IN THE SUPREME COURT OF QUEENSLAND Appeal No. 62 of 1980

FULL COURT

BEFORE:

Mr. Justice Douglas

Mr. Justice Kelly

Mr. Justice Connolly

BRISBANE, 20 November, 1981

BETWEEN:

THOMAS INGLIS ELSTON, JOHN HENRY EVANS REICHARDT, IVY CATHERINE REICHARDT, JOHN THOMAS REICHARDT RONALD HENRY REICHARDT — (First Plaintiffs) Appellants

-and-

RUDOLD SKOPAL and BEVERLY JUSTINE SKOPAL — (Second Plaintiffs)

-and-

ANTONIO MARSILIO and NANCY LENA MAESILIO — (Third Plaintiffs) Appellants

-and-

MAVISH BELL and RONDNEY GEORGE BELL — (Fourth Plaintiffs)

-and-

JOHN LUIGI MARSILIO and DENIS GILDO MARSILIO (Fifth Plaintiffs)

-and-

JAMES AUGUSTINE DORE Defendant (Respondent)

JUDGMENT

MR. JUSTICE CONNOLLY: In this matter I am authorised by my brother Douglas to say that he agree with the order to be proposed by my brother Connolly and with his reasons. I also agree with the order to be proposed by my brother Connolly and with his reasons.

MR. JUSTICE CONNOLLY: In my opinion this appeal should be dismissed. I publish my reasons.

MR. JUSTICE KELLY: The order of the Court is that the appeal is dismissed with costs to be taxed. Order that the security be refunded to the appellants.

IN THE SUPREME COURT OF QUEENSLAND

Appeal No. 52 of 1980

Townsville Writ No. 40 of 1980

BETWEEN

THOMAS INGLIS ELSTON, JOHN HENRY EVANS REICHARDT, IVY CATHERINE REICHARDT JOHN THOMAS REICHARDT and RONALD HENRY REICHARDT First Plaintiffs (appellants)

AND

ANTONIO MARSILIO and NANCY LENA MAESILIO Third Plaintiffs (appellants)

AND

JAMES AUGUSTINE DORE Defendant (respondent)

DOUGLAS J.

KELLY J.

CONNOLLY J.

Judgment delivered by Connolly J. on the 20th November, 1981. Douglas J. and Kelly J. concurring with those reasons.

"APPEAL DISMISSED WITH COSTS. SECURITY LODGED BE REFUNDED TO THE SOLICITORS FOR APPELLANTS.

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 52 of 1980

BETWEEN:

THOMAS INGLIS ELSTON, JOHN HENRY EVANS REICHARDT, IVY CATHERINE REICHARDT, JOHN THOMAS REICHARDT and RONALD HENRY REICHARDT	(First Plaintiffs) Appellants

-and-

ANTONIO MARSILIO and NANCY LENA MAESILIO	(Third Plaintiffs) Appellants

-and-

JAMES AUGUSTINE DORE	(Defendant) Respondent

JUDGMENT - CONNOLLY J.

The respondent (the defendant in the action) is the occupier of portion 13V in the County of Cardwell Parish of Tyson in the Stamp Road area near Euramo, a few miles south of Tully in North Queensland. Portion 13V is traversed in an east-west direction by a creek known as Orchard Creek. Immediately to the south-west of portion 13V are lands occupied by the appellants, Elston and Reichardt (the first plaintiffs) and further west again are lands occupied by the appellants, Marsilio (the third plaintiffs). The east arm of Orchard Creek also runs through part of the lands occupied by the first plaintiffs and land occupied by the third plaintiffs is traversed by part of the west arm of Orchard Creek, the junction of the two arms occurring approximately at the eastern boundary of their land. I take the following description of the area from the reasons for judgment of Kneipp J. who tried the action:—

> "The area is low lying and comparatively level. It is situated between the Murray River, which is a short distance to the west, and the Tully River, which is a little further to the east. The rainfall is about 140 inches per year. The subject lands and surrounding lands are drained by numerous watercourses but, because of the flatness of the country, any gradients are likely to be short, watersheds are likely to be formed by very low ridges, and watercourses which are quite close to each other are apt to flow in quite different directions. In addition, the whole area is from time to time completely inundated by flood waters from the Murray, or the Tully, or both, and the flow of flood-waters when they recede can result in scouring or "other interference with the surface of the country and with the watercourses which carry water away in times of normal rainfall."

From the function of the eastern and western arms Orchard Creek flows in a southerly direction into the Murray River. The direction of flow in the eastern arm therefore was obviously in a generally westerly direction. His Honour has found that prior to 1964 Orchard Creek flowed in that direction across portion 13V.

In 1964 a gentleman by the name of Lago approached the respondent's father who was then the owner of portion 13V

and obtained permission from him to carry drainage water in a south easterly direction across portion 13V by means of a drain approximately 15 chains in length and a further drain about 3 chains long and about 8 to 10 feet deep which brought the water down towards Bedford Creek. Lago occupied land which lies to the north of the land now owned by the third plaintiffs. It is obvious that the area occupied by Lago and the surrounding area posed a drainage problem. As the area was developed for cane farming stretches of Orchard Creek were filled in and have virtually ceased to exist and much of the surface drainage seems to be led into a lagoon in the centre of the area. Having regard to the natural flow of Orchard Creek in a westerly direction across portion 13V, it may at first glance seem odd that it seemed desirable to carry drainage from lands to the west across that portion in an easterly direction. No doubt the general nature of the country as described by his Honour explains this. However, it was necessary to cut through the watershed between Orchard and Bedford Creeks and it was the short 3 chain cut referred to above which enabled the waters to reach the latter. Bedford Creek then had its source in a swamp out to the east of portion 13V and south of the then headwaters of Orchard Creek and ran off to the south.

When these drains were dug only the third plaintiffs were in occupation of their lands. The first plaintiffs became occupiers in 1973 or 1974 and the defendant in 1975. There is thus no question of any arrangement among the parties or their predecessors in title which could provide the foundation for a claim in contract to have the drain kept open. In 1976 the respondent allowed the drain to be cleaned at the request of one of the first plaintiffs but in 1979, believing that additional drainage which was unacceptable to him was being directed into it, he blocked it and filled it in. The learned Judge has found that with the filling in of substantial portions of Orchard Creek drainage problems resulted and that these were solved by reversing the flow of Orchard Creek, this being facilitated by the cutting of the long drain on portion 13V and made

possible by the cutting of the 3 chain length to which I have already referred. His Honour has found as a fact that the original courses of Orchard Creek and Bedford Creek were as shown on the parish map (that is to say, in broad terms as I have described them above). It is now apparent and his Honour has so found that the swamp which was the original area of origin of Bedford Creek is now connected to the headwaters of Orchard Creek. This doubtless provides the reason why in the pleadings the long drain to which I have referred is described as connecting two points on Bedford Creek. With the reversal of the flow of the eastern arm of Orchard Creek, it is doubtless natural these days to regard the whole length of watercourse which carries the runoff in an easterly and then southerly direction as the one creek. However his Honour has found as a fact that the drain in question is in the vicinity not of the original Bedford but of the eastern arm of the original Orchard Creek.

Finally his Honour has found that the flow of water was greatly facilitated by the existence of the long drain and that since the filling of that drain water not only gets away more slowly from the appellants' land but some of it does not get away at all with consequent damage to the appellants.

The appellants claimed injunctions requiring the respondent to remove obstructions from the drain and restraining him from interfering with or obstructing the drain and damages. Kneipp J, refused relief.

It will be convenient to deal immediately with an argument that the blocking of the long drain by the respondent was unlawful by virtue of certain provisions of the Water Act 1926 - 1981. The respondent would appeal to have blocked the drain for the last time in mid-1979. An Amending Act of 1979 which was assented to on 30th April inserted a new definition of "watercourse" as follows:—

> "A river, creek or stream in which water flows either permanently, intermittently or occasionally in a natural

> channel or in a natural channel artificially improved or in an artificial channel that has changed the course of the watercourse but in any such case only at every place upstream of the point to which the spring tide ordinarily flows and reflows therein whether due to a natural cause or to an artificial barrier therein."

Now section 11B of the Water Act forbids the construction of a levee bank without a licence issued by the Commissioner of Water Resources and a levee bank is defined to mean an embankment or other structure which, amongst other things prevents the flow of water into or out of a watercourse. Similarly, clause 16 of the Schedule to the Act makes it unlawful to obstruct the flow of water in a watercourse and clause 43 of the Schedule makes a similar provision. It is a condition of the application of any of these provisions that the drain in question in mid-1979 was a watercourse within the meaning of the Act. The only part of the definition which could be argued to apply is that part of it which includes "an artificial channel that has changed the course of the watercourse". The primary meaning for the purposes of the definition is obviously a river, creek or stream in which water flows either permanently, intermittently or occasionally in a natural channel or in a natural channel artificially improved. Now the only watercourse in the primary meaning on portion 13V was Orchard Creek. The drain was dug in the vicinity of Orchard Creek but it is impossible to say that it was a drain which changed the course of that creek. The works in question simply ignored Orchard Creek and set out to carry, not the waters naturally carried by Orchard Creek, but waters from the west across portion 13V in the opposite direction. There is no evidence from which it could be concluded that the course of Orchard Creek was changed at all. It is said that it has silted up in the ensuing years and it may he that water from the bend in Orchard Creek has found its way to the drain and back out to the east. But in my judgment the learned Judge was plainly correct in concluding that the long drain did not so much change the course of Orchard Creek as create a completely new and artificial system of drainage. The argument that the filling in of the long

drain in 1979 was in breach of the Water Act is thus unsustainable.

The use which the appellant sought to make of the alleged illegality of the respondent's act was to pray in aid the principle of Beaudesert Shire Council v. Smith (1966) 120 C.L.R. 145 which lays down that, independently of trespass, negligence or nuisance but by an action for damages upon the case, a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another is entitled to recover damages from that other. What has come to be called the Beaudesert principle has had a mixed reception. In the recent decision of the Privy Council in Dunlop v. Woollahra Municipal Council (1981) 2 W.L.R. 693 Lord Diplock at pp. 700-701 said:—

> "Their Lordships understand that they are not alone in finding difficulty in ascertaining what limits are imposed upon the scope of this innominate tort by the requirements that in order to constitute it the acts of the tortfeasor must be 'positive', having as their 'inevitable consequence' harm or loss to the plaintiff and, what is crucial in the instant case must be 'unlawful'".

It is at least clear that the requirement of unlawfulness, a concept which for the purposes of the tort in question may well extend beyond the breach of a statute (see Kitano v. Commonwealth (1974) 129 C.L.R. 151) is a central element. The unlawfulness set up was a breach of the restrictions imposed by the Water Act on the stopping up of watercourses. For the reasons already given, no such breach being made out, the Beaudesert principle cannot be invoked by the appellants.

Finally it is contended that the filling of the long drain constituted an actionable nuisance. Now there can, I think, be no doubt but that at common law, the duty of one who obstructs the natural flow of a river is to prevent damage, and, if damage results to any persons, he will be liable to them irrespective of whether or not they are

riparian owners. See R. v. Southern Canada Power Co. Ltd. (1937) 3 All E.R. 923 and see Greenock Corporation v. Caledonian Railway Company (1917) A.C. 556. However, if the principle is to be invoked, it must be shown that the respondent in some fashion obstructed the natural flow of Orchard Creek There is simply no evidence to this effect. On the findings of the learned Judge, amply supported by evidence and not attacked before us, the natural flow of Orchard Creek in portion 13V was from east to west. The long drain constructed by Lago in 1964 established a drainage line in the opposite direction and one which carried the waters from lands out to the west of portion 13V in the direction of Bedford Creek. The appellants relied on the decision of the Court of Appeal in Baily & Co. v. Clark, Son & Morland (1902) 1 Ch. 649. The case concerned the rights of the owners of property situated on an artificial cut or channel by which water was diverted from the natural flow of a river and later led back into it again. It was held by the Court of Appeal that the proper inference from the user of the water was that the artificial cut had been originally constructed upon the terms that all the riparian proprietors should have at least the same rights in regard to the use of the water as they would have had if the stream had been a natural one. The case is far removed from the present. The long drain here is not a diversion of the natural westerly flow of the waters of Orchard Creek and there is moreover no question of inferring the terms upon which it was constructed. It was done by a private arrangement between Lago and the respondent's father for the convenience of Lago. It resembles the ditch in Gartner v. Kidman (1962) 108 C.L.R. 12. That ditch which drained a swamp, the greater part of which was on the plaintiff's land, had been in existence from 1909 to 1958 when it was blocked by the defendant. At first instance the ditch or drain in question was treated as an improved natural watercourse. This view was rejected on appeal. The court then affirmed that a right to the flow of water in an artificial I watercourse must be acquired by some method recognized by the law for the acquisition of proprietary rights such as easement, statute or contract.

No such proprietary rights being demonstrated the court finally turned to the question whether the downstream owner could be described as guilty of a private nuisance by reason of unlawful interference with the right of the upstream owner to require him to receive the discharge of surface water. The last mentioned question cannot arise here. The respondent has done nothing more than restore the level of his land to where it previously stood. But Gartner v. Kidman establishes his right to have repelled the flow of surface water for the protection of his land if he were so minded. So far as the artificial channel is concerned the appellants plainly cannot set up a contract and their attempt to set up the Water Act has failed. It is equally clear that, having regard to the provisions of the Real Property Act there can be no question of an unregistered easement. See Friedmann v. Barrett (1962) Qd.R. 498; Mills v. Stokman 116 C.L.R. 61 at p. 78; R.M. Hosking Properties Pty. Ltd. v. Barnes (1971) S.A.S.R. 100; Gallagher v. Thomson (1928) G.L.R. 373. And cf. Breskvar v. Wall (1971) 126 C.L.R. 376 at p. 385. Indeed it was not contended that the appellants were entitled to anything of the nature of an easement.

Gartner v. Kidman is clear authority for the proposition that an action does not lie for the blocking up of an artificial watercourse unless the right to the flow of water in it has been acquired by the plaintiff. It accords with decisions such as Nield v. London and North Western Railway Company (1874) L.R. 10 Ex 4 in which was held that the defendants, the owners of the canal, were not liable for damage caused by the overflow of flood water from their canal which they had penned up for the protection of their own premises. The principle is said to be that there is no duty on the owners of a canal analogous to that on the owners of a natural watercourse not to impede the flow of water down it. This was stated to be the ratio decidendi of Nield's case by Herron J., delivering one of the majority opinions in Grant Pastoral Co. Pty. Ltd. v. Thorpe's Ltd. in the Full Court of New South Wales

(1953) 54 S.R.N.S.W. 129 at p. 135 (affirmed on appeal 92 C.L.R. 373)

Finally reliance was placed on certain general statements in the speeches in Sedleigh-Denfield v. O'Callaghan (1940) A.C. 880. Thus at p. 888 Viscount Maugham says that there is no doubt that if an owner of land for his own convenience diverts or interferes with the course of a stream he must take care that the new course provided for it shall be sufficient to prevent mischief from an overflow to his neighbour's land and that he will be prima facie liable if such an overflow should take place. The findings of the learned trial Judge make it clear, as I have already said, that the long drain did not divert or interfere with the course of Orchard Creek. When it was dug Orchard Creek did not carry waters from the west in an easterly direction. The situation as found by the learned trial Judge is that the appellants and their neighbours and their predecessors in title, in developing their lands for cane farming filled in the natural drainage line of Orchard Creek in a southerly direction and drained their lands into Lagoon No. 2. They have been relying on the long drain at least in part as a means of getaway for surplus water. But unless they can establish a right to have the drain kept open for this purpose they must put up with the situation which they and their predecessors in title have created. At pp. 896-7 of the Sedleigh-Denfield case Lord Atkin defined "private nuisance" for the purposes of that case as a wrongful interference with another's enjoyment of his land or premises by the use of land or premises either occupied or in some cases owned by oneself. The emphasis, of course, must be on the word "wrongful". The definition adopted by Windeyer J. in Gartner v. Kidman (supra) at p. 22 is, I think, useful for present purposes. It derives from the 6th edition of Winfield and it describes private nuisance as an unlawful interference with a person's use or enjoyment of land, or of some right over, or in connection with it. If the appellants had a right to have the drainage from their land carried by the long drain on the respondent's portion 13V, his blocking up of that

drain would constitute an actionable nuisance. But for the reasons set out above they have no such right and the conclusion of the learned Judge that the action must fail is, in my opinion, clearly right. I would dismiss this appeal.