

15/81

## SUPREME COURT OF VICTORIA

**HAZLETT v PRESNELL**

Crockett J

3 February 1981 — [1982] VicRp 12; [1982] VR 137

**BOUNDARIES BETWEEN STATES – RIVER MURRAY – MEANING OF "ANABRANCH" – BEVERIDGE ISLAND IN VICTORIA - WATER ILLEGALLY TAKEN FROM SOUTHERN ANABRANCH OF RIVER MURRAY – MEANING OF "WATERCOURSE" – FINDING THAT NORTHERN BRANCH OF THE RIVER MURRAY IS THE WHOLE WATERCOURSE OF THE RIVER MURRAY.**

H. was charged with taking water illegally from an anabranch of the River Murray. It becomes an offence if the water taken illegally is used in Victoria. The River Murray bifurcates downstream from Swan Hill and the two channels meet up again for some distance. The land enclosed by the division is known as Beveridge Island and the defendant submitted that the southern branch of the River Murray was part of the River Murray and therefore the offence occurred within New South Wales and not Victoria.

**HELD: The River Murray has only one watercourse. So, if waters of the river divide only to rejoin at a point downstream and if it can not sensibly be said that during their line of disunion they occupy the one watercourse, then a choice must be made as to which of the two channels is to be designated the watercourse of the river. Given the size and nature of Beveridge Island, the length of each of the two branches, the contour of their beds, the nature of the surrounding countryside, the nature and degree of flooding to which the river was in the past prone and the general features of the river from Albury to the South Australian border, as disclosed by maps and plans in evidence, are among the considerations that tell against the defendant's contention that the southern branch was in New South Wales. The northern branch was the whole watercourse of the River Murray.**

**CROCKETT J:** The information charges the plaintiff with having illegally taken water from an "anabranch of the River Murray". The alleged illegality arose from an absence of the permission of the State Rivers and Water Supply Commission for the taking of the water. The Stream alleged to be an anabranch is the southern branch formed by the bifurcation of the river at a point 12½ miles (20 kms) downstream from Swan Hill. The southern channel rejoins the northern branch at a point further to the north west. The length of the northern stream is 7 miles (11.2 kms) and that of the southern branch is 3.6 miles (5.7 kms). The land enclosed by this division of the river is known as Beveridge Island.

Only if water taken without permission from the River Murray is used in Victoria does the diversion become an offence: ss6(3) and 204(5). The point was taken on behalf of the plaintiff (the defendant to the information) that Beveridge Island was part of New South Wales. For its success this submission relied upon an argument that the evidence established that it was not the northern but the southern branch which was, or was part of, the River Murray.

The Act of 1855, 18 & 19 Vict, c54 there was included a provision to be found in s5 which enacted "That the whole Watercourse of the said River Murray, from its Source therein described to the Eastern Boundary of the Colony of South Australia, is and shall be within the territory of New South Wales". The 1855 Act solved one problem but created another which itself was not resolved until *Ward's case*. In that case the High Court determined that on the true construction of s5, the words "whole watercourse of the River Murray" referred not to the flowing waters of the Murray but rather to the contour or physical features within which such waters ran, namely the bed, banks and stream so that it followed that the boundary line between the two States ran along the top of the southern bank of the Murray.

In my view, it is correct to give to the Act of 1855 a meaning which would in relation to subsequent avulsions locate forever the river boundary where it happened to lie in 1855. Early letters (1873) expressed the view that the northern branch was the "Main Murray River" and the southern branch a mere "Anabranch". The anabranch being the narrower and shallower taking

only a tenth of the flow of water when the river was low and that when the river was full the flow rate was in the proportion of three to two as between the north and south channels.

The expression "anabranh" is only recently to be found in any recognised lexicon. The *New English Dictionary* refers to it for the first time in its supplement (1933). It mentions its Australian use and defines it as "a branch stream which turns out of a river and enters it lower down." In 1875, a surveyor appointed by each State together took the necessary surveys, levels, soundings and hydrometric measurements in order to determine "the main channel of the Murray River at Beveridge Island". These showed the north channel to be "considerably" the deeper and broader and that the discharge from that channel was 9094 gallons per second compared with 6404 gallons per second from the south channel. In June 1876, acting upon the surveyors' report, New South Wales informed Victoria that there was "no question whatever that Beveridge Island belongs to Victoria" and that "the Government of New South Wales lays no claim to it".

It is clear that every watercourse that takes water from the Murray and later returns it to that river can not, on that account, be held to be part of the watercourse of the Murray. The evidence discloses countless examples of this occurring and in circumstances where it would be a distortion of language – and of the principles of physical geography – to describe those streams as part of the river. Equally on the other hand there are islands in the river formed by elevated land around which the river flows in two channels. Again, common sense demands that the water in both channels be treated as part of the one watercourse.

The Act speaks of "the watercourse", not "watercourses". The river must be taken, therefore, to have only one watercourse. So, if waters of the river divide only to rejoin at a point down stream and if it can not sensibly be said that during their line of disunion they occupy the one watercourse, then a choice must be made as to which of the two channels is to be designated the watercourse of the river.

I find it quite impossible to hold that a definition of the beds of both streams as the watercourse of the Murray is an accurate description of that river's watercourse. The size and nature of the island, the length of each of the two branches, the contour of their beds, the nature of the surrounding countryside, the nature and degree of flooding to which the river was in the past prone and the general features of the river from Albury to the South Australian border, as disclosed by maps and plans in evidence, are among the considerations that tell against the plaintiff's contention.

I find that, at the time I consider appropriate for the determination to be made, the northern branch was – and has thus continued to be – the whole watercourse of the River Murray. This conclusion means that it is unnecessary to consider whether a different view should be formed if the determination has to be made having regard to the conditions as they now are – particularly as during the past one hundred years the bed of the south channel has deepened due to the effect of "headward erosion" while that of the north channel has with siltation become shallower with a corresponding increase in water flow in the south at the expense of the north channel so that the greater volume of water now passes down the south channel.

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