Solicitors, for appellants, *Stone & Burt*, for *Kidston & Forbes*, Northam.

Solicitor, for respondent, *Barker* (Crown Solicitor).

N. G. P.

H. C. OF A. 1907.

SERMON v. THE COMMISSIONER OF RAILWAYS.

[PRIVY COUNCIL.]

THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA . . . . } APPELLANT;

AND

THE MAYOR &c. OF THE CITY OF MELBOURNE . . . . . } RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

PRIVY COUNCIL.* 1907.

July 31.

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

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 demand rate," consumers were charged at the rate of 7d. per unit as to such portion of the 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 words "a supply on the same terms" in sec. 38 of the *Electric Light and Power Act* 1896 bear their natural meaning and include price; that the "preference" prohibited by sec. 39 is a preference between customers dealing under similar circumstances, and not between customers dealing under two different systems of supply, either of which they are free to select, and therefore dealing under entirely different circumstances; and that therefore the charges were lawful.

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* Present.—The Lord Chancellor, Lord Macnaghten, Lord Atkinson, Lord Collins, Sir Arthur Wilson.

PRIVY COUNCIL. 1907.

Decision of High Court (*The Mayor &c. of the City of Melbourne* v. *The Attorney-General for the State of Victoria*, 3 C.L.R., 467), affirmed.

THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA *v.* THE MAYOR &c. OF THE CITY OF MELBOURNE.

APPEAL to His Majesty in Council from the decision of the High Court: *The Mayor &c. of the City of Melbourne* v. *The Attorney-General for the State of Victoria* (1).

The judgment of their Lordships was delivered by

LORD ATKINSON. The proceeding out of which the appeal in this case arose, was an information exhibited by the Attorney-General of the State of Victoria on the relation of the Metropolitan Gas Company against the Corporation of the City of Melbourne, who are by an Order of the Governor in Council, dated the 6th of September 1897, made under the authority of an Act of the Victorian legislature, entitled the *Electric Light and Power Act* 1896 (No. 1413), constituted undertakers for the supply of electricity within that City, to restrain them from continuing to charge their consumers for electricity supplied, rates which are not uniform per unit throughout the City.

There is no dispute as to the facts. It is admitted that the Corporation supply electricity under two different systems at rates appropriate to each, but not identical. Under the first, the quantity used is charged for at the rate of 4½d. per unit. It is known as the "flat rate." Under the second a rate of 7d. per unit, known as the "maximum demand rate," is charged for such portion of the electricity supplied as is equal to a consumption for a period of 45 hours per calendar month at the highest rate of consumption during that month, and a rate of 2d. per unit is charged for the remainder of the electricity supplied during the month.

Both rates are less than the maximum rate authorized by the Act and Order. It is admitted that it is optional with every customer, or intending customers, to choose the system under which he shall be supplied, and that, as between the several customers under each system, no preference is given to one customer over the other, though under the operation of the second system different results work out in the case of different customers, as

(1) 3 C.L.R., 467.

must be the case where, as in this instance, the amount consumed is taken into consideration in fixing the price.

The counsel for the plaintiff contend that the mode of carrying on their business adopted by the defendants is illegal: that they cannot have two different systems of supply, and are only entitled to charge one uniform rate for all electricity supplied by them, irrespective of the quantity supplied, or the time when, or circumstances under which, it is supplied.

The question for decision turns on the construction of the 39th section of the above-mentioned Statute taken in connection, as it must be, with sec. 38 which immediately precedes it. The two sections are in the terms following:—

"Sec. 38.—(1) Where a supply of electricity is provided in any part of an area for private purposes, 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.

"Sec. 39.—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."

The case came on for trial on the 26th September 1905 before the Chief Justice of Victoria, *Sir John Madden*. He referred the whole action on the pleadings and evidence to the Full Court of the Supreme Court of Victoria, who, considering that the case came within the principle of their previous decision in an action between the same parties: *The Attorney-General &c.* v. *The Mayor &c. of the City of Melbourne* (1), decided in favour of the plaintiff, and in effect granted the injunction prayed for, restraining the defendants from supplying throughout the area of supply

(1) 27 V.L.R., 568; 23 A.L.T., 123.

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electricity at other than a uniform rate, except so far as is authorized by the *Electric Light and Power Act* 1901 (No. 1775).

By this previous decision the defendants had been restrained from supplying electricity for heating or power purposes, at a rate lower than the rate charged for lighting purposes. And in consequence of it the legislature of Victoria had passed the Act in the Order of the High Court mentioned, the third section of which runs as follows:—

"3. Notwithstanding anything in any other Act contained it shall be lawful for any undertaker within the meaning of the *Electric Light and Power Act* 1896 or for any gas company to charge for the supply of electricity or gas used for power or heating purposes respectively or both a lower uniform charge than that charged for the supply of electricity or gas used for lighting purposes."

On appeal to the High Court of Australia the decision in the present case was reversed, and an order made dismissing the plaintiff's action with costs. From this last-mentioned decision the present appeal has, by special leave, been brought.

It was in argument contended on behalf of the plaintiff on the authority of *The Attorney-General* v. *Clarkson* (1), that the above-mentioned Statute of 1901 amounted to a statutory declaration that according to the true meaning of the Act of 1896 only one uniform rate could be charged by the defendants for the electricity supplied by them throughout their district.

In *The Attorney-General* v. *Clarkson* (1), the Crown claimed payment of the further duty called "settlement estate duty" on a legacy bequeathed by a testator on a certain contingency which, at the date of his death, had not happened and might never happen. One of the questions for decision was whether this legacy could be held to be "settled property" within the meaning of sec. 5, sub-sec. 1, of the *Finance Act* 1894.

In a previous case of *The Attorney-General* v. *Fairley* (2), it had been decided that property, bequeathed by will on a contingency which had not arisen at the testator's death and might never arise, was under the provisions of the above-mentioned section liable to this higher duty.

(1) (1900) 1 Q.B., 156. (2) (1897) 1 Q.B., 698.

By sec. 14 of the *Finance Act* 1898 (61 & 62 Vict. c. 10), it was provided that, "Where in the case of a death occurring after the commencement of this Act settlement estate duty is paid in respect of any property contingently settled, and it is thereafter shown that the contingency has not arisen, and cannot arise, the said duty paid in respect of such property shall be repaid." It is quite obvious that this enactment must have contemplated that the duty should continue to be paid on such a contingency, since it provided that, when so paid, it should, in certain cases, be returned, and was therefore an adoption of the construction put upon sec. 5, sub-sec. 1, of the *Finance Act* in *The Attorney-General* v. *Fairley* (1); but the Act of 1901 merely empowers the company to do that which they had insisted they had under the Act of 1896 the right to do, and by no means affirms expressly or impliedly that the Court, which held, on the construction of the latter Statute, that they had no right to do this thing, were justified in so deciding. Cases constantly occur where, if a Court, even of first instance, should put upon a Statute a construction which would defeat its obvious purpose, or cause great inconvenience, the speediest and most effective remedy is to pass an Act in a form similar to that of 1901, setting the matter right. Circumstances may not permit the delay necessarily involved in bringing the embarrassing decision before higher tribunals for reconsideration. The fact, however, that this remedy was at once applied by the legislature of Victoria does not, in the absence of express words or clear intendment, preclude those superior tribunals from reviewing the decision of the inferior when the occasion arises.

In the opinion of their Lordships the contention of the plaintiff on this point is entirely unsustainable.

Sec. 13 (*d*) of the *Electric Light and Power Act* 1896 provides that conditions and restrictions may be inserted in, or prescribed by, the Order in Council made under the Act with regard, amongst other things, to "the limitation of the *prices* to be charged in respect of the supply of electricity."

Sec. 38 is practically identical with the 19th section of the English Act, the *Electric Lighting Act* 1882; but sec. 39, dealing

(1) (1897) 1 Q.B., 698.

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with preference, differs in its wording from sec. 20 of the English Act of 1882, relating to the same subject.

In *The Metropolitan Electric Supply Company Limited* v. *Ginder* (1), it was held by the present Lord Justice *Buckley* that the words "a supply on the same terms," used in sec. 19 of the English Act, bear their natural meaning and include price. Mr. *Danckwerts* contended, on behalf of the plaintiff, however, that the same words, contained in the corresponding section of the Victoria Act, namely, sec. 38, cannot, by reason of the provisions of sec. 39, which follows it, be held to include price. Their Lordships cannot concur in this view.

The 39th section is rather unskilfully drawn and clumsily worded, but their Lordships think that the "preference" prohibited in substance by it is "a preference" between customers dealing under similar circumstances, and not between customers dealing under two different systems of supply, either of which they are free to select, and therefore dealing under entirely different circumstances.

This construction reconciles the two secs. 38 and 39 one to the other, and makes them consistent; does no violence to any of the provisions of either; does not impose on the defendants, as would the construction contended for by the plaintiff, most embarrassing restrictions in the conduct of their undertaking; and at the same time promotes rather than hurts the interests of the consumers, while there is, in the view of their Lordships, nothing in sec. 52 of the Act which prevents its being adopted.

Their Lordships are therefore of opinion that the decision of the High Court of Australia was right and should be affirmed, and this appeal dismissed, and they will humbly advise His Majesty to that effect.

The appellant will pay the costs of the appeal.

(1) (1901) 2 Ch., 799, at p. 811.