1920 ou une déclaration à l'effet qu'il n'avait acquis aucuns biens depuis sa première cession.

Pour ces raisonns et celles données par les juges Anglin et Mignault, dans lesquelles je concours, je maintiendrais l'appel et accorderais jugement à l'appelante pour la somme réclamée.

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Malouin J

Appeal allowed with costs.

Solicitors for the appellant: *Lamothe, Gadbois & Charbonneau.*

Solicitors for the respondent Champoux: *St-Jacques, Filion, Houle & Lamothe.*

Solicitors for the respondent Duval: *Monty, Durauleau, Ross & Angers.*

SAMUEL THOMAS STARR (DEFENDANT) ..... APPELLANT;

AND

HOWARD B. CHASE AND ANOTHER (PLAINTIFFS) ..... RESPONDENTS.

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*Mar. 21, 24, 25.
*June 18

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Trade Union—Provisions of constitution—Unlawful purposes—Restraint of trade—Protection of property—Resort to courts—Necessity to plead illegality.

The secretary-treasurer of an unregistered trade union was removed from office but declined to hand over to his successor a fund which he held for payment of certain expenses and salaries. In an action on behalf of the union for the amount:—

Held, per Duff and Malouin JJ., Idington J. *contra* and Mignault J. expressing no opinion, that though some of the purposes of the union may be illegal as being in restraint of trade the union is not thereby deprived of its right to hold a beneficial interest in the fund and to invoke the aid of the courts for its protection.

Per Mignault J. In the absence of a plea raising the defence that the union is an illegal association and the necessary proof to support it such defence should not be considered.

Per Duff J. Illegality was not pleaded and the claim cannot be rejected on that ground unless it has before it all the matter germane to the question so that it can see that some purposes are illegal in the sense that the law will not aid them and are so interwoven with the others that the legal and illegal parts cannot be separated. But the constitu-

*PRESENT:—Idington, Duff, Mignault and Malouin JJ. (Chief Justice Davies was present at the hearing but died before judgment was given.)

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tion and rules of the union do not show that any of its purposes are in unreasonable restraint of trade or, if any are, the whole constitution is not thereby affected with illegality.

One section of the constitution provides for expulsion of any member who takes the place of a striker.

Held, per Duff J. that this cannot be pronounced oppression or unreasonable without hearing such explanations as might have been given if illegality had been pleaded.

Judgment of the Court of Appeal (33 Man. R. 233) affirmed, Idington J. dissenting.

APPEAL from a decision of the Court of Appeal for Manitoba (1) reversing the judgment at the trial (2) in favour of the appellant.

The Brotherhood of Locomotive Engineers is a voluntary association not registered under the Trades Union Act of Canada. The appellant Starr was secretary-treasurer of that part of the system which was formerly the Canadian Northern Railway and on being removed from office refused to hand over funds alleged to be in his hands to his successor and this action was brought on behalf of the Brotherhood for the amount.

The constitution and rules of the Brotherhood authorize the calling of strikes on the system, the expulsion of members who take the places of strikers and forbid individual members to make agreements directly with their employers. The defence raised on the trial was that the action did not lie as the Brotherhood was an illegal association, some of its purposes being in restraint of trade, and at the trial the action was dismissed on this ground. This defence of illegality was not pleaded and the trial judge ruled that an amendment adding such plea was not necessary. The Court of Appeal reversed the judgment pronounced at the trial.

The material portions of the constitution of the Brotherhood are set out in the reasons for his judgment given by Mr. Justice Duff and published herewith.

Bonnar K.C. and *McArthur* for the appellant. Where, as here, on the material before the court illegality is shown the action must fail. *North Western Salt Co.* v. *Electrolytic Alkali Co.* (3); *Lipton* v. *Powell* (4).

The Trade Unions Act of Canada does not apply to unregistered societies (sec. 5). Therefore sec. 32 of that Act

(1) 33 Man. R. 233.
(2) 33 Man. R. 26.
(3) [1914] A.C. 461.
(4) [1921] 2 K.B. 51.

does not help the respondent nor do sections 496-7 of the Criminal Code. See *Russell* v. *Amalgamated Society of Carpenters and Joiners* (1).

The purposes of the Brotherhood were in unreasonable restraint of trade. See *Hilton* v. *Eckersley* (2); *Horniby* v. *Close* (3); *Rigby* v. *Connol* (4).

David Campbell K.C. and *Congdon K.C.* for the respondents. Illegality should have been pleaded and evidence given not only as to restraint of trade but that such restraint was unreasonable; Odgers on Pleading (7 ed.) page 220; *Connolly* v. *Consumers Cordage Co.* (5); *Northwestern Salt Co.* v. *Electrolytic Alkali Co.* (6).

Conspiracies in restraint of trade are not criminal so far as trade unions are concerned. Criminal Code secs. 497-8. *Reg.* v. *Truscott* (7); *Reg.* v. *Tankard* (8); *Ogilvie & Co.* v. *Davie* (9).

Any restraint of trade shown cannot be said to be so unreasonable as to be contrary to public policy. *Attorney General for Australia* v. *Adelaide SS. Co.* (10); *Amalgamated Society of Railway Servants* v. *Osborne* (11).

IDINGTON J.—For the reasons assigned by the learned trial judge for dismissing this action, and Mr. Justice Fullerton in the Court of Appeal, I am of the opinion that the judgment of the learned trial judge should not have been disturbed and that this appeal should be allowed with costs and said judgment be restored.

The magnitude of the association and the fact that its headquarters are in a foreign country, and the final disposition of any conflict of opinion relative to the conduct of its affairs being subject to the ultimate ruling of the officials there, and thus beyond the jurisdiction of our courts or any legislation in Canada to rectify the operation of such an association, render it necessary that we should be exceedingly cautious in recognizing it herein and furnishing thereby a precedent of which no one can tell the ultimate consequences.

(1) [1912] A.C. 421.
(2) 6 E. & B. 47, 66.
(3) L.R. 2 Q.B. 153 at p. 158.
(4) 14 Ch. D. 482.
(5) 89 L.T. 347.
(6) [1914] A.C. 461.
(7) 19 Cox C.C. 379.
(8) [1894] 1 Q.B. 548.
(9) 61 Can. S.C.R. 363.
(10) [1913] A.C. 781.
(11) [1910] A.C. 87.

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DUFF J.—The respondents sue on behalf of themselves and the members of the Brotherhood of Locomotive Engineers employed in that part of the Canadian National Railways which was formerly known as the Canadian Northern Railway. According to the system of organization of the Brotherhood, the engineers employed on the railway system known as the Canadian Northern Railway were represented by a General Committee of Adjustment elected by the twenty-one divisions comprising in their membership all the members of the Brotherhood employed on that system; and after the absorption of the Canadian Northern Railway in the Canadian National Railways no change was made. The General Committee of Adjustment is elected triennially, one member from each division, who is the chief engineer of his division; and there are a permanent chairman and a secretary-treasurer of the General Committee who receive salaries.

For the purpose of paying expenses and indemnifying the members of the General Committee of Adjustment in respect of loss of wages in consequence of attendance on the sessions of the Committee, as well as for the purpose of providing a salary for the General Chairman and the secretary-treasurer, a fund is created by assessing all the members.

These assessments are collected regularly by the secretary-treasurer for each division, and by him remitted to the sec'y.-treasurer of the General Committee of Adjustment whose duty it is to hold the fund thus created and to pay it out under instructions of the committee for the purposes for which it was brought into existence. It is also the duty of the secretary-treasurer, on his retirement from office, to hand over all moneys in his hands to his successor. The appellant was removed from office on the 25th May, 1921, but declined to hand over the funds in his possession to his successor, or to account for moneys received by him in his official capacity. The action was brought for an account and for recovery of moneys for which he was alleged to be accountable. The secretary-treasurer is custodian of these funds merely, and the question arises whether the members of the Brotherhood who had contributed this fund are destitute of any remedy by which

their interest in it can be protected against the depredations of a defaulting official.

The learned trial judge has based his judgment on the circumstances enumerated by him as follows:—

In the constitution of the Brotherhood of Locomotive Engineers the following provisions appear:

1. The Grand International Division, having its head office at Cleveland in the United States, is given exclusive jurisdiction over all subjects pertaining to the Brotherhood, and its decisions are the supreme law of the Brotherhood (sec. 3).

2. All brothers engaged in a legalized strike (i.e. a strike declared to be legal by the Head Official), and all brothers who lose their positions on account of the interest they take in brotherhood matters, upon satisfactory evidence of such facts being presented to the grand officers, shall receive $40 per month for a period of six months, unless they get employment sooner (sec. 39).

3. Any member of the Brotherhood of Locomotive Engineers who takes the place of any one engaged in a strike recognized as legal by the B. of L.E. shall be expelled when proven guilty and shall forever be ineligible for readmittance to this Brotherhood (sec. 51).

4. Members are prohibited from signing any contracts with a railway company, or making any verbal agreement without the consent of the General Committee of Adjustment of the system on which they are employed, under penalty of expulsion (p. 77, sec. 33).

5. Under the so-called Chicago Joint Agreement entered into between the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen, the following provision appears: "When a strike is called by one organization, the members of the other organization shall not perform any service that was being performed before the strike was called, by the members of the organization who are on strike." (p. 97, Art. VII (E)).

6. The so-called Ritual (Exhibit 18) sec. 1, contains a lengthy procedure for declaring a strike, after a two-thirds vote of all the members who are employed on the system where trouble exists. The remaining one-third of the men have no power to continue work, if they so desire, but must join in the strike."

These circumstances, the learned trial judge has held, impart to the Brotherhood the character of an illegal association, with the consequence that all contracts expressed by the rules and all trusts under them are void.

The unit of the organization is the division, each of which has its local Committee of Adjustment elected triennially, with its chief engineer, who is chairman and delegate of the division on the General Committee of Adjustment for the system. The duty of the local Committee of Adjustment as defined by section 13 is, to meet when and where the chairman may designate and

adjust, if possible, with the railway officials of the road or system the grievances of the members of their respective divisions.

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The local committee is prohibited from dealing with "any brotherhood business except upon instructions from their divisions," and is required to make a written report of all "cases the division instructs them to handle." Differences they are unable to adjust satisfactorily with the officials are to be

> sent by and under the seal of the division to the General Committee of Adjustment for further action.

By section 14, it is provided:

> Any Chairman of a General Committee of Adjustment, when called upon by one or more Divisions on his system, shall be empowered in conjunction with the Local Committee to adjust, if possible, all differences that may arise between members and their employers without convening the General Committee of Adjustment,

and by section 39:

> The General Committee of Adjustment shall have full power to settle all questions of seniority and rights to runs, or jurisdiction of territory that are presented to them legally, and their decision shall be final unless, on an appeal to the membership, their decision is repealed by a two-thirds vote of the membership on the system.

The activities of the Committees of Adjustment, so far as disclosed by the rules, concern rates of pay and conditions of work and the settlement of disputes between engineers and the management, and disputes among the engineers themselves, who are members of the Brotherhood, with respect to seniority and runs.

The constitution and rules of the Brotherhood contain nothing in relation to strikes or the support of striking members (with the possible exception of section 51 which I shall consider later) that can with any shew of reason be said to be illegal as being in unreasonable restraint of trade. The resolutions in the so-called ritual to which the learned judge refers were not, as we shall presently see, properly before him. So far as the constitution of the society is properly in evidence it can only be affirmed that the possibility of strikes is contemplated, that conditions are laid down which must be observed before a strike is sanctioned, and that maintenance is provided in such cases from the funds of the society. There is nothing to indicate that any member can be required to strike, or requiring him not to return to work after he has joined a strike. There is nothing to authorize a strike in violation of law or wrongful against an individual, or authorizing the application of the society's funds in support of such a strike; and the rules obviously

contemplate the exhaustion of all reasonable efforts for peaceable settlement before a strike is to be resorted to.

The fund in question, moreover, is a fund for defraying the costs of maintaining the General Committee of Adjustment, including the expenses and indemnities of members and the salaries of the Chairman and the Secretary-Treasurer. I can see no authority for the diversion of this fund to any other purpose; and the functions of the General Committee of Adjustment are mainly, if not exclusively, the settlement of disputes of the character indicated above. The General Committee of Adjustment has, so far as appears, no authority in relation to expulsion of members or the investigation of charges leading to expulsion. These are matters for the local divisions, subject to appeal to the Grand Chief Engineer and the Grand International Division.

Can it be affirmed, then, because of the circumstances enumerated by the learned trial judge as the foundation of his judgment, that the General Committee of Adjustment and the engineers it represents are disentitled by law to hold a sufficient beneficial interest in the fund in question to enable them to call upon the Secretary-Treasurer to deliver the fund to his successor in office?

The primary objects of the Brotherhood plainly are to secure satisfactory arrangements for its members in relation to conditions of employment and rates of pay, and to provide means of settling disputes amongst its own members arising out of their service, and, as I have said, there is nothing to indicate that the constitution has in view any means other than lawful means for accomplishing these objects. Illegality was not pleaded, and on the view most favourable to the appellant the court cannot reject the claim on the ground of illegality unless, being sure that it has before it all the facts germane to the question, it can see that some of the purposes of the society are illegal in the sense that the law will not aid them, and that these are so interwoven with the other purposes as to make it impossible to separate the legal from the illegal parts of the constitution. *North Western Salt Co.* v. *Electrolytic Alkali Co.* (1).

The document produced (the Constitution, Statutes and Rules of the Brotherhood) is one which plainly requires in-

(1) [1914] A.C. 462.

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terpretation and which in its actual operation is governed by interpretations by the constituted authorities of the society. As Cockburn C.J., said in *Farrar* v. *Close* (2). "It is the actual working of the society" that furnishes the decisive test in such matters, and therefore not the written word only, in this assemblage of rules, which has grown together during the sixty years of the society's life, but the interpretation, as well, that has been put upon it by actual practice, may have to be taken into account.

As to the first ground upon which the learned judge proceeds, the declaration is a general declaration, and must be construed by reference to the particular provisions of the constitution and regulations. The Grand International Division, representing, as it does, all the divisions comprised in the Brotherhood, has vested in it authority to amend the provisions of the constitution and statutes and rules, by a two-thirds majority vote of the delegates present at a session of the Grand International Division. It exercises also final authority in the matter of appeals in respect of expulsion and grievances of members. The character of the Brotherhood in respect of legality or illegality must, I think, be judged, not by reference to possible amendments, but by reference to the existing constitution and rules of the society.

Paragraph no. 6, as quoted from the learned judge rests upon an inadmissible document, which must be disregarded. The appellant, not having pleaded illegality, was not entitled to adduce evidence of facts solely for the purpose of establishing illegality, and otherwise irrelevant. *North Western Salt Co.* v. *Electrolytic Alkali Co.* (1). Paragraph no. 2 has already been dealt with. But it must be observed that the learned judge's interpretation of the word "legal" is not based upon evidence.

In considering the fourth ground, it must be remembered that the value of such an association must depend very largely upon its capacity to secure satisfactory arrangements in relation to pay and conditions of work, and this in turn must be affected by the capacity of the association to secure strict observance of its undertakings entered into on behalf of its own members collectively. Therefore,

(1) [1869] L.R. 4 Q.B. 602. (2) [1914] A.C. 462.

special arrangements by individuals behind the backs of the authorized representatives of the society obviously could not be tolerated. Effective action by a voluntary association would hardly be possible if the door were left open to individuals, while enjoying the advantages secured for all members, to obtain secretly special terms for themselves. It is quite clear that " contract " and " agreement " here are not used in any strict or accurate sense; they refer to special arrangements as to pay or conditions, varying those applicable to engineers generally.

As regards the third and fifth grounds, it should be recalled that no applicant is admitted to membership who has taken the place of a striking engineer in a strike recognized as " legal " by the Brotherhood. That is a fundamental condition of membership, and the rule referred to gives effect to the principle of it by decreeing expulsion and disqualification when the principle is violated by a member. In the earlier years of their organization, when disputes with railway companies were probably not infrequent, and pursued *à outrance,* it may well have been considered that the safety of the organization demanded the strict observance of this rule; actual experience, one can readily conceive, may have dictated that policy. The relations between the companies and the Brotherhood are, it may be presumed, on a different footing now but new sources of danger may demand the maintenance of the old safeguards. I am not satisfied that I can pronounce this rule to be oppressive or unreasonable, without hearing such explanations as might have been offered had illegality been pleaded. At all events, I can see no reason for holding that it affects with illegality the whole constitution. As to the fifth ground, the stipulation is a term of an agreement with the Brotherhood of Locomotive Firemen and Enginemen, and considering the relations between firemen and engineers is, I think, neither oppressive nor unreasonable. And even if so, it appears to me that nullification of it would not necessarily affect the provisions of the constitution with which we are concerned.

On principle, one has some difficulty in concluding that the policy of the law prevents recognition and protection by the courts of the interests in the fund of the General Committee of Adjustment and of the members from whose

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assessments the fund has been created. The functions of the General Committee of Adjustment being what they are, and the fund being exclusively applicable for the maintenance of the Committee, I do not know why the fact that some of the rules of the Brotherhood constitute an unreasonable restraint of trade, if that be so, should disentitle the engineers concerned to the aid of the court in requiring their custodian to account for the funds placed in his custody. As I have said, primarily the Committee is concerned with obtaining redress of grievances and settling disputes; and a wide distinction between this Brotherhood and other associations whose rules have been discussed in England—such, for example, as the Amalgamated Society of Carpenters, with which *Russell* v. *Amalgamated Society of Carpenters and Joiners* (1)—is that not only does the Brotherhood permit its members to work side by side with engineers who are not members of the society, but the rules of the Brotherhood require the General Committee of Adjustment to take up the grievances of any engineer who presents to them a complaint in writing.

On the ground, therefore, that this fund is not applicable to any of the illegal purposes of the Brotherhood, if there be such illegal purposes, the respondents would seem to be entitled to the protection of their property by legal process.

But I think their title to such protection may be put on a broader ground. If the Secretary-Treasurer were not a member of the Brotherhood, if he were a depositary whose duties arose from the acceptance of the custody of the fund simply, and not from any provision in the rules of the Brotherhood, the case would seem to be abundantly clear. Is it really less so because the Secretary-Treasurer is a member, a party to the agreements of the constitution, and because his duties are defined in the constitution? As regards this fund, his duty is merely that of a custodian. Is there any real difficulty in holding, either that those parts of the rules which make him the custodian and require him to deal with the fund in his hands according to the orders of the General Committee of Adjustment and to hand it over to his successor are capable of separation from the mass of the rules, so that they are not affected by the

(1) [1910] 1 K.B. 506.

nullity attaching to such agreements as may be considered illegal on the ground that they constitute an unreasonable restraint of trade, or that the policy of the law which forbids the enforcements of such agreements is not so wide as to forbid the recognition of the interest of the members of the society in the fund and the protection of that interest by legal process? May one not say that at this point one encounters a paramount policy which has to do with the protection of the owners of property against the defalcations of dishonest custodians? My conclusion is that since the Act of 1869, 32-33 Vict., ch. 61 (even before the Trades Union Act of 1871), such an action as this has been maintainable in England; and consequently that the right to maintain the action was recognized under the law of England, which was introduced into Manitoba in 1870.

It is quite true that prior to 1868, as a rule a member of a trade union who misappropriated trade union property could not be made criminally liable; but this was not primarily due to the illegality of the association, but to the common law rule that the misappropriation of common property by a co-owner was not theft. Before this disability was removed, a special procedure for prosecuting for misappropriation was conferred by statute on friendly societies. After the disability had been removed by the Act of 1868, the question was raised whether the illegality of a trade union, in the sense of its purposes being in unlawful restraint of trade, operated to prevent such a prosecution. In *Hornby* v. *Close* (1), it was held that the summary proceedings open to friendly societies were not available to a trade union, whose purposes were illegal in the sense mentioned, because, by the terms of the statute, such proceedings were open only to societies formed for purposes "not illegal"; and where the rules of the society, as being in restraint of trade, were illegal in the sense of being void, it was held that such purposes could not be described as "not illegal," within the meaning of this condition. The same principle was applied later in *Farrar* v. *Close* (1). Chapter 61 of 32 and 33 Vict. was passed in consequence of these decisions. By that statute it was declared:—

(1) [1867] L.R. 2 Q.B. 153. (2) L.R. 4 Q.B. 602.

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An association of persons having rules, agreements or practices among themselves as to the terms on which they or any of them will or will not consent to employ or to be employed shall not, by reason only that any such rules, agreements, or practices may operate in restraint of trade, or that such association is partly for objects other than the objects mentioned in the Friendly Society Acts, be deemed, for the purposes of the twenty-fourth section of the Friendly Societies Act, 1855, for the punishment of frauds and impositions, to be a society established for a purpose which is illegal, or not to be a Friendly Society within the meaning of the forty-fourth section of the said Act.

In *The Queen* v. *Stainer* (1), a society not registered as a Friendly Society within the meaning of this enactment initiated a prosecution of a defaulting official; and Cockburn C.J., with reference to this statute, observed:—

It was argued that the 32 and 33 Vic., ch. 81, applies only to registered societies; but even if this were so, it is equally an indication of the intention of the legislature that such societies as the present shall not have a defective title to property.

Piggott B. said in the report in (2), at p. 489:—

It is said that this society cannot hold property because its rules are illegal. Now they are only illegal as being in restraint of trade, *and not affecting their right to property.* By 32-33 Vic., ch. 61, the legislature *has recognized their right to property.*

In a later case, *Reg.* v. *Registrar of Friendly Societies* (3), Lord Blackburn, then Blackburn J., dealing with *Hornby* v. *Close* (4), said:—

It is a great mistake to affirm that there is any decision that trade unions or societies of that kind are, as it were, outlaws and out of the protection of the courts of law or equity. All that this Court held was that where statutes give certain benefits to friendly societies, societies whose rules were in restraint of trade, and illegal in that sense, could not claim the benefit of the statutes. However, section 3 of the Trades Union Act (1871) seems to put an end to all doubt as to the jurisdiction of the Court of Chancery by enacting that the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful, so as to render void or voidable any agreement or trust.

In more recent years, similar questions have arisen with regard to associations which, being composed of more than twenty members, were carrying on business in violation of section 4 of the Companies Act of 1862. In *The Queen* v. *Tankard* (5) speaking of such an association, the Lord Chief Justice (Lord Coleridge) said, at page 550:—

There are a number of persons who join themselves together, not for any criminal purpose, but their joining together is not legalized. It is

(1) 39 L.J.M.C. 54.
(2) 11 Cox 483.
(3) L.R. 7 Q.B. 741.
(4) L.R. 2 Q.B. 153.
(5) [1894] 1 Q.B. 548.

true they have no legal existence as a company, association or co-partnership, but they are none the less beneficial owners of property. * * * It would be a very strong thing to hold that a society not expressly sanctioned by law, yet not criminal, is incapable of holding any property at all.

In *Marrs* v. *Thompson* (1), a question arose as to the right of the trustees of a society of workmen formed for the purposes of mutual insurance, composed of more than twenty members, against a defaulting treasurer. One of the defences raised was that the society was an illegal society by reason of section 4 of the Companies Act, and consequently that no trust of the funds in the treasurer's hands could be recognized by a court of law. The action was held to be maintainable by the Lord Chief Justice and Darling J. and *Sheppard* v. *Oxenford* (2), supports this view.

The view of Cockburn C.J. expressed in *Reg.* v. *Stainer* (3) apparently was that, the taint of criminality being absent, the members of a trade union, though its purposes were illegal in the sense mentioned, were capable of possessing beneficial ownership in the union funds; that the Act of 1869 afforded conclusive evidence that it was not contrary to the policy of the law that this beneficial ownership should be protected by legal process. The opinion of Blackburn J. goes further. The language above quoted implies that such an association is entitled to resort to civil, as well as criminal remedies for the protection of its property.

Blackburn J.'s opinion apparently was that the Act of 1871 did not create a new right, but merely removed doubts as to the authority of the Court of Chancery to afford such protection. If I may say so, with the greatest respect, the Act of 1869 seems to give support to the view that thereafter such protection could not be regarded as contrary to the policy of the law, even where the society must, by reason of the character of its rules, be pronounced illegal as having, among its purposes, some which are in unreasonable restraint of trade.

The question is of great importance in Canada, because of the peculiar condition of trade union law in this country. The Canadian Act, which is ch. 125 of the Revised Statutes

(1) 86 L.T. 759. (2) 1 K. & J. 491.
(3) 39 L.J.M.C. 54.

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of Canada, 1906, has not been adopted by the provinces, and as to many of its provisions there is, to say the least, doubt as to the authority of the Dominion to enact them. Section 32, for example, in providing that the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render void or voidable any agreement or trust, is, *prima facie,* dealing with the subject of civil rights and property. No doubt the declaration that trade unions, whose purposes are in unlawful restraint of trade, are not, on that ground, to be regarded as criminal conspiracies, coupled with the declarations on the subject contained in the Criminal Code which have been cited to us, establish beyond question, if there ever was a doubt upon the subject, that such a society as the Brotherhood of Locomotive Engineers is not a criminal society. But these declarations do not carry us beyond the point reached by the declaration in the first section of the Act of 1869 above mentioned. If the appellant's contention is sound, it is highly probable that every trade union in Canada is, as regards the security of its funds, largely at the mercy of the officials who have the custody of them.

This would indeed be an extraordinary thing. Provincial and Dominion statutes for the past fifteen or twenty years have been directed to the encouragement of what is called " collective bargaining." Associations of employers, as well as associations of employees, must, if " collective bargaining " is to be effectual and bargains are to be carried out, have rules giving authority to discipline recalcitrant members; and must have funds; and most trade unions have rules vesting in some body authority to give a final decision upon the question of strike or no strike, a fact which the Industrial Disputes Act, 6-7 Edw. VII, c. 26, sec. 15, explicitly recognizes. It would be singular indeed if the rights of the members of such associations in the funds provided for defraying expenses and salaries of officers, were left with no legal protection except that which arises from the liability to criminal prosecution. My conclusion, for the reasons given, is that the action is maintainable.

The appeal should be dismissed with costs.

MIGNAULT J.—There is no question, in my opinion that the appellant is accountable for moneys received by him as secretary-treasurer of the General Committee of Adjustment of the Brotherhood of Locomotive Engineers.

The ground on which he chiefly relies to escape from this liability is that this Brotherhood is an illegal association or at least an association the objects of which are an undue restraint of trade, and that it, or those acting for it, should be denied the assistance of the court to enforce this liability.

In my opinion this question should have been raised by a plea to the action, and if this had been done all circumstances and facts connected with this association and its alleged illegality would have been investigated.

It is true that a motion was made to amend the plea in order to set up this ground of defence against the plaintiffs' action. The learned trial judge however did not allow the amendment, but thought that with the material put into the record it was possible to determine the character of this association.

With great respect, I do not feel that I should pass on so important a question in the absence of a plea raising it and of a full investigation of the objects and activities of the association. Nor would I at this stage send the case back to the trial court so that this amendment may be made and the matter inquired into. The appellant holds trust funds which he refuses to pay over to the body which employed him and the latter, to obtain the return of these funds, relies on a contract of employment which *per se* does not appear to be illegal. Without therefore expressing any opinion as to the character of this association, I would dismiss the appeal with costs.

MALOUIN J.—For the reasons stated by the Chief Justice of Manitoba, I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *F. J. G. McArthur.*
Solicitors for the respondents: *Campbell & Campbell.*