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"*As an old lawyer, I recognise that the profession is very much misunderstood. I have come to the conclusion that this is because, while the successful litigant never ascribes the result to the law or his lawyer, the unsuccessful one takes a most sinister view of the law. If, as has been suggested, the law is 'a hass,' I venture to submit that it is Balaam's ass, a very wise and sound guide to erring humanity. British justice is the admiration of the civilised world.*"

—Sir Robert Horne, K.C., M.P., at the Lord Mayor's Banquet to His Majesty's Judges.

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The Crown and Rating.

For some time past there has been considerable heart-burning on the part of local authorities in respect of the loss of rate revenue due to the entry into possession by State Departments of properties pursuant to their powers of sale upon default having been made under their mortgages. On the other hand, the State Advances Superintendent as the most considerable mortgagee in the Dominion, and other Departmental heads in varying degrees, would be seriously embarrassed if he or they were obliged to meet the combined demands of the local authorities in respect of rates made and levied during the period in which their instalments of principal and interest have become considerably in arrear, and, in many cases, almost wholly irrecoverable.

As to rating generally, a remedy is provided by statute against the land itself. As His Honour Mr. Justice Smith said in delivering the judgment of the Court of Appeal in *The King v. The Mayor, etc., of Inglewood* [1931] N.Z.L.R. 177, at p. 202:

> "When a rate is made, a charge is created upon the land in respect of which the rate is made to secure payment of the amount thereof upon the due date, but the enforcement of that charge is subject to the recovery of judgment for the rate within the time limited by s. 77 of the Rating Act, 1925."

The Court held that the charge so created and the estate created upon the enforcement of that charge rank in priority to registered incumbrances.

The Rating Act is not binding on the Crown: *see* s. 5 (*k*) of the Acts Interpretation Act, 1924. But, when the Crown is a mortgagee (as is the case in all State Advances mortgages), it was held in the *Inglewood* case (*cit. supra.*) that, if His Majesty takes a mortgage of the land at a time when the mortgagor's interest is free from any rating charge, the Crown will hold that mortgage *free from all rating charges subsequently* arising. If, when the mortgage is taken, there exists an unpaid rating charge upon the mortgagor's land, the Crown is liable for the amount of the same; but, if such rate is afterwards paid by the mortgagor or by the Crown, the Crown will not be liable for any further rates made and levied while His Majesty is registered as mortgagee of the property, since:

> "it is clear that His Majesty's rights as mortgagee are not affected by the further charge because His Majesty's charge, as mortgagee, had become free of the prior charge, subject to which his mortgage had been taken, and His Majesty's charge cannot be affected by a rate subsequently made, even though that rate became as against other encumbrances a prior charge on the property" (*ibid.*, at p. 211).

So that the subsequent unpaid rating charge ranks before any second mortgage on a property of which the Crown is registered as first mortgagee.

As regards special rates, made in respect of property acquired by the Crown, the Crown is liable for the payment of any such rates for any year during which there is no "occupier" of the land within the meaning of the Rating Act, 1913: *see* s. 123 of the Local Bodies' Loans Act, 1926; and for the meaning of "acquired" in that section, see *The Mayor, etc., of Stratford v. R.* [1926] N.Z.L.R. 316; [1926] G.L.R. 151. The State Advances Superintendent, or any other Crown mortgagee, *qua* mortgagee, does not "acquire" land within the meaning of such section since he becomes registered of an estate as mortgagee only. Should he buy in the land at a mortgagee's sale, his title in regard to the property, in relation to priorities, goes back to the date of the mortgage: consequently no rates made and levied during the term of the mortgage are recoverable down to the date of such sale since they rank as a charge subsequent to his mortgage.

There is a further class of particular and separate rates—such as water rate, lighting rate, drainage rate, library rate, and harbour rate. The *Inglewood* case did not cover these in regard to premises of which the Crown is mortgagee in possession. The local authorities, prevented from recovering general and special rates for the reasons already indicated, next explored the position in relation to water rates on land subject to Crown mortgages.

On May 19 last, the Auckland City Corporation disconnected from its waterworks certain properties in respect of which the State Advances Superintendent had entered into possession in exercise of the power conferred by s. 105 of the Land Transfer Act, 1915, and by s. 48 of the State Advances Act, 1913. The Corporation refused to supply further water to these properties, alleging as the reason for such refusal that certain water rates (which are not special rates) had not been paid in respect of such properties, which were severally let to tenants. The Borough of One Tree Hill acted similarly to its larger neighbour, and informed the State Advances Department that its Council would not turn on the water again to about twenty properties within its boundaries then let by the Superintendent as mortgagee in possession, "unless the respective amounts" [which totalled £12 4*s.* 6*d.*], "plus 10*s.* connection fee in each case, is paid."

The State Advances Department had previously offered "to pay a reasonable charge for water supplied to the various premises from the date on which the Department had entered into possession of them." It submitted that there was an obligation on the local authority to give a water-supply to the Department's properties, provided that, and as long as the Department should be willing, in consideration of the supply, to make a fair and reasonable payment therefor. The Department informed the local authority that such obligation could be enforced, if necessary, by an action in the Supreme Court, and cited the authority of *The King v. The Mayor, etc., of Napier* (1907) 26 N.Z.L.R. 917, 9 G.L.R. 416, and *The Dominion of Canada v. the City of Levis* [1919] A.C. 505. The local authorities, however, held to their opinion, and the Superintendent

sought by Originating Summons to have the following questions answered by the Court:

1. Whether upon the statement of facts the Auckland City and the One Tree Hill Borough are entitled to refuse to supply with water properties of which the Superintendent is mortgagee, and which he has leased pursuant to his mortgage and/or section 48 of the State Advances Act, 1913, unless and until arrears of rates due in respect of the supply of water to the mortgagors of such respective properties are previously paid, in addition to ordinary water rates and the cost of reconnection.

2. Whether, when the Superintendent has let a mortgaged property already connected with the water-supply, but in respect of which there are arrears of water rates or charges for water supplied to the previous occupier or mortgagor prior to the date of his letting, the said local authorities are entitled to disconnect the water-supply from such property during the period of such lease although he is willing to pay, and duly pays, the ordinary water rates or a fair and reasonable charge for water supplied during such period?

3. Is the Superintendent liable to pay a fair and reasonable charge for the supply of water under the circumstances set out in the statement of facts, and, if so, upon what principles is such charge to be fixed?

This Originating Summons, *State Advances Superintendent v. the Auckland City Corporation and the One Tree Hill Borough*, was removed into the Court of Appeal for argument. The judgment of the Court (Myers, C.J., Herdman, MacGregor, and Kennedy, JJ.) was delivered on the 28th ulto. In the opinion of the Chief Justice, and of the other members of the Court, who gave separate judgments in which they set out the reasons for their conclusions, the above questions (1) and (2) were answered "No"; and question (3) was answered by saying that a fair and reasonable charge must be paid for the supply of water under the circumstances as outlined above; and that, in the words of His Honour the Chief Justice, "without saying necessarily that it is the sole test, the charge made to other persons is at least a test—and probably the best test—of what is fair and reasonable."

The argument at the Bar and the resulting judgment centred around the construction of s. 86 of the Municipal Corporations Act, 1920, as will be seen from our report in the next column. Their Honours were in complete agreement that, as Mr. Justice Kennedy said, the Legislature had not in that section used language sufficiently apt to entitle a borough to refuse a supply of water to tenants and lessees of the State Advances Department who are not liable for the arrears of water rates. That point having been decided, then, so far as s. 86 was concerned, nothing turned on the stated circumstances referring to the position of the State Advances Department as an agent of the Crown; and so the Court found it unnecessary to consider the contention of the learned Solicitor-General that the section in question, by reason of s. 384 (1) of the Municipal Corporations Act, could not operate against the Crown.

There is another class of rate, namely, the particular separate rate levied for rubbish removal and night-soil service. Here, the position is slightly different: where such a service has been inaugurated either voluntarily or at the requisition of the Board of Health, there is a compulsion on local authorities to carry it on promptly and efficiently, at regular and prescribed intervals, to the satisfaction of the Medical Officer of Health: *see* the Health Act, 1920, ss. 33 and 34. Thus, a local authority has no power to discontinue such a service in respect of any property. On the other hand, there is an obligation on the Crown as occupier to pay a fair and reasonable sum for the service: *The Mayor, etc., of Auckland v. the King* [1924] G.L.R. 415. This obligation does not rise out of rating law, but apparently from an implied obligation to pay for services rendered.

Court of Appeal.

Myers, C.J.
Herdman, J.
MacGregor, J.
Kennedy, J.

October 3, 4; 28, 1932.
Wellington.

STATE ADVANCES SUPERINTENDENT v. AUCKLAND CITY CORPORATION AND THE BOROUGH OF ONE TREE HILL.

Local Authority—Rating—Water Rates—Whether Defendant Corporations may refuse water-supply to properties of which Plaintiff is mortgagee in possession and which he has let unless and until arrears of rates due in respect of supply to the mortgagors have been paid, in addition to ordinary water rates and cost of reconnection—Whether Defendants entitled to disconnect water supply from such properties during period of such letting although Plaintiff is willing to pay, and duly pays, ordinary water rates on a fair and reasonable charge for water supplied during that period—Upon what principles such charge is to be fixed—Municipal Corporations Act, 1920, s. 86.

Originating Summons for the determination of the following questions:

1. Whether, upon the statement of facts attached hereto and agreed upon by the parties, the above-named defendants are entitled to refuse to supply with water properties of which the plaintiff is mortgagee, and which he has leased pursuant to his mortgage and/or section 48 of the State Advances Act, 1913, unless and until arrears of rates due in respect of the supply of water to the mortgagors of such respective properties are previously paid, in addition to ordinary water rates and the cost of reconnection.

2. Whether, when the plaintiff has let a mortgaged property already connected with the water-supply, but in respect of which there are arrears of water rates or charges for water supplied to the previous occupier or mortgagor prior to the date of the plaintiff's letting, the defendants are entitled to disconnect the water-supply from such property during the period of such lease although he is willing to pay, and duly pays, the ordinary water rates or a fair and reasonable charge for water supplied during such period?

3. Is the plaintiff liable to pay a fair and reasonable charge for the supply of water under the circumstances set out in the statement of facts, and, if so, upon what principles is such charge to be fixed?

The facts giving rise to the questions submitted to the Court are summarised on p. 309. The Originating Summons was removed into the Court of Appeal for argument.

S. 86 of the Municipal Corporations Act, 1920, is as follows:

"If any person refuses or fails to pay any water rate for which he is liable, the Council may, without prejudice to any other remedy for the recovery of such rate, stop, in such manner as the Council thinks fit, the supply of water to the premises in respect of which such rate is payable, and may recover from such person the whole expense incurred in stopping such supply."

Held: *Per totam Curiam*: The first and second questions must be answered in the negative. The third question must be answered by saying that a fair and reasonable charge must be paid for the supply of water under the circumstances set out in the statement of facts.

Per Myers, C.J., and MacGregor and Kennedy, JJ.: Without saying necessarily that it is the sole test, the charge for water-supply made to other persons is at least a test, and probably the best test, of what is fair and reasonable.

Per Herdman, J.: There seems to be no reason why the Crown should pay more than the ordinary payer of rates is required, plus the cost of connecting up with the system.

Fair, K.C., Solicitor-General, for plaintiff.
O'Shea for defendants.

MYERS, C.J., said that a similar contention to that made by the defendant Corporations had been made in other reported cases, but on each occasion without success. The principles upon which the Courts had acted were, as His Honour under-

stood them: (1) that the supply of water is a matter of prime necessity; (2) that where a water-supply authority has a practical monopoly, there lies upon it an obligation (implied where not expressed) to supply water to all those requiring it and who are prepared to pay a fair and reasonable charge; and (3) that apt if not coercive language is required to confer upon the water-supply authority the right to refuse water, or stop the supply, to any particular premises by reason of non-payment of a rate or charge in respect of water previously supplied, except to the person primarily liable for, and actually in default in respect of, the arrears. In the nature of things that person is generally the person to whom the water in respect of which the arrears are owing was actually supplied. These propositions follow, His Honour thought, from the decisions in **Sheffield Waterworks Co. v. Wilkinson,** (1879) 4 C.P.D. 410; **Dominion of Canada v. City of Levis** [1919] A.C. 505; **McLean v. Municipal Council of Dubbo.** (1910) 10 N.S.W.S.R. 911.

The defendant Corporations here relied upon s. 86 of the Municipal Corporations Act, 1920, and said that the language of that section differs in some respects from that of any of the statutory provisions considered in the various authorities that were cited at the Bar. So it did. But the construction of the section had still to be considered in the light of the principles to which His Honour had referred. [The section was then set out.]

It was to be observed that the section did not say that, if the payment of water rate charged in respect of any building or premises is in arrear, the Council may without prejudice to any other remedy stop the supply of water to such building or premises until the arrears are paid. If the section had said that, there would probably be much more force in Mr. *O'Shea's* argument. But that was not the language used. The section referred to a personal liability. Now, for all practical purposes it may be said that personal liability is a liability either of the "occupier" within the meaning of the Rating Act, 1925, or of the owner where he is the occupier or where the premises are unoccupied. Consequently, even though premises are unoccupied and there is no actual supply of water to anyone on the premises, there is still a liability on the owner to pay the water rate. The "occupier" or owner (as the case may be) is the only person, His Honour thought, to be referred to by the section, he being the person to whom the water is actually or presumptively supplied. That this is so was shown, the learned Chief Justice thought, by the further provision that the Council may recover from "such person" the expense incurred in stopping the water. His Honour said he was unable to see that this was sufficient to create a further charge against the land for the amount of the Council's expenditure: that was to say, the section does not provide that the amount of such expenditure shall be treated as part of or an addition to the rate and charged upon the land. Nor did he think that it was sufficient to create a liability on the part of the mortgagee or any other person to pay the expenditure incurred by the Council if the person liable (that is, the "occupier" or owner) made default in payment.

Mr. *O'Shea* pointed first to the commencing words of the section, which are: "If any person refuses or fails to pay any water rate for which he is liable," and not "If any person supplied with water shall neglect to pay." But in **Sheffield Waterworks Co. v. Wilkinson** (*supra*) the words were: "If any person supplied with water . . . or liable . . . to pay the water rate," neglect to pay, etc. And in **McLean v. Municipal Council of Dubbo** (*supra*): "The power to cut off . . . may be exercised . . . in any case where any person refuses or neglects to pay to the Council on demand any rate, charge, or sum due to the Council for or in connection with water supply." Moreover, it would not be sufficient in New Zealand merely to say, "If any person supplied with water," because (as His Honour had already pointed out) premises may be unoccupied and no person may be actually supplied with water; but nevertheless there is a person (the owner) liable for the water rate just as if there had been an actual supply. Thus far, he could see no such difference in verbiage as would require a different construction from that given to the provisions that had to be considered in the cases cited.

Mr. *O'Shea* next said that the words "to the premises in respect of which such rate is payable" lend force to his argument. His Honour did not agree. Similar words were contained in the statutory provisions which were before the Court in **Sheffield Waterworks Co. v. Wilkinson** (*supra*), and words to the same effect in the by-law that had to be considered in **Dominion of Canada v. City of Levis** (*supra*). They seem to be the appropriate words to be used in any case because, whoever it is that is to be deprived of the supply, it must necessarily be in respect of the premises occupied by that person.

Then Mr. *O'Shea* relied upon the words "without prejudice to any other remedy for the recovery of such rate." He said that the stopping of the supply of water is treated as a remedy for the recovery of the rate and that it cannot be a remedy unless the Council has power to stop the supply of water to any person who may be occupying the premises until the arrears are paid. His Honour did not think that this was so because it is difficult to imagine, at all events in the case of an owner-occupier or an "occupier" (other than the owner) within the meaning of the Rating Act, any more effective practical remedy than the stopping of the water supply. Such person must do one or other of two things. Either he must pay the rate or leave the premises, because he cannot very well continue to occupy without a supply of water. The local body has various other remedies both by way of personal liability and also by way of charge against the land. Those remedies remain unaffected by the exercise of the right conferred upon the Council by s. 86.

His Honour went on to say that in the result the conclusion that he had formed was that the language of the section is not sufficiently cogent to support Mr. *O'Shea's* contention. The Court was not, he thought, coerced by the language of the section to hold that the stopping of the water supply is authorised as against any occupant of the premises other than the owner or "occupier" (as the case may be) liable to pay the rate. If that view be sound, then, so far as s. 86 is concerned, nothing turns on the circumstances stated in the case referring to the position of the Superintendent of the State Advances Department as an agent of the Crown or otherwise.

There was a second contention raised by the Solicitor-General, namely that even if section 86 had to be given the meaning contended for by Mr. *O'Shea* the section cannot operate against the Superintendent of the State Advances Department by reason of subs. (1) of s. 384 of the Municipal Corporations Act. The question was interesting and probably difficult, but in view of the fact that all the members of the Court had come to a conclusion against the defendant corporations on the meaning and effect of section 86, it was unnecessary to consider it.

His Honour concluded by saying that he thought that questions (1) and (2) asked by the Originating Summons should be answered in the negative; and that question (3) should be answered by saying that a fair and reasonable charge must be paid for the supply of water under the circumstances set out in the statement of facts, and that (without saying necessarily that it is the sole test) the charge made to other persons is at least a test—and probably the best test—of what is fair and reasonable.

HERDMAN, J., said that the State Advances Department had lent sums of money aggregating to a large amount on properties situated within the boundaries of cities and boroughs. It had been stated at the Bar that advances up to 95 per cent. of the cost of the properties, not 95 per cent. of the value, had been advanced with the result that many mortgagors have made default and the Superintendent was hard put to it to know what to do with the properties that have fallen into his hands. Local bodies, too, were interested in these properties, for rates are overdue in respect of some of them. Owners of properties had not paid their water rates, so defendants in these proceedings had endeavoured to compel the plaintiff to shoulder the responsibility for the defaulting owners' rate liabilities by putting into force s. 86 of the Municipal Corporations Act, 1920.

As His Honour understood the case, the Court was to assume that the plaintiff had gone into possession of properties under the powers contained in his mortgage and had arranged with tenants to occupy these properties. From the statement of facts supplied, he inferred that the properties had been let by the Superintendent, when possible, to weekly tenants.

In these proceedings, the Court is concerned with water rates only, and it is to be noted that these rates are not special rates. The plaintiff had offered to pay and was still willing to pay a reasonable charge for any water supplied to the premises which he had let. The defendants refused to supply water or to allow the plaintiff to effect a reconnection for the purpose of obtaining a water supply until the plaintiff had paid all outstanding water rates in arrear together with a connecting fee of 10s.

It was quite plain that if a person who is in actual occupation of a property fails to comply with a demand for a water rate the local body may for the purpose of enforcing payment stop the supply of water to the premises. Nevertheless, it appeared to be unquestionable that if the Crown is in possession of property

it may require a local authority to supply water at a reasonable rate and this notwithstanding that it enjoyed an immunity from liability for rates. For that proposition **Rex v. The Mayor of Napier,** 26 N.Z.L.R. 917, is an authority. Mr. Justice *Cooper* when giving judgment in this case said: "But, in my opinion, the Crown is certainly entitled to require a local governing body, within whose district the Crown's public buildings are situate, and which local governing body is the owner and controller of the public water-supply, to supply to the public buildings water for the public service at a reasonable charge." This case was decided in the year 1907. A question of a like character arose for decision in Canada and was ultimately adjudicated upon by the Privy Council in the case **Dominion of Canada v. City of Levis** [1919] A.C. p. 505. Water had been supplied to certain Government buildings by the City of Levis but differences having arisen about the amount which the Government should pay for water supplied it was cut off under a clause in a statute which provided that: "If any person . . . refuses or neglects to pay the rate lawfully imposed for the water supplied to him . . . the municipality may cut off the water and discontinue the supply as long as the person is in default." The Privy Council decided: first, that unless some statutory right was established the Government of Canada could not claim to have a supply of water for a Government building unless it was prepared to pay and to continue to pay in respect thereof a fair and reasonable price; second, that the City of Levis was under an obligation to give a water supply to the Government buildings so long as the Government was willing in consideration of the supply to make a fair and reasonable payment.

Reference had been made in the argument in the present case to another decision dealing with the subject of the supply of water by a municipality: **McLean v. Municipal Council of Dubbo,** (1910) 10 N.S.W. Reports p. 231. Here no question arose about the rights or interests of the Crown. The plaintiffs owned a private hospital and claimed that the local authority was not entitled to cut off the water supply because rates due by her predecessor in title were unpaid.

As His Honour thought it helped in a determination of this case to compare the legislation which was considered in **McLean's** case with the legislation in New Zealand he cited the New South Wales legislation. It provides that: "If any person supplied with water by the Council wrongfully does or causes, or permits to be done anything in contravention of any of the provisions of this part, or wrongfully fails to do anything . . . the Council may cut off any of the pipes by or through which water is supplied to him, or for his use and may . . . cease to supply him with water so long as the cause of injury remains, or is not remedied."

This Act was amended by a later Act by the enactment of the following provision: "The power to cut off water conferred on the Council by s. 45 of the principal Act may be exercised by the Council in any case where any person refuses or neglects to pay to the Council on demand any rate, charge, or sum due to the Council for or in connection with water supply, sewerage, or drainage, as well as in the cases in that section mentioned."

It was pointed out by Cohen, J., that the disqualification created by the statute was limited to the person who, having been supplied with water, committed a contravention of the statute. In the result, it was held that the Dubbo Council could not supply or withhold water at its own caprice and could not cut off water from plaintiff's premises because they refused to pay an amount due for water by the vendors of the property.

In the present case, there would be no doubt about the power of the Council to cut off the water supply when the mortgagor was in actual occupation of the property and had not paid his water rates. But what was the position when he, from whom rates were originally demanded, has ceased to be in fact the occupier and when a tenant had been placed in occupation by the plaintiff in exercise of his powers as a mortgagee?

The right of a company which supplied water under powers conferred by a statute to cut off water because of the non-payment of arrears of rates due by a former occupier was considered in **The Sheffield Waterworks Company v. Wilkinson,** (1879) 4 C.P. Div. 410. A short statement of the facts appears in the head note.

Speaking of the observations of the magistrate who had stated the case, *Bramwell,* L.J., said on page 422: "I agree with him in thinking that it was not the intention of the legislature that the undertakers should be at liberty to withhold the supply of water from the respondent's premises until the arrears due from some one else are paid. I also agree with him in thinking that ample provision is made for their security by enabling them to demand the rates in advance, without having what may be called something in the nature of a lien upon the property itself for by-gone rates."

From a consideration of the authorities cited, certain conclusions can be arrived at, with, in His Honour's opinion, certainty: First, that in New Zealand if the Crown is in occupation of buildings it can insist upon being supplied with water at a reasonable cost. Second, that in New South Wales and in England, under special legislation relating to water supply considered in the cases decided in these countries the remedy of "cutting off" does not affect an occupier who goes into occupation after a defaulting occupier has given up possession.

In deciding this case, much depended upon the view which one took of s. 86 of the Municipal Corporations Act, 1920. His Honour said he had given the section his best consideration, and he could not find in its terms any justification for coming to any other conclusion than that it gives to the body to whom a rate is payable another remedy for its recovery against the person from whom the rate has been demanded. The section speaks of a person refusing or failing to pay a water rate. The section speaks about stopping the supply of water to the premises and it gives a remedy against the person who is in default for the expense incurred. He did not think that the section gives rights against the property. It seemed to him that the remedy was against the person and against the person from whom the rate has been demanded. The rating authority had already complete rights against the land. A rate is a charge upon land. The "occupier" is primarily liable and the term "occupier" is defined in para. (*a*) of s. 2 of the Rating Act, 1925.

Section 70 of the Rating Act, 1925, provides that a mortgagee may also be proceeded against for unpaid rates and proceedings may be taken against the owner and against any person who is in actual occupation of the premises.

In the present case, having regard to the kind of tenancy under which the present occupiers were holding, the "owner" must be deemed to be the occupier. The definition of owner provided for that; but it would seem that rates may be recovered from a person in actual occupation. The mortgagee in this case is not in *de facto* possession, for he has put in a tenant. In such circumstances what right had a mortgagee to demand that water shall be supplied? Indeed, what right had anyone to demand that water shall be supplied?

The general policy of the law as disclosed in decisions relating to the supply of water seemed to have moved in the direction of giving a right to persons in occupation of property to claim water upon making a reasonable payment for it. In the case of a ratepayer he gets it upon payment of rates. In the case of someone else using the property who may not in the technical sense be a ratepayer, His Honour failed to see why he should not be supplied upon payment of a reasonable sum. The principle stated by their Lordships of the Privy Council in **The Dominion of Canada v. City of Levis** (*supra*) should be held to apply in the present case. It is contained in these words: "It must be recognised, however, that water is a matter of prime necessity, and that, where waterworks have been established to give a supply of water within a given area for domestic and sanitary purposes, it would be highly inconvenient to exclude from the advantages of such supply Government buildings, on the ground that these buildings are not liable to water taxation. The respondents are dealers in water on whom there has been conferred by statute a position of great and special advantage, and they may well be held in consequence to come under an obligation towards parties, who are none the less members of the public and counted among their contemplated customers, though they do not fall within that class who are liable to taxation, and who being in the immense majority are expressly legislated for and made subject to taxation." If this principle applied to lands within the limits of Auckland City, it must apply to lands within the boundaries of the One Tree Hill Borough.

Any difficulty that arose in the present case existed only because of deciding whether the Crown is in possession of the premises. In some cases, it was in fact actually occupying the lands. In other cases, it had a predominant interest notwithstanding that it had let the premises to persons on a weekly tenancy. If it be entitled to insist upon a supply of water to premises which it used as in the **Napier** case, His Honour failed to see why it could not insist on water being supplied to other properties to the possession of which as *Williams,* J. put it in **Campbell v. District Land Registrar of Auckland,** 29 N.Z.L.R. 332, "it has an indefeasible title."

As to what was a reasonable sum to pay the question was a little difficult to decide. There seemed to be no reason why the Crown should pay more than the ordinary payer of rates is required to pay, plus the cost of connecting up with the system.

MACGREGOR, J., said that before proceeding to determine the specific questions before the Court it was necessary first of all to attempt to ascertain from its language the scope and effect of s. 86 of the Municipal Corporations Act, 1920. It was obvious that this section affords to a local body supplying water what appeared to be a summary and convenient method of obtaining payment of arrears of water rates from the consumers of such water. It was equally obvious that to stop the supply of water to premises must produce serious inconvenience to the occupier, and loss to the owner, of such premises. The section is couched in somewhat ambiguous language, and is open to more than one construction. In these circumstances, it was contended for the local bodies, who are the defendants here, that s. 86 should receive a wide interpretation, and for the plaintiff, who is a property owner, that it should receive a narrower one. The broad question now was, which of these two conflicting views should prevail? That question, of course, depended on the true construction of s. 86 of the New Zealand Act, which is unfortunately not identical in terms with the corresponding sections in the Statutes relating to water supply either in England or in Australia. The contention for the defendants was in effect that the section means that the premises in question may be kept by the Council permanently without a supply of water until all arrears of water rates are paid, irrespective of the person for the time being in occupation of the premises. After full consideration, His Honour did not think that is the true meaning or effect of s. 86. It appeared to him that much stronger and clearer language would have been employed by the Legislature if it had been intended to produce such an extreme result, which must of necessity involve serious hardship to the property owner and occupier, and might well cause an epidemic in the neighbourhood of the premises. In this connection, it was instructive to examine certain aspects of the corresponding legislation in England. In London, for example, an occupied house without a proper and sufficient supply of water is a nuisance liable to be dealt with summarily, and, if a dwellinghouse, is deemed unfit for human habitation. Notice in writing of the water being lawfully cut off from any inhabited dwellinghouse for non-payment of water rates or other cause must be given to the sanitary authority of the district within twenty-four hours by the Metropolitan Water Board. (See **Halsbury's Laws of England,** vol. 28, p. 267.) It was fairly clear, that the stoppage of water allowed by s. 86 was not intended to be interminable. It must, he thought, be temporary and not permanent. The question remains, how long may it lawfully be continued by the Council? The answer to that question in His Honour's opinion must be, until the occupier who originally refused to pay his water rates either pays up his arrears, or leaves the premises. He is the "person" who is referred to in the opening words of the section, and he is the "person" from whom alone the expense of stopping the supply can be recovered under the latter part of the section. In other words, His Honour thought that the twofold remedy provided by s. 86 can be enforced by the Council only as against the actual person who refused or failed to pay his water rates for water supplied to him by the Council.

So far, His Honour said, he had dealt with the matter on the language of s. 86 itself, and apart from decided cases. It appeared to him, however, that the English cases cited in argument were really decided on the same principle as he had endeavoured to extract from the section in our Act. There is a *dictum* in the considered judgment of Bramwell, L.J., in **Sheffield Waterworks Company v. Wilkinson,** 4 C.P.D. at p. 422, which seems to support this view. There the learned Lord Justice says that he agrees with the Magistrate in thinking: "that it was not the intention of the Legislature that the undertakers should be at liberty to withhold the supply of water from the respondent's premises until the arrears due from someone else are paid. I also agree with him in thinking that ample provision is made for their security by enabling them to demand the rates in advance, without having what may be called something in the nature of a lien upon the property itself for by-gone rates." Those remarks, in His Honour's judgment, applied by analogy and with great cogency to the present case.

If this construction of s. 86 be the correct one, His Honour thought there need be little difficulty in determining the specific questions put by the summons. It was admitted that (s. 86 apart) the defendants here are bound to supply the premises in question with water. There was no alternative source of supply available. The plaintiff has agreed to pay the reconnection fees and also to pay the ordinary water rates as from the date of his taking possession. In those circumstances, in my opinion, questions (1) and (2) should each be answered in the negative. The first part of question (3) admittedly must be answered "Yes." Regarding the second branch of that question, His Honour agreed that it should be answered as stated in the judgment of the Chief Justice.

As the plaintiff had succeeded in substance in these proceedings, an order should be made directing the defendants to pay the sum of £30 and disbursements as the costs of and incidental to this originating summons.

KENNEDY, J., said that Boroughs are empowered by s. 239 of the Municipal Corporations Act, 1920, to construct waterworks for the supply of water for the use of their inhabitants. As suppliers of water, the defendants were in a special position. Their supply was the only one reasonably available and it was not practicable for the lessees or tenants of the plaintiff to obtain their water supplies elsewhere. The defendants were empowered to make and levy water rates in respect of the ordinary and extraordinary supply. All water rates for an ordinary supply are payable in advance and for an extraordinary supply are payable at such times as the Council directs: s. 85. Lands and buildings to which water can be, but is not, supplied situate within one hundred yards of any part of the waterworks are liable to rates not exceeding one-half of the rates specified in respect of the ordinary supply. The supply, even to persons outside the borough, may be discontinued by a borough only after three months notice in writing: s. 247. The inhabitants of the borough, such as the plaintiff's lessees and tenants if it be assumed that they are liable to water rates, are by an implication from the statute entitled to participate in the available water supply and, if not liable to water rates, are entitled, as inhabitants occupying lands and buildings, to a supply of water upon paying a reasonable price for it by virtue of an implication to be derived from the circumstances and the relative position of the parties. The principle upon which this obligation is based is thus stated by Lord *Parmoor* in **Dominion of Canada v. City of Levis** [1919] A.C. 505: "It must be recognised, however, that water is a matter of prime necessity, and that, where waterworks have been established to give a supply of water within a given area for domestic and sanitary purposes, it would be highly inconvenient to exclude from the advantages of such supply Government buildings, on the ground that these buildings are not liable to water taxation. The respondents are dealers in water on whom there has been conferred by statute a position of great and special advantage, and they may well be held in consequence to come under an obligation towards parties, who are none the less members of the public and counted among their contemplated customers, though they do not fall within that class who are liable to taxation, and who being in the immense majority are expressly legislated for and made subject to taxation. Their Lordships are therefore of opinion that there is an implied obligation on the respondents to give a water supply to the Government building provided that, and so long as, the Government of Canada is willing, in consideration of the supply, to make a fair and reasonable payment."

S. 86 does not entitle a borough to stop the supply to any premises irrespective of who may be in occupation and for all time so long as sums due for water rates are in arrear. His Honour thought that s. 86, like ss. 242 and 243 of the Municipal Corporations Act, 1920, gives a remedy available only against the persons named. Thus s. 242 gives a remedy against the person who fails to supply proper appliances or who wilfully allows water to run to waste and section 243 a remedy against a person who refuses or obstructs inspection. The remedy conferred by s. 86 is against the person *liable to pay any water rate* who neglects or fails to pay the same. The expense of stopping the supply is recoverable only "from such person"—namely "the person liable," and this expense is not treated as a rate. The words "to the premises" or similar words appear in many water supply statutes and here impose a limit on the power of stoppage, and provide that the stoppage against a person liable is in respect of the premises to which the water is supplied. But a disqualification in respect of some premises does not extend to other premises in respect of which no rate is in arrear. The truth was that persons are supplied and the disqualification is personal, but persons are supplied only upon premises and in a sense their supply is to the premises occupied by them. **Sheffield Waterworks Co. v. Wilkinson,** (1879) 4 C.P.D. 410 and **McLean v. Municipal Council of Dubbo,** (1910) 10 N.S.W.S.R. 911, illustrate the principle that clear words must be used to justify a refusal of supply to a person, who is not himself liable, because he declines to pay arrears of water rates due by prior occupiers. The Legislature had not, in His Honour's view, in s. 86 used language sufficiently apt to entitle a borough to refuse a supply to tenants and lessees of the plaintiff who are not liable for the arrears of water rates. In his opinion then, questions (1) and (2) should be answered "No," and question (3) should be answered as proposed in the judgment of the Chief Justice.

Solicitor for the plaintiff: **J. M. Tudhope,** Crown Law Office, Wellington.

Solicitor for the defendants: **The City Solicitor,** Wellington.

Myers, C.J.
Herdman, J.
MacGregor, J.
Kennedy, J.

October 19, 1932.
Wellington.

R. v. RICKARDS.

Criminal Law—Appeal Against Sentence of Death Commuted to Imprisonment for Life—Whether Court has Jurisdiction—Crimes Amendment Act, 1920, S. 2 (1).

Application for leave to appeal against sentence.

Held: Court has no jurisdiction. Only one sentence, that of death, can be passed on conviction for murder. The Governor-General's commutation to imprisonment for life is not a sentence of the Court.

THE COURT (per MYERS, C.J.): Even if we had jurisdiction, the case does not seem to be one calling for interference by this Court. But—apart from the fact that all the grounds alleged appear to be relevant to the propriety of the conviction and none of them to the question of sentence—it seems clear that the Court has no jurisdiction. The prisoner was convicted of murder, and the Court could pass only the one sentence —that of death. The sentence was then commuted by the Governor-General to imprisonment for life. That is not a sentence of the Court. So far as the Court is concerned, the sentence was fixed by law, and there could be no appeal: see the Crimes Amendment Act, 1920, s. 2 (1).

Application dismissed.

Supreme Court

Ostler, J.

August 25, September 20, 1932.
Napier.

In re McLEAN (DECD.): CONWAY AND ORS. v. THE COMMISSIONER OF STAMP DUTIES.

Revenue—Death Duty—Final Balance of Estate—Death before becoming liable to make Return of Income—Whether whole Amount of Income Tax for Current Year of Death is deductible as a Debt of Deceased, or whether the Statutory Deduction in respect of Farming Operations and assessed after Date of Death should be excluded from Final Balance—Death Duties Act, 1921, s. 9—Land and Income Tax Act, 1923, s. 12—Land and Income Tax Amendment Act, 1929, s. 12.

Case stated for the opinion of the Court under the provisions of s. 62 of the Death Duties Act, 1921.

Sir Douglas McLean died on February 7, 1929. Appellants were required under s. 21 of the Land and Income Tax Act, 1923, to make a return of his income from April 1, 1928, to the date of his death. They made a return of the income from April 1, 1928, to March 31, 1929. This return showed the deceased's farming income to amount to £13,442 9s. 6d., and his income from sources other than farming to amount to £4,408 14s. 1d. The appellants were finally assessed for income tax amounting to £999 0s. 5d. net. This income tax was imposed (*inter alia*) in respect of income from farming land under the provisions of s. 12 of the Land and Income Tax Amendment Act, 1929. Pursuant to such provision the sum of £2,954 18s. 1d. was deducted from the income tax otherwise payable by the deceased, such sum being the amount of land tax paid in respect of the land from which the income was derived not exceeding the amount of income tax payable in respect of the income so derived. Appellants did not object to this assessment and duly paid the tax. In computing the final balance of the estate for the purposes of the Death Duties Act, 1921, respondent allowed as a deduction therefrom under s. 9 of that Act and s. 21 (2) of the Land and Income Tax Act, 1923, the sum of £999 0s. 5d. Appellants claimed that the full amount of income tax that would have been payable if no deduction had been made in respect of the land tax should be allowed as a debt due by deceased at the time of his death, and that the amount of the final balance of the estate should be reduced by the additional sum of £2,954 18s. 1d.

The appellants contended: (1) that in assessing the net balance of an estate for death duty purposes a balance should be struck as at the date of death, and should not be affected by or take into account events happening *in futuro*; (2) at the date of death it was not possible to foretell whether the executors would be the owners of any land as at the following 31st March; (3) the whole amount of £3,953 18s. 6d. for income tax was a liability of the deceased incurred in his lifetime, and the respondent should have allowed such amount as a debt, instead of deducting the sum of £2,954 18s. 1d. land tax assessed as at a date after death, namely as at March 31, 1929.

The respondent contended that the amount was not a debt due by the deceased, and the amount deducted has been allowed only by reason of the practice of the respondent in treating it as such. Further, if it was a debt within the meaning of the Death Duties Act, 1921, the amount was not ascertainable until after the death of the deceased, and the amount so ascertained was £999 0s. 5d.

The question for the opinion of the Court was whether the deduction so allowed by the respondent is erroneous, and, if so, what is the correct deduction.

Held: Where a taxpayer died before he became liable for income tax, the executor was under no obligation to make a return until the time came when the taxpayer, had he lived, would have been bound to do so. The amount of tax payable by the executor, and only that amount, can be deducted in ascertaining the final balance of the estate for death duty purposes.

Martin for appellants.
Lusk for respondent.

OSTLER, J., said that when the testator died on February 7, 1929, no income tax in respect of income for the year commencing 1st April, 1923, was owing by him. That income year had not concluded and it was not known how the income for that year would be assessed, nor what the rate of assessment would be. That was a matter for Parliament, which would pass the annual taxing Act and might also pass an amendment of the principal Act altering the basis of assessment. But for the provisions of s. 21 of the Land and Income Tax Act, 1923, at the time of his death there would have been no debt due by testator in respect of income tax for the year 1928-29: see **Commissioner of Stamp Duties v. West Australian Trustee Executor and Agency Co.,** 38 C.L.R. 63. In that case the appellants would not have been entitled in arriving at the final balance of the estate for death duty purposes to deduct anything for income tax payable in respect of the year 1928-29, because no debt in respect of such income tax was incurred by deceased in his lifetime. But full provision was made for such a contingency by s. 21.

It would be noticed that the section applies to two cases: (1) the case where the deceased taxpayer ought to have made a return before he died but has failed to do so; (2) the case where the taxpayer died before he became liable to make a return. This was a case where the deceased taxpayer "would have been bound to make (a return) if he had remained alive," and therefore was the second case. The duty is cast on the executor in such a case to make the same return as the deceased taxpayer ought to have made. But where the taxpayer died before he became liable to make a return, the executor was under no obligation to make a return until the time comes when the taxpayer would have been bound to do so had he remained alive. When the return is made the Commissioner can require further returns, and he may assess the executor for income tax in the same manner in which he might have assessed the taxpayer had he remained alive. Had the testator remained alive till after March 31, 1929, it was clear that the Commissioner would have assessed the taxpayer under the provisions of the Act of 1923 as amended by the Land and Income Tax Amendment Act, 1929: see **A.B. v. Commissioner of Taxes** [1930] N.Z.L.R. 473. Therefore, the Commissioner had the same power with regard to the executors, and this was what had been done. Under that assessment the executors were assessed for income tax at the nett sum of £999 0s. 5d. Subs. 2 of s. 21 provides that "the tax so assessed shall be deemed to be a liability incurred by the deceased taxpayer in his lifetime." Were it not for that provision the executors could in ascertaining the final balance of the estate deduct nothing in respect of income tax for the year 1928-29, for when the taxpayer died he owed nothing in this respect. The statute provides that the tax subsequently assessed shall nevertheless be deemed to be a debt incurred by the taxpayer in his lifetime. That being so, the amount of the tax so payable by the executors, and only that amount, can be deducted in ascertaining the final balance of the estate for death duty purposes. For those reasons, in his Honour's opinion, the contention of respondent was correct.

Appeal dismissed.

Solicitors for the appellants: **Carlile, McLean, Scannell and Wood,** Napier.

Solicitor for respondent: **Crown Law Office.**

Court of Arbitration.

Frazer, J. June 21, 1932.
Dunedin.

PUBLIC TRUSTEE v. WAITAKI COUNTY.

Workers' Compensation — Disease — Pneumonia — Whether an "Accident"—Nature of Inferences to be Drawn by Court from Facts—Workers' Compensation Act, 1922, s. 3.

Claim for compensation on behalf of Frances Lizzie Mather, in respect of the death of her husband, Alexander Robert Mather, who died on June 13, 1931.

The deceased up to the time of his death had been in the employ of the Waitaki County Council. His ordinary work was that of a surfaceman, but for some weeks before he contracted the illness which culminated in his death he was engaged in cutting down willows and dragging them out of the Island Stream at Maheno. This employment necessitated working in water, and it was claimed by the plaintiff that the deceased met his death as the result of contracting pneumonia on June 10, 1931, by reason of wettings he received while so employed. The facts are detailed in the judgment.

Held: After consideration of facts: The contraction of pneumonia is to be regarded as an accident. Pneumonia is not an accident, but its contraction may be. The wetting of the worker, who was necessarily walking with gum-boots in water, exposed him to the risk of falling in and getting wet. This led directly to the contraction of the disease.

F. B. Adams for plaintiff.

A. N. Haggitt for defendant.

FRAZER, J., in delivering, orally, the judgment of the Court, said that there were numerous cases on record dealing with instances of the contraction of a disease being regarded as an accident. The disease itself is not an accident, but the contraction of the disease may be an accident. The two New Zealand cases, **Bresand v. N.S.S. Coy., Ltd.** [1928] N.Z.L.R. 461, G.L.R. 290 and **Whale v. N.Z. Refrigerating Coy., Ltd.** [1931] G.L.R. 542, may be taken as contrasting cases, showing two opposite views. In the first case the plaintiff contracted rheumatism. He had been working during wet weather in a somewhat damp spot, and his feet and clothing became wet. The Court held that, as the plaintiff had suffered no greater exposure than any other man who had to work in the open air, in wet weather, on damp ground, it could not be said that he had contracted rheumatism as an accident. The second case was that of a man who had been working for several hours in a high temperature and who, without having had time to cool down, went into a freezing chamber and worked there for a little while. Naturally he contracted a chill, which brought on an attack of sciatica. In the circumstances, though there was no accident in the ordinary acceptation of the term, he had miscalculated his resistance. He had put a greater strain on his constitution than it was able to bear. He had not realised, as a medical man would realise, that he was subjecting his constitution to a strain that no ordinary constitution would stand, so that in his case the contraction of sciatica was held to be due to what one of the cases refers to as a miscalculation of the effects of his act, and, accordingly, an accident. There need be no external happening. An accident may be due to a miscalculation concerning something internal—something in the man himself.

As to the facts, there was a considerable difference among the lay witnesses in connection with matters of detail, which was only to be expected. This man died, as far as anybody knew at the time, of an ordinary disease—pneumonia. He had not met with any notable happening, such as would ordinarily be described as an accident in the lay sense. He simply became ill, and, unfortunately, died. That is all that the people of Maheno would take out of the circumstances as known to them.

It was common ground that the deceased was, in his ordinary work, a surfaceman. He might sometimes have to be out in all weathers, exposed to the elements, but his general instructions were to work indoors on wet days. A man who is working in the open air runs a certain degree of risk from exposure, but probably his constitution becomes hardened to it, so that the risk in reality is not so very great. At all events, it may be taken that, up to eight weeks before his death, the deceased's work had nothing to do with cleaning rivers and removing willows from river-beds. His job had been a dry-land job. It was only in the last eight weeks that he had to undertake what was more or less a water job, and one might suppose that he was not used to that kind of work. It was common ground that he was a strong, healthy man, 54 years of age, and presumably not the sort of man to contract pneumonia unless there was some special cause for it. It was common ground that during the eight weeks before his death he was working pretty continuously in the creek bed. On practically every day he was in the water with gum-boots on. It was common ground, too, that there were several pools in the river-bed, and that the bottoms of the pools were full of pot-holes. There were logs and rocks and other uneven surfaces on the floors of the pools. The depth of water might vary from a few inches to several feet. In some cases the water was murky, in others it was thick with weeds, so that anybody working there ran a considerable risk of slipping and getting wet to the waist. There was a possibility also that a man might lose his footing altogether, and be totally immersed. So far that appears to be common ground. All the witnesses spoke in much the same way.

Now the Court came to the evidence about which there may be some question. It was common ground that the deceased did fall in, and was completely immersed, on two or three occasions, but it is not common ground that one of those immersions took place on any particular day. There was, however, Mrs. Mather's statement that her husband came home early on June 2, and said he had been totally immersed; he was, as a matter of fact wet all over. Mrs. Mather remembers the date because the next day was the King's Birthday. She speaks also of further wettings on June 9 and 10. There is some corroboration from the witness Yorstan. His recollection is not quite accurate on some points. He was confused in regard to a number of dates, but he says that on one occasion between the first and the tenth of June, while he was working with the deceased, the deceased had gone completely under water. The time-sheets kept by the witness Barron show that Yorstan was not working between June 4 and June 10. That would fix the date between June 1 and June 4, which corresponds with Mrs. Mather's statement that the last complete immersion was on June 2. It is common ground that the deceased ran a constant risk of getting wet. One of the witnesses told us that the deceased would often go in over his gum-boots, and that he was frequently wet. There is independent evidence as to his having got wet above his gum-boots on June 9. There is, moreover, Mrs. Mather's definite statement that he went home wet on that day. Other witnesses said that it was a common thing for him to get wet. One of the witnesses said that Mather had got wet on a number of occasions, and had had to change his clothes before he could resume work. The general picture of the evidence as a whole makes Mrs. Mather's statement probable. She has a special reason for fixing June 2 as the date of a complete wetting, and the onset of pneumonia on June 10 would fix the wettings of June 9 and 10 in her memory. Yorstan was a good witness in some respects, though rather hazy about dates. He does not actually remember June 10, but he says that on the last day on which the deceased went to work he met him going home, that the deceased said he was feeling ill, and that he knows he was wet. If the Court accepted that statement as an honest statement, as it did, it fitted in with Mrs. Mather's statement that her husband came home wet on June 10. There is no doubt about that occasion, because the deceased did not speak to anyone of being ill until June 10.

No doubt the deceased got wet over his gum-boots on a number of occasions, and the Court knew he was constantly in the water. It is probable that the wettings over his gum-boots would be quite a common occurrence. There is another matter of corroboration to which His Honour said he should refer at this stage—that is, the statement made by the deceased himself to Dr. Butler, which the Court had admitted on the authority of **Seed v. Somerville,** 7 G.L.R. 199. It was true that when he spoke to Dr. Butler about getting wet, he did not speak of a wetting on any particular day or of any total immersion: he merely spoke of working in the river and getting wet. The deceased, at that time, was under the impression that he had caught an ordinary chill or cold, and he did not realise that there was anything seriously the matter with him. In fact he seemed rather to resent his wife's action in sending for a doctor. He thought he had caught a chill that was not serious, and his reason for thinking so was that he had been getting wet at his work. The fact that the deceased himself connected the wettings with his illness indicates that he had been wet within a few days of the time he spoke to the doctor. If the wettings had occurred

more than a week or ten days previously, it would not be at all likely that he would put them forward to the doctor as the possible cause of his illness, and the Court may accordingly infer from the deceased's own statement that the wettings he referred to were recent wettings. The Court might, then, accept the evidence of Mrs. Mather, with such corroboration as there is, that her husband got wet over his gum-boots on June 9 and 10, and that he had a complete wetting on June 2.

The Court next considered the medical evidence in relation to these facts. Though quite a number of medical witnesses were called, there was not a great deal of conflict in the opinions expressed by them. Pneumonia is a disease that, though unfortunately very prevalent, is one about which the medical profession is somewhat lacking in precise knowledge. The duration of incubation is variable and is a matter of speculation, and the Court was inclined to the view taken by the medical witnesses for the defence, that it is more probable that, if the period is lengthy, premonitory symptoms will be shown before the actual onset of the disease. That leads the Court to think that in all probability the total immersion of June 2 was not the cause of the development of pneumonia: it was more probably the partial immersion of the 9th. That does not mean that the immersion of June 2 had nothing to do with the development of the disease. It was shown from the medical evidence that repeated immersions and exposures to cold and wet would have a cumulative effect, and it seemed not unreasonable that a man of 54, who had not been used to working in water, should be affected by having to work in water for eight weeks in midwinter, and under such conditions that, if he were not always actually wet, he would be in a damp place and always have his hands wet and part of his clothing damp. Even if the deceased had not felt any effects at the time, it is likely that the successive exposures would have rendered him less likely to be able to resist an attack of pneumonia. We think that the incident of June 10 was unconnected with the contraction of the disease, but it is reasonable to infer from the medical evidence that the wetting on June 9 was the effective cause of the development of pneumonia. A rapid incubation is usually unaccompanied by premonitory symptoms, and there were none in this case, except that when the deceased went home on the night of June 9 he complained that he felt very cold.

The Court's duty is to draw inferences, if they can be drawn, from proved or admitted facts. Pneumonia may be contracted in a number of ways. Its contraction may depend on a man's age to some extent. It may depend on pneumonia in an epidemic form being present in the district in which he lives. It may depend on his personal state of health—on his suffering from a cold or influenza or something of that kind. It may depend on unwholesome household conditions, bad food, or insufficient clothing. It may depend on one or other of a number of other circumstances, all of which seem to be excluded in this case. As Dr. Butler said, in answer to an invitation to put it in terms of chance, the odds were 10 to 1 that pneumonia in the present case was due to wetting. If the Court considered the evidence as His Honour had outlined it, it is not surmise or conjecture, but a reasonable inference from the facts, to say that it is proved that the death of the deceased was due to pneumonia, which he contracted as a result of having got himself wet on June 9. It is not a case in which a man became ill through ordinary exposure to the elements. It was not intended by the deceased or his employers that he should get himself wet. He had to work in the river, but he was provided with gum-boots in order to keep his legs dry. However, the existence of unexpected pot-holes, willow-roots, and other obstructions frequently caused him to fall. It was by accident, not by design, that he got wet. The facts of the present case are not to be compared for a moment with such a set of circumstances as existed in **Bresand v. Northern Steamship Company** (*supra*). This is definitely a case of a man who was set to do work which necessitated his walking in the water with gum-boots, and exposed him to the risk of falling in and getting wet. This he did on a number of days. The law is clear that the contraction of pneumonia, if it arises from such circumstances as these, is to be regarded as an accident. Once more, the pneumonia is not an accident, but its contraction may be, and the Court was satisfied that in this case it was an accident. The present case presents some features similar to those described in **Barbeary v. Chugg,** 8 B.W.C.C. 37, in which the contraction of sciatica by a pilot, who accidentally got himself wet while jumping into a boat, was held to be due to accident. The wetting, as in the present case, was a fortuitous and unpremeditated happening, and it led directly to the contraction of disease.

Judgment for plaintiff.

Solicitors for the plaintiff: **Adams Bros.,** Dunedin.
Solicitors for the defendant: **Ramsay and Haggitt,** Dunedin.

Police Practice and Double Prosecutions.

An Oppressive Proceeding

By CHARLES S. THOMAS.

Although much has been said for and against trial by jury of recent years the majority of thinking people realise its vital importance in the hearing of criminal cases. In democratic countries no system of criminal law can work satisfactorily unless it receives the general support of all sections of the community. The jury system is one method of insuring that the criminal code of a country is not too far in advance of public opinion. It serves to compel citizens to take an active and intelligent part in the administration of justice, and as de Tocqueville observed, the jury is fundamentally a political institution which has always been the strongest bulwark against the tyranny of the executive.

In New Zealand we are admittedly fortunate in having a police force which is at once competent and fair-minded, but lately a practice has grown up in respect of motor offences which calls for comment. On occasions where there has been loss of life as the result of a motor collision the police will charge the driver of the car both with "negligently causing the death of the deceased" and with "driving in a manner that is or may be dangerous to the public." The first charge has to be tried before a jury and whilst the accused person is awaiting his trial the second charge is held over.

Juries are rightly or wrongly accused of leniency in cases of this type, but if the accused is acquitted by the jury the police have a second attempt at a conviction in the lower Court on the second charge. It is submitted that this practice is a reprehensible one and has all the odious characteristics of Cardinal Morton's Fork. To the lay and the legal mind alike there is very little practical difference between driving in a manner dangerous to the public and driving negligently. Although in rare instances a *novus actus* may intervene and snap the chain of causation, in ordinary cases the facts tendered in support of both charges are identical. The principle has often been repeated that no man shall be tried twice for the same offence. Technically, there is a subtle distinction between the two offences; and, in consequence, the accused even if he is acquitted by his peers, has to submit to a second trial before a Magistrate.

In Christchurch recently a man was charged in the above manner. He was committed for trial on the major charge but the Grand Jury (who are seldom perverse) returned No Bill. He was then brought up on the minor charge on the same facts before the Magistrate and was convicted, although the tribunal remarked that no penalty would be inflicted in view of the fact that his wife had died in the accident.

In another case which occurred here at practically the same time, the accused had to attend the Inquest and then the taking of evidence in the lower Court, to be followed by two trials in the Supreme Court. On the first trial the jury disagreed. On the second they acquitted him. *Prima facie* one would imagine that he had suffered sufficiently, that his finances in these arduous times had been strained to the utmost. However, he too was brought up on an adjourned charge of driving in a manner

(*Continued on page 322.*)

Chief Justices of the Empire.

VI.—The Chief Justice of Australia.

BORN in Dublin on February 29, 1852, the Chief Justice of the Commonwealth of Australia on leap year day was eighty years of age. In the matter of birthdays (if I have made the computation aright) he will therefore still be in his teens; and it may be, in part, by reason of this leap-year luck that time and the passage of the years have touched him more lightly than most other men. According to the latest report, he is still young, vigorous and capable; and at eighty his eye is not dim or his natural force abated. He has been Chief Justice for little more than a year, since he succeeded Sir Isaac Isaacs on January 23, 1931. His appointment was popular and has been fully justified by the event, despite some criticism at the time regarding his age and some small comment by those who were in favour of the appointment of Evatt, J., who, with McTiernan, J., had been raised to the High Court Bench only a day or two before.

THE RIGHT HON. SIR FRANK GAVAN DUFFY, P.C., K.C.M.G.

Political considerations have in nearly all times and countries exercised an influence on judicial appointments. Even in England, where the fact has never been admitted, save possibly in the case of the Law Officers, appointments to the Bench were until comparatively recent times often made in recognition of services rendered to the party in power. For some years this has not been so, and it is no uncommon thing for the party in power to appoint as judges, on their merits, persons who in politics were of opposing views. The Lord Chancellor is the person chiefly concerned with judicial appointments; and the nineteenth century contained many examples of the Chancellor's preference for judges of his own party. It is therefore not surprising that in the Dominions, where lawyers and judges are so often statesmen, that a judge's politics should still be a matter of concern and comment. So when Gavan Duffy was appointed Chief Justice on merit and in strict order of seniority, the appointment was hailed by a section of the Press as a "defeat for the Caucus" and "a blow for the malcontents"; while another and smaller section expressed its views with less enthusiasm. There was, however, a general consensus of opinion that the appointment was sound and satisfactory; and that of all possible candidates Gavan Duffy, J., was on his record and his merits the man most fitted for the post. The event has proved him so.

It has been said that "rebels" and the sons of "rebels" often make the best citizens. De Villiers, Chief Justice of South Africa, fought against Britain in the Boer War; the C.J. of Australia is the eldest son of the second marriage of that Sir Charles Gavan Duffy, the prominent Young Irelander, whose political activities were not unconnected with his departure for Australia in the fifties. He went out, bag and baggage, with his family, his son Frank being then a very small boy. Soon after his landing he became a member of the Victorian Parliament; and from that time onward grew in reputation and service, and became a great Victorian. He held a portfolio in three Cabinets and became Premier of Victoria, a position which he held until 1872, two years before his son Frank was called to the Bar.

At the age of thirteen, Frank Gavan Duffy was sent back to the Old Country and was a pupil at Stonyhurst, the famous Catholic school in Lancashire, from 1865 to 1869. Later he returned to Australia and became an undergraduate of Melbourne University. He was for a short time an officer in the State Treasury Department; and was admitted barrister and solicitor of the Victorian Bar in 1874. For nearly seven years his practice was carried on mainly in the County Courts. During this period he was able to devote himself to other and subsidiary pursuits. In 1879 he founded the *Australian Law Times*, and he was for some years Lecturer on the Law of Contracts and Personal Property at Melbourne University.

It was in 1891 that he definitely transferred his

practice to the Supreme Court. Thenceforward his progress at the Bar was rapid and sustained. As junior he had a large and lucrative practice and his success continued after he took silk in 1900. He and T. L. Purves were then the only " Q.C.s " in Australia, and they appeared on opposite sides in almost every case of importance. Gavan Duffy had a great reputation as cross-examiner—not unlike that of Carson, his Protestant countryman, in Ireland and England. Purves was perhaps somewhat better than Gavan Duffy as an advocate ; but there was little in it ; and on the death of Purves, the Irishman became undisputed leader of the Victorian Bar.

His elevation to the High Court Bench took place in February, 1913, thirty-nine years after his call to the Bar. He was then 61 years old. Eighteen years later. when he was Senior Judge of the Supreme Court, Mr, Brennan announced his appointment to the Chief Justiceship in succession to Sir Isaac Isaacs, now Governor-General of Australia.

During his nineteen years on the Bench he has proved himself a sound and impartial judge ; one to whom common law principles and cases are familiar ; and who could and did apply those principles with understanding and justice. His judgments in the appellate tribunal, as appearing in the *Commonwealth Law Reports*, are far less numerous than those of others, including Isaacs, C.J., and the late Higgins, J. Not infrequently his individual opinions are indistinguishable owing to the prevailing practice of setting out in one judgment the consenting views of two or more. But his separate and individual judgments, where they appear, show his clear judicial quality and lucid powers of expression. They form no inconsiderable contribution to the interpretation of the Common Law ; while his judgments in patent cases are independent and illuminating ; they are often cited, and are noted and received with respect.

The popularity and great esteem in which he is held by the Bar and the Bench were abundantly revealed at the dinner given in his honour on the occasion of his knighthood in 1919 ; and the eulogies expressed at that crowded and representative function were many and sincere.

His son Charles is a prominent member of the Victorian Bar.

Mr. Francis Harrison.

Celebrates his 82nd Birthday.

The Wellington members of the profession in particular, and their brethren throughout the Dominion, will learn with great pleasure that Mr. Francis Harrison, for forty years Secretary of the New Zealand Law Society, celebrated his eighty-second birthday on last Tuesday.

The promotion of the welfare of the legal profession was always the objective of Mr. Harrison's active days, his only other interest being all branches of athletic sport in which, in his young days, he excelled. Practitioners loved and respected him, knowing that he ever kept before him the ideal of advancing their interests in every way, and they still hold his years of service as a fragrant memory.

Mr. Harrison, who now resides at Devonport, Auckland, in retirement, is hale and hearty, and his appearance belies his great age. His recent birthday was not forgotten by his old friends in the profession. Among others, the Wellington District Law Society telegraphed its felicitations.

Electric Lighting and Power.

Some Comparisons in Legislation.

By L. F. RUDD, LL.B.

Articles in the NEW ZEALAND LAW JOURNAL have made frequent reference to Lord Hewart's book, *The New Despotism*, and attention has been called to the practice of the English Parliament of delegating powers to Ministers of the Crown. So much stress has been placed upon this alleged weakness in English Legislation (although a mention is made of a similar tendency in our own Statutes) that we may be in danger of overlooking the fact that the English Parliament is still a zealous guardian of the rights and property of the subject, and that English legislation might with advantage be used as a model by our own Parliament. A glance through a volume taken at random of *Halsbury's Statutes of England* will probably cause the reader to look forward with eager anticipation to seeing the New Zealand Statutes similarly reprinted and annotated. Such a reprint will facilitate comparison between our Acts and English Acts on the same subjects : and such a comparison will, I suggest, be in favour of the English Acts.

As an instance, let us refer to legislation on " Electric Lighting and Power " from the point of view of the consumer and the public. In New Zealand, we have the Electric Power Boards Act, 1925, with amendments of 1927 and 1928. This is not an ordinary overriding Act coming into force and operating upon a defined date within a defined area (Chapman, J., in *Mayor, etc., of Wanganui v. Gonville Town Board and ors.*, [1924] G.L.R. 281, at page 283, as to the repealed 1918 Act ; and approved of by Herdman, J., in *Waitemata County Council v. Waitemata Electric Power Board* [1932] N.Z.L.R. 94, 101, his judgment having been upheld on appeal : (see p. 243, *ante*). It has no actual force until put into force in a newly-created district by the proclamation which creates the district. When the proclamation is issued a new governing authority has come into existence—a governing authority—in the words of Herdman, J., in the case last mentioned—created by the Legislature possessing far-reaching authority. The Act applies to any district when the proclamation issues. There are local Acts for many districts. Some areas are not within any electric-power district, and are supplied by a licensee after obtaining an Order in Council under the Public Works Act ; other areas are not supplied at all ; but for purposes of comparison and bearing in mind the mushroom growth in recent years of Electric Power Board districts, the 1925 Electric Power Boards Act with its amendments may fairly be considered as representing the dominating and latest New Zealand legislation on the subject.

In England the " Electric Lighting (Clauses) Act, 1899 " (*Halsbury's Statutes of England*, Vol. 7, pp. 679 *et seq.*), contains regulations and conditions to which all Undertakers (*i.e.* suppliers of electricity) are subject in the exercise of the powers conferred on them by Special Orders or Special Acts unless expressly varied or modified : the short title reads " An Act for incorporating

in one Act certain provisions usually contained in Provisional Orders made under the Acts relating to Electric Lighting." In addition, there are the Electricity (Supply) Acts, 1882 to 1928. It is in the 1899 Act that we find most interest; but as indicating the angle from which Parliament viewed the supply of electricity, it is useful to read Section 6 of the 1882 Act:

"The Undertakers shall be subject to such regulations and conditions as may be inserted in any licence, order, or special Act affecting their undertaking with regard to the following matters:—

(a) The limits within which and the conditions under which a supply of electricity is to be compulsory or permissive:

(b) The securing a regular and efficient supply of electricity:

(c) The securing the safety of the public from personal injury, or from fire or otherwise:

(d) The limitation of the prices to be charged in respect of the supply of electricity:

(e) The authorising inspection and inquiry from time to time by the Board of Trade and the local authority:

(f) The enforcement of the due performance of the duties of the Undertakers in relation to the supply of electricity by the imposition of penalties or otherwise . . .:

(g) Generally with regard to any other matters in connection with the undertaking . . ."

Under s. 10 (b) of the 1899 Act (as now amended), the Undertakers are required to obtain the consent of the Electricity Commissioners before placing any electric line above ground except within premises in the sole occupation or control of the Undertakers—a requirement that would surely obviate the unsightly overhead transformers and heavy wires in residential and suburban localities. The only New Zealand restriction on this head is to be found in the Electrical Supply Regulations, 1927, made under the Public Works Amendment Act, 1911, now s. 319 of the Public Works Act, 1928: Regulation No. 8 under the heading "Location of Overhead Lines" providing that the licensee (*i.e.*, normally the Power Board) shall leave one side of each street free for telegraph lines: and Regulation No. 9 providing that all overhead electric lines shall be placed on the opposite side of the street to that on which any telegraph lines are erected. The difference in the point of view is rather striking, the disfiguring overhead line in England being regarded as abnormal, but here as normal.

S. 27 of this Act provides:

"(1) The Undertakers shall, upon being required to do so by the owner or occupier of any premises situate within fifty yards from any distributing main of the Undertakers . . . give and continue to give a supply of energy for those premises in accordance with the provisions of the Special Order . . .:

"(2) Every owner or occupier of premises requiring a supply of energy shall—

(a) Serve a notice upon the Undertakers specifying the premises in respect of which the supply is required and the maximum power required to be supplied and the day (not being an earlier day than a reasonable time after the date of the service of the notice) upon which the supply is required to commence; and

(b) If required by the Undertakers, enter into a written contract with them to continue to receive and pay for a supply of energy for a period of at least two years . . ."

"(3) [Provision that the Undertakers may require security.]

"(4) [Providing that the Undertakers may discontinue to supply energy if used improperly.]

"(5) [Providing that the Undertakers shall not be compelled to supply energy unless they are reasonably satisfied that the lines, etc., are in good order.]

"(6) If any difference arises under this section as to any improper use of energy or to any alleged defect in any electric line, fittings, or apparatus, that difference shall be determined by arbitration."

One looks in vain in the New Zealand statute for any obligation on a Power Board to supply: the only provisions are s. 82 (*o*) of our 1925 Act.

"Subject to the restrictions hereinafter specified, the Board may do the following things in respect of any electric works authorised to be constructed or acquired under this Act: . . . (*o*) May sell electric energy to any local authority or to consumers generally within the district in bulk or otherwise, and on such terms and conditions as it deems fit."

And in s. 64 (as amended by the 1928 Act)—by way of a consolation prize—

"Every person liable to pay a rate under this section shall during the financial year during which such rate is levied be entitled to receive free of charge, for use on the property in respect of which the rate is levied, a supply of electrical energy equivalent in value to the total amount of such rate paid in that year . . ."

It is the more curious that Power Boards are not compelled to supply upon request, in that under the Gas-supply Act, 1908, companies (including municipal corporations) manufacturing and supplying gas are required (s. 3) to give a supply to the occupier of any premises situate within 100 yards from any main. Nor does our Act contemplate that the consumer may specify the maximum power he requires: nor has he the right to arbitration on any difference arising as to improper user, defects, etc.—the terms and conditions are as the Power Board deems fit.

The Supply Regulations under the Public Works Act make an attempt to cover what one would have expected to find in the Power Boards Act, Reg. 11 providing that "Every person within the area included in the license to whose premises electrical energy can be supplied from the licensee's distribution lines shall be entitled to a supply under the following terms and conditions . . ." The wholesome provision for arbitration in case of certain disputes, as it is set out in the English Act, is not mentioned in the Regulations; and, instead, a dissatisfied consumer under Reg. 217 may apply to the Minister of Public Works to have appliances, etc., tested by an Inspecting Engineer, and the cost of this test has to be prepaid by the Consumer, with no provision for refund or payment by the licensee of the cost if the Consumer should prove to be in the right.

The Undertakers in England have the right, under s. 18 of the Electric Lighting Act, 1909, to "refuse to supply electrical energy to any person whose payments for the supply of electrical energy are for the time being in arrear (not being the subject of a *bona fide* dispute) . . ." Our Act is silent upon this point, and one at least of the New Zealand Power Boards has protected itself (but hardly its consumers) by putting through a by-law making charges for electricity become due and payable day by day as it is supplied and payable on demand, in default of which the Board may at once discontinue the supply, no reference being made to the possibility of a *bona fide* dispute.

Section 30 of the Imperial Act of 1899 provides:

"(1) Whenever the Undertakers make default in supplying energy to any owner or occupier of premises to whom they may be and are required to supply energy under the Special Order, they shall be liable in respect of each default to a penalty not exceeding 40s. for each day on which the default occurs. (2) Where the local authority are not themselves the Undertakers, and the Undertakers make default in supplying energy to the public lamps to which they may be and are required to supply energy under the Special Order, the Undertakers shall be liable in respect of each default to a penalty not exceeding 40s. for each lamp, and for each day on which the default occurs. (3) Whenever the Under-

takers make default in supplying energy in accordance with the terms of the Board of Trade regulations they shall be liable to such penalties as are prescribed by the regulations in that behalf. (4) Provided that the penalties to be inflicted on the Undertakers under this section shall in no case exceed in the aggregate in respect of any defaults not being wilful defaults on the part of the Undertakers the sum of £50 for any one day, and provided also that in no case shall any penalty be inflicted in respect of any default if the Court are of opinion that the default was caused by inevitable accident or force majeure or was of so slight or unimportant a character as not materially to affect the value of the supply."

Our Act makes no provision for penalties. S. 125 is to the effect that:

"No person who is a consumer of electric energy supplied by the Board shall have any claim against the Board in the event of any failure of the supply of any such energy through accident, drought, or other unavoidable cause."

A local Act (Auckland Electric-power Board Act, 1921) goes further: s. 97 reads:

"No person who is a consumer of electric energy supplied by the Board or by a local authority, as the case may be, shall have any claim against the Board or such local authority in the event of any failure of the supply of any such energy through accident, strike or labour disturbance, drought, or other unavoidable cause,"

and that Board's By-law (No. 2, para. 22) carries the matter to the stage beloved by the bureaucrat:

"The Board shall exercise every effort to supply electrical energy continuously, but shall not be liable for any damage, loss, or inconvenience arising to any consumer from any interruption or discontinuance of supply due to any cause whatever, whether from negligence or otherwise, but the Board shall after any such interruption use every endeavour to restore the supply as early as possible."

The Supply Regulations under the Public Works Act provide (Reg. 229) that any licensee committing certain breaches of its license or of the regulations is liable to a fine of £20; and that the infliction of any penalty shall not relieve the licensee from any liability to pay compensation in respect of damage arising out of the commission of the offence in respect of which such penalty is inflicted. The infliction of a fine on any offending Power Board is hardly likely, however, to afford much satisfaction to an injured consumer, when he considers the difficulties placed by Statute in his way before he can obtain satisfaction in a civil action.

Even in procedure there is a special protection given to the Power Board by s. 127 of the Act—quite without any parallel in the English Acts on this subject—providing that:

"(1) No action shall be commenced against the Board or any member thereof, or other person acting under the authority or in the execution or intended execution or in pursuance of this Act, for any alleged irregularity, or trespass, or nuisance, or negligence, or for any act or omission whatever until the expiry of one month after notice in writing specifying the cause of action, the Court in which the action is intended to be commenced and the name and residence of the plaintiff and of his solicitor or agent in the matter has been given by the plaintiff to the defendant.

"(2) Every such action shall be commenced within six months next after the cause of action first arose, whether the cause of action is continuing or not."

It is to be noticed from the brief references given that the Electrical Supply Regulations (N.Z.) provide in some particulars a check upon licensees; but one of these regulations (No. 28) in the *Waitemata case* referred to has already been declared *ultra vires*, not being covered by the general authority of the Public Works Act to pass regulations relating to the erection and user of electric lines; and the other regulations, or some of them, if put to the test, may it is submitted suffer a similar fate. The learned Judge in that case stated (at p. 105 of the report *cited supra*):

"It is difficult to understand why such a provision as is comprised in Regulation 28 should have appeared in a set of regulations prescribing the conditions subject to which a license may be issued. Its proper place is in an Act of Parliament, and not in a set of statutory by-laws."

There are regulations of the Electricity Commissioners under the English Acts—they are set out in *Will's. Electricity Supply*, 6th Ed., pp. 569 *et seq.*—but they deal with technical details.

The English Acts on this subject might well be worth consideration by the New Zealand Legislature, if and when Mr. Justice Herdman's remarks cause those interested to attempt another amendment of the New Zealand Act.

Perjury and Honest Untruths.

In Running-down Cases.

The conviction for perjury committed during his giving evidence in a running-down case and the sentence of the "witness" to three years' imprisonment at Auckland last week, has encouraged speculation as to the amount of false evidence given during the hearing of this class of action. It is, however, true that running-down cases provide the most frequent examples of an honest mis-statement and misrepresentation of facts. Sometimes one may hear as many as ten witnesses all speaking of an accident and saying exactly the same thing, even as to the speed of a vehicle; and ten equally honest persons on the other side flatly contradicting the opposing ten, and yet apparently believing that they are telling the truth, the whole truth, and nothing but the truth in accordance with their oath. It is on such occasions that the baffled Judge turns with joy and relief to the independent witness, if there is one, and accepts his story in preference to the massed falsehoods of the twenty.

A Judge who had tried many such cases and was greatly interested in the phenomena of honest lying, endeavoured to explain it with reasons. He observed that it was a curious but undeniable fact that persons travelling in the same vehicle had a strong bias towards the conviction that their own driver was always in the right and the other always in the wrong. Of a charabanc load of forty persons, while not more than one had observed anything of importance when an accident suddenly occurred, all are ready to accept a suggestion or statement of the driver as to what had taken place, and in time really believe that they were eye-witnesses and accurate observers of the event and of all the material facts. So we have the miracle of a coach-load of persons swearing and believing that their driver sounded his horn and was travelling at about five miles an hour; while the tram passengers to a man (and woman) swear that he was tearing along at about 50 m.p.h. or more, and that he gave no warning of his furious approach.

It is extraordinarily difficult for many people to tell the truth and nothing but the truth. Not all are so careful as the man who, having given a certain distance in yards or inches, was asked by cross-examining counsel why he was so exact? "Because," said he, "I felt that some fool might ask me, so I measured it."

Australian Notes.

By Wilfred Blacket, K.C.

A Tale of Three Jurors: In Melbourne County Court, Judge Foster was trying a jury case brought to recover damages for injuries sustained in a motor collision. The plaintiff, one Taylor, was represented by Mr. Lazarus, and Hardman, the defendant, by Mr. Read. On the second day of the hearing, Mr. Lazarus stated that a constable who had given evidence for the defence had been seen talking to three of the jurors on the previous afternoon. The jurors stated that the meeting had been quite accidental and that the conversation had consisted of a humorous account given by the constable as to the way he had sustained a recent injury to his foot; but it was admitted that the constable had also said that he had not thought the case would ever have come into Court. A juror had thereupon remarked that they could not discuss the case and the conversation ended at that. Mr. Lazarus then applied that the jury be discharged: Judge Foster refused the application and Mr. Lazarus, saying that he "ought not to be forced to appear before a biassed tribunal," withdrew from the case. His Honour proceeded in the absence of the plaintiff with the hearing of the defendant's evidence. Presently, however, it was found that the plaintiff had not paid the jury fees for the second day's hearing, the Melbourne rule being that the defendant pays their fees on the first day and the plaintiff on the second. The jury was then discharged and the judge heard the remainder of the case, and at its conclusion found a verdict for the defendant with costs.

Judges *versus* Jurors.—*R. v. Sharah* is a case full-freighted with notable incidents. The prisoner, a fruiterer, was charged with an indecent assault upon a young girl, and upon trial at Sydney Judge Curlewis had but a poor opinion of the prosecutrix, and her evidence, and the Crown case generally: so much so that he in effect intimated to Mr. Kinkead, counsel for the defence, that he might safely leave the case to his learned leader, who would, so to speak, make the address on behalf of the prisoner from the Bench. He did so in the terse, lucid, and adequate English for which he is renowned, and the jury after a short retirement brought in a verdict of "guilty." His Honour, regarding the verdict as "outrageous," frankly said that it was so, and at once gave the prisoner leave to appeal and sent his unqualified opinion of the verdict to the Criminal Appeal Court, but although their Honours agreed that the verdict was capable of being described in most of the terms used by Judge Curlewis they found that there was evidence to support it and as the credibility of the evidence was a matter for the jury they dismissed the appeal. The High Court refused an application for special leave to appeal from this decision, and the prisoner was thereafter brought again before Curlewis, J., who, loyal to a verdict that he loathed and despised, awarded a sentence of two years' imprisonment. It is curious that I have in memory many cases in which fruiterers have been tried for similar offences. I am not putting this forward as an argument against vegetarianism, but still it does go to show that the modern Eve sometimes does suffer from the unholy alliance of apple and serpent.

The Fish Pond.—A Sydney daily in its report of a negligence case asserted that "The Chief Justice said that in considering the liability of the Transport Commissioners the same principles must to some extent be applied as if the Court was dealing with human beings." From a remote context it appeared that the Chief Justice in his reference to "human beings" was not really comparing Transport Commissioners with them, but merely cows and horses that had strayed on to the railway-line.

Nellie Davison sued the Canterbury Hospital Committee for compensation for injuries sustained by her when lifting a 14-stone patient into his cot, but failed to recover a verdict. In the newspaper report it is stated that she sued "by her next best friend," a phrase that would seem to indicate a "boy friend." "Second best" would perhaps have been preferable in spite of its association with the garments of boyhood.

Edwards, J., in a Quarter Sessions appeal at Sydney listened for some time to an argument between solicitors as to whether the costs allowed should be three or five guineas, and then advised them to go outside and toss for it. They did so. A shilling acted as deputy chairman of Quarter Sessions and assessed the costs at £5 5s.

Coyle, D.C.J., at Sydney, upon conviction of a prisoner on a charge of perjury, said that "perjury was committed in fifty per cent. of the cases in his Court, and that the sanctity of the oath in this country is no sanctity at all. People take oaths, call upon God, and then start to lie like the proverbial gas-meter." For these reasons he bound him over to appear if ever called upon. Reminds me of an occasion when I was appointed to act at Quarter Sessions and a dear old lady wrote congratulations and said she was "sure I would temper Mercy with Justice."

At Sunshine Pool.—Exhaustive study of the facts and law involved in *R. v. Russell* tried at Melbourne would be a liberal education in the laws relating to murder and manslaughter. The prisoner at the date of the crime alleged was a married man with two children; but notwithstanding this circumstance he married another lady whom his wife refused to receive as an inmate of their home. The end of the disputing between the husband and wife was that she and the children were found drowned in a bathing-place, happily named the "Sunshine Swimming Pool." There was no direct evidence, but the Crown case was that he had thrown her into the water and the children after her. A man named Brown, whose record was of a still darker colour, gave evidence of a confession by the prisoner in which the latter described with some lavishness of detail not necessary to be recounted here the awful facts of the triple murder.

The defence was that the wife had committed suicide and had taken the children into the pool with her, the prisoner although occupying a front seat at the performance being unable to save her, although he got some of his clothes wet in an endeavour to reach her.

The jury after four hours' deliberation inquired what the legal position would be if the woman had gone into the water with the children and the prisoner "had stood by conniving at the act."

Mann, J., obtained very little assistance from counsel, but after a short adjournment and consultation of authorities decided "as a matter of principle and not of authority" that in view of the prisoner's "duties for the care and welfare of those under his control as

father " that he would be guilty of manslaughter and so the jury found.

An appeal has been lodged, and without suggesting its probable outcome I may venture to say that I think the Judge would have been justified in telling the jury to acquit if they could not find that the Crown had proved the charge of murder. They had the two stories of the happening before them, and it was not the contention of the prosecution or defence that the prisoner had " connived at the act." In fairness to His Honour, however, it should be stated that there was no suggestion by counsel that the direction that I have indicated should be given.

Per Incuriam.—Some small measure of astonishment was aroused among men of law in Sydney when it was decided by Kenneth Street, J., that the Ejectment Postponement Act recently passed for the benefit of owners and tenants of lands and houses did not apply to orders of ejectment upon process instituted in the Supreme Court. This omission deprived the Act of all but a small fraction of its intended effect, but as Parliament was in session an amending Act was rushed through in one sitting and the loophole, almost as wide as the wall intended to be erected, was filled up.

The Season's Novelties in Crime.—In a case at Sydney it was proved that one, L. H. MacAulay, manager of a boot business—I mean of course a " footwear establishment "—had sold two pairs of boots *alias* foot-wear, to customers. The price of those boots, as before, was 14s. 8d., and to one customer he had stated the price as being 17s. 9d. and to the other £1 1s. The sales were made and he handed in dockets for 14s. 8d. for each pair of footwear retaining the difference of 3s. 1d. and 6s. 4d. These latter amounts he was charged with having stolen from the respective buyers. He admitted the facts stated, and the magistrate, remarking that it was " the most unusual type of stealing " ever proved before him, convicted the defendant and bound him over to be of good behaviour for two years. The observation made by the S.M. seems to be much more than justified for I certainly fail to see any evidence whatever of larceny from the customers. They were offered the boots at the prices mentioned, and agreed to buy: they were not defrauded. The crime in each instance was the embezzlement of the moneys that should have been paid over to the employer.

In another police court case, a real estate agent was convicted of obtaining money by false pretences. It was proved that he had overstated the takings and profits of a business then in his hands for sale, and had by these misrepresentations induced the prosecutor to pay the price asked by the vendor, the commission to the defendant being included in the money paid. I do not remember ever to have heard of a similar prosecution, but on the other hand do not know why there should not be a very large number of them, for the facts relating to a property for sale very often run a losing race with the agent's imagination. Moreover, I see no reason why an owner who by false pretences of existing facts induces a purchaser to part with his money should not be answerable criminally as well as liable in damages for his wrong-doing.

These considerations remind me of the converse case, for I once appeared for a defendant whose erstwhile girl friend sued him in the District Court for damages for indecent assault and recovered £150. This is the only precedent that I have seen in practice; but I think it is good precedent—that is, in law, although the facts proved on the trial constituted a very bad precedent.

Rt. Hon. Lord Salvesen.

A Visitor to the Dominion.

A member of the Judicial Committee of His Majesty's Privy Council, the Rt. Hon. Lord Salvesen, accompanied by Lady Salvesen, will arrive by the *Rangatane* on Tuesday next. His Lordship's name is a familiar one to us, and the profession trusts that his visit to the Dominion will prove very enjoyable.

Of Norwegian ancestry, Lord Salvesen was born in Leith on July 20, 1857. He was educated at the Collegiate School, and at the University of Edinburgh, where he graduated as M.A. and LL.B. He was admitted to the Scottish Bar in 1880, and soon became one of its most prominent members. He soon achieved much success, notably in shipping and commercial cases. He took silk in 1899, and became Solicitor-General for Scotland in 1905. After a brief occupancy of that position, he resigned on appointment as Judge of the Court of Session, an office he held until his retirement in 1922, when he was sworn as a member of the Judicial Committee.

From 1901 to 1905, Lord Salvesen was sheriff of Selkirkshire, and, as such, was a successor in office of Sir Walter Scott.

For many years Lord Salvesen has taken a prominent part in Edinburgh life, being President of the Zoological Society of Scotland, Chairman of the Royal Scots Association, and of the Royal Scots Benevolent Fund, and Fellow of the Royal Society, Edinburgh, and he is a Past President of the Royal Scottish Geographical Society. He has been Chairman of several Royal Commissions, and he has interested himself in the Association of Lowland Scots and of the Scottish Veteran's Garden City Association. In hours of release from judicial duties, he enjoys himself in shooting, fishing, and travelling.

Lord Salvesen, it will be remembered, is an Associate Editor of the *English and Empire Digest*. He was also part author of the title, Shipping and Navigation, in *Halsbury's Laws of England*.

Lord and Lady Salvesen are assured of a warm welcome in the Dominion.

Police Practice and Double Prosecutions.

(*Continued from page 316*).

dangerous to the public and was convicted. No fine was inflicted because as the Magistrate himself remarked he had been put to considerable expense in defending himself on the major charge, but his license was cancelled for 18 months.

It is my submission that the practice complained of is oppressive and should be discontinued. It must be remembered that the second defendant had already been acquitted by his country. In short, the procedure referred to has the effect of nullifying the verdict of the jury and therefore must be deprecated as one further inroad on the jury system itself.

Legal Literature.

Garrow's Wills and Administration.

The Law of Wills and Administration in New Zealand, by PROFESSOR JAS. M. E. GARROW, Emeritus Professor of Law, Victoria University College, Wellington. Author of *The Law of Property (Real and Personal)*, *The Crimes Act, 1908 (Annotated)*, and *The Law of Trusts and Trustees* and *Supplement*. Pp. 734, cv.

It is not only in the University Colleges that Professor Garrow's books are regarded as indispensable. Go into any law office, and you will find *Garrow on Trusts*, *Garrow on Property*, and *Garrow on Crimes*: and a glance at their appearance will tell you they are there not for ornament but for use.

A conveyancing transaction raises a troublesome question about apportionment. "What does Garrow say?" asks the practitioner. And if Garrow doesn't say, he at least tells his reader where to look. Or it may be that the problem has to do with a secret trust, or the doctrine of election, or the marshalling of assets. The perplexed practitioner reaches down his Garrow on "Trusts." His eye lights up. There is a case there not on all fours perhaps, but with facts very similar to those under consideration. Solution of the problem is in sight.

Or again, one's client is oppressively called upon to meet a criminal charge. He is wrongly accused of forgery, or false pretences or something less mentionable. *Garrow on Crimes* is invoked. He will surely show whether or not a hole can be picked in the information or indictment, or some other legal defence established. Seldom, if ever, is the oracle dumb.

Williams, Lewin, Russell are all good—very good—names. But they are English writers. They know nothing of the work of our Williams, or Prendergast, Edwards, Denniston, Chapman, Salmond. But Garrow does. No New Zealand decision has escaped him. If it has any value you will find it in its proper place in his book. You yourself may have missed it when going through your Digests: but Garrow hasn't.

It will be tidings of great joy to the profession to hear that Professor Garrow has now completed a work on "Wills and Administration in New Zealand." The book contains 49 chapters and with index of cases runs into some 900 pages. Everything is there. The Nature and Form of a will; what may be disposed of by will; who may take; how a will is made; how it is proved; who may and may not be executors. Some difficult matters as vested and contingent gifts; gifts in substitution; gifts by implication; gifts by reference—all are faithfully dealt with, and the most instructive of the relevant authorities condensed and explained. References are to be found even to cases decided in 1932.

To the practitioner who doesn't live in a law library this latest work of Professor Garrow will prove a God-send. In it he will find all that he would wish to get from Jarman, Williams, Mortimer, and the New Zealand Reports. And not only will he get what he needs more quickly from Garrow than he would get it from the other sources, but he will also get the benefit—not easily exaggerated—of the independent work of an analytical and critically selective mind. The book is a work. It is not one of those biblia-a-biblia that incurred the censure of Elia.

But it is really not necessary (and in the reviewer it would be presumptuous) to praise the work. It is enough to inform the profession that it exists.

—H. H. CORNISH.

Practice Precedents.

Leave to Defend a Bill Writ, &c.

The forms hereunder contemplate Leave to Defend a Bill Writ under Rule 495 of the Code of Civil Procedure, of a Motion to Rescind the order made, and the Motion and Judgment only on an appeal to the Court of Appeal.

It is to be remembered that, when the order giving leave to defend is granted it should be served: *Oake v. Moorcroft*, L.R. 5 Q.B. 76. When the order giving Leave to Defend is once made the decisions in the cases: *Agra and Masterman's Bank Ltd. v. Leighton*, L.R. 2 Ex. 56; and *Bank of New Zealand v. McLeod*, N.Z.L.R. 2 S.C. 39, establish that it will be rescinded only if the facts upon which the order was made are subsequently shown not to exist.

Note also the cases: *Munt Cottrell and Co., Ltd. v. Smith* [1921] G.L.R. 431, and *H. R. Munns and Co. Ltd. v. D. Levin, Ltd.* [1929] N.Z.L.R. 590.

1. MOTION FOR ORDER FOR LEAVE TO DEFEND.

IN THE SUPREME COURT OF NEW ZEALAND
.....District.
.....Registry.
BETWEEN C.D. & Coy. Ltd., *Plaintiff*
AND A.B. & Coy. Ltd., *Defendant*.

Mr. Counsel for the above-named Defendant Company to move before the Right Honourable the Chief Justice at his Chambers, Supreme Courthouse, , on day the day of 19 , or so soon thereafter as Counsel may be heard for an Order that leave be granted to the above-named Defendant Company to file a Statement of Defence and to defend this action and for an Order fixing the time within which the Defendant Company shall file its Statement of Defence and for an Order fixing the time and place for the hearing of this action and for a further Order that the costs of and incidental to this Order be reserved UPON THE GROUNDS that the Defendant Company has a good defence on the merits AND UPON THE FURTHER GROUNDS appearing in the affidavit of filed herein.

Certified pursuant to Rules of Court to be correct.

Counsel for Defendant Company.

Memorandum for His Honour.

His Honour is respectfully referred to Rule 495 of the Code of Civil Procedure.

2. AFFIDAVIT IN SUPPORT.

(*Heading as above*).

I, , of , in the Provincial District of , Company Secretary, make oath and say as follows:—

1. That I am the Secretary of A.B. & Coy., Ltd., the Defendant in this action.

2. That the Plaintiff Coy. is suing in this action as the payee and holder of a Bill of Exchange, a copy of which is set out in the Writ of Summons sealed herein and which was drawn on the Defendant Company by the Plaintiff Company and accepted by the Defendant Company.

3. That the said Bill of Exchange was drawn by the Plaintiff Company on the Defendant Company and accepted by the Defendant Company in payment of certain motor-trucks then under consignment from the Plaintiff Company to the Defendant Company.

4. That payment of the said Bill was refused by the Defendant Company because the said motor-trucks referred to in the said Consignment failed to comply in quality and description with the motor-trucks ordered.

5. That the motor-trucks supplied were unfit for the purpose for which they were supplied.

6. That the said motor-trucks were damaged and were of a different design to those ordered.

7. That the Defendant Company has a good defence to this action.

SWORN, &c.

3. Order Giving Leave to Defend.

(*Heading as above*).

UPON READING THE MOTION FILED HEREIN and the affidavit of filed in support thereof I DO ORDER that leave be and the same is hereby given to the above-named Defendant Company to defend this action and that the statement of defence be filed in the Office of this Court at within days from the date hereof AND I DO FURTHER ORDER that this action be heard at the next Sittings of this Court at for the trial of Civil actions and that the Costs of this application be reserved.

Judge.

4. Notice of Motion for Order Rescinding Order.

(*Heading as above*).

TAKE NOTICE THAT Counsel for the Plaintiff Company WILL MOVE this Court on day the day of 19 , at 10.30 o'clock in the forenoon or so soon thereafter as Counsel may be heard FOR AN ORDER:

(1) Rescinding the Order of this Court given or made on day the day of 19 , granting the Defendant Company leave to defend this action.

(2) In the alternative varying the said Order giving the Defendant Company leave to defend by imposing such conditions as to Security as this Court deems meet.

UPON THE GROUNDS:—

(1) That the affidavit filed on behalf of the Defendant Company fails to disclose any defence in fact or law to the said action.

(2) That the circumstances are such that unless Security is given by the Defendant Company for the Plaintiff Company's claim the Plaintiff Company will be prejudiced in the prosecution of such claim.

AND UPON THE FURTHER GROUNDS set forth in the Affidavit of filed in support thereof AND FOR A FURTHER ORDER that the Costs of this application be paid by the Defendant Company.

Dated at this day of 19 .

Solicitor for Plaintiff Company.

To the Defendant Company and its Solicitor . . .

and

To the Registrar of this Court.

5. Affidavit in Support of Motion to Rescind.

(*Heading as above*).

I, of in New Zealand make oath and say as follows:—

1. That I am a Solicitor in the employ of of (Street) in the City of , Solicitor.

2. That on the day of , 19 , I searched the records of A.B. & Coy., Ltd. at the Office of the Registrar of Companies at .

3. That I found that on the day of 19 , a Debenture to secure the sum of £ payable to bearer and charging all the assets and undertakings of the said Company including uncalled capital had been registered against the said Company.

4. That on the day of 19 , I was informed by the Secretary of the Defendant Company that the said Defendant Company's assets were so charged by the Debenture aforesaid.

SWORN, etc.

6. Order Dismissing Motion to Rescind.

(*Heading as above*).

day the day of 19 .

Before the Hon. Mr. Justice .....

UPON READING the Motion to rescind the Order giving leave to defend this action and the affidavit of filed in support thereof AND UPON HEARING of Counsel for the Plaintiff Company and of Counsel for the Defendant Company IT IS ORDERED that the said Motion be and the same is hereby dismissed AND that the Plaintiff Company DO PAY to the Defendant Company the costs of and incidental to this Order amounting to £ .

By the Court,

Registrar.

7. Motion on Appeal.

IN THE COURT OF APPEAL OF NEW ZEALAND.

Between A.B. & Coy. Ltd., *Appellant*

and C.D. & Coy. Ltd., *Respondent*.

TAKE NOTICE that Counsel for the above-named Appellant Company WILL MOVE THIS COURT on day the day of 19 , at 11 o'clock in the forenoon or so soon thereafter as Counsel may be heard ON APPEAL from the whole of the Judgment of the Supreme Court of New Zealand delivered by the Honourable Mr. Justice on day the day of 19 , whereby a Motion filed on behalf of the Appellant Company for an Order:

(1) Rescinding the Order of the Supreme Court given or made on day the day of 19 , granting the Respondent Company leave to defend this action.

(2) In the alternative varying the said Order giving the Respondent Company leave to defend by imposing such conditions as to Security as the Court deemed meet was dismissed and the Appellant Company ordered to pay the Respondent Company the Costs of and incidental to such Motion amounting to £ .

UPON THE GROUNDS that such Judgment is erroneous in fact and law.

Dated at this day of , 19 .

Solicitor for Appellant Company.

To the Respondent Company and its Solicitor ,

and

To the Registrar of this Court.

8. Judgment on Appeal.

(*Heading as in No. 7, supra*).

day the day of 19 .

Before the Right Honourable the Chief Justice Sir.....

K.C.M.G.

the Honourable Mr. Justice.....

the Honourable Mr. Justice.....

the Honourable Mr. Justice.....

THIS APPEAL coming on for hearing on day the day of 19 . UPON HEARING Mr. of Counsel for the above-named Appellant Company and Mr. of Counsel for the above-named Respondent Company IT IS ADJUDGED that the said Appeal be and the same is hereby ALLOWED AND IT IS ORDERED that the Order of the Supreme Court of New Zealand dated the day of 19 , be and the same is hereby SET ASIDE with £ costs and disbursements to be paid by the Respondent Company to the Appellant Company AND THAT THE ORDER of the said Supreme Court dated the day of 19 , be and the same is hereby varied by granting to the Respondent Company leave to defend the action upon condition that the said Respondent Company DO WITHIN days from the date hereof pay the amount claimed with costs into the Office of the Supreme Court at or give Security for such sum to the satisfaction of the Registrar of the Supreme Court at . AND IT IS FURTHER ORDERED that the above-named Respondent Company DO PAY to the above-named Appellant Company the sum of £ for costs of this Appeal.

By the Court,

Registrar.

New Books and Publications.

Notable British Trials—The Trial of John Watson Laurie (The Arran Murder). Edited by Wm. Roughead. (Butterworth & C. (Pub.) Ltd.) Price 9/6d.

Gibson and Weldon's How to Become a Barrister. Fifth Edition, 1932. (Law Notes). Price 5/6d.

Jurisprudence. By W. N. Hibbert, 1932. (Sweet & Maxwell Ltd.) Price 16/-.

Constitutional Law of: England, Colonies, Dominions, and India. By S. A. Desai, 1932. (Sweet & Maxwell Ltd.). Price 6/6d.

Will's Law Relating to Electricity Supply. By Edgar Macassey. Sixth Edition, 1932. (Butterworth & Co. (Pub.) Ltd.) Price 49/-.

International Guarantees of Minority Rights, 1932. By Julius Stone (Oxford Press). Price 17/-.