of the public being deceived in the sense intended by the section by the use of either the name "Mickey Mouse" or "Minnie Mouse" as a trade mark on the appellant's goods.

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Appeal dismissed with costs.

Solicitors for the appellant, *Herman & Coltman.*

Solicitors for the respondents, *Owen Jones & Co.*

H. D. W.

[HIGH COURT OF AUSTRALIA.]

THE PRESIDENT, COUNCILLORS AND RATEPAYERS OF THE SHIRE OF MULGRAVE . . . . . DEFENDANT, } APPELLANT;

AND

THE COMMISSIONERS OF THE STATE SAVINGS BANK OF VICTORIA . . PLAINTIFF, } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1937. MELBOURNE, *June* 4, 7, 8. SYDNEY, *Aug.* 9. Latham C.J., Dixon and Evatt JJ.

Local Government—Water supply—Water supplied by measure—Waterworks under control of council—Charges for excess water—Unpaid charges—Not due "in respect of any property"—Not a charge on land—Power to withhold supply during non-payment—Local Government Act 1928 *(Vict.)* (*No.* 3720), *secs.* 197 (1) (*iv*), 385 (1), 651-653.*

Unpaid charges for excess water supplied by measure to land by a municipal council which has accepted the management and control of the waterworks within its municipal district under secs. 651-653 of the *Local Government Act*

* The *Local Government Act* 1928 (Vict.) provides:—Sec. 197 (1): "Subject to the provisions hereinafter contained by-laws may be made for any municipality . . . for the purposes following . . . (iv) Regulating the supply and distribution of water from waterworks under the management of the council." Sec. 385 (1): "All rates and other moneys due to any municipality on the twenty-ninth day of December, in the year One thousand eight hundred and ninety-one, under any Act for the time being in force relating to local government in respect of any property by the owner of such property, and all rates and other moneys which have there-

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1928 (Vict.), and which by by-law made under sec. 197 (1) (iv.) of that Act and by special order has levied a water rate and has fixed the cost of excess water supplied to the owners and occupiers of land in the municipal district, are not due "in respect of any property" within the meaning of sec. 385 (1) of the *Local Government Act* 1928 and are, therefore, not a charge upon the land; but the council is not under any duty to maintain the supply of water and may therefore discontinue it until the charges are paid.

Decision of the Supreme Court of Victoria (*Mann* C.J.): *Commissioners of the State Savings Bank of Victoria* v. *Shire of Mulgrave*, (1937) V.L.R. 94, varied.

APPEAL from the Supreme Court of Victoria.

In an action brought by the Commissioners of the State Savings Bank of Victoria against the President, Councillors and Ratepayers of the Shire of Mulgrave in the Supreme Court of Victoria a special case substantially in the following terms was stated by the parties for the opinion of the court :—

1. This action is brought by the plaintiff, which is incorporated in Victoria under the title set out above pursuant to the *State Savings Bank Act* 1928 (Vict.), against the defendant, which is a municipality incorporated in Victoria under the title set out above, pursuant to the *Local Government Act* 1928 (Vict.).

2. Three agreements dated respectively 20th May 1924, 22nd October 1934 and 22nd October 1934 were made between the Melbourne and Metropolitan Board of Works (acting in pursuance

after and before the twenty-fourth day of December One thousand nine hundred and three become due to any municipality under any Act for the time being in force relating to local government in respect of any property by any person whomsoever, and all rates and other moneys which on or after the twenty-fourth day of December One thousand nine hundred and three have become or become due under any Act in respect of any property to any municipality by any person whomsoever, shall with interest thereon as in this Act provided be and until paid remain a charge upon such property." Sec. 651 (2): "The council may accept and have the management and control within the municipal district, or if the Governor in Council consents without the municipal district of any new waterworks, and may with the like consent within or without the municipal district construct any new waterworks for water supply for any purposes whatsoever and may supply with water any public baths or wash-houses." Sec. 652 (1): "In addition to the rates hereinbefore in this Act mentioned . . . the council of every municipality may by special order make and levy a water rate in respect of all or any part of the ratable property within such municipal district, for water supplied by the council to all or some of the inhabitants of such municipal district or for the purpose of constructing waterworks or paying the interest on any loan contracted by the council for such purpose." Sec. 653: "The council may contract for any period not exceeding ten years at one time with the owners of any waterworks or any other person for such supply of water as the council thinks necessary for the purposes of this Act."

of the *Melbourne and Metropolitan Board of Works Act* 1928 (Vict.)) and the defendant (acting in pursuance of the *Local Government Act* 1928) relating to the supply of water within the municipal district of the defendant. The agreement dated 20th May 1924 provided that the board would lay mains and pipes for the supply of water to the township of Mulgrave. By the agreement the waterworks were put under the control of the council. The council undertook to levy a water rate on the ratable property in the township and also to make a charge for water supplied by measure. It was also expressly agreed that it should not be compulsory on the board to supply any water to the council for the purposes of the waterworks and that the board would not be liable to the council or to any person to pay damages for any non-supply or defective supply of water. The council undertook to accept the management and control of the works for and on behalf of the board and irrevocably authorized the board to undertake the collection of the water rates and charges, and it was provided that the agreement should continue for ten years. An agreement of 22nd October 1934 extended this agreement until 30th September 1934. Another agreement of 22nd October 1934 provided for the continuance of the supply of water by the board to the council, and contained a similar provision to that in the earlier agreement, that it would not be compulsory for the board to supply water to the council and that the board would not be liable to the council or to any person to pay damages for any non-supply or defective supply of water ; and the council irrevocably authorized the board to undertake the collection of the water rates and charges.

3. The defendant now has, and at all material times has had, the management and control of the waterworks referred to in the said agreements and by means of the mains and pipes therein referred to has at all times material supplied water to some of the inhabitants of the said district.

4. The defendant duly passed a by-law No. 20, which was duly confirmed on 7th January 1926. The by-law provided, under the heading " water rate " : " 4. All ratable property within the area now supplied or hereafter to be supplied with water shall be liable for such rates and charges as the council may from time to time by

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'special order' provide." The by-law proceeded to provide for the supply of water by measure and provided that if any person refused or delayed having the meter repaired after having been required so to do, the council might shut off the supply of water from the premises until the meter had been repaired.

5. The defendant duly passed special orders, which were duly confirmed on 16th December 1933 and 5th December 1935. The special orders levied a water rate payable in respect of ratable property for the supply of water and, as to water supplied by measure, fixed a charge of 1s. per 1,000 gallons for all water supplied to property in excess of the minimum quantity allowed.

6. From about 16th July 1930 until the commencement of this action one Edward Francis Watt was the registered proprietor under the *Transfer of Land Act* 1928 (Vict.) of an estate in fee simple in certain land within the municipal district containing 13 acres 1 rood 24 perches or thereabouts being part of Crown portion twenty-two at Notting Hill, Parish of Mulgrave, County of Bourke, and being the whole of the land more particularly described in certificate of title entered in the register book in the Office of Titles vol. 3918 fol. 783428. The land is ratable property abutting on a portion of a road or street within the area of the Town of Mulgrave described in the special orders and was until 27th April 1936 supplied with water from a water-main, part of the waterworks hereinbefore referred to.

7. While Edward Francis Watt was in occupation of the land water from the main was supplied to him on the land and on 27th April 1936 there were due and owing by him to the defendant the following sums:—(1) Water rates made and levied in respect of the property, £2 2s. 9d.; (2) rent of water-meter on the property, £2 2s.; (3) water supplied to the property, in excess of the minimum quantity to be charged as provided in the special orders, £49 2s. 11d., making a total indebtedness of £53 7s. 8d.

8. By two several instruments of mortgage dated respectively 4th July 1930 and 27th May 1931 Edward Francis Watt mortgaged the said land to the plaintiff to secure repayment of a principal sum and interest therein mentioned. The mortgages were duly registered

in accordance with the provisions of the *Transfer of Land Act* 1928 on 16th July 1930 and 4th June 1931 respectively.

9. Edward Francis Watt made default in payment of such principal and interest and in the exercise of its powers as mortgagee the plaintiff on 21st April 1936 entered into possession of the land. No payment in respect of such principal or interest has at any time since 21st April 1936 been made by Edward Francis Watt.

10. By a contract of sale dated 14th May 1936 the plaintiff in the exercise of its powers as mortgagee sold the land to one Norman Edward Fear, and he entered into possession of the land pursuant to the contract of sale on 14th May 1936.

11. On 27th April 1936 the defendant cut off the supply of water from the water-mains to the land and disconnected the water-mains from the pipes leading to the land and has since refused to restore the supply of water or to reconnect such water-mains with the pipes while the sum of £53 7s. 8d. or any part thereof remained unpaid.

12. On 5th June 1936 the plaintiff, pursuant to a requisition made upon it by Norman Edward Fear in accordance with the contract of sale, wrote a letter to him in the following terms :—" 5th June 1936. Dear Sir,—As vendors under contract of sale of 13 acres 1 rood 24 perches to Norman Edward Fear dated 14th May 1936, we hereby undertake to indemnify the purchaser against any claim for water charges to the above-mentioned date and to arrange for the supply of water to be reconnected by the Shire of Mulgrave without charge to the purchaser."

13. On 5th June 1936 the water rates and meter rent due and payable as aforesaid in respect of the land were paid by the plaintiff, but the sum due and payable as aforesaid to the defendant in respect of excess water supplied as aforesaid is still unpaid.

14. On 4th June 1936 the defendant supplied to W. G. Cole, the solicitor for Norman Edward Fear, a certificate pursuant to sec. 385 (2) of the *Local Government Act* 1928.

15. The land is ordinarily used by the occupier thereof for the purpose of growing vegetables, and a constant supply of water is essential for the full beneficial enjoyment thereof.

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The relief claimed in the statement of claim included (*a*) an injunction directing the defendant—(i) to restore the supply of water to the land, and to reconnect the water-main with the pipes and taps on the land; and (ii) to continue to supply water to such land as long as the water rate made and levied in respect thereof should be duly paid; (*b*) an injunction restraining the defendant from failing or refusing to supply water to the land so long as the water rate made and levied in respect thereof should be duly paid; declarations—(i) that the sum of £49 2s. 11d. alleged to be owing by Edward Francis Watt for excess water supplied to him by measure was not a charge on the land; (ii) that if and so far as any of the provisions of the by-law or of the special orders did upon their proper construction make charges for excess water supplied by measure a charge on the land, such provisions were in excess of any power conferred on the defendant and were of no force or effect; (iii) that the defendant was not entitled to cut off or withhold the supply of water to such land by reason of non-payment of the sum of £49 2s. 11d. so long as the water rate made and levied in respect thereof should be duly paid; (iv) that the defendant was not entitled to cut off or withhold the supply of water to such land at its will and pleasure so long as the water rate made and levied in respect thereof should be duly paid; and (v) that the defendant was under a duty to connect its water-main to the water-pipes and taps on the land and to continue to supply water to such land.

The question for the opinion of the court was:

Whether the plaintiff is entitled to any and which of the relief claimed in the statement of claim herein.

It was agreed that if the court should be of opinion that the plaintiff was so entitled, judgment in the action should be entered for the plaintiff for such relief with costs; and if the court should be of opinion that the plaintiff was not entitled to any relief, judgment in the action should be entered for the defendant with costs.

Mann C.J. held (1) that the money due for excess water supplied was not a charge on the land, and (2) that the municipality had no right to cut off the water supply pending non-payment of the excess water charges: *Commissioners of the State Savings Bank of Victoria* v. *Shire of Mulgrave* (1).

From that decision the defendant appealed to the High Court.

(1) (1937) V.L.R. 94.

Fullagar K.C. (with him *Campton*), for the appellant. There are two questions for determination, (1) whether moneys owing for excess water, as distinct from moneys owing for water rates, are, under sec. 385 (1) of the *Local Government Act* 1928, a charge on the property to which the water is supplied; (2) whether the municipality is under any duty to supply water to persons connected with its mains. The statutory provisions governing the supply of water by municipal councils are secs. 651, 652 and 653 of the *Local Government Act* 1928. As to the first question.—Moneys owing for excess water are a charge on the land, as being "moneys owing in respect of" property, within sec. 385 (1) of the *Local Government Act* 1928. Before it can be ascertained whether there has been any excess water used, reference must be made to the rateable value of his property to see to what quantity of water the occupier is entitled by virtue of the rate. As to the second question, which is independent of the first.—There is no duty to supply water imposed by statute on the council, and it is not under any contractual or common law duty to do so. At any rate, the council is under no duty to a private individual, as distinct from a public duty enforceable by mandamus. The council obtains its power to charge for excess water from sec. 197 (1) (iv) of the *Local Government Act* 1928. [He referred to *Thompson* v. *Lapworth* (1); *Re Sneesby and Ades and Bowes' Contract* (2).] *Mann* C.J. was in error in applying to this question the cases of *Attorney-General* v. *Wilts United Dairies Ltd.* (3) and *The Commonwealth* v. *Colonial Combing, Spinning and Weaving Co. Ltd.* (4). [He referred to the *Melbourne and Metropolitan Board of Works Act* 1928 (Vict.), secs. 72, 73, 102, 103, 110, 113, 117.]

[LATHAM C.J. referred to *Betts* v. *Municipality of Manly* (5).]

That case is distinguishable from the present, because there was an ordinance which imposed a duty to supply. [Counsel referred to *Sheffield Waterworks Co.* v. *Wilkinson* (6).]

Eager K.C. (with him *Dean*), for the respondent. Moneys owing for excess water are not a charge on the land. This is merely a

(1) (1868) L.R. 3 C.P. 149.
(2) (1919) V.L.R. 497; 41 A.L.T. 28.
(3) (1922) 38 T.L.R. 781.
(4) (1922) 31 C.L.R. 421.
(5) (1923) 23 S.R. (N.S.W.) 249; 40 W.N. (N.S.W.) 29.
(6) (1879) 4 C.P.D. 410, at pp. 417, 418.

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case of goods sold and delivered. Sec. 652 (1) authorizes the imposition of a rate only, not of charges for excess water. The by-law-making power conferred by sec. 197 (1) (iv) does not extend to making charges for water supplied a charge on the land. The by-law should be construed in such a way that it will be within the by-law-making power. Before the council can either expressly or impliedly make such charges a charge on the land, it must be expressly given power by the legislature. Secs. 346 and 347 of the Act provide the means by which moneys other than rates are to be recovered by the council. As to the second question. —It is true that the Act imposes no express duty to supply water, but the exercise of the rating power by the municipality casts on it a duty to supply. Where there is power to supply for the benefit of the inhabitants, and the council exercises that power, a duty is cast upon it to supply water to a rated property. The test of ratability under the special order is the availability of water at the property. The rate is a burden on the property. It is difficult to imagine that the legislature would impose this burden on the property without giving it the benefit of the supply. I do not say that because the council takes on itself to supply water, it must do so under all circumstances, e.g., if water is not made available by the Board of Works, or if there is insufficient pressure. But where the water is available, it cannot cut it off because of non-payment of these charges. [He referred to the *Water Act* 1928 (Vict.), secs. 206, 225, 229 (2), 345.] The municipality, acting for the benefit of the ratepayers, has spent public money on these water-works. The reasoning of *Mann* C.J. regarding the exaction cases was correct. Even if the council has power to cut off the supply in some circumstances, the statute has stated explicitly the way in which it is to recover moneys other than rates, and it cannot recover them by any other means. If there is a power to cut off, its exercise for this purpose is a fraud upon the power.

Fullagar K.C., in reply. Sec. 385 (1) of the *Local Government Act* 1928 uses the words "moneys . . . due . . . by any person whomsoever," not "by the owner" or "by the occupier." "In respect of" means "arising in connection with" and is apt

to cover charges for excess water supplied on the property. The water is supplied for the more beneficial enjoyment of the tenement. Regarding the second question, the suggestion of discrimination assumes a power to cut off. [He referred to *Hoddesdon Gas Co.* v. *Haselwood* (1); *Melbourne and Metropolitan Board of Works Act* 1928, sec. 72.] In this case the water was cut off while money was owing for water rates as well as for excess water.

Aug. 9.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a judgment of *Mann* C.J. in an action by the respondent corporation against the appellant corporation by which it was declared (1) that a sum of £49 2s. 11d. alleged to be owing by one Watt to the defendant for excess water supplied to him is not a charge upon certain land of which he was previously the owner, and (2) that the defendant was not and is not entitled to cut off or withhold supply of water to such land by reason of non-payment of the said sum.

The plaintiff was the mortgagee of certain land in the shire of Mulgrave of which Watt was the owner. Watt owed £49 2s. 11d. to the defendant for excess water rates in respect of water supplied to him by measure. Upon default being made under the mortgage, the plaintiff sold the land and gave an indemnity to the purchaser against all municipal charges then existing on the land. When the excess charges were not paid the municipality cut off the water. The municipality contends that the excess charges are charges upon the land and that it was entitled to cut off the water. The plaintiff brought the action for the purpose of challenging these claims and obtaining suitable declarations. I propose first to deal with the question whether the excess charges are charges upon the land.

The decision of this question, in my view, depends upon the provisions of sec. 385 of the *Local Government Act* 1928. That section provides that all rates and moneys which have become due under any Act in respect of any property to any municipality by any person whomsoever shall with interest thereon as in the Act provided be and until paid remain a charge upon such property.

(1) (1859) 6 C.B. N.S. 239; 141 E.R. 447.

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The Act provides in express terms that certain moneys are moneys which are due in respect of property; e.g., sec. 264 provides that general rates are to be levied "in respect of all ratable property within the municipal district." Sec. 615, dealing with expenditure in keeping open drains, supplies another instance of moneys being declared to be a debt due and payable to the municipality in respect of land. The question is whether the excess water charges in question, which are moneys due to the municipality, are due "in respect of any property."

In order to provide a water supply for a portion of the shire the municipality made an agreement with the Melbourne and Metropolitan Board of Works. The municipality acted in pursuance of a provision contained in sec. 651 (2) of the *Local Government Act* 1928: "The council may accept and have the management and control within the municipal district . . . of any new waterworks." The Board of Works acted in pursuance of the power conferred upon it by sec. 36 of the *Melbourne and Metropolitan Board of Works Act* 1928. Under this section the board, "subject to the approval of the Governor in Council, . . . may upon such terms and conditions as it deems fit contract with any other body corporate or public body for or with respect to the doing and the control and management by either or both of the contracting parties of any matter or thing which such contracting parties are or either of them is by law empowered to do control and manage and to carry out every such contract according to the tenor thereof."

Under the agreement with the Board of Works the board agreed to lay down water-mains and pipes in certain streets and roads for the supply and distribution of water to and within the township of Mulgrave, and to supply water to the council for distribution by the council. The council undertook to accept the management and control of the works for and on behalf of the board. The council also agreed that it would by special order make and levy a water rate and that it would also by special order make and levy a charge of 1s. per 1,000 gallons for all water supplied by measure within the township. The council further agreed that it would make by-laws and regulations with respect to the supply and distribution of the water.

The *Local Government Act* 1928, sec. 652 (1), enables the council by special order to make and levy a water rate in respect of all or any part of the ratable property within the municipal district for water supplied by the council to all or some of the inhabitants. It is thus clear that the water rate is a rate which is due in respect of property, and it is therefore, by virtue of sec. 385, a charge upon the land upon which the rate is levied. The question is whether excess water charges are similarly chargeable upon the land. Sec. 652 deals only with water rates and not with excess charges. In sub-sec. 5 it is provided that the water rate shall not exceed in any year the sum of 2s. in the pound on the valuation of the ratable property within the municipality. It is clear that the power conferred on the council by sec. 652 cannot be relied upon for the purpose of justifying a charges for excess water supplied, the amount of which obviously might exceed in any year 2s. in the pound on the value of the rateable property. The amount payable by way of water rates depends upon the rate struck and the value of the land. The amount payable by way of excess charges depends upon the amount of water consumed and the charge fixed therefor. It has no relation to the value of the land.

The council made a special order in accordance with the agreement into which it had entered with the Board of Works. By this special order it levied a water rate on the net annual value of the ratable property referred to in the order for the supply of water for stock and/or domestic purposes otherwise than by measure. For all water supplied by measure " to any and all ratable property " the special order provided that there should be a charge of 1s. per 1,000 gallons for water supplied in excess of a minimum quantity, the minimum quantity being the quantity which at 1s. per 1,000 gallons would produce an amount equal to the water rate upon the land to which the water was supplied. Thus the municipality purported to fix excess water charges by special order and also in the special order referred to the excess charges as charges made for water supplied to property. As I have already said, sec. 652 does not confer any authority to make any provisions by special order with respect to excess charges. Therefore, in my opinion, even if the provisions of the special order mean that the charges are made

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in respect of property, the special order cannot be relied upon to support the contention that the charges are so made.

The council also, however, made a by-law under the power conferred by the *Local Government Act*, sec. 197 (1) (iv). Under this provision the council has power to make by-laws for the purpose of "regulating the supply and distribution of water from waterworks under the management of the council." It is clear, I think, that under this power the council may provide by by-law for the charges to be paid by persons to whom water is supplied. The by-law made by the council provides in clause 4 that all ratable property within the area supplied with water shall be liable for such rates and charges as the council may from time to time by special order provide. (The by-law was made in 1926 and the special order was made at a later date.) By clause 4 the council attempted to make the excess charges as well as the rates a liability in respect of property. Before considering whether the council had power to do this, reference should be made to clause 6 of the by-law, which provides that every owner or occupier of lands and tenements or other persons supplied or using water for specified industrial purposes or for (*inter alia*) watering gardens shall be supplied by measure. Clause 6 also provides that the amounts to be charged for water supplied by measure shall be at the rate of 1s. per 1,000 gallons. The land in respect of which the question arises in this case was a market garden, and the excess water was used for watering the garden, so that the person supplied with or using the water, namely, Watt, was supplied by measure and became liable to pay for the water at the rate of 1s. per 1,000 gallons.

Both the special order and the by-law are apparently directed towards bringing about the result that the excess water charges, as well as the water rate, are moneys due in respect of property. I have already explained why in my opinion the special order in itself is ineffective for this purpose. I am also of opinion that the by-law is similarly ineffective. In the first place it cannot be said that there is any general power in the council to make a by-law to the effect that any moneys whatever owing to the municipality shall be charged upon the property of the person who owes the money. No such power is conferred by any section of the act. In

the second place, the by-law-making power is limited to regulating the supply and distribution of water. Under such a power, as I have already stated, the council can determine the charges to be paid by the person to whom water is supplied or distributed. A by-law providing that another person should pay that person's debts in respect of those charges would clearly not be within the power. This is the effect of the attempt to make the charges a charge upon the land and, in my opinion, the attempt is unsuccessful. In the third place, the relevant provision of sec. 197 contemplates the regulation of supply and distribution by by-law and it is at least very doubtful whether the council had power to make a by-law which does not itself fix charges but which relegates the fixing of those charges to a special order—as is provided by clause 4 of the by-law. It is not, however, necessary to determine this last point, because the by-law itself fixes in clause 6 the charges for water supplied by measure in the present case. It is this provision of the by-law and not any clause in the special order which, in my opinion, makes the excess charges payable. The terms of clause 6 show that the liability to pay for water supplied by measure is not a liability in respect of land. The persons chargeable under clause 6 are "owners or occupiers of lands or tenements or other persons supplied with or using water." Thus a person who is supplied with or uses water is chargeable without respect to the land (if any) which he may own or occupy. The important matter is not the ownership of land but the supply and use of the water. The liability is plainly, I think, a personal liability, and not a liability in respect of land.

In my opinion, therefore, the judgment of the learned Chief Justice was right upon this question.

The second question is whether the council acted wrongly in cutting off the water when the charges were not paid. Any duty to maintain a supply of water must arise either from contract or from some statutory provision. There is no general common law principle that a person who or a corporation which enters into the business of supplying a commodity is bound to continue supplying it. There was no contract relating to the supply of water between the council and any of the parties presently concerned. The *Local Government Act* does not place any responsibility upon the council to supply

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water or to continue the supply of water if it has begun to do so. The appellant has not been able to refer the court to any statutory provision which confers upon any persons the right to be supplied with water by the council. I can see no foundation for the contention that the council is bound to supply water to the inhabitants of the shire or to any persons.

The learned Chief Justice applied to this case the principle which forms the foundation of the decisions in *Attorney-General* v. *Wilts United Dairies Ltd.* (1); see also *The Commonwealth* v. *Colonial Combing, Spinning and Weaving Co. Ltd.* (2). In my opinion, this principle is not applicable to the present case. The cases mentioned applied the principle that where a public authority was entrusted with the exercise of a discretion the authority could not validly use its powers for exacting money, for the reason that such action amounted to the unauthorized imposition of a tax. In the present case no question arises of the imposition of a tax or impost and the cases mentioned therefore do not appear to me to be applicable. If the council was under a duty to supply water, it could not lawfully exact compliance with requirements not authorized by law before supplying the water. But if, as I think was the case, the council was under no duty to supply water, no wrong was done to any person when the council refused to continue the supply of water because it had not been paid for water supplied in the past.

I am therefore of opinion that the order of the Supreme Court should be varied by omitting the declaration that the council was not entitled to cut off the water. To this extent the appeal should be allowed and the order of the Supreme Court should otherwise be affirmed.

DIXON J. The appellant is a municipality portion of whose territory lies within thirteen miles radius of the Melbourne post office. That radius measures the extent of the metropolis for the purpose of the *Melbourne and Metropolitan Board of Works Act* 1928. The municipal council entered into agreements with the Melbourne and Metropolitan Board of Works for the construction by the latter of a system for the supply and distribution of water to and within the

(1) (1922) 38 T.L.R. 781. (2) (1922) 31 C.L.R., at pp. 444, 459, 460.

township of Mulgrave, which apparently lies within the radius. The agreement under which the construction was carried out provided that on completion the council should undertake and accept the management and control of the waterworks for and on behalf of the board. That agreement has been superseded by another, which contains elaborate provisions governing the relations of the two bodies. In brief, these provisions make it the board's function to supply the water and the council's to "manage" the waterworks and to "comply with any suggestions or requests of the board," to levy rates and charges and to pay the proceeds to the board, to guarantee a return of six per cent per annum on the board's capital and to make by-laws.

The by-law made by the council of the municipality in pursuance of this arrangement is expressed to make the ratable property within the area liable to such rates and charges as the council might by special order provide. The by-law requires that users of water for certain purposes shall be supplied by measure and provides the rate payable for every thousand gallons.

The respondent bank was mortgagee of land within the area, land which was used for growing vegetables. The occupier was chargeable by measure under the by-law.

The special order which had been adopted purported to impose a rate and, in an obscurely expressed provision, to treat the amount of the rate as payment on account of water consumed by those chargeable by measure.

The occupier of the mortgaged land consumed an excess quantity of water, which, according to the tariff, made him liable for a little under £50. Default was made in the discharge of this liability and also of the mortgage debt and interest. The respondent bank sold the land under its mortgage. But before the sale was completed the municipality claimed payment of the liability for excess water and, as it remained unpaid, it cut off the supply of water.

The contention of the municipality is that the liability is a charge upon the land and that in any case it is entitled to withhold supplies of water on the ground of non-payment of arrears for excess water owing by a previous occupier, or, indeed, upon any or no ground at all.

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The respondent bank then brought the action out of which this appeal arises against the municipality seeking declarations of right and an injunction restraining the latter from refusing to supply water. *Mann* C.J., who heard the action, made declarations that the sum said to be owing for excess water was not a charge on the land and that the defendant municipality was not entitled to cut off or withhold the supply of water to the land by reason of non-payment of such sum.

The defendant municipality has not been constituted a local-governing body under sec. 168 of the *Water Act* 1928 and the well-considered provisions of that enactment relating to water-supply authorities are inapplicable.

The *Melbourne and Metropolitan Board of Works Act* 1928 contains sections which, if the board were dealing directly with the distribution of water to consumers, would govern the case and remove the difficulties which the parties have encountered.

The statutory provisions which have been invoked for the purpose of solving those difficulties are contained in Part XXV. of the *Local Government Act* 1928 together with the by-law-making power which is conferred by sec. 197 (1) (iv) and perhaps by clause 2 of Part II. of the Thirteenth Schedule under the operation of sec. 197 (1) (ii). One of the provisions of Part XXV. is sec. 653, which is as follows: "The council may contract for any period not exceeding ten years at one time with the owners of any waterworks or any other person for such supply of water as the council thinks necessary for the purposes of this Act, or with the consent of the Governor in Council may purchase any waterworks."

In making the agreement with the board, the defendant municipality apparently acted under this section.

On its part the board seems to have acted under sec. 36 of its Act. Possibly it relied also on sec. 104, but as the terms of the agreement may be considered to fall outside the latter provision, it may be disregarded. Sec. 36 makes the following provision: "Subject to the approval of the Governor in Council, the board may upon such terms and conditions as it deems fit contract with any other body corporate or public body for or with respect to the doing and the control and management by either or both of the

contracting parties of any matter or thing which such contracting parties are or either of them is by law empowered to do control and manage and to carry out every such contract according to the tenor thereof."

The language is not very grammatical and is certainly somewhat vague. It may, perhaps, be pressed so far as to authorize either party to the agreement to do what the other is empowered by law to do, if the agreement warrants it.

The provisions of Part XXV. of the *Local Government Act* 1928 contain no express power to lay a reticulated system of water supply and apparently reliance was placed upon the powers of the board to construct and perhaps to maintain the system. But sec. 652 of the *Local Government Act* 1928 enables the municipality by special order to make a water rate in respect of all or any part of the ratable property within the municipal district for water supplied by the council to all or some of the inhabitants. Sec. 651 (2) is expressed to authorize a council, *inter alia*, to accept and have the control and management within the municipal district of new waterworks. Sub-sec. 4 provides that the council may maintain and repair the same and make by-laws for the resort thereto and the use thereof. It is doubtful whether the words " the same " refer to this or another category of waterworks for which the consent of the Governor in Council would be requisite. The provisions from which I have extracted the powers mentioned are too long to set out in full, but they contain no reference to a reticulated system. They refer to reservoirs and waterworks in general terms. The by-law-making power contained in sec. 197 (1) (iv) simply speaks of regulating the supply and distribution of water from waterworks under the management of the council. The clause in the Thirteenth Schedule does, however, refer to a " pipe or conduit from or by which " a person is " supplied or to which he has access.'

The defendant municipality contends that, neither under its by-law nor under any of these provisions, does it incur any duty to supply water from its system and that, therefore, it can withhold the supply for any reason it thinks fit. On the other hand, it maintains that, under its by-law and sec. 385 of the *Local Government Act* 1928, the money due for excess water by an occupier of land

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becomes a charge upon the estate. The section imposes a charge for moneys becoming due under any Act in respect of property to any municipality by any person whomsoever.

I agree in the first contention and disagree in the second. The reasons which lead me to adopt the view that, on the one hand, the municipality is under no legal duty to supply water to an occupier of land, and, on the other hand, obtains no statutory charge for moneys owing for the excess supply of water have their source in one common consideration. That consideration is that, in my opinion, the municipality's duties in respect of the undertaking are not governed by any statutory provision which has been framed for a reticulated system of water distribution and lays down, as such a provision might be expected to do, the conditions for granting and withholding a supply of water to occupiers. It is a natural consequence of this view of the statutory provisions upon which the defendant municipality relies that no statutory right should be conferred to payment of the amount due as one payable in respect of land and no duty should be imposed of giving a supply of water to occupiers.

It is apparent that the conclusion I have stated is based to a great extent upon the purpose and scope of the provisions contained in secs. 651, 652 and 653 of the *Local Government Act* 1928. A short account of the history of these provisions is necessary for the proper understanding of their effect. For that history, considered with the form in which they are expressed, shows that they belong to a period of development when cruder facilities for water supply were in general use outside large cities.

The water supply of Melbourne itself was the subject of an Act passed in 1853 (16 Vict. No. 39). The supply of water in places outside Melbourne was dealt with to some extent by the *Municipal Institutions Act* 1854 (18 Vict. No. 15), which authorized the forming of municipal districts of an area not exceeding nine square miles, if the area contained at least three hundred householders. Sec. 27 provided that the municipal council should adopt such means as might seem desirable for, amongst other things, the securing the necessary supply of water for domestic, sanitary, or irrigation purposes and should and might make by-laws for carrying out that

among other objects. In giving powers to carry out works and in enumerating the purposes for which the council might enter upon private lands, the statute included wells, pumps and pipes (sec. 46). Next, among the provisions of the *Mining Leases Act* 1862 (No. 148) relating to water rights, there was included a power to the Governor in Council to demise to any elective body corporate any reservoir constructed at the public expense and any Crown lands necessary as a gathering ground at such rent whether nominal or otherwise and for such term as he should think fit (sec. 12). It is this provision that accounts for the reference in sub-sec. 3 of sec. 651 of the *Local Government Act* 1928 to mining laws. In the following year, the *Municipal Institutions Act* 1863, No. 184, enacted in relation to boroughs the provisions which form the foundation of secs. 651 and 652 of the *Local Government Act* 1928. Apart from arrangement and form, only three substantial changes have been made. The express vesting of the works in the council has been dropped. The source of the power conferred by the provision contained in the present sub-sec. 3 has been extended to "any other law now or hereafter in force authorizing works for supplying water to any districts or places in Victoria." The third change is in the provision contained in the present sec. 653 and consists in substituting ten for three years and adding a power to purchase waterworks subject to the consent of the Governor in Council.

The period of years was extended in the consolidation of 1903. The *Boroughs Statute* 1869 (No. 359) added power to purchase waterworks and extended from mining laws to other laws the source of power to accept the management and control of waterworks. This statute amended and consolidated the laws as to municipal corporations, that is, in effect, as to boroughs. Neither the *Local Government Act* 1863 (No. 176) nor the consolidating *Shires Statute* 1869 (No. 358) dealt with water supply. The *Boroughs Statute* 1869 also introduced by its section 351 the provision which is now contained in sec. 652 of the *Local Government Act* 1928. The provisions underwent no material change in their subsequent course. They were placed in Part XIX. of the *Local Government Act* 1874. In 1881 Act No. 688 provided that the power to construct new waterworks conferred by that Part should, so far as related to shire councils,

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include the power to construct weirs, dams, reservoirs and other works for water supply for any purpose whatsoever. In the consolidating *Local Government Act* 1903 the provisions became secs. 599, 600 and 601 respectively. In 1914 secs. 39-46 of Act No. 2557 introduced the provision standing as sec. 654 of the Act of 1928. In the *Local Government Act* 1915 the present secs. 651, 652, 653 and 654 were respectively secs. 598, 599, 600 and 601.

The history of the provisions, which I have thus briefly indicated, appears to me to account for what is the most conspicuous feature of the present sections 651 to 653, namely, the absence of all reference to a system of distribution by reticulation and the lack of all the powers, authorities and rights usually taken by an authority for carrying out such a system and of the responsibilities usually imposed, powers and responsibilities all set out in the well-known English *Waterworks Clauses Act* 1847.

Adequate provision is made by the *Water Act* 1928 for investing a municipality with all the authorities and duties proper for urban water supply. Under sec. 168 the Governor in Council may constitute the council a local-governing body and then with respect to the urban district it becomes an authority under Part IV. which deals with water supply. These provisions of the *Water Act* are not recent. They have been built up over a long period of time, beginning with the *Waterworks Act* 1865 (No. 288), which provided for a large number of towns and districts. The course of development may be seen from Acts No. 347, No. 449, No. 500, No. 1156 (*Water Act* 1890), Part VI., and Act No. 2016 (*Water Act* 1905), Part III., Division 4, and Part IV.

The difficulties of this case are due entirely to an attempt to find in secs. 651 and 652 of the *Local Government Act* 1928 some sufficient disclosure of the legislative will upon the questions whether a charge for excess consumption of water supplied through pipes formed an encumbrance to which a successor in title was subject, and, if not, whether the municipality as a water-supply authority, could indirectly exact payment from a subsequent occupier of the land by cutting off his supply of water *in pœnam*. No answer can, I think, be found in these provisions for the reason that they were not

originally framed to provide for a reticulated system. Sec. 652, which deals with rating only, may be capable of use in connection with a reticulation system. For it does not concern itself with the manner in which water is distributed but only with the fact of supply. But I do not think sec. 651 suffices to authorize the laying of pipes through streets and the supply through them of water to frontagers. So far as I can ascertain, the authority for the construction and maintenance of the Mulgrave system must rest upon the combined operation of secs. 36 and 104 of the *Melbourne and Metropolitan Board of Works Act* 1928 and sec. 653 of the *Local Government Act* 1928 and upon such statutory powers as an agreement made under those provisions makes applicable.

The application of the power to levy rates conferred by sec. 652 of the *Local Government Act* 1928 as, in effect, I have already said, may be consistent with this view and the by-law-making power conferred by sec. 197 (1) (iv) may not be excluded.

No question is raised as to the power of the council to levy a water rate. We are concerned only with charges for excess water. A question as to the by-law-making power does arise by reason of the attempt by clause 4 of the by-law to make the land, as distinguished from the consumer, liable for such charges. But I do not think that question is open to serious doubt. To interpret a power to make by-laws as authorizing the imposition of a charge or encumbrance upon the title to land would not be justified unless the intention of the legislature to do so appeared from express words or by necessary implication. No such intention can be found in sec. 197 (1) (iv). The present by-law therefore cannot, in my opinion, operate of its own force to impose a charge.

A more general attack was made upon the validity of the by-law as an exercise of the power conferred by sec. 197. But in the view I take its validity in other respects does not matter. Nor do the present proceedings raise any question as to the powers or duties of the Melbourne and Metropolitan Board of Works. The municipality is the defendant in the action. The board is not. The only questions with which I am concerned are whether the defendant is entitled to a charge upon the land in respect of liability for the excess

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supply of water and whether the defendant might lawfully cut off the supply to the present occupier because this liability remained unpaid. The view I have adopted carries with it an answer to each of these questions.

If the Melbourne and Metropolitan Board of Works was itself supplying water through the pipes it laid in pursuance of its agreement with the defendant municipality, the measure of its duty to supply water and its remedies for recovering payment would be clearly specified by its Act: secs. 110-113 would govern the remedies for obtaining payment. These sections would enable the board to recover the moneys in question in spite of the change in the ownership and the occupation of the land. Now if it be supposed that the effect of sec. 36 of the board's Act and of the agreement made under it is to enable the defendant municipality to exercise any of the powers of the board, then I should think the power conferred by sec. 113 of cutting off the water would be included. The correctness of the supposition need not be discussed. It is not my desire to go unnecessarily into the interpretation of sec. 36 and its operation. But the supposition provides one alternative of a dilemma. The other alternative is that none of the board's powers is exercisable by the defendant municipality. On that alternative neither can I see any duty. I am unable to agree in the contention that, either alone or considered with sec. 652 and with the special order, the by-law imports a right in an occupier or ratepayer to a supply of water whether absolutely or subject to particular discretionary powers or conditions. For the assumption made is that the supply of water is governed only by secs. 651 and 652 of the *Local Government Act* 1928 and the by-law. For the reasons I have given these sections are silent upon the responsibilities of an authority distributing water by reticulation. No intention, express or implied, in my opinion, can be discovered in them that an owner or occupier of land, whether considered as a ratepayer or merely as an inhabitant, shall have any right, conditional or unconditional, to the delivery of water to him or to the exercise of any particular discretion on the part of the council. I can find in the by-law nothing conferring such a right or limiting the ground upon which the council may refrain

from supplying water. The plaintiff cannot, therefore, complain that the municipality has discontinued the supply to it.

On the other hand, I can find no source whence the municipality obtains a title to a charge upon the land in respect of the liability for excess water. Whatever powers of the Melbourne and Metropolitan Board of Works may be exercisable by the municipality in consequence of its agreement with the board, such an agreement cannot operate to give the defendant municipality a charge upon land of the nature claimed. I do not think in sec. 385 of the *Local Government Act* 1928 any foundation can be found for so encumbering the land. In relying upon sec. 385, the defendant assumed that a statutory liability to pay excess arose. It was said that it was for money due under an Act in respect of property to the municipality, within the meaning of that section.

It appears to me that by no statute is the liability imposed in respect of property. Sec. 651 does not impose it at all. Sec. 652 certainly does not. It is said that a liability under a by-law is a liability under a statute and that the money is due in virtue of the provisions of the by-law. Perhaps so much may be conceded. But sec. 385 imposes a charge only when money is payable in respect of property. In my opinion the liability arising under the by-law for water supplied is not money payable in respect of property. The attempt of the by-law to make property liable for the payment does not show that the payment is "in respect of" the property. The by-law deals with the supply of water in a way that shows that the connection with ownership or occupation of land is accidental rather than necessary. Clause 6, which prescribes the charge for water supplied by measure, speaks of "every owner or occupier of lands and tenements or *other persons* supplied with or using water." In the special order made under the by-law a distinction is made in its expression between "water supplied by measure" and "water supplied to any and all ratable lands or tenements in excess of the minimum (*sic*) quantity to be charged." But the distinction is made only because an occupier of lands rated is by the special order allowed without further payment so much water as the amount of his rate would cover if expended in the purchase of water by measure.

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I am, therefore, of opinion that the land is not charged with the liability for excess water but that the defendant municipality could not be prevented from cutting off the water.

It follows that the appeal should be allowed in part, and the order of the Supreme Court should be varied by striking out the second declaration therein contained.

I think that the respondent should pay the costs of the appeal but I see no reason for interfering with the order of the Supreme Court in respect of the costs of the action.

EVATT J. I agree with the judgment of the Chief Justice.

Appeal allowed with costs. Order of Supreme Court varied by omitting the second declaration therein contained but otherwise affirmed.

Solicitors for the appellant, *W. H. Holroyd-Serjeant & Co.*
Solicitor for the respondent, *H. Stuart Hutchison.*

H. D. W.