**ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA**

**v.**

**ADELAIDE STEAMSHIP COMPANY, LIMITED**

PRIVY COUNCIL

1913 APRIL 21, 22, 23, 24, 25; MAY 2, 5, 6, 7, 8, 27, 28; JULY 25.

OTHER CITATIONS

3PLR/1913/2 (PC-E)

**BEFORE THEIR LORDSHIPS**

VISCOUNT HALDANE L.C.

LORD SHAW OF DUNFERMLINE

LORD MOULTON, AND LORD PARKER OF WADDINGTON

**ORIGINATING COURT(S)**

**1.** ON APPEAL FROM THE HIGH COURT OF AUSTRALIA

**REPRESENTATION**

R. FINLAY, K.C., WISE, K.C., AND ARTHUR PAGE - for the appellant

MITCHELL, K.C., ATKIN, K.C., SCHILLER, AND NESBITT - for the respondents.

Solicitor for appellants: J. H. GALBRAITH.

Solicitors for respondents: WADESON & MALLESON.

**ISSUES FROM OTHER CAUSE(S)**

ANTI-TRUST AND TRADE REGULATIONS LAW:- Australian Industries Preservation Act, 1906, ss. 4, 7, 10, 15A--Contract or Combination in Restraint of Trade –Monopoly - Intent to the Detriment of the Public – Construction -Evidence to establish Offence.

ENVIRONMENTAL AND NATURAL RESOURCES:- Coal – Exploitation, Mining and trade in same – monopoly of trade with intent to control – When deemed to be in detriment of the public and the supply/price of coal

BUSINESS AND INDUSTRY:- Business conduct of an industrial concern – When deemed to be against public interest and in restraint of trade – Complex wage determination practices designed to give workers opportunity for increased pay due to increase in price of commodity – validity – Attitude of court thereto

EMPLOYMENT AND LABOUR LAW:- Wages of workers – Commodity selling in diverse markets – Agreement to vary wages of workers depending on the selling price of commodity produced – Coal - Relevant considerations – When deemed in restraint of trade - Whether enforceable – Relevant considerations

INTERPRETATION OF STATUTE - S. 4 and 7 of the Act of 1906

WORD AND PHRASES:- "Detriment” - Meaning of

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

APPEAL, by special leave, from a judgment dated September 30, 1912, of the High Court of Australia in its appellate jurisdiction reversing, as regards the respondents, a judgment of Isaacs J. dated December 22, 1911.  
The action was brought by the appellants as plaintiffs under the provisions of the Australian Industries Preservation Act, 1906 (No. 9 of 1906 of the Commonwealth), as amended by the Australian Industries Preservation Acts, 1907 (being in fact No. 5 of 1908), and the Australian Industries Preservation Act, 1909 (No. 26 of 1909). The more material provisions of these Acts, constituting together the Australian Industries Preservation Act, 1906 - 1909, are set out below. [FN1]

*FN1 The Australian Industries Preservation Act, 1906 , by Part II, which is intituled "Repression of Monopolies," provided, inter alia:-- Sect. 4: "(1.) Any person who, either as principal or as agent, makes or enters into any contract, or is or continues to be a member of or engages in any combination, in relation to trade or commerce with other countries or among the States - (a) with intent to restrain trade or commerce to the detriment of the public; or (b) with intent to destroy or injure by means of unfair competition any Australian industry the preservation of which is advantageous to the Commonwealth, having due regard to the interests of producers, workers, and consumers, is guilty of an offence. Penalty Five hundred pounds. (2.) Every contract made or entered into in contravention of this section shall be absolutely illegal and void." Sect. 7: "(1.) Any person who monopolises or attempts to monopolise or combines or conspires with any other person to monopolise any part of the trade or commerce with other countries or among the States with intent to control to the detriment of the public the supply or price of any service merchandise or commodity is guilty of an offence. Penalty: Five hundred pounds. (2.) Every contract made or entered into in contravention of this section shall be absolutely illegal and void." Sect. 9: "Whoever aids abets counsels or procures or by act or omission is in any way directly or indirectly knowingly concerned in or privy to (A) the commission of any offence against this Part of this Act; or (B) the doing of any act outside Australia which would if done within Australia be an offence against this Part of this Act shall be deemed to have committed the offence. Penalty: Five hundred pounds." Sect. 10: "(1.) The Attorney-General, or any person thereto authorised by him, may institute proceedings in the High Court to restrain by injunction after hearing and determining the merits and not by way of interlocutory order the carrying out of any contract made or entered into after the commencement of this Act or any combination which - (a) is in restraint of trade or commerce to the detriment of the public; or (b) is destructive or injurious, by means of unfair competition, to any Australian industry the preservation of which is advantageous to the Commonwealth, having due regard to the interests of producers, workers, and consumers. Provided that except in the case of foreign corporations, or trading or financial corporations formed within the Commonwealth, this section shall only apply to contracts or combinations in relation to commerce with other countries or among the States." The Australian Industries Preservation Act, 1908, by s. 4, amended the Act of 1906 by inserting a section described as s. 15A, which section was itself amended by s. 12 of the Act of 1909, and as so amended read: "15A. In any prosecution for an offence against sections 4, 7, 7A, 7B, or 9 of this Act the averments of the prosecutor contained in the information declaration or claim shall be deemed to be proved in the absence of proof to the contrary, but so that - (A) The averment in the information of intent shall not be deemed sufficient to prove such intent and (B) In all proceedings for an indictable offence the guilt of the defendant must be established by evidence." The Australian Industries Preservation Act, 1909, s. 9, repealing s. 13 (1.) of the Act of 1906, substituted as follows:-- Sect. 13: "(1.) Proceedings for the recovery of pecuniary penalties for offences against this Part of this Act (other than indictable offences or offences against s. 15B, s. 15C, or s. 15E) shall be instituted in the High Court by way of civil action and shall be tried before a justice of that Court without a jury." The Australian Industries Preservation Act, 1910, was passed after the commencement of the litigation, but contained, in s. 7, provisions as to procedure and evidence which were held to be applicable.*

The action was commenced by writ dated June 4, 1910, and was brought against forty defendants to recover pecuniary penalties for alleged breaches of s. 4, sub-s. 1 (a), s. 7, sub-s. 1, and s. 9 of the Act of 1906, and also for an injunction restraining the defendants from a repetition or continuance of the alleged offences. The original defendants comprised two classes of persons; the first class consisted of companies owning or working various coal mines in the Newcastle and Maitland districts of New South Wales together with the managers or other responsible officers of those companies; the second class (being the present respondents) consisted of four shipping companies and their respective managing directors. The statement of claim was delivered on August 25, 1910, and was subsequently twice amended. It set out very numerous alternative charges against the defendants under the above sections, the general import of which was summarized in the following passage (accepted by both appellant and respondents) from the judgment of Isaacs J., who tried the case:--

"Now, broadly speaking, the allegations against the defendants amount to this; first, that very shortly after the Act came into operation a complete express contract was entered into between the collieries owners of the first part and the shipowners of the second part in relation to inter-State trade and commerce in Newcastle and Maitland coal, that this contract was renewed and continued to exist and operate with some intermediate modifications down to the commencement of this action and was then still in force, and that it was entered into and at all events was renewed, with intent to restrain that trade and commerce to the detriment of the public. In other words, the contract itself is relied on as constituting an offence against s. 4.

Next, it is said that there existed during the period mentioned a combination between the two sets of proprietors - coal and shipping - created by the conduct of the parties, that conduct consisting of concerted business action carried on upon certain recognized lines laid down probably by some contract in the nature of that already referred to, or if not then by some understanding or practice of a similar tendency and effect, and that during the greater part of that period two other shipping companies not defendants were added to the combination, the Melbourne Steamship Company and James Paterson & Co. This combination, it is averred, was maintained with the like intent to restrain the inter-State trade and commerce in Newcastle and Maitland coal to the detriment of the public.

The defendants concerned are said to come within the ambit of s. 4 as to combinations - in three different ways - inasmuch as each of them was and continued to be a member of, and was engaged in, the combination.   
Next, it is charged that the business conduct of the defendants and their established relations with each other amounted to monopolizing or attempting to monopolize and to a combination and conspiracy to monopolize the trade and commerce in Newcastle and Maitland coal with intent to control, to the detriment of the public, the supply and price of the coal.

And lastly, as to those who might be considered as merely assisting others to effect the prohibited acts, it is charged that they come within the provisions of s. 9 as aiding, abetting, counselling or procuring and are therefore to be deemed to have committed the principal offences.

The detriment to the public which is alleged to have arisen and to have been intended as a result of the matters complained of consists in the practical and persistent annihilation of competition on land and sea, excessive, arbitrary and capricious prices charged to consumers, restriction of their opportunities of choice, difficulties in obtaining particular classes or grades of coal desired, substitution really compulsory of other coal for coal preferred, delays in obtaining delivery.

The defence is in effect a denial of all that is charged by the plaintiffs."

The evidence in the action, the hearing of which occupied seventy-three days, was very voluminous and fell into two main heads. The first head comprised evidence to establish a contract and combination between the defendants. The second head comprised evidence to shew that this contract and combination resulted in detriment to the public. The first head established that a contract and combination existed between the defendants; this was found both by Isaacs J. and by the Full Court, though they differed in their views as to its legality, and the existence of a contract and combination was not disputed in the appeal. Its terms were contained in an unsigned agreement or draft agreement between the colliery proprietors and the respondent shipping company, who had theretofore purchased most of the coal for the purposes of inter-State trade.

This agreement was referred to as the shipping agreement. The colliery proprietors thereby agreed to sell to the respondent shipping companies (who were described as purchasing agents) the whole of the coal which might be required by them to supply the trade of the States of Victoria, South Australia, Western Australia, and Queensland, the colliery proprietors agreeing not to sell coal for consumption in those States except to the respondents or their nominees, and the respondents agreeing to buy from the colliery proprietors all the coal which they might require for their inter-State trade, and not to carry or deal in any other coal. The respondents as purchasing agents also agreed thereby not to resell, except in the case of certain small contracts, any of the coal purchased from the colliery proprietors at higher prices than certain specified c.i.f. prices which varied with the f.o.b. selling prices declared under the vend agreement hereinafter referred to. The evidence also established that shortly before the shipping agreement was entered into the colliery proprietors had entered into an agreement among themselves the terms of which were contained in an unsigned document referred to as the vend agreement. This agreement was not attacked by the statement of claim as being itself a breach of the provisions of the statutes, but its existence and terms were very material to the case. It came into operation on January 1, 1907, for a year and was subsequently renewed from year to year; it made provision for regulating the production and wholesale price of coal produced by the colliery proprietors, that is of the great bulk of the coal produced in New South Wales. Its effect, shortly, was that there should periodically be allotted to each of the collieries the proportion of the inter-State trade to be fulfilled by it, the proprietors each agreeing not to open new mining shafts or pits unless they were unable to maintain the allotted output with those already existing, and that provision should be made to fix from time to time the price of coal the produce of the various mines according to a classified table. Each proprietor might nevertheless sell the coal from his colliery without restriction as to quantity or manner, but any proprietor who sold in excess of his allotted proportion was to pay a contribution at a specified rate to a common fund. The terms of the vend agreement and of the shipping agreement and the circumstances under which they were entered into are more fully stated in the judgment of their Lordships.  
The second head of the evidence was mainly directed to establishing that a large and continuous increase was caused in the price of coal in the four States other than New South Wales to which the combination extended. The effect of this evidence is considered and dealt with in their Lordships' judgment. The defendants called no evidence at the trial, but submitted both upon the law and the facts that no case had been made against them. The learned judge (Isaacs J.) by his reserved judgment, delivered on December 20, 21, and 22, 1911, found that the colliery proprietors entered into the vend agreement in September, 1906, and that one of its objects was to enter into the class of contractual and business arrangements with the respondents which in fact ensued under the shipping agreement, which he found was made in September, 1906, and lasted with certain modifications until the end of 1907 and was renewed for 1908, 1909, and 1910. He also found that the colliery proprietors in pursuance thereof raised the price of coal (which during 1904, 1905, and the early part of 1906 had not been more than 7s. 6d. to 9s. per ton) to 10s. and 11s. per ton, and that a price of 9s. 1d. would have been profitable during 1907 and 9s. 8d. in the following years; that the respondents in accordance with the shipping agreement paid these increased prices but increased their prices to the consumers; that the public had borne and were bearing a heavy detriment in regard to the price of coal attributable to the defendants' combination; and that the contract and combination occasioned serious detriment to the public in the shape of arbitrary and capricious discrimination of prices. Further he held that the defendants intended to prevent all effective competition both of production and of carriage and that this elimination of competition was the main and central object of the whole combination complained of. The learned judge, having regard to these findings of fact and to the general principle that persons must be deemed to intend the natural consequences of their acts, convicted the defendants of offences under s. 4, sub-s. 1 (a), s. 7, and s. 9 of the Act of 1906, and inflicted a penalty of 500l. upon each of the respondents and upon the other defendants with one exception; he also granted an injunction. From this decision the respondents (but not the other defendants) appealed, their appeal being heard by the Full Court on August 26, 1912, and the following days.

DECISION APPEALED AGAINST

The Full Court, consisting of Griffith C.J., Barton J., and O'Connor J., by a reserved judgment delivered by the Chief Justice on September 20, 1912, unanimously reversed the decision of Isaacs J. and directed judgment to be entered for the respondents.

The judgment of the Full Court commenced by considering the meaning of ss. 4 and 7 of the Act of 1906; the learned judges considered first the meaning of "detriment," and from the provision of s. 4, sub-s. 1 (b), drew the inference that the Legislature did not think that an act which was apparently detrimental to one class of interest, say to consumers, was necessarily detrimental to the public as a whole. They continued: "In our judgment, it is an essential element of an offence under s. 4 (1.) (a) that there should be an intent to restrain trade or commerce to the detriment of the public, and mere intent to restrain trade or commerce, without the further intent to cause detriment to the public, is not sufficient." They rejected (as Isaacs J. also did) the argument that all agreements in restraint of trade were, in the eyes of the law, detrimental to the public, and said: "in our judgment the intent, which is made by s. 4 an essential element of the offence, must be a real actual intention and not a constructive intent to be imputed by virtue of an ancient doctrine of law which is recognized by Parliament as not applicable to the existing conditions of the Commonwealth. We agree, of course, that there may be cases in which res ipsa loquitur so that the intention to cause detriment to the public may be inferred from the nature of the contract or combination itself. But this is a matter relating to the proof of the offence and not the nature of it." So also they held that proof of an actual intent to the detriment of the public was essential under s. 7, and continuing they said: "It follows that the real subject of inquiry in this case is whether the appellants entered into the contract or combination alleged with an actual intent to restrain trade to the detriment of the public. That is entirely a question of fact and the relevant facts are not very complicated, although a vast amount of evidence has been put before the Court.

There is no real dispute as to the actual facts. The conflict is as to the proper inference to be drawn from them." After considering the evidence of the circumstances under which the vend agreement was made, they said: "we find as a fact at this time all parties honestly believed, and believed on grounds which were not only reasonable but very substantial, that the prosperity of the Newcastle and Maitland districts was in danger, as well as their own individual interests, by reason of the excessive competition and the unremunerative prices obtained for coal... In our opinion the fair inference to be drawn from the tenor of the vend agreement itself is that the intention of the parties was to put the Newcastle coal trade on a satisfactory basis, which would enable them to pay adequate wages to their men, and to sell their coal at a price remunerative to themselves, having regard to the capital and risk involved in the enterprise." After an examination of the terms of the shipping agreement, the judgment stated: "we come to the conclusion that the shipping agreement does not on its face disclose an intention either to restrict trade to the detriment of the public, or to monopolize the inter-State trade in Newcastle coal to the like detriment. ... We proceed then to consider whether an intention to cause detriment to the public can be inferred from the acts of the defendants consequent upon the agreement." The learned judges, after considering the evidence, rejected the finding of Isaacs J. that there had been an unreasonable increase of price, and found as a fact that the f.o.b. prices of 10s. a ton fixed for 1907 and 11s. for 1908 and afterwards not only were not shewn to be unreasonable but were affirmatively shewn to be reasonable, and they also found that the prices at which the shipowners sold were not unreasonable. The learned judges, in conclusion, held that the Crown had failed to prove any intent upon the part of the defendants to the detriment of the public or any actual detriment to the public. They therefore allowed the appeal and dismissed the claim against the present respondents, both as to penalties and as to the injunction claimed under s. 10.

ISSUES FOR DETERMINATION OF APPEAL

1. Whether a contract in restraint of trade which is unenforceable at common law, or a combination in restraint of trade which, if embodied in a contract, would be unenforceable at common law, are necessarily "to the detriment of the public" within the meaning of the statute and therefore unreasonable and unenforceable.

2. Whether the clauses in the shipping agreement which precluded the colliery proprietors from supplying coal for consumption in the States except to the respondents or their nominees, and precluded (with unimportant exceptions) the respondents from dealing in or carrying any coal except that supplied by the colliery proprietors, render the agreement one which is unenforceable at common law.

3. Whether the Sherman Act of the United States is substantially equivalent in effect to the Australian legislation, since the wrongful intent which is expressly made an essential element of an offence under the latter is made so under the Sherman Act by judicial interpretation.

4. Whether the terms of the shipping agreement do not themselves give rise to a presumption juris et de jure that the contract was to the detriment of the public.

5. Whether under s. 7 in addition to s. 4, the effect of the evidence is that the object of the Respondents was not only to establish a monopoly in Newcastle coal, but also in the inter-State trade in that coal.

6. Whether to constitute an offence under s. 4 of the Act of 1906, it is essential that the wrongful intent to the detriment of the public should be established by evidence.

JUDGMENT OF CURRENT COURT (PRIVY COUNCIL)

A contract in restraint of trade which is unenforceable at common law, or a combination in restraint of trade which, if embodied in a contract, would be unenforceable at common law, are neither of them necessarily "to the detriment of the public" within the meaning of the Australian Industries Preservation Act, 1906, ss. 4 and 7, and a party to a contract or combination of that character cannot, merely because he is a party thereto, be taken to have intended this detriment. In a prosecution under either of those sections the wrongful intent must be proved by proper evidence. For this purpose the prosecutor may tender proof that the evils against which the Act is directed were the natural and necessary consequence of the contract or combination, monopoly or attempt to monopolize, and that those evils have in fact ensued. He cannot plead the evidence upon which he hopes to establish wrongful intention and rely on s. 15A of the Act as rendering proof of what he pleads unnecessary.

The principles of the law as to monopolies and contracts in restraint of trade prior to the passing of the above Act considered.

**MAIN JUDGMENT**

The judgment of their Lordships was delivered by LORD PARKER OF WADDINGTON.

This is an appeal from an order of the High Court of Australia in its appellate jurisdiction reversing a judgment of Isaacs J., dated December 22, 1911, and made in an action instituted by the Attorney-General of the Commonwealth under the provisions of the Australian Industries Preservation Act, 1906, and two amending Acts, No. 5 of 1908 and No. 26 of 1909. The Act of 1906 was a new departure in legislation and its true construction may be a matter of far-reaching economic importance. Their Lordships propose to consider its provisions with some particularity Before doing so, however, it will be convenient, having regard to the arguments both here and in the Courts below, to refer to the law as it existed prior to and at the passing of the Act in relation to monopolies and contracts in restraint of trade.

At common law every member of the community is entitled to carry on any trade or business he chooses and in such manner as he thinks most desirable in his own interests, and inasmuch as every right connotes an obligation no one can lawfully interfere with another in the free exercise of his trade or business unless there exist some just cause or excuse for such interference. Just cause or excuse for interference with another's trade or business may sometimes be found in the fact that the acts complained of as an interference have all been done in the bona fide exercise of the doer's own trade or business and with a single view to his own interests (the Mogul Steamship Case [FN26]). But it may also be found in the existence of some additional or substantive right conferred by letters patent from the Crown or by contract between individuals. In the case of letters patent from the Crown this additional or substantive right is generally described as a monopoly. In the latter case the contract on which the additional or substantive right is founded is generally described as a contract in restraint of trade. Monopolies and contracts in restraint of trade have this in common, that they both, if enforced, involve a derogation from the common law right in virtue of which any member of the community may exercise any trade or business he pleases and in such manner as he thinks best in his own interests.

*FN26 23 Q. B. D. 598; [1892] A. C. 25.*

The right of the Crown to grant monopolies is now regulated by the Statute of Monopolies, but it was always strictly limited at common law. A monopoly being a derogation from the common right of freedom of trade could not be granted without consideration moving to the public, just as a toll being a derogation from the public right of passage could not be granted without the like consideration. In the case of new inventions the consideration was found either in the interest of the public to encourage inventive ingenuity or more probably in the disclosure made to the public of a new and useful article or process. In the case of sole rights of trading with foreign parts it might be found in the interest of the public in new countries being opened to trade. But for the validity of every monopoly some consideration moving to the public was necessary. Many of the monopolies purported to be granted by the Tudor or Stuart Sovereigns were bad for want of such consideration, and it was the vexatious interference with trade under cover of these invalid grants which led to the passing of the Statute of Monopolies. Further, monopolies were in the eyes of the lawyers of that time attended with the following evils: first, increase in the price of the wares, and secondly, deterioration of the wares themselves, both evils being due to the want of healthy competition (11 Rep. at 86b).

Contracts in restraint of trade were subject to somewhat different considerations. There is little doubt that the common law in the earlier stages of its growth treated all such contracts as contracts of imperfect obligation, if not void for all purposes; they were said to be against public policy in the sense that it was deemed impolitic to enforce them and not because every such contract must necessarily operate to the public injury. The old common law rule against enforcing such contracts has, however, been relaxed in more recent times. Though, speaking generally, it is the interest of every individual member of the 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 if interested to maintain freedom of trade is equally interested in maintaining freedom of contract within reasonable limits. The existing law on the point is laid down in the case of Nordenfelt v. Maxim Nordenfelt Co. [FN27]For a contract in restraint of trade to be enforceable in a Court of Law or Equity, the restraint, whether it be a partial or general restraint, must (to use the language of Lord Macnaghten, evidently adapted from that of Tindal C.J., in Horner v. Graves [FN28]) be reasonable both in reference to the interests of the contracting parties and in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. 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. Lindley and Bowen L.JJ. had suggested in the Court below that though a restraint might be reasonable as between the parties to the contract it might be unenforceable because of the "law which forbids monopolies," or because it was calculated to create "a pernicious monopoly," and there is a similar suggestion by Lindley L.J. in Underwood v. Barber. [FN29] The term monopoly cannot be here used in its proper legal signification of a right granted by the Crown, nor can the expression "the law which forbids monopolies" refer to any common law or statutory rule limiting the Crown's prerogative in this respect. The learned Lords Justices are contemplating a state of circumstances in which some trade or industry has passed or is likely to pass into the hands or under the control of a single individual or group of individuals, and are indicating that if a restraint on trade is likely to produce this result, it may on grounds of public policy be unenforceable however reasonable in the interests of the parties to the contract. Such a state of circumstances may, by eliminating competition, entail the evils thought to be incident to monopoly rights granted by the Crown, and may therefore in a popular sense be called a monopoly. It is so called by Farwell L.J. in the case of North Western Salt Co. v. Electrolytic Alkali Co. [FN30], now under appeal to the House of Lords.

*FN27 [1894] A. C. 535.; FN28 (1831) 7 Bing. 735.[ FN29 [1899] 1 Ch. 300.; FN30 107 L. T. 439.*

The chief evil thought to be entailed by a monopoly, whether in its strict or popular sense, was the rise in prices which such monopoly might entail. The idea that the public are injuriously affected by high prices has played no inconsiderable part in our legal history. It led, no doubt, to the enactment of most, if not all, of the penal statutes repealed by 12 Geo. 3, c. 71. It also lay at the root of the common law offence of engrossing, which, according to Hawkins' Pleas of the Crown, vol. ii., bk. 1, ch. 79, consisted in buying up large quantities of wares with intent to resell at unreasonable prices. It influenced the Courts in their attitude towards contracts in restraint of trade. Although, therefore, the whole subject may some day have to be reconsidered, there is at present ground for assuming that a contract in restraint of trade, though reasonable in the interests of the parties, may be unreasonable in the interests of the public if calculated to produce that state of things which is referred to by Lindley and Bowen LJJ. as a pernicious monopoly, that is to say, a monopoly calculated to enhance prices to an unreasonable extent. In this connection it should be noticed that the Act of 7 & 8 Vict. c. 24, which abolished the common law offence of engrossing, does not apply to the States of the Commonwealth, and that monopolies in the popular sense of the word are more likely to arise, and, if they do arise, are more likely to lead to prices being unreasonably enhanced in countries where a protective tariff prevails than in countries where there is no such tariff. It is, however, in their Lordships' opinion, clear that the onus of shewing that any contract is calculated to produce a monopoly or enhance prices to an unreasonable extent will lie on the party alleging it, and that if once the Court is satisfied that the restraint is reasonable as between the parties this onus will be no light one. Further, it must be remembered that the question whether a restraint of trade is reasonable either in the interest of the parties or in the interest of the public is a question for the Court, to be determined after construing the contract and considering the circumstances existing when it was made. It is really a question of public policy and not a question of fact upon which evidence of the actual or probable consequences, if the contract be carried into effect, is admissible.

It is only necessary to add that no contract was ever an offence at common law merely because it was in restraint of trade. The parties to such a contract, even if unenforceable, were always at liberty to act on it in the manner agreed. Similarly combinations, not amounting to contracts, in restraint of trade were never unlawful at common law. To make any such contract or combination unlawful it must amount to a criminal conspiracy, and the essence of a criminal conspiracy is a contract or combination to do something unlawful, or something lawful by unlawful means. The right of the individual to carry on his trade or business in the manner he considers best in his own interests involves the right of combining with others in a common course of action, provided such common course of action is undertaken with a single view to the interests of the combining parties and not with a view to injure others (the Mogul Steamship Case [FN31]).

*FN31 23 Q. B. D. 598; [1892] A. C. 25.*

Such having been the state of the law when the Act of 1906 was passed, their Lordships will proceed to consider the various provisions of that Act and its proper interpretation.

The full title of the Act is "An Act for the Preservation of Australian Industries and for the Repression of Destructive Monopolies," and Part II., comprising ss. 4 to 14, inclusive, is intituled "Repression of Monopolies." Sect. 4 provides that any person who either as principal or agent makes or enters into any contract, or is or continues to be a member of, or engages in any combination in relation to, trade or commerce among the States of the Commonwealth (a) with intent to restrain trade or commerce to the detriment of the public, or (b) with intent to destroy or injure by means of unfair competition any Australian industry the preservation of which is advantageous to the Commonwealth, having due regard to the interests of producers, workers, and consumers, is guilty of an offence the penalty for which is fixed at 500l. Sect. 6 defines unfair competition as "unfair under the circumstances," and specifies certain cases in which the competition is to be deemed to be unfair unless the contrary be proved. Sect. 7 provides that any person who monopolizes or attempts to monopolize, or combines or conspires with any other person to monopolize, any part of the trade or commerce among the States with intent to control, to the detriment of the public, the supply or price of any service, merchandise, or commodity, is guilty of an offence the penalty for which is fixed at 500l. Sect. 9 provides that whoever aids, abets, counsels, or procures, or by act or omission is in any way directly or indirectly knowingly concerned in or privy to an offence under s. 4 or s. 7 shall be deemed to have committed the offence and be subject to a penalty of 500l. Sect. 10 of the Act enables the Attorney-General of the Commonwealth to institute proceedings for an injunction restraining the carrying out of any contract or combination which is, in fact, in restraint of trade or commerce to the detriment of the public, or is, in fact, destructive or injurious by means of unfair competition to any such Australian industry as mentioned in s. 7. The amending Act No. 5 of 1908 contains a section which, as amended by the amending Act No. 26 of 1909, provides that in any prosecution for an offence against ss. 4, 7, or 9 of the Act of 1906 the averments of the prosecutor contained in the information, declaration, or claim shall be deemed to be proved in the absence of proof to the contrary, but so that the averment of intent shall not be deemed sufficient to prove such intent.

It is in their Lordships' opinion quite clear that the terms "monopolies" and "monopolise" as used in the Act of 1906 do not refer to a monopoly in the strict legal sense, but in the more popular sense in which Lindley and Bowen L.JJ. used the term "monopoly" in the dicta above mentioned. "Destructive monopoly" is equivalent to "pernicious monopoly" as used by the learned Lords Justices, and, no doubt, undue enhancement of the prices of goods or services is contemplated as one of the evils which may render a monopoly in the popular sense destructive or pernicious, it being assumed that such enhancement is to the public injury or detriment. Similarly there can be little doubt that one of the ways in which a restraint of trade might in the view of the Commonwealth Legislature be detrimental to the public was by its creating a pernicious monopoly in this popular sense of the word. There may, of course, be other ways in which a monopoly or restraint of trade may enure to the public detriment, but undue enhancement of prices must certainly be one. It should be observed that for the statutory misdemeanours created by ss. 4 and 7 there must be an intention to bring about all or some of the evils against which the Act is directed, and if there be such an intention it is quite immaterial whether these evils have or have not actually ensued. But in proving the intention the actual results of the contract or combination, or the monopoly or attempt to monopolize, may be of great materiality, for in a Court of law every man is taken to intend the natural or necessary consequences of his action. This point is emphasized by contrasting ss. 4 and 7 with s. 10, under which the contract or combination must be proved to have led to the evils against which the Act is directed. Thus, in proceedings for offences under ss. 7 and 9 the prosecutor must first establish the contract or combination or the monopoly or attempt to monopolize. He must then establish the wrongful intention necessary to constitute the misdemeanour. In establishing the contract or combination or the monopoly or attempt to monopolize he may, in default of evidence to the contrary, rely on averments in the information, declaration, or claim. But the wrongful intention must always be proved by proper evidence. For this purpose the prosecutor may, if he chooses, tender proof that the evils against which the Act is directed were the natural or necessary consequences of the contract or combination, monopoly or attempt to monopolize, and that these evils have in fact ensued. He cannot, however, in their Lordships' opinion, plead the evidence whereby he hopes to establish wrongful intention and rely on the provisions of the Act of 1908 as rendering proof of what he pleads unnecessary. With regard to s. 10 these last-mentioned provisions appear to have no application at all, and s. 10 itself has nothing to do with monopolies or attempts to monopolize, but is limited to contracts or combinations in restraint of trade or destructive of Australian industries.

It was strongly urged by counsel for the Crown that all contracts in restraint of trade or commerce which are unenforceable at common law, and all combinations in restraint of trade or commerce which if embodied in a contract would be unenforceable at common law, must be detrimental to the public within the meaning of the Act, and that those concerned in such contracts or combinations must be taken to have intended this detriment. Their Lordships cannot accept this proposition. It is one thing to hold that a particular contract cannot be enforced because it belongs to a class of contracts the enforcement of which is not considered to be in accordance with public policy, and quite a different thing to infer as a fact that the parties to such contract had an intention to injure the public. It is quite common in a contract of service to find a clause restricting the area in which the employee may carry on a business similar to that of his employer after the termination of the service, and such area is often held too wide for the restraint to be enforceable. In such cases both parties have as a rule bargained with a single view to their own interests, though in the opinion of the Court they have been mistaken as to the area of the restraint required in their own interest, but it would be wrong to infer from this that they had any intention of injuring the public. It would be equally wrong to infer that such a sinister intention must have existed in cases of trade combinations, such as that which was the subject of the decision in Hilton v. Eckersley. [FN32] If this were the true effect of the Act, no trade union would be free from the risk of proceedings under s. 4. It was said that this result with regard to trade unions was foreseen and provided against, by making the fiat of the Attorney-General necessary for any such proceedings, but their Lordships cannot believe that the Legislature intended to make the existence of trade unions, the economic advantage of which has often been recognized in modern legislation, dependent on the economic views of the Government for the time being or its law officers.

*FN32 6 E. & B. 47.*

It was also strongly urged that in the term "detriment to the public" the public means the consuming public, and that the Legislature was not contemplating the interest of any persons engaged in the production or distribution of articles of consumption. Their Lordships do not take this view, but the matter is really of little importance, for in considering the interests of consumers it is impossible to disregard the interests of those who are engaged in such production and distribution. It can never be in the interests of the consumers that any article of consumption should cease to be produced and distributed, as it certainly would be unless those engaged in its production or distribution obtained a fair remuneration for the capital employed and the labour expended.

In the argument upon the true construction of the Act of 1906 considerable stress was laid on the cases decided by the Supreme Court of the United States under the analogous statute known as the Sherman Act, and in particular on the case of Standard Oil Co. of New Jersey v. United States. [FN33] Although the judgments in this case are valuable for the light they throw on the development of the common law touching monopolies and contracts in restraint of trade, their Lordships do not think that the decisions themselves are of any real assistance in the present case. The Sherman Act, construed strictly, makes every contract or combination in restraint of trade and every monopoly or attempt to monopolize a statutory misdemeanour irrespective of any sinister intention on the part of the accused and irrespective of any detriment to the public. The actual decision is that contracts in restraint of trade which are enforceable at common law are impliedly excepted from the express provisions of the Act. The enforceability of the contract becomes in this way the test of its legality. There is, however, no justification for applying a similar test in the case of an Act which, like the Act of 1906, only deals with contracts or combinations or monopolies or attempts to monopolize which involve detriment to the public and in which a sinister intention is of the essence of the offence.

*FN33 221 U. S. 1 .*

Their Lordships are now in a position to consider the actual facts of the present case, and the inferences to be drawn therefrom, it being borne in mind that the offences charged against the respondent companies are under s. 4 (1.) (a), and alternatively under s. 7 of the Act of 1906, while the other respondents are charged under s. 9 with aiding and abetting the respondent companies in those offences.

The chief coalfield in New South Wales is the Newcastle coalfield. This field has been worked for nearly a century, and was for many years the only coalfield worked in New South Wales. Later, the Southern collieries and the Lithgow or Western collieries were opened up, and their coal began to compete with the Newcastle coal. The latter coal has, however, the advantage of easier access to deep water, and is for some purposes better than coal from the Southern or Western collieries.

For the last forty years wages in the Newcastle coalfield have, by agreement between the colliery proprietors and the workmen, varied with the selling price of coal. There is an assumed minimum price paid per ton for the best coal f.o.b. at Newcastle corresponding with an assumed minimum hewing rate. The probable price f.o.b. at Newcastle is declared for each year in advance by agreement between the colliery proprietors and the workmen, and for every 1s. by which the declared price exceeds the minimum price the minimum hewing rate is increased by 4d. and the wages of certain other workmen by sums amounting to 2 1/2 d., so that out of every shilling advance in price 6 1/2 d. in all goes to the workmen. It is not the practice to vary the declared price by fractions of 1s. This method of determining wages appears to their Lordships to be eminently reasonable and well calculated to prevent labour troubles. The declaration of the probable price for any year for the purpose of determining wages does not, however, in itself preclude the colliery proprietors from selling their coal at such prices as they think fit. It does not itself prevent the actual price of coal being determined by free competition, and for this reason the colliery proprietors of the Newcastle coalfield have from time to time entered into a combination or agreement usually called "a vend" upon terms which on the one hand preclude any of its members from selling the best coal at less than the declared price, and other grades of coal at proportionate prices, and on the other hand assure to each individual proprietor a certain proportion of the total output. Such a combination or agreement would, of course, be in restraint of trade, and the question whether or not it was enforceable at common law would depend on the considerations to which their Lordships have already referred.

In the first years of the present century a new coalfield situate about twenty miles from Newcastle, and sometimes called the Maitland coalfield, began to be developed, and Maitland coal gradually forced its way into the market in competition with Newcastle coal. The competition was so fierce that it became impossible to maintain any "vend" among the colliery proprietors in the Newcastle field. These proprietors accordingly entered on a course of ruinous competition with each other and with the colliery proprietors in the Maitland field, until in the spring of 1906, though the declared price of the best coal was for the purposes of the hewing rate 9s., such coal was being actually sold f.o.b. at Newcastle at 7s. 6d. only. The collieries in the Newcastle coalfield were ceasing to pay dividends and falling into the hands of the banks who had financed them; the miners had little chance of an advance in wages, though there had been a general advance in prices; and the prosperity of Newcastle, which is dependent on the coal industry and the shipping industry in connection therewith, was seriously threatened.

Further the coal output of the Newcastle field was in the spring of 1906 about equally divided between the home trade, the inter-State trade, and the foreign trade. For the purpose of the inter-State and foreign trade the colliery proprietors sold their coal f.o.b. at Newcastle. In the case of the inter-State trade such coal was for the most part bought by shipping companies who owned coal vessels in which they carried it to the various ports of disembarkation in the States and there sold it wholesale or retail. In some cases the coal sold was delivered to the purchasers straight from the vessel itself. In other cases it was landed and stored by the shipping companies and subsequently sold. The shipping companies, in fact, carried on the business of coal merchants as well as the business of shippers. Under these circumstances it was essential in the interest of the colliery owners that there should be a sufficient number of shipping companies always ready to purchase and ship their coal, and it was essential in the interest of the shipping companies that they should always be able to purchase and ship coal as soon as their vessels arrived at Newcastle; otherwise the colliery proprietors might be put to expense in storing coal pending the arrival of a vessel in which it could be shipped, and the shippers might incur expense in the nature of demurrage. J. & A. Brown& Co., who owned the chief colliery in the Maitland field, had vessels of their own and were themselves exporting coal to Melbourne and Adelaide, and selling it there through their own agents. The shipping companies were already suffering from the low prices at which J. & A. Brown & Co. sold their coal in those towns. Moreover, some of the shipping companies had controlling interests in companies owning collieries in the Newcastle and Maitland fields, and were suffering from the reduction due to the competition of J. & A. Brown & Co. in the f.o.b. prices at Newcastle as well as the c.i.f. prices at Melbourne and Adelaide.  
It was under these circumstances that on January 5, 1906, there was a meeting of some of the proprietors of collieries in the Newcastle and Maitland fields. The chairman pointed out the necessity of forming an association of all the collieries if the present very unsatisfactory state of the coal trade was to be improved. The meeting thereupon passed a resolution that it was desirable to form an association to raise and maintain the price of coal, and a committee was appointed to draft a scheme. The idea obviously was to reconstitute the "vend," admitting the colliery owners in the Maitland field, whose competition has proved so disastrous. The necessity of obtaining the concurrence of those shipping companies who had interests in the Newcastle and Maitland fields was expressly recognized. Lengthy negotiations followed, of which a record was preserved and put in evidence at the trial. Ultimately a draft agreement, hereinafter called "the vend agreement," was prepared, and in April, 1906, assented to by a number of the colliery proprietors, including Messrs. J. & A. Brown & Co., and, though never actually executed, was no doubt acted on and considered binding by the assenting parties.

The chief provisions of the vend agreement may be stated as follows: An association is formed of which the colliery companies and firms parties thereto are the original members. There is provision for the admission of new members and the withdrawal of members under defined circumstances. Each constituent company or firm appoints a representative, and these representatives constitute a board. The voting power of each representative on the board is determined by the proportion of the total trade which under a subsequent clause of the agreement is allotted to the company or firm by which he is appointed. The board may appoint and delegate any of its powers to an executive committee, and (under clause 9) must appoint a representative whose duty it is to allocate to the particular collieries the proportions of the inter-State trade to be fulfilled by them respectively. The resolutions of the board are to be binding on the members of the association. Each member contributes to the general funds of the association, as to the application of which the board has complete discretion. The total trade is allotted in certain proportions between the original members, provision being made for the increase or decrease of these proportions in the event of the admission of new members or the withdrawal of old members, or in other events specified. No member is to open up any new shaft, pit, or adit unless there be danger of his being unable to maintain his allotted proportion of the total trade by means of his existing shafts, pits, and adits. The board is to fix the selling price of all coal won from the collieries of the members of the association, and for this purpose these collieries are divided into four classes. The prices are to be the same for all collieries in the same class, and to all purchasers irrespective of quantity, but so that the board may, to meet the exigencies of trade, fix differential rates for particular markets, contracts, or classes of coal, and if it sanctions a contract for the supply of coal at less than the selling price for the time being may compensate the contractor out of the general funds of the association. All members of the association may dispose of the produce of their collieries without restriction as to quantity and manner except as therein provided, but in order to induce members whose trade may fall off not to endeavour to increase it by underselling contrary to the agreement, every member whose trade in any quarter exceeds his estimated proportion is to contribute in manner therein provided to a fund for compensating those members whose trade is less than their estimated proportions, accounts in this respect being adjusted at the end of each year, having regard to the total trade for such year and the actual proportions in such trade allotted to the various members. The agreement also contains clauses with regard to strikes, lock-outs, and references to the industrial court. The agreement is expressed to commence on January 1, 1907, and to continue in operation for a year, but there are provisions for its earlier determination and its extension for a further period. Their Lordships are of opinion upon the evidence that the vend agreement was acted upon from early in April, 1906, and must be taken to have been extended and renewed with minor variations from year to year, and to have been in force at the commencement of these proceedings. It is obviously an agreement in restraint of trade.

During the negotiations which led up to the vend agreement, the possibility and desirability of securing a steady market for coal for the inter-State trade were subjects of discussion. This was a matter of interest not only to the colliery proprietors, but to those shipping companies who were interested in Newcastle or Maitland coal. A suggestion was made that with this object it might be advisable for the vend when constituted to enter into some agreement with the shipping companies who had theretofore purchased most of the Newcastle coal for the purposes of the inter-State trade. After prolonged negotiations between the colliery proprietors on the one hand and the shipping companies on the other hand, a draft agreement, hereinafter called the shipping agreement, was prepared, and in September, 1906, assented to by the colliery proprietors constituting the vend, including J. & A. Brown & Co. on the one hand and the four respondent companies and J. & A. Brown & Co. on the other hand, J. & A. Brown & Co. assenting both as colliery proprietors and as shippers. The shipping agreement was never actually executed, but it was no doubt acted upon and considered binding by the assenting parties. Its chief provisions may be stated as follows: The colliery proprietors, therein called the vendors, are to sell to the shipping companies, therein called the purchasing agents, all the coal which the latter may require for the inter-State trade, such coal being purchased from all or some of the collieries therein referred to as mentioned in a schedule which is not in evidence, but which no doubt comprised the vend collieries, classified in the same manner as in the vend agreement. The vendors and purchasing agents are each to appoint a representative; the representative of the purchasing agents is, a week before the commencement of each month, to give notice to the vendors' agent of the approximate quantity and the particular class of coal required during such month, and the vendors are to supply that quantity and class accordingly. The vendors are, if possible, to comply with any requisition of the purchasing agents if they require coal from any particular colliery, but only when such colliery has not already reached its limit of output. When, however, the purchasing agents have with the assent of the vendors contracted to supply coal from a particular colliery, such coal is, if practicable, to be supplied whether or not such limit has been reached. This provision undoubtedly refers to the vend agreement. The coal is to be delivered f.o.b. at Newcastle, the prices to be paid for the various classes being fixed by the colliery proprietors each year in November and to take effect for the ensuing year commencing January 1. The vendors are not to supply any coal for the inter-State trade except to the purchasing agents, and the purchasing agents are not (with certain exceptions) to deal in or carry any coal except what they purchase from the vendors. The purchasing agents are not to resell any coal purchased from the vendors at higher prices per ton than the c.i.f. prices therein specified. These maximum c.i.f. prices vary with the f.o.b. prices at Newcastle, but to an extent which cannot be accounted for by any increase in cost, insurance, or freight attributable to the increased f.o.b. prices. The intention obviously is to give the purchasing agents an opportunity of benefiting by any increase in the f.o.b. prices provided they can obtain orders at increased c.i.f. prices. The purchasing agents may exceed these c.i.f. prices by 3s. a ton on large coal supplied under contracts with a single consumer not exceeding 10,000 tons in any one year, and also where the resale is not c.i.f. at any port of delivery by the amount of costs actually incurred for lighterage, wharfage, carriage, or otherwise as therein mentioned. If the purchasing agents sell at prices exceeding the maximum prices specified they are to account to the vendors for the excess, it being the intention of the parties to place the purchasing agents in the position of agents only, but clothed with a liability for all coal ordered at the rates agreed on, and that the difference between such rates and the maximum prices on resale shall represent compensation for freight and remuneration for work of realization. Where, however, the vendors consent to a resale at a price higher than the maximum, the amount of the excess is to be equally divided between the vendors and purchasing agents. The shipping agreement is expressed to commence on January 1, 1907, and to continue for one year from that date. There are no provisions for its earlier determination or for its renewal, but their Lordships are of opinion, on the evidence, that it was acted upon not only in 1907 but in 1908, and also in 1909 and 1910, and must be taken to have been renewed accordingly. It also is without doubt a contract in restraint of trade.

It is the shipping agreement and not the vend agreement which is impeached in these proceedings, but the Crown does not admit that the vend agreement could not itself have been impeached under ss. 4 (a) and 7 of the Act. If the intention with which the vend agreement was entered into be unlawful, it would be evidence of a like unlawful intention in entering into the shipping agreement, for the latter agreement was undoubtedly entered into by the colliery proprietors in furtherance of the policy embodied in the vend agreement, and the shipping companies were well acquainted with the terms of the vend agreement. If on the other hand the vend agreement were entered into with no unlawful intent, it would make it much harder to infer an unlawful intent from the shipping agreement. Their Lordships therefore propose to consider whether an unlawful intention, i.e., an intention to restrain trade to the detriment of the public, can be gathered from these agreements considered separately or as part of a general scheme, it being admitted that each agreement constitutes a contract or combination in restraint of trade. The unlawful intention alleged is, so far as the vend agreement is concerned, in substance an intention to injure the public (1.) by raising the price of coal, and (2.) by annihilating competition in the Newcastle coal trade. There was some suggestion of an intention to injure the public in other ways, namely, by causing delays or difficulties in prompt compliance with contracts for the supply of coal or a particular class of coal. This suggestion can, in their Lordships' opinion, be properly ignored. It attributes to the parties an intention to bring about delays and difficulties from which they could derive no possible benefit, and that, too, though the vend agreement, from which the Court is asked to infer the intention, contains provisions designed, so far as consistent with its main object, to preclude such delays or difficulties from arising at all.

There can be no doubt that the vend agreement was intended to preclude competition in the sense of underselling among its members, and by this means to raise and maintain the price of coal won from the Newcastle and Maitland coalfields. Ceteris paribus low prices are of advantage to the consuming public, and their Lordships will assume that in default of anything to indicate that the prevailing prices were too low to afford the colliery proprietors a reasonable profit, having regard to the capital embarked and the risk involved in their trade, a combination to raise prices would from the standpoint of public interest require some justification.

In the present case, however, it was proved that the prices prevailing when negotiations for this agreement commenced were disastrously low owing to the "cut-throat" competition which had prevailed for some years. Even Isaacs J., who decided in favour of the Crown, was apparently of opinion that there was early in 1906, at any rate, some case for raising the price of coal considerably above its then selling price of 7s. 6d. per ton. It can never, in their Lordships' opinion, be of real benefit to the consumers of coal that colliery proprietors should carry on their business at a loss, or that any profit they make should depend on the miners' wages being reduced to a minimum. Where these conditions prevail, the less remunerative collieries will be closed down, there will be great loss of capital, miners will be thrown out of employment, less coal will be produced, and prices will consequently rise until it becomes possible to reopen the closed collieries or open other seams. The consumers of coal will lose in the long run if the colliery proprietors do not make fair profits or the miners do not receive fair wages. There is in this respect a solidarity of interest between all members of the public. The Crown, therefore, cannot, in their Lordships' opinion, rely on the mere intention to raise prices as proving an intention to injure the public. To prove an intention to injure the public by raising prices the intention to charge excessive or unreasonable prices must be apparent. Not only can no trace be found in the vend agreement of an intention to raise the price of coal to an unreasonable extent, but such an intention is highly improbable, for it was not in the interest of the vend to charge unreasonable prices. The vend did not comprise all the collieries in the Newcastle and Maitland fields, nor any of the Southern or Western collieries. It did not, therefore, eliminate competition either in home trade, the inter-State trade, or the foreign trade. It is to be observed that the selling price to be fixed under the vend agreement applies to all these trades. If the vend fixed the prices too high, it would inevitably lead to the trade of its members being lost to competitors outside the vend. It might also lead to the development of further pits or shafts, and the consequent creation of new competitors. It would certainly check the demand for the coal of its members. That this is so is apparent from the action of the vend in 1909, when, in spite of pressure from the miners, they refused to advance the price of coal for the ensuing year more than 1s., because in their opinion it would be impossible to obtain any greater price in the foreign market. It was argued that the vend controlled so large a proportion of the home and inter-State trade that they could afford to ignore the competition of others in the home and inter-State markets, but in the foreign market there was no limit to the competition to which they were subject. Had there been any intention of charging excessive prices in the home or inter-State trade, as opposed to the foreign trade, one would have expected the vend agreement to provide for reduced prices for coal supplied for foreign consumption. It was argued that this might have been done under the terms of the vend agreement. But no inference adverse to the vend can in their Lordships' opinion be drawn from this possibility, and it was never, in fact, done. Indeed, their Lordships cannot find any satisfactory evidence that, except in some few isolated cases, and for some special reason, coal was ever supplied for the foreign trade at less prices than for the inter-State or home trade. The vend agreement may or may not contain provisions unenforceable at common law, but it certainly does not, on the face of it, disclose any such intention to injure the public as would make it illegal under s. 4 (1.) (a) of the Act, either because it was intended to limit competition among its members, or because it was intended to raise and maintain prices. Again, even assuming that the vend agreement amounts to an attempt to create a monopoly within the meaning of s. 7 of the Act, it certainly does not, on the face of it, disclose any intention of controlling the supply or price of coal to the detriment of the public by unduly raising prices or otherwise.

Passing to the shipping agreement, their Lordships are of opinion that there is still less justification for inferring from its provisions any such unlawful intention as would make it an offence under either s. 4 (1.) (a) or s. 7 of the Act. In substance it constitutes the shipping companies sole agents of the colliery proprietors for the purposes of their inter-State trade; the agents, as is not unusual in such cases, being responsible to their principals for the wholesale prices of the goods supplied, and being dependent for their own remuneration on the difference between the wholesale and retail prices. In contracts of this sort it is not uncommon to find a provision specifying the minimum retail price, a provision which might be very material from the standpoint of public interest. But there is no such provision in the present case. On the contrary, the agreement contains provisions specifying the maximum retail prices and imposing penalties if these prices be exceeded; and further it leaves it open to the shipping companies to compete with and undersell each other on the market. It is of course possible, if not probable, that the shipping companies had some arrangement between themselves precluding such competition, but there was no evidence whatever of any such arrangement. The inference their Lordships draw from the provisions of the shipping agreement fixing the maximum retail prices is that the colliery proprietors considered that it was not to their advantage that the shipping companies should unduly raise the price of coal to the ultimate consumer. It would give too great an advantage to their competitors in the coal trade. There is no ground for supposing that these maximum prices were intended to be minimum prices, or that if intended to be minimum prices they were necessarily excessive. Much stress was laid on those clauses of the agreement under which the colliery proprietors were not to sell coal for the inter-State trade to any persons other than the shipping companies, and the latter were not for inter- State purposes to purchase or carry coal for any persons other than the colliery proprietors. Similar provisions are quite common in contracts of exclusive agency, and, in their Lordships' opinion, are not necessarily unreasonable or injurious to the public. There is no evidence that the tonnage of the shipping companies was more than sufficient for their inter-State trade in coal, or that the effect of the agreement was to render their vessels idle. Of course the agreement precluded colliery proprietors not parties thereto from being able to avail themselves of these vessels. But a similar result follows whenever vessels are chartered by a single person or by a group of persons. The shipping companies were not the only persons engaged in the shipping trade in coal; they owned only about the same proportion of the total tonnage engaged in the Newcastle inter-State coal trade as the proportion of such trade represented by the parties to the vend agreement. So far as other colliery proprietors were concerned they were not by reason of the shipping agreement in any worse position than they would have been had the parties to the vend chartered all the vessels of the shipping companies, and, having regard to the exigencies of the inter-State trade, such action on the part of the parties to the vend would have been quite reasonable. With regard to the other provisions of the shipping agreement, their Lordships are of opinion that they were really to the advantage of the consumers as tending to ensure a reasonably steady supply to meet the inter-State demand.

There being nothing on the face of the vend agreement or of the shipping agreement from which an intention to injure the public by raising the price of coal to an unreasonable extent can be inferred, the question remains whether these agreements, if considered together as parts of a single scheme, can give rise to an inference of any such intention. Their Lordships are of opinion that this question, too, must be answered in the negative. If, as their Lordships think, there was justification for a combination of colliery proprietors to raise the price of coal, it was obviously reasonable on their part to take precautions to secure a market for their coal at the increased price. They could do this in various ways. At one time they appear to have contemplated forming a company by the agency of which their coal would be distributed to the ultimate consumers, but they finally adopted the plan of appointing the shipping companies their exclusive agents for that purpose. On the other hand the shipping companies, if a vend were formed, would either have to purchase coal from the vend at increased prices or obtain their coal elsewhere with considerable risk of loss from an unsteady or insufficient supply and the introduction of fresh competitors in the shipping business. Some arrangement with the vend would be advisable in their own interest, and again it was not unreasonable that this arrangement should take the form of an agreement of exclusive agency. Their Lordships conclude that neither the vend agreement nor the shipping agreement taken separately, nor both agreements taken together as parts of a single scheme, can raise any legitimate inference that any of the parties concerned, whether colliery proprietors or shipping companies, acted otherwise than with a single view to their own advantage, or had any intention of raising prices or annihilating competition to the detriment of the public.

It remains to be considered whether, if no illegal intention can be gathered from the agreements themselves, such an intention \*814 can be inferred from what was actually done pursuant to the agreements. The selling price of the best coal, f.o.b. at Newcastle, was during the negotiations for the vend agreement raised from 7s. 6d. to 9s., and this price prevailed during the last months of 1906. It was under the vend agreement itself raised to 10s. for the year 1907, and 11s. for the year 1908 and subsequent years. It was contended that these prices were unreasonable and excessive, and Isaacs J. found as a fact that in 1907 9s. 1d. and in 1908, 1909, and 1910 9s. 8d. were the highest prices which could reasonably have been charged. On the other hand the Court of Appeal was of opinion on the evidence that the f.o.b. prices actually charged were not only not shewn to have been excessive or unreasonable, but were shewn affirmatively to have been reasonable. Their Lordships agree with the opinion of the Court of Appeal, and consider that the criticisms of the Chief Justice on the process by which Isaacs J. arrived at his conclusions of fact in this respect were fully justified. The onus of proving that the prices charged were unreasonable clearly lay with the Crown, and the Crown tendered no satisfactory evidence in this respect. There was no evidence whatever as to the profits made by the colliery proprietors when the prices in question prevailed. On the other hand there was evidence that with the hewing rate at 4s. 2d., which was admitted to be the lowest hewing rate consistent with a fair remuneration to the miners, and which corresponds to a declared price of 11s., the colliery proprietors could not afford to sell the best coal, f.o.b., at less than 11s. Further, there is evidence that the prices actually charged inter-State were also obtained in the foreign market, where at any rate free competition prevailed.

With regard to the prices charged c.i.f. or in the retail trade by the shipping companies there is, again, no satisfactory evidence that they were not perfectly reasonable prices. The shipping companies do not appear to have raised the c.i.f. or retail prices even to the maximum prices they were entitled to charge as between themselves and the colliery proprietors. There is no evidence as to the profits they made either before or after the shipping agreement came into operation. The most noticeable instances of a rise in c.i.f. or retail prices after the agreement came into operation are in the case of sales in Melbourne and Adelaide, where the shipping companies had been suffering from the competition of J. & A. Brown & Co. There is, in their Lordships' opinion, no justification for the assumption that the c.i.f. or retail prices which prevailed early in 1906 were prices which ensured to the shipping companies a reasonable profit in respect of the carriage and distribution of the coal, or that, assuming this and making proper allowance for the rise in f.o.b. prices, the c.i.f. or retail prices charged in subsequent years were unreasonable. As pointed out by the Chief Justice, the rise in the f.o.b. prices is only one of the many considerations which would be material in forming an opinion as to whether an increase in c.i.f. or retail prices was justifiable.

As to the other modes in which it was said that the public were injured by reason of the agreements in question, their Lordships consider that, even if there were ample proof of the injury alleged, no inference could be drawn therefrom as to the intention of the parties in entering into these agreements. The parties to the agreements might gain by raising the price of coal, but they could gain nothing by putting difficulties in the way of their own customers. Such inconvenience as from time to time arose did not exceed what was to be expected from time to time in the conduct of so great a business.

Finally, it was contended that a sinister intention might be inferred from the policy of the colliery proprietors and shipping companies towards their competitors in the coal trade, and great stress was laid in this connection on the efforts made to bring the Burwood Extended, the Lymington, and the Newcastle Wallsend Collieries into the combination, and to check the competition of Scott, Fell & Co. and Kethel & Co. Their Lordships do not think that it would be proper to draw any inference from this policy as to the intention of the parties in entering into the agreements in question: the policy pursued is in no way foreshadowed or contemplated in either agreement, nor was it the necessary outcome of either agreement. It must not, however, be supposed that their Lordships view with approval everything which was done in pursuance of this policy.

In their Lordships' opinion the decision appealed against was \*816 right, first, because so far as the Crown relied upon s. 4 (1.) (a) and s. 7 of the Act there was no evidence (at any rate no satisfactory evidence) of any sinister intention on the part of either colliery proprietors or shipping companies; and secondly, because so far as the Crown relied on s. 10 there was no evidence (at any rate no sufficient evidence) of injury to the public.

Their Lordships desire, in conclusion, to acknowledge the assistance which they have received from counsel on both sides in a case of much difficulty and complexity.