[HIGH COURT OF AUSTRALIA.]

THE ADELAIDE STEAMSHIP COMPANY LIMITED AND OTHERS . . . DEFENDANTS, } APPELLANTS;

AND

HIS MAJESTY THE KING AND THE ATTORNEY-GENERAL OF THE COMMONWEALTH . . . . PLAINTIFFS, } RESPONDENTS.

ON APPEAL FROM A JUSTICE OF THE HIGH COURT.

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SYDNEY, *August* 26, 27, 28, 29, 30; *September* 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 16, 17, 20.

Griffith C.J., Barton and O'Connor JJ.

Trusts and combines—Combination or agreement in restraint of trade—Monopoly—Intent to cause detriment to the public—Combination to raise prices—Onus of proof as to intent—Australian Industries Preservation Act 1906-1909 (*No.* 9 *of* 1906—*No.* 26 *of* 1909), *secs.* 4, 7, 15A.

In order to establish an offence under sec. 4 (1) (*a*) or sec. 7 of the *Australian Industries Preservation Act* 1906 there must be proved, not only an intent to restrain trade or commerce or an intent to monopolize some part of the trade or commerce with other countries or among the States, but also an intent to cause detriment to the public.

The term "the public" in those sections is not limited to the consumers of any particular commodity, but includes also the producers of that commodity.

An agreement in restraint of trade is not necessarily detrimental to the public within the meaning of the Act, and,

The intent contemplated by those sections to cause detriment to the public is a real intention and not a mere constructive intention imputed from an intent to restrain or monopolize trade.

A mere combination of the producers of a commodity with the intention of raising the price of that commodity is not necessarily detrimental to the public.

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In sec. 15A of the *Australian Industries Preservation Act* 1906-1909, which provides that 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, the word "averments" is confined to pure allegations of fact and does not extend to conclusions of mixed law and fact.

The question whether a price fixed is unreasonable for the purpose of an inquiry whether an agreement or combination is made or entered into with intent to cause detriment to the public is a mixed question of law and fact.

That section has no application when the prosecutor elects to put the actual facts of the case before the Court.

Quære, whether that section is invalid as being an attempted interference with the judicial power of the Commonwealth by seeking to impose upon Courts the duty of passing sentence without trial.

The proprietors of the majority of the coal mines in a mining district in New South Wales, believing that the prosperity of the district and their own individual interests were in danger by reason of excessive competition and the unremunerative prices obtained by them for coal, entered into an agreement substantially to restrict the output of their mines and to raise and fix the price of coal sold by them. In order to further this agreement the proprietors then entered into an agreement with a number of shipowners who did the bulk of the trade of carrying coal to the other States and who were also in those States coal merchants, whereby, substantially, the proprietors agreed to sell all the coal required for the inter-State trade to the shipowners and not to sell coal for that trade except to the shipowners, and the shipowners agreed to buy all the coal required for that trade from the proprietors, not to carry or deal in coal other than that purchased by the proprietors, and not to re-sell such coal at a greater price than that fixed under the agreement, such price being fixed in relation to the price fixed under the agreement between the proprietors.

On an information against the shipowners and the proprietors charging offences under secs. 4 (1) (*a*) and 7 of the *Australian Industries Preservation Act* 1906,

Held, that the agreement between the proprietors and the shipowners was not on its face made with intent to restrain trade or commerce to the detriment of the public or with intent to monopolize the inter-State trade in such coal to the like detriment.

Held, also, that an intention to cause detriment to the public should not be inferred from the mere fact that the powers conferred by the agreement could be used so as to cause such detriment.

Held, further, on the evidence, that no actual detriment to the public was shown to have been caused by the exercise of the powers conferred by the

agreement and, therefore, that no intent to cause such detriment could be inferred.

Decision of *Isaacs* J. : *R. and The Attorney-General of the Commonwealth* v. *Associated Northern Collieries*, 14 C.L.R., 387, reversed.

APPEAL from *Isaacs* J.

This was an appeal by the Adelaide Steamship Co. Ltd. and three other shipping companies and their respective managing directors against the decision of *Isaacs* J. in *R. and The Attorney-General of the Commonwealth* v. *Associated Northern Collieries* (1), where, and in the judgment hereunder, the facts are fully set out.

Mitchell K.C. and *Knox* K.C. (with them *Ham*) for the appellants. The language of secs. 4 and 7 of the *Australian Industries Preservation Act* 1906 is so different from that in the *Sherman Act* that no arguments can be based on the American decisions, and the sections should be construed in the light of English decisions. A contract although in restraint of trade which at the time the Act was passed would have been enforceable in the English Courts is not within sec. 4. A contract to prevent competition and to raise prices is enforceable : *Collins* v. *Locke* (2); *Hearn* v. *Griffin* (3); *Hare* v. *London and North-Western Railway Co.* (4); *Wickens* v. *Evans* (5). *Isaacs* J. has treated any increase in price as being to the detriment of the public unless it be shown that such increase was to raise prices from those brought about by a state of ruinous competition. At common law the question whether a contract was or was not in reasonable restraint of trade was a matter for the Court and not for a jury to determine, having regard to the provisions of the contract and the circumstances surrounding the making of it. For the purpose of determining whether a contract was enforceable or not the Court would never have gone into evidence for the purpose of determining what were reasonable prices, at any rate as far as that would involve the consideration of what was a fair return for capital &c. Assuming, however, that the Court has to go into such calculations, the test as to whether charges

(1) 14 C.L.R., 387.
(2) 4 App. Cas., 674.
(3) 2 Chitty, 407.
(4) 2 John. & H., 80, at p. 103.
(5) 3 Y. & J., 318.

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are unreasonable or not so as to prevent the contract being enforceable would be by applying to the question of prices the general principle that an agreement to raise prices was not invalid if they were not raised beyond the legitimate interests of the parties required, and were not so arbitrary and excessive as to be to the detriment of the public. In considering whether anything is to the detriment of the public, it must be looked at not merely from the point of view of the consumers. The Act itself by its other provisions clearly indicates that the preservation of Australian industries is one of its main objects and that in that connection regard must be had to the interest of producers and workers as well as consumers. See secs. 4 (1) (*a*) and (*b*), 6 (1) (*c*) and (*d*), Part III. Therefore before the Court can hold that prices are so unreasonable as to be to the detriment of the public it must consider, at any rate, in relation to the appellant companies who are carrying on an Australian industry, what would be fair remuneration to enable those companies to be in a position to pay adequate remuneration to their employees, to give a fair return to their shareholders, and to put themselves in a sufficiently strong financial position to carry on in bad seasons as well as good. None of these matters were taken into consideration by *Isaacs* J. and there is no evidence upon them. A contract or combination in restraint of trade under sec. 4, which, in fact, amounted only to the establishment of a monopoly under sec. 7, would not of itself be an offence, for otherwise that would be an offence under sec. 4 which under sec. 7 is only an offence if done with intent to do detriment to the public in the manner there specified. As to sec. 7 there is no definition of a "monopoly" or "monopolize" and the words are clearly not used either in the legal sense of having a right to a thing and to restrain others from doing it, or in its popular sense of having sole control of a particular trade. Reference may therefore be made to the title of the Act which is described, *inter alia*, as one for the repression of "destructive monopolies," and the word "monopolize" must connote not merely the getting or attempting to get control of part of the trade or commerce with other countries or among the States, but the doing so by wrongful means such as those alleged to be the ordinary weapon of the large trusts in the United

States, *e.g.*, boycotting, rebates, &c.: see *Wickens* v. *Evans* (1). That is supported by the fact that the amending Act, No. 29 of 1910, makes monopolizing an offence even where there is no intent to do anything to the detriment of the public. As to both sec. 4 and sec. 7 the intent must be an intent common to all the persons convicted and must be a real intent, that is to say, if the real object of the parties to the alleged contract or combination was to enable them to obtain what was a fair and reasonable remuneration, or some other object which they regarded as reasonably necessary for their well being, the fact that incidentally the result was to the detriment of the public would not make them guilty of an offence, although possibly it might be a ground for the Attorney-General obtaining under sec. 10 (1) an injunction against the continuance of the contract or combination: See *Mogul Steamship Co. Ltd.* v. *McGregor, Gow & Co.* (2); *Lord Halsbury's Laws of England*, vol. IX., p. 244. Sec. 15A is *ultra vires* the Commonwealth Parliament as interfering with the judicial power, but, even if it is not, it does not aid the Crown in proving intent, and the whole onus of proof still remains on the Crown. [They also referred to *Scott Fell* v. *Lloyd* (3); *Colliery Employés Federation* v. *Dudley Coal Co.* (4).]

Wise K.C. and *Starke* (with them *Bavin*), for the respondents. A combination to raise the price of a prime necessary of life by interfering with ordinary or fair competition is illegal and void as being of necessity injurious to the public: *People* v. *Milk Exchange* (5); *People* v. *Sheldon* (6); *R.* v. *Norris* (7); *R.* v. *Eccles* (8); *R.* v. *Waddington* (9); *Urmston* v. *Whitelegg Brothers* (10); 9 Anne, c. 28. Such a combination is within sec. 4. The shipping agreement by itself is on its face as a matter of law detrimental to the public within secs. 4 and 7, and, if it is not, the evidence shows actual detriment to the public. Any agreement which aims at excessive and unreasonable prices is within the sections. If there is an agreement setting out the terms and methods of the combination and it is apparent that the agreement cannot be carried

(1) 3 Y. & J., 318.
(2) (1892) A.C., 25, at p. 37.
(3) 13 C.L.R., 230, at p. 239.
(4) (1903) A.R., N.S.W., 259.
(5) 145 N.Y., 267.
(6) 139 N.Y., 251.
(7) 2 Ld. Keny., 300.
(8) 1 Leach C.C., 274.
(9) 1 East., 143.
(10) 63 L.T., 455.

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out without detriment to the public, it is not necessary to wait until the injury has occurred, but the intent to cause detriment to the public will be inferred and the mere making of such a contract is a breach of sec. 4. There are two classes of contract which at common law are void because they cannot be carried out without injury to the public. The first are contracts to raise prices by unreasonable restrictions upon competition. In that class of cases it is not necessary that prices should be actually raised and the intent is sufficient. The restrictions may be unreasonable because they go beyond what is necessary for the protection of the parties to the contract, or because they unnecessarily affect third persons, or because they tend to monopoly. See *In re Greene* (1); *Maxim Nordenfelt Gun and Ammunition Co.* v. *Nordenfelt* (2); *Smith's Leading Cases*, 10th ed., vol. I., p. 397; *United States* v. *Addyston Pipe and Steel Co.* (3); *Standard Oil Co.* v. *United States* (4). The other class consists of contracts which aim at monopoly. These are necessarily void as being contrary to public policy or injurious to the public. The distinction between sec. 4 and sec. 7 is this:—There are two things commonly called monopolies—one, which is called a pernicious monopoly, connotes an attempt to raise prices, or to secure a dominant portion of trade, by methods of exclusion and is necessarily injurious to the public and is within sec. 4; the other, a monopoly which may arise by an enlargement of a man's business and which otherwise would be innocent is hit at by sec. 7 if it results in a control of prices and supply to the detriment of the public. [They referred to *United States* v. *American Tobacco Co.* (5); *Cooke on Combinations*, 2nd ed., p. 214; *United States* v. *Patterson* (6); *Mineral Water Bottle Exchange and Trade Protection Society* v. *Booth* (7); *Russell* v. *Amalgamated Society of Carpenters and Joiners* (8); *Tivoli, Manchester, Ltd.* v. *Colley* (9); *Lord Halsbury's Laws of England*, vol. IX., p. 563; *National Cotton Oil Co.* v. *Texas* (10); *Shrewsbury and Birmingham Railway Co.* v. *London and North-Western*

(1) 52 Fed. Rep., 104, at p. 111.
(2) (1893) 1 Ch., 630, at p. 667; (1894) A.C., 535, at p. 548.
(3) 85 Fed. Rep., 271, at p. 278.
(4) 221 U.S., 1.
(5) 164 Fed. Rep., 700, at p. 720.
(6) 55 Fed. Rep., 605, at pp. 610, 622.
(7) 36 Ch. D., 465.
(8) (1910) 1 K.B., 506.
(9) 20 T.L.R., 437.
(10) 197 U.S., 115, at p. 129.

Railway Co. (1); *Northern Securities Co.* v. *United States* (2); *Simpson* v. *Attorney-General* (3); *Allnutt* v. *Inglis* (4).] The raising of prices beyond those of a year in which the competition was normal is to the detriment of the public. The Court should assume that the year before the shipping agreement was a normal competitive year, and the burden is on the appellants to show that it was not. The respondents can rely on sec. 15A as supplemental to the evidence which is actually given: *Baxter* v. *Ah Way* (5). It establishes the facts from which intent can be inferred. Secs. 7 and 7B are complements of sec. 4, and are specific instances of what might be covered by sec. 4. Because of the existence of sec. 7 there should not be excluded from sec. 4 facts which would also prove an offence under sec. 7. If there is a complete restriction of competition and a substantial control of some service, there is strong evidence of intent. The coal vend and the shipping companies having the bulk of the Newcastle coal and of the intercolonial transport of coal, and having joined together to practically secure for the members of the vend the inter-State market and for the shipping companies the exclusive transport of coal, that is strong evidence of intent to restrain trade to the detriment of the public. So far as restraint of trade is unreasonable or unnecessary for the protection of the parties, so far will the Court infer that the intent is to the detriment of the public. To prevent other persons from entering into the trade is too wide to be reasonably necessary under any circumstances and the Court will infer intent to injure the public from it. The potential power of the combination, and the character of the commodity and of the service should be considered in saying what was the intent. The onus is on the Crown to prove a normal year, and the market price in a normal year is the only standard for determining whether prices are excessive. Any interference with normal prices must be justified by the defendants. If the only justification is the fact of the agreement of the parties itself, then that the agreement is detrimental to the public is strong evidence of intent. [They also referred to

(1) 21 L.J.Q.B., 89, at p. 93.
(2) 193 U.S., 197, at pp. 331, 339.
(3) (1904) A.C., 476.
(4) 12 East., 527.
(5) 10 C.L.R., 212.

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Judson on Inter-State Commerce, 2nd ed., p. 117; *Cooke on Combinations*, 2nd ed., p. 218; *Eddy on Combinations*, p. 787; *Wright on Criminal Conspiracies.*]

Mitchell K.C., in reply.

Cur. adv. vult.

The judgment of the Court was read by

GRIFFITH C.J. This is an appeal by eight of the defendants from a judgment of *Isaacs* J. convicting them of offences against the provisions of secs. 4 and 7 of the *Australian Industries Preservation Act* 1906 which was assented to on 24th September of that year.

The first question for determination is as to the meaning of those provisions.

Sec. 4 provides that:—

"(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:"

is guilty of an offence.

The term "detriment" is not a term of art. Strong light is thrown by the succeeding words of the section upon the sense in which it was used by Parliament. They provide that any person who enters into a contract or combination in relation to foreign or inter-State commerce—"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.

It is clear, therefore, that Parliament, contrasting detriment with advantage, recognized that the interests of all those classes are elements to be considered in dealing with the subject matter of the Act, and did not think that an act which is apparently detrimental, say, to consumers, is necessarily detrimental to the public as a whole.

In our judgment it is an essential element of an offence under sec. 4 (1) (*a*) that there should be an intent to restrain trade or commerce to the detriment of the public, and that mere intent to restrain trade or commerce without the further intent to cause detriment to the public is not sufficient. Any other construction would, indeed, give no effect to the words "to the detriment of the public." An elaborate argument was, however, addressed to us (which did not, as we understand his judgment, commend itself to our brother *Isaacs*) to the effect that all agreements in restraint of trade and commerce are in the eye of the law injurious to the public, so that the mere fact of restraint establishes the fact of detriment, and consequently a mere intent to restrain trade establishes the intention to cause detriment. In support of this contention reference was made to the older English authorities in which the doctrine as to agreements in restraint of trade was first formulated and afterwards developed. At one time, no doubt, the doctrine seems to have prevailed that every agreement by which a man promised to limit his opportunities of entering into trade in free competition with all his fellows was unlawful —not in the sense of being criminal or punishable, but in the sense of being invalid, *i.e.* not enforceable at law. Every agreement to fix the price at which a commodity should be sold by the persons making such an agreement would of course fall within the doctrine. Reference was made to the case of *R.* v. *Norris* (1), decided about the middle of the 18th century, and described in the report as a case of a combination not to sell salt under a certain price which exceeded that then received for it. In *R.* v. *Waddington* (2), Lord *Kenyon*, evidently referring to this case, described it (3) as a charge of conspiracy to monopolize or raise the price of all the salt at Droitwich. In the last-mentioned case Mr. *Erskine*, who was leading counsel for the Crown, described the substance of the offence then charged as "the engrossing a large quantity of hops by buying them from various persons by forehand bargains and otherwise at a certain price with intent to re-sell them at an unreasonable profit or an exorbitant price." In later times, however, great modifications have been introduced

(1) 2 Ld. Keny., 300.
(2) 1 East, 143.
(3) 1 East, 143, at p. 156.

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into the doctrine of the law relating to contracts in restraint of trade. The history of this branch of the law and of the qualifications of the original rule now recognized is fully expounded in the speeches of the learned Lords in the *Maxim Nordenfelt Case* (1). We do not think it necessary to quote them at length, but content ourselves with quoting two passages from the speeches of Lord *Watson* and Lord *Macnaghten*. Lord *Watson* said (2):—"When the series of cases, from the earliest to the present time, are carefully considered, I think they will be found to record the history of a protracted struggle between the principle of common honesty in private transactions, on the one hand, and the stern rule which forbade all restraints of trade on the other. In my opinion it does not admit of dispute that the ancient rule has had the worst of the encounter, and has been gradually losing ground in all the Courts."

Lord *Macnaghten* said (3):—"The true view at the present time I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable 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. That, I think, is the fair result of all the authorities. But it is not to be supposed that that result was reached all at once. The law has changed much, ever since *Mitchel* v. *Reynolds* (4). It has become simpler and broader too. It was laid down in *Mitchell* v. *Reynolds* (4) that the Court was to see that the restriction was made upon a good and adequate consideration, so as to

(1) (1894) A.C., 535.
(2) (1894) A.C., 535, at pp. 554-5.
(3) (1894) A.C., 535, at p. 565.
(4) 1 P. Wms., 181.

be a proper and useful contract. But in time it was found that the parties themselves were better judges of that matter than the Court, and it was held to be sufficient if there was a legal consideration of value; though of course the quantum of consideration may enter into the question of the reasonableness of the contract. For a long time exceptions were very limited. As late as 1793 it was argued that a restriction which included a country town, and extended ten miles round it, was so wide as to be unreasonable. It was said, and apparently said with truth, that up to that time restrictions had been confined to the limits of a parish, or to some short distance, as half-a-mile. But Lord *Kenyon*, in his judgment, observed that he did not see that the limits in question were necessarily unreasonable. 'Nor do I know,' he added, 'how to draw the line': *Davis* v. *Mason* (1). The doctrine that the area of restriction should correspond with the area within which protection is required is an old doctrine. But it used to be laid down that the correspondence must be exact, and that it was incumbent on the plaintiff to show that the restriction sought to be enforced was neither excessive nor contrary to public policy. Now the better opinion is that the Court ought not to hold the contract void unless the defendant 'made it plainly and obviously clear that the plaintiff's interest did not require the defendant's exclusion or that the public interest would be sacrificed' if the proposed restraint were upheld: *Tallis* v. *Tallis* (2). . . . I cannot help thinking that there is a good deal of common sense in the way in which Lord *Campbell* looked at this question. A retired partner in the canvassing trade of a publishing business, being under a restrictive covenant, claimed the right to disseminate his publications within the area of restriction. He appealed to public policy. 'It is clear,' said Lord *Campbell*, 'there would be evil if the law justified such a breach of contract; but it is by no means clear there would be any compensating good to the public from the publications intended by the defendant to be so made in violation of his promise to the plaintiff': *Tallis* v. *Tallis* (2). That, of course, is not decisive in itself. It is an element for consideration of more or less weight according to circumstances. But Lord

(1) 5 T.R., 118.

(2) 1 El. & B., 391, at p. 413.

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Campbell's observation serves to bring into contrast the two principles which have to be adjusted in all these cases—freedom of trade and freedom of contract." The same view of the modern law was taken by the Judicial Committee in *Collins* v. *Locke* (1).

But, as Lord *Macnaghten* says, this result was not reached all at once. The doctrine now recognized is that the validity of an agreement in restraint of trade as an enforceable agreement as between the parties to it depends upon consideration of the actual public interest. It is recognized that freedom of trade is not the only matter to be considered. Freedom to make contracts and the obligation to perform contracts honestly made upon good consideration are also regarded as matters in which the public are interested. If, therefore, the bargain taken as a whole is not unfair to the party who binds himself, in the sense that he receives an adequate consideration for the promise to restrict his own future freedom, the public interest is not regarded as affected merely by the restriction, unless there are some other stipulations in the bargain which injuriously affect the public. Again, regard is not paid exclusively to the interests of the party who makes the bargain, although in many of the decided cases that was the only element which fell to be considered. Apart altogether from his interests, the bargain may be such as to give or bring about advantages to the public or a considerable part of it of such a nature as to counterbalance, or, to use Lord *Campbell's* language in *Tallis* v. *Tallis* (2) to provide " a compensating good " to the public as against, the injury which, according to the old doctrine, would *primâ facie* be caused by the restrictive stipulation.

This view of the law is, of course, consistent with the ordinary course of human affairs. Cut-throat competition is not now regarded by a large portion of mankind as necessarily beneficial to the public. Indeed it is against the evil consequences of that class of competition that the second part of sec. 4 is aimed. The whole trend of modern legislation is in accord with the view expressed in the later judgments to which we have referred. The Trade Union Acts in effect authorize combinations, temporary or permanent, as well between workmen and workmen as

(1) 4 App. Cas., 674.

(2) 1 El. & B., 391, at p. 413.

between employers and employees for imposing restrictive conditions on the conduct of any trade or business, whether they would or would not have been unlawful but for the Act. The Wages Board Acts of the Australian States, with many others which have for their object to secure a fair reward for honest labour and enterprise, whether through Customs laws or arbitration, are based on the same notion. The mere fact that the effect of such combinations may be to raise the price of commodities to the consumer is not regarded. It is recognized that consumers of a commodity are a part, not the whole, of the public, and that in considering the question whether a contract in restraint of trade is detrimental to the public regard must be had to the public at large. It may be that the detriment, if it be one, of enhancement of price to the consumer is compensated for by other advantages to other members of the community, which may, indeed, include the establishment or continuance of an industry which otherwise could not be established or would come to an end. This view was taken by *Wood* V.C. in *Hare* v. *London and North-Western Railway Co.* (1).

It follows from what has been said that an agreement or combination in restraint of trade may be either detrimental or not detrimental to the public. It may be even beneficial, or it may be neutral. This is not only common sense but the actual truth, and we do not think that the old doctrine of the common law as to restraint of trade presents any obstacle which should prevent a Court of justice from dealing with things as they are.

Turning again to the Act, we find, as indeed might have been expected, that the legislature recognized things as they are, *i.e.* recognized that contracts or combinations to restrain trade may or may not be to the detriment of the public, and desired only to deal with those which in fact caused such detriment. They further recognized that a contract or combination which actually operates to the detriment of the public may or may not have been made or entered into with intent to cause such detriment. Accordingly, sec. 10 authorizes the Court to grant an injunction against carrying out a contract which, however innocently made, turns out to be detrimental.

(1) 2 John. & H., 80.

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It follows in our judgment that the intent, which is made by sec. 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 that is a matter relating to the proof of the offence and not to the nature of it.

The appellants were charged alternatively under sec. 7 of the Act which provides that:—

"(1) 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 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."

It is contended for the Crown that a contract or combination to bring about a "monopoly" (whatever that means) is regarded by the common law as necessarily injurious to the public, and consequently that such a contract or combination must connote an intention to cause public detriment within sec. 4 whatever the actual intention of the parties may be. This is substantially the same argument as that with which we have already dealt. But there is the further answer to it that sec. 7, like sec. 4, recognizes that such a contract or combination may or may not be to the detriment of the public. The penal consequences are only to follow when the detriment is intended.

We are unable to derive any assistance from the American decisions on the *Sherman Act*, which is framed on very different lines from that now under consideration, and contains no reference to an express intent to cause detriment to the public. They are interesting and instructive, and, so far as they are relevant, are entirely in accordance with the opinion which we have so far expressed.

It follows from what has been said 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 mass of evidence was 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.

There is no doubt—indeed it is admitted—that the appellants in 1906 entered into an arrangement—to use a neutral word including both contract and combination—with the other defendants to the suit, whom we will call the Colliery Owners. The main terms of that arrangement were reduced to writing but not signed. It appears that other parties were from time to time admitted to the benefit of it, and that the written terms were not always adhered to.

Nor is it disputed that this arrangement operated, and was intended to operate, in restraint of trade, using that term in the widest sense. Whether it operated to the detriment of the public, and, if so, whether it was intended so to operate, are questions and inferences of fact depending upon all the circumstances of the case.

It is always important, especially when using words which are not words of art, to define your terms, *i.e.* to have a clear notion of the sense in which you use them, and to adhere to that sense.

Indeed, so much of the argument for the Crown in this case has been—perhaps unconsciously—based upon vague phrases and ambiguous epithets that there is more than usual need of clear thinking, and of keeping the mind steadily fixed upon the real issue for determination, which is whether the appellants did the acts with which they are charged with an intent, *i.e.*, a real not an artificially imputed intent, to cause detriment to the public. Otherwise there is danger of getting lost in the multitude of details, and, as the saying is, of "not being able to see the wood for the trees."

For instance, the word "public" has been continually used in argument as if it meant consumers only, to the exclusion of all other persons. Again: it has been taken for granted that any rise in the price of a commodity is *primâ facie* a detriment to the public. The word "monopoly" has been used in the various

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senses of "complete control of a trade," "dominating influence in a trade," "practical control of a substantial part of a trade," "securing the greater part of a trade by keeping others out, whether by ordinary means of competition or otherwise," and "retaining possession of a trade actually enjoyed."

By way of illustration take the case of two neighbouring vignerons endeavouring to establish the industry of wine growing in a particular district which produces a special quality of wine not yet well known to the public. We do not think that an agreement between them to fix the price at which they will sell their wine is necessarily to the detriment of the public. Nor do we think that an agreement made by them with some or all the hotel-keepers and wine-sellers of a neighbouring town to sell their wine to them only, not to be re-sold at a price less than a stipulated margin, is necessarily to the detriment of the public. In one sense such an agreement would tend to a monopoly, but not in any relevant sense.

But perhaps the worst instance of confusion of thought is the use of the terms "reasonable" and "unreasonable" as applied to prices. Of course these terms are in one sense mutually exclusive. What is reasonable cannot be also unreasonable. But it does not follow that because a particular thing is reasonable everything else is unreasonable. In a relevant sense the term "reasonable" is generic, including all things which are not unreasonable.

The latter term does not mean larger than a particular instance of what is reasonable, but means outside of the class of things which are reasonable, the limits of which may be hard to determine. The antithesis is between a class and things outside the class, not between one instance of a class and everything else. So that, although the word "reasonable" is in one sense synonymous with "not unreasonable," it does not follow that because one thing is reasonable everything else is unreasonable. Yet much of the argument has been based on this assumption.

Before dealing with the evidence proper we will refer to some facts of public notoriety, which are necessary to the full understanding of the point to be determined. The coal industry at Newcastle in New South Wales has existed for the greater part

of a century, but the Newcastle coal mines no longer hold exclusive possession of the field. The group of mines on the South Coast, known as the Southern collieries, are important contributors to the output of coal, and serious competitors both in inter-State and foreign trade. The Lithgow mines, sometimes called the "Western Collieries," are also by no means negligible. Both of these fields are, however, at a disadvantage as compared with Newcastle in the point of convenient and certain access to deep water for oversea trade. Moreover, the Newcastle coal differs from that of the other fields in some of its qualities, which tend to its being preferred for some, though not all, purposes. The output from the Newcastle mines is distributed between the home trade of New South Wales, the inter-State trade, and the foreign trade in practically equal proportions. In Queensland the greater part of the consumption of coal is supplied from local mines, which do not, however, practically compete with the New South Wales mines in the oversea trade. The supply for the other Australian States came until lately almost entirely from New South Wales.

We pass now to the facts as shown by the evidence.

As might be expected, difficulties have arisen at Newcastle from time to time between the coal masters and the miners and other employees. From time to time during the last forty years arrangements have been come to between the owners and the men for the purpose of fixing the hewing rate of coal, which is obviously an important, but by no means the only important, element in the cost of production.

In 1873 (if not before), and again in 1886, 1888, 1893, 1900 and 1901, collective agreements, called district agreements, were made between the owners and the men on the basis that the hewing rate should vary with the selling price of coal. Substantially the basis has always been to fix a minimum rate, with a proviso that for every shilling added to the selling price fourpence should be added to the hewing rate. Other additional expenses at the mine, varying in like manner, raised the total labour additions to the direct cost of extraction to about sixpence halfpenny for every shilling of increase. In substance, therefore, the arrangement was that the owners and the workmen should divide in the

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proportion of about 11 to 13 any increase in the selling price. This arrangement may or may not have been based on sound principles of political economy, but during a period, as we have said, of forty years, it commended itself as satisfactory to all persons concerned. It may, therefore, *primâ facie*, be regarded as not unreasonable.

In the early years of this century some of the old Newcastle seams were becoming exhausted, and a large number of new mines have since been opened in the neighbourhood. The quality of the coal from the different mines naturally varies, and its selling price has varied accordingly. About the same time a new seam of coal was opened about twenty miles from Newcastle, which is spoken of as the "Maitland Seam" or "Maitland Mines." This coal had at first some difficulty in forcing its way into the market in competition with the better known Newcastle coal, but the owners, being apparently men of energy and determination, forced a way for it by selling it at a lower rate. One firm in particular, J. & A. Brown, who owned both Newcastle and Maitland mines, began to carry their coal in their own ships to Melbourne and Adelaide, and to sell it there through their own agents at reduced prices.

For many years before this it had been found or thought advisable by the Newcastle owners to form from time to time what was called a Vend, that is, a combination of coal owners who entered into mutual agreements for the purpose, not only of preventing unlimited and ruinous competition, but of fixing a definite basis for the hewing rate. By these agreements provision was made for declaring a selling price and for allotting to each of the several members a proportion of the annual trade. These combinations had been renewed or reformed from time to time, but by 1904 there was none in practical operation. There was still what was called the "declared price" of coal, with which the hewing rate and other labour charges varied, but the way in which it was fixed is not easily discoverable.

Moreover, no one seems to have felt himself bound not to sell under the declared price, the only definite effect of which appears to have been to determine the hewing rate.

For some years before 1905 the inter-State trade in Newcastle

coal had practically been carried on by the appellant Companies together with the Melbourne Steamship Company Limited and a firm of shipowners called James Paterson & Company. The course of the trade was that the shipowners bought from the collieries, carried the coal in their own ships, and resold it to customers in the other States both by wholesale and retail. They in fact carried on the business of coal merchants on a very large scale. They did not carry any coal but their own, nor did they confine their dealings to Newcastle coal. J. & A. Brown had also entered into this trade, carrying their own coal in their own ships, and disposing of it through their own agents in the other States.

By 1905 the competition of the Maitland mines with the Newcastle mines and of J. & A. Brown, both as owners of Maitland mines and as coal merchants, had become serious. The state of things existing at Newcastle is described by Mr. Ford, a witness for the Crown, who had been for many years manager of the Union Bank of Australia in that city. He said (as indeed is notorious) that the prosperity of Newcastle completely depended upon the coal trade, associated with which was a large shipping business, sometimes over one hundred ships being in port awaiting cargoes. "When the price of coal was high," he said, "things were good, and when it was very low things were very bad." He said that at the time of the Boer War in 1900 the trade was particularly good, but it was an artificial demand caused by the war. He thought it lasted for two years. "Then," he said, "the trade became very bad for several years." His impression, and he thought that of every one, was that the condition of the trade was brought about by the excessive competition that was taking place. "Different collieries were, it seemed to me, selling coal for what they could get." The hewing rate was very low, and he thought that it produced acute distress. In 1904, 1905 and 1906 there was a considerable exodus of miners from Newcastle, of whom, however, probably a great many went to the Maitland field. In re-examination he said:—"I think the competition of 1904, 1905, and 1906 ceased in a great measure when the proprietors came to an agreement, so to speak, not to cut each other's throats any longer. It ceased about the end of 1906 or the

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beginning of 1907. Prosperity in Newcastle then immediately set in, and the place has been more prosperous the last three or four years. That is since the competition ceased, up to the last big coal strike." The coal strike referred to lasted from November 1909 to March 1910.

Mr. Wheeler, another witness for the Crown, who was manager of the Newcastle Wallsend Mine, which had a large output that in 1907 exceeded 450,000 tons, and which did not join with the defendants in the combination attacked, said that at the beginning of 1906 the state of the trade was in the highest degree unsatisfactory because of the cutting and competition, and that it led to some of the collieries being practically in the hands of the Banks, and unable to pay dividends.

We are unable to find any evidence to show that the real state of things in Newcastle was not as disclosed by these witnesses. Indeed the only case suggested was that as the coal mines were actually worked, and the coal sold at a low price, it must be assumed that they were in fact worked at that selling price at a profit. It is poor satisfaction to a man who is starving to be told that according to the opinion of the most eminent physicians, who have not seen him but have been told some facts about him, he ought to be and must be taken to be well fed and to be enjoying good health and strength.

Under these circumstances an informal meeting of seven colliery proprietors, including Mr. Wheeler, was held at Newcastle on 5th January 1906. The chairman in opening the meeting pointed out "the absolute necessity of forming an Association of all the collieries if the present very unsatisfactory state of the coal trade was to be improved." Discussion followed, and it was unanimously resolved that it was desirable to form an Association to raise and maintain the price of coal.

Mention was made at the meeting of "Collieries owned by the Associated Shipping Companies." The reference was to the appellants the Adelaide Steamship Company and Howard Smith Company, both of which had large interests in Joint Stock Companies owning both Newcastle and Maitland collieries. Finally a committee was formed to draft a scheme for the formation of an Association.

Negotiations for that purpose were continued, full minutes of which were kept and were put in evidence. The result was that a draft of an agreement, to which we shall have to refer in detail, was prepared, and was practically agreed to in April.

In the meantime the committee of management of the Collieries Employees Federation of the Northern District (which included Newcastle and Maitland with a few outlying mines) had communicated with the colliery proprietors, requesting a conference with "those who are willing to discuss the question of an increase in the selling price of coal and in the hewing rate." The advance asked for at that time was eightpence per ton, representing an addition of 2s. to the selling price, which at that time was nominally 9s. The conference took place on 24th March 1906 at Newcastle. In the course of discussion it was alleged and not disputed that the miners at the hewing rate of 3s. 6d. per ton were at least 20 per cent. worse off than at the same rate ten years before. Although the nominal selling price at that time was 9s., on which the hewing rate of 3s. 6d. was based, it was pointed out that the real price of coal was below that figure owing, as was alleged, to excessive competition. There was no difference of opinion as to the necessity for action.

During the progress of the negotiations which led up to the agreement or arrangement of April it was suggested that it would be well that the Vend, if formed, should enter into a collective agreement with the Shipping Companies who up to that time had done the inter-State trade in coal. Two of them, as already stated, were also directly and largely interested in collieries.

We now come to deal with the alleged illegal acts with which the defendants are charged. We remark in the first place that this appeal is by way of re-hearing, and that we are bound to form our own independent conclusions as to the facts. We find as a fact that 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 unremunerative prices obtained for coal. Whether they were right or wrong in this

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belief is immaterial so far as regards the criminal responsibility of the defendants for acts done under it.

It had originally been proposed that the Vend agreement should continue in force for seven years, but the draft as finally agreed to expressed that it should come into operation on 1st January 1907, and unless determined as therein provided should continue in force for one year, with power of renewal. It was no doubt contemplated that it would be renewed, and it was in fact renewed in substance from year to year. J. & A. Brown were parties to it.

It first provided for the appointment of a Board to carry on the affairs of the Association. Clause 9 provided that in order to supply the inter-State trade the Board should appoint a representative who should allocate to the particular collieries the proportions of such trade to be fulfilled by them respectively, and that the members of the Association should abide by such allotment.

Clause 19 provided that the share of each of the original members in the aggregate trade of members in each year during the continuance of the agreement should be in accordance with a percental allotment stated, subject to a *pro rata* reduction or increase consequent upon the admission of other mines or the cessation of membership of any member, or upon a strike or lockout in any colliery. Clause 21 provided that the members should not open up new mining shafts, pits or adits unless they were unable to maintain the allotted output with those then existing. Clause 22 provided that the Board should from time to time fix and determine the prices of screened and unscreened and small coal the produce of the mines comprised in the agreement, which were to be divided into four classes, A, B, C and D, so that the price of coal from mines of class B should be 9d. a ton less than that from mines of class A, and that the price of coal from mines of classes C and D should be fixed at lower prices to be determined from time to time. The selling price of unscreened coal was to be in classes A, B and C, 1s. less, and in class D, 6d. less, than that of screened coal. The several mines were classified in a schedule.

Clause 25 provided that members might nevertheless dispose of

the coal from their respective collieries without restriction as to quantity or manner, but that "as an inducement to the parties whose trade fell off not to endeavour to increase it by underselling or other act contrary to the spirit of this agreement" any party whose sale exceeded his allotted share should pay a contribution per ton at a rate set out into a common fund, from which fund parties whose trade was less than their allotted share should receive compensation at the same rate. The rate specified was not in fact observed, but was varied from time to time, the rate ultimately observed being 1s. per ton.

The draft contained other subsidiary provisions ancillary to its main purpose.

It is very important at this point to remember that the selling price to be declared was not limited to sales for inter-State trade, but was to apply equally to foreign and home trade, in both of which the element of very real and active competition was undoubtedly present. It was, therefore, clear that the Board would have no inducement to fix prices which would enable competitors in the foreign trade or the home trade seriously to underbid them, and would not be likely to do so.

Although the agreement as drawn up was not to come into force until 1st January 1907, the terms of it seem to have been practically observed during the remainder of the year 1906. The selling price, *i.e.* for best coal, was taken at 9s.

The negotiations with the Shipping Companies continued, and were not finally concluded until September 1906, when a draft agreement in writing, in which the then members of the Vend, described as vendors, were expressed to be parties of the first part, persons to be afterwards named as vendors' trustees to be parties of the second part, the four appellant Companies together with the Melbourne Steamship Company Ltd., James Paterson & Co. and J. & A. Brown, described as "purchasing agents," to be parties of the third part, and other persons to be named as their trustees to be parties of the fourth part.

According to the terms of the draft the vendors agreed to sell to the 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, which coal

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was to be purchased from all the collieries mentioned in the schedule (which is not in evidence), or from some of them, and should be of the quality usually obtained from them.

A week before the beginning of each month the purchasing agents' representative was to intimate to the vendors' representative the approximate quantities required for the ensuing month. The vendors undertook as far as practicable to forward coal from the particular colliery required, and failing that colliery from another or others of the same class, but so that they should not be called upon to deliver coal from any colliery that had reached its limit of output under any agreement existing between the collieries. The reference is, of course, to the Vend agreement. If, however, the purchasing agents had with the vendors' consent contracted for the supply of coal from a particular colliery it was to be supplied accordingly unless conditions rendered it impossible.

The vendors agreed not to sell coal for consumption in the States mentioned except to the purchasing agents or their nominees, and they agreed to buy from the vendors all the coal which they might require for their inter-State trade, and not to carry or deal in any other coal, but with a proviso that they might buy from the Southern Collieries and resell 186,000 tons per annum, to be increased or reduced in proportion as the total inter-State export from New South Wales might exceed or fall below 1,500,000 tons.

The purchasing agents agreed not to resell any of the coal purchased from the vendors at higher prices than certain prices specified as c.i.f. prices, which varied with, but not in exact proportion to, f.o.b. prices, that is, the declared selling prices of the Vend, with a proviso that such prices might be exceeded to the extent of 3s. per ton in the case of coal bought to supply small contracts not exceeding 10,000 tons in any one year, and also to the extent of charges actually incurred by the purchasing agents for lighterage, wharfage, railway freight, cartage, bagging, screening and dues of all kinds.

If the purchasing agents violated these provisions they were to account to the vendors for any excess "it being the intention of this agreement to place the purchasing agents in the position of

agents only, but clothed with a liability for all coal ordered at the rates agreed upon, and that the difference between such rates and the prices on resale set out in clause 8 shall represent compensation for freight and remuneration to agents for work of realization, ... Provided that if the purchasing agents shall sell at prices in excess of the said maximum prices with the prior consent of the vendors in writing then the amount of such excess shall be divided equally between the vendors and the purchasing agents."

The term "purchasing agents" may be inaccurate, but it seems to be one in common use, and its actual signification is plain enough.

The schedule of c.i.f. prices appears to have been very carefully framed, different increases upon the f.o.b. prices being fixed according to the varying conditions applicable to the different ports of destination. We will take Melbonrne, to which much more than half of the coal was likely to go, as an illustration. The scheme was to fix as the maximum c.i.f. price a rate which would enable the shipowners to share in the advantage of a rise in the f.o.b. price of the coal. The hypothetical f.o.b. price varied from 7s. to 12s., which is probably accounted for by the original idea of making a seven years' agreement. If, for instance, the f.o.b. price was 9s., the permitted addition was 5s., if 10s., 5s. 3d., if 11s., 5s. 6d., and if 12s., 5s. 9d. The increase in the c.i.f. prices of coal for other ports varied to the same extent in each case.

The terms of the draft, although it was never signed, seem to have been substantially observed by the intended parties to it, although it does not appear that J. & A. Brown ever carried any but their own coal.

The charge made against all the defendants to the suit, including the appellants, is founded entirely on this agreement, which is alleged to be a contract or combination entered into with intent to restrain trade or commerce to the detriment of the public.

It was intimated from the Bench at a very early stage of the argument that the Vend agreement and the intention with which it was made were very material in determining the intent with which the agreement impeached was made.

If the Vend agreement was itself a lawful and even laudable

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transaction, it was also lawful to give effect to it by all legitimate means, and, so far as the appellants are concerned, they cannot be convicted of an offence for agreeing to do so.

The first contention put forward by the Crown was that the shipping agreement is unlawful on its face, as disclosing an intent to restrain trade to the detriment of the public. This argument was partly based upon the suggestion that under it both the coal-owners and also the shipowners as coal merchants might exact unreasonable and exorbitant prices, and partly on the suggestion that it tended to create a "monopoly" or to enable the creation of a monopoly, and that at common law all monopolies are regarded as necessarily detrimental to the public.

We have found it difficult to apprehend the real attitude of the Crown towards the Vend agreement. Many of the arguments addressed to us by Mr. *Wise* and Mr. *Starke* would prove, if they prove anything, that that agreement was on the face of it an unlawful agreement, being an agreement to do acts which are necessarily detrimental to the public. The statement of claim contained an allegation which is capable of being construed as a charge of an unlawful combination constituted by the Vend agreement alone, and of another unlawful combination amongst the appellant Companies alone. But the learned Judge has given judgment for the defendants on these allegations.

If the Vend agreement was unlawful, it is sufficient to dispose of the case, for the appellants, who knew of its nature, undoubtedly combined with the other defendants to give effect to it.

If, however, it was lawful, and the objects aimed at in it were innocent, it is difficult *primâ facie* to see why the members of the Vend should have combined with the shipowners for the purpose of enabling the latter to injure the public without any corresponding advantage to themselves. The criminal intent charged must, of course, be a common intent, and we think that, in reason, the common intent must be taken to be to do something from which both parties would derive advantage. *Primâ facie* the shipowners would derive no advantage from a mere rise in the f.o.b. prices, for they would have to pay more for their coal. On the other hand, the colliery owners would derive no

advantage from a rise in the prices charged by the coal merchants to their customers, unless in certain exceptional cases with which we will afterwards deal. The common intent must be established against both parties to the combination.

First, then, as to the Vend agreement. We have already stated the facts as we find them to have existed when it was entered into. In our opinion it was, under the circumstances, a lawful and even laudable transaction, which was intended to operate and did operate to the advantage and not to the detriment of the public at large, notwithstanding that it was intended to operate and did operate to raise the price of coal.

It would be absurd to attribute to the members of the Vend purely altruistic motives, but a desire to promote a legitimate enterprise from which you desire to obtain pecuniary advantage is not incompatible with an absence of desire to injure the public.

When a man enters into an agreement which can be carried out by lawful as well as by unlawful means the Court will assume *primâ facie* that he intended to do so by lawful means. This has been many times laid down by this Court.

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. It may also, we think, be fairly inferred that they intended to ask as high a price as they could get in the market without running the risk of being underbid by other competitors in Australia or abroad and so losing the trade. This is not, in our opinion, an intention to cause detriment to the public.

So far as we can see, all the terms of the agreement were reasonably necessary for securing this perfectly lawful object.

We turn now to the shipping agreement. There is nothing in the evidence to show what were the terms of the arrangement (if any) between the shipowners amongst themselves as to the division of the trade between them, or as to the prices (within the agreed limits) which they might individually ask from their immediate customers, except that it appears that on some occa-

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sions two or more of them joined in tenders for the supply of large quantities of coal with deliveries extending over long periods.

We have already referred to an allegation in the statement of claim which was capable of being construed as meaning that the shipowners entered into an unlawful combination amongst themselves, and on which, so construed, the learned Judge gave judgment for the defendants.

We pause for a moment to consider the position of the Vend at that time, starting with the assumption that the Vend agreement was a lawful one which might be carried into effect by any legitimate means. The members of the Vend enjoyed a large share of the inter-State trade in coal, but did not deal directly with consumers in the other States, the business of coal merchants in those States, so far as regards Newcastle coal, being in fact substantially carried on by the shipowners and the Browns. The Vend desired, of course, to maintain their existing trade and to extend it on terms advantageous to themselves, and also to have the advantage of being able to command the services of the shipowners' ships for the carriage of any coal they might sell for the inter-State trade. We do not know of any rule of right cognizable by a Court of Justice under which they could be blamed for such a desire. They also desired to be able to obtain in that trade such prices for their coal f.o.b. as might be fixed under the Vend agreement. Under these circumstances if the shipowners, who actually had in their hands the substantial part of the business of coal merchants, were to be free to buy from other coal-owners in New South Wales, such as, *e.g.*, the Wallsend Colliery or the Southern or Western Collieries, at lower rates than those fixed by the Vend, and to carry the coal so bought, the object of the Vend agreement might be frustrated in whole or part. If, on the other hand, the coal merchants who bought from the Vend were to ask for the coal prices so high that other collieries could underbid them, the interests of the members of the Vend might be seriously affected.

We approach, then, the shipping agreement with these facts before us, and, putting ourselves as far as we can in the place of the parties, we ask ourselves—Was the agreement in question on

the face of it made with intent to cause detriment to the public or with intent to create a monopoly to the like detriment?

On the face of the written draft it is a bargain by which a lawful association of coal owners agree to conduct a portion of their trade through the exclusive medium of certain shipowners, who are also in fact the principal coal merchants engaged in the trade, and who agree on their part not to buy from any other coal owners. The intention apparent on the face of the draft is to secure for the "Vendors" a continuance of a convenient and tolerably certain outlet for their coal in the inter-State market, and also to secure that the continuance of that outlet shall not be endangered by their vendees demanding such high prices for their coal as to create a risk of their being underbid by other competitors. There is nothing on the face of the agreement itself to show that the additions to the f.o.b. prices allowed by the agreement to be made on resale were unreasonable. This is, indeed, conceded.

It was suggested, indeed, that the fixing of maximum prices to be asked on resale was a mere blind, and that these prices were intended to be a minimum as well as a maximum. It was also suggested that this view is supported by the provision that the shipowners should account to the Vend for any excess price demanded and received, and for a division of the excess in the event of sales at larger prices by mutual consent.

The plain and obvious meaning of the first of these provisions is that it was a sanction for the stipulation that the maximum prices should not be exceeded, so that the coal merchants should have no inducement to exceed them, while the plain and obvious intention of the second was to provide for unforseen cases, analogous to strikes.

We decline to draw the inference that these provisions indicate a sinister intention.

An agreement between a single producer of commodities and another person to sell all his products to the latter on the terms that the latter shall not deal in any other products of a like kind is not *primâ facie* to the detriment of the public. It does not necessarily become any more detrimental if, instead of one producer, several producers join in agreeing to sell to him alone, nor

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if, instead of agreeing to sell to one person only, the agreement is to sell to a group of purchasers—see *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1). Evidence of detriment to the public must therefore be looked for elsewhere, and *a fortiori* evidence of intention to cause such detriment. Whatever may be the effect of the Statute now in question, it did not in our opinion make it unlawful for a trader or group of traders to push his or their trade by all fair means, or to desire to keep up and even to raise the prices to be obtained for his or their commodities.

For these reasons 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. Its terms do not appear to us to be obviously unreasonable as regards the interests of the parties themselves, or obviously or probably likely to affect injuriously the interests of the public. It is not therefore in our judgment unlawful on its face.

Whether the powers conferred by it could be exercised in such a manner as to cause public detriment is at this stage unimportant, since an actual intention to cause such detriment must be shown. We cannot (as seems at one time to have been done in England) infer an intention to do evil from a mere power to do so.

The intention may of course be shown *aliunde*. If the powers conferred were in fact exercised to the detriment of the public it would not be an unreasonable inference that they were intended to be so used. It may be also that, if the actual effect of the agreement was to cause such detriment, a like intent may be inferred. But here it is necessary to distinguish. In order that the actual effect may be invoked for this purpose, it is, we think, necessary to show that such effect was one which may reasonably be imputed to the parties as contemplated by them when the agreement was made. An injurious effect causing inconvenience or loss to the parties themselves as well as to members of the public stands on a very different footing from an effect beneficial only to the parties themselves, and cannot reasonably be thought to have been contemplated.

We proceed then to consider whether an intention to cause

(1) (1892) A.C., 25.

detriment to the public should be inferred from the acts of the defendants consequent upon the agreement.

The detriment primarily relied upon by the Crown is what is called an "unreasonable" increase in the price of coal in the inter-State market; and the suggested intent is an intent to obtain arbitrary and unreasonable prices for coal for the benefit of both the Vend and the ship owners. The term "arbitrary" is a mere epithet and means nothing. Every fixation of price by a seller is in one sense arbitrary. The term "unreasonable" is the only one with which we need concern ourselves. The term "reasonable," which is of common use in many branches of the law, always connotes a consideration of all the circumstances of the case, time, place, subject matter, persons concerned, their relations to one another and a thousand other matters. When applied to price it connotes a regard for both producer worker and consumer. We have already called attention to the recognition of this fact in sec. 4 (1) (*b*) of the Act. A producer is not required by our law to limit himself to such a price as will barely recoup his actual outlay, but may ask for something more by way of reward. It cannot be doubted that it is for the public benefit, perhaps especially in a new country, that the persons who engage in new enterprises should be encouraged by the hope of larger profits than those who confine themselves to the older grooves. Under ordinary circumstances the selling price of a commodity is governed by what is commonly called the law of supply and demand, so that if a seller asks too much he will not be able to sell, and if a buyer offers too little he will not get what he wants. At the same time it must be recognized that in the case of necessary commodities a seller having a complete or practically complete control of supply may be able to extort exorbitant or unreasonable prices, i.e., prices beyond all reason, which, as we understand the term, means prices such as to shock the ordinary sense of fair play.

In considering then whether a price asked is unreasonable in the relevant sense of the term, regard must be had to all these matters. Attempts to do otherwise and to fix prices at an arbitrary rate, having regard only to the consumer, are not unknown in history. An instructive instance of such an attempt

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is narrated in Ch. 28 of *I Promessi Sposi*, when the price of grain and flour was fixed (in 1629) by the Government of Milan at a low rate to the great joy of the consumers. The results were disastrous, being, as Manzoni says, the inevitable consequence of the first mistake, "which fixed for bread a price so far away from the price which would have resulted from the real condition of things." Similar attempts with similar results were made during the French Revolution.

The first point made for the Crown is that the prices fixed by the Vend for coal f.o.b. for the year 1907 and following years were in fact unreasonable and exorbitant, from which we are asked to infer detriment to the public, and also a common intent to cause such detriment.

The production of coal is an enterprise which involves under actual conditions the provision of capital, sometimes to a large amount, and considerable delay before obtaining a return. Persons who engage in such an enterprise are entitled to look for a reasonable return by way of profit for the use of their capital. The price at which they sell must therefore cover not only the cost of work but interest. Allowance should also be made to cover the risk of fluctuations of trade, as well as to provide for the development of the mines and an eventual recoupment of capital after the exhaustion of wasting property. Similarly, shipowners may reasonably expect something more than the bare cost of running their ships, and coal merchants may expect something by way of profit upon their trading operations after defraying their actual cost.

What then is the standard of unreasonableness?

Producers are not under the present law regarded as trustees for consumers. Yet this notion seems to have underlain a good deal of the argument addressed to us.

Price is a resultant of many variable forces, of which wages constitute one, but only one, element. To take one of these variables, as found existing at one time, as the sole basis of what is a reasonable price at a future time is obviously wrong and misleading. Yet in this case we have been asked to assume that all the variables except the cost of extraction of coal remained

stationary, although no evidence was offered on the point, and the assumption is notoriously contrary to the fact.

In the *Mogul Company's Case* (1) Lord *Watson* said:—"I cannot for a moment suppose that it is the proper function of English Courts of Law to fix the lowest prices at which traders can sell or hire, for the purpose of protecting or extending their business, without committing a legal wrong which will subject them to damages." In this case, however, the Court is asked to perform the somewhat analogous task of saying what is the highest price at which coal could be sold without causing detriment to the public, with the result that if its *ex post facto* opinion should differ from that of the sellers they are liable to heavy penalties.

The argument on which the Court is asked to infer that the f.o.b. prices fixed by the Vend after 1906 were unreasonable appears, when carefully examined, to be based on the following assumptions:—

(1) The price at which a commodity sells in any year is *primâ facie* a price actually remunerative to the producer:

(2) That price is *primâ facie* a reasonably remunerative price, *i.e.* affords a remuneration with which the producer ought to be contented:

(3) Any higher price would be unreasonable:

(4) All conditions affecting prices are to be taken as remaining stationary until the contrary is shown.

(5) Any rise of prices is *primâ facie* detrimental to the public.

In our opinion none of these assumptions is well founded. As to the first it is obvious that many circumstances must be taken into consideration before you can say that any particular year affords a fair basis of comparison, and as to the second that many industries are in fact carried on under conditions which afford a bare subsistence to the persons engaged in them, both employers and employees, and with which neither party is or ought to be contented. As to the third, it has been already pointed out that the term "unreasonable" price does not mean a price larger than a particular price which is not unreasonable, but means a price exceeding the limit of prices which are reasonable. The fourth

(1) (1892) A.C., 25, at p. 43.

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assumption is contrary to notorious facts. With the fifth we have already dealt. The whole basis of the argument therefore fails.

The learned Judge took as his basis for ascertaining a reasonable price f.o.b. the conditions existing at and immediately before the formation of the Vend, and came to the conclusion that in 1907 a price of 9s. 1d. per ton would have been extremely profitable, and in the succeeding year 9s. 8d. equally so. From this he inferred that the prices fixed by the Vend were unreasonable.

It is worth while, apart from the fallacies which we have pointed out, to call attention to the actual facts as disclosed by the evidence. At the end of 1906 the Vend fixed the selling price for 1907 at 10s. per ton f.o.b. This entailed a consequent addition of 4d. to the hewing rate, which was then notoriously inadequate. At the end of 1907 they fixed the selling price for 1908 at 11s., and afterwards fixed the same price for 1909 and following years.

When in 1907 they fixed the price at 11s. for 1908, the miners struck, demanding, amongst other things, that the price should be raised to 12s. on the ground that the 4s. 2d. hewing rate, attributable to an 11s. rate, was insufficient. The Vend, however, adhered to the 11s. rate. It is admitted on all hands that 4s. 2d. was then and afterwards the lowest hewing rate that could fairly be fixed having regard to the interests of the miners. Mr. Wheeler, the principal witness for the Crown, admitted that with a 4s. 2d. hewing rate he could not afford to sell coal f.o.b. at a less price than 11s.

Moreover, it appears that during 1908 and 1909 the declared price, and sometimes more, was obtained in the foreign market, subject, in some cases, to an allowance of a customary commission of $2\frac{1}{2}$ per cent.

Under these circumstances it seems strange to contend that the rate of 11s. was fixed with intent to cause public detriment.

We find as a fact that the f.o.b. prices of 10s. a ton fixed for 1907 and 11s. a ton fixed for 1908 and afterwards are not only not shown to have been unreasonable rates, but are shown affirmatively to have been reasonable. No inference of intent to cause public detriment can therefore be inferred from them.

The next point made is that the prices at which coal was sold

by the ship owners as coal merchants were in fact unreasonable and exorbitant, from which we are asked to infer detriment to the public and an intent to cause it. This argument is based upon the same foundation as that with regard to the f.o.b. price. The prices obtained in a particular year (1906) are taken as the basis, and it is sought to be inferred that any increase in them in subsequent years is *primâ facie* unfair and unreasonable and necessarily detrimental to the public. We have already said that we cannot find anything on the face of the shipping agreement itself to show that the specified prices c.i.f., were unreasonable. It is not in our opinion unfair that the merchants who pay a higher price for coal should ask on re-sale a price higher than a sum representing the exact equivalent of the increase in cost price. Nor can we see any reason to suppose that the cost of sea carriage remained stationary for several years. We all know that not only the wages but the conditions of seafaring men have been greatly improved of late as the result of benignant legislation. We decline to affect to believe that these changes did not affect the outlay of the coal merchants. Again we decline to assume that the cost of conducting the retail trade at Melbourne, Adelaide and other ports remained stationary. We cannot shut our eyes to the fact that wages have of late progressively risen all over Australia. We think that the coal merchants are entitled to some remuneration in respect of their outlay and trouble expended in respect, for instance, of such matters as the establishment and maintenance of coal yards and the payment of the wages of salesmen, clerks and workmen, ordinary trade risks, and retail profit. The sum of three shillings per ton was specified in the shipping agreement as the maximum sum to be charged to cover these and other contingencies in the case of what were called small contracts. It is conceded that it is not on its face unreasonable, and we can find no basis for holding that it was unreasonable in fact. It was not always exacted, and it does not appear that it was ever exceeded except, perhaps, but not certainly, in a few cases of sales of small quantities of coal which, as Mr. *Starke* very properly conceded, could not affect our conclusions.

In this case, therefore, as well as that of the f.o.b. prices we

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find no foundation in the evidence for the conclusion that the prices asked and received by the coal merchants were unreasonable in any sense of the word.

The foundation of the argument being gone, all the superstructure so elaborately raised upon it falls with it.

The burden of proof is on the Crown, and we cannot assent to the argument that the burden is shifted by merely showing an increase of prices.

Apart from this conclusion, which is one of fact, there is the further obstacle, to which we have already adverted, that, even if the coal merchants intended to sell at unreasonable prices, it cannot reasonably be imputed to the other members of the combination that there was a common intent to cause such a result, a result from which they would not derive any benefit. And we have already pointed out that the intent to cause detriment to the public contemplated by the Act is an intent common to all the members of the combination.

The next point made was that detriment to the public was caused in some instances by short delivery of coal or non-supply of a particular kind of coal desired by a customer. There is, in fact, no evidence that any actual detriment followed from any such causes, though there was in some instances fear of it. It is contended that this alleged detriment was a natural consequence of the combination. As a matter of fact it appeared that the alleged (apprehended) short delivery arose partly from a miscalculation by the coal merchants of the quantities of coal required, and their consequent failure to give sufficiently early notice to the Vend, and partly from an unusual congestion of ships at the port of Newcastle. It may be conceded that some such difficulties were not unlikely to arise under the Vend agreement, having regard to the possible error of human foresight, and to the probabilities that the demand of customers for coal from a particular mine might exceed its allotted output. But all this must stand or fall with the Vend agreement itself, and is in no way dependent upon the shipping agreement.

Moreover, it would be absurd to suppose that the parties when they entered into the shipping agreement intended that the coal

merchants should disappoint their customers and break their agreements with them.

The only other instance of actual detriment relied upon was inconvenience, and possibly pecuniary loss, sustained by the Broken Hill Proprietary Company by reason of the short supply of what is called "Roasting Coal" under a contract entered into by a firm called Scott Fell & Co. in 1906. The actual facts are that this contract was entered into a few days before the beginning of the negotiations for the formation of the Vend. By it Scott Fell agreed to supply coal from particular mines without having previously arranged to buy it from them. The owners of one of the mines had indeed already refused to supply him. It is impossible to trace any connection of cause and effect between this breach of contract by Scott Fell and the shipping agreement. The Broken Hill Company, however, did not hold him to his bargain, but agreed to accept other coal. Apart altogether from the particular case, owners of a commodity are not bound to supply it to a person who has, without first buying it from them, entered into a contract to sell it to another person with whom they prefer to deal directly.

With regard to the argument that the natural effect of the arrangement impeached was to exclude competitors in the inter-State trade in Newcastle coal, and, therefore, necessarily tended to create a monopoly, two answers may be made. The first is that already given, viz., that an agreement to create a monopoly is not unlawful under the Act unless it is made with intent to cause detriment to the public. The other depends upon the facts. The suggestion is that this alleged monopoly has in fact kept the price of coal unreasonably high. We have already given reasons for thinking that this is not proved. No doubt the shipping companies retained what they already had, *i.e.* the substantial control of the inter-State trade in Newcastle coal.

It is manifest that the only way in which they could exclude competition was by selling at such prices that it would not pay anyone else to sell at a lower rate. The Vend never included all the owners of mines at Newcastle. The Newcastle Wallsend Mine, with its great output, would of itself be a formidable competitor, to say nothing of the Southern and Western Mines, and

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other mines that might be opened in the Newcastle and Maitland districts. It is absurd to ask us to believe that sufficient steam tonnage could not be readily obtained in Australia to carry the coal of all possible competitors. Probably the immediate effect of such competition would be to lower the prices asked by those in possession of the trade, if only to drive out the intruders, and a combination for such a purpose might or might not be unlawful. But, if it was, it would be as a combination to lower prices. A combination to drive out competition by reducing prices is one thing, a combination to keep out non-existing competition by asking excessive prices is quite another. Indeed, the mere statement of such a combination sounds anomalous.

The only other point with which it is necessary to deal is the argument based upon sec. 15A of the Act, which provides that in prosecutions under the Act the averments of the prosecutor contained in the claim shall be deemed to be proved in the absence of proof to the contrary, but so that an averment of intent shall not be sufficient to prove such intent.

We express no opinion on the point taken by Mr. *Mitchell* that such a provision, read literally, is an attempted interference with the judicial power of the Commonwealth, by seeking to impose upon the Courts the duty of passing sentence without trial. Assuming that objection to be out of the way, we think that the term "averment" must be confined to pure allegations of fact, and does not include an allegation of a conclusion of mixed law and fact. It is settled law that the question whether an agreement in restraint of trade is unenforceable on the ground of being unreasonable is a question of law. The question whether a price is unreasonable for the purpose of the inquiry in which we are engaged would seem to be a mixed question of law and fact. In such a connection the mere allegation that a price is unreasonable is no more conclusive than a mere allegation that an act is fraudulent, to which, as has often been said, no Court will pay any attention. The word "arbitrary" is open to the same comment.

But, in any view of the matter, we are of opinion that the section has no application when the prosecutor elects to put the actual facts of the case before the Court.

We are, therefore, bound to decide the case upon the evidence, and upon that evidence we are of opinion that the Crown has failed to prove any intent on the part of the appellants to cause detriment to the public. This disposes of the case as regards penalties.

We are also of opinion that the Crown has failed to prove any actual detriment to the public. This disposes of the claim to an injunction under sec. 10.

The result is that the appeal must be allowed, and judgment entered for the appellant defendants with costs, and with the costs of the appeal.

Appeal allowed. Judgment for the appellant defendants with costs. Respondents to pay the costs of the appeal.

Solicitors, for the appellants, *Malleson, Stewart, Stawell & Nankivell*, Melbourne, by *Macnamara & Smith.*

Solicitor, for the respondents, *C. Powers*, Commonwealth Crown Solicitor.

B. L.