MONOPOLIZATION IN TRADE—A KIND OF INTIMIDATION

By JOHN LITTLE*

Introduction

The *Australian Industries Preservation Act* 1906-1950 entitled a trader to sue in respect of damage he suffered from monopolization, or a combination operating in restraint, of interstate or overseas trade.[1] The Act has recently been repealed by the *Trade Practices Act* 1965,[2] at a time of increasing, and not always unsuccessful resort[3] by traders to the *Australian Industries Preservation Act.*

Time will reveal the priorities and enthusiasm of the commissioner of Trade Practices appointed under the *Trade Practices Act.* It is conceivable that he will achieve very little; and except in cases of collusive tendering and collusive bidding,[4] a trader is not able to sue for damages under the new Act unless the Commissioner has first persuaded the Trade Practices Tribunal to make a restraint order relating to the trader's field of commerce, and then only for damages in respect of events that occur after, and in contravention of, the order.[5]

Does it therefore follow that the trader is not able to protect himself at law from combinations and monopolization in restraint of trade?

It will be suggested that the trader should seek the protection of the common law; in particular, the law relating to intimidation, the declaration or injunction to prohibit a company from acting ultra vires in restraint of trade, and ultimately, it is hoped, a developing tort – intimidation to monopolize – which will be a synthesis of the tort of intimidation, the declaration or injunction against a company's ultra vires restraints of trade, and the tort of conspiracy to injure.

The three elements of the synthesis will be discussed in what appear to the writer to be their order of promise.

* LL.B. (Melbourne), LL.M. (Michigan); Barrister-at-Law.

1 Sections 4, 7, and 11. The Attorney-General's written consent to sue was required; section 14(2).

2 Section 4(1) and (2A). Apart from Sub-Sections 1, 2, 5, 8 and 106, and Parts II and III, which by virtue of Section 2(2) of the Act, were deemed to have come into operation on December 18, 1965, the Act was proclaimed to commence on September 1, 1967. See *Commonwealth Gazette* 1967, p. 3975.

3 *Bourke Appliances Pty Ltd v. Wonder* [1965] V.R. 511; *Redfern v. Dunlop Rubber Australia Ltd* (1964) 110 C.L.R. 194; *Johnston v. Egg Marketing Bd. of N.S.W.* (1965) 112 C.L.R. 343; *Meyer Heine Pty Ltd v. China Navigation Co. Ltd* (1966) 115 C.L.R. 10.

4 Sections 85 and 86.

5 Section 88.

Intimidation

First, the tort of intimidation. In *Rookes* v. *Barnard*[6] the House of Lords held that a threat to commit a breach of contract by withholding vital supplies (trade union labour) from a person (B.O.A.C.) if the person did not terminate its business relations with a third person (an employee who was not a member of the trade union) was actionable at the suit of the third person. Besides establishing the tort of intimidation as part of the common law, the case is useful for its comments on conspiracy in relation to the tort.

Lord Reid, in the leading speech said:

> 'So long as the defendant only threatens to do what he has a legal right to do he is on safe ground. At least if there is no conspiracy he would not be liable to anyone for doing the act, whatever his motive might be, and it would be absurd to make him liable for threatening to do it but not for doing it.[7] . . . Intimidation of any kind appears to me to be highly objectionable.'[8]

Lord Evershed M.R. said:

> 'I am willing to concede that the tort is one of relatively modern judicial creation . . . and that its full extent and scope have not (at least before the present case) been authoritatively determined and may well, indeed, even by your Lordships' judgments in this case, still not have been finally stated.'[9]

Lord Devlin's statement on the scope of the tort was the most detailed.

> 'My Lords in my opinion there is a tort of intimidation of the nature described in chapter 18 of *Salmond on the Law of Torts*, 13th ed. (1961), p. 697. The tort can take one of two forms which are set out in Salmond as follows:
> (1) *Intimidation of the plaintiff himself*
> (2) *Intimidation of other persons to the injury of the plaintiff*
> In certain cases it is an actionable wrong to intimidate other persons with the intent and effect of compelling them to act in a manner or to do acts which they themselves have a legal right to do which cause loss to the plaintiff; for example, the intimidation of the plaintiff's customers whereby they are compelled to withdraw their custom from him, . . . There are at least two cases in which such intimidation may constitute a cause of action:—
> (i) When the intimidation consists in a threat to do or procure an illegal act;
> (ii) When the intimidation is the act, not of a single person, but of two or more persons acting together in pursuance of a common intention.'[10]

Lord Pearce, quoting Lord Dunedin in *Sorrell* v. *Smith*,[11] also

[6] [1964] A.C. 1129.
[7] Ibid. 1168.
[8] Ibid. 1169.
[9] Ibid. 1184-1185.
[10] Ibid. 1205-1206.
[11] [1925] A.C. 700, 718.

suggested that conspiracy might make illegal that which would be legitimate if caused by a single person acting alone.[12]

The usual explanation for the proposition that conspiracy may render illegal that which is legal if caused by a single person is that a lone man can achieve little, whereas two or more united men may be dangerous.[13] Of course, the single-plural touchstone is unsatisfactory because often a plurality of men will be relatively powerless. It is the appearance of power to carry out a threat that is decisive. That was recognized in *Rookes* v. *Barnard*. As Lord Evershed said:

> 'The threat, therefore, made by each defendant was not merely that he himself would go on strike for the coercive effect of such a threat standing by itself would be negligible . . .); . . . It was, . . . , a threat that strike action on the part of all the A.E.S.D. men would in fact occur unless the plaintiff were withdrawn from the design department.'[14]

Rookes v. *Barnard* serves notice that, given a threat with coercive effect, the courts will accept a meagre pretext for interfering. The pretext in *Rookes* v. *Barnard* was a threat of breach of contract with a person foreign to the action. But the dicta quoted above indicate that, had it not been for the protection from conspiracy actions given by the *Trade Disputes Act*, 1906, to trade union officials, the House would have been satisfied with a simple conspiracy pretext.

What effect will this case have; in particular, its dicta relating to conspiracy? It is submitted that, if the duly authorised secretary of a trade association of manufacturers of a particular product were to convey to all wholesalers of the product a coercive threat that, should any of them continue to resell it to a retailer who persisted in price-cutting, the manufacturers would cease to supply those wholesalers — there being no breach of contract in the threatened cut-off — the secretary and all manufacturers knowingly concerned would be parties to a conspiracy to intimidate actionable at the suit of the retailer.

Is the result different where a threat that his company will cut supplies is conveyed by the sales manager of a very large or monopoly manufacturer? It is submitted that, if the product were important to the retailer's business, he would have an action against the company since it would be vicariously responsible for the conspiracy of its officers to intimidate. The sales manager's fiat has the backing of great human and financial resources. In no sense is the threat that he conveys that of a single person. It is a threat by all of those working in the company's name, or — to use Salmond's words as

12 [1964] A.C. 1129, 1233-1234.
13 *Pratt v. Brit. Medical Association* [1919] 1 K.B. 244, 255.
14 *Op. cit.* 1181-1182.

quoted in Lord Devlin's speech – 'two or more persons acting together in pursuance of a common intention'.[15] The fact that a company is regarded as a legal person separate from its members or shareholders cannot affect the vicarious liability of the company for the conspiratorial tortious activities of its officers. There is no question of lifting the corporate veil. If the writer might be excused for using a metaphor to deal with a metaphor, it could well be said that the veil covers only the company's face, not its boots.

Joining company officers as joint tortleasers should be unnecessary though it appears to be the practice. The matter was discussed in a trade union context, in *Egan v. Barrier Branch of the Amalgamated Miners' Association*[16] where it was held that the association and some of its officers had conspired to injure the plaintiff. Irrespective of whether the reasoning in this case is right – indeed, it differs from the reasoning used above – the case shows that the result suggested, namely, that the manufacturing company would be held liable, is correct. Cullen C.J., with whom Sly and Ferguson JJ. delivered concurring judgments, said:

> 'He urges that a conspiracy cannot be proved between a union and some of its members, which would be equivalent to alleging that the individuals entered into a conspiracy with a larger number of persons including themselves.[17] . . . In many cases before the English Courts similar conspiracies have been alleged. I know none of them in which it was suggested that such a conspiracy could not be proved, and were there any doubt about it the decision of the High Court in *Heggie's case*[81] would be quite sufficient authority, and one binding on this Court. . . . Just as a person injured by such action can sue either the principal or the agent or both for the damage wrongfully occasioned to him, so there clearly can be, both on principle and on authority, a concerted action legally described as a conspiracy between the principal and the agent for the effectuation of those wrongful ends.'[19]

Although in *Williams v. Hursey,* Menzies J. said:[20]

> 'When a company merely acts through its directors, it is, however, not properly described as combining with them — *O'Brien v. Dawson*[21] — although in *Egan v. Barrier Branch of the Amalgamated Miners' Association* it was decided (and I consider correctly) that a trade union could be sued civilly for conspiring with its own members to commit a tort.'[22]

his remarks should not obscure the fact that a company may be vicariously liable for a combination of its employees among themselves. Indeed Menzies J. appears to have recognized that in his

15 See p. 266 *supra.*
16 (1917) 17 S.R. (N.S.W.) 243.
17 Ibid. 257.
18 (1906) 3 C.L.R. 686.
19 (1917) 17 S.R. (N.S.W.) 243, 258.
20 (1959) 103 C.L.R. 30.
21 (1942) 66 C.L.R. 18.
22 *Op. cit.* 128-129.

preceding sentence where he said: 'It is, moreover, now established that a company can be criminally or civilly liable for conspiracy. *R. v. I.C.R. Haulage Ltd*[23]; *Pratt v. Brit. Medical Association*[24].'[25]

The judgment of McCardie J. in *Pratt v. Brit. Medical Association* is one of the most impressive ever given on the subject of intimidation. In this case the defendant British Medical Association, which was incorporated by Royal Charter, and the defendant doctors, who were members, tried to influence the plaintiff doctors, who were not members of the Association, by threats, boycott and other coercive action. The plaintiffs were operating a scheme to provide cheap medical aid. The defendants sought to justify their activities with the argument that they were upholding the honour and protecting the interests of the medical profession. McCardie J. found for the plaintiffs, not expressly on the basis of conspiracy, though conspiracy was the basis of the claim and was clearly present. He said:

> 'In the great majority of recent cases the molestation of another in his calling has been effected by a combination of persons. The reason for this is obvious, for molestation by one may yield but slight result, unless obviously actionable weapons, such as defamation or personal assault, be employed; but molestation effected by a combination of many may achieve grave results, even though no specific part of the conduct employed amount in itself to actionable tort. . . . This element of combination, exhibited in many cases and dwelt upon in so many of the dicta of distinguished judges, has, in my view, tended perhaps to obscure the true basis of the rules of law which render actionable an unlawful interference with a man's calling.[26] In my opinion the rule of law is reasonably clear that a single person, or a body of persons, will commit an actionable wrong if he or they inflict actual pecuniary damage upon another by the intentional employment of unlawful means to injure that person's business, even though the unlawful means may not comprise any specific act which is per se actionable.'[27]

He continued:

> 'The rule just stated at once invited, and indeed requires, a consideration of the meaning of the words "unlawful means". . . . [T]hreats, even though they do not amount to threats of personal violence — see *Quinn v. Leathem*[28] — are recognized heads of unlawful means.[29] . . . I am bound by authority to recognize the distinction between a warning and a threat. . . . In every case, therefore, I must take it to be a question of fact whether or not the words used amount to a threat or constitute a mere warning.'[30]

He found that the plaintiffs had not been professionally dishonourable and that the defendants' action against the plaintiffs could

[23] [1944] K.B. 551.
[24] [1919] 1 K.B. 244.
[25] *Supra*, n. 22.
[26] *Op. cit.* 255.
[27] *Op. cit.* 260.
[28] [1901] A.C. 495.
[29] *Op. cit.* 260.
[30] *Op. cit.* 261.

not be justified on the pretext that the defendants were protecting their professional interests. There was no need for the plaintiffs to show that the defendants had a purpose or intent to injure though that was present. The plaintiffs needed to show only damage and illegal means. He also found that the Association's rules relating to the boycott were an unreasonable restraint of trade and void.

During the following year, 1920, the English Court of Appeal in *Davies v. Thomas*[31] accepted the proposition that illegal means included coercion, intimidation, threats and undue influence but found that the message conveyed in that case was a warning, not a threat. A year later *Ware & De Freville Ltd v. Motor Trade Association*[32] was decided by a Court of Appeal of entirely different composition and the tort of intimidation hibernated until revived by *Rookes v. Barnard.*

The weakest point in the judgment of McCardie J. in *Pratt v. Brit. Medical Association* is where he distinguishes, apparently with reluctance, between a warning and a threat. That is a distinction without a difference. It merely provides an opportunity for a value judgment as to whether the threatener has been so reprehensible that he ought to be penalised. It would have been better to recognize that only threats made for an improper purpose gave rise to liability. There is now some support for that approach. In 1966, in *Nagle v. Feilden*,[33] the English Court of Appeal held that a lady plaintiff had an arguable case that the Stewards of the Jockey Club could not arbitrarily refuse her a trainer's licence because she was a woman and thus, by virtue of their monopoly, exclude her from her chosen calling. It so held although there was no trace of contract between the plaintiff and the Stewards. A natural application of the principle of *Nagle v. Feilden* would be the protection of a trader dependent on a monopoly supplier who withheld goods that the trader needed for his business, if the purpose of the withholding were to unreasonably restrain trade, a purpose long considered improper by the common law. Combinations that unreasonably restrain trade are objectionable in a tortious sense only when they have the power to coerce. When they have that power and use it to unreasonably restrain trade, they are monopolizing trade, as that word is customarily understood by lawyers.[34]

Declaration and Injunction

The second legal shield that a trader has against monopolization is the declaration or injunction against a company or companies acting monopolistically. In *Eastham v. Newcastle Football Club*

[31] [1920] 2 Ch. 189. [32] [1921] 3 K.B. 40. [33] [1966] 2 Q.B. 633.
[34] See, for example, the definition of monopolization in section 37 of the *Trade Practices Act*, 1967 in particular, sub-section (4).

Ltd[35] the plaintiff was a playing member of a football club in an association and league that operated familiar retention and transfer restrictions on players. He asked to be transferred but his club had given him notice of retention and refused to release him. Having refused to re-sign with his club, he commenced proceedings against it, the association and the league, all of which were limited companies. He sought declarations that his agreements with his club, the rules of the association and the regulations of the league relating to retention and transfer were not binding on him since they were in unreasonable restraint of trade and/or ultra vires.

Wilberforce J., in his judgment granting all the declarations sought, asked:

> '[I]s it open to an employee to bring an action for a declaration that the contract between the employers is in restraint of trade? To my mind it would seem unjust if this were not so. The employees are just as much affected and, indeed, aimed at by the employers' agreements as the employers themselves.[36] . . .
> [T]heir liberty to seek employment is considered by the law to be an important public interest. Is the defence of that interest to be left exclusively in the hands of the employers themselves, who have set up the ring against the employees and who have (as here) shown every intention of maintaining it as long as they can; left to the chance that one day there may be a blackleg among the employers who will challenge it? In my judgment to grant a remedy by way of declaration to the persons whose interests are vitally affected would be well within the spirit and intent of the rule as to declaratory judgments.'[37]

Wilberforce J. also held that, since the system was an unreasonable restraint of trade, it was ultra vires the association and the league and, apparently, the club.[38] *Mogul S.S. Co. v. McGregor Gow & Co.*[39] and *Ware and De Freville Ltd v. Motor Trade Association*[40] did not preclude his making the declarations sought. They might have precluded an action for conspiracy, but there was no need to determine that question since the plaintiff's counsel sought only declarations.[41]

Wilberforce J. was not called upon to grant an injunction because the defendants capitulated by allowing the plaintiff to transfer long before the case was argued. By then it had become a test case whose issue was simply the legality of the retention and transfer system.

However, a recent dictum of Lord Denning, M.R. in *Dickson v. Pharmaceutical Society of Great Britain*[42] indicates that Wilberforce J. would have granted an injunction had the circumstances called

35 [1964] Ch. 413.
36 Ibid. 442.
37 Ibid. 443.
38 Ibid. 440.
39 [1892] A.C. 25.
40 [1921] 3 K.B. 40.
41 *Op. cit.* 446.
42 [1967] Ch. 708.

for one. The Master of the Rolls said:

> 'Suppose this society were to make a rule that no pharmacist should sell any goods other than pharmaceutical goods . . . Such a rule would be unreasonable and bad. Any member affected could bring an action for a declaration that it was invalid and an injunction to restrain the society from seeking to enforce it. . . . Not only a member but a party interested could bring it, such as a company chemist: see *Boulting v. Association of Cinematograph Television & Allied Technicians*;[43] for the company is just as much affected as a member: see [44]*Eastham v. Newcastle United Football Club*.'[45]

The Court of Appeal declared a new rule of the Society unreasonably in restraint of trade and ultra vires and enjoined the Society's council from carrying it into effect. The rule provided that, save with the approval of the council, new pharmacies would have to be situated in physically distinct premises and their trading activities confined to a defined range of pharmaceutical and traditional goods. The Society was incorporated by Royal Charter. A limited company could not be a member of the Society; nor could it be a registered pharmacist. Nevertheless, limited companies did carry on chemistry businesses by employing registered pharmacists. The companies were called 'company chemists'.

It is submitted that the dictum of Lord Denning M.R. is correct. To support an application for an injunction to prohibit ultra vires acts by a company two elements—a public wrong and special interest or special damage—must be shown to exist. A recent Australian case dealing with these two elements is *Helicopter Utilities Pty Ltd v. Australian National Airlines Commission*.[46] The ultra vires act was the leasing of helicopters and the defendant was a public statutory corporation.

Jacobs J. followed the principle of *Stockport District Waterworks Co. v. Manchester Corporation*[47] and held that, although Helicopter Utilities Pty Ltd had the commercial interest of a competitor, it had suffered no special damage. The principle of *Stockport District Waterworks Co. v. Manchester Corporation,* does not, however, apply to an action for an injunction to stop activities that are ultra vires because they unreasonably restrain trade. That is clear from the Lord Chancellor's judgment. He said:

> '[I]f I had here a party who had a right to restrain the Manchester Corporation within its proper limits, as, for example, the ratepayers who were interested in having the water at the lowest amount, and in having the certainty of an abundant supply or if I had the Attorney-General, I should probably not hesitate to restrain. . . . But here I have

[43] [1963] 2 Q.B. 606, 629, 643.
[44] *Op. cit.* 442-443.
[45] *Op. cit.* 745.
[46] [1962] N.S.W.R. 747.
[47] (1862) 7 L.T. 545.

> a rival company. . . . The plaintiffs, in point of fact, would, if they succeeded, have this consequence secured to them, that their own trade might possibly be benefited at the expense of their competitors. The people of Stockport might incur a very serious loss, because there would be a monopoly established in one company which would have the power then of exacting the highest rates allowed . . .'[48]

Jacobs J. did however find that the other ground existed. He held that it was a public wrong for the Australian National Airlines Commission to act ultra vires by leasing helicopters. It is submitted that, since a court will not, on public interest grounds, enforce a restraint of trade that goes further than affording adequate protection to the legitimate interests of the party whom the restraint benefits, the courts should, for the purposes of an application for an injunction, regard as a public wrong an act of a company that is ultra vires because it unreasonably restrains trade. A company can be an immense aggregation of human and capital resources; as such, and without consciously restraining trade, it does much by its sheer size to straight-jacket or restrict trade. When, therefore, a company acts in an overtly monopolistic manner, those acts should be considered a public wrong.

Conspiracy to Injure

Finally, there is the tort of conspiracy to injure. The right invaded by the commission of the tort is described authoritatively by Lord Parker of Waddington, speaking for the Privy Council, in *Commonwealth of Australia v. Adelaide Steam Ship Co.*[49]

> 'At common law every member of the community is entitled to carry on any trade or business he chooses and in such manner as he thinks most desirable in his own interests, and inasmuch as every right connotes an obligation no one can lawfully interfere with another in the free exercise of his trade or business unless there exist some just cause or excuse for such interference. Just cause or excuse for interference with another's trade or business may sometimes be found in the fact that the acts complained of as an interference have all been done in the bona fide exercise of the doer's own trade or business and with a single view to his own interests.'[50]

Later, he added:

> '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 Steam Ship Case*[51]).'[52]

[48] Ibid. 548.
[49] [1913] A.C. 781; (1914) 18 C.L.R. 30.
[50] Ibid. 793, 31-32.
[51] [1892] A.C. 25.
[52] *Op. cit.* 797; 35.

The Australian Full High Court in *Brisbane Shipwrights' Provident Union v. Heggie*[53] took a similar view.

The tort of conspiracy to injure has long been a dead letter because, as a result of a long line of House of Lords precedents ending with *Crofter Hand Woven Harris Tweed Co. v. Veitch*,[54] it has proved futile to argue that the defendants in a case have acted with a view to injure the plaintiff and not merely to advance their own interests. For this reason the tort of conspiracy to injure has been by-passed by the tort of intimidation and the action for a declaration or injunction.

It is proposed, however, to examine some of the old cases based on the tort of conspiracy to injure in the light of present-day approaches.

The plaintiffs in *Mogul Steam Ship Co. v. McGregor, Gow & Co.*[55] deservedly failed because they tried to run with the hares and hunt with the hounds. It appears from Lord Field's speech[56] that the Mogul Steam Ship Co. was no lonely under-dog. It was a member of an influential combination that was in competition with the defendants' combination in 1879, 1883 and 1885. In 1884 the competing combinations merged. In 1885 the merged combination split and the 1883 position was restored. That occurred because the plaintiff's combination wanted to trade on the route in question only when freights elsewhere were slack, whereas the defendants traded there for the whole year. The plaintiff's combination was expelled for commercial and not arbitrary reasons. The plaintiff sued because it was refused re-admission to the defendants' combination.

Sorrell v. Smith[57] is similar. It is a case of self-defence. The defendant newspaper proprietors threatened to cut-off supplies to a wholesaler who was supplying the plaintiff retailer in response to a threat of boycott by a trade union of retail newsagents of which the plaintiff was a member. The conflict began when the trade union called on its members to withdraw their custom from any wholesale newsagent supplying retailers, who opened shops without the trade union's permission. The defendant newspaper proprietors considered that the trade union policy was injurious to their trading interests. Their threat was designed to compel the plaintiff retailer to return his custom to another wholesaler who was supplying a retailer operating without the trade union's permission.

Thorne v. Motor Trade Association[58] probably cannot be rationalised, though it was a friendly action[59] and therefore is a little suspect.

53 (1906) 3 C.L.R. 686.
54 [1942] A.C. 435.
55 [1892] A.C. 25.
56 Ibid. 53-56.
57 [1925] A.C. 700.
58 [1937] A.C. 797.
59 Ibid. 809; per Lord Atkin.

Like all blots, the case can best be put out of mind by turning over a new leaf. It seems that *Rookes v. Barnard* is a first step in that direction.

The practical effect of *Allen v. Flood*[60] is eliminated by *Rookes v. Barnard*. *Allan v. Flood* is, however, distinguishable because the majority found no evidence of intimidation, coercion or threats.

Crofter Hand Woven Harris Tweed Co. v. Veitch[61] purports to follow *Mogul Steam Ship Co. v. McGregor, Gow & Co.*, but is quite different. The House of Lords appeared to be concerned to preserve the right to strike, but the right to strike for proper purposes—for example, participation in management, better conditions and wages—did not appear to be at stake. The strike appeared to have a thoroughly dishonourable purpose. The decision is now 25 years old, and another like it is not probable, at least in the House of Lords, which now eagerly seeks breaches of contract or some other element that will amount to intimidation or the tort of knowingly inducing a breach of contract, as in *J. T. Stratford & Son Ltd v. Lindley*.[62]

A Synthesis—Intimidation to Monopolize

The remedies discussed above are all directed to securing freedom of trade. They amount to what the Americans call 'anti-trust' law. Sections 1 and 2 of the American *Sherman Anti-trust Act*[63] were seen by some as a re-inforcement of the common law, and not as an innovation.[64] In the last decade of the nineteenth century, when the United States Congress passed the *Sherman Anti-trust Act*, dicta in *Mogul Steam Ship Co. v. McGregor, Gow & Co.*[65] were giving rise in England to the confusion that collusive activities in unreasonable restraint of a person's freedom of trade or employment were not actionable at the suit of that person. Now that the House of Lords is prepared to review its own decisions, it should, it is submitted, synthesize the three remedies described above into a tort of intimidation to monopolize and, in doing so, put the English common law back on to the track that it left after 1892.

To argue that an agreed course of action, that the courts will not enforce because it is against the public interest, may be legitimately pursued by economic coercion against those opposed to, or likely to

[60] [1898] A.C. 1. [61] [1942] A.C. 435. [62] [1965] A.C. 269.

[63] The Act became law on July 2, 1890. Sub-sectional 1 and 2 read: 'Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, among the several states, or with foreign nations, is hereby declared to be illegal. . . . 'Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states, or with foreign nations, shall be guilty of a misdemeanour . . .'

[64] See *Standard Oil Co. v. U.S.* (1910) 221 U.S. 1, 50.

[65] 23 Q.B.D. 598, 619-620 *per* Bowen L.J.; [1892] A.C. 25, 39 *per* Lord Halsbury L.C., 46-48 *per* Lord Bramwell, 51 *per* Lord Morris and 58 *per* Lord Hannen.

be injured by, the course of action is two-faced. There is no Privy Council or High Court authority for the argument known to the writer. It is true that in *Commonwealth of Australia v. Adelaide Steam Ship Co.* Lord Parker said:

> '[N]o contract was ever an offence at common law merely because it was in restraint of trade.... 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.[66] . . . [T]heir Lordships do not think that the decisions themselves [the cases decided by the Supreme Court of the United States under the Sherman Act, and in particular, *Standard Oil Co. v. U.S.*[67]] are of any real assistance in the present case. The Sherman Act, strictly construed, makes every contract or combination in restraint of trade and every monopoly or attempt to monopolize a statutory misdemeanour irrespective of any sinister intention on the part of the accused and irrespective of any detriment to the public [these elements being required for the offence with which the Adelaide Steam Ship Co. was charged under the *Australian Industries Preservation Act*]. 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 a 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.'[68]

Lord Parker's remarks are compatible with the existence or emergence of a tort of intimidation to monopolize. It is not suggested that every collusive activity in unreasonable restraint of trade is a tort. The tort occurs only where the activity harms an innocent person through the exercise of coercive power.

There ring in the ears of the writer the words of Professor Oppenheim in his 1964 fall semester lectures at the University of Michigan Law School on Federal Anti-trust Laws,[69] 'Purpose, power and effect'; effect being the consequence and proof of the power.

In the United States, the effect of the Sherman Act is to proscribe collusive price-fixing, both vertical[70] and horizontal,[71] monopolistic refusals to deal or boycotts,[72] territorial divisions among competitors,[73]

66 [1913] A.C. 781, 797; (1914) 18 C.L.R. 30, 35.
67 (1910) 221 U.S. 1.
68 *Op. cit.* 801; 39-40.
69 Professor Oppenheim, now retired, is the author of a casebook of the same title (2nd ed. 1959) and co-chairman of the Attorney-General's National Committee to Study the Anti-trust Laws, which, in 1955, produced the well-known Report on the U.S. Anti-trust Laws.
70 *U.S. v. Parke, Davis & Co.* (1960) 362 U.S. 29.
71 *U.S. v. Socony Vacuum Oil Co.* (1940) 310 U.S. 150.
72 *Fashion Originators' Guild of America Incorporated v. Federal Trade Commission* (1941) 312 U.S. 457.
73 *U.S. v. Timken Roller Bearing Co.* (1951) 341 U.S. 593.

and other monopolistic practices such as the wide-spread use of requirement contracts by a dominant enterprise[74] and mergers between leading corporations.[75]

It is submitted that, ultimately, the tort of intimidation to monopolize should encompass similar activities here. Since it will have the function of shielding the right of traders to trade freely, the tort, in its application to interstate trade, should, like the right it upholds, be preserved from statutory abridgement by section 92 of the Federal Constitution; section 92 stipulates that trade, commerce and intercourse among the States should be absolutely free.

[74] *Standard Oil Co. of Cal. & Standard Stations Incorporated v. U.S.* (1949) 337 U.S. 293.
[75] *U.S. v. First National Bank & Trust Co.* (1964) 376 U.S. 665.