27/90

SUPREME COURT OF VICTORIA

DICKINSON v BROWN

Crockett J

8 November 1988

CONSTITUTIONAL LAW – BOUNDARY BETWEEN VICTORIA AND NEW SOUTH WALES – COURSE OF RIVER MURRAY – LAKE HUME FORMED – LAND INUNDATED – TEST TO DETERMINE LOCATION OF RIVER BANK – OFFENCE COMMITTED AT LAKE HUME – WHETHER COMMITTED WITHIN VICTORIA: *FISHING (GENERAL) REGULATIONS* 1981, R76.

Where land is bounded by a navigable river, the boundary line is permanently fixed subject only to alterations from gradual and imperceptible erosion and accretion. The inundation of land following upon the building of Lake Hume did not change the boundary line because there was no gradual or imperceptible change nor one which occurred as a result of erosion or accretion. Where an offence under the *Fishing (General) Regulations* 1981 was committed at Lake Hume at a point south of the southern bank of the Murray River, the offence was committed in Victoria.

CROCKETT J: **[1]** This is the return of an order nisi to review the decision of the Magistrate at the Magistrates' Court at Tallangatta, wherein he dismissed an information which had been laid against the respondent, charging him with possession of a mesh net within close proximity of certain inland water, to wit Lake Hume, in contravention of Regulation 76 of the *Fishing (General) Regulations* 1981.

The possession by the respondent of what are described as 'gill nets' or mesh nets, five in number, was proved **[2]** by evidence of an Inspector of Fisheries who had conducted a search of the camp which had, shortly before, been set up by the respondent together with another man. The gill nets were dry and thus, of course, had not been used. The respondent indicated that he had intended to use them for catching European carp. The informant, who was the only witness for the prosecution, in addition to testifying to the matters to which I have just referred and the conversation which he had with the respondent upon the detection of the gill nets, also produced an aerial photograph of the area, which was received in evidence. The photograph, together with some marks placed thereon by the witness at the invitation of the Magistrate, show that the waters close to which the alleged offence occurred were part of the waters of the Murray River arm of the Hume dam. Although much of the area within the confines of the dam, which are marked by the clearly shown shore lines, must have been covered with water, the photograph is such that it clearly depicts the course of the River Murray itself as it was before the inundation occurred to form the dam.

The informant marked upon the photograph the high water mark of the waters of the dam in the area where the offence was said to have occurred and he also marked the low water mark of those waters. Finally, he indicated by yet another mark the point where it was that he detected and seized the gill nets. **[3]** That point is below the level of the high water mark and, of course, above the level of the low water mark and, indeed, quite close to it. The alleged offence was thus said to have occurred on or in an area which the waters from time to time covered as they progressed from the low water mark up to the high water mark.

The Magistrate, after the case for the prosecution was closed, as it was at that point, observed that he believed that the bank of the Murray River in the Murray River arm of Lake Hume had permanently changed with the impounded waters of Lake Hume. The Magistrate added that the defendant was camped below the upper level of the lake, although above the water level at the time. The Magistrate therefore concluded that the offence was one about which he could not be satisfied that it took place in Victoria. This conclusion led him to dismiss the information.

The order nisi to review that decision contains two grounds, only one of which has been

relied upon in the course of the present hearing. That ground has, in turn, been subdivided into three sub-grounds, all of which, it appears to me, say much the same thing in different words. But, in essence, the complaint is that the Magistrate, on the evidence, erred in finding that the bank of the Murray River in the Murray River arm of Lake Hume, forming the border of the State of Victoria, had permanently changed. In *Ward v R* [1980] HCA 11; (1980) 142 CLR 308; 29 ALR 175; (1980) 54 ALJR 271, it was held **[4]** by the High Court that the watercourse of the River Murray, referred to in the New South Wales *Constitution Act* of 1855, 18 and 19 Vic, Ch. 54, was not the water's edge of the constantly changing stream of water but the contour feature within which the waters of the River Murray flowed and so, where the course of the River Murray constitutes the boundary between New South Wales and Victoria, the boundary line runs along the top of the southern bank with all territory to the north being in New South Wales.

On the basis of that observation, the Magistrate appears to have reached the conclusion that the southern water line of the dam, since the inundation of the area to form the dam, formed the boundary between the States of Victoria and New South Wales. However, in *Hazlett v Presnell* [1982] HCA 58; (1982) 149 CLR 107 at pp116-118; 43 ALR 1; 56 ALJR, the High Court in a joint judgment dealt with the question as to changes in the boundary that might possibly occur. The Court said:-

> "At common law, where land is bounded by a navigable river, the rule *ad medium filum* does not apply. The title to the land is applicable to the land, as it may be from time to time changed by the gradual and imperceptible processes of erosion and accretion."

The Court, after citing authority, went on to say:-

> "This distinction between accretionary and avulsive changes has been recognised in international law."

A passage was then cited from a United States case of *Arkansas v Tennessee* 397 US 88 at pp89-90; 25 L Ed 2d 73; 90 SCt 784, in which it was said:-

> "While if the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one by the process known as an avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel, although no water may be flowing in **[5]** it and irrespective of subsequent changes in the new channel."

That passage was cited with approval and the court a little further on in its judgment went on to say:-

> "The requirement that erosion and accretion must be gradual and imperceptible (*Southern Centre of Theosophy case* (1982) AC 706 at 720-721) excludes from those processes sudden variations in the boundary or dramatic alterations in the status, rights or duties of individuals. Indeed, acceptance of the ordinary principles as to erosion and accretion is actually in the interests of certainty since the effects of gradual and imperceptible erosion and accretion along the banks of a great river will inevitably be incapable of precise determination. We respectfully agree with Stephen J in *Wade's case*, that, upon the proper construction of the statutory provisions, the ordinary common law principles of erosion and accretion are applicable. Different considerations and principles apply in respect of the more sudden and observable changes which result from avulsion."

Finally the Court held that:-

> "On balance, it appears to us that the provisions of the *Imperial Act* of 1850 and 1855 should be construed as defining the boundary of the new Colony of Victoria by reference to the then identity of the River Murray with its then existing course and watercourse with the result that the boundary line was permanently fixed subject only to alterations subsequently resulting from gradual and imperceptible erosion and accretion. The identification of the boundary line on the terrain is not, however, a question of mere construction. It involves the identification of what was the River Murray at the relevant place and the identification of the then course, whole watercourse and southern bank of the river so identified. Those matters are largely questions of fact."

In the present case, the change which came by the inundation following upon the building of a dam, or the raising of the level of the dam, was quite clearly not one that could be described as "gradual and imperceptible". Nor was it one which had occurred as a result of erosion or accretion. It was clearly one which had **[6]** occurred as a result of what, in the law relating to boundaries, is

described as "avulsion". Indeed, that is, I think, made clear by a passage from Vol. 2 of *Blackstone's Commentaries*, at p262, which was cited with approval by Griffith CJ in *Williams v Booth* [1910] HCA 12; (1910) 10 CLR 341 at p350, where the silting of the mouth of a lagoon that opened on to the sea had led to a sandbar's being built up so as effectively to close off rapidly the lagoon from the sea. The sudden change which had occurred in those circumstances was treated not as an imperceptible change but as an avulsion. The dry land did not accrue to the contiguous owner but to the Crown. The contiguous owner's boundary remained as defined by the shore line of the former lagoon. The present case is the reverse on the facts but the principle is the same.

Having regard to these principles to which I have referred, it is clear, I think, that there can be no question but that the southern boundary of the Murray River as it was prior to the inundation to form Lake Hume remains the border between the States of New South Wales and Victoria. The question of the ascertainment of that border, with all the difficulties which doubtless arise, having regard to the inundation, remains however a question of fact. But it is clear that the evidence before the Magistrate establishes beyond any question that the alleged offence occurred at a point which was some distance to the south of the southern bank of the Murray River as it was before the inundation and thus occurred in the State of Victoria.

[7] I am of opinion, therefore, that the Magistrate was in error in reaching the conclusion that he did and that the information should not have been dismissed at the close of the informant's case. The question as to what course ought now to be followed has caused me some little concern. The defendant was unrepresented at the hearing of the information. When asked to plead, he replied, 'Guilty but with reservations'. Not unnaturally, the Magistrate treated that as the entry of a 'not guilty' plea. The defendant indicated during the hearing that he did not disagree with any of the evidence which had been called on behalf of the informant. However, he may wish to put some matters in extenuation and the plea being formally one of 'not guilty' leaves him free on the resumed hearing to go into any matters of culpability if he wishes to do so.

Accordingly, despite the fact that it would appear to be extremely unlikely that the defendant would wish to play any further part in the hearing other than, perhaps, to put forward some matters of mitigation with regard to the penalty so that, perhaps, it might not be inappropriate simply to find the offence proved and to impose a minimum penalty at this stage, on balance, I think the prudent course is to remit the matter to the Magistrate to allow the hearing to continue in accordance with law, despite the inconvenience and expense that the adoption of that course will no doubt involve. The order nisi will be made absolute. The order of dismissal below is set aside. The information **[8]** is remitted to the Magistrates' Court at Tallangatta for the further hearing of the information before the Magistrate, to proceed according to law. There will be no order as to costs.

APPEARANCES: For the applicant Dickinson: Dr I Hardingham, counsel. Victorian Government Solicitor. No appearance on behalf of the respondent Brown.
