[HIGH COURT OF AUSTRALIA.]

THE EASTERN EXTENSION AUSTRALASIA AND CHINA TELEGRAPH COMPANY LTD. . . . . } PLAINTIFFS;

AND

THE COMMONWEALTH . . . . . DEFENDANTS.

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MELBOURNE, *Sept.* 11, 14, 15, 16, 28.

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

*Contract—Transmission of cablegrams by company—Agreement between company and Government—Power of Government to reduce rates—Abolition of rates—Rights of company—Post and Telegraph Rates Act* 1902 (*No.* 13 *of* 1902)—*Tasmanian Cable Rates Act* 1906 (*No.* 10 *of* 1906).

By various agreements made between a telegraph company, which had laid a telegraph cable between Tasmania and Victoria, and the Tasmanian Government, to whose rights and liabilities under the agreements the Commonwealth succeeded, the company was given a monopoly of submarine telegraph communication between Tasmania and Victoria for a fixed period, a scale of charges for the transmission of telegrams was fixed, and it was provided that the Government should pay a subsidy of £4,200 a year. It was further provided that the Government should have "full power at any time to reduce" the scale of charges for telegrams, that in each year the company should be entitled to take "the whole of the proportion of the moneys collected and receivable by them from all sources in respect of such telegrams," called "message receipts," and that "if, after any such reduction in the scale of charges, the message receipts shall not in any year . . . . by reason of such reduction or otherwise, amount to the sum of £5,600, the Tasmanian Government shall guarantee and pay to the Telegraph Company, and their assigns the difference between the message receipts and ths said sum of £5,600."

*Held* (*Higgins* J. dissenting), that the power to reduce the rates did not authorize the Commonwealth to abolish them.

The Commonwealth, after a previous reduction, purported to abolish the rates altogether, and thereupon the company protested, and for some time

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thereafter business was carried on uninterruptedly so far as the carrying of telegrams was concerned.

*Held*, that the company was entitled in respect of telegrams carried after the date of the attempted abolition to be paid as if no such abolition had been attempted; *Higgins* J. concurring on the ground that the defendants, by agreeing to the special case in its existing form, had precluded themselves from contending to the contrary.

*Held*, further, that the *Post and Telegraph Rates Act* 1902, as amended by the *Tasmanian Cable Rates Act* 1906, did not affect the rights of the parties under the agreements.

SPECIAL case.

In an action brought in the High Court by the Eastern Extension Australasia and China Telegraph Company Ltd. against the Commonwealth, the parties stated a case for the opinion of the Full Court which, so far as material, was as follows:—

"This action was commenced on 24th April 1908 by a writ of summons whereby the plaintiffs claimed 'the payment of the sum of £605 12s. 10d. being the proportion of moneys due by the Commonwealth for telegrams over plaintiffs' cables between these dates and payable to the plaintiffs under and by virtue of two agreements with the Government of Tasmania dated respectively 24th January 1868 and 14th March 1889 and also the sum of £14 19s. 6d. being the proportion payable to the plaintiffs for the period between the said dates of charges for certain cables termed "Australasian Traffic" under two agreements dated respectively 14th April 1900 and made between the plaintiffs and the Governments of South Australia Western Australia and Tasmania and 16th January 1901 made between the plaintiffs and the Government of New South Wales and also the sum of £12 10s. being the amount payable to the plaintiffs for the months of April May and June 1907 for the transmission of "shipping intelligence" to Tasmania for the period between these dates under agreements made between the plaintiffs and the Government of Tasmania and the plaintiffs and the Commonwealth Government respectively.' And the parties have concurred in stating the questions of law arising herein in the following case for the opinion of the Court pursuant to the Rules of the High Court, Order XXIX.

"2. Upon 24th January 1868 an agreement was made between

the Government of Tasmania of the one part and the Telegraph Construction and Maintenance Company Limited of the other part, a copy of which agreement is annexed hereto and marked 'A.'

"3. The said Telegraph Construction and Maintenance Company Limited first opened telegraphic communication between the State (then Colony) of Tasmania and the State (then Colony) of Victoria on 1st May 1869.

"4. By an agreement dated 27th May 1873 and made between the said Telegraph Construction and Maintenance Company Limited of the one part and the plaintiffs of the other part the plaintiffs acquired all the rights and interests of the said Telegraph Construction and Maintenance Company Limited under the said agreement mentioned in paragraph 2 hereof and the full benefit and advantage thereof and took upon itself all the liabilities and responsibilities to which at the date of the said agreement the said Telegraph Construction and Maintenance Company Limited were liable under the said agreement mentioned in paragraph 2 hereof.

"5. On 20th August 1883 as the result of negotiations between the parties an agreement was drawn up by the company for a reduction of the tariff under a guarantee of £5,600 per annum, a copy of which agreement is hereto annexed and marked 'B,' but the Government of Tasmania before executing the same added certain clauses contracting them out of certain provisions of the agreement dated 24th January 1868 mentioned in paragraph 2 hereof which the plaintiffs refused to accept and consequently refused to sign the agreement as executed by the said Government; such proposed agreement was acted upon to the extent that the reduction of rates and the guarantee mentioned therein by mutual consent came into operation on the terms and at the dates fixed therein.

"5A. The amounts set out hereunder have for the periods mentioned been paid by the Government of Tasmania to the company under the guarantee referred to in paragraph 5 hereof and the guarantee contained in the agreement 'D' annexed hereto, namely:—

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| | | | | | |
|---|---|---|---|---|---|
| 1883, 1st September | | to 31st December | | ... | £713 10 2 |
| 1884, 1st January | | to 31st December | | ... | 1,736 19 1 |
| 1885 | do | to | do | ... | 1,669 11 10 |
| 1886 | do | to | do | ... | 1,461 19 11 |
| 1887 | do | to | do | ... | 1,510 10 11 |
| 1888 | do | to | do | .. | 798 2 8 |
| 1889 | do | to | do | ... | 335 13 9 |
| 1893 | do | to | do | ... | 452 11 0 |
| 1894 | do | to | do | ... | 790 14 1 |
| 1895 | do | to | do | ... | 14 0 8 |
| | | | | | £9,483 14 1 |

The above mentioned sum of £713 10s. 2d. is the difference between £1,153 3s. 2d. the actual message receipts for the months of September, October, November and December 1883 and the sum of £1,866 13s. 4d.—the proportionate amount of the guarantee of £5,600 per annum for the said four months—and does not represent the difference between the message receipts and the guarantee for the period of eight months from 1st May 1883. The amounts paid as above mentioned were in addition to the sum of £50 per annum paid under the agreement mentioned in clause 6—such payment in fact commencing in 1884.

"6. In the year 1883 the Government of Tasmania agreed with the plaintiffs but not in writing to pay the plaintiffs the sum of £50 per annum for the transmission to Tasmania daily over plaintiffs' Tasmanian cables of telegrams containing shipping intelligence which the plaintiffs ever since have daily transmitted and still continue to so transmit and the Tasmanian Government up to the date of the transfer of the Post and Telegraph Department of Tasmania hereinafter mentioned duly paid to the plaintiffs the said annual sum and the Commonwealth from the date of the said transfer up to 31st March 1907 duly paid to the plaintiffs the said annual sum but since the said 31st March 1907 they have refused and still refuse to pay the said sum and the Deputy Postmaster General of the Commonwealth in Tasmania wrote to the plaintiffs' Superintendent of Cable Station George Town Tasmania a letter dated 9th August 1907." (This letter stated that it was

contended that the payment of £5,600 should be deemed payment in full for all telegrams transmitted over the cable).

"7. In 1885 the plaintiffs at their own cost laid down a second cable between Flinders in the State of Victoria and George Town in the State of Tasmania; the laying of this cable was made a condition precedent by the Tasmanian Government to their entering into the agreement of 14th March 1889 mentioned in paragraph 8 hereof; and in the year 1891 the plaintiffs at their own cost erected and fitted new cable station buildings at George Town aforesaid and in the following year namely 1892 they at their own cost erected and fitted new cable station buildings at Flinders aforesaid.

"8. On 14th March 1889 an agreement was made between the Government of Tasmania of the one part and the plaintiffs of the other part a copy of which agreement is hereto annexed and marked 'D'; the extended period of twenty years referred to in paragraph 1 of the said last mentioned agreement expires on 1st May 1909.

"9. On 14th April 1900 an agreement was made between the Government of the Colony of South Australia of the first part, the Government of the Colony of Western Australia of the second part, the Government of the Colony of Tasmania of the third part, and the plaintiffs of the fourth part. . . . .

"10. On 16th January 1901 an agreement was made between the Government of the Colony of New South Wales of the one part and the plaintiffs of the other part." (The two agreements fixed the rates for "Australasian traffic.")

"11. The amount payable to the plaintiffs under the two agreements lastly mentioned for the period between 7th December and 31st December 1906 in respect of 'Australasian traffic' over plaintiffs' cables between Victoria and Tasmania (hereinafter called the Tasmanian cables) was the sum of £22 10s. 6d. of which the sum of £7 11s. has already been paid, leaving a balance which the plaintiffs claim is due to them of £14 19s. 6d.

"12. On 1st March 1901 all the Post and Telegraph Departments of the Australian States were transferred to the Commonwealth.

"13. In or about the month of October 1902 the plaintiffs and

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the Commonwealth agreed that the cable rates for telegrams over plaintiffs' Tasmanian cables should be reduced to the following rates namely:—

(*a*) Ordinary telegrams ½d. per word including address and signature.

(*b*) Press telegrams 1s. for the first 100 words and 6d. each additional 50 words . . .

The rates above mentioned continued in force and were paid to the plaintiffs by the defendant up to and including 6th December 1906.

. . . . . .

"17. On 4th December 1906 the Governor-General in Council of the Commonwealth passed an order . . . . purporting to reduce to nothing and abolish all charges for the transmission by the said cables of telegrams to and from any part of the Commonwealth New Zealand Norfolk Island Fiji and New Caledonia.

. . . . . .

"19. Since the beginning of October 1906 the traffic over the said cables has considerably increased with the result that four additional clerks were added to the staff and although on 24th April 1908 (the date when the facts to be submitted by special case were agreed to by the parties) the staff of the plaintiffs was the same as before the abolition of the cable rate the staff had to work overtime and two additional clerks have since been added to the staff in Victoria and one in Tasmania and further increases of expenditure are anticipated owing to the abolition of the said cable rates as aforesaid. The defendants are to be entitled to contend at the hearing of the special case that the facts stated in paragraphs 7, 19 and 22 respectively and the agreement hereunto annexed marked 'B' are irrelevant.

"20. By the practice established between the plaintiffs and the Government of Tasmania and continued between the plaintiffs and the Commonwealth after the Post and Telegraph Departments were transferred to the Commonwealth as aforesaid the plaintiffs do not collect or receive any moneys from the public for the use of their Tasmanian cables but formerly the Government of Tasmania and the Government of Victoria as the case might be on behalf of themselves and the other Australian Governments and

afterwards the Commonwealth collected and received all telegrams from the public which were to be transmitted over the plaintiffs' Tasmanian cables and the moneys paid in respect thereof and accounted to the plaintiffs for so much thereof as they were entitled to receive for charges for the use of their said Tasmanian cables and the Commonwealth Government has up to and including the 6th December 1906 duly accounted to the plaintiffs in respect of all such moneys due to them according to the rates mentioned in paragraph 13 hereof; and the plaintiffs claim—Firstly that they should continue to be paid according to the said rates but the Commonwealth have refused to make any payment to the plaintiffs since the said date except of the difference between the total amount received by the plaintiffs from all sources in respect of all or any telegrams transmitted by the plaintiffs' Tasmanian cables between Victoria and Tasmania and *vice versâ* during a year commencing on 1st May 1906 and the amount guaranteed to the plaintiffs under Article 5 of the agreement marked 'D' referred to in paragraph 8 hereof and claim that such payment is sufficient to satisfy all the plaintiffs' rights under the agreements mentioned in paragraphs 2 and 8 hereof as well as under the agreements mentioned in paragraphs 9 and 10 hereof. Secondly:—The plaintiffs contend that in any event the payment at the rate of £5,600 per annum should not commence except for the period commencing on 7th December 1906.

"21. Between 1st May 1906 and 30th April 1907 the sum of £4,776 12s. 10d. has been received by the plaintiffs from all sources in respect of all or any telegrams transmitted by the plaintiffs' Tasmanian cables between Victoria and Tasmania and *vice versâ* of which £147 17s. 3d. has been received in respect of the apportionment to the Tasmanian cables of charges for certain cables termed Australasian traffic, under the agreements marked 'E' and 'F' (being those referred to in paragraphs 9 and 10).

"22. For some years prior to 1st March 1901 the annual receipts of the plaintiffs from the 'message receipts' have always been more than the sum of £5,600 so that no adjustment of accounts between the plaintiffs and the Tasmanian Government in respect of the latter's guarantee of £5,600 has been necessary; the subsidy of £4,200 mentioned in the agreement a copy of which is

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hereto annexed and marked 'D,' has always been paid by the Tasmanian Government and the defendants to the plaintiffs on each quarter of the calendar year.

"23. The sum which would be payable to the plaintiffs up to 31st December 1906 in respect of the matters mentioned in paragraphs 2, 3, 4, 5, 7, 8, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22 hereof if the plaintiffs' first contention is correct is £605 12s. 10d. and the sum of £14 19s. 6d. in respect of the matters alleged in paragraphs 9, 10, 11 and 12 hereof, and also the sum of £12 10s. in respect of the matters alleged in paragraphs 6 and 12 hereof for the period from 1st April 1907 to 30th June 1907 and if the plaintiffs' second contention only is correct would be the sum of £372 17s. 8d. altogether; whereas the sum which would be payable altogether up to the said date if the defendants' contention were correct is the sum of £141 19s. 2d. being the proportionate part of the period from 7th December 1906 to 31st December 1906 of £823 7s. 2d. the difference between the £4,776 12s. 10d. and £5,600 which said sum of £141 19s. 2d. has prior to the commencement of this action been paid by the defendants to and accepted by the plaintiffs without prejudice to the contentions hereinbefore set forth. As to moneys owing in respect of the matters mentioned in paragraphs 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22 since 31st December 1906 and moneys owing in respect of the matters mentioned in paragraphs 6 and 12 since 30th June 1907 the parties agree that the Court should make a declaratory order in respect thereof.

"24. The questions of law submitted to the Court are as follows:—

(1) With respect to the matters alleged in paragraph 1 to 23 inclusive whether according to the true interpretation of the agreements mentioned in paragraphs 2 and 8 hereof the Tasmanian Government or the Commonwealth had power to reduce to nothing and abolish the Tasmanian cables rates referred to in paragraph 13 hereof; and if 'yea' is the effect of such reduction to entitle the plaintiffs to nothing more than the said sum of £5,600 per annum in respect of the matters or any

and which of the matters mentioned in paragraphs 6, 9, 10, 11 and 12 hereof respectively ?

(2) Are the plaintiffs entitled only to the difference between the sum mentioned in paragraph 21 hereof and £5,600 in respect of the year commencing 1st May 1906 ? or

(3) Are the plaintiffs entitled to a proportionate part of the sum of £5,600 per annum for the period 7th December 1906 to 31st December 1906 irrespective of any amounts which have been received by them from message receipts for the period 1st May 1906 to 6th December 1906 ?

" 25. The exact form of judgment and the amount or respective amounts to be recovered under such judgment and all questions of costs are left in the discretion of the Court."

The provisions of Exhibits " A," " B " and " D " above referred to are sufficiently stated in the judgments hereunder.

*Mitchell* K.C. (with him *Cussen*), for the plaintiffs. The power to reduce rates does not give the Commonwealth, as successors to Tasmania, power to abolish the rates altogether. The language to the agreement shows that such a power was not intended to be given. The parties did not have in their minds that the rates might be abolished, but they intended that any reduction should be reasonable. If a contract has for a number of years been acted upon as bearing a certain interpretation, the Court will give great weight to that fact.

[GRIFFITH C.J.—That doctrine is often applied in the interpretation of international agreements.

The agreement is one under which the plaintiffs got a monopoly, and such a construction should be given to the agreement as would permit the plaintiffs a reasonable opportunity of making profits beyond the guaranteed amount: *Telegraph Despatch and Intelligence Co.* v. *McLean* (1); *Ogdens, Ltd.* v. *Nelson* (2).

[GRIFFITH C.J.—The effect of abolition of the rates would be to change the position of the parties from that of co-adventurers to that of employer and servant.]

A power to regulate does not include a power to abolish:

(1) L.R. 8 Ch., 658.

(2) (1903) 2 K.B., 287.

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*Municipal Corporation of City of Toronto* v. *Virgo* (1); *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (2).

[HIGGINS J.—If there is a power to reduce by degrees until the rates are practically abolished, then there is a power to abolish *uno ictu*. The substance of the power must be looked at: *Kenworthy* v. *Bate* (3).]

Even if there is power to abolish the rates, there is an implied agreement that that power will not be exercised. There is an analogy to an illusory appointment which was invalid in equity as being a fraud on the power until such appointments were validated by Statute: *Gainsford* v. *Dunn* (4).

[HIGGINS J. referred to *Aleyn* v. *Belchier* (5).]

Any reduction of the rates should be reasonable, otherwise several provisions of the contract would be rendered nugatory. The Commonwealth have purported to abolish the rates, and it is immaterial that they might have achieved practically the same result by reduction of the rates to a very small amount. Even if there is power to abolish the rates, that power is not retrospective, and cannot take effect until the yearly period which begins after the power is exercised. The £50 a year for "shipping telegrams" and the proportion of "Australasian traffic" charges are not within Article 5 of the agreement of 14th March 1889, and the plaintiffs are entitled to payment of those amounts irrespective of the guarantee.

[Counsel also referred to *Forbes* v. *Watt* (6).]

*Starke*, for the defendants. The power to reduce rates includes a power to abolish them. No limit can be placed on the reductions which can be made. The giving an exclusive right to the plaintiffs does not affect the question. That right has not been interfered with. A power to regulate may include a power to prohibit: *Slattery* v. *Naylor* (7). The fact that abolition of the rates was not in the minds of the parties when the agreement was made is immaterial, if the terms of the agreement are wide enough to include the power to abolish them: *In re Cadogan*

(1) (1896) A.C., 88.
(2) (1896) A.C., 348, at p. 363.
(3) 6 Ves., 793.
(4) L.R. 17 Eq., 405.
(5) 1 Wh. & T.L.C., 6th ed., p. 465.
(6) L.R. 2 H.L. Sc., 214, at p. 216.
(7) 13 App. Cas., 446, at p. 450.

*and Hans Place Estate Ltd.*; *Ex parte Willis* (1); *London and North Western Railway Co.* v. *Evans* (2). If the plaintiffs be entitled to recover anything, the measure of damages is the difference between £5,600 and the amount which the plaintiffs would have received if the Commonwealth had made the largest reduction of the rates which they were entitled to make.

[HIGGINS J. referred to *Maw* v. *Jones* (3).]

As to the meaning of "reduction," a power to reduce the capital of a company authorizes the abolition of a class of shares: *British and American Trustee and Finance Corporation* v. *Couper* (4); *In re Floating Dock Co. of St. Thomas Ltd.* (5). No retrospective effect is sought to be given to the abolition. The guarantee is referable to the yearly periods of the agreement, and, in adjusting the accounts at the end of the yearly period during which the abolition was made, the effect of that abolition was properly included in order to ascertain whether in respect of that period the sum earned exceeded the guaranteed amount. The £50 for shipping telegrams and the proportion of "Australasian traffic" charges were properly included in the receipts of the plaintiffs so as to determine the amount payable under the guarantee. No claim for money had and received will lie, for under the *Post and Telegraph Rates Act* 1902, as amended by the *Tasmanian Cable Rates Act* 1906, the Commonwealth was not permitted to receive from the public any cable rates for telegrams between Victoria and Tasmania after October 1906. If the agreement authorized the plaintiffs to charge rates and that power is not determined, the plaintiffs can still charge those rates and themselves collect them. No award will be made on a *quantum meruit* which is inconsistent with the special agreement, and the defendants should not be compelled to pay more than would have been payable if the largest possible reduction had been made. In that case nothing would be payable.

*Mitchell* K.C. in reply. The *Tasmanian Cable Rates Act* 1906 was not intended to interfere with the rights of the parties under the agreement. The defendants were bound to go on collecting

(1) 73 L.T., 387.
(2) (1893) 1 Ch., 16.
(3) 25 Q.B.D., 107.
(4) (1894) A.C., 399.
(5) (1895) 1 Ch., 691.

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the rates until they gave notice to the plaintiffs that they would no longer do so. That is an implication from the course of dealing between the parties.

*Cur. adv. vult.*

The following judgments were read :—

GRIFFITHS C.J. The agreements upon which the main questions for determination arise were made between the plaintiffs and the Government of Tasmania before the establishment of the Commonwealth, and at a time when Tasmania was a self-governing Colony having no political association with any other part of Australia. The rights and obligations of the Government of Tasmania under these agreements passed on 1st March 1901 to the Government of the Commonwealth. But the agreements are to be construed as agreements made by a quasi-independent State with regard to telegraphic communication between itself and the rest of the world. Many incidental consequences attach from the necessity of the case to bargains of such a character which might not attach to a contract to be entirely performed within the limits of a single State, such as the Commonwealth now is for postal and telegraphic purposes.

By an agreement of 24th January 1868, made between the Government of Tasmania and a company called the Telegraph Construction and Maintenance Company, the company agreed to lay a cable from Tasmania to Victoria, and the Government guaranteed to pay the company, their successors and assigns, interest at 6 per cent. per annum on £70,000, the agreed cost of the line (*i.e.*, £4,200 a year), payable quarterly, but subject to determination on permanent interruption of communication, and to suspension if communication should be interrupted for thirty days. The company were to have a monopoly of submarine telegraphic communication between Victoria and Tasmania for 20 years from the opening of communication (which occurred on 1st May 1869), subject to determination in case the liability of the Government in respect of the guarantee should be determined. It was further provided that if the net profits of the company from the line after payment of all expenses of and incidental to working and maintenance, together with the £4,200, should in

any year exceed £7,000 (being 10 per cent. on the agreed cost of the line) the company should refund to the Government the excess above £7,000, but so that they should not be obliged in any event to refund more than the £4,200. Under this agreement the company were, of course, bound to bring into account for the purpose of ascertaining the net profits all their earnings of the cable from any source whatever.

The agreement did not contain any stipulation as to the rates to be charged by the company for the transmission of messages over their cable. It must, I think, be taken that they were at liberty to make what charges they thought fit. No doubt they did in fact notify a scale of charges which persons using the cable would have to pay. We are not informed of the details of the working arrangements for the transmission of messages between the government telegraph stations in Tasmania and the government telegraph stations in Australia or other telegraph stations in other parts of the world. But it was the practice that, when the Government of Tasmania accepted a message for transmission to places out of Tasmania by means of the company's cable, they collected from the sender, in addition to the charges for land transmission, a sum to cover the company's charges, and accounted to the company for the money so received. A similar practice was followed by the Government of Victoria with respect to telegrams received for transmission to Tasmania from the mainland. This practice was continued after the Post and Telegraph Departments of the States were transferred to the Commonwealth. Under these circumstances a promise ought, I think, to be implied on the part of the respective Governments that they would collect, and account to the company for, the amount of the charges which the company was lawfully entitled to make from time to time for all messages so received and transmitted at the implied request of the Government.

In the year 1873 the Telegraph Construction Company's rights and interests under the agreement of 1869 were assigned to the plaintiffs.

In the year 1883 a fresh arrangement was made between the Government of Tasmania and the plaintiffs. A draft agreement was drawn up, but some of its terms were not acceded to by the

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plaintiffs, and it was not in fact executed. It was, however, acted upon so far as regards certain stipulations contained in it relating to the scale of charges to be made by the plaintiffs for telegrams and the disposal of the earnings of the cable. The rate of charges was to be as follows :—

"Private messages of ten words, Address and Signature not to exceed a like number of words one shilling. Every additional word one penny. Press messages not exceeding one hundred words two shillings. Every additional fifty words or part thereof one shilling."

With respect to the earnings the following stipulation was made :—

"The present company shall be entitled to the whole of 'The message receipts' (which term is hereby declared to mean and to be taken as the proportion of the moneys to be collected on telegrams to be sent to from and between Tasmania and any other place through the present company's submarine cable connecting Tasmania and Victoria, and receivable by the present company) in each year from all sources and if in any one year the message receipts shall not amount to £5,600 the Government shall pay to the present company the difference between the actual 'message receipts" and the sum of £5,600."

It will be seen that under this stipulation the plaintiffs were bound to bring into account their earnings from all sources for the purpose of ascertaining whether the message receipts fell short of the sum of £5,600. Nothing was said as to what was to happen if the profits of the company should exceed £7,000. The subsidy of £4,200 was to be continued as before.

In the year 1885 the plaintiffs laid down a second cable. In the year 1889 a new agreement was entered into between the Government of Tasmania and the plaintiffs, upon the construction of which the main questions for determination in this case arise.

The material provisions of this agreement were as follows :—

The exclusive right of the plaintiffs to submarine telegraphic communication between Victoria and Tasmania was extended for 20 years, *i.e.*, till 1st May 1909, and the subsidy of £4,200 was to continue for the same period subject in each case to determination on permanent interruption of communication, and, in the case of

the subsidy, to suspension in the case of interruption for thirty days.

The stipulation of the agreement of 1869 as to the net profits was declared null and void, "it being the intention of the parties" that the Government should not have any excess over the sum of £7,000 refunded to them, but that the whole of the net profits, including the subsidy, should belong to the company, whether they exceeded £7,000 in a year or not (Article 4).

Article 5 was as follows:—

"The Tasmanian Government shall have full power at any time to reduce the scale of charges for the transmission of all or any telegrams to be transmitted by the said cable between Tasmania and the Colony of Victoria, and *vice versâ*, and the telegraph company and their assigns shall in each year be entitled to take the whole of the proportion of the moneys collected and receivable by them from all sources in respect of such telegrams, which proportion of such money is hereinafter referred to as 'the message receipts,' and if after any such reduction in the scale of charges, the message receipts shall not in any year of the said current period of twenty years, or of the said extended period of twenty years, by reason of such reduction or otherwise, amount to the sum of £5,600, the Tasmanian Government shall guarantee and pay to the telegraph company and their assigns the difference between the message receipts and the said sum of £5,600; and any payment made by the Tasmanian Government under this Article shall be in addition to the said subsidy, and is hereinafter referred to as 'the message receipts guarantee.'"

From 1st September 1883 the dealings between the Government and the company were conducted on the footing of the arrangement of that year and the substituted agreement of 1889. At first the earnings of the cable at the rates fixed in 1883 did not amount to £5,600 a year, and the Government accordingly paid to the company substantial sums to make up the deficiency. From the year 1895, however, the earnings exceeded that sum, and the whole amount was retained by the company in accordance with the agreement of 1889 then in force.

In October 1902 the Government of the Commonwealth, in exercise of the power conferred by Article 5 of the agreement of

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1889, and after friendly negotiations with the plaintiffs, reduced the scale of charges, in the case of ordinary telegrams, to one half-penny a word including address and signature, and in the case of press telegrams, to one shilling for the first 100 words and six pence for each additional 50 words. Notwithstanding this reduction, the earnings of the cable still exceeded £5,600 a year.

By the *Post and Telegraph Rates Act* 1902 the rates to be charged by the Commonwealth Government for telegrams between other States and Tasmania were fixed at certain amounts "with cable charges added." By the *Tasmanian Cable Rates Act* 1906, which came into force on 1st October of that year, these words were repealed. The result was that after 1st October 1906 the Commonwealth Government could only collect the rates prescribed by the Act of 1902 without any additional charge in respect of transmission over the plaintiffs' cables. In my opinion this Act had no effect upon the implied promise by the Government to collect for the company the amount which the company was entitled to charge for the services rendered by them, and to account for the amount so collected. This view was apparently acted upon by the Government up to 6th December 1906.

On 4th December 1906 an Order in Council was made by the Governor-General directing that the scale of charges for the transmission of telegrams between Tasmania and Victoria to places beyond the Commonwealth and the Pacific should be "reduced to nothing and abolished as from the 6th of December."

The plaintiffs protested that this Order was not a valid exercise of the power to reduce the scale of charges within the meaning of Article 5 of the agreement of 1889, and intimated that they would continue to claim the rates as fixed in 1902. The course of business, however, was not interrupted so far as regards the public, and it must be taken that the Commonwealth Government continued to send telegrams to the plaintiffs for transmission, and that the plaintiffs transmitted them, subject to their respective legal rights and obligations under the contract of 1889, whatever they may be. If, therefore, the rates which the plaintiffs are entitled to claim for messages are the reduced rates of 1902, the Government is bound to account to them for the amount so ascertained. The circumstance that the Government did not in

fact continue to collect anything for cable rates from the senders of the messages is quite immaterial.

The plaintiffs contend that the word "reduce" in Article 5 does not include the case of total abolition. They say that the substance of the agreements between them and the Tasmanian Government was that the undertaking should be for the joint benefit of both parties, who were, in a sense, co-adventurers engaged in an adventure from which each party was to derive a benefit, the amount of the plaintiffs' profits as well as the keeping down of the liability of the Government being in substantial part dependent upon the volume of traffic; that the right of monopoly conferred upon them implied a right to make whatever profit they could during its continuance; that the possibility of making a profit was an essential element of the enterprise; and that the guarantee of a minimum income of £5,600 in addition to the subsidy of £4,200 was a guarantee of the amount of actual earnings from the traffic, at some rate, whatever it might be, and not a promise to pay a fixed subsidy. And they say that the total abolition of charges involves a subversion of all these conditions —that the position of the company is changed from that of co-adventurers, entitled to the chance of earning more than £5,600 a year, to that of servants bound to perform any work imposed upon them by the Government for a fixed remuneration, that the natural consequence of the abolition of the charges would be (as in fact it has been) largely to increase the volume of traffic and the consequent working expenses without giving them any opportunity of recouping themselves by increased earnings. Whatever, therefore, might in another context be included in the literal meaning of the word "reduce," they say that, as a promise would be implied on the part of the Government not to do anything which would prevent the substantial continuance of the adventure from which the plaintiffs were to have an opportunity of making profits of an indefinite amount, the word cannot in this agreement be so construed as to have the effect of authorizing the Government to make such a radical change of conditions.

The defendants say, in reply to these arguments, that the power to reduce might be exercised from time to time, and to any extent, so as to bring down the receipts to a merely nominal

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sum, and that consequently the plaintiffs have not suffered any loss by the action of the Government. I think that this argument is fallacious. It does not follow that, because a particular result may lawfully be effected in an authorized way, the same result may validly be effected in another way which is unauthorized. In my judgment the words "shall have power to reduce," do not, etymologically, include a power to reduce to nothing or abolish. I express no opinion on the question of how far reduction, not being abolition, could be carried. Apart from the guarantee, indeed, this point would not be arguable. If one person agrees to render services for another at a specified rate of charge, with a power to that other to reduce the rate, it cannot be contended that the power may be exercised so as to require the services to be rendered gratuitously. The arguments already adverted to satisfy me that in this case the guarantee to make up the actual earnings to £5,600, introduced into a contract made in 1889 by the Government of an Australian Colony, which was presumably and in fact interested in keeping down its public expenditure, is not sufficient to give such an altered meaning to the word "reduce" in that contract.

It follows, in my judgment, that the Order in Council of 4th December 1906 was not authorized by the power to reduce contained in Article 5, and was wholly inoperative. The result is that the Commonwealth were bound to account to the plaintiffs at the rates fixed in 1902 until they should be lawfully reduced, which has not yet been done.

It is admitted that, in this view, the amount for which the Commonwealth were bound to account to the plaintiffs for messages sent under the agreement of 1889 in respect of the period from 6th December to 31st December is £605 12s. 10d.

Three other questions were submitted and argued, which, in the view which I take of the first question, are not immediately material, but I will briefly express my opinion upon them.

In the year 1883 the Tasmanian Government entered into an informal agreement, not in writing, to pay to the plaintiffs a lump sum of £50 per annum for certain services in connection with the transmission of shipping news, and always continued to pay that sum by quarterly instalments, as a sum payable outside

of the formal agreements already referred to. The same practice was continued by the Commonwealth Government until 31st March 1907. They, however, contend that this sum was included in the words "moneys . . . receivable from all sources in respect of such telegrams" in Article 5 of the agreement of 1889 and would be satisfied by payment of the full sum of £5,600. It is, no doubt, within the literal meaning of the phrase, but I think that the course of dealing between the parties, coupled with the nature of the work and the mode of remuneration, show that it was a term of the unwritten agreement that this payment should be entirely independent of the formal agreement by which the scale of charges and the subsidy and guarantee were regulated. I think, therefore, that the plaintiffs are entitled to payment of the sum of £50 per annum for this service irrespective of their rights under the agreement of 1889, and that that sum cannot be regarded as part of the "message receipts" under that agreement, whatever the rates may be.

In respect of this matter it is admitted that the amount to which the plaintiffs were entitled up to 30th June 1907 is £12 10s.

The defendants, on the assumption that the abolition of rates from 6th December 1906 was valid, claimed that they were only bound to pay to the plaintiffs in respect of the year ending 30th April 1907 a sum equal to the difference between £5,600 and the amount received by the plaintiffs or for which the defendants were bound to account to the plaintiffs during the year, that is, the amount for which the plaintiffs were bound to account in respect of messages sent by cable before 6th December, or, in other words, that the abolition of the rates practically took effect as from the beginning of the year for which the guarantee became operative, whenever that year began.

For the purpose of this argument Article 5 must be read as if it expressly authorized the abolition of all rates, so as to change the guarantee into a subsidy. The accounts were by Article 7 to be adjusted quarterly, as had been in fact done under the agreement of 1883. With such a context, and even without it, I do not think that the contract could be construed as showing an intention that the loss which would almost certainly fall upon the

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plaintiffs by reason of abolition should affect them in respect of any period of time antecedent to the date of actual abolition. I think, therefore, that in this view a fresh departure should be made as from that date.

The charges made for the transmission of what was called Australasian traffic, that is, messages between Australia and the rest of the world, were not regulated by the agreement of 1889, but by other agreements to which other Colonies were parties. The arrangement with respect to this traffic was to charge through rates for messages, and to apportion the total rate amongst the owners of the different lines over which they were carried, the plaintiffs being allowed a specified sum in respect of the Tasmanian cable, and other sums in respect of other cables between Australia and Asia and Africa. The defendants contend that the plaintiffs' receipts in respect of these messages were part of the "moneys . . . receivable by them from all sources in respect of such telegrams" within the meaning of Article 5 of the agreement of 1889, and ought to be taken into account in relief of the guarantee. They were, in fact, so treated so long as it was necessary to compute the amount of the earnings of the plaintiffs for the purposes of the agreement of 1883, and, I think, rightly, just as they had been taken into account when it was necessary to ascertain their net profits. The plaintiffs, however, contend that this practice was erroneous, and say that, although the words "such telegrams" *primâ facie* mean telegrams transmitted by the cable between Tasmania and Victoria, yet upon a proper construction they should be limited to telegrams with respect to which the Government of Tasmania had power to reduce the scale of charges. There is much to be said in favour of either view, but, on the whole, having regard to the practice—necessary while the net profits of the company had to be ascertained, and continued after the account to be taken was limited to one side of the ledger, showing receipts only without disbursements—and to the words "from all sources," to which some effect must be given, I think that the contention of the defendants on this point is correct. The defendants are, however, bound until the plaintiffs' share is lawfully altered to account to them for the moneys

payable to them in respect of these messages. This amount up to 31st December 1906 is agreed at £14 19s. 6d.

The plaintiffs are therefore entitled to judgment for £491 3s. 2d., representing the sums of £605 12s. 10d., £12 10s. and £14 19s. 6d. (in all £632 2s. 4d.), less £141 19s. 2d. already paid. They are also entitled to a declaration that the defendants are bound to account to them for all messages at the rates fixed in 1902 until those rates shall be lawfully reduced, and for all moneys payable to the plaintiffs in respect of Australasian traffic, and also to pay the plaintiffs at the rate of £50 per annum in respect of the shipping intelligence until the agreement as to that matter is lawfully terminated.

BARTON J. The first question is whether, according to the true interpretation of the agreements under seal of 24th January 1868 and 14th March 1889, the Commonwealth had "full power to reduce to nothing and abolish" the charges payable to the plaintiff company in respect of the use by the public of the company's submarine cables between Tasmania and Victoria. It is conceded that from the time of the transfer of the Postal Departments of the States to the Commonwealth under the Constitution, in March 1901, the Commonwealth took over the rights and obligations of the Government of Tasmania in respect of these agreements, including "full power at any time to reduce the scale of charges for the transmission" of cable messages between the States mentioned. The cables, of which there are two, belong to the plaintiff company. The first of them was laid by the Telegraph Construction and Maintenance Company under the agreement of 1868, and communication by that cable was opened on the 1st May 1869. In 1873 the plaintiff company acquired all the rights and interests of the Telegraph Construction and Maintenance Company, and took over all that company's responsibilities in connection with its agreement. Both cables were in use at the time when the agreement of 1889 was made, and they are still the only means of telegraphic intercourse between Tasmania and the mainland. The two companies have successively borne the cost of construction, while from 1873 the cost of maintenance and working has fallen entirely on the plaintiff company.

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The history of the transactions between the Governments successively concerned and the owners of the cable is fully set forth in the special case.

The expression to be interpreted is to be found in Article 5 of the agreement of 1889. I need not repeat the Article. The Government (that of Tasmania under this agreement, and now that of the Commonwealth by force of the transfer of 1901) was to have "full power at any time to reduce the scale of charges for the transmission of all or any telegrams to be transmitted by the said cable between Tasmania and the Colony of Victoria, and *vice versâ*." The scale of charges then in existence was, for private messages of ten words in addition to address and signature, which were not to exceed another ten words, one shilling; every additional word, one penny; for press messages not exceeding one hundred words, two shillings; every additional fifty words or part thereof, one shilling. Let us assume, as I think it was assumed in argument, that in the phrase quoted the words "power at any time to reduce" imply that the power may be exercised from time to time. What then is done when the Government in its exercise "reduces" the scale of charges? Primarily the reduction of a charge means its diminution. When we are offered goods at reduced prices we do not expect to get them for nothing, however cheap they may have been before the reduction. But then it is said that the power may be exercised by successive steps until next to nothing remains, so that when an infinitesimal sum is reached by way of residuum, the charges have been practically abolished. To this there is a plain answer. Assuming the successive exercises of the power, there must be something left, and when that ultimate something is reached, *ex vi termini* there is neither a reduction to nothing nor an abolition. In truth, the power to reduce involves a direction to leave something, and therefore entire abolition is not an exercise of the power granted. After reduction, therefore, the rate is the residuum; that is, the whole rate as it stood, minus the part or parts taken off. And then the whole agreement could continue to operate as to the residuum.

Having arrived at the primary meaning of the term to be construed, let us next take it in connection with the rest of Article 5.

What aid is thus afforded to construction? There is literally nothing to help the defendants' contention that reduction includes abolition—which, by the way, is very much like urging that the less includes the greater power. But there is something to confirm the company's contention. The guarantee of the difference between the "message receipts" and the sum of £5,600 seems to imply continuing message receipts as the starting point for the calculation of the guaranteed difference. That difference, again, is to be made good "if after any such reduction . . . the message receipts shall not in any year of the said current period of twenty years, or of the said extended period of twenty years, by reason of such reduction or otherwise, amount to the sum of £5,600." This passage certainly looks as if there were to be message receipts in every year up to the expiration of the agreement; and if the case of entire abolition as a new species of reduction had been within the view of the parties, one would expect to see the term "message receipts" qualified by some such words as "if any." The final words of the Article draw a sharp distinction between the "subsidy" of £4,200 and the "message receipts guarantee" of £5,600. Any such distinction would be absurd in the absence of message receipts, for then the £5,600 would be subsidy as well as the £4,200. It seems to me also that, beyond the implication that the power to reduce is not a power to abolish, it may be further implied from the terms of the Article that the parties did not intend to give power to reduce to what Mr. *Starke* has termed the "vanishing point," because the Article evidently contemplates that the total message receipts shall always amount to something substantial—enough to be a factor of some value in the calculations of business men making such an agreement. The reduction made in 1902 left the rates sufficient to secure this result. The defendants' position then gains no support from the context of Article 5. Is it assisted or weakened by any other part of the agreement of March 1889? Article 1 gives the company "the exclusive right of submarine telegraphic communication" between Victoria and Tasmania for twenty years from the 1st of May 1889, subject to determination in the event of an interruption extending beyond twelve months. Now, the exclusive right can only have been a monopoly. There

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were to be no other cables. The public, therefore, could not communicate except through the plaintiff company's cables; and throughout the period of this concession to them they could charge the then existing rates or "scale of charges," subject, of course, to reduction from time to time. If the power to reduce was a term used by the parties in the sense of a power to "reduce to nothing and abolish," what meaning can be attached to this Article upon the ultimate exercise of such a power, say within six months or even a week of the execution of the agreement? The contention for the Commonwealth must go the length of claiming that such an exercise could have been resorted to, otherwise the whole contention must be abandoned. Would not the grant of "exclusive right" become from that day a grant of nothing, and would not the very term be a mockery? We are not to conclude that in this solemn deed the parties would have used such a term if it carried such a meaning. Let us turn to Article 4, which, in annulling Article 5 of the agreement of 1868, declares it to be the intention of the parties "that . . . the whole of the net profits (*including the said subsidy*) arising in every year from the said line of telegraph shall belong to the telegraph company and their assigns," &c. Can any one read this without admitting that both parties took it for granted that, whatever powers were rightfully exercisable, there would still "in every year" be receipts of the company over and above the subsidy, and therefore arising from the use of the cable by the public, which would be the source of net profits? That view of the parties cannot consist with the intention that one of them should be invested with the power to put an end to such receipts altogether.

The defendants then can take no comfort from any context of the agreement of 1889. But that document is avowedly "supplemental" to what it designates "the principal agreement," that of 24th January 1868, and in Article 9 the parties covenanted that, except so far as the principal agreement was modified by that of 1889, the principal agreement, so far as its provisions were then subsisting and capable of taking effect, should remain in full force. They intended, therefore, that the agreement of 1868 should as far as possible be treated as written afresh into the agreement of 1889. Article 6 of the principal agreement gives

the company "the exclusive right of submarine telegraphic communication" between Victoria and Tasmania for 20 years from the opening of communication, which was the 1st day of May 1869, subject to determination in the event of an interruption extending beyond twelve months. This is the provision, enlarged as to time by Article 1 of the agreement of 1889, which I have already dealt with in connection with that document. Article 8 gives the Government priority in respect of their messages, and provides also that they shall "be entitled to obtain and have the exclusive use of the said submarine telegraph upon giving reasonable notice to the company . . . and upon payment to them of an amount equivalent to the cost of the line and the value of the profits thereof including the Government guarantee"—that is, the subsidy—to be determined by arbitration. It is here made clear that it will be necessary for the Government to pay the cost of the line and the value of the profits before they can obtain a title to its exclusive use. But if the defendants' contention is correct they can, by abolishing the rates between the company and the public, obtain, in effect, the exclusive use of the line without any terms whatever. But that cannot be seriously urged. Thus the wide context of the two agreements taken together gives no help to the defendants' contention as to the meaning of the power to reduce rates; and it derives, as I have endeavoured to show, no support from the narrower context of the agreement of 1889 or that of the Article, taken by itself, of which it is part. I think the plaintiff company are justified in attributing to the two documents the meaning that they were to enjoy up to the 30th of April 1909 the monopoly of the traffic and of the profits thereof; that provision was made that the Government should be enabled to see that these profits did not become inordinate, and to that end should have power to reduce the rates in the interest of the individual citizen: yet that it was never contemplated by the parties that nothing should be received in ease of the guarantee of £5,600, or that it should be brought into the position of a mere arbitrary addition to the subsidy of £4,200 a year. The right of the plaintiffs to make some profit cannot be eliminated from a reasoned construction of the two agreements. To do away with

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the charges altogether would wrongfully annul that right. It would involve the Government in the absolute addition of a sum of £5,600 a year to the subsidy, and take the first named sum out of the category of a guarantee, in which by their own terms the parties have placed it throughout. For they made it a merely contingent liability, payment of the whole of which could never become necessary. In my opinion the construction contended for, instead of carrying out the intentions of the parties in 1868 and 1889, would enable the defendants to defeat those intentions in very material respects. Complete effect can only be given to the compact of the parties by the continuance to the plaintiff company of the opportunity to make some, and perhaps a substantial, profit from the public traffic along their cables. Using the words of *Cockburn* C.J. in the case of *Stirling* v. *Maitland* (1):—"I look on the law to be that, if a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative," or, as the present Lord Chief Justice of England has put it, "without the continuance of which effect cannot be given to the arrangement." Lord *Alverstone* C.J. in *Ogdens, Ltd.* v. *Nelson* (2), citing *Stirling* v. *Maitland* (3), and *Telegraph Despatch and Intelligence Co.* v. *McLean* (4). I hold, therefore, that the Government of the Commonwealth was not entitled to "reduce to nothing and abolish" these rates, for it had impliedly covenanted to do nothing of its own motion to put an end to them, since full effect could not be given to the agreements without their continuance. The Order in Council could not be effective as a lawful exercise of the power to reduce rates. As, therefore, there has been no valid exercise of the power, the plaintiffs are entitled to a continuance of the rates fixed in 1902 until they are reduced in terms of the agreement.

The Statutes No. 13 of 1902 and No. 10 of 1906 clearly relate only to the rates to be charged by the Government to the public. They do not purport to affect the present or any other contracts

(1) 5 B. & S., 840, at p. 852.
(2) (1903) 2 K.B., 287, at p. 297.
(3) 5 B. & S., 840.
(4) L.R. 8 Ch., 658.

such as those now in question, nor have they or either of them any such effect.

We learn from paragraph 20 of the special case that it has been the practice of the Government (or before the transfer of 1901 for the Governments) concerned to collect the cable charges from the public when transmitting telegrams to and from places between which this line of cable was part of the connection, and of the moneys so collected the sums due to the company have been accounted for to them, first by the Governments of Tasmania and Victoria, and from 1st March 1901 to and including 6th December 1906, by the Government of the Commonwealth. This course of dealing, in my opinion, has raised the implication that the charges on telegrams according to the scale in force, and agreed on by the parties, would be collected by the Government and by them accounted for to the company. Since the Order in Council of December 1906 has not as between the Government and the company effected any reduction of the rates at which the former were to account to the latter in respect of messages transmitted by the cable, I am of opinion that the defendant Commonwealth is still under this duty.

In respect of the "Australasian Traffic," as the rates in existence on 3rd December 1906 have not in law been reduced, the agreed sum of £14 19s. 6d. seems to me to be payable. I do not express any opinion on the rights which would have arisen had there been a right to abolish duly exercised.

Payment at the rate of £50 a year for telegrams containing shipping news was in 1883 agreed on between the company and the Government of Tasmania, and was made by that Government up to the transfer of 1901, and afterwards by the defendants until 31st March 1907, when payment was withheld pending the legal decision of the questions between the parties. The arrangement was apparently never reduced to writing. Upon the bare statement submitted to us, which we must take to be all that is available, it seems clear that the parties gave their own construction to the arrangement during a period of 24 years. Their conduct affords the best, if not indeed the only, measure we have of their intention, and as the Government continued to pay and the plaintiffs to receive the agreed sums for

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this service for eighteen years after the agreement of 1889, which is now invoked in bar of the claim, I think we should adopt the construction evidenced by this conduct, and hold the item of £12 10s. to be rightly claimable by the company as a debt not covered by the guarantee. Finally, if the view I have expressed on the main question is correct, it is not material to consider the question whether the company could suffer loss by the abolition of rates for the period between 1st May and 6th December 1906. It would take very strong argument to convince me that the operation could be given a practically retrospective effect. However, the rates have not been abolished.

Answering Question 1 in the negative, I agree in the judgment for the plaintiff company and the declaration of right as proposed.

O'CONNOR J. The answers to the questions submitted depend upon the terms of the existing agreement between the plaintiff company and the Tasmanian Government. But in order to interpret the portions in controversy it is necessary to make some reference to the preceding agreements, and the course of dealing between the parties.

The articles of agreement under consideration were entered into in March 1889. Four years previously the plaintiffs had at their own expense as a necessary preliminary to the agreement laid a second cable. Taking a general view of the whole agreement the consideration moving to the plaintiff company may be divided into three parts. The first part is the annual payment by the Tasmanian Government of £4,200, being interest at 6 per cent. on the capital cost of the first establishment of cable communication. That amount, described as the "subsidy," is to be paid irrespective of any other portions of the consideration during the continuance of the agreement. The fixing of rates is to be in the hands of the company as it had been previously, but subject to the power of reduction vested in the Tasmanian Government by Article 5. By an Article of the first agreement the company were obliged to hand over to the Government any net profits over £7,000 until the £4,200 subsidy was covered. Article 4 alters that basis of remuneration, declaring it to be "the intention of the parties hereto that the Tasmanian Government shall not

henceforth be entitled to have any excess over the sum of £7,000 referred to in that Article refunded to them, but that the whole of the net profits (including the said subsidy) arising in every year from the said line of telegraph shall belong to the telegraph company and their assigns, whether such net profit shall in any year exceed the sum of £7,000 or not;" thus constituting the second part of the consideration, which gave the company substantial compensation for the business risks of their outlay on the second cable, and for working expenses in the opportunity of making profits in a growing business of which they had the monopoly. The third part of the consideration is described in the agreement as the "message receipts guarantee," and is constituted by the following words of Article 5:—". . . and the telegraph company and their assigns shall in each year be entitled to take the whole of the proportion of the moneys collectable and receivable by them from all sources in respect of such telegrams, which proportion of such money is hereinafter referred to as 'the message receipts,' and if after any such reduction in the scale of charges, the message receipts shall not in any year of the said current period of twenty years, or of the said extended period of twenty years, by reason of such reduction or otherwise, amount to the sum of £5,600, the Tasmanian Government shall guarantee and pay to the telegraph company and their assigns the difference between the message receipts and the said sum of £5,600; and any payment made by the Tasmanian Government under this Article shall be in addition to the said subsidy, and is hereinafter referred to as 'the message receipts guarantee.'"

In the first agreement of 1868 the company's right to fix rates was uncontrolled. By the agreement of 1883, acted on in this and other respects, though not signed by the parties, a maximum rate was arranged of 1s. for ten words, and 1d. for every additional word for private messages, and for press messages not exceeding 100 words 2s., and 1s. for every additional 50 words or part thereof. Except for that limitation the fixing of rates remained in the uncontrolled discretion of the company, and at the time of the present agreement the rates arranged in 1883 were in force. The present agreement makes no stipulation for a maximum rate, but it gives in the opening words of Article 5 a

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very important power to the Government in the following words: —"The Tasmanian Government shall have full power at any time to reduce the scale of charges for the transmission of all or any telegrams to be transmitted by the said cable between Tasmania and the Colony of Victoria, and *vice versâ*." Then follows the rest of the Article which I have already quoted. Except for that stipulation the power of fixing rates is in the company as before. From 1883 to 1895 the amount received by message receipts had to be supplemented by the Government under their guarantee, first under the unsigned agreement of 1883 and later under the existing agreement. But, from 1895 until the abolition of rates by the Commonwealth now complained of, the message receipts received by the company were such as to relieve the Government from the necessity of payments under their guarantee. In 1902 the company and the Commonwealth agreed on a reduction of the rates to ½d. a word for ordinary telegrams, including address and signature, and for press telegrams to 1s. for the first 100 words and 6d. for each additional 50 words. And so the rates continued until 4th December 1906, when the Commonwealth Government, by Order in Council purporting to be in exercise of their powers under Article 5, reduced the rates to nothing and abolished them. In pursuance of that executive action they notified the company that as from 6th December 1906 the scale of charges for transmission of telegrams over the company's cables "were reduced to nothing and abolished."

Ever since the opening of the cable service under the first agreement the Government of Tasmania have collected from senders both the land and cable charges, and accounted to the company for the latter. It thus became the established course of business between the parties that the public should deal directly with the government telegraph offices in respect of the whole cost of the message, and that the Government should account to the company for the proportion of moneys received that represent cable rates.

It is important to notice here, although it cannot affect the plaintiffs' rights under the agreement, that an Act passed by the Commonwealth Parliament came into force in October 1906 cancelling the authority of the Government to charge the public

in respect of cable rates. Since the passing of that Act the Commonwealth telegraph offices have ceased to collect cable rates from the public, but they have continued to accept messages and have sent them to the company for transmission as before, and the company have transmitted them in the ordinary course of business. For the period between 1st October and 6th December in 1906 the Commonwealth paid the company on the footing of message receipts, although they collected none from the public. But since then they have refused to pay on any other basis than that of the guarantee under Article 5. For the period between 6th December 1906 and the beginning of the action the company are now claiming a sum equal to what the message receipts for that period would have amounted to if cable rates had been collected on the scale of charges fixed in October 1902. The Commonwealth answer that in reducing the scale of charges to nothing they acted within their powers under Article 5, and that the company after such reduction are entitled to be paid only under the guarantee. This raises directly the question whether the power to reduce rates conferred on the Commonwealth Government by that Article has justified them in abolishing the rates altogether.

The answer to that question will depend upon the meaning to be given to the word "reduce." It was contended on behalf of the Commonwealth that in its ordinary meaning the power to "reduce" must involve the power to abolish, because, after reduction has been carried almost to the vanishing point there will still be power to reduce what remains until nothing is left, and it is asked why, if that result can be attained lawfully by successive reductions, it cannot lawfully be achieved at one stroke?

There may be two methods of reaching the same end under this as under many other contracts, the one method in accordance with what the parties have agreed, the other not. If the latter method has been adopted it is no answer to a complaint of its illegality to say that the legal method would have brought about the same result. But assuming that the word "reduce" is capable in some contexts of the wide meaning for which the defendants are contending, the real question is whether it has

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been used by the parties in that sense in the Article under consideration.

In ascertaining the intention of the parties from their written contract the Court must endeavour as far as possible to give its full and fair value to every word they have used. And where a general expression occurs capable grammatically of a wider or a more restricted meaning the Court will take it that the words have been used by the parties with that meaning which, while effectively carrying out the purpose and object of the whole contract, is not inconsistent with any of its stipulations.

As I have already pointed out, the most important part of the consideration moving to the company under the agreement is the right to earn profits out of message receipts, and the right to the increasing profits which efficient management might bring them in the growing business of the undertaking. The whole contract shows that both parties regarded "message receipts" as an important factor in the undertaking and one in which they had a common interest. Increased earnings meant not only profit to the company, but the relief of the Government from their obligations under the £5,600 guarantee. The system of accounting on which the operation of the guarantee turned implies the continued existence of message receipts during the whole term of the agreement. The guarantee stands behind message receipts. And the amount payable under the guarantee, when there is a falling off by reason of Government reduction or otherwise, is ascertained by comparison with message receipts. The whole working of the guarantee system provided by the agreement assumes that, after the Government have exercised their power of reduction, there will still be message receipts. Taking the agreement as a whole, there is, to my mind, a clear implication of an undertaking that neither party will do anything to entirely put an end to the rates by which alone could be earned the message receipts which are so vital a part of the agreement in the interest of both parties. If, therefore, full effect is to be given to the whole contract, that meaning must be given to the word "reduce" which is most consistent with the preservation of some message receipts.

Taking the word in its ordinary meaning "reduce" does not mean "abolish." It might be difficult to determine exactly how

near to the point of extinction of rates the power of reduction might be lawfully carried in accordance with the agreement. But that question does not arise in the present case. Between reducing a scale of charges to the lowest appreciable amount and its total abolition there is a definite line of demarcation. To interpret "reduce" in the former or more restricted sense is to give it a meaning entirely in harmony with the other provisions of the Article. The reduction of rates to the smallest amount consistent with the existence of message receipts would give the Government ample powers of lessening the cost of cable communication in the public interests, and would still maintain a scale of charges from which message receipts in compliance with the agreement could be collected. To interpret "reduce" in the unrestricted sense for which the defendants are contending would be to render unworkable a vital part of the agreement. In accordance, therefore, with the principle of interpretation which I have stated, I have come to the conclusion that full effect can be given to the whole agreement only by interpreting the word "reduce" in the sense contended for by the plaintiff company. It follows that, in my opinion, the Commonwealth Government were not justified in the action they took in abolishing the rates altogether; that the attempted reduction of rates is of no effect; and that the scale of charges agreed to by the parties and fixed in 1902 is the scale upon which the company are entitled to be paid for all messages transmitted over their cables until it has been been lawfully reduced in accordance with the agreement. The precise form in which the liability of the Government is to be stated is of small moment.

The *Tasmanian Cable Rates Act* 1906 no doubt made it impossible for them to collect cable charges from the public after 1st October 1906, and it is difficult to see how they could be called upon to account to the company for cable charges which they did not and could not legally collect from the senders of messages. But the Act has not in any way affected the right of the company to be paid for transmitting messages over their cables in accordance with the scale of charges in force. Having regard to the course of business between the parties, I think it must be inferred that after the Government ceased to collect cable charges from the

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public they themselves became the senders of the messages and must be taken to have employed the company to transmit the telegrams at the company's existing rates. Under such circumstances a promise on their part to pay according to those rates for all cables transmitted must be implied.

The answer to the first question must therefore, in my opinion, be in the negative, and the plaintiff company's rights must be declared accordingly. I agree that the arrangement for an annual payment to the company of £50 for the transmission of weather telegrams was altogether outside the written agreement governing the ordinary use of the cable, and that the plaintiff company are entitled to payment at that rate for that special work until the arrangement is lawfully terminated. It follows that they should recover in this action the £12 10s. balance claimed under this head. As to the form in which the plaintiff company's rights are to be declared, and as to the item of £14 19s. 6d., I concur in the opinion of my learned brother the Chief Justice. In the view I have taken of the first question it becomes unnecessary for me to express any opinion on the other matters submitted for our consideration. In the result judgment must be entered for the plaintiff company for £491 3s. 2d., with the declaration of rights as stated.

HIGGINS J. The main question in this case is as to the meaning of Article 5 of the agreement of 14th March 1889. This Article has been set out in full in the judgment of the Chief Justice. The Commonwealth Order in Council purports to "reduce to nothing and abolish" the scale of charges for the transmission of telegrams between Tasmania and the Colony of Victoria and *vice versâ*; and it is contended that there was no power to make such an order.

The "scale of charges" in actual use at the time of the agreement of 1889 was that which appears in the unsigned draft of 1883 (Article 1); but this was altered by mutual agreement in 1902 to ½d. per word for private messages, 1s. for press messages of 100 words, &c. There was no scale of charges specified in the agreement of 1889. Under this agreement, as under a previous agreement of 1869, the company was at liberty to charge as it

liked, subject only (as to this agreement) to the power of the Government to reduce the scale. This agreement of 1889 provided (Article 5) that if after any reduction in the scale the message receipts of the company from the Tasmanian business should not in any year of the twenty years from 1st of May 1889 amount to £5,600 the Tasmanian Government was to guarantee and pay to the company the difference. Under Article 2 the Tasmanian Government was to pay, also absolutely and unconditionally, a subsidy of £4,200 per annum during the twenty years. This provision replaced the qualified agreement for such a subsidy contained in the agreement of 1868.

Now, Article 5 allows the Tasmanian Government to "reduce the scale of charges," but if it did reduce the scale, it had to pay the difference between the actual amount of the message receipts and £5,600. The company thus, under the agreement, enjoyed the certainty of receiving during the twenty years a subsidy of £4,200 per annum (interest at six per cent. on £70,000, the agreed "cost of the line" as laid in 1869), and a further sum of £5,600 per annum for message receipts. There is nothing to show the yearly expenses attributable to the line; but there is no reason for supposing that they would eat up the receipts.

It was not contended for the company (see letter of 5th October 1906), and it was not argued by Mr. *Mitchell* on their behalf (although he did not formally admit it) that the power to reduce the charges could not be exercised from time to time. A reduction was made in 1902, but by agreement—not under the power; and the first reduction under the power was the "reduction" now in question, made in December 1906. It is not contended that the reduction by mutual agreement in 1902 put an end to the power to reduce.

In interpreting Article 5 the proper course is first to consider the meaning of the words as they stand; and then to see whether there is anything in the nature of the case which renders that meaning absurd or inconsistent with the rest of the agreement, or with any other subsisting agreements. According to *Grey* v. *Pearson* (1) "the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or

(1) 6 H.L.C., 61, at p. 106.

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some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity or inconsistency, but no farther." We have no right to let our views as to the reasonableness or unreasonableness of the result affect the construction of the words if they are clear in their meaning. But it is our duty to examine and consider the agreement of 24th January 1868, the only previous agreement signed by the parties; for the provisions thereof remained in force except so far as modified by the agreement of 14th March 1889 (Article 9).

Now, there is here no express qualification of the power to reduce the charges. Therefore the power to reduce is a power to reduce without limit, unless there is some limit necessarily implied. The Article enables the company to take—"the company shall be entitled to take"—the whole of the proportion of moneys "collected and receivable by them from all sources in respect of such telegrams;" so that if there is nothing collected or receivable by the company, the company simply takes nothing. Apart from the use of the word "reduce" there is absolutely nothing to indicate that any scale of charges need be left. If any limit of the power to reduce is implied, what is the limit? The only suggested limit of the power is that the reduction must be reasonable. But why is such a limitation to be implied? Who can say even that a clear subsidy of £4,200 per annum, and a guarantee of £5,600 message receipts per annum will not provide a reasonable reward to the company during the twenty years, especially when the grant of a monopoly to the company (Article 1) is taken into account? Even if some limitation of the power were probable under the circumstances, probability is not enough. We have no right to add words to the agreement by conjecture. As *Rigby* L.J. said in *In re Cadogan and Hans Place Estate Ltd.*; *Ex parte Willis* (1):—"But with regard to all agreements I think it will now be found that the tribunals are more and more disposed to refuse to imply what the parties did not express, and to hold that no implication arises unless there is something amounting nearly to a certainty. By 'amounting nearly to a certainty,' I mean that there is something which the tribunal sees must have

(1) 73 L.T., 387, at p. 390.

been meant by the parties." It is, to my mind, idle to say that we are not now called on to say what is reasonable. It must be shown that such a qualification of the power is necessarily implied; and for this purpose there must be, at the least, some indication of a possible basis on which reasonableness in a contract of this kind is to be estimated. In such a case as this, where there is a definite subsidy, and a definite guarantee in case of reduction, there can be no such basis, and no such necessary implication. It is not uncommon in wills and settlements to find an estate given to an eldest son, with a power for the parent to charge the estate in favour of younger children. In the absence of an express limit to the amount of the charges, there is no obligation on the parent to leave a "reasonable," or any, margin for the eldest son. In such a case it might be urged with at least equal plausibility that the power to charge involved that some "reasonable" surplus would be left for the eldest son. The argument would not succeed; for the parent may charge up to the hilt: *Long* v. *Long* (1). I cannot help feeling that there is a tendency among lawyers to be over-subtle in the interpretation of documents, to import ingenious conjectures into plain words, and to confound what may seem *à priori* probable with what must be necessarily implied; and it is our duty continually to revert to the fundamental principle, that we are to take the words as expressing the intention of the parties, and not to infer that they mean something more unless the implication be more than highly probable, unless it be clearly necessary. So far, the question is one merely of interpretation of documents, as to which the principles at law and in equity are the same; and my conclusion is that there is at the least a power to reduce without limit, a power to reduce *ad infinitum*. The difference that remains is the difference between vanishing point and nothing—a difference which is appropriately dealt with by mathematicians, but not cognizable in practical affairs or by the Courts. *De minimis non curat lex*; and certainly not *æquitas*.

There is no point at which the power can be said to be no longer exercisable, beyond which the donee of the power cannot go. If the rate can be reduced to ¼d. per word, it can be reduced

(1) 5 Ves., 445.

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to ⅛d. per word; or to one-thousandth of a 1d. per word. It is well established that Courts of Equity, in dealing with powers, act on the substance rather than the form, according to the spirit rather than the letter. This principle is illustrated in a number of cases cited in *Farwell on Powers*, 2nd ed., pp. 319, 320, &c.; and this High Court, as a Court of full jurisdiction, is not bound by the narrow common law rules as to the mode of executing powers. If A. hand to B. a bag of sovereigns, and give him authority to "reduce" the contents without limit, could B. be checked from taking the last sovereign?

If we may look now at the circumstances under which the agreement was made, it seems, according to paragraph 5A of the special case, that the actual message receipts for several years before 1889 were very much below £5,600. The deficiencies in 1884-1887 had varied between £1,461 and £1,736; in 1888 it was nearly £800; and this deficiency in message receipts occurred even after the company had laid a second cable (1885). The agreement in question was for 20 years from 1st May 1889, and if we are to regard probabilities at all, nothing would have been more natural than for the company to make sure of the £5,600 message receipts per annum for the whole term (in addition to the clear subsidy of £4,200 per annum), even if it ran the risk of losing any possibility of profits beyond these payments during the latter years of the term. The company also secured for itself the chance of being allowed to receive the extra profits from message receipts should they exceed £5,600, and it appears that the annual receipts for some years before 1901 were always in fact more than the £5,600. By Article 1 the company secured for itself also the exclusive right of submarine telegraphic communication for the 20 years—a monopoly which would give the company a great advantage over rival companies, and against the Government, in establishing a connection with customers, and in bargaining for a renewal of the agreement. According to the special case, the Government made the laying down of a second cable a "condition precedent" to entering into an agreement so advantageous for the company. Therefore, a bargain as to reduction of cable rates *ad infinitum* provided that £5,600 message receipts were guaranteed as well as a subsidy of £4,200 per

annum—interest at 6 per centum on the first cost of establishing the communication—has no semblance of absurdity or inconsistency. It is said that the abolition of the cable rates would mean a great increase of business to the company and great expenses. But so would any substantial reduction of cable rates; and it is not contended that the reduction must not be substantial. A great deal has been made of the allegations in paragraph 19 of the special case, as to an actual increase in expenses; but I deny that such a fact, if proved, should affect our construction of the agreement. We should seek rather to know what the parties had before their minds at the making of the agreement; and this we do not know, except that there had been a big deficiency for years. Moreover, not a single extra employé was added to the staff, at the time of the special case, since the abolition of the scale of charges; and although it is said that "since the beginning of October 1906 the traffic over the said cables has considerably increased," it is not alleged that this increase is owing to the reduction of the rates for Tasmanian telegrams. These considerations, however, are to my mind nearly all outside the true question; and I have only examined these in order to see whether there is anything which makes the grammatical and ordinary meaning of the words absurd or inconsistent; and I can find nothing. My answer to the first question is that the Government had power to reduce the scale of charges to nothing.

I concur with the view that the *Tasmanian Cable Rates Act* 1906 does not affect the obligations of the Commonwealth to the company, whatever those obligations are. The Act merely settles what the department may collect from the public.

In view of the express words in paragraph 23 of the special case, taken with paragraph 20, I think that the Commonwealth, by agreeing to the special case in its present form, has precluded itself from contending that it is not under an obligation to continue to pay to the company the cable rates, if the reduction of 4th December 1906 is not valid as between the parties.

Inasmuch as in the opinion of the majority of the Court the reduction is invalid, and the £50 per annum, and the charges in respect of the "Australasian traffic" (to Europe, &c.) are therefore

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still payable, I do not think that we are justified in stating by way of anticipation the effect of a valid reduction.

The question as to these matters, though argued at great length, are asked only in the event of the Court answering "yea" to the main question. Questions (2) and (3) have also been asked and argued by counsel on both sides on the assumption that the reduction was valid.

*Judgment for plaintiffs for* £491 3s. 2d., *and declaration as above. Defendants to pay plaintiffs' costs.*

Solicitor, for plaintiffs, *E. E. Dillon.*
Solicitor, for defendants, *C. Powers,* Crown Solicitor.

B. L.

END OF VOL. VI.