[HIGH COURT OF AUSTRALIA.]

THE MAYOR &c. OF THE CITY OF MELBOURNE . . . . . DEFENDANTS, . APPELLANTS;

AND

THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA, ON THE RELATION OF THE METROPOLITAN GAS CO. . . . . INFORMANT, . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *March* 23, 26, 27, 31.

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

Electric Light and Power Act 1896 (*Vict.*) (*No.* 1413), *secs.* 13, 38, 39, 52—*Charge for supply of electricity—Preference—Uniform charge—Alternative rates—Option given to consumer—"Flat rate"—"Maximum demand rate."*

Sec. 39 of the *Electric Light and Power Act* 1896 (Vict.) is directed to a preference between persons supplied with electricity, and under it the charge for the supply of electricity may be uniform, notwithstanding that there are alternative scales of charges, under one of which the price for every unit supplied is uniform, while under another a larger price is charged for a specified quantity first supplied and a larger price for the remainder, provided that all the consumers may elect on which scale they will be charged.

Undertakers under the *Electric Light and Power Act* 1896 had two scales under which they charged consumers for the supply of electricity, and all consumers had the option of which rate they would select. Under one scale, called the "flat rate," consumers were charged for the actual quantity of electricity supplied at the uniform rate of 4½d. per unit. Under the other scale, called the "maximum supply rate," consumers were charged at the rate of 7d. per unit as to such portion of electricity supplied to them as was equal to a consumption for a period of 45 hours per calendar month at the highest rate of consumption during the month, and, as to the remainder of the electricity so supplied during the month, at the rate of 2d. per unit.

Held, that the charges were lawful.

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Decision of the Full Court, *The Attorney-General, on the relation of the Metropolitan Gas Co.* v. *The Mayor &c. of the City of Melbourne*, (1906) V.L.R., 36; 27 A.L.T., 116, reversed.

The Attorney-General, on the relation of the Metropolitan Gas Co. v. *The Mayor &c. of the City of Melbourne*, 27 V.L.R., 568; 23 A.L.T., 123, overruled.

APPEAL from the Supreme Court of Victoria.

In an information by the Attorney-General for Victoria, on the relation of the Metropolitan Gas Co., against the Mayor &c. of the City of Melbourne, it was alleged that the defendant Corporation, being undertakers within the meaning of the *Electric Light and Power Act* 1896 (Vict.), and being authorized by an order of the Governor in Council under that Act to supply electricity for any public or private purpose within their municipal area, in contravention of that Act charged consumers for such supply at rates which were not uniform throughout the municipal area, and in such a manner that certain companies and persons were being supplied at a less price than certain other companies and persons. An injunction was claimed restraining the defendants from continuing to charge consumers for supplies of electricity at rates which were not uniform throughout the said area. It was admitted by the defendant Corporation that, at the request of any consumer they were willing to supply, and did supply, electricity, at the option of the consumer, either on a system (called the "flat rate") whereby the quantity used was charged for at 4½d. per unit, or on a system (called the "maximum demand rate") whereby the rate of 7d. per unit was charged for such portion of the electricity supplied as was equal to a consumption for a period of 45 hours per calendar month at the highest rate of consumption during the month, and the rate of 2d. per unit was charged for the remainder of the electricity supplied during the month.

From the evidence it appeared that certain consumers, who were supplied with electricity under the maximum demand rate, paid as low as 2·8d. per unit of electricity supplied, others 2·9d., and others 3d. per unit.

The action having been referred to the Full Court, an injunction was granted as asked (*The Attorney-General &c.* v. *The Mayor &c. of the City of Melbourne* (1)).

(1) (1906) V.L.R., 36; 27 A.L.T., 116.

From this judgment the defendants now appealed to the High Court.

Isaacs A.G., and *Bryant* for the appellants. Sec. 39 of the *Electric Light and Power Act* 1896 is directed only to a preference between individuals supplied with electricity. No preference is shown if all persons supplied have the opportunity of availing themselves of the rates which are offered. Where there is a variation of the charge in exact proportion to the variation of the service there is no preference. See *Phipps* v. *London and North-Western Railway Co.* (1); *Denaby Main Colliery Co.* v. *Manchester, Sheffield and Lincolnshire Railway Co.* (2); *London and North-Western Railway Co.* v. *Evershed* (3); *Baxendale* v. *Eastern Counties Railway Co.* (4). If sec. 39 were held to mean that one price per unit must be charged in all cases, then sec. 38 would be useless.

[They also referred to *Railway Clauses Consolidation Act* 1845 (8 & 9 Vict. c. 20), sec. 90; and *Canada Sugar Refining Co.* v. *Reg.* (5).]

Mitchell K.C., and *Irvine* (with them *Starke*) for the respondent. The decision in *The Attorney-General &c.* v. *The Mayor &c. of the City of Melbourne* (6) is correct. Under the *Metropolitan Gas Company's Act* 1878 (No. 586) the Gas Company can only charge one price for gas whatever amount they supply. See secs. 134, 194, 199. The intention is that undertakers under the *Electric Light and Power Act* 1896 should be in a similar position with respect to charging for electricity as that in which the Metropolitan Gas Company is with respect to charging for gas. Sec. 52 of the latter Act recognizes that only one price per unit is to be charged for electricity. The cases on the English Act are inapplicable, because the words "undue preference" are there used instead of "preference."

Isaacs K.C. in reply. Sec. 52 of the *Electric Light and Power Act* 1896 only applies to a company, and therefore does not apply

(1) (1892) 2 Q.B., 229.
(2) 11 App. Cas., 97.
(3) 3 App. Cas., 1029.
(4) 4 C.B.N.S., 63.
(5) (1893) A.C., 735, at p. 741.
(6) 27 V.L.R., 568; 23 A.L.T., 123.

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to the defendant corporation. That section is not intended to universally control the previous sections. If a company cannot bring itself within the terms of that section by reason of the mode of charging for electricity, then it cannot avail itself of the privilege thereby granted. [He also referred to *Husey* v. *London Electric Supply Corporation* (1); *Shiress Will on Electric Lighting*, 3rd ed., pp. 35, 189, 445.]

Cur. adv. vult.

GRIFFITH C.J. This is an appeal from a decision of the Full Court upon questions referred for their opinion after a trial before *Madden* C.J. The form of proceeding was an action brought by the Attorney-General on the relation of the Metropolitan Gas Co. against the Mayor &c. of the City of Melbourne, who are undertakers under the *Electric Light and Power Act* 1896, to restrain them from supplying electricity except at a single uniform rate per unit of electricity supplied. It is alleged that the Corporation charges two rates, one called a "flat rate," under which a uniform charge per unit of electricity supplied is made, and another called a "maximum demand rate," under which the consumer pays a certain price per unit for a quantity of electricity ascertained by the maximum rate of consumption during a specified period in each month, and a lesser price for all electricity beyond that quantity. This, it is contended, is inconsistent with the express provisions of the Statute under which the Corporation acquired the right to supply electricity.

The question arises upon the construction of sec. 39 of the *Electric Light and Power Act* 1896, which provides that:—"The undertakers shall not in making any agreements for a supply of electricity show any preference to any council company or person, and the charge for such supply shall be uniform throughout such area, so that each council company or person shall be supplied at the same price and not less than any other council company or person, but such price shall not exceed the limits of price imposed by or in pursuance of the order authorizing them to supply electricity." It is contended by the informant that that section enacts that all electricity supplied shall be charged for at a single

(1) (1902) 1 Ch., 411.

identical price for every unit of electricity supplied. The defendants contend to the contrary, and say that the charge is uniform if the price is the same for the supply of electricity under the same conditions. The learned Judges of the Supreme Court did not express any independent opinion as to the construction of the section, considering themselves bound by a previous decision of the Full Court in an action between the same parties: *Attorney-General* v. *The Mayor &c. of Melbourne* (1). That case had been tried before *Madden* C.J., and he had accepted the contention for the Corporation. On appeal to the Full Court, the Court, by a majority (*Williams* J. and *Hood* J.) reversed his decision, *à Beckett* J. dissenting. The construction put upon sec. 39 in that case was to the effect that the price to be charged was a single identical price per unit of electricity supplied. The contest there was whether the Corporation was justified in supplying electricity for lighting purposes at a different price from that charged for electricity supplied for motive power. That was the opinion of the majority of the Court. *à Beckett* J., who dissented, said (2):—"I think we are not driven to this construction, and that, fairly read, the whole section is an enactment against preferences only, and does not operate to prohibit different charges for supplies for different purposes or at different hours or in different quantities." When the present case came before the Full Court, they thought themselves bound by the reasons as well as by the decision in the previous case, and, without expressing any opinion of their own, followed it. *Hodges* J., who had not been a member of the Court on the previous occasion, suggested that if the matter had been open he might possibly have come to a different conclusion. The matter therefore comes before us with the opinion of two Judges on one side and two Judges on the other, and a fifth Judge intimating that he is not at all clear that the decision is right.

Before criticising the language of sec. 39, I will refer to one or two other sections of the Act. The Act provides that municipal authorities, companies or persons desiring to supply electricity are to apply for an Order in Council. That Order is to contain a number of provisions for the benefit and protection of the public. Amongst other things by sec. 13 the Order may

(1) 27 V.L.R., 568; 23 A.L.T., 123. (2) 27 V.L.R., 568, at p. 579.

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prescribe conditions as to:—"(*a*) The limits within which and the conditions restrictions and liabilities under which a supply of electricity is to be compulsory or permissive." The Order is to be made with reference to a particular area. By the same sec. 13 the Order may contain conditions as to:—"(*d*) The limitation of the prices to be charged in respect of the supply of electricity." A point was made as to the use of the word "prices" instead of "price" in that sub-section. The next section to which I will call attention is sec. 38 which provides that:—"(1) When a supply of electricity is provided in any part of an area for private purposes," which are defined in sec. 2—then, "except in so far as is otherwise provided by the terms of the order authorizing such supply, every council company or person within that part of the area shall on application be entitled to a supply on the same terms on which any other council company or person in such part of the area is entitled under similar circumstances to a corresponding supply." That section, it will be observed, contemplates that the terms may be varied by the Order in Council and that preference may be allowed if the Order so permits. The section also applies to a part of an area, and the obvious intention is that as soon as the undertakers have laid their mains in a particular part of an area—for they cannot be expected to lay them all over the area at once—all persons desiring to be supplied with electricity are to be treated with equality, that is to say, the undertakers cannot say to one person "we will supply you," and to another "we will not supply you." The section prohibits any choice by the undertakers of persons to be supplied with electricity.

The word "terms" in that section is perhaps ambiguous. Under a similar section in an English Act *Buckley* J. held, in *Metropolitan Electric Supply Co.* v. *Ginder* (3), that the undertakers were not prohibited from charging different rates to different persons under different circumstances, provided that the conditions of supply were the same for all persons. So that for a large quantity or for a fixed period, the terms might be different from those for a small quantity or for a short period.

(1) (1901) 2 Ch., 799.

Probably the same construction should be put upon sec. 38 if no intention is shown elsewhere in the Act to qualify it.

Then we come to sec. 39. Bearing in mind that sec. 38 prohibits the undertakers from making a choice of the persons whom they will supply, and provides that the undertakers must give to every person who asks them a supply of electricity on the same terms as those on which they give a supply to others, sec. 39 goes on to provide against any preference as between persons who are actually supplied. It contained three distinct provisions. The first is:—"The undertakers shall not in making any agreements for a supply of electricity show any preference to any council company or person." Stopping there, that clearly would only prohibit the undertakers from charging differential prices to persons whom they had agreed to supply, and whom they were bound to supply under the previous section. The next provision is:—"and the charge for such supply shall be uniform throughout such area"—that is, the whole area. Those words suggest at once that they are capable of two meanings. They may mean that the charge shall be a single identical price per unit of electricity supplied, which was the opinion of the majority of the Full Court in 1901, or that the charge shall be at a price which is uniform for a supply under the same conditions whether as to quality or otherwise. I pause to give an illustration. We have lately had some discussion about the charges for telephone services. Suppose that there was a fixed minimum price of £5 per annum, and that, for every time the telephone was used beyond 800 times in a year, there was a charge of so much for every occasion on which it was used. That in ordinary parlance would be called a uniform charge to all persons for the service, not, indeed, for every use of the telephone, but a uniform charge for the service. Those two meanings being open, we must read on to see whether there is any context to show in which sense the legislature intended to use the words. The section continues:—"so that each council company or person shall be supplied at the same price and not less than any other council company or person," showing that what the legislature had in mind all through was a comparison as between persons, that is, that there was to be uniformity of price as between persons, and not as between units

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of electricity supplied. The words "so that" mean that the preceding words are to be interpreted in such a manner as to secure that each council company &c. should be supplied. Then follow the words:—"but such price shall not exceed the limits of price imposed by or in pursuance of the order authorizing them to supply electricity." The only word which it seems to me can suggest any serious doubt as to that being the correct interpretation is the word "same" in the clause "so that each council company or person shall be supplied at the same price." If the section had stopped at those words, it might be argued that there must not be a different price under different conditions, but the following words "so that each council company or person" &c. show that the comparison is between persons and not between instalments of supply. That construction gives full effect to all the words of the section, whereas the other construction, viz., that the charge for the supply of electricity shall be at a single identical price for every unit of electricity supplied, makes the rest of the section idle.

It is a well-known rule of construction that effect is to be given, if possible, to every word the legislature has used, and that it is not assumed that the legislature has used words meaning nothing. That rule alone, we think, is sufficient to determine the meaning of the word "uniform." One construction gives full effect to every word, the other gives effect to only a few of the words and makes the rest of the section inoperative.

That being the construction of the section at which I arrive on its language, the only other question is whether there is anything else in the Act to compel the Court to come to a different conclusion. The only section referred to as having any operation adverse to it is sec. 52, which provides that where a company is an undertaker it may not pay dividends at a greater rate than 10 per cent. per annum, with a proviso that "whenever throughout any half-year any company shall charge for electricity supplied to consumers a less price than the maximum charge fixed by the order authorizing the undertaking such company may increase such rate of dividend for such half-year by one-half per centum on the paid up capital for each and every reduction of one farthing per unit in the price of electricity." It is said that that assumes that the

charge is to be a uniform price per unit. It assumes certainly that if a company, one of the three classes of undertakers, wishes to take advantage of that proviso, it must bring itself within the proviso, and must show that it has reduced the price charged by it in accordance with that proviso. Beyond that it seems to me to do nothing. It may be that two constructions of sec. 52 are open; one, that the question whether the company has made a reduction within the meaning of the section is to be determined by the average price per unit charged by the company; the other, that the maximum price per unit charged for the smallest quantity of electricity supplied to any consumer is to be the basis of the calculation. Either construction is open, and either will give complete effect to the section. It is possible for a company to so conduct its business as to prevent it from taking advantage of the section. But the section does not seem to me to limit the meaning of the word "price" in sec. 39.

The view I take is slightly supported by the use of the word "prices" in sec. 13 (*d*), suggesting that the order in council need not fix one uniform price per unit, and also by the use of the words "limits of price" in sec. 29. But that is, perhaps, only verbal criticism.

Upon the whole I think the construction of sec. 39 is sufficiently clear. It is addressed to a preference as between persons supplied, and does not prescribe a single identical price per unit.

That being the construction of the section, have the defendants violated it? They offer a uniform rate of so much per unit supplied, and also a rate under which they charge a certain price for a maximum supply for 45 hours per month, and a lower price afterwards. If they claimed the right to choose the persons to be supplied at each rate, that would clearly be a violation of sec. 39. But they offer to every consumer an option as to which of the two rates he will take. It is impossible to say that in so doing they are exercising a preference. I am therefore of opinion that the view of *Madden* C.J. and *à Beckett* J. was right, and agreeing with them, I think the appeal should be allowed and the action dismissed.

BARTON J. I am of the same opinion. After what has been

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said I do not think it necessary to say more than that, having well considered the judgment of *à Beckett* J. in *Attorney-General v. Mayor &c. of the City of Melbourne* (1), I reach my opinion by very much the same reasoning as is so well expressed in that judgment. I am of opinion that that judgment secures due meaning and measure to both secs. 38 and 39, which the judgment of the majority of the Full Court in the present case fails to do. The remarks which have been made in the present appeal upon sec. 52, which does not appear to have been the subject of argument in the Supreme Court, do not detract from the construction which I think should be placed upon secs. 38 and 39. The construction contended for by the appellants would, by reason of certain machinery provided in relation to dividends in sec. 52, tend to render necessary a construction of sec. 39 which would render the whole of sec. 38 nugatory, and would, in my judgment, render a large part of sec. 39 unnecessary to have been enacted, inasmuch as it would have been sufficient to enact that there should be one uniform price per unit, no matter what volume of electricity was supplied or over what area. It is clear to me that is not the meaning of the Act. Secs. 38 and 39 have each their definite purpose. One relates to the persons to be supplied and the other to preference between the persons actually supplied. We cannot, because of the words at the end of sec. 52, adopt a construction which would render nugatory the whole of sec. 38 and a great part of sec. 39. It may be that in sec. 52 the legislature has had its eye merely upon one system of charging, but that does not debar an undertaker from instituting a system of charges which, while perfectly just and open to all, is none the less a uniform system because it contains rates under which there are different prices per unit, but each of which gives good consideration for the payment of the amount charged.

The real question before us, under sec. 52, which has attained such prominence, is whether we should give to the proviso to that section a force which would cause the rejection of a considerable portion of two main sections of the Act in relation to rates and prices, or whether, on the other hand, we should say with regard

(1) 27 V.L.R., 568, at p. 571.

to sec. 52 that, although it provides machinery by which on a certain reduction of price a larger dividend than 10 per cent. per annum may be paid, it is open to a company which is an undertaker not to take advantage of that section if it chooses not to do so. The undertakers may consider the prices fixed by the two rates in this case to be such that, by adopting them, they can best carry out the undertaking and best serve the interests of their customers. I do not think it necessary to add anything except to say I am perfectly satisfied with the meaning of sec. 39, and the reasons for it, given by *à Beckett* J. in *Attorney-General* v. *Mayor &c. of the City of Melbourne* (1).

O'CONNOR J. I concur in the judgments which have been delivered. I think it necessary to add very few words. It must be taken that the legislature intended that every expression used in secs. 38 and 39 is to have a meaning; we cannot assume that the legislature used idle words. It may not be very easy to give a meaning to every word in those sections, but it must be done as far as possible. I see no difficulty in coming to the conclusion arrived at by *à Beckett* J. in the case mentioned by the learned Chief Justice to-day. Mr. Justice *à Beckett's* judgment in that case gives full meaning to every word of those two sections.

It must be assumed that, in giving the rights included in sec. 38 to every person living within an area supplied with electricity, it was intended by the legislature that the right to a supply of electricity was to be in respect to price as well as in respect to other terms on the conditions named in that section. "Terms" according to the natural meaning of the word, would include "price." We must give to sec. 39 a meaning which will not cut down and narrow the meaning of the word "terms" in sec. 38 so as to exclude its application to price. Sec. 39 supplies in itself, in the use of the word "uniform," the key to its meaning. If it had been intended merely that sec. 39 should provide that each person claiming to be supplied with electricity should be supplied at the same price, it would only have been necessary to use very few words to express that idea. The section has gone beyond that, because it declares that "the charge for such supply shall be

(1) 27 V.L.R., 568, at p. 571.

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uniform throughout such area." If it stopped there I do not think there would be any difficulty in coming to the conclusion that the word "uniform" did not mean "identical" but meant "equal in form," that is to say, the same charge under the same circumstances. For instance, to take an illustration, if half a dozen persons were supplied with articles of any kind, and if a certain price were charged for any quantity less than a ton and a lower price for a quantity greater than a ton, it could not be said that the prices were not uniform. The prices are not identical, but, as between persons supplied, the prices are uniform—there is uniform opportunity for obtaining the goods at the same price. Sec. 39 goes on "so that each council company or person shall be supplied at the same price and not less than any other council company or person." It would be altogether against all rules of construction to construe those last words in such a way as to alter the meaning of the word "uniform." It is intended to be explained by the later words "so that each council" &c. The proper way to regard these later words is as an expansion and explanation of the word "uniform" as was pointed out by the learned Chief Justice, that is, to regard as the main question under consideration in sec. 39 the prohibition of preference as between individuals or bodies supplied with electricity. I entirely agree with the explanation given by the learned Chief Justice of the latter part of that section, and on the whole I concur in the judgment arrived at by him.

Appeal allowed. Judgment discharged. Judgment for appellants with costs, including costs of interrogatories and discovery. Respondent to pay costs of appeal.

Solicitors, for appellant, *Malleson, Stewart, Stawell & Nankivell*, Melbourne.

Solicitor for respondent, *Herald*, Melbourne.

B. L.