CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

MORDECAI WEIDMAN AND HIRAM WEIDMAN, TRADING UNDER THE FIRM NAME AND STYLE OF "WEIDMAN AND COMPANY" (DEFENDANTS) ..... } APPELLANTS;

AND

BERNARD SHRAGGE (PLAINTIFF) .. RESPONDENT.

1911
*May 11.
1912
*March 21.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Contract—Public policy—Restraint of trade—Combination—Conspiracy—Construction of statute—"Criminal Code" s. 498—Words and phrases—"Unduly" preventing competition, etc.—Monopoly.

A contract between dealers fixing prices to be paid by them for specified articles or commodities which may be the subject of trade and commerce with the object of restricting competition and establishing a monopoly therein, constitutes an agreement unduly to prevent or lessen competition within the meaning of section 498 of the Criminal Code, R.S.C., 1906, ch. 146, and is not enforceable between the parties. Judgment appealed from (20 Man. R. 178) reversed, Davies J. dissenting.

---

*PRESENT:—Sir Charles Fitzpatrick C.J., and Davies, Idington, Duff and Anglin JJ.

1912

WEIDMAN v. SHRAGGE.

Per Davies J. dissenting.—As the agreement was not, in the circumstances, void at common law as being unreasonably in restraint of trade it did not violate the statute.

APPEAL from the judgment of the Court of Appeal for Manitoba(1), reversing the judgment of Mathers C.J., at the trial, and maintaining the plaintiff's action with costs.

The circumstances for the case are stated in the judgments now reported.

Ewart K.C. and *F. M. Burbidge,* for the appellants.

M. G. Macneil, for the respondent.

THE CHIEF JUSTICE.—The action in this case is brought for an account based upon a contract between the plaintiff and the defendants which is described in the statement of claim as an agreement

for the purpose of carrying on their business in a manner mutually profitable to both parties to the said agreement.

The defence denies the state of the account as alleged and pleads the illegality of the agreement under sections 496 and 498 of the Criminal Code which are grouped under the general heading of "Offences connected with Trade." The trial judge decided the point of illegality in favour of appellants. On appeal this judgment was reversed.

Having very carefully read the cases cited by counsel at the argument and referred to by the judges below in their notes, I cannot better describe my condition of mind than by quoting from a very recent opinion of an eminent English jurist who said:—

(1) 20 Man. R. 178.

I am convinced it is impossible to give in a few pages a complete and accurate exposition of the English law as to combinations which are in restraint of trade or unduly impede free competition or employment so as to deduce from the numerous and conflicting cases clear and definite principles.

The same authority says that the case of *The Mogul Steamship Co.* v. *McGregor, Gow & Co.*(1), only decided that an action for conspiracy could not be maintained by the plaintiff, because the defendants did not by entering into the contract under consideration render themselves guilty of a criminal conspiracy. But on the question whether the contract was void and illegal because it was in undue restraint of trade or unduly impeded free competition, there was the utmost diversity of opinion both among the judges and the noble and learned Lords. In *Mitchel* v. *Reynolds*(2), the following principles were laid down: that all contracts in general restraint of trade are illegal in the sense of not being enforceable, but that agreements in partial restraint of trade, if for consideration, are valid, provided that the restraint is reasonable, in the sense that it is such as is reasonably necessary for the protection of the person who seeks to impose restraint (covenantee). In this case, however, we are not called upon to consider in what respect the contract declared upon is affected by the principles of the English law as to restraint of trade, nor are we at liberty to invent or give effect to any new ground of public policy. Our duty is to determine its validity in view of those sections of the Criminal Code relied upon. In effect, clause (*d*) of section 498 of the Code declares in very plain language that an agreement which might in itself be perfectly lawful as made by the parties in the exercise of the free-

(1) [1892] A.C. 25.

(2) 1 Sm. L.C. (10 ed.) 391.

1912

WEIDMAN v. SHRAGGE.

The Chief Justice.

dom to contract or to abstain from contracting, which the English law has for many years recognized in every individual, is unlawful if the object of the parties is to unduly prevent or lessen competition in an article or commodity which is a subject of trade or commerce. In other words, if the object of the parties to the agreement is to interfere with the free course of trade by unduly preventing or lessening competition the agreement is declared to be unlawful. It is not necessary, I repeat, that the agreement should be in itself fraudulent or otherwise illegal; and all agreements which prevent or lessen competition do not come within the operation of the statute; the mischief aimed at is the undue and abusive lessening of competition which operates to the oppression of individuals or is injurious to the public generally. And it is for the courts to say whether in the circumstances of each particular case the mischief aimed at exists. In *The United States* v. *The Trans-Missouri Freight Association*(1), it was held that the "Sherman Act" applies equally to all contracts tending to create a monopoly, whether or not they are reasonable, or whether or not they are unlawful at common law.

Parliament has not sought to regulate the prices of commodities to the consumer, but it is the policy of the law to encourage trade and commerce and Parliament has declared illegal all agreements and combinations entered into for the purpose of limiting the activities of individuals for the promotion of trade; and preventing or lessening unduly that competition which is the life of trade and the only effective regulator of prices is prohibited. The question for decision here, assuming the law to be as I have stated it,

(1) 166 U.S.R. 290.

1912

WEIDMAN v. SHRAGGE.

The Chief Justice.

is: Was the contract declared upon entered into for the purpose of unduly limiting competition in the purchase or sale of an article which is ordinarily a subject of commerce? It is admitted by both parties that junk, the subject-matter of the contract, is ordinarily a subject of commerce. The trial judge found that the manifest purpose of the agreement was to prevent competition between the parties to it, and to affect prices. He said:—

> It cannot be doubted that the tendency of such an agreement would be to lower prices on the junk purchased from the public, and, possibly, to increase the price of junk sold to the consumers.

The learned judge also said:—

> It is true that in the present case the agreement to fix prices was between two dealers only, but these two practically monopolised the whole trade in junk in Western Canada, and when they ceased to compete with each other all competition was gone. The effect of their agreement was not only to limit competition, but to destroy it.

And there can be no doubt on the evidence that the conclusion reached by the learned judge is well founded; the main object and purpose of the agreement was to eliminate competition and to control the junk market in all Western Canada both as to purchases and sales and, on that ground, I hold that the question must be answered in the affirmative and that the agreement is, therefore, bad under the sections of the Code. I can see no distinction in principle between this agreement and one that might be entered into between two or more traders to control the price of all wheat purchased and sold in Western Canada; and if the object was to monopolize the wheat trade of Western Canada instead of, as in this case, the junk trade, would any court hesitate to declare it illegal in that it was calculated to unduly impede free competition to interfere with the free course of trade, and to effect a wrongful purpose?

1912

WEIDMAN v. SHRAGGE.

The Chief Justice.

I would allow the appeal and restore the judgment of the trial judge with costs.

DAVIES J. (dissenting).—This is an appeal from the judgment of the Court of Appeal for Manitoba reversing a judgment of the trial judge which declared an agreement made between the parties on which the plaintiff had brought an action to be void as contravening section 498 of sub-section (*d*) of the Criminal Code.

The agreement in question was made between two junk and bottle dealers who purchased these articles amongst others in Winnipeg and elsewhere in Western Canada and shipped them for sale to Chicago in the United States of America.

It was dated the 28th of March, 1905, and was to continue from the first of April till the 15th of December following with a provision for an extension thereafter from month to month if mutually agreed upon, and as a fact it was renewed up to the 1st of January, 1907. It professed to fix the maximum prices which each of the parties should pay for the several articles specified in the schedule which prices were to be subject to revision by mutual consent; and provided that each party should make up accounts monthly shewing the profit or loss made on the business done and that the profits should be equally divided.

The trial judge held that

> the manifest purpose of the agreement was to prevent competition between the parties to it and to maintain a fixed price for junk purchased.

He further held, however, on the facts as proved and after reviewing a number of authorities, that

the agreement in question went no further than that in *Collins* v. *Locke*(1); that the provision for carrying it into effect, viz.: the monthly division of net profits, was not unreasonable and that the restraints imposed were nothing like as great as those in the case cited. He, therefore, held the agreement not to be void at common law as being in restraint of trade.

But, while upholding the agreement at common law, he nevertheless held it was void as being in contravention of section 498, sub-section (*d*) of the Criminal Code.

The Court of Appeal for Manitoba, Richards J. dissenting, reversed the judgment and held the agreement was not void either at common law or as contravening the Code. Richards J., the dissenting judge in the Court of Appeal, says nothing about the validity of the agreement at common law, but follows the trial judge in holding that it contravened the statute.

Chief Justice Howell held that outside of the criminal law the agreement was binding and that the intention of Parliament in passing the criminal statute was to

> suppress certain contracts and combinations in restraint of trade and make the parties thereto liable to an indictable offence and that the agreement did not contravene the statute.

Cameron J. agreed with him on both grounds, while Perdue J., agreeing on the first ground that at common law the agreement was not bad, held that it did not violate the statute because it did not "unduly prevent or lessen competition" in the articles it covered.

With respect to the agreement here in question I agree with the trial judge and the three judges of the

(1) 4 App. Cas. 674.

1912

WEIDMAN v. SHRAGGE.

Davies J.

Court of Appeal that, applying the rule now followed by the courts in determining the validity or otherwise of agreements or covenants claimed to be in violation of the common law, it cannot be held void. That rule, as I gather it from the authorities, is that every case must be decided on its own facts and that the controlling and guilding rule in each case is whether the restraint attempted is reasonable or not with respect to the interests of the parties concerned and to the public interests.

The case of *Nordenfelt* v. *The Maxim Nordenfelt Guns and Ammunition Co.*(1), decided by the House of Lords, determines that a covenant against the covenantor engaging in a particular business though unrestricted as to space was not, having regard to the nature of the business and the limited number of the customers, wider than was necessary for the protection of the company nor injurious to the public interests of the country and, therefore, was valid. The speeches of the distinguished Law Lords who took part in that decision without any dissenting voice united in the test of reasonableness, as being the guiding and controlling test in all cases and whether the covenant or agreement is general or particular. In determining the question of reasonableness they further held that the courts should have regard as well to the interests of the public as of the parties to the agreement and that each case must be decided on its own facts and by the application to them of this general test. The later cases of *Dubowski & Sons* v. *Goldstein*(2), and *Underwood & Son* v. *Barker*(3),

(1) [1894] A.C. 535.
(2) [1896] 1 Q.B. 478.
(3) [1899] 1 Ch. 300.

are to the same effect on similar reasoning. In the latter case Lindley, M.R., says, at pages 303-4:—

The law as now settled cannot, in my opinion, be more accurately expressed than it was by Lord Macnaghten in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.*(1). He said: "The true view at the present time, I think, is this: The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with the individual liberty of action in trading, and all restraints of trade of themselves if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable — reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public." Time was when all agreements in restraint of trade or liberty to work were regarded as against public policy and invalid. But this view of the law was found mischievous and intolerable, and it was gradually disclaimed and modified. The modern doctrine, as I understand it, is that if an agreement restraining a person from carrying on business is injurious to the public interests of this country such agreement is invalid to the extent to which it is injurious, but not further, if it is so framed as to permit of division into two portions, one of which is good and the other bad.

On page 305 he says further: —

As was pointed out by Lord Macnaghten in *Nordenfelt's* case(1) what may be reasonable on the sale of a business may be unreasonable on the departure of a man from the service of his employer; but I do not understand him as saying that a restriction which is *reasonably necessary for the protection of a man's business can be held invalid on grounds of public policy unless some specific ground can be clearly established.* If there is one thing more than another which is essential to the trade and commerce of this country it is the inviolability of contracts deliberately entered into; and to allow a person of mature age and not imposed upon, to enter into a contract, to obtain the benefit of it, and then to repudiate it and the obligations which he has undertaken is, *primâ facie* at all events, contrary to the interests of any and every country.

Applying what I conceive to be the modern rule with respect to the validity or invalidity of agree-

(1) [1894] A.C. 535.

1912

WEIDMAN v. SHRAGGE.

Davies J.

ments or covenants in restraint of trade, I have no difficulty in agreeing on the facts of this case with the finding of the trial judge, confirmed by the Court of Appeal, that the agreement in controversy from his obligations under which the defendants, appellants, seek to escape, is a valid agreement at common law.

The question then remains whether this agreement at common law has been invalidated by the statute. I have reached the same conclusion as that come to by the Court of Appeal that it does not violate the statute. I do not read the word "unduly" which prefaces and controls sub-sections (*a*), (*c*) and (*d*) of section 498 of the Criminal Code as having any greater or wider meaning than "unreasonably" which is the common law test and if that word had been used in the statute the finding of the validity of the agreement at common law would, of course, settle the question. I have heard nothing during the argument, and the consideration given to the case since then has not suggested anything which satisfies me that the word "unduly" was intended to have any broader meaning than "unreasonably." That some limitation was intended by the word is, of course, conceded. If it does not mean unreasonably I do not know what it does mean. I prefer the word "unreasonably" to any of the others suggested, such as "improperly," "excessively," "inordinately," because I think it satisfies the intention of Parliament better than any of the others.

Section 498 of the Criminal Code was first enacted in 1889 in a statute intituled "An Act for the Prevention and Suppression of Combinations formed in Restraint of Trade" which had for its preamble the following:—

Whereas it is expedient to *declare* the law relating to conspiracies and combinations formed in restraint of trade.

Parliament did not pretend to enact something new as part of the criminal law. It was not creating or defining a new offence before unknown to the law. It was simply, as said in the preamble, "declaring" and formulating what I venture to think the existing law then was, namely, that a conspiracy unlawfully (a) to unduly limit facilities for transportation, etc., or (b) to restrain or injure trade or commerce, or (c) to unduly prevent or lessen production, etc., or (d) to unduly prevent or lessen competition in any article which was a subject of trade or commerce constituted a misdemeanour. Punishments by way of fine and imprisonment were added, of course, as sanctions of the declared law.

The drafting of the new statute was, no doubt, faulty. The use of the two words "unlawfully" and "unduly" was necessary, but that it was a declaratory law only and only intended as such I do not doubt.

The Criminal Code of 1892 re-enacted this statute in its 520th section retaining both words "unlawfully" and "unduly" and enacted section 516 declaring what a conspiracy in restraint of trade was. That also was declaratory only of the existing law. In 1899 the section was amended by striking out the word "unduly" in paragraphs (*a*), (*c*) and (*d*). In 1900 the word "unduly" was restored in each of the three paragraphs (*a*), (*c*) and (*d*), while the word "unlawfully" was struck out of the main section so that it read every one was guilty of an indictable offence, etc., who conspired, etc., with others to "unduly" limit, etc. In this latter form it remains at present.

I think the amendment striking out the word "un-

1912

WEIDMAN v. SHRAGGE.

Davies J.

lawfully" was a desirable one, and that, in view of the enactment of the present section 486 in the Code of 1892, the retention of the word "unlawfully" was unnecessary. The history of this legislation, however, throws little light upon its proper interpretation, but it confirms me in my opinion that Parliament was not so much creating a new criminal offence as it was defining an existing though unwritten one and attaching to it punishments by fine and imprisonment.

If that is so and the misdemeanour defined by the statute is nothing more than a conspiracy to carry out contracts or agreements which by the common law were illegal as being in restraint of trade, the finding that this contract in controversy was not in restraint of trade would also determine that it was not a violation of the statute.

I agree with Chief Justice Howell and Cameron J. that this is the real solution of the difficulties arising from construing section 498 of the Code as creating a new offence instead of as declaring and defining an existing one. I also agree with them and Perdue J. that the word "unduly" as used in the section should not be given a greater or wider meaning than the word "unreasonably" and that if so confined the suggested construction as one declaratory only is confirmed.

Holding, therefore, that the contract in question is not void at common law as being unreasonably in restraint of trade, I am of opinion that it is not within the declaratory law, sub-section (*d*) of section 498 of the Code, which is directed against conspiracies to unduly or unreasonably prevent or lessen competition

in the purchase or sale, etc., of any article, etc., a subject of trade or commerce.

I would dismiss the appeal.

IDINGTON J.—By virtue of long experience in the business each had separately carried on in Winnipeg, these parties determined to control, by fixing the prices to be paid for the commodities dealt in, the entire purchases thereof between Lake Superior and the Rockies. They adopted, not as a partnership though resembling it, a device or plan of sharing the profits derivable from the dealings each might have in specified leading articles of said commodities for which the maximum prices to be paid were to be fixed by them jointly from time to time. These prices, or the lower prices actually paid, were to be the profit-sharing basis, and thus either transgressing by paying a higher price would be automatically penalized therefor.

There was neither joint capital nor mutual contribution of capital in any venture, nor joint action, in use of capital either used, or in the management of the business. Each carried on his own business free from interference of the other. At the end of the year an accounting was to be had of the profit or loss each had made on the basis of the maximum prices so fixed or such less prices as each might have paid. The only recital in the agreement expresses a desire

> of entering into an agreement to facilitate the dealing in various articles hereinafter mentioned, without in any way interfering with the freedom of trade and commerce.

In what way and how was this to facilitate dealing? When regard is had to the language used and to what was actually done this much is clear: first, that merely

1912

WEIDMAN v. SHRAGGE.

Idington J.

partnership profits was not the purpose of the agreement, and next, that the parties had a consciousness of how perilously near they might be to infringing the statute.

They operated and accounted to each other on the basis of this agreement for a year, and then by letters renewed it, but fell out later; chiefly because the appellants did not conform to the purpose of the agreement. They had so far departed from the paths of rectitude as to buy from another Winnipeg dealer who had come into and ventured to operate in the chosen field of these parties. The mind of respondent never contemplated that kind of "facilitating the dealing in various commodities." It was clearly repugnant to the common purpose and a breach of faith. The recital must have been a mistaken or defective description of the common purpose. After repudiating this vile deed done by his brothers-in-arms, he sued them for an account. The latter set up section 498 of the Criminal Code as a bar to this alleged right of recovery.

The defendants (now appellants) swear the purpose of the agreement was to control the market for themselves within said limits, to cease competition with each other, to get as large a profit by keeping out competition as they could; and he says they succeeded.

The learned trial judge finds this story the true one, though contradicted by the plaintiff (now respondent). He says further,

> the effect of their agreement was not only to limit competition, but to destroy it.

The objection to such extrinsic evidence, which is always admitted to prove illegality, cannot prevail.

I agree with the learned judge's findings of fact

relative to the issue. I do so the more readily as the respondent's letters and admitted conduct confirm or at least harmonize with the appellants' oath and contradict the respondent's.

The section 498 in question reads, as it stood amended at the time in question herein, as follows:—

> Every one is guilty of an indictable offence * * * who conspires, combines, agrees or arranges with any other person * * * (*d*) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, etc.

The phrase "article or commodity" is defined in sub-section (*a*) as anything "which may be subject of trade and commerce."

The entire scope and purpose of this legislation and the operative limits to be assigned it, are difficult of accurate comprehension and definition.

I am, however, with great respect, quite clear that the majority of the court appealed from have misapprehended it.

If I understand them aright, the measure of the word "unduly" is to be found in a long line of authorities where contracts in restraint of trade had been held to be against public policy. If the purpose of Parliament had been merely to make parties to such contracts as these authorities relate to, amenable to the criminal law, the expression thereof would have been easy, and, I apprehend, quite different in terms from those used either in the recital or operative parts of 52 Vict. ch. 41, which first enacted the law in question.

That Act recited:—

> Whereas it is expedient to declare the law relating to conspiracies and combinations formed in restraint of trade and to provide penalties for the violation of the same.

1912

WEIDMAN v. SHRAGGE.

Idington J.

And in the forefront, as it were, of the offences to be dealt with, we find (a) the limiting of facilities for transportation; (b) the restraining of commerce; (c) the limiting of production, or unreasonably enhancing the price of that produced; and lastly (d) which is in substance quoted above.

The whole scope of this legislation is clearly something beyond the narrow limits upon which the reasoning in support of the judgment appealed from seems to proceed. It cannot be said to be a purely declaratory Act. It covers ground not covered by the then existing law. In no sense can the field it covers be held to be co-extensive with the field of law relative to restraint of trade wherein these authorities had operated.

The case of *Nordenfelt* v. *The Maxim Nordenfelt Guns and Ammunition Co.*(1), relied on to shew earlier cases overruled, or law relaxed, had not even been heard when this statute was enacted.

Not only that, but who that has had to struggle with the innumerable contracts, and distinctions between contracts, alleged to be in some way in restraint of trade, ever dreamed of the law on the subject being made merely clearer by making it the subject of criminal legislation? Yet the offence against public policy involved in the said cases had been recognized, however ill-defined, for nigh three centuries and never seems to have been directly rested on criminal law; nor yet as a supposed violation of morals. Public policy alone it was said required certain limits of time and space to be observed in such contracts, and these limits were measured by that good old word "reason-

(1) [1894] A.C. 535.

able" so often found in every phase of our English law. Why should Parliament discard it and adopt another less in use, less easy of comprehension, if merely declaring and clarifying the law as applied in civil cases relative to restraint of trade ?

Not only had the expansion of trade and commerce in England by the year 1889 rendered the lines laid down in many old cases somewhat unfitted to follow under new conditions then existing in England, but their applicability to Canada and its conditions seemed still more grotesque as a foundation and defined field of operation for a criminal statute such as we have to interpret and construe.

But it may be asked, why should it proceed by prefacing the whole with the word "unlawfully"? And further asked was it not merely the purpose to fix penalties for doing that which was already unlawful ? Is it not clear that the draftsman erred in using both words, "unlawfully" and "unduly," in the connection in which they were placed ? Surely if a thing were unlawful it must be undue. It was never intended to declare that an undue measure of unlawfulness was the thing to become indictable.

Parliament set out, as the recital shews, to declare what was to be held unlawful and evidently intended to declare that the unduly doing that which was referred to in sub-section (*d*) amongst others, were unlawful things, and must be prohibited.

And to make this clear the Act was in 1899, inadvertently, as I think, amended by striking out the word "unduly" and thus leaving "unlawfully" the test. Next session, on attention being drawn to the inadvertence, the word "unlawfully" was stricken out and the word "unduly" restored. The Act as thus

1912

WEIDMAN v. SHRAGGE.

Idington J.

finally amended is what is pleaded here. This legislative history demonstrates as clearly as possible that it was not as against something already unlawful, but the unduly doing that then lawful so far as the criminal law extended that the amended statute was aimed at.

And with all this effort to express its meaning, we are asked to say it was not "unduly" that Parliament intended to use, but another word so commonly in use in relation to part of the very subject in hand.

It seems to me that so far from designing a law that must have for its limits of operation the field covered by such authorities, it was the settled purpose to avoid that being done. That was something which did not fit the subject in hand.

However, we are not debarred from looking at the legal history of either unreasonable restraint of trade as interpreted by the courts, or anything else within the common knowledge of mankind, which, in order to effectuate the purpose of the legislature, may help us to find out, if we can, what meaning we must attach to the word "unduly" in sub-section (*d*) of section 498 of the Code as it stood in 1905 and 1906.

The contracts usually designated as in restraint of trade at common law, may be so far as falling within the descriptive language of the statute, *primâ facie* within the field of that which is prohibited by this statute. I can, however, imagine instances of such restraint which may arise and yet not have been unduly made within the Act. And for reasons I am about to advert to in connection with the case of *The Mogul Steamship Co.* v. *McGregor, Gow & Co.*(1),

(1) [1892] A.C. 25.

its operative range as a criminal statute effecting and invalidating contracts must exceed the narrow limits of the old doctrine referred to. It is now for the first time before this court. So far as I can see each of the other cases cited to us, in which different courts have dealt with its application, presented a mass of facts shewing the conduct of those charged with having infringed it to have been more or less repugnant to the minds of all right-thinking men, and hence the duty to apply it apparently clear.

The magnitude of the aggregate business involved, the far-reaching evil consequences likely to flow from upholding as legal the respective schemes attacked in these cases, and the chances that if upheld their peculiar features so obnoxious to the welfare of the community, would be so greatly extended as to become disastrous, all aided the courts to apply the Act.

Whether if such schemes were allowed to run their own course entirely unfettered and unfostered by legislation, the result would be so dreadful as frightened people imagine, one may be permitted to doubt.

If one considers the long history of the abortive attempts exemplified in the long lists of Acts repealed by 22 Geo. III. ch. 71, and 7 & 8 Vict. ch. 24, this doubt will hardly disappear. As we have nothing, however, to do with the wisdom or unwisdom of the legislation, such considerations are only of value here in aiding us by a survey of the whole field of its possible operation to try by drawing lessons from past failures to give it such effect as will not operate detrimentally upon any person, or class of persons, not desiring to improperly defeat competition; and above all, that it may not become itself by virtue of our decision an undesirable restraint upon the freedom of

1912

WEIDMAN v. SHRAGGE.

Idington J.

men in their business dealings, and thus another hindrance to competition.

This being a criminal statute we must try to find the vicious purpose aimed at in order to bring parties within its prohibitions. What then are to be the distinguishing features that may in any given case, and must in this case, enable us to determine whether or not it falls within any of the prohibitions of the statute? To do that we must examine it in its general bearing and survey if we can its whole possible field of operation.

One thing which must appear in any given case is that the agreement or arrangement is one designed to prevent or lessen competition. It must be also an attempt at what would be an unduly doing thereof, that is agreed upon. It needs neither success nor actual operation nor aught but an agreement to try what if successful would be the unduly preventing or lessening of competition.

Crimes usually imply something all right-minded men condemn. This one may or may not necessarily be so offensive. For example, the contracts of hiring, of leasing, of partnership and incorporation, may in some ways involve an actual, and within some of said cases, unreasonable lessening of competition, and hence be conceivably formed outside the offence created by this statute, or fall well within it. It may be that all of these contracts, or indeed many others *primâ facie* legitimate, and possessing no inherent evil, may involve changes disturbing and possibly lessening competition, yet each and all be so used as to produce a great injury to society. It is this feature of the problem which this Act attacks that requires in the limitation and definition of the offence some quali-

fication such as the word "unduly" has been chosen to serve. The test must in each case be the true purpose and its relation to the activities specified in and by the words of the statute and a finding of an evil or vice answering to the descriptive word "unduly."

It may be asked how can prevention or lessening of competition or attempt thereof be an evil when the fact confronts us that the whole business fabric of Canada is founded upon restraint of competition ? It may be said that in face of such fact it is impossible to assign an evil motive or vicious purpose of any kind in merely contracting to prevent or lessen competition.

It may well be, indeed, that the one is the logical sequence of the other by force of the development thereof, or the activities induced thereby, yet be unjustifiable for those enjoying the benefits of these restrictions to abuse the power thereby given them.

We must, moreover, recognize that there are many statutes for beneficial purposes yet productive of evils which call for amendments to the law to meet the evil by-product thereof, whilst retaining for some wise purpose, the parent statute, as it were.

Corporate creations are necessary for the promoting of manufacturing and commercial life. Yet the facilities and capacities given them also tend in many ways to produce and do produce much of the evil I conceive to be aimed at by the statute.

Patent laws may be righteous protectors of the inventor or discoverer, and beneficient stimulatives, yet may be made undesirable weapons of offence.

It seems to those whose race and country have had such implicit belief in the sanctity of contract, untainted by immorality or illegality, difficult to justify

1912

WEIDMAN v. SHRAGGE.

Idington J.

on ethical grounds the invasion of any field covered thereby.

It is important, therefore, to make clear from the observation of the operation of possible causes and the experience relative thereto and in other regards, how such a vicious purpose as implied in violating this Act may spring from being tainted with a desire to do that which may not of necessity and under all circumstances be held in itself vicious.

The development of modern industrial and commercial life, however, has certainly, when some of the later results are looked at, justified men in re-examining the profound belief heretofore held in unfettered contract and such competition as may exist therewith. And when they produce as the result of such examination, a statute like this and throw upon the courts the duty of drawing the line at the right place, we must, in order to discriminate properly, examine all such similar suggestions as the several foregoing, and all else within the whole range of legislation bearing on the problem so far as we can, and determine the principles upon which to proceed.

The state assuredly has the right to withdraw its aid from him who plots with another to deprive his fellow-men of the reasonable expectations each of them is entitled to cherish if the ordinary results of competition are allowed that free scope upon which so much of the prosperity and happiness of the dwellers in a free country hang.

It is at this point the crux of the whole question lies. We must assume Parliament realized that the unlimited power of competition begotten of combination, and the unlimited right of contract cannot any longer exist together with a full enjoyment of the

ordinary results of competition to which I have just referred, and hence a new statutory crime had to be created.

The necessity for finding in this new crime the vicious or evil purpose inherent in the agreement of the parties to it, renders it necessary to determine in each case as it arises where the ordinary rights of the public to enjoy their reasonable expectation of due and fair competition, (which are yet possible within the limits left when legitimate effect has been given or allowed for the restrictive legislation I have referred to,) are at an end and the absolute right of contract begins. We need not traverse here the whole field, but use, as illustrative, a part of the evil existent under the old law, and the operation thereon of the new, and observe the wide distinction between the operation of the doctrine of public policy relative to restraint of trade, and the effective range of this new law.

The law as it stood in England coeval with the first passing of this Act, and till then existent as our law also, was laid down by the highest authority, relative to the right of competition as follows, in the case of the *Mogul Steamship Co.* v. *McGregor, Gow & Co.*(1), Lord Halsbury said:—

> I would rather think, as a fact, that it is very commonly within the ordinary course of trade so to compete for a time as to render trade unprofitable to your rival in order that when you have got rid of him you may appropriate the profits of the entire trade to yourself.
>
> I entirely adopt and make my own what was said by Lord Justice Bowen in the court below: "All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices, in order by driving competition away to reap a fuller harvest of profit in the future; and until the pre-

(1) [1892] A.C. 25, at p. 37.

1912

WEIDMAN v. SHRAGGE.

Idington J.

sent argument at the bar it may be doubted whether ship-owners or merchants were ever deemed to be bound by law to conform to some imaginary 'normal' standard of freights or prices, or that law courts had a right to say to them in respect of their competitive tariffs, 'Thus far shalt thou go, and no further.'"

And in the same case Lord Morris said, at page 49, as follows:—

> The object was a lawful one. It is not illegal for a trader to aim at driving a competitor out of trade, provided the motive be his own gain by appropriation of the trade, and the means he uses be lawful weapons.

It is to be observed that this was said in a case where the "conference" or league of shippers seemed by reason of its being against public policy to be admittedly not binding between the parties. In that case it seems to have been also made clear that those entering into such contracts committed no offence for which an indictment would lie.

We know, as part of common knowledge, that the most effective weapon such combinations have used on a gigantic scale to crush out competition, in the United States, for example, has been that which was adopted by the defendants in that case.

If this statute is not aimed at such combinations here, what can it have been aimed at?

There are a great many subsidiary methods commonly in use to promote the ends such combinations are directed to. Amongst those are the purchases or leases of factories to hold them in idleness; the combinations to fix prices, and to refuse to deal with any one who will neither accede thereto nor join the association, nor submit to undertaking for an observance of their rules; the restrictive contracts in sales; and the rebates given, or shifting rates of profit conditioned upon the observance of the terms imposed relative to resales and thus and thereby covering the

fixed or variable prices, and the lists of parties or classes of people not to be dealt with, or alone to be dealt with.

Often these devices are aided by the use or abuse of the patent laws which are made to lend a strength to the operation of these compacts dictated by the combinations; and the use or abuse of the incorporating laws are made to bear the like fruit.

The combination to remove competition by such like devices means, when pushed far, the ruin of many by the temporary lowering of, and fitful changing of, prices; and though some of the public may reap for a time the benefit of such proceedings, it means later on the payment by the public of much higher prices than in a fair competition at a fair continuous normal rate of profit would have to be paid, and generally as much higher as can possibly be extracted from the public regardless of any measurement of price by way of what a fair profit requires. In the long run it means, if successful, the reaping of enormous wealth by the few, to the detriment of the many.

The right in this country to drive others out of trade by such means and for such selfish purposes, so plainly recognized by the quotation above, as legitimate in England and formerly here, is taken away by this statute. The statement of this legal right was not intended by their Lordships to countenance the use of any but legal means.

Bowen L.J., in joining in the judgment from which the above appeal to the House of Lords was taken, says in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1), at page 614, as follows:—

(1) 23 Q.B.D. 598.

1912

WEIDMAN v. SHRAGGE.

Idington J.

No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it.

It is quite clear, however, that the covert use of all these means which the late Bowen L.J. refers to, are likely to be facilitated if not encouraged by a recognition of freedom to resort to the schemes this state of law in England permits. This statute is intended to prohibit not only the use of all such schemes but also all else conceivably productive of the like results as such means as Bowen L.J. defines might produce, whether allied together with such schemes or not.

The doctrine of *Allen* v. *Flood*(1) might also help in conceivable circumstances to lend an appearance of legality to that which would thwart the operation of this Act and in such cases may have to be discarded.

The almost exultant tone of exposition several of the judgments in the *Mogul Case*(2) adopt in maintaining the law as laid down above may be well warranted in a country enjoying free trade. But we have chosen an entirely different commercial system and must have regard thereto. We must act in harmony therewith. We must assume that an Act such as this is not placed on the statute book for an idle purpose. Its operation must not be minimized simply because of difficulties in the way of enforcing it. Its purpose is to crush out of existence an evil. Its success, if any, must depend on its administration. Its great risk of failure lies in the fact that the requisite knowledge of the social and commercial forces shaping the social

(1) [1898] A.C. 1. (2) 23 Q.B.D. 598.

structure does not lie in the daily path of the lawyer's life, and that it cannot be well supplied by expert evidence.

I desire to guard against the impression that each of many of the devices I have referred to by way of illustration, and others of a like kind that do exist, must necessarily be obnoxious to the Act. It is the purpose to which they may be put that is the test. If that purpose be to bring about what the Act is designed to frustrate, it is vicious. My endeavour herein is to point the attitude to be taken and the path or way to ascertain and identify in the concrete an evil which is incapable of concise and accurate definition.

The application of tests by which to ascertain the possible evil results the Act seeks to avert may be much facilitated by a study in that regard of the jurisprudence of the United States with a commercial system and an historical development similar to but older than our own.

The enhancing or lowering of prices; the variation thereof without obvious causes other than the evil purpose the Act forbids; the margin of profit; the scale of business, the operative field; the frame of the contract; the devices used therein and in its execution; the refusal to deal with others without assigning any reasonable cause, which is so inconsistent with the ordinary motives of men presumed to be governed by a due observance of the Act; the entire conduct of the parties and the results produced, must each and all furnish some aid to determine whether or not the Act has been intended to be violated.

On the other hand every step taken in the past to enlarge the bounds of human freedom of thought and action, has stimulated discovery and invention, and

1912

WEIDMAN v. SHRAGGE.

Idington J.

as a product thereof, increased competition, which may have left by the way here and there financial wrecks as the result thereof. This has made men cry aloud in denunciation of the waste of human energy, and loss of human comfort resulting from competition. The cry is often a thoughtless one. People raising it seldom reckon with the absolutely necessary waste there is and must ever be incidental to growth; though all nature attests it on every hand. Destroy competition and you remove the force by which humanity has reached so far. The altruism some people would substitute for it may, when it has arrived, bring with it a higher sense of justice, but it has not arrived. All these considerations must always be kept in view and not be lightly set aside or the results involved therein be confounded with the actual products of violation of the Act and used as absolute or necessarily any proof of a vicious purpose.

For example, though rate of profit may be some guide, the use of any standard of profit itself apart from the comparison of changes of one time or set of conditions with another, must, as evidence, be of trifling value.

To apply the standard of profit that might enable the stupid, the slothful, the ignorant, the overcapitalized man working with antiquated machinery, and a mill or warehouse overmanned, to compete with the standard that may be fairly reached by the men of brains, of energy, of sleepless vigilance, with only adequate capital to earn dividends for, and all the advantages that the latest improvements, invention or discovery can furnish, would be a sorry one indeed for society.

The fate of the former class must not be con-

sidered. But the latter must not resort to unfair devices. They do not need them. They are without them the best kind of commercial asset the world can have and must never be depressed or suppressed by this law.

They may, indeed, need to be protected and it ought to be the anxious care of society, and its courts of justice to see that they get protected against the combinations of the men of the other class who ultimately must go to the wall before their onward march if they be given a fair chance.

In thus illustrating the law as it was, the evil to be remedied, the principles to be observed in applying the remedy and the difficulties to be met in doing so, I by no means pretend to have covered the whole ground, but enough to enable those concerned in this case to apprehend the law.

I desire to add a few words here to what I said at the outset on the question of the widely different field covered by the doctrine of public policy relative to restraint of trade and this criminal statute.

The Act not only destroys a former right of combination, but also renders illegal every direct or indirect device contrived by the art of men to serve those agreeing in the purpose of acquiring the market for themselves and adopted by them to execute such purpose, and thus also destroys the devices they may have incidentally adopted to promote the main purpose. All that is, directly or indirectly, knowingly used to promote any criminal purpose must be held void.

A world-wide difference exists and may by grasping this principle of law be appreciated here between the consequence flowing from the application of the public policy principle and that of this statute.

1912

WEIDMAN v. SHRAGGE.

Idington J.

It is quite conceivable that in many ways people might have entered into contractual relations of a subsidiary or collateral character with any of the parties to the combination in question in *Mogul Steamship Co.* v. *McGregor, Gow & Co.*(1), sub-serving the purposes thereof and be bound by and able to enforce such collateral or subsidiary contracts, even if the existence and purpose of the combination were known to the people so contracting.

I can find no authority which has ever reached so far as to hold contracts having such an indirect relation to the restraint of trade being held void or tainted thereby, with illegality.

Indeed, within the principle that "when the object of an agreement is unlawful the agreement is void" (see Pollock on Contracts), it is difficult to see how collateral or subsidiary contracts, for example, designed to facilitate the execution of a plan (of which the execution is legal) once agreed upon could be held void. The compact itself in restraint of trade was void, but the execution of the purpose thereof was held to be legal, though involving the destruction of competition. The subsidiary contracts forming no part of the originating compact, but merely legally aiding that execution of it, could hardly be held void.

On the other hand every kind of contractual relation attempted to be made with any one of the parties to a combination obnoxious to this statute and to the knowledge of the party so contracting and sub-serving the purposes of the combination in doing that which violates the Act would be clearly void if for no other reason than constituting an aiding or abetting a vio-

(1) [1892] A.C. 25.

lation of the criminal law or as part of a conspiracy to defeat the criminal law.

This exact distinction I draw between the operation of the doctrine of public policy and this Act was not taken in argument and though I am profoundly convinced of its validity and importance, I am not to be taken as carrying in absence of argument, or necessity of doing so, the suggestion as to the validity of contracts subsidiary or collateral to a scheme formed in restraint of trade as violating public policy too far or indeed further than mere illustration and suggestion.

The doctrine of restraint of trade violating public policy is not abolished by this Act which I conceive not to be a substitution therefor. And as suggested by many learned judges the interest of the public means something possibly not yet passed upon in all its shades. Nor am I to be taken as suggesting that the illustration the *Mogul Steamship Co.* v. *McGregor, Gow & Co.*(1) furnishes covers all this Act is applicable to; far from it.

In this case I do not see such difficulties as I have adverted to as possible and as I anticipate must arise in many others. In addition to the vicious purpose to be sought in such cases which I think is only too apparent herein, we have the extent of field over which it was intended to reign, and did reign in its execution. It would have presented much greater difficulty had respondent's thorough going contempt for the thought of doing anything like a *"malimid"* (Hebrew for school-teacher), or, indeed, in any way regarding the welfare of others, not been made so apparent.

(1) [1892] A.C. 25.

1912

WEIDMAN v. SHRAGGE.

Idington J.

His one thought was, if possible, to destroy all competition and, if need be, those who ventured to come in competition with him. His language and conduct portray exactly what this statute strikes at. Its aim was to put out of business use the methods of men banding themselves together to render it difficult if not impossible for others to become rivals, and stop competition in the same field of business.

These parties succeeded so far that their profits were nearly doubled. They seem to have been reasonably successful previously to this and thus had no excuse for their conduct. Their purpose was so clearly obnoxious to the Act it would matter not even if increased profits had not been reaped. The legal result ought to be the same.

It is because of the novelty of the case and the need that there should be no misapprehension arising from its results, and that honest men may not be entrapped from reliance on the former state of law here and in England, which I have adverted to, and still existent in England, which seems in harmony with the commercial ethics of most men, that I have dealt at such length with it.

It is to be observed that the individual seems still free to do as was permitted to the combination in the *Mogul Case*(1). The corporation possibly may also, but there a nice puzzle may be presented some day which I will not venture to anticipate. It may itself be founded on a scheme to violate the Act.

The appeal should be allowed with costs here and in the court below and the trial judgment be restored.

(1) [1892] A.C. 25.

1912

WEIDMAN v. SHRAGGE.

Duff J.

DUFF J.—The learned trial judge has in effect found that it was one of the direct and governing aims of the parties to the agreement in question to restrict and if possible suppress competition in the buying and selling of the articles specified in the Provinces of Manitoba, Saskatchewan and Alberta with the object of establishing and maintaining a monopoly of the distributing trade in those articles. I think the evidence supports that view. At least one of the articles — scrap iron — is shewn to have been a commodity of considerable commercial importance. I think that in entering into such an agreement the parties to it were guilty of an offence under section 498(*d*) of the Criminal Code.

I agree with the Court of Appeal that looked at from the point of view of the parties alone the provision of the agreement for fixing the prices at which the commodities in question were to be bought would be a provision reasonably necessary for the protection of the interests of persons who should agree to share profits and losses in the purchase and sale of such commodities. But that circumstance, in my judgment is not decisive of the question upon which we have to pass in this appeal.

The view upon which the judgment of the Court of Appeal is based as I understand it, is that the question at issue must be decided by ascertaining whether at common law the courts would have refused to enforce this agreement as being an agreement in restraint of trade: and that the answer to this question must in turn be governed by the opinion of the court upon the point whether or not the term of the agreement providing for the fixing of prices was reasonably necessary for the protection of the interests of the parties

1912

WEIDMAN v. SHRAGGE.

Duff J.

under their contract to share profits and losses. That view, I think, with respect, is based upon an inadequate conception of the principle of the common law as well as of the theory underlying the enactment we have to apply.

An opinion which has often found expression in text-books and sometimes in the judgments of very distinguished judges is that the common law considers freedom of contract of such paramount importance that given a principal lawful contract not in itself affecting any restrain of trade (a partnership, a contract for the sale of a business, a contract of employment) subsidiary agreements restraining trade or competition are entitled to the aid and protection of the law if only such subsidiary agreements are reasonably necessary for the protection of the individual interests of one of the parties in the principal transaction.

But it is impossible now to affirm that such is the rule of the common law. In *Maxim Nordenfelt Guns and Ammunition Co.* v. *Nordenfelt*(1), at page 649, Lindley L.J. said:—

> In *Rousillon* v. *Rousillon*(2), Lord Justice Fry, in one of those admirable judgments for which he was so justly celebrated, came to the conclusion that the only test by which to determine the validity or invalidity of a covenant in restraint of trade given for valuable consideration was its reasonableness for the protection of the trade or business of the covenantee. This accords with the view of Lord James in *Leather Cloth Company* v. *Lorsont*(3), and is, in my opinion, the doctrine to which the modern authorities have been gradually approximating. But I cannot regard it as finally settled, nor, indeed, as quite correct. *The doctrine ignores the law which forbids monopolies.*

In the same case Bowen L.J. said, at pages 667-668:—

(1) (1893) 1 Ch. 630. (2) 14 Ch. D. 351.
(3) L.R. 9 Eq. 345.

For the purpose of clearness I will, in conclusion, attempt to summarize the exact ground on which I consider this case should be decided. The rule as to general restraint of trade ought not, in my judgment, to apply where a trader or manufacturer finds it necessary, for the advantageous transfer of the goodwill of a business in which he is interested, and for the adequate protection of those who buy it, to covenant that he will retire altogether from the trade which is being disposed of, provided always that the covenant is one the tendency of which is not injurious to the public. This last element in the definition ought not, I think, to be overlooked, for I can conceive cases in which the absolute restraint might, as between the parties, be reasonable, but yet might tend directly to injure the public; *and a rule founded on public policy does not admit of any exception that would really produce public mischief;* such might be possibly the case if it was calculated to create a pernicious monopoly in articles for English use — a point I desire to leave open, and one which, having regard to the growth of syndicates and trusts, may some day or other become extremely important.

The judgment of A. L. Smith L.J., at pages 672 and 673 makes it clear that that learned judge accepted the view that an agreement in restraint of trade would not be enforced if it was clearly one prejudicial to the interests of the public however unexceptionable it might be from the point of view of the parties.

In the House of Lords(1), Lord Herschell says, at page 549:—

I must, however, guard myself against being supposed to lay down that if this can be shewn (that is to say, if it can be shewn, to be reasonable from the point of view of the parties' interests) the covenant will in all cases be held to be valid. It may be, as pointed out by Lord Bowen, that in particular circumstances the *covenant might nevertheless be held void on the ground that it was injurious to the public interest.*

Lord Ashbourne, at page 559:—

I do not see anything to lead to the conclusion that the covenant is injurious to the public interest. I entirely agree with the Lord Chancellor in the propriety and prudence of not saying a word which would imply that such an important topic was ignored or lost sight of.

(1) [1894] A.C. 535.

1912

WEIDMAN v. SHRAGGE.

Duff J.

Lord Morris, at page 575:—

> These considerations (*i.e.*, the governing considerations in determining the validity of an agreement in restraint of trade) I consider, are whether the restraint is reasonable and *is not against the public interest;*

and finally, Lord Macnaghten, at page 565, states the law thus:—

> The true view at the present time I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is sufficient justification, and, indeed, it is the only justification, if the restriction is reasonable — reasonable, that is, in reference to the interests of the parties concerned *and reasonable in reference to the interests of the public so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.* That, I think, is the fair result of all the authorities.

It is quite clear that all of these eminent judges had in view the possibility of a state of circumstances arising in which the public interest in restraining encroachments upon freedom of competition might have to be maintained at some sacrifice of the public interest in freedom of contract, even in such common commercial transactions as the sale of a business.

It was because, no doubt, in the opinion of the legislature the conditions had actually come into existence which Lord Bowen foresaw as a possibility merely, that this legislation was enacted. The particular sub-section with which we are concerned was plainly intended to protect the specific public interest in free competition. In applying the section the public interest in freedom of contract in commercial matters, and especially in freedom of disposition by

the individual of his own labour and skill and in freedom of dealing in private property, must, of course, be kept scrupulously in view; otherwise there might conceivably be some risk of ultimately defeating the objects of the enactment by depriving the legitimate commercial energies of the country of some of their important incentives. But, giving full effect to these considerations, I have no hesitation in holding that as a rule an agreement having for one of its direct and governing objects the establishment of a virtual monopoly in the trade in an important article of commerce throughout a considerable extent of territory by suppressing competition in that trade, comes under the ban of the enactment.

ANGLIN J.—The plaintiff sues for an accounting of profits made by the defendants in their junk business, to a share of which he claims to be entitled under the terms of an agreement between them. The defendants, who pleaded as a defence the illegality of this agreement, on the grounds that it was designed to effect a restraint of trade unlawful at common law and that it contravened clause (*d*) of section 498 of the Criminal Code, in that it was an agreement to unduly prevent or lessen competition in the purchase and sale of articles which were a subject of trade or commerce, appeal from the judgment of the Court of Appeal for Manitoba reversing the judgment of Mathers C.J., who had held that the agreement, although not illegal at common law, was in contravention of clause (*d*) of section 498 of the Code.

If the determination of this appeal depended solely upon an appreciation of the evidence contained in the record, I should be disposed not to entertain it,

1912

WEIDMAN v. SHRAGGE.

Anglin J.

notwithstanding the dissent of Richards J.A., from the judgment of the appellate court. As I understand the matter, however, it is upon the meaning to be attributed to the word "unduly" in section 498 of the Code that the Court of Appeal differed from the learned trial judge and it is the appellate judges' interpretation of that important statutory provision which the defendants ask us to review.

I agree with the decision in *The King* v. *Elliott* (1), that it does not follow that, because an agreement, of which the alleged purpose is

> to unduly prevent or lessen competition in the * * * purchase, * * * * or sale of some article or commodity which may be a subject of trade or commerce,

is not unlawful at common law, it may not constitute an offence against clause (*d*) of section 498 of the Code. As pointed out in that case, Parliament, in striking out the word "unlawfully," with which the introductory paragraph of section 520 (now section 498) originally concluded (55 & 56 Vict. ch. 29), should be credited with an intention to effect some real change in the law. I cannot think that this word was struck out merely because it was thought that, upon a proper construction, the agreements dealt with in section 498 would be held to be only such agreements as are declared by section 496 to be conspiracies in restraint of trade. As originally enacted in the Code of 1892, section 520 (now section 498) contained both the words "unlawfully" and "unduly." To constitute an offence under it the parties must have unlawfully agreed "to unduly limit facilities for transporting, etc., to unduly prevent, limit, or lessen manufacture, etc., or to unduly prevent or lessen competi-

(1) 9 Can. Cr. Cas. 505.

tion in production, manufacture, purchase, barter, sale, transportation, etc." The history of section 498, I think, precludes the view that in amending it, Parliament merely wished to remove a tautologous word. "Unduly" was first struck out (62 & 63 Vict. ch. 46), "unlawfully" being left in; but in the following year (63 & 64 Vict. ch. 46) "unlawfully" was struck out and "unduly" was restored. As the Code was originally drawn, section 516 (now section 496) did not govern section 520. The latter section was complete in itself. Since it contained the word "unlawfully" there could be no occasion to import that restriction from section 516. I see no good reason for now giving to section 496, which is an exact reproduction of section 516, an effect which the latter did not have, and, obviously, was not meant to have, in the original Act.

If, however, section 496 should be held to modify or qualify anything in section 498, I would incline to the view that it would be the principal or introductory clause. If so, it would apply to each of the sub-clauses of section 498 and no change would have been effected by striking out the word "unlawfully." While, as pointed out by Phippen J., in *The King* v. *Gage*(1), there are serious difficulties in reading clause (*b*) of section 498 as wholly unrestricted (the learned judge treating clauses (*a*), (*c*) and (*d*) as specifying particular instances of a generic offence covered by clause (*b*) thought the word "unduly" should be read into it), as at present advised I am not prepared to accede to the view expressed by Howell C.J., at page 430, and referred to in *The King* v. *Clarke*(2), that clause (*b*) of section 498 should be confined in its applica-

(1) 13 Can. Cr. Cas. 415. (2) 14 Can. Cr. Cas. 57, at p. 63.

1912

WEIDMAN v. SHRAGGE.

Anglin J.

tion to such agreements as are declared to be conspiracies in restraint of trade by section 496. But it is not now necessary to determine that question, and I allude to it merely to avoid any possibility of leaving the impression that I would import into the clause (*b*) the word "unlawfully."

The single, if not simple, question before us is whether in the instrument under consideration the parties agreed "to unduly prevent or lessen competition in the * * * purchase, * * * (or) sale" of junk and bottles.

It is perhaps doubtful whether there is in the agreement any sufficiently definite provision as to sale prices to bring it within the statutory prohibition. But there is a distinct undertaking as to purchase prices to be paid by the parties, which I cannot read as aught else than a mutual promise that during the currency of the agreement neither would pay for bottles or junk prices higher than those specified in the schedules. That this agreement tended "to prevent or lessen competition" between the parties to it in the purchase of the scheduled articles there can be no question. In view of the fact that they controlled from 90% to 95% of the junk business in the territory in which they operated (a circumstance most material and proper for consideration in determining the true nature of the agreement, its purpose and the intent of the parties to it) it seems to me equally clear that, if carried out, it would tend to destroy in that territory all substantial competition in the purchase of junk and bottles and to leave the public as to the market price for these articles entirely at the mercy of the contracting parties.

The suggestion that, if too great a depression in

prices should result, competition would be invited rather than discouraged seems to ignore the fact that provision is made for consultation between the parties as to sale prices and that it is declared to be the intent of their arrangement that they are to work for the mutual advantage of both. The evidence establishes that the prices to which they bound themselves to adhere in purchasing the scheduled articles were materially smaller than had been paid by them when there was competition between them. Of course it would be to their mutual interest to place these prices as low as practicable, yet not to put them so low nor to raise their sale prices so high that the margin of profits would invite the invasion of their field by really formidable rivals. Were such an invasion threatened they had it in their own hands at any time to reduce their sale prices to meet it. Small competitors they were in a position to crush. I have no doubt that the purpose of the agreement was to prevent or lessen competition in the purchase of junk and bottles for the advantage of the parties, without regard to the public interest, but with the certain incidental consequence that the latter interest would suffer as the result of the provision for a substantial reduction in such purchase prices below what they would be under fair competition. It is not open to question that the agreement was well calculated to accomplish its purpose.

But every agreement to prevent or lessen competition is not declared to be an offence. The elimination or diminution of competition must be undue. It is suggested that if "unduly" does not mean "unlawfully" — and the history of the section seems to forbid such an interpretation — it is used as the equivalent

1912

WEIDMAN v. SHRAGGE.

Anglin J.

of "unreasonably," and that before an agreement can be said to provide for unduly preventing or lessening competition, the court must be satisfied that it is designed to do so to an extent not reasonably necessary for the protection of the interests of the parties to it, whatever may be its effect upon the interests of the public. I cannot accept that suggestion. It would re-introduce the common law test of illegality as defined in the modern cases such as *Collins* v. *Locke*(1); *Dubowski & Sons* v. *Goldstein*(2), and others referred to in the judgments of the provincial courts and at bar in this court. If deemed an interchangeable equivalent of "unduly" the presence of the word "unreasonably" in clause (*c*) of section 520 as originally enacted and now found in section 498, is scarcely intelligible. If the word "unreasonably" were used in the statute instead of "unduly" there might be much to be said for the view that any agreement reasonably necessary for the protection of the parties to it is not in contravention of section 498.

The difference, in my opinion, between the meaning to be attached to "unreasonably" and that which should be given to "unduly" when employed in a statutory provision such as that under consideration is that under the former a chief consideration might be whether the restraint upon competition effected by the agreement is unnecessarily great having regard to the business requirements of the parties, whereas under the latter the prime question certainly must be, does it, however advantageous or even necessary for the protection of the business interests of the parties, impose improper, inordinate, excessive, or oppressive re-

(1) 4 App. Cas. 674. (2) [1896] 1 Q.B. 478, at p. 484.

strictions upon that competition the benefit of which is the right of every one ? *The King* v. *Elliott*(1).

Applying this test to the agreement before us, when we find that it was designed and, if carried out according to the intent of the parties, would be effectual to destroy all competition in the articles which it covered throughout the extensive territory in which they operated, that it was intended to bring about a material reduction directly in the prices which had been paid to junk and bottle collectors and indirectly in the prices which had been paid to the public for the purchase of such articles when competition was unfettered and which would obtain under fair competition, and that the situation was such that the parties to the agreement were not subject to other competition and were in a position effectively to combat the introduction into their territory of other competitors, the proper conclusion seems to be that it was an agreement unduly to prevent or lessen competition in the purchase of these articles.

I might add that if, notwithstanding its utter disregard of the public interest and the incidental prejudice to that interest which it was calculated to cause, such an agreement would nevertheless be lawful if shewn to be reasonably necessary for the protection of the business interests of the parties to it, the evidence in the record does not establish such necessity. The effect of the operation of the agreement would appear to have been to increase the profits which the parties had been previously making by upwards of 15% — an object which though legitimate, or even laudable, does not sanction the employment of illegal or prohibited means to attain it. It is not

(1) 9 Can. Cr. Cas. 505, at p. 520.

1912

WEIDMAN v. SHRAGGE.

Anglin J.

established that the profits made by the plaintiff and the defendants before the agreement in question was entered into were not reasonably sufficient; still less that the increase provided for and brought about was indispensable to their conducting reasonably successful business enterprises.

It may be that to give effect to the defendants' plea of illegality will enable them dishonestly to escape from the consequences of a bargain which they made fully understanding and appreciating its effect. But that the purpose of Parliament in enacting section 498 of the Criminal Code should be carried out and that the influence of its provisions for the protection of the public interests should not be weakened or impaired is much more important than that in a particular case a party to an illegal agreement should be prevented from dishonestly evading his private obligation.

I would, with respect, allow this appeal and restore the judgment of the learned trial judge. The appellants should have their costs in this court and in the provincial Court of Appeal.

Appeal allowed with costs.

Solicitors for the appellants: *Andrews, Andrews, Burbidge & Bastedo.*

Solicitors for the respondent. *Elliott, Macneil & Deacon.*