(4) S. v. JACOBS[9]

Sharing one counsel

Two accused had been defended by one attorney and during the trial it had become apparent that there was a conflict in the defence of the two accused, but the attorney had not immediately clarified his own position nor immediately withdrawn from the defence of one or the other, and both accused had been convicted. The South African court held that as both accused had been prejudiced, the convictions and sentences should be set aside. However, in this instance the case was referred to the Attorney-General to consider a fresh prosecution.

(5) R. v. LANE[10]

Antagonistic defences

If in *Jacobs* it had been known that there were to be conflicting defences, it might have been more convenient to have separate trials. The question of whether antagonistic defences is a good ground for ordering separate trials was considered in this case. The High Court of Ontario held that the fact that the defences of co-accused will be antagonistic is not an over-riding reason for granting separate trials. It is one of the factors which the judge must consider in exercising his discretion—a discretion which must not be exercised in a desultory or unmethodical manner, but must be guided and regulated by judicial principles and fixed rules.[11]

D.B.

KENNEDY v. MINISTER FOR WORKS[1]

Abstracting percolating underground water

This is a disturbing case; it deals with the vexed problem of underground water in a vast State where water is precious.

K was the proprietor of Millstream Station in the Pilbara District of Western Australia. He had an estate in fee simple of forty acres which had been granted to his predecessor in title, under the terms of a Crown grant dated 11 July 1879. This area was completely surrounded by a pastoral lease comprising 640,110 acres. A spring called

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9 1970 (3) S.A. 493.
10 [1970] 1 O.R. 681.
11 R. v. Weir, (1899) 3 C.C.C. 351.
1 [1970] W.A.R. 102.

Millstream Spring rose in the pastoral lease and flowed in a surface channel to and through the area of the Crown grant and then again through the pastoral lease to the bed of the Fortescue River. It provided a valuable water supply for K.

The State Government decided to sink six production bores in the area south and south-west of the Millstream Spring and from these bores to pump the water by pipeline to Dampier, a developing port and commercial centre for the mining industry. The Public Works Department carried out the work of sinking the bores and installing the pumps and constructing the pipeline. The bores and the start of the pipeline were on the land over which K held a pastoral lease. The intention was to draw three million gallons of water a day. Due to the fact that the bores would draw the water from the same rock basin which supplied the Millstream Spring, it was probable that the abstraction of water by the bores would substantially reduce the flow of the Millstream Spring, and later, if the demand for water from the bores increased, perhaps prevent the spring from flowing.

K succeeded in establishing that the entry on his land was *ultra vires* the powers granted to the Public Works Department under the Public Works Act 1902-1967 (W.A.). He was not successful on the main issue, namely, the right of a land owner to prevent the abstraction of water from below the surface. An attempt to imply a term in his Crown grant that his rights to underground water would not be impaired also failed.

In one of the early English cases where the question of rights to underground water arose, Lord Ellenborough said that twenty years exclusive enjoyment of water in any particular manner, afforded a conclusive presumption of right in the party so enjoying it.[2] He did not consider the possibility of there being any distinction between water flowing and water percolating. Nevertheless this was the leading authority at the time of the reception of English law in Western Australia in 1829. No one attempted to argue that English and Australian common law parted company at that date.

All doubts on the subject were resolved by the House of Lords in *Chasemore v. Richards*.[3] A landowner and millowner, who had for more than sixty years enjoyed the use of a stream which was chiefly supplied by percolating underground water, lost the use of the stream after an adjoining landowner had dug, on his own ground, an

2 Balston v. Bensted, (1808) 170 E.R. 1022.
3 (1859) 11 E.R. 140.

extensive well for the purpose of supplying water to the local inhabitants. It was held that the millowner had no right of action. Lord Wensleydale, in a comprehensive judgment, concluded:

> What, then, is the distinction between superficial streams and subterranean water? With respect to underground waters percolating the strata, two considerations arise which make a material difference between them and the right to superficial streams. In the first place, these subterraneous waters cannot be actually enjoyed (and all things are given to be enjoyed) without artificial means. The water must be reduced into possession before it can be used, and some mode of reducing into possession must be permitted by law. If there be no such right, underground water is comparatively useless. A man may therefore dig for his supply, or make a well for his own use and that of his family, and, in so doing, he may deprive his neighbour's land of moisture, and even tap a copious spring, and prevent it from flowing to his neighbour's close. It can rarely happen that in excavating, in order to obtain the use of the water, some injury will not be caused to the subterraneous supplies of a neighbour, especially as the precise course and direction of such water can seldom be known accurately beforehand.
>
> In the second place, as the great interests of society require that the cultivation of every man's land should be encouraged, and its natural advantages made fully available, the owner must be permitted to dig in his own soil, and, in so doing, he can very rarely avoid interfering with the subterraneous waters flowing or percolating in his neighbour's land.[4]

The House recognised that it was one of the most important questions that ever came before a court of justice.[5] It was of course a decision reached against a Victorian background of agricultural conditions in England. Nonetheless the force and cogency of Lord Chelmsford's judgment has found wide acceptance in lands where geographical conditions are widely different. In Ireland FitzGibbon L.J. said that it would be

> impossible to recognise a natural right which would subject the lands of another to the burden of maintaining an unknown flow of water (whatever be the geological character of its channel), without introducing every difficulty which has already prevailed to prevent the recognition of such a right in respect of "percolating" water.[6]

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4 Id. at 155.

5 Id. at 156 per Lord Kingsdown.

6 Ewart v. Belfast Guardians, (1881) 9 L.R.Ir. 172, 205.

The principle has been applied in India,[7] South Africa,[8] Ontario,[9] and Western Australia.[10] It was further examined in England by Luxmoore J. in *Bleachers' Association Ltd. v. Chapel-en-le-Frith Rural District Council*,[11] and more recently by Plowman J. in *Langbrook Properties Ltd. v. Surrey County Council*[12] where all the relevant English authorities were considered.

In *Kennedy's* case, Hale J. accepted the rule without question. Unfortunately the Western Australian Law Reports do not contain any summary of the contentions of the plaintiff and the defendant. One is left to guess what these were from the content of the judgment. There is little indication that the plaintiff contested the validity of the common law rule. It seems to have been accepted without argument.[13]

One of the disturbing features which the case reveals is the lack of relevant legislation on such a vital subject as underground water. The Rights in Water and Irrigation Act 1914-1964 (W.A.) does not concern itself with underground water. Section 4(3) provides that the Act does not apply to any subterranean source of water supply from which the water does not flow naturally, but has to be raised by pumping or other artificial means. In a State where water is so vital it is curious that the legislature has not yet faced the problem of who is to control the percolating waters beneath the surface.

Another disturbing feature of the case was the apparent disinclination of the Court to consider any of the decisions of the United States. The trend of opinion in that country is towards the doctrine of "reasonable use". A landowner is entitled to take reasonable quantities of underground water from his land. It has been suggested that waters may only be taken for purposes connected with the use, enjoyment

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7 Adinarayana v. Ramudu, (1914) I.L.R. 37 Madras 304.

8 Union Government v. Marais, [1920] A.D. 240.

9 Storms v. M. G. Henniger Ltd., [1953] O.R. 717 (destruction of business due to excavation and removal of gravel from adjoining neighbour's quarry which interfered with the flow of percolating water).

10 Marshall v. Cullen (No. 2), (1914) 16 W.A.L.R. 92 (waters commencing in defined channel, flowing into undefined channels in sandy country causing a swamp in wet weather and drying up in summer, later emerging as defined channel—nuisance not established where owner utilised water in sandy swamp area and diminished flow to owner downstream).

11 [1933] 1 Ch. 356.

12 [1969] 3 All E.R. 1424.

13 'It is an essential element that the plaintiffs shall prove that at the point where the abstraction complained of was done the water which would ultimately have reached their land was already flowing in a known and defined channel'—per Hale J. at [1970] W.A.R. 102, 105.

or improvement of the land from which they are taken. Reasonable use does not prevent consumption of waters in agriculture, manufactory, irrigation, or otherwise, nor the development of the land for mining and the like, even though the underground waters of neighbouring properties may thus be interfered with or diverted.[14] But supplying the whole of an expanding town is surely an unreasonable use. The right to extract percolating water for the purpose of furnishing a public water supply is, in the United States, subject to the doctrine of reasonable user.[15]

The State Government saw fit to use its powers under the Public Works Act 1902-1967 (W.A.). This antiquated piece of legislative verbosity grants wide powers to the Government to take land. Yet one is disturbed that this legislation is used for such a purpose. Water is too vital a commodity to be lumped in with the general provisions governing the compulsory acquisition of surface land. Some hard thinking needs to be done on the future use of underground water by the legislature.[16]

D.B.

14 56 AMERICAN JURISPRUDENCE, Waters, para. 117.

15 56 AMERICAN JURISPRUDENCE, Waterworks, para. 44. There is of course a vast welter of American material on the subject not all of which is relevant because of different statutory provisions. Nevertheless the common law on the subject is more realistic than the Anglo-Australian rules. The reasonable use doctrine is considered in Hoskin, *Who Pays when the Well Runs Dry?*, (1965) 37 UNIV. OF COLORADO L. REV. 402, and Chadsey, *Rights to Underground Waters in Oregon,* (1965) 3 WILLAMETTE L.J. 317.

16 Some admirable spade work has been achieved by Clark and Renard, *The Riparian Doctrine and Australian Legislation,* (1970) 7 MELB. L. REV. 475.