[HIGH COURT OF AUSTRALIA.]

THE SOUTH AUSTRALIAN HARBORS BOARD APPELLANT; PLAINTIFF,

AND

THE SOUTH AUSTRALIAN GAS COMPANY . RESPONDENT. DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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MELBOURNE, *May* 30, 31; *June* 1, 5, 6, 7.

ADELAIDE, *Oct.* 5.

Starke, Dixon, Evatt and McTiernan JJ.

Regulation—Repeal—Preservation of accrued rights and liabilities—Lease by public authority—Covenant entitling lessee to use plant to be erected by lessor—No price fixed—Repeal of regulation fixing price—Quantum meruit—The Harbors Act 1913 (*S.A.*) (*No.* 1149), *secs.* 63, 84, 102 (11), (20), (21), 106—*Acts Interpretation Act* 1915 (*S.A.*) (*No.* 1215), *secs.* 4, 16 (1).

The South Australian Harbors Board, formed a plan for establishing at Osborne in South Australia a coal wharf equipped with electrically driven appliances for discharging colliers and delivering coal. Pursuant to this plan the Board leased certain land in proximity to the proposed wharf to the South Australian Gas Co. for 99 years from 1st January 1924. By clause 15 of the lease the Board covenanted that it would "within three years from the commencement of the said term erect . . . adequate coal-handling appliances for the purpose of discharging and handling coal and the lessee shall have the right of taking delivery from the said plant . . . at such point . . . as may . . . be mutually agreed." The lease did not stipulate the amount to be charged by the Board for the use of its plant. On 4th December 1929 the Governor in Council made a regulation purporting to be made under secs. 63, 84 and 102 (11) and (21) of the *Harbors Act* 1913 (S.A.) fixing the amount at 3s. per ton of coal delivered, with an additional 1d. a ton for 'tween-deck vessels, with certain rebates. This regulation was revoked on 19th June 1930; and on 25th August 1930 the Board under sec. 63 of the *Harbors Act* 1913 passed a resolution adopting the same charges and rebates. Subsequently the Board claimed from the Gas Co. remuneration for the use of its plant during 1930 and 1931 at the rate specified by the regulation and the resolution.

Held that the revocation of the regulation of 4th December 1929 had, in the absence of any statutory provision to the contrary, the same effect as was produced at common law by the repeal of a statute: Sec. 16 of the *Acts*

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Interpretation Act 1915 (S.A.) (which provides that the repeal of an Act of Parliament shall not affect rights and liabilities which have accrued thereunder) did not operate, in combination with sec. 106 of the *Harbors Act* 1913 (which provides that regulations under that Act shall have the same effect as if contained in the Act), to preserve rights created by the regulation, and the Board was entitled to recover for the use of its plant only such an amount as was in fact reasonable.

Decision of the Supreme Court of South Australia (*Napier* J.) affirmed as varied.

APPEAL from the Supreme Court of South Australia.

The South Australian Harbors Board, brought an action in the Supreme Court of South Australia against the South Australian Gas Company, claiming £10,670 8s., being the balance alleged to be due and payable by the defendant for the discharging of coal from vessels at the plaintiff's wharf and delivering it to the defendant. The defendant denied that it was indebted to the plaintiff in any moneys for the discharge of coal from any vessels, and alleged that, if the plaintiff was entitled to make any charge against the defendant for any services in discharging coal, the plaintiff was entitled to make a reasonable charge only for such services. The defendant also counterclaimed for the sum of £21,765 from the plaintiff for breach of a covenant by the plaintiff to have erected certain coal-handling plant within three years from 1st January 1924, the date of the commencement of a lease of certain land from the plaintiff to the defendant. Further facts appear in the judgments hereunder.

The action was heard by *Napier* J. who gave judgment for the plaintiff for £6,015 0s. 7d. on the claim and gave judgment for the defendant on the counterclaim for £12,098 18s. 6d. and directed that judgment should be entered for the defendant for the difference, namely, the sum of £6,083 17s. 11d.

From this decision the plaintiff now appealed to the High Court.

Hannan and *Alderman*, for the appellant.

Ligertwood K.C. and *Astley*, for the respondent.

The arguments sufficiently appear in the judgments hereunder.

Cur. adv. vult.

The following written judgments were delivered :—

STARKE J. The South Australian Harbors Board (hereafter called the Board) is the harbor authority for South Australia. It has the exclusive control and management of all harbors in the State and of navigation therein and of all such harbor works as are not private property. It may (amongst other powers) provide such engines, cranes, hoisting and weighing machines and other apparatus for facilitating the loading and discharging of vessels, and such other conveniences upon or near the wharves, docks and platforms vested in the Board, as it thinks expedient for the trade of the harbor. About August 1921, the Board concluded that the coal traffic at Port Adelaide should be concentrated at one site, and adequate coal-handling appliances erected for the purpose of discharging and handling coal. The principal importers of coal into South Australia, in order of tonnage imported, were the Railways and Government departments, the South Australian Gas Co. (hereinafter called the Gas Co.), the Electric Supply Co., and the Municipal Tram Co. Conferences were held between the Board and representatives of the importers, including the Gas Co. It was agreed that the plant should be capable of handling 500,000 tons of coal per annum, and it was estimated that the cost of handling the coal from ships to trucks would be 2s. 2d. per ton. The site selected was at Osborne on the Port River, alongside the works of the Electric Supply Co. The Board offered, and the Gas Co. accepted, a lease of a block of land at the Osborne site, separated only from the works of the Electric Supply Co. by a strip of land required for the Board's purposes. The lease was for ninety-nine years from and including 1st January 1924 at a rental calculated in the manner provided by the lease. It was agreed (clause 17) that the land leased might be used for the purposes of and in connection with the business and operations of the lessee and in particular (without in any way limiting the generality of the preceding words of this clause) for carrying on the manufacture of gas and by-products of coal and for storing coal and other materials for the purposes of the lessee's operations. The following covenant on the part of the Board was contained in the lease (clause 15) : " That the lessor shall within three years from the commencement of the said term erect or cause

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to be erected" on the Osborne site "adequate coal-handling appliances for the purpose of discharging and handling coal and the lessee shall have the right of taking delivery from the said plant or from any plant that may be erected in lieu thereof at such point in such plant as may from time to time be mutually agreed as being convenient of all coal required to be delivered by the lessee but any structure erected by the lessee for such purpose shall not unreasonably obstruct any traffic or operations of the lessor and in default of the said plant being so erected by the date mentioned the lessee shall have the right to determine this lease but such determination shall not affect any claim by either party against the other in respect of any antecedent breach of any covenant or condition herein contained." The Board erected a modern coal-handling plant at the Osborne site at a cost of £247,708. The cost of the plant, excluding telphers, conveyers, and bins, was £146,716. Telphers are unloading appliances erected on pontoons, and those acquired by the Board cost £16,507, and bins (of which there were forty) and conveyers cost it £84,485. The Gas Co. also proceeded to erect works on the site leased to it including a conveyer to take coal from the Board's conveyers into the Gas Co.'s works. This plant, for handling and storing its coal in its Osborne works, cost the Gas Co. £53,492, which included £1,165 paid to the Board as the cost of connecting the Gas Co.'s conveyers with those of the Board. The Board's plant was not completed within three years from 1st January 1924. Up to 28th October 1928 no facilities were available. From 28th October 1928 to 27th March 1930, unloading took place, but only by means of the basket system. From 27th March 1930 until 15th January 1931, telphers were used for the purpose of unloading coal. The plant was complete and in use on and from 15th January 1931. The Gas Co.'s plant was complete and ready for use about July 1928. During the period from 28th October 1928 to 15th January 1931, and after the expiration of that period, coal arrived for the Gas Co. and was discharged by the Osborne plant. The Gas Co. discharged at the Osborne works from 28th March 1928 to 1st September 1931 (both days inclusive) some 139,661 tons of coal, and the Board claimed for discharging the coal at the rate of 3s.

per ton, and one penny additional for coal discharged from 'tween-deck vessels. The Gas Co. made certain payments on account of this claim, and the Board sued for the balance alleged by it to be due, £10,670. The Gas Co., on the other hand, claimed from the Board £21,765 damages for breach by the Board of its covenant in the lease to erect or cause to be erected within three years of the commencement of the lease adequate coal-handling appliances for the purpose of discharging and handling coal at the Osborne site. The claim and counterclaim were tried before *Napier* J., who directed (omitting shillings and pence) that the Board should recover on its claim £6,015, and that the Gas Co. should recover on its counterclaim £12,098, and that judgment should be entered for the Gas Co. for £6,083, the difference between the two sums. An appeal is now brought to this Court.

Under the *Harbors Act* 1913 of South Australia, the Governor in Council is empowered, on the recommendation of the Board, to make regulations fixing and prescribing the rates or charges for the use of the Board's loading and unloading plant and appliances. (See *Harbors Act*, sec. 102 (20) and (21), and the *Acts Interpretation Act* 1915 of South Australia, sec. 23.) Such a regulation was made on 4th December 1929 fixing a minimum rate of 3s. per ton for the discharge of coal at Osborne, with 1d. per ton in addition for the discharge of coal from 'tween-deck vessels. But this regulation was revoked on 19th June 1929. *Napier* J. has held, in accordance with the common law principle, that the effect of the revocation of this regulation was to obliterate it completely, just as if it had never been passed (*Surtees* v. *Ellison* (1)). The provisions of the *Harbors Act*, sec. 106, and of the *Acts Interpretation Act* 1915, secs. 4 and 16, did not, in his opinion, preserve any right existing under any regulation prior to its revocation. It appears to me that the learned Judge was right in this opinion. The *Harbors Act*, sec. 106, enacts that regulations under the Act shall be of the same effect as if they were contained in the Act, but does not prescribe that they shall be incorporated in and form part of the Act, in which case the provisions of sec. 16 (1) would appear to operate. The point is of

(1) (1829) 9 B. & C. 750, at p. 752 ; 109 E.R. 278, at p. 279.

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comparatively little importance in this case, for it only affects coal discharged from four ships, involving a claim of about £1,870.

The Board's claim rests substantially upon the allegation that the Board, at the request of the Gas Co., discharged coal from various vessels by means of its plant at Osborne and delivered it upon the conveyer belt belonging to the Gas Co. The provisions of sec. 63 of the *Harbors Act* recognize the right of the Board to charge for the use of its plant, but require that the charges be reasonable. The Board, to quote the words of the section, " may make reasonable charges for the use of such depôts, sheds, engines, cranes, hoisting and weighing machines, and other apparatus and conveniences." Soon after the revocation of the regulation already mentioned, the Board, in August of 1930, pursuant to sec. 63, resolved that a maximum rate of 3s. per ton should be charged for the discharge of coal at Osborne, and with an addition of one penny per ton for the discharge of coal from 'tween-deck vessels. The resolution provided for rebate allowances if the tonnage of coal discharged at Osborne exceeded certain quantities, but these quantities were never reached in the periods in question in this case. A resolution of the Board, however, cannot determine the reasonableness of the charge; that is a matter, if the charge be challenged, which must be determined by a competent Court. *Napier* J., as I follow his judgment, accepted the maximum charge fixed by the resolution as a reasonable and adequate charge for the discharge and delivery of coal through the bins into trucks at Osborne. But that finding has been challenged on this appeal. The reasonableness of a charge is, I agree, a question of fact. But reasonableness depends upon the circumstances in which, and the time at which, the charge is made. The ordinary principle of assessment, says *Napier* J., is " the fair market value of the service," in other words, the charge ordinarily made for the same sort of service. But in the case of public utilities it is seldom possible to appeal to an ordinary or market rate or charge, and one is necessarily driven to a consideration of the capital expended upon the public undertaking and the revenue thereof as a basis for determining the reasonableness of the charges made or claimed for the use of the same.

Before examining the figures, it is well to recall that the estimate for handling coal by the plant erected by the Board from ship to truck was 2s. 2d. per ton, whilst discharge by the basket system formerly in use in Adelaide cost round about 3s. 6d. per ton. The estimate was based on the plant's handling about 500,000 tons of coal per annum. But to June 1933, the plant never handled more than 287,954 tons in any one year, and no evidence is available as to any subsequent year. The capital expenditure upon the plant was £247,708. It was not denied that the Board, upon any inquiry as to the reasonableness of its charges, should be allowed a fair return upon any capital expended upon the plant. But it was said that an expenditure of £84,485 upon bins and conveyers was so excessive and unreasonable that it ought not to be taken into account. The bins were for storage purposes. The plant could discharge into bins faster than the coal could be taken away by the importers, and at the same time they provided an economical method of discharge into trucks, or other methods of removing coal from the works. There were forty bins, each holding 275 tons. But the Gas Co. and the Electric Supply Co. had provided for themselves conveyer belts for taking coal from the Board's conveyors into their works, and did not require the use of the bins, except perhaps in the case of a breakdown of their conveyer belts. The original estimate was that about 400,000 tons of coal per annum would pass through the bins into railway trucks. Deliveries to the Gas Co. and the Electric Supply Co., however, would not go through the bins, but would be taken on their conveyer belts direct to their works. Consequently the estimate of coal passing through the bins should, it is said, be reduced from 400,000 tons to about 240,000 tons per annum. As a matter of fact, the coal delivered to the Gas Co. and the Electric Supply Co. through the Osborne plant in 1933 appears to have amounted to about 130,000 tons. Assume, however, that the estimate of coal passing through the bins should not have exceeded some 250,000 tons of coal per annum, does that estimate stamp the erection of the bins as imprudent or unreasonable? Competent engineers were of opinion that bins should provide a storage capacity equal to the loading capacity of two of the largest

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colliers trading to Port Adelaide, that is about 12,000 tons. The plant was designed for, and based upon, development and extension of the coal trade at Port Adelaide. The Board and the engineers were looking to the future as well as to the existing coal trade in South Australia, and, indeed, on its face, the scheme was based on the requirements of ten years ahead. The plant was designed by competent engineers and approved by the Harbors Board, whose good faith cannot be questioned. Breakdowns in plant—the Gas Co.'s and the Electric Supply Co.'s as well as the Board's—failure of railway service, and strikes, are contingencies that were also considerations to be weighed by those responsible for the erection of the plant, and they are necessarily in a better position than is any Court with regard to such matters. The provision of bins with a storage capacity of 11,000 tons in the plant erected by the Board cannot, in all the circumstances, be regarded as excessive or unreasonable.

The expenditure of £16,507 upon telphers was next attacked. It was said that this expenditure was rendered necessary owing to the default of the Board in not completing its works within three years from the 1st January 1924. Substantially this seems to be true. The evidence does not make it clear, however, whether the default was that of the Board itself or was due to circumstances beyond its control, or was that of contractors employed by the Board. But it was necessary to do something to relieve congestion in the port, and to reduce the costs of unloading at Osborne by means of the "antiquated basket system." Moreover, telphers are still used, and are apparently necessary for the purpose of discharging coal into hulks for bunkering ships. Even now, "without the telphers some other medium would have to be provided to work the plant efficiently." The expenditure upon the telphers was forced upon the Board in urgent circumstances, but upon the whole, in ascertaining the reasonableness of the Board's charges, it should not, I think, expect or be allowed in account any return upon capital so expended.

[His Honor then considered in detail the revenue of the Board from its undertaking, and proceeded:—]

In my judgment, the Board's charge of 3s. per ton for discharging coal through its bins with one penny per ton in addition if the coal was discharged from 'tween-deck vessels in the period in question here—28th March 1930 to and inclusive of 1st September 1931—is fair and reasonable and must be supported.

But it is said that the Gas Co. does not use the bins and takes delivery of its coal on its own conveyer belt. This is true. *Napier* J. found that under normal conditions the cost to the Board of the storage in the bins and loading into trucks was no less than 8d. per ton, and that this sum represents the proportion of the 3s. rate fairly attributable to this service. Further, he held that the cost to the Gas Co. of the service of its own conveyer belt was far more than 8d. per ton. The evidence warrants these findings, and they were hardly challenged on this appeal. The learned Judge said that the operations of the plant were " fairly divisible into three distinct stages: (1) the unloading, (2) the conveyance, (3) the service of the bins for storing and loading. The defendant company " he added " dispenses with the last mentioned, but the plaintiff Board is seeking to charge for the delivery of the coal at the rate of 3s. per ton, plus an additional 1d. per ton in the case of 'tween-deck vessels, being the flat rate that it has adopted, without regard to the manifest fact that the defendant company is not using the bins, but has provided, and uses, its own means of performing this part of the service." And he thus concludes that a fair and reasonable charge for unloading the coal and delivering it to the Gas Co.'s conveyor was 2s. 4d. per ton, with an additional 1d. per ton in the case of 'tween-deck vessels. That estimate is based, as already appears, on the flat rate of 3s. less 8d. per ton for the service of the bins. But too much stress, it seems to me, is here laid upon the order of the operations. The plant was erected for the purpose of concentrating the discharge of coal at one site in Port Adelaide, thus giving quicker discharge to ships, and, as it was hoped, reducing the costs of discharge. Coal-handling plant and appliances that would expeditiously and effectively discharge any imported coal were therefore necessary, and storage bins became an essential part of the plant, not only for the purpose of giving ships quick discharge,

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but also for the purpose of reducing the costs of discharge as a whole. In truth, as the learned counsel for the Board contended, the plant is an organic whole and not a divisible unit. And it is but reasonable that charges should be made upon that basis, otherwise each class of importer would require a special rate, e.g., those who discharged into hulks or trucks and did not use the conveyors or the bins. The business results of differential charges might well, in the bona fide and reasonable judgment of the Board, prove disastrous to the undertaking; and loading the charges to importers who availed themselves of the whole service, for the benefit of those who did not choose to do so, would be hard to justify as a matter of business or of fairness. Moreover, it must not be forgotten that the bin service is always open and available to the Gas Co. in case of need, as to all other importers, and breakdowns in conveyer belts are not so uncommon that they may be treated as negligible. It is with hesitation that I differ from the learned Judge, but, as I have reached the opposite conclusion, it is my duty to express and act upon it. The 8d. per ton for the bin service should not, in my judgment, be deducted from the flat rate charge of 3s. per ton.

The counterclaim of the Gas Co. remains for consideration. But here I can be short. The learned Judge in assessing damages has used the sum of 2s. 4d. as the charge which the Board was entitled to make, whereas in my judgment the sum should be 3s. But, subject to the substitution of this figure where necessary, I agree with the judgment of the learned Judge and cannot usefully add anything to his careful and exhaustive discussion of the facts.

Formally the appeal should be allowed. The parties have agreed that the Board would be entitled to recover £10,670 7s. 11d. on the basis of the flat rate charge of 3s. per ton plus 1d. per ton addition for 'tween-deck vessels, and the Gas Co. £6,731 17s. 10d. on its counterclaim. Judgment for the Board should therefore be entered for the difference, £3,938 10s. 1d.

DIXON J. Coal is imported into Adelaide by sea. After the South Australian Railways, the largest consumer of coal is the South Australian Gas Co., which is the respondent in this appeal and the defendant in the action out of which it arises. The South Australian

Harbors Board, which is the plaintiff appellant, formed a plan for establishing some distance down the Port Adelaide River, at Osborne, a coal wharf equipped with electrically driven appliances for discharging colliers and delivering the coal. A conference was summoned of representatives of the largest consumers of coal, including the Gas Co. A committee was formed which considered the prevailing cost of discharging coal at Port Adelaide from ship to trucks, the quantity of coal which might be expected to pass through the proposed plant at Osborne and the probable cost of discharge thereby from ship to trucks. It reported that the existing cost was 2s. 2d. a ton, that the amount it estimated would pass through the plant was 500,000 tons per annum, and that upon this estimate the cost would also be about 2s. 2d. The site proposed was next to the works of the Adelaide Electric Supply Co., a large consumer of coal, and the committee took into account the fact that its coal would be diverted by conveyer belts into its works and would not pass into the bins which would be needed to contain the coal pending loading into trucks. The Harbors Board requested the Gas Co., whose works were at Brompton, to establish new works upon the other side of the proposed site. After discussion and negotiation the Gas Co. agreed to take a lease of land adjoining the site, which was vested in the Harbors Board. A lease was accordingly prepared by the parties. It was executed on 29th February 1924. The term was ninety-nine years from 1st January 1924. The demised premises consisted of thirty-five acres of land bounded on the east by the Port River and on the south by the land reserved as the site for the coal-handling plant, which, on its southern side, was contiguous with the Adelaide Electric Supply Co.'s premises. The instrument, which expressly conferred upon the Gas Co. rights enabling it to provide itself with its own wharf if it wished to do so, contained the following provision :—" 15. That the lessor shall within three years from the commencement of the said term erect or cause to be erected on the piece of land coloured brown in the said plan adequate coal-handling appliances for the purpose of discharging and handling coal and the lessee shall have the right of taking delivery from the said plant or from any plant that may be erected in lieu thereof at such point in such plant as may from time to time be mutually agreed as

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being convenient of all coal required to be delivered by the lessee but any structure erected by the lessee for such purpose shall not unreasonably obstruct any traffic or operations of the lessor and in default of the said plant being so erected by the date mentioned the lessee shall have the right to determine this lease but such determination shall not affect any claim by either party against the other in respect of any antecedent breach of any covenant or condition herein contained."

The Gas Co. spent a large sum upon the construction of plant on the site at Osborne, but it did not disuse its works at Brompton. By August 1928, it was ready to receive coal at Osborne. But the Harbors Board's plant was not then ready for use. In fact it was not until 15th January 1931 that it was completed and put into proper operation. The Harbors Board, however, was able by temporary devices to discharge and deliver coal over the Osborne wharfs from 26th October 1928. Up to 28th March 1930, it did so by means of baskets handled by stevedores' labourers. Afterwards it installed some telphers. By these various means it discharged in 1929 50,162 tons of coal, all of which was received either by the Gas Co. or the Electric Supply Co. In 1930 the Harbors Board's plant discharged 118,255 tons, of which 53,034 tons were received by the Gas Co. and almost all the rest by the Electric Supply Co. In 1931 the completed plant discharged 193,635 tons of which the Gas Co. received 88,235 tons. In view, no doubt, of the difficulties attending the delivery of coal during the period when the ships were discharged by hand, the Harbors Board appears to have made no charge for unshipping coal in 1929. Unfortunately the Gas Co. and the Harbors Board have been unable to agree upon the amount of the charge payable thereafter. The lease is silent upon the remuneration payable by the Gas Co. to the Harbors Board for the services of its plant. By the latter's statute the Governor in Council is empowered to make regulations on the recommendation of the Board, amongst other things, for fixing all dues, charges and rates, and the Board may make reasonable charges for the use of apparatus and conveniences (Act No. 1149, secs. 84, 102 (11) and (21), and 63). It is not clear that the statute contemplates such an undertaking as the installation and operation by the Harbors Board of a plant like

that at Osborne, but it appears to be common ground that the parties supposed the remuneration payable for the services rendered to the Gas Co. would be fixed by regulation. On 4th December 1929, the Governor in Council made a regulation which provided that there should be chargeable and paid upon completion of the discharge of every cargo of coal to the Harbors Board by the consignees for the discharge of coal at Osborne a maximum rate of three shillings per ton with an additional penny a ton for 'tween-deck vessels. It provided further that rebates according to a scale might be paid by the Board, if, during a financial year, the tonnage of coal landed at Osborne exceed specified amounts, the lowest of which was 375,000 when a rebate of not more than $1\frac{3}{4}$d. a ton might be paid, and the highest, 500,000, when $8\frac{1}{2}$d. a ton might be paid. The charge was expressly made applicable whether to the case of delivery on the belts of the Gas Co., or the Electric Supply Co., or into cars under bins or overside. The regulation was, however, revoked on 19th June 1930. The reason suggested for revoking it is that the Legislative Council was about to disallow the regulation. On 25th August 1930, the Board passed a resolution adopting the same charges and rebates.

The Gas Co. refused to pay a charge of three shillings a ton as excessive, and the Harbors Board brought the action to recover that charge in respect of the coal received by the Gas Co. over the Board's plant during the years 1930 and 1931. It was heard by *Napier* J., who held that the regulation, upon its revocation, no longer operated to fix the charge even in respect of the period of its currency, that the resolution was not effective to impose the charge, and that the Harbors Board was entitled to recover a fair and reasonable rate of remuneration for the services it performed with its plant and that rate, after an elaborate examination of the materials laid before him, he assessed at 2s. 4d. a ton.

Relatively, the practical importance is small of the question whether the regulation after its revocation no longer operated to impose a legal duty to pay three shillings a ton upon coal that was delivered through the plant while it was in force. Four ships only were discharged in that period, and the amount underpaid by the

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Gas Co. would be only £1,870. In my opinion, the revocation of a regulation has, in the absence of some statutory provision to the contrary, the same effect as was produced at common law by the repeal of a statute. A right conferred or an obligation imposed by a statute did not survive its repeal. " It must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law " (per *Tindal* C.J. in *Kay* v. *Goodwin* (1)). The application of the doctrine to subordinate legislation is considered in *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (2). The law of South Australia contains no general enactment preserving, after the repeal of statutory regulations, rights and liabilities arising under them. But sec. 16 of the *Acts Interpretation Act* 1915 provides that the repeal or expiry of an Act of Parliament shall not affect rights and liabilities which have accrued thereunder, and on behalf of the Harbors Board it is contended that the power of the Governor in Council is conferred by its Act in such terms as, for the purpose of this provision, to place the regulations in the same situation as statutes. Sec. 106 of the *Harbors Act* 1913 provides that they shall be of the same effect as if contained in Part II. of the Act. It is suggested that both the revoked regulation and the revoking regulation are given by this provision the status of Acts of Parliament, and, therefore, the same consequences flow from the original promulgation and subsequent revocation as if done by statute. In my opinion the section does not alter the results of revoking a regulation. It is directed to the operation which regulations shall have while on foot. They will, in pursuance of its requirement, be interpreted by reference to the definitions contained in sec. 33, be enforced, where they provide no penalty, by that prescribed by sec. 124, and be proceeded on under Division IX. But they do not become statutes within the meaning of the *Acts Interpretation Act*, nor are those of its provisions, which are limited to defining the operation of statutes, made applicable. It follows that after the repeal of the regulation any liability it imposed of its own force upon the Gas Co. came to an end.

(1) (1830) 6 Bing. 576, at p. 583; 130 E.R. 1403, at p. 1405.

(2) (1931) 46 C.L.R. 73, at pp. 85, 87, and 105, 106.

The subsequent resolution of the Harbors Board adopting the rate and rebates prescribed by the regulation cannot, in my opinion, operate to impose liability as an exercise of authority and independently of contract. Sec. 63 enables the Board to make charges for the use of its apparatus and conveniences, subject to the condition that the charges shall be reasonable. It does not mean, however, to give an authority to levy the charges, independently both of regulation and of agreement. If the Gas Co. were not entitled to the use of the coal-handling plant, the adoption and notification of the rate, provided it be not unreasonable, would be enough to fix the Gas Co. with a contractual liability to pay it, because the Gas Co. after notification continued to avail itself of the services performed by the plant. But, notwithstanding the argument made on behalf of the Board to the contrary, I think that clause 15 of the lease means that during its currency the Gas Co. shall have a right to the services of the plant. Perhaps mutual agreement upon the point at which coal should be delivered was a condition precedent to the acquisition of an absolute right. But that condition has been fulfilled, and I cannot accept the construction of the clause which makes it necessary for the parties to agree as to the point of delivery upon every occasion the plant discharges coal consigned to the company. The Harbors Board has not disputed its power to enter into the bargain contained in the lease. The result of the view expressed is that the Board was not free to stipulate what remuneration it should receive for delivering coal to the Gas Co. through its plant, but was bound by clause 15 to deliver coal for whatever reward it would be entitled by law to receive. As there was no regulation fixing by law the rate payable, I think it necessarily follows that the amount to which the Harbors Board is entitled is that which is found as matter of fact to represent a fair and reasonable rate of remuneration, in other words, a *quantum meruit*. To the determination of such a rate *Napier* J. addressed himself. Although it is a question of fact, its answer depends very much upon the methods of reasoning which are pursued, and the appeal against the judgment resolves itself into an attack upon the correctness of the principles adopted by *Napier* J.

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The plant constructed by the Harbors Board which delivered the coal to the Gas Co. is of a very elaborate and expensive description. Four travelling jib cranes are supported upon a wharf. They are armed with grabs by which the coal in a collier's hold is seized, raised and deposited in receiving hoppers, whence it falls upon belt conveyers running parallel with the wharf. The belt conveyers carry it to apron feeds that deliver it on to a pair of conveyers which carry it at right angles and upwards to a point where it may be discharged upon other conveyers. At this point a cross-conveyer belonging to the Gas Co. runs off to its premises, and another belonging to the Electric Supply Co. runs off to its premises, and a system of forty bins commences over which conveyers run. The bins appear to be arranged in four parallel rows of ten each, and four conveyers carry the coal over them and discharge it into them. By switches coal can be sent by the Gas Co.'s conveyer, by the Electric Supply Co.'s conveyer or into the Harbors Board's bins by one of the conveyers. Each bin has a capacity of 275 tons. The purpose of the bins is to contain the coal pending its discharge therefrom into railway trucks underneath. The expeditious discharge of colliers contributes materially to the reduction of the landed cost of coal and forms one object which the plant was designed to achieve. The grab can unship the coal at a rate of 400 tons an hour, but it would be impossible to remove it by means of trucks at anything like that rate. Containers in which it can accumulate are, therefore, a necessary part of the plant. Excluding the telphers, upon which £16,507 was spent, the plant is said to have cost £231,000 to erect. Of this sum, about £84,500 is attributable to the bins and the conveyers over them. The Gas Co. installed a plant upon its premises for dealing with its supplies of coal at a cost of about £53,500, including the cost of the conveyers. The service performed by the Harbors Board for which the Court was required to fix a fair and reasonable rate of remuneration consisted in the unshipment of coal and its delivery on to the Gas Co.'s conveyers by means of the Board's coal-handling plant.

The lease bound the Harbors Board to install appliances which would handle coal adequately and so perform the service of delivering it out of ships to the Gas Co. at Osborne. It contemplated the

construction of permanent works by both parties which might be operated together to the advantage of each of them. Upon a *quantum meruit*, usually the value of services is assessed by reference to charges commonly made by others for like services. But in the present case no such standard is available. No doubt the cost of discharging coal at other wharves by other methods cannot be excluded from consideration as altogether irrelevant, because, for example, probably it would not be considered reasonable for the Harbors Board to demand a greater sum than the Gas Co. would pay if it adopted some such alternatives at Osborne. But, in the circumstances of the present case, the primary or initial factor in the estimate of a fair and reasonable rate must be the revenue expenses reasonably incurred by the Harbors Board in equipping itself to perform the services contracted for and in their performance. That this was so appears to have been fully recognized by *Napier* J. But he was confronted by the fact that, during the first of the two years for which the Board claimed, its plant was incomplete and it performed its contract only by resort to extraneous appliances. It was evident on that ground alone that no safe guidance could be obtained from the actual cost incurred during that year. Further, in the next year, the Harbors Board had not secured the handling of anything like the anticipated proportion of the coal coming to Adelaide, and to distribute the fixed charges over the actual quantity only of coal passing through the plant would produce a rate per ton which could not fairly be demanded of the Gas Co. For these reasons and the additional reason that the plant was designed on a much larger scale than was needed to deal with the amount of coal found in the event available, his Honor said that he could not accept the actual experience of the plant during the period in question as a fair guide to the value of the services rendered. But he found that a fair charge for the complete service of delivering coal out of ships through the plant into trucks under the bins was, or at least did not exceed, the three shillings resolved upon by the Harbors Board. This finding he made for four reasons. The amount was fixed by the Board itself: the original estimate for this work had been 2s. 2d.: when the cost of unloading into trucks at Port Adelaide was no longer

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included in the price of coal, the consignors reduced the price by 3s.: and the cost of unloading by the basket system appeared to be about 3s. 6½d.

Having accepted the rate of 3s. "as the full value of discharge and delivery through the bins," his Honor turned to the consideration of the allowance from that rate which ought to be made to the Gas Co. because it took delivery of its coal upon its own conveyers before it reached the bins. That such an allowance ought to be made he thought, as I understand, necessarily followed from the partial use made of the entire plant in delivering the Gas Co.'s coal. He said that the operations of the plant were fairly divisible into three distinct stages, namely, unloading, conveyance and the use of the bins, with the third of which the Gas Co. dispensed, but that the Harbors Board sought to charge it with the flat rate adopted as proper for the service of the plant "without regard to the manifest fact that the . . . company is not using the bins, but has provided and uses, its own means of performing this part of the service."

The Harbors Board denies the soundness of such a method of computing the fair and reasonable rate payable by the Gas Co. The deduction made does not represent the costs only in electric power, labour and the like which the Board may be saved by the idleness of the bins and the conveyers over them when the plant is dealing with the Gas Co.'s coal. It represents that proportion of the 3s. which the learned Judge thought was fairly referable to the third stage of the operations of the plant. The materials upon which he computed the deduction included not only the facts appearing to indicate how far the revenue expenditure incurred by the Board as a result of the bins entered into the composition of the three shillings, but also a table giving the annual charges for interest, depreciation, repairs and renewals based on the capital cost of the bins and the conveyers over them.

Upon the whole, I have come to the conclusion that the reasoning upon which such a deduction is based cannot be supported. The fact that no physical use is made of the third section of the plant in the operation of unloading coal shipped to the Gas Co. and delivering

it on to the company's conveyers is outweighed by other considerations which appear to me to show that, in arriving at a fair and reasonable reward for the service obtained by the Gas Co., such an apportionment of the costs and charges incurred by the Harbors Board ought not to be made. The plan to which the Gas Co. adhered when it took its lease was that the Harbors Board should undertake the responsibility of erecting a plant for the discharge of nearly all the coal shipped to Adelaide. A chief merit of the plan lay in the possibility of thus obtaining a reliable means of expeditiously discharging colliers and delivering coal to consignees at rates which would diminish as the quantity handled increased. To justify the undertaking financially the plant installed by the Harbors Board must include all the appliances required for the delivery of coal to the consumers expected to use it. To make it possible to conduct the operations at low charges, it must unload a quantity of coal several times greater than that imported by the Gas Co. A principle object being rapidity of discharge, it was essential to provide an adequate means of holding the coal discharged from the colliers pending its necessarily slower removal by trucks. A plant constructed to fulfil these purposes operates as a whole; its parts are interdependent. If the bins did not exist, the rapid discharge of 400 tons an hour would be impossible, unless the Gas Co. took the coal. Its conveyers are designed to accept coal at the maximum rate at which the Board's cranes and conveyers can deliver it. But when the switch diverts coal on to the Gas Co.'s conveyers at this rate, the conveyers over the Board's bins are thrown into idleness, and the bins, except for what they already contain, cease to fulfil their function. It is immaterial to the Board, which must maintain the bin system, whether the Gas Co. uses it or not, except that, if the Gas Co. did use the bins, a greater space would be utilized. As events have turned out, this space is available. In emergency, as for instance, if the Gas Co.'s plant failed, or if a strike took place, it might be compelled to use the bins.

The essential service performed by the plant, alike for the Gas Co. and other consignees, is unloading the colliers and delivering the coal. One consignee may take coal at an earlier point than another. Some coal may be discharged by means of the cranes overside into lighters,

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some may be taken off by the Electric Supply Co.'s belt, some by the Gas Co.'s, some may go through the bins. But unless the plant existed in its entirety, none could be delivered by it and, from the point of view of the Harbors Board, that one consignee's coal does, and another's does not, require the physical use of the entire plant is an accident to which it is almost financially indifferent. It is not, or ought not to be, completely indifferent financially, because there is a saving at the bins of labour (estimated by the Gas Co. at .65d. per ton) and of power and lighting. Further, fewer bins were needed than if the Gas Co. and the Electric Supply Co. proposed to take delivery through them. There is a dispute whether in the actual design sufficient account was in fact taken of this circumstance. But, for the reasons I have given, I am unable to agree in the method adopted by the learned Judge of ascertaining the fair and reasonable rate payable by the Gas Co. per ton of coal delivered over the plant.

The elements I have mentioned which tend to make the Gas Co. a less expensive customer of the Board do not, in my opinion, differentiate it from other customers to such a substantial extent as to make a flat rate for all unreasonable or unfair, so long as it is not measured by the costliness of the more expensive service only. It is impossible to say that a profit made upon the conduct of such an undertaking must be uniform for all classes of customers. But more than one difficulty exists in accepting the rate of three shillings as a fair and reasonable rate.

In the first place, the learned Judge has done no more than accept the rate of three shillings as " the full rate of discharge and delivery through the bins," which does not appear to me to be a finding that it is in truth a fair and reasonable rate for that service.

In the next place, in justifying this rate even in those calculations in which it has made what appears to me a necessary assumption, viz., that a figure of about eighty-nine per cent of the coal imported into Adelaide should be used as a divisor into costs to find a tonnage rate, the Board has included expenditure which ought not to be taken into account.

The annual charges for interest, depreciation, repairs and renewals in connection with the telphers should have no place in the account. The expenditure upon these expedients arose from constructional

risks which must be borne by the Board, risks which left it in default under clause 15 of the lease. Again, a high rate per ton is charged for contingencies which the evidence fails to justify, particularly upon the larger tonnage assumed. Then the view of *Napier* J. that the plant was larger than the event justified cannot be entirely disregarded. Again, the Board is in a real difficulty in reference to the two years in question. Its default during the first of them and the inadequate resort made to its plant during the second make it difficult for it to rely upon its experience as affording reliable materials to fix a rate for a customer who should not be required to bear any of the consequences of these misfortunes.

Upon the materials before us, which have been discussed by the learned Judge in a very helpful manner, I should think the rate of three shillings was somewhat too high as a flat rate payable by the Gas Co. as well as others. If differential rates had been fixed, it might be justifiable as the higher rate. If we do not adopt it, a rate must be fixed in the action as a fair and reasonable rate for the Gas Co. The Court is not to fix a rate for all customers. It is concerned only with the Gas Co. The guiding consideration, however, in estimating the fair and reasonable rate for the Gas Co. must be the total amount of the expenditure on revenue account reasonably incurred by the Harbors Board in providing all the services performed by the plant. That amount must be reduced to a rate per ton in order to be of use in estimating a rate of charge. In reducing it to a rate per ton, the important thing is the adoption of the quantity of coal which should be regarded as bearing the total expenditure. The actual quantity, which went through the plant in the years with which the action is concerned, ought not to be taken because it does not represent the amount of custom which might have been reasonably obtained by the Harbors Board if the plant had been put in operation in the manner required by the contract. A quantity should, in my opinion, be taken which is equivalent to the amount of coal the Harbors Board would probably have handled had the plant been in full working order. In computing the amount per ton, the working expenses, which vary with the tonnage handled, should so far as possible be separated from the fixed charges. Upon the evidence there is a little difficulty in

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constructing a common basis, but it can be overcome by making proper adjustments. The years sued upon are 1930 and 1931. Detailed accounts of working expenses are available for the period in which the Board's plant was in proper operation only up to 31st January 1933. The tonnage of 1932-1933 may, at any rate tentatively be taken to represent the tonnage which should be taken as that making use of the plant when it was put into proper condition and operation. The following calculation is based upon the tonnage for 1932-1933, upon working expenses during 1931 and 1932 and interest at the rate payable for 1930 and 1931.

[His Honor then proceeded to discuss the cost per ton of coal which would have been incurred by the Harbors Board if it had been able to handle the anticipated percentage of the coal imported and what percentage should be assumed. After analysing the working expenses and fixed charges his judgment continues :—]

These figures throw a great deal of light upon the expenditure per ton of coal handled which the Harbors Board's rate of charge should cover. An allowance of some amount should be added to cover unforseen and incidental expenditure, and a further allowance should be made by way of profit. These amounts are both difficult to assess. But the sum of 2d. a ton seems clearly excessive for contingencies, particularly on the larger tonnages assumed.

As to profit, it must be remembered that the Harbors Board contributed nothing but borrowed money and the land and thus the capital in the undertaking has already been credited in the computation with full remuneration in interest and rent. But, although it is a State enterprise, a reasonable rate of profit upon the operations should be included in the charge. Having regard to the variations in the figures of annual expenditure which have been set out and to the necessity of adopting a figure for the annual amount of coal handled as a divisor for the fixed charges, it is not possible to arrive arithmetically at the final figure. It must be fixed as a matter of judgment proceeding upon the considerations discussed. The charge to the Gas Co. must be mitigated to some extent by taking into account the savings in labour at the bins and in power and lighting and treating the Gas Co. as having relieved the Harbors Board of some annual expenditure on necessary bins. Upon the tables and

other materials submitted and the considerations mentioned, I would fix the rate at 2s. 9d. a ton. This would increase the amount of the judgment upon the claim to £8,924 12s. 8d., an increase of £2,909 12s. 1d.

The Harbors Board had engaged to erect before 1st January 1927 adequate coal handling appliances. It had been unable to fulfil this engagement and when, in August 1928, the Gas Co. began to need its coal at Osborne, the plant was not ready. The Board's default continued admittedly until the telphers commenced work at the end of March 1930, and, although it is not admitted, it is apparent that until the plant was completed the stipulation in the lease was not fulfilled. The Gas Co. counterclaimed for loss occasioned to it by this long period of breach. The general nature of the damages claimed is loss consisting of the difference between the cost actually and reasonably incurred by the Gas Co. in obtaining delivery of the coal and the cost which it would have incurred if adequate coal-handling appliances had been available to it at Osborne. It is obvious that, in ascertaining the amount of such damages, one limb of the comparison, the amount which it would have cost to obtain delivery if adequate appliances had been installed, must be largely determined by the charge fixed under the Board's claim.

The Gas Co. bought its coal upon terms that the suppliers should unload and deliver it, but the suppliers were ready to reduce the price by 3s. a ton if they were relieved from discharging the coal as they would have been if the Board's plant had been in operation. At the trial it succeeded in establishing, under the first six of the twelve subdivisions in which it scheduled its claim, that in respect of a large number of cargoes of coal, amounting to 152,526 tons, it had been deprived of the difference between the 3s. and 2s. 4d. per ton fixed by the learned Judge as the charge for unloading and delivery by the Board's plant.

[His Honor then dealt in detail with the counterclaim. His judgment concluded :—]

For these reasons I think that *Napier* J.'s decision as to the heads of damage recoverable should not be disturbed. If the sum of 2s. 9d. were adopted as the proper charge per ton for the services

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of the plant, the judgment on the counterclaim would be reduced from £12,098 18s. 6d. to £8,744 10s. 7d.

In my opinion the appeal should be allowed with costs.

EVATT J. I have had the opportunity of reading the judgment of my brother *Dixon* and I am content to express my entire concurrence with it.

McTIERNAN J. I have had the advantage of reading the judgment of my brother *Dixon* and agree with it.

Appeal allowed. Judgment appealed from varied by substituting the sum of £8,924 12*s.* 8*d. for the sum of* £6,015 0*s.* 7*d. thereby directed to be recovered by the plaintiff from the defendant on the plaintiff's claim and by substituting the sum of* £8,744 10*s.* 7*d. for the sum of* £12,098 18*s.* 6*d. thereby directed to be recovered by the defendant from the plaintiff on the defendant's counterclaim and by directing that the plaintiff recover from the defendant the difference between the said sums, namely* £180 2*s.* 1*d. and that judgment be entered accordingly. Order that save as aforesaid the judgment appealed from including the order as to costs be confirmed. Order that the defendant respondent pay the plaintiff appellant the costs of the appeal to this Court except in so far as such costs have been increased by including an appeal from the judgment on the counterclaim.*

Solicitor for the appellant, *A. J. Hannan*, Crown Solicitor for South Australia.

Solicitors for the respondent, *Finlayson, Mayo, Astley & Hayward.*

H. D. W.