[HIGH COURT OF AUSTRALIA.]

THORPES LIMITED . . . . . APPELLANT;
DEFENDANT,

AND

GRANT PASTORAL COMPANY PROPRIETARY LIMITED . . . . . } RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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1954, SYDNEY, *Dec.* 3, 6-8;

1955, MELBOURNE, *March* 15.

Dixon C.J., McTiernan, Webb, Fullagar and Kitto JJ.

Water, Water Supply and Watercourses—River—Riparian owners—Rights and liabilities—Common law—Statute—Earth works—Construction along banks of tributary and flood alveus—Interference with natural flow—Flood waters—Damage—Water Act 1912-1946 (*N.S.W.*) (*No.* 44 *of* 1912—*No.* 35 *of* 1946), *s.* 4A.

Appeal—Submission—Made late in address to High Court—Not made at trial of action, nor during appeal to State court—Not allowed.

A river flowed through certain lands owned and occupied by P. and also through D.'s lands opposite thereto. D. had constructed certain earth works along the banks of a creek, a tributary of the river, and across a flood alveus of the river, which in time of flood formed an escape channel for water which overflowed the banks of the river. During 1950, waters from the river inundated P.'s lands, leaving as they subsided a deposit of sand, silt and debris which caused considerable damage. In an action P. alleged that D. was negligent in the construction and maintenance of the earth works and was guilty of nuisance in interfering with the natural flow of the river and diverting its water on to P.'s land. A jury found for P. on both counts.

Held that the *Water Act* 1912-1946 (N.S.W.) had not deprived a landowner of his right to complain that water silt and debris had been thrown on his land by an obstruction made to the channel or natural flood channel of a stream without lawful justification or excuse.

Hanson v. *Grassy Gully Gold Mining Co.* (1900) 21 N.S.W.L.R. 271, referred to and distinguished.

Decision of the Supreme Court of New South Wales (Full Court): *Grant Pastoral Co. Ltd.* v. *Thorpes Ltd.* (1953) 54 S.R. (N.S.W.) 129; 71 W.N. 101, affirmed.

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At the close of the address on behalf of the appellant, D., its counsel submitted that the levee banks had been erected by way of defence against a common enemy and that the case was covered by *Gerrard* v. *Crowe* (1921) 1 A.C. 395. That submission had not been made either at the trial or upon the appeal to the Full Court of the Supreme Court of New South Wales.

Held that in the circumstances such submission not having been made previously should not be allowed to be made at that late stage.

APPEAL from the Supreme Court of New South Wales.

Grant Pastoral Co. Pty. Ltd. brought an action in the Supreme Court of New South Wales claiming that the defendant, Thorpes Ltd., had caused damage to certain land of the plaintiff.

The declaration contained two counts. In the first count it was alleged that at all material times the plaintiff was the owner and occupier of certain lands in the neighbourhood of the Belubula River and of certain other creeks or streams, and the defendant, who was possessed of and in occupation by its servants and agents of certain land in the same neighbourhood, by those servants and agents wrongfully and unlawfully made and erected certain works, embankments and channels on the defendant's land and kept and maintained them and wrongfully and unlawfully diverted and altered the usual and regular course of the waters of the above-mentioned river, creeks or streams and of flood waters coming therefrom and prevented and obstructed those waters from passing and flowing in the channels in and through which they had prior to those wrongful acts of the defendant regularly passed and flowed and caused those waters to flow and pass on to the plaintiff's lands in greater quantities and with greater velocity than they would but for those wrongful acts have done whereby the pasturage and crops on the plaintiff's lands were destroyed and damaged and parts of those lands were washed away and destroyed and parts thereof were and for a long time remained covered by water and great quantities of sand, silt and debris were deposited on the plaintiff's lands and the value of those lands was diminished. In the second count it was alleged that the defendant by its servants and agents so negligently carelessly and improperly made and erected certain works, embankments and channels on the defendant's said land and kept and maintained them and so negligently carelessly and improperly conducted itself in and about failing to take reasonable care and to exercise reasonable skill to prevent those works, embankments and channels from bringing about in times of flood or heavy rains the consequences and the damage

mentioned and in and about making, erecting, keeping and maintaining such works, embankments and channels in a manner and to an extent more than was reasonably necessary to protect the defendant's land from damage by flood that the usual and regular course of the waters of the river, creeks or streams and flood water therefrom was changed and altered and the usual and regular flow of those waters was obstructed and diverted and the waters were by those acts of the defendant caused to flow and pass on to the plaintiff's lands in greater quantities and with greater velocity than they otherwise would have done whereby the plaintiff suffered the damages set forth in the first count.

The defendant pleaded not guilty, and denied that part of the declaration as alleged that at all material times the plaintiff was the owner and occupier of the lands mentioned and that the defendant was possessed of and in occupation by its servants and agents of certain other land in the same neighbourhood. For a third plea the defendant said that at the time of the acts alleged in the declaration and at all material times the plaintiff and the defendant were occupiers of land situate on either side of the Belubula River and through and past the plaintiff's lands and the defendant's lands respectively flowed the waters of that river being the waters alleged in the declaration, and the defendant further said that those waters were waters flowing in a river within the meaning of the *Water Act* 1912-1946 and that the wrongful acts of the defendant alleged in the declaration were acts performed and done by the defendant in relation to water flowing in a river within the meaning of that Act.

The plaintiff joined issue upon the pleas, and, for a second replication to the third plea, said that the waters mentioned in the declaration were the waters of the Belubula River in the main stream thereof and also in the flood course thereof and also the waters of a creek known as Emu Creek and that the wrongful acts of the defendant alleged in the declaration were acts done and performed in relation to all such waters and in relation to the obstruction and diversion thereof. For a third replication the plaintiff, as to the third plea, said that the wrongful acts of the defendant alleged in the declaration included the construction and the maintenance of the levées and channels obstructing or diverting those waters which were works within the meaning of the *Water Act* 1912-1946 to which the provisions of that Act relating to the licensing of such works applied; and the plaintiff further said that no licence was at any material time granted pursuant to that Act in respect of those works or any of them.

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The plaintiff demurred to the third plea on the grounds : (i) that it confessed but did not avoid the causes of action to which it was pleaded ; (ii) that notwithstanding the provisions of the *Water Act* 1912-1946 the plaintiff was entitled to maintain the causes of action sued upon in relation to damage caused by the obstruction or diversion of waters flowing in a river within the meaning of that Act and that Act did not take away or limit the plaintiff's right to maintain such actions ; and (iii) if that Act did in any circumstances take away or limit such right when the acts complained of consisted of or included the construction or maintenance of works which that Act required to be licensed and which were not licensed and the plea was defective in that it did not allege that the defendant had obtained and at all material times held a licence from the Water Conservation and Irrigation Commission in respect of the embankments and channels mentioned in the declaration.

The defendant joined issue on the third replication and in demurrer on the third plea, and demurred to the second and third replications as affording no answer in law to the third plea.

In further particulars furnished by the plaintiff to the defendant the plaintiff stated, *inter alia*, that the damages sustained by the plaintiff included the following heads of damage : (a) about ninety-five acres of land upon which lucerne was growing and was in production were so damaged that the crop thereon was killed and to restore such land to production it must be reclaimed and recultivated and have fresh crops sown thereon ; (b) on the said area of land sand, silt and debris were deposited over an area of about thirty-six acres thereof and this must be removed before the said land can be recultivated. All the said area of about ninety-five acres was waterlogged ; (c) reclamation of the river bank and area adjacent thereto ; and (d) loss of value of the said land of the plaintiff.

The jury returned a verdict in favour of the plaintiff in the sum of £3,600.

An appeal to the Full Court of the Supreme Court of New South Wales (*Herron* and *Kinsella* JJ., *Owen* J. dissenting) against the judgment made pursuant to that verdict was dismissed (*Grant Pastoral Co. Pty. Ltd.* v. *Thorpes Ltd.* (1)).

From that decision the defendant appealed to the High Court.

Further facts and relevant statutory provisions appear in the judgment of *Fullagar* J. hereunder.

Sir *Garfield Barwick* Q.C. (with him *R. L. Taylor* Q.C. and *I. F. Sheppard*), for the appellant. The *Water Act* 1912-1946 (N.S.W.)

(1) (1953) 54 S.R. (N.S.W.) 129 ; 71 W.N. 101.

vested in the Crown a right of riparian ownership to the use of the flow. The respondent was complaining of an infraction of his rights as a riparian owner, that is to have the river go unimpeded and unaugmented in flow. The *Water Rights Act* 1896 (N.S.W.) precluded this cause of action. The first count is a count for the wrongful and unlawful diversion of the river and the obstruction of the passage of its waters in their normal channels. The respondent's pleadings show that it was complaining of obstruction or diversion of flowing waters in a stream. The broad plan of the *Water Act* 1912-1946 (N.S.W.) is that the control of the flow of the waters and the construction of levées and banks in the streams and in flood plains has been vested in the Water Commission. All owners of land within the flood banks are riparian owners: the important thing is that the land should abut on the river and it was to the land which so abutted that the common law attached disqualification of the rights of other persons to do anything in the alveus: see *Greenock Corporation* v. *Caledonian Railway Co.* (1). An owner is entitled to prevent water from going on to his land even though he directs it on to another man's land, and he has a right not to have water cast on to his land in quantities greater than they would naturally go. The owner of land has no absolute right not to have some more water on his land than would otherwise go there; he has to take floods as they come, at common law, if he is a riparian owner, subject to other riparian owners not altering the flow. If they alter the flow and consequential damage results he may complain; he complains, however, not because of the damage but because of his proprietary right. The doctrine of *Gerrard* v. *Crowe* (2), is that the throwing-off of flood waters is the natural use of one's land. The purpose of the *Water Act* 1912-1946 was to put into the control of the Crown the whole question of erecting banks and the like, in the channels of the rivers. *Gerrard* v. *Crowe* (3) justifies the proposition that the appellant was not liable for erecting the bank where it did although the appellant caused the damage. The erecting of the bank in that position was a reasonable and natural user by the appellant of his land to throw-off the flood waters, and it is immaterial that in so doing it caused damage through the flooding of the flood water on to the land of others. A plaintiff must prove that the natural user has been exceeded and damage caused thereby (*West Cumberland Iron & Steel Co.* v. *Kenyon* (4)). The appellant's case is not cut across

(1) (1917) A.C. 556.
(2) (1921) 1 A.C. 395, at p. 397.
(3) (1921) 1 A.C. 395.
(4) (1879) 11 Ch. D. 782, at p. 787.

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by *Greenock Corporation* v. *Caledonian Railway Co.* (1). In that case, which is not very far from *Rylands* v. *Fletcher* (2), the person concerned did not simply alter the flow of the stream but created an artificial channel: see also *Tennent* v. *Earl of Glasgow* (3). *Bickett* v. *Morris* (4) leaves no room for a different cause of action remaining with the riparian owner, namely a right to complain of the subsequent damage as in itself giving rise to a cause of damage. The summary of *Greenock Corporation* v. *Caledonian Railway Co.* (5) by Lord *Maugham* in *R.* v. *Southern Canada Power Co. Ltd.* (6) is not accepted. His Lordship took too much from the first-named case; there the water was completely stopped and put into a completely different channel. The riparian owner has a passive right to have the waters flow past and a right to use it (*Hanson* v. *Grassy Gully Gold Mining Co.* (7); *H. Jones & Co. Pty. Ltd.* v. *Kingborough Corporation* (8); *Dougherty* v. *Ah Lee* (9)).

[DIXON C.J. referred to *Nitro-Phosphate & Odam's Chemical Manure Co.* v. *London & St. Katharine Docks Co.* (10) and *Thomas* v. *Birmingham Canal Navigation's Prospectors Co.* (11).]

E. S. Miller Q.C. (with him *M. F. Hardie* Q.C. and *H. H. Glass*), for the respondent. The whole of the facts must be considered and not part only. (Counsel then dealt with the facts at length). The onus is upon the appellant to show that not only the action in nuisance but also the action in negligence was taken away by the *Water Act* 1912-1946. The respondent claims that its land has been damaged by the appellant. The land is vested in, and has never been divested from, the respondent. It is not vested in the Crown. The land which was damaged, if one assumes it was otherwise owned would be in the ownership of that person and in no different position than is the respondent's position in this case. Apart from the *Water Act* 1912-1946, the common law rights were, so far as nuisance was concerned, as stated in *Gerrard* v. *Crowe* (12); *Menzies* v. *Breadalbane* (13) and *R.* v. *Trafford* (14). The important question is: Is there in the *Water Act* 1912-1946 an express statement showing an intention to take away a previously existing common law right, or is it a necessary implication that such previously existing common law right has been taken away? The

(1) (1917) A.C., at pp. 569, 570.
(2) (1868) L.R. 3 H.L. 330.
(3) (1864) 2 M. (H.L.) 22.
(4) (1866) L.R. 1 H.L. Sc. & Div. 47, at pp. 48, 51, 55, 56.
(5) (1917) A.C. 556.
(6) (1937) 3 All E.R. 923.
(7) (1900) 21 N.S.W.L.R. 271, at pp. 275, 276.
(8) (1950) 82 C.L.R. 282, at p. 342.
(9) (1902) 19 W.N. (N.S.W.) 8.
(10) (1878) 9 Ch. D. 503.
(11) (1879) 43 L.T. 435.
(12) (1921) 1 A.C. 395.
(13) (1828) 3 Bli. (N.S.) 414 [4 E.R. 1387].
(14) (1831) 1 B. & Ad. 874 [109 E.R. 1011].

count for nuisance is not a count for interference with riparian rights. It has nothing to do with riparian rights. The appellant caused physical injury to the respondent's land by putting thereon harmful things. *Dougherty* v. *Ah Lee* (1) was wrongly decided. *Hanson* v. *Grassy Gully Gold Mining Co.* (2) had nothing to do with nuisance; it was merely a case in which the right of the riparian owner with respect to the use and flow of the water had been interfered with. In the respondent's case there was not any count for interference with riparian rights. It was an action for damages, mainly, for the physical injury to the respondent's land caused by the depositing on it of harmful things for which the jury has held the appellant to be responsible. The flooding of land caused by diversion of a stream is a type or species of the action of nuisance (*Sedleigh-Denfield* v. *O'Callaghan* (3)). While ordinary use of property is a defence as is also the putting-down of a bank outside a flood channel to repel a common enemy, the putting-down of a bank in the channel is not a defence, and the bringing-in by an artificial channel of water in this case puts the case still further away from any defence that may be available through *Gerrard* v. *Crowe* (4). In an action for nuisance it is immaterial that the land affected is in a flood channel. The subject land is outside the flood channel. It is a fundamental fallacy in the argument submitted for the appellant to confuse flood channel with land flooded. Of course, it is inundated because it is in a flood channel, but land flooded is not synonymous with flood channel. The evidence directly contradicts the view that the action was in substance an action for interference with the flow of the river. The *Water Act* 1912-1946 was the only matter argued before the Supreme Court and is the only matter open to the appellant in this Court. The claim of the appellant amounts to a submission that the *Water Act* 1912-1946 fundamentally affected the law of torts, that is that as a result of the Act persons, whether riparian owners or not, no longer possessed any rights arising out of damage suffered by them or their property as a result of the action of another person in discharging on to their land waters that would not have been so discharged in the ordinary course of nature. Such a fundamental alteration of the law would only be made by express words. The practice in the courts of New South Wales is to treat the *Water Act* 1912-1946 as affecting remedies rather than rights. There is nothing in the Act nor in *Hanson* v. *Grassy Gully Gold Mining Co.* (5) which authorizes the deposit of silt and stones

(1) (1902) 19 W.N. (N.S.W.) 8.
(2) (1900) 21 N.S.W.L.R., at pp. 273, 277.
(3) (1940) A.C. 880, at pp. 888, 889.
(4) (1921) 1 A.C. 395.
(5) (1900) 21 N.S.W.L.R. 271.

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on any person's land. If the appellant's argument is right no one can sue for damage to the respondent's land.

[DIXON C.J. referred to *R.* v. *Southern Canada Power Co. Ltd.* (1).]

What, under the Act, is vested in the commission is the right to the use and flow and to the control of water. In the exercise of that right the commission may enter land, may take measures for, *inter alia*, preventing the unauthorized obstruction or change in the course of rivers.

R. L. Taylor Q.C., in reply. The point under the *Water Act* 1912-1946 was argued in the Full Court below, and was argued on the basis that the respondent's cause of action was the cause of action as of a riparian owner and that right was taken away. It is nothing to the point to say that because the claim is that of a riparian owner it is an action in nuisance. In *Dougherty* v. *Ah Lee* (2) it was said it was a claim for nuisance because the plaintiff made a clear plaint alleging that both the plaintiff and the defendant were riparian owners. That plaint was a plaint in nuisance because the nuisance was an interference with the right that a riparian owner enjoys—to have the water come to him naturally: *Clerk and Lindsell* on *Torts*, 9th ed. (1937), p. 440. The cause of action now claimed on behalf of the respondent does not depend upon riparian owners but merely depends upon the respondent having damage done to the land by interference in the flow of water. It is implicit in *Gerrard* v. *Crowe* (3) that a person who prevents the river or flood from going further on to his land is entitled, provided he builds out of the alveus, to erect something on someone else's land. *Whalley* v. *Lancashire & Yorkshire Railway Co.* (4) is a different type of case, due to the peculiar circumstances. A cause of action may no longer be based upon alteration in the water that comes to a landowner and damage caused by it. The deposit of sand and silt on the respondent's land is stated in its claim as consequential damage only and not as the cause of action.

Cur. adv. vult.

15th Mar., 1955

The following written judgments were delivered:—

DIXON C.J. I have had the advantage of reading the judgment of *Fullagar* J. and agree in it. All I desire to add is that I think that the question whether the decision in *Hanson* v. *Grassy Gully Gold Mining Co.* (5) can be supported should be reserved for further consideration, that is to say until a case comes before us in which its correctness is directly in issue and it is fully argued.

(1) (1937) 3 All E.R. 923.
(2) (1902) 19 W.N. (N.S.W.) 8.
(3) (1921) 1 A.C. 395.
(4) (1884) 13 Q.B.D. 131.
(5) (1900) 21 N.S.W.L.R. 271.

McTIERNAN J. I agree that the appeal should be dismissed. There was ample evidence upon which the jury could find for the respondent upon the causes of action declared upon. The appeal really turns upon the question whether those causes of action were barred by the *Water Act* 1912-1946. Upon reading the two counts in the declaration, it is clear that neither of them falls within the scope of the Act. *Kinsella* J. said: "The complaint in the present case is not of interference with the flow of water in the river, but of inundation of lands by overflow of water which having left the channels has ceased to be part of the flow of the stream contemplated by s. 4A (1).

Hanson's Case (1), in my opinion, is not authority for the proposition on which the appellant's case depends, that the Act in abrogating the riparian rights of riparian owners has also divested those owners of their common law right to enjoy their lands outside the natural channels of a stream without unlawful interference with their possession, if that interference be in the form of inundation by water diverted from a river. At common law riparian rights are not and never were the only rights of riparian owners in relation to riparian lands, but were of a special class super-added to the ordinary rights incident to the possession of the land. The right to freedom from wrongful diversion of water out of the channel and on to his land is distinct from and independent of the right of a riparian owner to the uninterrupted flow of water in the channel.

I am therefore unable to accede to the appellant's contention that this action is a contest in respect only of riparian rights. In my view it is based on the general common law right of landowners. The action of the appellant in interfering with the natural flow of the stream was clearly wrongful. Its results extended beyond the immediate limits of the river and caused an interference with the lands of the plaintiff. The respondent's lands were damaged by the wrongful act of the appellant and for this an action will lie.

'At common law, apart from statute, the duty of one who obstructs the natural flow of a river is to prevent damage, and, if damage results to any persons, he will be liable to them, irrespective of whether or not they are riparian owners'. *R.* v. *Southern Canada Power Co. Ltd.* (2) (per Lord *Maugham*)" (3).

In my opinion this passage is correct, and it is a complete reply to the appellant's defence based upon s. 4A (1) of the *Water Act* 1912-1946.

(1) (1900) 21 N.S.W.L.R. 271.
(2) (1937) 3 All E.R. 923, at p. 928.
(3) (1953) 54 S.R. (N.S.W.), at p. 145; 71 W.N. 101.

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WEBB J. I would dismiss this appeal for the reasons given by *Fullagar* J. whose judgment I have had the advantage of perusing.

FULLAGAR J. The respondent was the plaintiff, and the appellant the defendant, in an action brought in the Supreme Court of New South Wales and tried before *McClemens* J. and a jury. The jury returned a verdict for the plaintiff for damages assessed at £3,600, and judgment was entered for the plaintiff for that amount. The defendant appealed to the Full Court of New South Wales against the verdict and judgment. A majority of that court (*Herron* and *Kinsella* JJ., *Owen* J. dissenting) was of opinion that the appeal should be dismissed, and it was dismissed accordingly (1). The defendant now appeals to this Court against the order of the Full Court.

The plaintiff's declaration contained two counts, of which only the first need now be considered. By the first count it was alleged that " the plaintiff was the owner and occupier of certain lands in the neighbourhood of the Belubula River and of certain other creeks or streams and the defendant was possessed of and in occupation by its servants and agents of certain land in the same neighbourhood and the defendant by its servants and agents wrongfully and unlawfully made and erected certain works embankments and channels on the said land of the defendant and kept and maintained the same and wrongfully and unlawfully diverted and altered the usual and regular course of the waters of the said river and of the said creeks or streams and of flood waters coming therefrom and prevented and obstructed such waters from passing and flowing in the channels in and through which they had prior to the said wrongful acts of the defendant regularly passed and flowed and caused the said waters to flow and pass on to the said lands of the plaintiff in greater quantities and with greater velocity than they would but for the said wrongful acts of the defendant have done whereby the pasturage and crops on the said lands of the plaintiff were destroyed and damaged and parts of the said lands were washed away and destroyed and parts of the said lands were and for a long time remained covered by water and great quantities of sand and silt and debris were deposited upon the said lands of the plaintiff and the value of the said lands was greatly diminished ".

The defendant pleaded the general issue. By a second plea it specifically denied the allegations of ownership and occupation of land by the plaintiff and defendant respectively. A third plea, which was allowed by amendment during the trial, was designed

(1) (1953) 54 S.R. (N.S.W.) 129; 71 W.N. 101.

to lay the foundation for an argument that any cause of action which the plaintiff might have had at common law in respect of the matters and things complained of had been taken away by the *Water Act* 1912-1946 (N.S.W.). This contention was the only ground of appeal argued in the Full Court, and it is the only point upon which it was intended to support the appeal to this Court, although, at the end of the argument for the appellant, as will appear, another ground was taken.

The plaintiff and the defendant are the respective occupiers of two properties near Canowindra in New South Wales. Between the two properties runs a stream known as the Belubula River. The river at the relevant part of its course runs approximately from north to south, the plaintiff's land abutting on it to the west, and the defendant's land abutting on it to the east. Running through the defendant's land, and following a course roughly from east to west, is a creek known as Emu Creek, the course of which joins that of the Belubula River at a point opposite the plaintiff's land. The plaintiff's case may be stated in outline as follows. Both the river and the creek are subject to flooding in times of heavy rainfall, but the normal flooding which took place on the plaintiff's land did no harm and was indeed, since the land was used for the growing of lucerne, generally rather beneficial than otherwise in its effects. When the land was in its natural state, flood water overflowing from Emu Creek, together with flood water coming from the part of the defendant's land to the north of Emu Creek, flowed in a general south and south-westerly direction, following a defined natural depression and spreading out here and there into " lagoons ", until it joined the course of another creek, known as Sullivan's Creek, and ultimately found its way into the Belubula River at a point more than a mile below the point of confluence of Emu Creek with the river. Some time before 1950 two banks or levées had been erected on the defendant's land, one along the north bank and the other along the south bank of Emu Creek. These levées were some five feet in height and some 2,000 feet in length, extending east from the point of confluence with the river. Some at least of the earth required for the erection of these levées was taken from the bed of the creek, so that the operation involved the deepening and widening of the channel of the creek for the whole length of the levées. There was a gap some six feet long in the northern levée, but the southern levée was continuous. The effect of this work was, when heavy flooding took place in 1950, to concentrate into the channel of Emu Creek large quantities of water which had formerly run down to the south and south-west. The water so concentrated

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ran, of course, into the river, and, entering it with some velocity, caused a " turbulence " and a " scouring ", with the result that not only was much more water thrown on the plaintiff's land than would normally have gone there, but considerable quantities of sand and silt and debris were deposited on the plaintiff's land, affecting it injuriously to a serious extent.

The above brief statement is in no sense a statement of agreed or admitted facts. On the contrary it was at most points the subject of strong controversy at the trial. It involves, moreover, a degree of simplification. It represents, however, the substance of the plaintiff's case, and there was evidence, including expert evidence, on which a jury could find that the plaintiff had established its case in point of fact. The jury must, of course, be taken so to have found.

The argument for the defendant appellant is that the plaintiff's action is an action for damages for the infringement of a right in respect of water, a right vested in it by virtue of its ownership of riparian land, and that in New South Wales no private person has had any such right since the enactment of the *Water Rights Act* 1896. Section 1 of that Act provided, so far as material, that " The right to the use and flow and to the control of the water in all rivers and lakes which flow through or past or are situate within the land of two or more occupiers shall, subject only to the restrictions hereinafter mentioned, vest in the Crown. And in the exercise of that right the Crown by its officers and servants may enter any land, and take such measures as may be thought fit or may be prescribed for the conservation and supply of such water as aforesaid and its more equal distribution and beneficial use, and its protection from pollution and for preventing the unauthorised obstruction of rivers ". The " restrictions " referred to are then set out : the only one that need be mentioned is that which makes the rights of the Crown subject to the right of a riparian owner to use the water of a river or lake for domestic purposes or for stock or for the irrigation of a garden not exceeding five acres in area. The Act of 1896 has been repealed, and the relevant statutory provision now in force is s. 4A of the *Water Act* 1912-1946 which does not differ materially in terms from s. 1 of the Act of 1896. The existing Act, however, is a much more elaborate Act, containing extensive provisions relating to water supply generally and to the constitution of water trusts with wide powers. A similar Act was passed in Victoria in 1905, the provisions of which now appear in the consolidating *Water Act* 1928.

The rights of an owner of land in respect of the water of a river flowing past his land are generally referred to as his " riparian rights ". They are rights of a special character, which he has by virtue of his ownership of land abutting on a river—his " riparian " ownership. The nature of these rights has been generally regarded as settled by the decision of the Court of King's Bench in *Mason* v. *Hill* (1); they were recently discussed in relation to somewhat exceptional circumstances in this Court in *H. Jones & Co. Pty. Ltd.* v. *Kingborough Corporation* (2). The appellant says that all these special rights of a riparian owner have been abrogated and destroyed by statute. Let it be assumed—though the correctness of the assumption is far from being obvious—that this is so. The case for the defendant is in no way advanced. For the plaintiff here is not relying upon any special right vested in him by virtue of riparian ownership. As *Kinsella* J. said, " at common law riparian rights are not and never were the only rights of riparian owners in relation to riparian lands, but were of a special class super-added to the ordinary rights incident to the possession of the land " (3). Here the plaintiff is not asserting any right to the use or flow or control of water, or any right dependent upon, or in any way connected with, the fact that its land abuts upon a river. Its action is an ordinary action of nuisance. Whether that action ought in old days to have been framed in trespass or in case need not be considered. The cause of action is the alleged throwing on the plaintiff's land of water, silt and debris with resultant damage. The acts alleged are equally lawful, or equally wrongful, whether the plaintiff's land is riparian land or not. The plaintiff's position would be precisely the same if the nearest point of its land to the river were miles away from the river.

For the reasons given above the argument for the defendant, in my opinion, fails. It is necessary, however, to consider two cases on which counsel for the defendant relied. These cases are *Hanson* v. *Grassy Gully Gold Mining Co.* (4) and *Dougherty* v. *Ah Lee* (5).

In the earlier of these cases the declaration alleged that the plaintiff was possessed of certain land, that there was a creek flowing past that land, and the defendants had dammed back that creek above the plaintiff's land so that it ceased to flow past his land. A Full Court consisting of *Stephen* and *Cohen* JJ. held that the common law right asserted by the plaintiff had been taken away from him

(1) (1833) 5 B. & Ad. 1 [110 E.R. 692].
(2) (1950) 82 C.L.R. 282.
(3) (1953) 54 S.R. (N.S.W.), at p. 145; 71 W.N. 101.
(4) (1900) 21 N.S.W.L.R. 271.
(5) (1902) 19 W.N. (N.S.W.) 8.

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by s. 1 of the *Water Rights Act* 1896, which has been, so far as material, set out above. This case seems clearly distinguishable from the present case, because the plaintiff was asserting, and had to assert, a special right vested in him at common law by virtue of his being a riparian proprietor. The plaintiff in the present case is, as has been said, in an entirely different position. He is not asserting a " riparian " right, but an ordinary right vested in every owner of land.

In *Dougherty* v. *Ah Lee* (1) a plaint for ten pounds in the Small Debts Court alleged that the plaintiff was possessed of certain land, through which there passed a creek, that he was entitled to have that creek flow by and away from his land, and that the defendant had dammed back and obstructed the creek so that it could not flow by and away from the plaintiff's land, whereby the creek overflowed and flooded the plaintiff's land and did damage thereon. The magistrates having refused to adjudicate on the ground that a " general right " was involved, the plaintiff moved in the Supreme Court for a mandamus. *Owen* J. said: " This is clearly a case based upon the riparian owner's right to have the water flow past by and away from his land " (1). And his Honour held the case to be governed by *Hanson's Case* (2) so that the plaintiff must fail, and the motion was dismissed. Here the claim, as framed in the plaint, seems to have been based on a supposed " riparian " right, and, if it be regarded as so based, *Owen* J. was justified in treating the case as indistinguishable from *Hanson's Case* (2), and on that basis *Dougherty* v. *Ah Lee* (1) is just as clearly distinguishable from the present case as is *Hanson's Case* (2). But the substance of the two cases (though the facts are not fully stated in the report) would appear to have been different, because it seems probable that the plaintiff in *Dougherty* v. *Ah Lee* (1), like the plaintiff in the present case, but unlike the plaintiff in *Hanson's Case* (2), had no need to rely on any special " riparian " right. If this be the correct view of the facts in *Dougherty* v. *Ah Lee* (1) then that case was, in my opinion, wrongly decided.

It is not, I think, strictly necessary, for the purposes of the present case, to consider the correctness of the decision in *Hanson's Case* (2). But I feel bound to say that I regard the correctness of that decision as open to grave question.

What was thought to be the object of the statute is stated by *Stephen* J. as follows:—" Has the plaintiff since the passing of the *Water Rights Act* any right to bring this action? It cannot

(1) (1902) 19 W.N. (N.S.W.) 8.

(2) (1900) 21 N.S.W.L.R. 271.

be denied that for years and years past the question of the rights of riparian owners in this country, where the conditions are so totally different from the condition of things in England, has been a source of almost insuperable difficulty. There has been a great deal of expensive litigation, and I suppose, for that reason, the Legislature passed this Act, in order to prevent riparian owners above and below from bringing actions against one another. If 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" (1).

This passage is open to several comments. For one thing, this intention to cure the disease by killing the patient is in itself a very curious intention to attribute to the legislature. I should have thought, with all respect to *Stephen* J. and *Cohen* J., that the real object of the *Water Rights Act* 1896, as revealed by the latter part of s. 1, 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.

The effect given to the statute in *Hanson's Case* (2) means that a riparian proprietor has no remedy as of right if a river is dammed by an upper owner so that no water reaches him, or if it is polluted and poisoned by the refuse of a factory. There is much to be said for the view that it would be contrary to elementary rules of construction to give to it any such effect in the absence of clear and unmistakable language. The view which I am disposed to take is 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. However, the question of the correctness of *Hanson's Case* (2) was not fully argued, and it is perhaps better not to express a concluded opinion upon it in a case in which it is not strictly necessary to do so.

For the reasons given the argument of the defendant appellant, in my opinion, fails. There is one other matter which should be

(1) (1900) 21 N.S.W.L.R., at p. 275. (2) (1900) 21 N.S.W.L.R. 271.

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mentioned. The argument which I have been considering was the only argument put before the Full Court, and was, until just at the very close of counsel's address, the only argument put before this Court. Counsel had indeed more than once expressly disclaimed advancing any other argument. He had expressly accepted the verdict as a finding that the flood waters had followed a defined flood channel which had been obstructed by the erection of the leveés. He had referred to *Menzies* v. *Breadalbane* (1) and a number of other cases, but only with a view to showing that the right put in suit by the plaintiff was a " riparian " right, and therefore among the rights destroyed, according to *Hanson's Case* (2) by the statute. At the very end of his address, however, he made a brief submission, the effect of which I understood to be that flood waters on the defendant's land had not followed a defined course but had merely spread out over its land, that the levée banks had been erected by way of defence against a " common enemy ", and that the case was covered by *Gerrard* v. *Crowe* (3). I do not think it possible that any such argument should be allowed to be raised at this stage. It is not merely that it was not raised at all in the Full Court, and not raised until a very late stage before this Court. What is more important, it does not appear to have been raised at the trial. The learned judge directed the jury without reference to it, and no objection relating to this point was taken to his charge. Moreover, counsel for the respondent referred us to certain evidence which, as it appears to me, would, if believed, make the decision in *Gerrard* v. *Crowe* (3) irrelevant. I think that counsel for the appellant was justified in his initial decision to confine himself to the one argument, and that no other argument can now be entertained.

The appeal should, in my opinion, be dismissed.

KITTO J. I agree with my brother *Fullagar* in his reasons for holding that the appeal should be dismissed. The case appears to me to be covered in principle by *Greenock Corporation* v. *Caledonian Railway Co.* (4). In that case as in this the damage complained of had been done to land which was not riparian, and the judgments delivered by their Lordships and the authorities cited are conclusive, as Lord *Maugham* remarked for the Privy Council in *R.* v. *Southern Canada Power Co. Ltd.* (5), " to show that, at common law, apart from statute, the duty of one who obstructs

(1) (1828) 3 Bli. (N.S.) 414 [4 E.R. 1387].
(2) (1900) 21 N.S.W. L.R. 271.
(3) (1921) 1 A.C. 395.
(4) (1917) A.C. 556.
(5) (1937) 3 All E.R. 923.

the natural flow of a river is to prevent damage, and, if damage results to any persons, he will be liable to them, irrespective of whether or not they are riparian owners " (1).

Accordingly there is no necessity to consider the decision in *Hanson* v. *Grassy Gully Gold Mining Co.* (2) as to the meaning and effect of the *Water Act* 1912-1946.

Appeal dismissed with costs including the costs reserved.

Solicitors for the appellant, *Sly & Russell.*
Solicitors for the respondent, *F. A. Finn & Co.*

J. B.

(1) (1937) 3 All E.R., at p. 928.

(2) (1900) 21 N.S.W.L.R. 271.