[HIGH COURT OF AUSTRALIA.]

HERON . . . . . APPELLANT;
DEFENDANT,

AND

THE PORT HUON FRUITGROWERS' CO-OPERATIVE ASSOCIATION LIMITED } RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

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HOBART, *Feb.* 15, 16.

MELBOURNE, *May* 15.

Knox C.J., Isaacs, Gavan Duffy and Starke JJ.

Contract—Validity—Restraint of trade—Reasonableness of restrictions—Company—Articles of association—Control over shareholders' produce—Penalty or liquidated damages—Companies Act 1869 (*Tas.*) (33 *Vict. No.* 22), *sec.* 16.

By the memorandum of association of a company registered under the *Companies Act* 1869 (Tas.) the objects for which the company was established were to do everything which might be or be considered conducive to the proper or best sale, handling, packing, treating, grading, marketing and branding of the fruit belonging to members of the company or others and particularly (*inter alia*) to establish and carry on depots for packing fruitgrowers' products, and to transport and sell fruitgrowers' products; and to buy and sell and export the products of fruitgrowers. By one of the articles of association each shareholder was to be deemed to have entered into a contract with the company that while he remained a shareholder he should in each year send to the company, to be packed, graded and sold in such manner as the directors might from time to time decide upon, his entire crop of merchantable fruit upon certain terms and conditions. By other articles it was provided that each shareholder agreed to abide by and observe all rules from time to time made by the directors relating to packing, grading, selling, distributing and marketing his fruit; that every shareholder who should sell or dispose of any marketable fruit grown by him except in the specified manner, should forfeit and pay to the company as and for liquidated damages a certain sum per case or pound for each case or pound so sold or disposed of; that notwithstanding anything in the articles the directors might where there was a reasonable

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excuse relieve a shareholder from his liability for not delivering his fruit to the company; that the shares of the company should only be issued to and transferable to *bonâ fide* orchardists or fruitgrowers; and that the directors might decline to register any transfer of shares not fully paid up without assigning any reason therefor. In an action by the company against a member to recover liquidated damages in respect of a sale by the member, while his shares were still not fully paid up, of fruit grown in his orchard otherwise than in the manner required by the articles,

Held, that the restraint imposed by the articles upon members in respect of the disposal of their fruit was not reasonably necessary for the protection of the company, and that, even if the provisions of the articles which imposed the restraint operated as an actionable contract between the company and its members (as to which *quære*), they were an unlawful restraint of trade and were unenforceable.

McEllistrim v. *Ballymacelligott Co-operative Agricultural and Dairy Society Ltd.*, (1919) A.C. 548, followed.

Per Isaacs J.: The sum required by the articles to be forfeited and paid by a member who sold or disposed of marketable fruit grown by him except in the specified manner was a penalty, and not liquidated damages.

Decision of the Supreme Court of Tasmania reversed.

APPEAL from the Supreme Court of Tasmania.

An action was brought in the Supreme Court, in its Local Courts Act jurisdiction, by the Port Huon Fruitgrowers' Co-operative Association Ltd., a company registered under the *Companies Act* 1869 (Tas.), against Herbert George Heron, a shareholder in the plaintiff Company, alleging by the plaint that under and by virtue of the articles of association of the Company each shareholder contracted with the Company that whilst he remained a shareholder he would in each year send to the Company to be packed, graded and sold in such manner as the directors might decide his entire crop of merchantable fruit upon the terms and conditions therein mentioned, and that by the articles it was provided that every shareholder who should sell or dispose of any marketable fruit grown by him except in the manner therein provided should pay to the Company as and for liquidated damages the sum of five shillings per case for each and every case so sold or disposed of. It was further alleged that the defendant during the year 1920 grew in his orchard and had for sale 750 cases of marketable fruit belonging to him, but that he failed to send the same to the Company for sale and disposal as required

by the articles, and in contravention thereof sold and disposed of the same elsewhere. The plaintiff claimed £187 10s.

The articles of association of the Company, so far as they are material to this case, were as follows :—7. Each shareholder shall be deemed to have entered into a contract with the Company and given an undertaking to the Company that while he remains a shareholder he will each year send to the Company to be packed, graded and sold in such manner as the directors may from time to time decide upon his entire crop of merchantable fruit upon the terms and conditions following, viz. :—(1) The shareholder to pick his fruit in accordance with the methods and rules prescribed by the directors from time to time, and to deliver the same free of expense to the Company to their packing shed or packing sheds at such time as he may be notified by the directors. (2) The Company undertakes to handle and market the shareholders' fruit with due diligence, and to pay the grower such advances from time to time as sales warrant, and to pay the balance of the net proceeds obtained by the directors for the fruit within thirty days after the receipt of the money for each pool of fruit. (3) All fruit delivered hereunder may be pooled by the directors according to size, grade, variety, and time of delivery, and the proceeds of each pool shall be distributed by the Association *pro ratâ* among the growers having fruit in such pool according to the respective amount and grade of fruit in such pool. (4) The Company shall be entitled to charge and retain from the proceeds such sum for packing, marketing, storing, advertising, handling, distributing, or otherwise dealing with the fruit as the directors shall from time to time determine. (5) Each shareholder shall receive the same price per case for the same variety, size and grade of fruit in each pool, and no shareholder shall be charged more for the services rendered to him than other growers are charged by the Company for similar services at that time. (6) The directors shall be entitled to withdraw from any pool fruit subject to any defect impairing the value thereof traceable to a diseased condition, whether visible at the time of the receipt of the fruit or developed afterwards. (7) Such other terms and conditions either in addition to or in substitution for any of the above as to the directors may from time to time seem advisable, and which are

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duly notified to the shareholders. 8. Notwithstanding anything herein contained each shareholder shall and they hereby respectively agree to abide by and observe all rules and regulations from time to time made by the directors relating to pools, or the packing, grading, selling, distributing and marketing of their fruit. 9. Every shareholder who sells or disposes of any marketable fruit grown by him, except in the manner herein provided, shall forfeit and pay to the Company as and for liquidated damages the sum of five shillings a case for each and every case so sold or disposed of, and one penny per pound for all small and soft fruit and fruit disposed of otherwise that in ordinary apple cases. 10. Notwithstanding anything herein contained the directors in any case in which they consider any shareholder has a reasonable excuse for not delivering his fruit according to the preceding clauses may relieve him from all liability for not so doing. 13. The shares in the Company shall only be issued to persons who are *bonâ fide* orchardists or fruitgrowers. 14. No person shall exercise any rights of a member until his name shall have been entered in the register of members and he shall have paid all calls and other moneys for the time being due and payable on any share in the Company held by him. 20. Subject to any special conditions on the allotment of shares, all calls on shares shall be made by and at the discretion of the directors, and shall be payable at such times and places and by instalments or otherwise as the directors may appoint. 22. A call shall be deemed to be made at the time when the resolution of the directors authorizing such call was passed. 23. Any member may, with the sanction of the directors, and upon such terms as to payment of dividends or interest and otherwise as the directors determine, make payments in advance of calls. 32. The Company shall have a first and paramount lien upon all shares registered in the name of every member (whether solely or jointly with others) for his debts, liabilities and engagements, solely or jointly with any other person to or with the Company, whether the time for the payment, fulfilment or discharge thereof shall have actually arrived or not. 39. The directors may decline to register any transfer of shares not fully paid up without assigning any reason therefor. They may also decline to register a transfer of any share on which the Company has a lien. 41. Shares

are transferable to *bonâ fide* orchardists or fruitgrowers only. No shares in the capital of the Company shall be sold or transferred by any shareholder or trustee in bankruptcy or personal representative of any shareholder unless and until the rights of pre-emption hereafter conferred shall have been exhausted, and in any case the directors shall refuse to register any transfer whatever to any person other than a *bonâ fide* orchardist or fruitgrower. 42. Every shareholder or trustee in bankruptcy who may desire to sell or transfer any shares in the Company, and every personal representative of a deceased shareholder who may desire to sell or transfer any shares of such deceased shareholder, shall give notice in writing to the directors that he desires to make such sale or transfer. Such notice shall constitute the directors his agents for the sale of such shares to any members or member of the Company at a price to be agreed upon between the party giving such notice and the directors, or in case of difference to be determined by the auditor of the Company. 44. No transfer shall be recognized, and the directors shall refuse to register any transfer to any person not a *bonâ fide* orchardist or fruitgrower or to any member which would entitle the transferree to hold more than one hundred shares.

The action was heard by *Crisp* J., who, after hearing evidence, gave judgment for the plaintiff for the sum of £187 10s.

From that judgment the defendant appealed by way of case stated to the Full Court, which, by a majority (*Nicholls* C.J. and *Crisp* J., *Ewing* J. dissenting), dismissed the appeal.

From that decision the defendant now, by special leave, appealed to the High Court.

The material facts are stated in the judgments hereunder.

A. I. Clarke, for the appellant. The provisions of the articles of association of the Company requiring shareholders to sell their fruit through the Company and imposing a forfeiture upon them if they fail to do so, do not impose contractual obligations upon them in respect of which an action will lie. Sec. 16 of the *Companies Act* 1869, which makes the articles of association binding on shareholders and the Company as if there were in them a covenant by each shareholder to conform to the regulations therein, applies only to

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obligations of the shareholders in their capacity as shareholders and not to obligations which affect shareholders as individuals only (*Baring-Gould* v. *Sharpington Combined Pick and Shovel Syndicate* (1); *Allen* v. *Gold Reefs of West Africa Ltd.* (2); *Hickman* v. *Kent or Romney Marsh Sheep-Breeders' Association* (3)).

[ISAACS J. referred to *Quin and Axtens Ltd.* v. *Salmon* (4).]

Even if the provisions in the articles gave rise to contractual obligations binding shareholders, those obligations are an unlawful restraint of trade and are not enforceable. The restrictions imposed on shareholders are not reasonably necessary to protect the Company. They leave shareholders no freedom of action at all in respect of any of their fruit and bind shareholders for an indefinite period, since shareholders cannot cease to be shareholders except at the will of the directors. (See *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (5); *Herbert Morris Ltd.* v. *Saxelby* (6); *McEllistrim* v. *Ballymacelligott Co-operative Agricultural and Dairy Society Ltd.* (7).)

[KNOX C.J. referred to *New Lambton Land and Coal Co.* v. *London Bank of Australia Ltd* (8).]

Although the articles speak of the sum to be paid by a shareholder who does not conform to the conditions as liquidated damages, it is a penalty. It is not a genuine pre-estimate of the possible loss to the Company (*Clydebank Engineering and Shipbuilding Co.* v. *Don José Ramos Yzquierdo y Castaneda* (9)).

[KNOX C.J. referred to *Waterside Workers' Federation of Australia* v. *Stewart* (10).]

Page and *Hodgman*, for the respondent. The business of the Company was such that, even if the shareholders were bound to sell all their fruit through it as long as they remained shareholders and must remain shareholders as long as the directors chose, the restrictions were reasonably necessary for the protection of the Company. The Company could not have an effective existence

(1) (1899) 2 Ch., 80.
(2) (1900) 1 Ch., 656.
(3) (1915) 1 Ch., 881, at pp. 890, 896.
(4) (1909) A.C., 442.
(5) (1894) A.C., 535, at p. 565.
(6) (1916) 1 A.C., 688, at p. 699.
(7) (1919) A.C., 548, at pp. 562, 568, 602.
(8) (1904) 1 C.L.R., 524.
(9) (1905) A.C., 6.
(10) (1919) 27 C.L.R., 119.

without such restrictions, or without their being concurrent with the existence of the Company. [Counsel referred to *Dewes* v. *Fitch* (1); *Attwood* v. *Lamont* (2); *Hamilton* v. *Lethbridge* (3).] The question of whether the restriction is reasonable or not is one of fact, and no reason has been shown for interfering with the decision of the Full Court. The provisions of the articles as to the selling of fruit through the Company is, by virtue of sec. 16 of the *Companies Act* 1869, a contract upon which the Company can sue (*Welton* v. *Saffery* (4); *Hickman* v. *Kent or Romney Marsh Sheep-Breeders' Association* (5); *Walsh* v. *Matamau Co-operative Dairy Co.* (6); *Gore Brothers* v. *Newbury Dairy Co.* (7); *Land Mortgage Bank of Victoria Ltd.* v. *Reid* (8); *Palmer's Company Law*, 11th ed., p. 40). The sum to be paid in the event of a shareholder not selling through the Company is liquidated damages.

A. I. Clark, in reply.

Cur. adv. vult.

May 15.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY AND STARKE JJ. The Port Huon Fruitgrowers' Co-operative Association was incorporated in Tasmania in the year 1918 as a company limited by shares pursuant to the provisions of the *Companies Act* 1869 of Tasmania. The objects for which the Company was established are contained in 24 paragraphs of its memorandum of association, but those numbered (1) and (2) will sufficiently indicate the nature of the Company for the purposes of the case. They are as follows :—" (1) To do everything which may be or be considered conducive to the proper or best sale, handling, packing, treating, grading, marketing and branding of the fruit or part of the fruit belonging to the members of the Association or others, and particularly (*a*) the determining of fruit standards, the registration and ownership of brands, marks, and other distinguishing devices in connection with the fruit industry ;

(1) (1920) 2 Ch. 159, at pp. 167, 180.
(2) (1920) 3 K.B., 571, at p. 589.
(3) (1912) 14 C.L.R., 236, at p. 268.
(4) (1897) A.C., 299, at p. 315.
(5) (1915) 1 Ch., at p. 896.
(6) (1918) 37 N.Z.L.R., 850, at p. 855.
(7) (1919) 38 N.Z.L.R., 205.
(8) (1909) V.L.R., 284 ; 31 A.L.T., 9.

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(*b*) to establish or /and carry on depots, sheds, agencies or markets in Tasmania or elsewhere for the packing, handling, drying, evaporating, selling or otherwise for dealing with fruitgrowers products, including cool stores and freezing works ; (*c*) the transport and sale of fruitgrowers' products in Tasmanian, inter-State, and oversea markets ; (*d*) to do anything and everything which may be or be considered desirable to enable shareholders in the Association to obtain the best prices for their products. (2) To secure, buy and sell, export and otherwise dispose of or deal with the product of the orchardists and fruitgrowers and to make all necessary arrangements for those purposes."

The registered articles of association of the Company contained the usual provisions for the regulation of the Company's affairs and also some special articles which raise the controversy in the present action. The latter are as follows:—[The judgment set forth arts. 7, 8, 9, 10, 13, 20, 39, and 41, and continued :—]

The *Companies Act*, sec. 16, provides that, when registered, the articles of association shall bind the Company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs and administrators to conform to all the regulations contained in such articles, subject to the provisions of the Act.

The defendant, who was an orchardist residing in Tasmania, became the proprietor of five shares of one pound each in the Company about April 1919, and he paid five shillings per share on application and five shillings per share on allotment. The balance was called up in January 1921. The defendant soon afterwards gave notice of a desire to sell and transfer his shares pursuant to art. 42, and a transfer to one Woolley, for a consideration of one shilling, was registered shortly after the institution of the proceedings now about to be stated.

In March 1921 the Company commenced an action against the defendant in the Supreme Court of Tasmania, alleging that the defendant during the year 1920 grew in his orchard and had for sale 750 cases of marketable fruit belonging to him, but that he failed to send the same to the Company for sale and disposal as required by

the articles of association, and in contravention thereof sold and disposed of the same elsewhere; and claiming £187 10s. as liquidated damages under art. 9 at the rate of five shillings a case for the 750 cases alleged to have been dealt with in contravention of the articles. *Crisp* J., who heard the action, gave judgment for the amount claimed, and on appeal to the Supreme Court in Full Court this judgment was, by a majority (*Nicholls* C.J. and *Crisp* J.), affirmed. Special leave to appeal against this judgment was given to the defendant by this Court; and we have now to determine the appeal so brought.

The appellant put forward three contentions: (1) that the contract relied upon by the Company and based upon its articles of association was an unlawful restraint of trade and so unenforceable; (2) that clauses 7, 8, and 9 of the articles of association did not operate as a contract between the Company and the appellant, and therefore imposed no obligation upon the appellant to pay the amount claimed in the action; (3) that the obligation created by art. 9 was to pay a penalty and not liquidated damages.

The principles of law governing the first and third contentions are well settled, and the difficulty is the application of those principles to the facts of the present case. The law as to the first contention is authoritatively stated in *Attorney-General of Australia* v. *Adelaide Steamship Co.* (1) and *McEllistrim* v. *Ballymacelligott &c. Co.* (2), and as to the third contention in *Dunlop Pneumatic Tyre Co.* v. *New Garage and Motor Co.* (3). The law governing the second contention has been the subject of very recent examination and statement by *Astbury* J. in *Hickman* v. *Kent or Romney Marsh Sheep-Breeders' Association* (4), but his opinion shows that the matter is still surrounded with a good deal of difficulty.

With regard to the appellant's first contention, the general principle of law is that "a contract which is in restraint of trade cannot be enforced unless (*a*) it is reasonable as between the parties; (*b*) it is consistent with the interests of the public" (Lord *Birkenhead* L.C. in *McEllistrim's Case* (5)). We propose to deal with the first of these requirements only, as absence of the other was not pressed upon us

(1) (1913) A.C., 781.
(2) (1919) A.C., 548.
(3) (1915) A.C., 79.
(4) (1915) 1 Ch., 881.
(5) (1919) A.C., at p. 562.

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in this case. "Public policy" says Lord *Finlay* in *McEllistrim's Case* (1), quoting *James* V.C., "requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the State of his labour, skill, or talent, by any contract that he enters into." "This is equally applicable," he continues (2), "to the right to sell . . . goods"—or, we may add, to the right to appoint agents for the sale of goods. Again:—"It is for the party who alleges that there are circumstances sufficient to outweigh the policy of the law against restraint of trade to establish this. 'The onus of proving such special circumstances must, of course, rest on the party alleging them.'" "The real test" whether a contract is reasonable between the parties "is," in the language of Lord *Birkenhead* (3), "does the restriction exceed what is reasonably necessary for the protection of the covenantee?" Do the articles "impose upon the appellant a greater degree of restraint than the reasonable protection of the respondents requires"? The facts of the case must therefore be examined.

The articles in the present case do undoubtedly restrict the defendant in carrying on his business or occupation as an orchardist. The circumstances here relied upon as outweighing the policy of the law against restraint of trade are forcibly stated in the judgment of *Crisp* J. The co-operation of fruitgrowers in Tasmania in the marketing of their fruit was necessary if the growers were to receive the benefit of their skill and labour. As matters stood prior to the formation of the Company, growers were at the mercy of middlemen, who had control both of the carriage of the fruit to market and of its sale when it reached there. Apparently the middlemen captured the space on the oversea ships, and the growers were thus compelled to submit to their terms. Again, in the hands of individual growers, the grading and packing of fruit was much neglected and loss was the necessary result. Co-operative selling was also of importance, for it lessened charges and also enabled the Company to distribute amongst the growers as dividends the profits made by it, as an agent for the sale of the fruit. Further, the Company was empowered to buy implements, plant, manures, &c., required by orchardists, and

(1) (1919) A.C., at p. 571. (2) (1919) A.C., at p. 572.
(3) (1919) A.C., at p. 563.

could probably do so more cheaply than individual growers. Apparently, too, a co-operative company could obtain advances from the Government of the Commonwealth which individual growers were unable to obtain.

Now let us consider the character and extent of the particular restriction. All liberty and freedom of action is taken away from the appellant. He is not free to use his own skill and knowledge in relation to his own business. He must pick, pack and deliver his entire crop of merchantable fruit in accordance with the methods, rules and directions of the Company. He cannot direct how or in what market his fruit should be sold: it may be pooled and sold when and where the Company thinks proper, together with the fruit of other growers. He must also submit to any additional or substituted terms or conditions which may be imposed relating to pools or the packing, grading, selling, distributing or marketing of the fruit. He cannot even stipulate with the Company as to its remuneration for services rendered: he must pay such sum as the directors shall determine. Further, it is stipulated that if the appellant sell fruit except in the manner provided by the articles he shall forfeit and pay to the Company as and for liquidated damages five shillings a case for every case sold. The restriction is unlimited in respect of fruit within the ambit of clause 7, namely, the appellant's entire merchantable crop. It may be suggested that the clause is wide enough to cover fruit wherever grown, but the more reasonable view would be to limit its words to "fruit grown" (art. 9) within Tasmania. And we are content to assume this construction without formally deciding the matter.

As regards duration, the restriction subsists while the appellant remains a shareholder in the Company. "If" the appellant "could cease to be a member at his pleasure there would be no ground for complaint" (*McEllistrim's Case*, per Lord *Finlay* (1)); but he cannot. The directors may refuse to register any transfer of shares not fully paid up without assigning any reason therefor (art 39). No doubt this power is fiduciary in its character and cannot be used arbitrarily and capriciously, but the onus would be upon the shareholders to establish an improper exercise of the power (see

(1) (1919) A.C., at p. 568.

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McEllistrim's Case, per Lord *Atkinson* (1)). Moreover, the right of a shareholder to pay up his share in full depends upon the discretion of the directors, and payment in advance of calls can only be made with their sanction (arts. 20 and 23). It is true that the evidence in this case discloses no intention on the part of the Company to delay the calling up of the share capital, and, indeed, in the present case the balance payable in respect of the appellant's shares was called up before the commencement of the action. It is also true that the articles of association of the Company may be altered in the manner provided for in sec. 55 of the *Companies Act* of 1869, and that the directors of the Company are subject to the control of a majority of the shareholders of the Company (see arts. 57-60, 84, 89). But the result is that a shareholder who cannot procure the necessary majority of his fellows willing to alter the articles of association or to control the action of the directors may find himself "precluded for life from disposing of his fruit" except through the Company. And, in testing the validity of the articles in question here, as Lord *Shaw* of Dunfermline said in *McEllistrim's Case* (2), it is necessary "to assume that these rules may be put in force against the appellant to the full extent and rigour of their terms."

Can so extensive a restriction as that above stated be justified as reasonable between the Company and the appellant? The grower was at the mercy of the middlemen mainly because they captured the space on the ships transporting fruit. But, whatever was the position in 1918, when the Company was formed, what interests of the Company required so extensive a protection? Freights were not for ever fixed, and open competition must reduce the power of the middlemen. The stability of the Company was, no doubt, of importance, but the Company was not entitled to shelter itself against all competition for an unlimited period. And, whatever the benefits of co-operative selling and of central control of picking, packing and grading of fruit may be, was it necessary to preclude the appellant from exercising his own skill and talent in the conduct of his own business during an unlimited period and in respect of all

(1) (1919) A.C., at p. 583. (2) (1919) A.C., at p. 588.

fruit grown by the appellant in any part of Tasmania ? The appellant had not sold any business to the Company which required protection against him, nor had he obtained any "inside knowledge or competitive resource by reason of the fact that special confidence . . . had been reposed in him" (*McEllistrim's Case*, per Lord *Birkenhead* (1)). That case makes it clear that the Company was not entitled, under these circumstances, to protection against competition *per se*. In view of the opinions expressed in that case, we think the restriction imposed upon him was in excess of anything that was necessary for the protection of the business of the Company, and therefore constitutes, in our opinion, an unlawful restraint of trade.

This conclusion renders unnecessary any decision on the other points made for the appellant, though the members of the Court have repeatedly considered them. Logically, perhaps, the second contention should be first considered, but it is of far-reaching importance and may well stand for further consideration in a case where it falls for decision.

The appeal ought to be allowed.

ISAACS J. The appellant is an orchardist in Huonville, Tasmania, and was in 1920 a shareholder in the respondent Company. He was sued by the respondent Company for £187 10s. damages for selling, in the year 1920, 750 cases of apples grown by him in his orchard, without the intervention of the Company as his selling agent on the terms required by the respondent Company's articles. The Supreme Court of Tasmania, by a majority, held him liable, and he has appealed to this Court.

The three grounds of appeal are (1) that the articles of association of the respondent Company which were sued upon are illegal and void as involving an unreasonable restraint of trade ; (2) that the respondent's articles of association which are so sued upon do not constitute a contract between the appellant and the respondent a breach of which affords the respondent a cause of action ; (3) that the ninth article stipulated for a penalty. All the grounds are very important both to the appellant and to other shareholders who are

(1) (1919) A.C., at p. 564.

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in the same position; and, in view of the fact that companies very similar to the respondent in various branches of productive industry have appeared not only in Tasmania but elsewhere in the Commonwealth, the present case is probably of far-reaching interest.

1. The principles controlling the question of contracts in restraint of trade have been so clearly expounded by tribunals of the highest authority, that from the moment the facts of the present case were made clear, I could not entertain the least doubt that this appeal ought to succeed.

The Company calls itself "The Port Huon Fruitgrowers' Co-operative Association Limited," but it is incorporated not under an industrial and provident Act but under the ordinary trading companies Act (*Companies Act* 1869), and its memorandum and articles must be considered accordingly. The principal facts in the case consist, first, of the relation created between the Company and its shareholders by the memorandum and articles, and, next, the nature of the businesses carried on by the Company on the one hand and the appellant on the other.

The Company's business as carried on is that authorized by the first and second objects set out in clause 3 of the memorandum. The first object is to do *everything* which may be or may be considered conducive to the proper or best sale, handling, packing, treating, grading, marketing and branding of *the fruit*, or *part of the fruit*, belonging to members of the Association *or others*, and, particularly, to establish or/and carry on depots, sheds, agencies or markets in *Tasmania or elsewhere* for the packing, handling, drying, evaporating, selling, or otherwise for dealing with fruitgrowers' products, including cool stores and freezing works; the transport and sale of fruitgrowers' products in *Tasmania, inter-State,* and oversea markets; to do *anything and everything* which may be or be considered desirable to enable shareholders in the Association to obtain the best prices for their products. It is to be observed, before going further, that the memorandum draws no distinction between the orchards of its own Association and those of "others." Clause 5 of the memorandum, from 14th May 1918 (the date of the incorporation) until 20th October 1919, was as follows: "The capital of the Company is £2,000 in 2,000 shares of £1 each

with power to issue all or any of the shares in the capital original or increased *with or subject to any special conditions as to* " (1) " *dealing with the Company*," (2) " *transferring or otherwise dealing with the said shares* or the ownership thereof, such shares to be held by *or transferable to orchardists or fruitgrowers only*." On 20th October 1919 a special resolution was confirmed increasing the capital to £50,000 on terms to be referred to later.

The regulations of importance are arts. 7, 8, 9, 10, 13, 14, 20, 22, 23, 32, 39, 41, 42 and 44. They are very lengthy, and, except for the quotation I am about to make, I incorporate those regulations by reference only. The heading of the group arts. 7 to 10 inclusive, is this :—" Undertaking by members to put all fruit through Company. Form of Implied Agreement, &c." Art. 7 begins as follows : " Each shareholder shall be deemed to have entered into a contract with the Company and given an undertaking to the Company that while he remains a shareholder he will each year send to the Company to be packed, graded and sold in such manner as the directors may from time to time decide upon his entire crop of merchantable fruit upon the terms and conditions following, viz. :—" Then follows a series of provisions, which purport to create an express obligation on the member to send, but which contains no express and, possibly, no implied obligation on the Company to receive, the member's fruit. The nature of the Company's business is therefore merely that of an agency company. The action it has brought against the present appellant is an assertion of its right to prevent any shareholders under the fixed liability of five shillings a case for fruit in apple cases, or one penny a lb. for other fruit, from selling or disposing of any fruit he grows to any person except through the Company as intermediary and on the terms permitted by art. 7. It is also to be observed that its agency business is not confined by the memorandum to the products of shareholders, but extends to fruit belonging to " others "—so that the co-operative character of the Company is far from perfect. It is necessary to consider what is demanded of a shareholder in the position of the appellant if the Company is entitled to succeed. A fruit-grower, whether his orchard be large or small, and as soon as in any season he possesses marketable fruit, is entirely under the

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control of the directors of the Company. They may dictate to him and may change as often as they please the method and manner of picking his fruit; until they permit him he must not pick it, when they direct him to pick it he is compelled to pick it, and as they tell him so must it be done. When picked, he is under obligation to send it free of expense to their packing shed or, if they think fit, to more than one packing shed, and must send it at any time they are pleased to notify him. He is not to be paid for it at once; they are to examine and grade it, and pool it with other fruit of other growers—not necessarily all shareholders; and if his fruit should be sold and if the purchaser pays for it and the money reaches the hands of the Company, then the sender of the fruit gets his *pro ratâ* share of that particular pool. In the first place, the sale may take place anywhere in the world, and, from the proceeds of the pool, charges for packing, marketing, storing, advertising, handling, distributing or otherwise dealing with the fruit may be "*such sum . . . as the directors shall from time to time determine*" (art. 7, par. 4). Consequently, though the Company "undertakes to handle and market the shareholders' fruit with due diligence"—whatever that connotes—one thing is clear, namely, that, whatever gross price is received and whatever expenses are actually incurred by the Company, the directors are free to insist on "any sum" they determine by way of charges to deduct from the proceeds of the fruit. There is certainly a provision for uniformity of charge (art. 7, par. 5), but non-discrimination is not the same as reasonableness. The grower is not entitled to any "advance" in respect of his fruit: he is only entitled to be paid "such advances from time to time as sales warrant"—a very indefinite right. And by the 7th sub-clause of art. 7 the directors are entitled, *without* any new regulation or article but merely at their own discretion, to change these terms and conditions either "in addition or in substitution," the only limitation being that the changes "seem advisable" to the directors and "are duly notified" to the shareholders. If art. 7 is a "contract" in the necessary sense, it is a contract which *in gremio* is variable at the will of one of the contracting parties. The 8th article is very exigent. It begins thus: "Notwithstanding anything herein contained"—which means "notwithstanding any

contractual right which any shareholder may have by reason of the provisions in his favour in art. 7 "—the shareholder enters into an additional and controlling obligation to be bound by "all rules and regulations made," with reference to fruit after reaching the Company, by "the directors"—not by the Company. Then comes art. 9, which imposes a fixed liability of five shillings a case (I omit the soft fruit provisions) if the shareholder "sells or disposes of" the fruit "except in the manner herein provided." These are very wide words, but whether their extreme limits are reached in this case, I have not to consider. It is stated that the liability is "liquidated damages," but whether it is so or not, is a matter of law, dependent on the circumstances. One circumstance is that art. 10 empowers the directors to relieve, not if no damages have ensued, but if "they consider any shareholder has a reasonable excuse." It strongly resembles a clause of exculpation in a statute imposing penalties for forbidden acts. The nature of the evidence relevant to the point will be mentioned later.

Now, how long is this liability to continue? How long must the shareholder continue to surrender his liberty of action, to act, not as a free man in relation to his own property, but to obey by positive conduct the unquestionable directions of the directors of the Company? If when circumstances alter he can find a readier or better means of disposing of his produce, if on cessation of the war which was being waged when the Company was formed shipping facilities increased or internal manufactures expanded, if he can find a quicker market for his special product or quicker returns in another State in the Commonwealth, or if he can best serve his own interests and those of his State or the Commonwealth in engaging in manufactures himself and converting his primary productions into secondary products, if when opportunity offers he is at liberty to do this, the matter from the standpoint of restraint of trade is clear. If, however, he is not only bound but caged, and if he finds that extension of production means extension of obligation and diminution of chance of escape, then, in my opinion, it is not only unreasonable from the private standpoint, but also, and notwithstanding the admission of the appellant that he could not argue it, is detrimental to the public interests. *I am of opinion as a matter of law that it is against the*

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public interest. The primary productions of Australia play so great a part in the larger welfare of its people and in the process of development of the Continent that a restraint of the kind existing here, if inescapable by any reasonable act of the party restrained, is *primâ facie* a serious public injury. How can a person in the position of the appellant escape? He has escaped, but since the events material to this action, and only at the will of the respondent. This case, however, must be judged of by the state of things as they formerly existed, and as they still exist, with respect to other shareholders in this and similar companies.

Art. 7, it is remembered, says, of course, "while he remains a shareholder." But, if the Company can keep him as a shareholder against his will, that—in spite of the multiplicity of words employed to say it—means simply "as long as the Company wishes to keep the shareholder bound." Art. 39 contains two important provisions. The first is that "the directors may decline to register any transfer of shares not fully paid up without assigning any reason therefor." The second is that "they may also decline to register a transfer of any share on which the Company has a lien." Now this art. 39 is a very ingenious link in a cleverly devised chain for preventing the escape of a shareholder whom the Company wishes to keep. It contains sufficient elasticity to allow one shareholder to go and to retain another at the will of the directors. The liability to uncalled capital is not a debt (*Whittaker* v. *Kershaw* (1); *In re Russian Spratts Patent Ltd.*; *Johnson* v. *Russian Spratts Patent Ltd.* (2); *Alexander* v. *Automatic Telephone Co.* (3)), and the shareholder cannot force the Company to accept the unpaid capital if the Company is unwilling to accept it. The relation is not that of simple creditor and debtor with the day of payment arrived. A tender would be ineffectual on ordinary principles. Payments in advance of calls could, by art. 23, be made only with the sanction of the directors. And, even if so made, that is not equivalent to actual discharge of the liability on the shares. The reference to "interest" is sufficient to show that. But there is abundance of well-known authority, of which *In re Pyle Works* (4) is a type, to

(1) (1890) 45 Ch. D., 320.
(2) (1898) 2 Ch., 149.
(3) (1899) 2 Ch., 302, at p. 306.
(4) (1890) 44 Ch. D., 534, at p. 586.

establish that advances of that kind are applied when and as the liability to contribute becomes by appropriate steps a debt payable to the Company. As, however, calls are at the discretion of the directors (art. 20), the shareholder's retention is equally at their discretion; and, as they are bound to exercise their discretion for the benefit of the Company as opposed to that of any individual shareholder, it follows that he remains bound indefinitely, whatever the consequence to him. The second limb of art. 39 is equally cogent. Had the Company a "lien" on the appellant's shares? Art. 32 prescribes that the Company shall have a first and paramount lien on all shares registered, not only for the debts and liabilities of a member, but also for his "engagements." Now, what is an engagement? Does it mean *quâ* member? Then, if art. 7 is an "engagement" *quâ* member, a lien exists in respect of it. If not, the whole action fails. "Engagement" is a term appropriate to the relations of a member of a truly co-operative society and is constantly used, and is a statutory expression in industrial and provident companies Acts (see, for instance, the English Act of 1893 (56 & 57 Vict. c. 39), sec. 54 (3)). There is no doubt in my mind that art. 32 is one of the closely woven links designed to hold the shareholder. It is the duty of directors to preserve a "lien" (*Bank of Africa* v. *Salisbury Gold Mining Co.* (1)); and, the more important it might become to the shareholder on account of the magnitude of his output to get free, the more important it might be to the Company to retain him, and so the more it would be the duty of the directors not to consent to a transfer. If, then, there be this onerous responsibility, without any opportunity of escape so long as the Company may choose, what is the legal result? The test is whether the restraint on the appellant was reasonably necessary for the protection of the Company, having regard to the interests of both parties? What was it the Company desired to guard against? The appellant had not sold the Company any business or secret process or other property which his sales to others would or might encroach upon. He had not entered into any similar agreement with any fellow shareholder. He had not become possessed of confidential business secrets which his independence might endanger. All he had done was to become a shareholder in

(1) (1892) A.C., 281.

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the Company which carried on a certain agency business, and which, if he once ceased to be a shareholder, he might compete with or enable others to compete with, and, if he legitimately could, directly or indirectly overcome in business. All the Company had by way of interest to protect was the corporation's agency business.

It is extremely important both for this and the second ground of appeal—contractual liability—to bear in mind that the Company's business was merely *agency*. The Company was not a purchaser of the fruit; it carefully guarded against any liability as purchaser; it owned nothing except the agency business created for the first time by its own incorporation and acting under its own powers. Individual shareholders had businesses of their own, just as the "others" mentioned in clause 3 (1) of the memorandum would have; but the Company had no legal right to guard those separate individual businesses from each other, for they were as distinct from the Company's business as from each other. Clearly then, the Company by art. 7 is only endeavouring to exclude competition with its own business by imposing an obligation on the shareholder not to compete himself or sell to another who does compete. The question of law for us is whether such an obligation can be sustained, that is, assuming it were set out in a formal contract between the Company and the shareholder as an individual.

In *Bacchus Marsh Concentrated Milk Co.* v. *Joseph Nathan & Co.* (1), decided in 1919, I formulated certain propositions of law relevant to that case which appeared to me to be warranted by the authorities up to that time. Of those propositions, the first four are relevant here, and are supported by the later authorities. They are:—"(1) Freedom of trade cannot, without sufficient legal justification, be restricted by agreement simply on the principle of freedom of contract (*Trego* v. *Hunt* (2); *Saxelby's Case* (3)). (2) No person has an abstract right to be protected against competition *per se* in his trade or business (*Trego* v. *Hunt* (4); *Saxelby's Case* (5)). (3) If there is something which he is entitled to be protected against, then a reasonable protection for that purpose contracted for will be upheld as far as the personal interests of the parties themselves are concerned,

(1) (1919) 26 C.L.R., 410, at p. 440.
(2) (1896) A.C., 7, at p. 24.
(3) (1916) 1 A.C., 688.
(4) (1896) A.C., 7.
(5) (1916) 1 A.C., at p. 700.

and subject to *public* interests (*Saxelby's Case* (1)). (4) Reasonableness is a question of law to be determined by the Court on the special circumstances of the case (*Saxelby's Case* (2))." All these propositions have since been confirmed by the House of Lords in two cases (*McEllistrim's Case* (3) and *Fitch* v. *Dewes* (4)). The first proposition is necessarily involved in both the later cases; the second was the basis of *McEllistrim's Case*. The third was the foundation of *Fitch* v. *Dewes*; and incidentally the learned Lord Chancellor (Lord *Birkenhead*) in that case (5) shows that his statement in *McEllistrim's Case* (6) with reference to the "protection of the covenantee" was not intended to be exhaustive, though quite sufficient for that case. Indeed, earlier on the same page (7) the learned Lord Chancellor speaks of "the reasonable interests of the contracting parties." And so, if nothing further had been said in *Fitch* v. *Dewes*, I should still have been unable to accede to the argument before us that in this respect the "interests of the covenantee" alone were to be considered. But in fact in *Fitch* v. *Dewes* (5) Lord *Birkenhead* does really make the matter plain. He says: "It might perhaps be more properly stated, as it has sometimes been with the highest authority stated, *does it exceed what is necessary for the protection of both the parties?*" The fourth proposition is illustrated by both the later cases.

It appears to me that *McEllistrim's Case* (3) is in itself a complete authority in favour of allowing this appeal. But I cannot part with this branch of the subject without observing that *McEllistrim's Case* and *Fitch* v. *Dewes* (4) are only the latest instances of the development of the law in relation to restraint of trade on very great lines, humanitarian lines (which mark the distinction between property and personal servitude). The whole question of restraint of trade is founded on public policy; and, therefore, while the principle of the common law remains fixed unless and until altered by legislation, the application of the principle necessarily alters so as to conform itself to the movement and sentiment of progressive society. The principle I endeavoured, in the *Bacchus Marsh Case* (8), to state in

(1) (1916) 1 A.C., at pp. 700-701.
(2) (1916) 1 A.C., at p. 707.
(3) (1919) A.C., 548.
(4) (1921) 2 A.C., 158.
(5) (1921) 2 A.C., at p. 163.
(6) (1919) A.C., at p. 563.
(7) (1919) A.C., at p. 563, ll. 9-10.
(8) (1919) 26 C.L.R., at p. 441.

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terms I now repeat:—"True freedom of trade is not to be restricted, but . . . a provision which, taken by itself, would amount to such restriction may, when considered in conjunction with and as qualified by the surrounding circumstances, prove to be not really a restriction but merely part of a larger transaction which, regarded as a whole, does not restrict, but may even assist, freedom of trade. To employ a simile, expenditure is *per se* a loss, but expenditure which secures a greater benefit is not." Now, I believe that principle is deducible from all the more recent judgments of the House of Lords. As I read those judgments, the learned Lords have applied the single principle to the varied circumstances presented by the cases. They have recognized that there has been developed a marked distinction in the public mind between the rights and obligations of a man with respect to property which he buys or sells, on the one hand, and those with respect to the control one man should have over the personal liberty of another man, on the other hand. The same principle applied to the one case frequently gives vastly different results from its application to the other. The speech of Lord *Shaw* in *Mason* v. *Provident Clothing and Supply Co.* (1) most distinctly marked the judicial recognition of the essential distinction between the two classes of cases. And yet the learned Lord showed how the fundamental principle laid down nearly twenty years before by Lord *Macnaghten* in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (2), when properly understood, was still the test. Lord *Haldane* (3) indicated his strong perception of the distinction referred to. In *Saxelby's Case* (4) we find the distinction permeating the case and emphasized in the judgments. In *McEllistrim's Case* (5) it is again on the surface, and that case seems to have been considered as partaking of a nature intermediate between merely selling property and contracting for services, namely, liberty to sell his own goods (see per Lord *Birkenhead* (6), Lord *Finlay* (7), Lord *Atkinson* (8), and Lord *Shaw* (9)).

The present case, by reason of the obligations to conform to the

(1) (1913) A.C., 724, at pp. 739 *et seqq.*
(2) (1894) A.C., 535.
(3) (1913) A.C., at p. 734.
(4) (1916) 1 A.C., 688.
(5) (1919) A.C., 548.
(6) (1919) A.C., at p. 564.
(7) (1919) A.C., at p. 572.
(8) (1919) A.C., at p. 573.
(9) (1919) A.C., at p. 590.

positive directions as to picking, delivery, &c., is even stronger than *McEllistrim's Case* (1) in relation to personal service. I would refer generally to the very clear judgment of *Younger* L.J. in *Attwood* v. *Lamont* (2), in which the learned Lord Justice traces with great detail the later development in applying the doctrine of restraint of trade to diverse circumstances. In *Fitch* v. *Dewes* (3) the House of Lords applied the principle to the protection of property in a manner which recognized the essential distinction alluded to. These considerations entirely justified the position that not merely is the protection to the covenantee to be regarded, but also, according to the nature of the subject matter, must the effect on the covenantor be taken into consideration.

The result is, in my opinion, that the contract in art. 7, so far as it is a contract between the Company and the appellant, is void, and that he and the other shareholders who, according to the evidence of Mr. Calvert (the managing director of the Company), have made default are free from the liability to pay five shillings a case or one penny a lb. and from all other liabilities which art. 7 purports to impose.

2. It was further argued, and I take up the third ground of appeal at this point, that the claim was for a penalty. Art. 7 calls it liquidated damages ; the manager of the Company in his letter of 18th August 1920 said : "The *penal* clause is five shillings per case for every case so sold." The question is : What is it in reality ? It cannot be a pre-estimate of damage, as suggested, for several reasons. In the first place, the appellant could not have pre-estimated it because he did not become a shareholder till April 1919, nearly a year after the articles were printed. Mr. Calvert says that on the formation of the rules five shillings per case was fixed for certain reasons by those who framed the rules ; but their reasons cannot be imported into the intention of a person applying for shares a year afterwards. His intention must as a matter of law be gathered as a matter of fact from the materials before him. And looking at those materials, why should the five shillings per case be regarded as anything but penal, as the manager of the Company described it ? The liability is irrespective of any opportunity for sale or for shipment, and irrespective of whether

(1) (1919) A.C., 548. (2) (1920) 3 K.B., at p. 580.
(3) (1921) 2 A.C., 158.

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the apples are to be made into cider in Tasmania or exported to England or sent to Western Australia. It is irrespective of the cost of labour or actual expenses, and irrespective of whether the failure takes place in 1918, the war year, or twenty years after. How could it be a genuine pre-estimate of damage? and, as already stated, the next succeeding clause—the exculpation clause—was apparently not intended to forgive actual pre-estimated damages. Why should it, as a business proposition? If the figures given by *Ewing* J. are correct, the question of whether it is a penalty or not presents no possible doubt.

I regard the five shillings a case as a penalty; and, if there were nothing more in the case, a new trial should be ordered.

3. On the second substantive ground of appeal, though it is of great importance, it becomes unnecessary in the circumstances to give any final opinion. The statement of so eminent an authority on this branch of the law as Lord *Wrenbury* is, however, sufficient to indicate the substantial nature of the contention. If art. 9 is binding as a contract, then, in the concluding words of sec. 16 of the Tasmanian Act (33 Vict. No. 22), the sum of five shillings per case and one penny per lb. are "deemed to be a debt due from such member to the Company in the nature of a specialty debt." There could not, of course, in that case be any question of penalty or liquidated damages, notwithstanding the very words of art. 9. In *Bisgood* v. *Henderson's Transvaal Estates Ltd.* (1) Lord *Wrenbury* (then *Buckley* L.J.) said: "The purpose of the memorandum and articles is to define the position of the shareholder *as shareholder*, not to bind him in his *capacity as an individual.*" And the learned Lord Justice added:—"The definition of his position as shareholder must be a definition consistent with the statutes. A perusal of the opinions of the learned Lords in *Welton* v. *Saffery* (2), and particularly those of Lord *Halsbury*, Lord *Macnaghten* and Lord *Davey*, will show that these statements are well founded."

Before going to *Welton* v. *Saffery* (2) it is profitable to refer to *Hickman* v. *Kent or Romney Marsh Sheep-Breeders' Association* (3), relied on for the Company respondent. That case is a very cogent

(1) (1908) 1 Ch., 743, at p. 759. (2) (1897) A.C., 299.
(3) (1915) 1 Ch., 881.

authority against the Company. It must be remembered that the objection taken here is not that there is not, in a proper regulation, an enforceable and even actionable contract as between the Company and the shareholder. Such a contention would be utterly unsustainable. The question is whether such a contract as is relied on in this case is one that can be made by a regulation of this Company. If made in the ordinary way by means of a real contract, then, unless it were struck by the first ground of objection, the appellant would, of course, be bound, because he had actually contracted. But in that case, his contract would be as much as "individual" and "outsider" as a like contract of one of the "others" mentioned in the memorandum. The quotation from *Bisgood's Case* (1) draws the distinction, not between (1) contract of company with member and (2) no contract of company with member, but between (1) contract of company with member *as member* and (2) contract of company with member *as outsider*. *Hickman's Case* (2) was concerned only with the issue of contract or no contract between company and member. No question was involved in the argument on the decision as to whether, conceding a contract, it went beyond the ambit of membership. Lord *Herschell's* words quoted from *Welton* v. *Saffery* (3) contained this passage: "It is quite true that the articles constitute a contract between each member and the company" &c., and for this purpose, the passage already mentioned, in *Bisgood's Case* (1) was quoted. The learned Judge, *Astbury* J., for himself said (4) in his second proposition "no right merely purporting to be given by an article to a person, whether a member or not, in a capacity other than that of a member, as, for instance, as solicitor, promoter, director, can be enforced against the company." Again (5), the learned Judge observed that the cases of the type of *Eley* v. *Positive Government Security Life Assurance Co.* (6) "ought to be regarded as only dealing with and applying to articles purporting, *first*, to contain an agreement with the company and a third person, or, *secondly*, to define the *rights* of a shareholder in some capacity other than that of a member of the company." His Lordship held that an

(1) (1908) 1 Ch., at p. 759.
(2) (1915) 1 Ch., 881.
(3) (1897) A.C., at p. 315.
(4) (1915) 1 Ch., at p. 900.
(5) (1915) 1 Ch., at p. 903.
(6) (1876) 1 Ex. D., 20, 88.

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agreement to arbitrate with reference to membership rights was itself a membership regulation, and by virtue of the *Companies Act* was a binding contract sufficient to satisfy the provisions of the *Arbitration Act*. Reverting for a moment to *Welton* v. *Saffery* (1), Lord *Halsbury* L.C., in two places on the one page, is most insistent on the distinction between the liability of a person "as shareholder" and "as individual."

It is trite law that regulations within the ambit of the power are binding if *bonâ fide* made in the belief that they are for the interest of the company (*McEllistrim's Case* (2)), the latest case in the Court of Appeal being *Sidebottom* v. *Kershaw, Leese & Co.* (3). If arts. 7 to 10 are within that ambit, there is nothing to prevent the terms being altered to much more severe restrictions on the individual interests of the shareholder, in the guise of a "deemed" undertaking. "Deemed" indicates a "fiction" (see, for instance, *Bell* v. *Master in Equity* (4); *Ex parte Walton* (5); *The Queen* v. *Norfolk County Council* (6)). No doubt such a word used in a contract would be binding on the man who used it, because it is a real contract. But in a document which is not a contract in the same sense, which is only indirectly a contract, and only so by force of other provisions which empower a majority to impose obligations, the case is different. We must then recognize that "deemed" means to say that although there is no true contract in the ordinary sense, which imports the actual consent of all concerned, this regulation shall, and as so changed from time to time and notwithstanding the absence of consent and even against the will of the minority, be regarded as if they actually consented and so bargained. But *McEllistrim's Case* (2) also shows that even the arbitration clause does not apply where the shareholder complains that a regulation is *ultra vires*. And it is hard to understand how under the Tasmanian *Companies Act* 1869, which by sec. 14 directs that the memorandum of association may, in the case of a company limited by shares, be accompanied when registered by articles prescribing such "*regulations for the company*" as the subscribers deem expedient, the 7th regulation

(1) (1897) A.C., at p. 305.
(2) (1919) A.C., 548.
(3) (1920) 1 Ch., 154.
(4) (1877) 2 App. Cas., 560, at p. 565.
(5) (1881) 17 Ch. D., 746, at p. 756.
(6) (1891) 60 L.J. Q.B., 379, at p. 380.

can in this case find a legal place. Having regard to the ambit of the business agency for marketing fruit, it is difficult to see how art. 7, in all its far-reaching ramifications, can be said to be confined to a "regulation for the company." And it is only such a "regulation" that can constitute a contract between the company and member as *such*. I do not overlook the fact that in *McEllistrim's Case* a very careful argument on this point was addressed to the House of Lords, and that no direct reference was made to it by any of their Lordships so far as the report of the case discloses. But that case arose under the *Industrial and Provident Societies Act* 1893, and not only is there an absence of the full statement of the business of the society, but there is one vital distinction between the two cases. Under the *Companies Act*, the memorandum is the charter, and the articles are subsidiary, and, for the "regulation of the company," the later provisions as to binding company and members, of course, assume no excess of power. And, as Lord *Wrenbury* points out in *Bisgood's Case* (1), even the purposes of the memorandum are limited. In the case of a co-operative society, under the *Industrial and Provident Societies Act* 1893 (sec. 22), the *Rules* constitute the charter, and form the contract of the members with relation to the carrying on of whatever business they select, and whatever personal obligations they select as incidental to the welfare and maintenance of the business are at least as valid as if they were set out in the memorandum of association under the Trading Companies Act. And possibly the nature of the Act itself, and the subject matter in relation to it, give a larger scope for mutual obligation. The words of Lord *Macnaghten* in *Auld* v. *Glasgow Working Men's Building Society* (2) regarding a building society, that "in societies of this sort, the rules form the contract between the members and the society," are equally true of a society like *McEllistrim's*; but not true of the articles alone of a company like the present. (See also *Smith* v. *Galloway* (3).) Here, as already shown, the Company is merely an agency company, and, though the only shareholders are to be orchardists and fruitgrowers (memorandum and arts. 13 and 44), yet the business of the Company

(1) (1908) 1 Ch., 743. (2) (1887) 12 App. Cas., 197, at p. 205.
(3) (1898) 1 Q.B., 71, at p. 77.

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is selling the fruit of individuals, and, when shareholders and "others" employ the Company to sell their fruit, they stand in the capacity of principals, of clients, of independent contractors, and as such employers, on the same footing. The right to charge for the service is not a charge against him *quâ* member, but *quâ* employer. The right to receive the proceeds is not *quâ* member, but *quâ* employer. The fruitgrower cannot stand on both sides of the line at once, and be individually both agent and principal. The positions are, in a sense, antagonistic. And going one step further back and remembering that buying fruit is no part of the Company's business, it is difficult to see why art. 7 is not mere coercion on a person who is a shareholder to compel him as an individual to bring his produce as and when, and in such form as, the directors dictate, to the Company as a compulsory agent.

As I have said, it is not necessary to give any final decision on this branch of the case, and I am open to reconsider the point; but I have given, with some elaboration, my reasons why I am not prepared, as at present advised, to accede to the argument of the respondent on the point.

Appeal allowed. Judgment appealed from set aside. Judgment for the defendant with costs. Respondent to pay costs of appeals to the Full Court of the Supreme Court and to the High Court.

Solicitors for the appellant, *Finlay, Watchorn & Clark.*
Solicitors for the respondent, *Page, Hodgman & Seager.*

B. L.