[PRIVY COUNCIL.]

THE ATTORNEY-GENERAL OF THE COMMONWEALTH . . . . . } APPELLANT;
PLAINTIFF,

AND

THE ADELAIDE STEAMSHIP COMPANY LIMITED AND OTHERS . . . } RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE HIGH COURT.

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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 of intent—Australian Industries Preservation Act 1906-1909 (*No.* 9 *of* 1906—*No.* 26 *of* 1909), *secs.* 4, 7, 9, 10, 15A.

The terms "monopolies" and "monopolize" as used in the *Australian Industries Preservation Act* 1906-1909 refer to a state of circumstances in which, by a contract or combination in restraint of trade, 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 to the detriment of the public.

A restraint of trade may under that Act be detrimental to the public if it creates a monopoly in the sense that it has the effect of bringing about an unreasonable enhancement of the prices of goods or services.

In proceedings under secs. 7 and 9 of that Act the contract or combination or the monopoly or attempt to monopolize must first be established and then the wrongful intent necessary to constitute the offence. The wrongful intent must be proved by proper evidence, such as by evidence that the evils against which the Act is directed are the natural or necessary consequences of the

* Present—Viscount Haldane L.C., Lord Shaw, Lord Moulton, and Lord Parker of Waddington.

contract or combination, monopoly or attempt to monopolize, and that those evils have in fact ensued. But it is not sufficient to plead the evidence whereby it is sought to establish the wrongful intent and rely upon sec. 15A as rendering proof of what is pleaded unnecessary.

Neither a contract in restraint of trade or commerce which is unenforceable at common law, nor a combination in restraint of trade or commerce which if embodied in a contract would be unenforceable at common law, is necessarily detrimental to the public within the meaning of the Act, nor must those concerned in such contracts or combinations necessarily be taken to have intended such detriment.

The public to whose detriment the restraint of trade or commerce must be is not limited to the consuming public.

Decision of the High Court: *Adelaide Steamship Co.* v. *The King and the Attorney-General of the Commonwealth*, 15 C.L.R., 65, affirmed.

APPEAL from the High Court.

This was an appeal by the Attorney-General of the Commonwealth to the Privy Council from the decision of the High Court: *Adelaide Steamship Co.* v. *The King and the Attorney-General of the Commonwealth* (1).

The judgment of their Lordships was delivered by

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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 22nd December 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 (2). 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

(1) 15 C.L.R., 65. (2) 14 C.L.R., 387.

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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 *bonâ fide* exercise of the doer's own trade or business and with a single view to his own interests (*Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1)). 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.

The right of the Crown to grant monopolies is now regulated by the *Statute of Monopolies*, but it is 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

(1) 23 Q.B.D., 598; (1892) A.C., 25.

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., 86 b).

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.* (1). For a contract in restraint of trade to be enforceable in a Court of law or equity, the restraint, whether it be partial or general restraint, must (to use the language of Lord *Macnaghten*, evidently adapted from that of *Tindal* C.J. in *Horner* v. *Graves* (2)) 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 he unenforceable

(1) (1894) A.C., 535. (2) 7 Bing., 735.

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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. *Barker* (1). 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. Ltd.* v. *Electrolytic Alkali Co. Ltd.* (2), now under appeal to the House of Lords.

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. III. c. 71. It also lay at the root of the common law offence of engrossing, which, according to *Hawkins' Pleas of the Crown*, vol. I., book 1, ch. 29, s. 9, 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* L.JJ. as a pernicious monopoly, that is to say, a

(1) (1899) 1 Ch., 300. (2) 107 L.T., 439.

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 showing 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 Case* (1)).

Such having been the state of the law when the Act of 1906

(1) 23 Q.B.D., 598; (1892) A.C., 25.

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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 secs. 4 to 14, inclusive, is intituled "Repression of Monopolies." The 4th section 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 £500. The 6th section defines unfair competition as "unfair in the circumstances," and specifies certain cases in which the competition is to be deemed to be unfair unless the contrary be proved. The 7th section 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 £500. The 9th section 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 sec. 4 or sec. 7 shall be deemed to have committed the offence and be subject to a penalty of £500. The 10th section 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 the 7th section. The amending Act No. 5 of 1908 contains a provision that in any prosecution for an offence against secs. 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 "monopolize," 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 secs. 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 monoply 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 secs. 4 and 7 with sec. 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 secs. 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

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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 the 10th section, these last-mentioned provisions appear to have no application at all, and the 10th section 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* (1). If this were the true effect of the Act, no trade union would be free from the risk of proceedings under sec. 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.

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 the *Standard Oil Co. of New Jersey* v. *United States* (2). 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

(1) 6 E. & B., 47. (2) 221 U.S., 1.

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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.

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 sec. 4 (1) (*a*), and alternatively under sec. 7 of the Act of 1906, while the other respondents are charged under sec. 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 2½d., so that out of every shilling advance in the price 6½d. 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 reasonably 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 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

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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 disembarkment 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 interests 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 5th January 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, 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

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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 1st January 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 inter-State trade was a subject 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 on the one hand and the four respondent Companies and J. & A. Brown on the other hand, J. & A. Brown 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 1st January. 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

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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 an increase in cost, insurance, or freight attributable to the increased f.o.b. prices. The intention obviously is to give the purchasing agents any 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 excess is to be equally divided between the vendors and purchasing agents. The shipping agreement is expressed to commence on 1st January 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 secs. 4 (1) (*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

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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 fixes 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 sec. 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 sec. 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 sec. 4 (1) (*a*) or sec. 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

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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,

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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 legal intention can be gathered from the agreements themselves, such an intention 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 shown to have been excessive or unreasonable, but were shown 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 evi-

dence 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. There is, in their Lordships' opinion, no justification for the assumption that 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

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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 right, first, because so far as the Crown relied upon sec. 4 (1) (*a*) and sec. 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 sec. 10 there was no evidence (at any rate no sufficient evidence) of injury to the public.

Cons *David Jones Finance & Investments v Comr of Taxation* (1991) 28 FCR 484

Foll *Waterside Workers Fed v Gilchrist Watt & Sanderson Ltd* (1924) 34 CLR 482

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.

Appl *Northern Territory of Australia v Lane* (1995) 39 ALD 527

Foll *Northern Territory of Australia v Lane* (1995) 59 FCR 332

Appl *Northern Territory of Australia v Lane (Native Title Registrar)* (1995) 138 ALR 544

[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION AND THE PRESIDENT THEREOF AND THE AUSTRALIAN TRAMWAY EMPLOYEES ASSOCIATION.

EX PARTE THE BRISBANE TRAMWAYS COMPANY LIMITED.

EX PARTE THE MUNICIPAL TRAMWAYS TRUST, ADELAIDE.

[No. 1].

H. C. OF A. 1914.

MELBOURNE, *March* 4, 5, 6, 9, 10, 11, 24.

Griffith C.J., Barton, Isaacs, Gavan Duffy, Powers and Rich JJ.

Jurisdiction of High Court—Prohibition—Original or appellate jurisdiction—"Officer of Commonwealth"—Judicial officer—President of Commonwealth Court of Conciliation and Arbitration—Binding effect of prior decisions of High Court—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51 (xxxv.), 71, 73, 75 (v.)—*Commonwealth Conciliation and Arbitration Act* 1904-1911 (*No.* 13 *of* 1904—*No.* 6 *of* 1911), *sec.* 31.