CASE AND COMMENT

CHARITABLE TRUST—CONDITIONS OF VALIDITY—APPEAL FROM DECISION OF COURT OF APPEAL—AFFIRMED ON OTHER GROUND—BINDING EFFECT OF DECISION OF COURT OF APPEAL—*Stare Decisis.*—The decision of Mr. Justice Wells in *Re Massey*[1] is interesting both from the point of view of *what* was decided and of *how* it was decided. This comment will deal with the method rather than with the substance of the decision.

On July 26th, 1916, Chester Daniel Massey, as settlor, entered a trust agreement providing for the settlement of 200 shares of Massey-Harris Company Limited upon the president and secretary (and their successors in office) of that company. The trustees were directed by the agreement to apply and distribute the trust income "under the guidance and direction" of the board of directors of the company "for the benefit of employees now or thereafter to be employed by the company in its factories in Canada in such manner and proportions as the board of directors might direct".[2] Paragraph three of the agreement gave the board of directors certain guides to be applied in determining "some of the uses" to which the trust income could be put, and paragraph four provided, *inter alia*, that the trustees, in distributing the trust funds, "shall deem the comfort of the employee and his family as a matter of the first consideration".[3] It was further directed that the trust income was not to be allowed to accumulate but that each year's receipts were to be distributed in the same or succeeding year and that those employees having given the company the longest service were to receive first consideration.

The validity of the trust was brought into question and the trustees sought the court's opinion. In arriving at his conclusion that the trust was a valid charitable trust confined to the relief of poverty, Mr. Justice Wells was obliged to deal with the decision of the Ontario Court of Appeal in *Re Cox*[4] and it will be

[1] [1959] O.R. 608, [1959] O.W.N. 373.
[2] *Ibid.*, at p. 609 (O.R.).
[3] *Ibid.*, at p. 610.
[4] [1951] O.R. 205 (C.A.).

useful at this point if that case is reviewed. The facts in the *Cox* case were strikingly similar to the facts in the *Massey* case. There, two persons had set up in each of their wills a trust in favour of the employees of Canada Life Assurance Company or their dependants, or former employees. The income was directed to be paid "for charitable purposes only" and the board of directors of that company was given absolute power to determine "the amounts to be expended and the persons to benefit therefrom". As in the *Massey* case, a question arose as to the validity of the trusts.

To explain how the question arose it is necessary first to recall Lord Macnaghten's definition of "charity" in *Commissioners of Special Purposes of the Income Tax* v. *Pemsel:*[5]

> "Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.

The second point to be borne in mind is the familiar proposition that in order to qualify as a charity, a gift must be "for the benefit of the community or of an appreciable important class of the community",[6] that is, the trust must have a feature of public benefit. To this general rule there is a well-known and firmly-settled exception namely that a trust for the relief of poverty among "poor relations" need not satisfy the requirement of public benefit to be a valid charitable trust.[7]

In the *Cox* case Mr. Justice Wells had reached the conclusion that the trust was valid as being for the relief of poverty among the objects of the trust.[8] In doing so he followed a line of English cases ending with the decision of the Court of Appeal in the case of *Gibson* v. *South American Stores Ltd.*[9] where it was held that a trust for the relief of poverty among the employees, past and present, of a certain company was a valid charitable trust. The Court of Appeal, consisting of Roach, Aylesworth and Bowlby JJ.A., reversed the judgment of Mr. Justice Wells.[10] In so doing Mr. Justice Roach, speaking for the court, first dealt with a then recent decision of the House of Lords, *Oppenheim* v. *Tobacco*

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[5] [1891] A.C. 531 (P.C.), at p. 583.
[6] *Verge* v. *Somerville*, [1924] A.C. 496 (P.C.), per Lord Wrenbury at p. 499.
[7] The authorities on this point are collected and explained by Lord Greene M.R., in *In re Compton*, [1945] Ch. 123 (C.A.), at pp. 137-139.
[8] [1950] O.R. 137.
[9] [1950] Ch. 177 (C.A.).
[10] *Supra*, footnote 4.

Securities Trust Co. Ltd. et al.[11] where it had been held that a trust for the purpose of ". . . the education of children of employees or former employees" of a British company or any of its subsidiaries or allied companies was not a valid charitable trust because it lacked the "public benefit" characteristic. Lord Morton of Henryton distinguished the *Gibson* case on the ground that the trust there was solely for the relief of poverty while the trust before the House was for the education of children. He therefore concluded that it was "neither necessary nor desirable"[12] to express an opinion on the correctness of the *Gibson* case. Mr. Justice Roach, in referring to the *Oppenheim* case, set out the issue before the Court of Appeal as follows:

> That was an educational trust and their Lordships left undecided the question whether that rule should be applied to trusts for the relief of poverty among a group of individuals who are defined by reference to a personal relationship to a designated *propositus* or several designated *propositi.*
>
> The question which their Lordships left undecided is the issue now before this Court. That issue may be otherwise stated thus: Does the relief of poverty among a group of individuals so defined constitute a second exception to the rule of public benefit?[13]

Having so defined the issue before him, the learned judge proceeded to examine at length the authorities bearing on it including the "class" of cases known as the "poor relations" cases referred to above. He then arrived at the following conclusion on the issue as defined by him:

> Since that class is closed then the trusts here in question can be valid charitable trusts only if there is a second exception to the general rule, namely, trusts for the relief of poverty among a group of private individuals who are chosen by the donor by reason of another type of personal relationship, namely, their relationship as employees or dependants of employees of a named employer.
>
> In my opinion this Court should hold that in this Province there is not such an exception to the general rule. The test as laid down in *In re Compton* and approved and applied in the *Oppenheim* case to an educational trust should also be the test to be applied in a trust for the relief of poverty. I can see no reason why it should be applied in the one but not in the other.[14]

The case was appealed to the Supreme Court of Canada[15] where the majority held that the trusts were invalid because they lacked the necessary characteristic of public benefit.

A further appeal was taken to the Judicial Committee of the

[11] [1951] A.C. 297 (H.L.). [12] *Ibid.*, at p. 313.
[13] *Supra*, footnote 4, at p. 220. [14] *Ibid.*, at p. 224.
[15] [1953] 1 S.C.R. 94. The court consisted of Kerwin J. (as he then was)

Privy Council[16] whose judgment was delivered by Lord Somervell of Harrow. Very early in his judgment, his lordship made it quite clear that he did not regard as the issue in the appeal that which had been defined by Mr. Justice Roach in the Court of Appeal of Ontario. He said:

> In the event of a certain determination a question of much difficulty arises, whether a gift in perpetuity for the relief of poverty confined to employees of a particular employer and their dependants is a good charitable trust. In the view which their Lordships take that question does not fall for decision.[17]

Instead his lordship held that the trusts were invalid because they were expressly stated to be "for charitable purposes only" and must be construed as including *all* of the heads enumerated in *Pemsel's* case and, therefore, though it was "open to doubt whether a gift in relief of poverty of such a group is valid it is clear that a gift for their education is not".[18] The element of public benefit would certainly be lacking if, for example, the trust funds were applied for the education of the employees and their dependants.

We shall now return to the *Massey* case and see how Mr. Justice Wells dealt with the decision of the Court of Appeal in the *Cox* case. The issue before him there was the same issue which Mr. Justice Roach had defined and determined in the *Cox* case. The question now arising was whether Mr. Justice Wells, as a judge of first instance, was bound by the decision of the Court of Appeal, although that decision had been affirmed on another ground by the Supreme Court of Canada and by the Judicial Committee of the Privy Council which stated that the issue as defined and determined by Mr. Justice Roach did "not fall for decision" by them. Mr. Justice Wells answered that question as follows:

> I have anxiously considered the judgment of the Court of Appeal and with great respect I cannot convince myself that the basis upon which they reached their decision is the same as that reached by members of the Judicial Committee. The opinion which I have quoted of Roach, J.A., therefore is a *dictum* which is, of course, as I have already stated, entitled to the greatest respect from me.[19]

And,

> Accordingly as a Judge of first instance dealing with this problem, I think the proper course for me to follow is to follow the opinion of

and of Taschereau, Rand, Kellock, Estey, Cartwright and Fauteaux JJ. Rand and Cartwright JJ. dissented from the majority.

[16] [1955] A.C. 627 (P.C.).

[17] *Ibid.*, at p. 637. [18] *Ibid.*, at p. 638.

[19] *Supra*, footnote 1, at p. 622 (O.R.).

the Court of Appeal in England, based as it is on previous authorities, and to declare that the trust in question here is a good charitable trust for the relief of poverty among the employees of the company concerned. I do this without any lack of respect for the *dictum* in the Court of Appeal but with the conviction that up to the time of its decision in *Re Cox*, the whole body of the law had treated the existence of an anomaly in respect of poverty as a good and subsisting one and many persons must from time to time have acted on the basis of that view. In my view, in the light of the subsequent decision in the Judicial Committee, the statement in the judgment of the Court of Appeal in *Re Cox* is a *dictum* which I should respect, but which at the moment I am not bound to follow for the reasons that I have already expressed.'[20]

The interesting point of course is whether Mr. Justice Wells was right in concluding that he was not bound by the decision of the Court of Appeal on the same issue. He regarded Mr. Justice Roach's holding as a "*dictum*" because the Judicial Committee had decided the case on another ground. If one considers the generally accepted technical meaning of "*dictum*" or of "*obiter dictum*"[21] he will find it most difficult to describe, much less relegate, the decision of Mr. Justice Roach in the *Cox* case, on the same issue before Mr. Justice Wells in the *Massey* case, to the standing of a mere *dictum*. The real question of course is not that but whether, apart from how one might describe the decision of Mr. Justice Roach in the *Cox* case, it should have been followed by Mr. Justice Wells in the *Massey* case, despite the view of the

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[20] *Ibid.*, at pp. 623-624. There is no doubt that the courts are very hesitant to depart from a case which has stood as the law for many years, although they may regard such a case as having been incorrectly decided or as "an anomaly". See Halsbury, Laws of England (3rd. ed., 1958), vol. 22, p. 802, para. 1690, footnote (o) and cases cited therein.

[21] In *Landreville* v. *Gouin* (1884), 6 O.R. 455, Rose J. defined an "*obiter dictum*" as "an opinion expressed by a Judge in giving judgment which was unnecessary for the determination of the case, and upon which such determination did not rest". It seems very plain that, having regard to the manner in which Roach J.A. defined the issue in the *Cox* case, it cannot be said that *he* considered it to be unnecessary "for the determination of the case". That was the very issue *he* decided though the members of the Judicial Committee thought it was unnecessary for *them* to determine that issue. The observations of Talbot L.J. in *Flower* v. *Ebbw Vale Steel Iron & Coal Co.*, [1934] 2 K.B. 132 (C.A.), at p. 154 on the meaning of "*obiter dicta*" are also instructive. He said: "'*Obiter dicta*' in this context means what the words literally signify—namely, statements by the way. If a Judge thinks it desirable to give his opinion on some point which is not necessary for the decision of the case, that, of course, has not the binding weight of the decision of the case and the reasons for the decision. It seems to me, however, to be an abuse of language to describe as *obiter dicta* the deliberate pronouncements in *Dew's case*, which were all made expressly as reasons for the decision to which the Court there came, and even if I did not assent to them, I should certainly regard these pronouncements as authoritative".

members of the Judicial Committee that it was unnecessary for them to determine that issue.

There appears to be few cases in Anglo-Canadian jurisprudence which deal with that point. Apart from the *Massey* case, the question has not been determined in Ontario. In 1883, Sir George Jessel M.R., in what is itself a *dictum*, gave the following view in the case of *Hack* v. *London Provident Building Society*[22] with regard to the binding effect of a decision of the Court of Appeal affirmed on another ground by the House of Lords:

> It appears to me that *Mulkern* v. *Lord* in the House of Lords, so far as it points out a *ratio decidendi*, is not only distinguishable from this case, but is an authority for deciding it in the way we are deciding it. As regards the judgment of the Court of Appeal in that case, I must say this, that the decision of the Court of Appeal was affirmed, but not the judgment, and that is a very important distinction. When the House of Lords affirm a decision on different grounds from those of the Court below, it is evidence, in fact proof, to those who know the practice of the House of Lords, that they do not agree with those grounds. Therefore a judgment so affirmed, so far from leaving the judgment of the Court of Appeal intact, shews the contrary, and that you are no longer bound by it. The mere affirmance of the decision is quite a different thing. You are bound by the decision but not by the reasons given for it.[23]

A second case is that of *Re Budd, Budd* v. *Budd.*[24] The issue before the court was whether the rule in *Shelley's* case was part of the law of Alberta. In 1927, the Appellate Division of the Supreme Court of Alberta in the case of *Re Simpson*[25] decided that the rule in *Shelley's* case was not part of the law of Alberta. That case was later appealed to the Supreme Court of Canada where Duff J., (as he then was), said:

> The Appellate Division in Alberta has held . . . that the rule in *Shelley's* Case has not the force of law in Alberta. The Judge in the first instance, Clarke, J.A., held . . . that the rule applies. It is unnecessary, in my view, to consider whether or not the rule is in force in Alberta. I have come to the conclusion that, assuming it is to be in force, it does not apply.[26]

When the issue was again raised in *Re Budd*, Egbert J. decided it as follows:

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[22] (1883), 23 Ch. D. 103 (C.A.).

[23] *Ibid.*, at p. 112. Lord Justice Lindley also sat on the appeal and gave reasons for judgment but did not make any reference to this point. The case was decided on February 24th, 1883, and the learned Master of the Rolls died less than a month later, on March 21st, 1883. See: A Generation of Judges (1886), p. 210.

[24] (1958), 12 D.L.R. (2d) 783, (1958), 24 W.W.R. 383 (Alta.).

[25] [1927] 4 D.L.R. 817 (Alta. A.D.).

[26] [1928] 3 D.L.R. 773 (S.C.C.).

> . . . in my view . . . the sole question in issue here has been clearly decided by the Appellate Division of this Court in *Re Simpson* . . . . There Chief Justice Harvey delivering the unanimous Judgment of the Court held specifically that the rule in *Shelley's* Case is not part of the law of Alberta . . . .
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> This Judgment was appealed to the Supreme Court of Canada . . . which sustained the Judgment of the Appellate Division on other grounds, and specifically stated that the Supreme Court did not consider it necessary to decide the question whether the rule in *Shelley's* Case was part of the law of Alberta. *It did not, however, reverse or overrule the finding of the Appellate Division, so that I am faced with the unanimous decision of that Division that the rule is not in force in Alberta. This decision I consider binding upon me.*[27]

It is submitted, with respect, that the conclusion of Egbert J. in *Re Budd* is to be preferred to that of Jessel M.R. in the *Hack* case and to that of Mr. Justice Wells in the *Massey* case. Although the Supreme Court of Canada and the Judicial Committee decided the *Cox* case on a different ground, they did not overrule the decision of the Court of Appeal. If I am correct in my submission, it would follow that the law on the point decided in the *Massey* case is not as there stated but is as decided by the Court of Appeal in the *Cox* case.

The point under discussion is of more than academic interest. This is illustrated by the recent decision of the Supreme Court of Canada in *The Corporation of the City of Toronto and F. E. Wellwood* v. *Outdoor Neon Displays Limited.*[28] That case concerned the application of the respondent to the appellant municipality and Wellwood (the Building Commissioner) for a permit allowing the erection of a neon display sign on the roof of its building in Toronto. The application was made under by-law 9868 which was passed in 1923 and which provided, in part, that the permit "shall" not be issued until the inspector of buildings (the Building Commissioner) had approved the location of the sign and also that the sign "shall" not be erected until the Building Commissioner had issued the permit. The Building Commissioner refused to issue the permit and the respondent brought an application for an order of mandamus directing the appellant to issue the permit. The application was refused. An appeal was taken to the Court of Appeal where the majority[29] held that, subject to The City of Toronto Act, 1939,[30] the part of the by-law in ques-

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[27] *Supra*, footnote 24, at pp. 783-784 (D.L.R.). Emphasis supplied.
[28] (1960), 22 D.L.R. (2d) 241 (S.C.C.).
[29] [1959] O.R. 26.
[30] S.O., 1939, c. 73. The constitutional issue was argued at the invitation of the court. Laidlaw J.A. dissented from the majority.

tion, chapter 31, section 3(1), was invalid because it was an illegal delegation to the Building Commissioner of a discretionary power which was exercisable only by the Municipal Council. The City of Toronto Act, 1939, section 3(1), provided as follows:

> The Ontario Municipal Board may approve by-law No. 9868 passed by the council of the said corporation entitled "a By-law to regulate the erection and provide for the safety of buildings" and any by-law passed by the said council amending such by-law or containing provisions regulating the erection or providing for the safety of buildings, and upon such approval being given any such by-law shall be deemed to have been validated and confirmed.[31]

It was shown that on February 25th, 1942, the Ontario Municipal Board had made an order "under and in pursuance of Section 3 of The City of Toronto Act 1939 that By-law No. 9868 as amended be approved". The question of whether the order of the Ontario Municipal Board had "validated and confirmed" the by-law gave rise to a further question, namely, whether section 3(1) of The City of Toronto Act, 1939, was valid provincial legislation. The majority held that it was not and hence the appeal to the Supreme Court of Canada.

The judgment of the court was given by Cartwright J. He held that once "the Inspector is satisfied that all the requirements of the by-law are fulfilled and there is no applicable prohibitory by-law, he has no discretion to refuse to approve the location of the sign and so refuse a permit".[32] The decision of the Court of Appeal was affirmed but on the ground that the Building Commissioner was duty bound in the circumstances to issue the permit, and not that the by-law was invalid and thus could not prevent the issuance of the permit.

Having so determined the issue Cartwright J. stated that, ". . . it becomes unnecessary to consider the question of the constitutional validity of section 3(1) of *The City of Toronto Act 1939*". He added:

> Counsel for the appellants and for the Attorney General of Ontario invited the Court to express an opinion as to the validity of the 1939 statute even if it should not become necessary for us to do so; but I do not think that we ought to do this. In view of the construction I have placed upon the provisions of the by-law with which we are concerned, anything said as to the constitutional validity of *The City of Toronto Act 1939* would be *obiter*. The dismissal of the appeal, of course, does not constitute an affirmation of the view of the majority in the Court of Appeal on the constitutional point.[33]

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[31] *Ibid.*

[32] *Supra*, footnote 28, at p. 246.

[33] *Ibid.*, at p. 247.

Mr. Justice Cartwright's words are not without their significance to the point being treated in this comment. Though he would not decide the constitutional question he went so far as to say that the dismissal of the appeal did "not constitute an affirmation of the view of the majority of the Court of Appeal on the constitutional point". It would have been very easy, it is submitted, for the learned judge to have completely nullified the decision of the Court of Appeal on the constitutional point, if it were possible to do so, by simply pointing out that the affirmance of the decision of the Court of Appeal on another ground relegated that decision to the standing of a *dictum*. This, while not necessitating a determination of the constitutional issue, would have rendered that issue an open question. Apparently the decision in the *Massey* case on the *stare decisis* point was not argued before the court. As matters stand, and if I am correct in my submission on the main point considered, section 3(1) of The City of Toronto Act, 1939, is *ultra vires* and by-laws whose validity depends on it are also invalid.

The *Outdoor Neon* case will perhaps illustrate the need for a definitive statement by high authority on the question discussed.

ARTHUR J. STONE*

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ARBITRATION—MANITOBA PUBLIC SCHOOL ACT—EFFECT OF FAILURE OF COUNTY JUDGE TO DISPOSE OF APPEAL WITHIN TIME LIMITED—STATUTORY INTERPRETATION—MEANING OF EXPRESSION "SHALL BE DEEMED".—In *St. Leon Village Consolidated School District No. 1425* v. *Ronceray et al*[1] Schultz J. of the Manitoba Court of Appeal delivered a most useful essay on the expression "shall be deemed", and then, resolutely ignoring the tenor of his own argument, arrived at a most surprising result.

Logically and grammatically it would seem that where the legislature, in a statute, says that some right, action or other thing "shall be deemed to be" extinguished, determined, concluded and the like, they must be taken to have intended something less than finality. Otherwise, why not say that it "shall be" extinguished, determined or concluded.[2] However, the overwhelming weight of authority favours the view that the expres-

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[1] (1960), 31 W.W.R. 385 (Man. C.A.).

[2] An example of this usage is cited *infra*.

sion imports a conclusive presumption, and a quick search of legal dictionaries and tomes of "words and phrases judicially defined" might well leave the impression that no other meaning is possible. Rooted in an ancient word meaning judgment, other survivals of which are to be found in the expression "doomed" and in "Deemsters" the traditional judges of the Isle of Man, "deemed" is, in court, generally construed to equal "determined" or "concluded". There are, however, exceptions to this rule which as a result of this judgment are now easier to find.

This case arose out of an arbitration under The Manitoba Public Schools Act.[3] The arbitrators considered three separate petitions dealing with alteration and consolidation of school boundaries (two of the petitions arising out of the third) and made a single award dealing with all three petitions. The Minister of Education requested that three separate awards be made, and this was done not by another meeting of the arbitrators but by the inspector interviewing the three arbitrators separately and having them sign the three separate awards—the effect of the three awards being identical with that of the original single award.[4]

An appeal by the disappointed applicants, Ronceray *et al.*[5] was heard by George C.C.J. on May 26th, 1959. He delivered his judgment on September 19th, 1959, finding "grave irregularities" in the procedure and ruling:

> The appeal will therefore be allowed, and all proceedings with respect to all three petitions before the board of arbitrators shall be quashed on the ground of irregularities of procedure . . . .[6]

In his judicial enthusiasm for slapping down an administrative tribunal the learned county court judge forgot that only one of the petitions was before him on appeal. Section 305 of the Public Schools Act provides that, ". . . notwithstanding the insufficiency or uncertainty of, or any error, omission, or defect in any arbitration proceedings or the submission thereto, or the award thereunder . . . if an appeal therefrom may be taken, on the expiration without appeal of all times for appeal . . . the proceedings, the submission, and the award shall . . . be sufficient,

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[3] R.S.M., 1954, c. 215.

[4] Two of the petitions were granted, St. Leon Consolidated S.D. itself being the result of one award. Ronceray *et al.* were the only disappointed applicants.

[5] Actually four of the seven original petitioners in this particular application.

[6] *Supra*, footnote 1, at p. 387.

certain and binding and . . . shall not[7] be questioned in any action suit or proceeding in any court . . . ."

To return to a point raised previously: the phrase "shall be sufficient, certain and binding" is certainly conclusive and the substitution of the phrase "shall be deemed to be sufficient, certain and binding" would logically raise the presumption of an intention to diminish the effect of the otherwise absolute expressions.

In any case the Court of Appeal quite properly held that section 305 removed from the trial judge any jurisdiction to consider the two unappealled awards and therefore "These awards have the same status in law as they had before the said findings were made by the learned trial judge".[8] On the Ronceray appeal which was properfy before the court different considerations applied. Section 323 of the Public Schools Act contains two relevant subsections:

> (7) Subject to subsection (8), unless the judge disposes of the appeal within three months after service of the notice of appeal has been completed the appeal[9] shall be deemed to be dismissed.
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> (8) Where the judge is satisfied that the appellant has been unavoidably delayed in obtaining necessary evidence, he may, in his discretion, extend the time for disposal of the appeal.

The Court of Appeal found that subsection (8) did not apply in the instant case, however it is included here for the light it throws on the intention of subsection (7). Doubtless subsection (7) is unfortunately worded in that it leaves open to doubt the question of whether the intention is to inform judges, or litigants. But a reading of subsection (8) makes it clear that subsection (7) is aimed at the appellant. Even without subsection (8) any other conclusion is preposterous, as then the section could be redrafted to read: "If the judge is negligent the litigant shall lose his rights," or more broadly: "The onus shall be on the appellant to compel the judge to act and the failure to discharge this onus shall determine his rights."

As indicated above George J. did not make his judgment until almost four months after the hearing (how long after service of notice of appeal does not appear from the report),[10] and this delay was a primary ground for the appeal by the St. Leon Consolidated School District.

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[7] The report leaves out the important word "not" (*ibid.*, at p. 387).

[8] *Ibid.*, at p. 388.

[9] The reference is to the appeal before the trial judge.

[10] It might very well be argued that if the hearing is held within three months of the service of notice of appeal, the judge has made such disposition of the appeal as is contemplated by ss. (7). However, I would not care to rest my case on this argument.

Counsel for Ronceray argued that the phrase "shall be deemed to be dismissed" should be interpreted liberally rather than literally, citing section 14 of the Interpretation Act which provides that:[11]

> Every Act . . . and every provision thereof shall be deemed remedial, and shall receive such fair, large and liberal construction and interpretation as best insures the attainment of the object of the Act . . . .

He argued that otherwise the result would be to work ". . . a distinct and unfair hardship upon a county court judge called upon to dispose of so complicated a matter."[12] In disposing of this contention Schultz J.A. indicated that he had fallen into the same trap as did George C.C.J. ". . . the only matter before the learned trial judge with which he had any obligation to deal and decide was the Ronceray appeal which was not complicated or difficult. The complications, if any, arose as a result of the error of the learned trial judge . . . ."[13] In their eagerness for putting an inferior court in its place the Court of Appeal forgot that the function of an appeal court is primarily to adjudicate the rights of appellants and respondents on their own merits and not to do this only incidentally to a criticism of the court of first instance. The Court's brief on the phrase "shall be deemed" is, however, unexceptional:

> What this court has to consider in regard to the interpretation of the words "shall be deemed to be dismissed" is not the type of interpretation, *i.e.*, whether literal or liberal, but the meaning of these words as used in the Act. The words "deem", "deemed", and "shall be deemed" when used in statutes usually imply an element of finality, but that meaning is not inflexible or invariable. In some cases these words, or words of identical import, are construed to establish a conclusive presumption . . . .[14] But there are cases which indicate that a strict, literal, interpretation is not justified; that the presumption established by the use of such words is rebuttable.[15]

In view of the result achieved in the instant case some of the authorities adduced in support of the latter proposition are worth quoting here. Thus Jessel M.R. in *Ex parte Walton; In re Levy* said:[16]

> The results of a literal construction of the section would be so monstrous that such a construction must be considered absurd.[17]

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[11] R.S.M., 1954, c. 128.

[12] *Supra*, footnote 1, at p. 389.

[13] *Ibid.*

[14] *Ibid.* In support of this proposition are cited *Shepard* v. *Broome*, [1904] A.C. 342; *Re Rogers and McFarland* (1909), 19 O.L.R. 622; *Re Dupperault*, [1940] 3 W.W.R. 385, and *Madden* v. *Madden*, [1947] O.R. 866.

[15] *Ibid.*, at p. 390.

[16] (1881), 17 Ch. D. 746.

[17] *Ibid.*, at p. 753.

and James L.J. was of the opinion that:

> When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to.[18]

Middleton J. in *Hickey* v. *Stalker* stated:[19]

> I think this modified meaning [that the word "deemed" in a statute meant "treated as *prima facie* evidence", "held until the contrary is proved"] should be given to the word as found in our statute, for it will not only save the legislation from being unjust but also from being absurd.[20]

The headnote of *Mutchenbacker* v. *Dominion Bank* reads as follows:[21]

> . . . the words "shall be deemed to be" were not equivalent to "shall be" when taken along with the rest of the document.[22]

This series of quotations seem tailored to fit the facts of this case in the light of subsections (7) and (8) of section 323: the purpose of these sections when read together is to force appellants to expedite their appeal, not to force judges to deliver a prompt judgment. To determine the rights of a litigant through no fault of his own, but because of the negligence of the court, is an "absurd" and "monstrous" result; clearly the "statutory fiction" was to be resorted to between appellant and respondent, not between the trial court and the Court of Appeal; considering the different wording of section 305, it is clear that in subsections (7) and (8) of section 323 read together the words "shall be deemed to be" were not equivalent to "shall be". Certainly reading this judgment one would be entitled to assume that the Court of Appeal was preparing to dismiss the technical objection and consider the appeal on the merits. But this was not the case. After pointing out that the purpose of the relevant part of the Public Schools Act is to "provide *inter alia*, a practical, inexpensive and expeditious method of dealing with the formation, alteration and consolidation of school districts and for arbitrations in relation thereto and appeals from such arbitrations",[23] and that delays in arbitrations might be vexatious and embarrassing, the court concluded:

> . . . the intention of the legislature in sec. 323 (7) is unmistakable. It provides that the county court judge hearing an appeal from arbi-

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[18] *Ibid.*, at p. 756.
[19] (1924), 53 O.L.R. 414.
[20] *Ibid.*, at p. 419.
[21] (1911), 18 W.L.R. 19 (Man.).
[22] Also cited in support of this proposition are *Hill* v. *East & West India Dock Co.* (1884), 9 App. Cas. 448; *Rex* v. *Fraser* (1911), 45 N.S.R. 218.
[23] *Supra*, footnote 1, at p. 391.

tration proceedings must act with promptitude; that if he fails to dispose of the appeal . . . "within three months after service of the notice of appeal has been completed the appeal shall be deemed to be dismissed."

It must be taken to mean that, subject only to the proviso in sec. 323 (8), the legal effect of the failure of the court to decide the appeal within three months is equivalent to a dismissal of it by operation of the law. It is immaterial if, as in the present case, the trial judge assumes to render judgment after the period of three months has expired for, being without jurisdiction, his judgment is of no effect.[24]

This case will remain a most useful mine for counsel who need to dredge up a brief on any aspect of the word "deemed". The result of the case can best be described in the words of the famous Master of the Rolls, Jessel,[25] "so monstrous that such a construction must be considered absurd".[26]

HUGH R. RANEY*

* * *

LABOUR LAW — COLLECTIVE AGREEMENT — RETIREMENT PLAN — ARBITRATION — VALIDITY OF *Clause Compromissoire* — JURISDICTION OF COUNCIL OF ARBITRATION — QUEBEC LAW. — The case of *Canadian Car & Foundry Company Limited* v. *W. E. Dinham, and Brotherhood Railway Carmen of America*,[1] decided unanimously by the Supreme Court of Canada on November 30th, 1959, raises several interesting legal issues in the field of labour law. It also highlights a social economic problem with a turn of geriatrics.

Dinham was one of a total of fifty-eight employees who had been laid off in accordance with a new policy established by the company of compulsory retirement of employees who had reached the age of sixty-five. He was seventy-two years old and had been in the service of the company for seventeen years.

Dinham brought suit before the Superior Court to annul a majority award rendered by a council of arbitration appointed under clause 17 of the collective agreement, entered into between his union and the company, which provided:[2]

17. (e) CONCILIATION OR ARBITRATION: The Parties to this agreement may refer any unsettled dispute to Conciliation and

[24] *Ibid.*, at p. 392.
[25] In *Ex parte Walton*, *supra*, footnote 16.
[26] I must acknowledge my indebtedness for this argument to some remarks of Mr. C. J. Towill, Registrar of Land Titles at Saskatoon.
*Hugh R. Raney, of the Saskatchewan Bar.
[1] [1960] S.C.R. 3. [2] *Ibid.*, at p. 5.

> Arbitration in accordance with the Trades Dispute Act. Such Arbitration Board shall be composed of one (1) representative selected by the Company, one (1) representative selected by the Union of Lodges 322 and 930, and a Chairman mutually agreed upon by the representatives of both parties. Should the Representatives fail to agree upon a Chairman, the Minister of Labour of the Province will be requested to name a Chairman. After such Arbitration Committee has been formed. it shall meet and hear the evidence of both sides and render a decision within seven (7) days of the completion of the taking of evidence. The majority decision of the Arbitration Board shall be final and binding on all parties. The Arbitration Board shall not alter, amend or modify any clause in this agreement.

The grievance, no doubt, was predicated upon the recent institution of a retirement plan, which did not provide for the payment of retirement pensions to the fifty-eight employees severed from their employment.

The issue had been submitted to a council of arbitration instituted pursuant to the provisions of the Labour Relations Act,[3] which Act referred to the provisions of the Quebec Trade Disputes Act.[4] The instrument of appointment of the arbitrators was signed by the Honourable Antonio Barrette, Minister of Labour, and both the union and the company appeared and made their representations to the council of arbitration.

The union contended that it was not a condition of the collective agreement that an employee, on reaching the age of sixty-five should be retired.

The company contended that it had the right to retire employees from its service, and that this right "lies beyond the scope of the collective agreement", and was a "prerogative of management". It contended further that the respondent was bound by the majority decision of the council of arbitration.

The majority of the council of arbitration decided in favour of the company, and, following such decision, Dinham instituted action in damages for wrongful dismissal against the company, asking that the decision of the council of arbitration be declared null and void, and that the company be condemned to pay him $800.00 as damages in lieu of wages due to the end of the term of the collective agreement.

In the Superior Court, Mr. Justice A. I. Smith proceeded on the basis that he could not find anything in the compulsory retirement of Dinham which constituted a violation of the provisions contained in the collective agreement clauses relating to seniority or management's rights, and then said:

[3] R.S.Q., 1941, c. 162A. [4] R.S.Q., 1941, c. 167.

> Contrary to what is suggested by his Counsel the plaintiff was not discharged. On the contrary, his contract of hire, which apparently was an engagement on a weekly basis (since it is admitted that the plaintiff was paid at the rate of $71.66 per week) was legally terminated after due notice (the record shows that the plaintiff and the other 58 employees were given one month's notice of termination of employment.)
>
> The plaintiff has not established that there was anything, either in his contract of hire or in the said collective agreement, *which took away the right of the defendant to terminate the plaintiff's contract at any time without cause* upon giving him the notice of termination prescribed by law.
>
> CONSIDERING that the defendant was within its rights in terminating the plaintiff's engagement upon notice duly given; (C.C. 1600, 1642 and 1657; Mignault, Volume 7, pages 370 and following: *Concrete Column Clamps Limited* v. *Pepin* [1949] K.B. 838; *Asbestos Corporation* v. *Cook* [1933] S.C.R. 86).

The Court of Queen's Bench, appeal side,[5] consisting of St. Jacques, Bissonnette and Hyde JJ., found no difficulty in reversing the lower court, and awarded damages until the end of the term of the collective agreement. Mr. Justice St. Jacques was clearly of opinion that the collective agreement governed the relationship of Dinham with his employer, and that he could only be discharged for cause. Mr. Justice Bissonnette was of the same opinion and held that a unilateral severance of Dinham from his employment transgressed the formal terms of the collective agreement and rendered it illusory. Mr. Justice Hyde opined that the individual contract of lease and hire must be read together with the collective agreement:

> With respect I am unable to accept these conclusions. Admittedly the collective agreement does not contain any provisions in regard to retirement on account of age. It does, however, specifically provide for "Reduction in Forces" and that in such case seniority shall be taken into account. It is evident that Appellant was not "laid off", within the technical meaning of that term, nor was his employment "suspended". It is equally clear that there is nothing in the record to indicate that he was discharged for cause or that his employment was terminated for any reason other than his age . . . .
>
> In introducing an age factor during the currency of the agreement Respondent has acted unilaterally and contrary to the rights of the employee.

He was of opinion that resort to the arbitration clause did not deprive Dinham of his recourse to the courts, and added that the arbitrators had jurisdiction over the collective agreement only, and not over the individual contract of employment.

[5] [1958] Q.B. 852 (Que. C.A.).

Mr. Justice Abbott,[6] speaking for the Supreme Court in a unanimous decision, restored the judgment of the trial court on what might be summarized as the following grounds:

(1) Dinham did not challenge the jurisdiction of the council of arbitration to hear and determine the question, but claimed in paragraph 5 that its decision was null and void, "in that it did alter, amend or modify Clause 17, Paragraph (e) of the said contract or agreement".

(2) The right to retire or terminate employement of overage employees had not been restricted by the collective agreement in question, and remained a "function of management".

(3) The majority decision of the council of arbitration was final and binding on all parties.

The learned judge said:[7]

> It is clear that, unless respondent had acquired some special right under the collective agreement, appellant was entitled to terminate the contract of hire of respondent's services at any time, for any reason, upon giving to him the notice of termination required under the Civil Code. Although he was not obliged to do so, respondent (and the other employees referred to) sought to have the legality of his compulsory retirement dealt with by arbitration under the provisions of Article 17(e) of the Collective Agreement, which I have quoted. Respondent, both before the arbitrators and in the present action, took the position that the question as to whether his compulsory retirement was a breach of his rights under the Collective Agreement was a dispute which the Council of Arbitration had jurisdiction to decide. Respondent did not attempt to show that the Council of Arbitration acted in an arbitrary or capricious manner or in any other way contrary to law . . . .
>
> No evidence whatever was adduced to establish that the Council of Arbitration in rendering its decision purported to "alter, amend or modify clause 17, paragraph (e)." On the contrary, the report makes it quite clear that the arbitrators proceeded to make their inquiry in strict accordance with the requirements of the clause in question and of the Quebec Trade Disputes Act. In my opinion, the Council had jurisdiction to render the decision which it did, its proceedings were conducted according to law, and, that being so, its decision was final and binding upon all parties concerned and is not subject to review upon the merits by the Courts; section 34(a) of the Quebec Trade Disputes Act, R.S.Q., 1941, c. 167; *Mantha* v. *City of Montreal*, [1939] S.C.R. 458, 4 D.L.R. 425.

Abbott J. then proceeded to state that he was in agreement with the decision of the arbitrators:[8]

> The determination of a mandatory retirement age, applicable to all employees, is clearly a function of management. While it may well

[6] *Supra*, footnote 1. [7] *Ibid.*, at p. 8. [8] *Ibid.*, at p. 9.

> be that the age at which such compulsory retirement should become effective could be made the subject of a collective agreement, the agreement under consideration here, does not touch upon it . . . .
> In my opinion, compulsory retirement at age 65 is not a violation of the clauses in the collective agreement respecting seniority rights, nor did appellant violate any other provision of the collective agreement when, during the pendency of that agreement, it established, as company policy, that all employees in all divisions of the company should be retired upon attaining the age of 65 years.

Several points raised in the judgment of the Supreme Court are treated with conspicuous concision. An enlargement upon the reasons might have proved helpful in a field where precision in contour of legal concept is often lacking.

The problem of overage retirement has been dealt with by American courts, and a review of the cases dealing with compulsory retirement shows a division of opinion, evidently shared by our courts. One line of cases holds that a stipulated exclusion is required to deny the employer the unilateral right to terminate employment.[9] The other line of cases holds that retirement must include consent by the employee under collective agreements which provide for discharge for good cause.[10]

The latter line of cases makes no distinction between compulsory retirement and discharge, and such cases state that in the absence of an established *bona fide*, uniform retirement plan which specifically governs the employees involved, an employer could not discharge an employee by the simple expedient of retiring him.

The question trenches upon the field of sociology, as well as the rule of law which in the final analysis is the rule of social order. Retirement age is relative in the light of the advances of modern medicine. The age of sixty-five no longer carries with it the former forebodings of decrepitude and obsolescence. The federal Parliament has fixed the pension age at seventy, and the multitude of pension plans which provide for retirement at sixty-

[9] *Grocery and Food Warehousemen Local No. 635 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL*, v. *Kroger Co.* (1947), 97 Pittsburgh L. J. 157, 17 Labor Cases, par. 65, 443 (Pa., Allegheny Ct. Common Pleas), aff'd (1950), 364 Pa. 195, 17 A. 2d. 218; *General Electric Co.* v. *United Electrical, Radio & Machine Workers of America (C.I.O.)* (1949), 196 Misc. 143, 91 N.Y.S. 2d. 724 (Sup. Ct., Sp. Term); *American Federation of Grain Millers, Local No. 110, AFL*, v. *Allied Millers, Inc.* (1949), 196 Misc. 517, 91 N.Y.S. 2d. 732 (Sup. Ct.).

[10] *International Association of Machinists* v. *Electric Vacuum Cleaner Division, General Electric Company* (1949), 72 Ohio L. Abs. 257, 136 N.E. 2d. 167 (Ohio, Cuyahoga County Common Pleas); *United Protective Workers of America* v. *Ford Motor Company* (1952), 194 F. 2d. 997 (C.A.) (1955), 223 F. 2d. 49 (C.A.).

five imply a recompense in the nature of freedom from work and opportunity for leisure, rather than rejection from useful and gainful employment of an individual who has given satisfactory service over a productive period of his lifettme.

The decisions which regard an employer as free to compel retirement without pension at an age commonly accepted as proper for retirement by consent with pension, do not demonstrate any great philosophical or social logic, nor impress with well-reasoned legal *considerants*, but proceed rather on an inclination towards the superior right in management.

In an evolving complex economy which aims at reconciling the rights of management and labour on a basis of equality, it becomes necessary at times to view the equities which underlie a given question. The law is plentifully bedevilled with attempts to apply the proper norm of interpretation, especially in cases of industrial conflict, and in searching for the true intention it is well sometimes to probe some of the imponderables which fashion our sense of justice.

With the utmost respect and deference, it may be asserted that where a collective labour agreement provides for seniority rights, contains clauses aiming at job security, and goes on to define the employer's rights to include the right to discharge for cause, there is no prerogative in management to discharge without cause. *Inclusio unius fit exclusio alterius.* Inefficiency due to senescence or even immaturity is a good cause of discharge. But facultative rights of termination are not lightly to be read into a bilateral consensual agreement. The argument that the agreement did not specifically deny management the right to discharge for age can readily be answered by saying that the agreement did not specifically grant to management the right to discharge on grounds of age alone without establishing a good cause as a condition precedent.

In distinguishing the *Mantha* case,[11] decided under a special by-law, it may be said that there the executive committee was vested by the by-law with the right to pass upon the eligibility of the applicant for pension. In the language of Duff C.J., "The right of the retired officer is a right resting upon the by-law and the by-law accords him a pension when and only when he has received a favourable decision from the Executive Committee".

In the instant case, the right to discharge for age alone had

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[11] *Mantha* v. *City of Montreal*, [1939] S.C.R. 458, [1939] 4 D.L.R. 425.

to be found in the agreement. In the court's judgment it was bestowed on management as a prerogative.

It is well to recall that the Collective Agreement Act,[12] in its preamble referred to "social justice" which "requires the regulating of labour whenever the economic situation involves unjust conditions for the employee", and "the forced acceptance of insufficient remuneration is to fail to take into account the dignity of work and the necessities of an employee and his family", and went on to state that "it was expedient to adopt, extend and render compulsory the working conditions contained in collective labour agreements, both to prevent unfair competition with the signatories and to establish a fair wage and to satisfy justice."

Walsh J.A., in *Comité Conjoint de l'Industrie de la Construction* v. *Ste. Prudentienne*[13] stated:

> The law to be applied though a matter of public order and enacted for the benefit of labour, is, however, very drastic and in conflict with the age old concept of freedom of contract. It must be accepted nevertheless . . . .

In *Crawford* v. *Universal Insurance Co. Ltd.*[14] Lessor J. said:

> The Landlord and Tenants Acts and the Workmen's Compensation Act must be construed in favour of the classes of persons for whose benefit they were passed.

Judgments in Quebec have held that the Collective Agreement Act was a law of public order, and was to be interpreted in a broad and equitable manner and not in a strict or narrow sense with respect to the persons whom these laws were designed to favour. *Boni judicis est ampliare justitiam.*[15]

There are also judgments which go the other way and hold that these laws are to be restrictively interpreted, and against the class of persons they were intended to benefit.[16]

As late as May 27th, 1960, in an as yet unreported decision, the *Joint Commission for the Dress Industry of the Province of Quebec* v. *Fernand Chagnon*,[17] Mr. Justice C.A. Bertrand said:

> Because our labour laws are an intereference with the heretofore

[12] R.S.Q., 1941, c. 162, originally enacted as 4 Geo. VI, c. 38, and assented to on the 22nd of June, 1940.

[13] (1940), 68 K.B. 236 (Que. C.A.)

[14] [1936] 1 All E.R. 151, at p. 155.

[15] *Deneault* v. *Monette* (1933), 55 K.B. 111 (Que. C.A.), per Bond J.A. at p. 113 citing Merlin and Fuzier-Herman; *Comité Conjoint des Metiers de la Construction* v. *Bisson & Vallee* (1937), 75 S.C. 209 (Que.); *Comité Conjoint des Métiers de la Construction* v. *Joseph Duquette* (1937), 43 R.L. 328 (Que. S.C.).)

[16] *Malavichko* v. *Tremblay* (1939), 45 R. de Jur. 254, per Forest J.

[17] Unreported, S.C.M., 423120.

> completely free exercise of unfettered rights to contract, they are an exception to a general rule, and as such, bound to be strictly construed and applied.[18]

These cases indicate the cleavage in judicial thinking, and the difficulties which judges encounter, especially where economic forces are at play.

The troublesome distinction between the individual contract of lease and hire and the collective agreement was raised in the case under review.

The Court of Appeal was clearly of opinion that the collective agreement bound the employer and the employee for the term of one year. Mr. Justice Abbott, however, said it that was clear to him that unless Dinham had acquired some special right under the collective agreement, the employer was entitled to terminate the contract upon notice, without cause. This may mean that as he read the collective agreement, he could not find the special right and was not prepared to assume the broader, underlying, collective principle of security on the job. It may also mean that he separated the individual from the collective agreement and treated the matter of notice as if there were no collective agreement.

Because this thought is not fully developed, it may come on for future adjudication.

In essence, the collective contract is diametrically opposed to the individual contract. The pith and substance of collective bargaining resides in the unionization of individuals into a cohesive group, not only in order to reduce multiplicity of contract, but to oppose management with a single bargainer. To oversimplify, it may be said that under individual bargaining, the employer relies on the maxim, "Divide and rule", and under collective bargaining, the employees rely on the maxim, "In union there is strength".

In joining a union the individual must give up some of his rights as an individual for the common good of the group. Furthermore, a line of demarcation must be drawn between members of a union as individuals and the union as a voluntary association of the individuals. The union begins, no doubt, as the agent of the individuals acting in their interests as a whole. For the purposes of negotiation and contract the union acquires, under law, a special status of its own.

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[18] Citing *Comité Paritaire du Meuble* v. *Woodskill*, [1958] Q.B. 769 (Que. C.A.), at p. 770.

Mr. Justice Judson, in *Syndicat Catholique des Employés des Magasins de Quebec* v. *Cie Paquet Ltée.*,[19] points out that the employer is bound to negotiate with the collective representative:

> . . . not because of a contractual relation of mandate between employees and union but because of a status conferred upon the union by the legislation.
>
> If the relation between employee and union were that of mandator and mandatary, the result would be that a collective agreement would be the equivalent of a bundle of individual contracts between employer and employee negotiated by the union as agent for the employees. This seems to me to be a complete misapprehension of the nature of the juridical relation involved in the collective agreement. The union contracts not as agent or mandatary but as an independent contracting party and the contract it makes with the employer binds the employer to regulate his master and servant relations according to the agreed terms.

The notion that an employer dealing with a union enters into a number of individual contracts within the context of, or even in opposition to, the broader collective contract, does not sufficiently take into account the realities of the situation, and leads into an avenue of legal speculation which must, in the end, result in more confusion than enlightenment.

Whether the employee was under individual contract when the collective contract was made, or whether he subsequently joined and thereby came under the cover of the collective contract, should make little difference. The contract under which he works is the union contract, and it should preempt the field of his contractual relationship with his employer.

No doubt, in the instant case, the union sought a technical advantage by relying on both the individual and collective agreement. This concept of parallel contracts was bound to inject divergence of views into the record. Mr. Justice Bissonnette spoke of the contract as being both collective and particular, —collective, because it covered all employees, and particular, because it bound the employer to Dinham for the term of the contract, which was one year.

In this sense, it would be quite correct to say that in the eye of the law there is a uniform *lien de droit* between each individual and the employer under group or collective contract.

It is respectfully suggested that whatever may be said concerning the duality of the individual contract of employment and the collective labour agreement, the acceptable view would appear to be a merging of one with the other, so that both are to be read

[19] [1959] S.C.R. 206, at p. 214, reversing [1958] Q.B. 275 (Que. C.A.).

together as a single contractual relationship rather than the co-existence of two separate contracts; and in case of conflict, the collective agreement will govern. It may now be stated that there is primacy of contract in the collective agreement.

The difficulty of applying legal concepts in the field of labour law is further evidenced by the attempt of the council of arbitration to differentiate "working conditions" from "conditions of employment". It was there suggested that overage retirement, although a breach of conditions of employment, was not a breach of working conditions to which the collective agreement was restricted.

This issue has been dealt with by our Court of Queen's Bench appeal side in at least two leading cases: *Rice Bros.* v. *Letarte*,[20] and *Le Syndicat Catholique* v. *Cie Paquet Ltée*.[21]

Both cases dealt with the check-off—the first with the voluntary, revocable check-off which the court held was a condition of employment, and permissible,—and the other with the application of the Rand formula, which the majority of the court held in effect was not a condition of employment, and therefore was not enforceable.

The judges of our court of appeal found the principles laid down by Mr. Justice Rand in the Ford arbitration too rich for the cooler blood of the Quebec corpus of law. The Supreme Court, however, was quick to strike down the distinctions between working conditions and conditions of employment against a bilingual background which tended to narrow the orbit of collective bargaining to the point of cavil. It is not difficult to find reasons for what one sometimes accepts upon *a priori* grounds. The legislator has long ago declared himself in favour of collective bargaining, which concerns a vast, complex body of citizenry engaged in the basic task of earning its livelihood, and analysis of the situation must at all times call for something beyond the strict application of legal concept in the old and accustomed manner.

It may be suggested that in the light of modern experience, the object of a collective agreement is to cover working conditions, or conditions of work, or conditions of employment, by whatever terms are used, and therefore the collective agreement covers the same broad field of labour-management relations, and should be dealt with by solutions along broad lines. This follows clearly from the Supreme Court decision in the *Paquet* case.

[20] [1953] Q.B. 307 (Que. C.A.). [21] *Supra*, footnote 19.

The judgment also raises anew the effect of an agreement to arbitrate and the binding effect of arbitration under the Quebec Trade Disputes Act.

The agreement to arbitrate, or *clause compromissoire*, as it is known in Quebec law, has been the subject of considerable discussion.

Article 1431 *et seqq.* of the Code of Civil Procedure define submissions to arbitrate and set out a series of specific procedural rules which require the making of a *formal* deed of submission, stating the name, qualities of the parties and arbitrators, the objects in dispute, and the delay in which the award must be given in writing. The submission becomes inoperative for various stated reasons, including, among others, death, or inability of an arbitrator to act, expiry of the delay for entering the decision, and failure to agree in the appointment of a third arbitrator.

These provisions dealing with submissions to arbitrate, (*compromis*), read together with article 13 of the Civil Code, which states:

> No one can, by private agreement, validly contravene the laws of public order and good morals.

have inclined Quebec law to the view which frowns upon ousting the courts from their sovereign jurisdiction to decide disputes.

Walter Johnson, Q.C., in his book on agreements to arbitrate,[22] traces the meandering line of judicial decision from the Law of the Twelve Tables through early French law, as well as the law prevailing in France after the decision of *Comp. L'Alliance* v. *Prunier* by the *Cour de Cassation*, on July 10th, 1843[23] and English common law. He probes the sources of Quebec law antedating the prevailing view established by the said case. He reaches the conclusions that our law recognizes the *clause compromissoire* because it forms part of the old French common law, and that modern French authors and decisions have no authority and are actually misleading.

Mr. Johnson further, in a case comment in this Review[24] on *Boisvert* v. *Plante*,[25] where the issue came up under a building contract, pleaded nobly in defence of the *clause compromissoire*, and observed that the evolution of our notions of public policy justifies a modification of our views in order to permit final ar-

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[22] The Clause Compromissoire (1945).
[23] Sirey 1843. 1. 562; Johnson, *ibid.*, p. 61 *et seqq.*
[24] (1952), 30 Can. Bar Rev. 931.
[25] [1952] Q.B. 471 (Que. C.A.).

bitration for a variety of reasons, including *inter alia* long delays of the law.

Mr. Châteauguay Perrault, in an article in the *Revue du Barreau*,[26] follows the line of a copious jurisprudence, declaring the *clause compromissoire* null under Quebec law.

In the light of the state of Quebec law on this question, and the many arbitration boards set up to arbitrate disputes under collective labour agreements, it has been generally accepted that the *clause compromissoire* in such an agreement has great moral weight, but unless followed by a formal submission to arbitration (*compromis*), the decision of the arbitrators is not final and binding.

Section 14 of the Labour Relations Act[27] states:

> If the report shows that an agreement has been impossible, the Minister shall appoint a council of arbitration pursuant to the Quebec Trade Disputes Act (Chapter 167), the report of the conciliation officer taking the place of application contemplated in the said Act.

Section 24 of the Act prohibits strikes and lockouts in the case of negotiation of a collective agreement until after conciliation and arbitration, and in the case of a dispute arising out of an existing collective agreement until a period of fourteen days have elapsed since the award was rendered.

The sole sanction provided by the Act is the revival of the interrupted right to strike.

Only in the Public Services Employees Disputes Act[28] is the right to strike or lock-out prohibited unconditionally, and provision is made to execute the arbitration award under the authority of a court of competent jurisdiction. However, section 4 of this Act then proceeds to mitigate the rigours of compulsory and final arbitration by stating:

> No arbitration award establishing conditions of employment shall bind the parties for a period of more than one year.

Section 26 of the Quebec Trade Disputes Act,[29] states:

> Either party to a dispute referred to a council of arbitration may, at any time before award, by writing, in accordance with form 13, agree to be bound by the award of the council, in the same manner as parties are bound upon an award made pursuant to a submission under Chapter LXXIII of the Code of Civil Procedure (articles 1431 to 1444).
>
> Every such agreement made by one party shall be communicated to the other party by the registrar, and, if such other party also agrees

[26] *Clause Compromissoire et Arbitrage* (1945), 5 R. du B. 74.
[27] *Supra*, footnote 3. [28] R.S.Q., 1941, c. 169. [29] *Supra*, footnote 4.

in like manner to be bound by the award, then the award shall become executory in accordance with article 1443 of the said Code.

While section 34 provides that:

Notwithstanding any legislative provision inconsistent herewith,
a. the decisions of any council of arbitration shall be without appeal and cannot be revised by the courts;
b. no writ of quo warranto, of mandamus, of certiorari, of prohibition or injunction may be issued against a council of arbitration or against any of its members acting in their official capacity;
c. the provisions of article 50 of the Code of Civil Procedure shall not apply to councils of arbitration or to members thereof acting in their official capacity. 14-15 Geo. VI, c. 36, s. 2 and 1-2 Elizabeth II, c. 15, s. 2.

It is submitted that section 34(a) of the Quebec Trade Disputes Act merely provides that the decisions of the council of arbitration shall be without appeal, and cannot be revised by the courts. It does not make the award binding unless the parties have complied with section 26 of the said Act and have agreed to be bound thereby.

It is necessary to reconcile sections 26 and 34(a) of this Act or else admit that they are in patent contradiction.

If the words of section 34(a) mean that the decision of the council of arbitration is final and binding, there is no necessity of a formal submission enacted by section 26. The Quebec Trade Disputes Act would thereby become an Act of compulsory arbitration, since it can be initiated by the Minister by merely filing a report of the conciliator, and arbitration thereunder would have a final and binding effect. Such conclusion would abrogate the provisions of the Code of Civil Procedure, with respect to the necessity of formal submissions to arbitration in labour matters.

On the other hand, it is possible to reconcile sections 26 and 34(a) by stating that once the council of arbitration has been set up under the Trade Disputes Act, its decision must stand and shall be without appeal or revision by the courts. It will have no binding effect, unless the parties sooner agree to be bound by the award in the same manner as parties are bound upon an award made, pursuant to a submission under articles 1431 to 1444 of the Code of Civil Procedure. In such case, the decision is "remitted to the Minister of Labour who shall deposit same in the archives in his department", as provided in section 25.

The binding effect, therefore, of the decision of the council of arbitration in the *Dinham* case must be found in clause 17(e) of

the collective agreement, which is merely a *clause compromissoire.* The Supreme Court read the said *clause compromissoire* together with section 34(e) of the Quebec Trade Disputes Act and omitted reference to section 26 of the latter Act.

Are we now to assume that the *Dinham* decision by our court of final appeal has laid it down that the formal deed of submission to arbitration between the parties to a collective labour agreement is no longer necessary, and that the requirements of the Code of Civil Procedure in this connection may be substituted by the conduct of the parties in proceeding with the arbitration?

As Mr. Justice Abbott points out, Dinham was not obliged to proceed to arbitration. If he had refused arbitration, it may be inferred that he could have freely invoked the aid of the courts in support of his grievance. There may be a question if under the Act it was open to him to refuse arbitration. But having in fact become a party to a ministerial arbitration under the Labour Relations Act, he had, by his conduct, waived the requirements of the Code of Civil Procedure.

This is a very interesting and novel result. And the conclusion here reached by inference may have equal effect in the various other fields where the *clause compromissoire* frequently arises, particularly building contracts, insurance, partnership, and other forms of contracts.

Quebec law on this point has its roots deep in established doctrine, and it may therefore be said that if this doctrine were to be reversed it would be done directly, and not by implication.

Meanwhile, the *Dinham* decision bids fair to set off a series of jurisprudential reverberations anent our law of arbitration.

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