[HIGH COURT OF AUSTRALIA.]

THE AMALGAMATED SOCIETY OF ENGINEERS AND OTHERS . . Defendants, } Appellants;

AND

SMITH . . . . . Plaintiff, Respondent.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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SYDNEY, *Aug.* 6, 7, 8, 11, 12; *Sept.* 5.

Barton A.C.J., Isaacs, Gavan Duffy, Powers and Rich JJ.

Trade Union — Member — Expulsion—Action for declaration that expulsion is invalid and order for restoration to membership—Jurisdiction of the Court—Rules—Construction—Ambiguity—Illegality—Strikes—Breach of Contract—Trade Unions Act 1886 (*Qd.*) (50 *Vict. No.* 29), *secs.* 25, 26.

Sec. 25 of the *Trade Unions Act* 1886 (Qd.) provides 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."

Sec. 26 provides that "Nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of enforcing or recovering damages for the breach of any of the following agreements, namely,—(1) Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not . . . be employed; . . . (3) Any agreement for the application of the funds of a trade union,—(*a*) To provide benefits to members; . . ."

Held, that an action by a member against a society registered as a trade union under the Act, seeking a declaration that an order of expulsion made by the governing body of the society is invalid and a consequent order that he be restored to membership, will lie, such an action not being a proceeding to enforce an agreement under either sub-sec. (1) or sub-sec. (3) (*a*) of sec. 26.

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Osborne v. *Amalgamated Society of Railway Servants*, (1911) 1 Ch., 540, followed.

A member of the society refused to obey an order of the governing body to cease work on a particular day. If the member had obeyed the order he would have broken his contract with his employer. The order was given for the purpose of assisting an association of workmen the members of which were in dispute with the same employer. The member was thereupon expelled from the society on the ground that he had acted contrary to the society's interests.

Held, that the expulsion was invalid:

By *Isaacs*, *Gavan Duffy* and *Rich* JJ., on the ground that the order was not authorized by the rules, and the society had no jurisdiction to expel the member for disobeying it.

By *Barton* A.C.J., on the ground that no rule of the society required a member to break his contract of service, or authorized the giving of such an order, or authorized expulsion for the cause assigned, and that an obligation to break his contract of service or an authority to give such an order would not be implied; and therefore there was no jurisdiction to expel the member.

By *Powers* J., on the ground that the member had not disobeyed any order which there was express or implied power to give.

Where substantial effect can be given to a rule of a society registered as a trade union by an interpretation which will not involve a breach of the law, that interpretation will be adopted.

Held, therefore, that a rule authorizing the governing body to order its members to strike should be interpreted as confined to strikes not involving the breach of existing contracts.

Decision of the Supreme Court of Queensland: *Smith* v. *Amalgamated Society of Engineers*, (1913) S.R. (Qd.), 114, affirmed.

APPEAL from the Supreme Court of Queensland.

An action was brought in the Supreme Court by John Smith against the Amalgamated Society of Engineers, a trade union registered under the *Trade Unions Act* 1886 (Qd.), and James A. Gale, John Spencer, Joseph Edward Russell, Edwin Feather and Henry Steyrme, the trustees of the Brisbane Branch of the society, the nature of which is sufficiently stated in the judgments hereunder. The action was heard before *Chubb* J., who dismissed it with costs. From that decision the plaintiff appealed to the Full Court, which allowed the appeal, and made an order declaring that a certain resolution of 20th May 1912, purporting

to exclude the plaintiff from membership in the defendant society, was *ultra vires* the rules of the society and void, and that the plaintiff was on 20th May 1912, and thereafter continued to be, a member of the society, and ordering that the individual defendants and the defendant society, its members, officers, servants or agents, and every one of them, should be restrained, and granting an injunction restraining them, and every one of them, from acting on or enforcing the resolution of 20th May 1912: *Smith* v. *Amalgamated Society of Engineers* (1).

The following extracts from the rules of the society are material to this report:—

Rule I.—Name, Objects and Constitution.— . . . (2) The society shall consist of members belonging to, and earning the rate of wages fixed by the District Committee for, the following trades or branches: . . .

(3) The objects for which the society is established are: By the provision and distribution of funds and by the other means hereafter mentioned on the conditions set forth in these rules, to protect and regulate the conditions of labour in the trades in the last clause mentioned, and the relation of its members with them; to promote the general and material welfare of its members; . . . . . to aid by federation other societies which do not come under the preamble of our rules, and other trade societies having for their objects, or one of them, the promotion of the interests of workmen; . . . . .

Rule IV.—Branch Committee.— . . . (2) All decisions arrived at by the committee shall be final, subject to the right of appeal, within one month, to a summoned meeting of the branch. Should any case come before a branch committee on which the rules are silent, the case and the decision of the committee shall be stated in the monthly report, provided that such decision be approved of by the Executive Council; the same to be a guide to all other branches. The above shall also apply to the Australasian, South African, and American areas in which any decision may be published in the reports issued by the respective councils. . . . .

Rule XIII.—District Committee.— . . . (2) District Committees shall have full control of vacant-book offices, &c. They

(1) (1913) S.R. (Qd.), 114.

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may pass resolutions on all matters here following, which, on approval by the Executive Council, but only with such approval, shall be binding upon all members working within the respective districts, and shall be enforceable by fine not exceeding £3, by suspension from benefits, or by expulsion from the society. . . . . District Committees shall have no jurisdiction in matters of branch business . . . . but shall have power (subject to the approval of the Executive Council) to deal with and regulate the rates of wages, hours of labour, terms of overtime, piecework, and general conditions affecting the interests of the trade in their respective districts.

(4) In the case of shop disputes, the District Committee shall have power (with consent of Executive Council) to take a vote of the members of the district upon the advisability of assisting the strike committee in the district by a local levy ; . . . .

(7) In the case of a shop dispute the members shall not leave their employment without the approval of the District Committee. In such disputes where any sections of the amalgamation can with advantage be exempt from being drawn out, their special cases shall be investigated with a view to the best interest of the society being conserved. A District Committee shall also have power . . . . to veto the admission, subject to the sanction of Council, of any candidate who has been excluded from a branch in the district for acting contrary to the society's interests. No general strike shall be entered upon in any district affecting the whole of the members unless carried by a majority of three votes to two of the members voting of said district, and no settlement shall be decided upon unless accepted by a majority. The vote must be taken by ballot. The Executive Council, having given the District Committee permission to take such a vote, shall have no power to interfere with its working.

(8) Members of the District Committee shall have been three years in the society previous to election. No member shall be eligible who is not working at the trade, under the conditions laid down by the District Committee (members on benefit excepted). . . .

Rule XVII.—American-Canadian, South African, and Australasian Councils.—(1) There shall be an American-Canadian

Council, an Australasian Council, and a South African Council, vested with authoritative and administrative powers sufficient to enable them to protect the interests of our trade and to advance the interests of the society on the American continent, Australasia and South Africa. Their duties shall be as hereafter set forth, subject generally to the rules of the society and to the Executive Council. (2) . . . The Australasian members shall nominate and elect the chairman of the Australasian Council.

Rule XX.—Admission of Full Member.—. . . . (9) No person shall be admitted a member who is at the same time a member of another society, except such membership of another society be but honorary, or except in the case of associated trades formed for their general protection. . . . Persons who have lost one eye may, if the remaining one be good, be admitted up to the age of 30 years, but must produce a medical certificate in proof of the soundness of the remaining eye. In all these cases the medical certificates must be submitted to the Executive Council prior to the admission of the candidates.

Rule XXII.—Admission of Apprentices.—. . . . (5) Any apprentice who has attained the age of 19 years, and has been at least 4 years at the trade and 12 months as a probationary member, may apply to his branch to become a full member . . . The entrance form shall be forwarded to the Executive Council. . . .

Rule XXVII.—Contingent Benefit.—(1) Should any member be thrown out of employment from any of the following causes, he shall be entitled to contingent benefit at the rate of 5s. per week, probationary members 2s. 6d. per week, upon production of evidence satisfactory to the Council. . . . (2) Any shop or district strike for an advance of wages, or for advance of piece prices or other improvement in the conditions of labour, entered into with the previous sanction of the Council, or members being compelled to cease work owing to disputes or causes over which we have no control, shall be entitled to contingent benefit. (3) Any strike or withdrawal of members against a reduction of wages, or against reduction of piece prices, entered into with the previous sanction of the District Committee. . . . (8) Any general strike or committee withdrawal, approved by the Council,

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against the imposition of unjust or tyrannical rules or conditions of labour. . . . (10) Members, acting on instructions from District Committee, refusing to do work coming from shops where members are on strike, or refusing to work with non-society men. . . . (12) No members will be entitled to contingent benefit who at any time fail to obtain for themselves the ordinary wages or other conditions of working, as laid down by the District Committee, of the shop in which they may start or be working, except in cases where their position has been affected or changed by a general advance of wages movement, as *per* clause 1 of this rule, nor will any members be entitled for refusing conditions previously accepted by them, or which they have assisted to establish.

Rule XL.—Conduct, Offences, Penalties.—(1) If any member be satisfactorily proved . . . to have refused to obey these rules, or to comply with any order by them authorized, he shall be fined such sum (not exceeding £5) or suspended from benefit for so long as the committee or branch meeting who have tried him may think proper, or shall be excluded from the society, and forfeit all money paid by him thereto.

From the decision of the State Full Court the defendants now, by special leave, appealed to the High Court.

Stumm K.C. and *Grove*, for the appellants. The expulsion of the respondent for acting contrary to the society's interests was authorized by the rules, and was effected in the manner prescribed by the rules. The fact that the act which the respondent was directed to do would be a breach of his contract with his employer does not affect the validity of the expulsion. The rules authorize such an order, and the respondent has agreed to be bound by the rules. Those parts of the rules which authorize the doing of illegal acts are inseparable from the other parts. A strike is illegal if it involves a breach of contract: *Russell* v. *Amalgamated Society of Carpenters and Joiners* (1). The rules authorize the ordering of a strike, and the only way in which that could be carried out so as to promote the society's objects would be by ordering members to break their contracts with

(1) (1912) A.C., 421, at p. 435.

their employers. The society is at common law unlawful as being in restraint of trade, and therefore an action of this kind would not lie at common law, but must rest for its justification on the *Trade Unions Act* 1886. But this is an action to enforce either an agreement "concerning the conditions on which any members for the time being . . . shall or shall not be . . . employed," within sub-sec. (1) of sec. 26, or an agreement "for the application of the funds of a trade union to provide benefits to members," within sub-sec. 3 (*a*) of that section, and the Act does not enable the Court to entertain it. The decision in *Osborne* v. *Amalgamated Society of Railway Servants* (1) does not apply, because the word "directly," which occurs before the word "enforce" in the English Act, is omitted from the Queensland Act. See *Rigby* v. *Connol* (2); *Wolfe* v. *Matthews* (3); *Chamberlain's Wharf Ltd.* v. *Smith* (4); *Yorkshire Miners' Association* v. *Howden* (5). Apart from being in restraint of trade, this society is illegal on the ground that the rules authorize the governing body to order the members to strike and to break their contracts with their employers, and so to commit offences against the *Commonwealth Conciliation and Arbitration Act*, the society being registered as an organization under that Act, and against the *Masters and Servants Act* 1861. [They also referred to *Donkin* v. *Pearson* (6); *Halsbury's Laws of England*, vol. IV., p. 416; *Hopkinson* v. *Marquis of Exeter* (7); *Federated Engine-Drivers and Firemen's Association of Australasia* v. *Broken Hill Proprietary Co.* (8).]

Feez K.C. and *Real*, for the respondent. The rules give no power to the governing body to order a member to cease work in breach of his contract. The order being invalid, the respondent was justified in refusing to obey it; and in doing so he could not be said to be acting contrary to the society's interests. The rules give no power to expel a member on the ground that he has acted contrary to the society's interests. Even if they do, the expulsion of the defendant was not carried out in accordance with the

(1) (1911) 1 Ch., 540.
(2) 14 Ch. D., 482.
(3) 21 Ch. D., 194, at p. 196.
(4) (1900) 2 Ch., 605.
(5) (1905) A.C., 256.
(6) Unreported in law reports.
(7) L.R. 5 Eq., 63, at p. 68.
(8) 12 C.L.R., 398, at p. 413.

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rules. At the time the respondent refused to cease work there was no valid order to him to do so. The whole charge against him was in respect of that refusal, and no subsequent attempt by the society to validate the order could affect the right of the respondent to refuse to obey it when it was given. The right of the respondent to bring this action is established by the decision in *Osborne* v. *Amalgamated Society of Railway Servants* (1). The omission of the word "directly" from sec. 26 of the *Trade Unions Act* does not matter: See *Cope* v. *Crossingham* (2). The respondent, by seeking a declaration that he is still a member, does not seek to enforce either directly or indirectly any rights referred to in that section. If he succeeds, he remains a member with the same unenforceable rights as before.

[RICH J. referred to *Gozney* v. *Bristol Trade and Provident Society* (3).]

The provisions in the rules for appeals do not preclude the respondent from coming to the Court if the governing body has acted without authority: *Palliser* v. *Dale* (4); *Cox* v. *Hutchinson* (5). The rules of the society are capable of a construction which does not authorize the society to do acts, or order acts to be done, which are contrary to law, and that construction should be adopted. A presumption will be made in favour of the legality of the society. As to the *Masters and Servants Act*, the rules do not authorize the society to order its members to break their contracts with their employers. As to the *Commonwealth Conciliation and Arbitration Act*, if the society is properly registered as an organization under the Act, it cannot be said to be illegal; and, if the society is not properly registered, the Act does not affect it, and, so far as it is concerned, the prohibition of strikes has no application.

Stumm K.C., in reply.

Cur. adv. vult.

Sept. 5.

The following judgments were read:—

BARTON A.C.J. This is an appeal from the judgment of the

(1) (1911) 1 Ch., 540.
(2) (1909) 2 Ch., 148, at p. 159.
(3) (1909) 1 K.B., 901, at p. 918.
(4) (1897) 1 Q.B., 257.
(5) (1910) 1 Ch., 513, at p. 518.

Supreme Court of Queensland. The defendant society is a trade union registered under the Queensland Act of 1886. It is also an association registered as an organization under the *Commonwealth Conciliation and Arbitration Act.* It is possessed of property real and personal. John Smith, the plaintiff, a member of the society, had been, by resolution of the Brisbane Branch, on reference from the District Committee, excluded from the society on the ground that he had acted contrary to its interests by disobeying an order to cease work. He brought an action against the society and the trustees of the Brisbane Branch, claiming a declaration that the resolution was *ultra vires* and void, and an injunction restraining the defendants from enforcing it, and also claiming to be restored to membership. The defences filed are: (1) that the resolution of exclusion was not *ultra vires*, but was properly authorized by the rules, and properly passed and enforced; (2) that the contract of membership constituted by the society's rules is unlawful at common law as being in restraint of trade, and therefore incapable of being enforced, and that under such circumstances the Court is prevented by the Queensland *Trade Unions Act* 1886 from entertaining the action because it is an attempt to enforce an agreement for the application of the funds of a trade union to provide benefits to members (see the Act, secs. 25 and 26, sub-sec. 3 (*a*)); (3) that the contract of membership is an illegal one and incapable of enforcement, apart from any question of restraint of trade. The second defence was varied during the argument, as will appear presently.

The action was tried by *Chubb* J. without a jury, and dismissed with costs on 11th December 1912. On appeal, the Full Court of the State, on 12th March 1913, reversed his Honor's judgment and declared the resolution complained of *ultra vires* and void, and that the plaintiff was when excluded, and still was, a member of the society; and it granted the injunction sought. The defendants were ordered to pay the costs of the appeal and of the action. The defendants now appeal to the High Court from that judgment.

It appears that in January of last year, the plaintiff was a member of the Brisbane Branch of the society, and fully entitled to all the privileges of membership. He was chief engineer in

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the power house of the Brisbane Tramways Company in that city. There were other members of the society also employed in the power house. In the employment of the company were a number of members of the Australian Tramways Employees' Association. A dispute having arisen between the company and the tramway men, who desired to wear, when on duty, a badge signifying their membership of their association, a strike was about to occur unless the men were allowed to wear these badges when at their work. The Tramways Association suggested that if their members ceased work, the members of other unions employed by the company should absent themselves at the same time. This would necessitate a stoppage of operations at the power house, and consequently a stoppage of the trams. At a meeting of the District Committee of the Brisbane Branch of the defendant society held on 18th January, a resolution was carried that the committee should instruct all members of the Branch employed by the company (with the exception of the chief engineer, the plaintiff) to cease working for that company simultaneously with the tramway men, if the Tramways Association decided on a cessation of work. The acting secretary was instructed to take immediate steps to give effect to the resolution. Next day the acting secretary wrote to the plaintiff conveying to him the decision arrived at, save that he did not inform the plaintiff that he had been excepted from its operation. On the same evening, the 19th, the committee again met, and the acting secretary made a report. He produced a copy of his letter to the plaintiff, and explained his own action in omitting to inform the plaintiff that he was excepted from the decision of the committee. This action, the officer said, he had taken on finding that the officials of the Iron Workers' Institute were prepared to recommend that their members should receive the same instructions as the defendant society's employees at the power house, but only on condition that the plaintiff "be asked to come out too, if necessary." The letter sent to the plaintiff had been shown to the officials of the Iron Workers' Institute as a guarantee of good faith. The meeting endorsed by resolution the acting secretary's action in writing to the plaintiff in the terms adopted.

On the following day, 20th January, the acting secretary again

wrote to the plaintiff, calling his attention to the fact that he had not answered the letter sent to him on the preceding day, and informing him, under instructions from the District Committee, that a complaint had been lodged with the committee, that the plaintiff had endeavoured to assist the Tramways Company, by offering unusually high wages to induce men to act as strike breakers; and the plaintiff was called on for an explanation. This charge does not appear to have been pressed.

On 23rd January the plaintiff answered this letter. He pointed out that there was no dispute between the defendant society and the Tramways Company, and maintained that there was nothing in the society's rules which authorized the committee to interfere with members of the society, merely on account of differences between the company and certain of its other employees. He said that as no dispute existed between the society and the company, he considered himself justified in continuing to carry out the lawful commands given to him by the company, as their engineer in charge of the power house. In other words, he refused to break his contract of service with the company.

On that date the District Committee again met, and the plaintiff's letter came before them. The acting secretary was instructed to send copies of the correspondence with Smith to the committee of the Australasian Council in Melbourne, asking their advice as to the steps to be taken. At the same meeting a telegram from the Australasian Council approving some action of the District Committee appears to have been read, but its contents are not stated. The proceedings at the meetings of the committee on 18th and 19th January were respectively reported to the Australasian Council in Melbourne, at a meeting held on 30th January. It is minuted that these two reports were then approved. The minutes further mention several telegrams from the Brisbane District Committee without stating their contents, and go on to state as follows:— "The steps taken by the District Committee were approved, and the action of the president and the secretary of the Australasian Council was endorsed." The Australasian Council again met on 13th February. They received a report from the Brisbane District Committee of its meeting on 23rd January, and decided to advise the District Committee that the secretary of that body

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should lay a charge against the plaintiff of "acting contrary to the interests of the society;" that the charge should be investigated by the committee, and a decision arrived at after hearing all the evidence, and that anyone concerned who might feel aggrieved at the decision might appeal through the Courts of the society.

At this stage, namely, on 22nd February, the plaintiff paid the sum of £1 to the secretary of the Brisbane Branch for his dues, and the money was accepted and apparently credited to him.

The next step was a letter of 23rd March summoning the plaintiff to attend a meeting of the District Committee to be held on 1st April to deal with the charge laid against him for acting contrary to the interests of the defendant society "during the recent strike." The strike, then, seems to have been over before this date. The plaintiff on 25th March wrote in reply, asking for full particulars of the alleged charge so that he might produce evidence as provided by the rules.

The meeting of the District Committee was held on 1st April, "principally," as the minutes state, "to hear evidence of members accused of acting contrary to the District Committee's instructions and against the best interests of the society." The plaintiff and three other members, whose cases are not stated to be identical with his, were heard by the committee, and the minute proceeds:—"After discussion it was moved by brother Jones and seconded by brother Curtis that all these cases be referred to the Branch with a recommendation that these men should be given notice of exclusion. Carried unanimously."

This meeting was reported to the Australasian Council. The report added that the plaintiff, who, it stated, had been a member for 41 years, did not cease work when ordered to do so by the District Committee; that he admitted acting contrary to the committee's instructions, and argued that the committee was not empowered by the society's rules to call upon him to cease work, since the dispute was not one in which the society was directly interested. The report was not forwarded to the Australasian Council till 9th May, and the secretary asked for the Council's opinion. A general meeting of the Branch was held on 20th

May whereat "it was moved and carried that in brother J. Smith's (tramway) case he be excluded."

On 21st May, apparently in ignorance of the result of the Branch meeting in Brisbane on the previous day, the Australasian Council met in Melbourne and resolved, as to the secretary's letter of the 9th of that month, that the District Committee be advised to proceed in the manner outlined by them. That apparently is what the District Committee had already done, with the result that the members of the Branch had excluded the plaintiff.

In pursuance of the resolution of 20th May the secretary, on the 27th of that month, gave the plaintiff, by letter, three months' notice of his "exclusion from the above society dating from 20th May 1912 for acting contrary to the society's interests by disobeying the District Committee's order to cease work when called upon on 19th January 1912."

The above are the material facts of the case.

The first proposition which, as it seems to me, the plaintiff has to sustain, is that he was unjustly excluded or expelled from the society without the warrant of any of its rules, so that the proceedings had against him, being beyond the contractual jurisdiction of the domestic forum, are void, and he is in law still a member. Several of the rules were quoted upon this branch of the case. The charge upon which the plaintiff was tried by the District Committee was one of "acting contrary to the society's interests" by disobeying the District Committee's order to cease work. There is no complaint that the proceedings, if authorized, were contrary to natural justice. The position which the plaintiff takes up is that no rule can be found which warrants the making or investigation of such a charge. It was made clear that there is no rule which expressly does so. But it is contended that authority for the charge is to be found by implication in some or one of the rules. It was urged for the plaintiff that the approval of the Executive Committee in London was necessary to regularize the action taken against him, while the defendants contended that the approval of the Australasian Council, which was, they said, obtained, was all that was contemplated. I do not deal with that question, because I think it is not necessary to do so in the

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present case. If there was nothing in the rules that warranted the expulsion of the plaintiff, he is upon that broad ground entitled to succeed, subject to his meeting the other defences, even if the course taken against him was in respect of mere procedure otherwise regular. It is admitted that he was ordered to break his contract of service with his employer and was expelled for refusing to comply with that order. It was an order to do something contrary to law. It is said that his conduct in disobeying it could properly be described as "acting contrary to the society's interests." The order was issued to all the society's members employed by the company, and to obey it in conjunction with them would have been to strike. A strike is not always unlawful at common law. But as regards the plaintiff singly, as it was not lawful to obey, I doubt whether the society can be heard to say that the refusal to do so was contrary to its interests. However that may be, it is not within the rules a cause of expulsion that the member has acted contrary to the society's interests. The only place in the rules where the phrase occurs is rule XIII., clause 7, by which a District Committee is given the power "to veto the admission, subject to the sanction of Council, of any candidate who has been excluded from a branch in the district for acting contrary to the society's interests." But this is only a power to veto an admission in certain circumstances. It does not imply a power to the District Committee to expel for that specific cause. In this rule expulsion for acting contrary to the society's interests probably means expulsion for some breach of a specific rule by conduct which in its effect is against the society's interests, for it cannot refer to a specific rule under which the member can be expelled on such a charge, seeing that no such rule exists. Indeed, in the absence of such a rule, there is nothing to show how the exclusion is to take place, nor by what authority it is to be sanctioned. Then rule XL., clause 1, was invoked. It prescribes the fining, or suspension, or exclusion, after trial by a District Committee or Branch meeting, of any member satisfactorily proved "to have refused to obey these rules, or to comply with any order by them authorized"; but here again we were not shown any rule which the plaintiff had refused to obey, nor any authority for any order with which he had refused to comply.

There is no rule either requiring a member to break his contract of service, or authorizing an order to a member to do so. It was, indeed, urged that rule XIII., clause 2, might be read as enabling such an order to be given with due authority, under the power to District Committees, subject to the approval of the Executive Council, "to deal with and regulate . . . . general conditions affecting the interests of the trade in their respective districts." But that is not a power to issue individual orders to break contracts of service; it is a power merely to make rules of general application to members with respect to trade interests. It is not suggested that the District Committee has made any regulation as to general conditions applicable to this case. It was further urged that as members thrown out of employment because of their refusal, on instructions from the District Committee, to work with non-society men were entitled to contingent benefit (rule XXVII., clauses 1 and 10), the committee were by implication entitled to order them to refuse so to work. That might be so; but the rule does not imply that the committee can order such a refusal where obedience would mean the breaking of a contract of service. A breach of such a contract, whether by a strike or by the act of a single workman, could not be said to be within the law: See *per* Lord *Shaw* in *Russell* v. *Amalgamated Society of Carpenters and Joiners* (1), and the Queensland *Masters and Servants Act* 1861. Other rules were appealed to, but those mentioned are the only ones I think relevant to the defence that the plaintiff was legally expelled.

On this branch of the case, then, the matter may be summed up thus. The plaintiff says that he was expelled in breach of his contract with the society. That contract is contained in the printed rules. Counsel showed us that there was no rule expressly warranting his exclusion in the admitted circumstances. The defendants have endeavoured to show that authority for the expulsion is to be implied from certain rules which they call in aid. In that attempt they have failed. The case would be different if the rules gave a majority of the members an absolute discretion to expel: See *Blisset* v. *Daniel* (2); *Hopkinson* v. *Marquis of Exeter* (3). Had the plaintiff, by his membership of

(1) (1912) A.C., 421, at pp. 435-436. (2) 10 Hare, 493.
(3) L.R. 5 Eq., 63, at p. 68.

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the society, contracted to abide by any such rule, he could not have had cause to complain. But under these rules there can be no expulsion without specific cause expressed in the rules. The plaintiff, therefore, has been unlawfully expelled.

But the plaintiff is not entitled to succeed if the second or the third defence is valid. By the second defence it was maintained that an action to establish a claim to membership of the defendant society is "a legal proceeding instituted with the object of enforcing an agreement for the application of the funds of a trade union to provide benefits to members," and that, as the society is at common law an unlawful association, the Court cannot entertain such a proceeding by reason of sec. 26 (3) (*a*) of the *Trade Unions Act*. This defence was insisted on at the trial, and on the appeal to the Full Court, but, before us, Mr. *Stumm* virtually admitted, being pressed with the authority of the case of *Osborne* v. *Amalgamated Society of Railway Servants* (1), that he could not rely on paragraph (*a*). But he contended that sub-sec. (1) of sec. 26 gave him a good defence, since the rules were an "agreement between members of a trade union as such, concerning the conditions on which any members for the time being . . . shall or shall not . . . be employed." As illegality is not to be presumed, it is still upon the defendants to show that the society would have been illegal at common law. Proof of that would not render their agreements, either with members or otherwise, void or voidable (*Trade Unions Act*, sec. 25); but, in the case of such illegality, sec. 26 shows that the plaintiff cannot have the assistance of the Court if the object of his action is to enforce an agreement with him which falls, as this agreement clearly does, within sub-sec. (1). Two questions, therefore, arise: Is the society an unlawful association apart from the Statute, and is this an action for the enforcement of an agreement between members as to conditions of employment? If the defendants fail to establish the affirmative of either of these propositions their second defence fails.

Now, assuming for a moment that the society is an unlawful association at common law, I do not think this action can be called a proceeding the object of which is to enforce an agree-

(1) (1911) 1 Ch., 540.

ment as to conditions of employment. The effect of declaring the plaintiff to be still a member of the society would clearly not be the enforcement of such an agreement. For if, after being declared to be still a member, he were to seek by legal process to enforce such an agreement against the society, sec. 26 would be a direct bar to his action. The enforcement of such an agreement would, therefore, not be the result of the relief sought. The plaintiff asserts and proves that, having been expelled by a proceeding which is *ultra vires* and void, his membership is unimpaired. The foundation of his action is property; for, as a member, he is a participant in the property held by the society, and his right to vote is also property. He can assert these rights without a proceeding to enforce the agreement as to conditions of employment, which, if the basis of the society is illegal, he could not do. The mere maintenance of his membership is not of itself the enforcement of rights which he is not even free to enforce. On the other hand, if the basis of the society is not illegal, an agreement within sub-sec. (1) is enforceable, for sec. 26 does not bar any action, otherwise valid, for such enforcement. It does not "enable" any Court to help their enforcement, but where the right to enforce existed previously, the fact that the Statute gives no further enabling authority is immaterial. In *Russell's Case* (1), Lord *Macnaghten* said:—"In the case of a trade union not dependent on the Trade Union Acts for its legality or immunity the law is open to the members of the society just as it is in the case of other voluntary societies for the purpose of enforcing contractual rights and trusts against the association." Consequently, even if there is a basic illegality in the society, this is not such an action as is barred by the Statute, because it is not for the purpose of enforcing any agreement as to conditions of employment; while, in the absence of such illegality, it would not matter if the relief sought included the enforcement of such an agreement: See the judgment of *Fletcher Moulton* L.J. in *Osborne* v. *Amalgamated Society of Railway Servants* (2), which is as applicable to an agreement within sub-sec. (1) as it is to an agreement within sub-sec. 3 (*a*). I respectfully adopt the distinctions which his Lordship drew between *Osborne's Case* (3) and

(1) (1912) A.C., 421, at pp. 429-430. (2) (1911) 1 Ch., 540, at pp. 556 *et seq.*
(3) (1911) 1 Ch., 540.

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such cases as *Rigby* v. *Connol* (1) and *Chamberlain's Wharf Ltd.* v. *Smith* (2). The exhaustive review of the authorities by the learned Lords Justices in *Osborne's Case* (3) renders an independent review of them a waste of time. In respect of the question arising under the *Trade Unions Act* upon the nature of the relief sought, I think this case is clearly within *Osborne's Case* (3), which was decided by a very strong Bench.

This conclusion is sufficient to dispose of the second defence as reconstructed; but, as the question of unreasonable restraint of trade in relation to the rules was very fully argued, and is of interest and importance, I will not leave it unnoticed. It is, however, unnecessary to treat it in detail, for it is not material to the plaintiff's right to maintain his membership. The rules were subjected to elaborate discussion during the argument, and the opinions of the Bench upon them were fully elicited. It is not enough to point to a rule, or to more rules than one, operating in restraint of trade, unless it is seen that the *objects* of the society are in restraint of trade. On the other hand that may be shown by the substance of objectionable rules, for it may be such as to be inconsistent with the notion that the true object of the society is not in restraint of trade. It seemed probable, with respect to each rule cited on this branch of the case, either that the rule was susceptible of a reasonable interpretation which relieved it of the stigma of illegality in that respect, or that the restraint of trade was merely incidental and did not go to the main objects of the society. But it is unnecessary to discuss the rules in their relation to the second defence, since that defence has failed in another element which is primary and vital. As has been pointed out, if it were established that the society, being in restraint of trade, is only legalized by the *Trade Unions Act*, that matters not unless this action is for the enforcement of an agreement within sec. 26, sub-sec. (1). And we have seen that this is not such an action.

Reference was made to a case of *Donkin* v. *Pearson* (4), decided by *Lush* J. at Manchester Assizes in November 1911. Assuming the report to be accurate, it appears that the action

(1) 14 Ch. D., 482.
(2) (1900) 2 Ch., 605.
(3) (1911) 1 Ch., 540.
(4) Unreported in law reports.

was brought by Donkin, who was admittedly a member of this society, against that body, for the enforcement, indeed, the direct enforcement, of "sick benefits," and was therefore within sec. 4 of the English Act and sec. 26 (3) (*a*) of the Queensland Act. Such an action was doomed to failure, once the learned Judge was of opinion that there was in the rules, or any of them, a restraint of trade which he could see to be no mere incident, but a part of the fundamental objects of the society, whether professed in rule I., clause 3, or not. If the action had been, like the present one, a proceeding merely for the assertion of a right of membership which had been challenged by an unauthorized and void expulsion, the question of restraint of trade would have become immaterial, as it is in this instance.

No doubt, if the present action were brought to enforce an agreement to provide benefits, or any other agreement within sec. 26, the opinion of *Lush* J. upon the construction of the rules would be very relevant, and entitled to great weight.

There was a third defence set up—that, apart from any question of restraint of trade, the contract of membership is illegal as containing authority to the society and its officers to compel illegal or quasi-criminal acts, and therefore that it is not enforceable even to the extent of the establishment of a claim to membership. The illegalities alleged were that the rules authorized the compelling of breaches of contract under the Queensland *Masters and Servants Act* and also of breaches of the *Commonwealth Conciliation and Arbitration Act*. This defence may be characterized as bold, seeing that it virtually asserts the existence of a conspiracy embracing all who knowingly assented to be bound by such rules. It is the more extraordinary since, if it were sustained, the society would forfeit its registration under the *Trade Unions Act* 1886, sec. 4. In support of this defence, so far as it related to the *Masters and Servants Act*, counsel cited sec. 2, the definition of "Servant," which includes artificers and handicraftsmen, and sec. 3, which penalizes the breach of a contract of service in certain cases by absence without reasonable cause. It was urged that an order to strike or leave work is, in respect of those who break their contract of service in order to comply, a punishable offence. As regards the *Commonwealth*

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Conciliation and Arbitration Act, secs. 4, 6, 8, 87 and 88 were referred to. It was urged with regard to both these Acts that an order to strike or to leave employment involved an attempt to compel an offence against the law. But the defendants failed to establish that obedience to any of the society's rules involved the commission of an illegality, since each rule cited for the purpose is capable of observance without breach of either of the Statutes to which we were referred. Where the obligation of a rule or contract can be performed without the commission of an illegality, it is to be assumed that it is the intention of the parties that the obligation is only to perform that which is lawful: See *per Griffith* C.J. in *Hamilton* v. *Lethbridge* (1).

The cases of *Hire Purchase Furnishing Co. Ltd.* v. *Richens* (2) and *Thwaites* v. *Coulthwaite* (3), are interesting in this connection. There is nothing here to show that the parties, when they entered into their contract, contemplated that the operations of the society would be carried on in any manner contrary to law. The third defence, therefore, fails as well as the first and second.

I am indebted to the courtesy of counsel for the reference to the two last cited cases, furnished to us since the close of the argument.

I am of opinion, for the above reasons, that the appeal fails.

ISAACS J. The action is brought solely for a declaration that an order of expulsion made by the Branch Committee and sanctioned by the District Committee is invalid, and an order that the plaintiff be restored to membership of the defendant society. In other words, no claim is made to enforce any specific agreement contained in the rules.

Several objections are raised by the defendants, with which I shall deal in what I conceive to be convenient order.

1. *No Jurisdiction to entertain the Suit.*

This is based on sec. 26 of the Act. The point is entirely covered by the decision of the Court of Appeal in *Osborne* v. *Amalgamated Society of Railway Servants* (4), which was a similar action. *Cozens-Hardy* M.R. says (5):—"If the plaintiff obtains

(1) 14 C.L.R., 236, at 242.
(2) 20 Q.B.D., 387, *per Bowen* L.J., at p. 389.
(3) (1896) 1 Ch., 496.
(4) (1911) 1 Ch., 540.
(5) (1911) 1 Ch., 540. at p. 554.

the relief he seeks, he will be entitled, not as a matter of legally enforceable right, but as a matter of reasonable expectation, to certain benefits for which he has subscribed. If a member is threatened with expulsion on grounds not justified by the rules, there is nothing in sec. 4" (reproduced in Queensland by sec. 26) "which prevents him from maintaining an action to restrain the contemplated wrong. And I see no reason why the mere passing of the resolution should preclude the Court from giving relief." So *per Fletcher Moulton* L.J. (1) and *Buckley* L.J. (2).

Learned counsel for the appellants urged that to claim a declaration of restoration to membership was in itself an attempt to "enforce," though not to "directly enforce," the terms as to employment or non-employment.

That is also met by *Osborne's Case* already cited (3), where the Master of the Rolls says:—"The language of sec. 4 is narrow, and it ought not to be construed so as to cover every agreement under sec. 3." Sec. 3 referred to is reproduced by sec. 25 of the Queensland Act. See also *per Fletcher Moulton* L.J. (4).

It is plain, then, on authority, that such an action as the present is within the jurisdiction of the Court, notwithstanding the words of sec. 26. That section is a qualification of sec. 25, and the agreements there enumerated are agreements specifically directed to the matters mentioned. They may be contained in the general compact by which a trade union is constituted, or they may be separately entered into, but it is the specific agreements severally described which are to be unenforceable, notwithstanding the legalization of trade union purposes by sec. 25, so far as restraint of trade is concerned.

The judgment of Lord *Macnaghten* in the *Yorkshire Miners' Case* (5) supports this view. That judgment shows expressly, and the decision of the House involves, that the construction of rules, which it is said the executive misconstrues, is a legitimate jurisdiction of the Court—provided, of course, the "object" of the action is not to enforce any of the agreements specified in sec. 25. And if, as in the *Yorkshire Miners' Case* (5), the Courts

(1) (1911) 1 Ch., 540, at p. 561.
(2) (1911) 1 Ch., 540, at p. 568.
(3) (1911) 1 Ch., 540, at p. 554.
(4) (1911) 1 Ch., 540, at pp. 559-561.
(5) (1905) A.C., 256.

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can lawfully construe rules so as to preserve members' rights by preventing the improper diversion of funds, still more must it be open to them to construe the same rules in order to preserve the status of a plaintiff as a member at all.

2. *Construction of the Rules.*

The next position taken by the appellants is that their action was justified by the rules. That contention divides itself into two parts.

(*a*) First, it is said that, assuming the Court is now to construe the rules, their true construction shews the right of the society, by the Branch Committee and District Committee, and certainly with the approval of the Australasian Council (all of which, it is claimed, concurred), to order the respondent to desist from work at any time the society required him to do so in support of other trades, and on his disobedience to expel him.

If the rules expressly or impliedly contain that power, the respondent has no case. Whatever the terms of the rules may be, whether they be legal or illegal, he, having agreed to abide by them, cannot ask a Court to enforce something different. He is plaintiff, and the Court cannot make for him a contract different from that into which he chose to enter. A defendant is in a different position, and may on various recognized grounds, including illegality, ask the Court to refrain from compelling him to observe some stipulation. But, as the respondent is asking the Court to declare his right to be a member of the society upon the basis that the contractual rights and obligations existing as a *universitas juris* by reason of that membership according to the terms of a certain contract, it is *that* contract or none which the Court can compel the appellants to observe by recognizing his status of membership.

It is for this purpose indivisible, each mutual promise being part of the consideration for the other party's promises, and the claim for an injunction is here equivalent to a claim for specific performance of the agreement to regard him as a member: See *per* Lord *Davey* in *Yorkshire Miners' Association* v. *Howden* (1). But in the case of *Nickels* v. *Hancock* (2), *Turner* L.J., speaking of specific performance, said:—"I think that this Court,

(1) (1905) A.C., 256, at p. 269.

(2) 7 DeG. M. & G., 300, at p. 327.

in its ordinary exercise of this jurisdiction, does not enforce parts of agreements."

In *Blackett* v. *Bates* (1) Lord *Cranworth* L.C. said:—"The Court does not grant specific performance unless it can give full relief to both parties." This is, of course, quoted for the principle only, and is subject to sec. 26 of the Act.

In *Ryan* v. *Mutual Tontine Westminster Chambers Association* (2) the Court of Appeal definitely affirmed the view of *Turner* L.J., *Kay* L.J. stating that there are exceptions, but they are irrelevant here.

See also *Dietrichsen* v. *Cabburn* (3); *Martin* v. *Mitchell* (4); *Stocker* v. *Wedderburn* (5); and *Fry on Specific Performance*, 5th ed., pp. 241, 408.

If the respondent promised as the appellants assert, then his refusal to adhere to his promise, whether on the ground of illegality or otherwise, in my opinion bars him from specific performance, and leaves him to whatever remedy (if any) he may have at law for any breach that he can show to be divisible, and enforceable by legal process.

The question, then, is: Do the rules confer the power claimed?

The sheet-anchor—if I may so term it—of the appellants' case is contained in clause 7 of rule XIII. That rule empowers a District Committee, subject to the Council's sanction, to veto the admission to a branch of any candidate "who has been excluded from a branch in the district for acting contrary to the society's interests."

Now, I am disposed to give a very broad interpretation to the terms of association in a society of this nature. I am prepared to read them, not as the strictly prepared and technically framed stipulations inserted in some legal instrument of lawyers, but as the plain and business-like statement of members of the trades concerned, combining for mutual support, and setting down the terms of their combination in language which is applicable to their situation and intended (subject to the presumptive intendment of legality) to be understood apart from technical rules of interpretation.

(1) L.R. 1 Ch., 117, at p. 124.
(2) (1893) 1 Ch., 116, at pp. 127-128.
(3) 2 Ph., 52, at pp. 56-57.
(4) 2 J. & W., 413, at p. 427.
(5) 3 K. & J., 393, at p. 405.

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And therefore I am prepared to give a broad meaning to the words quoted. But they cannot have an unlimited meaning. See the observations of *Fletcher Moulton* L.J. on somewhat similar words in *Osborne's Case* (1).

It could not be supposed that whatever the Branch or District Committee happened to think was contrary to the interests of the society would be a proper ground of expulsion. No member would know to what standard of conduct he must conform. What, then, is the limit of jurisdiction?

It seemed to me during the argument, and, after further consideration, it seems to me still, that however general any words of power may be, they must, in the absence of distinct statement to the contrary, be at all events controlled by the scope of the objects and purposes created by the constitution of the society.

It is all important to remember that the society is different from the individuals composing it. The House of Lords in *Amalgamated Society of Railway Servants* v. *Osborne* (2) places the distinctive personality of a trade union, when registered, on almost the same plane with that of an ordinary statutory corporation: See *per* Lord *Halsbury* (3), Lord *Macnaghten* (4) and Lord *Atkinson* (5). Lord *Atkinson* said:—"It is clear, in my view, that they are, when registered, quasi-corporations, resembling much more closely railway companies incorporated by Statute than voluntary associations of individuals merely bound together by contract or agreement express or implied. And it is plain that, as soon as this character was given to them, and the rights and privileges they now enjoy were conferred upon them, it became a matter of necessity to define the purposes and objects to which they were at liberty to devote the funds raised from their members by enforced contributions. A definition which permitted them to do the particular things named and in addition all things not in themselves illegal would be no definition at all and would serve no purpose at all. There would be some limit."

It is plain, then, that "the interests of the society" do not mean the interests of other societies, or of unionism in general,

(1) (1911) 1 Ch., 540, at p. 565.
(2) (1910) A.C., 87.
(3) (1910) A.C., 87, at pp. 92-93.
(4) (1910) A.C., 87, at p. 94.
(5) (1910) A.C., 87, at p. 102.

and still less of labour in general, whether associated or unassociated; but they mean the interests of this particular society as constituted, and having reference to its declared objects as a quasi-corporation.

Looking at those objects (stated in clause 3 of rule I.) they include the protection and regulation of the conditions of labour in the trades which compose the society itself, and the relation of its members with those trades, as well as the general and material welfare of its members. But as for assisting other trades, the objects are limited to federation. There is no object which can, by any breadth of interpretation, be construed as including assistance to other trades, with which the society is not federated, by calling out members of this society. Specific exception to this may, of course, be introduced by express language as in the case of a special levy (rule XIII., clause 4).

It was urged that rule XXVII. contemplated strikes with reference to other trades. But I can see nothing whatever in the language of that rule which supports the view so presented, or which is necessarily wider than the objects enumerated in clause 3 of rule I.

The order of 19th January was admittedly not given to protect any condition of labour in any of the society's trades, but in a trade altogether outside it.

Therefore, and without considering the further question whether, even in respect of the society's own trades, the power of ordering a strike is not limited to certain cases, as in clauses 3, 8 and 10 of rule XXVII., I am of opinion that this order was not authorized by the rules of the society, and the society had no jurisdiction, on a true construction of its rules, to proceed to expulsion for a disobedience of the order.

In passing, I may observe that I am not at all convinced, if there had been jurisdiction to make the order, and if approval had been necessary, that the Australasian Council was not the proper body within this territory to approve. It is unnecessary to decide it, but there is much force in Mr. *Stumm's* argument on this point.

Indeed, unless the large words of clause 1 of rule XVII. are given the full effect of substituting the Australasian Council, in

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Australian matters, for the Executive Council—but always subject to revision by the latter—the provision is severely restricted. Not only would the Australasian Council be a merely additional expense and obstacle, but its duties would be extremely difficult to discover, beyond the few specially enumerated. Take one or two examples of the result of holding the Executive Council's approval necessary under rule XVII., clause 2. The admission to a Queensland country branch of a member with defective eyesight would require under clause 9 of rule XX. the medical certificates to be submitted to the English Council. So, under clause 5 of rule XXII. the admission of an apprentice as a full member must be after the entrance form has been forwarded to the Executive Council. And rule XXVII. would be practically unworkable. I say no more as to this.

I am, however, distinctly of opinion that the orders of 19th January and of 20th May were neither of them resolutions of the classes included in clause 2 of rule XIII. The matters there referred to are regulative and quasi-legislative. The words "general conditions" are not apt to describe a specific order to members to desist from work altogether, because other trades are not properly treated. The "conditions" there intended presuppose working under those conditions, and mean "conditions" to which the members of the society, and not other trades, are to be subject. This is confirmed by reference to the word "conditions" in rule I., clause 3; rule XIII., clause 8; rule XXVII., clauses 2 and 12.

(*b*) The second part of this contention is that the Court will not overrule the decision of the domestic tribunal on the ground that it has misconstrued the rules, because that is the agreed duty of the tribunal specially constituted by the parties.

The respondent, it is said, could, and, if he desired to contest the decision complained of, should, have appealed as permitted by the rules up to the final Court of Appeal. Had the case been within the jurisdiction of the society or of the Branch Committee as representing the society, I should have agreed with that. It would then have been merely an attempt to "appeal" in the strict sense, that is, to review the determination of the domestic tribunal upon the facts. But, if legal analogy is applicable, this

action is rather in the nature of a prohibition, because it denies jurisdiction.

The words of rule IV., clause 2, are quite clear as to all matters within the jurisdiction. It provides: "All decisions arrived at by the committee shall be final, subject to the right of appeal." That makes every such decision final with respect to the particular case. And the rule goes on to say: "Should any case come before a branch committee on which the rules are silent, the case and the decision of the committee shall be stated in the monthly report, provided that such decision be approved of by the Executive Council; the same to be a guide to all other branches." In other words, if unappealed from, but approved by the Executive Council, a branch committee decision, though on a point untouched by the rules, may be placed in the position of a rule when published, and thus guide all other branches.

Now, the rule is laid down by the Privy Council as to how far the decision of a domestic tribunal is binding. In *Long* v. *Bishop of Cape Town* (1) Lord *Kingsdown* said:—"Where any religious or other lawful association has not only agreed on the terms of its union, but has also constituted a tribunal to determine whether the rules of the association have been violated by any of its members or not, and what shall be the consequence of such violation; the decision of such tribunal will be binding when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, and, if not, has proceeded in a manner consonant with the principles of justice.

"In such cases the tribunals so constituted are not in any sense Courts: they derive no authority from the Crown; they have no power of their own to enforce their sentences; they must apply for that purpose to the Courts established by law, and such Courts will give effect to their decision, as they give effect to the decisions of arbitrators, whose jurisdiction rests entirely upon the agreement of the parties."

But that requires the tribunal to act "within the scope of its authority," and, in view of what I have already said, the orders of 19th January and 20th May were not within the scope of

(1) 1 Moo. P.C.C., N.S., 411, at p. 461.

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authority. I do not lose sight of the point that the compact may include an authority to the domestic tribunal to determine even whether the matter complained of is included in the objects. If there were such a provision, then the matter would fall within the principles laid down by Lord *Selborne* L.C. in *Willesford* v. *Watson* (1) and *Jessel* M.R. in *Piercy* v. *Young* (2). But that would have to appear clearly, and here it does not appear at all.

3. *Illegal Society.*

Failing the other objections, the final contention is this: that the society is illegal, because its constitution contains some provisions which are inseparable from the rest and which violate the law in various ways, by providing for unlawful strikes and for contraventions of the *Masters and Servants Act* 1861, and by making agreements as to parliamentary representation. As a precedent, the case of *Russell* v. *Amalgamated Society of Carpenters and Joiners* (3) was cited.

It does seem anomalous that a defendant may set up its own illegal existence as a defence, but in giving effect to such an objection the Court does not do so for the sake of the defendant, but for the sake of the law. If the fact alleged is made to appear at any stage of a cause by any means, and even if the Court itself perceives it without attention being called to it by either party, the Court must refrain from assisting a breach of the law. It otherwise would be aiding that which the law forbids, and no Court can permit itself to be an instrument of illegality. See as to this, *Holman* v. *Johnson* (4); *Gedge* v. *Royal Exchange Assurance Corporation* (5).

Therefore, though the defendant's success on such a ground would be one of demerit, the objection, if valid, must be sustained.

As to strikes, except in one clause of one rule (clause 10 of rule XXVII.). I can see no pretence for alleging the contemplation of any unlawful strike.

Strikes are not in themselves unlawful. The passage quoted by Mr. *Stumm* from the judgment of Lord *Shaw* in *Russell's Case* (6) is a proof of this. The judgment of *Kennedy* L.J., in

(1) L.R. 8 Ch., 473, at p. 477.
(2) 14 Ch. D., 200, at p. 208.
(3) (1912) A.C., 421.
(4) 1 Cowp., 341, at p. 343.
(5) (1900) 2 Q.B., 214, at p. 220.
(6) (1912) A.C., 421, at pp. 435-436.

the same case, in the Court of Appeal (1) states in detail the reasons and some of the authorities for the distinction between lawful and unlawful strikes. The authority of greatest weight is, perhaps, the *South Wales Miners' Federation* v. *Glamorgan Coal Co. Ltd.* (2), where the illegality of a strike ordered by the federation was rested upon the fact that the workmen were thereby directed to break their contracts of service. And Lord *Shaw's* words above referred to were doubtless based on and are certainly supported by that decision. See also the *Denaby and Cadeby Main Collieries Ltd.* v. *Yorkshire Miners' Association* (3), and particularly at pp. 391-392.

Now, clause 10 of rule XXVII. does, in my opinion, raise a serious question whether it extends to cases involving breach of contract, the instructions of the District Committee referred to in such cases being unlawful. Both apart from, and with the support of, the observations of *Vaughan Williams* L.J. in *Russell's Case* (4), I am of opinion that it is obligatory on the members to obey those instructions. Rule XXVII. deals with contingent benefit, and is governed by the introductory words of the first clause of the rule. Clause 10 is one of the "causes" referred to in clause 1. There is no provision contained in the rule itself that disobedience to the "instructions" involves expulsion. Rule XL., however, after enumerating several specific causes of expulsion, concludes with this: "to have refused to obey these rules, or to comply *with any order by them authorized*," renders a member liable to fine, suspension or exclusion. Clause 10 of rule XXVII. is unmeaning if it does not authorize instructions to refuse to do work. But the question remains whether it authorizes the stoppage of work which would fail to be done in the regular course of daily labour during the currency of the man's engagement.

Reading the rule with reference to trade union efficacy, and untrammelled by any controlling canon of interpretation, one could hardly hesitate to say its framers intended to make a strike of its members already entered on thoroughly effectual, or to avoid any working whatever with non-unionists. Whether that is right or wrong, desirable or otherwise, is not for the

(1) (1910) 1 K.B., 506.
(2) (1905) A.C., 239.
(3) (1906) A.C., 384.
(4) (1910) 1 K.B., 506, at p. 518.

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Court to say. But, as a matter of interpretation of a document according to ordinary understanding, unfettered by legal methods of construction, it would be difficult to escape the conclusion that the rule means this: Whenever members of the society are out on strike at one shop, and the employers at that shop send their work to be done at another shop, the society men at the other shop may be ordered *instanter* to refuse to do that work, for doing it means so far breaking their fellow members' strike. And further: If non-society men are brought in to work at a shop, the intention of the rule appears to be that the society men may be instructed to quit instantly. Both these, and more particularly the first, seem to touch the root of the matter, for otherwise the society would be permitting one set of its members to be actively defeating another set of its members, who were struggling for redress of alleged grievances. No society could expect to maintain its objects if this were to proceed indefinitely, and for such internal disunion to exist at all is to some extent inimical to the society's purposes. Apart from settled principles of construction which coerce the judicial mind, I should so conclude. But there is a principle, namely, a presumption that if what is stated can be carried out, not "possibly"—for I think that is too extreme—but without depriving the provision under consideration of substantial force, "in a manner free from illegality, it must be so construed. "It is . . . a settled canon of construction," says *Kay* L.J. in *Mills* v. *Dunham* (1), "that where a clause is ambiguous a construction which will make it valid is to be preferred to one which will make it void." And in *Co. Litt.*, 42*a*, we find it stated as a general rule "that whensoever the words of a deed, or of the parties without deed, may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken," the maxim being "*Ea est accipienda interpretatio quæ vitio caret.*"

That intendment is based on two principles—the first in favour of validity, *ut res magis valeat quam pereat*; the other in favour of innocence. As applied to trade unions the latter is evidenced by *Osborne's Case* (2); *Swaine* v. *Wilson* (3); *Smithies* v.

(1) (1891) 1 Ch., 576, at p. 590. (2) (1911) 1 Ch., 540, at p. 553.
(3) 24 Q.B.D., 252, at p. 259.

National Association of Operative Plasterers (1), and also by various cases showing that an unlawful combination to do a wrongful act to another person may be treated as a criminal act—for instance, *per* Lord *Brampton* in *Quinn* v. *Leathem* (2), *R.* v. *Bunn* (3), *R.* v. *Parnell* (4).

If, therefore, there is an ambiguity or double intendment, the canon referred to must be applied, on the one hand, to save the very existence of the society, and the validity of its registration under sec. 4 of the Act, and, on the other, to avoid imputing a criminal offence to its members.

But the canon is not to be employed to make an ambiguity, or double intendment: that must already exist, and in a sense consonant with reason and substance. I therefore proceed to inquire whether substantial effect, having regard to the purpose of the provision, can be given to clause 10 of rule XXVII., without invading the domain of strikes involving breach of contract.

On the whole, I think it can; and for this reason. Those members of the trades who are instructed to refuse the work coming from other shops where other members are on strike, or to refuse to work with non-society men, are, doubtless, in the vast majority of instances, on terms of employment not exceeding a week. Doing the work during the time required to complete that period of engagement, though certainly, while it exists, antagonistic and harassing to the members on strike and the society itself, leaves, at least in most cases, a substantial field of operation for the clause. The ambiguity or double intendment exists, and, as I have to apply a rule of law and not weigh mere probabilities, I hold that the clause, so far as it relates to instructions, must be confined to strikes not involving breach of existing contracts.

The *Commonwealth Conciliation and Arbitration Act*, however, carries the illegality of strikes further.

Part II. forbids all strikes on account of an "industrial dispute"—that is, an inter-State industrial dispute—except as mentioned in sub-sec. (3) of sec. 6. But as clause 10 of rule XXVII. arises out of an industrial dispute, the exception is immaterial.

(1) (1909) 1 K.B., 310, at p. 339.
(2) (1901) A.C., 495, at p. 528.
(3) 12 Cox C.C., 316, at p. 340.
(4) 14 Cox C.C., 508, at pp. 513-514.

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Learned counsel for the appellants urged that, as the society is registered as an association under the Commonwealth Act, and as clause 10 of rule XXVII. included strikes forbidden by that Act, illegality was established.

Learned counsel for the respondent replied, first, that as long as registration stood, the legality of the society's rules could not be questioned. But registration does not establish the validity of the rules. If it did, *Osborne's Case* (1) would have differently decided. And see *per Fletcher Moulton* L.J. (2). Then he further contended that the canon of construction of presumptive legality should be applied also to the alleged contravention of the Commonwealth Act.

I think that last answer is sound, because the clause can have substantial operation if limited to disputes confined to Queensland, and registration as an organization must be supposed to be with a view not to violate the Commonwealth Act, but to act within its provision by approaching the Court with reference to disputes, not by striking to enforce demands.

But, further—suppose the clause were so wide as to contravene the Commonwealth Act—what would be the effect of that? At most, to invalidate the position of the society as an "organization" —though I do not decide even that,—but it certainly could not reach behind the statutory effect of the registration, and invalidate the original quasi-incorporation of the society by the State law. Granting that contravention of the Commonwealth Act undoes all that is permitted by it—that leaves the society as it was before. This action is based purely on its State position: the plaintiff asks to be restored to membership of the society as a trade union, and seeks no federal benefit. The objection, therefore, is to my mind immaterial.

As to the *Masters and Servants Act* 1861, what I have said respecting strikes at common law applies.

It was also urged that the provisions respecting parliamentary representation rendered the society illegal, by reason of the doctrines enunciated in the *Osborne Case* (3) in the House of Lords. But, as to illegality of the society, the point fails because the

(1) (1909) 1 Ch., 163; (1910) A.C., 87.

(2) (1909) 1 Ch., 163, at pp. 178 *et seq.*

(3) (1910) A.C., 87.

circumstances there relied on as inherently repugnant to the Constitution of the country are absent here.

As to whether the provisions challenged are *ultra vires* merely —that is, not authorized by the Act, which was the tenor of the judgments of Lord *Halsbury*, Lord *Macnaghten* and Lord *Atkinson*—I say nothing, because it is immaterial. Provisions merely *ultra vires* do not make a society illegal; if they did, many trading companies might be so considered.

The appellants' grounds consequently fail. It is unnecessary to say what the result would have been, had clause 10 of rule XXVII. been found to include unlawful action.

I ought to refer to one argument advanced by the respondent as a fatal defect in the appellants' case—assuming all else to be regular. It was this: that the letter of 19th January sent to respondent by the secretary of the society was not true, as the District Committee had not up to that time resolved to call out the respondent; that, although the District Committee on the same day ratified by resolution the letter sent, and notified the respondent next day that they required an answer to it, it was all void, because ratification was inoperative.

In my opinion, that view cannot be supported. Ratification dates back to the thing ratified, subject to this, that it does not make that wrongful which before was not wrongful. No breach of the order can be relied on which took place prior to ratification.

But the order here is not a mere order which would be satisfied by coming out on the 19th and returning on the 20th; it is a continuing instruction, and, in my opinion, the authorized request on the 20th made it from that moment a full operative order—supposing no other objection existed. *Hooper* v. *Kerr, Stuart & Co. Ltd.* (1) is an authority in point.

The defendants, however inartificial the language of their records may be, obviously dealt with the respondent on the basis of disobedience generally, and not merely for not coming out on the 19th. Indeed, having regard to the letter of the 20th, I should think it clear that the 19th was not ever really considered as part of his default.

(1) 83 L.T., 729.

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However, for the reasons already given, I agree that this appeal must fail.

The judgment of GAVAN DUFFY and RICH JJ. was read by

GAVAN DUFFY J. We have read the judgment of our brother *Isaacs*, and concur in the result at which he has arrived; but we desire to abstain from expressing any opinion as to what our decision should have been had we thought that the direction which the plaintiff disobeyed was one which the rules of the society in terms permitted, and was also a direction to do an illegal act.

POWERS J. This is an appeal from the decision of the Full Court of Queensland of 12th March last, reversing the decision of *Chubb* J. on 11th December 1912.

The facts of the case have been stated fully in the judgments already delivered.

I concur in the opinions expressed by my learned brethren for the following reasons :—

(1) The plaintiff was unlawfully expelled. He did not disobey any order that the rules gave the committee express or implied authority to make, nor was the order in question given in accordance with the rules: See *Osborne* v. *Amalgamated Society of Railway Servants* (1), where *Cozens-Hardy* M.R. said :—"If a member is threatened with expulsion on grounds not justified by the rules, there is nothing in sec. 4" (corresponding with sec. 26 of the Queensland Act) "which prevents him from maintaining an action to restrain the contemplated wrong. And I see no reason why the mere passing of the resolution should preclude the Court from giving relief."

(2) None of the rules of the society necessarily involve the commission of illegal acts. The assumption must be in favour of legality. *Cozens-Hardy* M.R. (2) said :—"Illegality must not be presumed or inferred. It must be established, if at all, upon some plain provision in the rules: See *Swaine* v. *Wilson* (3). I can find no such provision in the rules of this society."

(1) (1911) 1 Ch., 540, at p. 554. (2) (1911) 1 Ch., 540, at p. 553.
(3) 24 Q.B.D., 252, at p. 259.

There was nothing to show, clearly, that the parties when they entered into the society contemplated that the operations of the society would be carried on in any manner contrary to law: *Thwaites* v. *Coulthwaite* (1).

The rules are equally consistent with the society being legal or illegal: *Hire Purchase Furnishing Co. Ltd.* v. *Richens* (2).

The society is not, therefore, an illegal society apart from the Statutes.

Even if one of the rules did authorize an illegal act, that would not necessarily prevent a plaintiff from succeeding if it were not one of the main objects of the society: See *Osborne's Case* (3), where *Cozens-Hardy* M.R. said:—"The mere introduction of some objectionable rules will not necessarily taint the whole of the rules."

(3) In any case this action to establish a claim to membership to the defendant society with unenforceable rights is not, under the circumstances, a legal proceeding to enforce an agreement between members of a trade union, as such, concerning the conditions on which the plaintiff shall be employed; and it is not, therefore, barred by sec. 26 of the Queensland *Trade Unions Act* 1886.

Buckley L.J. in *Osborne's Case* (4) said:—"How can an order to restore him to membership do more than make him what he was before, namely, a member with the same unenforceable rights? How does such an order enforce those rights?"

I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors, for the appellants, *Ure & Nicholson.*

Solicitors, for the respondent, *Tully & Wilson.*

(1) (1896) 1 Ch., 496.
(2) 20 Q.B.D., 387, at p. 389.
(3) (1911) 1 Ch., 540, at p. 553.
(4) (1911) 1 Ch., 540, at p. 567.