[HIGH COURT OF AUSTRALIA.]

HILL . . . . . APPELLANT;
DEFENDANT,

AND

O'BRIEN . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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ADELAIDE, *Sept.* 27, 28; *Oct.* 4.

Latham C.J., Rich, Dixon, and McTiernan JJ.

Water—Riparian rights—Action for relief against infringement—Parties—Interest in land necessary to support action—Crown lands—Perpetual lease—Share-farming agreement by lessee from Crown—Provision for joint occupation and possession—Construction of agreement—Statutory prohibition of parting with possession—Action by share-farmer—Crown Lands Act 1929 (*S.A.*) (*No.* 1923), *secs.* 226, 227.

A lessee from the Crown under a perpetual Crown lease (pursuant to the *Crown Lands Acts* (*S.A.*)) entered into a share-farming agreement with his son, O. The agreement recited that the father had agreed to let the land to O. for grazing and to work and cultivate the land and to milk the father's cows upon shares for a term of five years. The terms and conditions of working were set out in the agreement, which also provided that nothing in the agreement should be construed as in any way constituting a partnership or an agreement therefor but that during the said term the father and O. should be jointly entitled to the occupation and possession of the said land. O. lived and worked on the land in accordance with the agreement. The land adjoined a river which, at that point, was a natural stream or watercourse. O. brought an action against H., complaining that H. had erected in the channel of the river a bank which had diverted the water and deprived O. of valuable floodings of the land, and claiming damages and an injunction.

Held that O. had no such interest in the land as would enable him to maintain the action:—

By *Latham* C.J., on the grounds that, (1) if the share-farming agreement purported to transfer an interest in the land to O., it was ineffectual, because (*a*) such an attempted alienation was prohibited by sec. 227 of the *Crown Lands Act* 1929 (S.A.), (*b*) the share-farming agreement was made in pursuance of an agreement to let which was deprived of legal effect by secs. 226 and 227 (3) of the *Crown Lands Act*; (2) if the share-farming agreement created only personal rights, O. had no right of possession of the land.

By *Rich*, *Dixon* and *McTiernan* JJ., on the ground that under the share-farming agreement O. had merely a contractual right to use and enjoy the land in conjunction with the father, who retained full legal possession of the land.

Decision of the Supreme Court of South Australia (*Cleland* J.): *O'Brien* v. *Hill*, (1938) S.A.S.R. 61, reversed.

APPEAL from the Supreme Court of South Australia.

John O'Brien held under perpetual lease from the Crown, pursuant to the *Crown Lands Acts* (S.A.), certain lands in South Australia adjoining the River Broughton, which, at that point, is a natural stream or watercourse. The perpetual lease contained covenants that the lessee would not during the currency of the lease without the consent of the Commissioner of Crown Lands and Irrigation first had and obtained transfer or sublet "these presents or the premises hereby demised or any part thereof or do commit or suffer any act matter or thing whereby the said premises or any part thereof shall or may be transferred or sublet to any person or persons." The leases also contained a provision for forfeiture upon breach of any covenant. On 19th February 1934 John O'Brien entered into a share-farming agreement with his son, Gerald Leo O'Brien. This agreement, after describing the father's property, recited that the owner (i.e., the father) had agreed to let the land to the share-farmer (i.e., the son) for grazing and to work and cultivate the land and to milk the owner's cows upon shares for a term of five years upon the terms and conditions thereinafter appearing. These provided that the share-farmer should work the land and cultivate it as agreed and that implements, horses, "super." and seed, &c., would be supplied by the owner and the share-farmer in equal shares. The share-farmer was to harvest the crops, and he was to be entitled to live on the land and to graze sheep on portions of the land. The crops were

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to belong to the owner and the share-farmer in equal shares. The share-farmer was to supply all labour, and the parties were to divide equally the net returns from the sale of cream. The share-farmer was to repair fences and gates, and the owner was to pay water rates and taxes. The final clause provided: "Nothing in this agreement shall be construed as in any way constituting a partnership or an agreement for a partnership between the owner and the share-farmer but during the said term the owner and the share-farmer shall be jointly entitled to the occupation and possession of the said land." The consent of the Commissioner of Crown Lands to this agreement was not obtained. The son lived and worked on the land in accordance with the agreement.

The son brought an action in the Supreme Court of South Australia against Norman Hill, complaining that the defendant had in July 1934 erected in the channel of the river a bank which had diverted the water and had in 1935 deprived the plaintiff of valuable floodings of his land. He alleged that, as occupier of the land he was entitled to have the river flow to and past his land without obstruction or diversion. The defendant claimed that as riparian owner he had a right to do the things he had done and use the waters as he had used them. He contended also that the plaintiff had no title in which to sue.

Cleland J. gave judgment for the plaintiff for £315 damages and also granted a mandatory injunction requiring the defendant to remove the bank or obstruction in the river of which the plaintiff complained.

From this decision the defendant appealed to the High Court.

Ligertwood K.C. (with him *Alderman*), for the appellant. The respondent is not entitled to recover, because the share-farming agreement is a breach of the *Crown Lands Act* 1929 (S.A.). Sec. 227 of that Act was passed in consequence of the decision in *Hensley* v. *Reschke* (1), and is construed in *Lang* v. *Castle* (2). Possession under the share-farming agreement must be either a demise or sub-demise, in which case the commissioner's consent was required, and without it the agreement is void; or there is a mere licence which

(1) (1914) 18 C.L.R. 452.

(2) (1924) S.A.S.R. 255.

does not give riparian rights (*Habel* v. *Tiller* (1)). The agreement is in effect a lease from A to A and B, a form of alienation recognized by law, which under sec. 40 of the *Law of Property Act* 1936 (S.A.) is effective in law as well as in equity. Even if it is not a valid alienation, it is an attempted alienation, which is also prohibited by sec. 227. Joint possession is different from sole possession, and, if the respondent gets a legal or equitable possession, the owner must have parted with some possession. The agreement is also invalid because it falls within sec. 226, which prohibits the transfer of any interest in such a lease. If the strict principle of common law is applied, only a licence has been given.

[LATHAM C.J. referred to *Smith* v. *Auchterlonie* (2) as to whether the owner should have been joined with the respondent.]

Whether or not the owner should have been joined, there is no right to sue in the respondent. [Counsel referred to *Halsbury's Laws of England*, 1st ed., vol. 28, p. 424, and *Salmond* on *Torts*, 8th ed. (1934), p. 279, as to rights of riparian owners and occupiers under a lease.]

Stanley, for the respondent, was called on as to the question of the right of the respondent to sue. Even if the respondent is only a bare licensee, he can acquire riparian rights. He need only be lawfully in occupation of the riparian land (*Salmond* on *Torts*, 8th ed. (1934), p. 279 ; *H. P. Farnham* on *Waters and Water Rights* (1904), vol. II, pp. 1606, 1667 ; *Mason* v. *Hill* (3) ; *Gaved* v. *Martyn* (4) ; *Nuttall* v. *Bracewell* (5)).

[MCTIERNAN J. referred to *Moore* v. *Collins* (6).]

A licence confers the right to bring an action (*Vaughan* v. *Shire of Benalla* (7) ; *Salmond* on *Torts*, 9th ed. (1936), p. 275). The *Crown Lands Act* 1929 (S.A.) does not prohibit every form of dealing with the land ; it prohibits only a transaction which involves parting with the whole of the possession or occupation. The agreement is not a sub-letting ; at the most it is a sharing of the possession.

(1) (1929) S.A.S.R. 170.
(2) (1897) 23 V.L.R. 16.
(3) (1833) 5 B. & Ad. 1, at p. 27 [110 E.R. 692, at p. 701].
(4) (1865) 19 C.B.N.S. 732 [144 E.R. 974].
(5) (1866) L.R. 2 Ex. 1.
(6) (1937) S.A.S.R. 195.
(7) (1891) 17 V.L.R. 129.

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[McTIERNAN J. referred to *Ex parte Duggan* (1).

[LATHAM C.J. referred to *Chaplin* v. *Smith* (2).]

An agreement is not caught by sec. 227 unless it parts with the exclusive possession of the property (*Jackson* v. *Simons* (3); *Stening* v. *Abrahams* (4)). A mere occupier as such has a right of action, and there is nothing in the Act to prohibit occupation without consent.

[RICH J. referred to *Hindmarsh* v. *Quinn* (5).

[LATHAM C.J. referred to *Peebles* v. *Crosthwaite* (6).]

Possession is not absolutely necessary to maintain the action.

[DIXON J. referred to *Stein* v. *Burden* (7) ; *Pocock* v. *Carter* (8).]

Ligertwood K.C., in reply. There is a distinction between possession and a mere licence ; the latter does not carry riparian rights. The agreement gives the respondent everything but the legal title. The Act applies to equitable as well as legal estates (*Credland* v. *Potter* (9).

Cur. adv. vult.

Oct. 4. The following written judgments were delivered :—

LATHAM C.J. The plaintiff O'Brien, the respondent to this appeal, sued the defendant Hill, the appellant, together with one John Castleton Afford, for damages and an injunction in respect of alleged interference with riparian rights of the appellant as an occupier of land adjoining the River Broughton. The defendant Afford died during the proceedings, and the action was not continued against his personal representatives. *Cleland* J. gave judgment for the plaintiff for £315 damages and also granted a mandatory injunction requiring the defendant Hill to remove the bank or obstruction in the river of which the plaintiff complained. The plaintiff sued as occupier of land adjoining the river, which, at the plaintiff's land, is a natural stream or watercourse. He complained that the defendant had in July 1934 erected a bank in the channel of the river which had

(1) (1902) 19 W.N. (N.S.W.) 260.
(2) (1926) 1 K.B. 198.
(3) (1923) 1 Ch. 373.
(4) (1931) 1 Ch. 470.
(5) (1914) 17 C.L.R. 622.
(6) (1896) 13 T.L.R. 37 ; affirmed, (1897) 13 T.L.R. 198.
(7) (1854) 60 Am. Dec. 453 at p. 457.
(8) (1912) 1 Ch. 663, at p. 665.
(9) (1874) 10 Ch. App. 8.

diverted the water and had in 1935 deprived the plaintiff of valuable floodings of his land. He alleged that, as occupier of the land, he was entitled to have the river flow to and past his land without obstruction or diversion. The defendant specifically denied in the defence that the plaintiff was the occupier of land as alleged and also specifically denied that he was entitled to any riparian rights.

Riparian rights, where they exist, belong to persons as natural rights incident to a right of property in riparian land. They are proprietary rights. The first question which arises in this case is whether the plaintiff has such a relationship to the land that he can be said to be entitled to riparian rights.

The land of which the plaintiff alleges that he is the occupier is Crown land. It is held by the plaintiff's father under a perpetual lease from the Crown. The plaintiff's father and the plaintiff on 9th February 1934 entered into a share-farming agreement for a five-year period. The plaintiff has lived and worked upon the land in accordance with the terms of this agreement. He relies upon the agreement to establish his right to sue. It is contended by the defendant, first, that an occupier of land has no riparian rights; secondly, that, if an occupier of land has such rights, they can exist only in cases where the occupier has possession or a right to possession of the land as distinguished from mere occupation; thirdly, that the plaintiff is not an occupier of the land, or, if he is an occupier, that he has no possession or right to possession of the land under the share-farming agreement; fourthly, that, if on its true construction the share-farming agreement does vest in the plaintiff any possession or right to possession of the land, the agreement is invalid by reason of the provisions of the *Crown Lands Act* 1929 (S.A.), and that therefore the foundation of the plaintiff's alleged right necessarily disappears; fifthly, that, if the agreement does not vest any possession or right to possession in the plaintiff, the same conclusion follows. There are other defences to which it is not necessary to refer if the defences mentioned are good.

Riparian rights, as in the case of other proprietary rights, are protected at the suit of a person who is in possession or entitled to possession of the property to which they are incident (*Gaved* v.

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Martyn (1), per *Willes* J.; *Stockport Waterworks Co.* v. *Potter* (2); and see *Salmond* on *Torts*, 9th ed. (1936), p. 275, and cf. *Stein* v. *Burden* (3)). Occupation which does not amount to possession cannot be the basis of any riparian rights. Such a person has no interest in the *ripa* and can claim no riparian rights (as distinct from rights *publici juris*, such as a right to navigation) in respect of the flow of water in the *flumen*. For example, an employee working upon his employer's premises which are upon the bank of a river has, as such, no riparian rights. It is not contended that the plaintiff is either the lessee or a sub-lessee of the land which, it is said, he occupies. But it is contended that, by virtue of the share-farming agreement, he became entitled, jointly with his father, to possession of the land and that he is in fact in such possession of the land. This question must be the first subject of inquiry.

The land of which the plaintiff claims to be occupier consists of sections 269S and C1 situated in the Hundred of Pirie and section 2W situated in the Hundred of Wandearah. The perpetual leases under which the plaintiff's father holds the land contain covenants that the lessee will not, during the currency of the lease, without the the consent in writing of the Commissioner of Crown Lands and Irrigation first had and obtained, transfer or sublet "these presents or the premises hereby demised or any part thereof or do commit or suffer any act matter or thing whereby the said premises or any part thereof shall or may be transferred or sublet to any person or persons." The leases also contain a provision for forfeiture upon breach of any covenant.

The *Crown Lands Act* 1929, sec. 226, provides (subject to exceptions which are not material in the present case) that no agreement for the sale, transfer or sub-letting of (*a*) any perpetual lease, (*e*) any interest in such lease, (*f*) the land or any interest in the land comprised in any such lease, shall be of any validity or have any force or effect after the expiration of one year from the making of the agreement, unless before the said expiration the consent in writing of the commissioner to the proposed dealing has been obtained. (The consent of the commissioner was not obtained to

(1) (1865) 34 L.J. C.P. 353, at p. 361.
(2) (1864) 3 H. & C. 300, at pp. 326, 327 [159 E.R. 545, at p. 556].
(3) (1854) 60 Am. Dec., at p. 457.

the share-farming agreement.) This section prohibits the transfer of the lease or of any interest in the lease and the sub-letting of the land or of any interest in the land. If, therefore, the effect of the share-farming agreement, construed apart from the Act, would be to convey any interest in the land to the plaintiff or to sublet the land, the agreement would be invalid and could not be the foundation of any right in the plaintiff (See *Roach* v. *Bickle* (1)).

Sec. 227 of the *Crown Lands Act* 1929 was originally enacted by Act No. 1311 of 1917 after the decision of this court in *Hensley* v. *Reschke* (2), where it was held that provisions identical with those of sec. 226 should be construed strictly, in accordance with the general rule of construing strictly any provisions the breach of which would work a forfeiture. It was accordingly held that equitable assignments did not fall within the prohibition of the section and that the section did not prohibit the letting of a proposed purchaser into possession before the registration of a transfer to which the commissioner had given his consent.

Sec. 227 was intended to extend the prohibition contained in sec. 226 to all forms of alienation or attempted alienation without the commissioner's consent and to entry into possession in pursuance of any such alienation. The section prohibits every form of alienation or attempted alienation, without the commissioner's consent, of the land comprised in a perpetual lease, and it also prohibits the mere parting, before such consent is actually obtained, with the possession of the land in pursuance of any agreement for the alienation thereof, whether or not the agreement is enforceable in law. Further, the section imposes a penalty upon any person who either gives or takes possession of any land comprised in a perpetual lease contrary to the prohibition contained in the section. Sub-sec. 3 of sec. 227 is as follows: "In the case of any person transferring, assigning, or sub-letting contrary to such prohibition as hereby extended without such consent as aforesaid, any deed, written instrument, or other agreement whereby the transfer, sub-lease, or assignment is made, or for the occupation of any land so transferred, assigned, or sublet, shall be wholly null and void for all purposes whatsoever."

(1) (1915) 20 C.L.R. 663.

(2) (1914) 18 C.L.R. 452.

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The effect of these sections in the present case, in the first place, is that, if the share-farming agreement transfers any interest in the perpetual lease or any interest in the land comprised in the lease, the agreement is invalid. Further, if the agreement amounts to an alienation or attempted alienation of the land, it is invalid. If the plaintiff's father parted with possession of the land in pursuance of the agreement, he did a prohibited act which is penalized by sec. 227.

In my opinion the provision against parting with possession contained in sec. 227 does not apply in this case. Even if the plaintiff was let into possession of the land by his father, the father did not part with his own possession of the land. The father was at all times still in possession of the land, though in one sense the *de-facto* possession may have been shared with the plaintiff. (See *Peebles* v. *Crosthwaite* (1), *Jackson* v. *Simons* (2) and *Stening* v. *Abrahams* (3).) It is clear that the plaintiff's father did not exclude himself from the legal possession of any part of the premises; therefore he did not part with the possession of the land or any part thereof. I proceed to consider the other provisions of secs. 226 and 227 in relation to the present case.

It is now necessary to consider the precise terms of the share-farming agreement. The agreement contains a recital that the owner, that is, the plaintiff's father (a perpetual lessee), "has agreed to let the land to the share-farmer" (the plaintiff) "for grazing and to work and cultivate the said land and to milk the owner's cows upon shares for a term of five years from the 19th day of February 1934" upon the terms and conditions of the agreement. The clauses of the agreement provide that the share-farmer shall work the land and cultivate it as agreed and that implements, horses, "super." and seed &c. will be supplied by the owner and the share-farmer in equal shares. The share-farmer is to harvest the crops, and he is to be entitled to live on the land and to graze sheep on portions of the land. The crops are to belong to the owner and the share-farmer in equal shares. The share-farmer is to supply all labour, and the parties are to divide equally the net returns from the sale of cream. The share-farmer

(1) (1897) 13 T.L.R. 198. (2) (1923) 1 Ch. 373.
(3) (1931) 1 Ch. 470.

is to repair fences and gates, and the owner is to pay water-rates and taxes. All these provisions, except the preamble, are consistent with a mere contract of employment which would transfer no interest in the land. There is no clause in the agreement which professes in express terms to carry out the agreement to let the land to which the preamble refers.

Clause 10 of the agreement, however, is as follows: "Nothing in this agreement shall be construed as in any way constituting a partnership or an agreement for a partnership between the owner and the share-farmer but during the said term the owner and the share-farmer shall be jointly entitled to the occupation and possession of the said land."

This clause provides that during the term of five years mentioned in the preamble the lessee and the plaintiff shall be jointly entitled to the occupation and possession of the land. The preceding clauses, as I have already stated, are consistent with a contract of employment under which the plaintiff is entitled to be in and upon the land and to occupy it for farming purposes without having any interest in the land itself. If in clause 10 the provision had been that the son and the share-farmer should be jointly entitled to the occupation of the land, and if nothing had been said in that clause about possession, it would be easy to construe the agreement as creating only contractual rights between the parties which might be protected by injunction or other remedy, and as not purporting to vest in the plaintiff any interest whatever in the land. In that case it is plain that the plaintiff would have no rights as a riparian owner. But clause 10 does contain the word "possession," and the agreement was intended to create a joint possession in the lessee and the plaintiff. This joint possession was intended to continue for five years. If the provision is effective according to its terms, the result is that the plaintiff is entitled to be in possession of the land for five years subject to the performance of the other terms of the agreement. He would then be entitled to riparian rights. If such a right to possession constitutes an interest in the land, then the conclusion appears to be inescapable that the lessee has transferred to the plaintiff an interest in the land. Such a transfer is prohibited by the *Crown Lands Act*, and is therefore ineffectual. Alternatively, there would

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be at least an attempted alienation of an interest in the land, and such attempted alienation is also prohibited by the Act. If, in order to avoid this result, the agreement is construed *ut res magis valeat quam pereat*, then (as already stated) it creates only personal rights between the parties and does not give the plaintiff any interest which would enable him to support a claim that he is entitled to riparian rights. Thus, in either view, the plaintiff has no right of possession of the land and therefore cannot sue as a riparian owner or occupier.

I have not found it necessary to consider whether, before the law was altered by the *Law of Property Act* 1936 (S.A.), sec. 40, so as to make it possible for one person to transfer chattels real to himself and another person, a perpetual lessee could, apart from the prohibiting provisions of the *Crown Lands Act*, have transferred a perpetual lease to himself and another person so that that person might become entitled to possession of the land in equity, if not at law. If, apart from the *Crown Lands Act*, such a transfer would have been effective, then it is prohibited and deprived of effect by sec. 227 of the Act as an attempted alienation. If, apart from the Act, it would have been ineffective, then it remains ineffective. In either event the plaintiff would not be entitled to any riparian rights.

The conclusion that the plaintiff has no right of action may, I think, be reached by quite a separate line of argument. Sec. 226 prohibits sub-letting without consent. The share-farming agreement recites that the lessee has agreed to sublet the land to the plaintiff. The whole share-farming agreement is made in pursuance of the agreement "to let," that is, really to "sublet," as the term is used in the statute (*Lang* v. *Castle* (1)). It is therefore made in order to carry out a prohibited transaction, and it cannot be separated from that transaction—it is part of the very transaction. It therefore cannot produce any legal effect and cannot be relied upon as the foundation of any rights in the plaintiff.

Finally, sub-sec. 3 of sec. 227 provides that, where any person sublets without consent, any agreement for the occupation of any land so sublet shall be "wholly null and void for all purposes whatsoever." In the present case, as the recital in the share-farming

(1) (1924) S.A.S.R. 255.

agreement shows, there was an agreement for sub-letting the land contrary to the prohibition contained in the Act, and in clause 10 of the agreement there is an express agreement for the occupation of the land so sublet. The result is that the agreement for the occupation of the land sublet is wholly null and void for all purposes whatsoever. Accordingly the agreement confers no rights of any kind upon the plaintiff and cannot serve as the foundation of his claim.

Thus, in my opinion, the plaintiff has no right of action, and accordingly the appeal should be allowed.

RICH J. The plaintiff's claim is for the violation of riparian rights in respect of land of which he says he is the occupier or one of the occupiers. He has no estate in the land, and he cannot succeed except upon the strength of his occupation. This means, in my opinion, that he must show that he was at the time of the acts, complained of in legal possession of the land. He does not contend that he solely was in possession, but he says that he and his father who held the Crown lease in the land, were joint occupiers, viz., had joint possession. "It is frequently uncertain to whom the actual control of a thing is to be attributed, and, when this question is settled, the law may credit the advantages of possession to some person other than the apparent possessor. Or it may credit these advantages to a particular person, although the possession is disputed or is vacant. Hence arises the distinction between actual and legal possession. Actual possession denotes the state of fact; but the person to whom are credited the advantages of possession has the legal possession, whether he is the actual possessor or no" (*Encyclopædia of the Laws of England*, 2nd ed., vol. XI., p. 319, s. v. "Possession"). Further, "ordinarily, actual and legal possession coincide. An occupying tenant of a house has the actual possession of the house, and can maintain trespass against an intruder; in other words, he has the legal possession as well. But if the occupier is a servant of the owner, he has only the actual possession; the legal possession is in his master, in whose name an action of trespass must be brought. If two men are present on a field, each claiming the possession, until one has prevailed the actual possession is undecided; but if either of them is entitled to the possession, the

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legal possession follows the title" (*Encyclopædia of the Laws of England*, 2nd ed., vol. XI., p. 319, s.v. "Possession"). Again, "possession is proved by various acts varying with the nature of the subject matter. But exclusiveness is essential. That, of course, does not mean that several persons may not in concert have and exercise that exclusive possession as against the rest of the world" (*Moors* v. *Burke* (1)). The only ground upon which the plaintiff relies for the assertion of his possession is the fact that, living with his father upon the land, his father entered into a share-farming agreement with him containing a provision for joint occupation and possession. The agreement has some curious features. It begins by reciting an agreement to let, but the letting is clearly not a leasing, because the father does not give up the possession of the land and the express purpose of the letting is that the son shall labour for the father. The clause relating to joint possession has for its main object the rebuttal of any implication that there is a partnership. It goes on to say that father and son shall be entitled to joint occupation and possession, but it says it rather as a qualification or antithesis to the statement that there shall be no partnership. I do not think that there was any intention either on the face of the agreement or behind it to confer legal possession in the sense I have explained upon the son, i.e., jointly with the father. In a passage from *Pollock and Wright, Possession in the Common Law* (1888), p. 28, cited in *Moors* v. *Burke* (2), Sir *Frederick Pollock* says: "The whole terminology of the subject, however, is still very loose and unsettled in the books, and the reader cannot be too strongly warned that careful attention must in every case be paid to the context." I am not disposed to attribute to the O'Briens, father and son, who reside above Goyder's line, any greater precision in the use of terms than Sir *Frederick* was able to find "in the books." But I propose to follow his counsel and pay careful attention to the context and, I would add, the subject matter. That seems to me to make it clear that they were concerned in giving the son a right resting in contract against his father to enjoy conjointly with him the use of the land without affecting his father's title to the property or legal

(1) (1919) 26 C.L.R. 265, at p. 271. (2) (1919) 26 C.L.R., at pp. 268, 269.

possession. Accordingly, I think the father is the proper plaintiff and the son cannot sue alone or at all.

The appeal should be allowed.

DIXON J. The judgment under appeal awards damages to the plaintiff for an injury consisting in the breach of one of the natural rights of property, and it grants a mandatory injunction so that enjoyment of the right may be restored. The right in question is one incident to land through which, or along the boundaries of which, a natural stream flows. It is the right to receive the advantages, and to make use, of the water of the stream flowing according to its ordinary course and without prior diminution by diversion to such an extent as to cause sensible loss or damage to the occupier of the land. The land in respect of which the plaintiff has successfully claimed this right is not owned by him. It is held by his father under a Crown lease, a perpetual lease under the *Crown Lands Acts*, now consolidated in Act No. 1923 (S.A.). His father dwells upon the land, and he lives with his father. Prima facie, therefore, it is his father and not he who should sue for any infringement of riparian rights incident to the land. The father, however, does not appear to have been willing to assume the position of plaintiff. The son claims, not as owner, but as one of two persons in joint occupation and possession of the land, or as a person in the position of a licensee with an interest who has suffered loss in consequence of the diversion of water needed for the enjoyment of his interest. In support of this claim, he puts forward a share-farming agreement which, he says, places him in joint occupation and possession of the land with his father and confers upon him an interest as a licensee. The instrument recites an agreement on the part of the father to let the land to the son " for grazing and to work and cultivate the said land and to milk the owner's " (i.e., the father's) " cows upon shares for a term of five years." The word " let " does not here import an intention to demise, as indeed the words which follow it clearly show. The operative clauses provide for the cultivation on share-farming terms of such parts of the land as the parties might agree upon. The document appears to intend also that the parties should graze dairy and other cattle and stock upon the land upon

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similar terms, and it provides that the share-farmer, that is the plaintiff, shall be entitled to live on the land. The final clause, after providing against the inference that a partnership is created, goes on: "but during the said term the owner and the share-farmer shall be jointly entitled to the occupation and possession of the land."

To the plaintiff's contention that under this agreement he obtains an occupation and possession of the land, or an interest sufficient to support his action, the defendant replies that either the agreement does not assume to give him any such interest in the land or in relation to the land, or, if it does, it is obnoxious to secs. 225, 226 and 227 of the *Crown Lands Act* 1929 (No. 1923), the general purpose of which is to forbid unpermitted alienation by a Crown leaseholder, including sub-letting and agreements for alienation and the parting with possession pursuant thereto.

It may be conceded that an action for the invasion of riparian rights is maintainable by an occupier of riparian land in virtue of his possession and a lawful estate or interest need not be shown (*Mason* v. *Hill* (1); *Stein* v. *Burden* (2); *Gaved* v. *Martyn* (3)).

But the possession must be full legal possession such as would support an action for trespass *quare clausum fregit*. I do not think a licensee, whether his licence be revocable or not and whatever his interest, not being in possession and being entitled to no estate or interest in the land, could maintain such an action. An examination and comparison of the two reports of *Gaved* v. *Martyn* (3) to which I have referred will show that the material part of that decision was based upon full occupation and possession of the close called Carrancarrow clay-works.

If, however, the plaintiff and his father were at the time of the grievances complained of in joint possession of the land in the full legal sense, they could, as plaintiffs, maintain an action for unlawful diversion of water flowing in a natural stream through or beside the land. No objection was taken before the trial to the non-joinder of the father, and accordingly at this stage the plaintiff may be permitted to recover upon the cause of action without joining him,

(1) (1833) 5 B. & Ad., at p. 27 [110 E.R., at pp. 701, 702].
(2) (1854) 60 Am. Dec., at p. 457.
(3) (1865) 19 C.B.N.S., at p. 752 [144 E.R., at p. 982]; 13 L.T. 74, at p. 77.

that is to say, if he makes out the joint possession and the other elements necessary to his title to relief. But, in spite of the terms in which the final clause of the share-farming agreement is expressed, I do not think full legal possession of the land should be attributed to the father and son jointly. I think it remained in the father solely. Possession is a word used in more than one sense. The purpose of the agreement is to provide for the co-operation of the share-farmer and the landowner in the cultivation and use of the land and to ensure that, as against the landowner, the share-farmer may have such enjoyment of the land as is necessary or proper for the purpose of working it and obtaining his share of the fruits of their co-operation. The landowner enters into the transaction as a Crown lessee who is entitled as against the world to exclusive possession and enjoyment. The parties are not concerned with rights of property and possession as against the outside world. Indeed, it may be assumed that they would desire to avoid anything which looked like alienation of any interest in the land or the creation of any right *in rem* in relation to the land which might be considered a breach of the *Crown Lands Act*, and no construction of ambiguous expressions in the agreement should be adopted which might lead to such a result. What was intended was that by contract the share-farmer, that is, the son, should obtain against the owner, that is, the father, a right to the full use and enjoyment of the land in conjunction with him. To give to the agreement an interpretation by which it would mean that the father's possession in virtue of his lease should be converted for a period of five years to a joint possession against the world, so that, for instance, they would be ratable jointly and must join in maintaining trespass, would, it appears to me, go far beyond the purpose of the agreement. The matter rested in contract, and the rights intended were rights *inter partes*. Further, I think that the mere execution of the agreement would not suffice to work a change in the full legal possession. There is no evidence of any change in the relationship of father and son to the land. No assertion of joint possession was made. They had long dwelt together on the land. The son had long worked upon it. They simply went on as before.

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In all the circumstances I do not think that the plaintiff has shown that his father's full legal possession was transferred or delivered to himself and his father.

For these reasons I think that the plaintiff has failed to support his cause of action.

McTIERNAN J. In my opinion, the appeal should be allowed. The respondent, I consider, failed to establish any interest entitling him to bring an action. His action was based on the alleged infringement of a supposed right in him to the flow of a stream of water which was diverted or obstructed by the appellant. The stream runs through land which, at all material times, the respondent's father held on a leasehold tenure from the Crown under the provisions of the *Crown Lands Act*, consolidated in Act No. 1923 of South Australia. The respondent's father, as the owner of this lease, enjoyed the right to have any natural stream of water which ran through the land flow in its natural state and course. *Aqua currit et debet currere ut currere solebat* (*Wood* v. *Waud* (1)). This is a right which exists *ex jure naturæ* as incident to property in the land. Unless the respondent had a right in the nature of property in the land, he had no title to sue in respect of the alleged diversion of the water; he enjoyed only such rights in respect of the land as were conferred on him by his agreement to work the land "on the halves."

The terms of the agreement have been set out sufficiently in the reasons for judgment of other members of the court. I agree that the agreement did not confer on the respondent any right in the nature of property. It is clear that it did not intend to create a term of years which would vest in the respondent's executors or administrators, if he died before its expiration; for, obviously, the agreement did not impose on the respondent obligations to perform work which would be transmissible. These obligations are not severable from the final clause of the agreement, which states that the owner of the leasehold and the share-farmer (the respondent) should be jointly entitled to the occupation and possession of the land. Moreover, the agreement negatives any assumption that the

(1) (1849) 3 Ex. 748, at p. 775 [154 E.R. 1047, at p. 1058].

respondent was to have exclusive possession of the land. These considerations are sufficient to dispose of the contention that the agreement created a lease. The word " let " in the introductory part of the agreement is insufficient in itself to create a tenancy. The word " possession " as used in the final clause is not unequivocally descriptive of an interest in the land. This clause is to be construed in the light of the whole agreement. It did not expressly divest the respondent's father of his right to the possession of the land. Its effect was to bind the respondent's father as the lessee in possession to share with the respondent his *de-facto* possession of the land for the purposes of the agreement, but not to divest him of any part of his interest in the land. Notwithstanding the agreement, the father continued to be possessed of the land in virtue of his ownership of the lease. The respondent got a licence in the terms of the agreement to use and occupy the land. The grant of this right gave him a remedy *in personam* based on the agreement, but no such right of property as would entitle him to the enjoyment of the riparian rights sought to be enforced against the appellant.

The respondent is confronted with the difficulty that, if the agreement operated to pass any interest *in rem*, it might be obnoxious to secs. 226 and 227 of the *Crown Lands Act*. It is unnecessary, however, to pursue that question ; for the agreement, whether it was invalid or not under these provisions conferred no right in the nature of property in the land. Accordingly, the respondent had no title to sue in respect of the alleged diversion or obstruction of the water by the appellant.

Appeal allowed with costs. Judgment of Supreme Court set aside and in lieu thereof judgment to be entered for the defendant Hill with costs.

Solicitors for the appellant, *Alderman, Reid & Brazel.*
Solicitors for the respondent, *W. J. Denny & Stanley.*

C. C. B.