CASE AND COMMENT

FRAUDULENT CONVEYANCES—LAND EXEMPTED FROM EXECUTION—In the writer's comments on the *Tencha* case in the November number of the CANADIAN BAR REVIEW [1] attention was drawn to certain cases. i.e., *Brimstone* v. *Smith*;[2] *Roberts* v. *Hartley*;[3] *Massey-Harris* v. *Warrener* (unreported); *In re McCuaig and Bray*,[4] which held, that where a judgment debtor has, with intent to delay, defeat, or hinder his creditors, fraudulently conveyed away land which ordinarily would be exempt from execution, and such conveyance was binding on the grantor even though set aside as against his creditors, such exemption will be lost and the land become exigible to a creditor of the debtor. This point recently came up for consideration by Kilgour, J., in the Court of King's Bench for Manitoba, in the case of *Dayholos* v. *Kuniec*.[5] The question arose on the plaintiff's motion for final judgment in an action to set aside the undermentioned transfer of land by the male defendant to the female defendant (i.e., the husband to the wife), as being in fraud of the former's creditors, and for sale of the lands to satisfy the plaintiff's registered judgment, interlocutory judgment in default of defence having been signed against both defendants, who were not represented in the action. The plaintiff had recovered a judgment against the husband for a certain sum in the County Court, and the plaintiff registered a certificate of such judgment in the Land Titles Office for the district in which the husband held land. Between the date of the recovery of the judgment in the County Court and the date of the registration of the certificate thereof, the husband executed a transfer of the land in question from himself to his wife, and the transfer was duly registered, the consideration for the transfer being natural love and affection and the sum of $1.00. Execution issued in the County Court by the plaintiff against the husband was returned *nulla bona*, and the action to set aside the above mentioned transfer was taken by the plaintiff. On the hearing of the motion for final judgment (the defendants, as stated above, not having delivered any defence) the question was considered as to whether or no the land upon which

[1] (1927) 5 C.B. Rev. p. 693.
[2] (1884) 1 M.R. 302.
[3] (1902) 14 M.R. 284.
[4] (1924) 4 C.B.R. 660; (1924) 2 W.W.R. 373.
[5] (1928) 1 W.W.R. 691.

the defendants resided was exempt from execution under the provisions of sec. 218 of the County Courts Act, R.S.M. 1913, c. 44, sec. 9 of the Judgments Act, R.S.M. 1913, c. 107, and sec. 29 of the Executions Act, R.S.M. 1913, c. 66. Sec. 215 of the County Courts Act (*supra*) provides for the registration in the appropriate Land Titles Office or Registry Office of a certificate of a judgment obtained in the County Court, and that from the time of registering the same the said judgment "shall bind and form a lien and charge on all the lands of the judgment debtor in any district in the registry office of which such certificate is registered, except lands subject to "The Real Property Act," the same as though charged in writing by the judgment debtor under his hand and seal, with the amount of the said judgment, and after the registering of such certificate the judgment creditor may, if he shall elect to do so, forthwith proceed upon the lien and charge thereby created." Sec. 216 makes similar provision regarding the registration of judgments in respect to land held under "The Real Property Act"; and sec. 218 provides that no proceedings shall be taken under a judgment registered under that Act against any land exempted by sec. 9 of the Judgments Act (*supra*) which latter provides *inter alia* that certain farm land in cultivation, buildings, etc., and also the actual residence or home of any person other than a farmer shall be exempt from execution within certain limits. Sec. 3 of the Judgments Act (*supra*) provides similarly to secs. 215 and 216 of the County Court Act, (*supra*).

The matter of exemption of land from execution has been the subject of a number of decisions. In *Brimstone* v. *Smith* (*supra*) the debtor, without consideration conveyed his farm land to R., who conveyed it to the debtor's wife, also without consideration, both conveyances being made before the plaintiff obtained the judgment upon which execution was issued. Smith, J., at p. 304, held that the conveyances were voluntary, and in pursuance of a scheme to vest the land in the wife, in fraud of creditors; that in order for the exemption from execution to operate the debtor must actually cultivate the land, and that as the debtor was not doing this the claim to exemption failed. His Lordship, following certain American cases, held further, that the debtor, having conveyed away all his interest in the land by a conveyance valid and binding on him, even when set aside by the Court as against creditors, the claim to the exemption would fail on that ground also, the creditors' right to seizure and sale being suspended only during the continuance of the exemption, but enforceable immediately upon its lapse, and that under the registration of the certificate of judg-

ment, a lien upon the exempted property would be established, although no proceeding could be taken to enforce the lien so long as the property retained the character which entitled it to the exemption. (See also *In re Frost and Driver*[6] and *Massey-Harris Co.* v. *Warrener* (unreported) but also decided by Bain, J., and referred to by him in *Roberts* v. *Hartley* (*supra*) at p. 293). The conveyance was set aside, and equitable execution ordered. In *Young* v. *Short*[7] the Full Court for Manitoba held, that, in the case of chattels, the right to claim exemption is personal to the debtor, and cannot be set up by his assignee. Delivering the judgment of the Full Court in *Merchants Bank* v. *McKenzie*,[8] Bain, J., at p. 34, declared that the fact that a man has been trying to defraud his creditors by transferring land to a third party "cannot exclude him from the benefit of the exemption law." In that case it was held, that although the evidence showed that Miss McKenzie, the registered owner, was holding the land as a bare trustee for the debtor, yet the evidence further showed that the debtor was not cultivating the land for himself but for one W. D. McLean, and that, therefore, the land was exigible to the debtor's creditors.

Applying these principles in *Roberts* v. *Hartley* (*supra*) the Full Court declared a conveyance of land made by a debtor to his wife before the plaintiff recovered his judgment against the debtor fraudulent and void as against the judgment creditor, and set the deed aside, and made a declaration that the judgment constituted a lien or charge upon the land, and ordered a sale. As regards the question of exemption, Killam, C.J., at p. 289, says:

> If it appeared that the transfer was colorable only and the property held upon a secret trust for the debtor, the latter could probably claim the benefit of the exemption for his equitable interest. But here both husband and wife unite in asserting the reality of the transfer. The answer to the argument is, that the transfer is effectual to divest the debtor of his property, but not to free it from liability to be subject to judgment or execution.

Applying the ruling in *Young* v. *Short* (*supra*) His Lordship held, that the same principle applied to land; and the right to exemption being personal to the debtor only, it could not be set up by the grantee. *Roberts* v. *Hartley* (*supra*) was followed by Macdonald, J., in *In re McCuaig and Bray* (*supra*).

Logan v. *Rea*[9] was decided by Perdue ,J., in 1903. The debtor, a woman, conveyed land to her son, with the intention of preventing

[6] (1895) 10 M.R. 319, Bain, J.
[7] (1885) 3 M.R. 302.
[8] (1900) 13 M.R. 19.
[9] 14 M.R. 543.

the land from being sold to realize the plaintiff's claim, and the plaintiff sought a declaration that the land belonged to the mother and that her son held as a trustee for her, and an order that the land be sold to satisfy the plaintiff's lien under the registered judgment. His Lordship found that the transfer was made without consideration, and with a view to securing the property for herself and her family, and that the son held the property as trustee for his mother, who continued to reside upon the property, paying no rent therefor.

At page 548, His Lordship says:

> The right given by the Judgments Act to a debtor to claim exemption in respect of his actual residence is clear and positive, and applies to his interest in the property so long as he continues to occupy it. Whether this interest is legal or equitable, the intention of the Act is that the exemption shall continue to apply * * * If the premises are once dedicated as an exemption, it is immaterial to the creditor whether the debtor's title is held by a trustee or not. The creditor would, however, in case the land stood in the name of a trustee, be entitled to a declaration that the premises were still the property of the debtor, so that, if the exemption should at any time lapse, the judgment might be enforced against the land.

His Lordship held that the plaintiff was entitled to the declaration as asked, but that the defendant, Mrs. Rea, would have the privilege of claiming it as an exemption during the time she continued to occupy the property as her actual residence and home.

The Courts outside of Manitoba take a different view. In the Saskatchewan case of *Fredericks* v. *North West Thresher Co.*[10] it was held that the lien of a judgment creditor does not attach to the homestead of the judgment debtor; but that case seems to have turned upon the point that the sheriff, under the writ of fi.fa. lands in operation in Saskatchewan, could only seize lands which were not exempt, and that at the time of the transfer from the debtor to his wife the land so transferred was exempt and the execution did not become a lien upon it. Beck, J., in *Hart* v. *Rye*[11] followed *Fredericks* v. *North West Thresher Co.* (*supra*). In the *Hart* case (*supra*), however, both the debtor and his wife (to whom he had transferred the land), whilst they vacated it during the time that it was in the occupancy of a tenant, had the intention to return, and did return, and reside upon the homestead; and they were so residing at the time of the action. It is not quite clear from the report of the *Fredericks* case whether or no the debtor and his wife and family were actually residing upon the property at the time of the action.

[10] (Newlands, J.) (1910) 3 S.L.R. 280, affd. (1911) 44 S.C.R. 318.
[11] (1914 Alta.) 27 W.L.R. 9.

In the Ontario case of *Temperance Insurance Co.* v. *Coombe*,[12] Dartwell, Co., J., held, that a debtor has an absolute *jus disponendi* over exemptions, and he is not compelled to keep them in his possession in order that they should retain the character of exemptions, and there could be no fraudulent transfer of property which in no case could be reached by execution. See also *Blakeley* v. *Gould*.[13]

Returning to the *Dayholos* case (*supra*); the statement of claim in the action to set aside the transfer contained *inter alia* an allegation that the transfer by the husband to the wife was fictitious and illusory, the true intention of the defendants being that such transfer should, as between the parties thereto, have no effect in reality whatever upon the title to, or ownership or possession of the land in question, which title, ownership, and possession were to remain in the husband alone, notwithstanding the transfer; and the plaintiff further alleged that the wife was a bare trustee for her husband of the said land, and that the husband was the real owner thereof. Rule 325 D. of the King's Bench Act, R.S.M. 1913, c. 46 (Eng. Order 13, rule 19, in part, former Manitoba Rule 305, in part), provides that, "every allegation of fact in any statement of claim or counterclaim, if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted." The Defendants, not having filed any defence or appeared in the proceedings, His Lordship held that the result was that the facts alleged in the plaintiff's statement of claim as set out above must be taken to have been admitted; and this being so, His Lordship further held that the allegations referred to unequivocally brought the case within the principle of *Logan* v. *Rea* (*supra*) and that, therefore, if the husband had any valid claim to exemption before the transfer such claim had not been lost.

The plaintiff's counsel raised the point that as the defendants had not specifically claimed the exemption such exemption could not be sustained. This point had come up for decision in *Marshall Wells* v. *Kaey*,[14] in which case Curran, J., had held that it was incumbent upon the plaintiff to plead in his statement of claim, or to show by affidavit, that the lands sought to be sold were not exempt as being the homestead of the defendant. With this view, Kilgour, J., agreed and held that the Statute which created the right under the judgment in question, itself limited the right to non-exempt land, that it is insufficient when invoking a statute which defines a right in general terms but subject to a specific exception to bring the case

[12] (1892) 28 C.L.J. 88.
[13] (1897) 24 O.A.R. 153, affd., 27 S.C.R. 682.
[14] (1913) 4 W.W.R. 1192.

within the general terms without negativing the exception, and that before any right of sale can be declared the plaintiff must allege and prove the conditions which make the lands in question liable to be sold—that is to say, *inter alia*, that they are not exempt under the Judgments Act. His Lordship, however, gave the plaintiff an opportunity to prove, if he could, that the land in question was not exempt, and failing such proof within one week, the relief by way of sale must be refused. The learned Judge, however, held that the plaintiff was in any event entitled to a declaration in the terms of his allegation set out above and to judgment accordingly, with costs.

With respect to the necessity for the plaintiff to show that the lands proposed to be sold are not exempt from executions, Killam, J., in *Fonseca* v. *Macdonald*,[15] held, on an application to sell lands under a registered judgment, that the bill should show that the lands sought to be sold were not exempt from seizure under execution.

Sec. 111 of the Administration of Justice Act, 1885, which Killam, J., interpreted in the *Fonseca* case (*supra*) provided for the registration of certificates of judgments, and was in substantially the same wording as sec. 3 of the Judgments Act (*supra*) and sec. 215 of the County Courts Act (*supra*) but excepted from that lien "such real estate as is exempt from seizure under any writ of execution issued by any court in the Province." S.M. 1886, c. 35, s. 14, amended the above-mentioned sec. 111 of the Administration of Justice Act, so that the exceptions clause read "excepting always that no proceedings in equity shall be taken on any such certificate of judgment against any real estate exempt from seizure under writs of attachment," etc., and by S.M. 1889, c. 36, s. 8, the last-mentioned section was repealed and the original sec. 111 amended by striking out the exception entirely, leaving the section in substantially the same form as section 3 of the Judgments Act (*supra*), and section 215 of the County Courts Act (*supra*). The 1889 Act also amended sec. 117 of the Administration of Justice Act (corresponding to sec. 29 of the Executions Act (*supra*) which made certain real and personal estate free from seizure under execution, by striking out the reference to real estate and inserting the words "and no proceedings in equity shall be taken against the following real estate under any certificate of judgment or attachment, namely," etc. These last mentioned changes were rendered necessary in connection with the legislation (S.M. 1889, c. 36) which put an end to the issue of writs of attachment against lands and confined creditors to the remedy by registration of their judgments and proceedings in equity thereon. See

[15] (1886) 3 M.R. 413.

also as to this, Killam, J., in *Keewatin Lumber Co.* v. *Wisch.*[16] This last mentioned case was brought by a judgment creditor to enforce the lien created by a registered certificate of judgment upon the lands of the judgment debtor; and counsel appeared for the defendant and objected that it was not sufficiently shown by the bill that the lands were not exempt from the lien or the right to proceed thereon, the plaintiff's counsel alleging in reply that in view of the above mentioned statutory changes it was no longer necessary to negative the exemptions in such a bill. His Lordship held, at p. 366, that the rule at common law is that where a pleader or an informant relies upon a statute he must negative any exception in the enacting clause on which his claim is based, but that a subsequent proviso in another section, or even in a separate sentence of the same section, need not be negatived, and any facts bringing the case within it will be for the opposite party to set up. The learned Judge cites in support: *Bac. Abr. Statutes, (L.)* 4; 1 *Wms. Saund.* 262a; *Jones* v. *Axen*;[17] *Spieres* v. *Parker*;[18] *Thibault* v. *Gibson*;[19] *Steel* v. *Smith*;[20] and says that he thinks the same rule is followed in equity, although he has not been referred to, and has not found, any authority definitely settling it. It may be mentioned, in reference to the cases cited by Killam, J., in *Keewatin* v. *Wisch* (*supra*) that *Jones* v. *Axen* (*supra*) decided in 1696, was a suit brought to enforce a penalty on a bond and the other cases *Spieres* v. *Parker* (*supra*); *Steel* v. *Smith* (*supra*); *Thibault* v. *Gibson* (*supra*) were all suits to enforce penalties recoverable under particular statutes. In *Codville* v. *Pearce*,[21] Killam, C.J., sitting as a member of the Manitoba Full Court and citing the case of *Goshol*z v. *Newman*,[22] says that the onus is thrown upon the party objecting to the proceedings to show that the property is of some class against which the proceedings cannot be taken.

Dealing with the point relating to pleading discussed above, Kilgour, J., in a subsidiary judgment (unreported) delivered in the case of *Dayholos* v. *Kuniec* (*supra*) on further argument by the plaintiff's counsel, adhered to his view expressed above. His Lordship says:

> While, perhaps, considerations of merits should not influence the determination of strictly legal questions of practice and pleading, it would, in my

[16] (1891) 8 M.R. 365, at 366.
[17] 1 Ld. Raym. 120.
[18] (1786) 1 T.R. 144.
[19] (1843) 12 M. & W. 95.
[20] (1817) 1 B. & A. 94.
[21] (1901) 13 M.R. 468.
[22] 21 Wall 481.

opinion, work a hardship and an injustice in the present case, where the fact of the land in question being the male defendant's homestead is not questioned, to deprive him of his right to exemption when the plaintiff's own allegations leave no doubt that the right of exemption exists if the property sought to be sold is the debtor's homestead * * * While I prefer to rest my decision mainly on the original ground, I cannot but think that whatever the strict practice as to pleading may be in defended actions, where amendments may be readily granted, the plaintiff in motions for judgments in undefended actions, if he has not so pleaded, should be at least called upon to prove that the lands which he seeks to sell are not exempt by statute as being the debtor's homestead." * * * Moreover, I cannot think that having regard to the history of the statutory right of exemption in this province, and the fact that a small and compact group of related provisions under a single heading creates the general right under a registered judgment and expressly limits it to non-exempt lands, the Legislature intended to raise such a distinction as was assumed to exist in the *Keewatin* v. *Wisch* case, and the authorities therein cited, even if, as may be doubted, these old and highly technical refinements had been carried forward into modern practice under the King's Bench Act.

The plaintiff having filed an affidavit that the value of the land in question was in excess of the statutory exemption, the learned Judge accepted such affidavit for the present purpose, conditionally on its being taken to admit, as had not been controverted, the defendant's right to exemption up to the statutory amount, and subject to this and to notice being given to the male defendant of subsequent proceedings, the order for sale was made with the usual reference reserving the defendant's statutory exemption.

The following principles respecting exemptions in Manitoba may be gathered from the foregoing:

1. The exemption contemplated by the (Manitoba) Judgments Act, (*supra*) is a right personal to the owner of the exempted property: *Young* v. *Short* (*supra*); *The London & Canadian Loan & Agency Co.* v. *Connell*,[23] *Merchants' Bank* v. *McKenzie* (*supra*); *Roberts* v. *Hartley* (*supra*); *In re McCuaig and Bray* (*supra*).

2. The exemption can only be claimed by a person who owns or has some interest in the actual residence or home in question: *Roberts* v. *Hartley* (*supra*); *Logan* v. *Rea* (*supra*), at p. 547.

3. The debtor must actually reside upon, and (in the case of farm land) cultivate, the land at the time the exemption is claimed: *Brimstone* v. *Smith* (*supra*); *Harris* v. *Rankin*,[24] *The London & Canadian Loan & Agency Co.* v. *Connell* (*supra*); *Merchants' Bank* v. *McKenzie* (*supra*); *Logan* v. *Rea* (*supra*) at p. 548.

4. The right being personal to the debtor, the exemption lapses on

[23] (1896) 11 M.R. 115, Taylor, C.J.
[24] (1887, Killam, J.) 4 M.R. 115, at p. 135.

the death of the debtor: *The London & Canadian Loan & Agency Co.* v. *Connell* (*supra*).

5. Upon the registration of a certificate of judgment a lien upon the debtor's land is created, whether that land do or do not come within the category of "exempted" land: Sec. 3, Judgments Act (*supra*), secs. 215, 216 (Manitoba) County Courts Act (*supra*); *Brimstone* v. *Smith* (*supra*).

6. In the case of "exempted" land, the lien attaches, but the creditor's right to seizure and sale is suspended during the continuance of the exemption, but enforceable immediately upon the lapse of such exemption: *Brimstone* v. *Smith* (*supra*); *In re Frost and Driver* (*supra*); *Massey-Harris Co.* v. *Warrender* (*supra*); *Codville* v. *Pearce*,[25] *Roberts* v. *Hartley* (*supra*); *In re McCuaig and Bray* (*supra*).

7. During the continuance of the exemption no proceedings to enforce the lien can be taken: *ibid*; and sec. 9 of the Judgments Act (*supra*) and sec. 218, County Court Act (*supra*).

8. The fact that a man purports to transfer his land, with the intention of defrauding his creditors, does not necessarily deprive him of the benefit of the exemption law: *Merchants Bank* v. *McKenzie* (*supra*), at p. 34.

9. If, with the intention of defeating or defrauding his creditors, a man transfers his land which in origin is exempt from execution, and the grantor and grantee concur in that intention to defeat or defraud and unite in asserting the reality of the transfer, the exemption is thereby lost so far as the right of the grantor's creditors to levy execution upon the land is concerned: *Brimstone* v. *Smith* (*supra*); *Roberts* v. *Hartley* (*supra*).

10. If, however, such a transfer as is referred to in the last preceding paragraph be merely colorable and such that the grantee becomes merely a bare trustee for the grantor (the grantor being the real owner of the land), then, despite the intention to defeat or defraud and the transfer in pursuance of such intention, the right of exemption (being personal to the grantor) is not affected, and the land is not exigible to the creditors of the grantor: *Roberts* v. *Hartley* (*supra*), at p. 289; *Dayholos* v. *Kuniec* (*supra*).

11. In such a case as is indicated in the foregoing paragraph, however, the creditor would be entitled to a declaration that the premises are still the property of the debtor; and if the exemption should at any time lapse, the judgment could be enforced against the land: *Logan* v. *Rea* (*supra*), at p. 548; *Dayholos* v. *Kuniec* (*supra*).

[25] (1901) 13 M.R. 468, at p. 472.

12. The exemptions provided by sec. 9 of the Judgments Act (*supra*) do not apply to property the purchase price of which is the subject of a judgment in respect to which a certificate has been duly registered; and such property may be sold under such a registered judgment: See sec. 13 of the Judgments Act (*supra*) which must be read as a specific exception to the general provisions of sec. 9 of the Judgments Act (*supra*) and sec. 218 of the County Courts Act (*supra*).

Manitoba Law School. FREDERICK READ.

* * *

TRADE UNIONS AND TRADE ASSOCIATIONS.—The case of *Polakoff et al* v. *Winters et al*[1] has raised the question of the legal position of the respective organizations of labour and capital in Ontario.[2]

At one time Trade Unions existed only furtively while now it seems to be the turn of the employers or trade associations to be self-concealing. The former were thought (erroneously) by some Judges to be criminal at common law, and were certainly criminal by statute.[3] Now there are broad provisions in the criminal code (Section 498) which probably comprehend a great many trade associations. The argument of this article is that Trade Unions and Trade Associations are equal before the law, that neither are criminal and that both are without legal status and outside the jurisdiction of the Courts if their constitutions are in restraint of trade, as they will in a great many cases be found to be.

The Imperial Acts of 1824 and 1825 were thought to have removed the disabilities of Trade Unions, but the Judges, gloomy about impending democracy, found in the doctrine of restraint of trade an excuse for refusing to recognize them. *Hilton* v. *Eckersley*[4] is the foundation of the line of cases, the Judge-made law, which issues in the decision of *Polakoff* v. *Winters* (*supra*). Curiously, *Hilton* v. *Eckersley* (*supra*) dealt with an employers' association; a bond had become payable by reason of the breach by a member of regulations of the Association. The Judges reasoned that if employers were allowed to surrender to leaders their right to determine for themselves the conduct and terms of their industrial activities nothing could prevent employees from doing the same. The possibility of so shocking a consumation was sufficient reason for dismissing the action.

[1] [1928] 2 D.L.R. 277; (1928) 62 O.L.R. 40.

[2] The judgment of the Honourable Mr. Justice Raney will be found reported in full in this volume of the CANADIAN BAR REVIEW. See p. 222, *ante*.

[3] Halsbury, Vol. 27, Sec. 1195-6 (contributed by Sir John Simon).

[4] (1856) 6 E. & B. 47.

Thus it came about that Trade Unions were once again sub-legem, a state of affairs which seemed to recommend itself as little to Raney, J., in *Polakoff* v. *Winters* (*supra*) as did that produced in England by the Trades Disputes Act [5] to Darling, J., which Act, said he, had made Trade Unions supra-legem. The words of Darling, J., in *Bussy* v. *Amalgamated Society of Railway Servants and Bell* [6] that the Trades Dispute Act had relieved all registered trade unions from the humiliating position of being on a level with other lawful associations of H.M. subjects, might equally well be applied to the decision in *Hilton* v. *Eckersley* (*supra*). In that case the Judges overrode what has been called the paramount public policy of the enforceability of contracts. In the Trades Disputes Act, the Imperial Parliament relieved Trade Unions from responsibility for torts. Such were the two extremes achieved by the law from 1856 to 1906 in its attempt to adapt itself to the conditions introduced by the industrial revolution.

But we are not really concerned with the Trades Dispute Act because it was never enacted in Canada. It has not been necessary, perhaps because we are not so highly industrialized, for Canada to enact the statutes respecting Trade Unions which have passed in Great Britain since the beginning of this century. The one Act that we have got (or think we have) is the Trades Union Act of 1875 which closely follows the Imperial Act of 1871.

Before, however, we look at the Trade Unions Act it may be worth while to submit a foundation for those difficult cases where societies have been branded as illegal by the application of the doctrine of restraint of trade.

The constitution, or rules and regulations, of the Trade Union constitute the terms of the contract whereby one becomes a member. While the "contrat social" may be an exploded political theory what may by analogy be called the "contrat industriel" is a conclusive legal presumption from the fact of membership in the trade union. The Court looks at the terms of this contract and considers whether they are in restraint of trade. Many considerations [7] enter into this question and this is perhaps hardly the place for hunting them down. Broadly, however, it may be said that Trade Unions have been divided into sheep and goats. The sheep are those whose constitutions show them to be primarily and fundamentally friendly societies. The goats are those which have been termed militant, whose chief object, as revealed by their constitutions, is that of fighting for

[5] Imperial, 1906 (6 Edw. 7 c. 47).
[6] (1908) 24 T.L.R. 437.
[7] *Slesser and Baker*, Law of Trade Unions (Nisbet & Co.) p. 8.

better terms. For instance those Trade Unions which give their leaders wide powers in regard to strikes and discipline of members are militant and probably therefore in restraint of trade. The individual contract between the Trade Union and its member is in restraint of trade and void. The Trade Union is the sum of these individual contracts which are void and, therefore, in the eyes of the law, the Trade Union does not exist. Technically stated the Trade Union has no legal status [8] or, alternatively, it is beyond the jurisdiction of the Courts.[9]

Curiously, this disability came to be considered a blessing in disguise.[10] The trade unions found themselves in the position of the nonchalant trader who has his property in his wife's name. Wrongs could be committed with impunity for the funds were beyond the jurisdiction of the Courts.

Then came the startling [11] decision of *Hornby* v. *Close*,[12] by which the Trade Unions learned that their funds, besides being not available to wronged outsiders, could not be recovered at law from a defaulting treasurer. The disturbance caused by this case gave rise to a Royal Commission of which Frederic Harrison seems to have been the outstanding figure.

By this time this status, or lack of legal status, was so valued by Trade Unionists that they wanted to perpetuate it. The upshot of the Royal Commission was the Trade Unions Act of 1871 (Canada 1875), the main function of which appears to have been to remove the civil disabilities of Trade Unions. Two requirements of the Act may be mentioned, first, registration, which was calculated to give a certain amount of publicity and state supervision, and second, the creation of a trust fund, which would enable the Trade Unions to be sued as well as to sue. The scope of the Act was, however, incomplete. Grouped into one section [13] were a number of classes of actions which were to remain under the ban of the common law doctrine of restraint of trade. The section reads "Nothing in this Act shall enable any Court to entertain any legal proceeding * * *," and proceeds to enumerate the unprotected matters. Broadly there were two classes of contracts that were to remain unenforceable if the constitution of the Trade Union in question was illegal as being in restraint of trade: the first were internal contracts, e.g., between

[8] Farwell, J., in *Osborne* v. *Amalg. Soc. of Ry. Servants* [1909] 1 Ch. 163 at p. 189.

[9] Lord Wrenbury in *A.S.C.* v. *Braithwaite* [1922] 2 A.C. 440 at p. 470.

[10] Webb's Industrial Democracy (Longman 1920) pp. 529, 534. Cf. Solicitors Journal Vol. 69, p. 352.

[11] Webb's History of Trade Unionism (Longmans 1920) p. 262.

[12] (1867) L.R. 2 Q.B. 153.

[13] Section 4 R. S. 1927, c. 202.

members concerning employment, and the second were contracts between one trade union and another. The fact that an employers' association is often a trade union within the meaning of the Act brings collective bargains within the second class of contract which remains unenforceable and, perhaps, accounts for the absence of a precedent for such an action as *Polakoff* v. *Winter* (*supra*). The fact, however, that the definition of a trade union in the Imperial Act as amended[14] is wider than that of the Canadian Act should not be overlooked.

The basis, however, of the judgment in *Polakoff* v. *Winters* (*supra*) was not that it was an action of one Trade Union against another, but simply that the plaintiff Union, not having registered, as required[15] by Section 5 of the Canadian Act,[15a] came under the ban of illegality as laid down first in *Hilton* v. *Eckersley* (*supra*) and finally in *Russell* v. *Amalgamated Society of Carpenters and Joiners.*[16] It was not necessary to consider the validity of our Trade Union Act; not being registered and its constitution being in restraint of trade, the trade union had no legal status to bring the action.

The judgment clearly indicates the position of Trade Unions in Ontario. Not all Trade Unions are without status, but only those whose main purpose, as exemplified by their rules, is in restraint of trade, *Gozney* v. *Bristol Trade and Provident Society.*[17] The undue gathering of power by Trade Union leaders is frustrated at law by considerations of individual liberty.[18]

Something should also have been said in this connection about the elasticity or inelasticity of the common law, particularly in regard to questions of public policy and the case of *Starr* v. *Chase*[18a] should have been referred to, but we must turn to consider the position of employers associations.

It has been pointed out that *Hilton* v. *Eckersley* (*supra*) was a case concerning an employers' association. In 1856 therefore in England the status of associations of employees and employers respectively was the same, and it remains the same, though it was the employees' association that gave the greater concern.

In the United States however concern seems rather to have centered on associations of employers or capitalists[19] than in those of

[14] Trade Union Amendment Act (Imperial) 1876 (39 & 40 Vict. c. 22).
[15] *Sellers* v. *Woodruff* [1925] 4 D.L.R. 646; 57 O.L.R. 582 at p. 587.
[15a] R.S. 1927. c. 202.
[16] [1912] A.C. 421.
[17] [1909] 1 K.B. 901.
[18] Jessel, M.R., in *Rigby* v. *Connol* (1880), 14 Ch. D. 482.
[18a] 1924 S.C.R. 495.
[19] From The Sherman Anti Trust Law of 1890 to the Clayton Act of 1914.

labour. The word "trust" acquired a wide secondary meaning and drastic provisions were taken to suppress combinations of employers. Whether the trust was a bogey that never was on land or sea, or was served with ingenious lawyers, it is a fact that Trade Associations continued to spread and flourish throughout the United States in spite of stern attempts to exterminate them. There, too, the pendulum of change has swung and the Department of Commerce now mothers a brood [20] of Trade Associations with ill-concealed pride.

It was natural enough that the fear of exploitation should cross the border to Canada. Our public opinion is still highly susceptible to any suggestion of a "trust." Unsettled judgment in this matter is reflected in the difficult provisions of Section 498 of the Criminal Code and in the Combines Investigation Act.

Neither of these enactments appear to have achieved much. It is by no means certain that the verdict of history will not place Sir William Glyn-Jones of the P.A.T.A. among the heroes of Canada. Open encouragement is given to the wheat pool.

But there is grave doubt whether either section 498 of the Criminal Code or The Combines Investigation Act are *intra vires*. As Mr. Justice Raney points out in regard to Trade Unions, the way seems clear for the Provincial Legislature to broach this great problem.

Finally, it is interesting to note that in England a number of Employers' Associations [21] have registered under The Trade Unions Act to obtain such status as it confers,[22] while in Canada neither the organizations of labour nor those of capital can enjoy even that limited legal recognition if, as is contended, all the legislation affecting them is *ultra vires*, as being enacted by the Dominion instead of the Provincial Legislature.

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Motor Car—Insurance—Third Party Risks—Insured Insolvent—Claim by Person Injured to Insurance Moneys.—"It is, perhaps, unfortunate that one should have to give a judgment which would, at first sight, appear to run counter to what I might call the common-sense view of the proceedings. None the less it is necessary for us to administer the law as it stands, and if any alteration is

[20] Over 1000 are enumerated in the Department's report of 1923.

[21] See chapter on Industrial Structure in Report of Committee on Industry and Trade, Part I, 1927.

[22] Report of Committee on Trusts 1919 (Cd. 9236) p. 18.

to be made in it that must be made by the proper authorities and by the proper means."[1]. Such is the attitude of the Court of Appeal in deciding *In re Harrington, Ex parte Chaplin.*[2]

In that case, the applicant recovered a judgment for damages and costs in an action against a limited company in respect of personal injuries caused to him by the negligence of one of the company's servants in operating a motor car. Before execution could be levied, the company went into liquidation. The company was insured against third party risks and the insurance company paid the amount of the judgment to the liquidator. It was held that the amount formed part of the assets of the company available for distribution amongst its general creditors, including the applicant, in the winding up.[3]

Owing to the lack of privity, the applicant could not have recovered in contract against the insurance company. To succeed in having the whole amount of the insurance moneys paid over to him, the claimant had to show some equitable grounds for relief.

In their anxiety to reach a common-sense result consonant with authority, one might have expected that the Court of Appeal would make more use of the case of *In re Richardson.*[4] In this case it was held that a trustee in bankruptcy of a bankrupt trustee must pay over to a creditor of the bankrupt the whole amount paid to him by a person bound to indemnify the bankrupt in respect of the debt which had been duly incurred. Fletcher Moulton, L.J., said: "Therefore I come to the conclusion that, as a general principle, an indemnity like this can be used by the trustee only for the purpose of bringing about payment to the head creditor of the claim against which he is indemnified."[5]

However, Atkin, L.J., in the *Harrington* case, (*supra*) distinguished the *Richardson* case (*supra*) on the ground that the bankrupt in the earlier case was a trustee and as such, having regard to a well settled principle of the law of trusts, could not make a profit out of his trust and that his trustee in bankruptcy was in no better position.[6]

[1] Lord Hanworth, M.R., [1928] 1 Ch. at p. 111.

[2] [1928] 1 Ch. 105.

[3] See also *Palmer* v. *McKnight* (1899) 31 O.R. 306, where it was decided that a judgment creditor of a mortgagor upon covenants in the mortgage could not obtain a receivership order to enforce payment by a purchaser of the equity of redemption who, on purchasing had agreed to pay and assume the mortgage.

[4] [1911] 2 K.B. 705.

[5] [1911] 2 K.B. at p. 714.

[6] It is interesting to note that in Massachusetts a statute has been passed, giving to a person injured by fault of the insured, in a manner covered by the policy, a beneficial interest in the proceeds thereof. See The Law Relating to Automobile Insurance, (1921), by John Simpson.

S. E. S.