VESTING AND DIVESTING: THE VICTORIAN GROUNDWATER ACT 1969

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The town of Nhill lies in mid-western Victoria exactly half way between Melbourne and Adelaide. The surrounding country is dry, with little surface run-off and, since 1949, the town has been dependent on two bores for its water supply. In mid-summer 1961 the supply from No. 1 bore failed. Investigations revealed that the static water-level in the bore had fallen 28 feet over the years and that five adjacent private bores were competing for the underground supply. The incident provoked an enquiry by the State Development Committee which, in 1962, recommended legislation to control the exploitation of underground waters. The Groundwater Act 1969 is the result.

The Irrigation Act 1886, inspired by the energy and assiduous enquiries of Alfred Deakin, first asserted the interest of government in the planned exploitation, conservation and distribution of water in surface streams. Since 1905, the State Rivers and Water Supply Commission has administered Victorian rivers and it is a tribute to the technical and administrative abilities of its officers that disputes and litigation over surface water rights have been reduced to insignificant proportions.

The Groundwater Act, however, is not just the natural outgrowth of successful surface-water legislation. There are important hydrological reasons for the new controls. Underground water is potentially our greatest source of naturally-occurring fresh water; yet adequate data to predict its behaviour exist for only one-twentieth of one *per cent* of the area of the State.[1] Groundwater basins usually re-charge very slowly. To withdraw water faster than it accumulates is to 'mine' the water. Should the water-table drop too far, not only may pumping become uneconomic, but also salt water may intrude, or the water-bearing strata collapse altogether. Once the decision to conserve and rationally to exploit these waters is taken, data must be obtained to plan permissible rates of extraction and to separate drainage aquifiers from those used for supply. There must be stringent controls over the spacing and depth of bores and their mode of construction. The natural re-charge of aquifers must be enhanced artificially by water from other sources. Furthermore, there is an intimate rela-

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[1] The first official report by the Government Geological Surveyor on 'the economic adaptability of the system of Artesian Wells' was tabled in the Legislative Assembly during the 1856-57 session. Subsequent research has, for administrative and financial reasons, been sporadic and detailed information is only available for areas where the effects of over-utilization have already been experienced.

tionship between surface and underground waters and all principles of hydrology point to the need for unified control.

I

The Victorian Act draws heavily on Australian and overseas precedent.[2] It directs the Minister of Mines, assisted by an Advisory Committee, to investigate existing resources of groundwater and plan for their artificial re-charge. Construction permits are necessary for all but emergency work on bores, and core and water samples must be filed on request. All drillers must be examined and licensed. Extraction licences must be obtained before water is withdrawn for any purpose other than domestic or stock supply. The Act also permits the declaration of particular conservation areas and the imposition of stringent restrictions within control zones. While the general scope of the legislation is unremarkable, there are two particular points where it diverges from current practice and thus attracts comment.

The Act manifests an unhappy and complex division of functions between the Department of Mines and the Commission which sets a sophisticated barrier of official correspondence between the farmer and the water under his feet. The Commission has been nominally responsible for investigating groundwater resources[3] but, by administrative arrangement, the Department of Mines has taken over this role in recent years. The Act appoints the Department to authorize the construction of bores, to control drilling operations and issue completion certificates. The Commission is to be consulted in these matters but is solely responsible for the licensing and control of extraction. For a landowner wishing to sink a bore for irrigation there are, 'twixt the cup and the lip, no less than ten stages of official documentation between himself, the Department, the driller and the Commission.[4] At first sight the procedure appears both cumbrous and potentially protracted. No doubt the functions of both authorities will be enhanced by the information they stand to receive and co-operation is manifestly desirable; but it seems preferable that the consumer should be required to deal with only one authority. The procedure is curtailed where emergency work is necessary to prevent waste, misuse or pollution.[5] Equally

[2] *Cf.* Australia: Water Act 1912 (NS.W.), reprinted 1968, ss 4B, 105-129; Water Act 1926-1964 (Qld), ss 4, 55-63; Underground Waters Preservation Act 1959-1966 (S.A.); Underground Water Act 1966 (Tas.); Rights in Water and Irrigation Act 1914-1954 (W.A.), ss 4, 18-24; Metropolitan Water Supply, Sewerage and Drainage Act 1909-1963 (W.A.), s. 35. England: Water Act 1945 (Eng.); Water Act 1948 (Eng.); Water Abstraction Regulations 1947 (Eng.); Underground Water (Controlled Areas) Regulations 1949 (Eng.). New Zealand: Underground Water Act 1953 (N.Z.); Water and Soil Conservation Act 1967 (N.Z.). Europe: see generally Food and Agricultural Organization of the United Nations, *Legislative Series No. 5: Groundwater Legislation in Europe* (1964). U.S.A.: see generally the statutory material referred to in Comment, 'Who Pays when the Well Runs Dry?' (1965) 37 *University of Colorado Law Review* 402.

[3] Water Act 1958, s. 33.

[4] See Groundwater Act 1969, ss 19-21, 23, 29, 30, 50, 51, 59.

[5] Groundwater Act 1969, s. 18(3).

disastrous to the owner would be the sudden failure of a stock bore in mid-summer. Here he must notify the Minister and lodge an application for a construction permit before undertaking emergency work.[6] If an irrigation bore fails in the middle of a season there are no emergency powers and the normal channels of application must be observed.

The second point of departure from existing Australian legislation is the definition of pollution as 'interference with the chemical or bacteriological qualities of water to such an extent as to render the water less fit for any purpose for which it is or might reasonably be used'.[7] In Victoria, at least eleven different types of authorities have responsibilities for guarding surface water from pollution.[8] In other states groundwater is already protected.[9] Generally there is no attempt to specify a scientific standard of pollution in such legislation.[10] An authority is often given power to make regulations governing pollution, but where an Act itself proscribes pollution it is general practice to prohibit specific acts or omissions which may be regarded as likely to result in pollution.[11]

It is, of course, difficult to make such formulae embrace every act which may be harmful. Pollution is a relative concept. To discharge industrial waste into other water may be harmful if the same source is used for domestic supply, but not if it is set aside exclusively for drainage. A slight suspension of minerals may not injure irrigators, but may destroy the ecological balance of marine life. The Groundwater Act obviously attempts to accommodate the need for flexibility, and is close to formulae suggested in discussions of the E.C.A.F.E. Working Group on Water Codes.[12] But it is not free from legal difficulty. A narrow reading could, in certain circumstances, make some beneficial acts unlawful, although such a conflict is much more likely in relation to surface waters. Doubtless one can rely on the integrity of the administration in launching prosecutions, but difficulties of interpretation can be foreseen. A more specific legislative definition, or no definition at all may have been preferable.[13]

[6] Groundwater Act 1969, s. 18(4).

[7] Groundwater Act 1969, ss 2, 77.

[8] See Water Act 1958, ss 11, 236, 244, 332; River Improvement Act 1958, s. 3; Melbourne and Metropolitan Board of Works Act 1958, ss 259, 273, 274; Geelong Waterworks and Sewerage Act 1958, ss 62, 175, 189; Sewerage Districts Act 1958, ss 124, 131, 154; Mines Act 1958, ss 99(t), 454, 456-459, 497; Health Act 1958, ss 68, 79, 81, 92, 221.

[9] *E.g.* Water Act 1912 (N.S.W.), reprinted 1968, ss 4B, 129; Underground Waters Preservation Act 1959-1966 (S.A.), ss 11, 18, 46; Underground Water Act 1966 (Tas.), ss 4, 11.

[10] One exception is Mines Act 1958, s. 457 giving a Sludge Abatement Board power to stop works resulting in more than 50 grains of poisonous substance *per* gallon or a suspension or solution of earth or minerals greater than 800 grains *per* gallon.

[11] *E.g.* Water Act 1958, ss 10, 245-249, 379. *Cf.* the elaborate enumeration of unlawful acts in Water Act 1912 (N.S.W.), reprinted 1968, s. 21A.

[12] *Report of the Working Group of Experts on Water Codes to 24th Session of United Nations Economic Commission for Asia and the Far East* (1968) 21.

[13] One formula devised to be all-inclusive yet sufficiently specific from the legal point of view is: '[s]uch alterations of the physical, chemical or biological properties of any waters, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to the public health, safety or welfare, or to domestic,

II

This paper is, however, prompted by considerations more fundamental. The nub of the Act is section 47 which provides:

> [t]he right to the use and control of all groundwater shall subject to this Act and until appropriated under this or some other Act rest in the Crown and shall be exercised by the Commission in the name of and on behalf of the Crown.

The section derives initially from the Victorian Irrigation Act 1886 and is an adaption of the formula widely employed in Australia, ostensibly to confer on the Crown adequate controls over both surface and underground waters.[14] The Minister viewed it as having the same effect as section 4 of the Water Act 1958 which was originally introduced for the express purpose of abolishing litigation of private rights in surface streams. He assumed that section 47 'clears away any other rights to groundwater which may purport to exist'[15] and accords with the State Development Committee's recommendation that 'the ownership of all underground water be vested in the Crown'.[16] In Committee he stated that the 'Bill hinges on this clause which is doing in relation to groundwater what was originally done in 1886 in Deakin's Irrigation Act in relation to surface water. The concept is that the Crown must in fact own the water. That is precisely what was brought about in regard to surface water some 80 years ago'.[17] Our purpose is to examine the fundamental contentions that section 47, or the Act viewed as a whole, confers ownership of underground water on the Crown and destroys any existing private common law rights in underground water. Whether the various formulae employed to govern surface water have the effects contended for will be the subject of a subsequent paper, but it is necessary to examine some aspects of the riparian doctrine and its appointed statutory remedy before reviewing the effect of section 47 on the very different common law of percolating waters.

The common law riparian does not own the water in adjacent rivers. There is a limited usufructary right in those owning land in lateral or vertical contact with the stream to use it[18] for certain purposes connected with the riparian tenement.[19] There is a primary right to take water for domestic

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commercial, industrial, agricultural, recreational, and other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life'. World Health Organization, *Public Health Paper No. 13: Aspects of Water Pollution Control* (1962) 12.

[14] Water Act 1958, s. 4; Water Act 1912 (N.S.W.), reprinted 1968, ss 4A, 4B; Water Act 1926-1964 (Qld), s. 4; Rights in Water and Irrigation Act 1914-1954 (W.A.), s. 4.

[15] Victoria, *Parliamentary Debates*, Legislative Assembly, 23 October 1968, 1197.

[16] *Report of the State Development Committee on the Underground Water Resources of Victoria* (1962) 26.

[17] Victoria, *Parliamentary Debates*, Legislative Assembly, 19 March 1969, 3327.

[18] *Lyon v. Fishmongers' Coy* (1876) 1 App. Cas. 662, 683; *Lord v Commissioners for the City of Sydney* (1859) 12 Moo. P.C. 473, 496.

[19] *Swindon Water Coy v. Wilts and Berks Canal Navigation Coy* (1875) L.R. 7 H.L. 697 as interpreted by Lord Macnaughten in *McCartney v. Londonderry and Lough Swilly Railway* (1904) A.C. 301, 308.

and stock purposes and, if necessary, to exhaust the stream for these ends.[20] Further use for irrigation or industrial purposes is subject to the crippling requirement that there be no sensible diminution in either quantity or quality to the customary flow of the stream.[21] Beneficial exploitation by both riparians and non-riparians is further restricted by the right of a lower riparian to enjoin higher agricultural or industrial use either because it is 'unreasonable'[22] or because it causes sensible diminution to the stream, whether or not the lower riparian is actually prejudiced thereby.[23]

Within the nineteenth century philosophy of the inviolability of private land and the almost unqualified right to enjoy its natural advantages, these rules are in fact innovative rather than restrictive. Admittedly, they ensured equitable distribution of benefits only among the limited class of other riparians, but they accord more with modern principles of resource allocation than the rules which subsequently evolved to govern percolating waters. The riparian doctrine adheres only to defined surface or underground streams[24] and is distinct from the principles governing water percolating over or through land. This distinction is hydrologically unsound,[25] but is 'settled in law by the highest judicial authority'.[26] The basic proposition is that an overlying landowner may appropriate and use water flowing beneath his land, without regard to the effect that his abstraction

[20] *Miner v. Gilmour* (1958) 12 Moo P.C. 131, 156; *H. Jones & Coy Pty Ltd v. Kingborough Corporation* (1950) 82 C.L.R. 282, 324.

[21] In *Bealey v. Shaw* (1805) 6 East 208 the rule was stated in absolute terms. Although Chancellor Kent argued that normal losses through seepage or evaporation should not be accountable, nor should further loss unless it worked 'material injury' to lower owners (*Kent's Commentaries* (9th ed. 1858) iii, 577) his views were expressly repudiated in *Wood v. Waud* (1848) 3 Ex. 748, 781.

[22] *McCartney v. Londonderry and Lough Swilly Railway* [1904] A.C. 301, 304; *Young and Co. v. Bankier Distillery Co.* [1893] A.C. 691, 698; *Swindon Water Coy v. Wilts and Berks Canal Navigation Coy* (1875) L.R. 7 H.L. 697, 704.

[23] *Embrey v. Owen* (1851) 6 Ex. 353, 368, 369; *Swindon Water Coy v. Wilts and Berks Canal Navigation Coy* (1875) L.R. 7 H.L. 697, 705; *John White & Sons v. J. & M. White* [1906] A.C. 72, 85. But see the criticisms of this rule in *Kensit v. Great Eastern Railway* (1884) 27 Ch.D. 122, 133, 135-6.

[24] *Chasemore v. Richards* (1859) 7 H.L.C. 349, 374; *Dickinson v. Grand Junction Canal Co.* (1852) 7 Ex. 282, 300-1; *Grand Junction Canal Co. v. Shugar* (1871) L.R. 6 Ch. 483, 486-7. Defined underground rivers apparently occur rather more frequently in the law reports than they do in nature. In recognition of this, the American courts have created a strong presumption that all underground water is percolating water: see *American Law Reports, Annotated* (1928) lv, 1387. The vesting provision of the Water Act 1958, s. 4, which relates to surface rivers employs the word 'flow'. This term is omitted from the Groundwater Act 1969, s. 47. The word is peculiarly apposite for waters to which riparian rights adhere: see the judgment of Dixon J. in *H. Jones & Coy Pty Ltd v. Kingborough Corporation* (1950) 82 C.L.R. 282. Its omission may indicate that it is assumed that there are no defined underground streams in Victoria to which riparian rights would adhere.

[25] Thompson and Fiedler, 'Some Problems Relating to Legal Control of Use of Ground Waters' (1938) 30 *American Waterworks Association Journal* 1049; Wiel, 'Law and Science: Their Cooperation in Groundwater Cases' (1940) 13 *Southern California Law Review* 377; Tolman and Stipp, 'Analysis of Legal Concepts of Subflow and Percolating Waters' (1942) *Oregon Law Review* 113; Barnes, 'Hydrological Aspects of Ground-Water Control' [1956] *Proceedings of the Water Law Conference in the University of Texas* 134; Greenhill, 'Well Spacing' [1956] *Proceedings of the Water Law Conference in the University of Texas* 1146; Krieger and Banks, 'Ground-Water Basin Management' (1962) 50 *California Law Review* 56.

[26] *Ballard v. Tomlinson* (1885) 29 Ch.D. 115, 125 *per* Lindley L.J.

may have on the wells of his neighbour. In *Acton v. Blundell* which established the rule, Tindal C.J. refused to impose correlative obligations between landowners. To guarantee to one the continued right to take water for a cottage may prevent a neighbour 'from winning metals and materials of inestimable value . . . the advantage on one side, and the detriment on the other may bear no proportion'.[27] Of course, the identical comparison could support precisely those correlative obligations between landowners which Tindal C.J. refused to impose, depending on whose well was most favourably situated.

However liberal the riparian rule may appear to be, compared to the absolute rights of an overlying owner, it was manifestly inadequate to permit the agricultural and industrial expansion of the arid, developing colonies. No sooner was it enunciated than American commentators condemned it as too restrictive.[28] Some common law jurisdictions discarded the doctrine in favour of alternative systems of judicial allocation of water-rights,[29] but these invited unnecessary, interminable litigation and extra-legal enforcement procedures.[30] Others advocated '[t]he total suppression of all riparian rights in water, so that the same, being vested in the Crown, may be distributed under well-considered government control for the benefit of the greatest possible number'.[31]

Victoria chose the second course as being most conducive to continued development. Like most jurisdictions, it turned its attention solely to surface rivers. There are several reasons for neglecting underground resources. Surface streams were not only visible, but easily exploited. Furthermore, engineers, legislators and judges were uniformly ignorant of the behaviour of underground waters and their relationship with surface streams. '[T]he existence origin, movement, and flow of such waters, and the causes which govern and direct their movements, are so secret, occult and concealed that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and would, therefore, be practically impossible.'[32] Because underground waters did not visibly contribute to

[27] *Acton v. Blundell* (1843) 12 M. & W. 324, 351.

[28] *Kent's Commentaries* (9th ed. 1858) iii, 577.

[29] *E.g.* the western United States doctrine of prior appropriation. See, too, the legislative scheme suggested in Pomeroy, *Water Rights* (1893) 323-49.

[30] 'In reply to an inquiry as to how he obtained his share of the stream one [Californian] gentleman said he first got a court decree and then shipped in two men from Arizona who were handy with a gun.': United States Department of Agriculture, Office of Experiment Stations, *Bulletin No. 100: Report of Irrigation Investigations in California* (1901) 53. Armed conflict over water rights was not unknown in Australia: see memorandum from Commissioner McKinney, *Correspondence of Sir Henry Parkes* xxvii, 193 (Mitchell Library).

[31] Recommendation of the *General Report on Irrigation and Canadian Irrigation Surveys* (1894). See also, South Africa: Hall, *Report to the Government of Cape Colony* (1898). United States: *Second Report of the State Engineer to the Legislature of California* (1881) 6-10; Hall, *The Irrigation Question: California and Australia* (1886) 6. Victoria: *First Progress Report Victorian Royal Commission on Water Supply* (1884) 54-5; *Fourth Progress Report Victorian Royal Commission on Water Supply* (1887) 19.

[32] *Frazier v. Brown* (1861) 12 Ohio St. 294, quoted in Wiel, *Water Rights in the Western States* (3rd ed. 1911) ii, 972. A similar view was expressed in *Acton v. Blun-*

major surface streams, the interest of the overlying owner in the quiet enjoyment of his land and its natural advantages was deemed to outweigh the benefits which statutory or judicial apportionment would confer on the public.

Deakin's original formula for limiting private riparian rights and vesting title in the Crown was to declare that all water at any time in any river 'shall in every case be deemed to be the property of the Crown'.[33] A similar provision in the Water Conservation and Distribution Act 1881 declared water within the area of a Waterworks Trust to be 'the property of such Trust'.[34] The debates in Committee on the Irrigation Bill 1886 show strong opposition to the formula, partly on the grounds that, at common law, there was no 'property' in river waters, either in the Crown or private persons.[35] Conceding that sufficient regulatory powers could be conferred on the state by creating a more limited proprietary interest, the government proposed that 'the right to the use of all water at any time in any river . . . shall for the purposes of this Act in every case be deemed to be vested in the Crown until the contrary be proved by establishing, any other right than that of the Crown to the use of such water'.[36] Plainly this section merely created a rebuttable presumption of a superior usufructary interest in the Crown, and did not confer 'ownership' in any sense.

The debates on this Bill reveal a finer appreciation of private law concepts and their limitations than most contemporary legislatures and courts. The late nineteenth century change in emphasis of the role of government from protector of private rights to entrepreneur and guardian of public resources caused conceptual chaos. It is, perhaps, natural for lawyers to cling to familiar conceptual frameworks; to be overtly inventive is to deny the immutable veracity of principle. Inevitably, though, powers given to government to provide public services will conflict with traditional private rights. Whenever enjoyment of such rights is restricted by the exercise of supervening governmental powers, traditional legal metaphysics go to the rack. Yet contemporary lawyers obdurately resisted the conclusion that the entrenched private law concept of 'ownership' was inappropriate in a public law context. In Australia, Canada and the United States the need for public control was appreciated; but statutory declarations adhered to private law terminology.[37] Even where the legislation was interpreted as a grant of

dell (1843) 12 M. & W 324, 350. See also United States National Resources Planning Board, *State Water Law in the Development of the West* (1943) 77; Thomas, *The Conservation of Groundwater* (1951) 243.

[33] Irrigation Bill 1886, cl. 4

[34] S. 48. See the explanation of this grant of property in the House: Victoria, *Parliamentary Debates*, Legislative Assembly, 21 December 1881, 1285.

[35] Victoria, *Parliamentary Debates*, Legislative Assembly, 21 September 1886, 1524-30.

[36] Irrigation Act 1886, s. 4.

[37] The unsuccessful Water Conservation Bills introduced in N.S.W. in 1890, 1891 and 1892 all used the formula '[t]o the Crown belong' certain waters. See also Control of Waters Act 1919-1927 (S.A.), s. 4; Northwestern Irrigation Act 1894 (Canada), s. 4. Wiel, *Water Rights in the Western States* (3rd ed. 1911) i, 194 lists 13 American States which declare water to be 'the property of the public' or to 'belong to the pub-

sovereignty rather than ownership,[38] other private law doctrines were invoked by the judges for metaphoric support, sometimes with ridiculous results.[39] The confusion was not confined to the common law. Civilians, with their ancient doctrine of the public domain, debated whether there was an independent concept of administrative property.[40]

III

English courts were first confronted with conceptual difficulties in interpreting statutes which did not employ the words 'ownership' or 'property' but 'vested' streets or sewers in public authorities. Conceits as to the nature of the statutory title were by-passed by defining the object vested. Thus, where a street was vested in a local authority, the word 'street' was construed to include only the surface and subsoil to the depth required for the ordinary functions of the authority.[41] The area of ordinary user defined the physical limits of an authority's proprietary interests and in most cases further analysis was unnecessary.

In *Bradford v. Mayor of Eastbourne*[42] Lord Russell C.J. changed the emphasis of the enquiry. Interpreting the word 'vest', he stated that:

> [i]t has been clearly held that the vesting is not a giving of the property in the sewer and the soil surrounding it to the local authority, but giving such ownership and such rights only as are necessary for the purpose of carrying out the duties of a local authority with regard to the subject matter.[43]

Such sections must be construed as giving 'the least interest in the soil that is compatible with the proper exercise of the powers given to the authority'.[44]

Perhaps the clearest break with the private law doctrine of ownership occurred in *The Medway Company v. Earl of Romney*.[45] A public Act provided that the Medway was 'vested in the said company, their successors, heirs and assigns forever', for the purpose of maintaining navigation.[46]

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lic'. Four more declare it to be 'the property of the State' and one the 'property of the people of the State'.

[38] *E.g. Farm Investment Co. v. Carpenter* (1900) 61 Pac. 258 (Wyo.); *Willey v. Decker* (1903) 73 Pac. 210 (Wyo.).

[39] *Muench v. Public Service Commission* (1952) 53 N.W. 2d 514, 517 (Wis.); *Leiske v. Town of Burlington* (Wis.) in Cutler, 'Chaos or Uniformity in Boating Regulations. The State as Trustee of Navigable Rivers' (1965) *Wisconsin Law Review* 311, 317.

[40] Compare Ducroq's thesis with that of Waline: Waline, *Droit Administratif* (4th ed. 1946) 430.

[41] *Coverdale v. Charlton* (1878) 4 Q.B.D. 104; *Rolls v. Vestry of St George* (1880) 14 Ch. D. 785; *Mayor of Tunbridge Wells v. Baird* [1896] A.C. 434. Similar rules applied to airspace above the street (*Wandsworth Board of Works v. United Telephone* (1884) 13 Q.B.D. 904) and to sewers (*Mayor of Birkenhead v. London and North Western Railway Co.* (1885) 155 Q.B.D. 572; *Ystradfodwg Sewerage Board v. Bensted* [1906] 1 K.B. 294).

[42] [1896] 2 Q.B 205.

[43] *Ibid.* 211.

[44] *Port of London v. Canvey Island Commissioners* [1932] 1 Ch. 446, 502 *per* Romer L.J.

[45] (1861) 9 C.B. (N.S.) 575

[46] 13 Geo. 2, c. 26 amending 17 Car. 2, c. 4.

This was viewed 'as creating a new species of statutory property and interest in the water'.[47] It is not surprising that the first clear acknowledgment of the peculiarities of the proprietary interest of statutory bodies should occur in a case involving water. The common law itself, unaided by statutory declarations, had already come to the conclusion that the special characteristics of running water made the ordinary private law rules of ownership inapplicable when analysing private interests in such water. For defined surface or underground streams the rule that water could not be owned was said to spring both from 'the nature of the water, which naturally descends, it is always current, *et aut invenit aut facit viam* and from necessity, as its common use 'is necessary for the preservation of the commonwealth'.[48] With reference to water percolating in a diffused underground aquifer, Tindal C.J. in *Acton v. Blundell*[49] had supported the unqualified right of the overlying owner on 'the principle. which gives to the owner of the soil all that is beneath his surface'.[50] Invocation of the maxim *dominus soli est dominus usque ad coelum et usque ad inferos* has confused both the riparian doctrine[51] and the rules of percolating waters.[52] It applies to neither. Of diffused underground waters it has been held that 'although nobody has any property in the percolating water, yet such water is a common source which everybody has a right to appropriate'.[53] Thus, as the common law itself did not apply the private law rules of ownership to running or percolating waters, words purporting to vest rivers or waters in statutory authorities seemed to create a proprietary interest unknown to the common law.

In Australia it has been expressly recognized that the vesting of a river creates special problems. The Tasmanian Local Government Act 1906–1947, section 209 conferred on municipal councils 'the care, control, and management of every water district within the municipality' and in them 'vested every river, creek, or watercourse, within the limits of every such water district'. In *H. Jones and Co. v. Kingborough Corporation*[54] Dixon J. regarded the English authority as establishing that '[t]he operation of statutory vesting is considered as confined to the purpose to be fulfilled'. A similar construction was appropriate to the vesting of rivers, but allow-

[47] (1861) 9 C.B. (N.S.) 575, 591.

[48] *Sury v. Pigot* (1652) Popham 166, 172 See also *Callis on Sewers* (1st ed. 1622) 78. The same principle was restated when the modern riparian rights doctrine emerged: *Mason v. Hill* (1833) 5 B & Ad. 1; *Embrey v. Owen* (1851) 6 Ex. 353.

[49] (1843) 12 M. & W. 324.

[50] *Ibid.* 354.

[51] Early authorities relied on the maxim: *e.g. Wolrych on Waters* (1830) 117; *Blackstone's Commentaries* ii, 18. Its inapplicability was finally declared in *Lyon v. Fishmongers' Coy* (1876) 1 App. Cas. 662, 683. See also *Lord v. Commissioners for the City of Sydney* (1859) 12 Moo. P.C. 473, 496.

[52] It has often been invoked in the United States to explain the English rule, and the conclusion drawn that percolating water is the absolute property of the overlying owner: *e.g. Gould v. Eaton* (1896) 44 Pac. 319 (Calif.); *Brown v. Kistler* (1899) 42 Atl. 885 (Pa.); *Stoner v. Patten* (1909) 63 S.E. 897 (Ga.); *Texas Co. v. Burkett* (1927) 296 S.W. 273 (Tex.).

[53] *Ballard v. Tomlinson* (1885) L.R. 29 Ch. D. 115, 122 *per* Brett M.R.

[54] (1950) 82 C.L.R. 282.

ance must be made for the peculiar characteristics of a river, and of the statutory formula.

> The description of the subject vested is indefinite. It is not a piece of land with boundaries. The purpose is limited. If any interest in the soil is taken by the council it is no greater than is necessary to enable it to control and use the waters of the streams so that the council may supply water and to that end construct weirs and other works. No doubt the council obtains a proprietary interest in the running waters of the stream but it is an interest in them considered as the running water of a stream and again it is an interest incidental to the exercise by the council of the particular function and does not extend further.[55]

Although Dixon J. chose not to formulate with precision the limits of the proprietary interest created in either the *alveus* or the waters of rivers, it is apparent that the interest is very different from private law ownership. It remains to be seen what the effect of a similar interpretation would be on section 47 of the Groundwater Act 1969.

First, the description of the matter vested is more definite than in the *Jones* case. The Tasmanian Act there vested 'every river, creek or watercourse'. Such a general description could carry the inference that some interest was created in the whole of a river, *i.e.*, in both the *alveus* and the water therein. Accepting this hypothesis, Dixon J. nevertheless construed the interest in both as limited to the particular functions assigned to the council. The Groundwater Act 1969, section 47 confers only the 'right to the use and control of all groundwater'.[56] The grant is not only definite but restricted. It permits no inference of a primary intention to convey an interest in the adjacent land, whether the water flows in an underground channel or is distributed. Any interest in the water-bearing strata or the surface could only arise by necessary implication from the express powers conferred by the Act.[57]

Secondly, any proprietary interest in the use and control of water extends no further than that necessary to support the administrative functions apportioned by the Act. It is not an absolute vesting but conditional. It is 'subject to this Act' and 'until appropriated under this or some other Act'. The primary appropriation of the right to use water envisaged by the Act is the licensed withdrawal of water by private persons. It is possible that the Crown's proprietary interest in the right to use water under certain land abates on the issue of a licence to the occupier and revives when the licence terminates. As to the right of control, the Act itself works out a division of functions between the Minister of Mines,[58] the Public Health

[55] *Ibid.* 320.

[56] It will be recalled that the section is based on the Water Act 1958, s. 4, whose precursor was specifically devised to avoid any inference of Crown ownership: *supra* pp. 261-264.

[57] *E.g.* s. 69 empowering the Crown or the Commission 'in the exercise of the right of the Crown to the control of groundwater' to enter and inspect land and summarily to prevent the operation of bores in contravention of the Act.

[58] He may collect and analyse data relating to the availability, suitability, depletion, wastage, pollution or replenishment of underground waters (Part II); authorize

Commission,[59] the State Rivers and Water Supply Commission,[60] the Minister of Water Supply,[61] and the Governor-in-Council.[62] Insofar as their functions bear directly on the control of underground waters, the residual proprietary interest in the Commission presumably abates.

On this view, section 47 may appear specious and redundant. The same administrative controls included in the Groundwater Act 1969 could have been imposed by legislation modelled on the South Australian or Tasmanian Acts.[63] These are couched in purely regulatory terms and avoid any reference to proprietary interests in the Crown; yet they are no less effective in result.

VI

It must be assumed, however, that section 47 is prompted by reasoning more substantial than the old fiction of continuity of seisin. In the view of the Minister, the purpose of vesting these rights in the Crown was primarily to divest private persons of their common law rights and thus stifle private litigation. Whether section 47 has such an effect must now be examined.

In *Metropolitan Asylum District v. Hill*[64] the respondent alleged that the appellant's infectious and contagious diseases hospital constituted a nuisance. The appellant argued that, even if their hospital amounted to a common law nuisance, the legislature, by authorizing the construction of such hospitals, necessarily intended to deprive neighbouring owners of their cause of action in nuisance. Weight was placed on the fact that the authority to establish hospitals was permissive, not imperative, but Lord Blackburn held that '[i]t is clear that the burthen lies on those who seek to establish that the Legislature intended to take away the private rights of individuals, to show that by express words, or by necessary implication, such an intention appears'.[65]

Although there is a well-known general principle that the statutes en-

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and control the sinking of bores and impose controls or interfere and carry out maintenance or protective works (Part III).

[59] Commission approval is required for drainage or disposal bores (Part IV). See also Health Act 1958, s. 82.

[60] Its prescribed functions are limited to the licensing, subject to conditions, of extractions for other than domestic and stock purposes (ss 20, 48-59); the recommendation of Groundwater Conservation Areas to the Minister and amendment of licences in such areas (ss 60, 63-65); entry, inspection and interference with unauthorized bores (s. 69). It might be possible to sustain an argument that, as these are the only functions conferred on the Commission, and as the rights vested in the Crown 'shall be exercised by the Commission in the name of and behalf of the Crown', the proprietary interests of the Crown are limited to those necessary to support only those powers conferred on the Commission.

[61] Under Part V, Division 2 he has power to act on the recommendation of the Commission that Conservation Areas be established by making a similar recommendation to the Governor in Council. When an area is declared, he may prescribe control zones therein and place limits on the total water extracted.

[62] There are general powers to exempt certain bores from the Act (ss 2, 44, 48), declare Conservation Areas (s. 61), and make regulations to carry out the Act (s. 74).

[63] Underground Waters Preservation Act 1959-1966 (S.A.); Underground Water Act 1966 (Tas.).

[64] (1881) 6 App. Cas. 193.

[65] *Ibid.* 208.

croaching on private rights must receive a strict construction, the Judicial Committee has cautioned that it 'means no more than that, where the import of some enactment is inconclusive or ambiguous, the court may properly lean in favour of an interpretation that leaves private rights undisturbed'. There is, however, 'no rule of construction that general words are incapable of interfering with private rights and that such rights can only be trenched upon where express power is given to do so'.[66] It was therefore able to uphold the expropriation of barley effected by an Order in Council made under broad powers to re-adjust industry and the Canadian economy conferred on the Governor in Council by the National Emergency Transitional Powers Act 1945 (Canada).

In the context of Australian water law, the effect of the vesting of 'the right to the use and flow and to the control' of surface streams on riparian rights has been considered in several cases. In *Hanson v. Grassy Gully Gold Mining Co.*[67] the plaintiff relied on his common law riparian rights to enjoin an obstruction by a higher riparian. The issue was whether the vesting section of the Water Rights Act 1896 (N.S.W.)[68] extinguished these rights. Stephen J. stated that '[i]f this Act does not aim to take the old common law rights from the riparian owners and vest them in the Crown; then I do not know what it was passed for nor what it means. It was passed in the public interest to prevent litigation'.[69] The vesting of rights in the Crown impliedly divested the riparian of his rights, and this conclusion was reinforced by section 2 which granted a limited right to riparian owners to take water for domestic and stock purposes. The decision was immediately followed in *Dougherty v. Ah Lee*[70] but its reasoning is open to question.

The riparian's right has traditionally been viewed as involving two elements; a right against lower owners to take water for certain purposes and a right against upper riparians to have the flow maintained.[71] This is reflected in the drafting of the vesting section which refers to the right to 'the use and flow'. Section 2, on which Stephen J. relied, re-defines only the riparians' entitlement to use water and, to that extent, may lend weight to the conclusion that private rights were abolished. Hanson, however, sought to invoke his common law right to the continued flow of the stream, and there is nothing outside the vesting section itself to point to the abolition of this right.

[66] *Attorney-General for Canada v. Hallet & Carey Ltd* [1952] A.C. 427, 450-51, citing *R. v. Halliday* [1917] A.C. 260; *In Re Gray* (1918) 57 S.C.R. 150; *In Re Japanese Reference* [1947] A.C. 87 and distinguishing *Attorney-General v. Wilts United Dairies* (1921) 37 T.L.R. 884; (1922) 38 T.L.R. 781 (H.L.).

[67] (1900) 21 N.S.W.L.R. 271.

[68] The section was in similar terms to the Water Act 1912 (N.S.W.), reprinted 1968, s. 4 and the Water Act 1958, s. 4.

[69] *Hanson v. Grassy Gully Gold Mining Co.* (1900) 21 N.S.W.L.R. 271, 275.

[70] (1902) 19 W.N. (N.S.W.) 8.

[71] *Cook v. Vancouver Corporation* [1914] A.C. 1077, 1082 *per* Lord Moulton; *H. Jones & Co. v. Kingborough Corporation* (1950) 82 C.L.R. 282, 323 *per* Dixon J. who does, however, state that it is possible to view the right as a *fasciculus*, and not to be dismembered; although the statute there in question did not permit such a view.

Implicit support for the view that the vesting section does not abolish private rights is found in *H. Jones and Co. v. Kingborough Corporation.*[72] Although the context of that decision was somewhat different as the statute in question purported to vest rivers with a rider protecting existing riparian rights, Dixon J. remarked:

> [b]ut riparian rights are incidents of property: there is no indication of any intention to destroy them and the bare vesting of the stream is not an apt or sufficient way of doing so.[73]

The reasoning of *Hanson's* case[74] was expressly criticized by Fullagar J. in *Thorpes Ltd. v. Grant Pastoral Co. Pty Ltd.*[75] With respect to the proposition that, to discourage litigation it was necessary to abolish private rights, he stated: 'this intention to cure the disease by killing the patient is in itself a very curious intention to attribute to the legislature'. He considered that the object of the act

> was to enable the Crown, in a country in which water is a comparatively scarce and important commodity, to exercise full dominion over the water of rivers and lakes and to undertake generally the conservation and distribution of water. For the attainment of that object it was not necessary to destroy anybody's rights but it was necessary to give to the Crown, or to some statutory authority, overriding rights to which private rights must, if need arise, give way.

Although he expressed no concluded opinion, he felt that the Act

> does not directly affect any private rights, but gives to the Crown new rights —not riparian rights—which are superior to, and may be exercised in derogation of, private riparian rights, but that, until those new and superior rights are exercised, private rights can and do co-exist with them.[76]

The final sentence is somewhat ambiguous, but rather than implying that all private rights automatically cease to exist when the Crown exercises its appointed powers, it is submitted that private rights would only abate to the extent that the exercise of statutory powers is necessarily inconsisent with them.[77]

[72] (1950) 82 C.L.R. 282. [73] *Ibid.* 322.
[74] *Hanson v. Grassy Gully Gold Mining Co.* (1900) 21 N.S.W.L.R. 271.
[75] (1955) 92 C.L.R. 317.
[76] *Ibid.* 331. Dixon C.J. expressed the opinion that the correctness of *Hanson v. Grassy Gully Gold Mining Co.* should be reserved for further consideration: *ibid.* 324.
[77] It is important to note that the problem mooted in the *Hanson, Dougherty* and *Thorpes* decisions does not arise under the Water Act 1958. S. 5 reserves the bed and banks of all boundary streams to the Crown. This re-states an informal practice adopted between 1863 and 1868 and laid down by Order in Council of 23 May 1881. Most private landowners thus lack riparian status and the *locus standi* to invoke the riparian doctrine. As to the incidence of riparian owners in Victoria, see statements by Mr Swinburne, Minister for Water Supply: Victoria, *Parliamentary Debates* Legislative Assembly, 18 July 1905, 364-5; Legislative Council, 30 August 1905, 1236. Comparable provisions are found in the Water Act 1926-1964 (Qld), s. 5; Control of Waters Act 1919-1927 (S.A.), s. 5; Rights in Water and Irrigation Act 1914-1954 (W.A.), s. 5.

Turning again to the Groundwater Act 1969, there is little doubt that the framers wished to curtail private litigation.[78] The vesting provision in the Water Act was expressly motivated by the fear that, unless private rights were restricted, litigation would be as pervasive as it is in the western United States.[79] It was therefore determined to adapt the formula of the Water Act which had reduced litigation in surface streams to insignificant proportions. Two incorrect assumptions thus led to section 47. The Australian system of regulatory legislation is not analogous to American schemes. There, stringent regulatory legislation is in danger of being interpreted as offending the due process clause of the Fourteenth Amendment.[80] Furthermore, the prevailing doctrine applicable to both surface and groundwater is that of prior appropriation. The express object of this doctrine is to create personal rights enforceable against later appropriators and the system is thus necessarily one of judicial apportionment rather than administrative regulation. Secondly, the suppression of private litigation under the Water Act 1958 is accomplished not by the vesting provisions of section 4, but by the reservation of bed and banks in section 5.[81]

As there are no express words in the Groundwater Act 1969 divesting private landowners of their rights to litigate, such a result could only be accomplished by either a provision analogous to the reservation of bed and banks, or because the abolition of such rights is necessarily incidental to the exercise of the administrative powers conferred on various agencies by the Act. These possibilities must be examined in turn.

V

The consequential amendments to the Land Act 1958 imposed by the Groundwater Act 1969 may seem to have a similar effect to a reservation of bed and banks. The Land Act 1958, section 2(8) now provides that, notwithstanding anything in that or any other Act relating to the alienation of Crown lands, and notwithstanding anything contained in any land grant:

> any right to the use or control of groundwater in existence before the commencement of the *Groundwater Act* 1969 shall cease and determine and the *Groundwater Act* 1969 shall apply to and in relation to such groundwater as if no such right had ever existed.

From the wording, this appears to be a companion provision to section 47 of the Groundwater Act 1969, the object being to ensure that nothing previously alienated should derogate from the new administrative controls over groundwater. It may be argued that the import is broader and that

[78] See Victoria, *Parliamentary Debates*, Legislative Assembly, 23 October 1968, 1197 and *supra* p. 261.

[79] See the arguments advanced in the material cited *supra* p. n. 31.

[80] See Comment, 'The Texas Groundwater District Act of 1949: Analysis and Criticism' (1952) 30 *Texas Law Review* 862; Greenhill and Gee, 'Ownership of Ground-water in Texas' (1955) 33 *Texas Law Review* 620.

[81] *Supra* p. 270, n. 77.

all private interests in groundwater are thereby destroyed. Against this is the fact that it is limited merely to the right to use or control, and any private rights not inconsistent with superior Crown powers on these matters will continue to co-exist. More conclusive still is a companion amendment to the same Act, contained in the same amending section.[82] The Land Act 1958, section 339(1) has the effect of reserving from alienation all land below a depth specified by the Governor in Council. This does not remove all private rights to groundwater, for section 339(2) expressly guarantees to the landowner 'the right to sink wells for water and to the use and enjoyment of any wells and springs' for domestic, stock, irrigation or industrial purposes 'as though he held or occupied such land without limitation as to depth'. Rather than repealing this acknowledgment of the usual incidents of a fee simple estate at common law (as might have been expected if the intention were to abolish all private rights), the amendment merely makes it 'subject to the *Groundwater Act* 1969'. The general language of the first amendment should, if possible, be construed so as to leave unimpaired the particular operation of the second. Perhaps an appropriate conclusion would be that, at least in respect of wells and springs, an owner's common law right to use and enjoy underground water is guaranteed, but must be exercised in accordance with the regulatory provisions of the Groundwater Act 1969. Although this right may be restricted by the exercise of superior statutory powers, the destruction of all private remedies is not a necessary result.

The Mines Act 1958, too, potentially restricts the common law rights of a landowner. The definition of 'mineral' in section 3 includes 'mineral water; and any other substance which is declared a "mineral" ' by the Governor in Council. The consequential amendments to this Act do not clarify whether rights to mineral water are still to be acquired under the Mines Act 1958 or the new legislation. A more significant oversight is the failure to repeal a Proclamation of 17 February 1959 declaring underground water to be a 'mineral'.[83] The purpose of the Proclamation was to extend the powers to carry out investigatory drilling for 'gold or minerals'[84] to underground waters, as the Mines Department at the request of the State Rivers and Water Supply Commission was at this time taking over responsibility for groundwater survey. Unfortunately the declaration was not limited to this purpose. Underground waters thus became subject to the provisions of section 291(1) of the Mines Act 1958 whereby all minerals on land alienated after 1 March 1892 'are and shall be and remain the property of the Crown'. From the point of view of absolute Crown title, this section is far more compelling than section 47 of the Groundwater Act 1969. Yet it has the incidental effect of subjecting underground waters to miner's rights, and mining leases and licences which can hardly have been

[82] Groundwater Act 1969, s. 3(4) (b).
[83] Victoria, *Government Gazette*, cclxxxvii.
[84] Mines Act 1958, s. 344.

the intention of the Department when pressing for an amendment of its investigatory powers. Although legislation by Proclamation is certainly more convenient than by an amending Act, the choice adopted in this case seems singularly inept. It is, however, anticipated that the anachronism will be remedied before the operation of the Groundwater Act 1969 is proclaimed and its impact on private rights can therefore be disregarded.

VI

It remains to consider whether those common law rights of action enjoyed by a Victorian landowner in relation to underground water necessarily conflict with the exercise of administrative powers conferred by the Groundwater Act 1969, or whether they may co-exist.

The classic exposition of the English rule governing underground percolating water is that

> the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure, and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of damnum absque injuriâ, which cannot become the ground of an action.[85]

Although the overlying landowner is not *ex jure naturae* the owner of the water, he has an unlimited right to appropriate it[86] and use it for whatever purpose he pleases, either on or off the overlying land[87] even if his sole motive is a malicious intent to injure his neighbour's wells.[88] The exercise of this right can only give rise to an action by a neighbouring owner in two limited situations. First, an action in nuisance will lie if a landowner by his actions pollutes the common source from which his neighbour's well is supplied.[89] Secondly, a neighbouring owner of land riparian to a surface stream has an action against a landowner whose well draws off water from the surface stream, thereby diminishing its flow.[90] Strangely enough, a

[85] *Acton v. Blundell* (1843) 12 M. & W. 324, 354; adopted in *Chasemore v. Richards* (1859) 7 H.L.C. 349, 377.

[86] *Ballard v. Tomlinson* (1885) L.R. 29 Ch. D. 115, 122, 123, 126.

[87] *Chasemore v. Richards* (1859) 7 H.L.C. 349.

[88] *Mayor of Bradford v. Pickles* [1895] A.C. 587, 594.

[89] *Ballard v. Tomlinson* (1885) L.R. 29 Ch. D. 115. The actual form of the action is expressed in terms of pollution of the common source of supply prior to appropriation. It is unclear whether this is identical to the ordinary action in nuisance for damage to land.

[90] *New River Co. v. Johnson* (1860) 2Bl. & Bl. 435, 445; *Grand Junction Canal Co. v. Shugar* (1871) L.R. 6 Ch. 483, 487 *per* Lord Hatherley as interpreted in *Jordeson v. Sutton, Southcoates and Drypool Gas Co.* [1899] 2 Ch. 217, 251-2 and *English v. Metropolitan Water Board* [1907] 1 K.B. 588, 601. To this extent the Water (Further Amendment) Act 1967 passed to prevent landowners in the King River area from evading restrictions on the use of the stream by the simple expedient of digging a soak adjacent to the river, may have been unnecessary. As a riparian owner, the Crown could perhaps have invoked its common law rights to restrain such acts.

similar action does not appear to lie if the well interrupts water which would otherwise have percolated into the river.[91]

Although the basic English authorities of *Acton v. Blundell*[92] and *Chasemore v. Richards*[93] have been accepted as authoritative in Australia and elsewhere,[94] the limited protection afforded to neighbouring owners has not gone unquestioned. In *Chasemore v. Richards* itself, Lord Wensleydale was dubious. Although every man has a right to the natural advantages of his soil, 'according to the rule of reason and law, *sic utere tuo ut alienum non laedas*, it seems right to hold, that he ought to exercise his right in a reasonable manner, with as little injury to his neighbour's rights as may be'.[95] Dissatisfaction has perhaps been greatest in the United States. Although early decisions accepted the principle of *Mayor of Bradford v. Pickles*[96] a far greater number have acknowledged a right of action where interference with the plaintiff's supply has been malicious.[97] There has also been a general trend towards limiting the landowner's right to use water for 'unreasonable' purposes. It was early suggested that an appropriative right is limited by the corresponding right of a neighbour and extends only to a reasonable exercise of such right.[98] As a result, an action will lie to enjoin waste, or any extraction which is not applied to some beneficial purpose on the overlying land.[99] There is, furthermore, authority giving compensation to an owner who, to overcome the effect of his neighbour's pumping, has been forced to deepen his own well.[1]

[91] *Chasemore v. Richards* (1859) 7 H.L.C. 349, 377-9 *per* Lord Chelmsford, *contra* Lord Wensleydale *ibid.* 388. See also *Balston v. Bensted* (1808) 1 Camp. 463 and *Dickinson v. The Grand Junction Canal Co.* (1852) 7 Ex. 282, both of which were dismissed by Lord Chelmsford.

[92] (1843) 12 M. & W. 324. [93] (1859) 7 H.L.C. 349.

[94] Australia: *Cooper v. Corporation of Sydney* (1853) 1 Legge 765; *Dunn v. Collins* (1867) 1 S.A.L.R. 126; *Mayor of Perth v. Halle* (1911) 13 C.L.R. 393. *Metropolitan Water Supply and Sewerage Board v. R. Jackson Ltd* [1924] St. R. Qd. 82. New Zealand: *The King v. Kaino Collieries* [1937] N.Z.L.R. 1012. South Africa: *Union Government (Minister for Railways and Harbours) v. Marias* [1920] S. Af. L.R. 240.

[95] (1859) 7 H.L.C. 349, 388. Coleridge J. in the Exchequer Chamber dissented on the same grounds: (1857) 2 H. & N. 186, 195.

[96] [1895] A.C. 587. *E.g. Chatfield v. Wilson* (1855) 28 Vt. 49; *Huber v. Merkel* (1903) 94 N.W. 354 (Wis.).

[97] See *American Law Reports, Annotated* (1928) lv, 1937; Eulmen, 'The Law of Underground Water: A Half-Century of Huber v. Merkel', [1953] *Wisconsin Law Review* 491; Hostak, 'Wisconsin Ground-Water Law—A New Era', [1957] *Wisconsin Law Review* 309.

[98] *Bassett v. Salisbury Manufacturing Co.* (1862) 43 N.H. 569, followed in *Katz v. Walkinshaw* (1902) 74 Pac. 766 (Calif.).

[99] The recognition of correlative rights between landowners implicit in the American 'reasonable use' doctrine reaches its zenith in the Californian rule which provides for judicial proration when a basin is being overdrawn: *Pasadena v. Alhambra* (1949) 207 Pac. 2d 17. For a general comparison of American doctrines see Hutchins, 'Reasonable Beneficial Use in the Development of Ground Water Law in the West' in *Ground Water Economics and the Law* (1956) 23; Note, 'Waters and Watercourses—Subterranean Percolating Waters—Acts to Enjoin Use which Impairs Adjoining Landowners' Use' (1958) 11 *Vanderbilt Law Review* 945; Comment, 'Who Pays when the Well Runs Dry?' (1965) 37 *University of Colorado Law Review* 402.

[1] See Hutchins, 'Protection in Means of Diversion of Ground-Water Supplies' (1940) 29 *California Law Review* 1; Chaffin, 'Rights of Wyoming Appropriators in Underground Water' (1947) 1 *Wyoming Law Journal* 111; Hutchins, 'California Ground Water: Legal Problems' (1957) 45 *California Law Review* 688.

In Australia there are indications of a similar readiness to re-examine and, if necessary depart from, the English doctrine. In *Mayor of Perth v. Halle*[2] the question was whether a landowner has a right to the support of subterranean water. In the opinion of the High Court, an action lay at least against any person other than an adjoining landowner who caused subsidence by withdrawing groundwater. O'Connor J., in considering the rights of adjoining landowners, hinted that the rights were, to some extent, correlative. Whilst affirming that an overlying landowner had extensive rights, they might be cut down 'in so far as their exercise would interfere with the adjoining owner in the exercise of his rights'. Interference with the rights of an adjoining owner would be legitimate only 'when the lawful use of his own land necessarily involves that interference'.[3] Only Barton J. appeared to give wholehearted support to the English doctrine and expressly approved *Mayor of Bradford v. Pickles.*[4]

More important is the decision of *Gartner v. Kidman.*[5] This decision, whilst dealing with diffused surface waters, is equally important to percolating underground waters, as the principles are said to be identical.[6] There the High Court declined to follow Privy Council *dicta* in *Gibbons v. Lenfesty*[7] which had led to numerous decisions in Australia and New Zealand. The actual question involved the right of a landowner to turn back surface water flowing towards his land. The same type of problem does not arise with respect to underground percolating water, but the willingness of the High Court to enunciate principles applicable to Australian conditions in the face of contrary authority is significant. Particularly relevant to our present enquiry are the general observations of Windeyer J.

> The idea of reasonableness, that is basic to so much of the common law, is firmly embedded in the law of nuisance to-day. Pronouncements concerning the scope of nuisance as a tort avoid stating rights and duties as absolute In respect of both what a man may do and what his neighbour must put up with, its criteria are related to the reasonable use of lands in question. In some recent cases there is perhaps a more explicit recognition than there was in some earlier cases that a landowner's duty to his neighbour qualifies his right to do what he likes with his own land and on his own land. But this always was the law, and such absolute statements as appear in *Bradford v. Pickles*, are no longer, I think, taken to mean the contrary.[8]

It does not follow from this statement that, if the occasion arose, the High Court would necessarily depart from the English common law rules governing underground percolating water. These rules are, for one thing, far clearer than those which were thought to apply to the interruption of distributed surface waters prior to *Gartner v. Kidman.*[9] Yet if the idea of

[2] (1911) 13 C.L.R. 393.
[3] *Ibid.* 414.
[4] *Ibid.* 404.
[5] (1962) 108 C.L.R. 12.
[6] *Chasemore v. Richards* (1859) 7 H.L.C. 349, 376.
[7] (1915) 84 L.J. (P.C.) 158, 160.
[8] (1962) 108 C.L.R. 12, 47, citing *Hollywood Silver Fox Farm Ltd v. Emmett* [1936] 2 K.B. 468.

reasonableness is as firmly embedded in Australian law as Windeyer J. suggests, it is unlikely that the absolute right of the overlying landowner will stand unqualified. It can, perhaps, be predicted that Australian courts will at least permit an action by an injured landowner where an adjoining owner pollutes the common supply, damages an aquifer, maliciously interferes with the supply, or uses water wastefully or unreasonably.

There seems no reason why such private rights of action should not co-exist with the administrative provisions of the Groundwater Act 1969. By section 45, the Minister of Mines must refuse to approve any drainage bore which will result in pollution. Section 69 gives power to interfere summarily to prevent the operation of such a bore and section 77 punishes negligent or wilful pollution. If, in spite of such precautions, a landowner suffers damage from the acts of his neighbour in polluting the water, to allow him a private remedy does not seem inconsistent with either the express powers mentioned or with the general right to use and control in section 47. In some cases, of course, a private right of action would necessarily be inconsistent with the exercise of superior Crown powers. Just as section 69 which authorizes entry and summary interference with a bore supersedes any cause of action for trespass by the occupier so, presumably, private acts which would otherwise generate a cause of action at common law will not be redressable if authorized by a permit or a licence granted under the Act.[10]

Complications arise where damage, not cognizable at common law, is caused by a landowner acting in breach of the Act or in excess of his statutory authority. If a pumper knowingly extracts more than his entitlement under a licence, albeit for approved purposes, does the illegality of his use confer a right of action on a neighbour whose bore fails, thereby causing damage?

There is, of course, always the possibility that the Act itself creates certain private rights of action for breach of statutory duty, and there are provisions which may point to such a remedy.[11] Furthermore, the vexed decision of *Beaudesert Shire Council v. Smith*[12] may confer an action quite apart from the preceding common law or any remedy for breach of statutory duty. There, in the context of a claim for damages by a licensed diverter against the unauthorized extractor of gravel from a river-bed, the High Court held that:

[9] (1962) 108 C.L.R. 12, 45 and see Derham, 'Interference with Surface Waters by Lower Landholders' (1958) 74 *Law Quarterly Review* 361.

[10] This conclusion may be enforced by s. 73 which states that '[s]ubject to this Act no action shall lie against any person in respect of any powers conferred by this Act', although it is possible that this general section could be read down to relate purely to the exercise of powers conferred on Crown servants.

[11] *E.g.* s. 51(3) directing the Commission to refuse a ground-water licence if it 'would materially interfere with the volume of groundwater to which any other person is entitled under the Act'.

[12] [1966] A.L.R. 1175.

> independently of trespass, negligence or nuisance but by an action for damages upon the case, a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another, is entitled to recover damages from that other[13]

The test of unlawfulness is undefined although it was said that regard must be had to the established principles of an action for breach of statutory duty.[14] In *Grand Central Car Park Pty Ltd v. Tivoli Freeholders*,[15] McInerney J. stated that:

> the High Court was careful to make it clear that the principle there enunciated was not intended to encroach in any way on "the limitations which the law has placed upon the right of a person, injured by reason of another's breach of statutory duty to recover damages for his injury".[16]

It may be doubted whether a direction to have regard to a principle is necessarily the same as an injunction not to encroach in any way upon it. Nevertheless the *Beaudesert* principle has been extensively criticized as unsupported by authority[17] and a restrictive interpretation seems probable. The indication is that a plaintiff wishing to invoke the action on the case must cast around for some other 'unlawful' behaviour than mere breach of statute.

VII

It is our conclusion, then, that the Groundwater Act 1969 neither makes the Crown owner of underground waters, nor abolishes all private rights of action. In neither case should this be deemed a failing in the legislation. The important regulatory function of the Act is in no way dependent upon the vesting section and its practical effect will be identical with its planned operation. Rhetorical flourishes stating the state's interest in controlling natural resources are not uncommon in other countries[18] and in some cases this may have a beneficial educative effect. In Australia, where there is a long-established tradition of governmental intervention in resource planning, such statements would appear redundant. Provided the particular powers conferred on the Crown are ample to carry out its objects, it would seem preferable to settle for a system of regulative intervention rather than invoke conceptual confusion by introducing superfluous notions of property.

In view of the abundant litigation observed in the arid American States, the desire not to emulate such a system is praiseworthy. Most litigation there, however, springs from the system of judicial allocation of rights to

[13] *Ibid.* 1180. [14] *Ibid.* [15] [1969] V.R. 62. [16] *Ibid.* 74.

[17] See Dworkin and Harari, 'The Beaudesert Decision—Raising the Ghost of the Action upon the Case' (1966-67) 40 *Australian Law Journal* 296 and 347; Note, (1967) 6 *M.U.L.R.* 225.

[18] *E.g.* California Water Code, art. 100; River Law 1964 (Japan), art. 2; Constitution of the Union of Burma 1947, s. 219; Water Nationalization Law 1968 (Iran), art. 1.

use water. In Australia the primary responsibility for allocating rights has rested with administrative authorities and this aspect of private litigation has therefore been of little significance. In this respect the benefits of the Australian system are being viewed enviously by others.[19] There is, however, no need to cure the disease by killing the patient. Common law rights to some extent still exist in surface streams in New South Wales; yet there has been little litigation other than that necessary to compensate owners for damage to their land.[20] Doubtless the administrative system is devised and operated with a view not only to distributing water equably but to protecting individuals from the excesses of their neighbours. In most cases, adequate protection is afforded, but in those cases where administrative control is inadequate to protect a landowner from damage by his neighbour, there seems no good reason to deprive him of his common law rights to be compensated.

[19] Davis, 'Australian and American Water Allocation Systems Compared' (1968) 9 *Boston College Industrial and Commercial Law Review* 647.
[20] *E.g. Thorpes Ltd v. Grant Pastoral Co. Pty Ltd* (1955) 92 C.L.R. 317, 330-1.