168/57

168/1957.

G.P.-S.105675 1954-5-1,000. U.D.J. 219.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Appèl Provincial Division).
Provinsiale Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

PIETER J. de VILLIERS TRAUT Appellant,

versus

JOHANNES H. BARNARD & ORS Respondent

Appellant's Attorney / Prokureur vir Appellant Rands & M.
Respondent's Attorney / Prokureur vir Respondent Petersen & Fraser

Appellant's Advocate / Advokaat vir Appellant Mr Theron Q.C. (J.H.P. Bruyn)
Respondent's Advocate / Advokaat vir Respondent [illegible]

Set down for hearing on / Op die rol geplaas vir verhoor op Mon. — Fri., 10th - 14th March, 1958.

(C.P.D.) 1.5.6.9.10 (2)

[illegible]

11/3/58 - 9.50 - 12.30 2.15 - 4.30

12/3/58 - 9.45 - [illegible]

[illegible]

[illegible]

[illegible]

15/3/58 [illegible] 12.50, 2.15 - 4.55

20/3/58 [illegible]

Appeal partly allowed and order of trial Court altered. (See full judgment).

Coram: C.J. de Beer, Beyers, [illegible] (Ag.) T. Hall (Ag.) JJ.A.

[illegible] Reg. [illegible]

Record

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

1. PIETER STEGMANN DE VILLIERS
2. WILLIAM STEGMANN DE VILLIERS ... Appellants

and

1. JOHANNES HENDRIK BARNARD
2. JAMES PETER COETZEE
3. ALEXANDER COETZEE ... Respondents

Coram: Fagan, C.J., De Beer, Beyers, JJ.A., Reynolds et Hall, A.JJ.A.

HEARD: March 10-14, 19-21, 1958. DELIVERED: 12/5/58

J U D G M E N T

REYNOLDS, A.J.A. :-

In this judgment are considered the rights of the owners of the property known as "Klein Aar" to use the water of the Salt River. "Klein Aar" is not riparian to that river, but used its water before 1906 in some measure but afterwards, after the passing of Act 8 of 1912, increased that user considerably. The Appellants contend that the owners of "Klein Aar" are restricted to using the amount of water used by that property before, and up to the passing of the Irrigation Act 32 of 1906, or at the latest before the Act 8 of 1912. This contention will be referred to as "the limited user". The owners of "Klein Aar" (now 2nd and 3rd Respondents in

/this ... 2

this appeal) maintain that they can use water not only for the "limited user" but all water they reasonably require for all irrigable land on "Klein Aar". This contention will be referred to as "extensive user". In the first portion of this judgment the Act of 1906 is referred to as "the Act".

To ascertain which of these contentions is correct, the enquiry falls into two distinct parts. The first is to enquire what rights "Klein Aar" enjoyed under the Act of 1906. This is really a most important question in view of the wording of Section 24 of Act 8 of 1912 in subparagraph (c) which reads :

> Section 24 "Nothing in this chapter shall be
> " construed as - (c) preventing any person who,
> " prior to the commencement of this Act, has used
> " and was entitled to use the water of any stream
> " for irrigating non-riparian land, from con-
> " tinuing so to use the water".

If it is found that under the Act of 1906, the owners of "Klein Aar" were entitled to the "extensive use" of the water, then there must be considered whether this right was in any way modified, or done away with, by any provisions or Regulations relating to the Act of 1912. It is this first portion of the enquiry that is most important for subsection (c) of Section 24 simply says that the right continues if the person enjoyed it before the passing of the Act of 1912 as of right.

/Dealing ... 3

Dealing with the first question, it is clear that prior to the passing of the Act of 1906, the water of a river like the Salt River did not belong to the public but was water which belonged to the owner of the land over which it passed as long as it was passing over his land. That is the simplest example that will be used here. If an owner had a farm "A" through the middle of which the river flowed and also a farm "B", contiguous to A, through which the river did not pass (to take the simple example), he could use the water not only on "A" but also on "B", and use it to any extent he pleased. That might be a valuable right since the farm "B" might have better irrigable land, or land better suited for manufacturing purposes, or other purposes. In fact he might have bought the two farms to farm them as one property, or because of the greater advantage of "B". On either farm he may have constructed irrigation or other works, and for those works he had the right to divert the water from the river and use as much as he pleased. He could use the water wastefully for maximum crops, or by a bad system of irrigation, or a wasteful manufacture, and was not restricted to the reasonable use of the water.

In 1906 the Act was passed to put an end to this unlimited right of the private owner. It was intended to see

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that water, even in intermittent streams, should be reasonably used, and used to the best advantage of the country. To do that, the Act restricted, henceforth, the rights of the user of the water, and gave the reasonable use of the water firstly to the riparian owners of the land, and then, in certain circumstances, to others after that use had been provided for. But, in so restricting the former rights of the owner, the Act had to protect them to some extent at least regarding the works they had ~~constructed~~ CONSTRUCTED prior to 1906. That would apply to works both on the riparian land A, and on the non-riparian land, B. That the Act did so in this respect is rightly common cause in this case, and it did protect them by limiting the future use of water for those works ta a beneficial user of the water. It is equally common cause that, as regards both riparian and non-riparian land, if Sub-section (a) of Section 8 refers to both riparian and non-riparian land, the Act expressly imposed a limitation on this recognition of previously existing rights, and that limitation was not only that the water should be beneficially used, but that it must have been used as of right for works "constructed or in the course of construction" at the date of the passing of the Act. This obviously, must have unequal, indeed inequitable results. Both C and D each have bought farms like A and ~~because~~ B because of the mutual advantages the farms could

/ have ..... /5.

have if farmed, or used together. C may have completed, or had under construction, but a very short time before the passing of the Act, irrigation or other works and have used the water. D may have fully intended to use the water in the non-riparian farm soon but not have actually started the construction of his works. Yet, plainly C came in for protection of the amount that could be used by his works even in the acceptance of the ~~I~~ contention of "limited user". D was cut out completely. Indeed, there might be even more unfair results. D might be the lower riparian owner and have completed his works some time before the passing of the Act, while C, the upper owner only completed his works just before the passing of the act. But owing to the seasons, freshets may have reached C before the passing of the Act, and he may have used the water, while the freshets may not have reached D and he not used the water in time. Yet C would receive protection under the Act and D not, for the benefits given by the Act to non-riparian land are contingent on the water having been used before the passing of the Act. But inequitable as this would be, it plainly is the case even if the contention of "restricted user" be correct. That is clear and common cause, and is due to the fact that the Legislature in altering the law had to adopt some rule in cutting down the

/previous ... 6

previous rights of owners of water, and adopted this rule, even though it would have inequitable results.

So much is clear. But the question remains whether, in favouring the owner of the non-riparian land who had constructed or was in the course of constructing irrigation works which actually used water, the Act did not limit its favour to protecting him in regard only to these works, or really equated his whole non-riparian land to riparian land as regards irrigation. That there was an equation as regards irrigation of some of his property to riparian land is clear even in the contention of "limited user". As already pointed out, the Act must have acted inequitably in some respects, and the question is whether it meant to restrict an owner who may have bought the non-riparian land contiguous to his riparian land for its irrigable land to this "limited user", when he had already shown he was going to irrigate the non-riparian land. It would thus confiscate a valuable right. Indeed, if the user was restricted to the "limited user" would not this person be put to great disadvantage if years after the passing of the Act, he had to prove the exact extent of his limited user? This is the question to be considered at present.

These were some of the difficulties to be dealt

/ with ... 7

with by the Legislature, when Act 32 of 1906 was passed. Whatever the difficulties were however, it is only from the language used in the Act, and from that alone, that the intention of the Legislature can be ascertained and it is now necessary to consider that language. Considerations of equity cannot correct the language of the Act, if clear.

Section 7 of the Act of 1906 CONFINED the rights of user of a stream like the Salt River to "riparian proprietors" alone but "subject to the existing rights of others" and THE ACT then went on to enact Section 8 which reads :-

" Nothing in the preceding section shall :
" (a) compel any person who, previous to the
" passing of this Act, has constructed or had in
" course of construction works for the useful em-
" ployment of the water of any intermittent stream,
" to allow to flow down past his works water which
" he could beneficially use by means of and for the
" purposes of his work, and which he was entitled so
" to use;
" (b) prevent any person from doing anything necessary
" to prevent the erosion of land;
" (c) prevent any person who, prior to the commence-
" ment of this Act, has used and was entitled to use
" the water of an intermittent stream for irrigating
" a non-riparian property, from continuing such use.
" And any special regulations drafted hereafter
" under the preceding section shall not interfere
" with the enjoyment of the exemptions in this
" section mentioned."

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It is clear from the concluding portion of the Section that the rights conferred in the exemption were protected to the full and these rights are also fully protected in the Regulations framed under Section 116 which had the same effect as if they were enacted in the Act. Those especially dealing with "intermittent" streams like the Salt River, provide in such Regulations as 113 for the quantity to be used by riparian owners to be "subject to the existing rights of others" and Regulation 116 reads :-

> " In considering what are 'the existing rights
> " of others' the court shall have regard to
> " (a) the rights of other owners which are pro-
> " tected under Section 8 of the Act."

But though the concluding portion of Section 8, and the Regulations, show the anxiety to protect these rights, they offered no help in ascertaining the extent and ambit of the rights, and that is the question to be decided.

In my view, Sub-section 8(a) refers to, and includes, both riparian and non-riparian land. It has been pointed out that the owner of A, in the example given or in any case, may before 1906 have established factories or carried on irrigation on non-riparian property because of the better advantages of the non-riparian land. It is obvious that the right to these activities would not be confiscated by the Act, and Section 8(a)

/ alone .....8(a)

alone would make that clear.

If Sub-section (c) is the only Sub-section in Section 8 referring to non-riparian land, then rights to use water for factories etc. existing before 1906 would be confiscated for Sub-section (c) refers only to irrigation before 1906. Sub-section (a) says quite definitely that a "person" who has "constructed or had in course of construction" works for the useful employment of water does not have to allow to flow past his works the water he could beneficially use for these works. It does not say that "a riparian" owner only is entitled to this right. In Section 7 the words "every riparian owner" are used in giving rights to use the water of an intermittent stream and nothing would be easier than to use these words again in Sub-section (a) if only riparian owners were referred to - but the words are not used. A "person" is given the rights, and then is defined who that "person" is and he is the one who has constructed or had in course of construction, the works described. Every riparian owner and every non-riparian owner who has so constructed works comes within this definition if he had the right to use the water. The word "person" and the definition of who that person is, was plainly put as it is in Sub-section (a) so that neither lost any rights at least to the "limited user" of water dealt with in Sub-section (a). It seems, therefore,

/ that ...../8(b)

that Sub-section (a) refers to both riparian and non-riparian land and to that extent must equate them, and this gives additional force to what is said in considering Section 9 of the Act and Regulation 119 that under them the non-riparian land is given rights even on the "limited user" contention, and "riparian land" as in the Section and Regulation set out cannot have its ordinary meaning or else it would completely nullify the rights given to non-riparian land by Sub-section (a) without even taking into account whether further rights were given by Sub-section (c). But, even if Sub-section (c) only gives rights under the "limited user" contention, that would and must mean, that to some extent riparian and non-riparian land are equated and must affect the meaning given to "riparian land" in Sub-section 9 and Regulation 119 and to corresponding provisions in Act 8 of 1912. As both riparian and non-riparian land are dealt with in Subsection 8(a), all are exempted from the provisions of Section 7 so long as they come within the provisions of Sub-section (a) and it seems to be accepted that "works" include irrigation works. This would include all works, however great or small. Even

/irrigation 9

irrigation by pumping involves the construction of irrigation works, both in installing the pump and using the water pumped by means of pipes and furrows. But it will be seen that sub-section (a) and Sub-section (c) differ wholly in their contents and nature on all relevant points. The only features they have in common are (1) that the water must have been used before 1906 and (2) that it was used of right. These they had to have in common because, as to (1), it is water common to them both that is dealt with, and, as to (2), the Act would certainly not protect the use of water which the owners were not entitled to use. But they differ in all other respects.

In making exemptions in favour of a person in regard to works owned by him, it is both usual and necessary to define (1) what ARE the works exempted and (2) what is the limit of the exemption given to these works if there is a limit, and that is especially so in regard to any limitation relating to quantity. In Sub-section (a) this is done regarding both (1) and (2). As to (1) in defining the works to be exempted they are defined as those which the person "has constructed or had in the course of construction" for employing water usefully. There could not be a more clear express limitation. In defining (2) the

/ extent ... 10

extent of any possible limitation of the exemption given to these works, there is again the express quantitative limitation that the owner of the works can use the amount of "water which he could beneficially use by means of and for the purposes of his work". So sub-section (a) deals purely and solely with matters or rights expressly limited, and prima facie does not deal with matters or rights not dealt with in forms of express limitation.

But when Sub-section (c) is examined, the position is completely different in all features save the two it just had to have in common with sub-section (a) as already indicated. Again there is (1) the description of the person who is entitled to the exemption from the provisions of Section 7. He is the person who "has used and was entitled to use the water of an intermittent stream for irrigating a non-riparian property" before 1906. There is not the faintest suggestion of any express, or indeed any other, limitation confining his user to a portion of the property, or confining his user to that, USER by works constructed OR in the course of construction. Indeed, the words are simply that he used water for irrigating "~~a property~~ LAND" and was entitled before 1906 to use water for that ~~property~~ LAND, and it is clear that before 1906 he could use water for the whole ~~property~~ LAND. Then as regards (2), where one

/ would ... 11

would expect to find an express quantitative limit if one was intended, there is no kind of express limitation at all, let alone a quantitative one. In fact the opposite is the case.

This at ONCE indicates that sub-section (a) and (c) deal with quite different matters and exemptions, are divorced from one another, and are subject to different considerations. As sub-section (c) has no express restriction, or any kind of restriction, relating to the quantity of land that can be irrigated because of the exemption on it, or any EXPRESS quantitive restriction as to the amount of water to be used, and only refers to irrigation, that might quite sufficiently settle the matter IN FAVOUR of the "extensive user" CONTETION . But it is best to consider what is so far set out merely as a basis for the further consideration of the matter in dispute.

Returning again to Sub-section (a) it is not only what it does expressly state that matters, but also what it does not state or deal with at all. As Sub-section (a) deals generally with both riparian and non-riparian land, and since it makes no distinction between them, it is best to divide consideration of it into two parts. Dealing with the riparian land first, Sub-section (a) in express terms merely makes the restriction as regards works "constructed or in the

/ course ... 12

course of construction" that they are to get water sufficient to enable them to be used beneficially. It says nothing at all about any other rights that the riparian land is entitled to enjoy under Section 7 of the Act. Thus the riparian farm A may have 300 irrigable morgen, and the works "constructed or in the course of construction" may be able only to irrigate 50 morgen owing to the contour of the land, or the bad system on which they were constructed, or an extravagant system. These works are to be restricted to the amount of water required for the beneficial user of the 50 morgen. But that does not mean that after 1906 the other 250 morgen would not be entitled to use water in a reasonable manner in addition. ~~to~~ To hold otherwise would be absurd. In the same way, if there were a factory on A, whether wastefully or beneficially using water, the protection given to it in terms of Sub-section (a) does not mean that after 1906 the owner of A could not use water reasonably for irrigable land which he wishes, now after 1906, to irrigate for the first time. That right the owner of A, retains in each of the examples given, under Section 7, and Sub-section (a) has got literally nothing to do with that right, and does not pretend, in any way to deal with any matter other than the express limitation it deals with relating to

/ works ... 13

works "constructed or in the course of construction". The 250 morgen has rights under the Act to the reasonable use of water under Section 7.

Next must be considered the non-riparian property dealt with by Sub-section (a). AGAIN ~~After~~, taking the example already given that the irrigation works on it "constructed or in the course of construction", can only irrigate 50 morgen as before stated, Sub-section (a) limits the water that can be used for these works to the amount that can be beneficially used. It is the same with a factory on the non-riparian land. But Sub-section (a) says nothing about any right to use water reasonably on the other 250 morgen and does not deal with that at all, just as it does not deal with this right in the case of the riparian land. Then comes the result of this, and the result is quite different from what it is in the case of riparian land if Sub-section (a) alone figured in Section 8. As already pointed out, the result in the case of riparian land is that Sub-section (a) still leaves the rights to irrigate the 250 morgen reasonably given by Section 7, quite intact, and does so because Sub-section (a) in no way deals with the 250 morgen and is confined to "works constructed or in the course of construction". In the case of non-riparian land

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however, since Sub-section (a), standing alone, does not in any way deal with or exempt , the 250 morgen, the result is that Section 7 applies. Since Section 7 confines the right to water to riparian land, and since Sub-section (a) only exempts as regards "works constructed or to be constructed", the result is in the case of the non-riparian land, that the 250 morgen not irrigated before 1906 have no rights at all to the water. If Sub-section (a) alone figured in Section 8, then the rights to "limited user" for the works "constructed or in the course of construction" is established as the correct contention in this case. There is simply no need for a further provision establishing that only the right to "limited user" is given, for it is plainly provided to be the position if Sub-section (a) alone figured in Section 8, and must be the position unless a further exemption is given in Section 8 relating to the 250 morgen of the non-riparian land. Unless something further in the nature of an exemption is to be given by Section 8, Section 8 would not require any Subsections other than (a) and (b). But the further exemption is given in Sub-section (c) which relates only to non-riparian land and differs completely from Subsection (a) and contains no hint of any express limitation, and the only limitation it can have is not an express one at all but simply that Section 7

/ still ... 15

still applies in limiting the water for the 250 morgen to a reasonable use, and Section 7 applies that way since Sub-section (c) in no way contains any words exempting the user under it from the rules laid down in Section 7 as to how an upper proprietor can be restrained from using more than his reasonable share of water. What is very clear, however, in dealing with the non-riparian land dealt with in Sub-section (a) is that any works to irrigate them in 1906 simply must have been works that were constructed. The water would have to be led across riparian land on to non-riparian land, usually by means of furrows and pipes. I am quite unable to see that only the intake portion, on the river bank, or in the river, can be separated from the furrows and that only that intake is included under the term "works constructed or in the course of construction" in Sub-section (a). The whole is included and certainly irrigation, on riparian or non-riparian land cannot take place unless there are works constructed in the form of furrows or other means to distribute water, abstracted from a river @ either by an intake or pumping or any other way over the irrigated land. It is extremely difficult to see how the method of diverting the water at the edge of the river or in the river can be separated from the rest of the works by which irrigation is effected and it seems clear that by

/ works ...../16

works, all are included as one whole work. This at once does away with any help to be obtained in favour of non-riparian land not being included in Sub-section (a) owing to the words "flow down past his works", for the water would flow down past the works of which the commencement is the intake or other method of diverting the water from the river. It seems quite clear that every irrigation of non-riparian land involves the construction of furrows or other works over the riparian property and thence to its destination on the non-riparian land by means of furrows or other means. Nor does it make any difference as to what is the manner in which the intake, or other means of diversion, on the riparian property, is constructed. It may be a primitive means - especially before 1906 - such as sandbags, or logs, or earth, but that is allied to, and forms part of the conveyance across the riparian land by furrows or other means, and the distribution of the water on the non-riparian property by some method of irrigation. Sub-section (a) nowhere limits the size of the works or their nature provided they are constructed, i.e. man made and not by nature, quite apart from what I have said about the intake, a means of diversion, being only a part of other necessary works.

It was suggested that this might have very peculiar

/ results ...../17

results. Before 1906 the owner of a non-riparian property might obtain from the owner of a riparian property the right to obtain certain water by means of a sluice and might obtain it either from a furrow of the owner of the servient riparian property or by getting a right from that owner to construct a furrow from the river across the riparian property to his own land. In that case, the owner of the dominant non-riparian property uses the water before 1906, and it is urged that the consequence of this will be that he can get further water for all his irrigable land after 1906, if Sub-section (c) is construed to favour extensive use. Nothing of the kind follows as a consequence. On the interpretation placed on Sub-section (c) that plainly refers only to a person who, in the example given of the 300 Morgen, has (1) irrigated before 1906 the 50 Morgen by irrigation works and (2) has the right to develope, in future, the 250 Morgen because he was a person who, before 1906, had the right to use the water as he pleased over both his riparian and his non-riparian properties. That, the owner of riparian and non-riparian land plainly had. But, the dominant owner of the non-riparian land had no such rights at all, for taking a servitude connotes that he is not the owner of the riparian land over which he obtained the servitude. The sole right he obtained before 1906 by his servitude is to

/ get ...../18

get the water dealt with by the servitude and to use the amount given him and no more. After 1906, as that right continued - [illegible] - he simply continues to enjoy the amount of water that his servitude, entered into before 1906, gave to him. He can not get it increased by an additional right of servitude from any riparian owner after 1906. As already pointed out, the riparian owner of any servient property after 1906, is still subject, as regards the whole 300 Morgen, to use the water reasonably or beneficially, and that means to use it for his own property and he cannot alienate his right to water that he does not use on his own property in favour of non-riparian property or to the detriment of a lower riparian owner. Hence, if the owner of the dominant non-riparian property has any rights at all under the servitude existing before 1906, they are confined to the rights given by that servitude and cannot be increased.

It is suggested that Sub-section (c), construed in favour of the extensive user, may have peculiar results where an original grant has been divided into a number of units, each owned by a different owner or all owned by one owner. It is suggested that if they are all owned by one owner then by doing some irrigation on one unit before 1906, the owner gets the right of extensive user on all units. This is not so. Each

/ unit ...../19

unit becomes a separate property owned under a separate title. [illegible] property [illegible]. If the owner does work on one property he only gets the extensive right for that unit or property and that right includes (1) the right to use water required for the beneficial user by the works he has constructed (the 50 Morgen) and (2) the right, in future, to bring the rest of his irrigable land under reasonable irrigation (the 250 Morgen).

Then, there is the question of water which spills over the bank of the river on the riparian property, or abutting on it, and then passes on to the non-riparian property. If this spilling over is done without any construction on the riparian property at all, and without any assistance from man, there is great difficulty in believing that it is any form of irrigation at all - within the meaning of Sub-section (c). It amounts to no more than the usual flooding over the banks of the river, and is not irrigation at all. Indeed, it would be difficult on the contention of "limited user" to see how the precise extent of the water used, or the land thus watered could be established. If the riparian owner makes any construction which brings it about, or assists to bring it about, then what he does amounts to a construction in itself and Section 8(a) nowhere states that the work must be of a certain size or

/ permanency ..../20

permanency. That would be so whatever the means the riparian owner adopts to conduct the overspill on to the non-riparian land, or even if he adopts no means at all. It would indeed be remarkable if he adopted none and let the water run riot over his riparian land and equally remarkable if Sub-section (c) was solely introduced to cover such a remarkable performance. It seems quite clear, therefore, that where a person has owned both riparian and non-riparian land he could not convey the water for irrigation across his riparian to the non-riparian land without the construction of irrigation works such as furrows etc., in addition to some work - great or small, primitive or elaborate, to divert the water from the river. All the irrigation means would be included in the word "works constructed or in the course of construction". It would be remarkable if this conveyance by these works, ceased to be works when they reached the line, without breadth, which is the boundary of his riparian property, and still more remarkable when further furrows or works are required as a continuation of them to irrigate his non-riparian property. Indeed that would be so even if he delivered the water under a servitude though that matter does not arise for the reasons given. Hence, in every case, the actual irrigation of the non-riparian property practised before 1906 would be by works constructed before 1906

/ and .....21.

and come within Sub-section (a). Accordingly, there would be no need whatever for Sub-section (c) unless some other right was given by Sub-section (c), as has already been indicated in this judgment and in that of the Water Court and the Court a quo. It could only be the right of "extensive user".

Even if the Legislature in 1906 and in 1912 desired to commit tautology by printing in Sub-section (c), it is too remarkable to think they would do it by the terms of that Section. As already indicated, Sub-sections (a) and (c) differ completely. Sub-section (a) deals with express limitations and (c) does not deal with any limitation regarding the extent of the land it refers to and only deals with irrigation. However attractively stated, the construction of Sub-section (c) according to the contention of "limited user" means that it is construed to contain a limit as regards the extent of land referred to in it. The contention is that the land is limited to that irrigated before 1906 and there is no avoiding that fact. The closest examination of Sub-section (c) does not reveal even a suspicion or shadow of any EXPRESS limitation as to the extent of land or it being confined to the extent limited before 1906. On the contrary following limitations made in express terms, it makes a general exception without any possible suggestion in itself of any EXPRESS limitation of land. This is the

/more ...../22

more remarkable when it does not exempt the land it deals with from the provisions of Section 7 : that the user must be a reasonable user of the water. Consequently, we are faced with the fact that by not exempting from reasonable use of the water as empowered by Section 7, it does by that silence impose a rule regarding the reasonable use of the water, but simply in no way whatever gives any express limitation of the extent of land to which the duty of reasonable use applies. The right to irrigate all the land, both that irrigated before 1906, and that the owner could develope in future, plainly belonged, before 1906, to the owner who owned the non-riparian as well as the riparian land, and would scarcely be taken away from him in terms that, at the very least, are so wide and general as the words in Sub-section (c) even if we had not the words in Sub-section (a) with which to contrast them.

A somewhat remarkable result would seem to follow from saying that by Sub-section (c) the "limited user" only is given. F may have a riparian farm, G, and contiguous to portion of it, a non-riparian farm, H, with 50 Morgen of good irrigable land. Before 1906 he may have constructed furrows over his riparian land and irrigated 5 Morgen of that property. By the contention of "limited user" he would completely have had confiscated

/ from ...../22(a)

from 1906 his right to future developement of the 45 Morgen. He may, however, have a neighbour, K, who only owns a non-riparian farm also abutting on a portion of the riparian farm, ~~G~~. K and F may have entered, for valuable consideration, into a servitude agreement whereby K obtains from F all the water he requires for his irrigable land amounting to 50 Morgen. That agreement was quite valid before 1906. K may only have irrigated 2 Morgen before 1906. But the passing of the Act of 1906 would not affect the contract of servitude between K and F for water for the full 50 Morgen. A valid contract like that is nowhere rendered invalid by Section 7 for the Section preserves existing rights of others. Yet that means that the rights obtained by K by a servitude contract continue to the extent the contract gives him rights, whereas the rights of the riparian OWNER which are real rights over the water to irrigate his own non-riparian land, are completely taken away as to the 45 Morgen. Real rights are confiscated but not contractual ones creating a servitude. It would seem more likely the case that both would be fairly treated and neither confiscated.

The servitude is preserved under Section 7 as being an existing right of others. But the real rights of the riparian owner are rights existing before 1906 and the rights of the owner himself and not of "others" and consequently not pre-

/ served ...../22(b)

served by Section 7. Section 8 had to be inserted to preserve them. It preserved them subject to express limitations in Sub-section (a) but laid down no express limitations of extent of land at all in Sub-section (c), though it could easily have done so. It did this to see that the owner of real rights should not be dealt with less fairly than the owner of the servitude, who forfeits no right under the Act of 1906.

As regards the Act of 1906, the question of what is the correct construction of Sub-section (c) is of paramount importance, and has to be borne in mind, always, in construing the Regulations. It is quite correct that these Regulations have force just as if they are contained in the Act. But, of course, they would only overrule the Act if they are inconsistent with the provisions of the Act - and that they are not when once examined.

/ If ...../23.

If I am wrong in the interpretation I have placed on Section 8, then that will affect what is said hereafter about the Regulations, except the passage where I expressly construe Regulation 118 independant of that meaning save the view that Sub-section (a) refers to both riparian and non-riparian land. If once it is wrong to construe Section 8 as establishing in itself the contention of "limited user", then that must affect ANY construction placed upon the Regulations as confirming that wrong construction. Indeed, the matter can be taken further : that, apart even from this aspect, to attempt to say that non-riparian land is not in some way equated to riparian land is quite an error on both the "limited user" contention and the "extensive user" contentions. The difference between the two is that in the "extensive user" contention the non-riparian is equated in both Sub-section (a) and (c) to completely equate the two as regards irrigation. On the "limited user" it is only equated by Sub-section (c) giving the non-riparian land the user for irrigation only to the extent it was practised before 1906, but clearly and inevitably equating the two to that extent. This has clearly to be borne in mind, especially in construing Section 9 of the Act and Regulation 119 as to the meaning of the words "riparian land" therein which must, at least include riparian land or either contention and not have its

/ordinary ...../24.

ordinary meaning. Failure to realise this must lead to viewing the meaning of the Regulation wrongly.

In dealing with Act 8 of 1912, however, the importance of the correct construction of Section 24 in the Act is of even more importance. It is correct that it differs in no manner from Section 8(a) in its meaning, but in the Act of 1912 Regulations are only valid in so far as they are not inconsistent with the provisions of the Act of 1912. Hence, if once the meaning of Section 8, standing by itself, is what I have indicated, no regulations could contradict or vary that meaning and the Regulations must be read in that light. If, on the other hand, the "limited user" is the correct meaning of Section 24, the same result follows that the Regulations cannot contradict or vary that meaning for if they did so, they would have no validity.

It seems to me, therefore, that Section 8(a) refers to both riparian and non-riparian land and Sub-section (c) gives a larger right as regards irrigation to the "extensive user" and I agree with the view expressed by OGILVIE THOMPSON, J., in the Court a quo wherein it is stated :

> " Now if Sub-section (c) was intended to preserve
> " merely the right to use that quantity of water which
> " was in fact diverted prior to 1906 there would have
> " been no need at all for the sub-section, because
> " that right was already preserved by Sub-section (a).
> " This indicates it was the intention of the Legisla-
> " ture to preserve a wider right under Sub-section
> " (c), for otherwise Sub-section (c) was tautologous."

/While ...../24(a)

While there is no rule of law that tautology cannot occur in a document or an Act, such are not construed as containing tuatology unless it is clear that that is the case. Yet it is not only not clear that tautology was committed but the exemptions in Section 8 and especially in Sub-section (c), have a clear meaning that acquits the Legislature of tautology. Indeed, it is noteworthy that in the later Act 8 of 1912, which

/ replaced ...../25

replaced the Act of 1906, the Section 24 is in substantially the same words as Section 8, and apparently two Legislatures would have been guilty of tautology if Sub-sections (a) and (c) referred to the same right.

Moreover, there is another aspect of the matter. Previous to the passing of the Act of 1906, the owners of the non-riparian land dealt with in Section 8, had clearly the right to irrigate all irrigable non-riparian land. That right should not be taken away from them save in clear terms and these clear terms are lacking for, at the very least, Sub-section (c) is quite capable of the meaning assigned to it in this judgment, and by the Court a quo. Enough confiscation of previously existing common law rights occured when the owner of non-riparian land like D, in the example given in the beginning of this judgment, lost all rights simply because he had not yet constructed or had in course of construction works by means of which he actually used the water.

On the construction of Section 8, as a whole, it is clear that "extensive user" is provided for as the grammatical construction of that section.

Before considering the Regulations made under the 1906 Act, it is necessary to consider Section 9 of the Act which reads :

/ The ... 26

" The Water Court shall be entitled to grant
" permits, subject to regulations and the provisions
" of this Act, for the use on non-riparian land of
" of the surplus water of an intermittent stream
" after the requirements provided for in the seventh
" and eighth sections have been satisfied on the
" riparian land; and every person to whom a permit
" has been granted shall be entitled to use such
" water to the extent and subject to the conditions
" stated in the permit; and no person shall inter-
" fere with the use of such water as authorized by
" such permit".

It must be emphasized that this SECTION enables the Water Court to grant permits, subject to regulations and the provisions of the Act, to use on non-riparian land the surplus water of an intermittent stream like the Salt River. Now the rights given by Section 8 (whatever their extent) are not rights by permit, or conditioned by a permit, but are rights given by Sections 7 and 8. It is quite impossible to believe that Section 9 could mean any of the rights given by Section 8, whether given to riparian or non-riparian land, should be disregarded in the giving of a mere permit. But there is the wording in Section 9 that the permit can be given after "the requirements provided for in the Seventh and Eighth sections have been satisfied on the riparian land". If by riparian

land is meant the land through which the river passes (to take a simple case as an example), then both the limited user " contention and the "extensive user " contention are negatived, and are done away with, for even on the "limited user" contention the rights relate to non-riparian land. But it is quite impossible to believe that these rights were done away with in favour of a mere <u>permit</u> to be given to non-riparian land which the Water Court is entitled but not compelled to give, and can lay down conditions if it does give the permit. Even the "limited user" contention equates, so far as irrigation is concerned" non-riparian to riparian rights. It is quite impossible to believe that though Sub-Section (a) of Section 8 protects factories on non-riparian land to a limited extent, that protection is done away with in favour of a permit to use surplus water. Indeed this is the more so since the rights given by Section 8 are to the <u>water</u> of the intermittent stream, and the permit is only to use the excess of surplus water. I do not think it possible that Section 9 was ever meant to do away with any rights enjoyed by non-riparian land under Section 8(a) or (b) or (c) - whatever be the extent of those rights. While "Riparian land" in Section 3 is given the meaning of land through which the stream passes or on which it

abuts, that meaning is only given "save where the context clearly indicates otherwise". Here that is the case and to adopt any other position would reduce all rights - whether under "limited user" or "extensive user" to nothingness, and defeat the whole object of Section 8 to preserve at least some rights, especially as Section 8 never mentions riparian land, under that name and only Sub-section (a) includes it. I am of opinion that the riparian and non-riparian land is equated in Section 8 once the requirements therein laid down are shown, and I quite agree with the same view taken on this point by the three learned judges of the Court a quo. Indeed, as already pointed out, that must be the case, pro tanto, even on the "limited user" contention. When the regulations are examined further support is given to this view. But of course, though Section 9 in itself shows that the phrase riparian land is used there to include non-riparian land, that does not ~~not~~ assist sufficiently in the present enquiry as to what extent of non-riparian land is so equated to riparian land. But, if the view taken of Section 8(c) already expressed is correct, then there is nothing in Section 9 to contradict or modify it but on the contrary the statement that the requirements of Section 8 must be satisfied indicates and means the requirements of all the exemptions dealt with in Section 8, and not only exemptions

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as given in Sub-section (a).

The regulations must be next examined. The regulations are framed under Section 116 of the Act and have the same force as if they were enacted in the Act. The regulations dealing with intermittent streams are regulations 113 to 120. They come under the heading "intermittent streams" and it is laid down at the commencement :

"Principles and considerations which should guide mem-
" bers of a Water Court in defining and fixing
" under Section 7, 8, 9 and 67, where necessary,
" the quantity of water of an intermittent stream
" any riparian owner can reasonably be expected
" to use subject to the provision of the Act, and
" the existing rights of riparian and other owners
" to the water of an intermittent stream, and in
" defining whether to grant or refuse permits for
" the use of surplus water on non-riparian land,
" and when granting, in fixing the conditions under
" which permits should be granted."

As before observed, mere permits could not be intended to be granted under existing rights and satisfied, as the aforegoing makes clear. But in Section 116 is enacted further:

" In considering what are "the existing rights of
" others" the Court shall have regard to (a) the
" rights of other owners who are protected by Section
" 8 of the Act."

Standing by itself, this gives no guidance as to

the extent of the rights, but it is different if the meaning given in this judgment, and in that of the Court a quo, is correct as to Section 8(c).

Then come regulations 117 and 118 which are given in full, so far as relevant :

Regulation 117: "The requirements of all the riparian land must first be fully considered before any water shall be diverted to any non-riparian owner. These requirements may be divided into

(a) the requirements of the land actually irrigated at the time of the application

(b) the requirements for land which might reasonably be expected to be brought under irrigation thereafter

(c) the requirements for other purposes in accordance with Sections 7 and 8(a) and (b) of the Act Regulations".

Regulation 118: "The requirements of non-riparian owners for the full exercise and enjoyment of rights allowed under Section 8(c) of the Act must be fully provided for.

In fixing and defining what quantity of water the several requirements in clause (a) and (b) of the regulations demand, the Water Court shall (as far as applicable) have regard to (then follow considerations which seem to apply to all owners in the catchment area when an application to divert surplus water is made). So these considerations cannot be used to favour "extensive user").

Regulation 119: "A Water Court having fixed or de-
" fined the quantity of water which should be allowed
" to meet the present and future requirements of the
" riparian land referred to in Sections 7 and 8 of
" the Act may on application grant a permit for the
" use on non-riparian land of the surplus water of
" the stream".

Dealing first with Regulation 119 it is obviously made in conformity with Section 9 of the Act. What is important to notice for present purposes is that the permit (1) to be allowed after the Water Court fixes the quantity of water available to be granted under a permit and (2) that even then the Court "may" grant the permit. The same phrase "riparian land referred to in Sections 7 and 8" is used as in Section 9 of the Act, and all that has been said in this judgment in dealing with Section 9 fully applies. Unless non-riparian is equated for purposes of irrigation to riparian (whether in part under the "limited user" contention, or as a whole under the "extensive user" contention) even the "limited user" contention would be nullified, and no rights at all given even under Section 8(a) would be effective. This would be the more remarkable as Regulation 116(a) provides that the rights given under Section 8 are existing rights and these have to be ~~prescribed~~ PRESERVED under the heading already quoted in

reference to intermittent streams. It is obvious, therefore, that by riparian land in the Regulation is meant something more, at least, than land through which the river passes or on which it abuts. But it is sufficient, at the present time, merely to emphasize that a permit "may" only be granted after the quantity of water is fixed that is available for a permit, and that in fixing that quantity, rights granted under Section 8 - whatever their extent - to non-riparian land must be provided for, under Regulation 119 as well as Section 9 of the Act.

Returning now to Regulation 117, it states that the requirements of riparian lands must be "fully considered" before any diversion (i.e. under permit) can be granted. It then states what these requirements are, and by "requirements" it means what "the full requirements" are. "Requirements" can only mean "full requirements" as that word is used in Regulation 117. But the full requirements set out in Clauses (a) and (b) are requirements as to irrigation, and irrigation only. It then goes ~~to~~ on in Clause (c) to provide for requirement "for other purposes" under Sections 7 and 8(a) and (b). Now Section 8(a), as regards the riparian land, deals with (I) irrigation by constructed works or those in the course of construction and (II) use of water for factories and other purposes.

But the use of water for irrigation by the constructed works is already provided for by clause (a) providing for the requirements of "the land actually irrigated at the time of the application". Hence "other purposes" in Clause (c) means purposes other than irrigation e.g. factories, and this is confirmed by the insertion of Sub-section (b) of Section 8 dealing with the matter of erosion of land. But the meaning of the word "requirements" is clearly set forth in Regulation 117, and must be given the same meaning right through the remaining ~~allegations~~ REGULATIONS unless there is some indication to the contrary however slight that indication may be. The first general statement in Regulation 117 would be quite adequate to cover all requirements of riparian land but clauses (a), (b) and (c) are put in to show how the different requirements must be treated in the calculations to find the total amount of water to be allowed for. As regards (a) the land has to be measured for the necessary water but (b) involves also deciding what land may be reasonably cultivated in future and (c) has nothing to do with irrigation calculations. But each requirement in (a), (b) and (c) is a separate one and the plural "requirements" is only used in each one because each may apply to many pieces of land. Each is a "several" requirement and it did not even ~~need~~ NEED that description of them as "several"

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in Regulation 118, as quoted, to indicate that.

Turning now to Regulation 118, it is to be remarked that it only, in express terms, mentions the "requirements of non-riparian owners" under Sub-section 8(c) must be fully provided for. If I am correct in the construction I have placed on Section 8 of the Act, that really concludes the whole matter. That construction is that Sub-section 8(c) gave in itself the right of "extensive user". Hence the express mention of Sub-section 8(c), even without the emphasis laid on "full" and "fully" in Regulation 118, means that "extensive user" is specially provided for by the express mention of Sub-section (c) in Regulation 118.

But the same result is arrived at in another way, and quite independently of whether or not the construction of Section 8 in the previous portion of this judgment is correct. Attention has already been drawn to the fact that requirements of the non-riparian as regards Sub-section (c) are alone expressly referred to in Regulation 118 and these are to be fully provided for. But there is not the faintest indication in Regulation 118 that "requirements" in Regulation 118 is to have a different, or more restricted meaning than that word has in Regulation 117, and the meaning of the word itself can

hardly alter according to the land to which it refers. The requirements of both riparian and ordinary non-riparian land for their irrigable portions are the same usually. They are water for land actually irrigated, and for that to be developed for irrigation in the future, just as set out in Clauses (a) and (b) of Regulation 117. They differ only as to the source from which the water is to be obtained, for the riparian land obtains its water from the river and the non-riparian in other ways, if it can get any at all. The word "requirements" is simply used in Regulation 118 to avoid the cumbersome method of again setting out in full any of the clauses (a), (b) and (c) which are relevant to requirements of land affected by Sub-section (c). But Sub-section (c) deals s solely and only with irrigation and has nothing to do with either Sub-section (b) of Section 8 which deals solely with erosion, or with "other purposes" e.g. factory purposes, which are dealt with in Clause (c) of Regulation 117. But from the analyses already given of the meaning of Clause (c) of Regulation 117, that clause refers to Sub-section (b) and that portion of Sub-section (a) of Section 8 which deals with other things than irrigation. Hence, it is clear that the express reference to the requirements of non-riparian land under Sub-

section (c) contained in Regulation 118 cannot refer to the requirements contained in Clause (c) of Regulation 117. If the word "requirements" in Regulation 118 meant only requirements for water for the beneficial user for irrigation and other works "constructed or in the course of construction", that matter is dealt with in Sub-section (c) with its express limitations. Accordingly, if Regulation 118 meant by "requirements" the water required for irrigation and other works "constructed or in the course of construction" only, then Sub-section (a) would figure in Regulation 118, and not Sub-section (c). Since Sub-section (a) does not figure at all in Regulation 118, the only conclusion must be that the word "requirements" in Regulation 118 does not refer only to "works constructed or in the course of construction", and must have its usual meaning as set out in Clauses (a) and (b) of Regulation 117, and refers to both of them. It is too much to believe that in Regulation 118, Sub-sction (c) was used as an equivalent of Sub-section (a) for Sub-section (c), at the very least, does not deal with works for purposes other than irrigation. It would be a completely strained construction to say that it only refers to Clause (a). In the first place, in the "limited user" contention, the user of water is confined to what was used before the passing of the Act of 1906 while Clause (a) refers to land "actually irrigated

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at the time of the application" and that application may occur years after the passing of the Act of 1906. Nor can, in this connection, any argument avail that Regulation 118 refers to Clause (a) and means at the same time that the Water Court, in applying that Clause (a) must set about ascertaining not the amount irrigated at the time of the application but the amount irrigated in 1906 of all non-riparian land affected by Section 8(c) and involved in the application being considered, to divert water on to non-riparian land. That seems absurd and there is no warrant for changing the clear words employed in Clause (a). Moreover, there must be remembered the clear unqualified use of the word "requirements" in Regulation 118 and of the full provision for these requirements. Hence, it seems to be the position that Regulation 118 refers to requirements under Clauses (a) and (b) and that means "extensive use" is given in them, for Clause (b) refers to future development by irrigation. Therefore, the Regulation 118, in itself, provides ~~vides~~ for "extensive user".

It is curious in a way, that the requirements of non-riparian land under Clause (c) of Regulation 117 is not confirmed in Regulation 118. If they are lost by this silence then that would lay even more emphasis upon what has been said

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about only Subsection (c) being expressly mentioned in Regulation 118. But I do not think for a moment that they were done away with by this silence. That would be completely contrary to the whole policy of the Act, both as regards rights in regard to factories etc. under Sub-section (a) and rights in regard to erosion under Sub-section (b), and the heading quoted as to "existing rights of riparian owners" to the water, and the Regulation 116 saying that "existing rights of others" includes "rights of other owners which are protected under Section 8 of the Act". The position is that since the Water Court had to consider these rights and since Clause (c) set out the separate consideration of them regarding the amount of water to be allowed, it was quite unnecessary to deal specifically with them in Regulation 118 and say they must also be allowed for. As already pointed out, it was really not necessary to cite the requirements of riparian owners under Regulation 117 but that was done for the reasons already stated. Indeed, it may be questioned whether the express reference to Sub-section (c) in Regulation 118 was strictly necessary. But it is not necessary to consider that point, since, if the reference was not strictly necessary, the express way in which the reference was made shows the clear intention to give the rights under Sub-section (c), as stated.

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While it is clear that "extensive user" is provided for by Regulation 118, the very least THAT can be said is that there is no cutting down of Sub-section (c) of Section 8, as construed in that Section, standing by itself.

Regulation 119 may again be mentioned, for it only comes in where the surplus has been ascertained and the permit may be granted. It has already been pointed out that "riparian land" in Regulation 119 cannot mean true riparian land even in the contention of "limited user". Indeed the wording is "riparian land referred to in Section 7 and 8" and in Section 8 "riparian land" is not referred to under that name at all, and is only dealt with in Sub-section (a) and (b) along with non-riparian land equaling both kinds of land in that respect. Since Regulation 119 at least refers to some non-riparian land the only question is the extent to which the riparian and non-riparian land is equated. But Regulation 119 seems to indicate of itself not only the equation of some of the land but the extent of the equation. It says: before the permit can be granted water must be provided "to meet the present and future requirements" of the riparian land referred to in Sections 7 and 8". Not only is it obvious that, if riparian land only was alluded to , there would be no need to refer to

/ Section ... 40

Section 8 at all, but the words " present and future" show that all land is referred to and not only that irrigated before 1906.

I think, therefore, that "Klein Aar" was entitled to the "extensive user" after the passing of the Act of 1906. Hence the only remaining question is whether this right was affected by any of the provisions in, or regulation made under, Act 8 of 1912. But it is important in considering this remaining question to remember the wording of Section 24(c) of Act 8 of 1912. That does not create the exemption as a matter which did not exist before 1912 but merely continues the right enjoyed under the Act of 1906. The task is certainly not to see whether the Act of 1912 created this right of "extensive user" for the first time.

Consideration of this point is made more brief by the detailed consideration already given to the Act of 1906 and its Regulations. Save for Section 9, in the Act of 1906, the same Sections of and Regulations under the Act appear again with no material alterations, and they may usefully be considered before turning to a contention based on Section 16 of the Act of 1912 for that section has no counterpart in the Act of 1906.

In the Act of 1912, Section 8 of the Act of 1906

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is replaced by Section 24 which again has Sub-paragraphs (a), (b) and (c) relating to the identical matters dealt with in Section 8(a), (b) and (c) of the Act of 1906. There is no change in the language that in any possible way affects the construction of Section 8 of the Act of 1906 as before set out in this judgment. No modification at all of the right given in Section 8(c) can be read under Section 24 of the Act of 1912, standing by itself.

Turning to the regulations made under the Act of 1912, these are made under Section 45 and are no longer regarded as if they were enacted in the Act itself for the POWER is to make regulations "not inconsistent" with the Act. But this distinction is of no real importance in this case, since none of them when properly construed are inconsistent with Section 24(a), (b) and (c). Section 9 of the Act of 1906 has no complete counterpart in the Act of 1912 but that is of no importance at all for the right given by Section 8 of the Act of 1906 is in no way dependent on Section 9. But the matter dealt with previously in Section 9 in allowing a permit for the diversion of water to non-riparian land is now substantially dealt with in Regulation 23 under the Act of 1912 and it may be stated that in these regulations under the Act of 1912

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"existing rights of others" is defined precisely in the same words as in Regulation 116 of the Act of 1906, save that Section 24 is substituted for the equivalent Section 8 of the Act of 1906. Section 25 and 26 lay down the rules by which the Water Court is to be guided. They are exactly the same in wording as Regulation 117 and 118, save that Section 24, and some other sections not hereto relevant, are (a) substituted for Section 8, the equivalent in the 1906 Act of Section 24 and (b) the "requirement" of non-riparian lands figure in the same regulation 25 as these of riparian lands with Section 24(c) substituted for Section 8(c). This inclusion in the same section as the "requirements" of riparian land seem to establish even more clearly that "requirements" has the same meaning as regards both kinds of land.

Regulation 27 under the Act of 1912 is the counterpart of Regulation 119 of the Act of 1906. As there is some change in the wording, it had best be quoted in full, and it reads :

> Regulation 27 : "A Water Court after having fixed
> " or determined the quantity of water which should be
> " allowed to meet the present and future requirement
> " of the riparian land, may, on application grant
> " permission to use the surplus water of a public
> " stream (1) on non-riparian land within the
> " cathhment, or (2) across the natural water shed

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" into any other catchment area in which the water
" can be utilized for the purposes mentioned in
" Section 23".

It is to be noted that again in Regulation 27 the right of the Water Court to grant the permission set out in the regulation only arises when the "present and future" requirements of the "riparian land" are fixed by the Water Court, and it only is a discretion it can then exercise. But again, the words "riparian land" cannot, in this regulation, bear a meaning that excludes non-riparian rights protected by Section 24(a), (b) and (c) any more than it could do so in Regulation 119 under the Act of 1906. It is true the words used are "riparian land", not "riparian land referred to in Sections 7 and 8 of the Act" as in Regulation 119. But that can make no difference. Even in the "limited user" contention, the rights given under Section 24(a) and (b) are definite rights which are protected by Section 24(a) of the Act of 1912, as they were by the Act of 1906. Indeed, it is not even a question of whether that "limited user" contention is correct, for they are plainly protected in law. But these rights are, even on that contention, "present requirements" which have to be allowed for before the permit, set out in Regulation 27 can be granted. To read "riparian land" in regulation 27 as ignoring them and confining the present require-

ments to truly riparian land in its ordinary meaning, would mean that Regulation 27 runs flatly counter to the preservation of "existing rights" set out in Regulation 21 (Regulation 116 of the Act of 1906), (2) to Regulation 25 and (3) to Section 24(a) and (b), even if (c) be ignored. This is not only plainly not the true construction of what is intended but would in addition make Regulation 27 really ultra vires on this point. As is plain and admitted, the least that can be granted as a right by Section 24(a) and (b), even ignoring (c), is that the non-riparian land is expressly protected to the extent of the user of water as of right before 1906. For Regulation 27 to deprive the non-riparian land of this right would mean that Regulation 27 does something inconsistent with the provisions of the Act of 1912 and a regulation made under the Act of 1912 cannot validly be "inconsistent with this Act." Hence the fact is that "riparian land" in Regulation 27 clearly means and includes some non-riparian land. The only question is to what extent it includes that non-riparian land and I have already indicated what that extent is on the construction of the similar sections and Regulations made under the Act of 1906. But when Regulation 27, at the very least, includes some non-riparian land under the word "riparian land", its wording then indicates

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that "extensive user" is provided for by it too. It says "to meet present and future requirements of the riparian land". In the case of the non-riparian land equated to riparian land under the "limited user" contention that would be provided for as "present requirements". But "future requirements" can only mean land expected to be irrigated in the future and refer to "extensive user". It may be argued that by "present and future requirements" is meant those granted by Section 24(a). But that only throws the matter back to the true construction of Section 24 (formerly Section 8 in substance of the Act of 1906) and seems in any event an unjustified restriction of a word having a plain meaning.

I think, therefore, on the relevant Sections of the Act of 1912, and the Regulation under that Act, there is nothing that is inconsistent with or modifies the view taken of the Act of 1906, and certainly nothing to show that the right given under the Act of 1906 is not to be continued after 1912, as provided for in Section 24(c).

It remains only to consider an argument based on Section 16 of the Act of 1912 which is said to be against the "extensive user" contention. Section 16 is part of the system of "protection" introduced into Irrigation Law for the first time by the Act of 1912. As laid down in Sections 15 and 16

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this system was found to be unsatisfactory and these sections were repealed in 1934. But though they were repealed they have to be considered in this case just as if they still formed portion of the Act of 1912, and that will be done. Section 15 gives the right to protection when it is applied for, and Section 16 gives the procedure to be followed in the application. By Section 16 a preliminary application is made to the Water Court. That Court investigates the application, and, if satisfied with the application, it has to "order that any riparian owner who, in its opinion might be affected by the permission" shall be served with a notice confirming certain details, and shall be called upon to file with the Court a declaration (usually called a "declare notice") stating what works he himself proposes to construct for storage or diversion of water in the catchment area, within a stipulated time. There is no compulsion on the affected owner to file the "declare notice", and that is optional on him. But if he does not appear to oppose the granting of the order, then he is debarred from constructing any works as and from the date of the granting of the order. (Wagenaar & another vs du Plessis 1931 A.D. 83). It is agreed that since this is the position, and since the non-riparian owner having the rights under Section 24 has not got a right or locus standi

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to appear before the Water Court to oppose the granting of the order and has not to be served with the order, he must thus lose any rights to construct irrigation works, and so this indicates that "extensive user" was not granted to him, for that extensive user means and includes a right to construct these works in future. Of course this loss would not occur in the case of the "limited user" since it is only the right to construct works in future that is affected.

But even if this contention were correct in the event of protection being granted, and if the non-riparian owner dealt with by Section 24 loses all rights as to future development by irrigation works, since he has no <u>locus standi</u> to file the "declare notice", it cannot possibly affect, in any way, the rights of the non-ripairan owners like those of Klein Aar in this case. Protection is a state of affairs that may or may not occur, and until it occurs and the order of protection is granted Section 16 does not apply at all. Whether protection comes about is a pure matter of contingency and depends upon whether or not some owner applies for, and obtains, it. Until some owner does so, no rights whatever are lost. In the area which has not been subjected to a protection order, the rules about losing the rights of future development do not apply at all, and everyone is free to exercise his rights to water and to

/ develop ... 48

develop his irrigable land by the usual works as long as he does not take more than his proper share of the water. But the farm Klein Aar, in this case, is not in any area that has been protected, and certainly was not in such an area in 1929 when its extensive works were constructed. Consequently Section 16, and the rules about protection, never applied to it, and it is going much too far to say that its rights have been taken away by a contingency that never happened. Nor can it be urged that because Section 16 would cause it to lose that right in the event of that contingency happening, therefore that shows that the Act of 1912 did not intend it to have that right even if the contingency did not happen. The opposite is the case and by making the loss occur on the happening of the contingency, the Act would indicate that the loss would not happen if the contingency never occured. It seems to me that on this simple ground, Section 16 affords no help to Appellants, and no argument in favour of "restricted user". Indeed, if I am correct in the view taken of the TRUE construction of Section 24, and Section 8 of the Act of 1906, the very fact that Section 24(c) appears in the Act, disposes of any idea that Section 16 in any way affected the "extensive user" right given in Section 24(c), and existing under the 1906 Act which had no protection sections

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in it. Nor can it be that Section 16 can show that the construction of Section 24(c) indicates any meaning other than that given to Section 24(c) in this judgment. It would certainly be remarkable if a right given in the terms in which it was given in Section 24(c) would be controlled as to its meaning in this case by a contingency which might never arise. Hence this CONTENTION cannot avail. It is not dealt with in the judgment of the Court a quo for it was only raised for the first time in this Court. But though the raising of it was belated it has to be considered.

Moreover, there is one other observation that may be made in regard to this effect. Until the actual order for protection is given works may be constructed freely, (Wagenaar vs du Plessis 1931 A.D. 83 per WESSELS, J.A.), and so the owners of Klein Aar could construct their new works until any protection order was granted, and did so, and would not be affected by it even if an order for protection could be granted afterwards, which has not been granted. Though I think any contention that Section 16 helps the Appellants in this case, must fail on the ground that protection is a thing which is a matter of pure contingency, I do not wish to be understood to agree WITH the view that the argument advanced in regard to the non-riparian land losing rights under Section 24(c) is correct

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even if protection is applied for. Without dealing with, or ~~deciding~~ CONSIDERING all of the many reasons to the contrary, it must be pointed out that Section 16 deals with service that is compulsory on riparian owners affected. In all law, service on Defendants is compulsory too, but that does not prevent a person interested sufficiently in a case ~~for~~ FROM obtaining a right to intervene. It would be difficult to see how Section 16 could prevent completely the non-riparian OWNER from appearing to show whether or not he has rights in the matter. Indeed, it is clear from the proviso (b) to Section 15 that the Water Courts cannot grant permission to ~~divert~~ DIVERT water where that permission would interfere with a permit granted under prior law and that would include a permit granted under Section 9 of the Act of 1906, yet there is no provision in Section 16 saying that there must be service on that person. However, it is not necessary to consider other reasons for not accepting the argument about the loss of rights under Section 16, in view of what has been stated in regard to protection being a contingency.

Though this contention based on Section 16 is dealt with, it is difficult to see how it can avail in view of the PROVISIONS of Section 24, and especially of Sub-section (c). That merely provided for the continuance of a right existing before the passing of the Act of 1912, and that right in this

/ case ... 51

case would be based on the Act of 1906. Section 24(c) gives no modification of that, and Section 24 at its very beginning gives rights under it after enacting specifically that "Nothing in this Chapter shall be construed" from interfering with those rights. But, both Section 16 and Section 24 figure in "this Chapter", which is Chapter 2 of the Act of 1912. How Section 16 can then be "construed" so as to nullify the rights given under Sub-section (c), or any Sub-section, of Section 24, is more than difficult to see.

It is suggested that since Sections 15 and 16 of Act 8 of 1912 only give the riparian owner the right to obtain protection, that in some way affects the right given by Section 24(c) which is substantially the same as Section 8(c). But this suggestion ignores what Sub-section 24(c) does. It merely continues the right previously existing under Sub-section 8(c) of the Act of 1906 and does not, of itself, add any other right. Prior to the passing of the Act of 1912, no right to obtain protection existed in favour of anyone, and so the right given by Section 8(c) could not include that right. It was quite open to the Legislature in passing the Act of 1912 to add that right to the right previously existing under Sub-section 8(c), but it did not do so. Failure to add that right, however,

/ cannot ...../52.

cannot be converted into any subtraction of the right given by Sub-section (c) or diminish that right at all. Hence the question of not giving rights to apply under Section 15 and 16 does not affect the present question at all.

Finally, Section 23 is relied on to support the contention of "limited user". That Section enables a Water Court to grant to others all water which cannot be used in the catchment AREA on land that is "riparian". It is to carry out this Section that the Regulations 25 to 27, already considered, were framed. It is urged that since Section 23 only mentions "riparian" land, therefore non-riparian land cannot be considered in deciding whether to give the grant under this Section. But even under "the limited user" contention : that by Sub-section (c) OF SECTION 24 only, the extent of land irrigated before 1906 is protected, that cannot be so. Section 23 is in the same Chapter II as Section 24 and Section 24 definitely states that nothing in that chapter can affect the rights given under Section 24, let alone the fact that the grant under Section 23 is a permit and could not overrule a right given under Section 24. It cannot nullify a right given, even on the "limited user" contention, or one given under the "extensive user" one. Unless there is some way of reconciling Sections

/ 23 and 24 ...../53

23 and 24, the provisions of Section 23 cannot affect those of Section 24. There is, however, an easy way of reconciling them. If ~~by~~ UNDER "riparian" land in Section 23 ~~is~~ are included ~~the~~ the rights given to non-riparian land in Section 24 - whatever their extent may be found to be - then the two sections are in complete accord. Even on the "limited user" theory as to the meaning of Sub-section (c) there is an equation pro tanto of the non-riparian land, irrigated before 1906, to riparian land, and by that means that land will be covered by the word "riparian" unless we are to hold that the two sections cannot be reconciled. It matters not whether it is said that land is included in riparian land by implication or by the meaning being enlarged ~~or~~ OR changed. When once it is clear that some non-riparian land comes ~~with~~ WITHIN the word "riparian", then it is ~~only~~ a question of to what extent that non-riparian is equated to riparian in Section 24, truly construed. Therefore, it seems to me that, so far from Section 23 assisting the contention of "limited user" it, to some extent, does the opposite because it shows that even in the Act of 1912 itself the word "riparian" has an enlarged and not the ordinary meaning and must have that in the Regulations framed to carry out Section 23, and especially in Regulation 27. This all shows how much is dependent on the true meaning of Section 23, as it is

/set ...../54.

set out in the Act.

It seems to me, therefore, that the right enjoyed by the owners of "Klein Aar" was that of "extensive user" and the appeal on this point should fail.

As regards the FARM, Roux's Dam, I agree with the finding of the Water Court and the Court a quo that the evidence shows it was not riparian in 1954 when the dispute arose and agree that that is the correct date to be regarded in finding out whether or not it was riparian. The inspection by the Water Court must be regarded as of the greatest value in this respect for the inspection took place only some two years later.

It seems to me, therefore, that, save for the minor alterations in the order which would not affect the question of costs, the appeal should be dismissed with costs.

Record

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between:

1.PIETER STEGMANN DE VILLIERS

2.WILLIAM STEGMANN DE VILLIERS .....Appellants.

and

1.JOHANNES HENDRIK BARNARD

2.JAMES PETER COETZEE

3.ALEXANDER COETZEE .....Respondents.

Coram: Fagan, C.J., De Beer, Beyers, JJ.A., Reynolds et Hall, A.JJ.A..

HEARD: March 10-14, 19-21,1958. DELIVERED: May 12, 1958.

J U D G M E N T.

HALL, A.J.A.:-

This is an appeal from a decision of the Cape Provincial Division, sitting as a court of appeal from the decision of WATERMEYER, J., who sat with assessors in a Southern Water Court at Beaufort West. Leave to appeal to this Court was given by the Court a quo.

The case arose out of a dispute between the owners of adjoining farms regarding the use of a public stream known as the Salt River. These farms are La Porte, Hopewell, Salt River, Mimosa Lodge, La Rochelle and Leeuwkuil, all situated...../2

all situated in the district of Beaufort West and a large part of the first five of them is made up of sub-divisions of two properties which are named in their original grants Salt River's Poort and Salt River's Vlei. The rest of the land which is included in the six farms comprises the separately granted properties Klein Aar, Gemsbok's Randt, Roux's Dam and the portion of Elandsfontein which is known as Leeuwkuil.

The parties to this appeal own these properties in the following manner:-

(a) The first appellant, Pieter S. de Villiers, is the owner of Salt River, which is made up of Lot F being the remainder of Salt River's Poort and of Salt River's Vlei and also Lot b of Roux's Dam.

(b) The second appellant, William S. de Villiers, is the owner of Leeuwkuil, which comprises Lot a of Roux's Dam and the portion of Elandsvlei which bears the name of Leeuwkuil.

(c) The first respondent, Johannes H. Barnard, owns the properties La Porte and Mimosa Lodge, which are made up of Lot B of Salt River's Poort, Lot D of Salt River's Vlei and the farm Gemsbok's Randt.

(d) The second and third respondents, James P. Coetzee

and Alexander...../3

and Alexander Coetzee, are joint owners of Hopewell, which is made up of Lot C of Salt River's Poort and the farm Klein Aar. They likewise own Lots D and E of Blink Fontein and a farm called Truter's Kuil, neither of which, although they appear on the plan to which I shall refer later, have any bearing on this case.

(e) The remaining property, La Rochelle, is owned by the estate of the late Charl R. de Villiers, which was a party in the Water Court proceedings and in the appeal to the Court a quo, but is not one of the parties in this appeal. These properties are shown on the plan which is annexed to this judgment, marked A.

Prior to 1891 the properties known as Salt River's Poort and Salt River's Vlei were held in undivided shares by a number of different owners and, in that year, transfers were passed to each of six owners or groups of owners. The conditions to which all the subdivisional transfers were made subject were annexed to those transfers and dealt with the water of the Salt River. These conditions became known as the "fair share agreement" and are so referred to in this judgment. The subdivisions were described in the diagrams

annexed...../4

annexed to the transfers as Lots A, B, C, D and E and the remainders of the two original farms, but these remainders became subsequently Lot F and are referred to as such in this judgment. The parties to this appeal are all, with the exception of the second appellant, successors in title to the original owners of the subdivisions of Salt River's Poort and Salt River's Vlei. There are two portions of the farm Salt River's Poort to which the present proceedings do not apply, namely Lot A and the most northerly portion of Lot C, which latter lot forms part of an upper property called Kamfer's Kraal.

The Salt River, which is marked on Plan A, runs through a narrow defile or poort situated on that part of Lot C belonging to Kamfer's Kraal. When it emerges from the poort it forms the boundary between Lots A and C and then, for a considerable distance, the boundary between Lots B and C. From there it runs to a point marked L on plan A, where its water is turned out of the river channel by means of a diversion dam, and flows down to the lower Lots D, E and F. Like most Karoo rivers, the Salt River is a flood-water stream without a normal flow and so all its water is surplus

water...../5

water. From the evidence it appears that it runs, on the average, for only sixteen days a year. When it is in flood its channel is in places too small to contain all the water flowing in it and much of it spills over the banks and floods considerable level areas on both sides of the river's course. The natural spreading of the water is a factor which has proved to be one of considerable importance throughout the prodeedings in this case.

Prior to 1891, it is not proved that any water was used for the irrigation of cultivated crops, but the flood waters were diverted, particularly from a dam known as the "Ou uitkeerwal" situated close to the point L for the purpose of irrigating the veld and flooding the low lying places which are known as vleis. It was only after the subdivision that the use of water for irrigating cultivated lands was gradually introduced. The first diversion furrow which is proved to have been made was taken out of the river at point B on the boundary between Lots B and C. This furrow crossed Lot C, passed over the corner of Lots D and E of Blink Fontein and carried water onto Klein Aar, all of which properties are now owned by the second and third respondents and form

part of...../6

part of Hopewell. This furrow was constructed in the year 1904 and it was used exclusively for ~~the~~ irrigation on Klein Aar. At some time which may have been earlier or later than ~~Some time later, probably about~~ 1908, a small furrow was taken out at the point A and water was led down by means of it to the homestead at La Porte (Lot B).

For the purpose of making subsequent events easier to follow, another plan, marked B, is annexed to this judgment. On it are marked the points A and B and the furrow running from B in the direction of Klein Aar. About 1930, the father of the second and third respondents, who then owned Hopewell, erected a weir across the channel of the river at B and diverted more water into the Klein Aar furrow than was then running into it. About the same time, he made an opening in the river bank at C and by means of it diverted more water onto Klein Aar.

At this time the owners of Lots D, E and F were entitled to such water as they were able to divert, in terms of the "Fair Share" agreement, by means of the weir at L. Benjamin de Villiers, who then owned Lot F (Salt River) and also Leeuwkuil, and Henry de Villiers who owned

Lot D..... ./7

Lot D (Mimosa Lodge) proceeded to buy in equal shares from one, Egbert de Villiers, who was then the owner of Lot B (La Porte) all his rights to the water of the Salt River. A notarial agreement recording the sale was referred to throughout the proceedings as "the 1932 servitude agreement" and it will be so referred to in this judgment. This agreement gave the two lower owners the right to divert the water at any point on Lot B and to lead it to their respective properties and, shortly after the conclusion of this agreement, Benjamin and Henry de Villiers enlarged the small opening in the river bank at A and constructed the furrow marked A-E-F on the annexed plan, marked B. This furrow had the effect of divering a large quantity of water over Lot B and returning it to the river channel in the vicinity of the point marked K on plan B, from where it ran down to the diversion weir at L. The appellants admitted that this furrow was constructed with the object of diverting more water to L by by-passing the two Klein Aar diversion points at B and C on Lot C. In 1937 Henry de Villiers purchased Lot B from Egbert de Villiers and so there was a partial merger of the servitude because Henry became the owner of one of the dominant

tenements...../8

tenements and of the servient tenement.

In 1951 the first respondent purchased La Porte and Mimosa Lodge which included Lots B and D, Lot B being subject to the servitude in favour of Lots E and F in respect of one half of its water rights. In 1952 the appellants went on to Lot B and cut the furrow marked G-H through the area marked 'Bos' on plan B and they likewise constructed an earthen wall in the vicinity of point K, which is shown on plan B and marked D. It was this act on the part of the appellants which led to the water court proceedings and ultimately to the present appeal.

The orders claimed in the Water Court under sections 32(a), (b) and (c) of Act 8 of 1912 by the respondents were, in so far as they are relevant to the present proceedings, as follows:-

(a) An order declaring that the appellants are not entitled, by virtue of the 1932 servitude agreement, to the use of more water from the Salt River than one half of the quantity which can be beneficially used on the farm La Porte (Lot B).

(b) An order declaring that the only furrow which the appellants are entitled to make over La Porte is one from the Salt River to any one of the appellant's properties

which...../9

which is not larger than is necessary for the conveyance of the water described in paragraph (a).

(c) An order defining the quantity of water which the appellants are entitled to divert in terms of paragraph (a).

(d) An order defining the rights and shares of the parties to the water from the diversion weir at L in terms of the "fair share" agreement of 1891.

(e) An order declaring that the appellants are not entitled to lead water by virtue of the 1932 servitude agreement onto the non-riparian properties Roux's Dam and Salt River's Vlei.

The appellants filed a counterclaim for a declaration that the respondents were not entitled to lead water on Gemsbok's Randt and Klein Aar as both of these are non-riparian properties. In the appeal both to the Court a quo and to this Court the only point raised regarding Klein Aar's right to water was whether the second and third respondents were entitled to divert on to it more water than was used there for irrigation on the 21st August, 1906, when Act 32 of 1906 (Cape) came into force.

The Water Court made the following declaratory

orders...../10

orders upon the claims ~~(a) to (c)~~ and counterclaim set out above:-

(a), (b) and (c). The appellants were entitled to 2,000 acre feet of water per annum by virtue of the 1932 servitude agreement. The appellants were entitled to divert the water at any point on La Porte (Lot B) provided no water for use on Salt River's Vlei and Roux's Dam was diverted above point B on plan A. The appellants were entitled to take and convey 2,000 acre feet per annum either by means of ~~one~~ a furrow having a capacity of 140 cusecs which remained continuously open, or by means of a larger furrow controlled by a measuring and regulating device to be installed by them. This furrow had to be constructed so as to convey water from the river to the appellant's properties, i.e. not from the point of diversion of A back to the river bed at K.

(d) The first respondent's rights as the owner of La Porte and the second and third respondents' rights as the owners of Lot C were unaffected by the provisions of the "fair share" agreement of 1891. The first respondent as owner of Lot D was declared to be entitled to 43½% of the water reaching the diversion weir at the point L and the first appellant as owner of Lot F ~~and Lot (b) of Roux's Dam~~ was declared...../11

was declared to be entitled to 36⅔% of that water, With the remaining 20% which was awarded to the owner of Lot E this Court is not concerned.

Klein Aar was declared to be non-riparian to the Salt River, but the second and third respondents were declared to be entitled to divert and use water on Klein Aar for irrigation purposes. Gemsbok's Randt was likewise declared to be non-riparian, but the first respondent was declared to be entitled to use upon that property (a) any water which naturally drains upon it, (b) any water to which he became entitled by virtue of the 1932 servitude agreement, and (c) any water to which he is entitled by virtue of the "fair share" agreement of 1891.

With regard to claim (e), although the Court found that both Salt River's Vlei and Roux's Dam were non-riparian, no specific order to this effect was made. The only order which has any bearing upon the Court's finding that they were non-riparian was to the effect that no part of the 2,000 acre feet which the appellants were permitted to divert by virtue of the 1932 servitude agreement might be diverted below B if it was to be used on these properties.

The appellants...../12

The appellants appealed to the Court a quo against all the orders set out above and, except for two minor alterations which are of no importance except possibly upon a question of costs, that Court dismissed the appeal. The appellants now appeal to this Court against the same orders and upon the same grounds as those stated in their notice of appeal to the Court a quo.

The matters which are put in issue by the appellant in this appeal are the following:-

(a) The nature of the remedies which are available to a riparian owner for the purpose of preventing an owner above him from diverting more surplus water than he is entitled to use and the locus standi of the respondents to apply to Court for relief.

(b) The rights of riparian owners to use the surplus water of a public stream such as the Salt River when they have not been made the subject of an order of Court or of an agreement between riparian owners.

(c) The quantity of water which the second and third respondents are entitled to divert for the irrigation purposes upon the non-riparian property Klein Aar.

(d) The rights...../13

(d) The rights which the parties to the 1932 servitude agreement and their successors in title acquired by virtue of that agreement.

(e) The declaration that the rights to use the water of the Salt River upon first respondent's property, Lot B of Salt River's Poort, and upon the second and third respondent's property Lot C of Salt River's Poort remain unaffected by the "fair share" agreement of 1891.

(f) Whether the first respondent is entitled to the use of any of the water of the Salt River on the non-riparian property Gemsbok's Randt.

(g) Whether Roux's Dam is riparian to the Salt River and, if it is, whether its owner is entitled to divert water at the point A for use upon it.

The first ground of appeal which Mr. Theron who appeared for the appellants put forward concerned the remedy available to the respondents. He contended that, in basing their application for relief upon sub-sections (a) and (b) of section 32 of Act 8 of 1912, they mistook their proper remedy and that it was not open to the Water Court to give them, under section 32, the relief which they sought. The question of the correct remedy is closely bound up with that of the rights of a

riparian...../14

riparian proprietor to surplus water by virtue of section 14 of the Act when those rights are unaffedted by an order of Court or an agreement between the riparian owners. For the sake of convenience I shall deal with these two matters at the same time. Mr. Theron contended that, by virtue of section 14 of the Irrigation Act of 1912, a riparian owner is given an unlimited right to use surplus water for irrigation on his riparian land, subject only to the restriction that he may not waste it. There were formerly two remedies open to riparian owners if they felt aggrieved by an upper owner's excessive storage. The first of these, which has since been the subject of repeal by Act 46 of 1934, was protection proceedings and the second was an application to the Water Court under the provisions of section 18 of the Act. The only remedy still available to the respondents is that under section 18 and it was by means of proceedings under this section, and this section only, that a limit upon the amount of water which might be diverted by the appellants from the Salt River could be imposed.

I am of opinion that Mr. Theron's contention that section 14 gives a riparian owner an unlimited right to surplus water is not well founded.

While...../15

While section 14 of the Act does not specifically limit a riparian owner's use of surplus water, his right to use water at all is made subject to the provisions of the Act and, according to section 9, the use of public water is the use which is regulated by the Act. The way in which a riparian owner is entitled to use surplus water for irrigation is set out in Regulation 19, which states that he may use no more than he can reasonably be expected to use, and it is this used which section 18 describes as the quantity of water which "he could reasonably be expected to use". In Smartt Syndicate Ltd. versus Richmond Municipality and others((1919) Krummeck's Reports 284 at page 289),DE VILLIERS, J.P.J., stated the position in these terms:-

" The 14th section places no limitation on the quantity
" of surplus water which may be diverted or stored by a
" riparian owner....Than section 18 comes in as a proviso
" and lays down that, if he takes too much, there is a
" remedy. A right of recourse to the Water Courts is
" given to lower owners if an upper owner takes more
" surplus water than he could reasonably use. This is
" tantamount to laying down that each riparian owner is
" merely entitled to the reasonable use of the surplus
" water for, if a remedy is given when he exceeds a
" reasonable use, it can only be because he is entitled
" to the reasonable use and no more."

In the same judgment at page 306, the Learned Judge said that it is an established principle of law that no person

possesses...../16

possesses a greater right to the use of public water than he is able to exercise beneficially and that it is this capacity for beneficial use which is the measure of rights to use public water. With this pronouncement I am in entire agreement. This statement is in accordance with Parliamentary Regulation 18 which should guide a Water Court in determining the quantity of surplus water which any riparian owner can reasonably be expected to use in the following terms:-

> "No riparian owner shall have the right to divert on
> " to his riparian land for the irrigation thereof,.....
> " more water than he can be expected to use....What
> " constitutes a reasonable use depends upon the circum-
> " stance of each particular case and is a question of
> " degree, but the following principle(s) shall be taken
> " to be of general application, viz:
> " (a) the quantity diverted .....must not be greater
> " than is required to carry out efficiently and econom-
> " ically the operations mentioned in section 14 of the
> " Act."

In the course of an article in Volume 39 of the South African Law Journal (1922) at pages 413 and 414 in which he made a detailed analysis of the rights of riparian owners under section 14, the same judge (later Sir J.E.R de Villiers) stated the position in the following terms:-

> " We will take it that an owner may only be placed on
> " an allowance as to surplus water if he has exceeded
> " his rights. But his rights are really the same

before...../17

" before he is placed on an allowance as they are after
" that event. The order of Court merely defines what
" is the amount which he should take and should have
" taken. It crystallizes but does not alter his rights..."
" The nett result of sections 14 and 18 and
" Parliamentary Regulation 19 is that a riparian owner
" may take as much surplus water as he requires for
" efficient and economical primary and secondary use on
" his riparian land."

I have no hesitation in saying that this exposition of the riparian owner's rights to surplus water in terms of section 14 of the Act is unquestionably correct. Mr.Theron referred to passages which he quoted out of the judgment in Smartt Syndicate Ltd.versus Richmond Municipality and others (supra) at page 289 and Wagenaar versus du Plessis (1931 A.D.) at page 99 from which he sought to deduce that section 14 gives a riparian owner an unlimited right to impound water. These passages were analysed by the learned Judge in the Court a quo who went to some pains to show that the purpose for which counsel sought to use them had the effect of divorcing them from their context. I am in complete agreement with his finding that the decided cases support the construction which has been given to section 14 in the passages quoted above and that if a riparian owner takes more than his reasonable requirements, he is exceeding the rights which the Act gives him.

Mr.Theron's.;..... /18

Mr.Theron's second contention was that section 18 provides the only remedy by means of which a riparian owner can limit the use of an owner above him. In support of this he laid considerable stress upon the fact that it has been said that section 18 is a proviso to section 14, and he sought to deduce from that that the limitation to the reasonable use of water cannot apply until the proviso has been put into operation by the making of any application to the Water Court. It seems to me that, while section 18 may be regarded as being in the nature of a proviso to section 14, its chief object is to provide a lower owner with a simple remedy when an owner above him is exceeding his rights. It does not seem to me that the section contains anything from which it may fairly be inferred that a riparian owner cannot be limited in his use of surplus water by any procedure other than an application under this section.

In the present case the orders asked for included (i) the determination of the rights of the parties by virtue of the "fair share" agreement of 1891; (ii) the determination of the rights of the parties by virtue of the 1932 servitude agreement; (iii) the determination of the

appellants' ...../19

appellants' rights of aqueduct over Lot B and a claim for an order for the removal of the furrow G-H; and (iv) An order declaring Salt River's Vlei and Roux's Dam to be non-riparian. These are all matters which can be adjudicated upon by a Water Court under the provisions of sub-sections (a) and (b) of section 32 of the Act. They are equally matters which cannot be dealt with under the provisions of section 18 of the Act. It does not appear to be logical to say that, because the definition of rights under certain agreements may necessarily involve the fixing of the respective quantities of water which any one of the parties may be permitted to divert, the remedy under section 32(b) ceases to be available. Nor is it plain to me how a number of riparian owners who are involved in a dispute as to water rights such as is the case here could possibly get their respective rights defined by way of an application under section 18. For these reasons I think that Mr. Theron's contention that section 18 was the only remedy available to the respondents is incorrect.

The appellants' counsel raised the further point that none of the respondents had locus standi to apply for a

definition...../20

definition of rights which involved a limitation upon the rights of the owners of Lots D and F to divert as much water as they saw fit in the exercise of their right to divert their share of Lot B's water under the 1932 servitude agreement. In so far as the first respondent is concerned, he is the owner of Lot B and he is entitled to one half share of the water rights pertaining to it. This must necessarily give him locus standi to bring preceedings in the Water Court for a definition of his rights and those of the owners of Lots D and F. In so far as the owners of Lots C are concerned, in the first place, it is common cause that they have, by virtue of their user of the water on Klein Aar prior to the commencement of Act 32 of 1906, and the preservation of such rights by section 8(c) of that Act and by section 24(c) of Act 8 of 1912, a right to use the water of the Salt River. What the quantity is which they may use is the subject of a later part of this judgment.

In the second place one, Jackson, who grew up on Hopewell and lived there stated that, in the days when he lived on the farm when the river was in flood water frequently spilled over the channel of the river between the points B and D marked on plan B, and that this water irrigated the

veld of Lot C lying to the north of point D. He said further that when the water was diverted at point C a considerable quantity of it ran round the eastern side of the Vogelstruiskoppie and found its way to the Langkuile, which lie partly on Klein Aar and partly on Lot C, and from there the larger part of the water flowed over Lot C down to Mimosa Lodge. This evidence was borne out by the contours shown on the topographical map which is exhibit 47 and by the evidence of Shand, who said a civil engineer, that the course which Jackson stated to have been that taken by the water over Lot C was in accordance with the natural fall of the land as shown by the contours. He stated furthermore that, when he inspected that area before giving evidence there were in many places traces of flood water having recently run over Lot C in the way which Jackson described it used to run in his time.

Both the right to use the surplus water by diverting it at B onto Klein Aar and the fact that prior to 1932, when the furrow at A was made by the appellants, considerable quantities of water naturally ran over the veld on Lot C and irrigated the veld and that some water still

does so...../22

does so, gives, in my opinion the owner of Lot C locus standi in a suit in which rights of diversion by other riparian owners immediately above them are put in issue.

Mr.Theron put forward one further contention under this ground of appeal. ~~that~~ It was that, even if the court,acting under section 18 of the Act placed a limit upon the amount of water which an upper owner was reasonably entitled to use, it was not justified in limiting the rights given him by section 14 merely to his reasonable requirements. The furthest that any such limitation could go would be to restrict ~~him~~ the quantity of water which he could use beneficially. This might well imply, he argued, the use of a greater quantity than was required to produce a crop by means of economic irrigation. If the application of a larger quantity of water would produce a more abundant crop, then the upper owner was entitled to take it because his full requirements had to be satisfied. As there was no evidence to indicate what that quantity might be, but only evidence of the reasonable requirements of Lot B, the Court could not make any order limiting the use of water on their respective properties in terms of the servitude agreement of 1932.

I have...../23

I have already dealt at some length with the rights of use under section 14 and I have expressed my entire agreement with the statement of DE VILLIERS, C.J., in Smartt Syndicate Ltd, versus Richmond Municipality and others (supra) in which he said that it is the capacity for beneficial use which is the measure of rights to use public water, and to his further pronouncement that sections 14 and 18 of the Act, read with Parliamentary Regulation 19, entitle a riparian owner to take as much surplus water as he requires for efficient and economical use on his riparian land. To say that a riparian owner may take the water which he requires for efficient and economical irrigation of his land is, in my opinion, exactly the same thing as saying that he may take his reasonable requirements or his full reasonable requirements and it does not seem to me that this is in any way different from saying that he must make beneficial use of the water without waste.

The evidence of Dr.Tidmarsh, which is criticised by Mr.Theron, is to the effect that the wetting of the soil on Salt River's Poort to a depth of six feet is the limit of the efficient and economic use of water for irrigation.

For this...../24

For this purpose between 30 and 31 inches would have to be applied to the soil during the irrigating season. This evidence was not contradicted and the Water Court accepted it. The learned Judge based his calculation of the quantity which would be required for the full reasonable requirements of one half of Lot B's irrigable area upon Dr. Tidmarsh's evidence and fixed 2,000 acre feet per annum as that quantity. I am of opinion that, in doing so, he gave the appellants the use of all the water they are entitled to in respect of their rights under the 1932 servitude agreement.

The next matter with which I shall deal is the quantity of water which the second and third respondents are entitled to divert and use for irrigation on the non-riparian property, Klein Aar. The construction of the furrow from point B on plan A to Klein Aar was completed in 1904. At that time, the only streams which the common law recognised as public streams were those which were perennial streams. The Salt River was not a perennial stream and consequently was a private stream, and every owner of propefty who had access ~~contiguous~~ to the stream could use all the water which reached

his property...../25

his property in whatever manner he chose, subject of course to the maxim sic utere tuo ut alienum nonlaedas. This position was changed in the Cape Colony through the passing of Act 32 of 1906, when, by virtue of section 3 of that Act, rivers which carried flood-water only, like the Salt River, were made intermittent streams. In terms of section 7 of that Act the water in these streams became, from then onwards, public water and the owners of land contiguous to them were given riparian rights.

Seeing that the Act was introducing an important change in the common law, it made provision for the preservation of existing rights and the rights so preserved are set out in section 8 which is as follows:

> " 8. Nothing in the preceding section shall:
> "(a) Compel any person who, previous to the passing of
> " this Act, has constructed or had in course of construc-
> " tion works for the useful employment of the water of
> " any intermittent stream, to allow to flow down past
> " his works water which he could beneficially use by
> " means of and for the purposes of his work, and which he
> " was entitled so to use;
> "(b) Prevent any person from doing anything necessary to
> " prevent the erosion of land;
> "(c) Prevent any person who, prior to the commencement
> " of this Act, has used and was entitled to use the
> " water of an intermittent stream for irrigating a non-
> " riparian property, from continuing such use.
> " And any special regulations drafted hereafter under

the preceding...../26

" the preceding section shall not interfere with the
" enjoyment of the exemptions in this section mentioned."

Act 32 of 1906 remained of force and effect in the Cape Province until 1912 when it was repealed by Act 8 of 1912, which ~~again~~ was of force and effect when the proceedings in this case commenced. Act 8 of 1912 provided, too, for the preservation of existing rights in terms similar to those which the previous Statute had contained. Section 24 of Act 8 of 1912, which is the relevant section, is as follows:-

" 24. Nothing in this Chapter shall be construed as -
"(a) compelling any person who, prior to the commencement
" of this Act or of any prior law, has constructed, or
" had in the course of construction, works for the
" useful employment of the water of any stream, to allow
" to flow down past his works, water which he could
" beneficially use by means of or for purposes of his
" works and which he was entitled so to use;
"(b) preventing any person from doing on his own land
" any act necessary to prevent the erosion thereof;
"(c) preventing any person who, prior to the commence-
" ment of this Act, has used and was entitled to use
" the water of any stream for irrigating non-riparian
" land, from continuing so to use such water."

Mr. Theron contended that upon a proper interpretation of section 8 of Act 32 of 1906 the water which the second and third respondents were entitled to use on Klein Aar was limited to the quantity which they were actually diverting when the Act came into force in that year. It followed, therefore, that ~~he was~~ they were not entitled to any

additional...../27

additional water which they obtained through the construction of the weir at B and through the diversion of water from the point C, both of which commenced in the year 1930. In support of this contention Mr. Theron argued that the final words of section 8(c) of Act 32 of 1906, i.e. "such use" could only refer to the water which an owner of land "has used and was entitled to use" when the Act came into force. This contention, he said, is further supported by the wording of sub-section (a) of section 8 of the Act. This sub-section limited the owner's rights to water which he could use by means of and for the purposes of his work and, although it does not specifically say so, it is applicable to irrigation works as well as works erected for other purposes (see Smartt Syndicate Ltd. versus Richmond Municipality and others,(1) Krumm eck's Reports at page 307). From this it follows that any interpretation other than the one contended for by him would cause sub-sections (a) and (c) of section 8 to be contradictory to each other, for under (a) an owner's right to use water for irrigation is clearly limited to the quantity which his works diverted at the commencement of the Act, while under (c) no such limitation is imposed.

I am...../28

I am of opinion that this contention is not well founded. It appears to me that the words "such use" with which sub-section (c) of section 8 conclude refer to "the use of the water.....for irrigating a non-riparian property", from which it follows that it is the use for irrigation of which no person might prevent the continuance. Act 32 of 1906 was, by section 1 of the Act, "cited as the Irrigation Act, 1906". A perusal of the statute makes it very clear that it is irrigation, and irrigation alone, which it is the object of the Act to promote and facilitate. Section 7 of the Act made a drastic change in the common law by taking away from the owners of land in the greater part of the Cape Colony the unlimited right to use the water of flood-water streams free from any restriction whatsoever. It introduced for the first time, the restrictions which riparian ownership and riparian rights entail in so far as a large number of rivers were concerned. It seems to me that the exemptions which section 8 introduced should be interpreted in the light of the whole frame and object of the Act and that, where a right to continue to irrigate land is preserved, it was intended to preserve it in a way which

would...../29

would enable the owner of the land to make the best use of his property by using water for irrigating it. From the time the Act came into force a preferent user of the water which had hitherto been private water was given to the owners whose land was riparian to the river, but these owners were, by the exemption, prevented from interfering with any use of water upon a property which was being irrigated at that time but would, otherwise, have fallen outside the somewhat arbitrary distinction of riparianism. The owner of the non-riparian land, who was doing the very thing which the Act sought to promote, was by the exemption relieved from a provision of the Act which would have thwarted his efforts.

Mr. Theron's contention that the words in section 8(c) "such use" can only refer to the water which an owner of land "has used and was entitled to use" when the Act came into force is, in my opinion, negatived by the wording of the section. The words are not "at the commencement of this Act", but "prior to the commencement of this Act" and the right of use which the owner of a non-riparian property had prior to the passing of Act 32 of 1906 was an unlimited use of the water of a private stream. This is a reason why the sub-section

lends...../30

lends itself so readily to the interpretation that the right which which is preserved is the right to a reasonable use for irrigation.

Nor can I see that any interpretation other than the one he put forward causes sub-sections (a) and (c) of section 8 to become contradictory to each other. In my opinion section 7 deals with the irrigation of riparian land, section 8(a) deals with water used on riparian land for purposes other than irrigation and section 8(c) deals with water used for irrigation upon non-riparian land. It seems to me that this is the basis upon which an interpretation of section 8(c) must rest and it excludes any question of both contradiction between sections 8(a) and 8(c) or of their overlapping. As section 8(a) is intended to preserve rights, other than rights to use water for irrigation, the limitation of them to the extent of such beneficial use as was enjoyed when the Act was passed fits fairly into the object of an Act which seeks solely to promote irrigation. It does not, however, in my opinion, detract from the much greater rights which are specifically preserved by sub-section 8(c) for the benefit and advantage of land owners who were then actually occupied

in...../31

in carrying out the objects of the Act.

There appears to me to be a further reason for holding that an owner of non-riparian land was not limited to the use of the quantity of water which he was using when Act 32 of 1906 came into force. The right which was preserved for his benefit by section 8(c) was so preserved because it was in existence before the Act came into force. By section 7, the newly created riparian owners became entitled to a preferent right to use the water, "subject to the existing rights of others" i.e. subject to the right of the owner of non-riparian land who had been using the water for irrigation to continue to do so. I cannot understand how any limitation of his user can possibly be read into section 8(c), the more so seeing that the rights of the riparian owners were limited in favour of the non-riparian owners' rights of prior use.

Mr.Theron argued that the wording of section 23 of Act 8 of 1912 indicated that section 24(c) of that Act should be read as placing a limitation upon the rights of use of an owner of non-riparian land. It is true that section 23 deals, as did section 9 of Act 32 of 1906, with surplus water, but it deals equally with normal flow. Moreover, it deals

with...../32

with the use of water for irrigation, but it deals equally with its use for industrial purposes. Rights of user ~~for~~ of normal flow for irrigation and rights to use either normal flow or surplus water for industrial purposes bring into operation legal factors which are totally different from those which govern the use of surplus water for irrigation, and I cannot understand how it is possible to use section 23 for the purpose of interpreting either section 24(c) of Act 8 of 1912 or section 8(c) of Act 32 of 1906.

A further point put forward by Mr.Theron was that ~~the~~ the 'protection' sections of Act 8 of 1912 (sections 15 and 16) applied only to riparian owners and that non-riparian owners were excluded from protection proceedings. From this he sought to deduce that their existing works were to be regarded as confined to the diversion of the quantities of water which they had originally been capable of diverting prior to the passing of Act 32 of 1906.

Protection was a privilege which was created for the express purpose of enabling a riparian owner, who had constructed or proposed to construct works for the storage or diversion of surplus water, to obtain some certainty that a

defined...../33

defined quantity of water would, if the river ~~water~~ came down in spate, be available for storgge or diversion by means of his works. The court was empowered to order that any ripparian owner, who might be affected by the granting of protection, should be called upon to declare what works he proposed, in the future, to erect. The right to apply for protection was given only to the owners of riparian land thus excluding owners of non-riparian land from participation in the privilege. Until protedtion had been granted to the declarants by a Water Court all owners of riparian land, and apparently of non-riparian land too, when their rights were preserved by §8(c) of Act 32 of 1906, were free to construct such works as were necessary to ensure them the beneficial use of the surplus water. After the granting of a protection order the owners of exisiting works, even if they were riparian owners, were barred from extending their works unless they had declared and been granted protection for the extension. After the grant of protection to other owners, the existing works of all owners who had not sought protection became "static" and that applied to both the owners of riparian and non-riparian land.

It does not appear to me that, from a position of this kind, it can fairly be implied that sections 15 and 16 place a limitation upon the rights of owners of such non-riparian land,

nor...../34

nor can I understand why, when the legislature selects a particular class of persons for the purpose of conferring upon it privileged rights to the use of water, its failure to confer upon a different class the same privilege is something from which a limitation upon the existing rights of the latter class must be inferred. The contention seems to me to be a non-sequitur and, consequently, unsound.

There is, however, another reason for coming to this conclusion at which I have arrived. Under ordinary circumstances it is not permissible to interpret a statute by relying upon the wording of regulation which have been passed subsequently by virtue of its terms. The position in regard to Act 32 of 1906 is, however, different for section 116 provides that all regulations proclaimed by the Governor under the Act shall while in force have effect as if enacted in the Act. The regulations which dealt with the use of water on non-riparian land, Regulations 117 and 118 are as follows:- "117.The requirements of all riparian lands must first " be considered before any water shall be diverted for " the use of non-riparian owners.....
"118.The requirements of non-riparian owners for the " full exercise and enjoyment of rightd allowed under " section 8(c) of the Act must be fully provided for."
These regulations were duly proclaimed by the Governor and thus became part of the statute. The words "full exercise and enjoyment" seem to me to place non-riparian owners whose rights had been preserved by section 8(c) in the same position as riparian owners when the question of granting other non-riparian owners the right to use surplus water.....

water..../35

water came up for consideration by a Water Court.

Mr.Theron raised the further point that the only right to which the owner of land contiguous to a private stream like the Salt River, was entitled prior to the commencement of Act 32 of 1906 was a right to divert such water as reached his property. He could not, he argued, ever have had a right,in respect of a private stream, to compel an owner of land above him to allow water to flow down to him. For this reason, he could never, after the Act came into force, require that any riparian owner should permit water to reach his point of diversion and that the position remains the same today. Theoretically that contention may be sound, but it has no application to the circumstances of this case. The evidence establishes beyond doubt that there was no diversion of water upon the farm Salt River's Poort in 1904. There was a diversion of a very minor nature in or about 1908 and the first major diversion was in 1932 when the owners of Lots D,E, and F made the furrow A-E-F with the object of by-passing the predecessor in title of the second and third respondents ~~diversions~~ and preventing him from diverting water to Klein Aar at the points B and C.

From these circumstances it follows that, in 1904 all

the water...../32

the water of the Salt River which its channel could carry reached the point B and that, had the furrow from there to Klein Aar been sufficiently large, the full requirements for the irrigation of Klein Aar could have been supplied. As it was this water which the owner of Klein Aar used and was entitled to use prior to 1906 there appears to me to be no substance in this contention.

Seeing that the plaintiffs' rights were protected in the manner I have indicated by section 8(c) of Act 32 of 1906, it cannot, in my opinion, be questioned that they were still so preserved at the time the application to the Water Court was made. The exemption created by section 8(c) of Act 32 of 1906 was re-enacted by section 24(c) of Act 8 of 1912 in almost the same terms. The only difference between the two sections is that, in the latter section, the concluding words are "so to use such water" instead of the words "such use" which are the concluding words of section 8(c). If this slight alteration in phraseology does not add to the preservation of rights which section 8(c) of Act 32 of 1906 ~~enacts~~ provides, it can assuredly be said that it does not detract from it. It seems to me to be clear that "so to use such water" was intended to mean "to use the water for irrigating non-riparian land".

I am, therefore, of opinion that it was the intention of

the ...../32a

the legislature of the Cape Colony, when it passed Act 32 of 1906, to put owners of non-riparian land, upon which the water of intermittent streams was being used for irrigation prior to the commencement of that Act, in exactly the same position as the land to which the Act had given the characteristics of riparian land, and to give to those owners the same rights to use water as it gave to the newly created riparian owners, and that it is these rights to which Klein Aar is entitled. Both the learned Judge of the Water Court and the three Judges of the Court a quo came to this conclusion and it appears to me to be the most logical interpretation of the section.

Mr. Muller referred to a passage from Hall on Water Rights at page 83 which is to the following effect:-

" The attribute of riparianism attaches to land only in
" respect of its relationship to public streams (Section 2
" of the Act), and so no distinction could be drawn between
" riparian and non-riparian land in relation to a private
" stream. Since the passing of the Irrigation Act of 1912,
" and, in the Cape Province, of Act 32 of 1906 (Cape), the
" provisions governing riparian land have become applicable
" to intermittent streams. If land which does not fall
" within the statutory definition of riparian land was,
" prior to the passing of these statutes, irrigated with
" water from an intermittent stream, its owner is entitled
" to continue such use, and, in any proceedings for re-
" stricting the use of, or apportioning, the water of that
"stream, such non-riparian land would have to be placed
" upon exactly the same footing as land which is riparian
" in terms of the Irrigations Act."

This is, of course, not an authority for the

correctness...../38

correctness of the statement which it contains but, when I wrote it in 1931, it represented the existing practice in connection with the use of surplus water on non-riparian properties which were exempted under Act 8 of 1912. During the 27 years which have passed since then exempted properties have in actual practice continued to enjoy the same rights to use surplus water as properties riparian to the river. Where there are two possible interpretations of a statutory provision and the choice in favour of one or other of them is so delicately balanced that a hair may tip the scale, it seems to me that the manner in which the provision has been carried out and the rights which have been exercised by virtue of it during a period of over 50 years cannot be enirely ignored. There must necessarily be a considerable number of properties which are in the same position as that owned by the second and third respondents i.e. properties which have enjoyed

full...../39

full reasonable requirements for irrigation since the two Irrigation Acts were passed. If the interpretation which the appellant seeks to place upon it is to be given to section 8(c) of Act 32 of 1906, any development by means of the irrigation of these properties since 1906 will have proved to be illegal and, in order to determine their rights, the clock will have to be put back to 1906. After the lapse of more than 50 years it will be extremely difficult to establish what quantity of water was used prior to 1906 and, moreover, as the quantity is likely to have been quite small because flood-water irrigation was then in its infancy, the present owners of some of those properties may well be faced with ruin.

The next matter which falls to be dealt with is whether, upon a true interpretation of the 1932 servitude agreement, the appellants exceeded the rights which it gave them. As the second and third respondents were not parties to the agreement, this is a matter between the first respondent as the owner of the servient tenement, Lot B, and the appellants. The relevant portions of this agreement are as follows:-

> "1.The said Egbert Devenish de Villiers as owner aforesaid hereby sells unto the said Benjamin Gerhardus de Villiers and Henri La Porte de Villiers as owners aforesaid in equal shares who hereby buy from him the full and sole right to and right to divert all the water of the Sout River, district Beaufort West, to which the said Egbert Devenish de Villiers is entitled as owner aforesaid and which flows on or through or over the farm "La Porte" otherwise known as Lot B Salt River's

"Poort, district Beaufort West, the property of the said Egbert Devenish de Villiers for the sum of One Thousand Pounds (£1000) Sterling, payable Five Hundred Pounds (£500) in cash and Five Hundred Pounds (£500) Sterling on registration in the Deeds Office, Cape Town, of this agreement against their respective Deeds of Transfer.

2. The said Egbert Devenish de Villiers, Benjamin Gerhardus de Villiers and Henri la Porte de Villiers agree that the water may be diverted and led over the farm "La Porte" otherwise known as Lot b, Salt River's Poort on to any of the properties owned by the parties of the second part as aforesaid at all times and in whatsoever manner the said Benjamin Gerhardus de Villiers and Henri la Porte de Villiers may wish, and for this purpose they shall have the right of aqueduct from any part of the Sout River flowing through "La Porte" otherwise known as Lot B, Salt Rivers Poort, through such property to any place they may desire to take such water on the properties owned by them as aforesaid.

3. The said Benjamin Gerhardus de Villiers and Henri la Porte de Villiers shall at all times have a free right of way over the farm "La Porte" otherwise known as Lot B, Salt Rivers Poort for themselves, their agents or servants to attend to the diverting and leading of the water. They shall likewise have the right to cut down trees where necessary to give effect to the said diversion and leading of water."

Mr.Theron contended that the appellants did not exceed their rights to take water because the owner of Lot B has at no time been restricted by an order, obtained under section 18 of the Act, to taking a limited quantity of water. Until such an order has been obtained he is entitled to an unlimited use of the surplus water and the appellants' rights

to take...../35

to take one half of the water are similarly unlimited. Before. As no such order has been claimed in these proceedings the Water Court has no right ~~either~~ to limit after the quantity they may take ~~or~~ the size of the furrow by which water may be diverted.

I have already found that it was not necessary for the first respondent to proceed under section 18 in order to obtain a declaration of his rights under the 1932 servitude agreement, and, furthermore, that he is entitled to have his rights defined under section 32 of the Act and, in consequence this contention fails.

Counsel then submitted that the right of agueduct granted to the appellants in Clause 2 of the agreement was couched in such wide terms that they were entitled to take as many furrows as they liked across Lot B and to take them in whatever directions they chose. The words upon which this contention is based are the following:-

> The parties "agree that the water may be diverted and "led over the farm La Porte....onto any of the properties "owned by the parties of the second part" (i.e. the appellants' predecessors in title)....."and for this "purpose they shall have the right of aqueduct from "any part of the Sout River flowing through La Porte... "through such property to any place they may desire

to take...../36

"to take the water on the properties owned by them as
" aforesaid."

The grant of the right of aqueduct to any place where the appellants wish to take the water on their properties, does not in my opinion admit of the construction placed upon it by Mr. Theron. The grant of the right of aqueduct is a grant simpliciter, and it gives the dominant owner the right to select the course of the furrow he requires, but he must select a course which will cause the least possible inconvenience to the servient owner, consistent of course, with the proper exercise of the former's right of servitude(Gardens Estate versus Lewis, 1920 A.D. 144). The grant is simpliciter because the dominant owners are permitted to construct their aqueduct from any point on the Salt River to any point on their properties, but it is limited in one respect and that is that its course must be from the river to those properties.

Moreover, it was proved in evidence beyond any doubt that the furrow which the appellants made between G and H in 1952 was of such a nature that a danger arose that the river might thereby be diverted to a new course and thus damage the first respondent's property. This is something

very different...../37

very different from the selection of a course which will cause the least possible inconvenience to the servient owner and it is not a legal exercise of the rights granted by the servitude agreement.

The second and third respondents were not parties to the 1932 agreement, but their right to divert water at point B on plan B for the irrigation of Klein Aar is necessarily affected by the diversion of large quantities of water at point A. Should the diversions be such as to bring about the formation of a new channel of the river along the course A-E-F-G-H, it would have the effect of depriving them of all water at point B, thus defeating their right to irrigate Klein Aar.

The furrow from A to F which was constructed in 1932 ran from A to F and there discharged water out on to the veld in such a way that it ran down to a place where the river makes a bend in the vicinity of the point marked K on plan B. Here all the water from A which reached K was discharged into the course of the Salt River, and it ran down the course until it reached the diversion dam at L and fell to be distributed in terms of the servitude agreement. This

diversion...../38

diversion had the effect of preventing all the water, which was diverted at point A from reaching points B and C on Lot C, and so any diversion which was in excess of the quantity which one half of Lot B could reasonably use made an inroad upon the right of the second and third respondents to use water on Klein Aar.

The appellants admitted in the course of their evidence that the furrow A-E-F was made with the object of by-passing the diversions on Lot C and of bringing down more water to the diversion weir at L from which point they could bring it to their properties. It is plain that neither the furrow A-E-F nor its extension from G to H was a furrow diverting the water from the course of the Salt River on to any point on the appellants' property in terms of the 1932 servitude, nor was it an aqueduct constructed for this purpose. It follows that the making and maintenance of both these furrows is unauthorised by the servitude agreement and that, unless the consent of the first respondent is obtained to this manner of taking the water, the appellants have no right to continue to do so.

In this connection, one further point was

raised...../39

raised by Mr.Theron i.e. that, in terms of Paragraph (4) of the Water Court's Order, the appellants were declared to be entitled to only one furrow from the river to their properties, whereas they may take water at point A for their riparian land, but only below point B for their land which has been declared non-riparian. This is an anomaly and it appears to have crept in per incuriam. With the consent of the parties paragraph (4) of the Order has been altered to read as follows:-

> "1. The present paragraph (4) is to become (4) (a).
> 2. A new paragraph 4(b) is to be inserted as follows:-
> Paragraphs (3) and 4(a) hereof are not to be construed as containing any decision on the question whether First or Second Respondents are entitled to exercise their right of aqueduct for conveyance of the quantity of water defined in paragraph 1 hereof by means of one furrow only or by means of more than one furrow or by means other than a furrow, e.g. a pipeline or pipelines".

The next point raised in the grounds of appeal is the definitions of the rights of the parties under the "fair share" agreement of 1891 and, more especially, the correctness of the finding by the Water Court and the Court a quo that the rights of the owners of Lot B and Lot C to use the water on those properties were not affected by the terms of the agreement.

The "fair share" agreement was concludded as a

subsidiary part of an agreement to partition the two farms Salt River's Poort and Salt River's Vlei between a number of owners who held those properties in undivided shares. After the shares of the different owners had been defined in the power of attorney to pass sub-divisional transfers, certain conditions were included with the object of enabling them to be registered against all the transfer deeds. Of these conditions, the first two gave rights of servitude over Lot B to certain of the owners of the newly allotted defined shares. The conditions are as follows:-

" We have further mutually agreed as follows:-
1. That the proprietor or proprietors at any time of any portion of the aforesaid farms, situate below the portion herein agreed to be allotted to the said Executors Testamentary of the said late Cornelis Forbes, shall have the right at all times to enter upon the portion so allotted to the said Executors for the purpose of repairing and maintaining in order, the existing Dam, known as the "Uitkeer Dam", situate in the run of the Salt River on the said portion of aforesaid farms.
2. That the proprietor or proprietors at any time of the said portion of said farms so allotted to said Executors Testamentary of late Cornelis Forbes shall allow the proprietor or proprietors of the portions of the said farms situate below the said portion so allotted to said Executors, to divert the water from the aforesaid Dam, when it shall be necessary so to do, to secure to the said lower portions of the said farm, a fair share of said water."

At the time the agreement was entered into,

there...../41

there existed in the vicinity of point L an "uitkeerdam" across the course of the Salt River which is marked as such on the plan marked B. This dam had been constructed for the purpose of diverting the flood waters from the channel of the river, spreading them over a large area of the surrounding land and filling the vlei areas situated below the dam with the object of improving the grazing. At that time this was the only place where water was diverted from the river channel, and the evidence shows that a considerable quantity of water spilled over the banks of the river on to Lots B and C above the uitkeerdam which headed the water back on to those properties. The water of the Salt River was private water and an owner over whose land it ran could use it, waste it or dispose of it just as it suited him. The water could, moreover, be used on any land on which it was diverted, for the distinction between riparian and non-riparian land did not then exist so far as the Salt River was concerned. The agreement falls, therefore, to be interpreted in the light of these circumstances.

Mr. Theron contended that clauses 1 and 2 of the agreement must be read to imply that each of the six

sub-divisions...../42

sub-divisions of Salt River's Poort and Salt River's Vlei were entitled to divert no more than a fair share of the water of the river. In order to give the agreement this meaning, he argued, all that was necessary was that for the words "the water" in the phrase "to divert the water from the aforesaid dam" which appears in clause 2, there should be substituted the words "the water of the Salt River" or the words "the water coming down the course of the Salt River". If the agreement were to be read with these words added to it, it becomes quite clear, he said, that when it stated that the object was that the fair share of the water in respect of which each of the lower farms had to be secured was a fair share in relation to the shares of the other five sub-divisions of the two original farms.

The rights given by the agreement were given to the owners of Lots situated below Lot B and these rights were, firstly, a right of entry upon Lot B for the purpose of keeping the uitkeerdam in order and, secondly, the right to divert water from it in order to ensure that these lower lots received a fair share of the water.

Mr. Theron argued that Lot C is situated below Lot B and

is, therefore, one of the properties contemplated in paragraph 2 of the agreement. The geographical stiuation of Lot C, as originally surveyed, does not support this contention for the area which was cut off at its northern end is, in relation to the course of the Salt River, clearly above the highest point of Lot B and it is difficult to understand ~~how he arises at~~ on what he bases his contention. I am of opinion that the ~~properties~~ lower portions of the said farm mentioned in paragraph 2 are the Lots D, E and F.

The rules which must be applied before a term can be implied in a contract were re-stated in MUllin (Pty.) Ltd., versus Benade (1950 (1) S.A. 211 (A.D.)) by CENTLIVRES, C.J., in the following terms:-

" SOLOMON, J.A., in delivering the judgment of the Court
" in the case of Union Government (Minister of Railways
" and Harbours) versus Faux Ltd., 1916 A.D. 105, said at
" page 112:- It is needless to say that a Court should
" be very slow to imply a term in a contract which is
" not to be found there, more particularly in a case like
" the present, where in the printed conditions the whole
" subject is dealt with in the greatest detail; and where
" the condition we are asked to imply, is one of the very
" greatest importance on a matter which could not possibly
" have been absent from the minds of the parties at the
" time when the agreement was made. The rule to be
" applied by a Court in determining whether or not a
" condition whould be implied, is well stated by LORD
" ESHER in the case of Hamlyn & Co. versus Wood & Co.

" (1891, 2 Q.B.D. 491) as follows:- "I have for a long
" time understood that rule to be that a Court has no
" right to imply in a written contract any such stipu-
" lation, unless, on considering the terms of the con-
" tract in a reasonable and business manner, an
" implication necessarily arises that the parties must
" have intended that the suggested stipulation should
" exist. It is not enough to say it would be a
" reasonable thing to make such an implication. It must
" be a necessary implication in the sense that I have
" mentioned."

I am of opinion that were the words to be read into the agreement as suggested by the appellants' counsel, they would give it a meaning palpably different from that which its plain wording conveys. It is not ambiguous in any way and there is no room for holding that the "fair share"of the water to which the lower properties are entitled is synonymous with a fair share of all the water of the Salt River. The only right to water to which the owners of Lots D, E and F which, otherwise, would have been cut off from any source of supply, became entitled was to go to the uitkeerdam on Lot B and to take all the water which reached it. It follows that the findings of the learned judges, both in the Water Court and the Court a quo, that the "fair share" agreement does not limit in any way the water rights of the owners of Lots B and C is correct. Lot A has never figured in these proceedings for

it is common...../45

it is common cause that, because of its geographical situation and geo-physical characteristics, water from the Salt River has never been used on it.

There remains to be considered the question of the use of Salt River water upon Roux's Dam and Gemsbok's Randt and I shall deal with Roux's Dam first. The only order of the Water Court which affects the appellants' rights to use water on Lots A and B of Roux's Dam is that part of paragraph (2) which states that "no water may be diverted above point B, shown on plan B, for use upon the two portions of Roux's Dam." It is this order which is appealed against, but the Water Court actually found that Roux's Dam is not riparian to the Salt River and it is upon this finding that the limitation in paragraph (2) is based. The question which arises for decision, therefore, is whether the Water Court and the Court a quo were justified in finding that Roux's Dam is not riparian.

Mr.Burger,who argued this part of the case for the appellants, based his contention that Roux's Dam is riparian upon two submissions, viz.:-

(a) That a branch of the Salt River formerly traversed

the property...../46

the property in the past and that, although changed somewhat in form, it continued to run across it when the present proceedings commenced, and

(b) That in former years the main channel of the Salt River traversed the property, but, owing to the steps taken by a former owner of Salt River's Poort to prevent erosion on his land, it became obliterated, which action could not operate to deprive Roux's Dam of its characteristics as riparian land.

In support of the first of these submissions, counsel pointed out, that it was clear from exhibit W.C.R. 17, which is a compilation plan made from the original grants of all the properties to which these proceedings relate, ~~it was clear~~ that, when Roux's Dam was granted in 1870, a branch of the Salt River is shown as running from Salt River's Poort right across Roux's Dam. He pointed out that when the Irrigation Department made a detailed survey of the whole area in 1916, there is a line on it which, he contended, indicated that a channel across Roux's Dam still existed. The evidence upon which he based his contention that there was a continuous channel of the river which crossed Roux's Dam was that of

Benjamin...../47

Benjamin de Villiers, a former owner of the farm Leeuwkuil of which Lot A of Roux's Dam forms a part. This witness stated that, when he owned Leeuwkuil, there was a furrow which ran down to it which had been there since he could remember and he shifted this furrow to where it is running today. He thought that this took place about 1912. The old sloot or furrow then silted up. It was upon this evidence supported by the plans I have referred to that Mr.Burger contended that, up to the time of the construction of the new furrow by Benjamin de Villiers, there had been a natural channel of the river crossing Roux's Dam to Leeuwkuil and he proceeded to argue that the artificial channel which de Villiers had made then took the place of the natural channel which has disappeared. It is thus owing to the fact that this artificial channel has taken the place of the natural channel that the property which it crosses still retains the riparian characteristics with which the existence of the natural channel impressed it. As authority for the propostion that the artificial furrow made by de Villiers could itself become a brandh of the river he referred to Myburgh versus van der Byl (1 S.C. 360).

Mr.de Villiers, the respondents' counsel,

pointed out...../48

pointed out that Mr.Benjamin de Villiers had stated in cross-examination that the furrow which he made was one taken out of the river course on Lot F of Salt River's Poort which then belonged to one, Pienaar, and that he made it straight down to his lands so as to avoid the water having to run down over the vlei before it could reach the lands. He was asked, too, whether there is still a channel across Leeuwkuil and he said "No, it has been covered up but I can show you where it is". He said that when he spoke of Leeuwkuil he referred to Lot A of Roux's Dam as well and when asked whether the water flows in a channel, or over the veld, or in an artificial channel he said that there is still a small channel there today, meaning over Roux's Dam. He also said in reply to the Court that there were three continuous channels which always ran. This was up to 1924 when he left the farm. He was asked whether they still run today and said "No, two are quite covered up". When asked as to the third channel he replied "The one we followed, that is about the most what-do-you-call-it-one still". He said again that these channels were always changing, and that when one got silted up another one started up when

another...../49

another flood came. When it was put to him that there was no continuous channel an that date, he replied "I maintain there is still a continuous channel, more or less". When asked again how many channels were in existence in 1924 and before, he replied that "They were more or less always there."

This was the evidence upon which the existence of a continuous channel was based and the learned Judge in the Water Court found that Benjamin de Villiers's evidence was inconclusive as to whether, or not, there was ever a continuous channel leading on to Roux's Dam. He said, moreover, that de Villiers had said that there were still continuous channels visible at that time, but the Court was unable to find them on inspection. The learned Judge who gave the judgment in the appeal to the Court a quo (OGILVIE THOMPSON, J) said that, after reading de Villiers' evidence, it appeared to him to be not only inconclusive, but also confused and contradictory on this point. It appears to me that there are undoubtedly unsatisfacory features about the evidence of this witness and I am of opinion that both the learned judges had good reason to come to the conclusion which they did.

With regard to the plans by means of which it

was sought...../50

was sought to support the verbal evidence, I cannot see the relevance of the diagram of 1870 for the question of riparianism could not arise before the 1906 Act came into operation. So far as the Irrigation Department's plan of 1916 is concerned, the learned Judge in the Water Court said that it was quite clear that this plan did not show a defined channel running down as far as Roux's Dam. I have examined the plan and it does not seem to me that the long straight line marked on the plan across Roux's Dam could possibly, as Mr. Burger suggests, have been intended to represent the natural channel of a river.

Once the basis of the claim to Roux's Dam's riparianism falls away, the claim that the furrow leading to Leeuwkuil's lands is an artificial channel which has taken the place of a natural one fails too, for the simple reason that it has not been proved that there was a natural channel which the artificial one could have replaced. In any event, it is clear that a furrow constructed by one riparian owner for the purpose of irrigating his lands and used solely for that purpose is not the kind of artificial channel which was in issue in Myburgh versus van der Byl (supra) and that this

decision...../51

decision is no authority in support of the appellants' contention.

The Water Court and the Court a quo both found that a channel which could be relied upon as the basis for Roux's Dam being riparian must necessarily be in existence at the time the dispute between the parties arose. I am in agreement with that finding and, as this ~~has not been proved~~ is not the case, it seems to me that the finding of both those Courts that Roux's Dam is non-riparian is a correct one.

During the course of the argument this Court raised the point whether it was in law possible for a riparian owner to grant to a lower owner the right of using the surplus water to which the grantor, as upper owner, is entitled. Surplus water may be used only for the requirements of ripafian property and, if a particular owner does not require that water for use upon his riparian property, the question arises whether he may ~~allow another~~ grant the use to another riparian owner ~~to use it~~, whose property is so situated that there are riparian properties intervening between him and the grantor. In the present case Lot C is, in relation to Roux's Dam, an upper riparian property and so, were Roux's Dam to be declared to be riparian,

and if...../52

and if this question were to be answered in the affirmative, the water to which Lot B is entitled could not legally be transferred by the owner of Lot B to the owner of Roux's Dam without the consent of intervening riparian owners whose rights to use that water would be defeated by the transfer. This point was not taken either in the Water Court nor in the Court a quo and it was by no means fully argued in the appeal to this Court. For these reasons and, seeing that it is not necessary for the purposes of this case to make any finding upon it, it does not appear to be advisable to come to any decision upon it.

The second ground for claiming that Roux's Dam is riparian is one based upon section 24(b) of Act 8 of 1912, which is as follows:-

> "24.Nothing in this chapter shall be construed as—
> " (b) preventing any person from doing on his own land
> " any act necessary to prevent the erosion thereof;.."

In support of this contention, Mr.Burger pointed out that there exist on Roux's Dam channels which are no longer connected with any existing channel of the Salt River. According to the evidence, he said, it was established that the owner of Salt River's Poort had repeatedly taken steps to prevent the erosion on his property by closing

up the...../53

up the main channel of the river which in former years had run down from Salt River's Poort and crossed Roux's Dam. By doing this he had placed the latter property in a position where its riparian characteristics were no longer clearly apparent. As the lower owner's right to object to this closing up of the river channel was taken away from him by section 24(b), the closing of the channel would have the effect of causing his property to become non-riparian.

In the first place it is at least doubtful whether the main channel of the river ever crossed Roux's Dam. Mr.Burger used exhibit W.C.R. 17 to show that the channel, appearing on it, which was the only continuous channel shown on the diagram of Roux's Dam framed in 1870, was the branch channel which formed the basis of his first contention. I can find no evidence to establish that the main channel of the Salt River was a continuous one from Salt River's Poort to Roux's Dam at any particular period of time. In the second place, the chapter referred to in the sentence which is the preface to section 24 is Chapter III of the Act and this deals with the use of public and private water. It has nothing whatsoever to do with

riparian...../54

riparian land, which falls, for the purposes of definition, under section 2 of the Act. It appears to me that section 24(b) relates to public water which, instead of being used for irrigation, is caught up by works which have been constructed with the object of preventing erosion. While the subsection may have the effect of defeating a claim by a lower owner that an upper owner is, by means of his erosion works, diverting more water than he is entitled to use, it cannot be construed as permitting the upper owner to block up a river channel in such a manner that the channel ceases to run through to the lower owners' property. For these reasons I do not think that there is any substance in this contention.

The second of the two matters which I mentioned above is that of the use of water upon Gemsbok's Randt. This property is non-riparian and whether water from the Salt River can be used for irrigating it depends upon whether the first respondent succeeded in proving that, prior to 1906, water was diverted on to Gemsbok's Randt and was used for irrigating the veld.

The Water Court found that water from the old uitleerdam near the point L had been led down from Lot B in the direction of Mimosa Lodge by means of a canal, and that the water was then allowed to spread over the vleis on Lot B from which it found its way down to the homestead. It was there diverted from the course it would have taken to the west of the homestead by means of a diversion wall which

turned...../55

turned it down onto Gemsbok's Randt. This wall likewise diverted water which came down from the point D on plan B in the same direction,

This finding was challenged upon appeal, firstly because the pleadings had stated that water was led down from the uitkeerdam by means of a canal and so it was not competent for the Court to find that water which had been led in this way for part of the distance between the uitkeerdam and Mimosa Lodge, and had then found its way over the veld to the vicinity of the homestead, had been led on to Gemsbok's Randt. Mr.Burger further contended that the Court had wrongly accepted Jackson's evidence to establish the fact that water from the uitkeerdam had reached Gemsbok's Randt, when his evidence dealt only with water from the point D. The third ground for attacking the judgment was that the finding that a contour wall existed on Mimosa Lodge in 1906, by means of which water was diverted down to Gemsbok's Randt, was not justified by the evidence.

The first of these grounds does not seem to me to be of any substance. It is true that in the particulars

given...../56

given to elucidate the pleadin reconvention the first respondent stated that the water was conveyed in a channel and no mention is made of its having flowed over the veld. The particulars do not, however, state that the channel continued right down to Mimosa Lodge homestead and, as the position was canvassed in evidence, it seems to me any difference or ambiguity in particulars which caused them to diverge somewhat from the evidence was not material to the issue which the Court had to decide.

The evidence of Jackson, was to the effect that he was born at Hopewell, which belonged to his father, in 1890. He grew up there and farmed there himself ffom 1913 2/22-24 to 1939. He was a frequent visitor at Mimosa Lodge and often used the road between the two places both to visit 2/34 there and to rescue stock in times of flood. Prior to 1909 2/26 the water from the river left its course near the point D 2/29 and flowed down the Langkuile to Mimosa Lodge. From there 2/26 it would go to Gemsbok's Randt. Any water which came through th the Langkuile area would converge near the homestead and then 10/1451 be turned by a wall, which the de Villiers' had constructed, 10/1485 to the east of the house. He saw this wall in 1900 and it

diverted...../57

diverted water past Mimosa Lodge to wherever the owner wanted to take it. The sloot along it was about 3 feet deep and 3 feet wide. It was visible for 100 yards before it disappeared into the bush. This evidence was accepted by the Water Court.

B.G. de Villiers, the former owner of Leeuwkuil, said that, somewhere about 1906 Henry de Villiers, the owner of Mimosa Lodge, made a furrow from Mimosa Lodge to Gemsbok's Randt. The chalk bank prevented the water from coming over towards Gemsbok's Randt and he made a broad furrow so as to divert water which passed down in front of his house. This was water which came from La Porte (Lot B), over the vlei down to Mimosa Lodge. It came out of the Salt River down to the old uitkeerdam. This water was diverted by the furrow and eventually ran past Mimosa Lodge to Gemsbok's Randt.

The learned Judge in the Water Court said that, upon the balance of evidence, particularly that of Stanley Jackson and B.G.de Villiers, it was established that water emanating from the old uitkeerdam was led to Gemsbok's Randt for the purpose of irrigating the veld. He had already said that Jackson's evidence established the fact that

the...../58

the contour wall diverted water from the point D onto Gemsbok's Randt for the same purpose. Mr.Burger is incorrect in his criticism that the learned Judge was wrong in stating that Jackson's evidence was in any way related to the water which came down from the uitkeerdam. He was, furthermore, incorrect in pointing out that the contour,wall which Jackson described as existing in 1900, had the effect of diverting water which came from the uitkeerdam down to Gemsbok's Randt. It was the evidence of B.G.de Villiers which established this fact and his evidence was to the effect that this water was diverted onto Gemsbok's Randt by means of the furrow which Henry de Villiers made for that purpose. As, however, B.G.de Villiers' evidence was not contradicted, the learned Judge was fully justified in accepting it. I am, therefore, of opinion that no argument has been put forward by counsel which would justify me in holding that the learned Judge came to a wrong conclusion upon the evidence before him.

The learned Judge accepted Jackson's evidence regarding the existence of the contour wall in 1900. I have not been convinced that he was wrong in doing so.

The effect...../59

The effect of these findings of fact is to establish that water was diverted onto Gemsbok's Randt, prior to the coming into effect of Act 32 of 1906, for veld irrigation, and that the first respondent is entitled to continue so to use the water by virtue of section 8(c) of Act 32 of 1906 and section 24(c) of Act 8 of 1913.

The Court a quo made two slight alterations in the order of the Water Court and the appellants' counsel contended that these alterations were of such importance that he should be granted some portions of the costs of appeal and he applied accordingly. This contention was rejected by the Court a quo and against that finding the appellants have likewise appealed. The Court a quo refused the appellants' application and gave its reasons for doing so and with those reasons I am in agreement.

During the course of the argument counsel agreed, for the sake of clarity, to an alteration of paragraph 4 of the Water Court's order in the following terms:-

(i) The present paragraph 4 becomes paragraph 4(a);

(ii) A further sub-paragraph, i.e. paragraph 4(b) is inserted and reads as follows:-

Paragraphs...../65.

Paragraphs 3 and 4(a) hereof are not to be construed as if they contain any decision on the question whether the first and second respondents are entitled to exercise their rights of aqueduct for the conveyance of the quantity of water defined in paragraph 1 hereof by means of one furrow only or by means other than a furrow, e.g. a pipeline or pipelines.

An order is made that paragraph 4 of the Water Court's order should be altered accordingly and the appeal should, in my opinion, be dismissed with costs.

O.D. Hall
AJA.
12/5/1958.

FAGAN, C.J.,
DE BEER, J.A.,
BEYERS, J.A.,
REYNOLDS, A.J.A.,

Record

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between :

1. PIETER STEGMANN DE VILLIERS,
2. WILLIAM STEGMANN DE VILLIERS, Appellants

&

1. JOHANNES HENDRIK BARNARD,
2. JAMES PIETER COETZEE,
3. ALEXANDER COETZEE, Respondents.

CORAM : Fagan C.J., De Beer, Beyers JJ.A., Reynolds et Hall A.JJ.A.

Heard : March 10-14, 19-21, 1958. Delivered : 12/5/58

JUDGMENT

FAGAN C.J. :- The facts of the case and the issues raised in it are set out by my brother Hall. I have read his judgment and find myself in disagreement with him only on two points. The one relates to the proviso contained in paragraph 2 of the Order made by the Water Court, the other relates to paragraph 9 of the Order. My view on the former of the two points will not require a change in paragraph 2 of the Order. Like my brother Hall, I consider that paragraph to be correct, but my reasons for doing so differ from those of the Water Court and the Provincial Division, which he is adopting. My conclusion on the second point will necessitate an important alteration in paragraph 9 of the Order.

Paragraph 2 of the Order follows on the provision, contained in paragraph 1, that the appellants are entitled to the use of no more than 2,000 acre feet of water per calendar year pursuant to the servitude agreement of 1932. It reads :

"(2) That the First and Second Respondents" (now the Appellants) "are declared entitled to divert the aforesaid water from the Salt River at any point on the property set out in paragraph 4 of Annexure 'A' " (i.e. Lot B of Salt River's Poort), "provided that no water may be diverted above Point 'B', shown on Annexure 'B' to the Application, for use on the properties set out in paragraphs 11, 12 or 14 of Annexure 'A' " - i.e. on the Remainder of Salt River's Vlei, on Roux's Kraal b, or on Roux's Kraal a.

Roux's Kraal is also known as Roux's Dam, and in further reference to it I shall, following my brother Hall, use the latter name.

The reason which Watermeyer J., in the Water Court judgment, gave for the limitation contained in the proviso, and which was adopted by the Provincial Division, is that Salt River's Vlei and Roux's Dam have been shown by the evidence to be non-riparian. This finding could not affect the rights of the owners in respect of those properties against the first respondent, for his predecessor in title had been a party to the servitude agreement. It prevented them, however, from exercising rights under the servitude agreement to the prejudice of the second and third respondents, who were not bound by the agreement.

The learned Judge therefore inserted the proviso that water taken for use on the properties which he held to be non-riparian should not be taken above the intake of the second and third respondents.

He considered the question whether the test of riparianism laid down by section 2 of Act 8 of 1912 - "if through the land (held under an original grant or deed of transfer of such grant, or certificate of title) or along the boundary thereof a public stream flows" - should be applied in respect of conditions existing (a) at the time of the grant, or (b) at the time when the Act became operative (July 1st, 1912), or (c) at the time of the dispute. His conclusion - with which I agree, as does my brother Hall - was that it is the time of the dispute, that is to say, the time with respect to which the Court has to determine the rights in issue between the parties. For the eventuality, however, that a different view might be taken by a Court sitting in appeal on his judgment, Watermeyer J. gave a finding on the factual situation at each of the three stages he had considered. "If the date of the grant is the critical date," he said, "then, in the absence of evidence to the contrary, I would hold both properties to be riparian." His reason was that "on reference to the diagrams attached to the

"original grants of Roux's Dam and Salt River's Vlei it appears that in all probability there were at the date of the grant branches of the river crossing both properties." For the position at the time when the Act came into force the appellants relied mainly on the evidence of one Benjamin de Villiers, of whom the learned Judge said : "Reading his evidence as a whole I find it inconclusive as to whether or not there was ever a continuous channel leading on to Roux's Dam or Salt River's Vlei." He summed up his impression by saying : "I find myself in a state of uncertainty as to what the position was in 1912. The question would therefore have to be determined on the onus of proof." And he held - to my mind rightly - that the onus rested on the applicants (the present respondents), as they were founding their claim for the limitation on the assertion that the properties in question were non-riparian. In other words, he would not have imposed the limitation if the critical date had been either the time of the grant or the time when the Act came into force ; but "if the date when the question arises is the critical date" (as he ruled it to be, and I have already said that I agree) "then I would hold both properties to be non-riparian because it is clear that to-day there is no

"continuous defined channel crossing on to either Houk's Dam or Salt River."

When the matter was argued before us, Mr. Turner, for the appellants, took a point which the Provincial Division decided against him on the grounds with which I am inclined to agree, to wit, that the factual data on the record of it basis are too vague to support the inference which he wishes the Court to draw. It was the submission that the artificial channel now taking water through Houk's Dam and the main Salt River would, on a comparison of the diagram attached to the grant of 1873, a survey plan of 1916, and an aerial photograph of 1945, appear to be merely a canalized deviation of the river course shown on the old diagram, and running parallel with variations of the survey plan, and indicated by traces discernible on the aerial photograph. The impression I gain from the judgment of Waterhouse J. is that the submission was not made to his Court, or at any rate not pressed there in the form in which it was put to us, for, while his judgment seems to deal meticulously with issues and arguments raised before him, I find there no discussion of this one. The point is one on which local observations by the water Court might have thrown considerable light, and the absence of a specific finding on it by that Court makes me hesitant about giving a final decision on it. Eventualities may arise in which the question whether Houk's Dam is or is not riparian will be of great importance to its owners, and as there is, in my opinion, another ground for supporting the only portion of the Water Court's Order on which it is material, I should prefer to leave that question undecided.

With regard to the Remainder of Salt River's Bed,

see, I am not sure that the test of riparianism settles the matter. This property has been using water of the Salt River, taking it - in conjunction with other properties - from the "Witbooms", near the point "B" shown on the plan between "C" and "D", ever since 1891 by virtue of the "fair/agreement" of that year. That user is protected by section 8(c) of Act 38 of 1906 (Cape) and section 24(c) of Act 8 of 1912, which I shall presently discuss at some length. Indeed, according to the construction placed on these enactments by both the Water Court and the Provincial Division, this protected user has the effect of equating the non-riparian with riparian property. If that is so, why should those Courts have inquired any further into the riparianism of Salt River's Vlei ? As appears below, I do not agree with this construction, but on any reading of the two enactments the user is protected to the extent to which it was exercised before 1906, and that is sufficient to give Salt River's Vlei, at any rate in respect of a certain quantity of water, a right which is not dependent on its being riparian.

I give no finding on the applicability of this section to Salt River's Vlei. The matter was neither investigated by the Water Court nor argued before us. But it is an

aspect which, as I see the position, would have required investigation and consideration if the proviso to paragraph 2 of the Order is to be based solely on riparianism, for the only purpose of considering whether that property and Rowe's Dam were riparian was to decide

whether their rights to water from the Salt River have to be recognized by a property owner who is not bound by the servitude agreement, and a right preserved by section 8(c) of the old Cape Act and section 24(c) of the 1912 Act would, as far as it goes, be no less valid as against such an owner than a right based on riparianism.

I prefer, then, to base my concurrence in the proviso to paragraph 2 of the Order on another line of reasoning. What is clear is that the situation of Roux's Dam, whether it is riparian or not, and also of Salt River's Vlei, as well as that of the dam at "L" from which the latter property had to take such water as it is entitled to under the "fair share agreement", is, in relation to the course of the Salt River, lower than that of Salt River's Poort and also lower than Klein Aar's intake at point "B". The water rights of the lower properties now under discussion are, as I have already said, based on a purchase of the rights of Lot B of Salt River's Poort in the servitude agreement of 1932, to which the owners of Lot C and Klein Aar were not parties.

Lot B is in a position to take out water from the river above Lot C and above point "B". To my mind, however, it does not follow that the lower properties, when they have bought Lot B's rights, may do the same.

We are dealing with the surplus water only. I express no opinion as to what the effect of an alienation of rights

to normal flow may be. I wish to point out, however, that on the point I am now discussing it may be possible to apply to normal flow a line of reasoning which is not applicable to surplus water. Normal flow can be the subject of apportionment in a manner which the Act does not contemplate in the case of surplus water and which would in the latter case meet with practical difficulties that may well be insuperable.

A riparian owner is "entitled to use the surplus water of a stream to which his land is riparian" (section 14 of Act 8 of 1912), but he has no ownership in it, only the use of it (section 9), and he must use it without waste (section 18 and section 133(d)). Now if there are three contiguous properties lying along the course of the stream, X, Y and Z, in that order looking down the stream, the effect of the provisions I have referred to, and indeed of the whole scheme of the Act with regard to surplus water (in the absence of protection), seems to me to be that, while X may take all the water it requires for primary and secondary use (tertiary use does not enter into our present discussion), the owner of Y has the right to expect to receive all the water which is not actually used, without waste, on X. If that is so, that

...right

right
cannot be prejudiced by an agreement between the owners of X and Z, and the owner of the latter property cannot, by agreement with that of the former, use an intake so situated that it will cause water that can be beneficially used on Y to by-pass this farm,

There is a stretch of river running along the boundary of Lot C below the point "B", but the second and third respondents, as owners of Lot C, are satisfied with the Order in its present form, i.e. merely prohibiting the lower owners from extracting water above the point "B". And though Klein Aar is itself not riparian, I consider that, since the second and third respondents have established a right to divert water to it from the point "B", their intake at that point should have the right to retain the priority which its position along the stream has always given it.

This is my reason for agreeing with the proviso to paragraph 2.

Paragraph 8 of the Water Court Order declares the second and third respondents' property Klein Aar to be non-riparian to the Salt River. Then follows paragraph 9, which reads :

"(9) That despite the declaration contained in paragraph 8 above, the Second and Third Applicants" (not the Second and Third Respondents) "are declared entitled to divert and

"use the water of the Salt River upon the aforesaid property, Klein Aar, for the purpose of irrigation."

In the course of the argument I pointed out to Mr. de Villiers that when property abuts on a stream, its order of priority in the diversion of water from the stream is determined naturally by its situation, but that non-riparian property may well be so situated - as, indeed, Klein Aar is in the present case - that this test cannot be satisfactorily applied to it. Such property may lie next to a row of riparian farms while itself having no place in the row. I asked Mr. de Villiers what priority he claimed for Klein Aar, and whether the Order, as formulated by the Water Court, would not allow the owners of Klein Aar to divert water from the Salt River at any point, even above Lot B, if they could gain access to that point by the purchase of ground or by the acquisition of the necessary servitudes. To meet this query, Mr. de Villiers expressed his willingness to substitute for the original paragraph 9 a new wording which, he said, gave effect to all that his clients claimed. In this new form paragraph 9 would read :

"(9) That despite the declaration contained in paragraph 8 hereof, the Second and Third Applicants as owners of the said property Klein Aar are declared entitled to use on the said property Klein Aar, for the purpose of

"irrigation, water of the Salt River abstracted from the river on the property set out in paragraph 9 of Annexure 'A'" (i.e. Lot C). "It is further declared that the continued existence of such right of user is dependent upon retention by Second and Third Applicants, as owners of the said property Klein Aar, of rights of access to the river over the property set out in paragraph 9 hereof, by virtue of ownership or servitudinal or similar rights over the last-mentioned property."

In this form the Order, while putting a limitation on the extent of river frontage from which water may be diverted for use on Klein Aar, places no limit, except the prohibition of waste imposed by law, on the quantity of water that may be withdrawn. It leaves the second and third respondents free not only to maintain the intake at "B", the capacity of which their father increased in 1930 by building a weir in the river, in its present state and to keep the new intake which he established at the same time at the point "C", but also to enlarge both intakes and establish fresh ones along the length of the river course abutted on by Lot C, i.e. anywhere between the points "B" and "D".

Since the appellants admitted in their pleadings that at the commencement of Act 32 of 1906 (Cape) the predecessors in title of the second and third respondents were entitled

to divert water at point "B" for use on Klein Zaer, there could be no objection to an order in this form if the construction - to which I have already referred - placed in the two judgments appealed from on section 8(c) of the Cape Irrigation Act, No. 32 of 1906, and section 24(c) of the Union Irrigation and Conservation of Waters Act, No. 8 of 1912, is held to be correct, to wit, that if prior to the commencement of either Act a person had used and was entitled to use the water of a stream for irrigating non-riparian land, such land now stands on exactly the same footing as riparian land. That would mean that in the case of that the old Act called an intermittent stream and of that the latter act called surplus water - and the Salt River ~~is an~~ was an intermittent stream carrying only surplus water - the owner may not only continue to divert water up to the capacity of his intake, but may at any time draw from the stream as much water as he can beneficially use on the non-riparian land.

It is this construction from which I dissent.

The Salt River, being an intermittent stream, did not become a public stream until the passing of the 1956 act. At the time, therefore, when the intake at "B" was constructed by a predecessor in title of the respondents, who was the owner of both Lot C - which gave him access to the river - and Klein Zaer, there was no restriction on his use of the water ; it was

private water, with which he could do as he liked.

Then came the 1906 Act, sections 7,8 and 9 of which read as follows :-

" 7. Subject to the existing rights of others, every riparian proprietor is entitled to use the water of an intermittent stream flowing on to or over his property by diverting it on to his riparian land for the irrigation thereof ; and he shall, moreover, be entitled to impound and store such water for the said purpose and for domestic, agricultural, manufacturing and drinking purposes : provided, however, that if at any time, any riparian proprietor along a stream shall consider that an upper riparian proprietor is impounding or storing a greater quantity of the water of such stream than he could reasonably be expected to use for the purposes stated, it shall be competent for such first-mentioned proprietor to apply to the Water Court for an order declaring the quantity of water which, in the opinion of such Court, such upper proprietor requires to impound and store for the said purposes : and, thereafter, such upper proprietor shall not be entitled to impound or store any greater quantity of water than that authorised by such order."

" 8. Nothing in the preceding section shall :

(a) Compel any person who, previous to the passing of this Act, has constructed or had in course of construction works for the useful employment of the water of any intermittent stream, to allow to flow down past his works water which he could beneficially use by means of and for the purposes of his work, and which he was entitled so to use ;

(b) Prevent any person from doing anything necessary to prevent the erosion of land ;

(c) Prevent any person who, prior to the commencement of this Act, has used and was entitled to use the water of an intermittent stream for irrigating a non-riparian property from continuing such use.

And any special regulations drafted hereafter under the preceding section shall not interfere with the enjoyment of the exemptions in this section mentioned. "

" 9. The Water Court shall be entitled to grant permits, subject to regulations and the provisions of this Act, for the use, on non-riparian land, of the surplus water of an intermittent stream after the requirements provided for in the seventh and eighth sections have been satisfied on the riparian land ; and every person to whom a permit has been granted shall be entitled to use such water to the extent and subject to the conditions stated in the permit ; and no person shall interfere with the use of such water as authorised by such permit. "

Section 7 mentions only a riparian proprietor as the one entitled to use the water ; he may divert it on to his riparian land for the irrigation thereof. He - the riparian proprietor - may impound and store water for a number of purposes, subject to the right of any lower riparian proprietor to object if he stores more than he could reasonably be expected to use for those purposes.

These rights of the riparian owner are subject to the existing rights of others.

Obviously the term "existing rights" here cannot mean the common law right of appropriating the water, for that would make the section nugatory and leave the common law unchanged. It can only refer to particular rights, e.g. rights enjoyed by servitude or agreement, such as - in the case before us - the rights of owners of portions of Salt River's Vlei, whether or not the farm was riparian, under the "fair share agreement" of 1891.

Section 8(a) ensured that a person should have and retain the full benefit of works which he had constructed, or had had in course of construction, before the passing of the Act, for the useful employment of water from the stream. The wording of this sub-section clearly limits the right of taking water to the capacity of the works constructed or in course of construction.

Let us now consider the wording of 8(c).

Mr. Muller submitted that the word "such" in the final phrase "continuing such use" should be read as referring to the earlier words "irrigating a non-riparian property", and therefore as indicating no further restriction on the use of the water than that it should be for the irrigation of that

property. I find it more natural, however, to read the words "continuing such use", which go together, as referring back to the words "has used and was entitled to use", i.e. that the person concerned may continue the use which he has made and was entitled to make. On this reading he would be limited to such use as he had actually made, and had been entitled to make (e.g. under a servitude giving him limited rights), prior to the commencement of the Act. If that had not been intended, it would have been much more apt to say "from irrigating such property" instead of "continuing such use".

This reading has the merit of bringing paragraph (c) of section 8 into line with paragraph (a) by having a limitation which, in principle, is similar in both cases.

Watermeyer J. said : "It is difficult to see how the water of an intermittent stream could be used for the purpose of irrigating without the construction of some sort of work or works to divert the water. Now if sub-section (c) was intended to preserve merely the right to use that quantity of water which was in fact diverted prior to 1906 there would have been no need at all for the sub-section, because that right was already preserved by sub-section (a). This indicated that it was the intention of the legislature to preserve a wider right under sub-section (c), for otherwise sub-section (a) was tautologous."

I have doubts as to whether sub-sections (a) and (b) were meant to allow use on non-riparian land at all - see my remarks below on Regulation 1[illegible]7 promulgated under the Act of 1906 and Regulation 25 under the Act of 1912. On the assumption that they do allow it I can well see some overlapping between sub-sections (a) and (c) - on either my construction of the latter sub-section or that of [illegible] J. - but I cannot concede that my construction makes the latter sub-section unnecessary or tautologous. It is works on riparian land that are contemplated in sub-section (a) - in the bed or on a bank of the stream - otherwise the words "to allow to flow down past his works" would be most inept. The Legislature must have considered that, despite the wide range of uses to which a riparian owner might put the water under section 7, there could still be room for some useful employment of water not falling under those uses or requiring water in excess of what might be allowed under that section. The provision may have been inserted ex abundanti cautela, but [illegible] there can be no doubt that its primary object was what I have stated here. As no [illegible] except that of useful employment of the water we get by sub-section (a), works for the abstraction of water for conveyance to non-riparian land may - on the assumption I have already made - be included, but that would be incidental. And for covering cases of irrigation of non-riparian land that sub-section by itself may well have been considered to be inadequate. The [illegible] which one gets on a reading of sub-section (a) is that the legislature there pictured to itself

works of a more or less permanent nature - works that had to be "constructed", and which would remain so that the provision could be applied that the owner could not be compelled to allow water which he could use beneficially "by means of and for the purpose of his work" to flow down "past his works". A man might have been irrigating non-riparian land with regard to which there might at least be considerable doubt as to whether it would fit into this picture. He might from time to time have been diverting water by such haphazard and temporary methods as throwing up a sand weir or putting some stones or tree-stumps or sandbags in the river bed, or the primary purpose of such works as he had might have been to divert water on to riparian land of his abutting on the stream, but he might have been taking some of that water across the boundary on to non-riparian land. A very common case might be that of the man who has a servitude right to draw water from a riparian neighbour's dam or furrow which itself is fed from the stream. This man would have no works in the bed or on a bank of the river at all - so how can one apply a provision which says that he cannot be compelled to allow water "to flow down past his works" ? Or again, a man who owns a strip of land abutting on the stream and also, adjoining that land, a non-riparian farm, may well have been using water on the latter

farm without having any works in the stream, by having furrows or contour walls that lead overspill water on to that farm. If, after the passing of the 1906 Act, and subsequently of the 1912 Act, a lower owner objected because that water, if not used on the riparian strip, should have been left to find its way back to the stream by natural draining, the upper owner would be protected by sub-section (c) of section 8 of the 1906 Act and sub-section (c) of the corresponding section 24 of the 1912 Act, but not by sub-section (a) of either section.

In I have given a few examples that strike me. There may be more, but these are surely sufficient to show that sub-section (c), read as I read it, is by no means unnecessary or tautologous.

In cases like the one before us, where an owner of both a riparian strip and non-riparian land adjoining it diverts water on to the non-riparian land by means of works in the stream, there would be overlapping between sub-sections (a) and (c) on either construction of the latter sub-section, mine or the Water Court's ; but on my construction there would be the logical position that the result is the same whichever section is invoked, whereas the other con-

struction would result in the anomaly that the situation would be governed by two statutory provisions, one of which contains a limitation and the other not.

Watermeyer J. posed the question : "What would be the position if prior to the 21st August a person had used varying quantities of water ? Would he have the right to continue using the maximum, or the minimum, or the average quantity of water which he had used prior to 1906 ? This is a practical difficulty involved in Mr. Wessels' interpretation. "

The practical difficulty seems to me to be no greater than that which may be involved in the application of sub-section (a). We are not dealing with a static volume of water - so many gallons or so many acre-feet - but with a flow. We look to the manner in which the man has been using water, and say he may continue "such use", i.e. to use it in that manner - which in its practical application, to give effect to the object of the limitation in a reasonable way, would not mean that there may be no change whatever, but no change that would prejudice other users of the water. And let us take the case, which is also clearly covered by the sub-section, where the man who uses the water on non-riparian land is receiving it under a servitude from an adjoining riparian owner giving

ain circumstances be equated with riparian property, why is this right conferred only on riparian proprietors ?

Section 9 empowers a Water Court to grant permits for the use of the surplus water of an intermittent stream on non-riparian land "after the requirements provided for in the seventh and eight sections have been satisfied on the riparian land". In his judgment in the Provincial Division Gilvie Thompson J. says, apropos of the words I have quoted :

" Now Section 8 includes no mention of riparian land eo nomine and, indeed, it is only sub-section (a) that could embrace riparian land at all. But the right to use the water of an intermittent stream for irrigating non-riparian property which is specifically preserved by Section 8(c) was not conditioned by permit and was manifestly intended to be preferential to the 'permit right' for non-riparian land dealt with in Section 9. These circumstances, together with the use of the words 'riparian land' in the above-quoted portion of Section 9, go to show, in my opinion, that, once the requirements of sub-section 8(c) are fulfilled, the non-riparian land mentioned in that sub-section is intended to be equated with riparian land. "

Both sub-sections (a) and (b) of section 8 deal with conditions which would usually occur on riparian land, and

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him the use of a furrow or a sluice of fixed dimensions. There could be no difficulty here about applying the limitation ; but we should come to a reasonable result if we read the enactment - which couples the phrases "has used" and "was entitled to use" - as allowing his limited right to preserve for him an unlimited one, which he can at any time in the futurity exercise to the prejudice of other users of the water of the stream if he can get his servitude rights extended or if he buys the servient or other riparian property. What that could be the effect if the limited use he can have asserted his property in riparian land.

A construction which allows, in respect of limitation on non-riparian land, a preservation of the most favourable situation that actually existed before the passing of the Act but not a change of that position to the prejudice of other users of the water would appear to me to be in keeping with the general scheme of the Act - preserving existing particular rights (vide the opening words of section 7 and of numerals or them above) - and with the wording of the other sections, also of certain restrictions, to which I shall now refer.

Section 7 gives to "any riparian proprietor along a stream" the right to object to schemes impounding or storing by an upper proprietor. A non-riparian property may in certain

ain circumstances be equated with riparian property, why is this right conferred only on riparian proprietors ?

Section 9 empowers a Water Court to grant permits for the use of the surplus water of an intermittent stream on non-riparian land "after the requirements provided for in the seventh and eight sections have been satisfied on the riparian land". In his judgment in the Provincial Division Ogilvie Thompson J. says, apropos of the words I have quoted :

" Now Section 8 includes no mention of riparian land eo nomine and, indeed, it is only sub-section (a) that could embrace riparian land at all. But the right to use the water of an intermittent stream for irrigating non-riparian property which is specifically preserved by Section 8(c) was not conditioned by permit and was manifestly intended to be preferential to the 'permit right' for non-riparian land dealt with in Section 9. These circumstances, together with the use of the words 'riparian land' in the above-quoted portion of Section 9, go to show, in my opinion, that, once the requirements of sub-section 8(c) are fulfilled, the non-riparian land mentioned in that sub-section is intended to be equated with riparian land. "

Both sub-sections (a) and (b) of section 8 deal with conditions which would usually occur on riparian land, and

there was no need to mention such land eo nomine. I have already said that the "works" envisaged in sub-section (a) are works in the bed or on the bank of the stream, which means that they would be on riparian land, though I am conceding that incidentally works may be included which divert water for conveyance across the riparian to non-riparian land. Sub-section 8(a) - assuming again that it must be read as applying use on non-riparian land - would definitely call for application mainly on riparian land, for that is where the water of a stream is mostly employed, and the sub-section wished to permit the use of more water than was required for beneficial irrigation if that use was necessary to prevent erosion.

The mention by name of sections 7 and 8 in section 9 is easily explained by the fact that these are the sections of the Act setting out rights to water of intermittent streams.

The main difficulty, however, which presented itself to Mr. Justice Thompson J., and which I also find myself faced, in the construction of section 9 is that the phrase "on the riparian land", in the context in which it occurs, seems, prima facie, to exclude a right for non-riparian land preserved under section 8(c) from consideration when the Court is asked to grant a permit under section 9, and yet - here I certainly

agree with the learned Judge - that right "was manifestly intended to be preferential to the 'permit right' for non-riparian land dealt with in section 9". I shall try to show later that even on the wording of section 9 by itself the difficulty may, in my opinion, be resolved without the drastic remedy of reading the word "riparian" as including a meaning which is the exact opposite of what it says - a liberty which a Court surely cannot take with a statute unless it is driven in sheer desperation to do so. However, since I find what to me appears to be a very definite clue on this point in the regulations, I may well deal with them first.

We must bear in mind that under section 116 of the Act the regulations while in force had effect "as if enacted in this Act". We therefore have to give the regulations the same force as the provisions of the Act itself ; we must allow the one to throw light on the other, and to amplify as well as clarify the other.

Parliamentary Regulations to Act 32 of 1906 were promulgated by Proclamation No. 362 of 1908. The regulations relevant to the granting of permits under section 9 are Nos. 117 to 120. I quote Nos. 117 and 118 and the material portion of 119 :

> 117. The requirements of all riparian lands must first be fully considered before any water shall be

> And the probable results as compared with those obtaining on the riparian land, and any other natural factors or facts which in the judgment of such Court ought to be taken into consideration in order to arrive at a fair determination of the facts of the particular case then under consideration.

119. A Water Court after having fixed and declared the quantity of water which should be allowed to meet the present and future requirements of the riparian land referred to in sections 7 and 8 of the Act may on application grant a permit for the use on non-riparian land of the surplus water of an intermittent stream .....

In passing I may draw attention to the fact that sub-sections (a) and (b) of section 9 of the Act are here dealt with solely as against the requirements of riparian lands which have first to be fully considered (Regulation 117(c)), and that rights allowed under sub-section (c) of section 8 are the only non-riparian rights mentioned as those for the requirements of which full provision must be made. While confirming the view I have already expressed that sub-sections (a) and (b) of section 9 are mainly, if not solely, used for water on riparian lands, and that therefore the reference to section 8 in the phrase "after the requirements provided for in the seventh and eighth sections have been satisfied on the riparian lands", occurring in section 9, is by itself

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We must here be mindful that under section 126 of the Act the regulations while in force had effect "as if enacted in this Act". We therefore have to give the regulations the same force as the provisions of the act itself ; we must allow the one to throw light on the other, and so amplify as well as clarify the other.

Parliamentary Regulations to act 32 of 1956 were promulgated by Proclamation No. 362 of 1958. The regulations relevant to the granting of permits under section 9 are nos. 117 to 119. I quote Nos. 117 and 118 and the material portion of 119 :

> 117. The requirements of all riparian lands must first be fully considered before any water shall be

diverted for the use of non-riparian owners. These requirements may be divided into :-

(a) The requirements for the land actually irrigated at the time of the application.

(b) The requirements for land which might reasonably be expected to be brought under irrigation thereafter.

(c) Requirements for other purposes in accordance with sections 7 and 8 (a) and (b) of the Act.

118. The requirements of non-riparian owners for the full exercise and enjoyment of rights allowed under Section 8(c) of the Act must be fully provided for.

In fixing and defining the quantity of water the several requirements of Clauses (a) and (b) of Regulation 117 hereof, the Water Court shall (as far as applicable) -

Have regard to the discharge and duration of flow in the stream.

The nature of the soil through which the stream flows.

The river frontage of each riparian property.

The total extent of land and the extent of irrigable land belonging to the various owners, riparian and non-riparian.

The distance the water in question will have to flow before reaching the cultivated or irrigable lands of the respective owners interested in the user of the water.

The mode of cultivation of the several lands, the quantity of the land and class of crops which can be irrigated.

Also the conditions under which water will be utilised on non-riparian lands or across the watershed.

> And the probable results as compared with those obtaining on the riparian land, and any other natural features or facts which in the judgment of such Court ought to be taken into consideration in order to arrive at a fair determination of the facts of the particular case then under consideration.

119. A Water Court after having fixed and certified the quantity of water which should be allowed to meet the present and future requirements of the riparian land referred to in sections 7 and 8 of the Act may on application grant a permit for the use on non-riparian land of the surplus water of an intermittent stream .....

In passing I may add that to the fact that sub-sections (a) and (b) of section 8 of the Act are here mentioned only amongst the requirements of riparian lands which have first to be fully considered (Regulation 117(c)), and that rights allowed under sub-section (c) of section 8 are the only non-riparian rights mentioned as those for the requirements of which full provision must be made. And in line with the view I have already expressed that sub-sections (a) and (b) contemplate mainly, if not solely, user for riparian lands, and that therefore the reference to section 8 in the phrase "after the requirements provided for in the seventh and eighth sections have been satisfied on the riparian lands", occurring in section 9, is by itself

no indication that non-riparian land was meant to be included in the phrase "the riparian land" or to be equated with it.

I think I can now say -

(a) that the regulations have up to the present day do not placed non-riparian land in a right preserved under section 8(c) on the same basis as riparian land, but draw a very definite distinction between them,

(b) the principle underlying the distinction being that in the case of riparian land the regulations contemplate future expansion of irrigation up to the full requirements of the land, but that no such expansion enters into the consideration of rights preserved for non-riparian land under section 8(c).

In Regulation 17 the mention of future requirements is expressly limited to riparian lands. In Regulation 18 the requirements of non-riparian owners in respect of rights reserved under section 8(c) are first of all mentioned and disposed of before the regulations returns to classes (a) and (b) of Regulation 17, which apply only to riparian lands. The reference to non-riparian land in the form of the detailed particulars that follow is obviously to the non-riparian land in respect of which the permit is applied for, and does not relate to rights reserved under section 8(c). These particulars state

considerations to which regard should be had in estimating the requirements of riparian lands. Why, if non-riparian land enjoying a right under section 8(c) stands on the same basis, should section 8(c), which has just been mentioned, be excluded from these considerations ?

Returning now to section 9, I find that the permits may be granted "subject to regulations and the provisions of this act". I have dealt with the regulations. When we consider "the provisions of this act", we see that the rights given to a riparian proprietor by section 7 are "subject to the existing rights of others" (vide the opening words of the section), and that section 8 reserves certain special rights which are not to be affected by section 7. In so far as these rights are of a more or less static nature the Legislature may conceived it unnecessary to refer to them in section 9. There were, however, also the wide general rights of a riparian proprietor. If express preference was not accorded to these rights in section 9, this latter section might conceivably be read by the Water Courts as not precluding it from exercising its discretion in respect of permit rights by authorizing, in cases in which it might suitable, granting permission for use of water on non-riparian land part passu with its use on riparian land. What the section did make clear was that

riparian land, whether in respect of general or particular rights, is always to have preference above permit rights. It leaves us to say that preference also for ~~the~~ any particular right preserved for non-riparian land in section 8(c), or under "existing rights", or possibly under section 8(a) and (b), must be implied, but including it by necessary implication is a permissible method of construing a statute, while reading a word to include its opposite is, generally speaking, not.

For Klein Aar's right to continued use of water from the Salt River the second and third respondents have to rely on section 8(c) of Act 8 of 1912 as well as on section 8(c) of the 1956 Act. Their right, if in existence in 1912 under the preserving provision of the earlier Act, had in that year to be exercised for and under the corresponding provision of the later Act.

There is no material difference between the wording of section 24 of the 1912 Act and that of section 8 of the 1956 Act. The final words of sub-section (c), "from exercising such use", become, in the later Act, "from continuing so to use such water". The change does not seem to me to affect the meaning of the enactment. The draughtsman apparently found the phrase "such use" somewhat inept because the word "use" had in the earlier part of the section occurred as a verb, not as a noun, and he therefore

preferred to repeat it as a verb.

In section 18 of the new Act we find again, as in section 7 of the old, that a riparian owner may object to excessive storage, impounding or diversion by an upper owner, with no mention of such right being exercisable by an owner of non-riparian land. My remarks on the corresponding provision of the old Act are therefore equally applicable.

The place of section 9 of the old Act has been taken in the new by section 23, and the new regulations corresponding to the old 117, 118 and 119 were Parliamentary Regulations Nos. 25, 26 and 27. On points relevant to my present inquiry the new regulations agree so closely with the old that the same reasoning will apply to them. There is this important difference, however, that the new Act did not, like the old, give the regulations effect as if they were part of the Act, and I therefore cannot use them, or at any rate cannot use them with the same weight, to amplify the Act.

On the other hand the wording of the new section 23 is much more explicit than that of the old section 9. For my present purpose it is enough to point out that the new section 23 gives the Water Court power to authorise the storage or diversion of water on non-riparian land, but only "if.....all

"the water" (of the stream) "is not or cannot be utilised
"within the catchment area on land riparian to every stream in
"or into which such water naturally flows," and provided that
"the diversion shall not deprive any riparian owner of water
"for irrigating any of his land which is under irrigation at
"the date of the said application, or of water for irrigating
"any land he might reasonably be expected to bring under irri-
"gation." The contemplation, then, of future expansion of irrigation on riparian property, with no corresponding reference to non-riparian property which enjoys a preserved right, is found here not only in the provisions but also in the Act itself.

I therefore put the same construction on section 2(c) of the 1912 Act as I have put on section 4(c) of the 1936 Act.

And if it is possible to put yet stronger confirmation, it is afforded by certain new provisions in the later Act.

I refer to sections 15 and 16 - those which entitled the Water Court to give protection to works for the storage of surplus water. These sections were repealed by Act 26 of 1934 and new provisions were substituted for them, but their repeal long after the passing of the original Act does not prevent our looking at them to see how far they may help to show what was in the legislature's mind in 1912.

The significant point about these provisions is that, under section 15, it is only a riparian owner who may apply for protection, and, under section 16, it is only on riparian owners that an applicant for protection need serve a notice calling on them to declare whether they themselves propose to construct storage or diversion works.

Existing works need not be declared - vide Wagenaar and Another v du Plessis, 1931 A.D. 83. Such works, said Wessels J.A., at page 99, "will be visible and the notice of the Court should be directed "to these works..... The Court will then naturally take "these works into consideration in determining what water can be im- "pounded and diverted." These remarks were obviously based on the fact that the works referred to were static and that their capacity for taking water from the stream could not be increased at the whim of their owner. If the owner wished to do so, he had, within six weeks of the receipt of the notice, to declare what he proposed to do. From the fact, then, that in respect of a non-riparian owner there was no provision for an application for protection and no requirement that he should be served with a notice to declare, I must conclude, not only that the legislature thought of any right he might have to take water from the stream as being static - any diversion works connected with that right would be visible and the notice of the Court could be directed to them - but also that it could not have thought of his being entitled to increase the flow, except on an application under section 23.

For the reasons I have given I have come to the conclusion that the right preserved, first by section 8(c) of the 1906 Act and then by section 24(c) of the 1912 Act, for the use of water on non-riparian land is the right to continue such use as was exercised, and the owner concerned was entitled to exercise, before, and does not include the right to change such use to the prejudice of any other party entitled to water.

My brother Hall refers in his judgment to an enunciation of the opposite view in Hall on Water Rights, page 83. He says that, when he wrote that passage in 1931, it represented the existing practice, which has been continued on the exempted properties, and that, on a different decision now, the clock will have to be put back fifty years, it will be difficult to establish what quantity of water was used prior to 1906, and the present owners of some of these properties may be faced with ruin.

We have no evidence before us as to what the practice has been. If my brother Hall's statement is correct, I should regret to learn that people may be faced with ruin, but that will not entitle me to interpret the law otherwise than as I see it. On the construction of the enactments in question my reasoning, which I have set out at length, can lead me to only one conclusion. While, as the point has been submitted to me, it is my duty to express a conclusion which I see so clearly whatever its practical effect may be, I must say that to me the other view seems to be one that can well lead to greater inequities than the one I am taking. It would mean that for an indefinite time in the future a man who used surplus water, however small the quantity, on non-riparian property

before 1906 in the Cape Province, or before 1912 in the Provinces which had no earlier legislation dealing with the matter, has the right to increase the flow he draws from the river to the full requirements of that property, cutting off the supply of lower riparian properties which have to rely on the stream and the grants of which were probably based on their abutment on the stream. In the actual case before us it was such action by the owner of non-riparian land that was the fons et origo of the trouble. It is a view, moreover, that can in certain cases give rise to awkward legal anomalies. I have already touched on the difficulty of ascertaining the priority which non-riparian land should enjoy. I have referred to another type of case, which I may illustrate by supposing that owner A of non-riparian property had before 1906 a servitude right to draw a limited supply of water, say whatever escaped through a small sluice-gate, from an intermittent river on the adjoining riparian property of owner B. Is A's property now to be regarded as having full riparian rights, so that, if at any time now or in the future its owner can connect it with access to the river anywhere, e.g. by buying a riparian strip above B's property, he can abstract water for its full requirements, to the prejudice of B and all lower

owners ? Or let us take the case of a man who in 1906 owned a small sub-division of an extensive grant of non-riparian property, and then, by servitude or through his ownership of contiguous riparian land, drew water from the river to irrigate his little plot. What is now to be regarded as having by the legislation of 1906 and 1912 been placed on the same basis as riparian land, the whole grant or only the small sub-division ? If the former, the result would be ridiculous, giving riparian rights to people who had never taken water from the stream ; if the latter, it would introduce a principle foreign to our law, which regards grants as the units for determining riparianism.

On my decision paragraph 9 of the Water Court Order will have to be worded as to limit the right of the second and third respondents (second and third applicants

in the Water Court) to use water of the Salt River on Klein Aar in a manner which will prevent them from making a greater inroad on the flow of water to the appellants than was made by the use on Klein Aar before 21st August, 1906, when the 1906 Act came into force, or than they may be entitled to by prescription (which they pleaded as an alternative basis for their right, but on which the Water Court, owing to its view of the 1906 and 1912 Acts, gave no decision).

In the pleadings the appellants gave the measurements of the intake which, they alleged, existed at point "B" before the 1906 Act came into force, but on this issue also we have no finding by the Water Court. The only course I therefore see open to myself at present is to state the legal limitation I have indicated and to leave the practical method of giving effect to the right thus limited to be determined by agreement between the parties, or by a reference back to the Water Court if they fail to agree.

I would therefore formulate paragraph 9 of the Order as follows :-

> (9)(i). That despite the declaration contained in paragraph 8 above, the Second and Third Applicants are entitled to divert and use the water of the Salt River upon the aforesaid property, Klein Aar, for the purpose of irrigation, provided that, subject to any prescriptive right which the Second and Third Applicants

may establish, they do not for such diversion and use abstract a greater flow of water from the river, or abstract the water at a point or in a manner more prejudicial to the First and Second Respondents, than was done for the maximum use made of such water on Klein Aar before August 21st, 1906.

(ii) Failing agreement between the parties concerned as to the method by which the abstraction may take place so as to give effect to this Order, the matter is referred back to the Water Court for a determination of the method of abstraction and a decision on any issues necessary to enable the Court to make such determination, as well as on the costs involved, and any of the parties concerned may, on notice to the other parties, set the matter down in the Water Court for such determination.

There remains the question how this variation of the Order should affect the costs. The Water Court carefully made separate allocations of the costs on the various issues raised in the application and in the counterclaim. The point affected by my alteration was raised in the counterclaim filed by the appellants, in which they disputed not only the right of the second and third respondents (second and third applicants in the Water Court) to their use of water on Klein Aar, but also that of the first respondent (first applicant in the Water Court) to his use

of water on Gemsboks Randt. The Water Court decided against the appellants on the disputed issues relating to Gemsboks Randt, and I agree with my brother Hall that we cannot interfere with that decision. This means that the appeal on the counterclaim, as far as it affects the first respondent, is dismissed, whereas I am allowing it to succeed as against the second and third respondents.

The appellants filed their counterclaim at a late stage, and had to make a special application for the purpose. The Water Court rightly ordered them to pay the respondents' costs connected with the application to introduce the counterclaim. On the merits of the counterclaim the appellants were ordered to pay the respondents' costs, save on certain special issues connected with it on which the appellants succeeded, (paragraph 12 of the Order). On my decision the first sentence of the fourth sub-paragraph of paragraph 12 of the Order, reading "That the First "and Second Respondents do pay the Applicants' costs of "the Counterclaim", should be altered to read : "That "the Second and Third Applicants do pay the First and "Second Respondents' costs of the Counterclaim against "them, and that the First and Second Respondents pay the "First Applicant's costs of the Counterclaim."

[illegible]y decision [illegible] a success for the appellants on [illegible] substan-[illegible] [illegible] in the [illegible] against the second and third respondents. The issues [illegible] which they fail, however, together took considerably more [illegible] than [illegible] the [illegible] involved in the counterclaim [illegible]. In respect of this issue, moreover, they succeed [illegible] legal point, and it is not unlikely that, if their appeal had been limited to this point, the parties might have agreed on a procedure by which the heavy costs of [illegible] the entire record before the Court [illegible] have been [illegible]. In [illegible] considerations [illegible] think [illegible] order will be that the second and third respondents (second and third [illegible] in the [illegible] Court) pay one-fourth of the appellants' costs of appeal in the Provincial Division and [illegible] this Court, while the [illegible] have to pay the costs of the first respondent (first applicant in the [illegible] Court) in both the Provincial Court [illegible] this one.

[illegible] de Villiers [illegible] agreed to an amendment of paragraph 4 of [illegible] Court's Order, but as this is merely for purposes of clarification, the costs should not be affected by it.

I [illegible] sum up the effect of my judgment by stating the [illegible] should be [illegible]:

(1) The appeal is partly allowed as against the second and Third Respondents (Second and Third Applicants in the [illegible] Court), who are ordered to pay one-fourth of the appellants' costs in the

Provincial Division and in this Court.

(2) As against the First Respondent (First Applicant in the Water Court) the appeal is dismissed with costs.

(3) The Order made by the Water Court, as amended by the Provincial Division, is further amended as follows :-

(a)(i) The present paragraph 4 to become 4(a).

(ii) Paragraph 4(b) to be inserted as follows :-

Paragraphs 3 and 4(a) hereof not to be constructed as containing any decision on the question whether First and Second Respondents are entitled to exercise their right of aqueduct for conveyance of the quantity of water defined in paragraph 1 hereof by means of one furrow only or by means other than a furrow, e.g. a pipeline or pipelines.

(b) The following new paragraph is substituted for paragraph 9 :-

(9)(i). That despite the declarati in paragraph 8 above, the Second and

Third Applicants are entitled to divert and use the water of the Salt River upon the aforesaid property, Klein Aar, for the purpose of irrigation, provided that, subject to any prescriptive right which the Second and Third Applicants may establish, they do not for such diversion and use abstract a greater flow of water from the river, or abstract the water at a point or in a manner more prejudicial to the First and Second Respondents, than was done for the maximum use made of such water on Klein Aar before August 21st, 1906.

(ii) Failing agreement between the parties concerned as to the method by which the abstraction may take place so as to give effect to this Order, the matter is referred back to the Water Court for a determination of the method of abstraction and a decision on any issues necessary to enable the Court to make such determination, as well as on

the costs involved, and any of the parties concerned may, on notice to the other parties, set the matter down in the Water Court for such determination.

(c) The first sentence of the fourth sub-paragraph of paragraph 12, reading "That the First and Second Respondents do pay the Applicants' costs of the Counterclaim", is altered to read : "That the Second and Third Applicants do pay the Respondents' costs of the Counterclaim against them, and that the First and Second Respondents pay the First Applicant's costs of the Counterclaim. "

S.S.P. Fagan

deBeer J.A. } concur.
Beyers J.A. }