A NOTE ON COMBINATIONS IN RESTRAINT OF TRADE.

By Warwick Chipman, K.C.

The following remarks are confined to articles 496. 497, and 498 of the Criminal Code, which read as follows:—

"496. A conspiracy in restraint of trade is an agreement between two or more persons to do or procure to be done any unlawful act in restraint of trade. 55-56 V., c. 29, s. 516.

"497. The purposes of a trade union are not by reason merely that they are in restraint of trade, unlawful within the meaning of the last preceding section. 55-56 V., c. 29, s. 517.

"498. Every one is guilty of an indictable offence and liable to a penalty not exceeding four thousand dollars and not less than two hundred dollars, or to two years' imprisonment, or, if a corporation, is liable to a penalty not exceeding ten thousand dollars, and not less than one thousand dollars, who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat, or transportation company,—

"(a) to unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or

"(b) to restrain or injure trade or commerce in relation to any such article or commodity; or

"(c) to unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or

"(d) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property."

2. Nothing in this section shall be construed to apply to combinations of workmen or employees for their own reasonable protection as such workmen or employees. 63-64 V., c. 46, S. 3."

Clause (b), the only clause dealing directly with restraint of trade, stands out from the rest in that the words "unduly" or "unreasonably" do not appear.

It has been held by the Court of Appeal in Manitoba, in the case of *The King* v. *Gage,* 13 Canadian Criminal Cases, 1908, p. 415, that a conspiracy to restrain or injure trade in relation to any commodity must, from the context, be taken to refer to undue restraints of trade, such as malicious restraints, or those not justified by any personal interest for the protection of which the trade arrangement is made. It was also held by the Supreme Court of Alberta in the same year, in the case of *The King* v. *Clarke,* 14 Canadian Criminal Cases, p. 57, that subsection (b) is not self-explanatory, and that to find the definition of what constitutes a conspiracy to restrain trade one must look at section 496 of the Criminal Code.

Notwithstanding the high authority behind them, neither of these interpretations appears to be quite satisfactory. They would make subsection (b) of no effect whatever as it stands, for upon turning to section 496, it is difficult to see what meaning could be given to the word "unlawful" save by reference to subsections (a), (c) and (d) of section 498.

It was pointed out in the case of *The King* v. *Elliott,* 9 Canadian Criminal Cases, 1905, p. 505 and p. 519, that

> "as section 498 was originally framed, it simply imposed penalties in respect of a conspiracy to commit some unlawful act unduly in transactions of the nature of those mentioned in clauses (a), (c) and (d). What was or might be unlawful was left to be ascertained by the general law of the land on the subject, the limited scope of which, and the difficulty of its application, were well seen

by such cases as the *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, 1892, A. C. 25, etc. When this was further qualified by the word 'unduly' it might seem that Parliament had defeated its own object, whatever it may have been, and had made the section unintelligible and innocuous by attaching a penalty only to a conspiracy to do an unlawful act unduly. The difficulty became partially evident to the legislators of 1899, when the word 'unduly' was struck out of the subsections (a), (c) and (d). This left the application of the general law untrammelled within its narrow limits; but in the session of 1900, Parliament shewed that it meant to go further, and did so, by striking the word 'unlawfully' out of the section and restoring the word 'unduly' to the sub-clause referred to. Thus we are no longer thrown back upon the general law to ascertain what is (a) an unlawful limitation of the facilities for transporting, etc., articles or commodities which may be the subject of trade or commerce, (c) unlawfully preventing the manufacture or production of such article or commodity, or (d) unlawfully preventing or lessening competition in its production, purchase, etc. It is the conspiracy to do these things *unduly* which is now made unlawful and an offence within the meaning of the section."

This reasoning would seem to give no more meaning to the word "unlawful" in section 496 than can be found in subsections (a), (c) and (d) of section 498, thus leaving subsection (b) still unaccounted for, and with, presumably, some independent force of its own. The situation appears, at first sight, an unreasonable one; for section 496, by speaking of unlawful acts in restraint of trade, would seem to imply that there may be *lawful* acts in restraint of trade whereas subsection (b) of section 498 would seem to make any conspiracy to restrain trade an indictable offence. Mr. Justice Anglin, in the very close analysis given by him in *Weidman* v. *Shragge*, 46 S. C. R. page 1, at pages 38 and following, expresses himself as anxious to avoid any

possibility of leaving the impression that he would import into the clause (b) the word "unlawfully."

Possibly the embarrassment may be resolved by supposing that section 496 refers to acts irrespective of whether or not their direct purpose is to restrain trade, whereas subsection (b) of section 498, read with its preamble, refers to acts whose direct purpose is to restrain trade. We would thus have the result that an act which did not infringe subsections (a), (c) and (d) of section 498, and which did not have the direct purpose of restraining or injuring trade or commerce, would not be unlawful; while an act which did have that direct purpose, would, if it did not come under subsections (a), (c) and (d) be punishable under subsection (b).

This reasoning would appear to be confirmed by reference to section 497 of the Criminal Code, which states that the purposes of a trade union are not, by reason merely that they are in restraint of trade, unlawful within the meaning of the last preceding section. Turning to section 2 of the Trade Unions Act, ch. 125, R. S. C., we find that a trade union means such combination, whether temporary or permanent, for regulating the relations between workmen and masters, or for imposing restrictive conditions on the conduct of any trade or business, as would, but for this Act, have been deemed to be an unlawful combination by reason of some one or more of its purposes being in restraint of trade. This lends colour to the view that an act done with the direct purpose of restraining trade is criminal in itself, even if it does not come under subsections (a), (c) and (d) of 498.

This would, in some respects, seem to be the view of the Courts in the case of *Gibbons* v. *Metcalfe*, 15 Manitoba Law Reports, 1905, p. 560 and p. 582, where it was held by Killam, C.J., that:

> "apparently the prevention of every enhancement of prices or every lessening of competition in the purchase, barter or sale of commodities was not intended to be included in sub-section (b);

> for where enhancing, preventing or lessening is specifically referred to, it is qualified by the word 'unreasonably' or 'unduly.' Sub-section (b), then, cannot well have been intended to embrace every combination to prevent or restrain particular kinds or systems of trading, or particular kinds of bargaining. At most, I can take it to include only combinations for the direct purpose of preventing or materially reducing trade or commerce in a general sense with reference to a commodity or certain commodities, or for purposes designed or likely to produce that effect."

This view was confirmed unanimously by the Court of Appeal of Manitoba. In that particular case, certain members of the Winnipeg Grain and Produce Exchange came to the conclusion that the Plaintiff was using his position as a member to assist other dealers not members to deal with members in violation of the rules of the Exchange as to Commission, and they agreed among themselves that they would neither sell nor buy grain from him. In so combining, they were not actuated by any malicious feeling towards him, but solely by the desire to serve the business interests of themselves and the members of the Exchange generally, and to protect the market created under the rules of the Exchange. They did not attempt to coerce the Plaintiff by violence or threats, or to induce him or others to break any contract nor had they tried to induce others to refrain from dealing with him. " I do not consider" said the first Court:

> "that the rules of the Exchange could be properly taken as intended or as likely to enhance the price of grain, or to prevent or lessen competition in the purchase, barter, sale or supply of grain, and still less could they be intended or likely to do so unreasonably or unduly. The members of the Exchange must be expected to deal for profit, and the commission provided for, and which it was the main object of the commission rules to secure, does not seem to have been in any respect unreasonable."

To these considerations may be added those of the Supreme Court of the United States, quoted by our Courts in the case of *The King* v. *Gage* already referred to. Out of several citations I take the following from the case of the *United States* v. *Joint Traffic Association,* 171 U. S. R. 68, in which Peckham, J., delivering the opinion of the Court, said:—

> "In *Hopkins* v. *United States*, decided this term, we say that the statute applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce, and that to treat the Act as condemning all agreements under which, as a result, the cost of conducting as interstate commerce business may be increased, would enlarge the application of the Act far beyond the fair meaning of the language used. The effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, we think, covered by the Act, although the agreement may indirectly and remotely affect the commerce."

This, after all, is only to repeat the general principles referred to by the Privy Council in the case of the *United Shoe Machinery Company of Canada* v. *Brunet* (Canadian Reports, 1909 A. C. 148), where, speaking of the "privilege which the law secures to all traders, namely, that they shall be left free to conduct their own trade in the manner which they deem best for their own interests, so long as that manner is not in itself illegal," their Lordships say:—

> "This privilege is, indeed, the very essence of that freedom of trade in the name and in the interest of which the Respondents claim to escape from the obligations of their contracts: *Hutton* v. *Eckersley,* 6 E. B. 47, approved of in the *Mogul Steamship Co.* v. *McGregor, Gow & Co.,* 1892,

A. C. 25. The latter case, indeed, affords a striking example of the lengths to which traders, in the bona fide defence or promotion of their own interest, may lawfully push this privilege, regardless of the injury, clearly foreseen by them, which they may thereby incidentally inflict on the trade of their rivals."

If these considerations prevail then, except in extreme cases, the offences that are generally referred to as combinations in restraint of trade will be found not, strictly speaking, as restraints under subsection (b), but as one or other of the high crimes dealt with in the three other subsections of Article 498. *Weidman* v. *Shragge* (*ubi sup.*) is a case in point.