigeonholing into trust, agency etc., does not answer these questions. So long as the law resolves controversies in this way, there is no reason to reject Lord Denning's ploy, that the third party has enforceable rights because he has a property right in the contract. It is no less conclusionary and perhaps more manageable. *Beswick v. Beswick*, *supra*, note 32 rejected this argument, which Lord Denning had based on interpreting "property" in s. 56 of *The Law of Property Act*, 1925 (15 & 16 Geo. 5, c. 20). The House of Lords held that "property" meant only real property. This result however was not forced. Courts have taken greater liberties with a statute. Also the word "property" is by itself neutral. It is now trite learning that property and right are tautological, and the circle is broken by the court's willingness to give a remedy. It is also trite learning that the definition of property reflects the times and that we presently are in a period in which rights are rapidly expanding. See, *International News Service v. The Associated Press* (1918), 248 U.S. 214; Reich, *The New Property* (1963-4), 73 Yale L.J. 733.

Perhaps Lord Denning was too cautious in presenting the property argument through s.56. The House of Lords was able to interpret the argument out of existence. If the argument had been brought as a matter of common law, it could not have been deflected so readily or without a fundamental inquiry.

67. *Jackson v. Horizon Holidays Ltd.*, *supra*, note 39; *Gore v. Van der Lann (Liverpool Corporation intervening)*, *supra*, note 32.

The Court also could have classified *Greenwood* as a master-servant or insurance case, and in relieving the employees of liability, used *Greenwood* as an opportunity to reject *Lister v. Romford Ice and Cold Storage Co. Ltd.*

In *Lister*, a truck driver made his employer vicariously liable by negligently, and in the course of his employment, backing a truck over a workmate. The employer, a corporation, had obtained motor vehicle liability insurance covering this specific risk, but insured only its own liability. The House of Lords established (a) that the corporate employer had an indemnity action against the employee, (b) that its insurance carrier could subrogate itself to the employer's action and (c) that the employer had no obligation to indemnify the employees.

Just as the idea of vicarious immunity is latent and unexpressed in all the attempts to protect the employees, so is the feeling that *Greenwood* raises the issues in *Lister*. *Greenwood* is analogous because it involves an employer, who ordinarily would be vicariously liable but is not subject to financial loss (he even may be an insured under the policy), and an insurance company and a landlord who have "assumed the risk" and are trying to recoup losses from an employee. In both cases, the risk came to fruition through the employee's act.

The decision in *Lister* has provoked intense and unanimous criticism.⁶⁸ The employee's arguments are compelling and the rationalizations are not only plausible but statistically probable. The passage of time has only made the arguments better. *Lister* cannot be followed without reflection even in Britain. The facts suggest collusion making the result not unwelcome. The injured workmate was the driver's father and he was held to be one-third responsible for his own injuries. Feelings about what is right and wrong in labour and insurance matters have changed dramatically in the 25 years since this case was decided. Insofar as *Lister* depends on the absence of an implied term in the contract of employment negating the employee's common law obligation to indemnify the master,⁶⁹

68. E.g., Glanville Williams, *Vicarious Liability and the Master's Indemnity* (1957), 20 M.L.R. 220 at 437.

69. The court, on these facts, refused to imply as a term of the employment contract that the employee would receive the benefit of the employer's insurance: that "the covenant would run" to the employee in the words of *T. Eaton v. Smith*.

the case may have limited generality.⁷⁰ In any event, *Lister* is law only in theory in Britain. It stands because insurers have a gentleman's agreement not to assert their legal rights.⁷¹

Lister was not cited to the Nova Scotia courts, but they sensed the *Lister* issues and rejected liability. The Supreme Court, also without being referred to *Lister*, inadvertently seems to accept *Lister* by imposing liability.⁷² Canadian insurance and labour law were not crying out for *Lister*.

Conclusion

Karl Llewellyn wrote in an enthusiastic and romantic moment:

I doubt if the matter has ever been better put than by that amazing legal historian and commercial lawyer, Levin Goldschmidt: "Every fact-pattern of common life, so far as the legal order can take it in, carries within itself its appropriate, natural rules, its right law. This is a natural law which is real, not imaginary; it is not a creature of mere reason, but rests on the solid foundation of what reason can recognize in the nature of man and the life conditions of the time and place; it is thus not eternal nor changeless nor everywhere the same, but is indwelling in the very

70. *Harvey v. R. G. O'Dell Ltd.*, [1958] 1 All E.R. 657 (Q.B.). The employee caused injury while driving in the course and scope of employment. He did not have to indemnify because he was hired as a storekeeper, not a driver.

71. *Morris v. Ford Motor Co. Ltd.*, *supra*, note 21 But *cf.*, *Janata Bank v. Ahmed* (1982), 132 New L.J. 46 (E.C.A.). The bank's employee negligently made bad loans and was obliged to indemnify the employer. The facts make one suspect fraud, in which case it cannot be doubted that the employer should have indemnity. However, fraud is virtually impossible to prove when an employee is required to exercise judgment and indemnity for negligence may be necessary as a practical matter.

72. *Lister* has been followed several times in Canada without any discussion of the merits of the decision or the obligation to follow the House of Lords, and without any attempt to distinguish the case. *Texada Towing Co. Ltd. v. Minette* (1969), 71 W.W.R. 417 (B.C.S.C.); *Overmeyer Co. of Canada Ltd. v. Wallace Transfer Ltd. and Pringle*, [1976] 2 W.W.R. 656 (B.C.C.A.), but see *per se* Seaton J.A. dissenting. Although *Lister* was followed in *McKee v. Dumas* (1975), 8 O.R. (2d) 229 (H.C.), the point was relatively minor, perhaps irrelevant as a practical matter, and recognized as not well developed. Another way of saddling the employee with liability is through the employer's statutory claim for contribution from the employee as a joint tortfeasor, *Ryan v. Fildes*, [1938] 3 All E.R. 517 (K.B.); *Necula v. Ducharme* (1963), 38 D.L.R. (2d) 736 (Alta. S.C.). *Necula* held that the employer could get statutory contribution and the *Lister* question therefore need not be reached. But see, *Lister*, *supra*, note 5 at 580, where Viscount Simonds stated that the statutory claim can be maintained only if a contract claim exists.

circumstances of life. The highest task of law-giving consists in uncovering and implementing this immanent law.”⁷³

Llewellyn did not mean in quoting Goldschmidt that perfect justice could be achieved, if one thought long enough about the problem and understood it well enough. His thesis was that universal rules are frail and ephemeral guides to the resolution of controversies. Cases should be seen as “transaction-types” which are governed by their own equities and these equities change with “life conditions”.

But both formalism and this relational pragmatism are part of the common law tradition and at times formalism has predominated. At times, contract law has forgotten that its rules originated as *ad hoc* means of answering the fundamental question: why should someone be held to his promise? Thus the passenger in *Alder v. Dickson* was bound to the ship owner by a shockingly harsh, unknown and unnegotiable term, while the consignee of the goods in *Midland Silicones* could ignore a term which was fair, negotiated, and relied upon. Subsuming *Greenwood* into the third party beneficiary rule confuses means with ends on a grand scale; *Greenwood* is anything but a contract case. Classifying it as such forecloses whole fields of inquiry. Applying a purportedly universal doctrine prevents an inquiry into the fact pattern’s inherent values before it can begin. Such an inquiry might lead to the articulation of a third party beneficiary rule which more closely reflects values and defines the range of facts to which it is relevant.

One must hesitate in criticizing *Greenwood* as an example of Llewellyn’s aphorism, indirect means are unreliable means.⁷⁴ The strength of the common law comes from a purposive application of these misstated and inadequate rules, including the third party beneficiary rule. But an examination of the judgment and the record in *Greenwood* does not show that the Court directly or indirectly advanced the law or any of its purposes other than by giving cause for an outcry which may move the legislature to intervene and reverse the decision. Perhaps this was the Court’s intent. There are institutional restraints even on the court of last resort for Canada in

73. K. Llewellyn, *The Common Law Tradition: Deciding Appeals*, (1960) at 122, quoting from Goldschmidt, Preface to *Kritik des Entwurfs eines Handelsgesetzbuchs*, *Krit. Zeitschr. f.d. ges. Rechtswissenschaft*, Vol. 4, No. 4.

74. Karl Llewellyn’s companion aphorism is “Techniques without ideals may be a menace, but ideals without techniques are a mess”.

making law; like the British courts, the Court can make law passively. But *Greenwood* issues arise in relationships which traditionally have been managed primarily by the judicial, not the legislative branch. If the legislature intervenes — and there is much competition for its attention in these difficult times — it will probably speak only to the very facts of the case and amend the fire provisions of the Insurance Act⁷⁵ or the like. Over-particularization is as debilitating to the law as over-generalization. *Greenwood* is to be regretted as an opportunity missed as much as for what it actually held.

75. See e.g. *The Insurance Act*, R.S.N.S. 1967, c. 148, s.90(1), which identifies a person who drives an auto with the consent of the owner of the auto to the owner.