to lead me to confirm in the most ample degree the significance of the *Bieber* decision.

I express my concurrence with my noble friends Lord Dunedin, Lord Atkinson, and the other noble Lords, and I put in particular this consideration before the House, that now this case has been decided it shall not be open hereafter to challenge the expansive and general authority of the *Bieber* case, defended, as in my view it is, by those other considerations with which I have ventured to trouble the House.

Appeal dismissed with costs.

Counsel for the Appellants — Compston, K.C.—Dighton Pollock. Agents—Nicholson, Graham, & Jones, Solicitors.

Counsel for the Respondents — L. Scott, K.C.—H. G. Wright. Agents—Bircham & Company, Solicitors.

Counsel for the Public Trustee — Austen-Cartmell. Agents — Coward & Hawksley, Sons, & Chance, Solicitors.

HOUSE OF LORDS.

Monday, March 24, 1919.

(Before the Lord Chancellor (Birkenhead), Lords Finlay, Atkinson, Shaw, and Parmoor.)

M'ELLISTRAM *v.* BALLYMACELLIGOTT CO-OPERATIVE AGRICULTURAL AND DAIRY SOCIETY, LIMITED.

(On Appeal from the Court of Appeal in Ireland.)

Contract—Illegality—Restraint of Trade—Industrial and Provident Society—Validity of Rules—Challenge by a Member—Arbitration Clause—Powers—Industrial and Provident Societies Act 1893 (56 *and* 57 *Vict. cap.* 9).

In 1916 the respondent society which the appellant had joined in 1903 altered its rules. By the new rules, to which the appellant objected as in unreasonable restraint of trade, members became bound under penalty to sell their whole output of milk to the respondents at their price, whilst they were prohibited from withdrawing from membership of the society except with the consent of a committee of the members. The rules referred all disputes between the society and its members to the decision of the Irish Agricultural Organisation Society.

Held that a dispute as to validity of the rules of the society was not a dispute between the society and its members in terms of section 49 of the Industrial and Provident Societies Act 1893. The action was therefore competent — *Heard* v. *Pickthorne*, 1913, 3 K.B. 299.

Held further (*dis.* Lord Parmoor on the ground that membership of a co-operative society is analogous to a partnership), that as the combined effect of the new rules was to impose restrictions more onerous than reasonably necessary for the protection of the respondents' business, they were *ultra vires* of the society.

Tipperary Creamery Society v. *Hanley*, 1912, 2 I.R. 586, *approved.*

Athlacca Co-operative Creamery, Limited v. *Lynch*, 1915, 49 I.L.T. 233, and *Coolmoyne and Fethard Co-operative Creamery* v. *Bulfin*, 1917, 2 I.R. 107, *overruled.*

The *facts* appear from their Lordships' considered judgment:—

Lord Chancellor (Birkenhead) — In this appeal the appellant seeks a declaration that a certain rule of the respondent Society is not binding on the members as being improperly adopted to his prejudice, illegal because in restraint of trade, and *ultra vires* the respondent Society, and he asks for an injunction to restrain the respondent Society from acting thereon.

At the trial judgment was entered for the plaintiff, but this was reversed by the Court of Appeal in Ireland, and from that reversal the present appeal is brought.

The respondent Society was registered on the 6th March 1903 under the Industrial and Provident Societies Act 1893, and was governed by special rules applying and modifying general rules.

By rule 3 of the special rules the Society was empowered to carry on the occupations, *inter alia*, of dairymen and manufacturers of dairy produce, but there was no limitation as to the area within which such occupations might be carried on. Rule 4 provided that the shares should be transferable only, except guarantee shares, which if issued were to be withdrawable. Rule 11 specified certain rules which were declared to be fundamental and alterable only at a special general meeting by a two-thirds majority, representing at least two-thirds of the nominal capital. Rule 20 provided that any member who should supply milk to any other creamery than that owned by the Society for three years from his admission to membership without the consent of the committee should forfeit his shares. The general rules provided for the constitution of the Society. Rule 45 enabled a member to transfer his shares with the approval of the committee. Rules 63-68 and rule 72 provided for the holding and conduct of special meetings, and rule 120 provided for the amendment of rules not declared to be fundamental.

Towards the end of 1915 the committee were considering a proposal to establish a new creamery at a place called Gortatlea, and on the 15th November 1915 the committee passed a resolution to call a special general meeting on the 7th December to consider the adoption of a complete amendment of the Society's rules. This meeting proved abortive, and another meeting was held on the 18th January 1916, at which a resolution to readopt the complete amendment of the Society's rules was declared to be carried by the requisite majority. These new rules superseded both the special and

the general rules, and are called in the proceedings the rules of 1916. They were registered on the 1st February 1916; and it is with these rules that your Lordships are concerned.

Rule 5 names some eighty townships, and provides that persons residing within any of them may become members. Other persons may become members if certain conditions are fulfilled, but no person carrying on business similar to that of the Society is eligible to become or remain a member.

Rule 6 (1) binds the Society to take all milk produced by members' cows kept or grazed on any lands within the area defined by rule 5, provided such milk shall be delivered fresh and in good condition at the creamery of the Society at such times as the committee shall appoint at the current price or rate fixed by the committee. In default the Society is to pay 1s. per cow per day for every cow's milk not so accepted.

Rule 6 (2) binds the member to sell such milk to the Society, and if he without the written consent of the committee sells such milk to any creamery other than a creamery of the Society or to any milk seller or butter manufacturer he is to pay to the Society the sum of 1s. per cow per day for every cow's milk sold contrary to the sub-rule.

Rule 6 (3) sets out exceptions which are not material.

Rule 16 provides that a member whose shares have been transferred or cancelled thereupon ceases to be a member, but a member is not otherwise entitled to withdraw from the Society.

Rule 21 requires the consent of the committee to any transfer of shares, but the committee are not bound to assign any reason for refusal.

Rule 69 provides that any dispute between the Society and its members shall be submitted for arbitration as therein provided.

This rule brings into operation section 49 (1) of the Act of 1893.

At the trial oral evidence was adduced to show that the provisions of rule 6 (2) would prevent any member who kept milch kine from selling to anyone but the Society, and that the Society's prices were less than those obtained by members who up to then had not sold their milk to the Society.

The plaintiff's attack was directed to the combined effect of rule 6 (2), rule 16, and rule 21. I was not impressed by the criticism of 6 (2) standing alone. But having regard to the view which I have formed it is not necessary to examine this contention. No attempt was made to show that the Society was acting from improper or indirect motives.

The defendants adduced evidence to show that the amendments were made to carry out an arrangement to establish an auxiliary creamery at Gortatlea. Mr Byrne, the secretary, said that it was necessary to protect the Society against the unscrupulous competition of those who might pay a special price to kill the new branch, and also to enable the Society to refuse unclean milk without members being able to take it to proprietary creameries. In cross-examination he said that the Society would not take the risk of a new creamery without some guarantee that it would be supplied with milk. He was cross-examined with the object of proving that the Society was applying the milk profits to capital expenditure. In re-examination he said that the necessary capital was borrowed from the bank on the guarantee of some of the members, and unless some such rule were adopted the members who had not guaranteed could leave the creamery without milk.

Mr Jones, the chairman of the respondent Society, said that the grounds for the rule were to guarantee an honest price to the creamery, and as the Gortatlea people were coming in, the rules were to be adopted in order that they should be loyal to the Society.

Mr Riddall, an inspector of the Irish Agricultural Organisation Society, gave evidence that it was essential that a co-operative society should be ensured trade and that its members should be bound to deal with it. He admitted that a member who did not want to make butter and had other outlet for milk but a creamery would have the market closed to him by the rule. He also admitted that the rule might throw the burden on the farmer members who had not guaranteed. It was a form of counter-security. The Rev. Patrick J. Brennan supported the rule on the grounds that some farmers were unreasonable and were open to the temptation of competition prices, and that the rule assured a larger supply of milk and safeguarded the position of the guarantors. As an application to stay the proceedings had been refused by the Court of Appeal in Ireland, and as a rule in the same terms had been held invalid in two cases, namely, *Athlacca Co-operative Creamery* v. *Lynch*, 49 I.L.T. 233, and *Coolmoyne Co-operative Creamery* v. *Bulfin*, 1917, 2 I.R. 107, the Judge and the Court of Appeal were only at liberty to decide whether the present case was distinguishable from the *Coolmoyne* and *Athlacca* cases. The House of Lords is not so bound, and the questions decided by the Court of Appeal on the application for a stay, and by Ronan, L.J., sitting as a Judge of Assize in the *Athlacca* case, and by the Court of Appeal in the *Coolmoyne* case, fall to be decided in this appeal.

I deal first for convenience with the short contention that the difference between the parties was a dispute under the provisions of section 49, sub-section 1, of the Industrial and Provident Societies Act 1893, and therefore that the present action was not competent.

I am of opinion that this contention is ill founded. The question here is whether certain rules were illegal and *ultra vires*. Such a dispute is not a dispute between a member and the Society within the meaning of the statute. The appellant in this case professes that he has not quarrelled with the Society as lawfully constituted, but complains that the constitution of the Society has been illegally altered. The dispute, therefore, rightly viewed, is a dispute between the parties as to the true constitution of the Society. I adopt upon this part

of the case the reasoning and the decision of the Court of Appeal in *Heard* v. *Pickthorne*, 1913, 3 K.B. 299.

I now approach the larger question whether the combination of rules attacked by the appellant in this case can be supported. I am of opinion that it cannot, and that the decision of the Court of Appeal in Ireland must be reversed.

The matters which were argued before your Lordships were much discussed in the Court of Appeal in Ireland in the case of the *Tipperary Creamery Society* v. *Hanley*, 1912, 2 I.R. 586. The rules under consideration in that case were not identical with the rules which are before your Lordships. In particular, the restraint in *Hanley's* case extended over the whole of Ireland, and was not confined as it is here to a number of adjacent townships. But it is to be observed that in a sparsely inhabitated agricultural neighbourhood, with scanty means of communication, a prohibition of trade in every township within a radius of ten miles might have precisely the same effect upon the business of a small trader as if the preclusion extended to the remotest corners of Donegal. Holding as I do that *Hanley's* case was rightly decided, and that the effects of the present rules cannot on a true view of the law be distinguished from the effects of the earlier rules in *Hanley*, the conclusion follows that Ronan, L.J., was bound by *Hanley* when he decided *Athlacca Co-operative Creamery* v. *Lynch*, and that he ought to have held himself so bound. Similarly in my view the decision of the Court of Appeal in Ireland in *Coolmoyne Co-operative Creamery* v. *Bulfin* (on which the Court of Appeal founded itself in the present case) was wrongly decided, inasmuch as it was covered by the decision in *Hanley's* case.

The principles of law which ought to be applied in such disputes as the present have been so fully and so recently expounded by your Lordships that no useful purpose would be served by attempting to restate them at length. Certain conclusions, however, which are directly relevant to the present dispute may be summarised.

A contract which is in restraint of trade cannot be enforced unless (*a*) it is reasonable between the parties, (*b*) it is consistent with the interests of the public.

Your Lordships have recently laid down rules as to where the *onus* lies in these matters. Such considerations, however, do not arise in the present case.

Every contract therefore which is impeached as being in restraint of trade must submit itself to the two standards indicated. Both still survive. The observation made by the Judicial Committee in the *Attorney-General of Australia* v. *Adelaide Steamship Company*, 1913 A.C. 781—"Their Lordships are not aware of any case in which a restraint though reasonable in the interests of the parties has been held unenforceable because it involved some injury to the public"—is not in my view to be construed as if both the tests indicated were not still in existence. It is, indeed, not difficult to conceive of a case in which a contract in restraint of trade might be adjusted to safeguard the reasonable interests of the contracting parties, and yet might be opposed to the public interest.

There is much to be said for the view that the restraint objected to in this case would be opposed to the public interest, but I do not think it necessary to decide this having regard to the clear view which I have formed that the rules under consideration are not reasonable between the parties.

So much guidance has been given by this House in recent decisions to those whose duty it is to understand the criteria by which one tests the meaning of "reasonableness between the parties" that little need be added upon this point. The real test is, as your Lordships have so often pointed out, does the restriction exceed what is reasonably necessary for the protection of the covenantee? To make the matter particular your Lordships have to reach a conclusion as to whether the combined effect of rule 6 (2), rule 16, and rule 21 is or is not to impose upon the appellant a greater degree of restraint than the reasonable protection of the respondents requires.

It is evident that the first question which requires an answer in this action is—"What was it against which the respondents were reasonably entitled to protect themselves?" Until this question is answered no answer is possible to the principal inquiry whether that which was stipulated for exceeded the reasonable needs of the case. Before attempting to discover a positive answer to the question I have proposed, it may be possible to clear the ground somewhat by answering it negatively. The respondents were not entitled to be protected against mere competition. No excellence of motive on their part, no record of efficient public service, can for this purpose place them in a different position from that occupied by any private contracting party who is called upon to justify his restraint. And it has been laid down by your Lordships over and over again that in this class of case the covenantee is not entitled to be protected against competition *per se*. The present case is entirely different from those in which he who has bound himself by the restriction has obtained inside knowledge or competitive resource by reason of the fact that special confidence under unusual circumstances has been reposed in him.

But a negative answer is not enough. I addressed a question upon this point to the learned counsel who appeared for the respondents, and I am not indisposed to accept his answer as reasonable. Mr Conner replied to my question—"The respondents are entitled to such a degree of protection as will ensure stability in the lists of their customers." Let me then, without subscribing entirely to the words of this answer, treat it as being generally acceptable. Were the rules complained of necessary in order to secure stability in the lists of the respondents' customers? By "stability" must of course be understood such reasonable stability of relationship as a careful merchant is content with.

In order to answer the question indicated

above the scope of the three rules complained of must be examined. I have already set out their terms. The combined effect is this—A member, if he joins young enough and lives long enough, may be precluded under heavy penalty for sixty years or more, and over a considerable area, from selling his milk to any creamery other than the respondents' creamery, or to any person who sells milk or manufactures butter for sale. It is necessary to notice that the penalty provided is avoided in favour of the member who obtains the written consent of the committee before making the sale otherwise prohibited. It is not pretended that it was the policy of the committee to give such consent. I say for sixty years or more, because having regard to the age at which members become eligible for election and to the possibilities of human life the supposition is by no means extravagant. It is possible that rule 6 (2) could have been supported as a part of a code which provided in further rules reasonable conditions of withdrawal. But the conditions of withdrawal which are contained in 16 and 21 are such as to make it for ever impossible for a member to withdraw unless the committee gives its consent. Under rule 16 no member may withdraw unless his shares have been transferred or cancelled. Under rule 21 no share may be transferred unless with the consent of the committee of management. And it is expressly provided that no share shall be withdrawn. The result is that an unwilling member is likely to find himself precluded for life from disposing of the raw materials of his trade to anyone but the respondents (with the exceptions already noted) within a radius which may easily include every neighbouring centre of population which affords him the slightest prospect of a valuable market. It is no answer to such a man to say, "You can go elsewhere." He may easily be owner in fee of a small holding which has been in his family for generations. The fact that his integrity is known amongst his neighbours may be no small element in his stock of trade. Further, the power of migrating to a part of Ireland in which he may never have lived and where nobody may know him cannot be considered to be any alleviation of the severity or unreasonableness of the rule.

The position therefore is that the respondents claim to impose a restraint, within the limits already indicated, upon any one of their members which will last for life unless the committee empowers him to transfer his shares. I see no reason whatever for supposing that unless in the most exceptional cases the committee would give such consent. In fact they could not so consent without abandoning the whole spirit of their contentions and submissions before your Lordships. Indeed, holding the views they do they would be lacking in their duty to their members if they consented upon a large or even upon a moderate scale to such transfers, for they have explained very candidly to your Lordships the reasons which oblige them to insist upon continued membership. It is even necessary, so it is explained, to depress the prices paid to their members for milk in order to increase the capital available for new building operations. The result evidently may be that a member in township A receives admittedly less than the local value of his milk in order that township B ten miles away may be indulged with a creamery of its own. It is by no means to be supposed that I am disputing either the wisdom or the commercial justification of such a policy. I am using the illustration in order to make it clear that it is impossible for a Society whose extension requires such methods to allow a wholesale transference of shares by members who find themselves in the position of the member whom I have imagined to be carrying on his business in what I called township A. I assume therefore—and indeed the contrary was not seriously argued—that transfers would not be granted by the committee.

It is therefore necessary to ask plainly whether it can be reasonably necessary for the protection of the respondents to tie the appellant for life unless the committee thinks fit to grant him a dispensation. I am clearly of opinion that it is not and cannot be so necessary. I am further of opinion that these three rules read together are bad as being in restraint of trade and not reasonable as between the parties. It is not for your Lordships to frame rules which would be good. It is, however, obvious that the objects indicated and claimed by Mr Conner on behalf of the respondents could be secured in a variety of ways by imposing restraints which would fall short of those attempted to be enforced in the present case.

Lord Finlay—The appellant is a shareholder in the respondent Society. He brought this action to have it declared that certain rules adopted by the Society and registered on the 1st February 1916 are not binding upon himself and the other members, as improperly adopted to the prejudice of the appellant, and illegal as in restraint of trade, and *ultra vires* of the Society.

Barton, J., before whom the case was tried made the declaration prayed for, but the Court of Appeal reversed his decision. The appellant now asks that the decision of Barton, J., should be restored.

The Society was registered on the 6th March 1903 under the Industrial and Provident Societies Act 1893. It is a corporation with limited liability (section 21), and the rules bind the Society and its members as if each particularly had covenanted to observe the same (section 22). Provision was made by rule 120 of the original general rules for the amendment of any rule not declared to be fundamental, and for the passing of new rules by a majority of two-thirds of the members present at any special general meeting. New rules were framed and adopted on the 1st February 1916, and the object of the present action is to have it declared that the new rule 6 (2) is illegal as in restraint of trade and *ultra vires*.

The Society exists for the manufacture and sale of butter and cheese made from

milk purchased from certain of its members at prices fixed by the committee. Rule 20 of the original special rules was as follows—[*His Lordship read the rule.*] It was explained that this rule has been construed as applying to the sale of milk to any other creamery at any time within three years of the admission of the member.

In the new rules of the 1st February 1916 the above rule is replaced by the following—[*His Lordship read rule* 6 (2) *and proviso* (*a*) *at the end of the rule, rule* 16, *and rule* 21.]

The effect of these rules taken together is that until the committee sanctions a transfer of his shares a member remains a member and subject to rule 6 (2). There is no doubt that rule 6 (2) is in restraint of trade, as it forbids the member to dispose of the milk produced on his farm as he pleases. But the Society contend that it is not bad on that ground, inasmuch as it does not exceed what is reasonably wanted for the protection of the business of the Society.

A certain amount of stability in the milk supply available to such a Society is essential. They make their profit from the sale of the butter and cheese which they manufacture, and if the supply of the milk which they want for such a purpose is liable to sudden and violent fluctuations it would be difficult or impossible to arrange for the carrying on of their business successfully. In a co-operative Society of this kind the Society depends upon getting a supply of milk from its members which will enable the Society to conduct profitably their business of making and selling butter and cheese. It was urged upon us that the members may be induced by offers of higher prices to discontinue their supply of milk to the Society, and that some security against fluctuations in the supply from such causes is necessary. I agree with this argument, but the question remains whether restraint on the ordinary freedom which every man enjoys of selling his own goods is not carried by this rule to a point beyond what is reasonably required for the protection of the Society's business.

If a member could cease to be a member at his pleasure there would be no ground for complaint. No one can say that it would be unreasonable that it should be one of the conditions of membership that while a man chooses to remain a member he should supply his milk to the Society and to no other dairy company. It does not appear that any hardship was ever alleged in connection with the old rule No. 20 of the special rules 1903. Under that rule if at any time within three years of his admission a member supplied milk without the sanction of the committee to any creamery not owned by the Society he forfeited his shares. It is said that although the Society prospered under that rule there was a necessity for further precautions against the diversion to other dealers of milk produced on the farms of members, and that rule 6 (2) was framed for that purpose.

There is nothing unreasonable in the provision that the consent of the committee is necessary for a transfer of shares. But this provision, reasonable in itself, has a most important effect upon the scope and operation of rule 6 (2). A member cannot cease to be a member except by getting rid of his shares, and if the committee refuse to give their consent the member remains subject to the operation of rule 6 (2), and is forbidden to supply milk to "any creamery other than a creamery of the Society, or to any company, society, person, or persons who sell milk or manufacture butter for sale." This is a very sweeping interference with the right to dispose of his commodities which every subject has. Until the committee consent to the transfer of his shares he is restrained not merely from supplying any other creamery with milk, but also from supplying with milk any society or person who sells milk or manufactures butter for sale. The member is put absolutely at the mercy of the committee, and may remain unable to supply milk to any dealer except the Society for an indefinite time, which might extend to the whole of his life. The committee might, and probably would, in very many cases consider that it is in the interests of the Society that the member should not be permitted to withdraw, and there would be, to say the least of it, very great difficulty in compelling their consent.

So long as he remains a member the rule provides that that member who commits a breach of the rule shall pay to the Society "as and for liquidated damages and not by way of penalty" the sum of 1s. per cow per day for every cow's milk sold contrary thereto. These liquidated damages might run up to a very high figure. In all the cases in which proceedings have been taken for the recovery of damages under this rule these damages appear to have been claimed as "liquidated damages." There is no trace of evidence of actual damage being required, and, indeed, it is not easy to see how such evidence could be obtained. Mr Conner, the leading counsel for the Society, argued that this rule was not and could not be effectual in making these sums liquidated damages. This view seems never to have been put forward on behalf of the Society on any previous occasion, nor in the course of the present case until it came to your Lordships' House. But assuming the provision for liquidated damages to be as futile as it is now asserted on behalf of the Society that it is and always has been, so that clause 6 (2) must be read without these concluding words, the objection that the rule operates in restraint of trade is not removed. The edge of the rule is less sharp, but it puts the members in the position of having covenanted not to sell their milk to any dealer other than the Society for a period which may be indefinitely prolonged.

Rules such as this have been on three occasions before the courts in Ireland.

In *Hanley's* case (1912, 2 I.R. 586) judgment had been recovered for £25 as liquidated damages under a rule very similar to that now under discussion. The scope of the rule in that case was, however, unlimited. It applied to milk from cows in any part of the country, while in the present case it is confined to cows in the particular district where the Society carries on its operations. The

Court of Appeal held the rule bad as in restraint of trade, and laid stress on the fact that there was no restriction of the area over which it was expressed to operate.

In consequence of this decision the rule was amended by confining the area of its operation, and the amended rule came under the consideration of Ronan, L.J., on Civil Bill in the *Athlacca* case, 49 I.L.T. 232. The Lord Justice held that the decision in *Hanley's* case did not apply owing to the alteration in the extent of the application of the rule, and with reference to the point made that the restriction might be perpetual he stated that he could not see that this was not essentially necessary for the protection of the Society.

The amended rule (in the same form as rule 6 (2) now under consideration) came before Madden and Pim, J.J., and the Court of Appeal in the *Coolmoyne* case, 1917, 2 I.R. 107. They held that the alteration in the rule had relieved it from the objections which had prevailed in the *Hanley* case, and that the £20 claimed was recoverable.

In the present case the Court of Appeal were of opinion that the *Coolmoyne* case was binding upon them, and that it was indistinguishable. They overruled Barton, J., who had held that the fact that the plaintiff in this case had not himself consented to the rule, and that it was imposed upon him against his will by the vote of the majority, constituted a material distinction between this and the *Coolmoyne* case. On this particular point I think the Court of Appeal were right. However carried, when once the alteration has been effected, the question must be whether the rule is or is not *ultra vires*, and this must be determined apart from the question whether any particular member concerned has or has not assented to the rule. When the alteration has been made by the necessary majority all members are put on the footing of having entered into a covenant to observe the rule. The question always must be—is the rule *intra vires* or is it bad on the ground of illegality or on any other grounds?

In the present case I am of opinion that the rule is illegal as an unreasonable restraint of trade, and therefore *ultra vires* and void. I may refer to what was said by James, V.C., in the *Leather and Cloth Company* v. *Lorsont* (L.R., 9 Eq. 345-353) in a passage quoted with approval by Lord Atkinson in *Herbert Morris Limited* v. *Saxelby* (1916, 1 A.C. 688)—"All the cases when they come to be examined seem to establish this principle that all restraints upon trade are bad as being in violation of public policy, unless they are natural and not unreasonable for the protection of the parties in dealing legally with some subject-matter of the contract. The principle is this—Public policy 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. On the other hand public policy requires that when a man has by skill or by any other means obtained something which he wants to sell he should be at liberty to sell it in the most advantageous way in the market, and in order to enable him to sell it advantageously in the market it is necessary that he should be able to preclude himself from entering into competition with the purchaser. In such a case the same public policy that enables him to do that does not restrain him from alienating that which he wants to alienate, and therefore enables him to enter into any stipulation, however restrictive it is, provided that restriction in the judgment of the Court is not unreasonable, having regard to the subject-matter of the contract."

The present case is really governed by the principle there enunciated that "public policy requires that every man shall be at liberty to work for himself and should 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 to the right to sell his goods.

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." Such restraint must be reasonable in the interests of the parties; that is, "it must afford no more than adequate protection to the party in whose favour it is imposed," and it must not be injurious to the public. I desire to add one more quotation from Lord Parker by citing a passage from the judgment of the Judicial Committee delivered by him in the case of the *Attorney-General of Australia* v. *Adelaide Steamship Company*, 1913 A.C. 781—"Though, speaking generally, it is the interest of every individual member of a community that he should be free to earn his livelihood in any lawful manner, and the interest of the community that every individual should have this freedom, yet under certain circumstances it may be to the interest of the individual to contract in restraint of this freedom, and the community being interested to maintain freedom of trade is equally interested in maintaining freedom of contract within reasonable limits."

The present case may be tested by the light of these principles, which are thoroughly established as law in England and Ireland. For the successful working of co-operative societies of this kind it is in the highest degree desirable that a steady supply of milk should be assured for the manufacture of butter and cheese. The supply is got from the members, and no one could object to a provision, say, that before withdrawing his supply from the society a member should be bound to give the society reasonable notice. But the combined operation of the rules to which I have referred goes far beyond what is reasonably necessary for the protection of the society. How can it be necessary that without any power of withdrawal a member should be restrained from supplying milk to other dealers unless and until he can get the consent of the committee to a transfer of his shares? Such a provision is in my opinion unreasonable, and might be oppressive in the highest degree. It far exceeds

anything required for the reasonable protection of the Society's business, and on the principles which have been repeatedly affirmed by this House and by the Judicial Committee of the Privy Council it is not enforceable.

In my opinion the appeal should be allowed, with costs here and below, and a declaration should be made as prayed that rule 6 (2) is illegal as in restraint of trade.

LORD ATKINSON—The main facts have already been stated, and the Irish decisions examined. I only refer to them therefore so far as is necessary to make what I am about to say intelligible.

The restraint of trade complained of in this case does not originate in any contract of service nor in any sale of the goodwill or business. No question arises as to the disclosure or use of trade secrets, or the enticing away by a former employee of the customers of his former employer. Still less does any question arise as to the competition on trade set up by a retired member of a firm against the remaining members who continued the partnership trade, and are entitled to the goodwill of the partnership business. The restraint of trade complained of here is alleged to be imposed by rules made in 1916 by the respondents, an incorporated society, as it admittedly is in relation to the supply to it by a certain class of its members of milk, the raw material of the industry of manufacturing butter, which the respondents were incorporated to carry on.

The respondent Society was on the 6th March 1903 duly registered under the Industrial and Provident Societies Act 1893 (56 and 57 Vict. c. 39). Immediately upon its registration it became a body-corporate by its registered name, having perpetual succession and a common seal, with power to hold land and buildings, its capital being divided into shares with limited liability. By section 10 of this Act it had power to make and amend rules on the subjects mentioned in the second schedule of the Act, including the determination of whether the shares, or any of them, should be transferable, the form of transfer and registration of the shares, and the consent of the committee thereto, the determination of whether the shares, or any of them, should be withdrawn, the mode of withdrawal and payment of the balance thereon, and the determination of how members might withdraw from the Society. By section 22 of this same Act it is provided that the rules of the Society shall bind the members and all persons claiming through them to the same extent as if each member had subscribed his name and affixed his seal thereto, and there was contained in the rules a covenant on the part of the member, his heirs, &c., to conform thereto, subject to the provisions of the Act.

The case has, it would appear to me, to be dealt with in the Court of Appeal in Ireland as if the appellant, being a member of this Society, was bound to submit to any rule which the Society, a *persona* at law distinct from its members, chose to pass, whether that rule was designed to protect to a reasonable extent some interest the Society was entitled to have protected, or was merely designed to shield it from competition *per se* in trade against which it was not entitled to have any protection whatever. The public is interested in every one of its members having freedom of action to carry on his trade or business and deal with the property invested in that trade within the law as it seems good to him. The deprivation of the subject of that liberty of action in any given instance is *prima facie* an injury to the public interest, and if it is to be excused or justified must be excused or justified on the ground that it affords no more than adequate protection to those interests of the private parties concerned which they have a right to have protected. Freedom of competition *per se* is not one of the things which, however lucrative, a trader is entitled to be protected against—see *Herbert Morris Limited* v. *Saxelby*, 1916, 1 A.C. 688, and especially *Trego* v. *Hunt* 1895, A.C. 7.

Two sets of rules, the special rules and the general rules which were subject to the special rules, were in force at the time the appellant became a member of this Society, and up to the time the new rules were framed and promulgated on the 3rd February 1916 continued to be so.

The appellant when he became a member of the Society, by the provisions of section 22 of the Act of 1893 covenanted that the Society should have power to alter any rules made dealing with matters mentioned in the second schedule to the Act. Those rules stand, I think, to the Society very much in the relation in which the articles of association of a limited liability company stand to that company. And accordingly the covenant of the appellant by no means implies that he should be bound by rules not dealing with the internal affairs and management of the Society, but, though touching upon the subjects mentioned in the aforesaid schedule, extend much beyond those internal affairs and this management.

I do not think that any help to the solution of the questions emerging for decision in this case can be obtained by comparing this Society to a partnership in which before its creation or while it exists the partners may agree to carry on their trade on any terms they please. It is not a partnership. Its true analogue is a limited liability company, and so close is the resemblance between the two in structure and operation and the rights and obligations of the members that by sections 54 and 55 of the statute each may be converted into the other by a special resolution. In order, therefore, to determine what was the aim and what the intended operation of the new rules of February 1916, it is essential to consider what was the aim and what the operation of the earlier special and general rules theretofore existing, and the progress and success of the business of the Society while acting under these earlier rules.

The general rules provide that the Society shall consist of special members and of all

such other persons as the special rules direct or the committee (which means the committee of management) may admit. Each individual must hold at least one transferable share. Every application for admission as a member is to be considered by the committee, and, if approved of, the name of the applicant is to be added to the list of members. Minors and married women are eligible as members. The committee of management are to be elected by the members. By rule 13 of the special rules it is provided that should any member of the committee with the consent of the committee become surety for any debt or liability of the Society he shall not be removed from office without his consent until this liability has ceased. This last rule has, in the events which have happened, tended to make the members of the present committee permanent. By general rule 19 it is provided that a person whose shares shall be transferred, repaid, or forfeited shall cease to be a member. All shares are transferable. And general rule 45 provides that any shares may with the approval of the committee be transferred by one member to any other member at the option of the transferor, but if the transferee should not be a member of the Society he must be approved of by the committee or by the committee and a general meeting, according to the provisions of the rules relating thereto, before the transfer can be registered; and if the rules require a member to hold more than one transferable share the transferee must acquire by transfer, or by transfer and allotment, the number so required before he can be registered.

If a sum be due in respect of a share the committee, if the sum has been in arrear for three years, may declare the share to be forfeited. This forfeiture may be remitted if the sum due be paid in manner provided.

No method is provided by the general or special rules by which the committee can be compelled to consent to the transfer of a share. And a member could never escape from any fetters imposed upon his freedom of trading by transferring his shares unless the committee consented to the transfer. By no independent act of his own could he free himself. This was not a matter of so much importance while the old rules remained unaltered, because of the slight restraint they imposed upon the members. Sec. 20 of the special rules ran thus—"Any member who shall supply milk to any creamery other than that owned by the Society *for the space of three years* from the date of his admission to membership *without the consent in writing* of the committee, shall *forfeit his shares, together with all money credited thereon.*"

It is clumsily drafted. It obviously means that during the first three years of the existence of the Society its members should supply their milk to the creameries of the Society, and to those alone, but after this stage of infancy had been passed the members might supply their milk to any other creamery they wished. The three years would expire in 1909, many years before the new rules were framed.

Mr John Byrne, the secretary and manager of the Society, admitted in cross-examination that under the old rules, *i.e.*, the special and general rules, the Society was up to the framing of the rules prosperous, was going on well, was able to hold its own in competition with other creameries. That (referring evidently to the old rule 20) at the end of three years on equal terms a business enterprise should be able to walk on its own feet if properly managed, though there was competition against it. He then said it would prosper infinitely more rapidly if all the members would remain liable. By the words "equal terms" he referred to the fact that they found special prices had been offered to some members to take them away, and by these words he meant "competition by offering special prices." The respondent Society were affiliated to the Irish Agricultural Organisation Society, and therefore under the rules of that Society is one of the group of creameries under the control of the Irish Creamery and Butter Control. There are other creameries in the district called, apparently, proprietary creameries. In the year 1916 the committee had, Mr Byrne further said, borrowed from the bank a sum of close on £1500 for the purpose of making loans to members to buy manures and seeds and feeding stuffs in the spring of the year till such times as the milk supplied by them should pay it off again. When milk was sent in by a member who had got an advance, the price of it was not paid to him; the amount was credited to him against his debt, but the cash which but for that debt would have been paid to him was paid into the bank. While this debt is due from the members of the committee to the bank, these members are, under rule 13 of the special rules, immovable. Mr Byrne proceeds to state why the new rules were passed, and what were the objects they were directed to attain. He says that in October or November of the year 1915 farmers living in the district of Gortatlea, a town about three miles distant from the centre of the district described in par. 5 of the new rules, were anxious to have a creamery there, that a deputation of those farmers waited upon the committee of the respondent Society and terms were arranged between them, that the terms were that these new rules should be adopted, which bound members to sell milk to their own Society. The rule, he said, was necessary to protect the Society against unscrupulous competition; what he meant by unscrupulous competition is shown by the next sentence. "To protect," he said, "the Society against the competition of those who may pay a special price for the purpose of killing the new branch in its infancy." He adds, "Or reducing the members of the Society to the proprietary creameries." The word "reducing" is I think a misprint for the word "introducing."

He was asked if the impeached rule gave his creamery any advantage in respect of controlling the quality of the milk sent to his creamery, and his answer is—"Yes, it

assists us in being more independent; we can send the milk back if not clean; we can refuse it, and they cannot go to the proprietary creameries next day."

Further on he said that the branch at Gortatlea cost £800, that the new rules compelled members, if offered a better price by a rival creamery, to sell to the respondents; that this was not the object of the rule, but to protect the Society in its outlay of capital against unfair trade competition. Further on he says the object of the rule was to keep the people together to make the Society a strong Society, to prevent disloyal members from grasping at fancy prices for the time being.

It is as plain to me as anything can be that the main object—if not the sole object—which the respondent Society desired to effect by these new rules was to protect themselves from the competition of proprietary creameries. The secretary chooses to style competition which consists in one's rival in trade offering a better price for a needed commodity than the price offered by oneself as unscrupulous and unfair competition. The law, however, does not so regard it. It is perfectly legitimate competition. The crippling or defeating by the Society of the competition of its trade rivals in this manner may be a lucrative thing for it. That, however, does not alter the law. The gain, I think it will appear, is made by the sacrifice of the pecuniary interest of its members.

These being the objects the Society designed to effect by making these new rules, one has next to consider to what extent it has gained its end. Rule No 5 of the new rules provides that the Society shall consist of the special members and of persons resident in or occupying grazing land in a very extended area of the county of Kerry comprising eighty-six townlands, and of such other societies registered under the above-named Act, wherever situated, as the committee of management may admit to membership.

The impeached rule, namely, rule 6 of the new rules, deals with a particular class of members, namely, those having milk for sale produced by the members' cows, kept or grazed on any lands within the area comprising these eighty-six townlands. And by the first sub-section of rule 6 the Society binds itself so long as it shall have a creamery working to accept this milk provided it be delivered fresh and in good condition at the creamery of the Society at such times as the committee shall appoint, and shall pay for the same at the current rate fixed by the committee for milk supplied to the creamery by members. And further binds itself in the case of default by it to pay to the member in respect of whom the default is made, as and for liquidated damages and not as a penalty, the sum of 1s. per cow per week for every cow's milk not accepted.

By the next sub-section of this rule it is provided that after the Society shall have started a creamery for its members, no individual member so long as he continues to be a member who shall have milk to sell, the produce of a cow or cows kept or grazed on lands within the aforesaid area, shall, without the written consent of the committee first obtained, sell any such milk to any creamery other than a creamery of the Society, or any company, society, person, or persons who sells milk or manufactures butter for sale, and that any member who commits a breach of the rule is bound to pay to the Society as and for liquidated damages and not by way of penalty a sum of 1s. per cow per day for every cow's milk sold contrary thereto. That is, that the committee shall themselves fix the price of the milk they consent to purchase, be it much or little, and that any members who may sell milk to any body or person who is more than a mere consumer shall come within the reach of this penal clause. Mr Connor is too good a lawyer to contend that these so-called liquidated damages were other than a penalty. He admitted that it was a penalty. But that admission seems to have been made for the first time at the bar of your Lordships' House. And it is clear from the evidence of Mr Byrne, the secretary, that the Society did not so regard it.

In the appendix he appears to have been asked on cross-examination by Serjeant Sullivan, who had made a calculation as to what Scanlan, an offending member, would have to pay per cow at the rate prescribed—"But if he sells elsewhere he will have to pay £800 a-year?" And the answer is—"That is his contract as I understand it." Then follows a proviso to the rule which is peculiarly oppressive. It provides that instead of proceeding for damages as above provided the committee may refuse to purchase the milk of any member who shall commit a breach of the terms of clause 2 of the rule. So that if a member should sell a gallon of milk to a dairy which re-sold milk, or a few gallons to a neighbouring farmer who was short of milk and wanted a small quantity of butter to fill up the firkin he was making up for the market, all the milk of this member may be thrown on his own hands.

A question was raised upon the meaning of the words "having milk for sale" occurring in rule 6. It was contended that this phrase included milk which at the time the rules were promulgated the member had already bound himself by contract to sell to some person or body other than the Society. If that were its true meaning I think there would be much in Mr Brown's contention that the appellant, being an existing member at the time the new rules were made, might be required to commit a breach of contract, and therefore that the rules dealt with something beyond the internal affairs and management of the company and were *ultra vires* and void. I do not think, however, the words "having milk to sell" bear that meaning. I think they mean "having milk which he is free to sell" to the Society, and do not include milk which the member has already contracted to sell to some other person or body.

I think this rule No. 6, interfering as it does with the individual liberty and freedom of action of the members of this Society in their trade or business and the legitimate

use and employment of their property, is *prima facie* contrary to public policy and the public interest, and is void as being a restraint of trade. The question is, does it come within one of the exceptions mentioned by Lord Macnaghten in the *Nordenfeld* case, 1804, A.C. 535? Is the rule reasonable in reference to the interest of the parties concerned (in this case the Society and its members)? Is it also reasonable in reference to the public interest? Is it so framed and so guarded as to afford adequate protection, but nothing more than adequate protection, to the party in whose favour the restraint is imposed, while at the same time it is in no way injurious to the public?

I think the rule offends in every way in one of these respects. It is harsh, oppressive, and unjust in its operation, especially to those persons who, like the appellant, are producers of milk and were members of the Society at and before the time the rule was made. It shuts out the products of the industry of this class from almost every market. It practically requisitions their products, paying for them such a price only as their own committee may choose to fix. That is confiscation in essence. It makes it impossible for these members by an independent act of their own to free themselves during their lives from the fetters it has thus fixed upon them. It is designed to protect and does protect the Society against a menace to its trade against which in the public interests it has no right whatever to be protected, namely, free and open competition. A rule much more restricted in scope and less oppressive in operation would, as is evident from the Society's success under rule 20 of the special rules, adequately guard and protect all its legitimate interests. Such a rule for instance as required that members who undertook to supply milk to the Society's creameries should be bound not to discontinue the supply when they had milk available without six months' or twelve months' (as they might determine) previous notice in writing. If that be so, as I think it is, then I protest against the notion that this Society can save a rule such as this from condemnation by saying to an aggrieved and complaining member—"You have contracted that we should have power to alter the rules; we have altered them. If you do not like to suffer under them as altered, transfer your shares and clear out." I do not think the Society has any right whatever to put such an alternative to any member. A share in such a society may be a comparatively worthless thing; at all events it is property. I do not think that a member is in any way bound either to get rid of it or to submit to an oppressive *ultra vires* or illegal rule. Therefore if the committee were ever so ready to consent to a transfer of the appellant's single share, that fact might make the rule less oppressive in operation no doubt, but in my view it would not make it the less illegal. The committee have never in fact offered to consent to the transfer of the appellant's share. The appellant never asked them to consent to it, but I do not think it is irrelevant to examine the provisions contained in the new rules touching the question of the transfer of shares.

Rule 21 of the new rules deals with transfer. Every share is made transferable. No share is to be withdrawable. A member may, with the consent of the committee of management, transfer his shares to any person upon giving one month's notice in writing to the secretary stating the full name, place of residence, and occupation of this person, the number of shares intended to be transferred, and the consideration for the transfer, but the committee is not to be bound to assign any reason for refusing to sanction any transfer of shares.

For all practical purposes this rule places the shareholder absolutely at the mercy of the committee, and at their option binds him to the Society for life. Even if they were *prima facie* compellable to consent to a transfer, they are not compellable to do so if they *bona fide* refuse to consent to it in what they believe to be the interest of the Society, and if they refuse to state their reasons it is to be assumed that they refused *bona fide* for reasons they deemed sufficient—*Mitchell (Nelson)* v. *City of Glasgow Bank*, 4 A.C. 642; *in re Coalport China Company*, 1895, 2 Ch. 404; *ex parte Penney; re Gresham Life Assurance Society*, 1895, L.R., 8 Ch. 446—so that for all practical purposes the member, if the committee refuse to consent to a transfer, becomes bound for life.

It has been held, however, that the fact that a restraint on trade is imposed for an indefinite time does not necessarily render it unreasonable and void—*Wallis* v. *Day*, 1837, 2 M. & W. 273; *Hitchcock* v. *Coker*, 1837, 6 A. & E. 438; and *Haynes* v. *Doman*, 1899, 2 Ch. 13.

Still in my view this point might in the particular circumstances of a given case be involved in the question whether the restraint afforded no more than reasonable protection to the person in whose favour it was imposed. In *Horwood* v. *Millar's Timber and Trading Company* (1917, 1 K.B. 305) a restraint was held bad as contrary to public policy, inasmuch as it unduly and improperly fettered the liberty of action of the mortgagor (*i.e.*, the person on whom the restraint was imposed) and the free use of his property. And the Master of the Rolls in giving judgment referred to what he had laid down in *Saxelby's* case (1915, 2 Ch. 57), in which this House concurred. It meant, he said, "that considerations of public policy must be had regard to, and that it is no answer to say that an adult man, as to whom no undue pressure is shown to have been exercised, ought to be allowed to enter into what contracts he pleases affecting his own liberty of action. I think that is not the law."

The case of *Joseph Evans & Company* v. *Heathcote* (1918, 1 K.B. 418) was a peculiar but very instructive one. There the plaintiffs, manufacturers of "Cased Tubes," were members of a trade combination called the Case Tube Association. The defendants, who were also manufacturers of "cased tubes," were the members of this same association other than the plaintiffs. The object of the association was the regulation

of the prices in that trade. In furtherance of this object it was provided by the rules of the association that each member should be restricted in the output of "cased tubes" to a certain fixed percentage of the total output of the members, the percentage being based on the members' actual output in the preceding years. Each member whose output in any month exceeded the percentage was required to pay the profits of this excess into a pool, while each member whose output in any month was less than this percentage was to receive a percentage out of the pool. The rules provided that each member should sell their cased tubes only upon the terms and at the prices which should from time to time be fixed by the association. No means were provided by which a person who once joined the association could be retired from its membership. By an agreement made between the plaintiffs, the defendants, and certain other firms, the plaintiffs in consideration of the defendants fixing their percentage at a certain figure agreed not to sell their cased tubes to any persons other than these firms; and the firms on their part agreed not to purchase cased tubes from manufacturers other than the members of the association. The agreement further provided that it should continue in force as long as the association and a certain other society over which the plaintiffs had no authority continued to control prices. For several months the plaintiffs' output was less than their percentage, and they therefore became entitled to receive from the association a sum of money out of the pool. Though the secretary of the association furnished the plaintiffs each month with an account showing them how much they were entitled to for that month, they were not paid, and brought an action to recover the amount so due. The defendants pleaded that the action was not maintainable, on the ground that the rules of the association of which they were members, and the agreement of June 1913 to which they were parties, were illegal as being in restraint of trade. It was held that the restraint imposed by the agreement and the rules was unreasonable as between the parties, and that therefore the agreement was invalid at common law, and that the plaintiffs could not recover on it. It was further held that the association was a trades union, and that the agreement was within the protection of sections 3 and 4 of the Trade Union Act 1871. This last point is immaterial for present purposes.

The peculiarity of the case was that the defendants were refusing to pay on the ground that the restrictions imposed upon the plaintiffs, to which the plaintiffs did not object, were unreasonable and oppressive.

In face of this decision, which in my view is absolutely right, it seems vain to contend, as apparently was contended in some of the Irish cases, that adult parties can enter into agreements to trade upon any terms they please, and that none of them can get relief from any contract they so enter into although it imposes upon them a restraint on trade.

The last matter I wish to refer to is the arbitration clause, rule 69 of the new rules. It is not a clause to the effect that the holding of an arbitration shall be a necessary preliminary to recourse to a court of law. It is designed to oust the jurisdiction of the courts of law altogether, since it provides that the award shall be final. The arbitrator is the committee of the organisation to which the respondent Society is affiliated, and which through one of its committees has control over the respondent Society. But the words disputed in this clause do not, I think, cover the controversy in this case, namely, whether these rules of February 1916 are *ultra vires*, void, and unenforceable in law. I think the plaintiff is entitled to the relief he prays for, and that the decision appealed from was wrong and should be reversed, that the decision of Barton, J., was right and should be restored, and that this appeal should be allowed with costs here and below.

LORD SHAW — The Society of which the appellant is a member, and whose new rules are in question in this appeal, was registered in the year 1903 under the Industrial and Provident Societies Act of 1893.

By section 21 of that Act the registration of the Society renders it a body corporate "with perpetual clauses and a common seal and with limited liability." By section 60 of the statute this limitation of liability is worked out in the usual manner in the case of contributories by the provision of sub-section D — "No contribution shall be required from any individual Society or company exceeding the amount, if any, unpaid on the shares in respect of which he or it is liable as a past or present member."

By the general rule of the Society No. 120 it was provided that any rule not declared to be fundamental "may be rescinded or any new rule be made by a majority of two-thirds of the members present at any special general meeting." The appellant joined the Society as a member when the original rules, without alteration, were in operation. He entered into a contract for a three years' supply of milk from his farm to the Society. The original special rules appear to have worked well, and a contract of the kind made with the appellant appears also to have worked well in the interests of all parties.

New rules were adopted on the 1st February 1916. They contained certain very serious alterations of the rights and particulars of the obligations of members of the Society. These alterations raise the questions in this appeal. The challenge brought against them is, *inter alia*, that they are not enforceable against the appellant as being contrary to public policy by reason of the restraint of trade which they contain, a restraint which is not justified as necessary for the protection of the Society's rights under its contract of membership with the appellant.

I am of opinion that this challenge is sound, and that the law cannot be invoked for the enforcement of the new bargain attempted to be set up by the new rules.

It may be explained that under the original special rule No. 20 of 1903 "Any mem-

ber who is supplying milk to any creamery other than that owned by the Society, for the space of three years from the date of his admission to membership, without the sanction in writing of the committee shall forfeit his shares together with all money credited thereon." The new rule, No. 6 of 1916, has been cited at length in the judgments of your Lordships which have preceded my own. It is of a severe character, and it is fair to the Society to say that its provisions are stringent also against the Society itself. Thus it is all the more necessary to examine with care the proposition that the restraints laid upon the freedom of trade of the individual member are not enforceable.

These are contained in the second part of rule 6. Under the first part the Society became bound to take the milk at a price or rate "fixed by the committee" for milk supplied by members. Under the second part it provided that no member of the Society having milk to sell from cows kept on his lands within the area defined should, without the committee's sanction, sell any such milk "to any creamery other than the creamery of the Society, or to any company, society, person, or persons who sells milk or manufactures butter for sale." A member breaking the rule was to pay to the Society "as liquidated damages and by way of penalty a shilling per cow per day for every cow's milk sold contrary to the new rule." It was provided further that instead of proceeding for damages the committee might refuse to purchase the milk from the cows of the offending member. In a word, the result was, of course, to exclude the appellant from the open market, the Society having the duty of buying and the right to buy at its committee's price. The sanction of the rule was of extreme severity—liquidated damages of 1s. per cow per day for every cow's milk sold contrary to the rule. This rule was to bind members not for a period of months or years but during their membership.

With regard to membership, however, another drastic alteration from the original rules was made. Under the latter a contravention of the rules by a member operated as a forfeiture of his shares, and accordingly a cessation of his membership. He accordingly was set free from the Society, but, of course, subject to any claim by it in respect to a breach of any contract made by him. But under the new set of rules it is provided that any member whose shares have been transferred or cancelled shall cease his membership; but "he shall not otherwise be entitled to withdraw from the Society." This transfer or cancellation, however, is a matter in which the committee of the Society has complete control. No transfer is effectual except with the consent of the committee of management, and "the committee shall not be bound to assign any reason for refusing to sanction any transfer of shares."

I should be the last to question that the new rules were framed with a praiseworthy intent, or that the administration thereunder, supervised, as it undoubtedly is, by the Irish Industrial Organisation Society, is intended to be in the public interest. But we are in the region of contract, and the sole question for the consideration of the House is whether the new rules which I have thus briefly sketched do or do not form an invasion of that system of contract beyond the points which public policy will sanction.

In order to test this question—and no less test can be satisfactory—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. In the result accordingly it will be observed that under the new rules as framed the appellant is, in a matter involving his own industry and daily occupation, bound for life. His release is at the option of a committee for whose conduct no reason need be assigned, and against whose conduct no challenge can be made except that it was moved by bad faith And the *onus* of establishing this grave charge would rest on the appellant.

I am satisfied that the new rule in the ordinary case, if put in operation against the appellant and apart from such release, would apply substantially as I have said to the whole of his industry. He might remain for life under obligations which would continue until his ruin had been accomplished or the Society moderated its terms or allowed him to escape.

In circumstances such as these, this instance of restraint of trade being so extreme as that which I have indicated, the sole question is whether such restraint was justified in order to protect the interests of the Society which imposed them. So far as finance and rights of property are concerned the contract between the Society and the appellant was one under which his liability was limited to the amount of his shares. It is not, of course, contended that such liability has anything to do with the present restraint.

The further remainder of the purpose would appear to be this, that looking to the different objects in view, and particularly to the advantages of co-operation in industry by the manufacture of butter and cheese from milk, it was legitimate that both parties to this contract, *i.e.*, the Society as a whole and the individual member, should agree to enter into a contract for the supply of milk for a term of years. This appears to me to be an interest in the protection of which the law would not in any ordinary circumstances interfere. Speaking for myself I may say that the three years' contract of supply which was originally attached as a condition of membership, and which in experience fortunately turned out well, was within the law. Questions of degree may have to be considered in all such cases, but in the present case I am of opinion that the interest of the parties to a contract implied in the membership of such a Society cannot be extended to justify the new rules which I have cited. These rules appear to me in their construction to involve not only conditions which might be financially equivalent to ruin, but to form a restraint on the industry and trade of the appellant which would be equivalent to a bondage in the nature of slavery for life. None of the cases

which have occurred in recent years in this House, where the whole authorities have been overhauled, can be cited to justify the enforceability of such a restraint. I recognise the difficulty in which the Court below was placed in view of the decisions in the *Athlacca* (49 I.L.T. 233) and *Coolmoyne* (1917, 2 I.R. 107) cases, but for the reasons stated by your Lordships who have preceded me I think these decisions to have been unsound.

On the general question that is raised of the restraint of trade, of its principles and its limit, I have expressed myself so fully in the recent cases of *Mason* v. *Provident Clothing and Supply Company* (1913 A.C. 724) and *Herbert Morris Limited* v. *Saxelby* (1916, 1 A.C. 688) that I will make so free as merely to refer to what I there stated. Unless this House is to embark afresh upon these difficulties, and unless, further, some unsettlement should take place of the principles laid down in them, and in the *Attorney-General of Australia* v. *Adelaide Steamship Company* (1913 A.C. 781), it does not appear to me to be necessary to say more. That these cases apply in complete support of the appeal I have no doubt.

I agree with the motion which has been proposed.

LORD PARMOOR—I regret that I am not able to concur in the judgments which have been delivered by your Lordships, although in agreement with the opinion that the principles of law applicable have been fully ascertained. The difficulty arises in applying these principles to the particular conditions which prevail in the present appeal.

The respondent Society was registered on the 6th March 1903 under the provisions of the Industrial and Provident Societies Act 1893. The appellant became a member of the respondent Society on the 5th October 1903, and still continues to be a member thereof. Towards the end of the year 1915 the respondent Society took steps to alter their rules. On the 7th December a special meeting was held to consider the adoption of a complete amendment of the existing rules, and a resolution was carried in favour of an amendment. A further special general meeting was held on the 18th January 1916, and at this meeting the resolution, passed on the 7th December 1915, was duly confirmed. On the 1st February 1916 the new rules were duly registered by the Registrar of Friendly Societies in Ireland.

The appellant, who is a farmer residing at Ballydwyer, Ballymaceltigott, in the county of Kerry, did not assent to the said amendment of the rules. Ninety-three members, holding shares to the value of £987, voted in favour of the resolution, while fourteen members, holding shares to the value of £146, voted against it.

The appellant, suing on his own behalf and on behalf of other dissentient members who voted against the adoption of the amended rules, commenced an action on the 3rd February, claiming—(1) A declaration that certain rules recently adopted by the respondent Society, and registered on the 1st February 1916, in particular rule 6 (2) and rule 16, were not binding on the appellant and the other members of the Society as being (*a*) improperly adopted to the prejudice of the appellant and other members, (*b*) illegal as in unreasonable restraint of trade, (*c*) *ultra vires* the defendant Society. (2) An injunction to restrain the respondent Society from acting upon or putting in force the said rules.

After service of the writ of summons the respondent Society claimed to have the action stayed on the ground that the rules of the respondent Society provided that disputes between members should be decided by arbitration. This motion was refused by Pim, J., whose order was affirmed by the Court of Appeal in Ireland on the 29th February 1916. The same question was raised again on the trial of the action, but it was held that the question being one of *ultra vires* as regards the powers of the respondent Society it was properly a question for the Court, and not for arbitration. On the hearing of the appeal this question was not seriously argued, and in my opinion the dispute which has arisen between the appellant and the respondent Society cannot be regarded as coming within the arbitration clause in the rules. I agree in the judgment of *Heard* v. *Pickthorne* (1913, 3 K.B. 299), and the present case appears to me to come directly within the principle which that judgment affirms.

The main question raised in the appeal is whether certain rules registered on the 1st February 1916 are *ultra vires*, and not binding on the appellant and other dissentient members as being an unreasonable restraint of trade and therefore contrary to public policy. When the case came before Barton, J., the trial judge, the case of *Coolmoyne Co-operative Creamery* v. *Bulfin* (1917, 2 I R. 107) had been decided by the Court of Appeal in Ireland, and rules identical with those now under consideration had been upheld. Barton, J., found in favour of the appellant on the ground that it was not possible to attribute to him or other dissentient members an implied agreement to surrender his or their judgment to the vote of a majority and that the conditions of the amended rules to which the appellant objected could not be imposed upon him in *invitum*. The agreement which Barton, J., held unreasonable and void was not the rule, but the alleged agreement which it was sought to attribute to every member of the respondent Society that he would be bound by any and every new rule in restraint of trade without having an opportunity of exercising his free judgment upon its reasonableness from his point of view, and upon the adequacy of the consideration which it offered to him. When the case came before the Court of Appeal in Ireland it was recognised that that Court was bound by its former decision as to identical rules in the *Coolmoyne* case and the argument was directed to the question whether or not the amended rules were binding on the plaintiff. In section 22 of the Industrial and Provident Societies Act 1893 it is enacted that the rules of a registered society shall bind the society and all members thereof and all persons claiming through

them respectively to the same extent as if each member has subscribed his name and affixed his seal thereto. There was contained in such rules a covenant on the part of such members, his heirs, executors, administrators, and assigns, to conform thereto subject to the provisions of the Act. The effect is that the rules form the contract between the members and the society —*Auld* v. *Glasgow Working Men's Building Society*, 12 A.C. 197. The rules of the respondent Society contain a provision that any rules of the Society not declared to be fundamental may be rescinded or altered, or that any new rule may be made by a majority of two-thirds of the members present at any special general meeting. Where a person joins a Society with power to make new rules, and new rules are duly made, the member is as much bound by the new rules as he was by the old rules, so long as they are within the powers of alteration possessed by the Society. It makes no difference that he was one of a dissentient minority, and such alteration cannot be regarded as a breach of the contract which has been entered into between himself and the Society—*Allen* v. *Gold Reefs of West Africa*, 1900, 1 Ch. 656; *British Equitable Assurance Company* v. *Baily*, 1906, A.C. 35; *Smith* v. *Galloway*, 1898, 1 Q.B. 71. The question therefore arises for decision in this appeal whether the case of *Coolmoyne Co-operative Creamery* v. *Bulfin* was rightly decided and the first point for consideration is the nature and meaning of the rules which constitute the contract between the appellant and the respondent Society.

The objects of the Society include the development and improvement on co-operative principles of the industry of dairying in Ireland, by carrying on the manufacture and sale of butter, cheese, and other milk products. The membership consists of special members, and of all such persons resident in or occupying or grazing lands in certain town lands, and of such other societies registered under the Act wherever situated as the committee of management may admit to membership. No importance attaches either to the area of limitation or to the qualification for membership, but it is provided that no person carrying on any business similar to that in which the Society is engaged shall be eligible to become or continue as a member of the Society. The effect of this would be that if the appellant set up business similar to that in which the Society is engaged he would not be eligible to continue a member. Rule 6 (1) and (2) are important. Rule 6 (1) places an obligation upon the respondent Society so long as it shall have a creamery working, subject only to certain exceptions, to accept from any member having milk to sell, all milk produced by such member's cows kept or grazed on any land within the area of membership, and to pay for such milk at the current price or rate fixed by the committee for milk supplied to the creamery by members of the Society. In case of default there is a provision for payment of liquidated damages by the respondent Society, but the so-called liquidated damages appear to be in the nature of penalties, and if this is so, it would be incumbent on any member in case of default of the respondent Society to prove what damages he had in fact sustained. Rule 6 (2), which is one of the rules directly impugned, provides that after the starting of a creamery for its members by the Society no individual member of the Society, so long as he continues a member thereof and has milk to sell, the produce of a cow or cows kept or grazed on lands within the defined areas, shall, without the written consent of the committee first obtained, sell any such milk to any creamery other than a creamery of the Society, or to any company, society, person or persons who sells milk or manufactures butter for sale. There is a provision for liquidated damages, but as in (1) the so-called liquidated damages appear to be in the nature of penalties, and if this is so actual damage would have to be proved. There is a proviso that instead of proceeding for damages the committee of the Society may refuse to purchase milk of any member who shall commit a breach of the terms of rule 6 (2). The result is that there is an obligation on the respondent Society to accept the milk of the appellant, so long as he is a member of the Society, produced from cows within the defined area, and a corresponding obligation on the appellant so long as he continues a member of the Society and has milk to sell from cows within the same area, not to sell it to any creamery other than a creamery of the Society, or to any company, society, person, or persons who sells milk or manufactures butter for sale, without the consent of the committee. It must, however, not be forgotten that if the appellant sets up a business similar to that in which the Society is engaged, he is no longer eligible to continue a member of the Society and that if the so-called liquidated damages are in the nature of penalties, only actual damages can be recovered at the instance either of the appellant or of the respondent Society, and that the respondent Society instead of proceeding for damages has the option to refuse to purchase the milk of the defaulting members.

The appellant is entitled to say that rule 6 (1) and (2) must be considered as one of a series of rules, and with special reference to the terms of rules 16 and 21. Rule 16 provides that a member, all of whose shares have been transferred or cancelled, shall cease to be a member of the Society, but that a member shall not otherwise be entitled to withdraw from the Society. Under schedule 2 (7) and (9) of the Act of 1893 the Society have power to make rules for the provision of the form of transfer and registration of shares, and for the consent of the committee thereto, and for the determination whether the shares or any of them shall be withdrawable, and whether and how members may withdraw from the Society.

The existence of this power is no answer to the allegation that the rules as a whole place an unnecessary restraint on trade, if such an allegation can be maintained, but it is clearly contemplated by the Legislature

that rules might be framed in the form which the respondent Society had adopted, and the mere adoption of such rules is not itself open to objection. Rule 21 provides for the transfer of shares and declares that a member may, with the consent of the committee of management, transfer all or any of his shares to any person upon giving notice in writing to the secretary, stating the full name, place of residence, and occupation of the transferee, the number of shares intended to be transferred, and the consideration for the transfer. The committee in refusing to sanction a transfer of shares is not bound to assign any reason, and there is a further provision that no shares shall be withdrawable. The result is that the appellant is unable to transfer his shares without the consent of the committee of management, and that so long as the consent is withheld he continues a member and is bound by the provisions of rule 6 (2), subject only to the condition that if he carries on any business similar to that in which the Society is engaged he is no longer eligible to continue as a member of the Society. In this case no application has been made to obtain the consent of the committee of management, but so long as they do not act capriciously or without *bona fides* the refusal of the committee of management to consent could not be questioned, and they are not bound to assign any reason for refusal. I am willing to assume that the consent of the committee to a transfer of his shares by the appellant would not have been given—but it is unfortunate that it was not sought to obtain the consent of the committee of management before the commencement of this expensive litigation. There is no reason that it might not have been given in the case of the appellant, and there is evidence that whenever a member has applied for a transfer it has been granted.

The rules referred to above constitute the contractual relationship between the appellant and the respondent Society so far as the contract is impugned as constituting an undue restraint of trade, and being in this respect contrary to public policy. Your Lordships are not considering the relationship of the members of the Society *inter se*, but of each member to the Society—a relationship between the members of a co-operative society and its co-operators, and intended for their common benefit, and in its character and inception voluntary. There is a close analogy to the relationship constituted in a partnership between an individual partner and the partnership firm of which he is a member. No one is compelled to become a member of the respondent Society, but if he does he knows that there are rules which will be binding on him, and that such rules may be altered if the prescribed conditions are followed. It makes no difference that the appellant was a dissentient to the alteration of the rules. He joined the Society with power to alter its rules under prescribed conditions, and so long as these conditions are observed he is as much bound by the altered rules as he was by the rules in force at the time when he became a member. On this point I am unable to agree with the reasoning on which the judgment of Barton, J., is founded. It is unquestionable that the contract does operate in partial restraint of trade, but a large number of commercial contracts are made with this object. The law does not sanction interference with the principle of freedom of contract unless the restraint is greater than is reasonably required for the protection of the covenantee, or to put the test in slightly different language, a contract in restraint of trade is not invalid so long as the restriction is no more than an adequate protection to the interests of the party in whose favour it is imposed. The Court of Appeal in Ireland has decided that the restrictions sought to be imposed upon the appellant in favour of the interests of the respondent Society are not unreasonable in degree, and after full consideration I find myself in agreement with this conclusion.

The contract to which the debate in this House has been directed is commercial in character, involving questions of business expediency. It raises questions essentially distinct from those which arise in the case of a contract to regulate the relationship between an employer and employee after the termination of a contract of employment or a contract protecting the goodwill on the sale of a business. It is, moreover, a commercial contract of a special character entered into for the purpose of furthering a co-operative movement imposing mutual obligations, and conferring mutual benefits both on the co-operators and the Society of which they are members. It will be convenient further to weigh the effect of this consideration at a later stage. It cannot be said that the contract is unilateral or one-sided, since the consideration for the obligation on the appellant not to sell his milk purchased under the defined conditions without the consent of the committee to any other person than the respondent Society is to be found in the obligation on the respondent Society to purchase all such milk produced within the defined limits as the appellant may have to sell. So long as there is consideration in a contract of this character the Court does not consider the question of its adequacy, and it has been said that any attempt to do so would impose an impracticable duty on the Court. I think it is also true that in a contract of this character the parties should be regarded as the best judges of whether the restraints mutually imposed are unduly restrictive, but this rule is not so rigid as to prevent the interference of the court in a particular case—*Heard* v. *Pickhorne*, 1913, 3 K.B. 299; *Herbert Morris Limited* v. *Saxelby*, 1916, 1 A.C. 688. A further consideration is that the contract does not impose on the appellant anything in the nature of servile conditions or of personal restraint, and as was stated during the argument the contract was impugned not as containing conditions vicious in character but conditions pressed beyond the degree required for the protection of the interests of the respondent Society.

I think that the contract should be considered as a contract of a distinctive char-

acter applicable to the relationships which arise between a co-operative society and any of its constituent members. The intention and purpose of the rules are to provide conditions under which with reasonable security a business can be instituted and carried on on a co-operative basis. The basic idea is co-operation. The restraint imposed ceases to be operative as soon as the appellant ceases to be in a position of a co-operator member of a co-operative society. No doubt this condition introduces an indefiniteness as to the length of the duration of the restraint, but such indefiniteness, unless unreasonably imposed, is not in itself an objection against the validity of the contract on the ground of public policy—*Wallace* v. *Day*, 2 M. & W. 273; *Hitchcock* v. *Coker*, 6 A. & E. 438. What is the effect of the consideration that the contract is applied in co-operative trading upon the argument of the appellant? In the first place it was said that the effect of the rule was to compel the appellant and other members of the Society to sell all their produce at a price to be fixed for the benefit solely of the respondent Society by the respondent Society itself. This allegation is, in my opinion, based on a fallacy. In the first place the sale is not at a price to be fixed for the benefit solely of the respondent Society, but at a price to be fixed for the benefit of all members of the respondent Society including the appellant. No doubt this implies that no higher price can be paid than the financial stability of the respondent Society may allow, but so long as there is no suggestion of improper conduct it cannot affect the validity of a contract whether at a particular moment the co-operative Society is or is not in a flourishing condition. It was stated in the present case that expenditure had been incurred in the erection of a new creamery, but this is a matter of internal concern and does not affect the questions to be determined by your Lordships. No member of the Society is subjected to the risk of selling his produce at a price dictated by an outside purchasing body for the purpose of profit, and I can see no reason for suggesting that the appellant and other members of the respondent Society are subjected to unreasonable conditions by an obligation to sell milk at a price to be fixed by a committee of their own choice in the interests of the members of the Society, and which it should be assumed in the absence of evidence to the contrary will be fairly fixed in the common interests of all the parties concerned.

The appellant, however, was undoubtedly entitled to argue that if the restraint as to the selling of his milk was not in itself unduly restrictive, yet that it might become so if considered in connection with the rule which imposed a penalty and with the rules relating to the withdrawal of members from their membership. It may be well to quote a passage from the statement of claim. "The effect of the new rules is that the plaintiff and other members of the Society are for the whole period of their lives bound under penalty not to sell the milk of their farms to any creamery or to any other person who sells milk or manufactures butter for sale other than the defendant Society." What is the effect of the rule or rules on which this allegation is based? It may be convenient to consider in the first place what is contained or implied in the words "bound under penalty." In form the same penalty or liquidated damages is imposed against the respondent Society under rule 6 (1) as is imposed in their favour under rule 6 (2). There is, however, a further provision (rule 6, proviso (*a*)) that instead of proceeding for damages the committee may refuse to purchase milk of any member who shall commit a breach of the terms of clause 2 of the rule, and it does not follow that the committee might not have adopted this form of alternative remedy in the case of the appellant or any other complainant member. There is a further difficulty in considering the effect of the provisions in rule 6 (1) and (2) which purport to fix an amount in the nature of liquidated damages and not by way of penalty. There has been no attempt to enforce the payment of the amount fixed as liquidated damages, and there is little relevant evidence on which to found an opinion whether the provisions in question are not really in the nature of the imposition of penalties. I can only say that as at present advised I should hesitate to say that the so-called liquidated damages could be recovered from the appellant or that the amount thereof has been estimated with any reference to a calculation of the actual damages that might probably accrue from the breach of the covenant. In other words it appears to me that the respondent Society could only recover against the appellant such actual damage as they could prove, and this view is supported by the argument on behalf of the appellant that if the amount limit as liquidated damages could be recovered it would be in itself unreasonable and would inflict considerably harsh conditions on the appellant. It is not, however, possible to follow this question further in the present appeal. I think it is to be deprecated that action should have been taken on the assumption that the committee of a co-operative Society formed by and representing the members would necessarily have attempted to press their claim to the uttermost to the disadvantage of the appellant. There is no reason why the respondent Society should not have preferred the alternative remedy of rule 6, proviso (*a*) which would not have involved the claim for any damage to the disadvantage of the appellant. I have come therefore to the conclusion that rule 6 taken in its entirety does not impose or imply an unreasonable degree of restraint.

The first provision in the rules relating to membership is to be found in rule 5—"No person carrying on any business similar to that in which the Society is engaged shall be eligible to become or continue as a member of the Society." The effect of this rule is that if the appellant or any other member carries on any business similar to that in which the Society is engaged he becomes ineligible to continue as a member, and ceasing to be a member he would no longer

be liable to the restraints imposed in rule 6 (2). It was said, however, that the appellant had no desire to carry on a business similar to that of the respondent Society, but only to sell his milk at advantageous terms to a different purchaser, and that this was the restraint of which he was really making complaint. Assuming this to be so, the allegation made in the statement of claim that the restriction is for the whole period of the life of the appellant and the other members of the Society appears to me to be expressed in far too general terms. It is open for the appellant or any other member, either in partnership or otherwise, to set up a business similar to that of the respondent Society, in which event his membership comes to an end and the restriction ceases to be operative. The further rules which regulate the continuance of the membership in the respondent Society are rules 16 and 21. Rule 16 provides that any member all of whose shares have been transferred or cancelled shall thereupon cease to be a member of the Society, but that no member shall otherwise be entitled to withdraw from the Society. This brings your Lordships to the consideration of rule 21. It is noticeable that this rule as well as rule 16 regulates matters of which the determination falls to be provided for by rules under Sched. II of the Industrial and Provident Societies Act 1893, but this would be no defence if the rules themselves constituted trade restrictions contrary to public policy. Under rule 21 the consent of the committee of management is required for the transfer of shares. The committee have an absolute discretion so long as they act *bona fide*, and they are not bound to assign any reason for refusing to sanction the transfer of shares, and apart from transfer no share is withdrawable. The effect is to place the transfer of shares within the power of the committee, and it is of this power that the appellant complains, since the committee by refusing consent to a transfer of shares can prevent a member from withdrawing from the Society, thereby imposing upon him for a duration only limited by their discretion the obligations which attach to rule 6 (2). There is, however, positive evidence that whenever a person has applied for a transfer it has been granted, and, moreover, the committee of management cannot be regarded as exercising an authority independent of the control of the appellant and other members of the respondent Society. The true position is that each co-operator in a common interest has submitted to a discretionary power which it may be assumed would be exercised impartially in his interest and in that of all the other co-operators. To take the analogy of partnership, there is no doubt that a partner during the duration of a partnership may bind himself not to compete with his firm—*Leather Cloth Company* v. *Lorsont*, L.R., 9 Eq. 345. The question in this appeal is in truth one of degree and not of principle. The question is of wide importance, since similar rules are said to apply to a large number of co-operative creameries in Ireland. Apart from the considerations which I have addressed to your Lordships, and which depend on the construction of the rules and the conditions to which they are applied, there is some relevant oral evidence which might assist in the determination whether the impugned restrictions are unreasonable or more than are required for the protection of either or both parties to the covenant. Evidence of what persons in the trade might think to be reasonable or unreasonable is not admissible, this being the very question which the Court is called upon to decide—*Haynes* v. *Doman*, 1899, 2 Ch. 13.

Assuming that a case has been made out by the appellant which requires an answer, the evidence of Mr John Byrne, the secretary and manager of the respondent Society, and of Charles Coates Riddall, the organiser of the Irish Agricultural Society, supports the plea of the respondent Society that the restrictions are no more than sufficient to reasonably protect the interests of that Society. Mr Byrne frankly admits that up to a certain time the less stringent old rules were sufficient to protect the respondent Society, but apparently in connection with the erection of a new creamery the committee of management became indebted to the bank for a sum of about £1500. The construction of a new creamery has been the subject of criticism, but it is a matter of internal concern dependent on a question of business expediency, and there is no suggestion of improper motive. If therefore the erection of the new creamery, or the general financial conditions of the respondent Society, did necessitate some more stringent rule to give security for capital outlay, there is certainly some justification for the alteration of the rules to which objection is taken, and Mr Byrne in terms states that the object of the rule was to protect the Society in a new outlay of capital. I am not prepared to say that this view is erroneous, or that the rule has not been shown to be reasonable whether regarded as one for the benefit of the Society or for the benefit of the members of the Society in order that the members may be kept together and the Society made as strong as possible on the side of financial stability. Mr Riddall, who has had a large experience of the management of co-operative societies and is the organiser of the Society which is designated the pioneer of the co-operative farming business in Ireland, states that it is of the very essence of a co-operative society that it should be ensured in its trade and that its members should be bound to deal with it, and that every member gets the benefit of what is done for the good of the Society, since anything that benefits the Society benefits also its members. He thus draws the distinction between a sale of produce by a member to a co-operative society and the sale of such produce to an outside purchaser whose primary object is profit on its own account.

In the case of *Tipperary Co-operative Creamery Society* v. *Hanley* ((1912) 2 I.R. 586) the Court of Appeal in Ireland gave a judgment in support of conclusions differing from those stated above. The rules were very similar to those under debate in the present appeal, although some weight was

attached to the want of any limitation whatever as to the locality of the lands in which the cows might be found, whether in the county of Tipperary itself or in any other county of Ireland. The arguments, however, addressed to the Court were similar to those which the counsel for the appellant addressed to your Lordships, and the rules contained a similar penalty clause, and did not provide for the voluntary withdrawal of a member except by transfer of his shares, to which the consent of the committee was necessary. The Court applied the recognised tests, and the judgment of the Lord Chancellor reproduces a passage from Farwell, L.J.'s, judgment in *Russell* v. *Amalgamated Society of Carpenters and Joiners*, 1910, 1 K.B. 506. It appears to me that this judgment gives no weight to the distinctive conditions which connote the relationship between a co-operative society and its members. The point is clearly put by Holmes, L.J.—"The Court has been asked by counsel for the society, how does the contract here differ from a similar contract by a person, whose business is to produce a particular article or class of goods, entered into with a wholesale distributor. I answer that there is no substantial difference, and that neither contract could be enforced. Let me suppose that in the days of hand-looms a weaver who had no other means of livelihood had contracted with a merchant in Leeds that he would sell to him the output of his loom during his whole life at a price to be fixed by the merchant, would any lawyer argue that such a contract was legal? It is because the contract arising from rule 5*a* is of the same character that I hold it void." With all respect to the opinion of the Lord Justice, I think, for the reason already stated, that the relationship between a co-operative society and its members is similar, not to the relationship between a producer and an ordinary wholesale purchaser, but to the relationship of a partner to his partnership firm, and that it is a fallacy to regard the impugned restrictions as though they had been imposed upon the vendor at the instance of an outside wholesale merchant purchasing solely for his own benefit.

In my opinion the appeal should be dismissed with costs.

Appeal sustained.

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