residuary beneficiary to seven twentyfourths by the next-of-kin. The consequences of this decision can be seen more simply in the following example. The residue of a will is £20,000 divided between two beneficiaries. One predeceases the testator and his share lapses. The debts and expenses amount to £9,400. Probate duty is assessed at, say, £1,200. By virtue of this decision, the remaining beneficiary and the next-of-kin each pay £600 duty. Consequently in the distribution the residuary beneficiary would take £10,000 less £600 duty; the next-of-kin would take £10,000 less £9,400 debts and expenses (according to the second schedule) less £600 duty, *i.e.* nothing. Now, on the face of it, this seems most unfair, for although it may be argued that under the will the testator intended the next-of-kin to take nothing, that would be an argument for making probate duty a debt of the estate payable according to the statutory order. That is not the case; duty is payable primarily from the residue (section 163). Apparently the intention of the legislature was that it should not be an estate duty though it is not clear that it should be a succession duty.[8] The wording of the section leaves the question open; the policy of the Act could provide a guide. Probably the answer lies in the fact that section 163 was passed many years before sections 33 and 34 and the second schedule were adopted.[9] The present solution is probably what was intended since the section throwing the duty onto the residue would probably have been considered at the time it was passed as making the duty an estate duty. So, unfair as it might seem at first sight, the solution arrived at probably fits in best with the present policy. To make the scheme more logical, however, and still further to lessen the duty burden on the residuary beneficiary, the section might well be redrafted so as to make the duty payable as a debt of the estate in accordance with the order of the second schedule.

W. F. ORMISTON

TRAIAN v. WARE [1]

Tort—Surface Waters—Adjoining landowners' rights

The plaintiffs and defendants owned contiguous blocks of country land, the defendants' block being at a higher level and to the east of the plaintiffs'. The natural drainage was through the lowest point of the common boundary—approximately midway along it—and was

[8] For the difference between estate and succession duties see *Attorney-General v. Peek* [1913] 2 K.B. 487, 491 and *Winans v. Attorney-General* (No. 2) [1910] A.C. 27, 47.

[9] S.163 was first enacted as s.3 of the Administration and Probate (Amendment) Act 1907 (Vic.). Ss. 33 and 34 and the second schedule were first adopted in the 1928 Act from the 1925 English Administration of Estates Act.

[1] [1957] V.R.200. Supreme Court of Victoria; Martin J.

from the defendants' to the plaintiffs' land. As a result of the defendants' cultivation of their land, surface waters which would otherwise have made their way directly to this depression were diverted to the south and then made their way in a delver drain which ran from south to north along the common boundary. The plaintiffs' predecessors in title had erected a bank to cover the depression so as to protect their orchard from flooding. On two occasions when heavy rain caused the delver drain to overflow, the defendants, without informing the plaintiffs, cut the plaintiffs' bank opposite the depression so that the overflow would gravitate to the plaintiffs' rather than the defendants' land. The plaintiffs claimed damages for alleged nuisance and trespass and sought an injunction restraining the defendants from cutting the bank. The defendants counterclaimed for a declaration that they were entitled to have the natural flow discharged on to the plaintiffs' land and for an injunction restraining the plaintiffs from impeding the flow.

Martin J. held that the defendants were entitled to the declaration sought on the counterclaim, but that they were liable in damages since the plaintiffs had not personally built the bank and the defendants had cut it without notice to them when in the circumstances notice should have been given.

It is proposed to discuss only that part of the case which relates to the question whether the defendants were entitled to the declaration sought on the counterclaim. The plaintiffs argued that they had an absolute right[2] by means of works on their land, to prevent the defendants' water from reaching their property. This view reflects what has been called the 'common enemy rule'[3] of surface waters. The defendants argued that the Roman civil law relating to surface waters was a part of the common law of England and that this rule gave them the right to discharge surface waters on to the plaintiffs' land in the way they had done. There exists a great deal of controversy throughout the British Commonwealth and also in the United States of America on the question as to whether the common law has adopted the civil law rule. Martin J. referred to a number of cases although he dis-

[2] It has been suggested that much of the confusion in this part of the law has resulted from an assumption that the correlative of the word 'right' is always 'duty'. See *Bell v. Pitt* (decided in the Supreme Court of Tasmania in December 1956 but not yet reported) which is noted in (1957) 31 *Australian Law Journal* 536. *Cf.* the argument of counsel in *Nelson v. Walker* (1910) 10 C.L.R. 560, 563.

[3] The term 'common enemy' dates from the nineteenth century and appears to have originated in England in cases where sea waters were described as the common enemy of the owners of fen land reclaimed from the sea. See *Rex v. Trafford* (1831) 1 B. & Ad. 874, 886 and *Rex v. The Commissioners of Sewers for Pagham Levels* (1828) 8 B. & C. 355, 360 *per* Lord Tenterden C.J. Kinyon and McClure, 'Interferences with Surface Waters' (1940) 24 *Minnesota Law Review*, 891 divide the rules relating to surface waters into three—the 'common enemy rule', the 'civil law rule' and the 'reasonable use rule'—and their terminology has been used here. The substance of the latter two rules appears later in the text.

cussed few of them in detail. He noted that the civil law rule had been accepted in New Zealand[4] and by individual judges in Queensland[5] and Victoria.[6]Three cases, however, assume most importance in the judgment.[7]

In *Vinnicombe v. MacGregor*[8] Madden C. J. gave an elaborate judgment adopting the civil law rule. On appeal[9] the decision was reversed without providing binding authority on this point. A'Beckett J., who dissented from the result achieved, also dissented from the view expressed by Madden C.J.; however Hodges J. agreed with the view that the civil law rule was part of the common law and Williams J. while not deciding the point, was inclined to the same opinion.

In *Walker v. Nelson*[10] the State Full Court, in reversing a County Court judgment based on *Vinnicombe v. McGregor,* approved the view of Madden C.J. as stating the general principles applicable, but held it inapplicable where the direction of flow had been artificially reversed. In the High Court[11] considerable doubt was cast on Chief Justice Madden's opinion in *Vinnicombe v. MacGregor,* although the appeal was decided on other grounds. O'Connor J. approved of the judgment of a'Beckett J., while Griffith C.J. was strongly inclined toward it. Neither Higgins J. nor Isaacs J. gave this question any detailed consideration, reserving their opinion on it, but Higgins J. threw some doubts on the correctness of *Vinnicombe v. MacGregor.*

In *Gibbons v. Lenfestey*[12] the Judicial Committee of the Privy Council, in a case which originated on the Island of Guernsey, where the civil law applies, declared that the common law of England had adopted the civil law rule. This statement is the merest *obiter dictum,* yet it has been given startling authority, particularly in New Zealand where an earlier current of authority was reversed in deference to it.[13]

In this state of conflict His Honour in the instant case held that 'although the *dictum* in *Gibbons v. Lenfestey* was unnecessary to the decision in that case I think I should regard it as the law, particularly as it accords with the view expressed by the Full Court in *Walker v.*

[4] *Bailey v. Vile* [1930] N.Z.L.R. 829; *Eaton v. Dalgleish* [1940] N.Z.L.R. 702; *Wilsher v. Corban* [1955] N.Z.L.R. 478.

[5] *Righetti v. Wynn* [1950] St. R. Qd. 231.

[6] *Baillie v. Baillie* (unreported) *per* Dean J., *City of Oakleigh v. Brown* [1956] V.L.R. 503, 511 *per* Sholl J. Kinyon and McClure *op. cit.* (*supra,* n. 3), 891, 899 and nn. 40-43 provide an excellent list of cases and articles. In the United States the choice between the rules appears to be rather a matter of deliberate selection on their merits than a weighing of authority such as Martin J. undertook in *Traian v. Ware.* Kinyon and McClure conclude that it is impossible to define the English common law of surface waters on the authorities. Among the most comprehensive Australian cases are *Vinnicombe v. MacGregor* (1902) 28 V.L.R. 144 (Madden C.J.) and *Bell v. Pitt* (*supra,* n. 2), (Burbury C.J.). For early English authority see Earl F. Murphy 'Early English Water Law Doctrines before 1400' 1 *American Journal of Legal History* 103.

[7] *Vinnicombe v. MacGregor* (1902) 28 V.L.R. 144; *Walker v. Nelson* [1909] V.L.R. 476 and on appeal *Nelson v. Walker* (1910) 10 C.L.R. 560; and *Gibbons v. Lenfestey* (1915) 84 L.J. (P.C.) 158.

[8] (1902) 28 V.L.R. 144.

[9] (1903) 29 V.L.R. 32.

[10] [1909] V.L.R. 476.

[11] *Nelson v. Walker* (1910) 10 C.L.R. 560.

[12] (1915) 84 L.J. (P.C.) 158.

[13] See *Bailey v. Vile* [1930] N.Z.L.R. 829.

Nelson . . . which view, though not approbated, was not overruled in the High Court, and so hold that the plaintiffs had an obligation to receive the natural flow of the natural surface water flowing from the defendants' land and that they had no right to build or maintain a bank or other obstruction which had the effect of impeding such natural flow.'[14] It is not clear whether Martin J. treated *Walker v. Nelson* as a binding decision, though the passage above suggests that he did not do so. The weight of authority to be given it does of course raise interesting questions in the theory of *stare decisis*.[15] It is submitted that His Honour's decision was not governed by these authorities and that he was free to decide the question on the competing merits of the various rules.

There has been conflict not only as to whether the civil law rule applies at all, but also as to its content. Even in Roman times the rule was fluid rather than static. In the *Digest,* Justinian expresses an opinion based on the conclusions of many writers. 'The *actio aquæ pluviæ arcendæ* is appropriate if rain water or water which is supplemented by rain causes damage not in the natural course of events but through the work of human hands, unless it has been done for agricultural purposes.'[16] The view of the civil law in the passage which Martin J. cites from *Gibbons v. Lenfestey*[17] and the view he states for himself[18] are similar to the Latin, save that Justinian regards the 'natural user' as the exception rather than the rule. There appears to be no reason why, once a civil law rule has been adopted by the common law, it should not develop in the same way as if it were originally common law. This does not mean that the common law should be arbitrarily altered merely because of some chance *obiter dictum* or because of some chance omission of a qualification in a case where it would not have been material. *Nelson v. Walker* was a case in which such growth was forestalled. It was a case involving urban land. On this aspect (there were a number of others) both Griffith C.J. and O'Connor J. referred to the *Digest* as authority for the proposition that the civil law rule had never been applied to urban land. There the translation of the Latin provides that 'further it is to be understood that this action is appropriate in no other circumstances

[14] [1957] V.R. 200, 206.

[15] See *e.g.* J. L. Montrose 'The Language of and a Notation for the Doctrine of Precedent', (1953) 2 *University of Western Australia Annual Law Reviews,* 504. Burbury C.J. in *Bell v. Pitt* regards the Full Court decision in *Vinnicombe v. MacGregor* (1903) 29 V.L.R. 32 as a binding decision in favour of the civil law. It is respectfully submitted that this is an error.

[16] *Digest* Book XXXIX Tit. iii, 1 *pr.* The translation was prepared by Mr L. J. Downer (Senior Lecturer in Law in the University of Melbourne) who has kindly consented to its being used here. In *Bell v. Pitt* Burbury C.J. notes the conflict between Canadian and New Zealand authority as to the content of the civil law. *Wilsher v Corban* [1955] N.Z.L.R. 478 and *Marchischuk v. Lee* [1954] 2 D.L.R. 484.

[17] (1915) 84 L.J. (P.C.) 158, 160, cited [1957] V.R. 200, 204.

[18] [1957] V.R. 200, 206.

than where rain water causes damage to open land. Otherwise if it damages a building or a township the action does not apply.'[19] It is a significant comment on the judicial process that the applicability of the civil law rule was an issue in three courts yet the question of whether the civil law rule has ever been applied to urban land was raised for the first time in argument in the High Court by Griffith C.J. The inference is that the case was argued from general statements of the civil law in cases involving rural land, where the point was not material. There seems no obvious reason why the primary sources were inapplicable, nor is it obvious that the rules for urban and rural land should be the same.[20]

In this case Martin J. held that the defendants came within the civil law rule as their cultivation was normal in the district despite the fact that it increased the rate of flow. His Honour found as a fact that the natural flow had not been augmented by irrigation water or water from other land.

Since *Traian v. Ware* was decided the question whether the civil law rule applies to surface waters has arisen again, this time in Tasmania in *Bell v. Pitt*[21] decided by Burbury C.J. Here the plaintiff was the owner of agricultural land which sloped towards the land of the defendant. The plaintiff had dug a drain which carried water from still higher land through the plaintiff's land to the defendant's land. It was held that the drain increased the quantity of water arriving on the defendant's land but that the drain was dug in good faith for the purpose of draining the plaintiff's property for pastoral and agricultural use. The defendant claimed to be entitled to block the drain and had threatened to do so. The plaintiff sought a mandatory injunction to compel the defendant to remove a windrow he had erected but this was, in the event, held not to impede the flow; and the defendant by way of counterclaim sought a like injunction to compel the plaintiff to remove the drain. The case thus raised the whole question of the interrelation of rights and duties between the higher and lower lands and Burbury C.J. has made a notable contribution to the law on the subject. As His Honour held on the facts and the authorities that the higher owner was a 'non-natural user' he held that the lower owner was entitled to compel removal of the drain.[22] His Honour

[19] *Digest loc. cit.* (*supra*, n. 16). See (1910) 10 C.L.R. 560, 563, 568, 576, and also *City of Oakleigh v. Brown* [1956] Argus L.R. 1155, 1163 *per* Sholl J.

[20] Kinyon and McClure, 'Influences with Surface Waters' (1940) 24 *Minnesota Law Review*, 891, 894, 931, note the various expressions of the civil law rule and the cases deciding whether or not to apply the rule to urban land but they do not refer to any primary sources.

[21] Not yet reported; noted (1957) 31 *Australian Law Journal* 536.

[22] A copy of the judgment reveals that Burbury C.J. made an extensive study of what amounts to a 'natural user'. He held that the rules relating to mines were generally applicable and that the escape of water in the course of a 'natural user' gave no cause of action. He went on to say 'What may constitute a natural use of

made it quite clear that, even had this conclusion been otherwise, it does not logically follow that the upper owner could insist on the removal of the bank (assuming contrary to the fact that it blocked the flow). He then considered the cases which had accepted the civil law rule and on which Martin J. had relied—Burbury C.J. also considered Canadian authority—but decided that that rule formed no part of the law of Tasmania with the result that the plaintiff was not entitled to insist on the removal of the bank even if he had been a natural user and the defendant could stop the flow of water on to his land. The note in the *Australian Law Journal* states that 'it is a case in which each of two persons is under a liability to endure a liberty enjoyed by the other without the right to prevent its exercise. The law will intervene when the conduct of one of the parties ceases to be reasonable'.[23] This rule is distinct from the common enemy rule and has been described as the reasonable use rule.[24] Kinyon and McClure in their article in the *Minnesota Law Review*[25] prefer this rule to the other two.

However, before discussing the rival merits of the three rules it is wise to take into account the statutory position. As between land owners the Drainage of Land Act 1928 provides that if in order to drain his own land a landowner desires to lay or improve drains through other land he may request the consent of the other owners involved with or without offering compensation. If such consent is not forthcoming he may require a Police Magistrate or an arbitrator to decide whether or not the proposed drain will cause injury and if so whether or not the injury so caused is capable of being fully compensated by money. Unless the latter question is answered in the affirmative no drains may be built. The applicant may, at his own expense, construct such drains as are allowed subject to prior payment of any compensation awarded for prospective injury.[26] Persons who do not qualify within this Act can always attempt to induce their local council to act under the provisions of section 606 of the Local Government Act 1946 which confers wide drainage powers. There are also other statutory bodies with wide drainage powers.[27]

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land for the purpose of the application of the principle is not capable of precise definition and may be a question of fact. (See *Gardiner v. Miller* [1956] S.R. (N.S.W.) 122, 126.).'

[23] (1957) 31 *Australian Law Journal* 536, 537. *Cf.* Kinyon and McClure *op. cit.* (*supra*, n. 20), 891, 904. Burbury C.J. is not so definite. He says that it is unnecessary to express any opinion on the extent of the lower owner's right to obstruct the flow of surface water coming naturally upon his property and adds 'that it may be that it is not an absolute right and that he is only entitled to take reasonable measures to protect his property'.

[24] *Supra*, n. 3.

[25] *'Interferences with Surface Waters'* (1940) 24 *Minnesota Law Review*, 891.

[26] Burbury C.J. delayed the injunction against the plaintiff in *Bell v. Pitt* so that the plaintiff could study his rights under the Land Drainage Act 1934 (Tas.) which corresponds to the Victorian provisions.

[27] *E.g.* Water Act 1928.

The existence of these statutory provisions detracts from the merits of a discretionary 'common law' rule such as Kinyon and McClure advocate and enhances the value of rules from which rights can be predicted in advance. Finally it is submitted that the 'common enemy rule' is more impartial as between adjoining land owners than the 'civil law rule' which favours the higher land owner.

S. W. BEGG