[HIGH COURT OF AUSTRALIA.]

J. KITCHEN & SONS PTY. LTD. . . . APPELLANT;
PLAINTIFF,

AND

STEWART'S CASH AND CARRY STORES . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *July* 31; *Aug.* 3.

SYDNEY, *Aug.* 26.

Latham C.J., Rich and McTiernan JJ.

Contract—Offer—Acceptance—Price-maintenance agreement—Indefinite duration—Right of party to withdraw offer or determine contract—Restraint of trade—"Commercial trust"—Directions of a commercial trust or of an association—The Profiteering Prevention Act of 1920 (*Q.*) (10 *Geo. V. No.* 33), *secs.* 3*, 18*.

A retailer in Queensland made an offer to a manufacturing company there in the following terms: "I/We offer to take from you supplies of the Oxygen Washing Compound known as 'PERSIL' at your current prices upon your usual business terms upon the following conditions, that is to say: In the event of your acceptance of my/our offer I/We would undertake not to sell any 'PERSIL' at less than 6d. a packet whether I obtain 'PERSIL' direct from you or from any other source, and I/We would not resell any 'PERSIL' to a Retail Trader unless such Trader had first agreed with you to conditions similar to those of this offer. In the event of such acceptance you would not during the currency of our arrangement supply 'PERSIL' to any Retailer

* *The Profiteering Prevention Act of* 1920 (Q.) provides as follows:—Sec. 3:—"In this Act, unless the context otherwise indicates, the following terms have the meanings respectively set against them, that is to say:— . . . 'Association' includes the union of any number of persons by or under any agreement or trust, whether temporary or permanent, and whether legally valid or not, and whether including any scheme of organisation or common management or control or not; 'Commercial trust'—Any association or combination (whether incorporated or not) of any number of persons established whether before or after the passing of this Act in Queensland or elsewhere, which carries on business in or acts in Queensland, and has as its object or purpose or as one of its objects or purposes—(*a*) Controlling, determining, or influencing the supply or demand or price of any commodity in Queensland or any part thereof; or (*b*) Creating or maintaining in Queensland or any part thereof a monopoly, whether complete or partial, in the supply or demand of any commodity; . . . 'Directions,' used with respect

except upon terms similar to those embodied in this offer." The manufacturing company supplied Persil to the retailer on the terms set out in the offer. The retailer sold Persil at less than sixpence a packet, whereupon the manufacturing company brought an action for an injunction.

Held, by *Latham* C.J. and *McTiernan* J. (*Rich* J. dissenting), that the offer should not be regarded as an offer which remained open for acceptance from time to time, resulting in a new contract on each occasion when the retailer gave an order to the manufacturing company for Persil which the manufacturing company supplied but capable of being withdrawn by the retailer at any time. Upon the acceptance of the offer by the supply of Persil by the manufacturing company to the retailer a contract came into operation which was indefinite in duration. Neither party had a right, independently of breach by the other party, to determine this contract. The obligation of the retailer thereunder not to sell Persil except under the conditions set out in the offer continued notwithstanding that the only supplies of Persil held by the retailer were obtained from a source other than the manufacturing company.

Crediton Gas Company v. *Crediton Urban District Council*, (1928) Ch. 447, distinguished.

Held, further, by *Latham* C.J. and *McTiernan* J., that the contract was not void as being in unreasonable restraint of trade.

Palmolive Company (*of England*) v. *Freedman*, (1928) Ch. 264, applied.

Three thousand and fifty traders in Queensland entered into similar contracts with the manufacturing company.

Held, by *Latham* C.J. and *McTiernan* J., that neither the manufacturing company itself, nor the manufacturing company together with the retailer, nor the manufacturing company together with all the traders who had entered into similar contracts, constituted a commercial trust within the meaning of *The Profiteering Prevention Act of* 1920 (Q.). *Garage and Service Stations Association of Queensland* v. *Stellmach*, (1940) Q.S.R. 60, distinguished. *Semble*, that a corporation may by itself be a commercial trust under that Act, but it is not to be inferred from the fact that the corporation by its trading influences or controls or determines supply, demand or price that it is one of the objects of the corporation to do so. An agreement voluntarily made not to sell at

to any association or commercial trust —includes determinations, directions, orders, regulations, rules, suggestions, and requests; . . ." Sec. 18: "(1) Every person commits an offence who either as principal or agent sells or supplies or offers for sale or supply any commodity—(*a*) If the price of such commodity has been in any manner directly or indirectly determined, controlled, or influenced by any commercial trust of which that person or his principal (if any) is or has been a member; or (*b*) In obedience to or in consequence of or in conformity with any directions of a commercial trust or of an association, whether he or his principal (if any) is a member of that trust or not. (2) If the person committing such offence is a commercial trust, then every person who is then a member of that trust is also deemed to have committed the offence. Moreover, if in any such case the commercial trust is a corporation, the liability of the trust does not exclude or affect the liability of its members."

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a price less than that fixed by the agreement does not fall within the description of "any directions of a commercial trust or of an association" as defined by the Act.

Per Rich J.: *Semble*, what is aimed at by sec. 18 of the *Profiteering Prevention Act* is the case of sellers of a commodity combining to regulate the prices at which they will sell it, and not the case of an individual seller who sells his own commodity at a price determined by himself alone and who makes special stipulations with buyers as to what are to be maximum or minimum prices upon resales.

Decision of the Supreme Court of Queensland: *J. Kitchen & Sons Pty. Ltd.* v. *Stewart's Cash and Carry Stores*, (1942) Q.S.R. 92, reversed.

APPEAL from the Supreme Court of Queensland.

An action was brought in the Supreme Court of Queensland by J. Kitchen & Sons Pty. Ltd. against Stewart's Cash and Carry Stores claiming an injunction restraining the defendants their agents and servants from selling or offering for sale or advertising for sale the oxygen washing compound known as "Persil" at a price less than sixpence per packet in breach of an agreement in writing made by and between the plaintiff company and the defendant firm and contained in a document entitled "Retailers' Offer" and dated 15th June 1932.

The plaintiff was the sole manufacturer in Australia of "Persil" which for the purpose of retail trade was packed in packets which contained eight ounces. The defendant was a duly registered firm, the members of the firm being Donald Stewart, Jack Stewart, Samuel Edgar Hamill, Harold Stewart and Daniel Stewart. The firm carried on business at various places in Brisbane as cash and carry storekeepers and dealt in goods usually sold by grocers.

In the year 1932 Donald Stewart signed a retailers' offer in the following form:—

"PERSIL—RETAILERS' OFFER.

To—Messrs. J. Kitchen & Sons Pty. Ltd.

Dear Sirs,—I/We offer to take from you supplies of the Oxygen Washing Compound known as 'PERSIL' at your current prices upon your usual business terms upon the following conditions, that is to say:

In the event of your acceptance of my/our offer I/We would undertake not to sell any 'PERSIL' at less than 6d. a packet whether I obtain 'PERSIL' direct from you or from any other source, and I/We would not resell any 'PERSIL' to a Retail Trader unless such Trader had first agreed with you to conditions similar to those of this offer.

In the event of such acceptance you would not during the currency of our arrangement supply 'PERSIL' to any retailer except upon terms similar to those embodied in this offer.

Dated this 15th day of June 1932.

Signature—D. Stewart.

Address—Railway Terrace Wooloowin.

Witness—M. Molloy."

Three thousand and fifty traders in Queensland signed offers in the same terms.

From 15th June 1932 up till March 1936 Donald Stewart ordered quantities of Persil, which orders the plaintiff accepted and made supplies available. After March 1936 the firm of Stewart's Cash and Carry Stores carried on the business previously carried on by Donald Stewart. No agreement in writing in the terms of the agreement above set out was entered into between the plaintiff company and the firm, but the firm from time to time offered to take from the plaintiff company supplies of Persil under and in pursuance of the agreement above set out, and the plaintiff accepted the offers and supplied the Persil.

In the month of July 1940 the defendants exhibited a placard on their premises at Roma Street, Brisbane, to the effect that they would pay 1½d. towards cartage costs when two packets of Persil were included in an order. The plaintiff then temporarily discontinued supplies of Persil to the defendants. In February 1941 the defendants were offering their customers a discount of 5 per cent on retail purchases of 1s. 8d. or over even if Persil were included. The plaintiff complained to the defendants and the defendants refused to discontinue this practice. By mutual arrangement between the plaintiff and the defendants the latter returned the stocks of Persil which they were then holding and the plaintiff accepted these stocks, giving the defendants credit for the value of stocks so returned. The defendants obtained supplies of Persil elsewhere, which they offered for sale at less than sixpence per packet.

In September 1941, on the defendant's refusing to give an undertaking that Persil would not be sold at less than sixpence per packet, the plaintiff refused to make any further supplies of Persil to the defendants. The plaintiff then commenced proceedings to restrain the defendants from selling Persil at less than sixpence per packet.

By consent the action was tried without pleadings, with liberty to the parties to adduce evidence at the trial by affidavit, or orally.

Macrossan S.P.J. gave judgment for the plaintiff for a perpetual injunction restraining the defendants from selling Persil at less

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than sixpence per packet. The defendants appealed to the Full Court of Queensland, which set aside the judgment of *Macrossan* S.P.J., and ordered that judgment be entered for the defendants: *J. Kitchen & Sons Pty. Ltd.* v. *Stewart's Cash and Carry Stores* (1). From that decision the defendants, by leave, appealed to the High Court.

McGill K.C. (with him *Hutcheon*), for the appellant. The contract which is constituted by the acceptance of the retailer's offer gives no right to either party to determine it by his own hand. The defendants are not bound to order any Persil. If they do order Persil, the plaintiff is bound to supply it. The offer contemplates an acceptance, and when it is accepted the acceptor is bound to give the supplies. The document contemplates a contractual relationship arising from the acceptance. That relationship is to continue for an indefinite time; the defendants have no right to determine the contractual relationship at will. The plaintiff cannot revoke the offer; he is bound to supply the goods on the terms stated. The words "during the currency of the agreement" show that the contract endures for some period of time. Each order for goods which is accepted does not constitute a separate contract. It is a commercial contract, and there is nothing in its terms to suggest that either party has a right to determine it. The case differs from *Crediton Gas Co.* v. *Crediton Urban District Council* (2). The onus is on the party who claims that the contract is determinable to prove that it is not permanent and irrevocable (*Llanelly Railway and Dock Co.* v. *London and North Western Railway Co.* (3)). In fact the contract was not determined. Where one party breaks a contract the other party is entitled to refuse further supplies and to take back stocks to prevent any further breaches of the contract. That does not terminate the contract, and does not amount to an actual rescission. There is no unreasonable restraint of trade (*Palmolive Company (of England) Ltd.* v. *Freedman* (4)). The contract was not illegal as offending against the provisions of *The Profiteering Prevention Act of* 1920 (Q.). There was no commercial trust: there was no agreement to unite or associate or carry on business as a commercial trust or combination. The 3,050 traders who have signed similar offers carry on business separately and not in combination. The two parties to this agreement are not associates carrying on business as a combination. The plaintiff company is

(1) (1942) Q.S.R. 92.
(2) (1928) Ch. 447.
(3) (1873) L.R. 8 Ch. App. 942; (1875) L.R. 7 H.L. 550.
(4) (1928) Ch. 264.

not an association within the meaning of the Act. The shareholders have not united or joined to influence the prices of Persil.

Fahey (with him *McLaughlin*), for the respondent. The retailers' offer is at most a continuing offer which may at any time be withdrawn by the defendants and binds nobody. It is an offer which remains open for acceptance from time to time, but which could be withdrawn by the defendants at any time. The defendants have withdrawn their offer. The words "during the currency of our arrangement" show that the arrangement was not permanent (*Crediton Gas Co.* v. *Crediton Urban District Council* (1)). There was a mutual rescission of the agreement in 1941. The contract was determined by the defendant in September 1941. Once the defendants ceased to hold any stocks purchased under the retailers' offer they were not bound by the agreement and were free to sell at any price. The Court will not imply a term in the contract unless necessary (*Peters American Delicacy Co. Ltd.* v. *Champion* (2) ; *Luxor* (*Eastbourne*) *Ltd.* v. *Cooper* (3)). The contract was void as being in restraint of trade (*Palmolive Company* (*of England*) *Ltd.* v. *Freedman* (4)). The restraint is unreasonable, especially if the contract should be for an indefinite period of time and cannot be determined by either party. The agreement exceeds what is reasonably necessary for the protection of the plaintiff's interests. The contract is illegal, as there is an association and a commercial trust within the meaning of *The Profiteering Prevention Act of* 1920 (Q.). The plaintiff and defendant are acting in combination : the combination acts in Queensland and influences the price in Queensland. The case is indistinguishable from *Garage and Service Stations Association of Queensland* v. *Stellmach* (5). The plaintiff company itself is an association acting in Queensland and has for one of its objects the influencing of prices.

McGill K.C., in reply. There was no mutual rescission. The evidence points to a continuation of the contract. The interpretation placed on the contract by the defendants makes the contract useless. It is an agreement to fix the price and the scheme could not succeed if after obtaining one supply the trader was no longer bound after he had sold out that supply. There should be some period of time during which the plaintiff is bound to supply and the defendant is bound to sell at a certain price. This case differs from

(1) (1928) Ch. 447.
(2) (1928) 41 C.L.R. 316, at p. 322.
(3) (1941) 1 All E.R. 33, at p. 37.
(4) (1928) Ch. 264.
(5) (1940) Q.S.R. 60

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Garage and Service Stations Association of Queensland v. *Stellmach* (1). In that case there was the association of garage proprietors with a scheme for common control. There is no common control here. The control, if any, is exercised by the plaintiff company. There is no control by the association or combination.

Cur. adv. vult.

The following written judgments were delivered :—

LATHAM C.J. AND MCTIERNAN J. This is an appeal from a judgment of the Full Court of the Supreme Court of Queensland allowing an appeal from *Macrossan* S.P.J. The plaintiff appellant is a company manufacturing and selling, *inter alia*, soaps and soap powders and carrying on business in Queensland and elsewhere in Australia. The defendant firm carries on business at several places in Brisbane and sells groceries, including soap powders. The plaintiff is the sole manufacturer of a soap powder called Persil. Since 1932, when the commodity under this name was first put on the market, the plaintiff has made a practice of requiring from retailers an undertaking not to sell Persil below the price of 6d. a packet. One Donald Stewart, now a member of the defendant firm, gave in 1932 a written undertaking to that effect which is hereinafter set out. It is admitted by the defendant firm that it continued to purchase Persil from the plaintiff upon the terms of that undertaking and that the defendant is bound by the same obligations to the plaintiff as those, if any, by which Donald Stewart was bound.

Donald Stewart signed and delivered to the plaintiff a document in the following terms :—

" PERSIL—RETAILERS' OFFER.

To—Messrs. J. Kitchen & Sons Pty. Ltd.,

Dear Sirs,—I/We offer to take from you supplies of the Oxygen Washing Compound known as ' PERSIL ' at your current prices upon your usual business terms upon the following conditions, that is to say :—

In the event of your acceptance of my/our offer I/We would undertake not to sell any ' PERSIL ' at less than 6d. a packet whether I obtain ' PERSIL ' direct from you or from any other source, and I/We would not resell any ' PERSIL ' to a Retail Trader unless such Trader had first agreed with you to conditions similar to those of this offer.

In the event of such acceptance you would not during the currency of our arrangement supply ' PERSIL ' to any Retailer except upon

(1) (1940) Q.S.R. 60.

terms similar to those embodied in this offer. Dated this 15th day of June 1932.

Signature—D. Stewart.

Address—Railway Terrace Wooloowin.

Witness—M. Molloy.

No. 1717."

The plaintiff has proved that the defendant firm sold Persil, by various means, at less than sixpence a packet before and during September 1941.

Three thousand and fifty traders in Queensland have signed retailers' offers in the terms set out.

Macrossan S.P.J. held that an agreement was made between plaintiff and defendant upon the terms set out in the document mentioned, that the agreement was not void at common law or by statute by reason of any illegality, and that it had not been determined. He granted an injunction in the terms sought by the plaintiff against the various practices adopted by the defendant which involved the selling of Persil below the price fixed in the agreement.

Upon appeal to the Full Court *Webb* C.J. held that the contract was illegal because the performance of it would necessarily involve breaches of the *Profiteering Prevention Act of* 1920. *E. A. Douglas* J. held that the contract was void at common law as an illegal restraint of trade. *Philp* J. held that the defendant had a right to determine the contract at any time, that he had exercised that right, and that therefore there was no subsisting contract at the time of action brought.

The appeal to the Full Court was therefore allowed and the judgment of *Macrossan* S.P.J. in favour of the plaintiff was set aside. The plaintiff now appeals to this Court.

The plaintiff contends that the document quoted was an offer made to the plaintiff by the defendant which the plaintiff accepted when it thereafter supplied Persil to the defendant. The order was given and the supply was made upon the terms of this offer. So far the defendant does not dispute the contention of the plaintiff. The plaintiff says that the defendant was not bound to order Persil from the plaintiff only, because the agreement plainly refers to Persil obtained " from you or any other source " ; that the plaintiff was bound to supply to the defendant at current prices and upon usual business terms such Persil as the defendant ordered : that the plaintiff was bound during the currency of the arrangement not to supply Persil to any retailer except upon terms similar to those contained in the defendant's offer : and that the defendant was bound not to sell any Persil, whencesoever obtained, at less than

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sixpence a packet and not to resell Persil to any retail trader unless that trader had first agreed with the plaintiff to conditions similar to those of the defendant's offer. The plaintiff also says that the agreement contains no time limit and that it therefore remains in force for an indefinite time.

The defendant objects on various grounds to the plaintiff's interpretation of the contract. In the first place the defendant urges that the offer should be regarded as an offer which remained open for acceptance from time to time but which could be withdrawn by the defendant at any time. The result would be that, as long as the offer remained open, a new contract containing its terms would come into existence on each occasion when the defendant gave an order to the plaintiff for Persil which the plaintiff supplied.

Upon this view it is difficult to define the period of operation of each contract so made. It is easy to say that each contract exists so long only as the parties continue trading. But what does that mean? The defendant is forced ultimately to say that it must mean that so long as the defendant firm has in its possession for sale any Persil obtained from the plaintiff, the obligations of plaintiff and defendant under the terms of the offer continue, but that they cease to exist from time to time when defendant has sold each lot of Persil so supplied, to be revived when a further order is supplied, if the offer has not in the meantime been withdrawn by the defendant. If the defendant happened to have in stock some packets of Persil supplied at different times, there would upon this view be several contracts in the same terms existing at the same time. This construction of the contract appears to us to rewrite it rather than to interpret it. The obligation of the defendant not to resell to retail traders who have not agreed to similar conditions is evidently intended to be a continuing obligation—not an obligation which is born and dies from week to week or possibly from day to day. The same observation applies to the obligation of the plaintiff not to supply Persil to any retailer except upon terms similar to those of this offer. Further it appears to us that there is no reason whatever to hold that the plaintiff's obligation not to sell Persil obtained from other sources than the plaintiff at less than sixpence per packet existed only so long as, from time to time, the defendant happened to have in stock and for sale Persil obtained from the plaintiff. The defendant's interpretation of the contract would make it foolish as a business arrangement from the point of view of both parties and, when a more reasonable interpretation such as that contended for by the plaintiff is open upon the words of the contract, the latter

view should be preferred. We therefore reject the defendant's arguments upon these points.

The defendant next argues that the contract, whatever its terms, was determinable at the will of either party and that it was determined by the defendant. The general rule is that stated by Lord *Selborne* in *Llanelly Railway and Dock Co.* v. *London and North-Western Railway Co.* (1): "An agreement *de futuro*, extending over a tract of time which, on the face of the instrument, is indefinite and unlimited, must (in general) throw upon anyone alleging that it is not perpetual, the burden of proving that allegation." In the present case the agreement does not provide in terms for any time limit or for any right of withdrawal by either party. *Prima facie*, therefore, the agreement continues in force for an indefinite period. In the next place, the absence of a time limit is an ordinary and almost necessary feature of agreements of this type: See *Palmolive Company (of England) Ltd.* v. *Freedman* (2), per *Lawrence* L.J., where the learned Lord Justice mentions the practical commercial reasons for excluding any time limit or power of withdrawal from price-maintenance agreements. Finally, the only argument in favour of implying a time limit is based upon the appearance of the words "during the currency of our arrangement" in the final paragraph of the plaintiff's offer. It is argued, on the authority of *Crediton Gas Company* v. *Crediton Urban District Council* (3) that these words impliedly give to each party a right to determine the contract at any time. But in the case cited the nature of the contract was such and the recitals and operative words were such that there were "clear indications that it was contemplated that the agreement should be subject to determination" (4). In the present case there are no such recitals or operative words and the nature of the agreement is such as to lead to an opposite implication. The agreement would become commercially useless to both parties if the reference to the currency of the agreement were interpreted, contrary to the tenor of the whole contract, as enabling either party to put an end to the contract at any moment.

If, in order to avoid a result which would make the whole transaction meaningless, it is said that the implied right to determine is not a right to determine at any moment but only a right to determine when some particular circumstances exist, it seems to us to become impossible to define those circumstances without constructing a new contract between the parties. It has been put for the defendant firm that it could determine the contract, perhaps not at any moment,

(1) (1875) L.R. 7 H.L. 550, at p. 567.
(2) (1928) Ch. 264, at p. 285.
(3) (1928) Ch. 447.
(4) (1928) Ch., at p. 459.

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but whenever it had no stocks of Persil obtained from the plaintiff. But the contract expressly covers Persil obtained from sources other than the plaintiff. There is nothing in the contract which can justify a court in holding that the obligation of the defendant with respect to such Persil lasted only so long as the defendant had in its possession Persil obtained from the plaintiff. Further, the defendant could at any time, by its own volition, get rid of any Persil obtained from the plaintiff. Thus this suggestion does not really differ from the interpretation which has already been examined —namely, that the defendant could determine the contract at any time.

A further objection to this view emerges when it is understood that any implied right to determine the contract must be a right of the plaintiff as well as of the defendant. If the plaintiff had such a right it is difficult to suggest any limitation upon that right—it must be a right to determine the contract at any moment. If such a right existed in the plaintiff the contract would be quite useless to the defendant. For all these reasons we are of opinion that neither party had a right, independently of breach by the other party, to determine its contract.

But even if, contrary to the opinion which we have expressed, the contract were determinable at the will of the defendant, it would still be necessary for the defendant to show that the right to determine had been exercised. This point may conveniently be considered in conjunction with two other contentions made by the defendant. The first contention is that the contract was rescinded by mutual consent in February 1941, when, after a complaint by plaintiff that defendant was breaking the contract by selling Persil at less than sixpence a packet, the plaintiff agreed to take back and did take back a quantity of Persil from the defendant and gave credit for it. It is said that this transaction impliedly rescinded the contract. The other contention is that the plaintiff refused to supply the defendant firm with Persil in September 1941 when the defendant refused to give an assurance that the firm would observe the terms of the agreement. This, it is said, was a breach of contract by the plaintiff which entitled the defendant to determine the contract and it exercised that right.

When the existence of a contract has been established the onus of proof of an allegation that it has been rescinded by mutual consent or that it has been determined by one party rests upon the party making the allegation. Such an allegation should be established by evidence which is reasonably convincing and should not be merely a matter of dubious inference.

Until the case came into court the defendant firm did not say or suggest that it was not bound by a contract. There was no express rescission by mutual consent. Nothing was said by the parties about rescission or release. The defendant did not purport at any time to determine the contract. But it is argued that the return of Persil by the defendant to the plaintiff in February and the acceptance of that return and the giving of credit therefor by the plaintiff amounted to a rescission by consent. The facts are at least equally susceptible of the interpretation that the defendant firm returned the Persil, not because the contract had been or was to be terminated, but because the defendant no longer wished to perform it—because it preferred not to sell Persil rather than to continue to sell it under the terms of the contract with the plaintiff.

On 4th September 1941 a conversation took place between Donald Stewart and W. H. Fraser, legal adviser to the plaintiff. Fraser asked for an assurance that if the plaintiff company supplied Persil he (Stewart) would not sell it at less than sixpence a packet. Stewart refused to give the assurance, saying that he reserved the right to trade as he liked.

On the following day Stewart gave the plaintiff an order for ten cases of Persil. The deponent S. L. Graham, Queensland sales manager for the plaintiff, gives the following uncontradicted account of what then happened: "I thanked him for it," (the offer) "but did not expressly accept it. I asked him whether he was then trading on straight-out prices with no bonus discounts and he informed me that this was his present—with emphasis on the 'present'—method of trading but not to be alarmed at what he might do at some future date, because he felt that he might institute a method of trading which in his opinion was consistent with our 'Persil' agreement but that we might not be of the same opinion. In that case he would spare no effort in proving that this future method was—with emphasis on the 'was'—consistent with our agreement even if he had to take the matter to Parliament."

In these conversations Donald Stewart did not deny the existence of a contract. He did not say that the agreement had been abandoned by mutual consent or that he had put an end to it. On the contrary he said that by some new method of trading he might succeed in acting in a manner which, in his opinion, would be consistent with the agreement, though the plaintiff might take a different view. The point of what he said appears to us to be, not that he was no longer bound by the contract, but that he strongly objected to being so bound and that he might even seek relief by going to Parliament to obtain a release from obligations which he regarded

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as unreasonable and objectionable. A refusal by one party to perform a contract the existence of which is not challenged is a very different thing from, first, a rescission of the contract by mutual consent and, secondly, a determination of the contract in exercise of a right to determine it. Accordingly we are of opinion that the defendant has not discharged its onus of showing that the contract was either rescinded by both parties or determined by the defendant.

This view of the facts excludes the proposition that the defendant determined the contract by reason of a breach of contract by the plaintiff. But we add that in our opinion even if the plaintiff was bound to supply in accordance with orders given by the defendant there was no breach by the plaintiff company when it refused to supply the defendant with Persil in September 1941. The plaintiff was ready and willing to supply Persil under the terms of the contract, but the defendant refused to accept any supplies under those terms. The plaintiff was not bound to supply otherwise than in accordance with the contract. Thus the refusal of the plaintiff to supply on this occasion was not a breach of contract.

We are therefore of opinion that, apart from considerations of alleged illegality, a contract as alleged by the plaintiff (with a possible exception as to one alleged term, namely that relating to the alleged obligation of the plaintiff to supply orders given by the defendant) was in existence in September 1941 and that the defendant in September broke the contract by selling Persil at less than sixpence a packet.

The defendant contends that the contract alleged by the plaintiff is void as being in unreasonable restraint of trade. The contract as alleged, it is said, does not entitle the defendant to supplies of Persil from the plaintiff and therefore there was no consideration for the defendant's promises; it is binding for an indefinite period even though the plaintiff supplies no Persil to the defendant; and the contract therefore exceeds anything that can be required for the reasonable protection of the parties or of either of them.

The objections based upon the absence of a time limit and of any power of withdrawal have already been considered. As already stated these are common and well-recognized features of price-maintenance agreements, and their presence in a contract does not justify the conclusion that, on either of these grounds, the contract is in unreasonable restraint of trade.

A promise in restraint of trade will not be held to be valid if there is no consideration for it (*Mitchel* v. *Reynolds* (1); *Smith's Leading Cases*, 11th ed. (1903), vol. 1, p. 406). For this reason it

(1) (1711) 1 P. Wms. 181 [24 E.R. 347].

has been strongly argued for the plaintiff that the acceptance by the plaintiff of the defendant's offer to take supplies of Persil from the plaintiff amounts to a promise by the plaintiff to give supplies in accordance with the defendant's orders from time to time. Such a promise would be consideration for the several promises of the defendant. The acceptance by a wholesaler of an offer by a retailer " to take supplies " of certain goods from the wholesaler may readily be interpreted as an undertaking to give such supplies as may be required by the retailer. But it is not necessary to decide this point in favour of the plaintiff in order to establish the existence of consideration for the promises made by the defendant. The plaintiff, by accepting the defendant's offer, promised not to supply Persil to any retailer except upon terms similar to those embodied in the offer. This promise provides consideration for the defendant's promises, whether or not the plaintiff was bound to supply orders given by the defendant. The value of the promise is obvious. It secures the defendant against underselling by other retailers.

In our opinion the defendant has failed to show that the contract is illegal as in unreasonable restraint of trade. The *Palmolive Case* (1) provides a reply to all the defendant's contentions upon this point.

The only question remaining for consideration is whether the contract is illegal by reason of the *Profiteering Prevention Act* 1920. The argument for the defendant is based upon sec. 18 of the Act, which provides, *inter alia*, that it shall be an offence for any person to sell any " commodity " if the price of the commodity " has been in any manner directly or indirectly determined controlled or influenced by any commercial trust of which that person . . . is or has been a member." It appears to be immaterial whether the price has been increased or decreased by the means stated. Persil is a soap powder, and soap powder has been proclaimed under sec. 4 of the Act as a commodity. The argument submitted to the Court was that the defendant, with the plaintiff, or with the other three thousand and fifty persons in Queensland who had signed the retailers' offer, constituted a commercial trust ; that the contract between the parties obliged the defendant, a member of the said commercial trust, to sell soap powder at a price, namely, not less than sixpence a packet, which had been determined and controlled and influenced by the commercial trust ; that any such sale would be an infringement of sec. 18 ; that therefore the contract required the defendant, if acting in pursuance of its terms, to commit an offence ; and that therefore the contract was illegal and accordingly

(1) (1928) Ch. 264.

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void. This view commended itself to the learned Chief Justice of the Supreme Court who held that the plaintiff, together with the defendant, as also the plaintiff together with all the retailers who had signed the retailers' offer, constituted a commercial trust within the meaning of the Act.

Sec. 3 assigns the following meaning to "commercial trust":— "Any association or combination (whether incorporated or not) of any number of persons established whether before or after the passing of this Act in Queensland or elsewhere, which carries on business in or acts in Queensland and has as its object or purpose or as one of its objects or purposes—(*a*) Controlling, determining or influencing the supply or demand or price of any commodity in Queensland or any part thereof; or . . . " &c. Only an association or combination which "carries on business in or acts in Queensland" can be a commercial trust. The plaintiff carries on business and acts in Queensland. So do the defendant and the other traders who have signed the offer. But the carrying on of business or acting referred to in the definition clearly means carrying on business or acting as an association or combination. It must be the association or combination *which* carries on business or acts. In fact all the persons mentioned carry on separate businesses and act separately. No business can be identified as the business of the association or combination constituted as suggested. Similarly no act can be specified as an act of that association or combination. Where an association acts as an association in controlling prices the case is different—as in *Garage and Service Stations Association of Queensland* v. *Stellmach* (1). For the reason that the alleged association or combination does not, as an association or combination, carry on business or act in Queensland we are of opinion that it should not be held that the plaintiff and the defendant or the plaintiff and the retailers who have signed the offer constitute a commercial trust. The argument for the defendant based upon a contrary contention therefore fails.

If the argument as stated did not fail upon this ground it would be necessary to consider whether "one of the objects or purposes" of the association or combination was "controlling, determining or influencing the supply or demand or price of any commodity in Queensland." What is the scope of this provision? The last clause of sec. 18 affords ground for the view that a corporation may by itself be a commercial trust under the Act. Every company which manufactures goods in Queensland or brings goods into Queensland necessarily influences the supply of and may influence the demand

(1) (1940) Q.S.R. 60.

for that class of goods in Queensland. Any transaction of purchase and sale may influence the general market price of a commodity: indeed, each transaction absolutely "controls" and "determines" the price of the commodity actually sold in that transaction. But even if such transactions by a corporation (regarded as the unilateral acts of the corporation) are included within the words "influences" &c., that is not enough. It is necessary, before a corporation can be shown to be a commercial trust, that it should be established that it is one of the objects of the corporation to bring about the results mentioned. An object or purpose of every trading company is to sell its goods at satisfactory prices. Should it be inferred from the *fact* that a company by its trading influences or controls or determines supply, demand or price that it is one of the *objects* of the company to do so? If the answer to this question were in the affirmative, the most ordinary commercial transaction would expose the company to a penalty of £1,000 under sec. 19 of the Act. Unless the words of the Act were clear beyond dispute we should hesitate to place a construction upon the Act which would bring about such a result. As, however, we are satisfied that, for the reason already stated, the defendant has not established the existence of a commercial trust constituted as suggested within the meaning of the Act, it is not necessary to decide this point in this case.

As already stated, there is ground for saying that a single corporation may be a commercial trust according to sec. 18. Thus the plaintiff could itself be a commercial trust and in that case apparently the shareholders would be members of the trust—see definition in sec. 3 of "association," "commercial trust" and "member of a commercial trust." But there is no evidence that any members of the defendant firm are shareholders in the plaintiff company. For all these reasons we are of opinion that a sale of soap powder by the defendant would not fall within sec. 18 (1) (*a*).

Sec. 18 (1) (*b*) makes it an offence to sell a commodity "in obedience to or in consequence of or in conformity with" any directions of a commercial trust or of an association whether the person selling be a member of that trust or not. "Association" is defined in sec. 3 as including the union of any number of persons by or under any agreement or trust. "Directions" is defined in the same sec. 3 as including determinations, directions, orders, regulations, rules, suggestions and requests. An agreement voluntarily made does not fall within this description. If the defendant firm carries out the contract by selling Persil at not less than sixpence a packet it is not acting in accordance with any directions, but in accordance with an agreement made by the firm itself. If the plaintiff were

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held to be a commercial trust or an association and if the contract contained provisions enabling the plaintiff to fix prices from time to time at which the defendant, independently of further agreement, would be bound to sell, the defendant's sales would then be made in obedience to in consequence of and in conformity with the directions of a commercial trust or association and would be an infringement of the Act. But there is no such provision in the contract now under consideration: Cf. *Smith* v. *Shell Co. of Australia Ltd.* (1).

It appears to us that little assistance with respect to the questions actually arising in this case can be obtained from the decisions of the Supreme Court of the United States upon the *Sherman Anti-Trust Act* 1890. That Act deals with contracts and combinations in restraint of inter-State trade and foreign trade and with monopolies and makes the former not only unenforceable but illegal and criminal. The decisions of the Supreme Court have been conflicting: See *Willis, Constitutional Law*, (1936), p. 56 and, on resale contracts, pp. 356-357. *United States* v. *A. Schrader's Son Inc.* (2), to which the learned Chief Justice of the Supreme Court referred, is a decision that an agreement to resell goods only at certain prices is an agreement in restraint of trade and that a set of such agreements involves a combination in restraint of trade. But the acceptance of this proposition in the present case is not of assistance in reaching a decision. The *Profiteering Prevention Act* does not provide that contracts or combinations in restraint of trade generally or of certain trade are illegal, as does the *Sherman Act*. The American decisions have no bearing upon the question with which we have dealt, namely, whether a combination or association assumed in other respects to fall within the definition given in the particular terms of that Act of a commercial trust carries on business or acts in a particular State.

For these reasons we are of opinion that the judgment of *Macrossan* S.P.J. was right and that the appeal should be allowed.

An objection was taken to the competency of the appeal. The Court was of opinion that, whatever the importance of this litigation might be to the plaintiff, it could not be said that in this case between the plaintiff and this defendant there was any sum or matter at issue of the value of £300 or involving directly or indirectly any claim, &c. to any property or civil right of that value: See *Judiciary Act* 1903-1941, sec. 35 (1) (*a*) (1) and (2). Therefore the plaintiff was not entitled to appeal as of right. In view of the importance to the plaintiff of the issues involved and of the general importance of

(1) (1934) Q.S.R. 10, at p. 20. (2) (1919) 252 U.S. 85; [64 Law. Ed. 471].

some of the questions raised, special leave to appeal was given, the plaintiff undertaking to abide by any order which the Court might make as to costs. The plaintiff should have the costs of the action as declared by *Macrossan* S.P.J. and of the appeal to the Full Court, but the plaintiff should pay the defendant's costs of the appeal to this Court.

RICH J. The question primarily involved in the present appeal is that of the effect produced upon the legal relations of the plaintiff company and the defendants by the fact that they entered into certain contracts of sale and purchase on the terms of a letter signed on behalf of the defendants and dated 15th June 1932. This letter, which is in a form evidently supplied by the plaintiff vendor, is in the following terms :—

"PERSIL—RETAILERS' OFFER.

To—Messrs. J. Kitchen & Sons Pty. Ltd.

Dear Sirs,—I/We offer to take from you supplies of the Oxygen Washing Compound known as 'PERSIL' at your current prices upon your usual business terms upon the following conditions, that is to say :

In the event of your acceptance of my/our offer I/We would undertake not to sell any 'PERSIL' at less than 6d. a packet whether I obtain 'PERSIL' direct from you or from any other source, and I/We would not resell any 'PERSIL' to a Retail Trader unless such Trader had first agreed with you to conditions similar to those of this offer.

In the event of such acceptance you would not during the currency of our arrangement supply 'PERSIL' to any Retailer except upon terms similar to those embodied in this offer."

The first question for determination is as to the meaning of this offer. It is clearly not an offer to buy, an acceptance of which would constitute a sale or an agreement to sell, because no quantity is mentioned. It is an offer to agree that certain conditions shall be treated as incorporated in any agreement by the defendants to buy from the plaintiff company any Persil which the plaintiff company may agree to sell to the defendants at its current prices and on its usual business terms. If the offer be accepted, then upon an order for a particular quantity being given by the defendants and accepted by the plaintiff company, a contract of sale and purchase comes into existence embodying the terms of the defendants' letter already in statement. But a mere acceptance by the plaintiff company of the offer contained in this letter would create no legal relations between them. It would merely constitute an intimation of willingness on the part of both parties to do business on the terms

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stated from which either party would be at liberty to recede by notice to the other at any time, except as to any business already transacted on those terms.

The next question is, What obligations were intended to be incurred by the defendant buyers and the plaintiff sellers respectively as the result of any particular purchase of Persil which embodied the terms of the letter in question? Clearly the buyers agree not to sell any of the Persil so bought at less than sixpence per packet, and also not to resell any of it to any other retail trader who has not already made a similar arrangement with the plaintiff company; and clearly their agreement in these respects goes further than this, because it is expressed to extend also to Persil obtained from any other source than the plaintiff company, e.g., from another retailer.

How long, then, was this obligation intended to last? If the defendants bought twenty packets of Persil from the plaintiff company on the terms of the letter, were they intended to be for ever afterwards precluded from selling at less than sixpence per packet Persil obtained from other sources, notwithstanding that they were no longer making purchases from the plaintiff company upon any terms? Light is thrown on this question by the language of the reciprocal obligation assumed by the plaintiff company which by its acceptance of the terms of the letter, agrees not to supply Persil to any retailer except on similar terms "during the currency of our arrangement." This states expressly what is necessarily involved in the scheme constituted by the letter—a scheme which brings into existence merely an arrangement which may be receded from at will except in so far as it has been embodied in a still uncompleted transaction.

Dehors any actual transaction of sale and purchase, the arrangement stands so long only as both parties choose to allow it to stand. Hence, so long as the defendants have in hand any Persil which they have bought from the plaintiff company in the terms of the letter, they cannot, without committing a breach of their agreement, sell that or any other Persil except on the terms of the letter, nor can the plaintiff company sell to any retailer except on those terms. But the arrangement, so far as it is constituted merely by acceptance by the plaintiff company of the terms of the letter, has no binding force, and, as already pointed out, can be receded from at any time upon notice on either side. So far as the arrangement, not having been receded from, has been incorporated in a particular sale and purchase, it is binding on both parties so long as any Persil purchased in accordance with it remains undisposed of by the buyer. And so long as the buyer chooses to go on trading with the seller on the

terms agreed on, he is bound by those terms as to the sale of Persil however acquired. But as soon as the buyer has disposed of all the Persil which he has bought under all agreements embodying the arrangement, the arrangement becomes an empty form devoid of any contractual operation, and either party can refuse to allow it to be included in any further contract of sale and purchase.

For these reasons, it follows that, on the evidence, the defendants at all times relevant to the present action were subject to no obligations to the plaintiff company with respect to the sale by it of Persil derived from other sources than the plaintiff company.

The contrary view I understand to be somewhat as follows. Admittedly an acceptance by the plaintiff of an offer made by a prospective purchaser on the plaintiff's form has no binding force. But, it is said, as soon as a purchase is made the buyer becomes irrevocably bound for all time by the terms of the letter. And, as successive purchases are made, he drags a lengthening chain of contracts, each of which binds him in perpetuity. Assuming, without deciding, that such an arrangement, if intended, would be valid in law, I am unable to discover any such intention. If agreements in restraint of trade were exceptionally favoured by the law —if a binding rule of construction made it necessary to give such agreements the fullest operation which their terms did not make impossible—I might be constrained to agree with the contrary view. In my opinion, however, if a wholesaler desires to bind retailers to himself in perpetuity, an intention in that behalf should be expressed in clear and explicit terms, so that he who runs may read. It would, in my opinion, be contrary to principle to allow retailers to be trapped into such a position by the use of a form, of the wholesaler's devising, which in terms refers to its being applicable only "during the currency of our arrangement."

It follows that in my opinion this appeal should be dismissed.

In these circumstances, it is unnecessary to determine whether, if the defendants had still had on hand, at the time complained of in the action, any Persil purchased from the plaintiff company by a contract incorporating the terms of the letter, the agreement for sale would have been obnoxious to sec. 18 of the *Profiteering Prevention Act of* 1920 (Q.). I am not satisfied that it would. The section is directed to curbing the activities of commercial trusts, i.e., combinations of persons which have as an object the controlling determining or influencing of the supply or demand or price of any commodity in Queensland; and it provides that a person commits an offence if he sells or supplies or offers to sell or supply any commodity and the price of such commodity has been in any way directly or

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indirectly determined, controlled or influenced by any commercial trust of which he is or has been a member. I am disposed to think that the price here referred to is the price at which such person sells or supplies or offers for sale or supply, and that what is aimed at is the case of sellers of a commodity combining to regulate the prices at which they will sell it, not the case of an individual seller who sells only his own commodity at a price determined by himself alone and who makes special stipulations with buyers as to what are to be maximum or minimum prices upon resales. It is, however, unnecessary, in my opinion, to decide the point on the present appeal.

Appeal allowed. Judgment of Full Court set aside. Judgment of Macrossan S.P.J. restored. Defendant to pay plaintiff's costs of appeal to Full Court of Supreme Court. Plaintiff to pay defendant's costs of appeal to High Court. Costs to be set off.

Solicitors for the appellant, *Hobbs, Caine & McDonald.*
Solicitor for the respondent, *James G. Drake.*

B. J. J.