[HIGH COURT OF AUSTRALIA.]

THE KING AND THE ATTORNEY-GENERAL OF THE COMMONWEALTH . . } PLAINTIFFS;

AND

THE ASSOCIATED NORTHERN COLLIERIES AND OTHERS . . . . . } DEFENDANTS.

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SYDNEY, *April* 13, 18-21, 24-28; *May* 1-5, 8-12, 15-19; *June* 7-9, 12-16, 19-21, 26-30; *July* 3, 4, 10-14, 17-21, 24-26; *August* 7-12, 14-18, 21, 23-25, 28, 29; *December* 20, 21, 22.

Isaacs J.

Trusts and monopolies—Inter-State trade—Contract in restraint of—Combination in restraint of—Detriment to public—Monopoly—Proof of conspiracy or combination—Penalties—Injunction—Australian Industries Preservation Act 1906-1910 (*No.* 9 *of* 1906), (*No.* 29 *of* 1910), *secs.* 4, 7, 9, 10, 14A, 14C, 14D.

(A). COMMON LAW RULES OF EVIDENCE.

At common law and apart from any statutory provisions—

(1) Acts of one defendant, however numerous and however pointedly in furtherance of a prohibited purpose, are not admissible in evidence as overt acts of offence against a co-defendant charged with conspiring with the first, unless the two defendants are shown to be associated for that purpose, so as to make the purpose common to both.

(2) Community of purpose may be proved by independent facts, but not necessarily so. If the other defendant is shown to be committing other acts tending to the same end, then though primarily each set of acts is attributable to the person whose acts they are, and to him alone, there may be such a concurrence of time, character, direction and result as naturally to lead to the inference that such separate acts were the outcome of pre-concert, or some mutual contemporaneous engagement, or that they were themselves the manifestations of mutual consent to carry out a common purpose, thus forming as well as evidencing a combination to effect the one object towards which the separate acts are found to converge.

(3) An unlawful conspiracy may be inferred from the conduct of the parties, and if several men are seen taking several steps, all tending

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towards one obvious purpose, and they are seen through a continued portion of time taking steps that lead to one end, it is for the jury to say whether those persons had not combined together to bring about that end which their conduct appears so obviously adapted to effectuate.

(4) Once the combination and its purposes are proved, the acts of any party to it in furtherance of those purposes are attributable to all, as being within the scope and in execution of their common agreement. No act which is not done in furtherance of the common purpose comes within that principle of admissibility.

(B.) STATUTORY RULES OF EVIDENCE.

Secs. 14C and 14D of the *Australian Industries Preservation Act* 1906-1910 which make certain minutes, records, books, letters, documents, etc., evidence against defendants in proceedings for an offence against Part II. of the Act are procedure provisions and are applicable to the trial of proceedings instituted before the passing of those sections by the legislature in 1910.

The sections referred to do not create any new liability or lessen an old one. They leave the rights and liabilities of the parties exactly where they were; but they lay down rules respecting the mode of proof at the trial.

The said sections apply to offences originally created under Part II. of the Principal Act of 1906 although material alterations with respect to such offences are made by the Act of 1910, and the sections apply as to the proof to be given as to such original offences as well as to the new offences created by the Act of 1910.

Semble, that sec. 15A of the Act which provides that in any proceeding for an offence against Part II. of the Act, any indictment, etc., shall suffice if the offence is set forth as nearly as may be in the words of the Act is valid.

Sec. 15A is a stringent provision casting the initial burden of proof upon the defendants in certain cases, but nothing more. It still leaves it to the judicial tribunal to determine on recognized principles the issue of guilt or innocence having regard to any evidence that may be adduced. It is not applicable where the affirmative evidence covers the whole ground.

(C). DISTINCTION BETWEEN CONTRACT AND COMBINATION.

The offence under sec. 4 of the Act of making or entering into a contract in relation to trade or commerce with other countries or among the States with intent to restrain trade or commerce to the detriment of the public is complete at the moment the contract is formed. The offence, however, under the same section, of being or continuing to be a member of or engaging in any combination for a similar purpose continues so long as the combination exists. The combination may be the pure result

of the contract, or may exist without any contract at all, or may originate in a contract and afterwards seriously depart from its terms and take on a new or modified purpose or method of action sanctioned by the conduct or acquiescence of the parties.

Quære, whether sec. 14 D does anything more than formulate a rule of common law leaving the effect of the document made evidence thereunder, when admitted, exactly what it would be apart from the Statute.

(D). INTENT.

The intent necessary for the commission of an offence under sec. 4 must be real and not merely imputed. It must be the actual intent of the defendant, and not that which might, without regard to the true condition of his mind, be deduced simply from the construction of his words used perhaps for another purpose. It is not the intent expressed in a contract to restrain trade or commerce to the detriment of the public to which the defendant is alleged to be a party—if such contract be the act complained of—but the actual intent of the defendant, of which the contract may, however, be evidence. To ascertain the defendant's intent, the Court may go behind the contract altogether, and in cases where the defendant's alleged connection with a combination to so restrain trade or commerce is complained of the Court may, by every lawful kind of testimony, search out the true state of the defendant's mind. Such intent, in the absence of direct evidence given by the defendant, may be proved from his declarations or conduct.

(E). TEST OF OFFENCE.

It is the duty of the Court under sec. 4 to enquire by a course as direct as circumstances will permit as to whether a contract in restraint of trade is to the detriment of the public and not to substitute an enquiry as to whether the contract is unreasonable as between the parties as an equivalent test of legality. The aim of the Statute is to protect the public at large and to give the public the power to prevent injury to the body politic by individual members of the community, and not to protect private individuals from unreasonable contracts into which they have voluntarily entered and which they may lawfully decline to fulfil or from equally unreasonable combinations from which they can at any moment retire without legislative or judicial assistance.

(F). TEST OF REASONABLENESS.

The reasonableness essential at common law to the validity of a contract, which is in fact in restraint of trade, is reasonableness as regards both the private interests of the parties and the interests to the public outside those private interests, but affected by their individual arrangements. If unreasonable towards the party bound, the contract is void; but, even if not so, yet if it results in a pernicious monopoly, which is unreasonable toward the public, it is equally void, unless the objectionable part is severable from the rest.

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(G). PUBLIC DETRIMENT.

"Detriment to the public" consists in whatever is to its loss or disadvantage or prejudice or puts it in a worse position, *e.g.*, a higher price, a worse quality, a restriction in choice, a more precarious supply or delay in delivery of a commodity or commodities.

The question of detriment under the Act must not be determined upon any narrow grounds. The mere fact that prices are raised, though *primâ facie* a detriment, is by no means conclusive, and may be shown by other circumstances not to be so.

Prices may be reduced so low as to work injury to Australian industries by unfair competition and a combination to restore to a fair level prices that had been reduced to a dangerous limit would not for that reason be regarded as contravening the law.

The real substantial effect upon the public must be considered. That which appears at first sight and standing alone to be a prejudice may when considered in conjunction with other circumstances prove to be the means, and the only means, of ultimate and lasting benefit. An apparent advantage may, when properly examined, be seen to be merely temporary and the prelude to severe public loss. Competition unrestrained may drive fair-minded and useful servants of the public off the field, bringing disorganization of labour in its train, and leaving the community at the mercy of those who risk a passing concession for a permanent control.

The Court, having regard to such considerations, must look beyond the surface and investigate causes and effects; it must regard not merely one or more isolated incidents, but the combined circumstances of the situation so far as they are ascertainable before it can pronounce whether upon the whole detriment has arisen, or is likely to arise, and whether the intention to which the law attaches culpability was present in the minds of those charged with contravention. The various parts of the contract or combination when considered separately may be lawful; but the scheme when examined as a whole may be found unlawful.

The public may justly be called upon to pay for a commodity whatever price is necessary to provide an adequate remuneration to both employer and employé; but where the employés wages are justifiably increased, the employer is not justified, when raising the price, in adding to such increase of wages a further bonus for himself at the expense of the public, where he is already receiving not only a fair, but a good profit, and a custom to partition the sale price of the commodity between the employer and employé is no excuse for the employer demanding such extra bonus for himself from the public.

No rigid standard can be adopted by the Court in determining what is a reasonable price; but, having regard to all the circumstances, it is

the function of the Court to guard the community from the artificial maleficence of combination or monopoly. Profit is one practical consideration in the calculation of a reasonable price, but is not the sole or governing test. The nature and extent of the competition, actual and possible, in the business are also material factors in the problem.

(H). MONOPOLY.

The Act does not strike at monopoly of production, but at monopolisation of trade and commerce.

So long as a trader increases his business by legitimate means and in the ordinary course of business, even although he may attract the whole of the trade in any particular direction, he does not offend against the law of monopoly contained in sec. 7 of the Act. When, however, he forsakes his quality of competitor and sets himself to stifle or strike down effective competition, which stands as a commercial protection between himself and the community at large, so as to substantially gather into his own hands the power of dictating the terms upon which the public needs may be satisfied, he does, within the meaning of the section, monopolise or attempt to monopolise. The mere fact of his allowing some other people to come into the arrangement does not take the transaction out of sec. 7.

The prevention or destruction of all reasonable and effective competition—the natural commercial safeguard of the public—is at the root of the conception of monopoly within the meaning of the Statute.

(I). PENALTIES.

Under secs. 4 and 7 of the Act as originally enacted one penalty only is enforceable against each defendant for a continuing offence. Each defendant convicted of a joint offence under the Act is also liable to a separate penalty.

(J). FINDINGS AND JUDGMENT.

Held, first, that inasmuch as the affirmative evidence covered the whole ground of complaint, sec. 15 (A) was unnecessary and was not to be applied, and then on the facts so affirmatively appearing, *held* that the defendants had made and entered into a contract and were and continued to be members of and were engaged in a combination with intent to restrain the inter-State trade and commerce in Newcastle coal to the detriment of the public and that they had also monopolised and combined or conspired to monopolise the said trade with intent to restrain to the detriment of the public the supply and price of the said commodity within the provisions of secs. 4 and 7 of the Act and that the defendants had aided and abetted one another under sec. 9 in the commission of the said offences and penalties inflicted on the individual defendants and an injunction granted against the further carrying out of the unlawful contract or combination.

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SYNOPSIS TO JUDGMENT.

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TRIAL of action.

An action was brought in the High Court by His Majesty the King and the Attorney-General of the Commonwealth against the Associated Northern Collieries, which was an association of a number of companies and individuals carrying on the business of colliery proprietors in the Newcastle and Maitland districts of New South Wales; those companies and individuals; certain individuals who were the representatives of those companies on the board of members of the Associated Northern Collieries; four companies carrying on the business of shipowners; the Associated Steamship Companies being an association composed of those four companies; and the four managing directors of those four companies. By the statement of claim the plaintiffs claimed:—

(1) A declaration that the defendants and each and every of them had been guilty of each and every or some of certain specified offences against Part II. of the *Australian Industries Preservation Act* 1906-1909, and that they and each of them should be convicted thereof.

(2) An order that each and every of the defendants, for each and every of such offences of which he or they respectively might be convicted, should pay a penalty of £500, or such other penalty as to the Court might seem proper.

(3) An injunction restraining the defendants and each and every

of them and their servants and agents from repeating or continuing such offences or any of them.

(4) A declaration that the defendants and each and every of them, after the commencement of the *Australian Industries Preservation Act* 1906, had made and entered into a contract or contracts, which were specified, which was or were in restraint of trade and commerce among the States to the detriment of the public, and had since carried out and were then carrying out such contract or contracts.

(5) A declaration that the defendants and each and every of them, after the commencement of the *Australian Industries Preservation Act* 1906, formed and entered into and engaged in a combination or combinations, which were specified, which was or were in restraint of trade and commerce among the States to the detriment of the public, and had since carried out and were then carrying out such combination or combinations.

(6) An injunction restraining the defendants and each and every of them from carrying out the contract or contracts and combination or combinations referred to in the last two preceding paragraphs.

(7) Such other declarations, orders and injunctions as might be necessary or proper.

The defences of all the defendants were, so far as is material, a general denial of the facts alleged in the statement of claim.

The facts are fully stated in the judgment hereunder.

The action came on for hearing before *Isaacs* J.

Wise K.C., *Shand* K.C., *Starke* and *Bavin*, for the plaintiffs.

Knox K.C., *Lamb* K.C., and *H. Milner Stephen*, for the defendants the Associated Northern Collieries, the colliery proprietors and their representatives on the board of members of the Associated Northern Collieries.

Mitchell K.C., *Broomfield*, and *Ham*, for the defendants the companies carrying on the business of shipowners and their managing directors.

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J. L. Campbell K.C. and *Blacket*, for the defendants J. & A. Brown and John Brown.

Cur. adv. vult.

ISAACS J. read the following judgment :—

PARTIES AND NATURE OF ACTION.

This action has been instituted by the King and the Attorney-General of the Commonwealth against forty defendants of whom sixteen are individuals, twenty-two are ordinary corporations, and two are named as commercial trusts within the meaning of the *Australian Industries Preservation Act* 1906-9.

The action is brought for various alleged violations of that Statute between 24th September 1906, when it commenced, up to 4th June 1910 when the writ was issued.

The defendants consist of two main groups, colliery defendants and shipping defendants. The first group comprises substantially all the proprietors of coal mines in the Newcastle and Maitland districts of New South Wales, together with persons who are directors or otherwise are charged as having taken an active and representative part in the transactions which are said to involve the corporations. The Associated Northern Collieries is the concrete body formed by the Association of the colliery proprietors. The defendants in this group besides the Associated Northern Collieries, are :—Corporations : Abermain Colliery Company Limited, Australian Agricultural Company, Caledonian Coal Company Limited, Central Greta Colliery Limited, Dudley Coal Company Limited, East Greta Coal Mining Company Limited, Heddon Greta Coal Company Limited, Hetton Coal Company Limited, Lymington Collieries Limited, Newcastle Coal Mining Company Limited, New Lambton Land and Coal Company Limited, Pacific Coal Company Limited, Scottish Australian Mining Company Limited, Seaham Colliery Company Limited, South Greta Colliery No Liability, Stockton Borehole Collieries Limited, Wickham and Bullock Island Coal Company Limited and William Laidley & Company Limited. Individuals : J. & A. Brown, Isaac Chapman, Henry Frederick Chilcott, Frederick R. Croft, George Frederick Earp, Henry Skinner

Forsyth, Frederick Livingston Learmonth, Leslie Herbert Lewington, Frederick William Newman, James Ruttley, Francis Sneddon and Daniel Sneddon.

The second group, besides what is called the Associated Steamship Companies, comprises four shipping companies and their respective managing directors.

These are: Adelaide Steamship Company Limited and Edward Northcote its managing director, Howard Smith Company Limited and Charles Morton Newman its managing director, Huddart Parker & Company Limited and William Thomas Appleton its managing director, and McIlwraith McEacharn & Company Proprietary Limited and David Hunter its managing director.

The charges laid against all the defendants conjunctively number nearly thirty, and each set of defendants namely, colliery proprietors, shipping companies and the individuals are separately charged with aiding and abetting.

The multiplicity of charges arises from the endeavour to exhibit the facts so as to satisfy the varied language of the statutory description of offences, and for the present I shall not do more than state in general terms the nature and substance of what is alleged as contraventions of the Act.

Sec. 4 provides that: "Any person, who, either as principal or agent, makes or enters into any contract, or is or continues to be a member of, or engages in any combination in relation to trade or commerce with other countries or among the States (*a*) with intent to restrain trade or commerce to the detriment of the public . . . is guilty of an offence."

Sec. 7 is in these terms: "Any person, who, monopolizes or attempts to monopolize, or combines or conspires with any other person to monopolize, any part of the trade or commerce with other countries or among the States, with intent to control, to the detriment of the public, the supply or price of any service, merchandise, or commodity is guilty of an offence . . . . . ."

Sec. 9 provides: "Whoever aids, abets, counsels, or procures, or by act or omission, is in any way, directly or indirectly, knowingly concerned in or privy to (*a*) the commission of any offence

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against this Part of this Act . . . . . shall be deemed to have committed the offence."

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

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

The defendants concerned are said to come within the ambit of sec. 4 as to combinations—in three different ways—inasmuch as each of them was, and continued to be, and was engaged in the combination.

Next, it is charged that the business conduct of the defendants and their established relations with each other amounted to monopolizing or attempting to monopolize, and to a combination and conspiracy to monopolize the trade and commerce in Newcastle and Maitland coal, with intent to control to the detriment of the public the supply and price of the coal.

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

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

The defence is in effect a denial of all that is charged by the plaintiffs. An objection raised on the ground of the *Statute of Limitations* (31 Eliz. c. 5) has not been persisted in, and need not be considered.

The trial lasted seventy-three days, and besides its duration, was exceptional in its character, partaking necessarily to a great extent of the nature of an investigation.

All the defendants named were represented, except three colliery defendants, namely, the South Greta Colliery No Liability, Central Greta Colliery Limited and Lymington Collieries Limited, the action being discontinued as against them, and except one shipping defendant, namely, the Associated Steamship Companies.

COMMON LAW PRINCIPLES OF EVIDENCE AS TO COMBINATION.

It is proper before entering upon a discussion of the facts to state some legal principles by which I am guided with respect to the evidence on the subject of combination. The first is a common law principle. In support of the case as to combination, evidence was in many instances given and admitted which primarily and taken by itself affected only one or some of the defendants, and then the Crown tendered it or argued or assumed its admissibility as against the other defendants, relying on the ordinary practice and rules relating to common law cases of conspiracy. Authorities were cited and arguments advanced on both sides, the discussion of which

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will be found in the official record of the proceedings. I shall here merely state the rule which in my opinion is the law applicable to this question.

Two things must be carefully kept distinct, viz., the fact of combination, and acts done in pursuance of the combination. There is a tendency to confuse the two, because in many instances acts of individual defendants may be regarded as evidence of the first as well as of the second.

But it is an error to say that acts of one defendant, however numerous, and however pointedly in furtherance of the prohibited purpose, are necessarily admissible as overt acts of offence against a co-defendant charged with conspiring with the first. They are not so admissible unless the two defendants are shown to be associated for that purpose, so as to make the purpose common to both.

Community of purpose may be proved by independent facts, but it need not be. If the other defendant is shown to be committing other acts, tending to the same end, then though primarily each set of acts is attributable to the person whose acts they are, and to him alone, there may be such a concurrence of time, character, direction and result as naturally to lead to the inference that these separate acts were the outcome of pre-concert, or some mutual contemporaneous engagement, or that they were themselves the manifestations of mutual consent to carry out a common purpose, thus forming as well as evidencing a combination to effect the one object towards which the separate acts are found to converge.

For instance, the Crown relies upon the contract alleged, as both an independent ground of offence, and as evidence of the combination.

In the latter aspect, if it be established, then separate acts of the several defendants in furtherance of those purposes of the contract which are part of the common plan may affect the liability of the other parties to the contract; but if it be not established then those separate acts may have first to be examined in order to determine whether they indicate or form a combination, before the acts of one person can be allowed to affect another.

Then I wish to say a few words with regard to the manner in which I propose to regard these separate acts as bearing on the

common purpose. The Judges in advising the House of Lords in *Mulcahy* v. *The Queen* (1), say :—" And so far as proof goes, conspiracy, as *Grose* J. said in *R.* v. *Bussac* (2), is generally ' matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.' The number and the compact give weight, and cause danger." Both the passage quoted and the added words are valuable guides here.

I quote as apposite to the present circumstances, and as expressing my opinion on arguments addressed to the Court, a passage from *Russell on Crimes*, 7th ed., vol. I., p. 191.

" The evidence in support of an indictment for a conspiracy is generally circumstantial ; and it is not necessary to prove any direct concert, or even any meeting of the conspirators, as the actual fact of conspiracy may be collected from the collateral circumstances of the case. Although the common design is the root of the charge it is not necessary to prove that the defendants came together, and actually agreed in terms to have the common design, and to pursue it by common means, and so to carry it into execution, for in many cases of the most clearly established conspiracies there are no means of proving any such thing. If, therefore, two persons pursue by their acts the same object, often by the same means, one performing one part of an act, and the other another part of the same act, so as to complete it, with a view to the attainment of a common object they are pursuing, the jury are free to infer that they have been engaged in a conspiracy to effect that object. It is not necessary to prove the existence of a conspiracy before giving in evidence of the acts of the alleged conspirators, and isolated acts may be proved as steps by which the conspiracy itself may be established. In *R.* v. *Duffield* (3), *Erle* J. directed the jury that it does not happen once in a thousand times when the offence of conspiracy is tried that anybody comes before the jury to say that he was present at the time when the parties did conspire together, and when they agreed to carry out their unlawful purposes; that species of evidence is hardly ever to be adduced before a jury ; but the unlawful con-

(1) L.R. 3 H.L., 306, at p. 317. (2) 4 East, 171.
(3) 5 Cox, 404.

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spiracy is to be inferred from the conduct of the parties; and if several men are seen taking several steps, all tending towards one obvious purpose, and they are seen through a continued portion of time taking steps that lead to one end, it is for the jury to say whether those persons had not combined together to bring about that end, which their conduct appears so obviously adapted to effectuate."

Once the combination and its purposes are proved, the acts of any party to it in furtherance of those purposes are attributable to all, as being within the scope and in execution of their common agreement. And no act which is not done in furtherance of the common purpose comes within that principle of admissibility. The case of *R.* v. *Blake* (1), exemplifies this point.

STATUTORY PROVISIONS AS TO EVIDENCE.

The next is a statutory matter, and I repeat what I definitely stated toward the close of the argument namely, that, after consultation with the learned Chief Justice, I hold that secs. 14 (*c*) and 14 (*d*) of the Act are procedure provisions and as such are applicable to this case, notwithstanding the fact that the action was instituted before those sections were enacted.

They do not create any new liability or lessen an old one, they leave the rights and liabilities of the parties exactly where they were, but they lay down rules respecting the mode of proof at the trial.

This is undoubtedly procedure. See *Lord Halsbury's Laws of England*, vol. XIII., p. 419, par. 581, and the *Colonial Sugar Refining Co.* v. *Irving* (2). Those sections then are not to be rejected for retrospectivity. Then it was said they are expressly made to apply only to a proceeding for "an offence against this part of the Act" that is Part II. of the Act; and as the Act of 1910, in which they are found, altered secs. 4 and 7 of the Principal Act by materially modifying the description of the offence, the old offences with which the defendants are charged were not any longer offences against Part II. of the Act. I can only say, if they are not, they are no offences at all. They are not, and never were, offences

(1) 6 Q.B., 126. (2) (1906) A.C., 360.

against any other Act or Part of an Act; and, if they were immediately before the 1910 Act offences against Part II. of the Principal Act, the mere fact that subsequent conduct may be more stringently visited does not destroy the character of the former conduct or efface the fact that an offence against Part II. of the Act had been committed.

It is quite true that if no statutory provision were made for punishment, a difficulty might arise, but that is met by sec. 8 of the *Acts Interpretation Act* (No. 2 of 1901). The legislature therefore intended that offences already committed against Part II. should remain offences against that Part; that, for the future, certain conduct not previously amounting to an offence against that Part should be such an offence; that an offence against that Part, whether committed before or after the new Act, should be proceeded for; that when any such offence came to be tried, a further rule of evidence should prevail; and, to make it quite clear that no discrimination in this respect was to be made between the old offence and the new, the later procedure rule was inserted as part of the old Statute. No satisfactory reason can be imagined why a simpler method of proof introduced, as we must assume, because Parliament thought it conduced to the elucidation of truth and the effectuation of justice, should be excluded where the case is more difficult to prove and apply only where the means of proof are comparatively light.

The argument may be further tested by having regard to sec. 14 (*a*) which provides that in "any proceeding for an offence against this Part of this Act" the process shall suffice if the offence is set forth as nearly as may be in the words of this Act. If then the day after the Act was passed a document was drawn describing in the terms permitted by that section an offence committed a week before, could it be maintained that the process was not protected? I should say clearly not, and, if not, the same result must flow from 14 (*c*) and 14 (*d*).

The fallacy of the defendants' position really is that it assumes "any proceeding for an offence against this Part" means "any proceeding for a *future* offence, &c." whereas, being procedure, it applies to any such offence whether committed before or after 25th November 1910 for which a proceeding is on foot.

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These sections are consequently applicable to this case. The Crown however has contended that its case has been proved by ordinary common law methods, and without the necessity of resort to those sections at all, and has strenuously pressed that view upon me.

I have accordingly considered the facts, first altogether independently of those sections, and next with their aid, and will state the conclusions to which the separate methods of approach have led me.

VALIDITY OF SEC. 15 (*a*).

I have not acted upon sec. 15 (*a*) at all, and will shortly state my reasons. So far as its validity is concerned, though not finding it necessary to decide, or to invite the Full Court to decide the question, it is desirable to state that I do not abstain from acting upon it, from any present doubt as to its constitutionality. It is a stringent provision casting the initial burden of proof upon the defendants in certain cases, but as I read the section that is all. It still leaves it to the judicial tribunal to determine on recognised principles the issue of guilt or innocence upon any evidence that may be adduced. Indeed I am acting in the present instance upon the basis of that interpretation, by disregarding the provisions of the section altogether.

Similar enactments have been held valid in America as for instance by *Marshall* C.J., in the case of "*The Thomas and Henry*" v. *U.S.* (1), and by *Gray* C.J., in *Holmes* v. *Hunt* (2), where a number of authorities are collected. See also *Li Sing* v. *United States* (3), citing with approval *Holmes* v. *Hunt* (4) and applying the rule of competency to a very strongly worded section; and again *Ah How* v. *U.S.* (5), see also *Craies on Statutory Law*, 2nd ed., p. 471, and *Cooley's Constitutional Limitations*, 6th ed., p. 452.

My experience in this case has convinced me that justice might often be frustrated in the absence of such a provision to meet a condition of affairs where it was morally certain that, at least, a *prima facie* contravention of the Statute had occurred, but had been

(1) 1 Brock., 367, No. 13919 Fed. Cas., vol. 23, at p. 990.
(2) 122 Mass., 505, at p. 519.
(3) 180 U.S., 486.
(4) 122 U.S., 505.
(5) 193 U.S., 65.

so carefully masked that tangible proof of a strict character was unavailable.

SECTION 15 (*a*) NOT APPLIED WHERE AFFIRMATIVE EVIDENCE COVERS THE WHOLE GROUND.

Two considerations however appeal to me in this connection. The first is, that the section itself applies the presumption only in the absence of proof to the contrary and it is immaterial by whom that contrary proof is supplied. The plaintiff may furnish it in his own case, and the defendants contend that has happened here. The other is, that once there is actual affirmative evidence covering the whole ground it is, to say the least, more satisfactory to the Court to deal with the case irrespectively of any presumptions which might otherwise be necessary to start it. I find that the evidence before me, to whatever conclusions it may justly lead, whether upon the whole it establishes the guilt or manifests the innocence of the defendants, does in effect cover the entire ground of complaint and therefore I concern myself only with the facts as they have been proved directly or by inference, and not with the statutory presumptions arising under sec. 15 (*a*) which accordingly I lay aside as unnecessary.

MEMBERSHIP OF COLLIERY GROUP OF DEFENDANTS.

I proceed now to examine the facts. Whether we regard the contract or the combination as the cause of the offence, the primary step is to ascertain the constituent membership of the two groups who form the respective parties.

As to the colliery group—the body styled the Associated Northern Collieries is avowedly an entity; it has appeared, its existence has been acknowledged, and its ownership of minute books and its employment of a secretary formally admitted by all the defendants.

As to its membership, I should have thought no time would have been wasted over that. And yet an extraordinary position exists with reference to this apparently simple matter. The minute books, admittedly the property of the Association—or Vend as it is usually termed—disclose the names of its members; those names correspond—with perhaps some immaterial exceptions—with the

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names of the defendant colliery owners, it is not suggested that any error has arisen in the repeated references to its members, the same learned counsel appear for the Vend and its alleged members—except J. & A. Brown—and yet from beginning to end the defendants have contested the colliery owners' membership of the Association, and raised objections of the most technical character, necessitating the wasteful consumption of hours and days in argument and the laborious piecing together of detached fragments of evidence in order to meet the requirements of technical proof as to this elemental fact. I have, of course, to be careful to see that even the most technical rules are satisfied, and to refuse to be judicially convinced of any contested fact that is not so established. But I feel bound to say that the defendants' attitude in persistently denying the Vend membership, and in insisting that the Crown at a great cost of time, money and energy, should pursue with necessary minuteness the multitude of documents and circumstances requisite to connect the various colliery owners with that Association admits of no reasonable excuse.

The Crown, however, has succeeded in connecting all the colliery defendants with the Vend. With regard to some of the defendants, the evidence is voluminous, as to others it is less abundant, but as to all it is clear and unmistakeable, and, as none of them has given a syllable of evidence in negation, there is not the least doubt that every one of them was a member or the active representative of a member of the Vend.

The Vend minutes begin 5th January 1906 and immediately before the first page of the minutes are seventeen names corresponding to seventeen of the colliery defendants. Other defendants appear later on in the records of the Vend. But, as was argued, and I agree with the argument as a legal proposition, the mere fact that these names appear in the minute book and correspond with defendants' names is not at common law any evidence against the defendants. In the list there are other names, including the Wallsend Coal Company, its named representative being John Wheeler. Mr. Wheeler related the genesis of the Association. At present I refer only to his testimony in relationship to membership. He said, at the first meeting of the proprietors there were present Mr. Lear-

month, Mr. Brown, Mr. Keightly (since dead), and one or two others, and at a later meeting there were pretty well all the colliery proprietors. Coming to particulars, he named specifically as present at meetings, Mr. Learmonth of the Australian Agricultural Co., Mr. Brown of J. & A. Brown, Mr. Chilcott of the Scottish Australian Mining Company, Mr. Keightley of the Newcastle Company, Mr. Chapman of the Seaham Company, the Caledonian Company by various representatives, including Mr. Newman, the Pacific Company and the Co-operative Company by their representatives, the East Greta Company by Mr. Earp, the Wickham Company—he thought about 30 companies in all. He recollected Mr. Simpson, the representative of the Pacific Company and afterwards one of the Vend's solicitors, producing at a meeting about the end of March 1906 a document similar to Ex. S. which was printed and that it was discussed as the proposed Vend agreement. Reference to that Exhibit shows that 16 of the defendants are named as members.

The minutes of 30th March (Ex. F., p. 37) contain the actual signatures to a resolution of ten of the defendants, seven being coal proprietors, and three being representatives. On April 24th 1906 a written agreement was entered into with reference to the tenders called by the South Australian Government Railways, and it recited the contemplated formation of the Associated Northern Collieries. By this agreement a number of collieries—twelve of which are defendants—guarantee some of their number in respect of the supply of coal under those tenders at prices determined. The agreement has importance in another direction, but its materiality now is as to the parties and signatures. By October 1906 the Association had been formed, and in that month a regular account in the name of the Associated Northern Collieries was opened with the Union Bank of Australia at Newcastle where Mr. Ford was manager. He produced a copy of that account extending from October 19th 1906 to 25th April 1911 and various authorities in connection with it. These are Exhibit C. An authority dated 31st October 1906 is signed by Learmonth, Keightly, John Brown, Chapman and Forsyth, all of whom are described as the Committee of Management, and by Lewington as Secretary. Another document appended dated 13th March 1907 was on letter paper with printed heading " Associ-

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ated Northern Collieries," and signed by Learmonth as Chairman, sending forward the signature of the Secretary, A. R. Cant. Another document is attached, dated 16th December 1909 signed by Learmonth as Chairman, and forwarding Lewington's signature. A large number of vouchers for debits and credits in connection with the banking account are contained in Exhibit E. Everyone of the colliery defendants—except Chilcott, Earp, Newman, and Stockton Borehole Company—is brought into direct connection with the Associated Northern Collieries by means of the very practical test of receipts or payments or both evidenced by these documents, and the bank account of which they are the vouchers. The Abermain Company paid moneys to the Association twice in 1906, six times in 1907, and once in 1908. The Australian Agricultural Company paid twice in 1906, ten times in 1907 and once in 1908, and received moneys from the Association three times in 1907, three times in 1908, twice in 1909, six times in 1910, one of those occasions being before the date of the writ, and the others evidencing intention to continue, and once in 1911. Brown paid to the Association twice in 1906, nine times in 1907, once in 1908, once in 1909 and twice in 1910, once before and once after the writ, and received once in 1907. The Caledonian Company paid once in 1906, ten or eleven times in 1907, once or twice in 1908, once in 1909 and twice in 1910, once before and once after the writ, and received three times in 1907, once or twice in 1910 after writ and once in 1911. Chapman was a member of the Committee of Management and as such signed cheques. Croft paid once in 1906, eight times in 1907, twice in 1908, and once in 1909, and received once in 1910 after the writ. The Dudley Colliery Company paid twice in 1906, eight times in 1907, twice in 1908, and received once in 1906, five times in 1907, twice in 1908 and once in 1909. The East Greta Company paid twice in 1906, nine times in 1907, and once in 1908, and received once in 1908, once in 1909 and once after writ in 1910. Forsyth was a member of the committee and signed cheques. The Heddon Greta Co. paid twice in 1906, nine times in 1907 and once in 1908, and received once in 1908, once in 1909, and once in 1910, after the writ. The Hetton paid twice in 1906, eight or nine times in 1907, twice in 1908 and once in 1909. Learmonth was Chairman and a member of

Committee and signed cheques and moneys were frequently paid into a Learmonth trust account. Lewington was for a time Secretary and was a member of Committee and signed cheques. He also received moneys as on 29th January 1908, 13th January 1909 and 24th February 1910. The Newcastle Co. paid three times in 1906, eight or nine times in 1907, once in 1908, once in 1909 and once in 1910, and received once in 1906, six times in 1907 and four times in 1908. The New Lambton Co. paid twice in 1906, four times in 1907, twice in 1908 and once in 1909, and received once after writ in 1910. The Pacific Co. paid twice in 1906, nine times in 1907, twice in 1908, once in 1909, and received once in 1909, and once after writ in 1910. Ruttley paid twice in 1906, four times in 1907, once in 1908, once in 1909 and once in 1910, and received once in 1908. The Scottish Australian Mining Co. paid twice in 1906, eight or nine times in 1907, twice in 1908, once in 1909 and once in 1910, and received once in 1906, five times in 1907, and twice in 1908. The Seaham Colliery Co. paid twice in 1906, and ten or eleven times in 1907, once in 1908 and once in 1910, and received once in 1906, four times in 1907, once in 1908, once in 1909, and once in 1910. Sneddons paid twice in 1906, nine times in 1907 and twice in 1908, and received once in 1910 after the writ. The Wickham and Bullock Island Co. paid once or twice in 1907 and once in 1908. William Laidley & Co. paid twice or more in 1906, nine times or more in 1907, twice in 1908 and once in 1909, and received once in 1906, three times in 1907, twice in 1909 and twice in 1910 after writ.

The nature of the Association as appears from its minutes—admitted on all hands—is such as to preclude any idea of these payments and receipts being otherwise than as by and to the members of the Association itself.

With regard to Chilcott, he assisted, as Wheeler has stated, at the early meetings held to form the Vend, he as manager of the Scottish Australian Mining Co. signed the minutes of 30th March 1906 and the guarantee agreement of 24th April 1906 and the letter of the next day, Ex. B5, to Scott Fell declining to supply coal for the South Australian Railway requirements. It is also admitted (Ex. V5), that he has been continuing since 24th September 1906

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the Sydney manager of the company, and the person appointed by the company to carry on its business in New South Wales. G. F. Earp signed the resolutions of 30th March 1906 for the East Greta and Heddon companies, and in the same capacity signed the guarantee of 24th April. He is admitted (Ex. V5) to have been continuing since 24th September 1906 the manager of the East Greta Co., and three letters in Ex. X, viz., two of March 18th 1907, and one of 6th September 1907 with its enclosure, are evidence that he on behalf of Heddon Greta Co. was acting as a member of the Association. F. W. Newman, as appears from Wheeler's evidence, attended meetings of the projected Association as representative of the Caledonian Co., it is admitted (Ex. V5) that he has since 24th September 1906 continuously been manager of that company, and as coal manager of the company he endorsed for the company the only two cheques to order paid by the Association to it, as already mentioned, namely, those dated 9th May 1907 and 24th July 1907. He also for Howard Smith signed the letter dated 12th December 1908 on behalf of the Caledonian Co., addressed to the Secretary of the Association (Ex. U). The Stockton Borehole Collieries Limited was formed about 1909 (see letter 24th March 1909 in Ex. U) to open up the Borehole Colliery at Teralba, formerly worked by the old Stockton Company and by that letter the new company asked Huddart Parker & Co. to list their coal so as to get a proportionate part of the railway trade in Victoria and South Australia, as well as of the general trade (see also p. 219 of the proceedings). The Vend, by letter of 6th April 1909 (Ex. U), permitted this request to be acceded to. The common law evidence as to this company is more slender than in the case of the others, arising largely from the lateness of the formation of the new company. But in the absence of any contradiction which would have been the work of a few minutes, I am satisfied this company from April 1909 was a member of the Vend, just as its predecessor clearly was.

Besides these evidences of connection there is in most cases abundant proof of other kinds that the defendant colliery owners were the constituent members of the Vend. Thus in the case of the Australian Agricultural Co. there are the letter of 30th March 1907

(Ex. O1), the telegrams of 15th and 16th May 1907 and the letter of 16th May (Ex. X), and the correspondence contained in Ex. Z6 between that company and Kethel & Co., in which I do not include the document dated 19th June.

Brown's continued connection is also shown for instance by their letter of 17th August 1908 (Ex. U), and their telegram of 6th November 1908 (Ex. O8). As to the Caledonian Co. there are the letters of 27th November 1906 (Ex. X); Newman's latter of 12th December 1908 already mentioned; and Howell's letter of 10th March 1909 (Ex. O1). Chapman appears constantly in the correspondence and notably the part he took in the Haynes' article. With respect to the Dudley Co., there are also the letters of 26th and 28th May 1908 (Ex. U), and that of November 22nd 1907 (Ex. O1). Forsyth is continually a party to the correspondence. The Heddon Greta Co. expressly admits its connection in the letter of 12th August 1907 (Ex. X). As to the Hetton Coal Co. there is the letter of 23rd December 1907 (Ex. X); Learmonth, like Forsyth, is visible throughout and Lewington frequently so. The Pacific Co. wrote the letters of 22nd and 25th February 1907 (Ex. O1); the Seaham Co. is affected by the letters of 20th, 22nd, 23rd and 26th November 1906 (Ex. X) and 31st March 1908 (Ex. O1); William Laidley & Co. wrote the letters of 5th April 1906 (Ex. T4) and of 25th March 1907 and 10th December 1907 (Ex. O1), and there is the correspondence of 22nd and 23rd April 1908 (Ex. U. p. 6), and also the letter of 7th October 1909 (Ex. S).

Membership of Shipping Group of Defendants.

Besides direct evidence which impliedly recognises the existence of the Vend, and its connection with the shipping defendants' affairs, the correspondence of the shipping companies enumerates several defendant colliery companies in a way which indicates the shipping companies' knowledge and recognition of these coal companies being members of the Vend.

Howard Smith & Co. by C. M. Newman, its managing director, signed on behalf of the Caledonian Co. the guarantee of April 24th 1906. On 29th January 1907 it wrote by C. M. Newman to Chapman as the acting-Secretary of the Vend, on 4th March 1907 a

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similar letter to Murrell as Secretary of the Vend (Ex. O1), on 23rd April to Cant as Secretary of the Vend (Ex. X). The last-mentioned Exhibit contains constant instances of recognition of the Vend and members of the Vend, and particularly the letter of 9th August 1907, which refers to a printed agreement containing a list of the members. On 29th June 1908 they paid (Ex. E) to the Vend £3,132 11s. 3d.

As to Huddart Parker—the guarantee of 24th April 1906 was on the basis of this company and the Adelaide Steamship Co. receiving the quotations agreed on, and becoming the contractors to the South Australian Government and this happened. By letter of 21st May 1906 (Ex. O1), these two shipping companies acknowledged the guarantee arrangement and the acceptance of their tenders. On 31st August 1907 they paid into the Vend £44 14s. (Ex. E). Finally Appleton's letter of 21st January 1908 (Ex. U) contains a list of pits.

As to McIlwraith McEacharn & Co. reference may be made to the letter of November 1906 to Chapman as Secretary of the Vend enumerating the pits (Ex. O1) and the company's letter to Chapman of 9th January 1907 (Ex. X).

The various tenders and contracts in evidence and the general method of dealing together with what I have specifically mentioned leave no shadow of doubt that the shipping defendant companies and individuals had the most complete acquaintance with the membership of the Vend and knew that this embraced the defendant colliery proprietors.

Viewing this issue, from the strictest aspect of common law requirements, the proof of the Crown's allegation as to membership of the Vend is overwhelming, and leaves no shred of justification for the deplorable waste of time the persistent denial has occasioned.

I have been greatly tempted to deal with the issue by dismissing it as too absurd for serious treatment in the face of the evidence poured upon it, and the knowledge of the truth that the defendants one and all undoubtedly possessed. But as it was solemnly maintained to the end, as if it were a real and substantial contest, I have felt it my duty after all to treat it seriously.

Calling in aid sec. 14 (*c*) the matter is much simplified. The

minute books of the Vend disclose the presence of the defendant collieries, communications to them and the presence on various occasions of representatives of the shipping defendants. The issue I have just dealt with is a signal proof of the value of such a provision in the interests of justice and economy.

DISTINCTION BETWEEN CONTRACT AND COMBINATION.

Having identified the personnel of the two groups, the next issue is as to the alleged contract between them. "Contract" and "combination" in sec. 4 are alike in having agreement as their basis. But an important distinction exists. The offence which one commits who makes or enters into any contract, etc., is complete at the moment the contract is formed. That definitely ends the contravention, and the act constituting the offence cannot be prolonged beyond that point. But the offence which a person commits, who, "is or continues to be a member or engaged in any combination" has no definite stopping place short of the termination of the combination itself, or his connexion with it, and so long as the objects are persevered in and its purposes are adhered to the persons associated are and always continue to be members of and engaged in the combination. The combination may be the pure result of the contract—it may exist without any contract at all, it may originate in a contract, and yet seriously depart from its terms and take on a new or modified purpose or method of action sanctioned by the conduct or acquiescence of the parties.

DEFENDANTS' SILENCE AS TO EXISTENCE OF CONTRACT.

First as to the contract. Ordinarily, when litigation brings into controversy the existence of an alleged bargain, its nature and terms, and the circumstances leading to its adoption or indicating intention or effect, the parties themselves offer direct evidence. Here the position is different. The defendants are the only persons who could furnish direct and absolute testimony and they have advisedly abstained from doing so. I do not doubt they have been well advised in adopting that course, but it carries with it certain consequences. Two reasons were advanced by the learned counsel for this abstention. One is the insufficiency of the Crown's evidence to make a *prima facie* case. That, if sound, would of course end the

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whole matter. The other is, that it would have occupied much time and involved considerable expense. This, in the view of the issues involved, their pecuniary importance to the defendants, the significance of some of the evidence touching the honor and probity of the defendants or some of them and the course pursued at the trial, strikes me as a reason without any reality behind it. In the first place if the evidence, however lengthy, sustained the innocence of the defendants, it is not they, but the Crown, that, in the absence of special circumstances, would have to bear the cost of its production, as well as the rest of the costs of these proceedings.

CONTRACT CHARGED ORIGINALLY MADE IN 1906 AND CONTINUED TO END OF 1907.

The agreement alleged in par. 41 of the statement of claim is substantially founded on the authenticity of a document part of Ex. S. That document was produced on 9th June 1910 to Mr. Hudson, Customs Officer, by Mr. A. R. Cant, the Secretary of the Vend, as a fair copy of the agreement between the Associated Northern Collieries and the Shipping Association under a demand upon him as such Secretary. As Cant was clearly for this purpose the representative of the then existing members of the Vend, sec. 14 (*d*) in itself would make that document admissible as evidence against all the defendant colliery owners, and by connection with them the colliery managers would be affected. But even that section would not carry the evidentiary effect of the documents so far as to reach the shipping defendants. And, although it is not necessary to decide it, it may be that sec. 14 (*d*) does nothing more than formulate a rule of common law and leave the effect of the document, when admitted, exactly what it would be apart from the Statute. At all events, I shall deal with this matter outside the statutory force of sec. 14 (*d*). Cant was the Secretary of the Vend and the natural custodian of its papers, was found in official possession of them, and delivered them up in pursuance of a lawful demand upon him as representative of the Vend, made under a statutory power. On the occasion when production took place Mr. Rankin the Vend's solicitor was present, and the occasion was a continuation of the original demand of 18th May, when

Messrs. Forsyth and Learmonth were present and when Forsyth said "Mr. Cant will offer no factious opposition to your demand for documents but we must protect ourselves before answers are given." Learmonth also said "Yes." By protecting themselves they meant consulting Rankin, which they did. The production was in the strictest sense official and representative by the Secretary with the sanction of two members of the Executive Committee, one being Chapman, and under the guidance of the Vend's solicitor.

The presumption then is that the document was not held by Cant otherwise than as such representative. It is the same as if found in and produced from the actual possession of all who constituted the Vend at the time. These, as already stated, were the defendant colliery owners. In the natural course of affairs such a document in the mature condition of Ex. S. would be the product of previous discussion among the colliery proprietors, and of negotiations with the persons therein described as the other contracting party, and this is confirmed by the minutes of the Vend. Consequently, as against all the colliery defendants, I take it, that Ex. S is *prima facie* proof that negotiations between them and the shipping defendants had reached a certain stage—namely, that embodied in the document, which was preserved unaltered in the condition in which it was found. It presents all the form and substance of a definite agreement and accords with the surrounding circumstances.

If it bore signatures it would of course be complete and definite and the proof would be direct. But it is not signed and consequently the mutual assent of the separate groups is open to dispute, and has been disputed. The want of formal signature is in itself a circumstance in favor of the defendants, and tends so far to show the negotiations stopped short of contractual relationship.

There is, however, other evidence having an opposite tendency either as explaining the absence of signature consistently with assent otherwise given, or as affording circumstantial proof of assent in some way communicated. This evidence is of more or less convincing force in proportion to the strength of probability of the subordinate facts to which it is directly applicable being more or less likely to exist in the presence or absence of assent.

When the negotiations started between the two groups in the

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early part of 1906 there were no statutory impediments to a bargain of the nature herein complained of, and had the law remained so, the want of signature to a document apparently intended to be signed would be a more formidable obstacle than it is. The Principal Act however was assented to on 24th September 1906 and it may be assumed that, for some days before that date, the passage of the Bill through both Houses had actually occurred or was or to be reasonably anticipated or apprehended as a matter of common interest and what is more of special interest to the parties in negotiation. There appears on the Vend minutes of 13th September 1906 (Ex. F, pp. 140, 141), a relevant and significant entry. The passage is as follows :—" Agreement. Mr. Simpson pointed out that any agreement that might be signed would bring the proprietors under the provisions of the *Australian Industries Preservation Act* 1906, and in his opinion it would be more advisable to carry on our operations on the lines of the agreement already decided upon but without any signed document."

I agree with the suggestion that this refers directly to the Vend agreement, and not to the combined agreement. But if danger was apprehended from the formal signing of the first to which the collieries alone were parties, and if prudence dictated assent by " understanding " without visible evidence of the fact, there is nothing surprising to find the same policy extended to the wider and infinitely more questionable arrangements in which both collieries and shipping companies were included, and which were proceeding concurrently with the Vend agreement.

Thus we find in the minutes of September 25th 1906, the day after the Act came into operation (Ex I, p. 1), the following entry :—" S.S. Owners' agreement. Mr. Simpson reported that he had gone through this in Melbourne with the S.S. Owners and there were a few matters that still required to be settled as follows—Right of S.S. Owners to take 180,000 tons per annum Southern coal, this must be the total quantity including bunker coal. Right to take Brisbane coal up to 200,000 tons per annum. The quantity taken from Wallarah not to exceed that purchased during 1905. A fair copy of the agreement when finally settled to be handed to the members for guidance."

I have then to look at the surrounding circumstances for enlightment as to the fact and time of assent. With regard to the colliery defendants there is very distinct testimony. The colliery proprietors adopted temporarily on 3rd April (F. pp. 49 to 51), a scheme which included the following :—" That no coal will be sold by the Association in the Commonwealth (New South Wales excepted) except to the steamship companies, set forth in the proposed agreement for carriage."

It is to be noted that Captain Webb and Appleton were present, and that Appleton was in the Chair. Wheeler (at p. 327) proves that on 12th April 1906 (F. 57), there was a meeting of the colliery proprietors at which " the proposed agreement between the Associated Northern Collieries and Steamship Owners' Association was read by the Acting-Secretary, the clauses discussed seriatim, and that amendments were noted by Mr. Rankin for reference to the Steamship Owners' Association." On the same page of the evidence Wheeler proved the accuracy of the minutes of 24th April 1906 (F. 65). These minutes are of extreme importance respecting several matters, but on the present point it may be observed that amendments in what is called the Steamship Owners' agreement were considered and the terms apparently settled. The full personnel of the contracting parties for the shipping side was left in doubt and the following resolution was passed (see at p. 69) :—" Resolved, that in connection with the admission of James Paterson & Co. and the Melbourne Steamship Company into the agreement with the steamship owners the contract with the coal proprietors shall be signed by all the steamship companies including the Melbourne Steamship Company and James Paterson & Co. and Mr. Hunter gives his undertaking that immediately on his return to Melbourne he will endeavour to make arrangements with the companies mentioned, and in the meantime the Association proceeds to complete its scheme of amalgamation, it being understood that, if the Melbourne Steamship Company and James Paterson & Co. will not accept the proposals submitted by Mr. Hunter to give them at least the trade which they had before retiring from the Steamship Owners' Association, then the coal proprietors will enter into agreement with

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the four steamship companies alone, subject also to a proper agreement being entered into with Mr. John Brown."

The whole course of conduct of both sets of defendants indubitably establishes that in the latter part of 1906, in 1907, and in 1908, I defer 1909 and 1910 for the present, they were working together under some agreement of the nature of the copy agreement contained in Ex. S and having terms apparently well defined. As regards the colliery defendants, the evidence teems with unquestionable proof of this.

Frequent references to an existing combined agreement are made in the correspondence for instance by Newman on 18th December 1906 (X. p. 18), where he says:—"The steamship companies' agreement with the collieries further protects both parties in this direction;" by Chapman on 9th January 1907 (X. 23); 16th January 1907 (X. 31); Cant 1st August 1907 (X. 124); Cant on 16th April 1908 to Appleton (U. 66), where it is styled a "compact," and on 10th June 1909 (U. 135), where it is referred to as "the general arrangement between us." These are only some of the very many references to a well recognised agreement between the two sets of defendants. No formulation of terms was suggested other than the copy in S—except Y, which was, as I find, an earlier draft, and superseded by S. I have therefore to inquire on the "contract" charge, whether the evidence shows to my satisfaction that the agreement which the parties recognised and acted on is correctly represented by the unsigned but carefully preserved document in Ex. S.

The Newman and Appleton correspondence (Exs. X and U) are highly important. From the Vend's standpoint it needs no further consideration to affect the defendants. The letters were in every case by or to the Vend Secretary or Acting-Secretary, so inferences may as legitimately be drawn against the colliery defendants as in the case of mutual correspondence found in an ordinary merchant's office.

But as regards the shipping defendants, further considerations are necessary. First as to Newman and Appleton themselves, of course they are affected, each by his own correspondence, and it is admitted that the shipping companies are equally affected by

whatever affects their respective managers. Consequently Ex. X is evidence against C. M. Newman and Howard Smith Co. and Ex. U against Appleton and Huddart Parker & Co. Nevertheless it was not admitted—but on the contrary strenuously denied—that Newman or Appleton respectively was in any way shown to have had authority to represent the three shipping companies other than the one of which he was manager. The facts however leave me in no doubt at all that as a medium of written communication with the Vend Newman first and Appleton afterwards were the duly authorised representatives of all four defendant shipping companies, and I am constrained with regard to the objections raised in respect of their representative character, and the wasteful consumption of time and money in contesting what is almost a patent fact, to make the same condemnatory observation as I have applied to denial of membership of the Vend. At the same time, Mr. *Mitchell*, so far as his clients were concerned, stated that he did not dispute that in 1907 and 1908 there was an arrangement that the shipping companies should carry exclusively and deal exclusively subject to the modifications for Southern and other coal, and that they did that. He also admitted that the four defendant shipping companies were in the arrangement from the first, and the other two, either at the same time or afterwards.

An admission was made by Mr. *Mitchell* (p. 187) with respect to Newman upon which the Crown is as a matter of strict right entitled to rest for reasons I gave during the course of the trial (see also *Sarai Chunder Dey* v. *Gopal Chunder Laha* (1). But though that is so, yet in view of the way in which the admission was made, and of the application to withdraw it, I prefer, so far as I am concerned, to examine the evidence apart from that admission, and my conclusions are reached as if it had never been made. The resolution of 24th April above quoted formally recognised a Steamship Owners' Association from which two companies had withdrawn. Then a mass of business operations extending over two years, which will be more appropriately detailed at a later stage, lead me unhesitatingly to the inference that the shipping companies were so far acting in concert with one another and with the Vend, that some

(1) L.R. 19 I.A., 203.

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single channel of communication was as a matter of business necessary or in the highest degree convenient. And when we find that men like Newman and Appleton—not together but in regular sequence—themselves managers of companies concerned, take upon themselves to conduct lengthy and continuous correspondence, on the basis of being duly authorised representatives of all four companies, in close business interest with each other, when they assert that these four companies are in association for the purpose, and when they purport to convey information to and fro on that basis it would be imputing to them gross dishonesty and wilful deception both towards the other shipping companies and to the collieries to believe they were not really in the position they assumed. I do not believe they were saying and acting thus contrary to what they considered was the truth. That strictly speaking does not make their actions evidence against the other companies; these business men acting successively as the sole channel of communication between two huge groups of business operators, when some such channel was obviously necessary, still leaves open the technical objection that their actions may have been the result of fraud, negligence, or error, long continued, systematically pursued and wholly unexplained. Error and negligence so profound and extensive and unnatural are to me incredible; fraud would there have been so comprehensive and yet so senseless, useless and disloyal to all concerned that I decline to entertain it. The objection is left so frail that it needs but the slightest touch to overturn it. The repeated movements of all the companies in accordance with the statements in the correspondence, and often with no other rationally assignable cause or source of activity than the correspondence itself, are in the circumstances sufficient, and as I consider solid and satisfactory indications of connection—particularly in the absence of contrary evidence, where explanation, if possible at all, would have been so easy. It is incredible that the Vend could have been deluded so long and so successfully by any false pretence of Newman's or Appleton's authority, or that they could as late as 5th December 1907 (X. 194) have addressed Newman as "The Chairman, Inter-State Steamship Companies' Association," and that several letters would have followed on that footing unless the fact were

so. And if some other channel of communication had ever been provided, that fact is one not likely to have been concealed from the Court.

Where for instance the medium of communication changed from Newman to Appleton that fact is shown. Appleton took up the correspondence substantially where Newman left it. In Newman's letter of 31st December 1907 (X. 210), there is a statement "We confirm wires exchange &c." Appleton, on 20th January 1908 (U 30), refers to this as "our offer of 31st December." He conducted exactly the same class of correspondence and what is important is that so far as the evidence discloses no one else did. As before, the conduct of both sets of defendants where it can be traced answers the course of the correspondence down to the end of the chapter. Looking at the objection from a legal standpoint and as a part of these proceedings the obstruction to the recognition of Newman's and Appleton's representative character as amanuenses of the four shipping companies in the correspondence with the Vend must be designated as frivolous in the extreme, and as delaying and impeding and obscuring the consideration of the real merits. Whether it was worthy of the defendants having regard to their actual relations to the community, and the nature of the charge they have been called upon to meet, is beyond my province to inquire. I take the correspondence contained in Exs. X and U as being communications between the associated collieries on the one side and the associated shipping companies on the other, and as being together with the proved acts of the parties proper materials by which to ascertain by common law rules of evidence whether there was an agreement between the two groups and whether that agreement is correctly represented by the document part of Exhibit S.

There was undoubtedly an association of shipping companies in connection with the inter-State coal trade, and the four defendant shipping companies were members of that association, and Newman and Appleton were successively not only the *media* of communication with the Vend, but were naturally the custodians of records of the association in relation to its common business. These records, unless communicated to or acknowledged by the

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Vend, I do not on common law principles read so as to affect the latter body, any more than I would affect the shipping companies with purely Vend records.

As to the shipping association records, there is for instance produced by Newman a document headed : (Exhibit X, p. 100 and following pages) " Precis of meeting of the representatives of the Newcastle Vend and shipowners held at the offices of the A.S.O.A. Melbourne on Tuesday 23rd July 1907." There were present—Hunter, Northcote, Appleton, H. B. Howard Smith and Hamilton—these represented all the four defendant shipping companies. The Vend representatives were Forsyth and Howell. Without descending to particularities in this connection, excepting in one instance, it is sufficient to say that the whole line of discussion recorded would be inconceivable and absurd unless underlying the proceedings there was some definite arrangement in the nature of a contract. That exception is the passage on page 110 as follows :—" Discussion here ensued regarding construction to be placed on a section of the agreement." Hunter's letter of 25th July 1907 addressed to Forsyth and Howell (Ex. X, p. 114 and U, p. 19) confirms the understanding verbally arrived at at that meeting and records in formal terms the views there expressed. That letter corresponds to the expressed expectation of Forsyth at the end of the conference. Cant's letter of 1st August 1907 addressed " H. B. Howard Smith Esq., The Howard Smith Company Limited," refers to the conference. The correspondence after 13th April 1907 was so addressed in pursuance of Newman's letter of that date (Ex X 62), in which he stated that during his absence in England " the correspondence as between the Associated Steamship Companies and the Associated Northern Collieries will continue to be conducted from this office." I refer also to Ex. X, p. 86 (6th July 1907), Ex. X, p. 94 (15th July 1907), Ex. X, p. 95 (16th July 1907), Ex. X. 198 (9th December 1907). The last-mentioned letter merits special reference because it is headed " Associated Northern Collieries," signed " A. R. Cant Secretary," and addressed to " C. M. Newman Esq. Chairman Inter-State Steamship Owners' Association," and contains the following passage :—" These rates will of course be subject to the terms of the agreement between your Association as the purchasing agents

and my Association as the Vendors." It enclosed a resolution of the Vend continuing their arrangement with the shipping companies during 1908. It is acknowledged with thanks on 12th December 1907 (X 201). I refer also to X 205 27th December 1907, X 216 and U 149 headed " Minutes of Meeting held at Offices of the Australasian Steamship Owners' Federation, Steamship Buildings 509 Collins Street Melbourne on Friday 23rd April 1909." It was called for the purpose of considering the suggested allotment proposed by the colliery proprietors of coal for the steamship companies' requirements 1909. Appleton was in the Chair. As to this conference, see with regard to the Vend their Minutes of 5th May 1909 in Ex. J, at p. 215. The correspondence, negotiations, and the course of business in 1910 lead me to the inference the agreement was in substance renewed in and for that year. This will be more particularly considered presently.

Then as to the identity of the terms of the agreement with those in S, which was modified as to some of the parties after being drawn up, see Cant's letter of 12th August 1907 (Ex. X, p. 235) and Ex. I, pp. 49 and 79). Clause 1 of that document says :— " The vendors agree to sell to the purchasing agents the whole of the coal which may be required by the purchasing agents to supply the trade of the States of Victoria, South Australia, Western Australia, and Queensland. Such coal shall be gotten from the collieries mentioned in the Schedule hereto or from some of them, and shall be of the quality obtained from such collieries respectively."

And clause 2 (*c*) provides that the " purchasing agents' representative shall where practicable at least once a week before the beginning of each month during the continuance of this agreement intimate to the vendors' representatives the approximate quantity of coal and the particular class of coal which the purchasing agents shall require during the ensuing month, and the vendors' representatives shall arrange to supply to the purchasing agents suitable coal in fulfilment of the purchasing agents' requisition " &c.

In Newman's letter to Chapman of 29th December 1906 (X. 18), reference is made to the quantities required by the steamship companies for the Commonwealth market and with specific relation to the Victorian Railways and this passage occurs :—" The steamship

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companies' agreement with the collieries further protects both parties in this direction." In Lewington's letter to Chapman 16th January 1907 (X 31) connected with the shipping defendants by Newman's letter of 30th January 1907 (X 34), reference is made *inter alia* to arrangements made at a conference for proper notice of requirements and for allocation of coal and generally working such clauses as Nos. 1 and 2 (*c*).

Then the document in S provides in clause 2 (*a*) :—" The coals obtained from the various collieries shall be divided into the classes mentioned in the schedule at foot."

The coal supplied was always graded and priced accordingly, see for instance annexure to letter of 9th December 1907 (X 200).

Clause 2 (*b*) says :—" The Vendors and the purchasing Agents shall during the currency of this agreement from time to time appoint each a representative for the purposes hereinafter appearing." As to this, see X 19 (29th December 1906), X 23 (9th January 1907), X 31 and 32 (16th January 1907), X 34 (30th January 1907), X 169 (23rd September 1907).

Clause 2 (*c*) further provides :—" The vendors recognising that the purchasing agents have to satisfy the demands of the consumers will so far as practicable forward to the purchasing agents the coal from the particular colliery required by the purchasing agents and, failing that, then coal from one or other of the collieries of the same class as that named in the requisition. Provided however that in no case shall the Vendors be called upon to deliver coal from any colliery that has reached the limit of output assigned to it by the Vendors under any agreement existing between the collieries. Provided further that in any case where the purchasing agents have entered into contracts with the consent of the Vendors for the supply of coal from any particular colliery or collieries then in such case the said purchasing agents shall unless conditions render this impossible be supplied with the specific coal required for the due fulfilment of such contract."

There are obvious references to this sub-clause in Newman's letter to Learmonth of 16th May 1907 which same contains a hope that modification of the provision has been agreed to. But that modification had not been agreed to as appears from the report of

the conference of 23rd July 1907 (X pp. 108 and 109), and as late as 23rd April 1909 the Vend proposition was to be adhered to as far as possible (X p. 219).

Clause 4 runs thus :—" All coal shall be delivered by the Vendors to the purchasing agents f.o.b. at the usual place of loading coal from such colliery. And the prices to be paid for the various classes of coal shall be fixed by the Vendors annually in the month of November in each year during the currency of this agreement, such prices to take effect from the first day of January following for the then ensuing year. The prices so fixed shall be communicated to the purchasing agents by notice in writing to their representative appointed as hereinbefore mentioned. The Government weights at Newcastle shall be taken as final and conclusive and no allowance shall be made for wastage." A red ink line is drawn through the words " the Government weights at Newcastle shall be " but that is a slip and means nothing.

On the basis apparently of this clause were written the following letters :—Howard Smith & Co. to Cant of 13th June 1907 (X p. 81), Howard Smith & Co. to Learmonth of 6th July 1907 (X. p. 85), Howard Smith to Cant 25th July 1907 (X 113), Hunter to Forsyth and Howell of 25th July 1907 (X. p. 114), Howard Smith to Cant of 13th August 1907 (X p. 136), same to same of 21st September 1907 (X p. 168), Cant to Newman of 9th December 1907 (X p. 198) and annexures (X. p. 200) and the reply of 12th December 1907 (X p. 201), Cant to Appleton, 16th April 1908 (U p. 66).

Clause 5 is in these terms :—" The Vendors agree not to supply any coal for consumption in any of the States mentioned in clause One hereof except to the said purchasing agents or their nominees in terms of this agreement." This is an important clause, the existence of which is manifested by the business conduct of the defendants with respect to Scott Fell, Kethel & Co. and others, conduct which I shall refer to specifically further on.

Some of the letters appear to me to assume the existence of such a clause—such as, Chapman to Hunter 9th February 1907 (X. p. 40), Chapman to Newman 11th February 1907 (X. p. 42), Cant to Howard Smith 1st August 1907 (X. p. 124), Beckett to Cant 12th August 1907 (X. p. 139) enclosed in letter Cant to Howard Smith of

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15th August 1907 (X. p. 138), Newman to Cant 27th December 1907 (X. p. 205), Appleton to Cant 16th January 1908 (U. p. 26), Cant to Appleton 24th January 1908 (U. p. 34).

By clause 6 the purchasing agents agreed to purchase from the vendors all coal they require for the inter-State trade and to pay the prices fixed from time to time and then the clause proceeds:— "And shall not purchase, sell or deal in, directly or indirectly or engage directly or indirectly in, or share the profits of the carriage of any coal other than that purchased by the purchasing agents from the Vendors." Then comes a proviso allowing the purchasing agents to purchase for their own use for bunkers of 186,000 tons Southern coal, with increase or reduction proportionate to increase or decrease of inter-State trade over or below 1,500,000 tons per year and with a further proviso that with the vendors' consent to be given if the trade of Newcastle is not prejudiced, a larger quantity of Southern coal may be taken. Brisbane coal may be taken up to 150,000 tons a year (the pencil figures 1,500 being evidently a slip) as in 1905 with increase or decrease relative to Commonwealth trade in Newcastle coal, but not beyond 200,000 tons a year. Wallarah coal of 50,000 tons may be taken by Huddart Parker Co., and it was agreed that any breach of this clause by the purchasing agents meant payment to the vendors of 4s. for every ton of coal purchased in violation of the agreement. As to this, see letter Cant to Howard Smith 6th July 1907 (X. p. 86), reply 9th July 1907 (X. p. 87), Howard Smith to Cant 16th July 1907 (X. p. 95), Howard Smith to Cant 27th July 1907 (X. p. 119), telegram Cant to Howard Smith 31st July 1907 (X. p. 120), letters Howard Smith to Cant 31st July 1907 (X. p. 121), Cant to Howard Smith 1st August 1907 (X. p. 124), Cant to Appleton 31st January 1908 (U. p. 39), Appleton to Cant 7th February 1908 (U. p. 47).

Clause 7 relates to time of payment and is immaterial. Clause 8 provides:—"The purchasing agents shall not resell any of the said coal so purchased as aforesaid at any higher prices per ton than the c.i.f. price mentioned in the following scale namely," and then follows a scale—specifying that if sold for delivery at Melbourne when the purchasing price f.o.b. at Newcastle for best coal was 7s. "the c.i.f. price mentioned" was 10s. 10d. and similarly c.i.f.

prices were fixed for Geelong, Adelaide, Wallaroo, Port Pirie, Port Augusta, Albany, Fremantle, Geraldton, Rockhampton, Cairns, Mackay and Townsville. Separate schedules are added to apply when the f.o.b. Newcastle price alters to 8s., 9s., 10s., 11s. and 12s. The clause proceeds :—" The provisions of the above clause shall apply also to the small coal purchased from the Vendors, but in lieu of the maximum reselling prices mentioned in the above scale the following shall apply to small coal namely "—then follow similar scales.

There are four provisos to this clause—Proviso (1) is " That the above-mentioned prices may at the discretion of the said purchasing agents be exceeded by 3s. per ton on large, where such coal has been sold to supply any contract or contracts with any one consumer not exceeding 10,000 tons in any one year, but this provision shall not apply to the bunkering trade."

Proviso (2) is :—" That whenever the f.o.b. selling price of screened or small coal respectively shall be fixed by the Vendors at any sum less than the f.o.b. selling price for the time being fixed for best screened or best small coal respectively then the c.i.f. prices above-mentioned in the above scales shall be reduced by an amount equal to the difference in such f.o.b. prices, it being the intention of the parties hereto that the freight or other compensation payable to the purchasing agents in respect of such coal shall be regulated by the f.o.b. price for the time being of best screened coal and best small coal respectively."

Proviso (3) is :—" That where any coal purchased from the Vendors and resold by the purchasing agents for delivery in any of the said States otherwise than c.i.f. at any of the ports therein the maximum price of re-sale may be increased by the addition of the following charges when same are actually incurred—Lighterage for bunkering steamers at the Semaphore, South Australia, not exceeding 7s. 6d. per ton, at Albany and Fremantle not exceeding 5s. per ton, and at Melbourne and Port Adelaide not exceeding 2s. 6d. per ton, at Mackay not exceeding . . . per ton and at Townsville not exceeding . . . per ton.

" Wharfage : Actual charge made by the wharf owner. Railways : Freight when incurred. Cartage : Actual cartage charged

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by cartage contractor. Or where the purchasing agents employ their own carts the current rate of cartage. Bagging : 9d. per ton. Screening : 1s. per ton. Dues : Any dues imposed by the various Governments or Municipal Authorities."

Proviso (4) is :—" That the schedule of prices referred to in this clause shall not apply to large contracts which may be secured by the said purchasing agents at special prices with the consent in writing of the said Vendors."

That there was a provision in the shipping agreement regulating the selling price of coal with freight and other charges appears clear from the letter of Lewington to Chapman 16th January 1907 (X. p. 32) already referred to. See also letter Howard Smith to Learmonth 6th July 1907 (X. p. 85), Webb to Appleton 19th July 1907 (X. p. 98), conference of 23rd July 1907 (X. pp. 102, 107, 108, 109), Cant to Howard Smith 1st August 1907 (X. p. 124), Cant to Howard Smith 26th August 1907 (X. p. 147), telegram Howard Smith to Cant 7th September 1907 (X. p. 157), letter Cant to Newman 9th December 1907 (X. p. 198) with annexures (X. p. 200), reply 12th December 1907 (X. p. 201).

Clause 9 deals only with the intermediate prices of purchase from the vendor and provides that the maximum reselling price shall be proportionate.

Clause 10 is as follows :—" If the said Vendors and the Purchasing Agents shall in the event of war strikes or lockouts agree to a reselling price in excess of the price hereinbefore referred to, the Vendors and Purchasing Agents shall share equally in the amount of any such excess."

Clause 11 is as follows :—" In the event of the Purchasing Agents, without the Vendors' consent, reselling any coal at prices in excess of the maximum prices fixed for the time being in terms of this agreement they shall account to the Vendors for the difference between such maximum reselling price and the actual price at which any such coal shall be resold, it being the intention of this agreement to place the Purchasing Agents in the position of Agents only but clothed with a liability for all coal ordered at the rates agreed upon and that the difference between such rates, and the prices on re-sale set out in clause 8 shall represent compensation for

freight and remuneration to agents for work of realisation and the purchasing agents and each of them shall at all reasonable times give to a duly qualified Accountant to be appointed by the Vendors full access to their books and documents to enable him to ascertain whether any breach of this clause has been committed. Provided that if the purchasing agents shall sell at prices in excess of the said maximum prices with the prior consent of the Vendors in writing then the amount of such excess shall be divided equally between the Vendors and the Purchasing Agents."

Clause 17 is as follows :—" In the event of war strikes lockouts or inevitable accidents which shall interfere with the carrying out of any of the engagements of the vendors or purchasing agents or of any of them such parties respectively shall to the extent of such interference be freed from compliance with the engagements embodied herein but the purchasing agents shall not without the consent of the vendors resell at a higher price than that provided herein and in the event of their reselling at any higher price the provisions of clause 11 hereof shall apply to any excess."

As to these three clauses I refer to the conference of 23rd July 1907 particularly pp. 102 and 107. On the latter page Mr. Forsyth says :—" If you sell coal over the agreed prices we are entitled to participate." Mr. Hunter observed :—" Mr. Forsyth is right in stating that if under special circumstances we get higher prices the collieries are entitled to share in the excess."

The mode in which coal was supplied to inter-State consumers through the intervention of the shipping companies only, with the occasional exception of Brown, who is shown to have had a collateral agreement, is a circumstance applying to both sets of defendants which strengthens my view that some agreement of the nature of that contained in Ex. S. was in operation between the parties. This was in marked contrast with the method of conducting the supply for New South Wales. For instance on the 23rd January 1907 (X. p. 30), Hunter telegraphed to Chapman that the Western Australian Government were calling for tenders, 1, 2 and 3 years and giving certain particulars, he added " Please place us in position, quote for full period as well as shorter." On the 24th a reply was sent giving certain directions and making suggestions (see Ex. X. 29-30). On

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4th May 1907 Newman wrote to the Vend (Ex. X. 64), "I have to inform you that the contract of Messrs. McIlwraith McEacharn & Co. on behalf of my Association has been accepted by the Western Australian Railways for 12 months from the 14th March 1907 on the basis of 10s. per ton cost of coal f.o.b. Newcastle." The letter gives information as to approximate quantities the form of the specification, and states "the Western Australian Government, as your Association is already aware does not specify in their contract any quantity of coal to be taken from any particular colliery. It will therefore be necessary for your Association to protect us for supplies to the Western Australian Railways as specified above." There are other instances the contents and nature of which fall better under the subject of combination, which also go to support the conclusions I have arrived at, and, also taking into consideration the way in which in fact the coal was dealt with at Newcastle, and there taken charge of by the shipping companies and distributed by them exclusively (with the exception of Brown, as already mentioned) and the resentment on the part of the Shipping Association of Vend interference with consumers as in the case of Forsyth with the Victorian Railways in November 1909 (X. pp. 221-222), I feel no doubt that such an agreement as the one in S. was the basis of mutual relations. There are many items of evidence applicable primarily at all events to the two Associations separately, and I need not for this purpose extend their application to the other Association. For instance as against the Vend it is recorded in the minutes of 24th April 1906 (F. 71), that Mr. Simpson stated he would have fair copies of the draft agreement prepared and circulated among the members prior to the next meeting. Apparently this was done, because in the minutes of 9th May (F. 95) it appears that the proposed agreement of the steamship owners was considered, and amendments agreed to, and it was arranged to send a copy to Mr. Hunter for consideration by the steamship owners. Again in the Vend minutes of 25th September 1906 (I. p. 1), there is the reference already given that a fair copy of the steamship owners' agreement when finally settled was to be handed to the members for guidance. There had been a draft which is marked Ex. Y, which I am clear was an

early draft and was abandoned in favor of S. It included shipping companies who were not ultimately parties to the combined operation, the subject matter of these proceedings. These were Archibald Currie & Co., The Australian United Steam Navigation Co. Limited and British India Steam Navigation Co. Limited.

It had a provision continuing it in force for seven years, probably dropped in view of the passing or probable passing of the Act. The Vend certainly altered the tenure of their own organization from seven years to twelve months in September 1906. See letter Cant to Howell 17th February 1908 (O. 1).

Its general tenor was not substantially different from that of the draft in Ex. S. Mr. *Mitchell* contended that there was a material difference in respect of one of the provisos to clause 8.

I have already stated sufficient material to indicate why I am satisfied that Ex. Y was abandoned. There is, however, additional material referable to the Vend indicating that Ex. S. contains the actual agreement come to. It appears from the minutes (Ex. J. p. 77), that a conference was held between representatives of the two Associations on 16th December 1907 as to which the following record appears :—" The existing arrangement was then reviewed and the following alterations effected :—

" Clause 1.—The second sentence to read ' . . . such coal shall be purchased from all the collieries . . . ' etc. instead of ' . . . such coal shall be gotten from the collieries . . . etc.'

" Clause 2.—(Section *a*) to be governed by clause 12.

" Clause 4.—The ' rise and fall ' clause to be included in all future contracts. The price of coal to be fixed annually no particular month to be specified.

" Clause 6.—The proportion of Southern coal to be allowed to 1,500,000 tons of Newcastle coal to be 186,000 tons. The quantity of Queensland coal not to exceed 200,000 tons and of Wallarah coal not to exceed 50,000 tons. The steamship companies to furnish a quarterly statement showing the respective quantities of coal lifted from these districts.

" Clause 8.—The steamship companies to have the right to increase the freights mentioned in the schedule by 10 per cent. to cover any increased cost as regards extra wages etc.

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"Clause 10.—To be eliminated.

"Clause 13.—The steamship companies considered that they should receive an allowance of 1% for wastage and it was agreed that the matter should be referred to the full meeting of the proprietors to be held next day."

It also appears that it was ultimately determined that the elimination of clause 10 should be conditional on a new clause being granted to take its place (Ex. J. 89 and 93). That new clause does not appear to have been drafted, or at all events agreed to, and so the old clause apparently stood. The alterations agreed to in December 1907, when carefully examined, are very strong to show that Ex. S. was the existing arrangement which was then reviewed.

First of all, there is no mention of the elimination from the list of purchasing agents of those shipping companies mentioned in Ex. Y, and not afterwards co-operating with the collieries. Next, one of the alterations is to fix the maximum quantity of Queensland coal which the shipping companies might purchase at 200,000 tons. In Ex. Y. there was no express saving of Queensland coal, in Ex. S. there is, the quantity being originally left blank. In Ex. Y, the schedule of prices under clause 8, no Queensland port is mentioned there being, after enumeration of ports elsewhere, a general note at foot "Queensland rates to be arranged." In Ex. S. a further stage was reached by inserting the four Queensland ports in every schedule together with amounts inserted for c.i.f. price in the first schedules of the best and the small coal respectively in type similar to the rest of the document. There is a pencil note alongside and in front of those figures in these words "Queensland freights not yet arranged" and alongside and after those figures is a pencil note of interrogation and a similar pencil note of interrogation before the names of the ports in each first schedule. Then in other schedules the c.i.f. price is left blank for Queensland ports; but the inference to be drawn from inspection of both documents, and the nature of the alterations is that, when S. was typed, arrangements had progressed so far at all events as to enumerate Queensland ports, tentatively fix some c.i.f. prices, for those ports conserve the shipowners' rights as to Queens-

land bunker coal, and at a later stage the parties agreed upon the maximum so conserved.

I therefore find, apart from the application of the new statutory rules of evidence that the defendant colliery proprietors made with the defendant shipping companies the contract in terms shown by Exhibit S., beginning "Memorandum of Agreement made this . . . day of . . . One thousand nine hundred and six"; that is to say the contract set out in paragraph 41 of the statement of claim.

Bringing into operation sec. 14 (*c*) of the Act the case is made much stronger against the defendants. By force of that section the Vend minutes and the record of joint conferences are evidence against all the defendants. That does not mean that the liability of any defendant is increased or that he is made responsible for any act for which he would not otherwise be responsible. It affects only the mode of proof, and leaves the relevancy and legal effect of the matters proved exactly as they would be if the proof were given by a witness who had been present at the meeting. It makes those records admissible in evidence against all the defendants, but only that the persons purporting to have been present at the meetings were present, and that whatever appears to have been done by any of the defendants was so done.

So far for instance as it is necessary in order to affect the shipping defendants that the membership of the Vend should be proved, the minutes of the Vend recording the presence of the colliery defendants establish the fact with respect to the shipping defendants as well as to the colliery proprietors; the minutes of the Vend of 23rd April 1906 (F 59 and 61) are evidence against both sets of defendants that both were represented and discussed the question of South Australian railways contract, and the minutes of 24th April (F. 65 to 69) are evidence that both parties were represented and discussed the proposed combined agreement and the records of conferences between the two Associations, produced out of the custody of C. M. Newman and Appleton respectively, are evidence against all the defendants as to the persons present and the transactions of the conferences. These are examples, and I need not pursue that point in further detail.

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I find that the contract was originally made probably in the last week of September 1906 between all the defendant shipping companies with the aid of the individual shipping defendants on the one side and all the defendant colliery proprietors now proceeded against except the Stockton Borehole Collieries Ltd. as in Ex. S., and that contract so made lasted down to the end of 1907, modified as described in December 1907.

CONTRACT RENEWED IN 1908, 1909 AND 1910.

It was renewed for 1908. It was at some time renewed for 1909, but whether before or after the formation of the Stockton Borehole Co., I am unable to say. That company was already in existence on 4th March 1909, but as the contract was renewed for 1910 the Stockton Borehole Collieries Ltd. must be taken to be a party to it for that year. I therefore hold that the charges in paragraphs 41 and 42 of the statement of claim are established against the defendants, so far as concerns the actual making of the contracts therein referred to, but modifications were introduced before 1909.

I now come to the question of combination. If the contract be taken as existing, of course there was a combination, but assuming the formal contract alleged did not subsist between the parties there still remains the question whether a combination was maintained between them as averred in the statement of claim. From this aspect I have to consider the relations of the parties as evidenced by their conduct examined by the light of surrounding circumstances.

As before, I shall consider this question in the first place according to the common law rules of evidence.

HISTORY, FORMATION AND OBJECTS OF COAL VEND.

The defendant colliery proprietors were free by law to deal, and, so far as appears were unhampered by any contractual obligation, in dealing separately and individually with any member of the public who desired to purchase their coal. They were free to bargain as to personnel, price, place, quality and any other term or condition of supply. In fact, so far as inter-State trade in Newcastle coal is concerned, the defendant colliery proprietors have rigidly confined their inter-State operations to selling to the defendant shipping

companies, and have refused to supply the public or any member of it direct. The history of the colliery proprietors' position is important for several reasons and it will be convenient here to relate it as it is disclosed by the evidence of Mr. Wheeler, principally at the following pages, 257, 293, 306, 313, 314, 328*a*. During the last 20 or 30 years the Northern collieries have in one way or another acted in concert. For instance, there has always been a declared selling price for the purpose of regulating the hewing rate to be paid to the miners. There was a formal agreement, referred to by Mr. Wheeler as the old Vend agreement, and which originated a good many years ago—according to the Vend minutes of 15th February 1906 it bore date 12th February 1891. It established a Vend: under that system a selling price was fixed, an allotment was agreed to, and a provision made for paying penalty for any excess and receiving compensation for any deficiency. But, says Wheeler, "there was no restriction of trade or taking away of individual control," by which I understand him to mean that each colliery could sell to whom it pleased. For some reason not disclosed, the Vend agreement, though faithfully carried out for a number of years, had for some considerable time before 1900 become entirely obsolete.

A coal owners' Association was then formed and continued until the end of 1902. Its objects were merely to fix a selling price so as to preserve a uniform f.o.b. price, unaffected by competition among themselves, and to give mutual advice.

It was not a Vend; that is, there was no allotment of output. But by 1903 it became apparent that two or three of the other collieries had begun to give rebates again, and that broke up the Association, though some of the collieries remained firm to the arrangement for another year. The Coal Owners' Association of 1900 did not comprise all the mines, there were eight or ten in it; the leading collieries were in it, though some larger ones as the A.A. Company were outside it. Those within it included J. & A. Brown, Scottish Australian Mining Co., W. Laidley & Co., West Wallsend and Killingworth, and Newcastle Wallsend and others. The withdrawal of members at the end of 1902 left the Wallsend colliery, J. & A. Brown and the Newcastle Wallsend Company the sole adherent members of the Association, and they continued until about the end of 1903.

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It is necessary to observe in order to understand the rise and fall of prices over the period covered by the evidence and material to this case, namely, the latter part of 1900 to the end of 1904, that as I find to the end of 1903, and beyond all question up to the beginning of the year 1903, there was not open competition with regard to f.o.b. price. There was always a declared price, and a declared price means, if faithfully adhered to, absence of competition below that price. Departures from the settled price were surreptitious, and though their existence was felt by those who maintained the declared figures, they were unacknowledged.

While the original Vend was adhered to all-round competition in regard to price was of course absent. By 1898 however, I do not know how much earlier, competition appears to have increased to an uncertain extent, but sufficiently to induce the collieries to regard the old Vend agreement as abandoned, and restore in 1900 the firm exclusion of competitive prices, while leaving output free. From 1900 to 1902 the prices as declared were equally supposed to be non-competitive, but Wheeler's evidence shows there was still some internal competition and that rebates were in fact allowed, so that it is impossible to regard the declared prices relied on as the true measure of competitive values. The amount of rebates given at that time was, according to the evidence, 1s. 6d.

The only period that can be relied on as one of really competitive Vend prices was that beginning 1904 and ending the early part of 1906. The present Vend was proposed in the beginning of 1906.

Wheeler describes the condition of affairs after 1903 as "go as you please till the invitation of 1906 to try and bring about some understanding." The invitation, to which he refers, was given to him by the Superintendent of the A.A. Company (Mr. Hall) and he met several colliery proprietors about February 1906. Several meetings took place and as I have already mentioned, many, nearly all, of the colliery defendants attended. Schemes were suggested to bring about an agreement between the colliery proprietors of the Northern district for the purpose of regulating the selling price. At a meeting in March Mr. E. P. Simpson, a solicitor, and who then represented the Pacific colliery, produced a document as a suggested agreement. It

was produced at half a dozen meetings. This document was called for by the Crown, but the defendants have not produced it to the Court. No doubt it was modified from time to time, and ultimately took shape as the draft in Ex. S. that I have found to be the contract entered into. Wheeler says it bore date April 1906, and he saw it as late as last year. He says that the proposals made included one for an allotment of the trade to each of the collieries as well as the regulation of the selling price. An understanding was arrived at that the collieries would not cut one another in prices, but would agree to a price.

The first Vend minute (F. 1) 5th January 1906 records a resolution that "it was desirable to form an Association to raise and maintain the price of coal." It was carried unanimously.

All members of the Vend, those who were present at that meeting and those who subsequently joined it and do not prove actual ignorance, are affected by a declared recorded and fundamental object. The declared price was fixed price f.o.b. at Newcastle. From Newcastle sea carriage is necessary for all inter-State and foreign trade as well as for a considerable part of the New South Wales supply. The distance from Newcastle to Sydney is only 60 miles, so that the requirements in respect of sea carriage for local supply stand on a somewhat different footing from those for inter-State trade, though some of the difficulties of the latter trade inherently exist in the former. The inter-State business had for some considerable time been mainly conducted by the defendant shipping companies, the Melbourne Steamship Co. and James Paterson & Co. Notwithstanding the declared fixed price, the shipping companies in dealing with the several collieries separately had obtained the usual rebate of 1s. 6d. and sometimes no doubt further concessions in price. Wheeler says:—"They asked for quotations from the different proprietors and then made arrangements. Undoubtedly they got the coal as cheaply as they could."

The expedient therefore which had in practice been followed by the collieries of substantially confining their sales inter-State to the shipping companies leaving them to make any bargain they chose with the public was not effective to maintain intact the declared selling price, and during the negotiations for the formation of the

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Vend a further expedient was apparently thought necessary. At what point of time or by whom it was suggested I do not know. That is left undefined by the evidence. The defendants alone could have afforded enlightenment, but in this instance, as in many others, they have preserved silence. I do not think it necessary to make any conjecture as to the source whence the various parts of the scheme ultimately adopted originated. I concern myself only with the fact, and the application of that scheme to existing circumstances. The weak spot in the colliery proprietors' arrangements with regard to the raising and maintenance of price was the internal competition among themselves for the business with shipowners ; and the expedient hit upon as a remedy, wheresoever it emanated, was that individual negotiation, whether by colliery owners or shipowners, should be eliminated. In future no single colliery was to treat with shipowners and no single shipowner was to treat with collieries. That this was one of the results achieved by their arrangements is manifest from the correspondence. It is made specially clear by two letters, one from Appleton to Cant 20th January 1908 and Cant's reply of 24th January 1908 (Ex. U. pp. 30 and 34). In the latter communication Mr. Cant says :—" With regard to individual contracts being entered into between members of your Association and ours, I quite agree with you that this is not in accord with the understanding between us, and we will do all in our power to prevent this being done." He then refers to a contract which Sneddon made with the Melbourne Steamship Co. as having being made by Sneddon in ignorance of the position, and that Sneddon is prepared to cancel the contract. He then adds :—" It might be as well perhaps if you on your part would see that your members do not in future make any negotiations with individual collieries for direct supplies." Earlier evidence is contained in letter 26th February 1907 from Murrell, then Secretary of the Vend (see Ex. I. p. 79), to C. M. Newman (Ex. X. p. 49), and letter Howard Smith & Co. to Cant, 13th August 1907 (Ex. X. p. 136). As against the colliery defendants, the entry in the Vend book (Ex. I. p. 45, 3rd December 1906) is evidence of the same fact. That entry shows that interviews had taken place between the Vend committee and Mr. Hunter representing the steamship owners followed by correspondence with a view of ascertaining their require-

ments for 1907, including requirements for James Paterson & Co. and the entry states :—" We are also informed that James Paterson & Co. and the Melbourne Steamship Co. are in line and that their requirements are included in the above figures. As you are aware, however, no contracts will be made directly with the individual steamship companies, but the trade will have to be dealt with as a whole by the joint representatives of the steamship companies, and your Association."

This then was the construction which the colliery owners placed upon the arrangements whether they amounted to a contract or not which were to govern their relations for the year 1907. How had those arrangements been arrived at ? On this point I may again refer to the Vend minutes of 24th April 1906 when the colliery proprietors met representatives of the shipping companies and agreed upon a resolution already set out in full. As to this I need only now observe that Hunter pointed out that it was necessary that the agreement between the Association and the steamship owners should be entered into with the four defendant steamship companies leaving out James Paterson & Co. and the Melbourne Steamship Co. in the meantime ; those companies either to come in later or make an independent concurrent agreement. The resolution already quoted indicates on its face that the colliery Association had not yet completed its scheme of amalgamation. I have no doubt therefore that the Vend agreement that is for the formation of the Associated Northern Collieries and the combined agreement or as it is sometimes called the shipping agreement proceeded concurrently, and that the shipowners knew before they entered into the combined agreement, or before they made their business arrangements with the Vend for 1907, that one of the purposes and objects of the formation of the Vend was to enter into the class of contractual or business arrangements with the shipping companies, which in fact ensued.

By the 13th September 1906 the terms of Association between the Vend members were decided upon as already stated, and the colliery proprietors were advised to carry on on those lines without any signed document. Those terms are contained in an unsigned document part of Ex. S. commencing :—" This Indenture made the . . .

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day of . . . One thousand nine hundred and six and purporting to be made between various coal proprietors mentioned of the first part . . . trustees of the second part and the several persons and bodies corporate thereafter becoming parties of the third part." By its terms a Vend is established, that is, an allotment to the several members of a proportion in the aggregate trade in each year. The Board is to fix the selling price from time to time of all coal raised from the mines, members being forbidden to dispose of the coal at lower prices than those fixed and forbidden also to make any allowance directly or indirectly to any purchaser, as commission, discount or otherwise. A penalty is imposed for selling in excess of allotment and compensation is given for deficiency in disposal of produce below allotment. Other provisions, some of which are important in themselves, I pass by as irrelevant to the issues raised in this case.

BEGINNING OF COMBINATION CHARGED.

The proposed agreement with the steamship owners was, as I have indicated, still in process of negotiation on 25th September 1906 in respect of the quantity of outside coal the shipowners might take, and it is admitted (paragraph numbered 39 of Admission of Facts by the defendants) that the shipping companies prior to 24th September 1906 carried on the inter-State business independently and in competition with each other, and with exceptions therein, previously expressed, did carry coal from all or any of the New South Wales mines to any of the other States. Mr. *Wise* has said that the words of this admission confine him more rigidly than he intended, and unduly restrict the plain effect of some of the evidence. But, though probably the Crown did not forsee the full use to which this admission could be put, I have applied to it the same rule as I did at the trial to Mr. *Mitchell's* admission respecting Mr. Newman's representative character as regards the correspondence. Consequently, I assume that up to 24th September 1906 there was no combination as alleged; but from 25th September 1906 onwards the facts convince me that the parties did act upon the lines and in accordance with the terms contained in the document in Ex. S. with the modifi-

cations I have previously stated. A very terse and distinct expression of this fact is found in the letter of Mr. Cant to Mr. Appleton dated 31st January 1908 (Ex. U p. 39) in these words :— "We act together for our mutual benefit." Instances of this joint action are numerous, commencing very shortly after 24th September 1906. On 27th September 1906 it appears from the minutes (Ex. I. p. 7) :—"It was arranged that the committee meet the steamship owners on Thursday next 4th proximo at 10.15 a.m. at these rooms to arrange prices &c. for various contracts." On the 4th October 1906 (I. p. 9) it appears they did meet, and agreed as to prices and proportions of coal for Victorian Railways contract. Those references affect only the colliery defendants. In Mr. Lewington's letter to Mr. Chapman 16th January 1907 (X. p. 31), it appears that in consequence of a conference between Mr. Hunter and the Vend committee it was arranged that a joint committee of steamship owners' representatives of Newcastle and the Vend committee of Newcastle were to meet as often as necessary to arrange for the shipment of coal. It also stated that it was "agreed that specific contracts should be entered into for special requirements such as railways, gas and Broken Hill. Other trade to be covered under the shipping agreement."

The same letter referred to the suggestion that the various collieries should appoint different steamship companies as agents for the collieries and a specific distribution of agencies was included in the suggestion. J. & A. Brown were suggested as inter-State agents for their own mines, McIlwraith McEacharn & Co. for some other mines, Huddart Parker & Co. for others, Adelaide Steamship Co. for others, Howard Smith & Co. for others, and, what is some importance in determining the personnel of the combination, the Melbourne Steamship Co. for Heddon Greta and Sneddon's, and Paterson & Co. for Newcastle Mining Co. The letter goes on to say, before definitely agreeing to the suggestion it was decided to refer the matter to Mr. Simpson for advice, and that the steamship companies had been advised not to take action in reference to any outside enquiries referred them by the companies *pro tem.* As to this, if the collieries and shipowners were acting independently of each other, it is hard to imagine why such advice as this should have been given ;

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for surely no doubt can exist as to the innocence of a person who merely acts as *bona fide* agent for a colliery. The rest of the letter contains further indication of joint action.

CONCEALMENT BY DEFENDANTS OF FACT OF COMBINATION.

On the 30th January (X. p. 34) Mr. Newman communicated to Mr. Chapman the fact that the proposal for agencies has been considered by the shipping Association. He adds that some inquiries had been made from Scott Fell & Co. to which "non-committal" replies had been given, and until Mr. Simpson's advice be received nothing further would be done in respect of agencies. On 7th February 1907 (X. 44) Minter, Simpson & Co. advise the Vend that by adopting the course proposed "the collieries will not in our opinion be prejudicing their position in the event of any steps being taken to charge them with any violation of the provisions of the *Australian Industries Preservation Act.*" Had there been no combination in fact one would have expected an answer of a totally different nature. On 11th February (X. p. 42) Chapman in letter to Newman communicates Simpson's advice and asks for shipping Association's views. On 4th March (X. p. 51) Newman writes to the Vend Secretary agreeing to the agency proposal and to the list previously sent "except that in order to keep matters on a uniform basis I have to request you to transfer Heddon Greta to say Huddart Parker & Co., Sneddon's &c. to Messrs. McIlwraith McEacharn & Co. and Newcastle to Howard Smith & Co. or otherwise as those collieries may desire." Further on he says "I think it will be as well for each colliery company to now formally appoint its agent in writing." This process bears the appearance not of an ordinary business transaction but of a device to conceal the true state of affairs or facilitate the operation of some unusual arrangement.

On 23rd April 1907 (X. p. 63) the shipping Association informed Mr. Cant that in order to meet the wishes of Mr. Sneddon it would concur in the appointment of the Melbourne Steamship Co. as their inter-State agents.

REPLIES TO SCOTT FELL & CO.'S REQUESTS FOR COAL.

Some of the enquiries made by Scott Fell & Co. which have been referred to were communicated by Mr. Northcote to Mr.

Chapman on 23rd February 1907 (Ex. O1). The letter suggested the correspondence should be brought up at a meeting of the coal Association.

It is remarkable that W. Laidley & Co. Ltd. as early as 14th January referred Scott Fell & Co. to the Adelaide Steamship Co. as their inter-State agents who would be pleased to quote for either Rhondda or Co-operative coals, that is to say, two days before Lewington's letter to Chapman, and a considerable time before the Steamship Association had consented to act, and not only so, but at a time when, as Mr. Lewington stated, they had been definitely advised by Mr. Simpson not to act in reference to any outside enquiries referred to them by the companies *pro tem.* The Adelaide Steamship Co. was obviously one of the companies to which Newman, in the letter of 30th January above quoted, referred, when he said enquiries had been made, non-committal answers given and that pending Simpson's advice nothing further would be done. Yet, on 29th January that company asks Scott Fell for further information and then says will be "pleased to give a quotation with the object of fixing up a contract." After the advice is given the company gives quotations, but on a c.i.f. basis only, and refuses to give any other, alleging as a reason in the letter of 23rd February that "We undertake all the carrying on behalf of the collieries mentioned, thus avoiding delays to collieries or clashing of steamers and I therefore regret we cannot give you a f.o.b. quotation."

This correspondence, linking the Adelaide Steamship Co. on the one hand with the Vend, and on the other with Newman writing for the shipping Association, is clear evidence of the Adelaide Steamship Company's membership of the Association, and its co-operation with the Vend.

But it is more. It affects the company whose act it is, it affects the whole shipping Association, because that Association's letter of 30th January (X. p. 34) exhibits full knowledge and adoption of the course taken by Northcote, and it affects the Vend because the combination is established, with this overt act of pursuing its purpose. Northcote's statement of the reasons for not quoting a f.o.b. price is distinctly untrue. In a casuistical sense it possesses some foundation. In one way, and one way only, his company had

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undertaken the carriage of Rhondda and Co-operative coals, but that was not the sense in which his words would naturally be understood, or were obviously intended to be understood, by Scott Fell & Coy. His company had undertaken the carriage of coal for every colliery in the Vend just as much as for those two collieries, and every one of the other shipping companies had undertaken the carriage of Rhondda and Co-operative coal as much as Northcote's company. For all practical business purposes, the reason given was misleading and untrue. But it was apparently thought desirable to give it, for Mr. Northcote would not have so far paltered with truth without some belief in its necessity. His company was named as agent for the two collieries, *prima facie* this meant an agency to sell coals f.o.b. because the collieries were not carriers. Some reason had therefore to be given why this was not possible. The true reason, namely, that the collieries were contractually forbidden to sell to outsiders at all, and that the so-called agency was a sham, could not be given without disclosing the combination, and so the actual state of affairs was distorted. But W. Laidley & Co. and the Adelaide Steamship Co. were not alone in this attitude. The simultaneous conformity of action on the part of several other defendants, the concurrence of the shipping Association and the Vend in non-committal replies, testify unmistakably to a concerted plan. The other replies to Scott Fell & Co. accord with wonderful unanimity, always in effect, and sometimes even in mode of expression, with those of W. Laidley & Co. and the Adelaide Steamship Company. In order to appreciate them it is necessary to quote Ex. D4, the letter which Scott Fell & Co. addressed to the Newcastle Coal Co., which was a circular letter addressed to various colliery defendants, about twelve in all. It ran thus :—

"Commonwealth Line of Steamers, Sydney, December 18th 1906. We shall feel obliged if you will give us a quotation for 5-25,000 tons of your best screened coal, in quantities to be mutually agreed on for shipment during the year 1907."

Of course every one of the defendants to whom it was addressed and the shipping companies knew that Scott Fell was doing or trying to do inter-State business. They knew it in January 1906 in connection with Scott Fell's Broken Hill contract (see evidence p. 458). Again the Vend minutes of 23rd April 1906 (F. 59 and 61) record

the joint meeting of representatives of colliery proprietors and shipping companies, when the proposed South Australian railway contract of 96,000 tons was considered. In presence of all, Mr. Simpson for the Pacific company and Mr. Laidley for Rhondda, stated that they had already given quotations to Scott Fell & Co. for a supply of a portion of the contract, and eight collieries agreed to supply the Steamship Owners' Association for two years for the South Australian railway contract at prices named, and undertook not to supply coal for this contract except to the Steamship Owners' Association, compensation was arranged for, and the guarantee of 24th April 1906 was the outcome of this undertaking. The meeting of 24th April was apparently the one deposed to by Wheeler (at p. 259) who gives a short account of it, and states that Hunter expressed the fear that Scott Fell would probably form part of the outside competition which it feared would take the South Australian railway contract away from the steamship owners.

COMBINED OBJECTS OF DEFENDANTS TO EXCLUDE SCOTT FELL & CO. FROM COMPETITION.

These are only specific instances, but there cannot be any doubt every one of the defendants knew Scott Fell was trying to get a footing in inter-State coal supply, and what is very important to observe to do it by means of their own carrying. In September 1906 (F. 141), the Vend abstained from sanctioning Laidley & Co. supplying Scott Fell & Co. with coal to fulfil some partly performed contracts, notwithstanding idleness at Rhondda. That brings us very close to Scott Fell & Co.'s circular letter and we have now to see the responses other than those I have mentioned. The East Greta Co. on 19th December 1906 (F. 4) for New Zealand and inter-State trade referred Scott Fell to McIlwraith McEacharn & Co., their "agents." On 19th December 1906, the Caledonian Co., as I gather from G4 and H4, and the absence of evidence to show the contrary, telephoned that on no consideration would they supply Scott Fell for the inter-State trade. Mr. Lane gave evidence (p. 470) of a memo on p. 4 initialled by W. H. Dawson, deceased, in the course of his duty, which would corroborate the inference I have drawn from G4 and H4. But

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though I think the memo perfectly admissible as against the Caledonian Co. in the first instance, and—the combination being proved—against the other defendants also, I arrive at my conclusion independently of the memo, and of any communication between Lane and Dawson. G4, unanswered, is quite sufficient, as it says on 20th December :—" We also understand you to say that on no consideration would you supply us for the inter-State trade. Please inform us whether we are correct in this assumption." On 27th December (H4) Scott Fell press for a reply to G4 and again on 10th January 1907 (also H4), but apparently none came. The inference of absolute refusal is therefore irresistible. On 19th December (P4) the Australian Agricultural Co. referred Scott Fell & Co. to their " agents " Huddart Parker & Co.

J. & A. Brown on 20th December 1906 (E4) affected to understand the enquiry as limited to foreign trade alone, and referred Scott Fell to their London House for fear as they said of disturbing their arrangements.

The Dudley Co., 20th December 1906 (N4), quoted, but said it must be understood the coal was not to be delivered inter-State, New Zealand, Manilla or Hong Kong, " as we are not in a position to sell Dudley coal for consumption in the places named."

On 21st December 1906 (K4) Sneddon's quoted, but on the understanding it was not for Commonwealth ports. There must have been some coercive reason for this refusal, because the letter concludes with thanking Scott Fell & Co. for past favours and trusting for a continuance of their esteemed orders.

The Newcastle Co. on 22nd December (O4) replied that the whole of their output for next year had been sold. The amount of output for 1907 was 283,459 tons, the exact quantity was of course unknown at the time of writing, and though it might be true in a very strained sense to treat the combined agreement as a sale prospectively to the shipping companies of the whole of their inter-State output, that is not the sense the words would convey to the enquirer and in no other sense was there any inter-State sale, so far as the evidence goes.

The Scottish Australian Co. on 24th December 1906 (L4) quoted for foreign shipment, and on 28th December said that, while

prepared to sell for New South Wales, they referred them as regards the other States to McIlwraith's.

The Seaham Co. on 21st December (I4) said the whole of Abermain output for 1907 was disposed of. As to Seaham they had agencies for inter-State and some foreign places named, but their agreements precluded their quoting. With qualifications they quote for " elsewhere," offer to remain open till 28th. On 28th December they said they were prepared to sell for inter-State markets, but they themselves would quote for consumption in New South Wales only, and, if quotations were wanted for other States, they referred Scott Fell to McIlwraith McEacharn & Co.

Having been thus referred to the shipping companies, Scott Fell addressed them accordingly.

On 27th December they asked McIlwraith McEacharn for quotations for say 25,000 tons of East Greta coal ; on the 28th they asked them for quotations for 25,000 tons Seaham coal ; on 29th December for a quotation for 25,000 tons Scottish Australian coal, all for the inter-State trade.

On 11th January a reply came, which I imagine the Association regarded as one of the non-committal replies. It asked for the quantities required at the various inter-State ports. Of course on the assumption that McIlwraith & Co. were only agents for the respective collieries, and with the knowledge that Scott Fell & Co. were themselves carriers of coal, the reply was not too highly colored, it being termed " non-committal." However, on 14th January 1907, Scott Fell reply ; they desired quotation for 25,000 tons from the three mines respectively, 25,000 from each mine for Victoria, 25,000 tons from each mine for South Australia and 25,000 from each mine for Western Australia. The only reply, which is sent on 23rd January, is to enquire whether McIlwraith McEacharn & Co. are correct in assuming Scott Fell wished to make a contract for a total quantity of 225,000 tons.

Obviously this letter was insincere, and was only a roundabout and disingenuous, but perfectly transparent method of saying No. The Exhibit is M4.

On 27th December 1906 (P4) Scott Fell addressed Huddart Parker & Co. as agents of the A.A. Co. On 2nd January 1907 a reply

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came asking, in striking unanimity with other replies, for what ports or places they required the coal delivered. On the 4th Scott Fell say it is for inter-State trade. To this no further reply was vouchsafed. On 10th January 1907 (R4) Scott Fell request the Pacific Co. to return an answer to their circular request of 18th December 1906. But no reply is evoked.

Altogether the batch of correspondence referred to at almost the very threshold of the defendant's combined operations, when read in connection with the facts as now known, not only manifests the existence of a combination, but, in addition, leaves a most unpleasant impression relevant to its character and objects, an impression which the defendants have not attempted to remove.

There is one letter which may be independently referred to as extremely potent to show the illusory character of the "agency" created. It is Appleton's letter to Cant of 21st January 1908 (U. 32) in which he says :—"I now beg to hand you list of agents for the various collieries for 1908. The only change is that Messrs. Huddart Parker & Co. have handed over the Seaham and Abermain to the Adelaide Steamship Co., who have handed to Huddart Parker & Co., Dudley, Co-operative and Rhondda. I trust the list will meet with your approval, in which case, when advising me, you might also advise Captain Brown, as we are sending a copy forward for information of Newcastle manager. The list is enclosed."

Usually principals select their agents, but here the so-called "agents" select their so-called "principals."

The "handing," as Appleton terms it, of collieries, by one shipping company to another on their own initiative is significant of the connection of their interests in relation to the inter-State coal business and of their true position as principals so far as the public are concerned and not as agents, except in the way specially provided by clause 11 of the combined agreement.

If they were really agents in the ordinary sense, the contracts they made would really have been between the purchaser on the one hand and the colliery on the other. But that we know was not to be the case. The arrangement was plainly—that is, on the facts as we see them now, an expedient for cloaking a scheme, and if so what scheme ?

DEFENDANTS' REASONS FOR SECRECY.

There is no doubt the Vend considered secrecy necessary as appears by their minutes of 24th April and 8th May 1907 (I. 105, 111, and 113) in which the chairman impressed upon the members the absolute necessity of taking steps to prevent any information respecting the business transacted at meeting of Association reaching those outside. Of course, in the case of an ordinary trading company it would not be expedient to placard all their transactions, but after making due allowance for legitimate guarding of business determinations, the nature of this Association, its purposes and its actual resolutions and transactions, make it more probable that the desire for secrecy was impelled, if not by an uneasy conscience, at all events by a fear of the consequences of publicity. There are letters and telegrams strongly indicative of this position, thus when Howard Smith on 21st May 1907 telegraphed the Vend Secretary (X 74) referring to Vend allotments and Hetton coal for Gas Co., and saying "Kindly give us your Association's assurance we shall get all coals our requirements call for;" Mr. Cant replied on 23rd by letter (X. 75) saying that at a committee meeting "members expressed surprise that you should have allowed information of the character contained in your messages to pass over the public lines. You can easily understand that such information if it chanced to get into the hands of outsiders might lead to complications. Kindly in future write me in connection with matters of this nature." It will be observed what the Vend feared was euphemistically termed "complications." Competition was out of the question, and in the absence of any other explanation of this expression I can only attribute to it the fear of legal proceedings or legislative interposition. On 20th April 1907 Howard Smith telegraphed to Cant (X. 143) in terms which will have to be referred to in connection with another branch of this case but which include the following passage:—"There is reason to fear that as soon as the general public knows the present state of affairs indignation meeting likely to be held and will probably result in deputations to Government seeking hostile legislation." This telegram was coded, apparently in pursuance of the suggestion made in the letter of 28th May 1907 (X. p. 78).

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COMBINATION CONTINUED TO END OF 1909.

Further evidence of the continuance of the combination and its nature is found in the correspondence, for instance Howard Smith's letter to Cant of 27th July 1907 (X p. 119) written as it states:— "At the request of the other members of my Association," refers to the fact that enquiry had been received from the Mount Morgan Gold Mining Company for a freight quotation for the carriage of 500 tons of Lymington coal from Newcastle to Rockhampton and for the carriage of 500 to 1,500 tons of Southern coal from Mount Kembla to Rockhampton. The letter states:—"In conformity with the arrangements between us quotation has been withheld, but it is considered dangerous to maintain this course in view of the facility with which the Mount Morgan Coy. could provide either by charter or purchase their own tonnage." It will be noticed that the quotation asked for was for carriage merely, a matter with which normally the collieries were unconcerned, but which was part of the ordinary business of the shipping company. The "arrangements" therefore must have been restrictive of the shipowners' right to carry and as the coal referred to was non-Vend coal the conclusion is inevitable that one of the terms upon which the combination proceeded was that the shipowners carry none but Vend coal, except possibly Queensland coal to Queensland ports and the stipulated maxima of bunker coal. The letter proceeds to say the position is an extremely difficult one and asks the question, "Practially are we to consider ourselves barred from carrying any coal for delivery at Queensland ports from collieries outside your Association?" A further letter of 31st July confirmed a telegram of same date explaining that in fact the Adelaide Company's agents had given a quotation which was accepted by the Mount Morgan Company, performance being postponed pending reference to the Vend. It suggested as a solution of the difficulty "Vend allows us fulfil this order conditional that all further quotations made c.i.f."

Two points present themselves—first the word "us" in the telegram sent by Howard Smith, which identifies his Company in that transaction with the Adelaide Company which alone has given the quotation; and next that "all further quotations made c.i.f." would in the circumstances imply that only Vend coal was to be

carried. The answering telegram of the Vend was as follows :— "Agree to your fulfilling 500 tons only, distinct understanding only our coal quoted and always c.i.f." Cant's letter of 1st August 1907 (X. 124) already referred to for other purposes contains a resumé of this transaction. The restriction mentioned is correlative to the understanding which is styled in Beckett's letter of 12th August 1907 to the Vend Secretary (X. p. 139) :—"The rule of the Association to sell the inter-State steamship companies only." As a matter of machinery, in order to prevent an unintentional breach of mutual arrangements Howard Smith's letter of 16th August 1907 (X. p. 140) to Cant asks for prompt notification of any withdrawal or addition to the membership of the Vend.

Cant's letter of 9th December 1907, Newman's letter of 27th December (X. p. 198), Appleton's of 16th January 1908 (U. p. 26), Cant's of 24th January 1908 (U. p. 34) and 31st January 1908 (U. p. 39), 6th August 1908 (U. 85), Howard Smith's letter of 20th August 1908 (U. p. 87), Cant's letter of 21st September 1908 (U. p. 98), Cant's letter of 28th September 1908 (U. p. 103) are equally evidentiary of the continuation during 1908 of the combination as well as of the contract. Similarly the minutes of the meeting of 23rd April 1909 (X. p. 216), (U. p. 149), which teem with evidence of continuance, Cant's letters of 7th May 1909 (U. 160) referring to contracts "in their names," 24th May 1909 (U. p. 131), 10th June 1909 (U. p. 134), and the minutes of the conference of 30th November 1909 (Ex. X. p. 221 and Ex. V) are evidence showing the combination was preserved throughout 1909.

On 18th January 1909, Melbourne Steamship Co. tendered to the Melbourne and Metropolitan Board of Works 2,000 tons of coal for the Pumping Station at 22s. 6d., deliveries to be made not less than 100 tons a week or as ordered. On the 29th April McIlwraith McEacharn & Co., Melbourne Steamship Co. and J. & A. Brown tender for 3,000 tons, the same place at 22s. 6d. separately but uniformly, and obtained 1,000 tons each. On 21st September 1909 McIlwraith McEacharn & Co., J. & A. Brown, Melbourne Steamship Co. and Howard Smith & Co. tender separately but uniformly at the same place at 22s. 6d. They obtained 750 tons each. On 23rd November 1909 McIlwraith McEacharn & Co., Howard Smith &

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Co., Melbourne Steamship Co. tendered separately for 1,000 at the uniform price of 22s. 6d.

It is not likely that this wonderful unanimity would have been attained or this partition of supply would have been continued without some pre-arrangement. It is not unworthy of notice that J. & A. Brown stood in a more advantageous position than the other tenderers in respect of the f.o.b. cost of their own coal. Their f.o.b. cost was his f.o.b. cost plus the collieries' profit and yet his delivery price and theirs happened to be fixed at the same amount. This continued time after time. So we have the collieries acting in concert with each other and the carriers including J. & A. Brown acting in concert with each other, and no change visible in the terms on which they acted. The only apparent difference was less regularity and definiteness in stating and recording their understanding. Ex. V. abovementioned shows that on 24th November a code telegram was sent from Cant to Appleton stating "Decision of Board to-day authority given to you to tender all inter-State contract one year including Railways upon understanding that each colliery will participate in total yearly requirements Northern coal to the extent of their respective percentage on the basis of our Association allotment. Committee has been appointed meet shipping companies during next week Newcastle when can you meet?" Later on the same day, and apparently immediately after the first another code telegram was sent from the same to same: "Stopping McIlwraith's Metropolitan Gas contract and forbidding any new contracts except railways." On 25th and 27th further telegrams passed which eventuated in the conference of the 30th. Mr. Hunter admitted he had arranged for 140,000 tons a year from the Hetton Co. for the Gas Company. Forsyth asked if that were "in order." Hunter said he held the Gas contract for 25 years and refused to allow the Vend or any other party to interfere between them. Forsyth said it was understood that the Gas Company would require an additional 60,000 tons a year and asked for an assurance that no contract would be entered into with an individual member of the Vend for the quantity until the matter had been discussed by the colliery proprietors for the reasons already stated. Hunter refused to give this assurance and further stated something which Mr. *Mitchell*

relied on as showing that in 1909 there was no combination. The statement was that " he would be no party to any understanding or agreement which in any way restricted trade or was in contravention of the *Anti-Trust Act*." This laudable sentiment was manifestly evoked by the pressure of the combination arrangements on Mr. Hunter's particularly tender trade spot. It is the first declaration by any member of the combination of allegiance to the law. It comes on the last day of November 1909, after the parties have been doing for years what is now admitted by him to be a breach of the law. It is limited to Mr. Hunter and apparently even by him in practice to gas coals as will presently be seen. And how far was it in fact observed ? When the general supply for 1910 was discussed objection was taken to the allotment basis on the ground of what I may shortly describe as public injury. The Vend adhered to its proposal, the matter was not decided there and then and it was arranged that representatives should meet later. In Ex. V will be found several telegrams ultimately arranging the meeting for Sydney on 17th December at two o'clock. What took place at the meetint there is no record to show. We can only infer it from subsequent conduct. I should think that no definite conclusion had been arrived at as to whether the allotment basis was to be adhered to. However, that was at the end of the year 1909, and the strike was still proceeding.

As against the Adelaide Steamship Co. Ex. R8 is an admission of the renewal of the agreement for 1909. It is a telegram from Captain Brown (Newcastle) to Northcote (Melbourne) dated 22nd January 1909 and contains these words :—" Coal agreement fixed for this year. Terms my letter nineteenth." The letter was called for, but not produced.

Combination Continued 1910.

As to 1910 direct proofs are less plentiful, but the circumstantial evidence leaves no doubt in my mind there was a continuance in fact. There is not a fragment of evidence to show the previous course of conduct was definitely broken off and the combination abandoned. The public had to be supplied and of course were supplied while the parties were struggling about strict allotment.

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In January coal was for instance raised to 46/- to the retail dealers in Adelaide (N5) because the strike was still on, and this made the immediate settlement of allotment less urgent. The strike continued till 24th March 1910. Can it be believed the shipowners got all the profits of the strike prices or was it not rather that clause 10 of the agreement was brought into operation, the price fixed by agreement, and the profits divided? Unless the contrary is shown, and it is not—I infer that latter course was pursued, though not a syllable has been produced to *record* it.

On 10th February 1910 (U. p. 140) Cant wrote to Appleton asking for a meeting between "your members and a committee of this association" to discuss matters generally in connection with inter-State supplies of coal. The letter refers to a meeting of the Vend held on the preceding Tuesday; but no Vend minutes have been produced later than Friday, October 8th 1909 (Ex. J. p. 263), notwithstanding the fact that later minutes were specifically demanded in writing by the Comptroller-General (Ex. Q.) 16th May 1910, and a few days later by Hudson verbally. The sudden termination of the minutes, the last entry of which is the record of the decision to call a full meeting of the members for the 14th October at 9.30 in the morning, is remarkable, and like many other incidents requiring explanation by the defendants has been left unexplained. On the side of the shipping Association the correspondence on the subject goes on up to 26th March 1910 (U. p. 148) when the whole correspondence between the two bodies so far as disclosed abruptly ends. But for one circumstance this fact would be not only singular but scarcely susceptible of reasonable explanation, because mutual business operations certainly did not terminate and up to the date mentioned there is no indication of any approaching change from the customary mode of transacting that business. The only suggestion of a reason for not holding the conference asked for is a statement by Appleton, in the latest letter disclosed, that he had expressed to Forsyth and Learmonth the opinion that "it would be better to let matters settle down for a time." Now what matters were there which the parties thought had better settle down for a time? The strike was over two days before the letter was written. That was past. But coming events frequently cast their shadows

before, and, when legal proceedings are in course of preparation by one party, steps have frequently to be taken which bring more than a premonition to the other; whether this was so or not in the present case it is difficult to say with certainty, but the fact appears that, within a very few days of 26th March 1910, active and open steps were taken by the Government to obtain information from some of the defendants in connection with the alleged combination. Hudson proved (p. 111) that on the 15th April 1910 he saw Mr. Cant at the latter's office Newcastle when the books were produced which are now in evidence (F. I. and J.).

Mr. Hudson identified a letter dated as appears in the notes 15th April 1910, which must be an error for the 13th April 1910, because it can have no reference to any letter other than that marked Ex. G., for identification (see p. 109).

The words "for identification" were inadvertently left on that document and Hudson's mistake as to the date was left uncorrected. I therefore base no inference on Ex. G. although in effect it was identified and so treated. Apart then from that document it is clear that on the 15th April a letter having reference to the production of the books had passed. A person in Mr. Cant's position was not likely to produce, and in similar cases (see p. 113) did not produce Vend documents without prior authority. The probability then, from the fact of production on 15th April and the existence of the letter, is that there had been a prior request and the consideration of that request by the Vend, authority being given to Cant to produce the books. Consequently it does not require a very strong effort of imagination to see why formal records, in the shape of correspondence after the end of March, have not been produced.

Business however had to go on and did go on after 26th March continually. The interviews Moorehead had with Appleton were four, namely, 26th and 27th May, when documents contained in Ex. U. were handed over; 1st June and 28th June 1910. Instances of business done may be found in the letter of McIlwraith McEacharn & Co. with Metropolitan Gas Company, 16th May 1910; the same Company's tender for general stores to Melbourne and Metropolitan Board of Works, 17th May 1910 (B8). Huddart Parker & Co.'s

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tender for general stores same date (B8). There appears in fact to be no break in the method of dealing with the public. The defendants' silence in regard to this period does not of course supply any want of Crown testimony, but it is a circumstance proper to be considered wherever there are any facts tending to show a continuance of the former course of conduct, or from which such a continuance in the absence of contrary proof might be presumed. So considered, it detracts from any observation as to the meagreness of the evidence; or as to its unsatisfactory character, or as to injustice of the inferences which the Crown invites the Court to draw. The circumstances appeal to my mind as immensely strong to show a continuance down to the commencement of the action; and, although no liability in this action attaches to the defendants for what they have since done, their subsequent conduct may show an intention to preserve the combination unbroken, and therefore be inconsistent with its termination in 1910. This is, in my opinion, the effect of the evidence. One instance may be mentioned at this point, viz., Ex. I8, which represents tenders of the four defendant shipping companies and J. & A. Brown, dated 1st May and 2nd May 1910, for general supplies for the South Australian Government for two years ending 30th June 1913. Those tenders include items of coal, some best screened and others small coal, one item being for Southern coal, in divergent quantities, from 20 tons to 3,000, deliverable at eight different places, some in bags and some not, some new items, some old. It is a most remarkable fact, but a fact nevertheless, that there is absolutely no difference in any of the five quotations; as to one item there are two tenders only, and as to two others there are three tenders only, but as to eleven items, the prices, varying of course as to the items themselves, do not vary one farthing as between the tenderers. Other instances are to be found in Ex. B8 Melbourne and Metropolitan Board of Works. Huddart Parker & Co. on 10th June 1910, J. & A. Brown on the 11th, the Melbourne Steamship Co. on the 11th, McIlwraith McEacharn on 11th, and Howard Smith & Co., on the 11th, tender for 1,000 tons engine coal, at the Pumping Station, all separately and all at the one price 22s. 6d. For coal at the Farm in May 1910 Huddart Parker & Co., Melbourne Steamship Co. and McIlwraith McEacharn & Co. all tendered for

50 tons at the one price 27s. 3d. Later on, in the same month, tenders were sent in for engine coal for the Farm, and as required from 1st July for two years by the following :—Huddart Parker & Co., McIlwraith McEacharn & Co., James Paterson & Co. and Melbourne Steamship Co., all tendered separately, and at the one price, 27s. 3d. Evidently a truce was observed on the question of rigid allotment and subject to that and the strike, matters went on by tacit understanding substantially as before. I will here quote a few words from the recent American case of *United States* v. *American Tobacco Co.* (1), *White*, C.J., in delivering the judgment of the Court said :—" Coming, then, to apply to the case before us the Act, as interpreted in the *Standard Oil* (2) and previous cases, all the difficulties suggested by the mere form in which the assailed transactions are clothed become of no moment. This follows because, although it was held in the *Standard Oil Case* that, giving to the Statute a reasonable construction, the words ' restraint of trade ' did not embrace all those normal and usual contracts essential to individual freedom, and the right to make which was necessary in order that the course of trade might be free, yet, as a result of the reasonable construction which was affixed to the Statute, it was pointed out that the generic designation of the 1st and 2nd sections of the law, when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed. That is to say, it was held that, in view of the general language of the Statute and the public policy which it manifested, there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible to escape, by any indirection, the prohibitions of the Statute."

This completes the enquiry as to the fact of a combination and its continuance down to the commencement of the action, and the statutory effect of sec. 14 (*c*) would simplify the approach to this result which so far has been affirmed at common law. The basis of the combination was undoubtedly the set terms appearing in the

(1) 221 U.S., 106, at p. 178; 31 S.C. Rep., 632, at pp. 648, 649.

(2) 221 U.S., 1.

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document contained in Ex. S. and its modifications. In other words, even if the document in S. and its modifications are by any technical process of reasoning or rule of law to be taken, as not constituting a formal contract, they do, as I find, constitute the bond of union and the basis of common action between the Vend and every member of it for the time being, on the one hand, and the shipping Association and every member of it for the time being on the other. Leaving aside for the present the question of intent and detriment I find the allegations of fact in pars. 43, 44 and 45 of the statement of claim are proved.

CONNEXION OF MELBOURNE STEAMSHIP CO. AND JAMES PATERSON & CO. WITH CHARGES.

The Melbourne Steamship Co. Limited and James Paterson & Co. were not, I think, originally parties to the agreement. But very soon afterwards they cast in their lot with the four defendant shipping companies, and were in some partly unexplained but perfectly certain manner assisting the combination and sharing the profits. As regards the Vend, their minute of 13th November 1906 (I. 37) says :—" Melbourne Steamship Co.—Mr. Hunter advised were in line." As against the shipping companies, the letter of D. Y. Syme, manager of the Melbourne Steamship Co. to Appleton dated 17th January 1908 (U. p. 28), Appleton's answer, 20th January, are in point with respect to the same Company. As against all the defendants see Chapman's letter to Newman, 29th December 1906 (X. p. 16) ; Chapman to Hunter 9th January 1907 (X. p. 21) ; Newman to Lewington 11th January 1907 (X. p. 26) ; Lewington's reply 14th January (X. p. 28) ; Lewington to Chapman 16th January 1907 (X. p. 31) ; Chapman to Newman 31st January 1907 (X. p. 36) ; Newman to Lewington 26th March 1907 (X. p. 55) ; Hunter to Forsyth and Howell 25th July 1907 (X. p. 114) ; Newman to Learmonth 15th November 1907 (X. p. 171) ; Newman to Learmonth 27th November 1907 (X. pp. 181 and 184) ; Earp's letter to Cant 7th September 1908 (U. p. 97) communicated to Appleton on the 10th as to the Melbourne Steamship Co. and Cant's letter 28th September 1908 (U. p. 103) to Appleton, and its enclosure—Reid to Greaves ; letters 20th March 1909, Appleton to Cant ;

Cant's reply 30th March and the enclosed letter from H. McLachlan, Secretary to Chief Commissioner of Police of New South Wales to Cant 23rd March 1909 (U. pp. 120, 121, 122); also minutes of Conference 23rd April 1909 (U. p. 149).

The fact that these two shipping companies were active and recognised members of the combination is proved, and it makes no difference that they were not directly and as between them and the Vend parties to the combined agreement, or that they stood in some sort of dependent or subsidiary relation with respect to the defendant shipping companies. They had their function to perform in the arrangement, and they performed it, and participated in the results.

Position of J. & A. Brown.

The position occupied by J. & A. Brown is a little complicated. They are colliery proprietors and members of the Vend, and it is in that quality only they are sued by the Crown. But they are also shipowners and carriers of their own coal. Apparently, and not unnaturally, they were not expected to surrender and they did not surrender their carrying trade. Some special arrangement was consequently necessary to meet this exceptional situation and it appears to have been made. As to its actual terms, the defendants J. & A. Brown have maintained consistently the general attitude of the defendants, by preserving silence. There are some few references to the arrangement which permit us to obtain some idea of its general nature, though not of its stipulations. When the shipping companies attended the Vend meeting on 24th April 1906 they arranged for the agreement between the coal proprietors and the steamship companies, but "subject also to a proper agreement being entered into with Mr. John Brown." That gentleman was present at the meeting. The amount of inter-State trade which J. & A. Brown did for the year 1906 was 36,624 tons cargo, and 4,250 tons bunker, in all, 40,874 tons, out of a total inter-State trade in Newcastle coal of more than 1,500,000 tons. Their subsequent inter-State exports may here be added. In 1907, they were 47,619 tons cargo and 4,600 bunker. In 1908, they were 62,150 tons cargo and 5,975 bunker. In 1909 they were 68,200 tons cargo

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and 4,860 bunker. In 1910, they were 65,110 tons cargo, bunker unknown (Y9). At the conference of July 1907, some question arose as to payments to be made by the shipping companies to J. & A. Brown. It appeared that the companies were now ready and willing to make the adjustment, and it was left in Mr. Appleton's hands to make it immediately subject to audit. The agreement between the Associated Steamship Owners and J. & A. Brown came up for discussion in January 1908 (X. p. 214), what the trouble was or how remedied does not appear. From Ex. U. pp. 132, 149, 150, it would seem there was some provision to keep Brown's coals apart from other coals shipped in the same vessel, but that otherwise there was no special stipulation as regards the coal; they shared in the general Vend allotment as appears from Ex. U. p. 158. At the conference of November 1909 observations were made by Mr. Hunter to the effect that while the other shipowners were expected to take each and every class of coal, Browns were at liberty to take and did take only Pelaw Main coal, and a lot of trade had been gained by Brown in consequence of this. He asked Mr. Forsyth if the Vend intended to place Brown on the same footing as other carriers, and allot them the same percentages of all classes of coals as other carriers. Mr. Forsyth did not answer this question. This indicates that although the Vend still continued in full force and the old exclusive arrangement between Vend and shipowners still went on including the allotment stipulation, yet for some reason the Vend permitted J. & A. Brown collaterally to break through their internal Vend agreement. Brown's special agreement is left indistinct as to terms but certain as to existence (see also Exhibits O8 and P8).

These considerations then establish the combination as well as the contract, but before the substance of paragraph 46 of the statement of claim can be pronounced upon it is necessary to enquire as to the intent of the defendants with regard to both the contract and the combination, and as to the alleged public detriment. There is no offence under sec. 4 unless the act complained of is done with a certain intent.

LAW AS TO INTENT.

The material words here are, "with intent to restrain trade or commerce to the detriment of the public." I apprehend the intent

must be real and not merely imputed. It must be the actual intent of the defendant, and not that which might, without regard to the true condition of his mind, be deduced simply from the construction of his words used perhaps for another purpose. The intent aimed at is not the intent expressed in the contract—if the contract be the act complained of—it is the actual intent of the defendant, of which the contract is excellent evidence to begin with, because a man's real intent may generally be gathered from what he says as well as from what he does. But to ascertain the defendant's intent, the Court may have to go behind the contract altogether, and, in the case of combination search out, by every lawful kind of testimony, the true state of the defendant's mind.

Proof of intention does not involve direct evidence. The person whose intention is in issue may give direct testimony on the point, but, apart from that, the only means of establishing his intent is by proving his declarations or his conduct. *Wills on Evidence*, 1907 ed., pp. 63 and 64, contains a passage which accurately states the position :—"In one class of cases circumstantial evidence must from the nature of the case be given. They are those where the state of mind of a particular person is in issue, as, for instance, where it is alleged that a party did a particular act with a fraudulent purpose, or where, to establish the commission of a particular crime, it is necessary to prove that the prisoner, when he committed the physical act, did so with some particular guilty intent. In these cases no one save the party charged can, strictly speaking, give direct evidence of his mental state ; and, when he denies the charge, it has to be proved by inference from his conduct."

The authorities are collected and the law summarised in Lord *Halsbury's Laws of England*, vol. IX., p. 236, and vol. XIII., pp. 448 and 449.

In this case the defendants and those for whose acts the defendants are responsible were mute, and so the matter rests upon the inferences to be drawn from their declarations and conduct on the well-known principle, *acta exteriora indicant interiora secreta.*

We start with a presumption of innocence : but there is also another presumption usually made, and which is applicable to the present case, that a person intends the natural and probable conse-

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quences of his acts (see Lord *Halsbury's Laws of England*, vol. IX., p. 389, and vol. XIII., p. 499).

In *Coaks* v. *Boswell* (1), Lord *Selborne* says :—"A man is presumed to intend the necessary or natural consequences of his own words and acts; and the *evidentia rei* would therefore be sufficient without other proof of intention." In *South Wales Miners' Federation* v. *Glamorgan Coal Company* (2), Lord *Halsbury* L.C., said :—"It is further a principle of the law applicable even to criminal law that people are presumed to intend the reasonable consequences of their acts." His Lordship doubtless in using the word "reasonable" meant "natural," and he went on to say :—"It is not perhaps necessary to have recourse to such a presumption where, as upon the facts stated, it is apparent that what they were doing must necessarily cause injury to the employers." I quote the last passage because the Crown has urged that upon the facts in this case it was apparent from the beginning and at all events very soon afterwards, that injury must necessarily have been caused to the public.

Then as to the nature of the necessary intent. It must be (1) to restrain trade and commerce; (2) to the detriment of the public. In view of the argument I shall deal with these two parts separately.

LAW AS TO CONTRACTS IN RESTRAINT OF TRADE.

Mr. *Mitchell* advanced an argument which may be stated, as I apprehend it, in the following four propositions :—

(1) The legislature has penalised only those contracts intended to be in restraint of trade and commerce which are to the detriment of the public.

(2) It could not have been intended therefore to penalise any contract which the common law at the time of passing of the Act would regard as enforceable, because not detrimental to the public.

(3) That contracts though in restraint of trade are, according to the common law, not detrimental to the public, and are consequently enforceable, provided only they are reasonable.

(4) That reasonableness has reference only to the parties themselves, the common law in that connection disregarding any element

(1) 11 App. Cas., 232, at p. 236. (2) (1905) A.C., 239, at p. 244.

of raising prices to the public and regarding as invalidating circumstances only such as vitiate any other contract, as for instance some proposed illegal means of performing the contract or some contemplated breach of positive law, outside the mere restraint of trade.

The argument may be effectually answered in two ways. First, the legislature has not left the limitation on the words " restraint of trade or commerce " to be implied. Sec. 1 of the American Act of 1890 used those words without qualification. For many years dicta had fallen from the American Courts to the effect that these words were to be taken in an unqualified sense, and that all such contracts were stamped with illegality whether reasonable or unreasonable, whether beneficial or detrimental to the public.

In a later case, *The Standard Oil Co. of New Jersey* v. *U.S.* (1), confirmed in the subsequent case of *U.S.* v. *American Tobacco Company* (2), the Supreme Court has held, upon a consideration of the whole Act and its relation to the common law, that the legislature had not rigidly invalidated all contracts in restraint of trade, but intended that the standard of reason which had been applied at common law and in America, in dealing with subjects of the character embraced by the Statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the Statute has provided.

The Commonwealth legislature, having before it the American Statute and the earlier judicial expressions of interpretation which had fallen from the American Courts, inserted in the Australian Act its own express limitation on the words referred to. When the legislature has turned its mind to the consideration of a subject and expressly stated its will as to the limits to be observed, it is beyond the province of the Court to further extend those limits. The qualification of the phrase " in restraint of trade " found by the United States Court to inhere in the Act as a whole was adopted as that which Congress would have expressed if it had preferred to record its intention in definite words, which it had not done. That qualification may be found to be just what has been inserted

(1) 221 U.S., 1. (2) 221 U.S., 106.

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in the Australian Act. But in any case, our own Parliament has thought fit to clothe its intention in express language, and that language must be taken to be the measure of its intent. *Expressum facit cessare tacitum.*

It is not as if the phrase "restraint of trade" or its equivalent "to restrain trade and commerce" were in itself ambiguous.

In the *Ipswich Tailors' Case* in 1615 (1), the Court spoke of Parliamentary prohibition to use more than one trade as a "restraint of trade and traffic"; it also said it appeared by the Statute of Elizabeth that "without an Act of Parliament none can be in any manner restrained from working in any lawful trade." It is clear from this, and from the way in which the phrase "restraint of trade" is used in the classical case of *Mitchell* v. *Reynolds* (2), that the restraint spoken of is simply a restriction in fact. The restraint may be good or bad according to circumstances. It may be reasonable or unreasonable, it may be productive of injury or of benefit to the public; but the expression "restraint of trade" means the same thing in each case. So when the legislature says that the kind of restraint of trade or commerce, which it seeks to suppress in certain cases, is where there is detriment of the public," I conceive it is not open to the judiciary to add a further condition, or apply a different or additional test.

The duty set by the Statute is to enquire, by a course as direct as circumstances will permit, as to detriment of the public, and not substitute an enquiry as to whether the contract is unreasonable as between the parties as an equivalent test of legality.

The common sense of the matter makes this obvious. For with what was Parliament concerning itself when it forbade certain contracts and combinations under penalties of fine and imprisonment? Was it undertaking to protect private individuals from unreasonable contracts into which they had voluntarily entered, and which *ex hypothesi* they might lawfully decline to fulfil; or to protect them from equally unreasonable combinations from which they could at any moment retire without legislative or judicial assistance? Assuredly not. Such matters called for no repressive legislation. The aim of the legislature, as is apparent from the ordinary natural

(1) 11 Rep., 53*a*. (2) 1 P. Wms., 181.

meaning of the words of the Statute, as well as the reason of the matter was to protect the public at large. The community had no voice in the making of such contracts or combinations; it was no party to them, it could by its Courts refuse to enforce them to its own detriment, but, if the parties found it to their mutual advantage to proceed with them, the public had only to submit to the consequences, however disastrous.

This is the mischief the Statute was designed to meet, by giving the public the power to prevent injury to the body politic by individual members of the community; and it is precisely the mischief which the argument of defendants' counsel would allow to escape, by leading the Court along a road it was never intended to travel, and which, so far as the Statute is concerned, leads nowhere. And if Parliament was looking to the safety of the contracting parties, it would certainly be a quaint method of protecting private interests to do so by compulsory Crown intervention, subjecting *all* the parties to the compact, to fine, or fine and imprisonment.

For what it is worth as a legislative guide to intention, it may be added that in sec. 2 of the amending Act, No. 29 of 1910, the defences of "not to the detriment of the public" and "not unreasonable" are treated as separate defences.

The second answer to the argument is that it is inherently unsound at common law because it rests upon a fallacy.

The fallacy lies in assuming that reasonableness as dealt with in the decisions has reference only to the parties themselves, and their private individual rights and interests.

On the contrary, the reasonableness that is essential to the validity of a contract, which is in fact in restraint of trade, is reasonableness as regards both the private interests of the parties, and the interests to the public outside those private interests, but affected by their individual arrangements. If unreasonable as to either it is invalid. If it is unreasonable towards the party bound it is admittedly void, and, if though not open to this form of unreasonableness it results in what Lord *Lindley* has termed a pernicious monopoly, it is unreasonable toward the public, and equally void, unless the objectionable part is severable from the rest.

The authority chiefly relied on for the defendants was *Collins* v.

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Locke (8), and the passage most pressed upon me was the last paragraph on p. 685, which is as follows :—" The objects which this agreement has in view are to parcel out the stevedoring business of the port amongst the parties to it, and so to prevent competition, at least, amongst themselves, and also, it may be, to keep up the price to be paid for the work. Their Lordships are not prepared to say that an agreement, having these objects, is invalid if carried into effect by proper means, that is, by provisions reasonably necessary for the purpose, though the effect of them might be to create a partial restraint upon the power of the parties to exercise their trade."

It could not in my opinion be disputed that some cases of prevention of competition between the contractors, and some cases of keeping up prices would not be objectionable. Competition though stayed as between the parties might still be open to others. Certain competition unrestricted might be of the nature forbidden by the second part of paragraph 1 of sec. 4 of the Act ; and the agreement would be a laudable one which would restore it to a normal condition. The prices that are kept up by an agreement might be quite fair and reasonable, and nothing more than would exist under healthy competitive conditions. Their Lordships of the Privy Council did not I apprehend intend to lay down a rule of law, that prevention of competition and maintenance or increase of prices are under all circumstances legal and enforceable objects. There was nothing in the contract then under consideration to show any intention to prejudice the public, except in the covenant at the end of the first clause. In all but that the contract appeared to be a mere distribution amongst themselves of work on terms not shown to be unreasonable or exacting. Nothing was said in it about prices and although probably the arrangement would prevent competitive cutting it did not appear that the parties when they made their contract intended to use, or did at any later period in fact use, their power so as to treat the public unfairly as to prices or otherwise. But as to the covenant at the end of the first clause the Privy Council held that it made the contract illegal because it provided that if the merchants loading ships did not chose to

(8) 4 App. Cas., 674.

employ the party to the agreement, who between themselves was entitled to do the stevedoring, no party to the agreement could do the work; and their Lordships said (1):—"The combination they have thus entered into is obviously detrimental to the public."

In that case a passage from the judgment of *Tindal* C.J. in *Horner* v. *Graves* (2), was expressly quoted with approval. It is important because it lays down the test of reasonableness and contains the common law answer to defendants' argument. I will not stay to quote it now because it comes in more clearly in connection with the next case cited. The leading case on the subject is *Nordenfelt* v. *Maxim Nordenfelt Co.* (3). In that case Lord *Herschell* L.C. said:—"I would adopt in these cases the test which in a case of partial restraint was applied by the Court of Common Pleas in *Horner* v. *Graves*, in considering whether the agreement was reasonable. *Tindal* C.J. said:—'We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, *and not so large as to interfere with the interests of the public.* Whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive, and, if oppressive, it is in the eye of the law, unreasonable.' The tendency in later cases has certainly been to allow a restriction in point of space which formerly would have been thought unreasonable, manifestly because of the improved means of communication. A radius of 150 or even 200 miles has not been held too much in some cases. For the same reason I think a restriction applying to the entire kingdom may in other cases be requisite and justifiable.

"I must, however, guard myself against being supposed to lay down that if this can be shown the covenant will in all cases be held to be valid. It may be, as pointed out by Lord *Bowen*, that in particular circumstances *the covenant might nevertheless be held void on the ground that it was injurious to the public interest.*" Lord *Macnaghten* (4), laid down the law clearly and succinctly in a notable passage which states the rule together with its reason and its meaning. He said:—"The public have an interest in every person's

(1) 4 App. Cas., 674, at p. 688.
(2) 7 Bing., 735, at p. 743.
(3) (1894) A.C., 535.
(4) (1894) A.C., 535, at p. 565.

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carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions; restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—*reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public,* so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities."

The result of *Nordenfelt's Case* and authorities of that class is thus stated by the Judicial Committee in *United Shoe Machine Co. of Canada* v. *Brunet* (1) :—" In each of them the person restrained from trading had granted, presumably for adequate consideration, some property privilege or right to the person who desired to impose the restraint upon him, and, in order that the latter might receive, without injury to the public, that for which he had paid, the contract imposing the restraint was held to be valid only where the restraint was in itself *reasonable in reference to the interests both of the contracting parties and of the public.*"

It is therefore plain beyond possibility of doubt that the test of reasonableness is not confined to a consideration of the matter as it affects the protection of the parties to the contract. Indeed that would be beginning at the wrong end, and mistaking the incident for the rule. *Bramwell* B. in *R.* v. *Druitt* (2) said :—" The public had an interest in the way in which a man disposed of his industry and his capital." The test of whether the contract is fair and reasonable is always and from first to last whether it is prejudicial or not to the public interest; " it is " as *Parke* B. said in *Mallan* v. *May* (3) " on grounds of public policy alone that these contracts are supported or avoided."

(1) (1909) A.C., 330, at p. 344.
(2) 10 Cox C.C., 592
(3) 11 M. & W., 653, at p. 665.

Where they are upheld, it is as that learned judge said "not because they are advantageous to the individual with whom the contract is made, and a sacrifice *pro tanto* of the rights of the community, but because it is for the benefit of the public at large that they should be enforced." *Mallan* v. *May* (1) was approved in *Collins* v. *Locke* (2).

These considerations justify *Sir Frederick Pollock's* view in his *Principles of Contract* (8th ed., 1911, at p. 374), and are confirmed in *Nordenfelt's Case* (3) by the observations of Lord *Watson* at p. 552 and of Lord *Macnaghten* at p. 566; and in *Russell* v. *Amalgamated Society* (4). *Parker* C.J. in *Mitchel* v. *Reynolds* (5) summed up the common law attitude of the Court in these terms: "In all restraints of trade where nothing more appears the law presumed them bad; but if the circumstances are set forth that presumption is excluded, and the Court is to judge of those circumstances and determine accordingly and if upon them it appears to be a just and honest contract it ought to be maintained." That reasoning was followed by *Parke* B. in *Mallan* v. *May* (6) and holds at the present day as is seen from the citation made from the judgment of Lord *Macnaghten* whose words were followed in *E. Underwood* v. *Barker* (7) by *Lindley* M.R. (8) and *Vaughan Williams* L.J. (9). See also per *Collins* M.R. (10) and *Mathew* L.J. (11) in *Dowden* v. *Pook* (12); *Russell* v. *Amalgamated Society of Carpenters* (13). Even at common law therefore the Court is bound to consider whether the contract is reasonable from the standpoint of the public.

Since writing the foregoing observations there has come to hand Vol. 220 of the United States Reports. It contains the case of *Dr. Miles Medical Co.* v. *Park & Sons Co.* (14) decided in April of the present year. At p. 406, the judgment of the Court contains this passage:—"With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified in adaptation to modern conditions. But the public interest

(1) 11 M. & W., 653.
(2) 4 App. Cas., 674.
(3) (1894) A.C., 535.
(4) (1910) 1 K.B., 506, at p. 516.
(5) 1 P. Wms., 181, at p. 197.
(6) 11 M. & W., 653.
(7) (1899) 1 Ch., 300.
(8) (1899) 1 Ch., 300, at p. 304.
(9) (1899) 1 Ch., 300, at p. 312.
(10) (1904) 1 K.B., 45, at p. 50.
(11) (1904) 1 K.B., 45, at p. 53.
(12) (1904) 1 K.B., 45.
(13) (1910) 1 K.B., 506, at p. 520.
(14) 220 U.S., 373.

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is still the first consideration. To sustain the restraint it must be found to be reasonable both with respect to the public and to the parties and that it is limited to what is fairly necessary in the circumstances of the particular case, for the protection of the covenantee." Among other citations in the judgment is the passage I have quoted from Lord *Macnaghten's* speech in the *Nordenfelt Case* (1).

I therefore reject the defendants' contention both because the reasoning by which it is supported is unsound at common law, and because even if sound it would have to give way to the express rule laid down by the Statute.

LAW AS TO DETRIMENT TO THE PUBLIC.

This brings me to the question of "detriment to the public." As the circumstances appear, including the terms of the contract, the course of dealing, the partial character of the restraint, and so on, I am not to make any presumption of illegality against the defendants—that is excluded—but I am to judge of the circumstances set forth in evidence, and determine accordingly as to public detriment. And further, the law as I understand it requires me to arrive at that determination, approaching the consideration of those circumstances with the initial presumption of defendants' innocence, and requiring the Crown to bear the burden of satisfying my mind not by conjecture but with moral certainty based on proved facts and proper inferences, that the defendants have offended against the Statute.

"Detriment" carries its own meaning upon its face. Whatever is its loss or disadvantage, or prejudice, whatever puts it in a worse position is to the detriment of the public. A higher price, a worse quality, a restriction in choice, a more precarious supply, delay in delivery, are instances.

As *Fry* L.J. points out in *Mogul Steamship Coy.* v. *McGregor* (2), the ancient common law of England—as well as some ancient Statutes—referring to forestalling, regrating and engrossing regarded certain operations in goods which interfered with the more ordinary course of trade as "*injurious to the public*"; and those

(1) (1894) A.C., 535, at p. 565.

(2) 23 Q.B.D., 598, at p. 628.

Statutes made them criminal. *Blackstone* in his *Commentaries* (18th edtn.) (1830) Vol. 4, pp. 189, 190, observes that forestalling among other things enhances the price ; so does regrating. Engrossing was the getting into one's possession, or buying up large quantities of corn or other dead victuals, with intent to sell them again, that is at monopolising prices. Says *Blackstone* :—" This must of course be *injurious to the public,* by putting it in the power of one or two rich men to raise the price of provisions at their own discretion." And he adds " so that the total engrossing of any other commodity with intent to sell it at an unreasonable price, is an offence indictable and finable at the common law." See also *Russell on Crimes* (7th edtn.) (1909) at p. 1919.

As *Fry* L.J. observes the Act of 12 Geo. III. c. 71 repealed the other Acts and left the common law to operate. It recited the tendency of the former Statutes to " enhance the price." In 1844 the common law itself was altered by 7 & 8 Vict. c. 24, which abolished the offences of badgering, engrossing, forestalling and regrating, but provided as the learned L.J. says that " nothing in the Act contained should apply to the offence of knowingly and fraudulently spreading or conspiring to spread any false rumour or with intent to enhance or decry the price of any goods or merchandise " &c.

In *Scott* v. *Brown* (1) *Lopes* L.J. refers to *R.* v. *Berenger* (2) in which Lord *Ellenborough* says of a conspiracy to raise by false rumours the price of public funds :—" The purpose itself is mischievous, it strikes at the price of a vendible commodity in the market, and if it gives it *a fictitious price,* by means of false rumours, it is a fraud levelled against all the public."

In the *Termes de la Ley* under title " Forestaller " the definition is " he that buyeth corne, or other merchandize whatsoever is saleable, by the way as it cometh to markets, Faires, or such like places to be sold, to the intent that he may sell the same again at a more high and deer price *in prejudice and hurt of the commonwealth and people.*"

There are some definitions which I shall give in their proper place under the head of monopoly very much to the same effect. Forestalling, and regrating and engrossing are only slight variations

(1) (1892) 2 Q B., 724, at p. 730. (2) 3 M. & S., 67.

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of each other; and condemnation of one frequently implied condemnation of the others. There is nothing technical about the injury to the public, and never was. When Bishop Latimer in 1550 besought King Edward VI. to appoint promoters—*i.e.* informers—against various oppressors of the poor as rent-raisers, extortioners, bribers and usurers, he instanced the case of regrating and he said among other things:—"Yea and (as I hear say) aldermen now-a-days are become colliers; they be both woodmongers and makers of coals . . . There cannot a poor body buy a sack of coals, but it must come through their hands."

After allowing for differences of modern commercial life that and the citation from the *Termes de la Ley* bear a considerable analogy to the position as put by the Crown in this case. The passages I have quoted abundantly testify to the recognition by English lawyers of the fact, which no ordinary individual would deny, that raising prices to a height, variously characterised as unreasonable, fictitious, monopolistic, exorbitant, oppressive, or by some similar adjective, must be a prejudice to the public.

The Supreme Court of the United States in the *Standard Oil Case* (6), reaffirmed last May in the *American Tobacco Company's Case* (7), based their decision on the principle that the American Act was intended to repress the evils produced by the common law offences which unreasonably restricted competitive conditions, of which a monopolistic increase of price was recognised as one.

In the celebrated case of monopolies, *Darcy* v. *Allen* (8), *Popham* C.J. said the sole trade of any mechanical artifice or any other monopoly is a damage and prejudice to those who exercise the same trade, and he referred to three incidents of a monopoly against the Commonwealth which the Court there considered inseparable, viz., 1. "that the price of the commodity will be raised, for he who has the sole selling of any commodity may and will make the price as he pleases; 2. that the commodity will not be so good and merchantable as it was before; and 3. it tends to the impoverishment of divers artificers and others who before by their labour had maintained themselves and their families."

(1) 221 U.S., 1.

(2) 221 U.S., 106; 31 Sup. C.R., 632.

(3) 11 Rep., 84*b*.

He also referred to a case of *Davenant* v. *Hindis* (1) in which an ordinance made by the Merchant Taylors Company, under their charter, was held void. The ordinance was that every brother of the Society putting cloth to be dressed by any clothworker, not being a brother of the Society, should put one-half of his cloths to some clothmaker who was a brother of the Society under penalty of 10s. The ground of the decision was that the ordinance was against the common law, as it was against the liberty of the subject, to get his cloth dressed by whom he pleased, and cannot be restrained to certain persons, "for" said the Court "that would be in effect a monopoly." It is interesting to see that even at that early date the Courts applied to what was "in effect a monopoly," the same rule as to a monopoly strictly so called, that is, one granted by the Crown. See also *Pollock Principles of Contract*, 8th Edition, p. 374.

I by no means regard as inseparable the incidents referred to by *Popham* C.J. but I refer to them because, when they do occur, they are regarded by the law as prejudice or detriment to the public; and further though not inseparable they are not unlikely to occur. The Crown asserts that they have all occurred in the present instance.

I am distinctly of opinion that this question of detriment must not be determined upon any narrow grounds. The mere fact that prices are raised is by no means conclusive. And for this, there is strong judicial warrant. For instance in *Hearn* v. *Griffin* (2), there was an agreement between two coach proprietors that each should charge the same price to passengers. Lord *Ellenborough* C.J. said that it was merely a convenient mode of arranging two concerns which might otherwise ruin each other. *Collins* v. *Locke* (3) in the passage quoted is clear on the point.

The Act under which these proceedings are taken, as I have already pointed out, indicates that prices may be reduced so low as to work injury to Australian industries by unfair competition, and a combination to restore to a fair level prices that had been reduced to a dangerous limit could not for that reason be regarded as contravening the law.

(1) (1599)

(2) (1818) 2 Chitty, 407.

(3) 4 App. Cas., 674.

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In *Hare* v. *London and North Western Railway Co.* (1) *Wood* V.C. said :—"It is a mistaken notion that the public is benefited by pitting two Railway Companies against each other till one is ruined; the result being at last to raise the fares to the highest possible standard." It is the real substantial effect upon the public that must be sought after. That which appears at first sight and standing alone to be a prejudice may when considered in conjunction with other circumstances prove to be the means, and the only means, of ultimate and lasting benefit.

An apparent advantage may, when properly examined, be seen to be merely temporary and the prelude to severe public loss. Competition unrestrained may drive fair-minded and useful servants of the public off the field, bringing disorganization of labour in its train, and leaving the community at the mercy of those who risk a passing concession for a permanent control.

The Court then is bound to look beyond the surface, and investigate causes and effects; it must regard not merely one or more isolated incidents, but the combined circumstances of the situation so far as they are ascertainable before it can pronounce whether upon the whole detriment has arisen, or is likely to arise, and whether the intention to which the law attaches culpability was present in the minds of those charged with contravention.

The particular application of these general principles to the several incidents of detriment complained of by the Crown will be made as these are in turn considered.

I could well have wished to state my views in a very much briefer form than that in which they will be presented. The enormous mass of evidence, the separateness of the transactions which compose it, their varied nature, and individual peculiarities, the numerous attendant circumstances proper to be looked at before some of them are, so to speak, reduced to a common denominator in order to be correctly estimated and justly compared, preclude anything like a generalisation unless preceded by a detailed examination. The novelty of the enquiry, the importance of the issue to both the defendants and the public demand the best and most anxious scrutiny I can give to the matter, and I have thought that after

(1) 2 J. & H., 80, at p. 103.

all it would be a mistake to sacrifice precision to conciseness, or to deprive anyone concerned of the opportunity, if he so wishes, of following my steps upon the long and often thorny path that has led me to my conclusions.

At this point I take the opportunity of expressing my sense of obligation to learned counsel, who, from their respective standpoints, conducted the case with so much ability and skill. Of those having the responsibility of leadership I need say no more, but a special word of appreciation is undoubtedly due to the junior counsel all round. I say this because, in addition to their other specially laborious duties, they so readily and so admirably responded to the requests I made to summarise and systematise the enormous and intricate mass of transactions that otherwise would have been most difficult to follow, and would have prolonged the case beyond all reasonable compass.

Although I have found it necessary to examine the original records of those transactions for myself, the summaries prepared on both sides not merely expedited the progress of the trial itself, but have been welcome guides to the contents of the documents, and tests of my own examinations and comparisons.

VARIOUS CLASSES OF DETRIMENT RELIED ON BY THE CROWN.

The first and the main detriment relied on is the excessive character of the prices charged, the excess being neither natural nor uniform, governed not by legitimate business considerations, but dictated by the necessities of consumers, their artificially increased difficulties in obtaining other supplies, and by favouritism or other erratic causes.

Other grounds of detriment, all serious, are urged—as restriction upon the public choice of transportation and of the pits, and in the total quantity from permitted pits, restriction upon the quantity of small coal, short deliveries of coal contracted for, and substitution of other coals, some inferior.

The Crown says that the contract and the combination alike gave power, and each was intended to give power, to the defendants to create all these prejudicial circumstances, and particularly to artificially raise the price of coal the public would have to pay;

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that they at once commenced to do so, and have ever since continued to maintain and, where opportunity offered, to advance their artificial and unnatural prices still higher.

FACTS RELATING TO DETRIMENT AS TO PRICE.

Looking to the terms of the contract itself, no price, either to shipping companies or to the public, is fixed. Clause 6 binds the shipping companies to pay whatever price the collieries may fix from time to time as their f.o.b. price Newcastle, and clause 8 provides in the first instance for the maximum prices to be charged by the shipping companies to the public ; additional stipulations being added by later clauses.

The contract specifies in the schedules 7s. as the lowest and 12s. as the highest f.o.b. price apparently within the contemplation of the parties for best coal apart from circumstances such as war, strikes and lockouts, and 5s. and 6s. as the corresponding limits for small coal. The collieries are left by the contract entirely at large to fix whatever prices they choose, certainly within those limits. If the agreement consisted of nothing more, I think the proper rule to be applied in the absence of actual abuse or of some exceptional circumstance, as where the limits are palpably excessive or some outside event makes it probable that abuse will arise, is to assume, as I think the Privy Council assumed in *Collins* v. *Locke* (1) that no unfair advantage will be taken of the power. But there is strong common sense in the view that when the whole of an agreement is looked at one part presumably innocent when considered separately may give rise to a strong probability of danger. The idea was well expressed by Mr. Justice *Holmes* in *Swift* v. *United States* (2). That was a case where a charge of combination was made against a dominant proportion of the dealers in fresh meat throughout the United States not to bid against or only in conjunction with each other, to fix prices at which they would sell, restrict shipments of meat when necessary, and charges of intent to monopolise, &c. The learned Judge said :—" The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body and, for all

(1) 4 App. Cas., 674. (2) 196 U.S., 375, at p. 396.

that we can say, to accomplish it. Moreover, whatever we may think of them separately, when we take them up as distinct charges they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful. *Aikens* v. *Wisconsin* (1). The Statute gives this proceeding against combinations in restraint of commerce among the States, and against attempts to monopolize the same. Intent is almost essential to such a combination, and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Commonwealth* v. *Peaslee* (2). But when that intent and the consequent dangerous probability exist, this Statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result. What we have said disposes incidentally of the objection to the bill as multifarious. The unity of the plan embraces all the parts."

In conjunction therefore with the stipulation as to price, there are found the stipulations which I have, in the earlier part of this judgment already quoted—clause 5 binds the collieries not to sell for inter-State trade except to the shipping companies ; clause 6 binds the shipping companies not to purchase any coal for inter-State trade except from these collieries, and binds them further not to carry or have anything to do with the carriage of any other coal. I have referred to the exceptions made in favour of the shipping companies and which are negligible in this connection.

There is thus erected a ring fence in connection with the public supply of Newcastle coal as it may be shortly termed. The dominant proportion of colliery proprietors in number and in quantity of coal produced thereby agreed with the dominant proportion of shipowners that not an ounce of Newcastle coal shall be supplied inter-State except through the shipowners and that whatever

(1) 195 U.S., 194, 206. (2) 177 Mass., 267, 272.

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price may be demanded for Newcastle coal, none other shall be obtainable by inter-State consumers by means of the shipping companies. Further the agreement provides as already pointed out that as a rule the collieries need not deliver to the shipping companies coal from any colliery that has reached the limit of output assigned to it by the collieries under any agreement among themselves. If the consumers object not only to prices but also to the nature of the coal supplied through the shipping companies, their opportunities for obtaining supplies elsewhere are immediately, that is, directly, curtailed.

Two opposing suggestions were made as to the intention of the combination in stipulating for a maximum c.i.f. price. The Crown suggested that the collieries imposed a maximum limit so as to guard against the probability of the shipping companies demanding such high prices as would drive the trade to other collieries. The idea contained in the suggestion is that the parties arrived by calculation or estimate at the highest price which the public would consent to pay rather than go elsewhere. This seems to me highly improbable. It would involve among other things some estimate of the lowest prices at which other collieries could afford to sell. It would further connote that the shipping companies would not be alive to their own interests, but would pursue the fatal policy of driving trade not only away from the Northern collieries, but also from themselves, because they had undertaken with minor exceptions not to carry other coal.

Somewhat to alter a homely adage that would be not to kill the goose that laid the golden egg, but to drive it away that it might lay the golden egg on other persons' premises. Such reckless altruism is not to be imputed to the shipping companies. I do not accept the Crown's suggestion. Equally unable am I to adopt the view suggested by the defendants. That view is that the maximum c.i.f. price was fixed in order that the public might be protected against the rapacity of the shipowners. It was argued that if no maximum had been imposed the agreement might have been open to the objection that the exclusive purchasers of the Vend coal were left at large to charge what price they wish ; and that the fixation of the maximum exhibited a laudable solicitude for the welfare

of the public on the part of the Vend, and a corresponding recognition of the propriety of such fetter upon temptation on the part of the shipping companies. There are several difficulties in the way of accepting this suggestion. First of all—there is no corresponding fetter placed by the shipping companies on the possible rapacity of the Vend. At any time without rhyme or reason, the f.o.b. price could be raised from 9s. or 10s. to 12s. at least which would mean an automatic advance of the maximum c.i.f. price from 14s. or 15s. 3d. at Melbourne to 17s. 9d. and from 15s. 6d. or 17s. at Adelaide to 19s. Again there is no indication in the agreement of any special consideration for the public. The tendency of the whole agreement is self-interest, and if there had been any desire to guard the public in the way suggested I should have expected to find some distinctive provision in regard to it. For instance, there would in all likelihood have been some condition providing that if there were any attempt to extort higher prices from the public, the agreement might be terminated, or the collieries should be at liberty to sell to the public direct or to other shipping firms ; nothing of the kind appears ; on the contrary there is a distinct provision made of a wholly different nature as to what is to happen where excess prices are charged.

Clause 11 already quoted makes that provision, which is that the whole excess if without the consent of the collieries is to go into the pockets of the Vend, and what is extremely important is, that the reason for this stipulation is expressly given. That reason says nothing whatever about protection of the public ; the reason given being that it was the intention of the agreement to place the shipowners, who are called the purchasing agents, in the position of agents only, with a liability to pay for all coal ordered at the rates agreed on ; and it is stated as will be seen on reference to the clause that the maximum c.i.f. prices set out in clause 8 are to represent the shipowners' compensation for freight and remuneration for their work of realisation. The further provision in the clause that the shipowners are bound to give full access to their books and documents to the Vend's accountant to enable him to ascertain whether a breach of the clause has been committed emphasises the previous words regarding agency. The collieries it appears are

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as between themselves and the shipowners to be deemed to supply the public, but only in the way provided by the agreement, and this clause 11 indicates the intention of the agreement to unite the two groups by constituting the shipowners *pro hac vice* the exclusive agents of the Vend, forbidding them to act for the benefit of any collieries other than those of their principals and stipulating as to the application of the purchase money received from the public. The further proviso in clause 11 applying where excess prices are obtained "with the prior consent of the Vendors in writing"—an expression pointing to the protection of the collieries, not of the public—divides the excess in such case equally between the collieries and the shipowners. The difficulty of explaining away the very clear language of this clause led Mr. *Mitchell* to rely on some expression used by the representatives of the parties at the conference held 23rd July 1907. They are found at p. 107 of Exhibit X. Mr. Forsyth on the side of the collieries said :—"We have the right to increase our price to you at any time for such coal as you may not require to satisfy your contracts." That was statement number one. Then he made statement number two, which I agree with Mr. *Mitchell* is a distinct statement, though it appears in the same paragraph—"If you sell coal over the agreed prices we are entitled to participate." Mr. Hunter on the side of the shipowners replied, "Mr. Forsyth is right in stating that if under special circumstances we get higher prices, the collieries are entitled to share in the excess." Mr. *Mitchell* urged that an interpretation was thus placed by the parties on clause 11 which gave an entirely different effect to it. He said in effect that they recognised that excess prices should be shared only in special circumstances, and he argued that "special circumstances" meant only the special matters mentioned in the agreement, wars, strikes, lockouts, and that clause 11 was limited in its application to clause 10. But that suggestion cannot be accepted. The parties at the conference were not directly discussing the effect of clause 11 and it does not appear that any formal interpretation contrary to its plain meaning was ever adopted. Still less did the parties ever act upon any such basis as is suggested. The statement by Mr. Hunter, that if an excess price is obtained the collieries are entitled to share in the excess,

obviously does not apply to cases where the excess is obtained without the consent of the Vend, because in that case the excess is not shared—it all goes to the collieries.

The special circumstances referred to, I take to mean whatever circumstances may at any time be recognised by both parties by mutual consent as sufficiently special to warrant an increase in the maximum prices fixed by the agreement. War, strikes, lockouts, are recognised by clause 10, but a war, from its situation and the nation involved, may be such as in the opinion of the parties not to affect the demand for Newcastle coal. In that case it would not be a special circumstance, so also a strike or a lockout wherever it takes place might or might not in the opinion of the parties appreciably affect the supply of available coal. That opinion would determine whether they consider it a special circumstance and so induce the Vend to give or withhold their consent. Again a change in the demand, home or foreign, a natural alteration in the supply, or accidents to mines or ships might induce a reconsideration of prices.

Clause 17 adopts clause 11 in a very remarkable manner. In addition to war, strikes and lockouts "inevitable accidents" are referred to as possibly interfering with the carrying out of the engagements of the parties "or any of them." Such parties are "to the extent of such interference" to be free from compliance with the engagements embodied in the agreement.

The largeness of that expression would so far free the shipowners from the provisions of clauses 10 and 11 so that they might without the Vend's consent sell at an excess price and keep the excess. But then comes the concluding part of clause 17 providing that the shipowners shall not without the consent of the collieries re-sell at a higher price than already provided and "in the event of their selling at any higher price," which applies whether there is consent or not, the provisions of clause 11 are to apply to any excess.

I accordingly put aside all idea of the maximum being instituted for benevolent motives, or to establish *bona fides* in the event of the agreement—which the parties refrained from signing—being brought to light. Also do I discard the notion that it sprang from a distrust of the business capacity or sanity of the shipowners.

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INTENTION AND EFFECT OF PROVISION FOR MUTUAL EXCLUSION OF OUTSIDE COMPETITION.

I see in it *prima facie* an intention that the shipowners shall not get more than a certain proportion of whatever price may be obtained for the Vend coal. Circumstances like the strike of 1909 might permit of much higher prices being obtained from the public than the fixed maximum, and the collieries were not disposed to be absolutely content with their previously fixed f.o.b. price and allow the shipowners to get all possible surplus advantage of the market. The higher prices might be reasonable or unreasonable; that was immaterial for this purpose, but whatever they were the arrangement amounted to this, if only they were obtained by joint consent the excess should be shared equally. By constituting, as between themselves, the shipowners jointly the agents of the Vend jointly, the Associated Collieries retained a hold upon the transactions of sale which secured the due fulfilment of this part of the bargain. As a deterrent against its secret violation, they established a right to the whole of the excess unless their prior consent were given and this right with the right of examination of the shipowners' books made any attempt at evasion futile. The defendants by these means built up a ring fence as I have already described it, which was high enough and close enough to shut out almost all effective competition. It is demonstrated by tenders (see Q3), contracts and verbal evidence that, for the larger contracts, consumers frequently desire several pits to draw from. Regularity and continuity of supply are of high importance to railways, gas and electric lighting companies and public bodies generally. To guard against interruption or total stoppage it is desirable to have a number of pits from which supplies can be drawn. This in itself puts a powerful lever into the hands of the combination and seriously detracts from the availability of the non-Association mines—Wallsend, Burwood Extended and Ebbw Main—to meet the general demand supposing all other things equal. An example of the power this confers on the combination is afforded by Learmonth's telegram to John Brown of 30th October 1909 (Ex. P8). Again, whatever chances of outlet the non-Vend mines may have, means of transport are indispensable and there is a closed door between them and the

shipping companies with their allies, the Melbourne Steamship Co. and Paterson & Co.

That was the object of this ring fence so far as may be deduced from the agreement itself. Mr. Campbell said that at most it merely formulated a pre-existing practice. Whether that was so in fact or not will appear presently, but it matters not, because a contract which imposes an obligation to continue a practice seen to be prejudicial creates a very different situation from that where any party may freely at any moment alter his practice as soon as prejudice threatens or appears, and, as already pointed out, the correspondence presents numerous occasions where both parties in turn point to the agreement existing between them as a reason why, to some step taken or desired to be taken in the circumstances, this obligation constitutes a bar, and we find when this is pointed out that the step complained of, however desirable, is either regretted, retraced or abandoned. There are some additional concrete instances which further indicate to my mind that but for this combination the exclusiveness which is its central vice would not have existed. In January 1906 when the South Australian Government was about to call for tenders, Mr. Colebatch, the Chief Storekeeper and Executive officer of the Supply and Tender Board for that State to make enquiries as to direct tenders, towards the end of the month saw Mr. Chilcott, of the Scottish Australian Co., with reference to altering the form of contract that had hitherto prevailed, and calling for tenders in two parts, one for freight from Newcastle to South Australia, the other for coal direct to the Government instead of as formerly to the shipping Association so as to be cheaper. Mr. Colebatch put the question to him whether he would tender to the South Australian Government direct if he had the opportunity and he said he would do so. About the same time Mr. Colebatch saw Mr. Wilkins of the Hetton Coal Co. and Mr. Learmonth of the A.A. Co. and Hebburn, and Mr. Brown of J. & A. Brown. Mr. Wilkins said he was agreeable to tendering to the South Australian Government instead of to the shipping Association; Mr. Learmonth said he considered it a good move on the part of the Government to separate the tenders in the way previously described, and he gave reasons. The account of these three interviews I have admitted

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only as evidence against the following defendants respectively, Chilcott, the Hetton Co., Learmonth and the A.A. Co. These defendants are certainly affected by what they said. It appears that the Government called for tenders in March and Scott Fell & Co. desired to tender. The Vend minutes of the 23rd April 1906 (F. 59 and following), already mentioned in another connection, refer to the South Australian contract of 96,000 tons. Shipowners and collieries were both represented at this meeting, Mr. Hunter addressed the meeting and explained the position of the Steamship Owners' Association in regard to the contract and asked for such a quotation from the colliery proprietors as would enable them (the Steamship Owners' Association) to secure the business. Reference to Ex. C2 shows that the only coal called for by the Government was Newcastle coal.

The minute proceeds to say that Mr. Simpson for the Pacific and Mr. Laidley for Rhondda informed the conference that they had already quoted for Scott Fell & Co. for a supply of a portion for this contract, but were willing to make a quotation to the Steamship Owners' Association, with the result previously adverted to. Several companies undertook not to supply coal for this contract except to the Steamship Owners' Association. The immediate outcome was the guarantee of 24th April ; that is evidence against all the defendants and there is nothing to countervail it. There is also affirmative evidence from the resolutions of 30th March that no member of the Vend would sell to Howard Smith & Co. or to the Adelaide Steamship Co. pending the report of the Committee about to proceed to Melbourne without consulting the Board, and on the 23rd April, at the meeting of the Vend before the joint conference on that day (and this I take as against the Vend only), Mr. Chilcott mentioned this resolution and asked if he were still precluded from supplying the Adelaide Steamship Co. The meeting resolved that he be allowed to execute the order given by that company. I think it is idle for the defendants to ask me to assume that the same system of exclusiveness would have prevailed if the combined agreement had never been made. Then said Mr. *Campbell* further, the combination was beneficial, because it promoted concentration of supplies, in other words having the whole of the production avail-

able for the service of the trade. That means as I understand if ships load whatever coal is brought to them the loading takes place quicker and with less possibility of delays than if coal from particular pits were selected for the cargo. The bare fact may be so, but that is no guarantee of advantage from the combination, for it is little satisfaction to a consumer to know that he can be the more speedily supplied with coal that he would rather not have, in return for not getting at all the coal he prefers. *Mr. Campbell* adds to the supposed advantages of the arrangement, those of regularity and continuity. They are only consequences of what is already said. How the inter-State consumers of coal in Australia suffered for want of some such beneficial arrangement all the years down to 1907 the defendants have not vouchsafed to explain. How the foreign trade and the purely New South Wales trade suffers at the present time is not shown. It was also claimed as a benefit from this arrangement to the smaller collieries and I suppose through them to the public that their products are more sure of earlier and regular despatch. Perhaps to the collieries this may be so, though I am not altogether convinced of that on the whole, but to consumers I should say certainly not. If a consumer wants the coal of a particular small colliery, so far from being sure of getting it quicker, he is not, unless in some exceptional cases, sure of getting it at all. The object of the ring fence then so far as a deduction may be made from the agreement unqualified by what was done under it was to control, so far as it could be controlled, the supply to the public of what is known as Newcastle coal. Mr. *Knox* said it was absurd to talk of creating a monopoly of Newcastle coal just as it would be to talk of creating a monopoly of Tasmanian apples. If the charge were that the defendants had created a monopoly in the production of Newcastle coal, there would be more force in the argument. Newcastle coal, of course, can only be produced in the Newcastle district, and that fact must remain so, combination or no combination, so long as all the mines are worked. But the supply of Newcastle coal to the public involves other considerations. The producers of that coal, whether singly or in any form of mutual association as a Vend, might, lawfully or unlawfully, raise the price, restrict their aggregate output, and allot individual proportions of that output,

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and yet stand clear from the particular objection of monopoly. If notwithstanding all other objections they sold to any consumer whomsoever that applied for coal, if they sold indiscriminately to any shipping firm whatsoever that applied, and did not prevent other persons from raising coal in that district and disposing of it, they would be free from monopolizing the trade in Newcastle coal. The Act does not strike at monopoly of production, it strikes at monopolization of trade and commerce, which is a very different thing. As to what is necessary to constitute such a monopoly, I shall address myself later; I am concerned at the present moment only with distinguishing between mere monopoly of production, and monopoly of trade.

The charge here is, that by the combined agreement a monopoly has been created in the trade and commerce in the coal which begins with the first movement of the produced commodity on its transit to other States by limiting its course of transit to the one channel, namely, the shipping companies. The collieries undertake to let their coal reach the public in no other way; there can, consistently with the agreement, be no inter-State trade in Newcastle coal except that which is concentrated by means of this agreement in the hands of the shipping companies, which are regarded for the purposes of the agreement and in relation to the collieries as one entity. I have previously said that that result would not have arisen if the agreement had not been made; whether that amounts in law to a monopoly depends upon considerations properly dealt with later on.

I have now described what in my opinion is the plan or scheme contained in the agreement each part throwing light on every other part, the general intention animating the whole.

If consequently, I were driven to find from the contract itself whether or not there was a probability of danger to the public of the absolute power to raise the f.o.b. price from its then present price to some higher price, at all events up to 12s. for best coal, being misused, should opportunity offer, I should have no hesitation in thinking, having regard to human nature and the absence of any explanatory reason for the contract and the form it has taken, that here was a strong probability of such misuse. I gather from the

document and the way it came into existence an intention to be guided only by self-interest, an intention to make the most of any situation which the necessities of the Australian public might present and, in utilising all such opportunities, not to be restricted by limits of price which would be measured by ordinary and reasonable competitive standards. Competition is killed so far as the parties by agreement could kill it. But, in favor of the defendants, I do not arrive at my conclusion against them on this point without considering their conduct during and since the latter part of 1906. I take into account their course of business and estimate their actual intention and the probability of danger to the public arising from the new combined power created by the contract from the consideration of its terms as they have been actively applied, and as they have been interpreted practically by themselves so far as words and acts have placed any definite and reliable construction upon them, and, where they have not, then from an interpretation of the document itself by the light of surrounding circumstances. These external matters, as I may style their words and conduct alluded to, fall conveniently under their appropriate classification of intent and suggested detriment.

INCREASED PRICES TO THE PUBLIC ACTUALLY CHARGED BY SHIPPING COMPANIES AFTER DEFENDANTS' COMBINED AGREEMENT.

The issue of excessive prices opens up evidence bearing very strongly on the question of intent, as well as detriment, but in the first instance it is, I think, desirable to show in a succinct form in figures the actual increases in price which either were coincident with the coming into operation of the combined agreement, or else were introduced as soon afterwards as current engagements permitted.

The Vend on 27th September 1906 fixed the prices of coal for 1907 at a higher level than that existing at the beginning of 1906, namely, at a minimum 10s. net for large and 5s. 9d. net for small. The combined arrangements would naturally be expected therefore to operate as from 1st January 1907 ; this they did for the most part ; an expressly admitted example exists in the case of the Townsville Gas Co., see letter of 4th January 1907 (Ex. A9). In a few excep-

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tional instances prices began to rise a little earlier, but only after the prospect of completed combination seemed assured. Coming now to the actual advances of price I will take the States separately, enumerating the respective consumers and showing the increase of price in each case.

VICTORIA. (1) *Victorian Railways.*—The price of Pelaw Main, Stanford Merthyr, Abermain and Hebburn coal for 1906 (contract made towards end of 1904) was 10s. 5d. and 10s. 6d.; for 1907 (contract made towards end of 1906) 14s. 1d., a rise of 3s. 7d. and 3s. 8d. or 34 per cent. That was under a contract for 3 years. For 1910 the price was 15s. 5d. and 16s. 2d., that is to say an eventual rise over the 1906 price of 5s. and 5s. 8d., say 48 per cent. The quantity was about 260,000 tons per annum for the period 1907-9, and about 129,000 tons for 1910.

(2) *Footscray Gas Co.*—The price of coal screened at pit from A.A., Stockton and Hetton collieries for 1906 (fixed in March 1905) was 14s. 9d. at Footscray wharf; for 1907 (fixed in March of that year) was 18s. 6d., a rise of 3s. 9d., about 25 per cent.; from Abermain, Hebburn and Aberdare pits for 1906 13s. 9d.; for 1907 18s. 6d., a rise of 4s. 9d. Small coal for 1906 11s. 9d.; for 1907 14s. 6d., a rise of 2s. 9d. In 1908 the price advanced to 19s. 9d. or 5s. over the 1906 price, and small coal to 15s. 3d., which was 3s. 6d. advance; in 1909 the price was 19s. 6d. and in 1910 19s. 3d. The last quotation leaves the price at 4s. 6d., increase about 30 per cent. The quantity averages about 5,000 tons per annum.

(3) *Melbourne Glass Bottle Co.*—Newcastle engine coal for 1906 was 12s. 3d.; for 1907 was 15s. 6d., an advance of 3s. 3d. or 26 per cent.; in 1908 the price was 17s. making the advance 4s. 9d., which receded in 1909 and 1910 to 16s. 10d. and 16s. 6d. respectively, the eventual increase being 4s. 3d. per ton or 34 per cent. The quantity used is about 12,000 tons per annum.

(4) *Melbourne Co-operative Brewery.*—The latest date given prior to 1907 is 1904 when the price was 16s. 3d.; the earliest date after the combination is February 1908 when the price was 22s. 3d., nearly 37 per cent. In 1909 it was 22s. 3d.; in 1910 21s. 3d.; the quantity is about 2,000 tons per annum, an eventual rise of 5s. or 30 per cent. over 1904 price.

(5) *Australian Paper Mills.*—The price for 1906 and up to the end of February 1907 under a contract dated March 1905 was for Newcastle engine coal at Melbourne 13s. 6d., and small coal 12s. 3d.; for 1907 (by contract of March that year) the price for engine coal was 18s. 6d., being a rise of 5s. or 37 per cent. over the previous price; and for small 14s. 6d., being a rise of 2s. 3d. and a provision of 1s. extra if more than 25 per cent. small. In 1908 the price for engine coal rose to 21s., a total advance of 7s. 6d., that is more than 50 per cent. on the price paid in 1906. Small was 16s. 3d., a rise of 4s. and 1s. extra if more than 25 per cent. small. In 1910, the price of engine coal, 20s. 9d., an eventual rise of 7s. 3d., that is, 53 per cent. The price of small is 4s. 6d. less, namely, 16s. 3d. The quantity supplied was about 5,750 tons large coal per annum.

(6) *G. Mowling & Son.*—For 1906 the price of Maitland engine coal was 14s. 3d. and small 13s. 3d.(contract note December 1905); for 1907 (by contract note dated 18th December 1906) the price was 20s. 1d. and 17s. 1d. respectively, being a rise of 5s. 10d. or 40 per cent., and 3s. 10d. or close up to 29 per cent. respectively. For 1908 a further rise takes place. The contract note bears date 30th December 1907, and engine coal is 22s. 9d., which is 8s. 6d. rise or about 60 per cent.; small coal is now 19s., a rise of 5s. 9d., about 40 per cent. For 1909 the last mentioned prices are maintained. The quantity supplied was about 2,000 tons per annum.

(7) *The Melbourne Harbour Trust.*—In 1906 the price for Hebburn and Maitland coal was 11s. 6d. In 1907 Lambton, Burwood, Newcastle, Hebburn, and Abermain 15s. 3d. ex steamer, a rise of 3s. 9d., within a fraction of 33 per cent. In 1908 it is 17s. 9d., which is 6s. 3d. advance, over 55 per cent. In 1909 and 1910 the highest price is retained. The quantity supplied is about 4,000 tons per year.

(8) *Melbourne City Council.*—At the Electric Light Station in 1906 Aberdare, Abermain and Hebburn were 13s. 6d. For 1907 for the same three pits and fourteen more the pits being named as "and/or" the price was 18s. 3d., an advance of 4s. 9d., that is 35 per cent. In 1908 the price for "Newcastle coal" is 20s. 10d., an advance of 7s. 4d. In 1909 and 1910 it recedes to 20s. 4d., the final increase being 6s. 10d., a shade over 50 per cent. Small coal is :—

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1906 12s. ; 1907 15s. 3d. ; 1908 and 1909 16s. 7d. ; 1910 17s., a total rise of 5s. on small coal. The quantities used are about 7,825 tons large, and 8,600 tons small.

(9) *Melbourne and Metropolitan Board of Works.*—First at the Pumping Station for 1906 the price of A.A., Stockton, Hetton, and/or Newcastle was 13s., the tenders being dated 9th January of that year. In January of the following year the price rose to 18s. 9d. and 19s., about 46 per cent. ; and in 1908 to 22s. 6d., where it has remained, that is an increase of 9s. 6d., over 73 per cent. The quantity per annum averaged about 6,800 tons. For the Werribee Farm down to 30th June, Newcastle engine coal in bags was 19s. By contract dated 13th June 1906 based on a tender of 28th May and covering the period from 1st July 1906 to 30th June 1908 the price was raised, but only to 21s. 5d., an advance of 2s. 5d. In 1909, the price was 27s. 9d. and in 1910 27s. 3d. ; an ultimate advance of 8s. 3d. over 43 per cent. The quantity about 300 tons per annum.

(10) *Commonwealth Services.—Forts, Port Phillip Heads.*—First as to the Point Nepean house coal the price fixed in October 1905 for the year 1906 was 17s. For 1907 by tender dated 5th November 1906 the price is raised to 28s., a rise of 11s., close on 65 per cent., a tolerably substantial rise. I should here state that William Rea, who is Regimental Quarter-Master Sergeant, has stated for the past 10 years the conditions of delivery have been exactly the same with regard to Point Nepean and Queenscliff. In the following year however a still further rise took place. By tender of 4th November 1907 wrongly bearing date 1908 the price reaches 32s. 3d., and, in the following year, by tender of 16th November of that year wrongly dated as 1910 the price is 32s. 9d., being over 92 per cent. increase. The amount is only about 30 tons per annum, but that circumstance would of course have been considered when the price was fixed in 1906 and so the contract between the two limits is unaffected by the quantity.

Then as to Queenscliff, the price of house coal for 1906 was 18s. ; for 1907 23s. 6d., that is, 30 per cent. ; for 1908 and 1909 27s. 3d., and for 1910 27s. 9d., just over 54 per cent., the quantity about 140 tons per annum.

(11) *Victorian Government Special Services.*—(*a*) Sunbury : House Coal.—The price for 1906, see McIlwraith's tender 17th October 1905 (V2), was 19s. for Maitland coal ; for 1907 the price is 25s. 3d., a rise of 32 per cent. ; for 1908 the price is 27s. 3d. where it remains ; that amounts to a total rise of 8s. 3d., over 43 per cent. The quantity is about 500 tons per annum. (*b*) Melbourne District House Coal.—Price in 1906 was 14s. ; in 1907 it sprang to 20s. 3d., over 44 per cent. ; in 1908 it was 22s. 3d., a total rise of 8s. 3d., over 58 per cent. The quantity is 1,400 tons per annum. (*c*) Melbourne G.P.O. Steam Coal.—The price in 1906 was 13s. 3d. for Maitland, 13s. 9d. for Newcastle. In 1907 it was 19s. for both, that is 42 per cent. over the previous average price. By direction of the Victorian Cabinet, Jumbunna coal was taken at 19s. 5d. In 1908 the price rises to 20s. 6d., the tender of James Paterson & Co. being accepted. The rise here is 7s. 3d., over 54 per cent. beyond the previous lowest price, or 50 per cent. over the average. The quantity is about 600 tons per annum. (*d*) Lady Loch Steam Coal.—For 1906 the price of Maitland coal was 12s. 3d., Newcastle 12s. 9d., or an average of 12s. 6d. For 1907 the price was 18s. 4d., a rise of 6s. 1d. over Maitland and 5s. 10d. or 46 per cent. over the mean. By Cabinet direction Jumbunna coal was taken at 19s. 6d. In 1908 the price was 20s. which gives a total increase of 7s. 9d., which is over 63 per cent. over Maitland and 7s. 6d. or 60 per cent. over the mean. The quantity is about 950 tons per annum. (*e*) Yarra Bend.—Price 15s. 1d. and 15s. 7d. for Maitland and Newcastle respectively for 1906, an average of 15s. 4d. In 1907 21s. 6d. or 38 per cent. over the mean. In 1908 23s., a total rise of 7s. 8d., that is 50 per cent. The quantity is about 2,125 tons per annum.

(12) *Retail Dealers.*—Mr. Ramsay is a coal and firewood dealer carrying on business at Windsor, Melbourne ; he is Secretary of the Melbourne and Suburban Firewood Dealers' Association. His trade since 1897 has been nothing less than 200 tons of Newcastle coal a year. There are about 600 members in the Association. It does not appear how much in the aggregate was sold by the 600 members, but it must be a very considerable quantity, some tens of thousands of tons, and we are not concerned here with the exact tonnage of coal sold. The defendants in 1908 estimate it at 53,607

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tons, but it is more. The shipping companies also sold direct to the public. The Adelaide Steamship Co. to a very small extent indeed, the quantity so sold being negligible, the other three do sell retail in a substantial sense; they issue lists such as those in Ex. K8 in which prices are given for dealers on the wharf, for casual dealers and for private orders. So far as Victoria is concerned the lists show that to dealers on the wharf up to 1st June 1906 the price was 14s. 9d. for screened coal; 13s. 9d. for engine coal; 11s. 6d. for smiths coal. Private orders on the wharf, which may be taken as the datum, were 2s. more. From 1st June 1906 dealers on the wharf were charged 16s. 9d. for screened; 15s. 9d. for engine; 13s. 6d. for small. From 23rd July 1906 the price to dealers on the wharf was 19s. 3d. screened, 18s. 3d. engine, 16s. small. There was a discount of $2\frac{1}{2}$ per cent. given to dealers taking 25 tons per month and paying by 14th of following month. If that discount were frequently operative, it would be in cases at the rate of 300 tons per annum and applying this to 600 dealers would make the total tonnage something very great, about 180,000 tons, but the total quantity sold in this way was not one half that tonnage. There is the statement that about 7 per cent. of the total trade is what is called the general trade (Ex. X. 107). This is substantially assented to by defendants (see p. 1806). But that does not give anything exact for Victoria. The total inter-State trade is certainly over 1,200,000 tons and about 7 per cent. of that is 84,000 tons of which it would not be over estimating it to say 60,000 tons were sold in Victoria. Continuing the range of prices, the October list 1906 repeated the July list, so that up to end of 1906 the price had risen for screened coal from 14s. 9d. to 19s. 3d. to dealers with 2s. extra to the public direct. I do not refer to this so far as any advance of price resulting from the combination, because of the admission that before 24th September the Shipping companies were not acting in combination; although the colliery proprietors had to a certain extent coalesced, and had determined, in conjunction with the shipping companies, to assist those companies or some or one of them, since I must take it they were acting independently, to obtain the South Australian contract. And these rises in price during 1906 are probably due to the influence of the coming change which was confidently anticipated.

However that may be, I have the undeniable fact, that the price of coal had so far mounted. From the 1st January 1907 a further rise—a combination rise—took place, the prices now being 21s. for screened, 20s. for engine and 17s. 9d. for small, that is to say 1s. 9d. per ton was clapped indiscriminately on all three classes of coal, 2s. additional being still retained for the public. Casual dealers special prices now disappeared. From 1st January 1908 a further rise took place, they were 22s., 21s. and 18s. 9d. respectively—corresponding prices to the public being 24s., 23s. and 20s. 9d. From 1st January 1909 a reduction of 6d. per ton on large coal was made to dealers, so that the prices stood thus :—To dealers, screened 21s. 6d., engine 21s., small 18s. 9d. ; to the public prices were respectively 24s., 23s., 20s. 9d. ; that is the public did not get the benefit of the 6d. reduction and this was continued into 1910. There was now no discount—the reduction apparently taking its place. The result to the public is that the price has gone up from 16s. 9d. for ordinary household coal prior to June 1906 to 21s. 3d. to end of December 1906, but not so as to attribute this to the combined contract or combination charged in the statement of claim. Had these agreements not been in an advanced state of negotiation, it may be that the rise in prices, so far, would not have taken place. I draw no legal conclusion adverse to the defendants from the rise of price up to this point, but I take the rise as a fact, and I do not think any conclusion favourable to them can be drawn from the circumstance that by the end of 1906 or properly speaking by 24th September of that year the prices had reached the limits mentioned. But from the beginning of 1907 when the defendants were in combination the public have to pay for ordinary household coal at the wharf the difference between 21s. 3d. and 24s. at the time the action was commenced and for 18 months before. Now 2s. 9d. a ton extra, close upon 13 per cent., is a considerable addition to a householder's bill of coal especially after the recent advances, which altogether brought them to 7s. 3d. a ton or 43 per cent.

(13) *Metropolitan Gas Co.*—The price in 1906 of large coal was 14s. 7d. ; small coal 10s. 3d., that was under a tender dated 18th September 1903 for a period of 3 years from 1st April 1904. The next contract was in May 1907 for 3 years for best screened round

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coal at 15s. 2d. per ton, the quantity about 150,000 tons per annum.

The Crown has drawn attention to the double fact that the rise in 1907 was only 7d., and secondly the price reached in that year 15s. 2d., whereas in the case of the Footscray Gas Co. the rise was 3s. 9d. and the total price for the same year 18s. 6d. In 1910 by contract of the 16th May the price for the next 3 years has been increased by 1s. further, making the total cost price 16s. 2d. as against 19s. 3d. in the case of the Footscray Gas Co.

The case of the Metropolitan Gas Co. is pointed to by the Crown not as an instance of excess price, but as evidence that the other instances disclose exorbitancy. I may add at this point that *the defendants have attempted no explanation of the conspicuous discrepancy between this and the other cases referred to.* The discrepancy in the case of small coal is extremely great. In the 1910 contract small coal delivered to the Gas Company is 11s. 5d. per ton. The Footscray Gas Co. paid 15s. 3d. in 1908 delivered on the wharf. The Melbourne City Council in 1910 were charged 17s. for small coal delivered at the Electric Light Station. G. Mowling & Son paid 19s. in 1908-1909 for small coal; and private consumers as already mentioned were charged in 1909 and 1910 20s. 9d. Unless therefore some reason can be given for thinking that the price of 11s. 5d. delivered on the premises in the case of the Metropolitan Gas Co. is due to some exceptional circumstance, which made it fair to lower the usual standard, and not some desire to unduly favor the particular company—any idea of which I reject—or some pressure or inducement to sell at a great loss—which is not pretended—the prices charged to other consumers certainly in comparison do stand out in relief as amazingly great.

We now come to SOUTH AUSTRALIA.

(1) *Retail Dealers.*—I think this class of transaction properly occupies the first place, because it is apparently clear and simple and because of the only explanation, if it may be called one, which has been given regarding it. Mr. Thomas is a fuel merchant in Adelaide of many years standing—he is President of the Fuel Merchants' Association there, and he speaks as to the trade. He produced invoices of Howard Smith & Co. for the years 1904 to 1910 inclusive. He also produced some invoices of J. & A. Brown

in 1905 and 1908 and, at the request of defendants, invoices from Bell & Co. were put in. The invoices showed that the price of screened coal to dealers in 1904 was substantially 20s. for the first half of the year, coming down to 18s. 6d. at end. In 1905 it was 17s. In 1906 and for all household coal delivered to end of December 1906, it was 17s. I omit reference to some few intervening exceptional cases and disregard them, taking what is clearly the governing standard price. For coal delivered in January 1907 there is a sudden and startling leap in price to 24s. 6d. which I take to be the regular price for 1907. Throughout 1908 and 1909 the price advances to 26s. except at the end of that year when strike conditions brought it up to 46s. and kept it there till the end of January, a circumstance which of course I disregard for this purpose. For the rest of the year 1910 the price is 26s. 3d. Bell's price in January 1904 for 15 cwt. was 23s. 6d. per ton, but this may have been a moment of emergency or temporary shortness of supply which for the moment enhanced the price. However that single instance on 1st January 1904 cannot outweigh the general force of the prices charged down to end of 1906, and in addition the other invoices of Bell & Co. which are in 1907 make their prices accord with Howard Smith's. Brown's invoices in November and December 1908 are 26s., the same as Howard Smith's. The rise from 17s. to 24s. 6d., an advance of 7s. 6d. to dealers and of course passed on to their consumers, is a very substantial addition to household expenditure. A sudden rise of 44 per cent. in an article of prime necessity is severe, whether it can be justified is another question. No attempt has been made to justify that particular advance or the subsequent advances which have brought the additional cost to 9s. 3d., that is 54 per cent. over and above the 17s. pre-existing, that is before the combination arrangements came into operation. Mr. *Knox* said of this, while it could not be denied there was a large jump in price there ought to be borne in mind the utter insignificance of the whole of the South Australian retail trade, as compared with the rest of the trade. He said it works out something under 2,000 tons out of 2,000,000 tons and he urged it could hardly be imputed as intention to the defendants that they intended for the sake of getting a few shillings a ton more from some dealers whose total purchases

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amounted to about 2,000 tons a year to get at the rest of the public. I am not prepared to say that 2,000 tons is the full amount of the defendants' general retail trade in South Australia. The total inter-State trade being over 1,200,000 tons, and the general trade portion being from 76,000 to 84,000 tons in all, according as we take the percentage, at 6.38 or 7 per cent., I should think South Australia consumes a good deal more than 2,000 tons in retail purchases. But however that may be, I cannot accept the invitation of Mr. *Knox* on behalf of the colliery proprietors to close my eyes to the significance and seriousness of the alteration of prices to retail dealers. Insignificant it may be to the defendants, it is not insignificant to householders to whom coal is a necessity. If so insignificant why was the advance made in 1907 ? Why was it increased in 1908, and the increase maintained in 1909, and why was this insignificant portion of business of 1910 weighted with another 3d. per ton ? One further observation is to be made. The price to dealers in Melbourne, as already appears, was 21s. in January 1907 as compared with 24s. 6d. in Adelaide, a difference of 3s. 6d. ; 21s. 6d. in Melbourne from 1st January 1909 as compared with 26s. in Adelaide, a difference of 4s. 6d. ; and from February 1910 it has been 21s. 6d. in Melbourne as against 26s. 3d. in Adelaide a difference of 4s. 9d. The defendants have not explained whether the absence of South Australian coal mines affected their minds in fixing prices there.

(2) *The South Australian Government* ; *General Supplies.*—(*a*) Adelaide and Suburbs : In April 1905 the price of best screened Newcastle house coal was 18s. 5d. by contract for two years. In April 1907 the price tendered was 25s. 7d. for 2 years. The rise in price was 7s. 2d., over 38 per cent., and the Government apparently was cautious enough to accept for 6 months only. In December 1907 it called for tenders for the year 1908 for these and other coal services, the approximate annual quantity for Adelaide and suburbs being 1,750 tons ; but the Government was unfortunate, because the lowest price on this occasion was 27s. 2d., a rise of 8s. 9d. a ton, and this was accepted and was the price for year 1908. For 1909 the price was again 27s. 2d. ; in 1910 and 1911 it was 27s. 3d. under contract May 1909. The advance in price thus amounts to 8s. 10d.

upon an original price of 18s. 5d., which may be taken to be 48 per cent. (*b*) Port Adelaide and Suburbs.—In 1906 (by contract of 1905) the price of Newcastle house coal was 15s. 5d. In 1907, McIlwraith & Co. tendered for 2 years at 20s. 9d., a rise of 34 per cent. Again the Government's caution led it to limit the time to 6 months, and again ill-fortune attended it for in December fresh tenders gave the lowest price at 23s. 3d., which the Government paid for 1908. In 1909 and 1910, the price is 22s. 9d., a total advance of 7s. 4d., which is 47 per cent. Small coal was 14s. 3d. in 1906; in 1907 the price was 19s. 9d.; in 1908, 1909, 1910, 20s. 6d., a rise of 6s. 3d., which is 43 per cent. (*c*) Port Pirie.—The price in 1906 for best Newcastle steam coal was 14s. 11d. In 1907 20s. 9d., or an advance of 41 per cent. for 6 months, caution again bringing misfortune, the December tenders bringing the price to 22s. 6d. for 1908; for 1910 and 1911, 22s. 9d., being an advance of 7s. 10d., which is 52 per cent.

(3) *Adelaide City Council.*—In 1906 down to July, screened coal was 18s. 5d.; in July it went to 23s. 5d.; in September it reverted to 18s. 5d., and so continued up to November. On 19th November by contract note the price was fixed for 1907 at 26s. 3d., a sudden advance of 7s. 10d., over 42 per cent. In November 1907, a contract was made fixing the price for 1908 at 27s. 9d., and in 1908 the price for the next year is again 27s. 9d., and 1909 the price was fixed for the following year at 28s., the total increase is 9s. 7d., that is, 52 per cent. The quantity is about 2,000 tons a year. Small coal was 14s. 11d. in 1906; 20s. 9d. in 1907; 21s. 9d. in 1908 and 1909; and 23s. in 1910, a rise of 8s. 1d., that is 54 per cent.

(4) *South Australian Railways.*—In 1906 the price was 11s. 9d. by tenders dated April and May for 96,000 tons per annum for two years. This price was tendered by Huddart Parker and the Adelaide Steamship Co. as an all-round price for every port. This price is either a fair price or an extremely low price and unremunerative price. If it were the latter, the history of the transaction will show that the lowness of the quotation was not due to any competition among the defendants, but in order to underbid a possible freight competitor, and this phase comes in later. If, however, the view is to be taken that it was a quotation of what the defendants thought

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was a fairly remunerative competitive price, then we may take it as a present starting point. In April 1908 the lowest price tendered by any of the defendants was an all-round price of 17s. 6d. for one year and 17s. 3d. for two years. The quantity was 133,000 tons per annum. The tender was ultimately accepted for two years at 17s. per ton. In 1910 the all-round price for first grade coal was 17s. 145,000 tons. Even 17s. is low if compared only with some of the prices I have mentioned, and one of the questions which it will be material to consider is, why this considerably advanced, but still comparatively low price, was taken for the South Australian railway contract. The advance in two years and afterwards maintained was 5s. 3d., which is over 44 per cent. increase.

(5) *South Australian Gas Co.*—The price on trucks Port Adelaide was by tender made March 1905 for 3 years 15s. 3d. In March 1908 the price was 19s. an advance of 3s. 9d., which is 24 per cent. At the Retort House, Port Adelaide, the price was 17s. in 1906, and 21s. 6d. in 1908-1910, a rise of 4s. 6d., over 26 per cent. For the Company's Retort House at Port Pirie, the price in 1906 was 17s. 6d., that is 6d. more than at Adelaide; in 1908-1910 the price was 23s. 4d., that is 1s. 10d. more than at Adelaide, and a rise of 5s. 10d. above the 1906 price, which is 33 per cent. The quantity of screened coal delivered to the company was about 18,000 to 19,000 tons a year.

Small coal was 12s. in 1906, and 14s. 3d. in 1908, 1909 and 1910, a rise of 2s. 3d., which is only 18 per cent.

(6) *Wallaroo and Moonta Co.*—The price in 1906 was 14s. 3d. tender accepted in 1905 for three years. In 1908 the price for large was 18s., a rise of 3s. 9d., which is 26 per cent., and for small in 1906, the price was 11s. 9d. In 1908 it was 15s. 6d. for deliveries over 6,000 tons a month, a rise of 3s. 9d., being 31 per cent.

(7) *Kitchen Sons & Marsh Limited.*—In 1906 the price of engine coal was 14s. In 1907 18s. 9d., almost 34 per cent. rise. In 1908-1910, 20s. 3d. The quantity was 375 tons per annum, a rise of 6s. 3d., being over 44 per cent.

(8) *Adelaide Electric Lighting Co.*—Small coal. In 1906 the price was 11s. 10d. In 1908-1909, 17s., a rise of 43 per cent. In 1910

17s. 3d., a total rise of 5s. 5d., being 46 per cent. Average 7.400 tons per annum.

(9) *May Brothers Limited.*—Small coal. Average 350 tons per annum. In 1906 the price was 12s. 3d. In 1907, 16s. 9d., a rise of about 36 per cent. In 1908, 17s. 6d. In 1909, 17s. 3d. ex heap. In 1910, 17s. 6d. ex steamer Port Adelaide. The final rise is 5s. 3d., without taking into consideration the place of delivery. If loaded ex heap it is 1s. per ton extra ; to calculate the percentage I add the 1s., being 51 per cent.

(10) *Sulphide Corporation.*—The price of best brands, A.A., Newcastle, Wickham and Hetton, free on railway trucks Port Pirie in 1906 was (by contract made in December 1903) 14s. 8d. Pelaw Main was 13s. 8d. Call that a mean price of 14s. 2d. During 1906 and 1907 the company was supplied by Scott Fell & Co. By contract dated 30th April 1908 two of the shipping defendants contracted to supply until end of February 1910 up to 1,600 tons per fortnight, coal from 18 specified pits at the company's option, but with the proviso that the contractors could obtain the coal required at the time their steamers are loading at Newcastle and deliveries were not to be made from pits disapproved provided contractors could obtain suitable coal as a substitute while loading. These provisoes, in view of what we now know to have been the relations between the contractors and the collieries are very material on the question of price. The price for this contract was 18s. per ton, a rise of 3s. 4d. on Newcastle and 4s. 4d. on Greta coals, being 22 per cent. to 31 per cent., or an average rise of about 27 per cent.

(11) *The Broken Hill Proprietary Co.*—By contract January 1906 Caledonian or Seaham coal 12s. 1d. ; East Greta, Hebburn and Abermain 12s. 3d. ; Newcastle Co., Dudley and A.A., 12s. 10d., a mean price say of 12s. 5d. The conditions were very favorable to the consumer, the contract was for two years to end of February 1908. By contract of May 1908 the price was 16s. 6d., coal from Newcastle and/or Maitland districts with a rise and fall clause. That was an advance of 3s. 8d. to 4s. 5d. or 28 per cent. to 36 per per cent., or an average of say 32 per cent. The contract was extended for a year.

(12) *Broken Hill Water Supply.*—The price by contract note in

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February 1906 to March 1908 was 13s. 9d. for best Newcastle and/or Maitland pits including A.A., Newcastle, Hetton, Caledonian, Hebburn and Aberdare, and free into trucks Port Pirie. By contract 23rd June 1908 the price of coal from 18 named pits at the company's option but with provisoes previously mentioned was 17s. 6d. There have been three extensions of this contract by mutual agreement and, as some reliance is justly placed on that fact, I particularize it. The first occasion was on February 8th 1910, when the contract was extended by agreement to 31st August 1910. It was afterwards agreed to extend it to 28th February 1911; on the third occasion undated it was extended by agreement to 29th February 1912, the price being raised to 17s. 9d., that is 27 per cent. to 29 per cent., or an average of say 28 per cent.

(13) *North Broken Hill.*—The price in 1906 Maitland, engine, 12s. 6d. Newcastle, screened engine, 13s. for two years from 1st March. That is a mean of 12s. 9d. Quantity being 500 tons per month. From April 1908 to October 1909 the price was 18s., a rise of say 41 per cent., the quantities for that period being 17,333 tons, over 900 tons per month. The strike prices then intervened, but from April 1910 to end of the year the price was again 18s. for 8,672 tons over 960 tons per month. A rise of 5s. to 5s. 6d, being 38 per cent. to 44 per cent., or a mean of 41 per cent.

(14) *New South Wales Railways: For Broken Hill Trams.*—The price of Newcastle large coal from A.A., Newcastle, Stockton and Hetton pits, delivered into trucks, from 1st July 1906 for one year was 13s. 9d., which was the same starting price as in the case of the Broken Hill Water Supply. In May 1907 the price was raised to 18s., a rise of 31 per cent., although the Broken Hill Water Supply price was still 17s. in 1910 and has not yet gone beyond 17s. 9d. In 1908 the price for twelve months was raised to 19s., and in February 1909 it was further proposed to be raised for 12 months to June 1910 to 20s. The tender was not accepted because the Government were considering the using of coke instead of coal. Supplies were continued at 19s. In November and December there was a contract to supply till 30th June 1910 at 19s. on condition that West Wallsend was added to the list of pits from which coal could be supplied. The quantities delivered under the various arrangements

were 2,263 tons for 1907-1908; 1,536 tons for 1908-1909; 1,360 tons 1909-1910. The final rise was 5s. 3d., a percentage of 38 per cent.

(15) *Walter Sully & Co.*—The price of engine coal in 1906 from February was 14s.; small coal 13s. In June 1906 engine coal was 17s. 6d., the combination not being then formed; small coal still 13s. In January 1908 engine coal was 20s.; small 16s. 3d., with rise and fall clauses. In December 1908 it was the same. The quantities average per annum 1,500 tons, a rise of 2s. 6d. over the June price, that is 14 per cent of a price, enhanced by 25 per cent. over the price in January 1906 for large, and 3s. 3d., or 25 per cent. for small.

(16) *Neild & Hyde.*—In 1906 the price was 14s. for large engine coal and 13s. for small; in January 1907 for one year it was fixed by contract at 17s. 6d. (that is 25 per cent. advance) and 13s. 6d. respectively, a maximum monthly quantity of 500 tons not to be exceeded except at Vendor's option at any time of threatened troubles, also rise and fall clauses, the basic price being 10s. per ton large. February 1908 prices are 20s. and 16s. 3d. respectively, the basic price being 11s. per ton large. December 1908, prices again 20s. and 16s. 3d., price subject to 5 per cent. discount, with rise and fall clause, the basic price being 11s. per ton large.

(17) *Broken Hill Junction North Co.*—In 1906 the price on trucks at Port Pirie was 12s. 6d. and 13s., a mean price of 12s. 9d., as in the case of the North Broken Hill Co. In 1908 the price was fixed as for March 1st 1908 to 28th February 1909 at 18s., a rise of 5s. 3d. or 41 per cent., on terms similar to those for the last mentioned company. In 1909 the price advanced to 19s. The final rise was 6s. and 6s. 6d. or 46 per cent. and 52 per cent. over extremes, and 49 per cent. over the mean.

(18) *Zinc Corporation.*—The prices in 1906 and 1907 under two years' contract made in May 1906 as in the previously mentioned contract was 12s. 6d. In 1908-1909, it was 19s. 6d., that is 56 per cent. rise; from 1st June 1910 to 31st May 1911, the price was fixed by contract at 18s. 6d. including wharfage. The quantity is 1,250 tons per month, the eventual rise 6s. or 48 per cent.

WESTERN AUSTRALIA.—(1) *Western Australian Railways.*—The

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price by extension in March 1905 of a current contract made in 1904 with modification of price from 15s. 10d. was 15s. 4d., it was an all-round price for the following ports, Fremantle with a probable consumption of 30,000 tons, Geraldton 5,500 tons, Albany 3,500 tons, Bunbury 2,200 tons. The coal was to be from the A.A., Newcastle, Hetton, Burwood, Dudley Wallsend, Old Lambton, Stockton, Seaham, Duckenfield, Waratah or other agreed to. The Government had the right to determine from which colliery or collieries the coal should come. In January 1907 the price was raised to 18s. 11d. that is 23 per cent. more for all four ports for one year. The Government right is no longer to select the pit, the contractor having the right to load coal obtainable at time of loading with a provision of mixing Seaham with other Maitland coal. The Government has the power to reject coal below a certain calorific value. The tenders of McIlwraith & Co. and the Adelaide Steamship Co., the only defendants tendering, were separate, but they were accompanied by letters which stated alike that the tenders must be accepted for "all ports or none." In November 1908, McIlwraith's price for Fremantle for 3 years for February 1909 as originally tendered was 21s., but, after interviews with the Commissioner, the price was reduced to 19s. for the first year and 19s. 6d. for the second and third years. Geraldton was separately tendered for by the same firm, and was raised to 24s. for the whole 3 years. In the letter which revises the tenders in this respect, there are reasons given which are said to be important, and to which I shall hereafter refer, the letter is dated 21st November 1908, part of Ex. E1. In connection with this tender Howard Smith & Co. also tendered, in one tender, for Fremantle and Geraldton at an all-round price of 22s. 4d. with this note "Conditional upon tender being accepted for both ports or neither." The Adelaide Steamship Co. tendered Fremantle 21s. 6d., Geraldton 26s. McIlwraith's accepted price for Albany was 21s. The special feature of these contracts is that in 1904-1905 and 1907-1908, McIlwraith & Co. and the Adelaide Steamship Co. and Huddart Parker whether their tenders were for 1, 2 or 3 years made an all-round price for the four ports, Fremantle, Geraldton, Albany and Bunbury. Howard Smith & Co. gave an all-round price for Geraldton, Albany and Bunbury, and made Fremantle 2s.

less. All four defendant shipping companies tendered for the earlier contract, that contract (McIlwraith's) was extended for a further period of 2 years. In contract 1907-1908 McIlwraith and the Adelaide Steamship Co. were the only two of the defendants that tendered. Their respective prices were all-round for the four ports. Then for the contract 1909-1912, the tenderers were McIlwraith & Co., Howard Smith & Co., Adelaide Steamship Co. and Melbourne Steamship Co. McIlwraith had originally an all-round price for Fremantle, Albany and Bunbury, with a higher price for Geraldton. Howard Smith had a similar price for Fremantle and Geraldton with the condition "both or neither," the quantities being for the first year Fremantle 23,000 tons, second and third year 40,000 tons per annum. Geraldton 8,000 per annum. Howard Smith & Co.'s price for Albany was lower than for Fremantle. The Adelaide Steamship Co. had only 1d. difference between Fremantle and Albany—21s. 6d. for former, 21s. 5d. for the latter where the quantity was only 1,000 tons while their tender was 26s. for Geraldton. Melbourne Steamship Co. was very close for Fremantle and Albany, namely 21s. 11d. and 21s. 7d. whilst Geraldton was 25s. The eventual rise for Fremantle was 4s. 2d. and Geraldton 8s. 8d. the respective percentages of increase being 27 per cent. and 56 per cent. It is suggested that the Collie coal question accounts for the difference, and to this reference hereafter will be made (see Ex. G1).

(2) *Perth Gas Co.*—The price from July 1905 to March 1908 for Wickham, Hetton and Stockton at 17s. 6d. Purchasers paid for wharfage and haulage, 2s. for part of the time, 2s. 6d. for the rest, besides 3d. for handling. In February 1908 the price was raised to 21s. clear to the Vendor with rise and fall clause, the purchasers as before paying wharfage and haulage 2s. 6d., and handling 3d. In April 1909 the price is fixed for 3 years at 21s. clear to Vendors with a fall clause. Purchasers continued to pay the extra charges as well as the Harbour Improvement rate; the rise is as between 17s. 6d. and 21s., being 3s. 6d. or 20 per cent.

(3) *West Australian Ironworks.*—In 1906 the price of large coal was 19s.; smith's coal 17s. In 1907 large coal was 23s. 9d., a rise of exactly 25 per cent.; small 19s. 9d., *i.e.*, over 11 per cent. In 1908-1909 they were respectively 24s. 9d. and 20s. 9d., and in April

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1910 small reached 22s. The prices so far appear to be free on trucks. I say also, merely in reference to continuation and not as affecting detriment as forming part of the offence charged, the later invoices show a further increase in price. The increase which is definite is in large coal 5s. 9d. and small 5s. respectively, being 30 per cent. and 29 per cent.

(4) *Perth City Council.*—(*a*) Parkerville.—Large coal in 1906, the price was 23s. delivered. In 1907 it was 26s. 8d. ex ship and 29s. 2d. ex coal yard. In 1908 it was 27s. 2d. ex ship and 29s. ex yard. In 1909 it is 28s. 2d. ex ship and 30s. ex yard. In 1910 it is 28s. 8d. ex ship, and 30s. 6d. ex yard ; an eventual rise of 7s. 6d. or 32 per cent. of which 6s. 2d., or 26 per cent took place in 1907. Small coal at this site started with 20s. 9d. in bulk in 1906, went to 26s. 5d. ex yard in 1907, but that was bagged, loose small coal not being quoted. In 1908, small coal loose ex yard 25s. The price for small coal bagged ex yard being 29s. 2d., an advance in bagged coal of 2s. 9d. on the year before. In 1909 loose coal ex yard is 26s., bagged 30s. 2d. In 1910, small coal loose ex yard is 26s. 6d., bagged 30s. 8d. I am not clear whether the original price of 20s. 9d. was loose or bagged. I assume it was loose, and, if so, and in order to estimate the rise in 1907, I take 4s. 2d. off 26s. 5d., that is 22s. 3d., which is only a very small percentage about 7 per cent. The final price if taken as loose shows a rise of 5s. 9d., or 27 per cent. (*b*) City Yards.—The price of large coal was 23s. 3d. ; in 1907 it was ex yard 25s. 9d. ; in 1908 it was 29s. 1d. ; in 1909 it was 30s. 1d. and in 1910 it was 30s. 7d. That shows a rise in 1907 of 2s. 6d. or over 10 per cent. In 1908, the rise is 5s. 10d., which brings the percentage up to 25 per cent. ; the final rise of 7s. 4d. in 1910 brings it up to 31 per cent. As to small coal—The price in 1906 was 21s. which I again take to be loose. In 1907 the price appears (with doubt) to be 23s. bagged, and deducting 4s. 2d. brings the price of loose coal for 1907 to 18s. 10d., which makes me somewhat dubious of its accuracy. In 1908 loose small coal ex yard is 25s. 1d. In 1909 it is 26s. 1d. In 1910 it is 26s. 7d., the total rise is 5s. 7d., or 26 per cent. after deducting the 4s. 2d. (*c*) Sanitary Site.—Large coal in 1906 was 25s. 9d. ; in 1907 it was 27s. 3d. ex yard, a rise of only 1s. 6d. ; in 1908 it was 32s. 6d., a rise of 6s. 6d. ; in 1909 it was

33s. 1d. and in 1910 33s. 7d., a total rise of 7s. 10d., being 30 per cent. Small coal in 1906 was 23s. 6d.; in 1907, assuming it originally to be fixed as loose, the price is 20s. 2d., which would be a reduction, if it is not taken as loose the price in 1907 is 1s. advance, namely, 24s. 6d.; in 1908 it is 28s.; in 1909 it was 29s. 1d.; and in 1910 it was 29s. 7d., a total rise of 6s. 1d., being 25 per cent. after deducting 4s. 2d. for certainty sake in defendants' favour. In making these last-mentioned calculations I have departed from the figures shown in the graphs presented by the Crown. Those graphs as to these Perth City Council contracts, I am now dealing with, show small coal brought to a higher price than large coal: this is very improbable and I think the error has arisen through not observing the words "in bulk" on the Adelaide Steamship Co.'s letter of 14th October 1905. I am not altogether clear, but on the whole this seems correct.

The next State is QUEENSLAND.

(1) *Chillagoe Company.*—Price of screened coal delivered c.i.f., Cairns, was 20s. per ton, the price being fixed in April 1905. This was a reduction from the previous contract of 3s. a ton, and was on the understanding that the purchasers did not supply other consumers from their stock. It was also arranged as part of the former contract of 10th July 1903, which provided for back cargo. On 16th February 1906 the c.i.f. price of coal was reduced to 17s. for 3 years, subject to termination on 6 months' notice. The contract bound the purchaser to take the whole of its coal from the contractor, and to ship its products solely by steamers controlled or nominated by them. On 1st February 1909 the price is 19s. for 2 years on similar terms, the contractors paid no wharfage. These prices are relied on by the Crown as some indication of fair prices; the defendants claim that the back loading is a material business consideration, which does not come into play in other Queensland instances. In any event the prices may very justly be contrasted with others in order to determine whether the discrepancies can be wholly accounted for by possible profits on back loading.

(2) *Queensland Government Railways.*—There has been very little Newcastle coal used on the Queensland Railways. For a

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number of years they have used Queensland coal as a matter of policy. Some emergency contracts have been made from time to time in small lots, but, as far as showing excess of price of coal to the Government is concerned, I do not think I can base anything upon that. In June 1907, 103 tons was supplied at Cairns for 21s. Then at Townsville, the following deliveries : May, 1907, 100 tons @20s. ; October, 1907, 881 tons @ 19s. ; May, 1909, 311 tons @ 21s. ; June, 444 tons @ 21s. ; August, 157 tons @ 21s. 9d. ; November, 168 tons @ 19s. 8d. These prices, however, create difficulty for the defendants ; for, if they are not excessive, they leave much to be accounted for as to prices charged for regular and larger contracts.

(3) *Townsville Harbour Board.*—The price fixed by tender of 16th March, 1905, for one year ending 30th March 1906, was 18s. 9d. for Abermain and 19s. for Seaham. A passage in that tender (B.9.) is important. It states :—" This contract is based on the following prices for coal at Port of Shipment : Seaham Newcastle screened 7s. 6d. a ton ; Abermain Newcastle screened, 7s. 3d. a ton." The quotations were for delivery on purchaser's lighters ; there was a rise and fall clause ; estimated quantity 100 tons a month ; contractor to pay all charges. By contract 2nd April 1906, the price for Seaham and Abermain coal was 20s. 6d. ; estimated quantity 300 tons a month. The contract was based on following prices at Port of Shipment ; Seaham, 8s. ; Abermain, 8s. In March 1907, the price of Abermain, Seaham, Stockton, A.A., and Hetton was 23s., based on 10s. f.o.b. price, rise and fall clause included. There was a provision that when the vendors had a steamer in the Harbour and could deliver direct to the Board's lighters the price should be 21s. 9d. instead of 23s. That of course does not affect the question of rise. In March, 1908, the prices advanced to 25s. (with reduction in case of direct delivery to 22s. 9d.) based on 11s. f.o.b. price. March, 1909, prices still 25s. (with reduction for direct delivery to 24s.). April, 1910, price stands the same. The initial price, I take, as 20s. 6d. ; the final price is 25s., a rise of 4s. 6d., or nearly 22 per cent. as compared with Chillagoe of nearly 12 per cent. ; the quantity in the latter case being 3,000 tons per annum, and in the present case 3,600 tons per annum.

(4) *The Queensland Meat Company.*—The place of delivery here is Townsville at the wharf, and the quantities about 4,000 or 5,000 tons a year. The prices, which include harbour and wharfage dues paid by purchasers, were 1905, 21s. ; 1906, 22s. 6d. ; 1907, 20s. 3d. ; 1908, 23s. 6d. ; 1909, 22s. 9d. These prices seem erratic in themselves and discrepant with others.

(5) *Townsville Gas Company.*—The quantity was 1,800 tons a year and the contractor paid wharfage (where payable) and harbour dues. In 1906, the price, by contract of 1905, was 20s. 3d. for A.A., or Stockton ; 19s. 9d. for Hetton. In October 1906, A.A., Stockton or Hetton are priced at 20s. 9d., with rise and fall clause. 4th January 1907, notice was given (A.9.) that the price in future would be 1s. a ton in advance :—" As the price of coal has advanced in Newcastle ; from 1st January our contract with you will be increased accordingly." In January 1908, the price was 23s. 9d. ; 1909-10, the price remains the same. The final advance was 3s. 6d. ; equivalent to 17 per cent.

(6) *The Commonwealth Naval Depot.*—These were supplies to the *Gayundah* at Townsville. The price in June 1906 was 25s. ; 1907, 26s. ; 1908, 27s. ; 1909, 25s. 3d. ; 1910, 30s. The supplies in this case were inconsiderable in themselves, ranging about 25 tons up to 65, but they are erratic and no explanation is given ; still I am not able to regard the contracts as material for any conclusion with respect to general excessive price.

EFFECT OF NON-PRODUCTION OF FURTHER CONTRACTS AND DEALINGS BY DEFENDANTS.

The various contracts in evidence do not compose all the inter-State transactions of the defendants. No doubt the powers of discovery in possession of the Crown are very great, though they were not so extensive when this action began as they are now. It is consequently just to put into the balance in defendants' favour the unusually wide authority of the Crown to ascertain the facts. On the other hand, powers theoretically unbounded are practically limited by want of knowledge as to the proper points of application. Therefore, though it is possible the Crown has in its possession information as to dealings other than those in evidence,

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it is also obvious that the defendants have them too and probably more; and there may be attendant circumstances of which the Crown probably is not cognisant, but of which the defendants or some of them are not ignorant. It was pressed upon me by defendants that Mr. *Wise* had confessed he had every contract which the defendant shipping companies had made, and therefore I ought to infer that all the coal unaccounted for by affirmative evidence should be treated as disposed of on unexceptional terms, and as unaffected by the combination. Personally I did not understand Mr. *Wise* to make so extreme a statement, though his assertion was very large. I accept the assurance of learned counsel for the Crown that so sweeping an assertion was not intended. Whatever other information the Crown has, I am quite willing to believe, would lend no additional strength to its case. On the other hand—

—the defendants—at least equally competent to produce them—have abstained from doing so; and so I do not think I ought to make any inference in their favour as to the prices upon which the residue of the coal was sold to the public. The proportion of tonnage dealt with by the contracts put in, and the extensive varied and representative character of the transactions covered by them, leave me to infer—in the absence of evidence to the contrary—that at all events they are not entirely exceptional. If they are entirely exceptional, the defendants whose transactions they are might have shown it. They constitute in themselves an immense body of material, comprising also a large proportion of the whole, affecting in the past, and, if continued on the same lines, certain to affect in the future many public activities, important industrial operations, and the comfort convenience and private welfare of a large number of the inhabitants of Australia. So large a proportion of the inter-State trade, as is covered by the contracts before me, is in itself necessary to protect; and if the defendants' conduct in regard to it is open to objection their suggestion that the balance unaccounted for was on a less onerous footing would add to their difficulties of explanation.

PRIMA FACIE EFFECT OF RAISED PRICES.

In themselves and *prima facie* these advances have caused directly,

and must in the natural course of events have caused indirectly, a heavy detriment to the public. It is unnecessary and would be a work of supererogation even if it were in all cases possible to calculate the precise additional outlay occasioned to the various consumers by the increases in price, disclosed by the evidence. It is sufficient to say they have been very considerable.

To what conclusion do these advances tend? They have on the whole been maintained for three years and a half, and therefore cannot be due to any sudden or temporary cause. Their general steadiness and progress proves an intention to persevere in adhering to the system of higher prices. The strike of course raised the price abnormally, but when the extraordinary cause disappeared so fell the extraordinary prices; and the cost of coal to the consumers resumed the general level it had reached before.

There are no unusual circumstances of trade which can account for the rise, and the successive rises, and consequently the impression received from the general and the constant increases is that they were due to the contract and the combination alone. So far then the conduct of the defendants would in itself indicate to me an intention to combine for the purpose of raising prices to a height limited only by the possibility of obtaining them, free from the protection which the public might have from the competition previously existing, and the fierce character of so many of the increases such as in the cases of the Adelaide retail trade, the South Australian Government Special Services, the Adelaide Electric Lighting Company, May Bros., The Broken Hill Contracts, the Melbourne & Metropolitan Board of Works, The Melbourne City Council, the Commonwealth Services, the West Australia Ironworks, the Perth City Council, to say nothing at present of the Victorian and South Australian Railway Services, impresses me with the *prima facie* belief, which of course other evidence might remove, that the previous free competition was not carried on at such a destructive rate as could only be met by the huge additions to the price which followed the inauguration of the combination. I use the word "huge" because not only did the advances mean much to the consumers, but the magnitude of the defendants' trade made a slight advance per ton of enormous importance to

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the suppliers. If, for instance, only one penny per ton were added all round to the price of inter-State coal—1,500,000 tons—it would give an aggregate additional return of £6,250. There is therefore a wide margin between the 1906 price and the subsequent prices on the coal dealt with in the evidence to be accounted for by the mere restoration of fair and reasonable competition, and the necessity of avoiding impending ruination.

The defendants have not given affirmative evidence to show whether the new prices were fair or unfair, nor as to the character of the competition prevailing at the time the combination was projected. They themselves have remained entrenched behind a breastwork of silence; and—by their counsel—have met the case of the Crown with an endeavour to extract qualifications sufficient to destroy it, and otherwise have relied on the initial presumption of their innocence; that presumption however gradually weakening under the strain of actual circumstances.

It may be proper at this point to refer to the case of *The King* v. *Burdett* (1). I shall quote some passages from the judgments of the eminent Judges who sat. *Best* J. at p. 121 observed :—"It has been said, that there is to be no presumption in criminal cases. Nothing is so dangerous as stating general abstract principles. We are not to presume without proof. We are not to imagine guilt, where there is no evidence to raise the presumption. But when one or more things are proved, from which our experience enables us to ascertain that another, not proved, must have happened, we presume that it did happen, as well in criminal as in civil cases. Nor is it necessary that the fact not proved should be established by irrefragable inference. It is enough if its existence be highly probable, particularly if the opposite party has it in its power to rebut it by evidence, and yet offers none; for then we have something like an admission that the presumption is just." *Holroyd* J. used language to the same effect and said at p. 140 :—"The presumptions arising from these proofs should, no doubt, and most especially in crimes of great magnitude, be duly and carefully weighed. They stand only as proofs of facts presumed till the contrary be proved, and these presumptions are either weaker or stronger

(1) 4 B. & Ald., 95.

according as the party has, or is reasonably to be supposed to have it in his power to produce, other evidence to rebut or to weaken them, in case the fact so presumed be not true, and according as he does or does not produce such contrary evidence."

Abbott C.J. at p. 161 said :—" In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded, either of explanation or contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction ; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which the proof tends ? The premises may lead more or less strongly to the conclusion, and care must be taken not to draw the conclusion hastily ; but in matters that regard the conduct of men, the certainty of mathematical demonstration cannot be required or expected." The learned L.C.J. added in accordance with the current of thought at the time that it was a special advantage of British Jurisprudence that the verdict should be rendered by the unanimous judgment and conscience of twelve men of the world, who know that where reasonable doubt is entertained it is their duty to acquit, rather than by lawyers whose habits conduce said the learned Judge to subtilty and refinement. Fortunately or unfortunately the law in many cases, reflecting a somewhat changed public opinion, has placed this duty upon lawyers but none the less the principle is faithfully observed to acquit whenever reasonable doubt is entertained.

DEFENDANTS' SUGGESTION OF PRIOR RUINOUS COMPETITION AS JUSTIFICATION FOR ADVANCED PRICES, &c.

Learned counsel for the defendants offered me some suggestions with respect to the evidence actually given which, if well founded in fact, would help to lay some meritorious foundation for the defendants' action, though certainly not capable of supporting the whole structure they sought to rest upon it.

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The main suggestions were that, as matters stood before the formation of the Vend, the collieries were engaged in ruinous competition with each other; and that the Shipping Companies before the combined agreement were carrying coal at unremunerative and perhaps losing rates. I shall deal with them in turn. As regards the collieries no trace of such a reason is found in any of the records of the Vend, its minute book, and its correspondence between its own members and with the Shipping Companies. If the fact were as suggested, the omission is surprising; nor is there any mention in the evidence of such a reason having been put forward by any of the parties to the Vend at its formation or afterwards. I look with suspicion on this attempted justification, which saw the light for the first time as a suggestion from the bar, foreshadowed in Wheeler's cross-examination and taking definite shape in argument. It is so fundamental to that argument; so vital to the justification suggested for the original increased charges, which the coal proprietors deliberately set themselves to demand of the Australian people for an article of prime necessity, that it is remarkable not to find it strongly emphasised as the ground of joint action and on many occasions. When those charges were increased, occasions were not wanting when such a reason, if it could have been truly stated, would scarcely have been overlooked. The suggestion rests for support mainly on some evidence obtained from Mr. Wheeler at p. 294. Mr. *Knox* asked him "None of the mines have overdrafts have they?" He answered "A good many of them are in the hands of the banks."

Question.—A good many of them have not been able to make a living?

Answer.—Some of them were in the hands of the Banks.

Question.—You knew that in 1904-5 there were many coal proprietors who could not make a living out of the mines?

Answer.—So public information told us.

Question.—And you believed it?

Answer.—Well they could not pay dividends—a good many of them—.

So that Mr. Wheeler's evidence amounted to this that some collieries unnamed are in the hands of the banks, whatever that means.

It means of course they are in debt, but to what extent or for what reason, whether bad management, or want of capital, or accident, or, what is not improbable, inferior coal, which the public did not desire, we are not told. Apparently some are even now, despite the rise in price, in debt to the banks according to Mr. Wheeler's belief the grounds of which we do not know. As to which collieries were in that position in 1906 very little direct indication is given. But the conclusion I formed from hearing Mr. Wheeler's evidence was that it was the smaller collieries. On page 269, speaking of April 1906, he says, he said to those of the defendants who approached him on the question of allotment that he was quite willing to limit his trade "to assist the smaller collieries who could barely exist." If the defendants wanted to prove impecuniosity and the necessity of raising their prices as these have been raised in order to make their business payable, evidence of a first-hand nature and of a much more definite reliable and satisfactory nature was easily within reach. And, in the circumstances, I am not prepared to conjecture the existence of justifying facts, which could so easily have been demonstrated if they had any real existence. A tithe of the effort spent in painting the picture might have produced the living subject. Mr. Wheeler also said that in 1906 there was a good deal of undercutting. I think there was undercutting below the declared price, but that does not at all settle the question whether the prices were ruinous or payable.

The defendants also relied on Mr. Wheeler's balance sheets, in 1905 and 1908. Mr. *Knox* analysed them substantially as follows :— In 1905, Wheeler's output was 230,000 tons sold at a profit of £4,289, which is a profit of 4.4 pence per ton. Wheeler paid no royalty, and, if he had, it would have more than absorbed his profit. Again the hewing rate paid by him that year was 3s. 6d., the declared price being 9s. per ton. On this analysis Mr. *Knox* argued that other collieries less fortunately placed in 1905, inasmuch as they had in most instances to pay a royalty, and were no better equipped than Wheeler's mine, could not possibly afford to sell at 9s. The whole argument based on this balance sheet tumbles to the ground, because although the declared price was 9s. there was a rebate of 1s. 6d., and, out of that 1s. 6d., the

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royalty, which Mr. *Knox* takes at 5¼d. all round, can be provided for and leave 1s. 0¾d. profit. 230,000 tons at 1s. 0¾d. amounts to £12,218, which makes a vast difference in a balance sheet. I have already referred to the fact that the Shipping Companies in dealing with the several collieries separately used to obtain a rebate of 1s. 6d. off the declared price, that is the clear view I take of Wheeler's evidence. Part of the colliery defendants' argument was that the Shipping Companies played off one colliery against another, and went marketing the quotation (see page 1537); that of course connotes a reduction of the declared price. So far as the shipping defendants are concerned it was not only admitted, but strongly urged by Mr. *Mitchell*, that they were getting the inter-State coal at 7s. 6d. in 1905 (see page 1780). The Adelaide S.S. Company in the letter of 16th March 1905, to the Townsville Harbour Board (Ex. B.9) stated in express terms that its prices quoted to the Board were "based on the following prices for coal at the port of shipment:—Seaham Newcastle screened, 7s. 6d. per ton; Abermain Newcastle screened, 7s. 3d. per ton," &c. Undoubtedly the shipping defendants in October 1904, Huddart Parker and Howard Smith & Coy. jointly tendered to the Victorian Railways for 1905-6 at 11s. 11d. best coal, minimum 50,000, maximum 95,000 per annum. For Seaham or West Wallsend 10s. 11d., 75,000 tons; Hebburn, 100,000 tons at 10s. 5d. J. & A. Brown tendered Pelaw Main, 75,000 to 150,000 at 11s. 6d. and also the same quantities of Pelaw Main or Hebburn at contractor's option at the same price. The Adelaide S.S. Coy. quoted best coal 11s. 11d., Seaham and West Wallsend, 10s. 11d.; Abermain, 10s. 8d.; Hebburn, 10s. 5d. If coal was sold at 9s. it would leave 1s. 5d. as a minimum, and 2s. 11d. as a maximum for the Shipping Companies freight and management. This would be absurd from Newcastle to Melbourne, particularly when we recollect that in the Vend minutes (F.61) it appears that the colliery proprietors agreed that the freight from Newcastle to Sydney for the Sydney Gas Contract should be a minimum of 2s. 9d. a ton, a figure that was repeated in the following year's minutes (I. 97.). It appears too by Exhibit 7c that in January 1906, Wheeler agreed to sell to Scott Fell & Coy 50,000 to 150,000 tons of his best screened coal at

9s. subject to rebates of 1s. 3d. to 1s. 6d. according to quantity taken and on small coal, which was at 5s. a ton, rebates over 20,000 tons in a year—3d. to 6d.

Referring then to Exhibit T.8. it appears that the New South Wales Railways obtained coal as follows :—Abermain, 1904-5, 20,824 tons at 6s. 6d. delivered at East Greta Junction ; in 1905-6, 28,818 tons at 5s. 10d., and in 1906-7, 16,655 tons at 6s. 10d. ; the railway freight for shipment of the coal being carried in privately owned trucks from Abermain to Newcastle was 1s. 2d. all through, that meant an f.o.b. price of 1s. 8d., 7s. and 8s. respectively.

From the Dudley mine there came 24,013 tons at 7s. 6d. in 1904-5, which with freight (10d.) made the f.o.b. price 8s. 4d.

From the Newcastle Company, the railway had 28,786 tons at 6s. 9d. at Newcastle colliery siding in 1905-6, which with 9d. freight would bring the f.o.b. price to 7s. 6d. Wallsend sent 3,171 tons at 8s., which, with 9d. freight would make the f.o.b. price 8s. 9d. The smallness of the quantity apparently did not allow of the usual rebate. In 1906-7, Wallsend delivered 5,320 tons, partly at 8s., and partly at 9s. Though it was still under 9s., the price changes in the year 1907-8, when Abermain rises from 6s. 10d. to 8s. 10d. and 9s. 10d., and the Newcastle from 6s. 9d. in 1905-6 to 7s. 2d. and 9s. 3d., and Wallsend from 8s. and 9s. to 9s. 3d. and 10s. 3d. at Wallsend colliery siding. According to the evidence the declared prices in 1904 were 10s. ; in 1905, 9s. ; in 1906, 10s. It is idle therefore to ask me to believe that the collieries were selling their output at declared prices. One observation should be interposed regarding Wheeler's balance sheet. Even if his price were taken at 9s. net,—which I reject—there is some confusion and doubt respecting the expenditure debited ; and I am far from clear that there have not been carried against coal receipts items of debit that have no relation to coal production. The balance sheet was introduced by defendants, was built on by them, was used by them to contradict Wheeler's sworn testimony, and they obtained from him some further figures to enable them to complete their process of analysis of the figures in the balance sheet. The Crown did not insist on strict proof of these figures, but pursued the course most reasonable

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in this unique case and adopted generally on both sides, not insisting in mere technicalities in such a matter.

When however the Crown insisted for still further information to test the figures so obtained, learned counsel for the defendants suddenly, and, as I consider unreasonably, raised a formal objection. It was technically correct and I was forced to allow it. For the Crown to follow the strictly formal course, it would have been necessary to bring Mr. Wheeler's books into Court and display his business affairs. That is a thing I would not permit in this case if at all avoidable. This he strongly objected to, and I think the Crown acted most properly in not doing it. I am therefore left in grave doubt as to the reliability of the actual debits pressed upon me by Mr. *Knox*, and in any case, therefore, I could not with any degree of confidence act upon them in his favor. The rebate 1s. 6d. however destroys the supposition on which Mr. *Knox* built, that in 1905 Wheeler sold at 9s. net, and so cuts away his whole position based on the balance sheet namely that 9s. would plainly have been a ruinous price for other collieries.

Looked at from the rebate standpoint it is consistent with the other circumstances I have related, and that have been established, that other collieries of importance were selling their product at much below the declared price at that time. It is not probable that those collieries would continue so long and persistently to march on the road to ruin ; and, more than that, the Vend minutes of 28th February, 1906 (F.13) disclose the fact that, at a meeting of the Vend, Mr. Chapman claimed the right to sell Seaham coal at 1s. a ton under the fixed price for other Borehole coals, and Abermain at 6d. a ton under that fixed for Maitland coal. Mr. C. M. Newman likewise claimed 1s. a ton on the Caledonian Company's coal, but afterwards agreed to modify his *demands*, and make it 1s. for inter-State, and 6d. for foreign trade. Mr. Chilcott, who represented the Scottish Australian Coy. ; Mr. Laidley, who represented the Co-operative claimed the *right* to sell Lambton B., and Co-operative coal respectively at 6d. a ton below the fixed price, and Mr. Jno. Brown, and Mr. Earp also considered they had a similar right to be put on a level with the Seaham and Caledonian coals. Afterwards, Mr. Chilcott, Mr.

Laidley, and Mr. Earp withdrew their claims, the minutes record: —"In order to help forward the movement for Association." Ultimately it was resolved that "Seaham, West Wallsend, Killingworth (the two latter being Caledonian), and Duckenfield, which is Brown's, be allowed to sell at 6d. a ton below the fixed price of the other Borehole collieries"; that was carried with only two dissentients.

These various claims arose upon a discussion of the Chairman's suggestion that a document fixing the selling price, such as put before the last meeting should be signed that day by all present. The reference to the minutes of the previous meeting shows that the prices referred to were best 9s.; unscreened, 8s.; small, 5s. 6d. per ton f.o.b. Newcastle. The Caledonian Seaham Companies did not then consent, and so it came on for the later discussion. Now it does seem very extraordinary to me that men should require a mutual pledge to sell at 9s., if they were already doing so; and still more extraordinary is it that two large companies, one Newcastle, and the other Maitland, should hesitate to pledge themselves to do what they were already doing, or, on the other hand, should hesitate to do what is now said to have been their only means of salvation from bankruptcy. Not only so, but at the second meeting, if the defendants are right, several companies of considerable output, and of the highest grade of coal (see Ex. X, page 200), claimed the "right" and made the "demand" to commit what, I am now invited to believe, would have been industrial suicide. It must not be overlooked also that Lane (p. 492a) says the price he based his tender 1906-8 upon was 7s. 6d. f.o.b. Newcastle. I have said that occasions presented themselves when the colliery proprietors might have been expected to advert to their impending ruin if a f.o.b. price of 9s. were adhered to as a reason for the formation of the Vend. The first was on 5th January 1906, when we find the first record (F.1.) of the meeting of coal proprietors, Mr. Learmonth, who was chairman, pointed out the absolute necessity of forming an Association of all the collieries, if the present very unsatisfactory state of the coal trade was to be improved, and he asked those present to express their opinions.

Mr. Alexander Brown proposed that it was desirable to form an

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Association to raise and maintain the price of coal : that was carried unanimously. The price subsequently being fixed at 9s. is a clear indication that that was not really the price at which it was being sold in January 1906. The reference to the very unsatisfactory state of the coal trade by no means necessarily indicates that some profits were not being made. Mr. Wheeler said that, at the invitation of Mr. Learmonth, he met that gentleman, Mr. John Brown, Mr. Keightley of the Newcastle Coal Company, and others. He is not clear about the date, but the first minute shows he was present, and that was the first meeting he referred to Mr. Wheeler. Nowhere was it said that the prices obtained were ruinous, or that the defendants ever said they were. Indeed, he said that his sale of 20,000 tons of coal for the South Australian Railways at 7s., with an extra 1s. under the guarantee agreement, making 8s. over all, left him no loss, but, as I gather, returned him some profit. But for the 1s., that is at a net price of 7s., he would have lost, but he could not say how much. The unsatisfactory state of the coal trade might well be accounted for by the underbidding in an article, which the coal owners knew was limited to their own locality.

Subsequent to the meetings I have referred to, namely, on 11th April, 1906, Mr. Learmonth wrote to Mr. C.M. Newman, apparently as the Caledonian Company (F. 45.), in which reference is made to an arrangement " That you would associate yourselves with us in the object we have in view, namely that of raising the price of coal, and working amicably for that end." No reference whatever is made to ruinous prices although the occasion was one that invited it, if the fact were so. And without further particularizing, there were many points in the history of the Vend, where such an allusion would have been effective. Nothing has been brought before me to indicate that Mr. Learmonth, Mr. Brown, Mr. Keightley, Mr. Chilcott or the other gentlemen, representing large collieries, who met Mr. Wheeler to form the Vend took this action to avoid disaster. Perhaps the most decisive refutation of the contention that 9s. and not 7s. 6d. was the price obtained prior to the formation of the Vend is found in the letter of Newman to Chapman of 23rd November 1906 (X. page 3). Speaking of Indian coal exported to Hong Kong during the year 1905-6 Mr. Newman states that

no less than 126,000 tons was shipped to that market. He then put this question "If India secured this volume of trade in competition with Newcastle coals at 7s. 6d. how much more will they take with the price of Newcastle coal ruling at 10s." The reply tacitly admits the fact and discusses the prospect.

Mr. *Campbell* relied on Cant's evidence of the cost of production at the Abermain colliery as showing the ruinous character of the 1905 price. Cant said that in 1908, which was his only personal acquaintance with the mine, the cost of raising and delivering Abermain coal f.o.b. was 7s. taking it all through. But the cost in 1908 was not necessarily the cost in 1905. In the first place hewing rate in 1908 was based on a 10s. selling price : and even 3d. a ton on 200,000 tons the output for 1905 amounts to £2,500. But, besides that, the mine was really just beginning in 1905, and in 1908, though by no means an old one, they had got in about a mile. I am not able to say that the cost of engine driving, stores, pit timber, horsefeed, underground work, and wheeling, would all be the same in the two years. Probably not I should think.

I cannot therefore conclude that in the Abermain mine the bare cost f.o.b. was 7s. merely because it was so in 1908 under conditions constantly altering. Still less can I assume from that fact that 7s. was then or at any time the minimum in all other mines.

As against the Crown I refused to receive Cant's evidence respecting the one year's working at Abermain as against other mines. It was received as against Abermain only. Mr. *Campbell* now however relies on it as in favor of all ; because Abermain he says is a favourably situated mine. It may be in some respects, but may not be in others. That is all left in doubt, and the party who wants to use the evidence affimatively for his own purposes must make it applicable.

Besides *the Crown's case is not confined to the one point of time or to the one price.* Suppose 7s. were the cost in 1905 and made some rise of price reasonable, 8s. in 1907 would have given a handsome fund for profits after paying the extra labour cost under the agreement in L.8. The output of Abermain that year was 236,000 tons and at 1s. the extra fund is £11,800.

In 1908 when 7s. cost is actually proved the declared selling

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price was 11s. f.o.b. The all round selling price of Abermain in that year from January to June—the rest is not shown (see Ex. L.8)—was 10s. 8.77d., which includes foreign coal. Probably many instances of 29 per cent. discount for foreign coal occurred, and probably too some further allowances or charges, and so the average price I take at a high price namely 10s. 6d. Now that is 3s. 6d. a ton over cost relied on by Mr. *Campbell* and, although it is difficult to say from the agreement of 10th May 1906 exactly how much would be added to labour cost, it is easy to see that that is comparatively small. The output for 1908 was 373,000 tons returning at 3s. 6d. an extra fund of £65,275 to cover extra labour cost and profit. What then becomes of the argument as to ruinous price both in 1907 and still more in 1908. The defendants have to answer for that year as much as for the previous year. Then Mr. *Campbell* relied on the case of the Burwood Extended Mine. Mr. Webb who has a good deal to do with the management of the mine said that his principals started in 1905 re-working the mine, which had been unworked for years, even during high prices. They worked in 1905 the Victoria Tunnel seam, and produced a C grade coal. It is therefore a third class coal, which was suggested by the defendants in cross-examination to be suitable only for bunker purposes. Mr. Webb maintained it was suitable for stationary engines, and has not been used on railways, except during the strike, and then only 1,000 tons. He says it is suitable for household purposes, but cannot say how much was sold for that purpose. The total quantities were 30,000 tons in 1906, 35,000 in 1907, 46,000 in 1908, 41,000 in 1909, and 35,000 in 1910. The declared selling prices of this grade were 1906, 6s. 6d. ; 1907, 7s. 6d. ; 1908, 8s. 6d. ; 1909, 8s. 6d. ; 1910, 8s. 6d., all f.o.b. Newcastle. He says the cost of production is 7s. 1d. f.o.b. for 300 tons a day working 9 days a fortnight. A fair average would be 6 days a fortnight. He says they never made a profit except in one year he thinks. He says in answer to cross-examination that " that was on account of being unable to get trade and nothing else—I should say, being unable to get sufficient trade."

They had to hire waggons. It is quite impossible that this mine with its low grade coal, the evident comparative unsuitability of

its product for general purposes—I do not wish to say more about it—can be accepted by me as a guide to the position of the great Newcastle and Maitland mines. If the Burwood Extended mine was not thought worth to work in war time, its character is far from being typical. Mr. Webb says he made a profit in 1908, when the price was 8s. 9d., and that by no means assists the defendants' case.

So far everything upon which I can rely as indicating affirmatively an answer to the question whether the pre-Vend price was so low as to be ruinous, leads me to a negative conclusion. I should not omit to notice Ex. 38c, which consists of extracts from annual reports by Mr. Atkinson and issued by the Mines Department of New South Wales. With regard to the trade for 1905, the defendants put in the following passage :—" During the year coal generally speaking was dull and the prices realised unusually low. The latter was particularly the case in the Newcastle District, where competition from the Maitland collieries is now very severe." That is all I have in the exhibit as to the year 1905. The first observation to make upon this is that if the dulness is referable to the quantity of coal exported foreign or inter-State the statement is not borne out by the figures. In another of the defendants' exhibits (33c) in 1905 the total quantity exported from Newcastle to foreign, inter-State and New Zealand ports, was 3,461,438 tons, the highest it had ever reached ; the quantity going foreign 1,595,654 tons was the highest on record except 1903 when it was only 11,725 tons more. The inter-State exports were 1,577,707, and the highest record was in 1901 when there were 38,723 tons more. The New Zealand tonnage was the highest up to that time. Comparing that year with 1904, there was an excess in 1905 of 372,346 tons foreign ; 94,524 tons inter-State ; and 43,267 tons to New Zealand. For home consumption, I cannot separate Newcastle from other New South Wales coal, but the total home consumption for 1905 according to Exhibit 34c was 2,914,085 tons, the highest up to that time. So far then as output is concerned, the evidence does not disclose any convincing symptoms of dulness. Next, it has to be observed that Mr. Wheeler in his evidence thinks the Maitland competition was felt somewhere about 1906 to 1907. It is true Pelaw Main

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produced in 1905 311,000 tons but this did not all go inter-State, the amount must have been small. In 1906, Pelaw Main produced 294,065 tons besides J. & A. Brown's Newcastle output, but yet, their total inter-State trade for that year including bunkers was, as we have seen, under 41,000 tons. Further, the previous output of Pelaw Main was in 1902—95,430 tons; in 1903, 229,723 tons; and in 1904 it had reached 337,768 tons (Ex. V.8). It had therefore declined in output in 1905. Abermain, and Hebburn were pointed to by Mr. *Knox* as each producing 200,000 tons in 1905. That is true, but it is also true as he said that in 1904 Abermain produced 87,000 and Hebburn 155,000 tons; and how much of the produce of these two mines went inter-State I am not aware. There is another feature that strikes me as worth considering from the standpoint of common sense. Besides Pelaw Main which is Maitland, J. & A. Brown had the Minmi, Duckenfield and Back Creek collieries. These were Newcastle proper. In 1904 they put out 270,333 tons; in 1905 the output amounted to 324,000 tons. Now, if Maitland, so largely represented by Brown, was attempting to supplant Newcastle, what am I to believe Browns were doing with regard to Duckenfield and Back Creek? Were they designedly losing money in Pelaw Main in order to lose more in Duckenfield? It seems to me on a rational view of the matter that though the competition might be severe, at all events, as understood by Mr. Atkinson, that is not at all the same thing as disastrous or suicidal. The annual report for 1906 says that the state of the coal trade as evidenced by the recorded figures of production was good and prices realised have generally increased. That is true, but the price as we know was 9s. net. Mr. *Campbell* analysed Mr. Brown's price of 14s. in 1905 with a view of demonstrating its ruinous character. In my opinion Mr. *Shand's* answer was correct.

Mr. Ford manager of the Union Bank of Australia, at Newcastle, said in cross examination that he was bank manager there for 14 years; that at the time of the Boer War in 1900 the trade was particularly good; but, it was an artificial demand caused by the war, and he thinks it lasted for 2 years. He states that he had an impression, and he thinks everyone had an impression, that

the bad trade was brought about by excessive competition. He adds that different collieries were, it seemed to him, selling for what they could get. He goes on to say that the one result of that excessive competition was the want of trade. By "result" I think he must mean "cause," for excessive competition would increase trade; but even if he does mean "cause" the figures I already quoted show that his idea was wrong. His error in this respect is further demonstrated by reference to Ex. 33c. In 1900, a war year, the total export of Newcastle coal was 3,021,912 tons. In 1901 it was 3,104,685 tons. In 1902 it was 2,966,764. In 1903 it was 3,420,197 tons, a larger output than Newcastle had ever seen, much larger than the previous year, which he regarded as a year of prosperity. In 1904 it was 2,951,301 tons almost as large as in 1902, and far above the average of 1897-8-9. In fact it was over 486,000 tons above that average then as I have shown. The next year 1905, the export tonnage rises another 510,000 tons, making the total export output of Maitland and Newcastle coal nearly a million tons more than the average for the three years immediately preceding the war year. And Wheeler, though pressed in cross-examination, persisted that *serious Maitland competition was not felt till* 1906. That is very probable since the total output from all the Maitland mines for 1905 was about 1,162,800 tons. Mr. Ford was J. & A. Brown's banker and he has been the banker for the Vend, but that does not qualify him to testify to the cost of production in the mines. His "impression" as to whether competition was excessive does not carry much weight with me as showing that 9s. or even 7s. 6d. was a disastrous price, particularly in view of more solid evidence that I have before me and still less can I build on his statement as to other people's impressions. But he may possibly be correct in thinking that some of the collieries were selling for what they could get, they may have been going below 7s. 6d. In fact V.8, *Chamber of Commerce Reports* 1910-11, p. 61, shows that in 1905 some Newcastle coal was sold as low as 7s. 3d. although the selling price was 9s. Undisclosed rebates may in some instances have still further reduced net receipts. Maitland certainly was selling as low as 7s. 1½d. in 1905; about 7s. 1d. in 1906 (Gale's reports L.8) as an average for all trade.

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Mr. Ford goes on to say that the hewing rate was very low and that was not so good for the miners, and those with whom they dealt did not do so well. Of course that is natural. He also said that in 1904-5-6 there was an exodus of miners from Newcastle. I have already referred to the excellent volume of trade in 1905, and I will add that in 1906, during the whole of which year the exodus continued according to Mr. Ford, the exports rose another 514,000 tons. It is now, that is 1906, over 1,000,000 tons more than 1902, one of Mr. Ford's years of prosperity and during this year the supposed cut-throat business had stopped. But the miners in the beginning of 1907 got 3s. 10d. hewing rate instead of 3s. 6d. that is to say a nearer approach to a decent wage. As to where the miners went during the exodus Mr. Ford is unable to tell. He states that whether they left the district permanently or went to Maitland he cannot say. He adds "I think a great many of them went to Maitland coal field." I cannot regard this evidence as at all satisfactorily establishing the crucial justification of the defendant collieries' first steps in connection with the formation of the Vend. It is all hazy, indistinct, inexact, and is in important points of contact with the issue of a hearsay and fallacious character. Direct and clear evidence on the point was easily within defendants' control. Mr. Ford it must be remembered though called by the Crown and perfectly honest, was by no means a witness antagonistic to the defendants.

PROVISION IN VEND AGREEMENT FOR PENALTIES AND COMPENSATION.

There are one or two other features that have been the subject of much discussion. One is the *provision* in the Vend agreement for penalties and compensation. As originally fixed, the penalty for selling beyond the allotment was 4s. a ton when the selling price was 10s., and 3d. less for every diminution of 6d. in the selling price. And every colliery whose trade fell below the allotment was to receive at the like rate out of the fund in compensation. It was said the penalty was a deterrent, and it was probably something considerable over the price and the question is how much? The compensation was no doubt likewise intended as a reward for honest adherence to the compact as well as recoupment for actual

loss to those whose trade fell off, causing a smaller output, and the same question presents itself on the converse side. On 5th June 1907 (Ex J. p. 1) the rates both for penalty and compensation were reduced to 2s. a ton from 1st January of that year, and modifications were made as to adjustments. On 21st November 1907, the rates for 1908 were fixed at 2s. for penalty, and 1s. for compensation, the surplus to be paid into the general fund (J. p. 59). On 13th February 1908 (J. p. 111) it was resolved that penalties should be reduced to the compensation rate, and this left both at 1s. Finally on 22nd January 1909, the rate of both penalty and compensation was fixed at 1s. 6d. per ton. It is very hard if not impossible to arrive at any satisfactory conclusion from the penalty and compensation proceedings as to the proportionate relation the rates bore to profits.

My impression so far as I have been able to form one on a review of the whole circumstances is as follows. Events had proved too strong for the Vend. In face of the insistent public requirements, the 4s. penalty—intended like the same penalty on the shipping companies in clause 6 of the combined agreement to be a complete deterrent—had to be abandoned. Some of the collieries were forced to go beyond their allotment. Being so compelled, it would naturally have been considered unfair and unreasonable to deprive them of all their profit, but enough must be taken as a penalty to put a substantial check upon them so as to confine the breach to cases of pressure; otherwise the allotment system would fall altogether. Thus, as a rough working amount, 2s. was taken as a sufficient sacrifice of profit, most probably the greater part of the profit on the price ruling in June 1907, and this it was apparently thought would meet the situation. It is plain to see how the pressure arose. The telegram of Howard Smith to Cant of 21st May 1907 (X. 74) and subsequent communications exposed a serious state of affairs. On 5th June (J. p. 1), at the Vend meeting, the Chairman stated that difficulties had arisen which required to be dealt with. No doubt he referred to the public difficulties the penalties and the Vend stipulations had occasioned. He went on to say :—"Some of the regulations, for instance, had the effect of crippling the trade of the port generally. Another thing was that the scale of penalties and

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compensations had been fixed at too high a rate." The discussion took place at a critical moment. The community stood knocking at the door of the Vend for coal, and the Vend evidently felt themselves forced to abate some of their restrictions on supply, but not all. They have given no explanation whatever of why they came down from 4s. to 2s. and dated back the reduction 6 months; and I am driven to reason it out as best I can from the probabilities of the situation as read by the light of ordinary human and business motives. Consequently I think that they would naturally try to some extent to remove the prohibition against meeting public requirements without entirely abandoning their scheme, and would therefore compromise opposing influences by leaving some, but comparatively small, advantage to those going beyond allotment. In November 1907 they determined (J. p. 59) to meet the difficulty they were in by the danger of public outcry on one hand, and the risk of collieries overselling on the other, by what they called "a scientific basis of allotment for an extended period after 1908."

I am confirmed in my impression, because, on 21st November 1907, when the Vend committee reduced compensation to 1s. and adhered to 2s. for penalties important events had taken place. On 20th August (X. 143) an impressive telegram had been sent by the shipping companies to the Vend pointing out the seriousness of the shortage in three States, and the likelihood of general indignation leading to hostile legislation. There had been an effort to meet the urgency of the situation. In September (X. 158) another pressing letter was sent, and another assurance given of endeavour to meet the shortage. Then in November came the strike of 1907 which lasted about a fortnight. While the prices continued and State services were endangered, the Premier of New South Wales was approached by the Vend to obtain relief from penalties from various State Governments for the short delivery or non-delivery of coal under contract and it was pending receipt, and in fact one day before receipt of the Premier's reply, that the Vend passed the resolution I have just referred to, maintaining a penalty of 2s. for overstepping allotment. I assume the collieries were not prepared to go so far as to impose a direct fine for daring to supply the urgent needs of the various States especially when asking for relief for

penalties, and at the same time human nature tells us that ordinarily no colliery would be prepared to supply coal for no reward at all. I have a distinct *prima facie* impression from all the circumstances connected with the penalty that 2s. was recognized as something appreciably less than the amount of profit when the declared selling price was 10s., but what I cannot tell from this branch is how much. That has to be determined by resort to other and independent evidence. The declared price was not raised to 11s. until 2nd December 1907 (see Cant's letter of 9th December Ex. X. p. 198). I do not feel concerned with the reduction of compensation in November to half the amount of penalty. It may have been some scheme of partition of profits in an indirect way, and the fixation in February 1908 a direct partition of those profits. I am not prepared to search out possible answers to a *prima facie* inference when the defendants might so readily have satisfied all doubts. Even at the bar no reasonable explanation was suggested as to the penalties which, taken not so much in isolation as in conjunction with other features, impress my mind against the Vend. But even considered alone, it is not to be overlooked that, notwithstanding the liability to penalties, several of the collieries did in fact largely over-deliver. At what date these over-deliveries began I do not know. However there is a letter of 10th December 1907 from Laidley to Learmonth (Ex. O. 1), and in that letter reference is made to the heavy payments they may be called upon to make for excess of coal invoiced during that year. There is another letter of 6th December from Mr. E. P. Simpson of Minter, Simpson & Co., writing on behalf of the Pacific Co. to the Secretary of the Vend. He refers to the very heavy responsibilities the company will have incurred in the then present year for penalties. He suggests that some automatic process should be arranged whereby those collieries which might in any one year secure trade in excess of their Vend should receive some reasonable addition to the Vend in the following year based on a proportion of such excess. One can hardly imagine —and without some evidence cannot presume—these collieries supplied the extra coal without some little profit. I think that in actual practice that such an automatic arrangement was applied. I mean that in alloting the output for any given year, the total

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quantity sold by each colliery, whether under penalty or not, was taken into account. But it is quite plain that the prices obtained for the coal must in any case, and putting it at the very lowest, have been considered sufficient to provide against loss after allowing for penalties as well as ordinary expenditure. Either that is secured by the price already fixed for the current year or else the price for next year must be made to cover it. Probably it is the former, seeing that the price remained the same from 1908. Some of the penalties paid were considerable in amount. Looking at the minutes of 13th February 1908, and particularly at the Chairman's statement that the sub-committee had devoted two days to matters relating to compensation for loss of trade during 1907, I gather that the reduction of compensation to 1s. was retrospective, and this helps to incline my mind to believe that the reduction then made was a short and direct way of dividing the profits. It may be that penalties paid after resolution and down to the final change were all on the basis of 1s. even retrospectively, at all events future penalties were. On 21st February 1908, eight days after the reduction of that month, the Pacific Co. paid £888 1s. 3d.; then on 29th February 1908, Hetton Co. paid £975 18s. 4d., and Laidley & Co. £532 19s. 8d., and another sum of £548 2s. 5d. These sums were clearly penalties, and were apparently awaiting final adjustment. The ordinary monthly contributions of these two companies under clause 14 of the Vend agreement amounted to £58 13s. 7d. and £22 1s. respectively. On 5th March 1908, Sneddon paid in £1,225 1s. 6d., also obviously for penalties. On 16th May 1908, the Scottish Australian Co. paid £1,563 12s. 3d., of which £1,400 at least must have been penalties. The Caledonian paid £3,123 11s. 3d on 29th June 1908, but, although this payment was made for penalties, I am willing to believe the company, when they sold the coal, did not so construe the Vend agreement as to think they were liable to pay them. Apparently the Vend thought 1s. penalty not sufficient deterrent and so in January 1909 they raised it to 1s. 6d. But on 13th March 1909, the same company paid in £1,297 13s. 4d.; this time beyond all question with full understanding right through. On the same date, the Hetton Co. paid in £535 15s. 5d.; J. & A. Brown on 15th April 1910 paid £7,122 0s. 2d., that may have all

been for penalties. It is just possible however that portion of it included monthly levies. I am not satisfied that is the case, but, if so, the levies would amount approximately to £3,000 at most, leaving over £4,000 for penalties. The penalty then and since January 1909 being 1s. 6d., Brown on this, the lowest assumption, sold 53,333 tons and probably more, knowing that the declared price recouped him the 1s. 6d. penalty as well as his regular expenditure, and yet returned him a profit.

The Seaham Co., on 22nd April 1910, paid in £4,147 19s. 8d. This money may have been all penalties, but, assuming with fullest liberality that for two years they never paid levies, it leaves £1,700 net penalty.

Caledonian Co., on 23rd June 1910, paid £1,324 15s. 8d., which I take to be penalties.

FUNDS OF VEND AND INFERENCE THEREFROM.

The funds of the Vend frequently mounted very high. In August 1907, there was £13,181 5s. to its credit (J. p. 27). In November same year there was £21,952 5s. 9d. (J. p. 63), and heavy sums were paid out for compensation (see J. pages 101, 109 and 147). I may quote some figures from the last-mentioned page :—East Greta received in July 1908 £3,284 14s. ; Heddon Greta £1,505 ; Newcastle Co. £4,165 4s. ; Shortland Colliery £290 ; that left a credit balance on 15th July of £15,522 1s. 6d. On 10th June 1910, when this action commenced, the credit balance was over £20,000. The common-sense question arises how could those members of the Vend who provided these huge sums afford to do it ?

DEFENDANTS' SUGGESTION AS TO FOREIGN TRADE PRICES FOR VEND COAL AS JUSTIFICATION.

I now come to the second additional matter debated, as throwing light on the question of whether the declared f.o.b. prices were excessive ; I allude to the foreign prices obtained for New South Wales coal. Mr. *Knox* placed great reliance on this contention. He urged, in what I may call his relative argument, that in 1907-1908 the foreign trade of the Northern Collieries gave them higher prices than they got inter-State, and that it could not be said to be exorbitant to charge the Australian people prices

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that could have been bettered if the coal were sent abroad. It strikes the mind as singular that the collieries would have voluntarily taken a lower price here, if they could have got a substantially higher price elsewhere. Some allowance must of course be made for merchants preferring a market at hand, but that preference is on the ground of material not sentimental advantages, and no mercantile or other circumstances have been pointed out to me which would outweigh the discrepancy of suggested prices. If the foreign market offered higher prices for the coal sold in Australia, why was not more coal sent there? The output certainly more than filled the Australian demand, and of course when foreign commitments are made they must be kept. But when the foreign demand for Australian coal is filled, the foreign market is gone at the price. To gain further entry—other things being equal—the price must be lowered and then we have to ask by how much? Then say the defendants: We lowered the price for Australia, and lowered it appreciably and therefore it must be assumed we could certainly have got those prices abroad for our coal or much of it, and so it cannot be said the prices were excessive.

Mr. *Knox* put his arguments into an effective visual form by means of a graph, showing by corresponding lines the relative prices, inter-State and abroad, obtained for New South Wales coal for 30 years from 1880 to 1910. From this graph it appears that during the whole period foreign prices were unmistakeably higher. The differences shown are sometimes enormous; as in 1903, when foreign prices appear to reach 2s. beyond the home prices, the extremes being about 10s. 3d. abroad when the inter-State price was as low as about 8s. 3d.

In 1905 foreign prices are shown at their lowest at about 8s. 3d.; while in Australia they never went higher than 7s. 9d. The graph rightly conceives these extremes as probably gradual, and so we take it that in the beginning of 1905 the difference in favor of the foreign prices was nearly 1s. and at the end nearly 10d., and an average over the year would be approximately 9d. The quantity of Newcastle coal exported inter-State in that year was 1,577,707 tons as against 1,595,654 foreign. Is it not reasonable to believe

that if 9d. a ton more or anything near it could have been obtained in 1905, when learned counsel for the defendants tell me the collieries were on the verge of ruin, they would have eagerly taken it ?

From the middle of 1905, the discrepancy gradually grew wide until the middle of 1908 when it was 1s. 10d. in favor of foreign price. In 1909, the difference was about 1s. 9d., and at this time the Newcastle supply was divided inter-State and foreign as follows :—1,645,071 tons inter-State and 1,532,039 tons foreign. From the defendants' standpoint it is incomprehensible why advantage was not taken during the several years in which, judging by the diagram submitted, enormous profits could have been made by transferring the inter-State coal. Still, say the defendants, the graph correctly represents the prices in Exhibit 34 C, and so it is necessary to examine that Exhibit. It is an official table, which shows the quantities and average value per ton of coal exported to Australasian and other ports respectively. It also distinguishes between coal exported to Australasian ports, and coal exported to other ports. It states the value in each case at the port of shipment. The average prices per ton are evidently arrived at by dividing the value at the port of shipment by the number of tons. The coal dealt with by the table includes all coal, whether Newcastle, Southern or Western, and whether large or small. It also includes bunker coal. The value of the coal exported is furnished to the Mines Department by the Customs, who get it from the invoices of the coal exporters. The invoice price I take to be f.o.b., because the return says "at the port of shipment." Apparently a considerable proportion of Southern and Western coal went foreign. The quantities may be arrived at in this way—Exhibit 34 C shows that in 1906, 2,701,450 tons of New South Wales coal were exported abroad; Exhibit 33 C shows that in the same year the quantity of Newcastle coal that was exported abroad was only 1,918,086 tons, therefore the difference, namely, 783,354 tons must have been Southern and Western coal. So in 1907, the total tonnage going foreign was 3,364,483, but of this only 2,313,614 were Newcastle—there thus being 1,050,869 tons of Southern and Western coal. In 1908 the total foreign tonnage was 3,383,366. In that year Newcastle tonnage foreign was 2,446,293, leaving a balance of 937,073 tons

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Southern and Western. In 1909 the total foreign export was 2,192,834, Newcastle providing only 1,532,039, the balance being 660,795 for Southern and Western. In 1910, the total tonnage foreign was 2,211,936, Newcastle providing 1,722,997. Southern and Western coal was therefore included to the extent of 488,939 tons. On reference to Exhibit T8, it is seen that some of the railway freights from the South coast and Western mines to Darling Harbour are very heavy, even on coal for shipment. For instance from South Clifton 2s. 5d.; Lithgow Coal Association 4s. 3d. Besides this the inter-State exports included a considerable quantity of small coal. Foreign exports were large coal or practically so. Mr. *Knox* admitted that far more small coal went inter-State than foreign (page 1,322a), and he candidly agreed that that is one of the factors which accounts for the difference between the prices foreign and inter-State on which he relied. It also appears in the minutes of the conference of shipowners and coal-owners of 23rd April 1909 (X. 219) that the steamship owners stated as one of the reasons for deficiency in small coal that the foreign markets were being supplied with small coal, which to their knowledge had not been the case previously. It seems to me therefore quite impossible to regard the two lines on Mr. *Knox's* diagram as showing the respective prices obtained by Newcastle coal only, and of the same class and under similar conditions, except that in one case the destination was inter-State, and, in the other case, it was foreign. That line of argument therefore lacks affirmative support. But there is also a strong body of evidence of a negative character. On 30th March 1906 (Ex. F. pp. 33 and 41), the Vend passed a resolution which was signed by all present, who represented J. & A. Brown and nine other collieries, that, until otherwise altered by the Association, the minimum price of coal for foreign trade shall be 9s. for large, and 5s. for small, less a maximum of 2½ per cent. allowed; and for inter-State and New Zealand, the minimum prices shall be 9s. for large, and 5s. for small net.

As against the Hetton Co. only—I may refer to Exhibit G6, by which it appears that on 3rd March 1906, Arch. Currie & Co. stated to the Hetton Co that they already had a contract for 3,000 tons for the East at 8s. per ton f.o.b. Newcastle—subject to the 1 per cent.

wastage—but otherwise net. Arch. Currie & Co. offered to increase the quantity to 8,000 tons at the same price. Hetton Co. replied, agreeing to accept the offer, but strictly on the understanding that no portion of this quantity was to be disposed of within the Australian Commonwealth, and an option of a further 7,000 tons was likewise given. So far as the Hetton Co. is concerned, this correspondence militates strongly against the argument put forward on its behalf. It appears from the minutes (I. p. 59) that the Vend allowed 1 per cent. wastage off foreign shipments for 1907, but none off inter-State or New Zealand deliveries. On 24th April 1906 a meeting of the Vend at which the shipping companies were represented authorised the Seaham and Caledonian proprietors to tender for the Manilla contracts of 110,000 tons in all for United States at 7s. 6d. per ton f.o.b. Newcastle, with compensation in the event of the hewing rate increasing. After the shipping representatives retired, Mr. Simpson made a statement which, in accordance with the rule I have already explained, I use against the Vend only. He asked whether it would not be fair to allow compensation under the Vend agreement to collieries doing foreign trade at a lower price, while another colliery is doing inter-State trade at the full price. In December 1906, when 10s. per ton was demanded for large coal from the Metropolitan Gas Co., it is noted in the minutes (I. page 43) that that price was unobtainable for contracts to the West coast of North America and the East; see also on the same subject X. pp. 2 and 3, I. pp. 45 and 47. I refer also to I. 55, and note minute as to 'Frisco trade. I refer to the Vend minutes of 10th October 1907 (J. p. 26) also the minutes of 11th March 1908 (J. p. 123) to be read with the minute of 23rd April 1908 (J. p. 135). Just at that time Laidley & Co. were in correspondence with A. Currie & Co., and, as regards those defendants only, I refer to the letters, the Exhibit is U6, and consists of two documents, 22nd and 23rd April 1908. It is sufficient to say that the clear inference to be drawn from those letters is that foreign prices were not procurable at higher rates than Australian prices, and therefore the defence of the Vend price rested by Mr. *Knox* on the relative superiority of foreign prices is not sustained.

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I leave another of his arguments over for a little later consideration.

DEFENDANTS' SUGGESTION AS TO ADVANCE IN MINERS' WAGES AS JUSTIFICATION.

Another justification to support this successive rise was the advance in miners' wages. It is admitted on both sides that the miners were underpaid in 1906. The mine owners though not losing were not adequately remunerated as I find, in the earlier part of the year, but were most assuredly well paid in the latter part. And yet because the miners, as everybody now concedes, were justly entitled to an advance in wages, the owners provided for it, or for part of it at all events, but only on conditions which made the public pay the advance in full and also gave 5½d. a ton to the mine owners. I asked for some explanation of this; I was told that it had been the custom for years at Newcastle to regulate the miners' wages by the selling price, that the two things went together, that is for every 1s. of the selling price the miners received 4d. hewing rate with a consequent rise to ancillary workers of say 2½d. I can quite understand the justice of an arrangement between miners and mine owners that after a certain minimum wage is provided, every additional 1s. of profit beyond the price giving that minimum and legitimately obtained from the public shall be shared in agreed proportions between those who jointly co-operate in producing the commodity. But that assumes the 1s. as being legitimately obtained from the public who had had no voice in the arrangement. The agreed partition is the result of obtaining the price, and it is altogether misusing it to convert it into an instrument for measuring the price the consumer has to pay. To make the price itself fair, we must not overlook the fact that the public have rights too, and so long as the 1s. belongs to them it is not a sufficient reason for compelling them to pay it to say that the two other parties to the industrial operation have agreed to divide it in certain proportions. A price that is not excessive regards what is fair to all parties. The public may justly be called upon to pay whatever price is necessary to provide an adequate remuneration to both employer and employed, and therefore if the 1906 price were not sufficient without

trenching on the owners' fair remuneration to provide the extra 6½d. for the miners, the public could with propriety have been called upon to bear that addition. But on the other hand, if the owners were already receiving for themselves, not only a fair, but a good profit I have to enquire whether there was still any fair business justification for demanding from the public an extra 1s. and so obtaining from them both the increase of wages and also a further remuneration to the proprietors of 5½d. per ton. The custom of partition of sale price is no answer. In its just application the point where the public are concerned is already passed, for reasonable competition has already fixed the price and the two sets of partners, as I may term them, are merely sharing the legitimate returns that have come in.

To give effect to the defendants' argument as to this point would be to sanction a misuse of the custom by admitting the right of the collieries to decline to recognise the admittedly just claims of their employees except at the cost of working a gross injustice to the community. From that injustice the public have some sort of protection while competition prevails, but by combination that protection is annihilated and the colliery proprietors are then in a position in which they are able to make any increase of wages to the miners dependent on their also obtaining, however unnecessary it may be, an almost corresponding bonus for themselves. It was suggested that the custom must be well founded because it had been so long adhered to; but that might be said and has been said of many admitted abuses. It was also said that it had received the sanction of the New South Wales Industrial Court in the *East Greta Case* (1). But that case is entirely beside the present question. The Court was there considering only the relative rights of the two sets of co-operators, and the basis of the whole position was that a price—presumably fair, but at all events unquestioned—was in fact obtained, the only question being its subsequent partition. The public were not there represented, the law then (1903) made no provision for their representation, and in the particular dispute they had no interest. The Statute under which these proceedings were instituted affords the first opportunity the public have had

(1) 2 N.S.W. Ind. Arb. R., 311.

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to be heard as to its rights, and it has been pressed upon me that but for the Statute the whole scheme was perfectly legal. The custom of fairly dividing a justly earned price consequently gives no more sanctity to an increase of price composed of a fair advance to employees, plus an unnecessary bonus to employers, than it would to a bargain between the collieries themselves to divide in certain agreed proportions whatever profits they might be able to extract.

I was told that to reduce the prices, charged by the Vend, would necessarily involve the lowering of the wages to their employees. I do not believe that such a result would follow unless the present f.o.b. price were fair and legitimate. If it is excessive the reduction of the price to what is reasonable would be much more likely to enable other employers to pay better wages to their work people. And the law either is, or may be made, strong enough to secure justice at the same time to the miners without imposing an undue burden on the rest of the community, and I do not believe any injustice will accrue to the miners. It is admitted that 4s. 2d. is not too much for them, and therefore no f.o.b. price can be fair and reasonable that does not include provision for at least so much. Whether even that hewing rate is sufficient I have not been asked to enquire, and have no materials to decide. But nothing I say prevents the colliery proprietors from demanding whatever price is required to pay 4s. 2d. and as much more as may by agreement or any competent tribunal be found to be a fair addition to the present wage. I simply refuse to countenance as a valid reason for increasing the price of coal the plan of tacking to a justifiable advance of miners' wages, which the public may reasonably be asked to provide whether there be competition or none, a further and unjustifiable bonus to the mine owners not called for on fair business grounds, and which therefore apart from combination would not be insisted upon, but would be corrected by free and reasonable competition. In other words I decline, as I stated during the argument, to permit the defendants to use the miners as a buffer between themselves and the public. The claims of all parties concerned must stand on their own merits, or fall by reason of their own defects.

DEFENDANTS' SUGGESTION AS TO RECOUPMENT FOR PAST LOSSES AS JUSTIFICATION.

Mr. *Campbell* sought to justify the addition of the mine owners' bonus by attributing it to recoupment for past losses. The suggestion is that the colliery owners having for some time voluntarily sold below payable prices, some of them designedly—*ex hypothesi*—to run competitors out of the market and ultimately recoup themselves by higher prices, they are justified in demanding an otherwise unjustifiable accretion to the price of their coal. The persons who have to pay it may not be the same as those who previously got coal cheap; the increase may seriously affect other industrial operations; it is not limited in time, or amount; there is no indication of staying the increase when collieries, that according to the argument were forced to lower their prices so as to live, shall have their losses repaired, but they, and the aggressors in this trade war, are to continue the process of recoupment indefinitely. But most singular of all, the miners, who during all this time and without any choice on their part have been receiving admittedly inadequate wages, have no fund provided for their recoupment. Miners at Newcastle sometimes remain for years even continue for generations in the same employment. Mr. Wheeler tells us that his company has been in existence over 50 years and father, son, and grandson, have been employed in the mine. Yet they received no recoupment. On the contrary they were still allowed what is now conceded to have been an insufficient wage. I reject the suggestion of the owners' idea of recoupment—for many reasons—because there was no loss to need recoupment, because, if there was, the increase should at least cease when recoupment was effected, because extra charges on the public indiscriminately is an unjust mode of recouping losses voluntarily occasioned by concessions to particular individuals, because I believe the idea of recoupment as such never entered the minds of the colliery owners, but has been the despairing suggestion of learned counsel since it has no evidence to support it, is inconsistent with the argument that by custom the hewing rate followed increased price, and was unaccompanied by any corresponding recoupment in favor of the miners, who simply got a somewhat better future wage for future work.

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Mr. *Knox* put in Mr. Wheeler's balance-sheets for 1907 and 1908. I do not want here to say more about them than this, that, even allowing for a further outlay for royalty, they show a very handsome profit, and certainly do not assist the defendants' case. Wheeler too was fighting against difficulties of combined opposition.

CONDUCT OF DEFENDANTS INDICATING F.O.B. PRICE FOR 1907 UNNECESSARILY HIGH.

Before parting with this phase of the matter reference should be made to the minutes of the Vend of 11th December 1906 (Ex. I. p. 55). It is this:—"Abermain allowed to supply to 30/6/07 at 9s. 6d. and 5s. 6d. in connection with Cockatoo Dock contract, it being agreed that Abermain do not come on the funds for compensation for difference in price." This entry has obvious reference to the last proviso of clause 22 of the Vend agreement in Exhibit S. which says:—"That where in order to procure any particular trade any member in pursuance of authority received from the Board sells coal at a lower rate than that in force he shall be indemnified to the extent of the difference." At this time the declared prices, as per the resolution of 31st October, gave 10s. for Abermain coal for 1907. The importance of this minute is this—That the Abermain Company were willing to supply at the lower price and agreed with the rest of the Vend that no compensation should be paid. Now, there may have been special circumstances which induced all parties to depart from the provision of clause 22, but no such circumstances have been suggested. I am bound to draw what conclusions I can from the circumstances apparent. If therefore, the Abermain Co. was anxious to get the trade even at 6d. less than the declared price and sought permission hoping to get compensation; and if the Vend thought no compensation was necessary and the Abermain Co., was still desirous of doing business on those terms, I will not assume in the absence of affirmative evidence that they were anxious to make a loss or to work without a fair profit. And if that were so the 1907 price of 10s. was not needed to return a reasonable profit; and the 1908 price still less necessary. In my opinion 9s. 1d. for 1907 was unquestionably extremely profitable; and for 1908, 1909,

1910, the price of 9s. 8d. was equally so. I reckon the 6½d. in each case as 7d.

FURTHER INCREASE OF F.O.B. PRICE IN 1908.

In and for 1908, there was a further increase of 1s. in the f.o.b. price beyond 1907, with of course a rise of 6½d. for the miners, bringing their wage to the point now conceded to be not unduly high, namely 4s. 2d. at which it still remains. The prices were fixed at the Vend meeting of 2nd December 1907 of which no record has been disclosed, there being only a reference to it in Cant's letter of 9th December (X. 198). Trade had greatly improved. In 1904 the total foreign export was 1,223,308 tons, and inter-State 1,483,183 tons and to New Zealand 244,810 tons, a total tonnage of 2,951,301 tons. That had mounted in 1906 to 1,918,096 foreign, 1,723,643 inter-State, and 333,916 New Zealand, a total of 3,975,655, over a million tons more. In 1907 there was a still further increase; foreign 2,313,614, inter-State 1,893,913 and New Zealand 338,721, total 4,546,248, over 570,000 tons above the preceding year. So with trade more vigorous, greater output and consequently a lowering of the average cost of production per ton, with no untoward circumstance existing or threatening, it is decided at an unrecorded meeting for reasons wholly undisclosed, except the obvious advance of 6½d. per ton being the labor cost of large first-class coal, that the public shall pay 1s. more per ton on the best coal up to point of putting it on board at Newcastle. But that is not all that was done at that unrecorded meeting. It will be seen that its proceedings are of great importance in relation to this matter. It will be necessary to compare the Vend minutes of 31st October 1906 (Ex. I. p. 33) with Cant's letter of 9th December 1907 and enclosures (Ex. X. pp. 198, 200).

From the earlier Exhibit we find that the prices of best Newcastle or Maitland were fixed for 1907 at—Large, 10s.; Small 5s. 9d. By the latter Exhibit, coal of the "A" grade, which included mines that in 1908 produced 4,774,798 tons all reckoned as "A" grade, except such part of Seaham, West Wallsend and Killingworth coal as was required for Australian railways and Sydney trade, was raised to 11s. large, 10s. unscreened, 6s. 3d. small. The names

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of the collieries are set out in the latter exhibit and are to be found in almost exactly the same order in Ex. S. schedule to Vend agreement. In 1907 the price of West Wallsend and Seaham was—Large 9s. 3d., small 5s. 9d., without distinction, and apparently constituted the " B " grade for the railways and Sydney trade (see the earlier Exhibit and the schedule in Ex. S.).

For 1908 these mines are raised 1s. for large and 6d. for small, and unscreened is charged 9s. 3d. In 1907 grade " C " (unscreened) and apparently including New Lambton, Ebbw Vale, Shortland and Waratah (upper seam) was 7s. 6d., altered for that year to 7s. by resolution of 3rd December 1906 (I. p. 43). This was raised for 1908 to 8s. 6d. The " D " grade, Pacific, Rhondda, Northern Extended and Northumberland in 1907 was best 6s. 6d., unscreened 6s., small 4s. 9d. Before stating the 1908 prices it will be well to refer to the prices for these inferior coals as fixed by the Vend on 9th May 1906 (F. p. 91). On that date, it was resolved that the prices fixed for the coals in classes " C " and " D " should be as follows :—On the basis of 9s. for coals in " A " class ; class " C " unscreened, 6s. 6d. per ton net ; class " D " best, 6s. per ton ; unscreened, 5s. 6d. ; small, 4s. 9d., all net. So that in 1907 there was added to those prices 6d. per ton on class " C " and 6d. per ton on best and unscreened in class " D." Now in 1908, an astonishing further advance is made, " C " grade advancing still another 1s. 6d., which makes it 2s. beyond the first fixed Vend price and " D " grade large is advanced 2s. more which makes it 2s. 6d. above the first fixed Vend price ; " D " unscreened is also advanced 2s., making it 2s. 6d. more than first Vend price, and " D " grade small is brought to 5s. 6d., which is 9d. above its previous price.

How can these advances in price be explained ? Ruination in 1905 and 1906, if it ever had any substantial existence, was ended when the Vend raised its price by 1s. 6d., and brought it to 9s. net. The additional 1s., or net 5½d. in 1907, poured another stream of income into the pockets of the Vend. The Teralba coals in 1907 may not have helped so much, but the others did. And then we reach the further increases in 1908 merely announced, without a word of recorded explanation why they have been made, and made at a meeting, the importance of which cannot be denied, and yet

but for a formal allusion in a letter they would have found no written notice.

AGREEMENT OF NOVEMBER 19, 1909.

Then I was invited by Mr. *Knox* to regard the agreement of 19th November 1909 (Ex. 17C) between Kethel & Co. of the one part and Hughes and others of the other part as a guide and almost a convincing guide to the proper price of coal. Mr. *Knox* put it that it was an admission by Cant that 9s. was the sum necessary to cover colliery cost f.o.b. Newcastle, and that 11s. was not an unfair f.o.b. price. It was also argued that the contract had an additional significance in this case from the fact that one of the parties to the contract was now Attorney-General. This last suggestion I at once put aside as impossible. Under no circumstances could private transactions of any individual affect the rights of the public whom he officially represents. So far as Cant is concerned, it could only be taken at most as affecting his evidence, and it does not lead me to alter my view of his testimony in Court. On the merits, the circumstances in which the agreement is made were quite abnormal. The strike introduced elements that affected prices, employment of workmen, and the supply of coal generally; and as will hereafter be seen the defendants in certain transactions receive the benefit of these considerations.

In view of the practice prevailing to control the hewing rate by the declared selling price of coal, I can quite understand also a readiness on the part of the miners to recognise 11/- at least as the f.o.b. selling price. I cannot suppose that the miners had worked out all the items going to the mine owners' cost of production, such as management, &c.; and having regard to the unusual features of the time I do not accept the figures adopted by the parties to the agreement as sufficient to determine the limits of fair and reasonable price.

GENERAL CONCLUSIONS AS TO PRE-VEND PRICE.

Looking at the numerous circumstances I have considered, some because the Crown affirmatively advanced them, others because the defendants relied on them as negativing the Crown case, I see no reason for hesitating to believe that the prices, prevailing before

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the Vend formation, were not only not ruinous in themselves, but were, to some extent, profitable prices, and that, then and since, they were not lower than the foreign prices obtainable for the same coal. They were in my opinion higher, though of course not so much higher as to attract in ordinary circumstances an influx of foreign coal into Australia. There was I believe in some few instances—smaller collieries only—difficulty in disposing of the output arising from its comparative inferiority, and in those instances standing charges brought up the average cost per ton so as to require a larger sale to pay. But this did not apply to the substantial trade in Newcastle coal and in no appreciable degree affected either the welfare of the district, or of the miners, or of the general body of mine-owners, or the public at large.

And when the mine owners in 1906 after years of experience of cost fixed on 9s. net, having no one to consult but themselves and free from internal competition, I must assume, having no evidence to the contrary, it was at least a reasonably payable price. *And if so no circumstances have appeared which make it less so, except the addition of the miners' wages.*

But that does not end the matter by any means.

EFFECT OF COMBINATION ON PRICES IN AUSTRALIA BY EXCLUDING COMPETITION.

I appreciate the force of the observation made by learned counsel for the defence, as to the difficulty of a Court of justice finding what is a reasonable price or *e converso* what is an unreasonable price. So many elements enter into a determination of that question, that it can never be invested with absolute certainty. And as the factors that go to its determination are not constant, but may change from day to day, no arbitrary figure can ever be permanently adopted as the limit of reasonableness. I have been referred to the observations of Lord *Bramwell* in the *Mogul Steamship Co.'s Case* (1) where the learned Lord quotes the following words of *Fry* L.J., in the Court below :—" To draw a line, between fair and unfair competition, between what is reasonable and unreasonable, passes the power of the Courts." I was invited to regard this dictum as a judicial admission of incapacity to ascertain whether

(1) (1892) A.C., 25, at p. 49.

a price transcends the bounds of reasonableness; it was certainly not so intended. The sentence immediately preceding the passage adopting those words is this :—" I cannot think that the defendants did more than they had a legal right to do," and when the judgment of *Fry* L.J. is referred to in which the quoted words appear it will be found that he is referring to the legal power, not the actual ability, to determine upon appropriate evidence whether a given price is reasonable or not. Reasonableness as to prices, wages, charges of all descriptions and conduct of every kind may at any moment in ordinary litigation have to be considered and determined by some tribunal in a Court of law. I think the case of *Rickett* v. *Midland Railway Co.* (1) much nearer the point, though, of course, no rigid standard can ever be fashioned, as a test of reasonableness, it all depends on circumstances compared with which the kaleidoscope might sometimes be regarded as stability itself. *Rickett's Case* (1), came before the Railway and Canal Commission of which Lord *Collins* (then *Collins* J.) was the judicial member. Under the Act, the tribunal had to determine whether a rate or charge was reasonable or unreasonable. *Collins* J., held in effect that the standard of reasonableness of any increase of rates depended on the circumstances existing or apprehended before the increase was made. The learned Judge said (2) :—" By what standard are we to try the question of reasonableness ? The legislature have left us at large on the matter, except so far as we may be helped by presumptions or their absence. I think it clear, however, that in our capacity as Judges we are bound to direct ourselves adequately as to what circumstances we are to take into consideration on the question of reasonableness. We are not a Court of conciliation, or a tribunal of honour. We are not made Judges of prudence or of generosity. Vast interests have been committed to our keeping, and a jurisdiction of extreme delicacy has been conferred upon us, in virtue of which we are called upon to adjust a dispute as to the reasonableness of charges made by one set of traders to another in connection with the carriage of coals, in enormous quantities, to the centres of consumption. Our decision upon matters of fact is final. There is no appeal. And yet I cannot suppose that Parliament intended

(1) (1896) 1 Q.B., 260. (2) (1896) 1 Q.B., 260, at p. 264.

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to take the management of these trading concerns out of the hands of the practical men who work them, and to place it in the hands of the Railway Commissioners. It is of the utmost importance, therefore, that we should not travel beyond our proper province in exercising this novel jurisdiction." To some extent those observations have present application. The legislature has left the Court without a specific standard of detriment, and therefore without a specific standard of excessiveness of price; like the railway Commission, this Court is not a Court of conciliation nor a tribunal of honor, nor am I to determine the issues on the grounds of generosity or mere prudence. Prudence of course may be an element legitimately influencing the defendants in fixing their prices. With equal truth also may this Court remember that vast interests have been committed to its keeping. Mr. *Knox* told me that the coal industry is probably the vastest industry in the whole Commonwealth, and vaster still is the collective welfare of the Commonwealth itself, dependent in so great a degree upon the industry I am immediately considering. And equally with the Railway Commission do I conceive it incumbent on this Court not to take the management of great trading concerns out of the hands of the practical men who work them. The functions of this Court are only to guard the rest of the community from what I may shortly describe as the artificial maleficence of combination or monopoly. Lord *Collins* had to consider how to determine what were reasonable rates at which the carrier was bound to convey; he said (1):—"A main element in such determination must be the expense to the carrier." He then cited the words of Baron *Parke*, who said:—"The charge is no doubt to be varied according to the trouble, expense and responsibility attending the receipt, carriage and delivery of the different articles." Lord *Collins* went on to say for himself:—"The affluence or indigence of the person rendering or receiving the service is beside the question." By that last paragraph he meant, I apprehend, affluence or indigence of the person rendering the service outside the conduct or maintenance of the business by which the service was rendered. Lord *Selborne* in *Canada Southern Railway Co.* v. *International Bridge Co.* (2) said:—

(1) (1896) 1 Q.B., 260, at p. 265. (2) 8 App. Cas., 723.

"The principle must be when reasonableness comes into question, not what profit it may be reasonable for a company to make but what is reasonable to charge to the person who is charged." Now in this case the task which is set me by the Statute includes the determination whether "detriment of the public" arose or was intended to arise as a result of the combination. Undoubtedly prices rose, and were intended to rise and to be maintained at the higher scale by those entering into the combination; but for the combination those prices which were different at different stages of the combination would not have existed; prices would have been lower. The defendants by urging ruination prices as existing before invite me into the consideration of the question, whether that increase which on its face looks like a very substantial detriment was really a detriment at all, having regard among other things to the cost of production. In this way some of the principles referred to in *Rickett's Case* (1) come into play, those principles being applied to the varying circumstances of the present case. In this way I am led to consider what would probably have happened had no combination been formed. I put aside the suggestion of ruination on inter-State prices for reasons already given and for further reasons to be stated in their appropriate place later on.

What price then would have represented the reasonably competitive price, which the collieries would have charged f.o.b. at Newcastle, and which would have allowed them a fair profit after allowing for full cost of production and transit to Newcastle. Profit, as Lord *Selborne* says is not the test of reasonableness, for instance a 46s. price in strike time may not be unreasonable, while a 26s. price without a strike might be highly unreasonable, and yet the profit would be 20s. more in the reasonable than in the unreasonable case. But incidentally it is difficult, if not impossible, in ordinary circumstances to eliminate the question of profit. Competition and profit act and react. Competition in trade, where possible, is induced by profit, and when present regulates it. Profit is therefore one practical consideration that in one form or other enters into the calculation of a reasonable price, but it is by no means the sole or even the governing test. It is not sufficient to ask what profit a given

(1) (1896) 1 Q.B., 260.

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price affords, when we are seeking to discover whether it is a reasonable competitive rate. The nature and extent of the competition, actual and possible, are for instance, material factors in the problem.

And here comes in Mr. *Knox's* second argument which I call his absolute argument. The relative prices, foreign and inter-State, I have found not to be as he suggests. But he has pointed out to me as a hard fact, the actual foreign f.o.b. price for New South Wales coal stated in 34C, which needs no question of comparison to make us feel its force. That price is not entirely independent of this combination, because tenders for Newcastle coal were still controlled by the Vend, but it must be largely so. Other New South Wales mines compete and coals from other parts of the world compete, and the prices thus obtained must be taken as natural and real, and not artificial or fictitious. Now, Ex. 34C says that the price at port of shipment for New South Wales coal going foreign was in 1905 8s. 3.33d.; in 1906 8s. 10.76d.; in 1907 9s. 11.57d.; in 1908 10s. 8.8d.; in 1909 11s. .80d.; in 1910 10s. 10.38d. These are the prices stated, and are, as I understand, gross, that is before commission or wastage or other allowances are considered. That is a factor—not a supreme factor, as no one factor is supreme, but it is a highly important one. If—apart altogether from combination the collieries could make more money by sending their coal abroad, there is nothing in the Act to stop them. They are not philanthropists and the law does not demand it of them. If I thought therefore they could have got as much, and would have sold for as much—because that is important too—abroad, as here, their price could not be said to be excessive by reason of the combination. It would have been extremely profitable—immensely so in my opinion—but that would have been due to natural business causes—not to the combination. But, I do not believe they could or would. I believe that there are several causes which would have prevented that. First, material considerations making the home trade more advantageous in many ways would have operated; it is on the spot more under control and more regular, foreign commission is $2\frac{1}{2}$ per cent., and the danger of letting others get a footing in the Australian trade, all would have operated to keep the coal here. Be-

sides, to throw into the foreign market say 1,500,000 tons more would have undoubtedly appreciably lowered the price even if the means of transport could have been secured. The prices in 34.C are not confined to Newcastle coal as I have said and looking at Ex. L.8, Mr. Gale's prices for Hebburn, for instance 10s. 5.6d. up to 31st December 1909, and to some extent for Abermain for instance 10s. 2.74d. up to June 1910, and remembering it is all or practically all large coal for abroad, and the way the 34.C prices were furnished, I am clear that 10s. in 1907 and 11s. in later years could not, and what is essential would not, have been obtained abroad. In 1909 exports foreign had fallen below 1905, and were more than 780,000 tons less than in 1907, and were 914,000 tons less than in 1908 (see 33C).

And therefore if the competition had been more open in Australia, that is to say if the combination agreement had not been formed, and acted on, prices here would in 1907 have been substantially less, at the very least 6d., and most probably 1s. less per ton for best coal and proportionately for other coal. I do not think I am at all illiberal to the Vend in taking that limit. It would unquestionably have been most highly profitable and taking this fact and all others into consideration, including the probable action of collieries controlled by shipping companies and the result of that generally, if I have to state the limits definitely I would say *in* 1907 *the price was* 6*d., and in* 1908 *and afterwards* 1*s. in excess of what it would have been in Australia but for the combination.* To that extent I find exorbitancy in the f.o.b. price. Small coal was practically unaffected or very slightly affected by foreign prices.

I have already explained why in my opinion *the formation of the Vend was a preparatory but contemplated and essential step in the formation of the combined agreement.* No doubt the shipping companies had no desire that the f.o.b. price should be raised to them, but they knew from the very beginning that it was part of the scheme, and that when that scheme was put into operation higher f.o.b. prices would be charged and they knew it all along.

That would have meant splitting the shilling as it is called. It was suggested that a split 1s. would have been unusual. If it

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were that would be no valid answer. But it was not unknown. Mr. Wheeler could not recollect a split 1s. in the price of best coal for many, I think 25 years. But it happened all the same. In Exhibit V.8 the *Chamber of Commerce Report* 1910-11 it appears at p. 61 that in 1903 coal, the declared price of which was 10s., and on which 4s. 2d. was paid as hewing rate, sold also at 8s., 9s. and 9s. 6d. in 1904, when the declared price was 10s. and the miners received 3s. 10d. ; coal also in 1904 sold at 9s. 3d., 9s. 6d., and 9s. 9d. ; in 1905 when the declared price was 9s. and the hewing rate 3s. 6d., it was also sold at from 7s. 3d. to 8s. 6d. This I may observe was the year of Wheeler's first balance sheet, when defendants allege coal sold at 9s. net. Then in 1906, the declared price being 9s. coal also, says the exhibit, "sold from 7s. 6d. to 10s." That evidently refers to the beginning and the end of the year. It is plain therefore that up to the end of 1906, split shillings were common for four years, evidently the result of competition. Then the split shillings stop.

RESPONSIBILITY OF SHIPPING COMPANIES FOR EXORBITANCY OF VEND PRICES.

I have now to turn to the Shipping Companies and the prices ultimately charged to the public by them. They carried on the excess imposed by the Vend and are just as much responsible as the colliery proprietors. It was put on their behalf by way of excuse that the Vend had made up its mind to raise the price to 9s. net in 1906 even if no general combination had been formed. Perhaps it had ; and I am inclined to agree that it had. But how would it have succeeded ? Could that price have been maintained without the assistance of the Shipping Companies ? And besides, the Vend clearly had not then resolved to push on to 10s. and again to 11s. It must never be forgotten that, as I have observed before, sea-carriage of the coal is an essential part of the inter-State trade. The Shipping Companies watched the progress of the Vend's growth, they awaited its completion, they agreed to make the observance of part of its regulations a condition of their own compact, they undertook to aid the Vend by refusing to carry for public consumption any other coal with negligible exceptions which were for their

own benefit—in short *they consented to allow the Vend to raise its price to any desired height, stipulating only that no Vend coal should reach the public except through them*, so that exorbitancy of f.o.b. price up to the limit of necessity became a matter of perfect indifference to them—it must all be refunded by the consumers. They in their turn undertook to decline the carriage of all competing coal, so that in short they formed a sort of marine guard for the Vend's coast battery. Experience showed that before the combined agreement the Shipping Companies played off one colliery against another, and if the Vend had been forced to act independently of the Shipping Companies, the latter—or some of them—might not improbably have carried other and competitive coal for a considerable part of the inter-State trade. This, or the fear of it, would have been a wholesome corrective to the cupidity of the Vend, it would not have been unrestrained and so it is manifest to my mind the Shipping defendants must be held responsible, even if the detriment to the public travelled no further than the declaration of the excessive f.o.b. prices, pronounced by the Vend, and executed by the Shipping Companies.

SHIPPING COMPANIES' ADDITIONAL EXCESSIVE CHARGES AND ADVANTAGES.

I have now however to inquire whether the detriment did not proceed further and whether the Shipping Companies used the powers of the combination for additional advantages to themselves. A brief glance at the contracts already referred to will show incontestably they did.

When the Vend on 30th March 1906 (Ex. X. at pp. 33 & 41) fixed 9s. as the net price for large it also fixed 5s. net for small. It has been assumed generally that small was always sold net before and I believe it was usually so, but I have found references to a small percentage allowance, I think about 5 per cent. ; and in favour of the shipping defendants I will assume that it was so.

The progressive rise in prices f.o.b. charged to the Shipping Companies may thus be summarized. In 1906—large, 1s. 6d. rise ; small, 3d. ; in 1907—large, 1s. further rise ; small, 9d. further rise ; in 1908—large, 1s. further rise ; small, 6d. further rise. With these

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may now be compared the progressive rises which the Shipping Companies obtained from the public.

First as to VICTORIA: (1) *Victorian Railways.*—In 1907 a rise of 3s. 7d. and 3s. 8d. as against 2s. 6d. f.o.b. rise; in 1910, 5s. and 5s. 8d. as against 3s. 6d. in other words the Shipping Companies' own eventual increase is 1s. 6d. and 2s. 2d. (2) *Footscray Gas Company.* —In 1907 a rise of 3s. 9d. as against 2s. 6d. for Stockton and Hetton, and a rise of 4s. 9d. as against 2s. 6d. for Maitland that is all large coal; small coal a rise of 2s. 9d. as against 1s. In 1908, large coal a rise of 1s. 3d. over the previous price as against 1s. f.o.b. rise; in 1909 large receded 3d. and in 1910, 6d., the latter quotation reducing the Shipping Companies' total increase to 4s. 6d. as against 3s. 6d. total f.o.b. rise. (3) *Melbourne Glass Bottle Works.*—In 1907 a rise of 3s. 3d. as against 2s. 6d.; in 1908 a further rise of 1s. 6d. as against 1s.; in 1909-10 the rise is reduced to 1s. 4d. and 1s. leaving the eventual increase 4s. 3d. as against 3s. 6d. (4) *Melbourne Co-operative Brewery.*—The starting point is 1904 when the declared price was 10s. If as I think was the case the net price was then lower, I should take it from a consideration of the Metropolitan Gas Company's case to be about 9s. 6d. In that event the Shipping Companies' price to the Brewery in 1908 showed a rise of 6s. as against 6d. increase in f.o.b. price. If on the other hand 10s. was the net price f.o.b. in 1904; then the Shipping Companies' price in 1908 showed an advance of 6s. net. In 1909 the rise was still 6s. in 1910 it was 5s. over the 1904 price, that is a shipping rise of either 4s. 6d. or 5s. net. (5) *Australian Paper Mills.* —In 1907 the price of engine coal rose 5s. as against 2s. 6d. and small 2s. 3d. and an extra 1s. for excess for over 25 per cent., as against 1s. f.o.b. rise. In 1908 large rose another 2s. 6d. as against 1s. f.o.b.; small rose 1s. 9d. as against 6d. f.o.b. In 1910 —large dropped 3d. leaving the eventual rise of large at 7s. 3d. as against 3s. 6d. and small 4s. with 1s. extra if above 25 per cent. as against 1s. 6d. (6) *G. Mowling & Son.*—In 1907 there was a rise of 5s. 10d. for large coal the f.o.b. rise being 2s. 6d. and small coal rose 3s. 10d. on a f.o.b. rise of 1s. In 1908 there was a further rise on large of 2s. 8d. as against 1s. f.o.b. and on small a rise of 1s. 11d. as against 1s. 3d. f.o.b. In 1909 the prices were maintained.

(7) *Melbourne Harbour Trust.*—In 1907 a rise of 3s. 9d. as against 2s. 6d. f.o.b.; in 1908 a further rise of 2s. 6d. as against 1s. f.o.b. In 1909-10 the price is maintained. (8) *Melbourne City Council.*—At the Electric Light Station—In 1907 there is a rise of 4s. 9d. as against 2s. 6d. f.o.b. In 1908 there is a further rise of 2s. 7d. as against 1s. f.o.b. In 1909-10 it recedes 6d. leaving the eventual shipping increase at 6s. 10d. as against 3s. 6d. f.o.b. Small coal in 1907 showed a rise of 3s. 3d. as against 1s.; in 1908-9 a further rise of 1s. 4d. as against 6d., and in 1910 a further rise of 5d. which was in fact an increase of 1s. 9d. as against 6d. (9) *Melbourne and Metropolitan Board of Works.*—In 1907 at the Pumping Station there is a rise in large of 6s. as against 2s. 6d. f.o.b.; and in 1908 a further rise of 3s. 6d. as against 1s. f.o.b. At Werribee Farm, the price from 1st July 1906 to 30th June 1908 was fixed by contract, it was an advance of 2s. 5d. on previous prices as against 1s. 6d. f.o.b. increase. I merely mention this as not affecting the result because it was before the combined agreement, but in order to make the next figure understood. In 1909 there was a further advance of 6s. 4d. as against 2s. f.o.b.; and in 1910 that was reduced by 6d.; the eventual Shipping increase stands therefore at 5s. 10s. as against 2s. f.o.b. (10) *Commonwealth Services.*—For Point Nepean in 1907 the rise is 11s. as against 2s. 6d. f.o.b.; in 1908 there is a further rise of 4s. 3d. as against 1s. f.o.b.; and in 1909 there is further rise of 6d. being an increase over 1907 of 4s. 9d. as against 1s. f.o.b. For Queenscliff there was a rise in 1907 of 5s. 6d. as against 2s. 6d. f.o.b.; for 1908-9 a further rise of 3s. 9d. as against 1s. f.o.b.; and for 1910 a further rise of 6d. being an increase of 4s. 3d. as against 1s. (11) *Victorian Government—Special Services.*—(*a*) Sunbury—there was a rise for house coal in 1907 of 6s. 3d. as against 2s. 6d. f.o.b.; in 1908 a further rise of 2s. as against 1s. f.o.b. (*b*) For the Melbourne District, in 1907 a rise of 6s. 3d. as against 2s. 6d; in 1908 a rise of 2s. as against 1s. (*c*) At Melbourne General Post Office in 1907 a rise of 5s. 3d. and 5s. 9d. as against 2s. 6d.; in 1908 a further rise of 1s. 6d. as against 1s. (*d*) Lady Loch Steam coal: In 1907 an average rise of 5s. 11d. as against 2s. 6d.; Jumbunna Coal was however taken at a higher price. In 1908 there was a further rise of 1s. 8d. as against 1s.

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(*e*) Yarra Bend. In 1907 a rise of 6s. 2d. as against 2s. 6d.; in 1908 a further rise of 1s. 6d. as against 1s. (12) *Retail Dealers.* —In October 1906 there was a rise of 4s. 6d. as against 1s. 6d.; as already explained this is not considered as an advance of price resulting from the combination but is necessary to understand the rest of the figures. From 1st January 1907 a further rise took place of 1s. 9d. for screened coal as against 1s.; 1s. 9d. for Engine coal as against 1s.; and 1s. 9d. for Small coal as against 9d. From 1st January 1908 a further rise of 1s. for engine and screened as against 1s. and 1s. for small as against 6d. From the 1st January 1909 a reduction of 6d. on large coal was made to dealers but not to the public. (13) *Metropolitan Gas Company.*—Up to 1907 the price of large coal was 14s. 7d. and small coal 10s. 3d. under a tender given when the declared price was 10s. In May 1907 the price of large coal was raised 7d.; the declared price again being 10s.; in 1910 there was a further increase of 1s. corresponding to a rise of 1s. f.o.b.; this it will be remembered is the case pointed to by the Crown as strangely discrepant from the other cases. No reason appears to suggest why the Shipping Companies should lose money for the sake of the Gas Company, and if not how are the other increases to be justified?

Then as to SOUTH AUSTRALIA.—(1) *Retail Dealers.* The rise in January 1907 was 7s. 6d. as against 2s. 6d. f.o.b.; in 1908-9 there was a further advance of 1s. 6d. as against 1s.; in 1910 a further advance of 3d. although there is no increase in f.o.b. price. (2) *South Australian Government General Supplies.*—(*a*) *Adelaide and Suburbs.* In 1907 there was a rise over 1905 of 7s. 2d. as against 2s. 6d. f.o.b. and later in the year the rise mounted to 8s. 9d. as against 2s. 6d., so also 8s. 9d. in 1909 as against 3s. 6d.; in 1910-11 there is a further 1d. rise without further f.o.b. rise. (*b*) *Port Adelaide and Suburbs.* In 1907 there was a rise in house coal of 5s. 4d. as against 2s. 6d.; and a second tender raised the price by 7s. 10s. as against 3s. 6d.; in 1909-10 there is a further 6d. rise without any rise in the f.o.b. price. Small coal in 1907 was raised 5s. 6d. as against 1s. f.o.b.; in 1908-9-10 a further rise of 9d. as against 6d. (*c*) *Port Pirie.* In 1907 an advance in steam coal of 5s. 10d. as against 2s. 6d. and a later tender showing an increase of 7s. 7d.

as against 3s. 6d., that is 1s. 9d. extra for 1s. f.o.b. added in the meanwhile. In 1910-11 a further 3d. is added by the Shipowners without any advance f.o.b.

(3) *Adelaide City Council.*—In 1907 there was a rise of 7s. 10d. as against 2s. 6d. f.o.b.; in 1908-9 a further advance takes place of 1s. 6d. as against 1s., in 1910 3d. more is added to the price without any advance f.o.b. That was screened coal. As to small coal there was in 1907 a rise of 5s. 10d. as against 1s.; another rise of 1s. in 1908-9 as against 6d.; a further rise of 1s. 3d. in 1910 without any further rise f.o.b.

(4) *South Australian Railways.*—In 1908 there was an increase of 5s. 3d. as against say 4s. 2d. owing to the special price at which this coal was supplied by the collieries. In 1910 the price was still 17s., *i.e.* there is no advance over 1908, there being also no increase in the f.o.b. price.

(5) *South Australian Gas Company.*—In 1908 on trucks Port Adelaide an advance of 3s. 9d. as against 3s. 6d. f.o.b. At the Retort House an advance of 4s. 6d. for 1908-10 as against 3s. 6d. At Port Pirie in 1908 a rise of 5s. 10d. as against 3s. 6d. At Port Pirie in 1908 a rise of 5s. 10d. as against 3s. 6d; small coal showed a rise of 2s. 3d. in 1908-9-10 as against 1s. 6d.

(6) *Wallaroo and Moonta Company.*—In 1908, the price was advanced for large 3s. 9d. as against 3s. 6d. f.o.b.; and for small 3s. 9d. as against 1s. 6d.

(7) *Kitchen Sons & Marsh Limited.*—Engine coal was advanced in 1907, 4s. 9d. as against 2s. 6d. f.o.b.; in 1908-10, it again rose 1s. 6d. as against 1s.

(8) *Adelaide Electric Lighting Company.*—Small coal rose in 1907-9 by 5s. 2d. as against 2s. 6d. and 3s. 6d., and in 1910 another 3d., there being no further f.o.b. rise.

(9) *May Brothers Limited.*—Small coal rose in 1907 by 4s. 6d. as against 2s. 6d.; in 1908, it rose another 9d. as against 1s. f.o.b. In 1909 it receded 3d. In 1910, it is nominally altered again to the 1908 price, but the place of delivery is changed so as practically to add a shilling to the price, though no rise takes place in the f.o.b. price.

(10) *Sulphide Corporation.*—The price before 1908 was 14s. 8d.

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and 13s. 8d. or a mean of 14s. 2d. in 1903 when the declared f.o.b. price was 10s. In 1908 the defendants' price to the corporation was above that of the 1903 price by 3s. 4d. on Newcastle coal, and 4s. 4d. on Greta coal, the rise f.o.b. being 3s. 6d. above 1906, but not so much above 1903.

(11) *Broken Hill Proprietary Company.*—In 1908 there was a rise of 4s. 1d. as against 3s. 6d. This was repeated in 1909.

(12) *Broken Hill Water Supply.*—In 1908 a rise of 3s. 9d. as against 3s. 6d., extended to 1911, then rise increased to 4s.

(13) *North Broken Hill.*—A rise for engine coal in 1908 of 5s. 3d. as against 3s. 6d.

(14) *N.S.W. Trams, Broken Hill.*—A rise in 1907 of 4s. 3d. as against 2s. 6d. ; in 1908 a further rise of 1s. as against 1s. f.o.b., and in 1910 it was tendered at a further rise of 1s., though the f.o.b. price remained stationary. The tender was not accepted and the price was allowed to remain on a condition favourable to the defendants.

(15) *Walter Sully & Co.*—In June 1906 a rise of 3s. 6d. took place for engine coal, the f.o.b. price being raised 1s. 6d., this being prior to the combination ; in 1908, a further rise of 2s. 6d. as against 1s. f.o.b. Small coal rose in 1908, 3s. 3d. as against 1s. 6d.

(16) *Nield & Hyde.*—In 1907 engine coal rose 3s. 6d. as against 2s. 6d., and small 6d. as against 3d. In 1908 engine coal rises another 2s. 6d. as against 1s. ; and small 2s. 9d. further as against 6d. Later in the year there is a 5 per cent. discount.

(17) *Broken Hill Junction North Company.*—In 1908 a rise of 5s. 3d. as against 3s. 6d., and in 1909 a further rise of 1s. without any advance f.o.b.

(18) *Zinc Corporation.*—In 1908 there was a rise of 7s. as against 3s. 6d. f.o.b. ; in 1910 it is only 6s. as against 3s. 6d.

Then we come to WESTERN AUSTRALIA.—(1) *Western Australian Railways.* In 1907 there is a rise of 3s. 7d. as against 2s. 6d. In 1908, after discussion more particularly mentioned hereafter, there is added for Fremantle another 1d. for one year and another 7d. for the second as against 1s. f.o.b. For Geraldton there is a rise in 1907 of 8s. 8d. with no advance in f.o.b. price.

(2) *Perth Gas Company.*—There was a rise in 1908 of 3s. 6d. as against 3s. 6d. f.o.b.

(3) *West Australian Ironworks.*—In 1907 there was a rise in large coal of 4s. 9d. as against 2s. 6d., and in small of 2s. 9d. as against 1s. In 1908 a further rise of 1s. in large as against 1s., and first 1s. and then 2s. 3d. in small as against 6d.

(4) *Perth City Council.*—(*a*) Parkerville In 1907 a rise in large coal of 6s. 2d. as against 2s. 6d. f.o.b. ; in 1908 it recedes 2d., though 1s. f.o.b. is added ; in 1909 there is an advance of 1s. though no further f.o.b. price is charged ; in 1910 a further 6d. is added without any rise f.o.b. small coal in 1908. Small loose coal in 1907 rose 4s. 3d. over 1906 price, as against 1s. f.o.b. Small coal bagged in 1908 rose 2s. 9d. over 1907 price *i.e.* as against 6d. f.o.b. In 1909 small coal both loose and bagged rises another 1s. with no advance in f.o.b. price. In 1910 it rises yet another 6d. with no advance f.o.b.

(*b*) City Yards. Large coal rose in 1907 2s. 6d. as against 2s. 6d. ; in 1908 it rises another 3s. 4d. as against 1s. ; in 1909 it rises another 1s. and in 1910 still another 6d. without in either case another rise f.o.b. Small coal ; the rise in 1907 was 2s. as against at most 1s. f.o.b. In 1908, the price of loose small coal has risen 4s. 1d. as against 1s. 6d. ; in 1909 it rises another 1s. without any advance f.o.b. ; in 1910 it rises still another 6d. without any rise f.o.b. The total rise in small coal therefore is 5s. 7d. as against 1s. 6d.

(*c*) Sanitary Site. Large coal rose in 1907, 1s. 6d. as against 1s. ; in 1908 it rose 5s. more as against 1s. In 1909 it rose 10d. more and in 1910 a further 6d. in each case without any further rise f.o.b. Small coal in 1908 rises 3s. 6d. as against 6d. ; in 1909 it rises 1s. 1d. and in 1910 another 6d., in each case without a rise f.o.b.

Then as to QUEENSLAND.—(1) *Chillagoe Company.*—In 1909 there was a rise in large coal over 1906 price of 2s. as against 3s. 6d. rise f.o.b. This supply to the Company is impossible at all events on the materials before me to reconcile with the other Queensland transactions. (2) *Townsville Harbour Board.* In 1907 the price rose 2s. 6d. above 1906 on a stated 2s. rise. In 1908 there was a further rise of 2s. as against 1s. f.o.b. In 1909-10 prices remained

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the same. (3) *Townsville Gas Company.* In 1907 there was a rise of 1s. over October 1906 as against 1s. f.o.b. In 1908 there was a further rise of 2s. as against 1s. f.o.b. the price still remaining the same for 1909-10. (4) *Commonwealth Naval Depot, Townsville.* In 1907 there was a rise of 1s. corresponding with 1s. f.o.b. rise. In 1908 a rise of another 1s. corresponding with the further rise of 1s. f.o.b. In 1909 there was a fall of 1s. 9d. In 1910 a rise of 4s. 9d.

PRE-COMBINATION FREIGHTS.

Before estimating the force of what I may term for convenience of expression *the shipping accretions*, by which I mean the additions to the successive f.o.b. increases, it will be necessary to consider the question of what are fair freights in connection with the various contracts referred to. At first blush the trade by the Shipping Companies in 1905 and the beginning of 1906 might well be taken as a fair standard of reasonable freight. There were, excluding J. & A. Brown, six recognised inter-State shipping companies in effect selling nearly the whole of the inter-State coal produced by the Northern Collieries, the four defendant Shipping Companies were the chief carriers. It is said however that the condition of trade in 1905 was abnormal. There is no evidence that the defendants and the other two shipping companies were as between themselves playing any game of cut-throat. They were according to the admission acting freely and in competition, but nowhere does it appear that they were acting recklessly or inharmoniously. Their competition indeed was of a most friendly nature; this is rendered indisputable by the proceedings of 23rd and 24th April 1906, when the Shipping Companies arranged with the Collieries for exclusive supply for the South Australian contract. Their friendliness was carried so far that the tender for that contract, dated 1st May 1906, was a joint one by Huddart Parker & Coy. and the Adelaide S.S. Company and was accepted. Furthermore, it was carried out with even marked cordiality because, as Mr. Russell, the South Australian Locomotive Inspector, stated, all four defendant Shipping Companies helped to carry the coal, and although they were as per the admission free competitors up to September 1906, there is no doubt that for some purpose, or

purposes, compatible with that free competition, they were, for some time before in friendly association and were called the Steamship Owners' Association. Traders who are in actual competition with each other are not infrequently and quite consistently members of the same Association for general mutual advantage. But that presupposes no such antagonism as leads to ruinous or unhealthy competition. Looking back for a number of years, the inter-relations of the shipping firms were by no means hostile; but on the contrary highly amicable. Thus for instance, on 22nd November 1897, there is a tender to the Victorian Railways signed by James Paterson & Co. for self and other firms associated with them, those firms are Howard Smith & Sons Ltd., McIlwraith McEacharn, Huddart Parker & Co., Adelaide Steamship Co. and the Melbourne Steamship Co. That is repeated in 1898 and 1899. On 30th December 1902, there is another tender to the Victorian Railways jointly made by Jas. Paterson & Co. and Huddart Parker & Co. For the Victorian Railways there is another joint tender for 1905-6 (R5) on this occasion Howard Smith & Co. and Huddart Parker & Co. are the tenderers. There are, in addition to the joint tender, a separate tender by the Adelaide Steamship Co. and another joint tender by James Paterson & Co. and McIlwraith McEacharn & Co., and another separate tender by J. & A. Brown. Consequently it is seen that from 1897 down to 1905 there is no unfriendliness at all amongst the six shipping companies, but their natural feelings of self-interest are generously mingled with threads of sympathy needing but little effort to be woven into the firm bond of union manifested in the combined agreement. There is no reason therefore for imagining any cutting of freights as between the shipping defendants. There was some outside competition, the history and effect of which belongs rather to another chapter.

At this point I would only say that to some extent I believe the outside competition did influence the action of the shipping companies as well as of the collieries in reducing in some instances both f.o.b. prices and shipping freights. For instance I would not think it fair to the defendants to take the South Australian tender of 1st May 1906 as a normal tender. Roughly estimating the freight portion of the 11s. 9d., I should think it was about 4s. 10d. or 4s. 11d.

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I am not prepared to say that there was any loss on this, I believe it was above actual cost, but I do not think it afforded a fair business profit for that trade. Special circumstances affecting both the f.o.b. prices and the shipping freights have been disclosed in regard to this contract. On the other hand, I accept the view urged by the defendants that prior to the combined agreement there was in practice a monopoly in the carriage and therefore in the public supply of Newcastle coal. This is to be taken with the qualification of Scott Fell & Co.'s competition. Apart from that the sympathetic friendliness and harmonious action of the six shipping companies greatly modifies the value to the defendants of previously existing freights. In the absence of definite testimony, I can only have recourse to the business conduct of the shipping companies in transactions which, so far as appears, are not affected by special circumstances adverse to the defendants, but on the contrary occur after they have entered into combination.

EARLY COMBINATION FREIGHTS.

I take the Victorian Railways contract tendered for in October 1906. This seems a plain case to begin with. The quantity called for by the Railways Commissioners as appears from the Departmental letter 24th October 1906 (S5) was 200,000 tons per annum minimum, with a maximum of 300,000 tons. The matter came before the Vend on 4th October 1906 (Ex. I. p. 9) and it was agreed by the coal proprietors that proportions and prices should be as follows :—For Maitland collieries 45 per cent. of the total quantity ; from Borehole collieries 1st grade 30 per cent., 2nd grade 15 per cent. ; Teralba (optional) 10 per cent. ; prices : 10s. Maitland and 1st grade Borehole ; 9s. 3d. 2nd grade Borehole ; 6s. 6d. Teralba. Tenders to be conditional on the whole quantity being taken from the above collieries. The quantity to be supplied by each colliery to be a matter for arrangement later on. Period of contract 3 years.

On the 8th October 1906 Huddart Parker & Co. and Howard Smith & Co. jointly tender subject to certain conditions including taking the whole quantity required, the proportions being stated exactly as by the Vend and the alternative option being worked out as

Maitland 50 per cent. ; No. 1 Borehole 33 per cent. and No. 2 Borehole 17 per cent. The prices are :—Maitland and No. 1 Borehole 14s. 1s. ; No. 2 Borehole 13s. 4d. and Teralba 10s. 7d. In each case 4s. 1d. has been added to the Vend's f.o.b. price, that is a clean c.i.f. contract, and I see no reason for not accepting it as yielding a fair freight. I cannot refrain from quoting a passage in the letter of tender which having regard to what we now know, respecting the then undisclosed relations between the Vend and the shipping companies, and the manner in which the quantities and prices and conditions of this contract were arranged between them, must be admitted to be remarkable. The two shipping companies tendering say :—" We have only offered for a 3 years supply, as we have not been able to get under offer for a shorter period any of the coals, which so far as our experience has been able to guide us, we think most suitable for the requirements of the Department."

The impression naturally conveyed by this statement is that a really independent negotiation had taken place with the Vend to get certain coals only and for a shorter time than 3 years, and that in spite of the tenderers' efforts on the Department's behalf, they had failed, but that, with the stipulation as to time, the quality was secured. But no one would have suspected the truth, that the tenderers had already bound themselves to submit to the allotment system and knew they could not rely on getting simply the coals which their experience told them were the most suitable for the Departmental requirements, nor indeed that the collieries had expressly informed the shipping companies that the quantity to be supplied by each colliery was to be a matter for arrangement later on. I refer also to tender (R5) for 1905-6, which is lower still, but I pass that by without further comment. I come to the Metropolitan Gas Co.'s contract and tenders (Exh. T7). It has been properly urged on the part of the Crown that this contract was the most onerous which the shipping companies entered into. The conditions from January 1898 down to, but not inclusive of the contract made in 1904 contained a provision that all coal supplied by the contractors should be conveyed direct from Newcastle to Melbourne (without calling at Sydney) in steamships owned by them or

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some one of them or in steamships which were under their absolute or exclusive control.

In the contracts of 1904, 1907 and 1910, it is provided the coal is to be conveyed to Melbourne in suitable steamships and in all the contracts there is a provision that the coal is to be carried in separate holds.

For breach of any stipulation as to their own or suitable steamships as the case might be or as to carrying in separate holds or as to not sub-letting without consent, there is a provision for liquidated damages £10,000; there are other provisions of comparative stringency to which I need not refer. Then there is also a provision for what is known as emergency clauses. I refer at present to freights only. The eighth clause of the 1897 contract stipulates that in the event of a strike at Newcastle the contractors will carry coal for the Gas Co. from Newcastle at 4s. 5d. per ton; that was Howard Smith & Co. The Adelaide Steamship Co. tendered at the same time 4s. 6d.; McIlwraith McEacharn stated at rates to be mutually agreed on; and Huddart Parker & Co. stated 4s. In the 1901 contract, which was tendered for in 1900, McIlwraith McEacharn named 5s. 8d. including wharfage—which means 4s. 8d. without as to the emergency freight. In 1904 McIlwraith McEacharn named 5s., including wharfage, which is equivalent to 4s. without. J. & A. Brown named 4s. as emergency freight. In 1907 the emergency freight is 5s. 7d. including wharfage. Of course these prices being emergency prices must be considered as being distinctly higher than they would be under ordinary circumstances. Some guide as to what the ordinary price would be may be gathered from clause 13 of the contract of 16th May 1910 made by McIlwraith McEacharn & Co. The clause contains a proviso that if at any time during the currency of the contract "the Association Colliery Proprietors shall have been dissolved, the prices for the best screened round coal shall after such dissolution but not before 31st March 1911 be the declared selling price at Newcastle upon which the hewing rate is based in addition to freight and wharfage calculated on the basis of 5s. 2d. per ton delivered at West Melbourne into tubs." That freight is equivalent to 4s. 2d. independent of the 1s. for wharfage. *The price of 4s. 2d. is an extraordinary piece of testimony to the effect of the*

combination. If the Vend disappeared of course the combined agreement would cease, and though nothing is said about a combined agreement in the contract—which is natural—the effect is there. And in that view we may make a comparison with the emergency freight stipulated in the very same contract, but with no dissolution of the Vend, it is 4s. 7d. Why should the combined agreement —for it must be that as the mere alteration of internal relations of colliery proprietors ought to make no difference to the shipowners —create a difference of 5d. a ton on freight ? This anomaly has not been explained, and the fair inference to my mind is that, in the event of a dissolution, the exclusive sale to the shipping defendants would cease, other carriers could come in, and the Gas Co. could, or might, secure the transport of their coal at a lower price. From these contracts it will appear on the whole, that 4s. 1d. without wharfage as charged to the Victorian Railways or *at the most* 4*s.* 2*d.*, *was a fair freight to Melbourne.* The next is the Melbourne Glass Bottle Works contract, dated 3rd November 1904 (Ex. X. 7). The price of best Newcastle coal from A.A., Stockton and Hetton was 12s. 6d. Assuming that 7s. 6d. was paid, that would leave 5s. for freight, and as delivery was ex steamer into railway trucks it included wharfage, making the net freight 4s. This again supports the conclusion already arrived at.

INFERENCES FROM SHIPPING DEFENDANTS' CONTRACTS.

It is to be noted also that whatever the pressure might have been before the combined agreement was formed to reduce freights, the contracts made afterwards must be taken very strongly to represent rates which the shipping companies felt they could now safely demand, because henceforth the coal needed for railways and gas companies must come through them, unless the freight was extraordinarily excessive. In the absence therefore of any explanation which the shipping companies might have given, which they alone could give, but which has not been given, they cannot complain of the inference which common experience, of ordinary human nature and affairs of life, prompts one to make, namely that the freights I have quoted would not have been named by the shipping companies as their prices unless they left a

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reasonable margin of profit. With less strict and onerous conditions and less risk in the event of a breach of contract, the same prices are still better for the defendants.

The onus of proof is doubtless on the Crown in this as in other respects, but I repeat when conduct is proved which in normal circumstances means one thing, if the defendants rely on any unusual or disturbing factors, influencing the particular contract and altering the normal inference, it is they who should establish them. If they assert the competition in any special instance was unhealthy, they must indicate the nature and extent of the deviation from the normal state, they must show why and how the ordinary instinctive and necessary desire to make a profit was suspended. The summaries of Victorian c.i.f. contracts 1907 to 1910 submitted on behalf of the shipping defendants and embracing the railways, Gas Co., Glass and Bottle Works and Harbour Trust were offered to show that to the end of 1909 the average freight earned per ton on 426,000 tons per annum did not reach 4s. 2d. and in 1910 it did not reach 4s. 4d. on 316,000 tons.

LANE'S TESTIMONY AS TO FREIGHTS.

The inference from the defendants' own business transactions is affirmatively supported by Lane's evidence. He says (p. 492*a*) that during 1906 a 4s. 3d. freight Newcastle to Melbourne would be a profitable freight, would give not less than 3d. and probably 6d. per ton profit, and would enable the shipowner to sell advantageously at a c.i.f. price based on that freight added to the f.o.b. value of the coal at Newcastle. Even at 3d. per ton on the 1907 Victorian railway supplies which were 260,000 tons, the profit would amount to £3,250. On the Metropolitan Gas Co.'s supplies, 150,000 tons, the profit would be £1,875. On the Glass Bottle Works, 12,000 tons, the profit would be £150, and on the Harbour Trust, 4,000 tons, £50.

CANT'S TESTIMONY AS TO FREIGHTS.

Lane also said freights remained stationary from 1906 to 1910. There is another witness, James Cant, of Kethel & Co. Ltd. He was Managing Director and his company (now in liquidation) carried on

the business of colliery proprietors and coal merchants, wholesale and retail. They owned the Ebbw Main colliery in the Maitland district and leased the Young Wallsend colliery in the Newcastle district. The latter was on the upper Borehole seam. The company was formed on 1st May 1909, operations then commenced, and prior to that Cant was about 13 or 14 months Secretary of the Ebbw Main Co., the then owners of the mine. Before the formation of Kethel & Co. Ltd., Cant was also lessee of the Young Wallsend mine. Mr. Cant gave evidence as to the rates of freight from Newcastle to Melbourne, based on his actual experience, the coal being carried by the company not in their own vessels, but in vessels they had to charter. Cant's evidence is that a fair freight would be 4s. 1½d. including discharging and trimming. He also stated the actual cost to himself. The defendants have taken the figures of his actual cost, and treated them as representative charges, applicable to trade in general, including their own. But I cannot accept that as a correct application, the circumstances of Kethel & Co.'s business operations were quite exceptional, and necessitated expenditure that would not have happened under ordinary circumstances, and that I am sure did not happen in the regular commercial transactions of the coal business carried on by the defendants either before or after the combined agreement.

SOME OF DEFENDANTS' FREIGHT CALCULATIONS.

For instance the yard expenses which are put down at 2s. 6d. in connection with such contracts as the Melbourne City Council, J. Kitchen & Sons, The Australian Paper Mills, form a very considerable addition to the suggested expenditure of the shipping defendants and the claim for allowance of that expenditure does not rest on anything more than the mere fact that Cant in his own particular business had yard expenses, which the defendants say amounted to 2s. 6d. Some astonishing results are brought out by this process, for instance, it is made to appear by the defendants that in supplying the Victorian Government with 1,500 tons of coal in 1906, for the Melbourne district, after paying the collieries, their f.o.b. price put down at 7s. 6d., wharfage 1s., 2s. 6d. yard expenses, 1s. for screening and loss by

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screening, and 1s. 6d. for cartage, making a total money outlay by the shipping contractors of 13s. 6d.; they charged the Government only 14s. That is to say they charged only 6d. to cover the whole cost of sea carriage, standing charges of management and to cover profit; that is quite unlikely. Similarly in the same year it would appear that they charged the Government only 4d. per ton freight for 120 tons delivered at Parliament House and the same for 240 tons delivered at Coburg, while for 1,900 tons delivered at Yarra Bend and Kew they were so generous as to do it at 1d. per ton loss to themselves. I have taken the contract prices as stated in the summaries (198) prepared by the defendants. Substantially I have no doubt they represent the fact, or the defendants would not have accepted them, but it is my duty to point out that in the last two mentioned instances, Coburg and Yarra Bend, the materials for those contract prices were struck through at defendants' instance and are not strictly part of the Exhibit (V2) because they were transactions of the Melbourne Shipping Co. before the date when that company is proved to have joined the combination. Taking the lowest tenders of the defendants in connection with those matters, the Coburg case would stand at 5d. more, which would be McIlwraith McEacharn's tender, so that their balance to provide for general expenses of company, wages, wear and tear of ship, cost of bunker coal, and their own profit would be 9d. per ton, which, as a business proposition, is absurd. In the case of the Yarra Bend, the same firm's tender was the lowest among the defendants and would convert the debit balance of 1d. a ton into a credit balance of the same amount, a scarcely less conspicuous example of self-sacrifice in the public interest.

And so looking down the same summary, there appears to have been provided only 1d. for the same expenditure and profit in supplying the Melbourne City Council with 600 tons at the Corporation Quarries, and 11d. for 4,000 tons at the Refrigerating Works. This is a price incredible, and, more particularly, when we find 5s. 2d. provided for 70 tons to the Melbourne and Metropolitan Board of Works, and 2s. 9d. for the Harbour Trust for 4,000, and 2s. 9d. and 3s. for the Australian Paper Mills for 5,750 tons.

In view of the ordinary impulses of human nature and remembering the shipping accretions already pointed out, I have no reason to think that the shipping defendants would conduct their affairs on the lines of philanthropy rather than of business. One is morally certain that the surprising results exhibited by the defendants' summaries must be resting on some fallacious support.

CONTRAST BETWEEN SHIPPING COMPANIES' BUSINESS AND THAT OF KETHEL & CO.

And the fallacy is in treating their long established and systematically arranged methods of supply on a larger scale as exactly similar to the struggling and inexperienced efforts of Kethel & Co. to compete on a less extensive basis in the inter-State trade. It is not disputed by the defendants (see page 2,316) that they would naturally avoid yard expenses so far as possible by delivering from the wharf. Why then should the coal supply to the Government, for the City Council, for the Paper Mills, for the Melbourne and Metropolitan Board of Works, be stored in the defendants' yards before delivering at an extra cost of 2s. 6d. a ton. Their huge contract business was quite easy to arrange with regard to arrival, so as to obviate the necessity of incurring this heavy expense in connection with the wharf trade, and defendants have given no evidence, and have not pointed to any, that contract or any coal was delivered from the yard. If the defendants foresaw the probability of such an expenditure they naturally would have increased their price by so much ; and if they did not add this to the price, it is because their years of experience told them the coal could be delivered without passing through the yard. Mr. Cant was under a special arrangement with his agents, Crosby & Co., through whom they were forced by stress of business necessities to work these operations, to keep a certain amount of coal, about 8,000 tons always in stock. Now, as the Harbour Trust does not allow anyone to stack more than 2,000 tons at the wharf, it follows he always had the expense at the yard of 6,000 tons at least, and at times possibly 8,000, seeing that a cargo was more than 2,000 tons. The defendants on the other hand were under no such obligation. The trade had its facilities before the combination, and they were no less afterwards.

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AFFIRMATIVE EVIDENCE FROM DEFENDANTS' TRANSACTIONS AND CONFERENCES AS TO YARDAGE.

Besides there is affirmative evidence coming from the defendants' possession which supports the natural presumption. The dealers' lists, issued by the shipping companies (Ex. K8) state explicitly that the price to dealers was so much per ton "on the wharf." If carted to dealers the "price on wharf is plus cartage as per cartage schedule." So in J. & A. Brown's advertisements (V5) the prices are "on wharf" cartage added.

By K8 the prices already detailed by me were "on the wharf." Thus from 1st June 1906 dealers "were charged 16s. 9d. for screened coal on wharf" and from 23rd July 1906 19s. 3d. I leave out the discount for this purpose. From 21st January 1907 it is 21s., and from 1st January 1908 it is 22s., with a reduction of 6d. in 1909.

Now, although there is the distinct statement in K8 that the prices are "on the wharf," and an express intimation that, if cartage is required, cartage will be charged for as per scale, and although no contract existed requiring delivery on specific terms or at all, yet the defendants wish me to believe they voluntarily incurred 2s. 6d. per ton extra expense, and made the dealer a present of it. They have put down that 2s. 6d. as an actual outlay, and yet adhered to the 14s. 9d. wharf price to the dealer. Not only so, but a discount under certain circumstances is allowed. Further, the price to the public is only 2s. more than to dealers and the same contention applies that though the public are specifically told a price on the wharf and another price for delivery at their homes being cartage added, yet 2s. 6d. yardage is said to have been paid by the shipping companies, and ignored in their price to the general public. If the 2s. 6d. is provided for in the regular price, then an overcharge *pro tanto* must be made from the wharf. There being not a particle of evidence that the repeated price lists were so strangely departed from, I prefer to accept the defendants' own statements—business statements—which are in conformity with their policy of "accretions," and with ordinary commercial motives, rather than the ingenious but erroneous suggestions made by learned counsel on the strength of adopting Cant's exceptional experience as a universal standard.

Ramsay's summaries, part of K8, in fact state " at wharf " except where a higher price was charged for " delivery."

DIFFICULTIES OF DELIVERY.

Although the shipping defendants have not thought fit to give the Court any information through the medium of the witness-box why they insist on this item of 2s. 6d. yardage as one of the reasons for the increase of price to the public, it has been possible by means of the record of the conference of 23rd July 1907 to gather to some extent their own views on the subject, when it was to their interests to object to it. At this conference the shipping companies were complaining that they did not get sufficient coal when they needed it, and the Vend suggested that during certain months of the year, the shipowners did not take enough. Mr. Hunter then said :—" I presume your members appreciate the fact that during certain months of the year we have actually had either to lay up certain of our tonnage or send it off the coast, the whole of our wharves being blocked by coal, &c., while we could not get our customers to take a larger quantity of coal than they required." Mr. Appleton said :—" That does not apply this year, I think we have hardly had our monthly share of our contracts. It has been a constant labour to keep anywhere near our principal customers' requirements." Mr. Hunter said later, speaking of the early months of the year, " Our outlet was not sufficient and our stocks were consequently full." Mr. Howard Smith said :—" I think we ought to accentuate the fact. The collieries are of opinion that we can stock up and subsequently supply the whole of our trade out of the stocks as easily as ex ship. Now if they knew the expense and loss entailed in putting coal ex ship into the yard and subsequently re-delivering they would appreciate the undesirability of such a course. The storing of coal during the slack months for the busy season would mean an extraordinary loss which the collieries would not ask us to bear. It would mean storing coal in the yard for 3 or 4 months." Mr. Forsyth asked would not a higher price be received for a portion of that trade. Mr. Northcote replied " Certainly not for contract general trade." It will be seen from the discussion so far that neither the shipping companies nor the collieries make any statement

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that in the ordinary course of business it is necessary to yard coal, and the trouble the shipping companies have had was in the slack and not in the busy season. In the busy season when more coal was required they even had difficulty in sending out the coal as fast as it arrived. The very object of the conference was to get more coal and to get it faster in the busy season, and according to the defendants this would increase the yardage. I infer from what Mr. Howard Smith said in particular that they had until then avoided as far as possible what he termed the " extraordinary loss " of yarding coal delivered ex ship, and that the collieries' proposals would lead to the incurring of such expense.

Mr. Northcote's statement that an increased price could not be asked for the contract general trade implies that it was the contract price that prevented it, and he did not say that to meet additional expenditure an increased price could not be obtained from retail dealers or the general public with whom no contract existed. Mr. Northcote went on further to say :—" The great bulk of the coal consumption is for contracts with railways, gas companies and brick companies, and they require coal ex ship and would not face the additional expense of yarding and re-delivering coal." Later on Mr. Hunter said " Our requirements have largely increased and we have not been able to satisfy the demands of our customers." Mr. Appleton said :—" We are 20,000 tons behind in our big contracts and 20,000 in our small contracts." This clearly shows there was no need to yard. It could be sent away from the wharf, if wharf trade, screened or unscreened. On the whole the impression left by that conference is that the shipping companies were not in fact as a general rule yarding their coal, paying 2s. 6d. out of their own pockets and bearing the loss. They did not seem to yard it at all as a rule, and did not yard it except as presently to be mentioned. Some rough estimate in figures may be made, as to the quantity of coal which on the average might require to be dealt with on arrival at Melbourne. The Victorian inter-State tonnage for 1907 according to Mr. *Mitchell's* figures (p. 1806) was 840,248. From that we may deduct 426,000 tons for railways, gas, Glass Bottle Works and Harbour Trust, and that leaves 414,248 tons for the year, roughly speaking 8,000 per week, which is the exact amount of

accommodation for the four shipping companies at their own wharf sites; and it must be remembered that they had the whole week for the arrival and disposal of this coal. Taking the Victorian trade rather at say 1,000,000 tons a year or 20,000 tons a week, railways and gas alone absorbed 8,000, leaving 12,000 to be provided for, or 3,000 for each of the four shipping companies, even if we limit it to four. Each company has only 1,000 tons to provide for, over its permanent wharf accommodation, and has the whole week to do it in. There seems to be no reason therefore for yard expenses unless for what was called necessary stocking up in the slack season, or on some special and exceptional occasion. An instance of the exceptional nature of this treatment is given in the report of the conference of 23rd April 1909 (X. p. 218). Mr. Hunter pointed out that Teralba coal was not suitable for general trade requirements and it was impossible to dispose of it as such. At the date of the conference, there was a quantity of 3,000 to 5,000 tons lying in the Melbourne yards the greater portion of which had been there for 12 months or more. Then this statement is made by Mr. Hunter :— "Owing to being unable to dispose of this coal, it was not possible to allow it to remain on the wharf, and thus an extra cost was incurred for carting to the yard." It is tolerably plain that if the shipping companies had been free to purchase just what they chose, there would have been no Teralba coal in Melbourne to yard. This ultra expenditure was the result of the artificial position in which the shipping companies had placed themselves. As for stocking up during the slack season, the shipowners stated in their letter of 25th July 1907 (X. 114) that in their own interests and for their own protection, though at a very considerable cost to themselves, they had stocked up during the slack season, though at times short of coal during the busy season. We may take the figures they give in this letter as the strongest possible. In January there were 25,359 tons on wharves and yards in Melbourne at some specific date, deduct from that 8,000 for the wharf, that gives 17,359 tons on some one day which I presume to be higher than any other day. In February on some one day they had 20,599 tons that is 12,599 in yards. In March on some one day they had 22,225 tons in all, or about 14,000 in yards. In April they had 18,829 tons in all, or

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10,929 tons in yards. In May they had 13,298 tons in all, or 5,298 tons in yards. In June they had 4,925 tons in all, and in July 6,376 tons in all. In the last-mentioned two months, the wharf afforded more than sufficient accommodation. These figures were independent of the stocks held by the Melbourne Steamship Co., James Paterson & Co. or J. & A. Brown.

DIFFICULTIES OF SUPPLY ARISING THROUGH THE COMBINATION.

Now when the shipping companies say in that letter that it was in their own interests and for their own protection stores had been accumulated in the yards and on the wharf, it is necessary to enquire how that protection became essential. Would it have been necessary but for the combined agreement and the combination? The combined agreement in clause (2) sub-clause (*c*) provides for a monthly intimation of the coal required and compliance with the requisition. The provision of course is qualified by the words "when practicable." Apparently precise monthly requisitions were not found to be practicable; from some of the correspondence as 11th January 1907 (X. p. 26) it seems Mr. Hunter on 29th November 1906 sent Mr. Chapman a list of the steamship companies' requirements for 1907. That was an annual statement of requirements and its terms are not before me. I gather from a statement of Mr. Hunter at the conference of 23rd July 1907 (X. at p. 105) that it gave "average monthly requirements." Then according to Mr. Lewington's letter of 16th January 1907 it was agreed that a joint committee should meet at Newcastle as often as necessary to arrange for the shipment of coal; the letter also states that it had been decided between the parties that full advance notice would be given of requirements. A telegram dated 15th May 1907 (X. p. 69) to the Secretary of the Vend, states that steamers were seriously delayed at Newcastle owing to the collieries declining to supply coal except for gas or railway contracts, the collieries having already oversold their Vend allotments; and subsequently further correspondence takes place already adverted to in which "the seriousness of the position then created" is insisted on, on behalf of the shipping companies. On 17th May, the Vend Secretary says:—"Although I did not exactly state in my previous

letter to you that you would be protected as regards supplies, this was intended, and you now have the assurance such is the case." This apparently is the "protection" required by the shipping companies. It will be observed that in the next month, June, there was no necessity for storage in yards or even for filling up the wharves. At the conference of July 23rd Mr. Hunter stated that they were not in a position to give anything more definite than the letter of estimate contained in the letter of 29th November 1906. He said :—"You know no reasons which prevented us." Mr. Forsyth said :—"We know that." The Court has not been furnished with those reasons. Forsyth had already referred to the fact that the Vend had no figures before them as to the shipowners' actual requirements. Apparently then regular and definite monthly requisitions had not been made, nothing more than average monthly requirements stated and then sudden demands in the busy season say for 58,000 tons when the whole output is 93,000 (see X. 102). Mr. Forsyth (X. p. 105) said :—"We should get longer intimation of your requirements. For instance on Monday morning we get your requirements for that week." And on the next page the difficulties and the possible way out are discussed. Now during that conference the shipowners complained that they could not get coal as they wanted it. The Vend complained that during certain months the shipowners did not take the quantity of coal the Vend desired. Among other things discussed was the question of difficulty arising from allotment. Mr. Appleton says for instance, "Is a ship to wait till A.A. or Stockton is available"? Mr. Howell says "Yes. If you ordered and were not entitled to Hetton." Mr. Appleton :—"The position is this : A ship is at Newcastle to load for W.A., and the only coal we can get is Hetton, we cannot get A.A. or Stockton ; is that ship to wait till A.A. or Stockton is available ?" Mr. Howell replies :—"That is no concern of the collieries." Mr. Appleton says :—"Yes it is ; you cannot expect us to keep the ships there for a week waiting for coal." Later on Mr. Hunter says :—"What we want is quite apart from any Vend allotments. You supply coal in accordance with our trade requirements." Mr. Howell answers :—"Provided it does not go over their allotment ;" and so the dispute stands. It is quite plain to me as far as can be discerned on the sur-

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face of the evidence before me, that, having entered into the combined agreement, the shipping companies became entangled between the Vend allotment on the one side which might be exhausted by home trade or more especially foreign trade, but which they agreed to observe at all events to a great extent, and on the other side by the requirements of their own customers. Naturally for their own protection and in their own interest, having regard to their self-created embarrassments, they mitigated the evil of their original error by stocking up in the slack season, beyond the natural requirements of the trade; and therefore I do not see how they can rely upon what happened in the early part of 1907 as an ordinary incident of the business. In the letter of 25th July 1907 following the conference, the shipowners say to the Vend :—" We took the opportunity of specially pointing out to you that the trade of Australia is not one which can be dealt with on the basis of regular monthly supplies and deliveries, nor is it possible for the shipowners to do much more than they have done in the past in the way of storing coal in their wharves and yards during the slack season of the coal trade."

Naturally, this provokes the question : " *Why then persist in a system admittedly so inimical to the trade of Australia* ? " The answer will be made very evident a little later, and may at this point be shortly stated. It was so as *to repress certain shipping competitors who were then struggling to share the inter-State trade, and so as to make other competition practically impossible.*

The shipping companies then still retained their system of " monthly proportions " as we see from a letter of 5th March 1908 Cant to Appleton (Ex. U. 52).

So far, for convenience of treatment, I have been referring particularly to the Victorian yardage, but the same thing must be said of South Australia. At the July conference (X. p. 110) the trouble was the Vend allotment. Mr. Appleton on behalf of the shipping companies said :—" That if the Government increased their requisitions, the Vend should see that the shipowners were protected." But Mr. Forsyth for the collieries replied :—" The man who gets it is alright, but it costs the Vend 3s. per ton. Do you think I am entitled to ask J. & A. Brown for 3s. per ton ? As a matter of fact we made arrange-

ments for 86,000 tons of Vend coal only. The Vend refused to supply any more because they had to pay 3s. or 4s. a ton over-delivered."

Mr. Howell (colliery) addressing the shipping representatives said :—"You must remember you have no arrangements with the Vend, but you have arrangements with each individual for the South Australian contract." This of course had reference to the special arrangement of April 1906, so frequently referred to, for 96,000 tons per annum. Then comes an observation from Mr. Hunter which goes to the root of his difficulty. In answer to Mr. Howell he says :—"But we have our general arrangements also with the Vend." Evidently the stocking up in Adelaide was also the result of this general arrangement, and an attempt to lessen the risk it occasioned to the shipping companies, and the cost of doing it is not a fair charge against the general public whose interests are prejudiced by the compact. In the result, *I disallow actual yardage as claimed by the defendants.*

QUESTION OF FAIR FREIGHT IF YARDAGE WERE ALLOWED.

If, however, actual yardage were to be allowed, what would be a fair price to allow? The amount charged for freight includes the placing of the coal on the wharf; then in order to get it into the hands of the consumer certain operations are necessary. I will first enquire as to these and their cost. The coal has to be trimmed; the Harbour Trust regulations preventing the stack rising above a certain height. According to Cant's evidence, which I adopt as to this, 2d. per ton would be a full price to pay for that. Screening where necessary has to be done, which is performed on the wharf, and this occasions not only expense of screening, but involves a loss in respect of the small coal left after screening. If engine coal is ordered, there is no screening, it is delivered straight on to the customers' carts, it is also necessary to weigh the coal and load it on to the carts. Incidental to all this, there is supervision, and of course there is the standing charge of rent for the space. It is not easy for those unfamiliar with the actual outlay which the experience of many years has shown to those engaged in the trade to be necessary for these operations to say just what is a reasonable allowance to cover the cost. Those who could tell us exactly what that outlay

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was, and who claim to have it allowed, have remained mute. We are left as before to thread our way as best we can through the various business transactions of the defendants that the Crown has collected. They touch various classes of supply. In K8, which covers the period from 1st March 1905 to 1st January 1910, retail dealers and the general public were charged 1s. more for screened coal than for engine coal. There is no doubt in that class of business the defendants fully reimbursed themselves for all outlay and loss of and occasioned by screening. Notwithstanding this consistent fixation of 1s. in their actual trade, they have claimed in their summaries 1s. 6d. for this item in respect to this very class of business. Then turning to the contract June 1906 for 2 years for the Melbourne and Metropolitan Board of Works (Ex. B8) the prices of McIlwraith McEacharn & Co. for screened coal was 1s. per ton more than for engine coal. So also by Huddart Parker & Co. for same period. In the same Exhibit by tenders dated 16th May 1910 and acceptance 1st June for the period of 2 years the Melbourne Steamship Co. fixed 1s. more for screened than for engine coal. In the same Exhibit, 16th May 1910, General Stores, Jas. Paterson & Co. by contract note charged 1s. more for screened than for engine coal and by tender 17th May 1910 McIlwraith McEacharn made the same difference. Then the combined agreement itself in a proviso to clause 8 names 1s. per ton as a permissible charge additional to the c.i.f. price. Therefore 1s. is the outside charge allowable for this item. Any larger expenditure must be the result of exceptionally restricted facilities or other unusual circumstances. For cartage Ex. K8 shows for 1907 the rates for that year, but in 1908 the cartage rates were increased; in 1909-1910-1911 lists are given. As far as cartage is necessary to any of the places mentioned in that list I adopt defendants' higher rates, not as cost but as rates to be charged, though with some hesitation, on account of the Gas Co.'s contract (T7). That includes of course all labour of weighing, and of loading and unloading the carts with respect to the coal actually carted. Now we come to the cost of yarding the coal where yarding is necessary. Mr. Cant (p. 801) gave some analysis of his estimated cost and one matter is fundamental. The average cost per ton of yarding coal is dependent, among other factors, upon the number of

tons disposed of. The rent of the yard is constant, so is that of the wharf. Cant said that his estimate was arrived at by considering the amount he had to deliver under contract, he also took one half as representing the proportion to be taken into the yard as distinguished from that left on the wharf. Reference to Ex. 168. (summary) shows that Kethel & Co.'s rent of yard for 8 months was £482 13s. 4d. The total sales for that period amounted to 34,195 tons of which 33,811 tons were ex yard. The average rent of yards and wharf was 3.38d. per ton, and the fact that so large a proportion of their sales took place ex yard must be taken in conjunction with the firm's undertaking to keep 8,000 tons always in stock. The average per ton yard expenses was in this manner brought up to 1s. 7½d. per ton. Kethel & Co.'s contracts were all delivery ex wharf. It is not difficult to see that in the defendants' trade the position was wholly different. The quantity turned over would in any case immensely reduce the average rent. I should say it would be well under 1s. 3d. A yard was in fact, as I understand, provided by the defendants, and whether actual yardage took place or not I think it ought to be regarded as a cautious provision against the possibility of requiring it, however unlikely that eventuality might be. I can well understand and agree that within limits, which experience has measured, that is a fair provision. And an average of about 84,000 tons a year appears to be the requirement in Melbourne. An allowance of 4d. per ton would be certainly ample to satisfy rent of wharf and yard and the operations to and fro between wharf and yard. If I err in amount in this respect, I do so in favour of the defendants ; but to avoid any chance of insufficient allowance I set this down at 4d. a ton. I am not aware of any direct evidence on the point of yardage cost so far as Melbourne is concerned. But one contract has been pointed to which is the nearest transaction to which my attention has been drawn for Victoria. It is contained in Ex. N8. J. & A. Brown by contract note of 24th February 1909 charged the Australian Paper Mills 17s. 9d. per ton on trucks ex steamer in Victoria Dock, that would of course be loose. If delivered, which means at the mill, there was an additional 1s. 6d. per ton for cartage. That cartage involved practically the same kind of work as if the coal were yarded. In the case of yardage however there are two differences ;

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the first is the yards would doubtless be in much closer proximity to the wharf; and next the 1s. 6d. charged to the Paper Mills was for each ton of coal actually delivered, whereas in estimating the average cost of yarding it must be borne in mind that not every ton is actually yarded. Mr. Cant thought that about half the output would be carted from the wharf to the yard, and that was rather his estimate applying, as I take it, to Kethel & Co.'s own trade as they would be able to work it under improved circumstances, than a formula for the trade in general. (See for instance p. 807*a*). I have already stated circumstances respecting the defendants' own trade which have convinced me that nothing like one half the wharf coal need go to the yard. Mr. Cant put down the actual cost of carting at 6d. for every ton carted or 3d. when averaged, or his evidence on the whole may be 9d. for actual carting and an average of 4½d. The actual average yard expenses per ton in Kethel & Co.'s business is shown by Ex. 16S., these expenses include wages for trimming coal, loading and unloading carts, bagging, weighing, &c., the cost of bags and sundries, and after taking all these things into account and the comparative disadvantages under which he laboured, they are brought out at 1s. 7½d. Taking the last item for instance, namely, 3,338 tons, total sales for January 1911, they were all sold at the yard, at a yardage cost of 1s. 4.69d.; if half had been sold at the wharf, the average cost would have been much less. First of all, there would have to be deducted one half the rent of the yard, 3.38d., one half loading and unloading carts, and one half wear and tear in the course of the operations and this would reduce the cost to very nearly one half, after allowing for bags and baggage, weighing and sundries, which would have to be paid for somewhere. At all events the difference would be very great. The defendants' cost, if any were incurred, ought to be very much less. If the Australian Paper Mills contract be taken as a guide and 1s. 6d. be a profitable charge for carting to the Mills, then 9d. would be a profitable average charge for carting, less than one half the defendants' wharf turnover. The same contract note affords some evidence of what is, in my opinion, a proper charge, not rightly called yardage, but which the defendants have included in their term yardage. In their charge of 2s. 6d., they have, so to speak, eliminated the wharf operations

except as to wharfage. According to their summaries they do practically no wharf trade. This is inconceivable. But at the same time the whole 2s. 6d. must not be struck off. They ought to be allowed for wharf operations the fair cost of putting the coal on the wharf, and on this point Brown's contract note with the Paper Mills is informative. As we have seen loose coal on trucks ex steamer in Victoria Docks is 17s. 9d. per ton. If bagged on Brown's wharf, South Melbourne (bags returnable), the price is 19s. 3d. or 1s. 6d. more. Bagging with bags returned everyone agrees comes to 6d., so that the cost of placing on the wharf is charged for at 1s. This 1s. includes what we must take to be reasonable profit, the actual cost then is something less. In Tasmania, coal is charged for 1s. per ton more for both large and small when the shipping companies, instead of delivering coal ex steamer, either tranship it into a hulk beside their vessel alongside the wharf or put it ashore into customers' carts. In South Australia we find from the contract note of McIlwraith McEacharn & Co. and May Bros., 30th January 1909 (P7) that coal, whether steam or small, is 1s. per ton extra, if loaded ex heap at Port Adelaide, beyond the price on trucks ex steamer direct at Port Adeliade. That contract was for a year, and the contract for the following year is to the same effect. The contract note of 29th December 1905 for year 1906 makes the extra cost for small coal only 9d. per ton. In Western Australia Howard Smith & Co. charged 1s. more for Steam coal loose ex coal yard for city and for sanitary site than if direct ex ship and so for small coal bagged. For some reason not disclosed there was 2s. 6d. difference if delivered at Parkerville Railway Station. I presume 1s. 6d. is railway freight. That was in October 1906. Next year the differences are the same. In the city, steam coal ex yard is 1s. 10d. more, so also at Parkerville Railway Station, while at the sanitary site it is only 1s. 9d. more. Small coal bagged in the city is only 1d. more, so at Parkerville Railway Station, while at the sanitary site it is the same. Loose small coal in the city is 1s. 10d. more ex yard so at Parkerville, while at sanitary site it is 1s. 9d. In 1909 the extra cost all round is 1s. 10d. Even these extreme charges as was observed by learned counsel for the Crown do not bring the cost up to 2s. 6d. The defendants' summaries assume 5d. a ton to provide for yard management at

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Melbourne, apart from management otherwise, and apart from pure freight, and that happens in this way. Cant, taking his evidence as a whole, say the defendants, gives 2s. 2d. as the actual cost of expenses over all. Owing to what was even for him an extraordinary expense of £100, they deduct 1d. per ton, leaving 2s. 1d. Then Crosby & Co.'s additional net charge for what they did in Melbourne was 1s., making the total cost to him 3s. 1d. The defendants, without applying any precise standard of division, strike off 7d. from Crosby's charge, leaving it at 5d., which, added to the other item of 2s. 1d., produces the 2s. 6d. entered under the head of yard expense. Thus 5d. is set down really as the cost of effecting and superintending operations in Melbourne, which is taken as equivalent to yard management there. Of course that leaves general management to be provided for.

With regard to this we have to recollect that all other expenses are assumed to have been defrayed. Now, as to cost of yard management, Cant's expenditure in favour of Crosby is no criterion for the present purpose. Crosby & Co. were necessary to them to find business, make contracts, bear a contingent liability for fulfilment, superintend Melbourne affairs and do all the incidental work a branch office would do. It is plain therefore that in addition to the disparity between the magnitude of the defendants' business and that of Kethel & Co. several special circumstances concurred, including the profit that Crosby & Co. would naturally look for on their prime outlay, to prevent me adopting Crosby's charges against Kethel & Co. as the standard of what it would actually cost the defendants in respect of their Melbourne sales, or indeed of any of their branch office sales. It has been forcibly urged that 6d. a ton on the defendant's turnover would provide a fund for management alone, that would be exorbitant. So even would 5d. a ton. According to the defendants' summaries, the average Melbourne trade for the four years, 1907 to 1910, is 857,330 tons. According to 33C it was much larger, but for this purpose I assume 19S is correct. This tonnage at 5d. per ton would give a management fund of £17,861, which supposing it to be apportioned among the four defendant shipping companies allows £4,465 to each, and if the whole six companies interested are to participate each would have £2,976. The coal busi-

ness is only a branch of the shipping defendants' affairs and for this one item of management I agree that 5d. per ton on the whole tonnage is exorbitant, even for the whole of the operations of the shipping companies connected with the Victorian trade and much more for the yard business alone. Each of the six companies concerned would have about £1,200 from 2d. a ton which is the utmost I would allow for this item if it be necessary for me to allocate any specific sum with regard to it. The cost of management in other States may not unfairly or illiberally be put at the same amount per ton. There are considerations of variation, telling both ways, and I leave it at that.

SUMMARY OF SHIPPING COMPANIES' ALLOWABLE DEDUCTIONS FOR COSTS AND EXPENSES.

The matter can then be summarised thus. In order to arrive at the amount for freight and general management—which latter term covers all general expenses of direction and supervision—the shipping companies are entitled to deduct in the first instance (*a*) the f.o.b. price; (*b*) wharfage and dues where payable by them; (*c*) general wharf charge for labour 1s.; (*d*) screening where necessary 1/-; (*e*) cartage where necessary according to schedule, &c.; (*f*) rent of wharf and yard and also yard labour 4d., allowed for all possible cases, that is all wharf trade, and I call these standing expenses. I allow them at this point because of their separate connection with a particular section of the business; general management and other expenses covering the trade indiscriminately are supposed to be included in all freights alike.

CROSBY'S GUARANTEE TO KETHEL & CO.

I have had pressed upon me the fact that in October and November 1909 Crosby & Co. guaranteed to Kethel & Co. that the freight for coal for the Victorian railways would not exceed 4s. 9d. per ton for the first year, and 5s. for the second year. I think however, this has been well answered. Kethel's business, and Crosby's business in relation to that coal, cannot be put on the same footing as the business of the defendants. It is said by Mr. *Mitchell* that Crosby & Co., proposed to carry the coal by the one vessel, the *Wonga Fell*. But there would have been 160,000 tons per annum to be carried

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according to 15S or 175,000 according to Wheeler (p. 267). At all events it meant over 3,000 tons a week, and I do not adopt the view that it was intended to do it all with that one vessel. Besides, the terms of the letter of 20th October (Ex. 15S) indicates clearly that Crosby would have to get the carriage done, and for that reason could not state the precise terms, but were willing to guarantee a maximum. This indication is supported by the expression "the steamers provided by Messrs. Crosby & Co." in the same letter. Crosby & Co. were not therefore, in the position of the defendants, even in the best of circumstances. Coal-carrying trade was not easy to provide for, outside the defendants themselves, the business had to filter, arrangements would have had to be made with people *pro hac vice*, and the channels are not indicated; probably they were not completely settled by Crosby & Co., and I have no evidence establishing the accuracy of the 4s. 9d. and 5s.

Besides, Wheeler was in a difficult position, Kethel & Co. were practically dependent on Crosby & Co. and the situation of the last named firm being, as I have stated, the tentative price obtained in the way it was mentioned does not appeal to me as at all a safe guide for freight in the regular, normal, well-established course of business prevailing before the combine or that would have been a non-combination freight in 1909.

We are now in a position to deal with the various contracts that have been challenged.

EXCESSIVE PRICES CHARGED BY SHIPPING COMPANIES.

VICTORIA.—(1) *Victorian Railways.*—1907 f.o.b. cost 10s., no other charges, except haulage Geelong 3d., contract price c.i.f. 14s. 1d. to Melbourne and 14s. 4d. to Geelong; freight 4s. 1d. This is what I have said, at all events, within 1d. of a fair freight from Newcastle to Melbourne, a freight that returned a reasonable remuneration to the shipping companies without being excessive to the consumer. The quantity was 260,000 tons a year for 3 years, the f.o.b. price being 10s. was 6d. a ton in excess of the highest reasonable price. This amounts to £6,500 a year, or £19,500. The next lot of contracts in 1910 (U5) consisted of 129,000 tons at least at 15s. 5d. and 50,000 tons at 16s. 2d. deliverable either at Melbourne or Geelong. The

f.o.b. price was 11s., the shipping company's freight was therefore 4s. 5d. and 5s. 2d. Although practically it would be known that most of the coal would be delivered at Melbourne, yet, looking at the terms of the contract, the contractors must be taken as properly protecting themselves against Geelong, and therefore I am disinclined to attribute any excess in freights of the first of this set of contracts, but on the second there is an excess of 9d. As to the f.o.b. price, it exceeded by 1s. what I have already found to be the highest price within reason for this period, namely 10s. The excess cost to the Railways may be thus calculated 129,000 tons at 1s. is £6,450 for the Vend and 50,000 tons at 9d. come to £1,875 for the shipping companies.

(2). *Footscray Gas Co.*—In 1905 the price was 14s. 9d. at Footscray wharf for large and 11s. 9d. for small. The f.o.b. price for large was 7s. 6d. and small 5s.; wharfage 1s., making 8s. 6d. outlay. I disallow lighterage, there is no evidence it was employed or necessary. It is not contended the defendants could not have delivered from their collieries. The balance for freight is 6s. 3d. for large and 5s. 9d. for small. This is only referred to as history, being before the combined agreement. In 1907 the price was 18s. 6d. for large and 14s. 6d. for small, the f.o.b. price large was now 10s., for small 5s. 9d. Adding to these 1s. for wharfage, there is left 7s. 6d. as freight upon large, and 7s. 9d. small. The total quantity delivered was 4,100 tons, 25 per cent. small was guaranteed if necessary, but I do not know what proportion of small was in fact taken. The excess in f.o.b. price was 6d. per ton. The freight exceeded not merely the reasonable amount, but exceeded also the maximum amount provided in the combined agreement, namely 5s. 3d., by 2s. 3d. on large and 2s. 6d. on small. That cannot be precisely calculated, but taking it all at 3s. 4d. on 4,100 tons it comes to £683 13s. 4d. By "maximum amount" I mean throughout the schedule maximum; because the first proviso to clause 8 of the combined agreement permits another 3s. per ton where the yearly contract does not exceed 10,000 tons. The next contract for this Gas Co. was in 1908 when engine coal was 19s. 9d. large and small 15s. 3d.; the f.o.b. price large is now 11s., small is 6s. 3d., that means 7s. 9d. for freight on large and 8s. on small. The f.o.b. excess is 1s.

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on large and the small is proportionate. The maximum schedule rate of freight in the combined agreement is 5s. 6d. The excess even over that is therefore again 2s. 3d. and 2s. 6d. The excess above reasonable freight is 3s. 7d. and 3s. 10d. The price of large descends to 19s. 6d. in 1909, and 19s. 3d. in 1910, there being always a margin of excess.

(3) *Melbourne Glass Bottle Co.*—In 1907 the c.i.f. contract price was 15s. 6d., the f.o.b. price was 10s. and after adding wharfage 1s., this left 4s. 6d. freight, which was under the schedule maximum, but 4d. beyond reasonable freight. The excess cost to the Bottle Works per annum on 12,000 tons after allowing 9s. 6d. f.o.b. is 6d. per ton which comes to £300, and in freight at 4d. excess is £200. In 1908 the price is 17s. receding however eventually to 16s. 6d. The f.o.b. price is 11s. and with allowances 12s., the final freight is again 4d. in excess meaning £200, the f.o.b. price 1s. in excess being £600, or £800 in all.

(4) *Australian Paper Mills.*—In 1907 engine coal 18s. 6d. and small 14s. 6d. f.o.b. price is 10s., allowances should be 1s. wharfage; 1s. wharf expenses; 4d. standing expenses; 1s. 6d. cartage; leaving 4s. 8d. for freight on large or 6d. excess. For small the f.o.b. price is 5s. 9d., which added to 3s. 10d. allowances totals 9s. 7d., leaving 4s. 11d. for freight or 9d. excess. The total quantity for the year is 5,750 tons, the respective quantities of large and small do not appear, but taking the freight at the minimum excess it amounts to £143 15s. The excess f.o.b. is 6d. on large and proportionately on small. In 1908, the price of large is 21s.; small 16s. 3d.; f.o.b. price is now 11s., additions the same as before, the balance for freight is 6s. 2d. or 2s. excess and 8d. above the maximum schedule amount. The f.o.b. price of small is 6s. 3d., and with additions it comes to 9s. 9d., the freight being again 6s. 2d. with the same excess. In 1910 large is 3d. less; small remains the same.

(5) *G. Mowling & Son.*—In 1907 the price was 20s. 1d. for large engine coal and small 17s. 1d.; f.o.b. price for large 10s., small 5s. 9d.; additions are wharfage 1s.; wharf expenses 1s. and 2s. 6d. cartage, 4d. standing expenses. The amount for freight is 5s. 3d., which is 1s. 1d. above the reasonable rate and is exactly the maximum of the combined agreement. Small coal: Making the same

additions the freight is 2s. 4d. above the reasonable rate and 1s. 3d. above the agreed maximum. In 1908 the f.o.b. price being 11s., the additions are wharfage 1s.; wharf expenses 1s.; cartage 2s. 9d., and 4d. standing expenses. The price of large coal was 22s. 9d., leaving 6s. 8d. for freight, which is 2s. 6d. above the reasonable amount and 1s. 2d. above the agreed maximum. The f.o.b. price of small is 6s. 3d. and this with the same additions of 5s. 1d. comes to 11s. 4d., the contract price is 19s., leaving 7s. 8d. for freight, 3s. 6d. in advance of the reasonable rate and 2s. 2d. above the agreed maximum when the price is 6s. which is the highest schedule for small coal. The quantity was about 2,000 tons a year. The f.o.b. excess is 1s. on the large and correspondingly on the small.

(6) *Melbourne Harbour Trust.*—In 1907, 4,000 tons of coal screened at pit at 10s. per ton f.o.b.; the only proper addition in my opinion is 9d. extra for discharging. The contract price is 15s. 3d. which leaves 4s. 6d. for freight which is 4d. in excess. The f.o.b. price however is 6d. too much which comes to £100. In 1908, 4,000 tons are 17s. 9d., the f.o.b. price is 11s. with addition of 9d. making 11s. 9d., which leaves 6s. for freight, being 1s. 10d. above the reasonable rate and 6d. above the agreed maximum. The total excess cost to the Harbour Trust for this year was 1s. per ton for the collieries, being £200, and 1s. 10d. per ton for the shipping companies being £366 13s. 4d., a total of £566 13s. 4d.

(7) *Melbourne City Council Electric Light Station.*—In 1907 engine coal is 18s. 3d.; the f.o.b. price was 10s., the addition being wharfage 1s.; wharf expenses 1s.; cartage 1s. 4d., and 4d. standing expenses, leaving 4s. 7d. for freight or an excess of 5d. on 7,825 tons, making £163 0s. 5d. The f.o.b. was 6d. in excess on this quantity, making £195 12s. 6d.; in all an overcharge of £358 12s. 11d. on the large coal. Then there were 8,600 tons of small coal, the f.o.b. price is 5s. 9d. and with the same additions it makes 9s. 5d. the cost to the contractors. The contract price was 15s. 3d., the freight being 5s. 10d. which is 1s. 8d. in excess and 7d. above the agreed maximum. The small coal I take at 6d. excess on f.o.b. price which is £215 for the collieries, and the excess freight amounted to £716 13s. 4d. for the shipping companies. The total excess for small coal for that year is £931 13s. 4d.; the combined excess for the year in respect

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of the Electric Light Station alone £1,290 6s. 3d. In 1908 for the same quantity of coal the prices are 20s. 10d. for large and 16s. 7d. for small. The f.o.b. price for large is 11s. and, adding the additions of 3s. 8d. leaving 6s. 2d. for freight, an excess of 2s. above the reasonable rate and 8d. above the agreed maximum. The overcharge for freight on large coal is £782 10s. and the excess f.o.b. price is 1s. which comes to £391 5s. ; in all for large coal £1,173 15s. The small coal is 6s. 3d. f.o.b. and with 3s. 8d. additions comes to 9s. 11d., leaving 6s. 8d. for freight being 2s. 6d. above the reasonable rate and 1s. 2d. in advance of the agreed maximum. This makes the excess freight on small coal £1,075. The f.o.b. price of small is more than 6d., properly speaking about 1s. in excess, but taking it at 6d. that is £215, the total excess cost of small is £1,290 which added to the excess on large shows on the lowest basis a combined overcharge for the year 1908 for the Electric Station of £2,463 15s. In 1909-10 large coal receded 6d. ; small coal advances to 17s. in 1910.

(8) *Melbourne and Metropolitan Board of Works.*—In 1907 the price of engine coal at Spotswood was 18s. 9d. and 19s. for 8,000 tons ; the f.o.b. price was 10s., 1s. wharfage, and cartage claimed at 1s. 6d., and I see no reason to cut it down, making 12s. 6d., it has to be trimmed into bunkers behind the boilers at the Pumping Station, I think 3d. per ton is well paid for that, and should be allowed, though not pressed by defendants, making 12s. 9d. The defendants claim 1s. 6d. discharging from lighter and 2s. for lighterage being an additional 3s. 6d. The Crown objects to the last two items altogether ; these, if allowed, would bring the outpockets to 16s. 3d. The defendants claim 16s. for this leaving 3s. only for freight. I am not at all clear about the lighterage and the discharge from lighter. In the previous year the Adelaide Steamship Co. tendered for 8,000 tons, same place, same conditions, 14s. 3d. for Seaham and Caledonian, and Howard Smith tendered 13s. A.A. and Stockton, Hetton and/or Newcastle. They did not get the contract and it may be inferred that some cheaper arrangement was adopted. But whether that was so or not the 13s. tender affords some criterion for judging of the accuracy of the expenses claimed by defendants in 1907. In 1906, the f.o.b. price was 7s. 6d., the additions claimed amounted to 6s., the total outlay therefore being 13s. 6d. When

Howard Smith & Co. tendered at 13s. did they intend to lose 6d. per ton hard cash amounting to £200 and in addition carry the coals oversea for nothing? If 4s. 2d. be a fair amount to charge for freight it would mean that Howard Smith were foregoing no less a sum than £1,666 13s. 4d., part of which was actual cost and part profit, a total benefaction of £1,866 13s. 4d. The Adelaide Steamship Co.'s tender reduced this benefaction by 1s. 3d. per ton equalling £500. I cannot believe the shipping companies were prepared to do business on these terms, and therefore am of opinion that there must be some fallacy either with respect to the wharfage or the amount charged in connection with the lighter and the cost of carriage. But whatever the difficulty may be in arriving at freight with precision, I do not believe that the advance of 5s. 9d. and 6s., *i.e.*, a net advance of 3s. 3d. and 3s. 6d. from the standpoint of the shipping companies left them in the position of being underpaid. I will assume in their favor that for this year 1907 they charged no excess freight, but the f.o.b. price was 6d. in excess, being £200. In the next year 1908, the contract price for 5,500 tons was 22s. 6d., the f.o.b. price was 11s. The defendants' claim additions which leave the balance for freight at 5s. 6d., the agreed maximum, even on these figures that is 1s. 4d. too much, being £366 13s. 4d., so that I need not enquire further; the f.o.b. price is also 1s. too much, which is £275 making a total of £641 13s. 4d., even granting the full charges connected with the lighter and the full carriage paid. It may not be out of place to observe at this point that *the freight for the Metropolitan Gas Co. this year was 4s. 2d. for both large and small.*

(9) *Victorian Government Special Services*: (*a*) Coburg.—In 1908, 240 tons of house coal were charged 23s. 3d., the f.o.b. price was 11s., to that is to be added wharfage 1s.; wharf expenses 1s.; screening 1s.; cartage 3s. 9d. and standing expenses 4d., making 18s. 1d., leaving a balance of 5s. 2d. for freight or 1s. in excess which amounts to £12. The excess f.o.b. is 1s. also equalling £12. (*b*) Yarra Bend and Kew.—1900 tons at 23s. in 1908; 3d. less is charged for cartage, there is therefore again 1s. excess in freight amounting to £95, and 1s. f.o.b. also comes to £95, a total of £190. In the previous year the balance for freight appears to be only 3s. 3d.; cartage to Kew appears in Ex. K8 as 3s. 3d. for 1907, and 3s. 6d. in subsequent years.

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That is the charge made, and the amount is allowed by me as the cost, though that is probably much less. It is always difficult to believe that in 1907 the shipping companies carried at a loss, but, where so much is clear, it is unnecessary to run after less obvious instances. (*c*) Lady Loch, Hobson's Bay.—1,000 tons steam coal at 20s. ; f.o.b. price 11s. ; 2s. lighterage ; 1s. 9d. discharging ; total 14s. 9d., leaving 5s. 3d. for freight, excess of 1s. 1d., amounting to £54 3s. 4d., and 1s. excess f.o.b. amounting to £50, total £104 3s. 4d. (*d*) Melbourne District.—1,500 tons house coal price 22s. 3d. ; f.o.b. 11s. ; wharfage 1s. ; wharf expenses 1s. ; screening 1s. ; cartage 1s. 6d. ; standing expenses 4d. ; being 15s. 10d. leaving 6s. 5d. for freight or 2s. 3d. excess, amounting to £168 15s. ; add to this 1s. excess f.o.b. price, namely, £75, total excess being £243 15s. (*e*) Parliament House.—120 tons house coal at 21s. 6d., the same deductions, namely, 15s. 10d., leaving 5s. 8d., freight being 1s. 6d. excess amounting to £9 and 1s. excess f.o.b. equals £6, a total of £15.

(10) *Retail Dealers.*—The price in 1907 was 21s. It is claimed by the defendants there was a discount of 6d. per ton on large coal to dealers. That was confined to dealers taking 25 tons per month and paying by the 14th of the following month, but I will assume for convenience' sake it applied to all dealers, making the net price 20s. 6d. The f.o.b. price was 10s., to that must be added wharfage 1s. ; wharf expenses 1s. ; screening 1s. ; standing expenses 4d. ; total 13s. 4d., leaving 7s. 2d. for freight or an excess of 3s. per ton. The quantity for 1907 sold in Victoria to dealers and in private trade according to the defendants' figures (in 198) was 53,607 tons ; this taken at 3s. amounts to £8,041 1s. overcharge by the shipping companies to the general public ; it was even more because private buyers were charged 2s. more and were not given the 6d. discount. The f.o.b. price was 6d. in excess, and on the same quantity was £1,340 3s. 6d. overcharge by the collieries. So that between the two, the general public, practically householders, overpaid to the combination £9,381 4s. 6d. in 1907. In stating that amount it is an under-estimate, because according to 33C the total Victorian trade for 1907 was 1,325,739 tons or over 84,500 tons for general trade.

However, for the present purpose of calculation, it is enough to take the figures of the defendants' summary.

In 1908 the price was 22s. to dealers. I will assume the discount in all cases; the price to the public was 24s. The f.o.b. price was 11s. and to this must be added wharfage 1s.; wharf expenses 1s.; screening 1s.; standing expenses 4d., making 14s. 4d. The difference between that and 21s. 6d. looking at the dealers' price only is 7s. 2d.; the excess freight is therefore 3s. and the quantity as per Ex. 198 is 63,022 tons, which makes the excess freight £9,453 6s. The excess f.o.b. price is 1s. and on the quantity mentioned comes to £3,151 2s.; a total of £12,604 8s. overcharge for the year, taking dealers' prices only, but for any sales direct to the public 2s. 6d. per ton must be added. This again is an under-estimate, because Ex. 198 takes the Victorian total trade at 987,821 tons whereas 33C shows it to be 1,477,770 tons taking 70 per cent. of the total inter-State trade. In 1909-10 prices stood the same, the quantities were different, namely, 47,115 in 1909, and 55,044 in 1910 according to the percentage estimates in Ex. 198—they however being as before under-estimates.

The prices charged for *Commonwealth Services* are so exorbitant that no comment can add to the effect of the bare figures.

I then take SOUTH AUSTRALIA The first thing to consider is what is a *fair freight to Adelaide*? McIlwraith McEacharn by their tender of 1st May 1906 name 5s. 3d. Newcastle to Port Adelaide for 1 or 2 years (Ex. C2). On the same date Huddart Parker & Co. and the Adelaide Steamship Co. tendered at 11s. 9d. for Port Adelaide and the other ports in South Australia for 192,000 tons of coal. This coal they were in fact getting at about 6s. 10d. as I reckon in their favor, and after paying 4d. for haulage, would leave about 4s. 7d. for freight, or as has been reckoned on both sides 4s. 5d. I doubt if there would be any actual loss on this. Lane says that 4s. 11½d. gives a fair profit. But though I do not wholly lose sight of that statement, I am not altogether persuaded that what he says applies generally to the defendants' business. In their favor I conclude it would not yield them a fair profit, for reasons to be hereafter given.

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I think McIlwraith's tender for freight more nearly represented the true amount. In February 1906 (Ex. I9) Howard Smith & Co. sold screened coal to the Broken Hill Water Supply Co. at 13s. 9d. free into trucks at Port Pirie. The contractors paid 9d. wharfage, which made the net price 13s., the cost f.o.b. was then 7s. 6d., that left 5s. 6d. freight to Port Pirie. The combined agreement recognizes a difference of 3d. to 6d. more at Port Pirie than at Adelaide. This contract consequently represents 5s. 3d. freight to Adelaide. It continued to March 1908. There were some deliveries at higher prices, which were apparently anomalous and I pass them by. From April 1908 to March 1910 Howard Smith & Co. and the Adelaide Steamship Co. sold to the Broken Hill Water Supply Co. under contract best coal at 17s. 6d. into trucks Port Pirie. The contractors paid 1s. wharfage, which reduced the price to 16s. 6d. The f.o.b. price at this time was 11s., which again left 5s. 6d. for freight to Port Pirie, equivalent to 5s. 3d. Adelaide. In the letter of 19th February 1907, Northcote to Scott Fell (part of Ex. O1) and a portion of the correspondence forwarded by Northcote to the Vend, and already commented upon, the freight to Adelaide as quoted to Scott Fell & Co. is 1s. 3d. more than to Melbourne. There are transparent exaggerations of price in that letter. For instance Co-operative coal which was 10s. f.o.b. is quoted to Scott Fell & Co. at 15s. 6d. Melbourne c.i.f., that is 3d. more than the agreed maximum in the combined agreement, and 16s. 9d. to Adelaide which is within 3d. of the maximum ; for Port Pirie it is quoted at 17s. 9d. which is 6*d. more than the agreed maximum.* This last super-Dreadnought quotation, when Scott Fell's needs were for coal at Port Pirie and not at Adelaide, must surely have been conceived in the most delicate spirit of irony. The combined agreement in the various schedules is erratic with regard to the differences between Melbourne and Adelaide ; in one place it is 1s. 2d. for large coal, in the next 1s. 7d., in the next 1s. 6d., then 1s. 9d., then 1s. 8d., and lastly 1s. 3d. at the highest price large coal. For small coal it is 1s. 3d., 1s. 7d., 1s. 6d., 1s. 9d., and 1s. 6d., there are differences in maximum. No steady guidance is there obtainable as to the proper differences between Melbourne and Adelaide.

Making up my mind on the materials I have, I conclude without

hesitation that 5s. 4d. is ample to return the shipping companies a good profit, and anything beyond it would most certainly be excessive. Resolving all doubt in their favour I allow it at that. I would mention in passing that the Broken Hill Water Supply contracts are specially valuable because there was no back-loading, and this is a practical answer to the conjecture raised by the defendants that the possibility of getting—not the contractual right to get—back-loading was a factor in fixing such a freight for Port Pirie.

I have now to consider from the standpoint of freight, some of the South Australian transactions.

(1) *Retail Dealers' Trade.*—The price in 1907 was 24s. 6d. to dealers, the f.o.b. price was 10s., to this the following additions should be made—wharfage 1s. ; haulage 4d. ; railage 2s. 6d. ; yard expenses I would allow at 1s. 3d: ; with 4d. standing expenses and 1s. further for screening, making 16s. 5d. ; this from 24s. 6d. leaves 8s. 1d. for freight. The defendants bring out the balance for this year for freight and management at 6s. 5d. ; if that is right, the previous year's business must have been on a purely philanthropic basis. The f.o.b. price was 7s. 6d., the additions claimed amount to 8s. 1d., that added to 7s. 6d. totals 15s. 7d. The price charged to dealers was 17s., so that according to defendants' contention they were content with 1s. 5d. to provide for freight and management. It is putting too severe a strain on my credulity to ask me to adopt that suggestion. Taking 8s. 1d. as the actual balance for freight in 1907, the excess is 2s. 9d. per ton ; the amount of trade done is left unfixed. The defendants suggest that it was 1,500 tons and, with Port Adelaide trade, about 2,000 tons in all, that was Mr. *Knox's* suggestion and is inserted in 19S. It may be right ; but if it is, the proportion of 6.38 per cent. to total trade is not maintained in South Australia. In that case the Victorian quantities ought probably to be largely increased. If, following defendants' assumption in 19S as to Victorian dealers' trade, that trade were calculated on the total Adelaide trade, it would be many thousand tons more for 1907. I do not know in what State proportions the dealers' trade was distributed ; there is doubt on this point, and so I do not work it out in total results, but leave it with the observation that a large excess in freights was obtained on the total quantity from the general

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public by the shipping companies somewhere. The f.o.b. price was 6d. in excess and although it is impossible to say with definiteness, or otherwise than by taking 6.38 per cent. of the tonnage for South Australia, how much is obtained from the South Australian public, the collieries got it. The dealers' trade at Port Adelaide on the defendants' own summary showed a balance of 7s. 5d. for freight and management. That is an admitted excess of 5d. over the scheduled maximum. When I use the word "admitted" as to excesses I mean only an admission that that is the effect of the evidence, not an admission that the evidence is true, nor an admission that no other charges could be made, though no others are suggested. The real excess in this instance however is greater still. To the f.o.b. price there are to be added wharfage 1s.; wharf expenses 1s.; screening 1s.; general expenses 4d.; making 13s. 4d. in all. The sale price is 21s. 9d. leaving 8s. 5d. for freight being an excess of 3s. 1d. over the reasonable rate and 1s. 5d. over the agreed maximum. In 1908, the Port Adelaide price is increased to 23s. 3d.; the f.o.b. price is 11s.; to this add 3s. 4d. making 14s. 4d., the balance now being 8s. 11d., or 3s. 7d. above the reasonable rate and 1s. 11d. above the maximum. In the Adelaide trade in 1908 the price to dealers was 26s.; to the f.o.b. price 11s., additions of 6s. 5d. should be made in all 17s. 5d., which leaves a balance of 8s. 7d. freight, that is 3s. 3d. excess above reasonable rate and 1s. 7d. above the maximum. In 1909 the position was the same. In 1910, the Adelaide price advances another 3d. making excess freight 3s. 6d. and the excess f.o.b. price 1s., altogether an overcharge of 4s. 6d. per ton.

(2) *South Australian Railways.*—In 1908-9 there were 133,000 tons a year at 17s. all round. The f.o.b. price was 11s., and adding haulage 4d., there remains 5s. 8d. freight which means an excess of freight to Adelaide of 4d. a ton on 75,800 tons amounting to £1,263 6s. 8d. Port Pirie, Port Augusta and Wallaroo, there is an excess of 5d. a ton on 52,700 tons equal to £1,097 18s. 4d. The f.o.b. price is 1s. too much, amounting to £6,650. This added to the excess freight gives £9,011 5s. per annum taking those two ports alone. Against this must be set the other portion of the contract. The defendants claim and I assume that as to Beechport and

Kingston and Port Lincoln there was an actual loss of 1s. 6d. a ton, paying coastal freight. To this I add 5s. 4d. the fair freight to Adelaide, a total set-off of 6s. 10d. a ton. This rate on 2,500 tons amounts to £854 3s. 4d. Then as to Port Wakefield, the admitted sum left for freight is 1s. 6d. which is 3s. 10d. below the reasonable rate and this diminution on 2,000 tons amounts to £383 6s. 8d., a total debit of £1,237 10s. Deduct this from £9,011 5s. and the net overcharge as the effect of the combination is £7,773 15s. For 1910-11 the only difference is in the quantity, it is 145,000 tons.

(3) *South Australian Government General Supplies.*—In 1907 the contract price for Adelaide and suburbs was 25s. 7d. for 6 months, the annual quantity being 1,750 tons. The f.o.b. price was 10s. add 8s. 5d. for proper additions making 18s. 5d., leaving a balance of 7s. 2d. for freight, being 1s. 10d. above the reasonable rate and 2d. above the agreed maximum. For 1908-9 the price is 27s. 2d.; the f.o.b. price being 11s., adding to this 8s. 5d. and deducting the result 19s. 5d., it leaves a balance of 7s. 9d. for freight, being 2s. 5d. above the reasonable rate and 9d. in advance of the maximum. At the end of 1909, the price advanced another 1d., the final excess in freight is 2s. 6d. per ton, and this added to 1s. excess f.o.b. price amounts to 3s. 6d. per ton combination overcharge.

(4) *Adelaide City Council.*—In 1907 screened coal was 26s. 3d.; against this is the f.o.b. price 10s.; wharfage 1s.; haulage 4d.; railage 2s. 6d.; wharf expenses 1s. 3d.; standing expenses 4d.; screening 1s.; cartage 1s. 10d., or 18s. 3d. in all, the balance is 8s. for freight, 2s. 8d. in excess of the reasonable rate and 1s. over the maximum. Engine coal was also 26s. 3d., but the cost is 1s. less as screening is omitted. The defendants admit that the balance here is 8s. 4d. or 1s. 4d. over the maximum. In reality, the balance is 9s., that is 2s. 8d. over the reasonable rate and 2s. ahead of the maximum. In 1908, the price is 27s. 9d. for screened and engine coal, the f.o.b. price being 11s. and adding 8s. 3d. as before making 19s. 3d., the balance for freight for screened coal is 8s. 6d., being 3s. 2d. above the reasonable rate and 1s. 6d. above the maximum. Engine coal cost them 1s. less, that is 18s. 3d., leaving 9s. 6d. for freight or 4s. 2d. excess above the reasonable rate, and 2s. 6d. above their own maximum. If we add 1s. excess f.o.b. to the excess

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freights there is in the case of screened coal a total over-charge of 4s. 2d. and in the case of engine coal 5s. 2d. a ton. The same prices prevail in the following year. In 1910 screened coal advanced 3d. and engine coal receded 1s. 6d. ; still leaving however in the case of engine coal an excess over the maximum on defendants' own admission. The price of small coal is noticeable in 1910. It is charged at 23s. per ton, the f.o.b. price is 7s. ; adding 7s. 3d. for charges as in the case of engine coal the sum is 14s. 3d., the freight balance therefore is 8s. 9d., that is 3s. 5d. above the reasonable rate and 1s. 9d. above the maximum. The defendants' figures really confess to 11d. above the maximum.

(5) *May Brothers.*—In 1907 the price of large was 19s. 9d. The f.o.b. price was 10s. to this should be added 1s. wharfage ; 1s. wharf expenses ; 4d. haulage (with doubt), and 4d. general charges, making 12s. 8d., leaving for freight 7s. 1d., which is fourpence less than is admitted by the defendants and is 1s. 9d. over the reasonable rate and 1d. above the agreed maximum. Small coal was charged at 16s. 9d. ; against this there is 5s. 9d. f.o.b. and also additions 2s. 8d., making 8s. 5d., leaving a balance of 8s. 4d. for freight which is 3s. above the reasonable rate and 1s. above the maximum. The defendants admit to the extent of 8d. above the maximum. The quantity is 400 tons. In 1908, the price of large coal is 21s. 3d. ; to the f.o.b. price 11s., we must add wharfage 1s. ; wharf expenses 1s. ; 4d. haulage and 4d. general charges, making 13s. 8d., leaving a balance of 7s. 7d., 4d. less than is admitted by the defendants. This is 2s. 3d. above the reasonable rate and 7d. over the maximum. Small coal is 17s. 6d. ; against this is 6s. 3d. f.o.b. price and 2s. 8d. additions, making 8s. 11d., a balance being left of 8s. 7d., of which 7s. 11d. is admitted. The excess above the reasonable rate is 3s. 3d. and above the maximum 1s. 7d. In 1909, large coal was 20s. ex steamer, which was 1s. less than ex heap. From this the deductions are 11s. f.o.b. ; wharfage 1s., and 4d. haulage, in all 12s. 4d., leaving a balance of 7s. 8d., namely 2s. 4d. above the reasonable rate and 8d. above the maximum, which the defendants admit. Small coal was 16s. 3d. ex steamer f.o.b., price 6s. 3d. allowances 1s. 4d., total 7s. 7d., leaving 8s. 8d. or 3s. 4d. beyond

reasonable rate and 1s. 8d. above maximum. Defendants admit 8d. above maximum.

In 1910 large coal is the same ; small coal is 1s. 3d. more, namely, 17s. 6d. The f.o.b. price has advanced to 7s., a rise of 9d. to the shipping companies to which they add 6d. more to the consumer. The final excess on large coal is 2s. 4d. freight and 1s. f.o.b. cost or 3s. 8d. a ton ; and for small coal 3s. 10d. freight, and an excess in f.o.b. cost proportionate to the large. I may have allowed 1s. too much in favor of the defendants in 1910 on this contract. I believe it was pure c.i.f.

(6) *Electric Lighting Co.*—In 1908 there were 6,900 tons small coal. Contract price 17s. ; the outpockets were 6s. 3d. f.o.b. price ; 1s. wharfage ; 1s. wharf expenses ; 4d. standing charges, leaving a balance of 8s. 5d. for freight, that is 3s. 1d. over the reasonable amount and 1s. 5d. over the maximum. Taking the excess f.o.b. price at 6d., the overcharge would amount to £1,236 5s. The defendants admit up to 5d. beyond the maximum. In 1909 the quantity was 5,888 tons, the price still 17s., the excess as before. In 1910 the quantity was 13,432 tons, the price 17s. 3d. This year the f.o.b. price is 7s., and with 2s. 4d. additions, equals 9s. 4d. for outpockets, and leaves 7s. 11d. for freight, that is 2s. 7d. excess above the reasonable rate and 11d. above the maximum. The defendants admit to within 1d. of the maximum. Adding to the excess freight say 1s. excess f.o.b., it totals 3s. 7d. over-charge per ton, which brings out the total over-payment to £2,406 11s. 4d.

(7) *Kitchen & Sons Limited.*—In 1907 they used 400 tons large coal at 18s. 9d. The f.o.b. price was 10s. ; wharfage 1s. ; wharf expenses 1s. ; 4d. general charges, making 12s. 4d., leaving 6s. 5d. for freight, being 1s. 1d. excess. In 1908 the price is 20s. 3d. ; f.o.b. price 11s. ; additions 2s. 4d. ; freight 6s. 11d., being 1s. 6d. in excess. In 1909-10 the same prices exist. The final over-charge 2s. 11d. makes £58 6s. 8d.

(8) *Nield & Hyde, Broken Hill.*—In 1907, engine coal was charged at 17s. 6d. ; f.o.b. price 10s., the only additions, 1s. wharfage ; 4d. standing charges ; the balance is 6s. 2d. freight, fair freight to Port Pirie 5s. 7d. ; the excess is 7d. in addition to 1s. on the f.o.b. price ; small coal was 13s. 6d., the f.o.b. price 5s. 9d., adding wharf-

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age 1s. and 4d. standing charges gives 7s. 1d. balance for freight 6s. 5d., the excess is 10d. freight and 6d. excess f.o.b. The total quantity is 5,000 tons, but I do not know how it is apportioned between large and small. The over-charge is certainly considerable. In 1908 the net price of large is 19s., the f.o.b. is 11s. with 1s. wharfage and 4d. standing charges, leaving 6s. 8d. for freights. The freight is 1s. 1d. in excess of the reasonable rate. Small coal is 16s. 3d., the outpockets being 6s. 3d. f.o.b., 1s. wharfage, and 4d. standing charges, leaving a balance of 8s. 8d. for freight or 1s. 5d. above the agreed maximum. The excess above the reasonable rate is 3s. 1d. a ton, and taking the excess f.o.b. to be 6d. on small, the over-charge on every ton of small coal comes to 3s. 7d. In 1909, it is the same thing for large coal. For small coal there is a discount of 5 per cent. which brings it to 15s. 6d. and reduces the total over-charge upon it to 2s. 10d. a ton. I am not quite sure if the same discount was given the year before. In 1910 it stands in the same position.

(9) *Walter Sully & Co.*—This is practically the same as Nield & Hyde. The quantity however is 1,500 tons.

(10) *New South Wales Railways* (*Broken Hill*).—In 1907 there were 2,300 tons of large coal charged at 18s. at Port Pirie; the outpockets were 10s. f.o.b.; 1s. wharfage, making 11s., and leaving a balance of 7s. freight or 1s. 5d. above the reasonable rate. The excess f.o.b. cost is 6d. so that the over-charge is 1s. 11d. per ton, amounting to £220 8s. 4d. for the year 1907. In 1908 the price was 19s.; outpockets were 11s. f.o.b. and 1s. as before, making 12s., and leaving 7s. freight with same excess of 1s. 5d.; add to this, 1s. excess f.o.b. the total over-charge per ton is 2s. 5d. on 1,500 tons making £181 5s. In the two succeeding years it is the same.

(11) *Sulphide Corporation.*—In 1908 very large quantities were taken, the contract being up to 1,600 tons a fortnight to the end of February 1910. I am told the actual quantity was 20,000 tons a year. I am not able to distinguish between respective quantities of large and small, but the general result may be seen. The price of large was 18s.; small 14s.; the outpockets were 11s. f.o.b., and 1s. wharfage, which left on large 6s. or 5d. beyond a reasonable rate. Small f.o.b. price 6s. 3d. and 1s. addition making 7s. 3d.,

leaving 6s. 9d. or 1s. 2d. beyond the reasonable rate. The excess f.o.b. was 1s.

(12) *Zinc Corporation Limited.*—In 1908 there were 12,000 tons large coal charged at 19s. 6d. Here the defendants admit excess of 3d. a ton freight above the agreed maximum, which is 1s. 11d. above reasonable rate, and this being added to 1s. excess f.o.b. amounts to 2s. 11d. per ton over-charged, the total over-payment being £1,750, which is the same for 1909.

(13) *Broken Hill Proprietary Co.*—In 1908 the price of large coal was 16s. 6d., the only outpocket was f.o.b. cost 11s., making the freight 5s. 6d. This is the same as the Water Supply Company. Although I have no moral doubt that 5s. 6d. was an extremely good freight, yet as I have established the extreme margin of reasonableness at 1d. more, I reckon the whole net excess at 11d. per ton, the quantity being 110,000 tons per annum, and this continuing for three years the total over-payment amounted to £15,125.

(14) *Broken Hill Junction North.*—In 1908, there were 4,500 tons large and small, price 18s. and 14s. 6d. respectively. Outpockets 11s. and 6s. 3d. respective f.o.b. prices; 1s. wharfage, leaving 6s. freight on large and 7s. 3d. on small, being 5d. excess on large and 1s. 8d. excess on small, besides 1s. excess on large and 1s. excess on small f.o.b. In 1909 the same quantity; price 19s. large; 15s. small; the outpockets are the same, making 1s. 5d. excess on large and 2s. 2d. excess on small with the same excess f.o.b. In 1910 the same quantities, prices 19s. large as before and 15s. 6d. small, an advance of 6d., the f.o.b. price having risen 9d. The excess freights now stand 1s. 5d. on large, and 1s. 11d. on small.

(15) *North Broken Hill.*—In 1908, 7,500 tons of large at 18s., leaving 6s. as admitted for freight, that is 5d. excess freight and 1s. excess f.o.b.

The same in 1909 and 1910.

(16) *Broken Hill and Suburban Gas Co.*—Quantity 2,500 tons per annum, price 19s. with admitted 7s. freight and excess of 1s. 5d. per ton freight and 1s. f.o.b. That is the same for the two following years.

With regard to WESTERN AUSTRALIAN freights. McIlwraith McEacharn's contract with the Railways for 1904-5 was for 15s. 4d.

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for all ports. I assume coal was 7s. 6d., that would leave 7s. 10d. freight for all ports 30,000 tons Fremantle, 5,500 tons Geraldton, 3,500 tons Albany, 2,500 tons Bunbury, the tender was for one year only. The Adelaide Steamship Co. tendered at 14s. 8d. but restricted the collieries. Howard Smith & Co. tendered at 15s. 10d.; McIlwraith's tender being accepted; the question is whether it was remunerative. That seems to be answered by the renewal on March 18th 1905 (Ex. C1) by which the term of contract was extended for 2 years further, bringing the operation of the contract down to 22nd April 1907. In 1907 however, the combined agreement was in force, the f.o.b. price had advanced by 2s. 6d.

In 1907 the tender of McIlwraith McEacharn & Co., dated 29th January 1907, was as already stated 18s. 11d. without wharfage and for all ports. This being an average, Fremantle alone would be less. The f.o.b. price was 10s. except Seaham which was 9s. 3d. (see letter of 24th January 1907, Chapman to Hunter X. p. 29). The defendants in their summary 19S have taken the f.o.b. price at 10s., which I think is substantially right. The balance is 8s. 11d. for freight which means a little less for Fremantle. The tender of the Adelaide Steamship Co. is 19s. 5d. all round, which would mean less than 9s. 5d. for Fremantle. The Melbourne Steamship Co. tendered at 19s. 10d or 9s. 10d. for Fremantle. Assuming the tenders of the Adelaide Steamship Co. and the Melbourne Steamship Co. to be genuine and honest tenders, *the very highest possible freight to Fremantle would be* 9*s.* 10*d. and would average very much less.* In October 1908 tenders were called, for 1, 2 and 3 years for Newcastle coal. On 24th April by letter Cant to Appleton the price f.o.b. had been fixed at 11s. for 1 or 2 years with 12s. for the 3rd year for the Western Australian Railways in substitution for a previous fixation of 11s. for the first year and 12s. for the second and third years. On 29th October McIlwraith McEacharn tendered 21s. for Fremantle alone for one year and separately at the same price for two years. Verbal negotiations ensued resulting in McIlwraith & Co. tendering at 19s. for the first and 19s. 6d. for the two succeeding years. The other tenders for this contract have already been mentioned. That left McIlwraith's freight at 8s. for one year, and 8s. 6d. for the two next years. The quantity contracted for was 23,000 tons for the

first year and 40,000 per annum for the 2nd and 3rd years. In the same amended tender Geraldton was contracted for at 24s. The Geraldton price had been separately tendered originally, while the Fremantle tender was 21s.

Another instance which indicates the normal and payable freight to Fremantle is that with the Perth Gas Co. in 1907. From July 1905 to March 1908, McIlwraith supplied to the Gas Co., Wickham Hetton and Stockton large coal at 17s. 6d. The f.o.b. price is taken by the defendants to be 10s. I am not sure whether it was 10s. or 9s. If the former it left 7s. 6d., if the latter 8s. 6d. for freight. The quantity was 300 or 400 tons a month. The Perth City Council was supplied with coal in 1907 for delivery in the city which after deducting 10s. f.o.b. and proper additions claimed by defendants and conceded by the Crown left the freight at 8s. 6d. Making up my mind therefore as well as I can on the materials before me, and bearing in mind the possible competition of Collie coal, remembering also that some of the freights to which I have referred were fixed after the formation of the combined agreement, and assuming that traders do not ordinarily carry on such extensive operations over so lengthened a period as is covered by those freights without a sufficient recompense, I should be of opinion, if it were necessary to come to a definite conclusion on the matter, that the limit of reasonable freight from Newcastle to Fremantle is passed after 9s. In saying this I am giving a long margin to the defendants. The reasonable freight from Newcastle to Melbourne, I have stated to be 4s. 2d. at most. This provides for the two terminals as well as clear sea mileage. For additional clear sea mileage I add what I have already and otherwise found to be proper, viz., the additional 1s. 2d. to Adelaide, which is a distance of 508 miles. Now, if the further distance of 1,378 clear sea miles Adelaide to Fremantle be added at the same rate, it means approximately 3s. 2d. more, and adding 4s. 2d. 1s. 2d. and 3s. 2d. we get 8s. 6d. which is practically the defendants' price. I merely put this as a corroborative test of the accuracy of the conclusion otherwise arrived at. It is not necessary however for me to fix the freight to Fremantle definitely as I am not really concerned with definite amounts of excess except for the purpose of determining the question of substantial detriment. The Western Australian

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contracts are more easily dealt with in this respect than those of Victoria and South Australia. Before referring to their excess, I again have regard to Mr. Northcote's letter to Scott Fell on 19th February 1907 (in Ex. O1). He quotes for Co-operative coal for Melbourne 15s. 6d., Adelaide 16s. 9d., Port Pirie 17s. 9d. and Fremantle 21s.; the Melbourne quotation allows 5s. 6d. for freight, Adelaide 6s. 9d. I pass by Port Pirie as wholly exaggerated. Fremantle is 11s. *The Melbourne freight* 5*s.* 6*d. is* 1*s.* 4*d. beyond the reasonable rate, namely* 4*s.* 2*d.*; *Adelaide is* 1*s.* 5*d. beyond the reasonable rate, and deducting, say* 1*s.* 4*d. the Melbourne excess, from* 11*s. charged for Fremantle there is left* 9*s.* 8*d. Even this figure is beyond all reason, after allowing* 4*d. for standing expenses, but it is less than the freights admitted by the defendants in their summary.* They admit that in 1908 for large coal they charged the Perth Gas Co. 10s. for freights, according to the way the evidence stands, and that they charged the Perth City Council 10s. and the Westralia Ironworks Limited 11s. They say and the Crown admits that 8s. 11d. was the amount of freight for the large coal in the Government contract. But in the same year the Government was paying 18s. for small coal, the f.o.b. price of which was 6s. 3d., thus leaving 11s. 9d. for freight. They also charged the Gas Co. 11s. 9d. freight for small. Besides these the supplies to the City Council at the various sites mentioned in an earlier part of the judgment have been analysed by the Crown in Ex. E10 in which the charges claimed by the defendants have been adopted. I am not clear whether anything extra should be allowed in respect of Parkerville and the sanitary site. I think not, but, as I am not certain, I build nothing on them in this respect, beyond believing they are at least as high as the city deliveries. As to the city deliveries I need say nothing more about large coal; but as to the small coal bagged, the balance for freight on 6s. 3d. f.o.b. price is taken by the Crown on the basis of defendants' allowances as 16s. 8d. ex ship and 14s. 3d. ex yard. I allow 16s. 2d. ex ship, although it is hardly likely to have been bagged and 13s. 11d. ex yard. That is not only grossly exorbitant, but is far beyond the agreed maximum namely 13s. Small coal loose is very much less, being as I find 10s. 9d. ex ship and 9s. 9d. ex yard.

In 1909 the defendants admit that upon the evidence for large coal they charged the Perth Gas Co. 10s. ; the Perth Council 11s. and the Westralia Ironworks 10s. 6d. for freight. Besides this they charged the railways 11s. 9d. for small to Fremantle, and 13s. for large to Geraldton, the agreed maximum of which is only 2s. more than Fremantle. For the City Council it also appears that in respect to small coal bagged ex yard the amount for freight was 14s. 11d. or 1s. 11d. over the maximum. For small coal loose ex ship 11s. 9d., and ex yard 10s. 9d. In 1910 the defendants admit for large coal 10s. for the Gas Co. ; 11s. for the City Council and 11s. for the Ironworks. Besides this the Government was charged 11s. 9d. for small coal Fremantle, and 13s. for large coal Geraldton. The City Council for small coal bagged delivered in city was charged in 1910 14s. 2d. ex yard for freight, which is 1s. 2d. above the maximum and loose was charged 11s. ex ship and 10s. ex yard as freight. The cost price for small this year was 7s.

So far I have referred only to the Western Australian freights. But the excess f.o.b. prices in themselves constitute a heavy detriment for which the whole combination is responsible ; and even if the freight were moderate the excess prices charged to consumers would render the shipping companies and the Vend alike liable for the consequences. Taking not all the tonnage of large coal, but simply the tonnage stated in defendants' summaries, viz., 35,800 for 1907 to 1910 inclusive, the f.o.b. overcharge is £895 for 1907, £1,790 for 1908, 1909 and 1910 respectively, in all £6,265 for the period. I do not stop to reckon up the excess freights—but it is easily seen they are considerable.

We now come to QUEENSLAND.

So far as freights are concerned, the evidence of excess is meagre, the primary proofs submitted consist of two contracts with Chillagoe Railway Co., Cairns. One contract was made 16th February 1906 by the Adelaide Steamship Co. (G5) and the other on 1st February 1909 between the same parties. There is no doubt that the first contract, though made before the combined agreement, and even before the Vend was fully formed, was entered into after steps had been taken to form the Vend and being for three years with possible further continuance. There is no doubt also the Adelaide Steamship

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Co. would be prudent enough to make sure of the future. I think therefore that as against the Adelaide Steamship Co. this contract is some evidence as to freight. The defendants in 19S say and the Crown in E10 admits that 9s. was the balance for freight. But as this was before the combination, and the only precombination evidence, I ought not to act upon it as regards the other defendants. *The other contract was made during the combination* and all the defendants are affected by it; both sides agree that the balance for freight is 8s., the contract price being 19s. and the f.o.b. cost 11s. The nature of the contract has to be carefully considered, the Chillagoe Co. was bound to purchase all its coal from the Adelaide Steamship Co, and ship all its products in "Steamers controlled or nominated by the contractors," by a fortnightly service; the freights for the Chillagoe products were fixed and the Chillagoe Co. was to bear all harbour dues if imposed. This contract was therefore a very special contract, there was not merely a prospect, but a certainty of backloading that could be definitely counted on, and I am not prepared to say that anything over 8s. would have been an excessive freight for coal to Cairns, a distance of 1,348 miles from Newcastle. I should think it would be comparatively low, but in the absence of evidence to the contrary I cannot assume it was an actual loss. If it were a loss, not only would the ordinary presumption be reversed, but it would be strange from the standpoint of the Chillagoe Co. That company must be considered as having had a fair idea of reasonable freights for their own products to Brisbane and Sydney, namely, copper, copper matte and lead; and these products have to compete in the open market with similar commodities elsewhere produced. If a loss on coal is to be piled on to the freight of these commodities as a recompense to the carriers, it would, at first sight, at all events, handicap the Chillagoe Co.'s products in the market. Of course all this is possibly capable of special explanation, but in the absence of that I have to judge of the meaning of defendants' acts by the light of ordinary considerations. These lead me to infer that the sum charged for freight for coal, copper and lead are neither under cost, nor excessive. Starting with this as a base, I come to some Townsville contracts. I need only say that I take the figures as admitted by the defendants. If I had to state a definite

conclusion as to which set of figures I thought was more correct, I should be disposed to adopt the Crown's figures in E10 rather than the defendants' figures in 19S. The defendants admit upon the evidence that in 1908 the balances for freight were as follows :— Queensland Meat Export Co. 3,500 tons, 10s. 9d. ; Townsville Harbour Board, 3,600 tons, 11s. ; Townsville Gas Co., 3,000 tons, 11s. ; Mount Morgan Co., 6,000 tons, 10s. ; the Chillagoe Co. was 3,000 tons. In 1909, there is admitted freight to Townsville Government Railway, 750 tons, 10s. ; The Queensland Meat Co., 6,500 tons, 10s. ; Harbour Board, 3,600, 11s. ; Gas Co., 3,000 tons, 11s. In 1910 the Harbour Board, 3,600 tons, 11s. ; Gas Co., 3,000 tons, 11s. ; Townsville is 160 miles nearer Newcastle than Cairns and therefore the face money difference in freight is not as great as the real difference. I cannot avoid coming to the conclusion that the Townsville freights were excessive. In 1907, the balance for freight on 880 tons for the railways was 9s. In 1909, it was 10s. for 750 tons. The freight to the Meat Export Co. for 5,000 tons in 1907 was admittedly 8s. 6d. Why it rose in 1908 to 10s. 9d. and stood in 1909 at 10s. is difficult to understand in the absence of explanation except on the basis that the latter prices were unreasonably high. I have no doubt at all that 11s. was exorbitant, so was 10s. 9d., only to a less degree, and I feel no real doubt that 10s. was excessive for Townsville. I observe in the Schedule in the combined agreement that 12s. 6d. is the maximum for Cairns and 17s. for Townsville, a difference of 2s. 6d. That has relation only to large coal at 7s., but no other maximum price for large coal is fixed, and none for small except for small coal at 5s., where there is a difference of 2s. If these stipulated differences afford a fair or even an approximate guide as between the two places, the conclusion I have stated is immensely strengthened. The f.o.b. excess on large and small coal amounts for the period mentioned to a considerable overcharge. For this, as in the case of Western Australia, all the defendants are responsible.

TOTAL YEARLY OVER-CHARGES.

It is extremely difficult, if not impossible to say just how much the public have been over-charged by the combination. There are how-

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ever some figures which satisfy the mind that the total amount improperly gathered in by the united efforts of the collieries and the shipping companies must have reached a very high figure. I do not feel very much concerned as to my ultimate conclusion what precise figure the excess works out to, but an attempt may be made to get a rough idea. The year 1908 is the perhaps least disturbed year, and at all events appeals to me as giving the most easily treated material for obtaining a broad impression. Exhibit 33C shows that in that year the total Newcastle trade inter-State amounted to 2,111,100 tons. That exceeded the estimated requirements for 1908 which the shipping companies sent to the Vend on 15th November 1907 (Ex. X. p. 172). The total there estimated was 1,578,750 tons, composed of 1,175,000 tons of large coal, all first class, and 403,750 tons small coal. The foreign exports took practically no small coal, and therefore I could not say with any precision how much of the actual export was large and how much was small. But the trade exceeded the estimate, and the estimate separates the two classes, and so I take in the first instance the quantities there stated.

Now in 1908 the excess f.o.b. price on large coal was 1s. a ton. This reckoned on 1,175,000 tons amounts to £58,750. The excess on the small which was then 6s. 3d. a ton, and had little or no foreign sale was not less than 1s., rather more, a ton and so taking it at 1s. the amount in money on 403,750 tons comes to £20,187 10s. in all £78,937 10s. The balance of coal actually exported inter-State according to Ex. 33C was 532,350 tons. Of course a large proportion—doubtless the greater portion of it—was large coal. But whether large or small coal it is to be reckoned at 1s. excess, and that amounts to £26,617 13s. The sum of these over-charges is £105,555 5s.

So much for the collieries. The freight total cannot be figured out, but looking carefully over the broad results already stated, it can be safely asserted that the shipping companies have not failed to better their instruction.

How Far Pre-Combination Prices are a Guide.

A view was presented by the defendants as qualifying and practic-

ally outweighing all the circumstances to which I have referred. I mean the suggestion that the prices obtained prior to 1905 indicate that the lower prices of that year must in all probability be due to some abnormal circumstance. No doubt previous prices are a portion of the facts to be considered and weighed; but they must be taken in conjunction with all other circumstances, and the similarly or dissimilarity of surrounding conditions are important in determining whether the defendants' suggestion should be adopted. There is evidence of prices going back many years, but of course the further back they go the less convincing they are, because trade conditions are certainly not constant for many years together. The world trade, and even the domestic trade, are subject to normal developments, as well as unexpected changes. Production and means of transport alter, and in the later portion of the period we are to consider, new mines were brought appreciably into the sphere of competition. Ultimately, as I understood, the defendants placed very little or no reliance on prices before 1901 or perhaps 1900. The f.o.b. prices before 1900 would not help them very much. The Chamber of Commerce Report for 1910-11 gives at p. 61 the Newcastle selling price for the various years and they vary greatly. For instance, in 1891 the first old Vend year, it was 11s.; in 1892 it was 10s.; in 1893 it was 9s.; in 1894 it was 8s.; in 1895 it was 7s.; in 1896-7-8 it was 7s. 3d. and 7s. 6d., and in 1899 it was 8s. Maitland was not yet a disturbing factor. Then came two events, the Boer war and the formation of the new coal Association. In 1900 prices were 8s., 10s. and 12s. In 1901 and 1902, the declared price was 11s. and in 1903 it was 10s. I stay there a moment because Mr. Ford has told us that the war not only made the trade particularly good in 1900, but also created an artificial demand that lasted as he thinks for 2 years. The coal Association also as I have pointed out still affected 1903.

It appears from the Chamber of Commerce report that notwithstanding the declared price of 10s., coal was sold in 1903 at 8s., 9s. and 9s. 6d.; and in 1904 at 9s. 3d., 9s. 6d. and 9s. 9d. These are reductions that were announced; there were others that were not, because the evidence shows that in 1904, there were rebates of 1s. 6d.

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Mr. *Blacket* handed in a very useful document, being extracts from the summary of summaries, and it exhibits in a succinct form the prices of 1902, 1903, 1904, so as to compare the prices up to 1905 with those afterwards. The comparison, when considered with all the surrounding conditions, does not lead me to the conclusion the defendants desire.

Take first the Metropolitan Gas Co., the first in Mr. *Blacket's* list. In 1902 the declared f.o.b. price was 11s., and the consumers' price 14s. 9d. ; but it would be absurd to imagine that 3s. 9d. was the freight charged to compensate for everything. The next year 1903, the declared price was 10s. and still the consumers' price was 14s. 9d., in 1904, the declared price was still 10s. and the consumers' price was 14s. 7d. In 1907 when the declared price was 10s. net, the delivery price was 15s. 2d., and in 1910 the declared price being 11s. the price to the consumer is 16s. 2d.

The question becomes insistent :—"*Did the shipping company who supplied the Gas Co. during* 1902 *and later years, lose money all the time*?" *Assuredly not.* But if not, the fact that other consumers were charged more is hardly a ground for assuming the reasonableness of the higher rates. On the other hand take the next item on the list, the Footscray Gas Co. In 1902 it was charged 21s. 3d. as against the Metropolitan Gas Co. 14s. 9d. a difference of 6s. 6d., and 19s. 9d. in 1903 as against 14s. 9d. or a difference of 5s., and 18s. 9d. in 1904 as against 14s. 7d., a difference of 4s. 2d., and so on. So that it is difficult to accept 18s. 9d. as a just criterion even for 1904. The price to the Footscray Gas Co. comes down to 14s. 9d. in 1905 which approximates it to the Metropolitan price, the two together seem to show that price is nearer the right amount, having regard to the net f.o.b. price then paid ; the balance for freight as will be seen was 6s. 3d. which is still more than is reasonable.

The Metropolitan Gas Co.'s price in the absence of some explanation by the shipping companies is a real obstacle not in itself conclusive, of course, but very substantial, in the way of any presumption in their favour, and helps to lead me as before to an inference against them.

Then take the case of the Victorian Retail Dealers typified by Ramsay. In 1902 the price is 23s. 6d., in 1903 it is 20s., in 1904 it drops to 16s. If 16s. were a normal price in 1904 why was it raised in June 1906 to 16s. 9d., and in July 1906 to 19s. 3d. even allowing for the discount in certain cases; and why further advanced in January 1907 to 21s., higher than in 1903, and still further to 22s. in 1909? Reckoning 7s. 6d. as the net f.o.b. price, and adding 2s. 4d. for additional outpockets, as explained, the total sum to be provided for in 1904 is 9s. 10d., and the balance 6s. 2d. is for freight and management on a selling price of 16s., which is an excess of 2s. above a reasonable amount.

Looking down the prices of 1904, they are decidedly lower on the whole than those of 1902 and 1903. On the other hand they are not so low as in 1905, but lower than in subsequent years. But in 1904, Maitland was distinctly beginning to assert its influence—not a ruinous influence at any time, but at this time perhaps appreciable—through the oversea trade. Scott Fell however were a potential danger. It was proved in direct examination against Howard Smith & Co. only—and therefore I do not carry the direct examination as to this beyond this company—that in 1903 Scott Fell & Co. got a Broken Hill contract for the assignment of which Howard Smith & Co. paid a very substantial sum. Mr. *Campbell* was however, told generally by Lane, in cross-examination (p. 548) that before 1906 Scott Fell had held an inter-State contract which they transferred. In 1904 Scott Fell & Co. were open to do inter-State business if they could get it (p. 444). In fact on 16th September 1903 they tendered (Ex. 58), to the Metropolitan Gas Co., on that company's conditions, to supply delivered best large at 16s. 4d. and best small at 12s. 7d. Their fleet was large. Their balance-sheet (16C) shows the list of vessels. Their turnover was £250,000, but none inter-State in 1905, though they had the means of doing it if they got an opening. In January 1906 they succeeded in getting another Broken Hill contract. Their course of inter-State trade did not run smooth, and ultimately their business and effects fell into the hands of the inter-State companies (see pp. 557, 561 and 584 among others).

This is one of the instances where the defendants and they alone

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could have given clear information and assistance, beyond what has been given.

CONCLUSIONS AS TO PUBLIC DETRIMENT WITH RESPECT TO PRICES.

On the whole, taking into full and careful consideration the contracts and prices before 1905 and weighing them in the balance along with others, I arrive on the question of fact as to reasonableness of the prices charged to the public, at the conclusions I have announced. Indeed the more I have examined the facts, and the longer I have pondered over them, the more satisfied I am that *in* 1904 *the defendants were only getting down towards reasonably competitive prices to the consumer*, and that in 1905, though the net f.o.b. levels were somewhat lower than fully adequate price warranted, yet the ultimate prices charged to the consumer, *i.e.*, when the shipping companies had added their freight charges, were on the whole nearer a reasonable standard—nearer a reasonable effective competitive standard—than in 1904. Certainly as to freights, the shipping companies, though conceded by the admission to be free competitors, were not engaged in laying violent hands on each others' business. *Therefore, unless they were in* 1905 *deliberately losing money in order to smother Scott Fell & Co.—which of course they do not admit—and people do not usually throw away money unnecessarily—it is difficult,—too difficult for me at all events—to accept their suggestion on the materials they have left me.*

I wish to say at this point that, though I have endeavoured to work out as precisely as I could the various steps contested and leading to the result, yet I have made large mental allowances for possible errors of excess, but I believe if I have erred in arriving at the sums I have fixed, it is distinctly on the side of liberality to the defendants.

Even if the various steps of calculation in the intricate circumstances before me were reduced in amount—and considerably reduced—there is such an enormous margin of excess and so many circumstances concurring in the same result, that *I would entertain no doubt whatever the public have borne, are bearing, and will unless the combination is restrained, continue to bear, a heavy detriment in regard to the cost of coal, attributable entirely to the existence of*

the defendants' combination. The indirect pecuniary loss though inevitably great, I leave out of consideration, and here speak only of the direct payments, which have passed from the public—individually and corporately in various forms of aggregation—into the pockets of the shipowners, and by them partly retained and partly distributed to those associated with them in the combined scheme.

The price though generally the most important detriment is however not the only one arising from the combination. There are others quite distinct and extremely important, though secondary to price.

PUBLIC DETRIMENT FROM RESTRICTION UPON CHOICE OF COAL.

The stipulation that the Vend should not be called upon to deliver coal from any colliery that has reached the limit of output assigned to it by the Vend under any agreement existing between the collieries gave rise to a very real restriction upon the choice of coal which the public otherwise had. Instances have presented themselves in the evidence quoted for other reasons. The shipping companies, having once entered into the stipulation with the collieries, were naturally compelled for self-protection to refuse to contract for coal specially desired in any quantity. This new practice was put in force early in the history of the combine.

The Western Australian Government on 4th January 1907 called for the tenders already referred to. The specifications named certain pits, 16 in number, and provided that the Chief Railway Storekeeper should have the right to determine from which of the enumerated collieries the supply should come.

But the Adelaide Steamship Co. in tendering said :—" We cannot undertake to supply coal from any one pit but guarantee that the coal delivered shall be from one or more of the pits specified in the general specifications."

McIlwraith McEacharn & Co. with their tender also stipulated for the right to load coal from such of the schedule pits as it might be obtainable from at time of steamers' loading.

The Melbourne Steamship Co. did not make that stipulation though they knew quite well they could not ensure delivery as specified. Their prices made that event sufficiently safe.

On 4th May 1907 (Ex. X. p. 64), Newman for the shipping com-

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panies wrote to the Secretary of the Vend saying:—"I have to inform you that the contract of Messrs. McIlwraith McEacharn & Co., *on behalf of my Association*, has been accepted by the Western Australian Railways for 12 months from the 14th March 1907 on the basis of 10s. per ton cost of coal f.o.b. Newcastle." He stated the quantities, and quoted verbatim the clause as to pits and quantities which had been substituted for the original clauses. This was replied to on 9th May 1907 (X. p. 67) and the Vend approves of the substituted clauses. The letter of 4th May is relied on by the Crown as strongly evidencing the nature of the shipping Association. Whatever else the shipping companies and the Vend were doing, they were not deceiving themselves. I have referred in the proper place to this contract in relation to prices and there I indicated there was some doubt as to the tenders of the Adelaide Steamship Co. and the Melbourne Steamship Co. being genuine and honest. I have now to state my definite opinion on this subject. And I need say nothing about the Melbourne Steamship Co. which is not a defendant. The tender of the Adelaide Steamship Co. at all events was undoubtedly misleading and intended to be misleading. On the face of it, it appeared to have come from a real competitor. It followed all the form of a genuine effort to obtain the contract at the lowest prices the tenderer was willing to take, it enclosed bank cheques for £2,800 as required, and undoubtedly the Western Australian Government, reading the tenders and not knowing the truth as we know it now, would inevitably be deceived in thinking that of two rival tenderers, McIlwraith McEacharn & Co. was the lowest, and in face of that competition, and the apparent unwillingness of the other shipping companies to engage in the business at all, the Government would be less inclined to question the advanced price. That advance was, as we have seen, no less than 3s. 7d. a ton on 56,000 tons. And in addition to that there was the double refusal to specify pits. Yet, here we find in the correspondence I have mentioned, an admission written by Newman of Howard Smith & Co. who normally would have nothing to do with the transaction, that McIlwraith McEacharn & Co. made the contract on behalf of the shipping Association. The apparently fraudulent nature of those

tenders induced me to specially invite some explanation. None has been offered, and I can only take the matter at its low face value.

The tenders to the City of Melbourne show the restriction of choice very distinctly. In April 1906, the Adelaide Steamship Co. contracted for one year for large coal supplied from the following pits: "Abermain, Hebburn and/or Aberdare at contractor's option," and in another tender " A.A., Stockton, Hetton, Abermain and/or Hebburn pits at contractor's option." This was a limited range, giving some security to the purchaser—and some elasticity to the Vendor. In February 1907 Howard Smith & Co. tendered " Newcastle pits at our option." This was done notwithstanding the term in the specification that pits were to be specified. At the same time, the Adelaide Steamship Co. named 17 Newcastle and Maitland pits, with " and/or " between each two, and obtained the contract. In May 1907 the Adelaide Steamship Co. repeated that stipulation for the remainder of the year. On 31st October 1907 Howard Smith & Co. tendered to the Council for a year's supply. The Council's tender form required the pits to be named with respect to Newcastle coal, but the letter accompanying the tender said " we regret we are unable to specify pits from which the coal would be drawn."

The Adelaide S.S. Company on the same day wrote " Pits to be specified. Owing to the altered state of the coal trade at Newcastle, and the impossibility of obtaining coal from particular pits (which we have previously been able to do) we are unable to specify pits, but would supply the best coal obtainable with steamers' ordinary despatch in loading. The coal would be drawn from mines from which the port of shipment is Newcastle." The tender is from pits :—" the port of shipment of which is Newcastle." Subsequently we find tenders are for coal drawn from " Mines, for which the port of shipment is Newcastle." Huddart Parker on November 4th 1907, in tendering to the Victorian Government for Commonwealth and State Services, declined to do more than supply the best coal they could obtain with steamers' ordinary despatch in loading." No one would for a single moment imagine they had pre-arranged with the collieries that despatch should be controlled by the Vend allotment. The ostensible reason given in the letter

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accompanying the tender (X.2) was couched in these terms:— "We regret however that owing to the unsettled state of affairs with the miners in the Newcastle district, and the impossibility of our being able to contract for our supplies of any particular class of coal." I do not for a moment accept that as an honestly given reason. It said nothing whatever of the allotment difficulty and threw the whole of the responsibility for the restricted choice on the miners. On the same date, Howard Smith & Co. wrote, that they had to eliminate clauses 2, 16, 17, 18, and 19, also 21 and 24 of the Conditions of Contract, just as Huddart Parker & Co. had done.

The reason given was "owing to the disturbed conditions now existing in the coal trade at Newcastle," and they add:—"As we find it almost impossible to obtain coal from any particular pits, we can only offer to supply your requirements with the best coal available during the loading of our steamers at Newcastle."

Again, no one would understand from this, that there had been a bargain as to allotment, which was the real cause of the difficulty. The insincerity of the ostensible reason simultaneously advanced by these two Shipping Companies is shown by the recurrence of the stipulation in 1908 for 1909. The true cause was industriously concealed. And with what intent? I have already made repeated reference to the struggles on the part of the Shipping Companies to induce the Vend to break through the restriction and the general persistence of the Vend in adhering to it. On occasions such as the Western Australian Contract, the Vend gave an assurance to supply. But as appears from the Conference of July 1907, the restriction was as a general thing adhered to, and the contracts were made on that footing down to 1910 inclusive. There is an instance in the Vend's minutes of 29th May 1907 (Ex. I. p. 119), which as evidence affects the Vend only, stating that the Hetton Company had to refuse trade owing to the Vend allotment.

PUBLIC DETRIMENT ARISING FROM SHORTAGE OF SUPPLY.

The question of shortages is closely connected with restriction. When to the limitation of the Vend allotment there is added the provision for exclusive purchase from the Vend, the danger

of shortage is immensely increased, the public are thus left entirely in the hands of the Vend, and this Association is free from the motive for relaxing its limitation which would spring from the possibility of outside supplies. It has been urged on behalf of the Shipping Companies that the allotment regulation is purely a Vend arrangement and not a creation of the combined agreement; that the Shipping Companies found that instituted and had to accept it, and make the best of it, and at times tried, as I have pointed out, to get rid of it, and so, say the Shipping defendants: "We are not responsible for it." The colliery defendants say likewise among other things:—"Whatever injury has been or is occasioned by it, is the result of our own independent Vend agreement and as that *per se* is not being attacked we are not assailable in this action." But that argument cannot prevail. A consumer prefers for the purposes of his business coal from pits A. B. & C., and finds that coal from pits X. Y. & Z. are altogether unsuitable. He is told that he cannot rely on having all or any from the pits he desires, but may have to take some or all from the pits he disapproves of, and take them at the same price because the Vend classes them together. In such a case, if ordinary competitive shipping conditions existed, he might choose between what is for his purpose second or third rate coal, at the top price, and Southern or even Western coal at a less price. That possibility is a powerful antidote against autocratic refusals to depart from the allotment rule, such as we have seen evidenced. But where each group for its own objects makes and adheres to *a compact of mutual exclusiveness, they form, so to speak, the corresponding blades of huge commercial shears that cut off all approach to relief from despotic prices of the Vend, as well as those of the Shipping Companies.* And not only are prices heightened but shortages are likely to occur. We have just partly seen how the Shipping Companies feared and felt them, and tried to some extent to provide against them.

That shortages occurred in fact is undeniable. At the conference of July 1907 (X. p. 105), Mr. Forsyth correctly points out how the difficulty arises. Mr. Northcote stated that the previous week his Company had been advised that they could not get coal and were subsequently informed that as several oversea steamers

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had not turned up they would be able to load a large amount. He then said what seems to me to be plain common sense, "It seems very hard that our clients' works should be liable to absolute stoppage, if these oversea steamers had come in." And then he adds:—"I venture to say there would have been a great outcry if such a thing had happened." Mr. Forsyth put his finger upon the right note when he said in reply:—"It always goes back to the initial stage, you estimated." That means that at the beginning of the year or before, the Steamship Companies give to the Vend an estimate of their probable requirements including the probable monthly instalments, the Collieries allow for that, and knowing that the Steamship Companies undertake absolutely not to purchase elsewhere, arrange as far as possible for all the rest to go foreign. Sometimes a particular colliery complied unwillingly (see Earp's letter to Murrell 6th March 1907 (O1) and Ex. I., p. 91). Then if the inter-State actual demand happens to exceed the estimate it cannot be met if the foreign demand requires the coal. It would not be an accurate answer to say that if the demand increased fresh pits or shafts or adits might be opened. There is a clause in the Vend agreement to which I should refer, though not for the purpose of affecting the Shipping Companies as part of the Combined agreement. It was not part of that agreement but it is material in showing the impossibility of making good any deficiency by the means mentioned and also as affecting the members of the Vend with regard to their knowledge of the circumstances. Clause 21 is in these terms:—"No member shall open up any new winding shaft pit or adit on any of the Colliery properties hereinbefore named nor shall any member lease or let on tribute any part of any Colliery property on any agreement other than those disclosed by such member to the Association in writing prior to the execution of these presents the intention of the parties hereto being that as the pits already opened are more than sufficient to supply the existing trade no fresh pits shall be opened on any of the properties hereinbefore named. Provided however that this clause shall not prevent any member from opening fresh pit or adit to maintain his allotted output should he be or appear likely to be rendered

unable to maintain the same owing to exhaustion of coal accident or other similar cause."

This contracts the possible production, and as may be gathered from the conferences and correspondence no suggestion was ever mooted to open fresh pits or shafts or adits.

And *whatever the pressure for more coal, the Shipping Association must not go outside to get it. This is an imperative bar.*

SHIPPING COMPANIES' ADMISSIONS OF PUBLIC INJURY FROM SHORT SUPPLY.

The telegram sent by Howard Smith to Cant on 20th August 1907 (Ex. X. p. 143) which is a month after the vigorous arguments of the July Conference, puts the position against the defendants as strongly on this point as any presentation the Crown has ever made. These are its terms :—" Steamers, *Mintaro, Time, Cycle, Perth, Barrier,* now *Newcastle,* and *Colac, Norkoowa, Komura, Period* due this week. No coal available for any. Positions very serious. Contracts Victoria, South and West Australia seriously short ; all stocks are exhausted. There is sure to be trouble unless coal is provided Newcastle immediately. There is reason to fear as soon as the general public knows present state of affairs indignation meetings likely to be held, and will probably result in deputations to Government seeking hostile legislation. We consider position warrants your Association deferring further supplies foreign until our immediate requirements satisfied. Public will demand this before allowing Railway, Mines, and various industries being rendered idle on account of —It is very important your advice by telegraph extent present and future relief we can depend upon in order to defend ourselves."

The Shipping Companies knowing the evil, persuade, remonstrate, supplicate, warn and prophesy—they in fact take every course but the proper and effectual one, which obviously was, to break away from the bonds which fettered their own freedom of action. Like the Athenians they knew what was right ; but unlike the Lacedæmonians they did not practise it. The railways and mines and various industries they knew would not stop if they carried other coal. There might in some cases be comparative

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inefficiency, but the dire results, apprehended by Mr. Howard Smith writing for his Association, could only occur by the persistence of the combination in maintaining the artificial restrictions in which they had confined the working life of Australia. *Why this pre-judicial course was clung to, they have not condescended to explain.* One would have thought they would have considered it a moral duty to the community, whose industrial life they held in their hands, to explain how it came to that imminent condition of peril. They must have thought otherwise, and I lay that consideration aside. They must be left to be the final judges of that—the moral —aspect of the matter. But when they ask me to draw an inference from the proved facts more favourable to them than the ordinary process of reasoning warrants I must regard the opportunities they have conspicuously neglected of offering whatever material they possess to place some better interpretation on the circumstances.

VEND'S OWN RECOGNITION OF INJURY FROM SHORTAGE.

The Vend on 21st August recognized the seriousness of the position and offered 2,700 tons of West Wallsend which the Vend rate as second class for Railways and Sydney trade, and so the Victorian Railways thought (see S5 Oct. 31/07). They also pressed upon the Shipping Company 5,000 or 6,000 tons of Teralba coals, that is the fourth grade, saying that if the position was as acute as represented consumers should not hesitate to accept Teralba. This is the coal that could not be disposed of in Melbourne. In September, the Vend are informed by the Shipping Companies that the shortage in Victorian Railways Supplies has reached such a climax that the Commissioners notified the contractors they would purchase against them. The Vend replied, it was due to the abnormal state of the trade for the last six months. And Mr. Cant forwarded to the Shipping Companies a calculation of Victorian Railway shortages showing it to be as at 31st July 1907, 32,133 tons. He also shows that other coals were substituted to the extent of 19,498 tons, and even after this substitution has taken place, that is, coals outside the Schedule altogether, there still remained a net shortage of 12,635 tons. I imagine Mr. Cant meant that such a shortage was nothing much to complain of. The Vend promised on 12th

September to do everything possible to assist the Shippers. Notwithstanding this assurance *the allotment system is not abandoned, and the exclusiveness continues* ; the result is that the short supply continues up to the middle of January 1908, and the Railways threaten to buy another 16,000 tons against the contractors. In the previous month as appears from Ex. S.5 the Secretary for Victorian Railways called at the office of Huddart Parker & Co. on 12th and saw Mr. Appleton, told him 28,000 tons were absolutely necessary that month and that all that was actually in sight for December up to the 31st was 12,000 tons. He asked for an assurance to receive 28,000 tons but this Mr. Appleton could not give, nor could Mr. Appleton and Mr. Newman together obtain such an assurance from the Colliery proprietors or give any hope of more than 4,500 tons in addition to 16,500 tons in sight. Mr. Appleton assured the Commissioner that no stone was left unturned in the contractor's efforts to provide coal for the department. However as I have said notice to purchase against the contractors came in. Ex. S.5., shows that short deliveries went on to 1909 and in November of that year the Contractors were ordered to make up shortages. See the Chief Storekeeper's memo of June 9th 1908 as to the serious expense occasioned by irregularities. In January 1910 Mr. Sutton the Chief Storekeeper spoke of the personal efforts he made to obtain full deliveries. He said that the substituted coal was sometimes inferior, that he told Huddart Parker so, and that he accepted it only because of the low condition of the Railway Stocks. His evidence is that the coal he regarded as inferior would be from 45,000 to 50,000 tons out of 800,000 tons that is 5 per cent. to 6 per cent. It was suggested by defendants' counsel that the shortage was the result on the whole or in part of shortage of trucks, the evidence does not support that. Sutton's memo to Captain Bull of Huddart Parker & Co., dated 9th June 1908 (O1) is opposed to it. The witness could not give any concrete instance where substitution had made trains late, but I do not think that is necessary. He said that some of the coal such as A.A. was too soft for their purposes and as an observation applying to several cases of substitution I think the consumers having the experience of their own working necessities must be taken to be the best judges of what best

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suits their own business. When the Victorian Railways authorities or the S.A. Railways authorities (Evidence p. 694), or any of the other consumers tell me that they find a particular class of coal the best for their purposes I believe them. I prefer to take their actual experience to accepting the suggestion of learned counsel that other coal which they did not order and did not want, but had to take, was something quite as good for them.

The normal reserve of the Victorian Railways was about 30,000 tons. In December 1907 it got as low as 10,000 tons, only about a week's supply. It must be noted however that in the next month the stock of coal was 33,400 tons, there were 17,256 tons over supplied for the month, and from that time onwards the reserves were well over 30,000 tons. Some months there was a surplus for the month, but more often a deficiency, the net shortage at the end of November 1909 being as already stated. Two observations may here be made, whatever the normal reserve might be the Railways were entitled to have what they ordered and what the contractors undertook to give the Railways.

The subsequent maintenance of stock was well beyond the normal essential reserve—three weeks supply was of course a great improvement. But the constant shortage was complained of, and ought not to have occurred, and *would not have occurred in my opinion if the Vend had not had the exclusive undertaking of the Shipping Companies.* It was this which made them feel secure as to their allotment provision—a security which nothing could disturb except dread of consequences. Up to the beginning of January 1908 there was actual detriment of a perilous kind ; after that there was real detriment, but not attended with present danger. The evil was there, its presence was felt, though not in a great degree, and if a sudden demand had arisen for foreign coal, I have no doubt, there would have been a real risk of embarrassing shortage. Since November 1909, the risk of detriment is greatly lessened by the opening up of the Powlett River field. This is undoubtedly a source of safety to the Victorian Railways, and therefore except as part of a great scheme of concert I would, in view of the proved policy of the Victorian Government to use local coal, be disposed

to disregard the *future* danger to the Victorian Railways from the latent risk of shortage of Newcastle coal.

There were shortages also in connection with the South Australian Railways. Coals that were contracted for were not delivered and in some cases inferior coals were substituted. There was a contract of 10th May 1906 for 2 years supply. This contract I have more than once referred to. It was the outcome of the guarantee of 24th April 1906. The approved pits were specifically named, 70 per cent. of the deliveries was to come from the Burwood, Co-operative, Newcastle Wallsend and Newcastle Company, 15 per cent. from the Seaham, and 15 per cent. from Wallarah. Certain collieries were struck out.

Shortages commenced in appreciable quantities about June 1907. On 1st June 14,065 tons, on 6th July 13,999 tons, on 3rd August 15,113 tons; 7th September 12,198 tons; 5th October 15,936 tons; 26th October, 19,573 tons; 2nd November, 22,027 tons; 16th November, 18,428 tons; 30th November, 26,716 tons; 14th December, 26,136 tons; 21st December, 24,485 tons. Then in 1908 on 4th January, 27,603 tons; 18th January, 21,936 tons; 1st February, 23,475 tons; 15th February, 18,542 tons; 22nd February, 11,808 tons; 29th February, 5,386 tons; 14th March, 8,231 tons; 21st March, 3,384 tons; 4th April, 4,280 tons; 11th April, 1,929 tons; 2nd May, 1,654; 30th May, 201 tons; 13th June, 3,684 tons. As to substitutions, a considerable quantity of distinctly inferior coals was practically forced upon the South Australian Government. These commenced about July 1907, and went down to June 1908. They consisted of 10,097 tons 16 cwt. of West Wallsend, and 2,992 tons 4 cwt. of Teralba coals. These inferior coals were the subject of remonstrance by the Department. Mr. Russell, Locomotive Inspector said that he drew the attention of Huddart Parker & Coy. to the fact that West Wallsend had been struck off the schedule in October 1904, and it was not a fair thing that they should have to take it to make up the requisitions. In October 1907, other pits were added to the schedule. Those pits were first class, the quantity from these added pits was 19,041 tons and no complaint can be made as to the quality of this coal.

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PUBLIC DETRIMENT ARISING FROM INFERIORITY OF COAL.

As to the detriment arising from inferior coal, Mr. Russell states his opinion that delays were increased owing to this reason to the extent of 5 per cent. There is no doubt looking at the position broadly, the South Australian Railways were very much hampered, and their safeguards against interruption of traffic were reduced, and an appreciable impediment was placed in the way of the satisfactory conduct of that traffic. All this was the plain result of the combination, and the danger still exists. South Australia is entirely dependent upon outside sources for its coal supplies. The next tenders were called on 18th March 1908 for 1 or 2 years' supply from 1st July 1908. The tender of Huddart Parker & Co. and the Adelaide S.S. Coy. was dated 28th April, and so was Howard Smith & Co.'s separate tender. The contract was dated 18th May for two years. There is a letter from Appleton for the Shipping Association to Cant as Secretary of the Vend dated 30th July 1908 (Ex. U. p. 83) which is illuminative of the position when read with the original tender. The joint tenders embraced 16 pits, including the West Wallsend and Pelaw Main. The price was 17s. 6d. for one year and 17s. 3d. for 2 years. The previous contract was for 11s. 9d. a difference of 5s. 3d., on 133,000 tons a year, which meant an annual increase of £34,912 10s. and on the two years' contract an increased expenditure of £69,750. Besides this as is seen, the objectionable West Wallsend, as well as Pelaw Main, and Duckenfield were included. From the letter, it appears that the tender had been placed before the South Australian Cabinet, —not to be wondered at—who gave express instructions to the Supply and Tender Board to adhere to certain conditions. Whilst this was pending, the South Australian Government entered into negotiations for the purchase of coal property. This fact, coupled with the further fact, which the Shipping Companies had evidently learned, that a number of members of the South Australian Government were disposed to carry this project into effect, led the tenderers to answer the request for an immediate reply by closing the contract without Pelaw Main or West Wallsend, and at 17s. all round. The saving by this was about £8,300. The shortages are not complained of after this time, as to the South Australian Railways,

but the range of pits exists, Pelaw Main is now included, but not West Wallsend. With regard to the Broken Hill Contracts with Scott Fell & Co. I need not repeat the observations referring to Scott Fell & Coy.'s ineffectual efforts to obtain coal. It may be summed up in this way that roasting coal was requisitioned for Port Pirie to the extent of 50,000 tons approximately, that was for the Broken Hill Proprietary Mine, the only one that uses roasting coal. The Company prefers for roasting purposes, East Greta, and South Greta, as it gives a good flame for roasting purposes. The quantity of roasting coal supplied was 5,977 tons, principally from Heddon Greta, but also from South Greta, Oakey Park and Burwood Extended. They had to use some of the other coal to make up the shortage of 44,000 tons of roasting coal. Mr. Dickenson said that the roasters were not stopped, nor were the smelting works for want of roasting coal. Mr. Delprat had to put down 1 or 2 other boilers in April or May 1906, but that is outside the period covered by the charges, and I cannot take that as anything more than evidence of the nature of the expedient necessary, when other coal is substituted for roasting coal, the deficiencies of course occurred partly after the combined agreement because the Broken Hill Coy. required 25,000 tons a year. The Company also had to get Lithgow coal to mix with the Newcastle Wallsend coal for steam as better suited to their purposes. They were always short of coal, and at one time got coal from Natal. It was said by the defendants that the Broken Hill Coy. could not complain as it paid very large dividends notwithstanding its inability to obtain the commodity it needed through Scott Fell & Coy. As a legal proposition I simply have to say I fail to understand it. Then it was suggested that the Broken Hill Coy. might have obtained what it wanted by direct application without the intervention of Scott Fell & Co. Of course that means confining them to the single channel of supply established by the combined agreement. This happened with the next contract, dated 15th May 1908 (W.4) the price being 16s. 6d. as against Scott Fell's 12s. 11d. and 12s. 9d. but allowing for the rise f.o.b. from 7s. 6d. to 11s. In 1911 it was 16s. 9d. The Broken Hill mines represent an important department of Australian Industry, employing about 7,000 men at Broken

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Hill, and 1,500 at Port Pirie, and although they may be able to bear the substitution of less efficient roasting coal for more efficient, without greatly suffering, the detriment is real and may be carried further. One or two general references may still be made which shows that shortages did not stop early in 1908. There is a most vigorous struggle by Paterson & Co. through Appleton with the Vend in September 1908. Paterson & Co. had taken their share of inferior coals—or what is inferior for their trade—as in duty bound, and they object to any more (Ex. U. p. 103). Then there is a letter from Appleton to Cant dated February 20th 1909 (Ex. U. p. 118). It states "all the Companies here are very short of smalls, being unable to supply customers, and the position is serious. There is little or none for bunkering the small steamers, and under the circumstances I will be very much obliged if you will do all you can to facilitate the loading of some of the vessels with this class of cargo." The reply is dated 22nd February and the reason given is that there is a great scarcity of small coal on account of the falling off of the trade generally, but, said Mr. Cant, you may rest assured nevertheless that I will do all possible to meet your requirements. Of course *the serious position and the inability to supply customers might easily have been met if the Shipping Companies had been free to take Southern or other coal.*

OTHER COALS POTENTIALLY COMPETITIVE.

There is a section of the evidence which does not raise any distinct issue, but the effect of which, on the issues I have just been discussing, is best seen by separate consideration. *The stipulation that the Shipping Companies will carry no other coal*, excludes all other coals that might otherwise be carried inter-State. Several have been referred to some of which may be briefly disposed of. The following coals could not in ordinary circumstances be carried inter-State so as to compete with Newcastle coal at the price at which the latter had up to the present been sold. I am not speaking of strike prices. Those coals are Collie and Powlett River; yet both these coals have an important bearing upon the case in another way. But Southern coal might be a very close competitor with Newcastle coal, and at a further distance even Western coal

should not be left entirely out of consideration. As to the last mentioned coal as early as 21st December 1906 the Vend Secretary received a wire from Newman (see X. p. 12) that Wilkins of Hetton Company was upsetting the market by offering Lithgow to Victorian Gas Companies and others. The fact that Wilkins denied the offer is nothing to the point, which is the recognized competitive value of Lithgow coal for inter-State purposes and the effect it had on the Vend. The letter referred to is remarkable as showing that Green (of Hetton) said he was not surprised that Lithgow was being offered, and so, if the Vend and the Shipping Companies both thought Lithgow coal a possible competitor, that is a very good reason for my thinking the same. The quantities exported by Scott Fell & Co. in 1906-08 (see Y.9) also evidence its adaptability. Again, the Vend in April 1908 thought it necessary to obtain from the Shipping Companies a statement of the quantity of Southern, Western and other coals taken for the previous quarter. The answer was given on 29th April (Ex. U. p. 73) the quantity was 74,000 tons Southern, no mention made of Western. The average calorific value of Western coal is 11.67 as against the average Southern 12.73. The highest Southern is Metropolitan 12.8; Borehole has an average of 12.9; Maitland 13.8. Southern coal is in all respects a good coal. It is very slightly inferior to the Borehole in analysis, and for some purposes, it is even better. Mr. Pitman, the Under Secretary for Mines and Government Geologist for New South Wales, said that for steam purposes and smelting he would say that Southern coal is better. For bunkers it is admittedly better (p. 1387). For household and gas making purposes, Newcastle coal is undoubtedly better. For Railway purposes Mr. Pittman thought the two about equal. The effect of this statement read with other evidence, as for instance that of Mr. Russell of South Australia (p. 1001); Dickinson of Broken Hill (p. 639); and Lane (p. 518) is that it depends largely on the conditions under which it is used such as the type of the machine and so on. The Southern coal agency in their circular prescribe the conditions for best results.

Mr. Colebatch the South Australian Chief Storekeeper tells us that the *commanders of vessels in South Australia prefer Southern*

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coal for bunkering purposes; *Mr. Lane said that Southern coals are peculiarly suitable for bunkering marine engines.* Mr. Lane considers Newcastle coal best for steaming purposes. The shipowners themselves have a high opinion of Southern coal as is seen by Appleton's letter of 20th January 1908 (Ex. U. p. 30). To this as we have already seen, the Vend objected in their letter of 31st January (Ex. U. p. 39). On 27th January 1907, Newman wrote to Cant with reference to an inquiry from the Mount Morgan Company for a freight quotation for 500 to 1,500 tons of Southern coal from Mount Kembla to Rockhampton. *Southern coal was also tendered for and sold by the Shipping Companies apparently within the quantity permitted by the agreement* (see p. 420 of proceedings). According to the letter of the Adelaide S.S. Co. of 12th February 1907, addressed to Chapman (Ex. S.) the Melbourne City Council had used Southern small coal, but, I read that statement only as against the Adelaide S.S. Coy. Howard Smith & Co. by letter of 9th November 1906 decline to quote a freight on Southern coal enquired after by the Australian Paper Mills; at pp. 1903a, 1903b, 1903c, 1904 will be found what are in effect refusals. In 1908 Howard Smith & Co., Huddart Parker & Co., and McIlwraith McEacharn & Co. declined to supply Southern, at all events except to a limited extent, and in a very guarded way. It is plain therefore that *Southern coal could become a check upon the advancing prices of the Vend.* Exh. 26C contains the Southern Coal-owners Agency offers to the Victorian Railways in October 1909. There was first an offer of 150,000 tons of best screened Southern coal for one or two years at 15s. c.i.f., Melbourne,one condition insisted on, other conditions to be mutually arranged. That was informal and was followed by a more formal offer which stated the coal owners' inability to tender under the prescribed conditions of tender, and they made a new and independent offer. That offer was for coal the product of Mount Kembla and/or Mount Pleasant and/or Osborne-Wallsend at Mount Kembla from the shoots at the jetties —minimum quantity 125,000 tons—maximum 175,000 a year at 14s. 3d. c.i.f., Melbourne or Geelong. If that coal was not thought suitable then the offer was 60,000 tons minimum and 80,000 maximum taken at Pyrmont cranes at Darling Harbour, the price

being 14s. 8d. c.i.f. Melbourne and Geelong. Certain conditions were stipulated for. The circular enclosed mentions that the Southern collieries had steam colliers with a carrying capacity of 2,350 tons —how many is not stated. The Mount Kembla colliery is 52 miles from Sydney, the Osborne 49 miles, and the Mount Pleasant 48 miles, and the freight would be along the South Coast Railway. The rate is not mentioned, but the Metropolitan rate is 1s. 11d. for about 29 miles. Mr. *Knox* thought this Exhibit proved that the 15s. tender supported the reasonableness of the charge of 15s. 5d. to the railways and that of the defendants' tender in Exh. U.5, and that the railways could have been sufficiently supplied with Southern coal.

With respect to the first point—the defendants consistently obtained the rejection of evidence as to the cost of production in other mines, because the conditions were different, or might be, and the rejection of other persons' tenders, as matters unknown to defendants, and possibly dependent on special or different considerations. This tender was not known to defendants so far as appears, and is not like a known price in the open market. It may have been very unreasonable itself. Therefore the reasonableness of the defendants' charge in their own tender could not be measured by a particular and secret offer of another person. Where Southern coal and Newcastle coal stand on comparable footings, or where market prices have been proved, they may be compared, as Mr. *Knox* did at pp. 1379 and following, and there is a mass of evidence as to this. But a party is not at liberty to approbate and reprobate, to procure by useful argument the rejection of hurtful evidence, and then swing round and press the admission of what may be friendly evidence on the contrary argument. But even if the tender be looked at for the purpose of testing the reasonableness of the Newcastle price f.o.b. or c.i.f., it does not help the defendants in the least. As shown, the amount of 15s. was not attached to any particular set of conditions ; and so the point urged is not made, viz., that the railways could not be prejudiced by the price ; and the corrected tender was much lower ; and for the better sample, namely at Pyrmont the maximum quantity was clearly insufficient. Further, it would not have, and was not suggested

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to have any bearing *ultra* the railways, that is plainly because even if the railways could have got it at the price mentioned there is no likelihood as things stood of a regular carrying trade to supply smaller consumers who desired it, either absolutely or at a comparative price. The conditions annexed in the letter of 22nd October 1909 that there must be 12,000 tons a month taken shows that clearly. But on the other hand if the defendants had not debarred themselves from carrying it inter-State there is no reason why this coal purchasable at Darling Harbour or Port Kembla jetties would not have formed an appreciable restraint on the growing prices of the Vend, and if the Shipping Companies continued in real competition with each other, the price 14s. 8d. c.i.f. Melbourne would if admitted at all as to price be instructive as to freights. The prices to be presently mentioned which are relied on by Mr. *Knox* show that if you take the cost at the pit, and add the railway freight to Darling Harbour, you have a sum which allowed only 4s. freight, when the c.i.f. price is as stated. The tender consequently if looked at with regard to the issues of detriment to the railways alleged to have arisen or to have been intended through the raising of prices in Newcastle coal is adverse to the defendants. Though I have stated my views on the Exhibit had it been admitted as to reasonableness of defendants' prices, I do not use it against them except for the purposes for which it was in fact admitted. I am not able to say on the materials before me that any of the other coal would in ordinary circumstances be extensively carried inter-State and be affected by the provision of exclusive purchase.

It appears from Exhibit T.8 and also from the evidence of Mr. Parry that the prices of the Metropolitan coal which is of a higher calorific power than the average Borehole was purchased by the New South Wales Railways at prices some of which I shall quote. In 1905-6, 7s. 6d. ; the same in 1906-7 ; the same in 1907-8 ; then 9s. in 1908-9 ; 8s. 9d. in 1909-10 and the same in 1901-11 ; the quantities were very large 176,844 tons in 1905-6 ; then 179,133 tons; 175,981 ; 187,033 tons ; 129,473 ; 137,682 ; These prices were at the Metropolitan siding. The freight to Darling Harbour for shipment was 1s. 11d., that would make the price in 1905-6-7 and 1908

—9s. 5d. No reason is given for the sudden rise to 9s. in 1908-9 and the partial maintenance of that rise 8s. 9d. for the next two years. It may be that the progressive and permanent Newcastle rise furnished the opportunity. Or it may be—judging from the headings on the letters and circulars in 26C—that the Southern coal owners are also as between themselves non-competitive. It would still at its advanced rates be much cheaper to the Government at Darling Harbour than any Newcastle coal.

NEW SOUTH WALES RAILWAYS PREVENTED FROM GETTING METROPOLITAN COAL.

The New South Wales Railways Commissioners as Mr. Parry tells us would have sent Metropolitan coal to Broken Hill in 1908 *if they could have got the freight.* At the price quoted to the Government plus fair freight for shipment it would be cheaper to send inter-State, and might, if freight existed, prove a formidable competitor to the extent of its production.

SHORT SUMMARY OF DETRIMENT ALREADY DEALT WITH.

Summing up the question of detriment I have no hesitation in finding that the Australian public in four States have suffered great detriment in respect of excessive prices charged for Newcastle coal; that the excess is accentuated by the restriction on choice introduced by the Vend and made more thoroughly effective by the Shipping Companies. There has been, and should pressure of circumstances at any time arise, there would probably again be shortage in delivery of desired coal. The enforced general enumeration of pits takes away the quality of a legal breach of contract in not delivering coal particularised in a requisition, but it remains a real objection. And the presence of a penalty on mines for delivery beyond their allotted output is a standing deterrent against meeting an emergent demand. Substitution to some extent and to a substantial extent must follow, and the substitution must be other and possibly inferior Vend coal; and it cannot be Western or Southern except within the limited range.

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PUBLIC DETRIMENT FROM ARBITRARY DISCRIMINATION OF PRICES.

There is however another distinct detriment, that of arbitrary and capricious discrimination of prices. I do not for a moment assume favouritism. I think the Vend and the Shipping Companies looked to no persons' advantage but their own. And their own they followed up wherever they could, and to the farthest distance possible. But sometimes consumers' opportunities, or want of opportunity, made them discriminate. In one sense discrimination by reason of purchasers' special opportunities is perfectly legitimate, but when the heavy end of discrimination owes its weight to *combination*, there is a distinct lawful cause of complaint for those who have to carry it, while their neighbours escape.

The process is illustrated in various ways. A signal example occurs in relation to the Melbourne Gas Company. I have pointed out how much lower the price of coal was to this Company than to the Footscray Gas Company, and other consumers. The reason is not difficult to trace. On 4th October 1906 (Ex. I. p. 5), just after the formation of the combine, the Vend resolved that all gas contracts throughout the Commonwealth should be 10s. 6d. best coal, and 6s. small; and the Melbourne Gas Co. was expressly included. On 3rd December (I. pp. 45-47) the Vend minutes record that interviews had taken place with Mr. Hinde the Gas Company's Secretary, who strongly resented the extra 6d. and hinted at being forced to buy elsewhere. The Committee thought it would be "prudent" to sell at 10s. and 5s. 9d. on a certain named basis and asked for authority. On 27th December 1906 Chapman for the Vend wrote to Newman for the Shipping Companies asking to negotiate *inter alia* on the Melbourne Gas Company's contract (X. p. 16). Newman replies two days later that Hunter will not allow anyone but himself to deal with that matter. McIlwraith & Co. were the contractors, but the communication so far with reference to it each way went through Newman. The contract was completed by 9th January 1907 as appears from a letter Chapman to Hunter. It was at 10s. (I. p. 59).

Now a word as to the cause or the partial cause of the "prudence." As far back as May 1906 (F. p. 103) both collieries and shipowners

heard rumours that the Gas Company was negotiating for the purchase of Cessnock land for a coal mine, and this led to action by the Vend, and communication between the Shipowners. The exact position does not appear, but evidently there was enough to awaken "prudence" when some months later Mr. Hinde's "hints" were given to the Vend Committee. Whether a coal mine or some other possible source of supply was at the back of these resentful objections, the Vend and the Shipping Companies supplied the Melbourne Gas Company with first class coal at a most favourably discriminative price. And even at this price the contract must have been valuable, for, besides the ordinary presumption from a business transaction, Hunter was specially jealous of any one else conducting negotiations. Indeed the mere fact of the Gas Company's representatives conferring with the Vend direct at all is singular.

The aberrations in prices generally have not been accounted for; and apparently are *the result of arbitrary power, restrained only by possible limits of endurance.* In Western Australia, Collie coal is very largely used on some of the railways on the South Western, Great Western, and Eastern Goldfields lines. Collie coal is very friable, and as far as I can see unsuitable for export. The further too it is carried inland, the more it breaks up. But the Department, naturally having general considerations of local concern to observe, does in fact use a considerable quantity in certain localities, about 75 per cent., and might there use more.

But Geraldton means 230 miles sea carriage, with two terminal handlings for Collie coal, and this appears to me to account for the tremendous disparity between the later freights of Newcastle coal to that port and to Fremantle. It must also be remembered that Bunbury is 40 miles from Collie Mines, and is the nearest port. Geraldton took 15,000 tons of New South Wales coal in 1905; 21,000 in 1906; 12,000 in 1907; 9,700 in 1908; 9,700 in 1909, and 8,500 in 1910 up to 13th September, and I think 18,000 more to 13th December 1910 (V5).

That Collie coal competition was a possibility actively contemplated by the Shipping Companies is undeniable in face of their own statements.

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In Appleton's letter of 7th February 1908 to Cant (U. p. 47) this passage occurs which illustrates the position as to several classes of coal, and therefore may be quoted once for all. It indicates the straits to which consumers were driven for want of Newcastle coal, and also that after a certain limit is passed other coals are locally of commercial advantage. The defendants' power must not be pushed indefinitely far. Tentative advances are to say the least prudent, before rushing on to the 12s. contemplated by the combined agreement. That was attempted once in April 1908 (Exh. U. p. 68), when the Vend fixed 12s. for the second and third year's supply in connection with the Western Australian Railways, but dropped it. The passage I refer to is as follows :—" Last year you undertook to supply us in addition to the special contracts we had with all coals we required for the general trade, but so far from this undertaking being fulfilled, Victorian coal, Collie coal, Natal coal, Westport coal, and Tasmanian coal all came into the market, which should never have happened at any rate to the considerable extent it did, depriving us of the carrying of whatever the quantity may have been." On the other hand in January 1908 the Vend were on the alert also against the same coal. At a Vend meeting Mr. Forsyth was asked to draw the attention of the Steamship Companies to the fact that the Collieries were advised they had been delivering Collie coal to mail steamers (J. pp. 90-93). Natal and Westport coal came of course from abroad. Tasmanian coal also came inter-State by sea carriage, but, as we know, it cannot compete at regular rates ; and the Victorian and Collie coal must have been intra-State. This passage really does not affect the exclusive clause in the combined agreement, but it shows there are limitations of excess which must not be passed, because it proves the suitability and consequently the competitive restraint of the local coal in Victoria, Western Australia and Tasmania, beyond a certain margin of necessity.

Appleton wrote again to Cant on 29th April 1908 (Ex. U. 72) in which this passage occurs " West Australian Railways :—We passed on the information to Fremantle in regard to your modification of prices for the second year, but I am afraid owing to the

position of the Government there with the Collie coal people, they may not accept any contract meantime . . . we are watching matters very closely."

Victorian coal in ordinary circumstances was largely absorbed by the railways on the ground of public policy. The limited quantity of Victorian coal left for general consumption and the comparative superiority of Newcastle coal presented no obstacle therefore to maintaining prices beyond those of healthy competition, while in South Australia there was no local competition at all. The variety of circumstances prevailing throughout Australia were regarded by the defendants—so I judge from the facts before me—merely as more or less effective obstructions to the full use of the combined power they had artificially created.

The case of Ballarat in Victoria is a very instructive one. Exclusive of the Gas Companies there, the volume of trade in coal held by the Shipping Companies, for Ballarat and the District, was 39,000 tons which according to Newman's letter of 10th December 1906 (X. p. 6) was sold on the basis of 7s. 6d. f.o.b. Newcastle, 4s. 9d. freight to Geelong on trucks,, wharfage 1s. ; in all 13s. 3d. Maitland coal was used but owing to increased prices the competition in wood threatened the trade. Newman said :—" We have no desire to reduce prices unnecessarily, but we think that in the present instance the circumstances justify us in suggesting that the Vend allow the Shipping Companies to secure the Ballarat business at the best rates possible, and any reduction that it may be necessary to make at the end of the year be adjusted proportionately between the shipowners and the Newcastle Vend."

There is no talk of ruination or loss—it is merely " reduction." The Vend met this on the 17th (I. p. 59) by asking the Caledonian Co. to fill orders with 75 per cent. " D " grade and 25 per cent. Maitland or No. 1 Borehole—that is to foist inferior coals on to Ballarat. Next day they wrote (X. p. 9) to the shipowners suggesting this blend, three-fourths inferiority. Evidently they felt they had the power and intended to use it. This apparently led to some correspondence which is not before me, and on 9th January 1907 Chapman suggested that one group should reduce freight and the other reduce the price of coal a little, to meet the case.

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Chapman's letter to Lewington (X. p. 31) establishes—as against the Vend—that Hunter said the Vend price plus freight and other charges provided by the shipping agreement, made the coal cost 19s. 9d. at Ballarat, that is cost to the consumer—whereas they could only get 15s. 9d. Hunter suggested 9s. f.o.b. price and the shipping companies would reduce the freight so as to retain the business.

There is no suggestion in Chapman's letter that that would be an unremunerative price, in fact it is what they had been charging since the price was made net. Yet the Vend on 18th January, having the power, refuse after consideration, (I. p. 63) and Lewington's footnote to his letter, to make any reduction. No reason is given, and Chapman dissented, a thing he would be hardly likely to do if it meant any loss of fair return. The shipowners, though protesting, clung to the agreement, and so Ballarat had either to use inferior coal or to pay a higher price for Maitland coal.

INTENT INFERRABLE FROM PROBABLE RESULTS.

Intent.—I now come to the question of intent. I need not say any more than I have already said with regard to the natural consequences of defendants' conduct, when considered quite apart from any special circumstances of bad faith or industrious concealment. No one acquainted with the facts, and who thought for an instant, could have any doubt that the result of the combination and its operations would in all probability be to bring about the detrimental consequences I have narrated.

INTENT INFERRABLE FROM ACTUAL EFFECTS.

Besides, the injurious effects were obtruding themselves year after year. The shipowners saw the f.o.b. price raised from time to time, and the Vend must have known the way the freights were growing too. However little compunction the Vend and the shipping companies had for the general public, I assume they were honest and frank with each other. I assume also therefore that when the shipping companies charged as in several cases they admittedly did charge, more than the agreed maximum they were honest enough to observe the provisions of

clause 11 of the agreement. To assume the contrary would be to convict them of the fraudulent retention of moneys for which they as Agents undertook to account to the collieries, as their principals. This applies to general trade and to contracts not within the first proviso to clause 8, as the Zinc Corporation, the Melbourne City Council, &c. I may assume too, that as business men the collieries, having taken the express power of checking the shipping companies' charges, would be likely to do it, or get some reliable information on the matter. The nature of the correspondence and of the conferences between the two groups of defendants leave me in no doubt whatever that *each of them was substantially aware of what the other was doing*. This would be only natural, seeing that the object of each was to know how much the public could be safely asked to pay. It would be only natural too that each group would be concerned in guarding the elaborate structure they had combined to erect.

INTENT INFERRABLE FROM PRE-COMBINATION CONDUCT.

The origin of the combined agreement is not difficult to ascertain. In the year 1905 six shipping companies—as I have called them—together with J. & A. Brown, enjoyed a virtual monopoly of the carrying trade in Newcastle coal. As appears by Ex. Y9 Table 5, the total tonnage exported inter-State, except Tasmania, in 1905 was 1,342,117, and of this, only 3,241 tons were carried by other companies. In 1906 a total tonnage of 1,444,274 was carried inter-State and of this 91,600 tons were carried otherwise than by the six shipping companies and Brown. This outside tonnage, as I may call it, was more than that carried by Brown, or by the Melbourne Steamship Co. or by James Paterson & Co. It was more than a third of that carried by McIlwraith McEacharn & Co. or Howard Smith & Co., or Huddart Parker & Co., and was more than a fourth of that carried by the Adelaide Steamship Co. This change had arisen principally, at all events, from the intrusion of Scott Fell & Co. into the inter-State coal trade. That firm had at the end of 1902 first endeavoured to get a footing in that trade. But it is unnecessary to enter into that. On 9th January 1906, they contracted with the Broken Hill Proprietary Co. to deliver coal

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for 2 years from 1st March 1906 at Port Pirie. The coal was to be steam coal from approved pits, approximate quantity per annum 70/84,000 roasting East Greta, Hebburn or Pelaw Main 25,000 tons, in all 95/109,000 tons per annum. Under this contract, Scott Fell delivered 167,600 tons steam coal which was Wallsend and Lithgow. Such a contract could hardly have been unknown to the defendants. There is no doubt that the defendant collieries refused to supply Scott Fell to enable him to carry out this contract and Mr. *Knox* very properly admitted (p. 1411) that it is perfectly clear there was an arrangement between the collieries and the shipping companies that the collieries would not sell inter-State to Scott Fell. In March 1906, the South Australian Railways called for tenders for the supply of 96,000 tons Newcastle coal a year for 1, 2 or 3 years, and also separately for freight for that quantity of coal. Scott Fell & Co. were known by the defendants to be anxious to obtain the contract. Mr. Wheeler said that at the meeting early in April of the colliery proprietors at which also Mr. Hunter and Mr. Newman were present, Mr. Hunter stated with reference to those tenders, that he feared the trade would go away from the steamship owners because of some outside competition that was likely to be brought into the market. He said the outside competition was by some tramp steamers, probably, and Messrs. Scott Fell & Co. The Vend minutes of this meeting, 23rd April 1906, have been referred to in detail, Captain Webb was also there. And this was followed by a meeting the next day at which the resolution was passed that the collieries should proceed with their scheme of amalgamation and the combined agreement should be entered into. It was also resolved that any further application for coals by Scott Fell & Co., other than for bunker purposes should be referred to the Collieries' Board. In the meantime the guarantee of 24th April was given. Huddart Parker & Co. and the Adelaide Steamship Co. tendered the all-round price of 11s. 9d. previously alluded to. That guarantee, it may be repeated, expressly mentioned that it was to enable Huddart Parker and the Adelaide Steamship Co. to secure the contract and was signed for the Caledonian Co. by Howard Smith Co. by C. N. Newman, managing director. Of course no real competition with the selected tenderers was contemplated ; nevertheless we find Howard

Smith & Co. also tendering for the same contract on the same date, but on the following terms :—Port Adelaide 14s. a ton ; Wallaroo, Port Pirie and Port Augusta, 15s. per ton ; Port Wakefield, 17s. 6d. per ton ; Beachport and Kingston, 21s. per ton. The letter contains these words :—" Should these prices be accepted we will be pleased to discuss conditions with you.

In the light of the arrangements now unearthed, that letter cannot be appropriately described without a severe term. I do not suppose Howard Smith & Co. wanted to play false to their fellow shipping companies, or that they were so foolish as to imagine such a letter would succeed in supplanting the tenders they had themselves, acting for the Caledonian Co., assisted to guarantee. But, if not, why was the letter written ? Plainly, *to deceive the South Australian Government.* And what was the intended deception ! The letter could have no other effect than *to make the Government think there was a genuine competition*, that Howard Smith & Co. were wholly unconnected in this transaction with Huddart Parker and the Adelaide Steamship Co., that the joint tender of the two latter companies was markedly advantageous, and so by helping to induce the Government to accept that tender, to help the common, though concealed, purpose of driving the common rival off the field. McIlwraith McEacharn & Co. also went through the form of tendering freight, although Mr. Hunter was the moving cause of the undertaking by the collieries on 23rd April—only 8 days before the tender —not to supply coal for that contract except to the steamship owners.

The intent of all concerned to beat off competition is unmistakeable and this action on their part is preparatory to the definite formation of the combination. Scott Fell & Co. might have developed into a formidable competitor. They had a large fleet under their control. They owned only one steamer the *Wonga Fell*, but they had several large steamers on time charter. Evidently the advent of Scott Fell & Co. into the inter-State coal trade was a disturbing element to the previously unchallenged control enjoyed by the shipping companies. Mr. Wheeler deposed—and he has not been contradicted—that at the meeting of 23rd April, Mr. Hunter said :—" With competition of course they would have to have

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cheap coal." Scott Fell & Co. were unable during 1906 to get Vend coal as appears from Mr. Lane's cross-examination (p. 585). This naturally, he said, occasions losses in his business. There was an incident between the Abermain colliery and Scott Fell & Co. and one Lloyd much relied on by the Crown. The evidence was admitted like very much more, provisionally. The final event in connection with it occurred after the formation of the Vend, and the combined agreement, but its roots were long anterior, and although possibly related to the matter of April already referred to, I am unable to judicially connect any of the other defendants with the conduct of the Abermain Co. Whatever my opinion of that conduct might be, yet as the evidence does not influence me on the issues I have to try, I abstain from expressing any view upon the matter.

INTENT INFERRABLE FROM CONDUCT DURING COMBINATION AS (*a*) VICTORIAN RAILWAYS CONTRACT 1906.

The first contract after the combined agreement was with the Victorian Railways; tenders were called for 1,2, 3 or 4 years, the estimated quantities were yearly maxima of 315,000 tons. The tenders came before a meeting of the steamship owners' representatives and the Vend committee on 4th October 1906 (see Ex. I. pp. 7 and 9) and the resolution I have earlier quoted was arrived at, fixing proportions and prices. This was done with the full knowledge of the Vend that Wheeler was under commitment to Scott Fell & Co. for the next year to the extent of 150,000 tons which ran into February 1908 (I. p. 7). On the 8th Huddart Parker & Co. and Howard Smith & Co. offered coal on the terms dictated by the Vend. I need not repeat my comments on this letter. Alternative tenders were called for freight only, but none were offered. In the tender an equitable arrangement re minimum and maximum of quantities was asked for and also a satisfactory interpretation re strike clause, but in other respects the conditions of tendering were adopted except in the following important respect. The condition which the Vend imposed, namely, " all or none " was also made a condition of the tender. Brown had taken part in the arrangements, fixing the Vend price and other conditions. Notwithstanding these arrangements J. & A. Brown, on the same date, put in a tender

utterly ignoring the prices and proportions he had helped to fix. For some considerable time this tender, for reasons which I need not detail, impressed me very badly as to its genuineness and I invited some explanation. Mr. *Blacket*, while not obliterating that impression, effectively shook my mind sufficiently to engender grave doubt, and so I resolve the matter in the defendants' favour. The net result of this transaction is that the Vend and the shipping companies so framed their tender as to exclude Scott Fell or any other possible competitor from participating in the supply.

(*b*). NEW ZEALAND BUSINESS.

During 1907 an arrangement was made between the Vend and the Union Steamship Co. relative to the New Zealand business of the Northern Collieries to come into operation as from April 1st. It gave the Union Steamship Co. the exclusive carriage of coal for New Zealand with certain exceptions mentioned. One of the terms was that the collieries should not sell f.o.b. Newcastle for shipment to New Zealand except to the Union Steamship Co. The Vend, before signing the document, consulted their solicitor, who said he was strongly of opinion that the proposed arrangement should be on exactly the same footing as that existing with the inter-State steamship companies. Mr. J. Brown asked if he were not perfectly correct in saying that every member present that day fully intended to carry out the agreement to the letter "writing or no writing." It was referred for further consideration. One of the exceptions in the proposed arrangement was the s.s. *Inga*, chartered to Craig, of Auckland. On 6th May 1907 Newman wrote to the Vend Secretary (Ex. X. p. 66), complaining that the *Inga*, protected under the New Zealand agreement—which was evidently regarded as completed by this time—was in active competition with the vessels of the shipping Association, then occurs this passage :—"It is, as you will recognise somewhat anomalous that the *Inga* should be protected under an agreement to which the members of my Association are indirectly parties, and at the same time be free to engage in competition with them in other directions." This was answered on 16th May by Cant asking for suggestions to prevent competition. On the 28th, Newman replies :—"The terms are not material." It

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appears therefore that there was really an understanding between the Union Steamship Co., the Vend and the shipping companies, that the shipping companies be not interfered with by the Union Steamship Co. in the Australian trade, and the shipping companies should not interfere with the Union Steamship Co. in the New Zealand trade, and each set of carriers should be the only channel of supply for their representative localities. In each case also it was considered desirable for some reason that the arrangments should not be reduced to contractual formality. See the revised agreement (J. p. 120).

(*c*). SOUTH AUSTRALIAN RAILWAY CONTRACT 1908.

During the year 1907 Scott Fell & Co. exported for their Broken Hill contract a large quantity of coal and struggled on until July 14th 1908 when they went into liquidation. A good deal of discussion occurred before me as to the real cause of their failure, as to whether they had carried on business at too low rates, or were reckless, or were crushed by defendants. Whatever other causes assisted, there cannot be any doubt that the defendants tried to crush them, and at all events contributed to their downfall. The defendants gathered to themselves a giant's strength, and used it as a giant; they have used it not only on the public, but on all that has stood or has endeavoured to stand between them and the public. Scott Fell & Co. shortly before their liquidation sold out their business in Melbourne to one of the shipping companies, Huddart Parker & Co., as it appears for the inter-State companies; that company took over the time charter of their steamers in connection with that business, also the liabilities of the coal yard, and the services of their agent, and Scott Fell & Co. gave permission to run the *Wonga Fell* in the inter-State trade. The disappearance of Scott Fell & Co. in the middle of 1908, left the combination for the time without a really effective competitor. The alteration of the position may to some extent be observed in the export tonnage. We have seen that with the entry of Scott Fell into the inter-State trade the "outside" exports, as I term them, had risen from 3,241 tons in 1905 to 91,600 in 1906, they mounted to 136,435 in 1907, but dropped to 37,715 in 1908. It must have been evident to the defendants at

all events by April 1908, when they tendered for the South Australian Railways that Scott Fell & Co. were weak. But they took the precaution to tender for the whole quantity required and the provision in the call for tenders reserving to the Board the right of accepting a portion only of the tender was excised. The hesitation of the South Australian Cabinet to accept the tender has been adverted to, and it will be remembered that one of the reasons given by the shipping companies to the Vend for their hurried yielding to the requirements of the authorities was the discovery of negotiations for the purchase of a coal mine. The immediate effect of this intimation upon the members of the Vend is left entirely to the imagination, but, there is a subsequent incident which evinces that the warning had not altogether fallen on deaf ears.

(*d*). VEND COMPLICITY IN HAYNES' ARTICLES.

The Vend minute book (Ex. J. 181) under date 27th November 1908 contains this remarkable record :—" The proposal by the South Australian Government to open a State mine was touched upon, and the proof of an article which it was proposed should be published in the Adelaide press was submitted. There were one or two alterations required in the article to make it correct, and Mr. Chapman and Mr. Doddemeade were deputed to attend to this matter and have the article published through Mr. Hayes to whom it was agreed to pay £50 for his services. The Secretary was also instructed to write to the shipping companies seeking their support in an endeavour to restrain the Government from carrying out the proposal." The name " Hayes " should be " Haynes."

That gentleman, Mr. John Haynes, is the proprietor and editor of a Sydney journal, the *Newsletter*. He was called by the Crown to state what he knew of the incident. The genesis of the idea that such an article should be published in South Australia, the original source of some of the information contained in it, and the full nature of the communications between Haynes and the Vend, are all still left indefinite. I am not called upon to probe the whole narrative. Certain clear facts were proved, and the defendants did not even challenge them by cross-examination. They are these. Haynes had an interview with Chapman at the Seaham Colliery office, when

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he offered to publish the article in the Adelaide papers for £100. He left a clear print of it with Chapman for perusal; Chapman as obviously appears from the minute communicated the offer to his associates in the Vend, they on 27th November discussed the matter, read the article, cut Haynes down to £50, and deputed Chapman and Doddemeade to have it published through him. Haynes got his £50 and the article appeared as a telegram from Sydney in the Adelaide *Advertiser* on 30th November, and in the Adelaide *Register* as a letter signed "Sydney," on 1st December. The contents of the article need not be quoted, but they amount substantially to a businesslike presentation of facts and figures relating to prices of land, depth of coal, the absorption of coal trade by steamships in existing contracts, the cost of haulage, the cost of coal production, the existence of cut-throat competition in former years, the absence of any real cause of complaint on the part of the South Australian Government, the talk of the Federal Government suppressing the Vend, and finally the astonishment in commercial and colliery circles in Sydney and Newcastle at the position of the South Australian Government.

In the way it was presented—and intended by the Vend to be presented—to the people of South Australia, it wore the appearance of a vigorous, fearless, and timely word of caution from a source independent, but well informed, friendly to the people of that State, cognisant of the main facts surrounding the question, and stating the opinion generally entertained not only among the collieries but in the commercial circles.

One would not have suspected however that the collieries had so direct a hand in the publication, any more than any specially interested section of the commercial world. It was intended to influence the South Australian Government, both directly, and through public opinion indirectly, to stay their hand in taking a course of action which would interfere with the existing monopoly the defendants then enjoyed in the supply of Newcastle coal. If the representations had been made avowedly by the collieries or on their behalf, so that those to whom they were addressed could have weighed the statements, together with the contrary interests of the persons making them, and felt the necessity of testing their accuracy

there would have been less to complain of. But the inherent vice of the transaction was the concealment of the identity of the advisers. The collieries paid Haynes £50 to fire off these statements from a masked battery. What effect they had I know not, and need not stop to inquire. But the project was not carried through. Some of the statements bear a strong resemblance to contentions I have had addressed to me, and which, as already appears, I have found to be inaccurate. But that is comparatively immaterial. All I take notice of as important in this connection is that the Vend :—(1) took an active part in the publication of the article and revised and approved its terms ; (2) they spent Vend money to obtain that publication in the very way it was done ; (3) they concealed their participation in the transaction ; (4) they did this to prevent a diversion of the trade they then held into other hands—self-supply by the South Australian Government and possibly supply by that Government to South Australian consumers ; and (5) they instructed their Secretary to ask the shipping companies to assist in restraining the Government from carrying out the proposal.

I have been asked to find that the shipping companies in some way were involved in the publication of the article—but there is no evidence whatever to connect them with it. Whether such a letter, as the Secretary was instructed to write, was ever written I do not know, and have no evidence to tell me. So far as this incident is concerned, the shipping companies are clear. But the Vend's intent is indisputably plain.

It was suggested to me by learned counsel for the defendants that the actuating motive of the Vend in paying the £50 was simply to save the South Australian Government from a blunder—a merely altruistic, and ultra-patriotic purpose—to save the people of a neighbouring State from disaster. The world has far to go before such self-sacrificing impulses will commonly sway the actions of men. It is a hopeful sign when learned counsel can gravely advance these motives on behalf of clients whom modesty apparently prevents from personally admitting them, but I fear I am cold-hearted enough to weigh the suggestion in the balance of every-day life, and find its effect imperceptible.

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(e). FORM OF SYDNEY CONTRACTS.

About May 1909 A. Kethel & Co. Limited was formed. It was the incorporation of the firm of Kethel & Moore which had been in the coal trade since 1905. It had theretofore done only Sydney trade. Contracts were produced with various defendant companies (Ex. Y6). They contained a clause by which the purchaser undertook that the coal purchased would not be re-sold to, or delivered by him, directly or indirectly, to any gas company, or be exported beyond New South Wales as cargo. The dates of those agreements are 14th November 1906 Seaham Co.; 15th November 1906 Pacific Co.; blank 1906 but apparently December 1906 because it is a supply of 12 months ending 31st December 1907 Newcastle Co.; 17th April 1907 Newcastle Co., and 10th December 1907 Abermain Co.; they are all on a printed form and manifestly copies of the same imprint. The Vend minutes of 4th October 1906 (Ex. I. p. 11) state that authority was requested for the following sales to Kethel & Co., viz., Abermain, Seaham, Pacific, S.A.M. Co., the tonnage and price being named in each case.

Authority was given to contract with the stipulation that contracts must be subject to the form to be generally adopted, such form to be prepared forthwith.

The next day's minutes, 5th October 1906, show that it was left to the Vend's solicitor to prepare forms of contract, and those of 11th October contain a resolution that purchasers in Sydney be allowed to contract at current prices subject to a form to be prepared. The minutes of 24th October 1906 (Ex. I. p. 29) contain an entry showing that the contract forms for Sydney and inter-State trade were approved, and among the documents demanded by Mr. Hudson from Mr. A. R. Cant, the Secretary of the Vend, were those contract forms so approved. They were produced and are contained in Ex. S., one for Sydney trade, and one for the export trade. The third clause of the form in Exhibit S. is precisely that in the contract mentioned in Y6. In fact the whole form in Ex. S. agrees with the whole form in Ex. Y6. There is no doubt in making those contracts the particular companies were carrying out the approved course prescribed and required by the Vend for its individual members. Kethel & Co. could not, nor could any other purchaser of Vend coal, supply

it inter-State, however urgently it was needed. Why should such a prohibition be inserted if the only object of the colliery defendants' Vend was to suppress cut-throat competition among its members. The sale to a purchaser at the Vend f.o.b. price at once secured the collieries from undercutting, whether sold for Sydney, Melbourne or Adelaide trade. What did it matter to them where the coal went afterwards if their only object in association was self-protection against internal warfare? And if a Sydney purchaser could find freight and export the coal inter-State, why prevent him? Clearly in the interests of the shipping companies, and with equal clearness that would only happen as a means of guarding the stipulation in the combined agreement giving the steamship companies the exclusive inter-State supply of Vend coal.

Just as the shipping companies guarded the allotment provision, so the collieries guarded the exclusive carriage provision.

(*f*). REPRESSION OF KETHEL & CO.

Just as the shipping companies guarded the allotment provision, so the collieries guarded the exclusive carriage provision.

Early in 1908 the Ebbw Main colliery commenced producing coal from its mine. It is a first-class coal. During that year it was developing and the production up to May 1909 was from 50 to 100 tons per day. The coal was sold in Newcastle and Sydney. Its sale seriously affected the Vend (see Howell's letter 10th March 1909, 01). The company was absorbed in Kethel & Co. Limited in May 1909. Mr. J. Cant also worked the Young Wallsend mine late in 1908 and in November or December put out coal 50 to 100 tons per day. That also passed to Kethel & Co. Limited on its formation. About the end of 1909, Kethel & Co. Limited were putting out 230 tons a day from each mine. The output from Ebbw Main was obtained with one shift of 8 hours and with another shift could be doubled. Kethel & Co. were now in a fair position to do inter-State trade. In June 1909 through Mr. Learmonth (deputed by the Vend Exh. J. p. 223), with Mr. Forsyth and Mr. A. R. Cant, the Vend had an interview with Mr. Kethel and Mr. Moore with a view of considering Kethel & Co.'s desire to join the Vend. That went off apparently because they could not come to terms. A document dated 19th

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June, was produced, but I pay no attention to it, because it has not been properly proved, and the condition upon which objection was waived was not performed. All I can take about the incident is that Kethel & Co. desired to enter the Vend, probably induced by Howell (see his letter of 10th March 1909), that the matter was considered by the Association, and discussion took place as to allotment and prices. Kethel & Co. wanted 100,000 tons allotment for each mine, and Learmonth suggested 50,000 tons for each. Moore agreed to maintain certain prices, and I should infer from his verbal evidence that a disagreement arose about the allotment, and so Kethel & Co. remained outside the Vend. One observation should be referred to. Moore said that Learmonth indicated in the course of the negotiations that there were certain trading advantages to be obtained from joining the Vend, and that Kethel & Co. would not be harassed in their trading conditions as much as they would be if they were working individually. Now as to Mr. Moore's evidence there were certain matters he had to admit which do not redound to his credit. Nevertheless I am not prepared to reject everything he said or consider him as generally untruthful. His account of the interviews is supported by the correspondence, and the surrounding probabilities, and is not denied by the defendants. I believe it.

In about October or November 1909 two trial shipments were sent to Melbourne, also 1,000 tons to the Melbourne Gas Company; 300 tons to the Victorian Railways, and small sample parcels 25 or 30 tons to different manufacturers in Melbourne. They leased a yard from the Harbour Trust there, and employed Crosby & Co. as agents. I have already referred to the trade they did there during 1909-10. They obtained contracts from various Victorian customers. The coal was carried to supply these contracts in two vessels chartered by Kethel & Co., the *Romford*, time-chartered from the British Steamship Coy. Ltd. London in March 1910, and the *Five Islands* chartered from the Mount Kembla Coy., in April 1910. Some coal also was carried for the Company by one of the defendants, three shipments in all, by Huddart Parker & Coy. to Melbourne, in November and December 1910, that is after this action was begun. The whole quantity so carried was about

1,600 or 1,700 tons,—a full cargo for the *Chillagoe* and a part cargo on another ship. The circumstances under which this was done do not appear but it is in evidence that in 1910 the A. J. S. Bank took possession and offered the Ebbw Main Colliery and plant for sale, for an account owing of about £5,000 or £6,000. At the time of the trial, liquidation proceedings were pending. I conclude Kethel & Co. were at the end of 1910 practically moribund.

The Crown pressed very strongly that the defendants' combination had driven Kethel & Co. to ruin. Various specific acts were pointed to as evidence of this. One class I may call direct, because they were immediately between the defendants and Kethel & Co. As to these the root of the matter was the difficulty in loading the *Romford* with payable despatch. The vessel carried 4,750 tons cargo and 200 tons bunker. Unfortunately for Kethel & Co. their storage capacity at Newcastle was only about 12 or 1,300 tons. The consequence was that the vessel had to be berthed and re-berthed four times for one cargo. Naturally this was not a payable method. In May 1910, they applied to several collieries for coal and received answers expressing inability to quote. At the same time they applied to the shipping Companies for a freight quotation for 1,000 tons of their own coal. Again answers were again received intimating inability to quote. I have considered this evidence (excluding Earp's letter) and I must say that I am not able to come to any finding upon it adverse to the defendants. The events happened at a time when the answers given might fairly have been made, if there had been no combination at all. Stocks were still being replenished to some extent after the strike, and on the whole I am not prepared to regard that correspondence as evidence of wrongful act or intent. Then there was another class of action, of what I may call indirect prevention of Kethel's inter-State trade. In October 1909, the Victorian Railways called for tenders for non-Victorian coal, the conditions stated that the total yearly requirements of coal were estimated at 325,000 tons. It was also stated that the tenderer might quote rates for all or any portion of the quantity for one or two years or both, and that the Railways should have the option to accept for all or part with certain qualifications unnecessary to state. The tenders required the mines

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to be stated. Ebbw Main coal though first class was insufficient. Newcastle-Wallsend was also excellent, but in view of other probable arrangements, and the regular output of the mine under 300,000 tons a year, the deficiency could hardly be expected to be made good either for the first year, or the second year. Young Wallsend was third class coal. On 25th October 1909, Kethel & Co. through Crosby & Co., and with the assistance of Wheeler of the Newcastle-Wallsend Coy., tendered for the supply of 1910-11. They tendered for a portion only of the quantity for the first year namely 70,000 tons Ebbw Main; 70,000 Newcastle-Wallsend; and 20,000 Young Wallsend, with alternatives, also below the estimated full quantity. For the second year they tendered 100,000 Ebbw Main; 150,000 Newcastle-Wallsend and 70,000 Young Wallsend. There were alternatives unnecessary to particularise. In the meantime the Vend had arranged with the Shipping Companies at an interview between Cant and Capt. Webb on Wednesday 20th October (see Ex. V.) what the prices and terms of the tender should be. It was arranged amongst other things that the tender should be as far as possible on the same lines as the tender for the last contract, that is about half and half Maitland and Borehole coals, plus the quotation of the other grades. On 22nd October the terms of the arrangement were confirmed by letter Cant to Appleton with a graded list of the coals attached. On 25th October a joint tender by Huddart Parker & Co. and Howard Smith & Co. was sent in for "the whole of the Commissioners' requirements of New South Wales coal for two years." The list of pits is clearly taken from Cant's letter and the prices to the railways being fixed by adding 4s. 5d. to the respective prices with the exception of Lymington coal to which was added 4s. 11d. The first letter of that date began with these words "Under and subject to conditions of contract to be mutually agreed upon." It ended by stating "that the tender was open for acceptance till noon November 8th." Apparently the tenderers were informed at once that their tender was liable to rejection because the Departmental conditions were not accepted. They wrote again the same day explaining the position, they again emphasised the condition that the tender was for the whole quantity. They urged that they or one of them had been the Contractors

for many years, they could offer the best terms available "through their long connection with the coal trade" also an adequate supply of sufficient tonnage. They said further that the freight was low, and added that expenses had materially increased during the last 3 years by reason of wages, cost of wharf labour, coal labour, stores and bunker coal, and claims for compensation, under various Acts of Federal and State Governments.

(*g*). SUGGESTION IN CORRESPONDENCE AS TO INCREASED EXPENSES.

It will be convenient to say a word or two as to the reference to increased expenses. At the Conference of 16th December 1907 (Ex. J. at p. 79) clause 8 of the combined agreement was amended by granting to the Steamship Companies the right to increase the freight in the schedule by 10 per cent. to cover any increased cost as regards extra wages, &c. The letter however does not say what the increase, if any, was and no proof has been given as to this.

The defendants' contracts (Adelaide S.S. Co.'s) with various Victorian consumers militate against the justice of their claim to increased freight for the Railway contract. *These and other contracts show either that expenses had not materially increased or that even with the increase their prices needed no addition to make them adequate.* The Footscray Gas Contract (U.7) which had gone up from 1905 to 1908, came down 3d. in 1909, "in order to meet you" as they said to the Gas Company and this amiable disposition continued in March 1910, to the extent of another 3d. So with the Melbourne Glass Bottle Works (X7) the same company reduced engine coal from 17s. in 1908 to 16s. 10d. in 1909, and further to 16s. 6d. in March 1910. Again with the Melbourne Co-operative Brewery (Ex. W.7) James Paterson & Co. reduced engine coal from 22s. 3d. in 1908 and 1909 to 21s. 3d. in 1910. Then as to the Australian Paper Mills (N.8) engine coal fell from 21s. in 1908 to 20s. 9d. in 1910. The natural inference in the absence of any explanation by the defendants is that they lowered their prices in presence of Kethel's competition in some instances at least, and, whatever increase there might have been in expenses, their charges at all events before the lowering were excessive. Besides, in the case of the Railways why should they quote what

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they call a "low" freight except to succeed against a competitor? It is not within the bounds of probability that their fellow shipping companies were the antagonists they feared—the circumstances preclude that. The joint tenderers too put in no tender for freight. And no other of the shipping companies tendered for supply.

(*h*). SHAM TENDERS.

But on the same date 25th October the Adelaide S.S. Coy. does put in a tender which impresses me very unfavourably. It was sent from Collins Street Melbourne and evidently with a knowledge of Cant's letter of 22nd, and in any case with a knowledge of the facts it recorded. It states that that Company's representative —that is Capt. Webb mentioned in the letter to Appleton—visited New South Wales to secure an offer of coals on the railway conditions. The collieries having declined, the Adelaide Steamship Co. said they themselves could not as carriers accept the conditions; they proposed, as they said, to tender for freight only, and they did solemnly offer to take delivery in the steamships at the port of Newcastle for one or two years of the total quantity of 325,000 tons for transport to Melbourne and Geelong, etc. The rates were to Melbourne 4s. 7d., to Geelong 4s. 9d.; that is to say 2d. more to Melbourne and 4d. more to Geelong than the joint tender of the other two companies. That could be seen by deducting the declared selling price 11s. from the tender of 15s. 5d. They expressed their happiness if the Commissioners favourably entertained the offer, to wait on the Commissioners, and discuss other conditions, adding that they had not time to consider the printed freightage form. *Now, I believe that offer to be like some others that I have mentioned, a sham.* They knew of course that Captain Webb had represented all the shipping companies. Appleton at the conference of 30th November 1909 (Ex. X. p. 221) speaking clearly on behalf of all the shipowners, Northcote being present, said he had given Webb a letter with all information. Appleton was the medium of written communication, and the confidence between the shipping companies was such that he of course would not keep back from them such a letter as he received from Cant, nor the nature of the joint tender. They knew full well that the collieries would not sell direct

to the railways and that there was no reasonable probability of the Victorian Railways getting coal elsewhere of suitable quality and quantity to make their freight tender effective.

Mr. Northcote of the Adelaide Steamship Co. himself at the November conference referring to Mr. Forsyth having communicated with the Railway Commissioners asked if it were a correct thing for any member of the Vend to approach or come in contact with any of the shipowners' clients. Forsyth admitted that this should not be done. And what concern had Northcote with Forsyth's communication? But, on the face of it, it manifests the clear expectation that no supply would come from the Vend direct to the railways, and how then could the freight tender of Mr. Northcote's company have been any business reality? Further, that company did not in their tender bind themselves to any conditions; but the amounts they inserted for freights, unfettered by specific stipulations, showed by comparison that the freight addition in the joint tender of the other companies was, as those companies said it was, low. The freightage desired by the railways was not restricted by them to Newcastle. See T5 and the call for tenders in 158, which states that the coal was to be simply "non-Victorian," but the Adelaide Co.'s tender was restricted to Newcastle. If they were ready to act as carriers only in full and open competition, I do not see why they tied the Commissioners down to Newcastle. Huddart Parker & Co. and Howard Smith & Co. had evidently either interpreted Cant's letter as requiring an "all or none" condition, or else had inserted it on their own account. The date when they first heard of Crosby's tender for Kethel & Co. does not appear, but probably they knew or anticipated it before their second letter of 25th October was written. At all events Learmonth knew of it on the 30th because on that day he telegraphed from Newcastle to John Brown who was then in Melbourne in the following terms:— "Am wiring Appleton re Crosby's tender Railways advise him tender all our coal or none see Appleton Monday morning and consult." The advice was unnecessary as the desired course had been already taken, but the intention of both parties to the combination is unmistakeable. Some of their coal was really indispensable; but it must be "all or none," therefore all; so that neither Kethel &

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Co., nor Wheeler in his separate tender of 22nd October (Exh. Q1) could hope to succeed.

At the conference of 30th November that year (Ex. X. 21) the discussion on the subject of this contract showed how much the defendants were playing into each others hands with regard to this contract. I think the true inference from all these facts of what I have called the indirect class is this, that Kethel & Co. and Crosby their agent were held to be either alone or in conjunction with Wheeler possible competitors in the inter-State trade and the defendants used their combined power to overcome that competition. The condition "all or none" was in the circumstances a powerful and indeed resistless weapon. *Summing up this transaction the combination enlisted in their service both force and fraud.* In a letter of 7th February 1908, written to the Vend Secretary, Mr. Appleton, when urging the right to use the Southern coal they required, referred to the possible resentment of the Southern owners if the bunker coal supplied were altered. In doing so, he reminded the Vend of a proverb that commends itself to all, both for its justice and its humanity. He said "It is well to live and let live." No doubt when men embark in business they must take their chance of failure and success. None can demand more than a fair field, and no favor. But what the law we are considering looks to is that there shall be a fair field. The united efforts of what Howard Smith & Co. (in Ex. X. p. 94) termed "A vast concern such as the Vend," and an equally vast concern such as the Shipping Association, hardly afford a fair chance of life to any ordinary single competitor. Mr. Appleton's excellent maxim was seemingly reserved for very special application.

(*i*). CONDUCT TOWARDS NON-VEND COLLIERIES.

There is a line of conduct which though in accord with the suppression of competition, I have referred to, is more conveniently considered by itself than taken in order of time. I allude to the Vend's action, supported by the shipping companies, in relation to non-Vend collieries. Non-Vend coal was forbidden to the shipping companies both by the agreement and in the course of correspondence as for instance in January 1907 with regard to Wallsend coal (Ex. X

p. 29). Instances will be found in quotations I have made and I shall not repeat them. Efforts were made by the Vend to induce outside collieries to join, for example, we find on 8th January 1907 (Ex. I, p. 61) that the Vend committees directed Mr. Chapman to make arrangements if possible for the Cardiff, South Wallsend, Burwood Extended and North Lambton to join in. At the next meeting it was resolved on Mr. Chapman's report that the Burwood Extended should be left out, the reason not being stated, and the North Lambton presumably was allowed in but not to be increased above 10,000 tons; and, as to the South Wallsend and Cardiff, there was to be an extension of the collieries and a report as to their capacities &c. In October 1908 (Ex. J. p. 173) efforts were made to bring in the Wallsend Co., the Lymington Co., and the Burwood Extended Co., the last-mentioned company refused, the Lymington was admitted on terms and the Wallsend was to be further negotiated with. I have referred to Howell's suggestion to bring in the Ebbw Main and to the negotiations for that purpose. The conclusion to be drawn from these and similar instances is that the defendant collieries intended with regard to competitive conditions in the inter-State Newcastle coal trade there should as far as possible be a clean slate.

And the question is why? In January 1907 the alleged murderous conflict between Maitland and Newcastle, if it ever existed, had been most effectually stopped; f.o.b. prices had been lifted from 7s. 6d. net to 9s. net and again to 10s. net. Again in October 1908 the combination were so safe and strong that the f.o.b. price was 11s. What then was the necessity for inducing the mines to join? It was not necessity, it was not self-protection, but the desire for complete control. That complete control was impossible except where, as J. & A. Brown, in the letter of 25th November 1909 to the Australian Paper Mills (Ex. N8), euphemistically expressed it, the colliery was one "with whom we are on friendly relations." Unfriendliness there meant independent action, *i.e.*, free competition, no matter how fair. To such was given the choice of the Koran or the sword, the "friendliness" of Brown's letters to the Paper Mills, or the "harrassing" of Learmonth's interview with Moore, *for the plain guiding principle of the combination was to sweep away by*

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artificial arrangements whatever protection the public might have against the terms of price, choice, and other conditions of supply, which the will of the combination might at any moment think opportune to dictate.

LAW AS TO MONOPOLY.

I have now to ask myself the question, does this amount to monopolising, or an attempt to monopolise, or combination or conspiracy to monopolise the inter-State trade or commerce in Newcastle coal with intent to restrain, to the detriment of the public, its supply or price. The intent is obvious—and to prevent any possible misconception I unhesitatingly find its existence as a matter of fact from the whole circumstances. The detriment I have already declared. Mr. *Mitchell* argued that no combination though trying to get the whole of the trade into their own hands and excluding other people would contravene the Statute unless they did so by some unlawful means. He relied on some observations of *Garrow* B. in *Wickens v. Evans* (1). In that case an agreement was made between three persons carrying on the trade of trunk and box makers and travelling in various parts of England, that each would restrict himself to trading in certain portions of the country and give up his existing trade in other parts, viz., the remaining portions where the other two contractors respectively worked in their trade; and they agreed to assist each other, and in case other persons should begin to trade as box makers in any of the districts allotted to one of them they should all meet and devise means to promote their own views. The learned Baron said :—" What those means may be it is unnecessary to surmise; but we cannot presume they will be illegal; and therefore this stipulation does not affect the validity of the agreement." On those words Mr. *Mitchell* hangs his argument but in my opinion they have no application to this case. The question was whether three box-makers out of the number to be found in all England made an illegal contract in agreeing to confine themselves to certain respective districts. The learned Baron after pointing out the mischief sought to be cured, namely, the loss and inconvenience to each by exercising their trade in the same places in various parts of the country, put the question " What is the remedy

(1) 3 Y. & J., 318, at p. 329.

they propose?" He answered it in this way, "Not a monopoly except as between themselves; because every other man may come into their districts and vend his goods; all they propose is that they shall not carry on a rivalry, nor continue any longer to trade throughout the country." Now that is the part of the judgment that has a bearing on this case. Its meaning and effect are better seen by reference to the other judgments. *Hullock*, B., said (1):—"But it is said that the effect of this agreement is to create a monopoly, and that by upholding its validity, we shall lead to other combinations for monopolising trades. If the brewers or distillers of London were to come to the agreement suggested, many other persons would soon be found to prevent the result anticipated; and the consequence would be that the public would obtain the articles they deal in at a cheaper rate." *Vaughan* B., said it was, "a contract by which the public are not injured, as they may be supplied upon easier terms." So far then as the general nature of the contract was concerned the Court had regard to the small number of persons contracting as compared with the number of other persons who could be found in the community able and willing to provide for public wants should necessity arise. Indeed the very pith of the judgments was that the sources of supply could not be controlled by the parties to the contract, and so, on the principles I have earlier stated it did not offend against public policy on the ground of restraint of trade. But an objection was made to a special part of the agreement, namely the one I have mentioned, as to meeting together in the event of opposition to any one of them and consulting as to what should be done. But as to this it was held for the reason given by *Garrow* B. as no illegal means was suggested they would not be presumed. There is nothing therefore in the case cited to support the proposition contended for. Besides, if making the contract in this case is an offence under sec. 4 the foundation of the argument fails, because that section declares it to be illegal, and so its observance would provide the necessary illegal means. Mr. *Mitchell* further said that if other people in the trade were offered the opportunity of coming in (p. 1233) the transaction was outside the section. But stating the proposition in that way passes by the fundamental

(1) 3 Y. & J., 318, at p. 330.

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idea. *It is the injury to the public that is to be prevented, and* merely giving an opportunity to an outside trader, whose means of communication with the public have been cut off, to relieve himself of his own personal loss by coming into the combination circle regardless of its effect upon the public is not in my opinion an avenue of escape left open by the section. Such a position would nullify it; in fact it might aggravate the evil. In *Cade v. Daly* (1) the Master of the Rolls held, that an agreement between a number of traders in the mineral waters and bottlers trade was not unenforceable. At p. 320 he pointed out that the covenant complained of was only for a brief period between a few local bottlers and within a certain limited area. He said :—" To my mind, when the sphere of operations is ' cabined, cribbed confined ' within such limits of time and space, when there is no prohibition and can be no prohibition against outsiders coming in and competing against any one or all of the persons named as parties to the covenant, the public, at all events, cannot suffer wrong. The public can suffer no injustice and in the ordinary sense of the word cannot be detrimentally affected. Outsiders are absolutely free to compete, and if the scheduled prices are too high the public can buy elsewhere." The original use in law of the term " monopoly " was, as has been pointed out, in connection with the grant by the Crown of an exclusive right; its signification in the Statute before us is commercial and denotes the acquisition of exclusive power. It was in that sense in which Lord *Kenyon* in 1800 used the word " monopolise " in *The King* v. *Waddington* (2). And that was no innovation even at that date in the sense of the word. We see in the Oxford Dictionary under the word " monopoly " 1 (*b*) several instances of the same meaning at very early dates. One I will quote under date 1622 :—" Monopoly is a kind of commerce in buying, selling changing or bartering usurped by a few, and sometimes but by one person, and forestalled from all others, to the gaine of the monopolist, and to the detriment of other men." There we have all the main elements of the law, including detriment which obviously must include excessive price. There is a looser sense in which the term is sometimes employed as meaning the mere fact of posses-

(1) (1910) 1 I.R., 306.

(2) 1 East., 143, at pp. 156-7.

sion or enjoyment of practically the whole of a particular trade, that is sometimes referred to as a "practical monopoly," as for instance in *United Shoe Machinery Co. of Canada* v. *Brunet* (1); see also *Oxford Dictionary*, Monopoly 1. But the legislation is not aimed at the share or proportion of trade which any person whether individual or corporation may acquire in the ordinary course of business. If by superiority of service or commodity, by lower prices more desirable terms or any of the arts and inducements known to active rivalry, always consistent with healthy competition, and free from force or fraud, a trader attracts to himself the whole of the trade in any particular direction he does not offend against the law of monopoly. The field of opportunity is open to all; he has fairly used it and has succeeded. He has succeeded, not because he has silenced, but because he has outstripped his competitors, and because the public find it to their advantage to voluntarily accept his service in preference to that of others they might have; and should he abuse his opportunity by asking unduly high prices, or restricting facilities or otherwise, the field is as open as ever for competitors to offer and for the public to accept. At all events, up to that point, he has neither done or intended any harm to the community. But if not content with serving the public to the best of his ability, and letting consequences take care of themselves, he so acts as to purposely concentrate in himself the existing means of public satisfaction in such a way and to such an extent as in the circumstances to prevent or destroy all reasonably effective competition, he does, within the meaning of the Statute, monopolise or attempt to monopolise.

Competition itself connotes attraction of trade, and so long as it remains legitimate the law, as I read it, does not reprove it simply because it attains its necessary object.

When however a trader forsakes his quality of competitor, and becomes an engrosser, when he sets himself to stifle or strike down effective competition which stands as a commercial protection between himself and the community at large, and so substantially to gather into his own hands the power of dictating the terms upon which the public needs may be satisfied he offends against the

(1) (1909) A.C., 330, at pp. 338-40; and see p. 344.

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enactment. Nor is the offence less that two or even twenty traders combine to effect this object.

The most recent application of these principles to the corresponding American enactments was in the *Tobacco Company's Case* above quoted. There the learned Chief Justice *White* said (1), the history of the combination the Court had to deal with was " demonstrative of the existence from the beginning of a purpose to acquire dominion and control of the tobacco trade, not by the mere exertion of the ordinary right to contract and to trade, but by methods devised in order to monopolise the trade by driving competitors out of business, which were ruthlessly carried out upon the assumption that to work upon the fears or play upon the cupidity of competitors would make success possible." This conclusion said the learned Chief Justice was reached by certain considerations which included acts justifying " the inference that the intention existed to use the power of the combination as a vantage ground to further monopolise the trade in tobacco by means of trade conflicts designed to injure others, either by driving competitors out of the business or compelling them to become parties to a combination."

In my opinion *the prevention or destruction of all reasonable and effective competition*—the natural commercial safeguard of the public—is at the root of the conception of monopoly within the meaning of the Statute.

ACTUAL INTENT TO MONOPOLISE.

I have no doubt, and I cannot imagine any doubt existing, that the intention of the defendants was to monopolise in the sense in which I have explained that term. They intended to efface competition in every form—competition of production which is only material here as bearing on the inter-State trade in the Article when produced, and competition of carriage. They intended to grasp into one huge hand the whole inter-State supply of Newcastle coal.

I have had some argument as to whether that was their main intention or whether it was only an object incidental secondary and subordinate to a scheme, the main object of which was merely to preserve a sinking industry.

(1) 221 U.S., 106, at p. 181 ; 31 S.C.R., 632, at p. 649.

I have no hesitation in concluding that the elimination of competition was the main and the central object of the whole combination complained of.

Whatever might be said of isolated parts of the Vend scheme, or even of some detached clauses of the combined agreement, yet taken as a whole the conclusions as to intention which I deduced from the consideration of the scheme as an entirety are supported and supplemented by the whole trend and significance of the events which formed the course of business.

I fully recognise and appreciate the difference between an indirect and subordinate injurious result from a primarily innocent scheme ; see *Russell* v. *Amalgamated Society of Carpenters* (1) ; such consequences are sometimes inevitable, but there is no possibility upon the facts that such a fortuitous calamity has occurred in the present case. From first to last the path of the defendants has been marked by demands as high as the public could bear, tempered only by such gleams of competition as appear from time to time, and accompanied by determined and on the whole successful efforts to remove or nullify that competition.

Effect of Defendants' Silence.

The evidence has now been reviewed in I think all of its important features. The mass of facts and figures marshalled on the various points of attack and defence show how little substance there is in the defendants' contention that there is no evidence against them. The testimony adduced on behalf of the Crown, when arranged in order and considered in proper sequence and relation, coheres into a solid bank of proof which, unanswered by opposing facts and unqualified by explanatory circumstances has forced my mind to the view that the case as presented by the plaintiffs is correct. And why has there been neither answer or explanation by the defendants themselves ? People, if they have a fair case in reply to an attack upon their pockets, especially if it be a serious attack, do not usually fail to prove it. Silence in such a situation can scarcely be regarded as golden ; and when, as in the present instance, the attack is made on grounds of injury to the general community, it is still more difficult to understand.

(1) (1910) 1 K.B., 506.

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Add to that, as here, open charges of oppression and fraud made incidentally but directly, backed by evidence strongly tending to establish the correctness of those charges, and the question becomes still more pressing why the defendants were not roused to some plain personal denial or explanation. Instead of that they left their extrication to the fertility of counsels' forensic resources. These have been great, and have required of me careful and detailed examination. I cannot think that the defendants were actuated to maintain silence by mere disdain of consequences—the comparative triviality of the suggestion of not risking the expense of a few days cross-examination is proof to the contrary—nor can I imagine it was simply defiance of the opinion or power of the community. If these were their motives, their silence would not affect the matter. But if these were not their motives, I cannot but regard it—not of course as additional evidence—but as confirming the credit to be attached to the facts proved and the inferences they *prima facie* afford.

FORMAL FINDINGS ON STATEMENT OF CLAIM.

I am now in a position to deal with the statement of claim as a whole. Paragraphs 1, 2, 3 and 4 are true. Paragraph 5 is true, except that the Stockton Borehole Collieries Limited dates from 2nd July 1909, the Central Greta Colliery Co. Limited from 15th February 1910, and the Lymington Collieries Limited from 14th October 1907 to January 1910. As to paragraph 6 it is true that the business of the colliery proprietors consists among other things of winning coal from collieries owned and worked by them respectively and in selling the same. As to the method of such sale, it was normally, that is independent of the contract and combination complained of, either direct or through agents in the ordinary sense to purchasers in one or more of the other States of the Commonwealth of Australia for transportation and for consumption in such other States, and the defendants proceeded against, and each of them respectively, are now and subject to the dates specially mentioned have been at all times material to this action engaged in trade and commerce in coal among the States.

Paragraph 7 is true subject to the dates specially mentioned.

Paragraphs 8, 9 and 10 are true; but as to these my findings are only for the purpose of dealing with the questions of the combined agreement and the combination. As to paragraph 11, for reasons already given I pass it by without any finding. Paragraph 12 is true. Paragraph 13 is true altering the word "Superintendent" to "Agent." The defendant Forsyth has been and is also a director of the New Lambton Land and Coal Co. Limited. Paragraphs 14, 15, 16, 17, 18, 19, are true. Paragraphs 20 and 21, 22 and 23 are true, but with the qualification that Queensland is to be excepted. This again must be understood of the business of each of the companies concerned, considered apart from the combination. Paragraph 24 is true. Paragraph 25 is true. This also is found to be true merely with reference to the combined agreement and combination for reasons already given. As to paragraph 26 I have not sufficient evidence to come to any conclusion upon it. Paragraph 27 I pass by as immaterial, paragraphs 28, 29, 30, 31, are true. Indeed the truth is much understated—see Ex. Y9. As to paragraph 34, Newcastle coal is as I have stated undoubtedly better for household and gas-making purposes. For steam production there is not much difference; one or the other may be superior according to the conditions under which it is used. For those undertakings equipped for Newcastle coal, it is distinctly disadvantageous to use Southern coal; mechanical alterations would often be necessary and expensive even were other coal easily procurable. In short, Newcastle coal may truly be said to have qualities which render it especially useful for use in the manufacture of coal gas, and also for the purposes of domestic use, and under certain circumstances for the purposes of steam production; and in that sense coal possessing similar qualities is practically unobtainable in Australia, except from Newcastle and Maitland district, New South Wales.

As to paragraph 35 it is true. As to paragraph 36, it is true that the defendant shipping companies with J. & A. Brown in 1906 substantially controlled about 80 per cent. of the whole carrying trade in coal between New South Wales and the other States of the Commonwealth. In the same year, the Melbourne Steamship Co. Limited and James Paterson together controlled about 12 per cent.

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The same figures apply to paragraph 37. Paragraph 38 is true. What has been called an actual monopoly of the carrying trade was up to the combined agreement a matter of free choice as to every transaction. Paragraph 39 is true. It is admitted there was competition but, I have indicated that, though the shipping companies prior to 24th September 1906 were not parties to any treaty of alliance, there certainly existed among themselves something in the nature of an *entente cordiale*. Paragraph 40 is true. As to paragraphs 41 and 42 I have already stated that the allegations of the statement of claim are established so far as concerns the actual making of the contracts therein referred to, with the qualification that the modifications in the contract were introduced before 1909. I now add that the rest of the allegations in those paragraphs are true and I explicitly state that I mean the contract was made and entered into by the defendants with intent to restrain trade and commerce to the detriment of the public. Paragraphs 43, 44 and 45 are severally fully proved as to the whole of the periods respectively mentioned. Then as to paragraph 46. With regard to sub-paragraph 8*a* relating to supply and carriage of coal from New South Wales to Tasmania, I do not find that proved. With regard to sub-paragraphs 10*a*, 10*b*, 10*c*, 10*d*, except so far as prevention referred to is included in the general stipulation expressed or implied not to carry any but Vend coal, there is no proof of the allegations. With respect to the rest of paragraph 46, I find that the defendant colliery proprietors and the Associated Northern Collieries and the shipping companies were in combination between themselves and the Melbourne Steamship Co. and James Paterson & Co. in relation to trade and commerce in coal between the State of New South Wales and the States of Victoria, South Australia, Western Australia and Queensland, and that the nature purposes and effect of the combination were as alleged, in various sub-paragraphs subject to qualification I have mentioned.

I find the allegations in paragraphs 47, 48, 49, 50, 51, 52, 53, 54, 55, 55*a*, to be true. I find paragraph 55*a* to be true to the extent mentioned with respect to paragraph 46. In all the paragraphs up to 55*a* inclusive as well as in the subsequent paragraphs, I find the intent alleged to be proved. In relation to the dates, such as with respect

to Stockton Borehole Collieries Limited, my finding of course takes effect as to the collieries that came in later only as from the dates previously mentioned, when they joined the Vend. I find paragraph 56 to be proved.

I find the following paragraphs relating to monopoly to be proved, namely, 57, 58, 58*a*, 59, 59*a*, as to Newcastle Wallsend Co., A. Kethel & Co. Limited and Lymington Collieries Limited., 60, 60*a*, as to the same collieries mentioned in connection with 59*a*. I except from these findings the words "others to the plaintiffs unknown." As to paragraphs 61, 62 and 63 which relate to combination and conspiracy to monopolise, these I find proved except the words "others to the plaintiffs unknown." As to paragraphs 64, 65, 66, 67, 68 and 68*a*, so far as these may be considered a repetition of previous paragraphs they are found to be proved to the same extent, but, if they are meant, as I rather think they are, to charge a conspiracy by the shipping companies among themselves only, as the main charge and then incidentally and in point of law superfluously introducing the collieries and similarly but conversely with regard to the Vend, I can only say that no such case was fought or in my opinion established, the contract and the combination and conspiracy relied on as substantive offences was the composite one of collieries on the one side and the shipping companies on the other. Of course in a sense the shipping companies did combine with each other and the collieries did combine with each other and each did combine with the rest, but it was in the way in which I have explained in the beginning of this judgment. If in law, contrary to my opinion, the paragraphs referred to should be held to have been proved, the facts speak for themselves, and afford the means of correction. As to paragraph 69, the defendants, who were not principals and including the defendant the Associated Northern Collieries, did abet, counsel and procure the several contraventions which I find the principals committed. I cannot however see how the principals, that is the collieries, and the shipping companies themselves can be said to have aided, abetted, counselled and procured the offences they primarily committed. Paragraphs 71, 72, 73, 74, 75, are substantially proved. As for paragraph 76 I have had no evidence directly substantiating the allegations in that paragraph. It is left

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to inference whether the increased price of coal increases the price of secondary production. Of course it naturally would, but whether it did in any particular case there is nothing to show. There is some evidence that in certain industries such as gas there was no increase of price. As to paragraph 77 the averments in my opinion are correct. There has been no undertaking by the defendants or any of them that they would abstain from pursuing the same course in future. It has been rather the other way, their attitude seemed to me to be in effect one of resolve now to test the right to do what they have done in the past. Paragraph 77 is therefore correct.

DECISION ON FINDINGS.

The plaintiffs claim a declaration that the defendants and each and every of them have been guilty of the offences charged or some of them and that they be convicted accordingly. They also claim a declaration that the defendants made the contract or contracts charged and have carried out and are still carrying out such contract or contracts. They also claim a declaration that the defendants formed and entered into and engaged in the combination or combinations. So far as such declarations are necessary I make them first as to each and every one of the offences severally which I have found to have been committed, and as to the contract made and renewed from time to time, its modifications of the same as stated, and as to the combination formed and continued as above stated.

I convict the defendants, and each and every of them, of the several offences severally found against them respectively as above stated.

Then comes the question of penalty. The law under which these proceedings were instituted provided that the penalty should be "Five hundred pounds."

Mr. *Wise* has argued that there should be a penalty for every "offence," that is, for making the contract, for being a member of the combination, that is from the first day of joining it, also for continuing to be a member of it, and for engaging in the combination which is rather using "combination" in an abstract sense, the earlier use being rather in a concrete sense, the word being properly used in either sense. "Combination" means either the abstract act of

combining, the banding together of persons for a common object, or the concrete body or association so combined or formed.

Mr. *Wise* claimed that there might and in this case there should be a penalty for every day from 25th September 1906 to the commencement of the action. He cited *White* v. *The King* (1); *The Apothecaries Co.* v. *Jones* (2); *Allen* v. *Worthy* (3); *R.* v. *Waterhouse* (4), and *Garrett* v. *Messenger* (5), and *City of Atlanta* v. *Chattanooga Foundry* (6); *Jackson* v. *The Blanche* (7).

Mr. *Mitchell* opposed this view and cited *Milnes* v. *Bale* (8).

In my opinion that contention of the Crown cannot be sustained. Though I have convicted each of the defendants of the various several offences, yet it must be clearly understood that that is so because what is substantially for the present purpose the one set of facts in this case collected between the date of commencement of the combination and the date of the writ fits linguistically the several statutory descriptions of those offences. That does not alter the actual conduct of the defendants or multiply their contraventions. Any one of those charges might have been selected by the Crown and prosecuted to conviction. If so, no further proceedings could have been taken on the same facts merely because they answered another stated offence, and I must not treat the defendants more harshly because all possible forms of contravention are set out in the same statement of claim.

The substance of the matter as the Crown has charged it in the statement of claim is that in 1906 a contract in violation of the Act was made and thereby or by means of conduct on the lines of its terms an illegal combination arose, which by various prolongations was continued down to the commencement of the action. Possibly each renewal of the contract might have been shaped as a new contract entered into, the original contract being in 1906, the first renewal in 1907, the next in 1908 and so on. But though in technical strictness that might apply and probably would fit some of the words of sec. 4 yet I hesitate to think it would be within its spirit, in the circumstances of this case. I can quite conceive a case where the

(1) 4 C.L.R., 152.
(2) (1893) 1 Q.B., 89.
(3) L.R. 5 Q.B., 163.
(4) L.R. 7 Q.B., 545.
(5) L.R. 2 C.P., 583.
(6) 127 Fed. Rptr., 23; 2 Fed. Anti-Trust Decisions, p. 299.
(7) (1908) A.C., 126.
(8) L.R. 10 C.P.,, 591.

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renewal of an expiring contract would be within both the letter and the spirit of the law and constitute a new offence as contemplated by Parliament. And the action if commenced earlier might have given a new starting point, a new offence beginning if further continuance of the combination were persevered in. But looking broadly at the facts here I am not satisfied that the rule of renewed contract being a distinct and separate offence was meant to apply to such a case as the present. The contract was but the means of creating or helping to create or bring about a combination, its renewal being more like a new link in the same chain, and where there is a combination it is that which makes the public danger, because the mere making of the contract is not so important as the action taken under it, and that in this case was by the combination. The substantial facts were the creation and continuance of a combination, or in the abstract sense the combination of the defendants. And Parliament appears to have so considered the subject in the amending Act, because it imposes a daily penalty and in some cases imprisonment for a continuing offence which is specially appropriate to a combination. That is the serious fact, and the Crown has rightly in my opinion, taken that view in framing the Statement of Claim. Paragraph 41 alleges the original making of the contract. Paragraph 42 speaks of another contract after January 1909 with modifications. I have found that, as a fact—as steps in the proof—the original contract as modified in 1907 was renewed in 1908 and 1909, and this is legitimate as evidence of conduct relating to the charge of combination; but the idea of paragraph 42 was apparently a newly modified contract, and that did not take place, and whatever opinion I form of the conduct of the defendants, I do not fell justified in looking at the charge in paragraph 42 in a light different from that in which it was on the whole presented to them. This view is strongly supported by the next paragraph 43, which charges a combination—one and the same combination—between 1st October 1906 and 1st January 1910. Now if paragraph 42 were understood to mean that there was a distinct contractual break at the end of 1908, and a fresh and distinct start in 1909 of a new contract as a substantive offence, the combination would have been similarly charged in paragraph 43. So I do not think paragraph 42 was so intended. Again paragraphs 48, 50, 52 and 54 charge a continuance

from 2nd January 1907 to 31st December 1907, and again in 2nd January 1908 to 31st December 1908, and again from 2nd January 1910 to 4th June 1910, of the combination mentioned in paragraph 46 which is there alleged to have been in existence on 1st January 1907. These considerations do not of course exclude the effect of the unlawful intent arising either at the beginning or at any other point of time during the existence and continuance of the combination. That principle has full play and has been so treated during the case. Then again in paragraph 57 it is charged that the defendants monopolised trade in and between October 1906 and June 1910 by making and entering into what is termed " An agreement or an arrangement between themselves, &c." and then the substance of the agreement and arrangement is described as previously mentioned. The point of the matter is that that agreement or arrangement—in other words, the contract or the combination—is spoken of as if it were one continuous thing, susceptible it is true as an arrangement or a combination of the accompaniment of unlawful intent at any stage of its career. So in paragraph 58, which charges the attempt to monopolise, and similarly in paragraphs 58*a*, 59, 59*a*, 60 and 60*a*. In paragraphs 61 to 65 and paragraphs 67 and 68*a* the same course is followed with regard to the charge of combining and conspiring, which being continuous might become unlawful at any point. A separate penalty for each year would still in my opinion be inadequate to meet the merits or rather the demerits of this gigantic conspiracy, but justice is to be measured as Sir Edward *Coke* said by " The golden and straight metwand of the law and not the uncertain and crooked cord of discretion." And " the metwand of the law " here requires me to measure the offences by a fair and reasonable interpretation of the real intention of the legislature as applied to the facts of the case and the intention of those who framed the Statement of Claim, which in this instance are in my opinion substantially the same. So reading it the defendants' behaviour resolves itself into one accumulated, though sometimes varying, mass of conduct, and one only, extended over a considerable period of time and in the course of that time touching the law at many points, and wearing many legal aspects ; I am therefore not justified in awarding penalties according to the number of aspects, or otherwise than according to the practically united mass of conduct

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charged. Still less ought I to inflict more than one penalty for contract, and only one for combination. I do not agree with the view presented by the Crown that " continuing " is to be treated for the purpose of penalties as separate from " being " and that every day of continuance is a new offence. The case of *Apothecaries Company* v. *Jones* (1) is opposed to that view. In that case a Statute provided that any person who should act or practise as an Apothecary without a certificate should be liable to a penalty for every such offence. The defendant practised as an Apothecary without a certificate and treated three different persons at three different times on the same day. He was sued for three penalties. It was held that he was liable for only one penalty because the word " practise " implied continuity. At p. 96, the Court in effect construed the Act as implying that the penalty was imposed for practising " on any day in the week." Then came the principle of continuity which applied during the whole of the day. *Hawkins* J. said (2), that the principle was :—" That the offence created by the Statute can alone be made the subject of conviction—the overt acts done in the commission of that offence are but so many pieces of evidence." In the present case the word " continues " cannot be restricted to one day, and therefore it must have its natural signification which I have described in the earlier part of this judgment. I have dealt with the section as if it stood unaltered because Mr. *Wise* argued on that basis ; but it has been amended and it seems to me that Parliament has put an interpretation on the words which leaves no doubt whatever. The Act of 1910, No. 29, provides that sec. 4 of the Principal Act is amended by inserting after the words " Five hundred pounds " the words " or in the case of a continuing offence Five hundred pounds for each day during which the offence continues " ; and a similar amendment is made as to sec. 7 which *inter alia* increases the punishment. I can only say the defendants are fortunate that the amending Statute was not in force prior to the institution of this action.

Then Mr. *Mitchell* argued that there could not be more than one penalty of £500 for all the defendants jointly. In other words that the defendants were not severally liable to penalties. The conse-

(1) (1893) 1 Q.B., 89.

(2) (1893) 1 Q.B., 89, at p. 96.

quence of such a doctrine would be alarming. Two individuals might each have to pay £250 for an injurious but comparatively innocuous contract in restraint of trade, whereas 50 powerful monopolists would get off with £10 each. I am satisfied that so unexpected and destructive an interpretation should not be adopted without clear coercive authority.

Mr. *Mitchell* cited a case of great authority, *Del Campo* v. *The Queen* (1). There it was held by the Judicial Committee that the receiving goods on board a slave ship was the joint act of the owner and the master of the vessel, and that two penalties could not be awarded, but only a joint penalty against both. But when the case is carefully looked at it is seen that the *ratio decidendi* is against the defendants' contention. Lord *Brougham*, who delivered the judgment said :—" The single offence of shipping or receiving goods on board is made a joint offence ; the words are, ' in every case the persons so offending,' not every person so offending, and though, as was observed by Lord *Mansfield* in *Rex* v. *Clark* (2), ' where the offence is in its nature several, and every person concerned may be separately guilty, there each offender is separately liable to the penalties,' it has been decided in *Hardyman* v. *Whitaker* (3), that where the offence is made a joint offence by Statute, the parties concerned are liable to but one forfeiture ; this has been followed in *Barnard* v. *Gostling* (4). Looking to the words of the Act, and these authorities, their Lordships are of opinion that the separate penalties of £10,000 against Del Campo and Riera must be remitted."

In the present case the offence is not made a joint offence. The words pointed to by Lord *Brougham* as words which would have involved separate penalties namely " every person so offending " are practically in the Statute, which says :—" Any person who, &c., is guilty of an offence." That is each and every person doing the forbidden act is guilty and is liable to the penalty. I may here quote some observations from *Maxwell on Statutes*, 4th ed., p. 298, which seem to me entirely convincing, speaking of the case of *R.* v. *Clark* (5), above-mentioned, it said :—" The question whether the offence was joint or several evidently arose not from the nature

(1) 2 Moore P.C.C., 15.
(2) Cowper, 610.
(3) Bull. N.P., 189.
(4) 2 East., 569.
(5) Cowper, 610.

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of the offence, but from the nature of the penalty. If the penalty had been corporal instead of pecuniary, the distinction between joint and several offences could hardly have occurred: for it would have been found difficult to apply the rule of one joint penalty to two offenders sentenced to five weeks imprisonment or twenty-five lashes. It would seem that the question whether the penalty is to be understood as separate or joint, where the Act is not explicit, would be better governed by the consideration whether the penalty was intended as compensation for a private wrong, or as a punishment for an offence against public justice."

If on conviction for a second offence the Court under sec. 13 impose a term of imprisonment, would the defendants share it numerically?

The argument is untenable, and I hold that each and every defendant is liable to a penalty not exceeding £500. From what I have already said it will have been gathered that my opinion is that the full amount is not too much for the least of the offences proved, and accordingly I impose a penalty of £500 on each and every defendant proceeded against, except the defendant called the Associated Northern Collieries. I except this defendant because though in a sense it is a separate organisation and has appeared as such, yet in effect all its members are fined to the statutory limit, and it would be unfair, and a virtual excess of Parliament's intention to fine them again indirectly through this Association. The defendants, Frances and Daniel Sneddon to pay one penalty jointly.

INJUNCTION.

An injunction is claimed in the Statement of Claim and is now asked for at the bar by learned counsel on behalf of the Attorney-General under sub-section 2 of section 10 of the Act which is in these terms:—"On the conviction of any person for an offence under this Part of this Act the justice before whom the trial takes place shall, upon application by or on behalf of the Attorney-General or any person thereto authorised by him, grant an injunction, restraining the convicted person and his servants and agents from the repetition or continuance of the offence of which he has been convicted."

This subsection makes it a matter of right to obtain the particular

remedy and leaves no discretion to the Court. If it were a matter of discretion the circumstances are such that I should have no hesitation in granting it. I say this because it may be that subsec. 1 of sec. 10 also could be relied on to support the claim for an injunction. My own view expressed on the application for discovery was and is that the claim for injunction was closely connected with subsec. 2 and the issues involved in the claim for penalties rather than with subsec. 1, and I could not limit it to paragraph 56. But, I may be mistaken, and I was then carefully guarding the defendants from discovery by what might have been regarded as a side wind. It may be that now it is to be supported under paragraph 56 alone. Consequently, I think it right to state that if the grant of an injunction depends on discretion I exercise it by granting the injunction restraining the defendants, their servants and agents from the repetition or continuance of the several offences of which they have respectively been convicted.

The practical importance of the matter is that if the claim falls within subsec. 1, there is no need to trouble about intent. It is sufficient to establish a contract or combination in actual restraint of trade or commerce to the detriment of the public.

There is really no other method than injunction to protect the public, who are the complaining parties in this case. Ordinarily the Court has to consider whether in the circumstances, damages will be sufficient or whether convenience points rather to withholding than to granting the injunction. But here everything points to the absolute necessity of granting it if any relief is to be given at all.

I need hardly say that the injunction in no way affects *per se* any agreement other than the combined agreement and the combination charged.

The defendants must pay the plaintiffs' costs.

Declaration accordingly. Penalties imposed and injunction granted.

Solicitor, for plaintiffs, *Powers*, Commonwealth Crown Solicitor.

Solicitors, for defendants, *Minter Simpson & Co.*, *Sparke & Millard* and *Malleson, Stewart, Stawell & Nankivell.*