there is a practice under which an accused person may make a statement from the dock and may then swear in the witness-box that what he said in his statement was true. But I have not found any reported decision in which the practice has been discussed, or in which consideration has been given to the question whether it should be followed in a joint trial, or whether limitations should be imposed upon it, or dealing with the nature of the directions which should be given in a joint trial concerning evidence in that form. . . . If . . . there is a joint trial and a statement has included matter which implicates a co-defendant, but would be no evidence against the co-defendant if the maker of the statement did not go into the witness-box, it would seem to be generally desirable that, if he does then go into the witness-box, he should be required to give his evidence in the ordinary way, so that, as each question is asked, the ordinary rights of a party who may be affected by the evidence to object to it will be preserved.[7]

(3) R. v. WARBURTON[8]

Failure to direct jury properly

On a trial of four persons on a charge of arson evidence was given by each of the accused and witnesses were called on behalf of two of them. The evidence of these witnesses supported the evidence of the other two accused as well as the evidence of the two accused on whose behalf they were called. In addition the accounts given by some accused in the witness box tended to support the evidence given by other accused. Because the trial judge failed to draw the attention of the jury to the rule that the evidence of each accused and the evidence of the witnesses was admissible for or against each accused, the Court of Criminal Appeal of Queensland held that there had been a mistrial.

The theory is, of course, that once the trial judge has drawn the relevant rules of evidence to the attention of the jury his duty is done. Whether or not the jury do follow his guidance on points of evidence is not known because the deliberations of juries take place in camera. Nevertheless the case prompts the thought that an accused stands a better chance of finding fault with points of procedure and evidence in a joint trial than he does if he is tried singly. The possibilities of flaws are that much greater.

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7 [1970] 1 N.S.W.R. 750, 754-755.
8 [1970] Q.W.N. 15.

(4) S. v. JACOBS[9]

Sharing one counsel

Two accused had been defended by one attorney and during the trial it had become apparent that there was a conflict in the defence of the two accused, but the attorney had not immediately clarified his own position nor immediately withdrawn from the defence of one or the other, and both accused had been convicted. The South African court held that as both accused had been prejudiced, the convictions and sentences should be set aside. However, in this instance the case was referred to the Attorney-General to consider a fresh prosecution.

(5) R. v. LANE[10]

Antagonistic defences

If in *Jacobs* it had been known that there were to be conflicting defences, it might have been more convenient to have separate trials. The question of whether antagonistic defences is a good ground for ordering separate trials was considered in this case. The High Court of Ontario held that the fact that the defences of co-accused will be antagonistic is not an over-riding reason for granting separate trials. It is one of the factors which the judge must consider in exercising his discretion—a discretion which must not be exercised in a desultory or unmethodical manner, but must be guided and regulated by judicial principles and fixed rules.[11]

D.B.

KENNEDY v. MINISTER FOR WORKS[1]

Abstracting percolating underground water

This is a disturbing case; it deals with the vexed problem of underground water in a vast State where water is precious.

K was the proprietor of Millstream Station in the Pilbara District of Western Australia. He had an estate in fee simple of forty acres which had been granted to his predecessor in title, under the terms of a Crown grant dated 11 July 1879. This area was completely surrounded by a pastoral lease comprising 640,110 acres. A spring called

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9 1970 (3) S.A. 493.
10 [1970] 1 O.R. 681.
11 R. v. Weir, (1899) 3 C.C.C. 351.
1 [1970] W.A.R. 102.