# CASE NOTES

## DRIVE YOURSELF LESSEY'S PTY. LTD. v. BURNSIDE[1]

*The Liability of an Invitor for Damage to the Goods of an Invitee.*

It is fortunate for the patrons of public car-parks, "drive-in" theatres and the like, that the Full Court of New South Wales in the present case, comprising Street C.J., Owen and Herron JJ., felt unanimously disposed to differ from certain *dicta* of the judges of the Court of Appeal in *Tinsley v. Dudley*.[2] The important point which was raised in both cases was whether the duty owed by an occupier of premises to an invitee, as laid down in the oft-quoted judgment of Willes J. in *Indermaur v. Dames*,[3] is confined to liability for personal physical injuries caused by the dangerous condition of land or premises the existence of which the occupier "knows or ought to have known", or whether the principle extends to cover liability for damage to the goods of an invitee. The respondents (plaintiffs in the original action) were the owners of a motor car which they had hired to one Taylor under a contract of bailment whereby Taylor became entitled to use it for the period of the hiring. The appellants were occupiers of a public recreation area within the N.S.W. Public Parks Act, 1912. Taylor drove the car to the recreation area where he was met by an employee of the appellants. On payment of a few shillings he received a parking ticket and was then shown a place in which to park in an area at the foot of a cliff. On a number of occasions prior to that day, rocks had to the knowledge of the appellants fallen on top of and had damaged cars parked in the area. Taylor was given no warning and those dangers were not apparent or known to him. A boulder fell from the cliff and damaged the car. The question was whether in those circumstances the respondents were entitled to recover damages. The action was brought on four counts, but the only one relevant to this discussion was that founded on negligence. On appeal counsel for the appellant submitted broadly that no relationship of invitor and invitee or licensor and licensee existed between the parties. Even if it did exist the appellants could be made liable only for any personal injury and not in respect of injury to property, unless the injury to property was incidental or ancillary to the personal injury. In support of that proposition a *dictum* of Lord Evershed M.R. in *Tinsley v. Dudley* was relied upon. The facts of that case are not relevant here, but in the course of his judgment the learned Master of the Rolls said that the question whether the

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1 (1959) S.R. (N.S.W.) 391.
2 (1951) 2 K.B. 18.
3 (1866) L.R. 1 C.P. 274.

relationship of one person to another is that of licensor and licensee or invitor and invitee has often been before the courts, "but the validity of the distinction bears only I think on matters of personal injury or, at most, material injury which is incidental or ancillary to personal injury".[4] Despite the fact that the question of the invitor-invitee relationship was entirely irrelevant to the decision in that case there are writers, for example, Fleming, who consider *Tinsley v. Dudley* an authority for the proposition that the liability of an invitor does not cover damage to the goods of an invitee save for the exception to which I have referred.[5]

Street C.J., however, arrived at the opposite conclusion in *Burnside's Case*, and although the two other members of the Court did not make this point the *ratio* of their respective decisions they agreed with the learned Chief Justice in *dicta* to the same effect. He was the only judge to decide definitely that in the case before him the relationship of invitor-invitee existed. He said:

> "I am of opinion that where motor cars are placed by their owners in the parking area provided by the appellant trustees at Bobbin Head after payment of the required sum for parking such car, the relationship between the person leaving the card and the trustees is that of invitor and invitee".[6]

Owen J. said that it would be sufficient if the plaintiff were regarded as a licensee,[7] and Herron J. said that the defendants were liable on the wider principles expressed in *Donoghue v. Stevenson*.[8]

The principal authority cited by the learned Chief Justice in support of his conclusion that the liability of an invitor extends to liability for damage to the goods of the invitee was *Lancaster Canal Company v. Parnaby*.[9] In that case the damage complained of was damage to a fly-boat, which was passing along a canal vested in the defendant company, owing to the presence of a sunken boat in the canal. He cited a passage from the judgment of Tindal C.J. who said that it was the duty of the company who "made the canal for their profit and opened it to the public upon payment of tolls to the company . . . to take reasonable care so long as they keep it open for the public use of all who may choose to navigate it that they may navigate without danger to their lives or property . . . and they are responsible for the breach of it upon a similar principle to that which makes a shopkeeper, who invites the public to his shop liable for neglect on leaving a trap-door open without any protection by which his customers suffer injury"[10] That decision of the Court of Exchequer Chamber presents, it is submitted, a formidable obstacle in the path of

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4 (1951) 2 K.B. 25.
5 *Law of Torts*, footnote at p. 428.
6 (1959) S.R. (N.S.W.) at p. 396.
7 *Ibid.*, p. 405.
8 *Ibid.*, p. 409.
9 (1839) 11 Ad & E. 223, 113 E.R. 400.
10 *Ibid.*, at pp. 242, 243.

those who would deny the right of an invitee to claim for damages to goods as well as for personal physical injuries. In fact, it was not referred to by the Court of Appeal in *Tinsley v. Dudley*.

As Street C.J. points out, the classic statement of Willes J. in *Indermaur v. Dames* already mentioned, laying down the standard required by law to which an occupier is expected to conform in his relationship with an invitee and which, as Fleming puts it, "has been accorded a degree of respect usually reserved for statutory definitions",[11] was expressed to rest on the authority of *Parnaby's Case*".[12] That this is so is manifest in the judgment of Willes J. who said:

> "We are to consider what is the law as to the duty of an occupier of a building with reference to persons resorting thereto in the course of business upon his invitation express or implied. The common case is that of a customer in a shop: but it is obvious that this is only one of a class; for, whether the customer is actually chattering at the time or actually buys or not he is according to an undoubted course of authority and practice entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger, of which the occupier knows or ought to know such as a trap door left open, unfenced and unlighted: *Lancaster Canal Company v. Parnaby* . . ." [13]

This passage is quoted in full because it is submitted that it can leave little room for doubt that the learned Chief Justice was correct in his conclusion. *Parnaby's Case*, as already pointed out, was a case involving damage to property, and with that fact in mind it is extremely difficult to justify the words of Evershed M.R. in *Tinsley v. Dudley* when he said:

> "Willes J. in *Indermaur v. Dames* stated that an invitee on premises is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger of which he knows or ought to know. *But the damage which is there referred to is seen on examination of the authorities to be damage to the person rather than the goods of the invitee.* . . ." [14]

The editor of Salmond on *Torts*[15] is one of the few writers to criticise *Tinsley v. Dudley* on this point, and he refers to such cases as *The Moorcock* and the *Cawood III* "in which ship-owners in the position of invitees of a dock or harbour authority have recovered damage done to their vessels by the defective state of harbours or wharves".[16]

It is submitted in conclusion that the view taken by Street C.J. and the other members of the Full Court in the present case is therefore no doubt correct. May one hope that should the question arise for decision in a court of binding authority in our jurisdiction their view will be preferred to that of Lord Evershed in *Tinsley v. Dudley*. In the light of

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11 *Op. cit.*, p. 447.
12 (1959) S.R. (N.S.W.) at p. 399.
13 (1866) L.R. 1 C.P. 287.
14 (1951) 2 K.B. at p. 25. Italics supplied.
15 11th edition (1953), by R. F. W. Heuston.
16 *Ibid.*, p. 562.

modern conditions and with the increasing necessity for such places as public car-parks and caravan sites, it is both just and sensible that an invitor should be held liable for damage to goods and property as well as for personal injuries. For it is contended that in such places the invitation has been extended primarily to the motor car or caravan rather than to the owner thereof, whose presence is merely incidental even if to a large extent necessary.

*A. E. Bailey.*

## COMMISSIONER FOR RAILWAYS (N.S.W.) v. SCOTT[1]

### *Action per Quod Servitium Amisit*

This case is of considerable interest seeing that it involves a complete review of the history and present state of the action *per quod servitium amisit*. The High Court of Australia examined the effect on the scope of that action of the Privy Council's decision in *Attorney-General for New South Wales v. Perpetual Trustee Co. Ltd.*,[2] and also decided the question of the relation between the Commissioner for Railways (N.S.W.) and a railway employee.

The Commissioner sought to recover damages for loss of the services of Rogers, an engine driver employed under the N.S.W. Government Railways Act, 1912-1956. Rogers suffered a breakdown after helping to prevent an accident for which the defendant, a motor-cyclist who had negligently attempted to cross before an oncoming train, had been held responsible.

The district court judge found for the plaintiff and awarded him full damages. On appeal, the Full Court of the Supreme Court of New South Wales reversed the decision by a majority (Street C.J. and Herron J., Owen J. dissenting). The plaintiff appealed to the High Court of Australia by special leave and the appeal was heard by Dixon C.J. and McTiernan, Fullagar, Kitto, Taylor, Menzies and Windeyer JJ.

The sole question at issue was whether there existed between the Commissioner and Rogers a relationship that would support the action *per quod servitium amisit*. The Court held unanimously that a master and servant relationship did exist and that Rogers was not a public officer as, for example, had been held in the case of a constable. The Department of Railways is a department of the Ministry of Transport, "but," said Kitto J., "we are not here concerned with an ordinary department. The Parliament of New South Wales by the Government Railways Act has set up the Commissioner as a corporation to administer the Act . . . An officer in the public service enters into no contract of service with any individual. If he can be said to enter into a contract at all it is a contract with the Government. But an officer in the railway service enters into the employment of the Commissioner. The conduct of the railway is, in law, the Commissioner's responsibility".[3] His Honour also referred to

1 (1959) 33 A.L.J.R. 126.
2 (1955) A.C. 457.
3 (1959) 33 A.L.J.R. 126, at pp. 135-136.

the decision in *Obee v. Railway Commissioners*[4] which turned in part on this very issue. Menzies J. referred to the analysis of the master and servant relationship by Kitto J. in *Commonwealth v. Quince*.[5] There the basic element of the relationship was held by Kitto J. to be the servant's obedience to orders in doing work, the work being for the benefit of the master and relating to his own affairs; the last factor constitutes the difference between the authority of a master and, for example, an overseer. As the control of the railways is in law vested in the Commissioner, it seems clear that a master and servant relationship did exist between him and Rogers.

The history of the action *per quod servitium amisit* was examined in detail by Dixon C.J. and Kitto, Taylor, Menzies and Windeyer JJ., all of whom reached the conclusion that historically the action lay wherever the relationship of master and servant existed. The origins of the action are not clear, although the peculiar rights of lords over their villeins indubitably played an important part; but, as Windeyer J. points out, "the action *per quod servitium amisit* is not an application to servants by contract of an action developed in respect of villein status. It was developed in relation to the position of servant whether *servus*, *serviens* or *famulus*".[6] The *raison d'etre* of the action would therefore seem to be not the fact that "servants were regarded as property belonging to the master",[7] but "the property that every man has in the service of his domestics; acquired by the contract of hiring, and purchased by giving them wages".[8] This is further borne out by the fact that not every trespass to a servant was actionable by the master, but only a trespass that deprived him of his servant's services. "It was not because the wrong was committed *vi et armis* and *contra pacem* that trespass lay but because the master suffered the consequent loss of service, etc., that he could bring it".[9]

In 1795 Eyre C.J. observed that he did not think that in this action the court had ever gone further than the case of a menial or domestic servant.[10] The observation, however, was *obiter*, for the action failed on the ground that the injured person was not a servant at all. In *Bennett v. Allcott*,[11] an action *per quod* for the loss of a daughter's services, the latter was described as a menial servant, but this may have been surplusage. Lord Kenyon, in *Fores v. Wilson*,[12] said that where a parent maintained an action in respect of his daughter, the action rested "on the supposed

4 (1930) 30 S.R. (N.S.W.) 201.

5 (1944) 68 C.L.R. 227.

6 (1959) 33 A.L.J.R. 126, at p. 148.

7 *Inland Revenue Commissioners v. Hambrook* (1956) 2 Q.B. 641, *per* Denning L.J. at p. 661.

8 Blackstone's Commentaries, I, 429.

9 *Per* Dixon C.J., (1959) 33 A.L.J.R. 126, at p. 128, referring also to *Robert Mary's Case* (1612) 9 Co. Rep. 11b.

10 *Taylor v. Neri* (1795) 1 Esp. 386; 170 E.R. 393.

11 (1787) 2 T.R. 166; 100 E.R. 90.

12 (1791) Peake 77; 170 E.R. 85.

relation of master and servant, though everyone must know that such a child cannot be treated as a menial servant". This "seems a somewhat rickety foundation for a conclusion that the common law gave the action *per quod* in respect of menial or domestic servants only".[13] In all other cases reported the allegation of service is unqualified and, in *Martinez v. Gerber*,[14] the servant is described as a "servant and traveller". The conclusion that the action was not limited to menial and domestic servants is confirmed by one writer,[15] though "no direct evidence has been found of an action for the loss of services of a superior servant, for example a bailiff or steward; it is problematical whether the action extended to this class".[16]

In the present case, the High Court of Australia decided by a majority (Kitto, Taylor, Menzies and Windeyer JJ.) that the action *per quod servitium amisit* lay wherever the relation of master and servant existed between the plaintiff and the person injured. The dissenting judges (Dixon C.J., McTiernan and Fullagar JJ.) held that whatever the scope of the action had been, it was now limited to the case of a domestic or menial servant by the decision of the Judicial Committee of the Privy Council in *Attorney-General for New South Wales v. Perpetual Trustee Co. Ltd.*[17]

In that case, the Crown sought to recover damages for loss of the services of a police constable, but the Privy Council held that it was not entitled to do so. The majority of the High Court in the present case held that the decision in the *Perpetual Trustee Case* was based on the fact that the constable was a public officer and that no master and servant relation existed; that although the words "domestic relations" frequently appear in the Privy Council's judgment, this is probably due to their Lordships' insistence on Blackstone's dichotomy between "public officers" and "domestic" or "private economical relations".[18] The Privy Council quoted the observation of Eyre C.J. in *Taylor v. Neri*, but in the context of the judgment it is clear that this was in order to establish that Eyre C.J. "must have been aware how far beyond the injury cases the enticement and harbouring cases had gone".[19] In delivering the judgment of the Privy Council, Viscount Simon "was concerned . . . to insist that the relation of master and servant which the law knew as one of the private or domestic relations of life would support the action and that no other relation and in particular no relation in the sphere of public relations would do so. 'The service of a constable', his Lordship said, 'is different in nature, or on a different plane from the domestic relation'."[20]

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13 *Per* Kitto J., (1959) 33 A.L.J.R. 126, at p. 133.

14 (1841) 3 Man. & G. 88, 133 E.R. 106.

15 Gareth N. Jones in *L.Q.R.*, 74 (1958), 39.

16 *Ibid.*, at p. 57.

17 (1955) A.C. 457.

18 See *per* Menzies J., (1959) 33 A.L.J.R. 126, at p. 138.

19 *Per* Kitto J., *ibid.* at p. 134.

20 *Per* Kitto J., *ibid.* at p. 133.

The position is thus by no means clear. The Court of Appeal in *Inland Revenue Commissioners v. Hambrook*[21] took the view that the *Perpetual Trustee Case* had in fact limited the action *per quod servitium amisit* to the case of a domestic or menial servant. The same conclusion was reached by the editor of the title, "Master and Servant", in Halsbury's Laws of England.[22] Such view is not, however, expressed in the headnote to the report of that case. *Hambrook's Case* could have been decided on the ground that the person injured was a public servant whose position was partly regulated by statute, and therefore a public official between whom and the Crown there was no servant and master relation. This was, in fact, the view of the case taken by Lord Goddard C.J., the judge at first instance, who found for the defendant on those grounds.

In view of the emphasis of the Privy Council's judgment on "the fundamental difference between the domestic relation of a master and servant and that of the holder of a public office and the state which he is said to serve",[23] it would seem, with great respect, that the decision of the majority of the High Court of Australia is correct. Unless and until the matter is brought before the Privy Council, therefore, it is settled law in Australia that the action *per quod servitium amisit* will lie against a wrongdoer wherever the relation of master and servant exists between plaintiff and the person injured.

*R. Plehwe.*

## SCHEIDER v. EISOVITCH[1]

*Damages — Recovery by Plaintiff in respect of voluntary undertaking to pay third party for gratuitous services*

This case illustrates a conflict between two important principles of the law of damages — the rule that the defendant is liable for all damage directly caused by his tortious act, and the duty of the plaintiff to mitigate damages.

The problem concerned the extent of the liability of a defendant for voluntary payments made by the plaintiff to a third party as a result of the defendant's tort.

The plaintiff and her husband were holidaying in France when, due to the defendant's negligent driving, the plaintiff's husband was killed and she herself was injured. On hearing of the accident, the plaintiff's brother-in-law and his wife, immediately, and without any request from the plaintiff, flew from England to France with the intention of helping the plaintiff to bring her husband's body back to England and also to assist her in returning to England herself. Evidence was adduced to show that the plaintiff could not speak French and that if her relatives had not voluntarily helped her she would have had to employ a nurse to accompany her to England and someone to arrange to transport her

21 *Supra.*
22 Third edition, vol. xxv, p. 558.
23 (1955) A.C. 489.
1 [1960] 1 All E.R. 169.

husband's body there. The plaintiff considered that she was under a moral duty to pay, and undertook to pay out of any damages that she recovered, the expenses incurred by her brother-in-law and his wife.

Paull J. held that the expenses of the plaintiff's brother-in-law and his wife could be included in the amount awarded to the plaintiff for special damages.

In so holding, the learned judge declined to apply either the test of the legal liability of the plaintiff to pay or the moral duty on her to refund her brother-in-law's expenses. His Lordship formulated three requirements which the plaintiff had to fulfil:[2]

> ". . . that the services rendered were reasonably necessary as a consequence of the tortfeasor's tort; secondly, that the out-of-pocket expenses of the friend or friends who rendered these services are reasonable bearing in mind all the circumstances, including whether expenses would have been incurred had the friend or friends not assisted, and, thirdly, that the plaintiff undertakes to pay the sum awarded to the friend or friends."

Paull J., in coming to this conclusion, relied on the decision of Denning J. (as he then was) in *Dennis v. London Passenger Transport Board*[3] and a judgment of Goddard J. (as he then was) in *Allen v. Waters & Co.*[4]

It is certainly surprising that no reference was made to *Admiralty Commissioners v. S.S. Amerika.*[5] That was an action brought by the Admiralty against the owners of a ship which had negligently sunk a Royal Navy submarine, causing the death of all members of the crew except one. The plaintiffs claimed as an item of damage the capitalised value of the pensions payable by them to the relatives of the deceased men.

The attention of the House of Lords in the latter case was admittedly concerned in the main with rebutting the attack made by the plaintiffs on the long established rule in *Baker v. Bolton*[6]—*viz.*, that in a civil court the death of a human being cannot be complained of as an injury. But it is respectfully submitted that it was equally the *ratio decidendi* of the case that the pension payments could not be recovered because they were voluntary payments in the nature of compassionate allowances which the plaintiffs were under no legal liability to pay. Lord Parker of Warrington said:[7] "No person aggrieved by an injury is by common law entitled to increase his claim for damages by any voluntary act; on the contrary, it is his duty, if he reasonably can, to abstain from any act by which the damage could be in any way increased".

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2 At p. 174.

3 [1948] 1 All E.R. 779.

4 [1935] 1 K.B. 200.

5 [1917] A.C. 38.

6 (1808) 1 Camp 493.

7 At p. 42.

Certainly the *Amerika Case* was understood to be clear authority for that proposition by Lord Wright M.R., who remarked in *The Oropesa*[8]: "It was held that that [the bounties paid to the relatives of the crew members] was purely voluntary. This is a very extreme but obvious illustration of a case resulting from the collision, which as a matter of fact did not result in any legal sense in such a way as to impose a legal liability. It was a pure case of loss incurred by ultroneous conduct".

The *locus classicus* of this proposition, it is submitted, is to be found in the old case of *Dixon v. Bell*.[9] That was an action for damages in respect of negligence. The particulars of special damages included a physician's bill and a surgeon's bill. At that time a surgeon could sue to recover his fees but a physician could not. Lord Ellenborough C.J. directed the jury that as to the surgeon's bill they were to consider the amount as paid by the plaintiff since the surgeon could compel payment of it as a legal debt, but the physician's fees could not be taken into account since they had not actually been paid and he could not enforce payment by action.[10]

Weighty Australian authority tending towards this conclusion is to be found in *Commonwealth v. Quince*.[11] There it was decided that the action *per quod servitium amisit* did not lie at the suit of the Commonwealth for the loss of the services of a member of the R.A.A.F. caused by the defendant's negligence. Latham C.J. and Starke J. (the former being one of the dissentient minority) both clearly stated that a discretionary pension paid by the Commonwealth to its airman could not, on the authority of the *Amerika Case*, be recovered.[12]

However, in the later case of *Blundell v. Musgrave*,[13] Dixon C.J. in discussing *Dixon v. Bell* suggested that Lord Ellenborough C.J. might have gone too far and that an expense which a plaintiff was bound to meet as a matter of social and moral obligation might be sufficient.[14] It is interesting to note that Dixon C.J. seems to follow Lord Ellenborough's distinction between a voluntary payment which has been actually paid and one that has not been paid and therefore cannot be enforced against the plaintiff. Taking Lord Ellenborough's direction in this way, the test would be: "Have the payments been actually made as a direct result of the debtor's tort, or can they be enforced against the plaintiff?" If either of those tests is satisfied the plaintiff can recover the amount. This, of course, would not cover *Schneider v. Eisovitch* in which there was an undertaking to pay.

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8 [1943] 1 All E.R. 211, 216.

9 (1816) 1 Stark 287.

10 At p. 289.

11 (1943) 68 C.L.R. 227.

12 At pp. 239 and 247 respectively.

13 (1956) 96 C.L.R. 73.

14 At p. 79.

It is respectfully submitted that the only basis on which *Schneider v. Eisovitch* can be sustained is that of the principle of subvention, as explained by Fullagar J. in *Blundell v. Musgrave*. The learned judge there described the principle as follows:

> ". . . the question is not whether the plaintiff is entitled in the assessment of his damages, to be credited with the amount of an actual or prospective expenditure by him, but whether he ought to be debited with the amount or value of a subvention of which he has had the benefit".[15]

This would explain cases like *Dennis v. London Passenger Transport Board*[16] where the plaintiff, who was incapacitated from work for a period due to an accident caused by the defendants' negligence, received payments equal to his wages from his employer and the Ministry of Pensions. The plaintiff had undertaken to repay these amounts if successful in the action. It was held that the amount of wages which would otherwise have been lost could be recovered by the plaintiff. Denning J. (as he then was) remarked:[17] "The cardinal point to remember is that it is the defendants who are responsible for what has occurred. In my opinion a wrongdoer is not to be allowed to reduce damages by the fact that persons have made up to the plaintiff his wages". A similar approach was made in *A.-G. v. Valle-Jones*.[18] In other words, if a plaintiff incurs loss of wages or hospital expenses as a result of the defendant's tortious act, and some third party makes those up to the plaintiff, the defendant is not allowed to rely on the fortuitous generosity of that third pary.

This, of course, is a different situation from the case where the third party himself claims those voluntary payments as in the *Amerika Case* and *Quince's Case*. Explained on this basis, the case of subvention is not inconsistent with principle because by repaying expenses which would have been otherwise incurred and have been paid voluntarily, the plaintiff is not failing in his duty to mitigate damages. However, considerable doubt seems to prevail in this field and it would seem that an authoritative judicial pronouncement is overdue.[19]

*P. C. Heerey.*

## ISAAC v. HOTEL DE PARIS LTD.[1]

The question whether an occupancy was a lease or a licence recently came before the Privy Council on appeal from an order of the Federal Supreme Court for the West Indies.

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15 At p. 93.
16 *Supra.*
17 At p. 779.
18 [1935] 2 K.B. 209.
19 In *Viney v. Springer* (unreported—Tasmanian Supreme Court, June 30, 1960), Gibson J. declined to follow *Schneider v. Eisovitch*. The learned Judge remarked that "the existence of a moral and social obligation to reimburse, the fulfilment of which is essential to the preservation of a reputation for honest dealing" would be enough to entitle a plaintiff to recover the amount of expenditure voluntarily made by a third party as a direct consequence of the defendant's negligence, and he noted that Paull J. in *Schneider v. Eisovitch* expressly rejected the test of a moral duty to pay. On the facts of the case he held that no moral duty existed.
1 (1960) 1 W.L.R. 239.

The respondent company owned the Hotel de Paris in the City of the Port of Spain. It also leased the first and second floors of a nearby building for $250 a month. This building was known as the Parisian Hotel. One, Attie Saffie Joseph, owned all the sixty-four shares in the respondent company, and in September 1955 he agreed to sell to the appellant Isaac fifteen of those shares. The agreement, which was in writing, required $1,000 to be deposited and the balance to be paid in monthly instalments. In December 1955 the appellant, who was duly performing his obligations under the contract, suggested that repairs should be done to the Parisian Hotel, that a night bar should be established there, and that he should be put in charge of it on the respondent company's behalf. To this Joseph agreed. In the same month Isaac went into occupation of the first floor of the Parisian Hotel and obtained a licence to use it as a night bar.

Differences occurred between the appellant and Joseph in February 1956, and at a meeting the parties agreed on terms which were later to be incorporated in writing. Lord Denning, who delivered the opinion of the Judicial Committee, said of this arrangement:

> "Their Lordships are of opinion that no concluded contract was reached at the meeting. Everything was subject to a contract later being signed. A draft contract was prepared by Mr. Joseph's lawyer but it was not approved by the appellant's lawyer. So the contract never materialised".[2]

Three of the terms were found to have been acted upon. First, the appellant was to remain in occupation of the first floor of the Parisian Hotel. Secondly, the appellant agreed to pay all expenses incurred in connection with the running of the Parisian Hotel, including the monthly rent of $250 which the respondent company paid to its landlord. The appellant was also to retain for himself all profits which he made from the business carried on at the Parisian Hotel, in lieu of the dividends on his shares if he acquired them. A fourth term, whereby Isaac was to pay the balance due on the purchase of the shares, was not acted upon.

Until April 1956 the appellant continued in occupation, running the night bar. The monthly sums of $250 were paid to the respondent company, but the balance on the shares was not paid to Joseph.

Notice to quit the premises was served on Isaac on May 7th, but he was still in occupation in October 1956, when the respondent company sought a declaration that it was entitled to possession and an order for possession.

It is to be noted that their Lordships held that Isaac was in occupation of the Parisian Hotel on behalf of the respondents until February 17th, 1956, the day on which the meeting took place.

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2 *Ibid.*, p. 350.

Counsel for the appellant submitted that thereafter there existed a monthly tenancy since not only was there exclusive possession but also payment and acceptance of rent. Lord Denning, however, said:[3]

> "Their Lordships cannot accept this view. There are many cases in the books where exclusive possession has been given of premises outside the Rent Restriction Acts, and yet there has been held to be no tenancy. Instances are *Errington v. Errington and Woods*[4] and *Cobb v. Lane*,[5] which were referred to during the argument. It is true that in those two cases there was no payment or acceptance of rent, but even payment and acceptance of rent, though of great weight — is not decisive of a tenancy where it can be otherwise explained: see *Clarke v. Grant*".[6]

The relationship existing between the parties after February 17th, 1956, was in their Lordships' opinion that of licensor and licensee.

> "The circumstances and conduct of the parties show all that was intended was that the appellant should have a personal privilege of running a night bar on the premises, with no interest in the land at all".[7]

It will be recalled that in *Errington v. Errington and Woods*,[8] Denning L.J. (as he then was) had stated that the test of exclusive possession is by no means decisive and that although a person who is let into exclusive possession is *prima facie* to be considered a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy.[9] It would appear that this statement of principle was intended to be of general application so that exclusive possession would give rise only to a presumption that a tenancy had been created.

Now in *Facchini v. Bryson*,[10] Denning L.J. qualified the opinion he had previously expressed in *Errington v. Errington and Woods*. In the later case he said:

> "In all the cases where an occupier has been held to be a licensee there has been something in the circumstances, such as family arrangement, an act of friendship or generosity, or such like, to negative any intention to create a tenancy".[11]

This passage was commented upon by Jenkins L.J. in *Addiscombe Garden Estates Limited v. Crabbe*: "It seems to me that, save in exceptional cases of the kind mentioned by Denning L.J. in that case, the law remains that the fact of exclusive possession, if not decisive against the view that there

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3 *Ibid.*, p. 352.
4 (1952) 1 K.B. 290.
5 (1952) 1 All E.R. 1199.
6 (1950) 1 K.B. 104.
7 (1960) 1 All E.R., at p. 352.
8 (1952) 1 K.B. 290.
9 *Ibid.*, p. 298.
10 (1952) 1 T.L.R. 1386.
11 *Ibid.*, p. 1389.

is a mere licence, as distinct from a tenancy, is at all events a consideration of the first importance".[12]

It could hardly be suggested that the arrangement in the present case fell logically within any of the three exceptions stated in *Facchini v. Bryson*. It is further respectfully submitted that this decision, in so far as it is based on the law expounded in *Errington v. Errington and Woods* purports to go beyond the principles which are stated by Jenkins L.J. (*supra*).

The present case may usefully be compared with the recent decision of the High Court of Australia in *Radaich v. Smith*.[13] The Court had there to decide whether a deed created a lease or a licence, and it unanimously held that there was a lease. It is unnecessary to recount the facts of the case as there is little parity with the arrangement in the *Hotel de Paris Case*. However, the principles which the learned judges applied afford a sharp contrast with the reasoning of Lord Denning.

> At one end of the scale is the opinion of Windeyer J., who said: "What then is the fundamental right which a tenant has which distinguishes his position from that of a licensee? It is an interest in land as distinct from a personal permission to enter the land and use it for some stipulated purpose or purposes. And how is it to be ascertained whether such an interest in land has been given. By seeing whether the grantee was given *a legal right of exclusive possession*[14] of the land for a term or from year to year or for a life or lives. If he was, he is a tenant".[15]

Implicitly adopting the terminology of Jenkins L.J. in the *Addiscombe Garden Estates Case*, Menzies J. held that what he regarded as decisive in favour of the deed creating the relationship of landlord and tenant was that it gave the right of exclusive possession of the premises for the term granted thereby. Neither McTiernan J., who expressly approved the reasoning in the English case, nor Menzies J. indicated whether they would approve the exceptions outlined by Denning L.J. in *Facchini v. Bryson*. Taylor J. adopted the reasoning of the English case and had this to say:

> "It must be taken as beyond doubt that in cases where there is a real contest between the issues of lease and licence the problem may be solved by considering whether the right which is conferred is a right to the exclusive possession of the property in question. This, however, does not deny that exceptional cases may arise in which it will be seen that a right to exclusive occupation or possession has been given without the grant of a leasehold interest".[16]

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12 (1958) 1 Q.B. 513, at p. 528. For two recent cases where a similar attitude was adopted see *British American Oil v. De Pass* (1960) 21 D.L.R. 110 (decision of Ontario Court of Appeal) and *Sylvester v. Cyrus* [1959] 1 W.I.R. 406 (decision of the Federal Supreme Court of West Indies).

13 (1959) 33 A.L.J.R. 214.

14 Italics supplied.

15 (1959) A.L.J.R., p. 218.

16 *Ibid.*, p. 217.

Thus, it seems clear that the High Court of Australia still regards the test of exclusive possession as more or less decisive. Whether the exceptions approved of in the *Addiscombe Garden Estates Case* will be expressly applied is a matter of future decision. But it is perhaps doubtful if, on the authorities, the reasoning of the Privy Council in the present case will meet with much approval in English Courts, and even less in Australia.

*B. Doyle.*