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ATTORNEY-GENERAL

v.

WILLIAM LINDSAY ISAAC VERRIER

[COURT OF APPEAL, 1966 (Gould V.P., Marsack J.A., Bodilly J.A.)

B

2nd, 13th June]

Civil Jurisdiction

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Water supply—water charges—no account delivered—whether consumer in default—disconnection of meter—trespass—Water Supply Ordinance (Cap. 89) ss.8, 8(a) (b), 9, 9(a) (b) (c) (d), 10, 14—Water Supply By-laws 1955, By-laws 2, 3, 4, 9, 10, 11(7), 13—Magistrates' Courts Ordinance (Cap. 5) s.62(3).

Water supply—whether statutory obligation upon Commissioner of Water Supply to supply and to continue to supply water—Water Supply Ordinance (Cap. 89).

Trespass—justification—entry to disconnect water meter—circumstances in which statutory right of entry exists—Water Supply Ordinance (Cap. 89) ss.8, 9, 10.

Practice and procedure—case without jury—submission of no case to answer—necessity for election whether to call evidence.

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The respondent sued the appellant in the Magistrate's Court for damages in respect of the action of a servant of the Commissioner of Water Supply in wrongfully entering upon the respondent's premises and disconnecting his water supply. The appellant denied that the entry was wrongful and claimed that an account evidencing the cost of the water used had been sent through the post; it was, however, conceded that the account had never been received by the respondent. At the conclusion of the case for the respondent in the Magistrate's Court counsel for the appellant submitted that there was no case to answer; the trial magistrate upheld the submission and dismissed the claim on the basis that there was no statutory or contractual obligation upon the Commissioner to supply water. An appeal to the Supreme Court was allowed on the ground that a *prima facie* case of trespass had been made out and it was ordered that the case be re-heard *de novo* by the Magistrate's Court. In the Court of Appeal the argument was confined to the terms of the Water Supply Ordinance.

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Held: 1. The Commissioner could justify a trespass under a contract (the existence of which he had disclaimed) or by pointing to a statutory right to enter on the premises in question. There was no provision in the Water Supply Ordinance which gave the Commissioner any such statutory right in the circumstances shown by the evidence and no such right was to be implied from the terms of the Ordinance.

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2. Section 8(b) of the Ordinance gives a right to disconnect a supply if default is made of any moneys due under the Ordinance, but there was no evidence that the respondent had made default under the terms of the Ordinance.

(per Bodilly J.A.) In the case of a continuous supply of a commodity such as water, money cannot be considered due for payment until the amount has been ascertained. A person can hardly be said to be in default unless he is made aware of the amount due, or would have been made so aware but for his own wilful neglect or default. There was no evidence of either circumstance in the present case.

3. The normal order which should have followed the findings of the Supreme Court was that the case be continued from the point it had reached in the Magistrate's Court; the order of the Supreme Court would be varied accordingly.

Observations upon the inconvenience which may be caused by failure to adhere to the practice, in cases in which there is no jury, of refusing to entertain a submission that there is no case to answer unless the applicant has first been called upon to elect whether he will call evidence and has elected that he will not do so.

Cases referred to: *Mulgrave Corporation v. Commissioners of the State Savings Bank of Victoria* (1937) 57 C.L.R. 461: *Alexander v. Rayson* [1936] 1 K.B. 169; 154 L.T. 205: *Laurie v. Raglan Building Co. Ltd.* [1942] 1 K.B. 152; [1941] 3 All E.R. 332: *Parry v. Aluminium Corporation Ltd.* (1940) 162 L.T. 236; 56 T.L.R. 318: *Young v. Rank* [1950] 2 K.B. 510; [1950] 2 All E.R. 166: *Yuill v. Yuill* [1945] P.15; [1945] 1 All E.R. 183.

Appeal from a decision of the Supreme Court sitting in appellate jurisdiction on appeal from a Magistrate's Court.

D. McLoughlin, Solicitor General, for the appellant.

Respondent in person.

The facts sufficiently appear from the judgments.

The following judgments were read:

GOULD V.P.: [13th June 1966]—

This is an appeal from a judgment of the Supreme Court of Fiji, given in its appellate jurisdiction on an appeal from a decision of a Magistrate's Court of the First Class. The appeal to this Court lies only on questions of law.

The proceedings in the Magistrate's Court were commenced by the present respondent, Dr. Verrier, who has appeared in person in all courts. He claimed damages in the sum of £5 from the Attorney-General of Fiji, the present appellant, in respect of the action of a servant of the Commissioner of Water Supply, for wrongfully entering the respondent's premises and disconnecting his water supply on the 26th May, 1965. The Attorney-General filed a defence admitting the entry but denying that it was wrongful; he relied upon

section 9(c) and 9(d) of the Water Supply Ordinance (Cap. 89, Laws of Fiji 1955) and claimed that an account evidencing the cost of water consumed by the respondent (£1-4-9) had been served on him "through the medium of the post" on the 9th April, 1965. The only witness called was Dr. Verrier, but agreed correspondence had been put in, including a letter from the Commissioner of Water Supply dated the 17th August, 1965, stating that he had conceded, on Dr. Verrier's assurance, that the latter did not in fact receive the notice of demand. At the conclusion of Dr. Verrier's evidence counsel for the Attorney-General made a submission that he had no case to answer. The learned Magistrate reserved his ruling and, on a later date, upheld "the submission by Mr. Palmer that the plaintiff has failed to establish any legal foundation for his claim". The basis of this ruling was that there was no contractual or statutory obligation to supply water. The claim was accordingly dismissed and counsel for the Attorney-General did not ask for costs.

It may serve to clarify the issues if I make at this stage an observation on the ruling of the Magistrate, based as it was, on the submissions made by counsel. He held that there was no contractual obligation to supply or to continue to supply water and I say at once that I am not deciding, one way or the other, the correctness of that finding. Before this Court Dr. Verrier said he did not rely upon any such contract and as I see it, if there were an implied contract it must incorporate or be subject to the provisions of the relevant legislation which is the all important feature of this case. What I do wish to observe is that, apart from legislation, it is a *non sequitur* to say that because there is no contract to continue to supply water that is justification for a trespass. If there is no contract the Commissioner can have no contractual right to enter the consumer's land. If he seeks to recover his water meter he is not justified in trespassing for the purpose, for clearly the water meter has come rightfully on the land by bailment or otherwise; *Clerk & Lindsell on Torts* (12th Edition) para. 1158.

I return now to the history of the proceedings. Dr. Verrier appealed to the Supreme Court against the dismissal of the action and judgment was given by Knox-Mawer J. on the 22nd March, 1966, allowing the appeal. He concluded that it was necessary to remit the case to the Magistrate's Court for re-hearing, and ordered the costs in both Courts, and of the re-hearing, to be paid by the Attorney-General. Against all of these orders the Attorney-General now appeals to this Court.

In his judgment Knox-Mawer J. confined himself to the issue of trespass. He held that section 9 of the Water Supply Ordinance, which gives to the Commissioner a right of entry for certain purposes, could not be read in isolation. It must be read subject to section 8 which stipulated conditions in which a service could be disconnected from the waterworks. This finding is challenged on the appeal with specific reference to section 9(d) which is the subsection relied upon as justifying the entry by the Commissioner.

Section 8(a) and (b) reads as follows :

"It shall be lawful for the Commissioner to disconnect from the waterworks the service to any premises without prejudice to any water charges, meter rent or other sums due or to become due under this Ordinance—

(a) unless the owner within thirty days from the date of service of written notice in that behalf or such extended time as the Commissioner may allow, gives an undertaking satisfactory to the Commissioner to pay to the Commissioner the amount due for charges for water and for meter rent in accordance with the by-laws;

(b) if default is made by the owner of the premises in the payment of any deposit which the Commissioner may require or of any moneys due under this Ordinance, for so long as the default continues;"

I have omitted, for the sake of brevity, sub-paragraphs (c) (d) and (e) which delineate three more sets of circumstances in which disconnection shall be lawful.

Section 9 reads :

"It shall be lawful for the Commissioner or any person duly authorized by him at any reasonable time between six a.m. and six p.m. or in the case of urgency at any time for the purposes hereinafter mentioned to enter into and upon any premises into or upon which any service has been laid for the supply of water from the waterworks, namely—

(a) to inspect any service and to ascertain whether there is any waste, leakage, obstruction, alteration, interference or damage to any service or meter therein and anything in connexion therewith;

(b) to regulate or repair any service or meter;

(c) to ascertain the consumption; or

(d) to disconnect the service to any premises or to diminish, withhold or suspend, stop, turn off or divert the supply of water to any premises through or by means of any service either wholly or in part."

Section 10 is also relevant. It reads :

"It shall be lawful for the Commissioner to restrict, diminish, withhold or suspend, stop, turn off or divert the supply of water through or by means of any main, service or public standpipe, either wholly or in part, and without prejudice to any water charges, meter rent or other sums due or to become due under this Ordinance, and without compensation for any damage or loss which may result—

(a) whenever the available supply of water from the waterworks shall in the opinion of the Commissioner be insufficient;

(b) whenever it may be expedient or necessary for the purpose of extending, altering, testing or repairing the waterworks or for the purpose of the connexions of services or fire services;

- (c) whenever any public standpipe is damaged or the waters thereof are polluted or wasted;
- (d) in the case of an outbreak of fire; or
- A (e) in case of a breakdown in the waterworks."

The learned Solicitor-General, who appeared for the appellant in this Court, submitted that section 8 is merely declaratory of the type of case in which a water supply can be disconnected and that it is not exclusive. Section 10, he added, provides other instances. Sections 8 and 9, in his submission, stand side by side. The Ordinance

B itself was enabling or permissive.

Section 9 I think must be examined more closely. Its purpose is to render entry upon private property lawful for certain purposes and to limit the hours within which it may be made. Section 9(d) provides for this right of entry for the purpose of disconnecting the service and the issue is whether this right extends beyond those cases in which the Ordinance enacts that it shall be lawful to disconnect the service and gives a right to disconnect for any other reason the Commissioner may consider sufficient, or even at his mere whim.

Paragraphs (a), (b) and (c) of section 9 differ from paragraph (d) in that the right of entry is given to perform acts which are authorised by necessary implication by the Ordinance, as they are acts which are an essential part of the operation of the water supply authorised by the Ordinance. For example, the Commissioner could not render his accounts as provided by the By-laws if he could not read the meter. The section enables him to carry out these essential functions without committing a trespass. Paragraph (d) on the other hand, deals with purposes which are not essential to the carrying on of a water supply to premises and there is no necessary implication in the remainder of the Ordinance that these acts may be performed in order to carry on the water supply. Hence in section 8 of the Ordinance it is stated when the Commissioner may lawfully disconnect the service and in section 10 it is stated when the Commissioner may lawfully "restrict, diminish, withhold or suspend, stop, turn off or divert the supply of water, either wholly or in part", the exact words (except for the additional word "restrict") of the second part of section 9(d). It appears to me quite apparent that section 9 is designed to enable the Commissioner to carry out functions under the Ordinance which, in the cases of paragraphs (a), (b) and (c) arise specifically or by necessary implication under the Ordinance and By-laws, and in the case of paragraph (d) are authorised by sections 8 and 10. There are two cases in which the Commissioner may be called upon to disconnect a service without the authority of section 8. They are where the consumer applies for it to be done under By-law 13 of the Water Supply By-laws, 1955 and in the cases to which By-law 9 applies. The By-laws provide the authority and section 9(d) no doubt applies, though in the case of By-law 13 what is done at the invitation of an owner could not constitute trespass. These specific powers under the By-laws provide no support for the argument that section 9(d) gives power to the Commissioner to disconnect whenever he wishes.

In my opinion the judgment of Knox-Mawer J. (who quoted two relevant passages from *Maxwell on Interpretation of Statutes* (11th Edition) pp. 275 and 153) on this point, is correct. I think that is the case irrespective of the question raised in Grounds 3 and 4 of the Memorandum of Appeal in which it is claimed that the learned judge should have found that the Ordinance did not impose a statutory obligation upon the Commissioner to supply or continue to supply water. The Commissioner may justify a trespass under a contract (but this is disclaimed) or by pointing to a statutory right to enter. In the absence of (say) a further paragraph in section 8 such as "if the Commissioner wishes to discontinue the service", I fail to see any such statutory ground, and I do not think it would be permissible to resort to implication (if one could be found) where so much has been specified. In case I am wrong in that opinion I would add that the tenor of the legislation does appear to me to indicate a statutory obligation to supply and continue to supply water except in such cases, such as those set out in sections 8 and 10, as are the subject of particular authorisation. By-law 4, which relates to applications for water supply made under By-law 2 gives power to the Commissioner to refuse the application or grant a limited supply where it appears that the applicant would be likely to use such a quantity of water as would prejudice the supply to other consumers, or where approval would or would be likely adversely to affect the efficiency of the scheme generally. This matter has not been argued, but it appears that the Commissioner would not otherwise be entitled to refuse the application. Then section 8(b) which provides that it shall be lawful for the Commissioner to disconnect the service on default of payment of moneys due under the Ordinance renders the disconnection lawful "for so long as the default continues". That appears to imply that it would not be lawful to leave the consumer's supply disconnected after he has terminated his state of default.

A passage from the judgment of Dixon J. in *Mulgrave Corporation v. Commissioners of the State Savings Bank of Victoria* (1937) 57 C.L.R. 461, a case which was relied upon by the Solicitor-General, is helpful in illustrating the difference between the legislation under consideration in that case and the Fiji Ordinance. At p.478 he said :

"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 that statutory provision 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."

A As I have pointed out, By-law 4 indicates the conditions in which a supply may be withheld, with a corresponding implication that it must be granted in other cases. Sections 8, 9 and 10 give ample power and protection to the Commissioner. As I have indicated I do not think this question is an essential one in the present circumstances, but as at present advised and without the benefit of full argument, I think a statutory duty to supply water did exist in the present case.

B The Solicitor-General next argued that if section 8 of the Ordinance was relevant, the matter fell within paragraph (b) and under that paragraph a right to disconnect arose as soon as there was default in payment of any moneys due under the Ordinance. There was no requirement that thirty days notice should be served as in paragraph (a). It would appear from the agreed correspondence that at one stage section 8(a) was treated by both parties as governing the matter, but I am unable to see that it does, and agree with the Solicitor-General that it is section 8(b) which must be looked at.

C I agree also that the Solicitor-General correctly stated the content of section 8(b) but the fact remains that there is no right under that paragraph to disconnect until there has been default. Before there can be a default moneys must have become due and payable. Even if they have become due and payable there may still be no default if, for example, a period of credit is given or a right to a period of credit can be claimed by an established course of conduct.

D To ascertain when any moneys become due and payable the natural source of information, one would think, would be the legislation, which is unfortunately vague. Section 14 of the Ordinance enacts that all charges under the Ordinance for water and meter rent shall be payable by the owner. By-law 11(7) provides that no question of the accuracy of the meter shall exempt the consumer from payment

E "within the time prescribed by these By-laws of the quantity registered *prima facie* by such meter". The only indication I have been able to find of a "time prescribed by these By-laws" is in By-law 10, which provides that meters shall be read at such times as the Commissioner may direct, and that accounts shall be rendered quarterly. This matter has not been argued on the appeal but (perhaps subject to argument that the "quarterly" requirement was

F directory only) it would seem that a consumer would not be in default until a quarterly account had been rendered and the period of credit (if any) given by that account had expired. No evidence has been given that any quarterly account, or any account, has been rendered, and there is accordingly no evidence that the respondent to this appeal has made default. The appeal therefore fails in this main aspect. It would be premature to endeavour to consider

G how default could be established in the light of the admission on record that the respondent did not receive an account, before the evidence which may be relied upon by the Attorney-General is disclosed and adduced.

H Before I proceed to the subsidiary questions raised on the appeal, which relate to the subsequent proceedings ordered and to costs, I think it expedient to make some reference to the procedure adopted in the Magistrate's Court. When counsel for the Attorney-General

submitted that he had no case to answer there is no doubt, in my mind, that he should not have been permitted to do so without being put to his election as to whether he proposed to call evidence in that court. Only if he had said that he did not in any event intend to call evidence should his submission have been entertained at that stage. This is a practice which is now well established in trials without a jury though in jury cases it is left to the discretion of the judge. Relevant authorities are *Alexander v. Rayson* [1936] 1 K.B. 169 at 178; *Laurie v. Raglan Building Co. Ltd.* [1941] 3 All E.R. 332 at 337; *Parry v. Aluminium Corp.* (1940) 162 L.T. 236 and *Young v. Rank* [1950] 2 All E.R. 166. In the last mentioned case Devlin J. treated *Alexander v. Rayson* (*supra*) as establishing the rule that a judge sitting without a jury is bound to put counsel to his election, though he was of opinion that in jury cases the matter was one of discretion.

The present case illustrates the inconvenience which may be caused by failure to adhere to the practice. Counsel for the Attorney-General said at a later stage that he expected to be put to his election and that his reply would have been that he would be calling evidence; if, therefore, the learned Magistrate had refused to entertain counsel's submission until his evidence had been heard the whole matter would have been concluded so far as the Magistrate's Court was concerned. Appeal might or might not have followed, but the matter could at least have been brought to final determination in the Court or Courts of Appeal. As the matter stands, a further hearing in the Magistrate's Court is necessary, with the possibility of further appeal. From every point of view this result is highly undesirable. The learned judge in the Supreme Court, having considered the authorities, found it rather surprising that the law allowed a litigant to enjoy the advantage of a misapprehension on the part of the learned Magistrate. For my part I find it surprising that counsel for the Attorney-General, appearing against a litigant in person, and obviously being aware of the rule of practice, did not refrain from making the submission or at least ensure that the mind of the learned Magistrate was directed to the authorities on the rule under discussion.

On the remaining grounds of appeal the Solicitor-General first submitted that the order made in the Supreme Court that the case should be re-heard *de novo* in the Magistrate's Court was wrong and that the action should have been ordered to continue from the point it had reached. This submission is in accordance with what was ordered in *Yuill v. Yuill* [1945] P.15 and I think that practice should be adopted in the absence of good reason to the contrary. The learned judge considered the case one in which a complete record of evidence should be maintained, but neither party complains that the existing record is inadequate and I think that the ordinary practice should be followed and the judgment under appeal varied in this respect. The final submission was that it was an incorrect exercise of the learned judge's discretion to order the appellant to pay the costs of the original and the future proceedings in the Magistrate's Court. On my reading of the judgment in the Supreme Court the learned judge made this order because he disapproved of

A the course adopted in relation to the submission of no case to answer. I have earlier indicated my own opinion that it would have been preferable if counsel for the Attorney-General had adopted one of two other courses, but I do not think there should be a departure from the usual costs order on that account, as he was entitled in law to make the application he did. I would, therefore, substitute for the order for costs made by the learned judge, so far only as it relates to costs of the proceedings in the Magistrate's Court, an order that the costs of the original hearing and the subsequent proceedings will be in the discretion of the Magistrate.

B In the result I would dismiss the appeal, except—

(a) That in lieu of remission to the Magistrate's Court for hearing *de novo*, I would remit the case to the Magistrate's Court, Suva, to be continued from the point which it had reached and before the same Magistrate; and

C (b) That I would rescind the order for costs in the proceedings before the Magistrate made by the learned judge and substitute an order that the costs of the original hearing and of the further proceedings before the Magistrate shall be in the discretion of the Magistrate at the further hearing.

The appellant has failed on the main grounds of the appeal which had for their object the restoration of the judgment in his favour, and the respondent is entitled to an order for his costs of the appeal.

D BODILLY J.A. :

This is an appeal from a decision of the Supreme Court issued on 22nd March, 1966, acting in exercise of its appellate jurisdiction in civil proceedings instituted in the Magistrate's Court of Suva.

E The facts of the case are simple. The Respondent is the owner of residential premises situated at No. 6 Gorrie Street, Suva, which he has occupied for many years. At all material times he has drawn his domestic water from the public water supply which is under the statutory control of the Commissioner of Water Supply. On 26th May, 1965, a servant of the Commissioner entered upon the respondent's premises and disconnected the water because the respondent, so it was alleged, was in arrears in the sum of £1-1-9 with his payment of charges for water consumption. It is not disputed by F the respondent that this sum was owing but he has stated in evidence that he had received no demand for payment. After considerable correspondence between the respondent and the Commissioner, the respondent instituted proceedings in the Magistrate's Court against the Attorney-General claiming damages. The claim is pleaded in trespass and the respondent contends that the Commissioner had no legal right to disconnect the water and that consequently his servant committed trespass when he entered upon G the respondent's property in order to do so; and the respondent claims £5 damages and costs.

H In the Magistrate's Court the proceedings took the following course. The record of proceedings was maintained in shortened form pursuant to the provisions of section 63(3)* of the Magistrates'

* The reference should probably be to section 62(3) as inserted by the Magistrates' Courts (Amendment) Ordinance, 1962. —Ed.

Courts Ordinance (Cap. 5). Neither party to the proceedings requested that a full note should be kept and before this Court both parties have stated that they were and still are quite satisfied with the note which the Magistrate took. At the end of the respondent's case the Crown submitted that there was no case to answer and tendered no evidence. For some reason, which is not clear, possibly by an oversight on the part of the Magistrate, Crown Counsel was not put to election and the Magistrate ruled upon the submission and dismissed the respondent's suit. The respondent appealed. In the Supreme Court the case was argued on the evidence so far adduced in the Court below and the learned Judge found in favour of the respondent and directed that the case be remitted for retrial *de novo*. He then made certain orders as to costs, namely that the respondent be awarded the costs of the appeal and in the Court below and also the costs of the rehearing in any event.

This appeal is brought against that decision and those orders as to costs.

There are six grounds of appeal. The first two grounds deal with the interpretation of sections 8 and 9 of Water Supply Ordinance (Cap. 89). The appellant contends that those two sections must be construed independently of each other. The third and fourth grounds of appeal allege that the Judge on appeal in the Court below erred in law in omitting to rule that there is no statutory obligation upon the Commissioner either initially to supply water or, having commenced a supply, to continue it. Ground 5 contends that the Judge was wrong in directing a retrial *de novo*. And finally Ground 6 deals with the orders made as to costs.

I will deal with the grounds of appeal in that order.

The appellant has contended before this Court that section 8(a) of the Ordinance deals exclusively with the case where the Commissioner may require a consumer to give an undertaking to pay the consumption charges and that in this case, and this case only, as I understand the appellant's argument, is the question of notice relevant. As a matter of construction I think that contention is right. It is to be observed that the reference to thirty days notice is not contained in the head portion of the section which would indicate that it applied to all the lettered paragraphs which came after, but is inserted only in the body of paragraph (a) of the section which, in my view, indicates clearly that its operation is confined to the provisions of that paragraph. That being so, contends the appellant, the provisions of paragraph (b) of that section are untrammelled by any requirement as to notice at all and the Commissioner is entitled as of right to terminate the supply of water at will at any time without notice. The appellant then contends that section 9 of the Ordinance standing independently of section 8, gives the Commissioner a power of entry to do certain things, one of which, specified in paragraph (d) is the disconnection of water at will, irrespective of the reason.

If those two sections are to be read independently of each other in all respects as is contended, section 8(b) would only entitle disconnection when a default was made in the payment of a sum

- of money due. But section 9(d) would entitle the disconnection of water at will even though nothing was due, where for example a consumer may have overpaid his account previously and in fact be in credit. If this interpretation is to be accepted section 8(b) becomes superfluous to the legislation altogether, because it would not matter whether default was made or not, the result would be the same. It is an established rule of construction that effect must where possible be given to each provision of an Ordinance. In my opinion effect can only be given to section 8(b) if it is read as a qualification of the powers of entry granted by section 9(d). This interpretation does no violence to the statute. On the contrary it removes what is otherwise an apparent inconsistency and makes good sense of the sections. In my judgment, therefore, where the reason for the disconnection of water is a default in payment of money alleged to be due, and it is not suggested in this case that there was any other reason, then the relevant portion of section 9(d) can only be invoked if the conditions specified in section 8(b) are established, namely that money is due and payment is in default.

- If I am correct in this view, then in order to determine whether the Commissioner, through his servant, trespassed upon the respondent's premises or not, it becomes necessary to consider whether the respondent was at the time of the entry in default of payment of money due. Owing to the course which the proceedings took in the Magistrate's Court, only the evidence of the respondent is before this Court. He has given evidence that he did not at any time receive a demand for payment of the sum of £1-1-9 until the Commissioner's servant entered his premises to disconnect the water when he was informed, upon enquiry, that the disconnection was due to his failure to pay that amount. He says that he immediately tendered a cheque for the sum but that the Commissioner's servant refused to accept it and took away the meter. It has been stated in the case that a bill was posted but there is no evidence of that. There is only the evidence of non-receipt. Assuming therefore, for the purposes of this judgment, that the respondent in fact received no notice in the form of a bill or demand that the sum in question was owing, can it be said that he was in default? In a case such as a water supply, or a continuous supply of any other commodity, it seems to me that money cannot be considered as due for payment until the amount has been ascertained. This is done by measuring from time to time the quantity of the commodity consumed and computing the price. In the meantime further quantities of the commodity are being consumed all the time for which money is accruing but it cannot in my opinion be said to be due until another act of measurement and computation takes place. That seems to me to be the first leg of section 8(b), namely the determination of the point at which money becomes due. The second leg of that paragraph requires determination of the question when is the consumer in default of payment. In my opinion a person can hardly be said to be in default unless he is made aware of the amount which is due. Where a person buys a pound of sugar it might be said that he is aware of the amount due *ab initio* and as a debtor it is his duty to come to the creditor, but that can scarcely be the case where the amount due is ascertained by the reading of a meter by the seller and the seller

elects the time at which he will take the reading and compute the price. In the absence therefore of evidence to establish that the respondent had been made aware of the amount due or, but for his own wilful default or neglect, would have been made aware of it, I do not consider that he can be held to be in default of payment.

It has been mentioned in the case, though owing to the course which the proceedings have taken no evidence has yet been heard on the matter, that a bill was posted. In the absence of specific statutory provision, and there is none contained in the Ordinance in question here, I can find no general proposition of law that the posting of a communication gives rise to an irrebutable presumption of receipt. At the most proof of posting might be taken as *prima facie* evidence of receipt.

For the above reasons I do not find, in the absence of further evidence, and I am not forgetting that evidence for the appellant has not yet been heard, that section 8(b) of the Ordinance is satisfied and consequently, as I have already found that section 9(d) must be read subject thereto, on the plain construction of those two sections I am of opinion that it has not been established at this stage of the case that the Commissioner was entitled as of right to enter upon the respondent's property for the purpose of disconnecting the water for the reason alleged, namely default in payment of money due.

As far as this aspect of the case is concerned that could be the end of the matter, but grounds 3 and 4 of the appeal allege that the learned Judge was wrong in not specifically finding that no statutory obligation lies upon the Commissioner either to supply water initially or, having commenced, to continue to do so. I shall express my opinion therefore on those two grounds also.

I think that there is such an obligation. It is true that nowhere does the Ordinance specifically state that there shall be an obligation upon the Commissioner to supply and conversely there is no saving provision whereby it is declared that nothing in the Ordinance shall be construed as implying such an obligation. The provisions of the Ordinance must therefore be examined as a whole in order to seek the true tenor of the relevant provisions. Speaking for myself I have no hesitation in finding that such an obligation arises by implication. For the appellant it was contended that the provisions of the Ordinance are merely permissive in relation to supply because the supplier of the water is the Crown in its Government of Fiji. I will concede that where a Government department enters the market to provide a public amenity it is usual, indeed it may be necessary, to cover the action by statutory authority. But that does not mean that the statute in question is not subject to the ordinary rules of construction. It is well known that, and there are a great many cases in which, particular permissive expressions such as "the authority may" or, as in this case, "it shall be lawful" etc. have been construed in the context of a particular statute and circumstances as having obligatory effect. I think that this is the case here. I am fortified in this view not only by the wording of sections 8, 9 and 10 of the Ordinance which go into considerable

- detail as to the circumstances in which the Commissioner may disconnect a supply of water once commenced, and in the case of default in payment the duration of the disconnection, but also by the provisions of By-laws 2, 3 and 4 of the Water Supply By-laws 1955, which prescribe the manner in which a member of the public shall obtain a water supply initially. These provisions appear to me to imply that once an application is received by the Commissioner in the form prescribed in By-law 2 and the fee prescribed in By-law 3 has been paid, then the Commissioner may only refuse to grant the application in the circumstances specified in By-law 4. Unless an obligation is implied it seems to me that sections 8, 9 and 10 of the Ordinance and By-law 4 of the By-laws are rendered largely meaningless. For the above reasons I think that the learned Judge was right to make no contrary ruling on the matter.

- As to ground 5, our attention has been drawn to certain authorities, in particular *Yuill v. Yuill* [1945] P.15 dealing with the matter of election. I think it quite clear that where counsel in a civil matter has not for any reason been put to his election his right to call evidence is not lost. It only becomes lost if he in fact elects not to call evidence. It is unfortunate that counsel was not put to election expressly in the Magistrate's Court as time and expense might have been saved. But however that may be, as I would for the reasons above stated uphold the decision of the learned Judge of the Supreme Court to the effect that the Magistrate was wrong in nonsuiting the respondent upon the submission of no case to answer, I think that the case must be remitted to the Magistrate. The complaint in this ground of appeal is that the learned Judge directed a retrial *de novo*. Why he did this is not clear, but with respect I think that he was wrong and I would direct that the case be remitted for continuation as though no submission had been made.

- That brings me to the final ground of appeal which relates to the orders as to costs. The case is only part-heard and I cannot find that the Crown has acted up to this stage in any way improperly so as to justify penalising the appellant in costs. The learned Judge appears to have based his order as to costs on the ground that had not the appellant made a submission that there was no case to answer, the case would have been concluded there and then in the Magistrate's Court. I cannot approve of this ground because the appellant was fully entitled to take that course. He was merely exercising a procedural right and cannot on that ground only be penalised in costs. Costs rest in the discretion of the Court but that discretion must be exercised judicially. It is true that had the Magistrate put Crown Counsel to election expense and time might have been saved. But that was the duty of the Court and any extra expense arising from omission to do so cannot be placed upon the shoulders of one party rather than the other. I think it unfortunate that Crown Counsel, if he was aware of the procedure, did not specifically draw the attention of the Magistrate to the matter at the time, especially having regard to the fact that he was opposed by a lay litigant in person who would be unlikely to know of such procedural niceties. But I do not think the matter can be taken further than that.

In the result I would dismiss main grounds of the appeal to the extent that the case be remitted to the Magistrate with a direction that the hearing be resumed as though the submission of no case to answer had not been made; and I would vary the orders as to costs by directing that the costs before the Magistrate remain to be awarded in his discretion but that the Respondent be entitled to the costs of the appeal before this court and also in the Supreme Court.

MARSACK J.A. :

I have had the advantage of reading the judgments of Gould V.P. and Bodilly J.A. and agree with the order proposed by the learned Vice-President, including the order as to costs. I have nothing to add to the reasons set out in those judgments, with which I fully concur.

Appeal dismissed, subject to variation of order as to manner of continuation of proceedings in the Magistrate's Court.