

It may perhaps be fairly remarked in conclusion that it would be unfortunate if the courts were to develop a policy whereby they kept in operation old Imperial legislation, the preservation of which in Australia can have no more effect than to unnecessarily clog the law. It is to be hoped that *Bice v. Cunningham* is not indicative of such a trend in judicial decision.

## ELECTRICITY TRUST OF SOUTH AUSTRALIA

### *Duties of Public Utilities*

The dearth of modern decisions interpreting the statutory duties of public utilities towards their consumers makes the recent decision of *Bennett and Fisher Limited v. Electricity Trust of South Australia*<sup>1</sup> of considerable importance.

The plaintiff company made an application to the Trust for a supply of electricity to a building it has recently erected in Currie Street, Adelaide. The defendant Trust, the only supplier of electrical energy in the city, indicated its willingness to supply the plaintiff's building but only on the terms of its standard contract. This contract, which the Trust makes with all consumers, contains a condition in the following terms:

"When in the opinion of the Trust, the supply of electric energy can most conveniently be effected by placing transformers and/or other equipment on the premises of the consumer, the consumer shall provide free of cost to the Trust, suitable accommodation for such equipment, in a position satisfactory to the Trust, in such manner as to allow free access to the equipment at any time by the Trust's representative(s).

"The Trust reserves the right to supply other consumers from the said equipment.

"Any such equipment erected by the Trust shall be under its sole control, and shall remain its property, and shall be removed by it on the termination of the agreement for the supply of electric energy to the consumer."

The Trust indicated that if the parties entered into the standard contract to supply electricity, it would demand considerable basement space in the plaintiff's building, free of cost, for the installation of a transformer from which the building would be supplied. The plaintiff accordingly sought declarations that the defendant Trust was not entitled to place a transformer in the building; and the plaintiff not obliged to provide space for the transformer, free of cost, as a condition precedent to supply. Should the defendant be entitled to install a transformer, the plaintiff claimed compensation.

The plaintiff's claim was dismissed in the Supreme Court by the late Mr. Justice Brazel.<sup>2</sup> The plaintiff appealed by special leave to the High Court.

Counsel for the appellant argued that the common law position was best expressed by the maxim *qui sentit commodum sentire debet et*

1. 35 A.L.J.R. 481.

2. Unreported.

onus and claimed "that a principle of law exists that when a public utility or other body or person exercises an exclusive franchise, the body or person is under a duty to provide the service or give the supply covered by the franchise".<sup>3</sup> This proposition, it was argued, is supported by the common law relating to ferries and such bodies as railway companies.<sup>4</sup> It was further contended that the well established American principle that there is not only a duty to serve, but also a duty to serve without discrimination between consumers, existed at common law.<sup>5</sup> The appellant thus sought to show that to require space for a transformer from one consumer and not from another was an act of discrimination and an infringement of the common law principle. The Court refused to recognize the existence of a general common law duty on the holders of a public franchise either to provide the service or to refrain from discrimination amongst users.

The Trust is established and empowered by the Electricity Trust of South Australia Act 1946-54. Sec. 40(e) of this Act confers power upon the Trust to do any act or thing and enter into and carry out any transaction which it is necessary or convenient to do, enter into or carry out for the purpose of generating transmitting and supplying electricity. The general powers conferred by this section are, however, limited to some extent by secs. 36 and 37 of the Act which incorporate, by reference, certain provisions of the enactments which established the Trust's predecessors.<sup>7</sup> S. 15 of the South Australian Electric Light and Motive Power Company's Act 1897 confers a power to contract with a local authority person or company for the supply of electricity, certain equipment and for the supply of motive power. The supply may be in such manner and upon such terms as shall be agreed upon between the company and the said local authority person or other company: provided that the company, in making any agreement for a supply of electricity, shall not show any undue preference to any local authority person or other company. S. 16 of the same Act reads:

"Where a supply of electricity is provided in any part of an area (or part of a town) for private purposes, every company or person within that part of an area (part of a town) shall, on application, be entitled to a supply of electricity on the same terms on which any other company or person in such part of an area (part of a town) is entitled under similar circumstances to a corresponding supply."

Relying on these provisions the appellant's case centred about two contentions. It was argued that the offensive clause insofar as it left a discretion to the Trust to require the instalment of a transformer

3. Per Dixon C.J. at p. 482.

4. See Wharton 3rd edition p. 159. *A.G. v. Simpson* (1901) 2 Ch. 671; [1904] A.C. 476. *Hammerton v. Dysart* [1916] 1 A.C. 57. *Bournemouth Swanage Motor Co. v. Harvey* [1930] A.C. 549.

5. See *American and English Encyclopaedia of Law* 2nd Edn. 1899 Vol. 10 p. 869 and the cases there cited. See also: *United Fuel Gas Co. v. R.R. Commissioner of Kentucky and ors.* (1928) 278 U.S. 300. *Norde v. Butte Water Co.* 30 P.R. 809 (New Mexico). *State v. Water Supply Co.* 140 P.R. 1059 (Montana).

6. Per Kitto J. at p. 485.

7. *The South Australian Electric Light and Motive Power Company's Act 1897. The Adelaide Electric Supply Company's Act 1922.*

contravened s. 15 as it purported to enable the Trust to prefer one company by abstaining from making such a requirement in that company's case. Dixon C.J. met this contention by pointing out that "the clause gives a discretion which must be controlled by the obligation not to give an undue preference, and if this be a purported preference by the Trust it may be dealt with under s. 15".<sup>8</sup> This would obviously involve an examination of the bona fides of the Trust and would probably arise by the intervention of the Attorney-General or the grant of his fiat.

The more important contention by the plaintiff was that it was entitled to a supply of electricity on the same terms on which any other consumer was entitled. "Terms of supply" in this sense, it was argued, meant the physical circumstances under which a consumer was actually receiving a supply of electricity; and many consumers were receiving a supply without having to provide space for a transformer. The appellant therefore claimed to be entitled to a supply of electricity "on the same terms" as these consumers.

The majority of the Court (Dixon C.J., McTiernan, Kitto and Menzies JJ., Owen J. dissenting) held that this was not the true meaning of s. 16. They held that if a consumer is offered a supply of electricity pursuant to the terms of a standard contract which all other consumers must enter into, then he is offered "a supply of electricity on the same terms" as everybody else, and it matters not that it is only in particular cases that the Trust insists upon exercising its contractual power to install a transformer. The necessary result of this approach is that if every consumer's contract gave the Trust authority to fix the price for electricity supplied, the Trust could insist upon one consumer paying twice as much as another for the same supply in similar circumstances without in any way contravening s. 16.<sup>9</sup> As a result the Court held that the Trust was empowered to require the company to enter into the standard contract and submit to the exercise of its powers under that contract as a condition precedent to supply.

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8. At p. 483.

9. Per Menzies J. at p. 487.