

## [HIGH COURT OF AUSTRALIA.]

GIBSON . . . . . APPELLANT;  
 PLAINTIFF,

AND

MITCHELL . . . . . RESPONDENT.  
 DEFENDANT.

ON APPEAL FROM THE COURT OF PETTY SESSIONS,  
 SYDNEY.

*Telephone—Change in occupation of premises—Failure of incoming occupier to obtain transfer of service—Assumption of service—Money owing by outgoing occupier in respect of service—Liability of incoming occupier—Regulation—“Necessary or convenient”—Post and Telegraph Act 1901-1923 (No. 12 of 1901—No. 17 of 1923), sec. 97—Telephone Regulations 1913 (Statutory Rules 1913, No. 349), reg. 21A (2).* H C. OF A.  
 1928.  
 ~~~~~  
 SYDNEY,  
 Nov. 22.

Knox C.J.,  
 Isaacs, Higgins,  
 Gavan Duffy  
 and Powers JJ.

By sec. 97 of the *Post and Telegraph Act 1901-1923* the Governor-General is empowered to make regulations, not inconsistent with that Act, “prescribing all matters which are necessary or convenient to be prescribed for carrying out or giving effect to this Act” and, in particular, he may make regulations (*inter alia*) for “(m) prescribing the fees rates and dues to be received for . . . rent or hire for the use of any . . . private telephone line.”

*Held*, by Isaacs, Higgins and Powers JJ. (Knox C.J. and Gavan Duffy J. dissenting), that reg. 21A (2) of the *Telephone Regulations 1913*—which provides that a person who enters into occupation of any premises having a telephone service shall not be entitled to use the service until he has obtained a transfer of it, and that if he uses it before transfer he shall be deemed to have assumed the service, and shall be liable for all amounts owing in respect of the service, at the time he entered into occupation of the premises—was necessary and convenient for carrying out and giving effect to the Act and was not *ultra vires* the Governor-General.



H. C. OF A. APPEAL from the Court of Petty Sessions, Sydney.

1928.

GIBSON  
v.  
MITCHELL.

William Gerrand Gibson, Postmaster-General of the Commonwealth of Australia, sued Peter Mitchell in the Court of Petty Sessions, Sydney, to recover the sum of £14 18s. 9d. alleged to be due by Mitchell for telephone service number Forbes 162 for rental from 1st July 1927 to 23rd July 1927 and for local and trunk calls from 1st December 1926 to 23rd July 1927.

The telephone service in question was transferred in July 1926 to two persons trading together as Comino & Voges, and on 11th April 1927 their business was transferred to and the premises were thereafter occupied by the firm of Mitchell Brothers, the defendant being one of the members of that firm. No notice, as required by reg. 21A of the *Telephone Regulations* 1913, was given by Comino & Voges to the Deputy Postmaster-General for the State of New South Wales that they were leaving or had left the premises occupied by them, and Mitchell Brothers used the telephone service after 11th April 1927 without notifying the Deputy Postmaster-General that they were using the service, and without obtaining a transfer of the service to themselves. The telephone service was disconnected by the Deputy Postmaster-General on 23rd July 1927. Mitchell paid an amount into Court sufficient to cover local and trunk telephone calls from 11th April 1927 to 23rd July 1927 and telephone rental from 1st to 23rd July 1927, and as to the balance denied indebtedness.

Reg. 21A of the *Telephone Regulations* 1913 is (so far as material) as follows: “(2) A person who has entered the occupation of any premises having a telephone service shall not be entitled to make use of the service, or to suffer any other person to do so until he has obtained a transfer of the service, and if such person makes use of the service, or suffers any other person to do so before obtaining a transfer of the service, he shall be deemed to have assumed the service, and (without prejudice to any liability of the subscriber or any right or power of the Department) shall be liable for all amounts owing in respect of the service at the time he entered into occupation of the premises as well as amounts which become payable in respect of any use of the telephone after that time.”



The Magistrate held that, so far as it related to the matter in question in this case, reg. 21A (2) of the Telephone Regulations was *ultra vires* and that the defendant was liable only for any rent or other charges due on the telephone service after the time he went into occupation of the premises and entered a verdict for the Postmaster-General for the amount paid into Court.

H. C. OF A.  
1928.

GIBSON  
v.  
MITCHELL

From this decision the plaintiff now, by special leave, appealed to the High Court.

*J. R. Nield*, for the appellant. The matter prescribed in reg. 21A (2) is a matter which is both necessary and convenient within the meaning of sec. 97 of the *Post and Telegraph Act* 1901-1923 for carrying out or giving effect to that Act. The imposition of a penalty would not sufficiently cover the whole position, as a penalty could be enforced against an offender only if he were caught in possession. [HIGGINS J. referred to *M'Culloch v. Maryland* (1).]

The regulation cannot be said to be an unreasonable one in the circumstances.

*Flattery*, for the respondent. Reg. 21A (2) is *ultra vires*. It is not necessary for carrying out the Act as the property of the Postmaster-General is adequately protected by the statute. The respondent, at the most, was a trespasser and such offence should be made the subject of a penalty only. In *Commonwealth v. Progress Advertising and Press Agency Co. Pty. Ltd.* (2) a similar regulation—reg. 126A of the *Telephone Regulations* 1908—was held to be *ultra vires*. Reg. 21A (2) has the effect of being uncertain, as the one remedy was applied no matter how great the variation in the amounts owed by different defaulters. It is not reasonable to ask one man to pay the debt of another.

*J. R. Nield*, in reply.

KNOX C.J. The question raised in this appeal is whether reg. 21A (2) of the *Telephone Regulations* 1913 (Statutory Rules 1913, No. 349) is valid.

(1) (1819) 4 Wheat. 316.

(2) (1910) 10 C.L.R. 457.



H. C. OF A.  
1928.

GIBSON  
v.  
MITCHELL.  
Knox C.J.

The regulation in question is in the words following: [His Honor read reg. 21A (2).] By sec. 97 of the *Post and Telegraph Act* 1901-1923 the Governor-General is empowered to make regulations not inconsistent with the Act prescribing all matters which are necessary or convenient to be prescribed for carrying out or giving effect to the Act and in particular prescribing the fees, rates, and dues to be received for the management, working and maintenance of telegraph (including telephone) lines. Power is also given to prescribe penalties not exceeding £50 for the breach of any regulation. The first portion of the regulation now under discussion, which provides that a person who has entered into occupation of premises having a telephone service shall not be entitled to make use of the service or to suffer any other person to do so until he has obtained a transfer of the service seems to me to be free from objection. But I can find no authority in the Act for the later portion of the regulation, which purports to render a person who fails to comply with the earlier provision liable for all amounts owing in respect of the service at the time when he entered into occupation of the premises. This purports to create a quasi-contractual obligation for which the occupier of the premises is liable to be sued in any competent Court, and the Act, in my opinion, confers no power on the rule-making authority to do this. The method prescribed by the Act for enforcing obedience to the Regulations is by imposing a penalty not exceeding £50 for the breach of any regulation, to be recovered in a Court of summary jurisdiction.

In my opinion the appeal should be dismissed.

ISAACS J. I am of opinion that reg. 21A (2) of the *Telephone Regulations* (Statutory Rules 1913, No. 349) is valid.

It is made under sec. 97 of the *Post and Telegraph Act* 1901-1923, which empowers the Governor-General to make regulations, not inconsistent with the Act, "prescribing all matters which are necessary or convenient . . . for carrying out or giving effect to this Act." "In particular," says the section, regulations may be made, *inter alia* "(m) for prescribing the fees rates and dues to be received for . . . (2) rent or hire for the use of any . . . private telephone line." The objection taken to reg. 21A (2) is that it



compels one man to pay the debt of another man. But the matter is not as simple as that. The telephone services are the property of the Postmaster-General and no one has any right to use them without his permission. It is plain that if a telephone service is installed for the use of A, and he, without notice to the Department, leaves, and B, without the permission or knowledge of the Department, enters and uses the service, B causes confusion. It is easy for him to say he should not pay A's debt; but who but himself can tell how much is A's debt? B is responsible for the confusion, and it is easy to see how easily the Department could be defrauded. The regulation simply makes provision that B, if he makes use of the service without a proper transfer, must pay, *as his own debt*, in return for the service he has taken, whatever amount is due in respect of the line. When he, without authority, assumes possession of the service, he alone knowing when, he assumes at the same time as the price of his assumption the debt attaching to that service. There is nothing in that inconsistent with the Act. Why is it not "necessary or convenient"? Those words in that collocation mean necessary or convenient from the standpoint of administration. Primarily they signify what the Governor-General may consider necessary or convenient, and no Court can overrule that unless utterly beyond the bounds of reason and so outside the power. The meaning of "necessary" has been dealt with in many cases in this sense. (See, for instance, *Australasian Steam Navigation Co. v. Morse* (1) and *Local Board of Health of Perth v. Maley* (2).)

I see no reason for questioning the validity of the regulation, and therefore think the appeal should be allowed.

HIGGINS J. I am of opinion that the regulation is valid and that the appeal should be allowed.

The question turns ultimately on the effect of sec. 97 of the *Post and Telegraph Act* 1901-1923. Under that section, the Governor-General "may make regulations, not inconsistent with this Act, prescribing all matters which are necessary or convenient to be prescribed for carrying out or giving effect to this Act" &c. What the Governor-General has done is this: he has made reg. 21A,

H. C. OF A.  
1928.

GIBSON  
v.  
MITCHELL.  
Isaacs J.

(1) (1872) L.R. 4 P.C. 222, at p. 230.

(2) (1904) 1 C.L.R. 702.



H. C. OF A.  
1928.

GIBSON  
v.  
MITCHELL.  
Higgins J.

prescribing (1) that a subscriber who leaves his house shall give notice of that fact in writing to the Deputy Postmaster-General, and (2) that a person who enters into occupation of any premises having a telephone service shall not be entitled to use the service until he has obtained a transfer of it, and that if he uses it before transfer he shall be deemed to have assumed the service and shall be liable for all amounts owing in respect of the service at the time he entered into occupation of the premises. It is said that reg. 21A is invalid. It is said that it is invalid because it directs one man to pay another man's debt. But that is not conclusive. Acts of Parliament make arrears of municipal rates a charge on the premises payable by the new occupant; and if the Governor-General choose to apply a similar rule to telephone rates, in order to ensure proper notice to the Department of changes in the occupancy of a house and in the users of the telephone (for the Department has no knowledge otherwise of any changes), how can one say that the rule is neither "necessary" nor "convenient" for "carrying out or giving effect to" the Act? In one aspect it may be treated as being in the nature of a penalty or punishment imposed on the new occupant for using the Department's telephone instrument before he gets leave—he has simply to pay something extra for the calls which he makes himself (or his household).

Mr. *Flattery* has referred to some words of mine, used in *Commonwealth v. Progress Advertising and Press Agency Co. Pty. Ltd.* (1). It was there held that a regulation making it an offence to publish telephone lists without authority of the Department was beyond the powers of the Governor-General; but the words of the Act were then narrower—the relevant power was to make regulations for "all other matters and things which may be *necessary* for carrying out this Act or for the efficient administration thereof." The regulation looked like an addition to the law as to copyright. The decision of the Full Court was given on 6th June 1910; and on 25th November 1910 Parliament gave the wider power of regulation as it now appears. I see that I referred to the remarkable similarity of this problem to that in the great constitutional case of *M'Culloch v. Maryland* (2). In that case, Congress had power "to make all laws which shall be *necessary*

(1) (1910) 10 C.L.R., at pp. 468-469.

(2) (1819) 4 Wheat. 316.



*and proper* for carrying into execution the foregoing powers " &c. ; and although grammatically the laws made had to be *necessary* as well as proper, it was held that Congress had power to erect a National Bank. This case may be surprising ; but it has stood now these 100 years, unimpeached apparently. According to *Marshall* C.J., " let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional " (1). In this case there is no need to go so far, for here the power is to prescribe all matters which are " necessary or convenient . . . for carrying out or giving effect to this Act " ; and, personally, I should have thought it beyond all doubt that the regulation is valid.

H. C. OF A.  
1928.

GIBSON  
v.  
MITCHELL.  
Higgins J.

GAVAN DUFFY J. In my opinion the appeal should be dismissed.

POWERS J. I agree that the regulation is valid, and that the appeal should be allowed.

*Appeal allowed. Order of the Magistrate discharged. Order made for the payment of £12 3s. 5d. to the Postmaster-General. Costs of the appeal to be paid by the appellant in pursuance of his undertaking.*

Solicitor for the appellant, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

Solicitor for the respondent, *R. Meillon*, Forbes, by *Barry, Norris & Wildes*.

J. B.

(1) (1819) 4 Wheat., at p. 421.