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NOTE AND COMMENT.

* * * A very important statement was made in the House of Commons by the Right Honourable the Prime Minister on the 11th May, 1923, as to the difference between the provisions of the Bill to provide for an investigation of Combines, Monopolies, Trusts and Mergers, and those of section 498 of the Criminal Code. It is as follows:—

"Mr. Mackenzie King: My hon. friend asked me on the seconding of the bill, what was the difference in the interpretation clause between the phraseology and the effect of the phraseology and the definition relating to combines from that which appears in the Code. I think possibly for the purpose of record I had better place the distinction on Hansard. It is a little technical, but I have it in detail. This memorandum reads:—

> The difference between sec. 498 of the Criminal Code and the crime created by secs. 26 (*a*) and 2 (*a*) of Bill 54.
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> Section 498 of the Criminal Code reads as follows:—
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> 498. Everyone 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 workman or employees. 63-64 V., c. 46, s. 3.

Sub-sections (*a*), (*b*), (*c*), (*d*) of sec. 498 should be compared with the following sub-sections of sec. 2.

Section 498 (*a*) of the Code reads:—

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.

Clause 2 (*a*), (3) (*i*) of the present bill reads:—

Limiting facilities for transporting, producing, manufacturing, supplying, storing or dealing.

The word "limiting" is substituted for the words "to unduly limit." Section 498 (*b*) of the Code reads:

—to restrain or injure trade or commerce in relation to any such article or commodity.

Clause 2 (*a*) (3) (vi) of the present bill reads:—

Otherwise restraining or injuring trade or commerce.

Section 498 (*c*) of the Code reads:—

> To unduly prevent, limit or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof.

Clause 2 (*a*) (3) (ii) of the present bill reads:—

> Preventing, limiting or lessening manufacture or production.

That is, eliminating from it the words "unduly" and "unreasonably." Section 498 (*d*) of the Code reads:—

> 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.

If that is to be compared the present bill, clause 2 (*a*) (3) (v) reads:—

> Preventing or lessening competition in, or substantially controlling within any particular area or district or generally, production manufacture, purchase, barter, sale, storage, transportation, insurance or supply.

In the above section it will be seen that section 498 contains the word "unduly" in sub-sections (*a*), (*c*), and (*d*), whereas such word does not appear in the corresponding provision of section 2. The test in section 2 of whether a crime has been committed is whether what has been done has operated, or is likely to operate to the detriment of, or against the interest of the public whether consumers, producers or others. This is the test which is substituted for the word "unduly."

Section 498 applies only to persons who conspire, combine, agree or arrange with any other person, or with any railway, steamship, steamboat or transportation company to do any of the acts set out in sub-sec-

tions (*a*), (*b*), (*c*) and (*d*). Section 2 (*a*) is wider in that the limitation with respect to conspiracy, etc., is not mentioned, and it extends to "any actual or tacit contract, agreement, arrangement or combination which has, or is designed to have" any of the results mentioned in the rest of the paragraph.

Section 2 (a) extends not only to the matters which have already been enumerated and contrasted with the corresponding sections of 498, but also to:—

(1) Mergers, trusts and monopolies so called;

(2) The relation resulting from the purchase, lease or other acquisition by any person of any control over or interest in the whole or part of the business of any other person;

(3) Any actual or tacit contract, agreement, arrangement or confirmation which has or is designed to have the effect of,

(iii) fixing a common price or a resale price, or a common rental, or a common cost of storage or transportation; or

(iv) enhancing the price, rental or cost of article, rental, storage or transportation.

It will thus be seen that section 2 (*a*) is substantially broader than section 498, and more applicable to modern conditions."

The significance of this statement may be judged by the following extracts from three judgments delivered by members of the Court of Appeal and the Appellate Division in Ontario, and of the Supreme Court of Canada. They are to be found in the following cases: *Rex* v. *Elliott*, 1905, 9 O. L. R. 648, where Osler, J.A., expresses himself thus:—

"The right of competition is the right of every one, and Parliament has now shewn that its intention is to prevent oppressive and unreasonable restrictions upon the exercise of this right; that whatever may hitherto have been its full extent, it is no longer to be exercised by some to the injury of others. In other words, competition is not to be prevented or lessened *unduly*, that is to say, in an

undue manner or degree, wrongly, improperly, excessively, inordinately, which it may well be in one or more of these senses of the word, if by the combination of a few the right of the many is practically interfered with by restricting it to the members of the combination.

In *Weidman* v. *Shragge*, 46 S. C. R. 1, Anglin, J., says:—

> "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 restrictions upon that competition the benefit of which is the right of every one?"

In the recent case of *Attorney-General for Ontario* v. *Can. W. Grocers Assn.*, 1923, 2 D. L. R. 617, the following view is expressed by Hodgins, J.A.:—

> "'Undue' is not quite the same as 'unreasonable'; it may be said to import the idea of unfairness and while the respondents might establish that what they have done is reasonable both as to themselves and others affected by their actions and also as to the public at large, it may be contended that if it resulted in unfairly oppressing or injuring trade, it thus gave a cause of action, which is not met by the usual defence based on the necessities and proper conduct of their own trade. This view does not necessarily make malice a decisive constituent, but it makes the test a higher one, introducing into the domain of business exigencies as shewing just cause or excuse, the element of oppression, malice and unfairness and their effect on others and rend-

ers it harder to justify restraint of or interference with trade. . . . The legislation thus interpreted imports the consideration of the effect of the conduct of the respondents and introduces the elements of fairness in enforcing their legal rights on the one hand and oppression on the other."

It is a matter of satisfaction to those who think all the better of legislation framed with due regard to the rules of syntax that the Bill respecting Combines is not marked with that bias for the "split infinitive" which is exhibited in the articles of the Criminal Code above cited.

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* * * Those who are inclined to listen to the claim put forward by certain bands of Indians in Canada that they are not to be treated as subjects of the Crown of Great Britain, but as independent nations, would do well to read what Mr. Justice Riddell has to say on this question in the case of *Sero* v. *Gault* (1921), 50 O. L. R. at pp. 31, 32:—

"It is well known that claims have been made from the time of Joseph Brant that the Indians were not in reality subjects of the King, but an independent people—allies of His Majesty—and in a measure at least exempt from the civil laws governing the true subject. 'Treaties' have been made wherein they are called 'faithful allies' and the like, and there is extant an (unofficial) opinion of Mr. (afterwards Chief) Justice Powell that the Indians, so long as they are within their villages, are not subject to the ordinary laws of the Province.

As to the so-called treaties, John Beverley Robinson, Attorney-General for Upper Canada (afterwards Sir John Beverley Robinson, C.J.), in an official letter to Robert Wilmot Horton, Under Secretary of State for War and Colonies, March 14, 1824, said:—

'To talk of treaties with the Mohawk Indians, residing in the heart of one of the most populous districts of Upper Canada, upon lands purchased for them and given to them by the British Govern-

ment, is much the same, in my humble opinion, as to talk of making a treaty of alliance with the Jews in Duke Street or with the French emigrants who have settled in England.' Canadian Archives, Q. 337, pt. II., pp. 367, 368.

I cannot express my own opinion more clearly or convincingly."

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* * * When Byron said that—

" 'Tis pleasant sure to see one's name in print"

he meant, of course, when it is correctly printed. We owe an apology to the Honourable Mr. Justice McCardie of the English Bench for referring to him in the last issue of the REVIEW as Sir *William* instead of Sir Henry Alfred McCardie. Thackeray does not enumerate such errors among the "thorns in the editorial cushion," but he does refer to lapses and ineptitudes that have escaped correction as "weeds" and calls a plague upon them, adding "Every day when I walk in my little literary garden-plot, I spy some, and should like to have a spud, and root them out."

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* * * Many kindly references have been made by the press of the United States to the memory of the late Charles Thaddeus Terry, whose death occurred in New York a short time ago. Mr. Terry was a lawyer and jurist of international prominence. He was a member of the Executive Committee of the American Bar Association. He was also a member of the New York State and City Bar Association, as well as of the New York Law Institute and the Academy of Political Science. He was one of the American guests present at the inaugural meeting of the Canadian Bar Association which took place in Ottawa in 1914. On that occasion his gifts as a public speaker and personal charm won golden opinions for him among members of the Canadian profession.