THE RIPARIAN DOCTRINE AND AUSTRALIAN LEGISLATION

By SANDFORD D. CLARK* and IAN A. RENARD**

For many years, governments have exercised an important role in the control, allocation and distribution of Australian surface water resources. The purpose of this paper is to state briefly the reasons which led to dissatisfaction with the common law riparian doctrine and created the need for legislative intervention; to examine the evolution of legislation conferring power on governments to control surface waters; and to examine the effect of present legislation on common law rights.

There are, of course, numerous factors which, quite apart from purely legal considerations, dictate a high degree of government initiative and enterprise in developing water resources for a modern society. Today, such development is relatively unaffected by private investment. The capital expenditure necessary to harness water is enormous and the investment is manifestly not convertible. Private canal companies or co-operative local retention and reticulation schemes still exist, but modern technology has made huge, multi-purpose headworks and extensive supply schemes feasible. Further, the service of conserving, controlling or distributing water, unlike the extraction and purification of minerals or the distribution of natural gas, rarely yields high direct financial returns to the entrepreneur. Neither mechanized commercial farmers nor subsistence farmers are able to pay handsomely for regular irrigation. The benefits from such ancillary features as flood control and recreation facilities are hard to assess and harder to apportion among beneficiaries. Even the relatively high returns from the sale of hydro-electric energy or water for urban supply are rarely sufficient to meet interest on capital, maintenance and distribution expenses, except in highly industrialized areas.

Large scale development of major water resources therefore falls outside the realm of private investment and into the public sector. It was not always thus. One acquainted with the impact of developing transportation facilities on the law in nineteenth century England will recognize the canal company as almost as familiar a litigant as the railway company. A corollary to mining development in Western America was the private canal company which undertook to supply remote claims with ample water. Similarly, the early Trust system of water supply in Victoria, both for domestic and stock requirements and for irrigation, was envisaged as

* LL.B. (Hons.) (Adel.); Barrister and Solicitor; Senior Lecturer in Law in the University of Melbourne.

** B.A., LL.B. (Hons.); Research Fellow in Water Law and Administration in the University of Melbourne. Research for this article was supported in part by the Australian Research Grants Committee and the Australian Water Resources Council.

an 'encouragement to self-reliance, to self-support, to self-independence' and as discouraging 'crawling by a locality to the Government for everything it wants'.[1] Yet the result of this official policy of non-involvement was catastrophic and, in 1889 £575,152 of capital and £342,773 of interest were written off in Victorian irrigation districts.[2] Today initial development is invariably undertaken by public investment and many countries which originally encouraged localised private or community development, have reverted to the idea that the control of water resources is necessarily a function of government.

One reason for the trend to public enterprise is the social complexity of modern water development projects. Few dams today serve but one purpose. Usually they serve many distinct ends. Water will be directly used for domestic and stock purposes, for urban, irrigation and industrial supply. Projects may assist soil conservation, flood protection, land reclamation, transportation and fisheries. They may provide hydro-electric energy and recreation or tourist facilities. Patently, such projects are not merely of regional significance. Single river basins may occupy large areas of land, all of which will be directly affected by a single dam. Indirect consequences may be nation-wide. The channelling of resources into a major dam automatically withdraws those resources from other employment. Patterns of agriculture, population density and national productivity may all be affected. In short, government is the only body with the mandate, the resources and the power to undertake such work and to plan and co-ordinate the consequent economic and social upheaval.

Another reason for the trend to public enterprise stems from a fundamental idea of the nature of water. Water in its natural flowing state is a transient elusive commodity, whether flowing in a river, diffused over land or percolating through it. Even when it comes to rest in an apparently stagnant pond, it is in fact subject to change by precipitation, natural surface drainage, seepage, evaporation and transpiration. Technically expressed, all water is part of the continuous 'hydrological cycle'. Coupled with this is the universal dependence of all life on water. Together, these notions have dictated a common response by all legal systems. Without exception, the vast bulk of visible water has been removed from the sphere of private ownership. The exact philosophy of the state's or public's interest in these 'public' waters varies. It is sufficient that the public nature of certain waters is universally accepted and, in modern political theory, it is not a difficult step to acknowledge

[1] H. McColl, Victoria, *Parliamentary Debates,* Legislative Assembly, 24 October 1883, 1629.

[2] J. H. McColl, 'Hugh McColl and the Water Question in Northern Victoria' (1917) 5 *Victorian Historical Magazine* 145, 162. A further, undisclosed reason for official disinterest was that the London money market was closed to Victorian borrowers at this time.

that the state is charged with administering and developing these resources.

The doctrine that river water has a public character is by no means a modern one. The earliest jurists acknowledged that private ownership would not attach to water running in streams, for 'water is a moveable, wandering thing, and must of necessity continue common by the law of nature'.[3] The Institutes and subsequent commentators classified running water as *res communes* and instanced air, the wind, light and the sea as sharing its character.[4] Some threw in birds and wild animals, inviting analogies with the law of capture, and in the transition to modern civil and common law, the terms *res nullius, bonum vacans* and *publici juris* are variously employed.[5] Whilst Blackstone spoke of *res communes,* a number of early cases classified running water as *publici juris.*[6] Yet the common law always acknowledged that running waters were of the 'negative community'[7] and fell outside the normal rules of private property. This special treatment was said to spring both from 'the nature of water, which naturally descends, it is always current, *et aut invenit aut facit viam*' and from necessity, as its common use 'is necessary for the preservation of the commonwealth'.[8] Furthermore,

> it should be strange the law of property should be fixed upon such uncertainties as to be altered into *meum, tuum, suum,* before these words can be spoken, and to be changed in every twinkling of an eye, and to be more uncertain in the proprietor than a chameleon of his colours.[9]

The common law doctrine of riparian rights thus developed from the premise that there could be no private ownership of running water. Australian dissatisfaction with the developed doctrine stemmed not from the fundamental premise that only usufructuary interests could exist. This accorded well with the natural desire in an arid country to distribute water as widely as possible. It was the ancillary rules of the doctrine, operating

[3] Blackstone, *Commentaries* (10th ed. 1787) ii, cap. 2, 18.

[4] *Institutes* ii, t.i., s.1; Vinnius as quoted in *Mason v. Hill* (1833) 5 B. & Ad. 1, 23-4; Vattel, *Le Droit des Gens* i, cap. 20, s. 234; Pufendorf, *De Jure Naturae et Gentium* iv, cap. 5, s. 2 citing Petronius and Ovid, *Metamorphoses* iv. English authorities include Bracton, *Legibus et consuetudinibus Angliae* ii, cap. 2; Fleta, *Commentarius Juris Anglicani* iii, cap. 2; Britton ii, cap. 2; Hale, *De Jure Maris* caps. 1, 6.

[5] Each different category attracted special rules under Roman Law. See Grotius, *De Jure Belli ac Pacis* ii, cap. 3, s. 9; Planiol, *Traité Elémentaire de Droit Civil* (4th ed. 1948) i, art. 2416; Planiol et Ripert, *Traité Pratique de Droit Civil Français* (2nd ed. 1952) iii, 486.

[6] *E.g. Williams v. Morland* (1824) 2 B. & C. 910, 913; *Liggins v. Inge* (1831) 7 Bing. 682, 692.

[7] This expression belongs to civilian commentators but has the advantage of being a non-technical expression at common law. See Pothier, *Traité du Droit de Propriété* No. 21 quoted in *Geer v. Connecticut* (1895) 161 U.S. 519, 525 (Conn.).

[8] *Sury v. Piggot* (1652) Pop. 166, 172 *per* Doderidge J., holding that unity of title would not extinguish the right to have a watercourse flow from one close to another.

[9] *Callis on Sewers* (1622) 78.

against maximum utilization, which created opposition. First and foremost was the rule that only those owning land in lateral or vertical contact with the stream could use the water.[10] This rule was not so much a product of the riparian doctrine itself as of the general rules of trespass. The claim of non-riparians to share in the available supply inevitably conflicted with the fundamental principle that a landowner's close is inviolable. This problem could have been set to rights by a statutory easement to take water, but further accidents of interpretation had grown from this basic rule. Thus specific cases had produced statements that water could only be taken for uses connected with the riparian tenement[11] and that non-riparians could be restrained from using water, even if access had been gained amicably and no damage to lower riparians resulted.[12] These qualifications subsequently hardened into rules of law.

Again, the extent to which a riparian might use water was limited. Despite forceful views that the only situation in which a riparian should be prevented from using water was where his use would work actual, material harm to a lower riparian[13] this view was not accepted wholeheartedly.[14] Additional tests grew up. The use must be 'reasonable'.[15] There must be no 'sensible diminution' of the stream.[16] If there were, a

[10] *Lyon v. Fishmongers' Co.* (1876) 1 App. Cas. 662, 683. The importance of access had been incidentally recognized in numerous other attempts to formulate the rule. *E.g. Wright v. Howard* (1823) 1 Sim. & St. 190; *Mason v. Hill* (1833) 5 B. & Ad. 1; *Embrey v. Owen* (1851) 6 Ex. 353; *Stockport Waterworks Co. v. Potter* (1864) 3 H. & C. 300; *Nuttall v. Bracewell* (1866) L.R. 2 Ex. 1; *Lord v. Commissioners for the City of Sydney* (1859) 12 Moo. P.C. 473, 2 Legge 927.

[11] *Swindon Waterworks Co. Ltd. v. Wilts and Berks Canal Navigation Co.* (1875) L.R. 7 H.L. 697, 704 *per* Lord Cairns L.C.; *McCartney v. Londonderry and Lough Swilly Railway Co. Ltd.* [1904] A.C. 301, 307; *H. Jones & Co. Pty. Ltd. v. Kingborough Corporation* (1950) 82 C.L.R. 282, 324.

[12] This is said to rest on an implication from *Stockport Waterworks Co. v. Potter* (1864) 3 H. & C. 300, *Nuttall v. Bracewell* (1866) L.R. 2 Ex. 1 and *Ormerod v. Todmorden Joint Stock Mill Co. Ltd.* (1883) 11 Q.B.D. 155. In *Moore v. Corrigan* [1949] Tas. S.R. 34, 49 the rule was said to flow *a fortiori* from *Attwood v. Llay Main Collieries Ltd.* [1926] Ch. 444. The rule was, however, trenchantly criticised as unsupported by either authority or reason in *Kensit v. Great Eastern Railway Co.* (1884) 27 Ch.D. 122.

[13] Kent, *Commentaries on American Law* (1828) iii, lect. iii, 440-1 quoted with approval in *Embrey v. Owen* (1851) 6 Ex. 353, 369.

[14] *Wood v. Waud* (1849) 3 Ex. 748.

[15] *Embrey v. Owen* (1851) 6 Ex. 353; *McCartney v. Londonderry and Lough Swilly Railway Co. Ltd.* [1904] A.C. 301; *John Young & Co. v. Bankier Distillery Co.* [1893] A.C. 691; *Swindon Waterworks Co. Ltd. v. Wilts and Berks Canal Navigation Co.* (1875) L.R. 7 H.L. 697. Attempts to point out that the test of reasonableness is unnecessary have been only partially successful. See *Ormerod v. Todmorden Joint Stock Mill Co. Ltd.* (1883) 11 Q.B.D. 155.

[16] An absolute test of no diminution was originally put forward. *Bealey v. Shaw* (1805) 6 East 208; *Wood v. Waud* (1849) 3 Ex. 748. Subsequent cases talked of diminution which was 'perceptible to the eye' (*Embrey v. Owen* (1851) 6 Ex. 353), 'sensible' (*John Young & Co. v. Bankier Distillery Co.* [1893] A.C. 691; *H. Jones & Co. Pty. Ltd. v. Kingborough Corporation* (1950) 82 C.L.R. 282, 323), 'serious' (*H. Jones & Co. Pty. Ltd. v. Kingborough Corporation* (1950) 82 C.L.R. 282, 325), 'substantial' (*McCartney v. Londonderry and Lough Swilly Railway Co.* [1904] A.C. 301, 307), 'material' (*Stollmeyer v. Trinidad Lake Petroleum Co. Ltd.* [1918] A.C. 485, 492). Others spoke of the obligation to let water flow 'practically undiminished' (*Secretary of State for India v. Subbarayudu* (1931) L.R. 59 I.A. 56, 64).

lower riparian could enjoin the use, irrespective of the actual harm caused. Even though the lower riparian had no use for the water being diverted by his neighbour, he could obtain an injunction to prevent the diversion ripening into prescriptive title.[17]

Such results were manifestly unsuited to an arid country where extensive irrigation well away from existing stream-beds would be necessary not only to ensure development but to sustain life. Had the common law maintained the early emphasis in cases like *Embrey v. Owen*[18] on actual damage being the basis of relief, the doctrine may have been more palatable. Minor legislation allowing statutory easements to be acquired for taking water to non-riparian land[19] and abolishing prescriptive rights to water[20] could have adapted the doctrine for arid consumption. But the potential flexibility of the early rule was destroyed by the penchant of the common law for elevating factual conclusions to rules of law. Propositions that the use must be reasonable or connected with the riparian tenement or that water must be returned without sensible diminution were propounded originally as rationalizations of specific factual conclusions that, in a given case, the injury to lower riparians was, or was not, of sufficient magnitude to justify relief. It cannot have been intended that each proposition disjunctively should become a separate probative barrier, the absence or existence of which would determine the issue, without direct reference to the actual effect on lower riparians. Yet the rigorous methodology of precedent led to this result, and it was a deep, almost hysterical fear of the possible effects of these rules on agricultural development which led to legislative intervention in Australia.

I

Melbourne was early supplied with river water by private carters. No attempt was made to control or organize supply until 1842, when the settlement was incorporated as a town. The incorporating Act empowered the Council to construct waterworks for the 'health comfort and convenience of the inhabitants of the said town'.[21] Unfortunately, the Council had very limited powers of taxation and neither funds nor borrowing powers to enable it to construct works. It was entirely dependent on the administration of the parent colony in Sydney, but it immediately set about examining waterworks schemes. On 26 October 1843 a petition was sent to the colonial legislature requesting £25,000 for water supply. It was ignored, as were most financial requests from the fledgling Council.

[17] *Wood v. Waud* (1849) 3 Ex. 748; *Sampson v. Hoddinott* (1857) 1 C.B. (N.S.) 590; *Crossley and Sons Ltd. v. Lightowler* (1867) 2 Ch. App. 478; *Clowes v. Staffordshire Potteries Waterworks Co.* (1872) 8 Ch. App. 125; *Pennington v. Brinsop Hall Coal Co.* (1877) 5 Ch. D. 769; *Swindon Waterworks Co. Ltd. v. Wilts and Berks Navigation Co.* (1875) L.R. 7 H.L. 697.

[18] (1851) 6 Ex. 353.

[19] *E.g.* Water Conservation Act Amendment Act 1883, s. 107.

[20] *E.g.* Irrigation Act 1886, s. 5.

[21] Melbourne Corporation Act 1842, s. 88.

By 1846 the population had risen to almost 11,000, but supply was still primitive and privately conducted. Even the government had to call tenders for the supply of water to public buildings.[22] Unable to undertake works for lack of funds, the Council was impotent to control supply or proper drainage. A row of slaughter-houses, boiling-down works and candle factories polluted the river above the point of supply. The troops made 'an extensive washtub' of the river[23] and in 1849 the *Argus* facetiously suggested the inauguration of a new industry of 'tallow catching on the Yarra', asserting that it would pay better than the richest goldfields in California.[24] Impatiently, the Council awaited the separation of the new settlement from New South Wales, when local revenues and proceeds from the sale of Crown lands would become available for public works.

On 1 July 1851, Victoria was formally separated from New South Wales, and the colony became entitled to the revenues from the sale of Crown lands for its own purposes.

The Sewerage and Water Supply Act 1853 relieved the Council of its responsibility for water supply and created an independent board of Commissioners, nominated by the government, with power to control sewerage and waterworks. Private enterprise was permitted to supply some of the suburban areas.[25] Such legislation necessary to secure a supply of water to the town of Melbourne and to control pollution was inevitable and marked no great innovation of principle; it adhered to the general pattern of metropolitan water control in England.

When gold was discovered in the early 1850's, the colony soon faced a bustling movement through the port of Melbourne to the gold centres. The goldfields presented new problems for the government; problems which occurred simultaneously on the goldfields of California. Mining machines and techniques demanded constant supplies of running water, but neither country possessed ample, permanent rivers adjacent to all existing claims. Each country found a different solution, and an important distinction in their water-use laws resulted.

Although the United States purchased California from Mexico within five months of the discovery of gold in 1848, 18 years passed before Congress acted to govern the acquisition of rights in public lands. Meanwhile, thousands of diggers had established themselves in small, self-governing communities which acted to protect mining and water claims in each district. There were remarkable similarities in the customary laws created and applied by these geographically and racially disparate communities, particularly with respect to water. The so-called doctrine

[22] Victoria, *Government Gazette*, 26 October 1846.
[23] *Argus*, 9 February 1847.
[24] *Argus*, 23 January 1849.
[25] *E.g.* South Yarra Waterworks Company Act 1855.

of prior appropriation adhered to the frontier principle of 'first come, first served' and was uniformly acceptable as it protected diversions by non-riparians and placed no limitations on the use or distribution of the water, provided it was applied to some beneficial purpose. It thus circumvented the contentious elements of the riparian doctrine discussed above, although it created its own problems.

In spite of state legislation adopting the common law of England as the rule of decision in state courts[26] mining customs became so strong that a subsequent Act recognised them 'where not in conflict with the constitution and laws'.[27] After initial hesitation[28] the Supreme Court fully espoused the prior appropriation doctrine[29] as the general rule governing water use.

No such development occurred in Victoria. The colonial government allowed no period of legislative inaction in which custom could develop into a recognisable body of principles. Legislation for the taking up of Crown lands existed before the gold rush and the fever was quickly met by further stringent regulation. Local mining boards and committees had power to regulate the use of water channels connected with puddling and other machines, and for regulating the drainage of land held under a miner's right or lease.[30] Special leases were granted for erecting pumping machinery for clearing mines, and for gold-washing plants.[31] A significant concession was granted by a licence to construct and use races, dams and reservoirs on Crown land; or to divert water from any river situated on or flowing through Crown land. These licences were 'to supply water for gold mining purposes' to the licensee himself, or any other miner.[32] Such leases supplied the same mining needs as the Californian doctrine of appropriation, as well as permitting a class of private water-sellers; but there are significant legal differences. Both systems conferred a usufructuary interest in running water which was unrelated to the ownership of riparian lands. In this sense, they both departed from the common law doctrine. The Victorian right, however, arose from a fifteen-year revocable administrative grant subject to terms and conditions, whereas the Californian right was absolute, provided the claim was formally made and the water was actually put to use within reasonable time.

Initially, the Victorian diverter could take water only 'to the same but no greater extent as and than he might do if he were the owner of such

[26] California Act, 13 April 1850.
[27] California Practice Act 1851, s. 621.
[28] In *Eddy v. Simpson* (1853) 3 Cal. 58 the court refused to adopt the trial judge's direction based on the prior appropriation doctrine.
[29] *Irwin v. Phillips* (1853) 5 Cal. 140. See, however, *Lux v. Haggin* (1886) 69 Cal. 255.
[30] *E.g.* Gold Fields Act 1857, s. 111; Gold Fields Amendment Act 1860, s. 1; Drainage of Quartz Reefs Act 1862, s. 1; Mining Leases Act 1862, s. 10.
[31] Mining Leases Act 1862, s. 2.
[32] Mining Leases Act 1862, s. 11.

Crown lands'.[33] By implication this preserved the common law rights of any riparian owners affected by the licensee's diversions. This qualification disappeared in later legislation and the owner of a miner's right could take water 'for mining for gold and for his own domestic purposes'.[34]

The right was subject to any by-laws made by the local mining board, which could lay down a system of priority of supply between miners.[35] To this extent, an appropriative system was sanctioned and the customs of particular areas could be accommodated. The local board could decide whether there should be a priority system, how it should work, and how rights could be created, forfeited or relinquished. But such a system could only regulate priorities between the miners of the district and, in the absence of an express legislative statement, cannot be taken to have altered the common law rights of riparian owners who were not, at the same time, miners. The period of mining expansion did not, therefore, lead to a radical departure from common law principles as it did in the west of the United States.

Superficial gold deposits were exhausted by 1865 and a movement of population from the goldfields into agricultural areas began. Water supply works were already under construction for at least 40 country towns, and an attempt was made to deal with the increasing need for proper planning, construction and financing of major works. The Public Works Statute 1865 vested the Board of Land and Works with powers over roads, railways, sewerage, electric-telegraphs and water supply. It was generally charged with supplying water in urban areas for domestic use, for cleansing of streets and sewers and for providing fire plugs. The wrongful taking of water, its pollution, misuse and wastage were penalised. A proscription of undue consumption for irrigation in section 231 is the first statutory acknowledgment of the practice of irrigation.

The Waterworks Act 1865 imposed the further duty on the Board to construct and extend waterworks in 39 districts (most of them mining towns), and to acquire existing works for those purposes. There was power to construct works on Crown or private lands. Significantly, the Board could take or divert water from any river and store, use, sell or otherwise dispose of it without making compensation, but this was an apologetic intrusion on common law rights. The Board was enjoined wherever 'reasonable and practicable', to preserve vested rights and to 'allow to flow in any river . . . from which water shall have been . . . taken or diverted sufficient water for the reasonable requirements of the owners and occupiers of land alienated from the Crown on the banks of such river . . .'[36]

[33] *Ibid.*
[34] Mining Statute 1865, s. 5. See also ss 25, 31, 36.
[35] *Ibid.* s. 71.
[36] S. 6.

The following years saw a considerable amount of experimentation with the organisation of local government[37] and, in 1869, a consistent policy of decentralization of control over water resources began.[38] None of this legislation actually went beyond supplying urban centres or the populous mining districts with water for domestic and stock use. The only legislation relevant to the farming population was found in the Land Acts providing for the occupation of Crown land.[39] Re-settlement of disappointed miners up to 1870 had generally been in higher rainfall areas. They could take up land by licences or leases for agricultural or pastoral purposes, or buy it at auction. The Governor could reserve from sale land required for communication canals, reservoirs or watercourses. Where a stream ran through land conveyed under this Act, a penalty attached to any person obstructing or interfering with it, unless he had been authorised to do so by the Board of Land and Works. The Board could also grant licences to cut and construct reservoirs or channels upon, and take water from, any land provided compensation was paid.

Apart from these limited rights of interference, no direct assault on the riparian principle was made on the face of the legislation. Yet it may be that the riparian doctrine, in Victoria, at least, existed more in theory than in fact.[40] As early as 1862, a private Bill had been introduced to declare all waters not required for domestic and stock consumption by riparian owners to be public property. The Bill failed, but at some time between 1863 and 1868 an administrative practice was introduced into the Victorian Lands Department which had an important effect on the acquisition of riparian rights. The common practice in alienating lands from the Crown had been to convey in the grant of title the whole of the bed and banks of any river flowing through the land. Where a river formed a boundary between two grants, the grant was *ad medium filum aquae*.[41] The Victorian practice, subsequently promulgated by Order-in-Council[42] was to reserve a strip of land adjacent

[37] Waterworks Commissioners Act 1869; Shires Act 1869; Boroughs Statute 1869; Local Governing Bodies Loan Act 1872.

[38] See comments of Mr Deakin, Victoria, *Parliamentary Debates,* Legislative Assembly, 22 June 1886, 416.

[39] *E.g.* Land Act 1869.

[40] Some argued that the riparian doctrine did not have even theoretical application n Australia. See the opinion of Mr De Verdon, Commissioner of Crown Lands, uoted in Victoria, *Parliamentary Debates,* Legislative Assembly, 18 July 1905, 364-5.

[41] See the South Australian practice recommended by Messrs Gawler and Turner n Memorandum 8353/86 of the Surveyor-General's Office, 13 February 1880, and ninute to the Surveyor-General from the Chief Draftsman, 1 March 1854. The ractice of reservation of land along the bank of the Murray, navigable rivers and akes was laid out in Colonel Light's instructions from the Colonization Commissioners in March 1836. See also Regulations governing the sale of land, South ustralia, *Government Gazette,* 14 May 1840; 18 May 1843; 19 June 1845. In ew South Wales the common law position is maintained. Grants bordered by ivers are made *ad medium filum* and that fact is noted on the title: *In re White* (1927) 27 S.R. (N.S.W.) 129.

[42] Volume 13 of the Minutes of the Executive Council contains an order under . 102 of the Land Act reserving land along certain major rivers from sale, lease r licence: 10 March 1873, Minute 19. See also Order-in-Council of 23 May 1881.

to the river over which a landowner could not obtain title. Landowners adjacent to such rivers thus were not the owners of land laterally or vertically in contact with the stream,[43] and were effectively denied riparian rights.[44]

In the spring of 1870 unusually heavy rain fell over the whole colony. Several excellent seasons followed, and in 1875 there were widespread floods. The dry Northern and North-Western districts had, to this time, been only sparsely populated by a few hardy 'squatters', and pastoral tenants, but the continued good seasons enticed a large flow of agricultural settlers into these areas. Dry seasons inevitably had returned by 1880, with disastrous results. The evil was intensified 'by the more settled character, as well as by the increased numbers of the newcomers'; and by the fact that they were 'dependent for a livelihood on agricultural rather than pastoral pursuits'.[45] No action had been taken to anticipate the water-needs of these settlers in the preceding ten years, although in 1871 an ambitious project to build a Victorian North-Western Canal had been put forward by private promoters. The scheme was treated with indifference by the government, but there was much public controversy and the issue of irrigation came before the community for the first time. By 1880, then, the time was ripe to fight an election on the water issue, and the O'Loughlen Government pledged itself to a Water Conservation Bill.

The enduring importance of the Water Conservation and Distribution Act 1881 lies in the creation of local Trusts, appointed on the petition of local districts, which could construct, finance and control works. It envisaged the creation of Trusts in rural centres as well as urban districts, but its aim—'the modest, moderate and legitimate aim—was to provide, first of all, for a domestic supply and a partial stock supply'.[46] Although it thus did nothing to meet the demands of the new, drought-stricken agriculturalists, it recognised the need to confer sufficient power on an appointed authority to control and distribute water without interference from riparian owners who might block a scheme by exercising their common law rights. It is thus the first step in the fumbling search for a legislative formula to permit a more widespread distribution of river waters.

Section 48 of the Act thus declared that all the water in any river *etc.* under the control of a Trust:

> shall be the property of such Trust and be used by them for the purposes of the work: provided however that nothing in this part contained shall in any manner take away or lessen any rights heretofore granted on any person [under the Mining Statute 1865].

[43] This is the criterion of entitlement to riparian rights. *Lyon v. Fishmongers Co.* (1876) 1 App. Cas. 662, 683; *Gartner v. Kidman* (1962) 108 C.L.R. 12, 32.

[44] The practice did not extend to the bed and banks of all rivers. See *infra* 491-2

[45] Stuart Murray, 'The Arid Districts of Victoria and the Waterworks Trusts *Progress Report, Victorian Commission on Water Supply* (1885) Appendix 4.

[46] Victoria, *Parliamentary Debates,* Legislative Assembly, 10 October 1883, 1388

Reference has already been made to the common law rule that there can be no property in running water. The grant of property in this section is the more mystifying as no practical advantages would seem to follow. By section 37 a Trust had 'the exclusive control and management' of the rivers specified in the Order creating it. There were added powers to build and maintain works. Together, these powers seem sufficient to allow a Trust to carry out approved works and to control the distribution of water to consumers. It is difficult to see how the grant of property in all waters under its control could aid a Trust.

The Bill, as introduced, protected a Trust from paying compensation to riparian or other landowners who were injured by any diversion of waters. Perhaps it was thought that, if no compensation were to be payable to riparian owners, it would be preferable in principle to confer a superior title on the Trust. The compensation provision was strongly debated, however, and the government finally undertook to limit the clause by making Trusts liable to pay compensation except where floodwaters were diverted.[47] Any possibility that the section might have been construed as implicitly divesting riparians of their entire common law rights was thereupon destroyed.

The grant of property was not disputed until it came before the Legislative Council and, upon re-submission to the Legislative Assembly it was explained as

> manifestly to enable [a Trust] to deal with the abstraction or fouling of water. No doubt it was a novelty in legislation to give an absolute property in a running stream, but on careful consideration it would be found that the provision was a very useful one, as by the absolute control it would give to the Waterworks Trusts within their boundaries, it would save much litigation.[48]

Yet 'absolute control' is not the same thing as 'property', nor did the Bill, unless clauses 37 and 48 were repetitive, regard them as identical. Clause 44 empowered a Trust to make regulations preventing the fouling or wastage of water contained in, or supplied from its works, and to prevent trespass or injury to the waterworks. These provisions could easily have been extended to other running water within a Trust's area. The departure from common law theory in granting property can only be seen as a clumsy form of 'over-kill'.

The express saving clause in respect of rights acquired under the mining statute implies that a Trust's powers could be exercised to the detriment of riparians, within the limits of the compensation section. A riparian was deprived of his common law right to demand re-instatement of his supply, and he might be required to take water only under specified

[47] Victoria, *Parliamentary Debates,* Legislative Assembly, 17 November 1881, 285. See 45 Vict. 716 s. 39.

[48] Victoria, *Parliamentary Debates,* Legislative Assembly, 21 December 1881, 1285.

circumstances, on payment of rates and charges. But both these results could have been reached through the 'exclusive control and management' provision. The attributes of the grant of property may be purely that an action for simple larceny would lie. The common law cannot assist in supplying further meaning to the word 'property' as it recognises only a usufructuary interest coupled with a right to prevent diversion by others. The idea of a 'property' in running water which is, at the same time, statutorily limited by purpose is even more difficult.

The Water Conservation Act Amendment Act 1883 was the first Act directly addressed to the matter of irrigation. It provided for Irrigation Trusts to be established along the lines of Waterworks Trusts. Six Trusts were established, but development was hampered as they did not possess the same borrowing powers as Waterworks Trusts. Whereas the government had made loans available to Waterworks Trusts, it was hesitant to support irrigation in the same way. Modest works for domestic or stock supply could serve a large surrounding area. For irrigation, the water had to be brought to the land concerned. This not only required more extensive distribution works but inevitably enhanced the value of the land served. The government therefore decreed that the financing of irrigation schemes should be a local responsibility. Trusts could only borrow against the security of rates to be levied within the district and by 1885 it became necessary to empower loans to Irrigation Trusts by the Governor-in-Council.[49]

The important deviation from common law principle in this Act lay in section 107. It empowered not only any Trust but also any person to acquire a compulsory easement over the land of another 'for the purposes of irrigating or draining land of water which has been used for irrigation or domestic supply'. The provision, insofar as it conferred rights on private persons, was hailed as 'utterly contrary to all English precedent'.[50] Although statutory powers to obtain easements for drainage already existed,[51] this provision was the first to extend the same principles to supply, thus avoiding the common law exclusion of non-riparians from sharing in the source of supply.

Immediately after this Act, Alfred Deakin was appointed to lead a Royal Commission to make recommendations on the future development of irrigation in Victoria. He travelled extensively, particularly in the western states of the United States of America and the various reports he prepared are remarkable in their completeness. His major recommendations were that the state should 'exercise the supreme control or ownership' over all waters other than springs on private land,[52] that i

[49] Water Conservation Act Amendment Act 1885.

[50] Young, Victoria, *Parliamentary Debates*, Legislative Assembly, 25 October 1883 1651.

[51] Drainage of Land Act 1864.

[52] *First Progress Report Victorian Royal Commission on Water Supply* (1884) 54-5.

should dispose of water to irrigators, but there should be unity of title to water and land, and that the object should be to encourage the greatest possible utilization of water over the largest possible area. Others, at the same time, were also re-thinking the riparian rule. Canada advocated the 'total suppression of all riparian rights in water, so that the same, being vested in the Crown, may be distributed under well-considered government control for the benefit of the greatest possible number'.[53]

The Irrigation Act 1886 which resulted from the findings of Deakin, was thus motivated by three controlling beliefs. Previous legislation had only encouraged small irrigation schemes. To undertake widespread development without attracting difficulties of administration and litigation, it was necessary that 'supreme power and responsibility in connexion with the care and custody of water and, in certain cases, in the construction and management of works, can be vested nowhere else than in the State itself'.[54] Secondly, the assumption of rights by the state would be ineffective 'unless we are absolutely sure that they cannot be interfered with by the existence of any such thing as riparian rights'.[55] Finally, progress of irrigation development would be hindered by lengthy and costly litigation unless the rights of individuals and state were properly defined.[56]

Section 4 stated:

> The right to the use of all water at any time in any river stream watercourse lake lagoon swamp or marsh shall for the purposes of this Act in every case be deemed to be vested in the Crown until the contrary be proved by establishing any other right than that of the Crown to the use of such water . . .

Elsewhere the right of a riparian to take water for domestic and stock purposes was guaranteed, and in Deakin's view, this was the only attribute of the riparian right to survive the Act. 'In thus limiting riparian rights, it enables the whole of the rest of the water to be utilized for irrigation and other purposes.'[57]

There was, however, apparent confusion over the scope of the section. On its face the section appears to apply to all waters, yet the Attorney-General, Mr Wrixon, denied that the provision purported to abolish riparian rights throughout the colony.

> The Government . . . have been anxious not to introduce any sweeping or revolutionary clause which would unsettle the rights of property in water all through the colony. The irrigation works will, of course, only apply to certain districts for many years to come. . . . [T]here is a

[53] Recommendation of the *General Report on Irrigation and Canadian Irrigation Surveys* (1894). See also, South Africa: Hall, *Report to the Government of Cape Colony* (1898). United States: *Second Report of the State Engineer to the Legislature of California* (1881) 6-10; Hall, *The Irrigation Question: California and Australia* (1886).

[54] Victoria, *Parliamentary Debates,* Legislative Assembly, 24 June 1886, 426.

[55] Victoria, *Parliamentary Debates,* Legislative Assembly, 24 June 1886, 440.

[56] Victoria, *Parliamentary Debates,* Legislative Assembly, 24 June 1886, 442.

[57] *Ibid.*

> seductiveness in the idea for doing the whole thing thoroughly, by sweeping away riparian rights altogether; but that would not be a wise course to adopt.[58]

In the light of subsequent judicial pronouncements, it may be that Wrixon rightly regarded the section as operating only in those areas where the Crown had proceeded to exercise the other powers conferred by the Act.[59] Yet Deakin appeared to consider that the provision was of wider import and if the government really intended that the superior rights of the Crown should only operate within declared irrigation areas, it is difficult to understand why they would not yield to demands that words be inserted to make the meaning clear.[60] The contention that the Act was supposed to be of general application is supported by the unrestricted operation of section 5 which, in abolishing the possibility of obtaining prescriptive title to divert water, neutralized the power of a riparian to restrain upstream diversions in the absence of actual damage. The confusion arising from the section prompts one to agree with the assessment of Dr Quick, an eminent member of the House, that 'such miserable and contemptible literary productions would disgrace a shire council of Timbuctoo'.[61]

It is important to concentrate on the vesting formula chosen for section 4. The Bill as introduced by Deakin had used the formula: 'All water at any time in every river . . . shall in every case be deemed to be the property of the Crown . . .'. In committee there was opposition not only to the lack of clarity of the scope of the legislation but to the use of the term 'property'. Several members noted that the common law did not acknowledge property in river water and that the purported grant of property was therefore contrary to all principle. In substituting the formula of 'the right to the use of all water at any time in any river' the government affirmed that no practical difference had been made by the change in wording and the main opponent of the Bill agreed.[62]

It may be concluded, therefore, that it was the opinion of the government that, had not the Act expressly preserved certain existing riparian rights, then the formula of section 4 was sufficient to abolish all riparian rights. Whether this was so is open to doubt and will be discussed later; yet subsequent opinion has construed this Act as indicating a clear intention to 'nationalize' water.[63] Certainly it marked an important stage in the development of governmental control over water distribution. Its guiding principle was to encourage large-scale development whilst retain

[58] Victoria, *Parliamentary Debates*, Legislative Assembly, 7 July 1886, 590.
[59] *Thorpes Ltd. v. Grant Pastoral Co. Pty. Ltd.* (1955) 92 C.L.R. 317, 331 *per* Fullagar J. See *infra* 497 and Clark and Myers, 'Vesting and Divesting: The Victorian Groundwater Act 1969' (1969) 7 *M.U.L.R.* 237, 248-9.
[60] Victoria, *Parliamentary Debates*, Legislative Assembly, 19 August 1886, 1156.
[61] Victoria, *Parliamentary Debates*, Legislative Assembly, 13 July 1886, 679.
[62] Victoria, *Parliamentary Debates*, Legislative Assembly, 21 September 1886, 1527.
[63] East, *Water in Australia* (1960) 9; Davis, 'Australian and American Water Allocation Systems Compared' (1968) 9 *Boston College Industrial and Commercial Law Review* 647.

ing ultimate control in the government. National works were to be undertaken by the Board of Land and Works, and Trusts would also undertake works under the supervision and control of the Board.

II

Victorian legislation reached its final form in the Water Act 1905. The most significant and enduring administrative feature of this Act was the constitution of the State Rivers and Water Supply Commission to bear over-all responsibility for water development in the State. It also adopted a series of provisions calculated to put an end to riparian rights, and it is to the vesting section which we now turn.

In order to confer adequate power on government to control water, it will be remembered that Victoria had experimented with grants of property to individual Trusts and a grant of the right to use to the Crown. New South Wales, in three unsuccessful Bills, had used the formula '[t]o the Crown belong' certain waters.[64] Canada, at much the same time, had adopted a formula that 'the property in and the right to the use of all the water at any time in any river . . . shall be deemed to be vested in the Crown'.[65] The New South Wales Water Rights Act 1896 adopted a new formula which subsequently became section 4A(1) of the Water Act 1912. Section 4A(1) reads:

> The right to the use and flow and to the control of the water in all rivers and lakes . . . shall . . . vest and be deemed to have vested in the Commission for the benefit of the Crown.[66]

A similar formula was adopted by the Victorian legislature in 1905.

Why this particular formula was adopted in New South Wales and subsequently in Queensland, Victoria and Western Australia is not really clear. The most likely reason is that it was thought to confer comprehensive powers on government but did not commit the common law heresy of granting property in water. Our purpose now is to examine the effect of this formula on private riparian rights, but before looking at judicial interpretation of the provision it is interesting to examine parliamentary debates in both New South Wales and Victoria.

The debate on the New South Wales Water Rights Bill 1896 reveals an apparent difference of opinion as to the effect of the vesting formula on riparian rights. The opinion of both government and opposition members in the Legislative Council was that the vesting words clearly abolished all private riparian rights and placed them in the Crown

[64] N.S.W.: Water Conservation Bill 1890, cl. 4; Water Conservation Bill 1891, cl. 4; Water Conservation Bill 1892, cl. 6.

[65] North West Irrigation Act 1894 (Can.), s. 6.

[66] The detailed provisions of the section underwent several re-enactments and minor changes, but the vesting formula essentially remains the same. The most important alteration was in the Water (Amendment) Act 1930 whereby the various rights granted by the section were vested in the Commission for the benefit of the Crown, rather than in the Crown itself.

instead. Section 2[67] which gave a riparian the right to use water for domestic, stock and limited gardening purposes was thus an express grant from the Crown of new statutory rights, rather than a mere declaration or affirmation of continuing common law rights. In speaking of this clause, the Attorney-General said:

> The next feature of the bill is the broad principle which is not a novelty outside the colony—the nationalization of the waters. In other words, it is proposed to make these waters, so to speak, the property of the Crown, which will then have control over them. . . . All that the bill seeks to do is to place the waters of this colony, as well as it possibly can, in the hands of one person as a trustee, so to speak, for everybody.[68]

In the House of Assembly, however, the cast of the debate is markedly different. It must be remembered that the three Bills of 1890, 1891 and 1892 had endeavoured to vest all rights to running water in the Crown (with certain express exceptions). The minister sponsoring the 1896 Bill had also sponsored the Bills of 1890 and 1891, yet he failed to use the word 'nationalization' nor did he state that riparian rights would be abolished. Certainly, he stated that the Crown would become 'trustee'[69] of the water and a riparian owner would have no remedy against works authorised by the Crown. He did not say that a riparian would lose his common law right to restrain an unauthorized diversion by another riparian; in fact, he implied the opposite:

> If a person who had constructed a work applied to the Government for the work to be licensed, and if no other rights would be interfered with, it would be in the province of the Crown to give a right to the person constructing the work in order that it might not be interfered with.[70]

Mr Lyne who had put forward the 1892 Bill but was now in opposition stated that 'he would suggest to the Minister that, instead of going on with the bill in this form he should pass a bill vesting riparian rights in the Government'.[71] Another member 'thought the mistake of the Minister was in not perceiving the difference between bringing in a bill to define the rights of the individual against individual, and the right of the Crown against all individuals'.[72] Plainly these members felt that the mere vesting of the 'right to the use, flow and to the control' in the Crown or a Crown authority could not, of itself, divest private persons of their riparian rights.

[67] The equivalent section in the Water Act 1912 is s. 7. See also, Water Act 1958 (Vic.), s. 14; Water Acts 1926-1964 (Qld.), s. 9; Control of Waters Act 1919-1925 (S.A.), ss 2, 7; Rights in Water and Irrigation Act 1914-1964 (W.A.), s. 14; Control of Water Ordinance 1938-1968 (N. Terr.), s. 7.

[68] New South Wales, *Parliamentary Debates,* Legislative Council, 2 September 1896, 2799.

[69] New South Wales, *Parliamentary Debates,* Legislative Assembly, 2 July 1896, 1283.

[70] New South Wales, *Parliamentary Debates,* Legislative Assembly, 8 July 1896, 1410.

[71] New South Wales, *Parliamentary Debates,* Legislative Assembly, 8 July 1896, 1407.

[72] New South Wales, *Parliamentary Debates,* Legislative Assembly, 8 July 1896, 1410.

Within four years, the Full Court of the Supreme Court of New South Wales ruled that this formula was in fact sufficient to abolish all common law riparian rights.[73] Yet doubts persisted and when Victoria sought to legislate to abolish riparian rights completely in 1905, two other sections were inserted expressly for the purpose of overcoming the shortcomings of the vesting formula. Section 4 of the Water Act 1905 vested the right to the use, flow and to the control of all waters in the Crown. Section 5 declared that the bed and banks of all boundary rivers were deemed to have remained the property of the Crown. Several members asked the minister why this step was necessary. His answer, whilst quite explicit, demonstrates the prevailing doubt as to the effect of section 4. 'I want to prevent any rights whatever accumulating in any form and to get rid of existing rights.'[74] Similar reasoning dictated the insertion of section 7 which expressly prohibited the diversion or appropriation of water, except in accordance with the Act. It was stated that it was this section, not section 4 'under which the Government would resume all riparian rights'.[75]

Before proceeding to examine the effect of vesting provisions similar to section 4, it is worthwhile to consider whether the two additional sections inserted by Victorian draftsmen bear on common law riparian rights. Similar sections were subsequently adopted in Queensland, the Northern Territory, and portions of Western Australia[76] and South Australia[77] but still do not appear in the New South Wales Act.[78] Whether either provision, taken alone is sufficient to abolish riparian rights is doubtful. The provision vesting bed and banks in the Crown applies only to streams forming portion of the boundary of an allotment. Although the precise wording of the section differs from state to state, it appears that the Crown in each case only has title over that part of the *alveus* which constitutes the boundary of various allotments and not necessarily along the whole course of the stream. If original surveys invariably regarded watercourses as natural boundaries to the allotments on either side, the section would, in effect, have made the Crown the sole riparian owner. Private persons would have no *locus standi* to challenge the Crown, as they would not own land in vertical or horizontal contact with the

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

[74] Victoria, *Parliamentary Debates,* Legislative Assembly, 19 July 1905, 457. See also n. 44 *supra.*

[75] Victoria, *Parliamentary Debates,* Legislative Assembly, 19 July 1905, 441. See also 452.

[76] The Rights in Water and Irrigation Act 1914-1964 (W.A.), s. 5 is significantly different from the provision in other states. Only the bed is reserved, and not the banks. As the riparian right depends on ownership of the banks *or* bed, this section cannot deprive adjacent owners of riparian rights. See n. 46 *supra.*

[77] Water Acts 1926-1964 (Qld), ss 5, 6; Water Act 1958, ss 5, 6; Control of Waters Act 1919-1925 (S.A.), ss 5, 8; Rights in Water and Irrigation Act 1914-1964 (W.A.), ss 5, 6; Control of Water Ordinance 1938-1968 (N. Terr.), ss 4, 5.

[78] The Water Act 1912 (N.S.W.), s. 4C does, however, prohibit the unauthorized interference with underground waters. There is no corresponding provision for surface waters.

stream.[79] In Victoria, in fact, the common practice was to make more important streams the boundary of neighbouring allotments or to reserve the bed and banks from alienation. Adjacent land is then inevitably deprived of riparian rights. The only authors to doubt this are Dworkin and Harari[80] in their criticism of *Beaudesert Shire Council v. Smith*,[81] but they apparently overlook the fact that the plaintiff's land in that case was bounded by the stream. In view of their trenchant criticism it is ironic that the High Court expressly held that no riparian rights attached to the land in question.[82]

It appears, however, that in Victoria, at least, the practice of reservation operated only in relation to major rivers and boundary streams. The Commissioner of Crown Lands in 1905 expressly acknowledged that, in some grants, a stream ran *through* the one parcel, and no steps had been taken to reserve the *alveus* to the Crown or to reckon the acreage of the grant excluding the river bed.[83] Officers of the Victorian Lands Department have confirmed that such grants exist to the present day, and this is possibly the position in Queensland, South Australia[84] and Western Australia. Manifestly, a section reserving the bed and banks of boundary streams could not operate to divest such lands of their riparian rights.

The second additional provision introduced by Victoria prohibits the taking of water except in accordance with the relevant Act.[85] This, too, has limited effect. At most it could impinge on the riparian owner's right to use water and only partially limit his common law right to sue an upstream diverter who was taking water without a licence and in excess of his common law entitlement as a riparian. The reasons for this conclusion are advanced below.[86]

Whilst neither of these additional sections is sufficient in itself to abolish riparian rights, it is conceivable that they may do so in concert with the provision vesting the 'right to the use, flow and control' in the Crown or its agent. The High Court, interpreting the Queensland Water Acts 1926-1964 in *Beaudesert Shire Council v. Smith*[87] stated:

[79] *Lyon v. Fishmongers' Co.* (1876) 1 App. Cas. 662, 683. See n. 43 *supra* and the qualification concerning Western Australia voiced in n. 76 *supra*.

[80] Dworkin and Harari, 'The Beaudesert Decision—Raising the Ghost of the Action upon the Case' (1967) 40 *Australian Law Journal* 296, 347.

[81] (1966) 40 A.L.J.R. 211.

[82] (1966) 40 A.L.J.R. 211, 213.

[83] See the opinion of Commissioner De Verdon presented by the Minister of Lands, Mr Swinburne during debates on the Water Bill 1905: Victoria, *Parliamentary Debates*, Legislative Assembly, 18 July 1905, 364.

[84] In spite of the instructions to reserve land adjacent to the River Murray (*supra* n. 41) it appears that some parcels adjacent to Lake Alexandrina and perhaps elsewhere were conveyed to the water's edge. Although the Murray is invariably the boundary of neighbouring parcels, the reservation section only applies to land alienated after 1919: Control of Waters Act 1919-1925 (S.A.), s. 5. The provisions of the Act which originally applied only to the Murray above Mannum have recently been extended to the lower Murray by proclamation.

[85] Water Act 1958, s. 6. *Cf.* Water Acts 1926-1964 (Qld), s. 6; Control of Waters Act 1919-1925 (S.A.), s. 8; Rights in Water and Irrigation Act 1914-1963 (W.A.), s. 6; Control of Water Ordinance 1938-1968 (N. Terr.), s. 5.

[86] *Infra* 499-500.

[87] (1966) 40 A.L.J.R. 211.

> Counsel for the respondents contended, however, that as a riparian owner Smith was, at common law, entitled to the flow of water as it was when the pump was installed. It seems to us that the scheme of *The Water Acts* denies this. What the Acts do is vest the bed and banks and the right to the flow of a watercourse in The Commissioner of Irrigation and Water Supply, subject to certain restrictions: see *Water Acts,* ss. 4, 6 and 7. Of these restrictions, the only one that we think is material for present purposes subjects the right of the Crown, through the Commissioner, 'to the rights of the holders of licences granted under this Act' (*Water Acts,* s. 4(2)(c)). Apart from the special rights conferred by a licence, the only riparian rights of an owner or an occupier of land abutting on the bank of a watercourse are those referred to in ss. 7 and 9 of *The Water Acts*.[88]

Although this passage emphasizes the total scheme of the Acts, it must be remembered that it is confined to the situation where the land in question is bounded by a stream and the *alveus* is consequently in the Crown. In those situations, albeit limited, where a stream flows across one parcel of private land, the abolition of riparian rights must depend upon the nett effect of the 'right to the use flow and control' provision alone.

The problem in states like Victoria thus becomes essentially similar to that in New South Wales. In Victoria, riparian rights will still adhere to certain parcels through which a stream flows, unless the vesting section is sufficient to abolish them indirectly. In New South Wales a similar situation exists, though for different reasons. There is no statutory provision reserving the *alveus* of boundary streams. Instead, 'all the beds of rivers and their Tributaries in the Eastern and Central Divisions of the State' were temporarily reserved from sale or lease in 1918 and this reservation was extended to the Western Division in 1935.[89] These provisions were not retrospective, and many alienations prior to these dates carry title to the bed and banks either absolutely or *ad medium filum*.[90] At the very least, this class of lands will carry riparian rights unless they are divested by the 'right to the use, flow and control' provision. Probably the class is much wider, as the reservations of 1918 and 1935 only refer to the beds of rivers. At common law a clear distinction has been drawn between ownership of the bed and ownership of the banks and there is the highest authority for the view that the latter is sufficient to support riparian rights, without ownership of the bed.[91]

It thus becomes important to examine the vesting provision more closely to determine whether riparian rights have been completely abolished.

[88] (1966) 40 A.L.J.R. 211, 213.

[89] New South Wales, *Government Gazette,* 3 May 1918; 11 May 1923; 31 May 1935. See Moore, 'Land by the Water' (1968) 41 *Australian Law Journal* 532, 540.

[90] *In re White* (1927) 27 S.R. (N.S.W.) 129; *Lanyon Pty. Ltd. v. Canberra Washed Sand Pty. Ltd.* (1966) 115 C.L.R. 342.

[91] *Lyon v. Fishmongers' Co.* (1876) 1 App. Cas. 662, 683; *Gartner v. Kidman* (1962) 108 C.L.R. 12, 32.

III

The scheme of the New South Wales Water Act 1912 which superseded the original Water Rights Act 1896, in so far as it relates to river waters, is as follows. The 'right to the use, flow and to the control of the water' is vested in the Water Conservation and Irrigation Commission by section 4A(1). By section 4A(2), this grant is subject to certain specified restrictions; in particular the provisions of section 7. Section 7 in turn states that the riparian owner has 'the right to take and use' water for domestic and stock purposes and for irrigating a household garden not exceeding five acres in extent. The Commission is also given many other powers and rights, *e.g.*, to modify the right to take and use water granted by section 7; to enter land; to quiet enjoyment and exclusive use of all works constructed under the Act and to issue concessions or licences to water users. Under the Irrigation Act 1912-1966 the Commission is given further power to manage its own affairs.

Judicial interpretation of the effect of this Act on private riparian rights reflects the same differences of opinion as were voiced in the legislatures of New South Wales and Victoria. The first contention is that the vesting of 'the right to the use, flow and control' of water in the Commission is sufficient, in the context of the detailed powers conferred by the Act, to impliedly divest riparian owners of their common law rights. The other view is that riparian rights are not abolished by the Act but survive to the extent that they are not inconsistent with the exercise of powers conferred on the Commission. We propose to examine the conflicting authority and the arguments in support of each view.

Does the vesting section abolish riparian rights by necessary implication?

In three early cases, the Supreme Court of New South Wales held that the Water Rights Act 1896 effectively abolished riparian rights. *Dougherty v. Ah Lee*[92] and *Attorney-General v. Bradney*[93] both adopted the conclusion of the Full Court of the Supreme Court of New South Wales in *Hanson v. Grassy Gully Gold Mining Co.*:[94]

> It cannot 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.[95]

This assessment of the purpose of the Act hardly appears on the face of the legislation. There are, admittedly, provisions which indicate that

[92] (1902) 19 W.N. (N.S.W.) 8.
[93] (1903) 20 W.N. (N.S.W.) 247.
[94] (1900) 21 N.S.W. L.R. 271.
[95] *Ibid.* 275.

actions by the Crown are not challengeable before the courts, but there is nothing to indicate that private actions which a riparian might have against an unauthorized diverter are abolished. Thus, Fullagar J. in *Thorpes Ltd. v. Grant Pastoral Co.*[96] vigorously disagrees with Stephen J. In speaking of the passage just quoted, he said:

> 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 . . . 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 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, over-riding rights to which private rights must, if need arise, give way.[97]

Not surprisingly, these differences in approach produced different conclusions as to the effect of the vesting section on private rights. In *Hanson's* case, Stephen J. remarked:

> Although there are no words saying the riparian owners' rights are 'divested' the section says these rights 'vest' in the Crown. I do not think the language of the Act could be clearer, and plainly the rights of the riparian owners were divested and vested in the Crown.[98]

The view that no express section was necessary to divest riparians of their common law rights has some implicit support. In *Melbourne Harbour Trust Commissioners v. C.S.R. Ltd.*[99] the Commissioners had narrowed the course of the Yarra pursuant to powers granted by the Melbourne Harbour Trust Act 1890. Nothing in that Act specifically or directly divested riparians of their common law rights, and the company asserted its common law right of access to the river as riparian owners. The Victorian Supreme Court held they had lost their common law riparian rights, even though there was no divesting provision in the Act. According to a'Beckett J.,

> the right given to the Harbour Trust to make those who had been riparian proprietors to cease to be riparian proprietors, made the defendant lose, as a consequence of that interference with their property, all the special advantages which a riparian proprietor would have enjoyed.[1]

Similarly it could be argued that the very complexity and completeness of the New South Wales Water Act 1912 demonstrates an intention to cover the whole field of water law. The powers given to the Commission to control watercourses throughout the State—to build works, alter customary flows, license extractions—are so extensive that they may indicate that the Act was intended to incorporate all the water law of

[96] (1955) 92 C.L.R. 317.
[97] *Ibid.* 331.
[98] (1900) 21 N.S.W. L.R. 271, 275.
[99] (1897) 3 A.L.R. 231.
[1] (1897) 3 A.L.R. 231, 235.

New South Wales and abolish common law rights entirely. The decision in *Beaudesert Shire Council v. Smith*[2] may support this broad view of the Act. In the passage from that case quoted above[3] the High Court bases the conclusion that riparian rights have been abolished on the general structure of the Queensland Water Acts. Specific emphasis is placed not just on the reservation of bed and banks but also on the vesting section which closely resembles the New South Wales provision. It could possibly be argued that there is no indication that the reservation of bed and banks is an indispensable element in the general scheme and that the provisions of the New South Wales Act are adequate to abolish private rights, yet the fact that Smith's land was bordered by a stream, the *alveus* of which was reserved, argues against this interpretation.

On the other hand, whilst there is 'no rule of construction that general words are incapable of interfering with private rights and that such rights can only be trenched upon where express power is given to do so',[4] the emphasis, especially in cases concerning riparian rights, has been on clear and explicit divesting provisions. Thus, in *H. Jones and Co. Pty. Ltd. v. Kingborough Corporation*[5] the section in question vested certain rivers in municipal councils and conferred 'the absolute control and regulation' of supply along those rivers. There was no express provision divesting private persons of their rights. Dixon J. commented:

> but riparian rights are incidents of property: there is no indication of any intention to destroy them and the bare vesting of the stream is not an apt or sufficient way of doing so.[6]

In *Upper Ottawa Improvement Co. v. Hydro-Electric Power Commission of Ontario*[7] the appellants invoked a statute which guaranteed their right to drive logs. They argued that riparian rights, in so far as they interfered with their statutory right, were abolished by implication. The Full Court of the Canadian Supreme Court held that the statute only created a right which must co-exist with those of riparian owners.

> We are asked to say in the present matter that these ancient rights of the riparian owner, so long embedded in the common law, have been taken away by inference, a conclusion which I find impossible to reach. Had the legislature intended that these rights should be restricted to any greater extent than has been done by the statute, it would, no doubt, have said so in clear terms.[8]

In view of this authority, it would seem that the mere grant of rights to use, flow and control of water to the Commission does not necessarily point to the consequent abolition of private rights. The import of the vesting section, standing alone, is sufficiently inconclusive to lead a

[2] (1966) 40 A.L.J.R. 211.
[3] *Supra* 493.
[4] *Attorney-General for Canada v. Hallet & Carey Ltd.* [1952] A.C. 427, 450-1.
[5] (1950) 82 C.L.R. 282.
[6] *Ibid.* 322.
[7] (1961) 28 D.L.R. (2d) 276.
[8] *Ibid.* 289 *per* Locke J. See also *Lomax v. Jarvis* (1885) 6 N.S.W. L.R. 237.

court to favour an interpretation which leaves private rights undisturbed. Yet the hypothesis that common law riparian rights may still survive can only be valid if the existence of such rights can be reconciled not only with the general rights vested in the Commission by section 4A, but also with the specific powers conferred by the rest of the Act.

Is the existence of common law riparian rights consistent with the powers conferred on the Commission?

In *Thorpes Ltd. v. Grant Pastoral Co.*[9] Fullagar J. was not only of the opinion that such rights could still exist, but showed how they are to be reconciled with the broad regulatory powers of the Commission.

> 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.[10]

It is, by now, a well established principle that the vesting of property in the Crown or a statutory body 'is considered as confined to the purpose to be fulfilled'.[11] The grant of rights to the use and flow of water is therefore not absolute but limited to the exercise of the powers of construction of works, distribution, licensing of structures and uses *etc.* provided for in the Water Act 1912. On this view, the riparian right to enjoin interference with the flow of a stream would only abate in circumstances where the Crown or Commission exercised its powers in a manner inconsistent with the continued existence of the riparian's right. Thus, if the Commission granted a licence to divert water, a lower riparian would not be able to invoke his common law right to enjoin that use. If, however, the diverter took water without Commission approval, or in excess of the amount approved by his licence, there would have been no attempt by the Crown to exercise its superior rights and the common law right would survive.

There is, admittedly, some uncertainty as to what would amount to a sufficient exercise of the Crown's superior rights to cause private rights to abate. Thus, if the Commission purported to issue a licence to a diverter but the licence for some technical reason was invalid, a nice point may arise as to whether a lower riparian could sue for damage to his right to continued flow during the period before the Commission remedied the situation. Although such uncertainty exists, it is hard to accede to the view that the Commission may, in fact, never have exercised its rights in respect of many streams over which it has acted as if it had rights, in derogation of the rights of private riparian occupiers, for many years.

[9] (1955) 92 C.L.R. 317.
[10] *Ibid.* 331.
[11] *H. Jones & Co. Pty. Ltd. v. Kingborough Corporation* (1950) 82 C.L.R. 282, 320 *per* Dixon J. *Bradford v. Mayor of Eastbourne* [1896] 2 Q.B. 205, 211; *The Medway Company v. Earl of Romney* (1861) 9 C.B. (N.S.) 575, 591; *Cooper v. The Corporation of Sydney* (1853) 1 Legge 765.

The mere fact that it has acted in derogation of private rights would constitute an exercise of its superior rights. It is even harder to agree with the same critic's view that

> Fullagar, J.'s view, if accepted, could place the exercise of many of the Commission's functions on a doubtful basis, and would defeat the presumed intention of the legislature in enacting the section.[12]

This criticism rests on the hypothesis that the primary purpose of the legislation was to abolish private litigation. Yet the outraged riparian who wished to make things difficult for his neighbour who acted without statutory authority has plenty of ammunition without resorting to his riparian rights. He may sue to enforce a statutory penalty imposed by the Water Act 1912.[13] This is a right at common law[14] which is certainly not divested by the Water Act 1912. In fact, it is expressly preserved by the New South Wales Fines and Penalties Act 1901-1954, section 4. Again, he could possibly sue as relator through the Attorney-General.[15] He may further have a strictly private cause of action, if he has suffered damage, by an action on the case under *Beaudesert Shire Council v. Smith*.[16] Finally, a riparian owner still retains all the common law rights in trespass, negligence and nuisance which inhere in all landowners.[17] It is hard to believe that the survival of the riparian's right to continued flow on uncontrolled streams would seriously increase the frequency of litigation.

There are, moreover, good reasons why a riparian should be able to invoke his common law rights on uncontrolled streams. If the river is of so little public significance that the Commission has not been moved to exercise its superior powers, it is unlikely that it will rapidly move to protect the interests of an injured riparian, where neither the upstream nor downstream diverter has been required to take out licences. In such cases, where immediate intervention by the Commission to protect the lower riparian might not be anticipated, to deprive him entirely of his riparian rights would unjustifiably limit his possible avenues of compensation for damage caused to his land.[18]

Our tentative conclusion, then, is that common law riparian rights are not automatically abolished by the Water Act 1912. They may survive unabated in streams where the Commission has not chosen to exercise powers conferred on it by the Act. Furthermore, they may continue to exist, even on controlled streams, if they are not inconsistent with the

[12] Comment, 'Flood Damage: Actions between riparian owners' (1956) 2 *Sydney Law Review* 144, 150.
[13] *Mettam v. Squire* (1906) 23 W.N. (N.S.W.) 17.
[14] *R. v. Stewart* [1896] 1 Q.B. 300; *Robertson v. Nesci* [1948] 2 A.L.R. 382; *McKay v. Faulkner* [1953] A.L.R. (C.N.) 1161.
[15] *Attorney-General v. Bradney* (1903) 20 W.N. (N.S.W.) 247.
[16] (1966) 40 A.L.J.R. 211.
[17] *Thorpes Ltd. v. Grant Pastoral Co.* (1955) 92 C.L.R. 317.
[18] *Ex hypothesi* he would be unable to sue for a statutory penalty or as relator, for the Commission not having exercised its powers, the Water Act 1912 would not apply.

lawful activities of the Commission. There are, moreover, sound policy reasons why common law rights should survive in such circumstances.

One difficulty remains. It is possible that the specific provisions of section 7 of the Water Act 1912 may operate to abolish, or at least to qualify, common law rights. As Fullagar J. in *Thorpes Ltd. v. Grant Pastoral Co.*[19] did not expressly advert to this provision, it must be considered in some detail.

Does the section re-defining the right of a riparian owner to take water for limited purposes abolish all other incidents of the common law right?

Section 7 of the New South Wales Water Act 1912 as amended, states:

> (1) The occupier of land on the bank of a river or lake shall, subject to the provisions of subsection two of this section, have the right to take and use the water then being in the river or lake for domestic purposes, and for watering stock, and for irrigating gardens, not exceeding five acres in extent, used in connection with a dwelling-house where the produce of such garden is not offered for sale.
>
> It shall not be necessary for any such occupier to apply for or obtain a licence for any work . . . used solely in respect of the right conferred by this subsection.[20]

At the outset, it must be noted that any argument which seeks to show that this section divests common law rights faces the same difficulty as the argument of Stephen J. in *Hanson v. Grassy Gully Gold Mining Co.*[21] The section does not expressly purport to divest any private rights and, as has been shown, there is strong authority that common law riparian rights may only be abolished by express words.

Yet there can be no doubt from the formula and context of section 7 that it impinges on certain aspects of the common law right. It re-states the common law right to take water for domestic and stock purposes. It changes the common law by elevating the use of water for irrigation of household gardens to the same status as domestic and stock uses, thus allowing a riparian to draw unlimited quantities for each of these purposes, subject only to the Commission's right to intervene in cases of wastage and actual or threatened shortage.[22] At the same time, it subjects other uses of water, which would be classified by the common law as 'extraordinary' or 'secondary' uses[23] to the licensing provisions of the Act, by necessary

[19] (1955) 92 C.L.R. 317.

[20] The equivalent sections in other states are found in Water Acts 1926-1964 (Qld), s. 9; Control of Waters Act 1919-1925 (S.A.), ss 2, 7; Water Act 1958, s. 14; Rights in Water and Irrigation Act 1914-1964 (W.A.), s. 14; Control of Water Ordinance 1938-1968 (N. Terr.), s. 7.

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

[22] By s. 7(2) the Commission may 'suspend or modify' the rights of use preserved by s. 7(1) in such circumstances upon giving notice. There is no record of this power having been used to date.

[23] *Swindon Waterworks Co. v. Wilts and Berks Canal Navigation Co.* (1875) L.R. 7 H.L. 697, 704; *McCartney v. Londonderry and Lough Swilly Railway Co. Ltd.* [1904] A.C. 301, 306; *Attwood v. Llay Main Collieries Ltd.* [1926] Ch. 444, 458; *Secretary of State for India v. Subbarayudu* (1931) L.R. 59 I.A. 56, 64; *H. Jones & Co. Pty. Ltd. v. Kingborough Corporation* (1950) 82 C.L.R. 282, 324.

implication.[24] Quite a strong argument could be made that this section, by enumerating the rights of riparian owners, concurrently infers that no other riparian rights exist. No mention is made, for example, of the common law right to restrain any diversion which sensibly diminishes the flow of a stream, and the implication may be that this right is not preserved by the section. The argument could proceed on alternate grounds. It could be argued that the express saving of limited common law rights negatives the existence of all other common law rights. Alternatively, it could be argued that section 7, rather than guaranteeing the continued existence of limited common law rights, creates an entirely new statutory interest in the riparian, thus denying the existence of any common law rights whatsoever.

Whatever the merit in this position, it is necessary to observe that section 7, like the other provisions of the Act, is ambulatory and not absolute in operation. Although it appears on its face to be of general application and apply to all riparian owners, in fact it will only operate in situations where the Commission purports to exercise its powers under the Act. The contrary view would lead to absurd results. On a watercourse where the Commission had not chosen to exercise its superior powers, there would be no law governing the extraction of water for other than domestic, stock and household garden purposes. On the hypothesis that all other incidents of the riparian right are abolished, there would be no right to restrain even the most flagrant upstream diversions. Even on the more likely view, advanced below, that a limited right to restrain diversions still exists, it could only be invoked to protect those limited uses specified in section 7. Such a situation could surely not have been contemplated by the legislature, which leads to the conclusion that the enactment of section 7 does not *ipso facto* abolish common law rights. At most, it can operate only in relation to streams over which the Commission chooses to exercise its powers. On completely uncontrolled streams, then, common law riparian rights would continue absolutely undiminished and without any limitation imposed by section 7.

It remains to consider whether section 7 can operate to limit common law riparian rights on *controlled* streams. In the view of Fullagar J., private rights would abate where they were inconsistent with the exercise of superior powers conferred on the Commission. If the Commission chose to grant extensive irrigation licences to riparian and non-riparian users on a particular stream, a lower riparian would be unable to invoke his common law right to the undiminished flow of the stream to enjoin the upstream uses. His common law right to the continued flow would abate to accommodate properly authorized diversions by others. On the other

[24] The implication would be much stronger if there were a provision in the Act prohibiting diversions except in accordance with the Act. Such a section exists in other states, but the N.S.W. provision is of limited application. See Water Act 1912 (N.S.W.), s. 148A.

hand, section 7 guarantees to a riparian the right to take water for domestic, stock and household garden purposes. It would not seem inconsistent with any powers conferred on the Commission to acknowledge that a common law right survives in a riparian to enjoin any upstream diversion, not authorized by the Commission, which detracts from his right to take water for domestic, stock and household garden purposes. To this extent, at least, the common law right to restrain diversions by others would survive.

This conclusion from the hypothesis advanced by Fullagar J. in *Thorpes Ltd. v. Grant Pastoral Co.*[25] appears to be confirmed by *H. Jones & Co. Pty. Ltd. v. Kingborough Corporation*[26] although, at first sight, the latter case contains conflicting views as to the character and divisibility of the riparian right. Section 209 of the Tasmanian Local Government Act 1906 is in two parts. The first part 'vests' certain rivers in municipal councils. The second gives them 'the absolute control and regulation' of supply along such rivers 'subject to the previously existing rights of any riparian proprietors to the use of the water'. The appellants invoked their previously existing rights to the use of the water against an upstream diversion by the Corporation, and claimed that the diminished flow caused by the respondent would prevent them from using water as they were accustomed and entitled to do. Section 209 only protected rights 'to the use of the water' in express terms. Nothing specifically was said about the common law right to have the undiminished flow of the stream maintained. The problem was thus analogous to that raised by the wording of section 7 of the New South Wales Water Act 1912.

Unfortunately, the judgments in the case are not free from difficulty. Although the section only preserved rights of 'use' expressly, both Latham C.J. and Fullagar J. held that the common law right to enjoin interference with the flow of the stream also survived; as they both put it, the one necessarily 'involves' the other.[27] Yet there is some doubt as to whether the right to the continued flow survives *in toto,* and some confusion is apparent in the judgments. At one place Latham C.J. asserts:

> The rights of the plaintiffs are to have the water of the stream come to them *in quantity and quality not sensibly diminished or altered* and to use the water for domestic and stock purposes and, at least to some extent, for irrigation.[28]

Elsewhere he remarks:

> The rights of the plaintiffs which are preserved by s. 209 are rights to use the water of the stream. A right to use the water of a stream (and all the water thereof if that can lawfully be done) is illusory if the flow of the stream can be diminished at will by another person. A positive right in a landowner to the use of the water of a stream prima facie involves a

[25] (1955) 92 C.L.R. 317, 331.
[26] (1950) 82 C.L.R. 282.
[27] *Ibid.* 301 *per* Latham C.J., 344 *per* Fullagar J.
[28] *Ibid.* 301. Italics ours.

right to prevent *such interference with the stream as would prevent him from using the water.*[29]

There is an important distinction between the two italicized phrases. The first represents the common law right which could be invoked to prevent any sensible diminution by an upstream proprietor, irrespective of whether it resulted in any actual or threatened injury to the plaintiff's use of the stream. The second is a far more limited right only to restrain those diversions which actually interfere with the legitimate uses of the plaintiff.

Although this distinction is raised by Latham C.J., he does not develop it and he concludes, with Fullagar J., that the common law right to restrain *any* sensible interference with the flow of the stream remains intact, by virtue of the express saving of the right to use water. With respect, however, it would seem that the purpose of the Act was to grant the council at least some effective power to control and regulate the supply of water in the stream. To hold that every riparian proprietor retains an absolute right to enjoin any sensible interference with the customary flow would limit the council's power of 'absolute control and regulation' to only those acts which have no sensible effect on the customary flow of the stream. This absurdity would not arise if the second formulation advanced by Latham C.J. were adopted. If the right to enjoin interference survived only to protect actual rights of use, the council would have plenary powers over all that water which was not necessary to maintain the existing rights of use of riparians. This would seem to be more in accord with the intention of the legislature.

For this reason, the conclusion that the right to enjoin sensible interference survives in its entirety must be regarded as a product of the peculiar position of the plaintiffs, rather than a conclusion of general application to all riparians. The plaintiffs were, in fact, the last owners on the stream, occupying land extending to the mouth of the stream. As such, they were in the unique position of being able to use all the water which flowed to them, and their rights of use were not limited by any obligation to allow water to flow to downstream riparians. Their rights of use were absolute and unlimited and they could, if they chose, use all the water in the stream.[30] Yet the statute preserved common law rights of use in their entirety and, in order to protect these rights fully, it was necessary to hold that the right to restrain any sensible diminution continued unabated. Such a conclusion inevitably makes nonsense of the power conferred on the council, but follows necessarily from the saving of all existing rights of use. Fullagar J. attempted to avoid this result by suggesting that the rights of use preserved were only those being exercised at the time of the constitution of the water district;[31] but this conclusion is arguable. The section preserved 'the previously

[29] *Ibid.* Italics ours.
[30] *Holker v. Porritt* (1873) L.R. 8 Ex. 107; (1875) L.R. 10 Ex. 59.
[31] (1950) 82 C.L.R. 282, 345.

existing rights of any riparian proprietors to the use of the water'. At common law, the right to take and use water to the extent permitted could be exercised at any time and the right to have an injunction against any person who sensibly diminished the customary flow, irrespective of actual damage, existed for the express purpose of protecting possible future uses. It would seem that the previously existing rights to the use of water included the right to future use and that, if only rights to existing uses were protected, the statute would have said so.

Had the plaintiffs been riparian proprietors higher up the stream, it is probable that the conclusion would have been that an action to enjoin interference only lay to protect rights of use and did not extend to having the stream flow without any sensible diminution.

It is probable that Dixon J. would adhere to this conclusion, although it is fair to remark that his judgment is, on the surface, fraught with possible inconsistency and resort must be had to inference to rationalize his conclusions with his reasons. Instead of adopting the view of the other judges that the various incidents of the riparian right are interdependent, he felt that the wording of the statute required a contrary view.

> It is of course possible to regard the rights at common law of a riparian owner as a *fasciculus* that is not to be dismembered so that the right to use the waters cannot be divorced from the right to the undiminished flow of a stream. But that is not a conception of the rights to which the statute can give way.[32]

From this position he concludes that there is a distinction between rights of use and rights of flow and whilst rights to use water are expressly retained,

> the riparian rights thus preserved as paramount do not include a right to an undiminished flow of the stream but do include a right to take water from the stream for irrigation and other purposes . . .[33]

Yet his final position is that a court must 'grant an injunction if there is a real and present threat to deprive the plaintiffs of water that they should receive, and refuse if there is not'.[34] In view of his statement that the 'section does not mean to preserve more than the right to use the water flowing by the land'[35] an appearance of inconsistency is created by the assertion that they have a right to receive water which may be protected by injunction.

Dixon J. does not explain the nature of the surviving right of action, and the difficulty is reconciling his statement that rights of flow do not survive with his final result. One possibility is that he regards the right to injunctive relief to preserve the undiminished flow of the stream as separate from the right to an injunction to maintain such continued flow as is necessary to preserve rights of use. According to the dichotomy

[32] *Ibid.* 323.
[33] *Ibid.* 326.
[34] *Ibid.* 331.
[35] *Ibid.* 323.

between rights of use and rights to flow advanced by Dixon J.,[36] the right to the continued flow necessary to maintain rights of use must be an incident of the right to use the stream. On this hypothesis, the council's right to regulate and control all water in excess of that required for use would be maintained.

There are thus two possible analyses which emerge from the case. One is that the so-called common law right of flow continues in a truncated form to support rights of use only. The other is that the common law right to flow is properly regarded as a right to the *undiminished* flow of the stream. Whilst this is abolished, a right to restrain interference with the stream is a necessary incident of the rights of use, and this right is preserved by the statute. Although these views conflict in their analysis of the incidents of riparian title, they lead to exactly the same result. A common law right to injunctive relief was held to survive to the extent necessary to support the rights to use water expressly preserved by the Act.

Applying this result to section 7 of the New South Wales Water Act 1912, the express saving of certain rights to use water does not lead to the conclusion that no common law rights exist to restrain upstream diversions. In the case of section 7, it appears that a riparian proprietor would still enjoy the right to restrain any upstream use which was not authorized by the Commission and which actually interfered with his right to take water for domestic, stock and household garden purposes. This conclusion is consistent with the view advanced by Fullagar J. in *Thorpes Ltd. v. Grant Pastoral Co.*[37]: common law rights survive to the extent that they are not inconsistent with the exercise of superior powers vested in the Commission.

Thus far, the result is, in our submission, consistent with both principle and policy. There is, however, a further problem which admits of no easy solution. Section 7(1) provides that certain rights of use exist in a riparian 'subject to the provisions of subsection two'. Section 7(2) allows the Commission to 'suspend or modify the said right' where the riparian is wasting water, or where there is 'an actual or threatened shortage' of water. The Commission is required to observe certain statutory procedures of notice before the right is 'deemed to be suspended or modified'. It would seem that a strong argument could be made that section 7(2) defines the only circumstances in which and procedure by which the rights of use guaranteed by section 7(1) can be interfered with by the Commission. Although, according to the analysis of Fullagar J., the Commission's rights, when exercised, would supersede private rights, section 7(2) may be viewed as defining the circumstances in which those superior rights can be exercised. On such a view, it would not be possible

[36] In adopting this division of the riparian right he relies on the distinction advanced by Lord Moulton in *Cook v. Vancouver Corporation* [1914] A.C. 1077, 1082.

[37] (1955) 92 C.L.R. 317, 331.

for the Commission to deprive a riparian of the rights guaranteed by section 7(1) by the simple expedient of granting a licence to a higher user. In such a case, the riparian could exercise his common law right of action to restrain any use which interfered with his right to take water for domestic, stock and household garden purposes, even if the offending use was purportedly authorized by the Commission.[38]

IV

Our conclusion is that common law riparian rights exist *unabated* in New South Wales only in those rivers over which the Commission has not exercised its powers.[39] Until licensing requirements or other manifestations of control were extended to watercourses within the meaning of the Water Act 1912, rights to take water and to restrain interference with the continued flow of a stream were governed by the common law. For all practical purposes these rights would seem to be of little importance, as the Commission has extended its controls to most rivers. It is possible, however, that some watercourses exist which are technically within the meaning of the Act, but which are not controlled because of their minor importance. Riparian rights would there survive, provided they were watercourses within the common law meaning of the term. This result, we submit, would be avoided by a section such as exists in other states, prohibiting all diversions not in accordance with the Act.[40]

We further conclude that, even where licences have been issued to all landowners along a river, the common law right will survive to enjoin an upstream diverter from taking water in excess of this licence, to the extent that it prevents an effective exercise of the right to use as redefined by section 7, and is a use which could be enjoined at common law.[41] In such a case, a riparian will also have a right to claim damages, based on his riparian right, for any injury caused by the excessive diversion.

In Western Australia, the right would survive to this second extent.[42]

[38] By the Water Act 1968, s. 14(2) was inserted into the Water Act 1958. It gives the Governor in Council power to make regulations permitting the Commission to qualify the rights of use of a riparian in circumstances similar to those in New South Wales. Its wording probably would not support so strongly the argument advanced in relation to New South Wales.

[39] There is other authority for this view, apart from *Thorpes'* case. *In re White* (1927) 27 S.R. (N.S.W.) 129 held that a riparian was entitled to have his ownership *ad medium filum* stated on his certificate of title. The Full Court discussed the applicant's riparian rights as though they were very much alive. No reference was made either to *Hanson's* case or the Water Act 1912, but it is hard to believe they were unaware of the argument in *Hanson's* case.

[40] See Water Acts 1926-1964 (Qld), s. 6; Control of Waters Act 1919-1925 (S.A.), s. 8; Water Act 1958, s. 6; Rights in Water and Irrigation Act 1914-1964 (W.A.), s. 6; Control of Water Ordinance 1938-1968 (N. Terr.), s. 5. The Water Act 1912 (N.S.W.), s. 148A is of limited application.

[41] Whether the right extends to uses *authorized* by the Commission but which nevertheless interfere with the uses protected by s. 7(1) is arguable.

[42] The right appears to be as broad as that in New South Wales because s. 5 of the Rights in Water and Irrigation Act 1914-1964, although reserving the bed of rivers to the Crown, fails to reserve banks, and riparian rights therefore still adhere to adjacent lands.

The same right exists in Queensland, parts of South Australia, Victoria[43] and the Northern Territory, but only in respect of allotments actually abutting rivers, *i.e.* where there has been no reservation of the banks of the watercourse in the original grant and the watercourse does not form the boundary of an allotment.

We cannot see that the existence of such rights interferes with the important regulatory powers of the various State Commissions and Departments. Their powers may still be exercised at will and, to the extent that they are exercised, private riparian rights will automatically abate. The existence of these rights is unlikely to lead to abundant and harmful litigation. A landowner is safe from the threat of private action, provided he diverts water in accordance with his licence. If he exceeds his entitlement, he is admittedly liable to a statutory penalty and there seems no good reason why he should not be also obliged on occasions to compensate a neighbour who is injured by his illegal excesses. In view of the possibly precarious future of actions on the case under *Beaudesert Shire Council v. Smith*[44] and the limitations of the other possible common law remedies, the continued existence of a riparian remedy may be positively beneficial. Such cases will doubtless be rare. It is possibly for this reason that the New South Wales Commission continues to accept the validity of *Hanson's* case and has no record of any suggestions to amend the Water Act 1912 to overcome the problems raised by *H. Jones & Co. Pty. Ltd. v. Kingborough Corporation*[45] or *Thorpes Ltd. v. Grant Pastoral Co.*[46]

Whilst we therefore see no need to abolish those limited riparian rights which continue to exist, some qualification of the New South Wales position appears desirable. In other States there is legislation preventing the acquisition of a prescriptive title to divert water.[47] There is no similar provision in New South Wales, and it is technically still possible for a riparian to enjoin a higher use, even though no actual damage is caused to his land. To prevent the barren assertion of a technical legal right against another diverter, legislation preventing the acquisition of prescriptive title to divert water seems necessary.

[43] In reaching this conclusion we do not disregard ss. 326 and 319 of the Water Act 1958. S. 326 is a legacy from the Water Conservation and Distribution Act 1881, s. 37 conferring property in water on local Trusts: *supra* 484-6. Although, by the operation of the definition section, the State Rivers and Water Supply Commission would thus seem to have 'property' in water, the location of the section within the scheme of the Act, and its generality would indicate that it cannot detract from the rights guaranteed by s. 14.

[44] (1966) 40 A.L.J.R. 211. See the limitations of this case foreshadowed in *Grand Central Car Park Pty. Ltd. v. Tivoli Freeholders* [1969] V.R. 62, 74.

[45] (1950) 82 C.L.R. 282.

[46] (1955) 92 C.L.R. 317.

[47] Water Acts 1926-1964 (Qld), s. 8; Control of Waters Act 1919-1925 (S.A.), s. 9; Water Act 1958, s. 8; Rights in Water and Irrigation Act 1914-1964 (W.A.), s. 8; Control of Water Ordinance 1938-1968 (N. Terr.), s. 8.