IN THE SUPREME COURT

OF VICTORIA

O/R 6893
O/R 6984

IN THE MATTER OF

JAMES GREAVES SIMPSON

v.

RODNEY SINCLAIR KNOWLES

and

JAMES GREAVES SIMPSON

v.

JOHN MANNERS IGGULDEN

Judgment:

NORRIS J. Delivered 20th.September, 1973.

These are two Orders to Review decisions of Mr. H.E.Daly S.M. sitting in the Magistrate's Court at Mordialloc on 7 August, 1972, on informations laid against Rodney Sinclair Knowles and John Manners Iggulden by James Greaves Simpson. Each was charged with an offence under sec. 9(1)(d) of the Summary Offences Act 1966 which provides that any person who wilfully trespasses in any place and neglects or refuses to leave that place after being warned to do so by the owner or a person authorised by or on behalf of the owner or occupier shall be guilty of an offence. In each case the Stipendiary Magistrate found the offence proved, and adjourned the hearing of the information to 7 August 1973 on the defendant entering into a recognizance in sum of $50 to be of good behaviour until that date.

Iggulden was charged with one other offence, Knowles with three other offences, and three other persons were charged with various offences arising out of the same set of circumstances. All the cases were heard together and the hearing extended over some three days.

On 23 November, 1972 an order nisi to review the decision of the Stipendiary Magistrate in each case was obtained from Master Brett. For some reason, of which I am unaware, the matters only came on for hearing on 6 September 1973.

The informations as amended alleged in effect wilful trespass on 21 June, 1972 in a place, to wit part of the Mordialloc foreshore and a neglect or refusal to leave that place after the appropriate warning. The particulars given alleged that on 14 June, 1972 the Governor in Council in pursuance of the provisions of sec. 20 of the Pipelines Act 1967 authorised Esso Exploration and Production Inc., and Hematite Petroleum Proprietary Limited to construct a pipeline through or over certain Crown lands part of which was the Mordialloc foreshore; that on 21 June, 1972 Australian Pipelines Constructions was in occupation of that part of the Mordialloc foreshore included in the Order in Council and was engaged in the actual construction of the pipeline through or over that part of the Crown lands and that the defendant wilfully trespassed on that part of the Crown lands and neglected or refused to leave after being warned to do so by the Contracts Manager of Australian Pipelines Construction and by the informant Sergeant Simpson.

The ground of each order nisi to review was that on the evidence the Stipendiary Magistrate should have held that the place occupied by Australian Pipelines Constructions namely portion of the Mordialloc foreshore, being part of a public park, the Defendant was therefore entitled as of right to enter thereon and accordingly the Stipendiary Magistrate should have held that within the meaning of sec.9(1)(d) of the Summary Offences Act the Defendant did not wilfully trespass upon the said land. On the return of the orders nisi I granted Mr. Eames who appeared to move each order absolute leave to amend the ground by inserting the word "purportedly" before the word

"occupied". Mr. Nettleford who appeared for the informant in each case did not seek to object that this amendment amounted to the addition of a new ground, the informant desiring to have the point of substance determined. I was in some doubt at the time whether such an objection if raised would have been good: I am now of the opinion that it would not.

The facts as found below or admitted were that each defendant was on 21 June, 1972 at the time the respective trespasses were alleged to have occurred, within an area defined in the terms of a permit and of a licence granted under the provisions of the Pipelines Act 1967 to the two companies mentioned jointly and that each refused to leave after being warned to do so as set out in the Particulars. The permit issued on 6 April, 1970 was a permit to own and use a pipeline, situated along a route described in the document, for the purpose of carrying gaseous hydrocarbons. The course of the pipeline entered Port Phillip Bay fter traversing some part of the Mordialloc foreshore. The licence dated 11 June 1970 was a licence and authority to the same two companies to construct and operate a pipeline along the same route. This route passing through Crown lands, the Governor in Council on 14 June 1972 authorised the two companies to construct the pipe line through or over those Crown lands, including the relevant portion of the Mordialloc foreshore. The two companies arranged for Australian Pipelines Construction, a firm, to construct the line and on 21 June, 1972 that firm was engaged in digging and laying the pipeline along the foreshore. It appeared that the firm had enclosed that portion of the foreshore which was part of the route of the pipeline by a wire fence, and it is on that portion so enclosed that the alleged trespasses occurred.

It was conceded by the informant that pursuant to sec.221 of the Land Act 1958 the Council of the City of Mordialloc had been appointed as manager of the Mordialloc foreshore, which was Crown land reserved under sec.14 of that Act as a public park.

It was contended by Mr. Eames that the Defendants were therefore entitled as of right to enter on the Mordialloc foreshore unless that right had been lawfully taken away, that the Pipelines Act 1967 conferred upon the two companies no title or right to occupy the foreshore but merely a licence to go upon it to construct the pipeline and that therefore the purported exclusion of the Defendants was unlawful and that they could not be said to be trespassing.

For the informant, Mr. Nettlefold's argument was that Australian Pipeline Constructions by virtue of the permit, the licence and the authority of the Governor-in-Council granted to its employers pursuant to the Pipelines Act 1967 was lawfully in occupation of the limited area enclosed and that therefore each Defendant being in the enclosed area and refusing to leave on being warned to do so was guilty of the offence charged.

It is, I think, convenient to consider first what relevant rights the public and therefore the Defendants had in respect of entering on the foreshore apart from the Pipelines Act and the various authorisations given thereunder. I shall then consider the effect of that legislation and what was done in pursuance of it upon those rights.

Mr. Eames cited for the general position certain passages from the well known judgment of WINDEYER J., in Randwick Corporation v. Rutledge (1959) 102 C.L.R. 54 - a judgment in which Dixon C.J. Fullager and Kitto JJ concurred.

The judgment is, if I may with proper respect say so, an illuminating account of the historical origins of and the attributes attaching in law to Crown lands in Australia reserved from sale to be used for such purposes as public parks. His Honour said at p.70 "The term 'public reserve' - and the word 'reserve' when not controlled by a definition or a context indicative of a different sense - have come to be used in common parlance in Australia in an imprecise way to describe an unoccupied area preserved as an open space or

park for public enjoyment, to which the public ordinarily have access as of right". And he points out later on the page that in common speech a public park is a typical form of public reserve. This language is apt to describe the position in relation to lands reserved under Sec.14 of the Land Act as a public park, including the Mordialloc foreshore (c.f. 102 C.L.R. at pp.76-8). At pages 88-89 His Honour in discussing the New South Wales legislation relevant to the matter then in question makes some observations which are applicable to the provisions of the Land Act 1958. Speaking of the fact that the land to be exempt from rating under that legislation must be in the relevant sense open to the public as of right, he said that it was nevertheless not necessary for all members of the public to have free access to all parts of the land at all times, and gave examples - of exclusion for misbehaviour, of the regulation of use of the land having regard to the particular form of recreation and enjoyment taking place there, of the exclusion wholly of the public at particular times as at night, and of certain persons being allowed access at times when, or to certain parts from which the general public were excluded. All or any of these restrictions are not necessarily inconsistent with a general access as of right.

It would therefore not be inconsistent with the reservation of the Mordialloc foreshore as a public park under the Land Act 1959 that some restrictions might be placed on the right of members of the public or some of them to be or go upon it at particular times or to be or go upon particular parts of it. And of course it is competent for Parliament at any time to impose such restrictions upon the right of public access as it may think proper in regard to either space or time.

I did not understand the parties to be in difference as to any of this. Mr. Nettlefold contended however that the effect of the Pipelines Act and what was done under its

authority was on the relevant date effectively to restrict the public right of access to the area on which the defendants were and to authorize the two companies and their contractor to occupy that land to the exclusion of all others.
Mr. Nettlefold relied on Prior v. Sherwood (1906) 3 C.L.R. at 1034 as authority for the proposition that the particular piece of the foreshore concerned could be a place occupied by Australian Pipelines Constructions within the meaning of sec.9(1)(d) of the Summary Offences Act 1966 though it was part of a larger area to which the public at large had access. Prior v. Sherwood, which was a decision on the meaning of the word "place" in sec. 19 of the New South Wales "Games Wagers & Betting Act 1902", has really nothing to do with the present case. It followed the leading authority on the subject Powell v. Kempton Park Racecourse Co. (1899) A.C. 143. The criteria to establish the existence of a "place" which could be said to be used for the purpose of betting may or may not be appropriate to determine whether a "place" is occupied for the purposes of sec. 9(1)(d) of the Summary Offences Act. But whether or not I can see nothing to suggest that an area enclosed by a fence is not a "place" for those purposes.

Mr. Nettlefold examined the relevant provisions of the Pipelines Act 1967 in some detail. Sec.9 provides that no person shall own or use a pipeline unless it is constructed along the authorised route in respect of the pipeline and unless he holds a permit entitling him to own and use the pipeline. This language necessitates a reference to various definitions contained in sec.3. So far as relevant "Pipeline" means a pipe or system of pipes for the conveyance of anything through the pipe or pipes and includes all apparatus and works associated with the pipe or pipes. "Construction" includes the placing of the pipeline and "construct" has a corresponding interpretation. "Own and use" means the owning and being entitled to convey an authorized thing through the pipeline.

Sec.9 enables application to be made for a permit and a person proposing to apply may after obtaining the consent of the Minister enter upon Crown or other land lying in the intended route of the pipeline to make surveys or examinations. Sec.12 deals with the granting of the permit - it is a permit authorizing the applicant to own and use the pipeline along the authorized route. There are provisions regulating what may be conveyed through a pipeline - secs. 15, 16, 17 & 18. In the present case the permit to own and use the pipeline was issued to the two companies as I have said on 6 April 1970.

I turn next as Mr. Nettlefold did in his helpful examination of the Act to sec. 25 which provides that no person shall construct or own a pipeline unless he holds a licence issued by the Minister of Mines entitling the person to construct and operate the pipeline, and that no person other than a permittee shall be entitled to the issue of such a licence. As stated earlier the Minister on 11th June 1970 gave to the two companies "licence and authority" to construct and operate a pipeline along the route approved in the permit.

Now neither sec.12 nor sec.25 appear in Part III of the Act, which under the heading "Acquisition of Rights Over Land" comprises secs. 20-23. Sec. 20 deals with the granting of rights over Crown land to permittees. Sec.21 empowers public statutory corporations in appropriate circumstances to grant to permittees certain rights over lands vested in them or under their care and management, and sec.22 empowers permittees with the written permission of the Minister to take compulsorily easements over private land. Now the rights which may be granted under secs.20 and 21 are any lease, easement licence or other authority necessary or expedient to enable the permittee to construct an authorized pipeline or any part of the authorized pipeline through or over any land of the specified kind and to operate inspect maintain and retain any part of the pipeline.

Section 23 deals with notification of easements taken by permittees over Crown lands held on licence or lease and does not concern this case.

It is to be noted that while a lease could here have been granted in respect of the Mordialloc foreshore, it was not. The words used in the Order in Council of 14 June 1972 are "... the Governor ... doth by this Order authorise" (the two companies) "to construct the pipeline through or over the Crown lands" (here follows a description). While the words "licence" or "license" were not used as they could have been, this Order in Council does I think amount to a licence but no more. It grants the companies the right for the specified purpose to go upon the land and use it, but being the grant of a licence only it merely renders lawful conduct which otherwise would be unlawful. It certainly gives no right to such exclusive possession as would be necessary to enable the grantees to sue for trespass. A lessee can of course if in possession sue for trespass, but the owner of an easement can not (Paine v. St. Neots Gas Co. (1939) 3 All E.R. 812 at 823). A licensee has no right to sue a third person for a disturbance of his right (Hill v. Tupper 2 H & C 121). If some of the language used in Vaughan v. Shire of Benalla 17 V.L.R. 129 may be regarded as inconsistent with this proposition, the decision may yet be supported on Lord Atkin's "neighbour" principle as stated in Donoughue v. Stevenson (1932) A.C. 562. In any event the Court in Vaughan v. Shire of Benalla (supra) pointed out that the cause of action which it held the licensee there had lay in case and not in trespass.

For these reasons I am of the opinion that the informant cannot rely upon the Pipelines Act as the foundation for the proposition that there was a trespass by the defendants upon the place in question.

But "the mere de facto and wrongful possession of land is a valid title of right against all persons who cannot

show a better title in themselves, and is therefore sufficient to support an action of trespass against such persons" (Salmond on Torts 15th. Ed. 59). Or, as it is put in Halsbury 3rd. Ed. Vol. 38 p. 743 "any form of possession, so long as it is clear and exclusive and exercised with the intention to possess, is sufficient to support an action of trespass against a wrong doer."

Mr. Nettlefold relied on Moore v. Robb 18 A.L.T. 5 - a decision of the Full Court. Moore and Robb each entered into a contract with the Melbourne & Metropolitan Board of Works: Moore contracting to construct section 2 of a sewer and Robb to construct section 1 of the same sewer. The sewer was to be constructed on Crown land; it would seem that the Board of Works was not the owner. The terms of Moore's contract provided that the Board should give him possession of the ground, but it was not to be an exclusive possession and that the Board might retake possession for the purpose of carrying on any other works or for any purpose whatsoever. Moore started his work from the end furthest from the point of junction of the two contracts. After Moore had started, Robb in order to proceed with his contract sank a circular shaft 20 ft. in diameter, the centre of which was the junction point, 10 ft. of which therefore was on ground on which was to be constructed the final part of Moore's work. Moore sued for trespass and the Full Court (Williams, Holroyd and Hood JJ.) held that he had sufficient possession of the land to maintain the action. Objection was taken for the defendant that there was no such possession of the land by the plaintiff as would entitle him to bring the action and that he was a mere licensee, to which Hood J., observed that a licensee might sue for an interference with his licence, referring to Vaughan v. Shire of Benalla (Supra). Counsel for the plaintiff was not called on on this point.

Delivering judgment, Williams J., said:-

"The second point is that there was no such possession by the plaintiff as would entitle him to maintain this action. We think as against the defendant, who was a trespasser, there was sufficient possession. Very slight evidence would do as against a wrongdoer. The plaintiff was put in possession of this land by the body with whom he contracted. He only took possession of part, but the whole was defined."

I was troubled by the use of the word "trespasser" in this passage. I was at first inclined to question the validity of the argument for the word "trespasser" as it were assumed the conclusion. But His Honour's meaning was as I take it that the defendant had no right or title to go on the part of the ground referred to, and that therefore the plaintiff who was in de facto possession of the land could maintain trespass against him.

In the present case, Australian Pipelines Construction having enclosed the route of the pipeline through the Mordialloc foreshore with a fence were asserting a right to occupy it to the exclusion of others. If the defendants had no right to go upon it - if, as appears to have been the position of the defendant in Moore v. Webb, they had no right to go upon the Crown land in question, then Australian Pipelines Constructions might have maintained trespass against them irrespective of whether or not Australian Pipelines Construction's possession was de facto or de jure. But the defendants as members of the public had access as of right to the whole of the Mordialloc fore shore except to the extent that that right had been lawfully restricted.

In the present case, the Pipelines Act 1967 and, in particular, the Order in Council made pursuant to Sec. 20 did not restrict that right and it was not suggested by counsel for the informant that for present purposes public access was otherwise restricted. I must therefore conclude that neither of the defendants on 21 June 1972 trespassed on that part of the Mordialloc foreshore referred to and that the informations should have been dismissed.

So far as the defendant Knowles is concerned, the order nisi is made absolute with costs $200 and the order below set aside and in lieu thereof the information is dismissed.

There are difficulties in dealing with the matter as it concerns the defendant Iggulden. It appears that on 6 September 1972 an articled clerk in the employ of Iggulden's solicitors swore and lodged in the Prothonotary's office an affidavit in support of the application for an order nisi to review and sought leave to appear before Master Brett on that day. Master Brett was the appropriate Master to hear the application having regard to the alphabetical basis (if I may so term it) on which matters are distributed between the various Masters. Master Brett's secretary informed him that it was not possible for the articled clerk to have the matter heard within the period of one month limited by s.155 (1) of the Justices' Act 1958 to make the application. The reason given was that there was no time available within the period for the Master to hear it. The secretary set the matter down for hearing on 11 September 1972. Master Brett on that day adjourned it for further hearing to 23 September 1972 on which date on the application of counsel the order nisi was granted. The affidavit on which the order nisi was granted was that of the articled clerk, Carl Anthony Massola.

Paragraphs 5 and 6 of his affidavit were as follows:-

"5. I was present in Court during the whole of the hearing of the trespass information against John Manners Iggulden. No depositions in writing were taken at the hearing but the prosecution did arrange for transcript to be made and the Solicitors for the defendant Rodney Sinclair Knowles, Messrs. Slater & Gordon, were supplied with it.

6. I am informed by the said Solicitors and verily believe that the transcript is the exhibit marked with the letter "D" to an Affidavit of Rodney Sinclair Knowles sworn the 1st day of September, 1972, seeking review of the order made on the trespass information against him".

No further account of the evidence or proceedings was given in the affidavit, beyond the fact that it set out the appearances for the various parties, exhibited copies of the informations against Iggulden and stated that the Stipendiary Magistrate on the 7th August 1972 found the offence proved and adjourned the hearing until 7th August 1973 on the defendant entering into a recognizance.

It was objected by the informant at the outset of the hearing before me that the order nisi was granted out of time and that it should therefore be discharged. I decided to hear Iggulden's case together with Knowles' case on the merits, which in each case involved precisely the same question, and reserved my decision on this point until it became necessary to decide it. At the conclusion of the argument on the merits, Mr. Nettlefold submitted that the affidavit of Carl Anthony Massola on which the order nisi was granted was insufficient in that it did not properly

verify the evidence given in the Court below, and he referred to paragraph 6 in particular. A decision on this objection adverse to the defendant would render unnecessary to arrive at a conclusion on the first. I must therefore in any event deal with it.

The law in relation to this subject is so fully dealt with by Smith J. in Atherton v. Jackson's Corio Meat Packing Pty. Ltd. 1969 V.R. 850 that the need for reference to earlier authority is largely obviated. From His Honour's decision it appears that an affidavit of information and belief only may be received on the application for an order nisi to review as being an interlocutory application, (Order 38 Rule 3) and that there is a discretionary power to receive such an affidavit on the return of the Order Nisi under Order 38, Rule 14 and Order 70 Rules 1 and 2. I think that the effect of paras 5 and 6 of the affidavit is that the deponent is swearing on information and belief to the fact that Exhibit D to the affidavit of Rodney Sinclair Knowles sworn the 1st day of September 1972 is a transcript of what occurred at the hearing. It is true that the transcript was not exhibited to the affidavit of Mr. Massola, but it was thereby identified as an exhibit to Mr. Knowles' affidavit. It was on 23rd September 1972 that Master Brett granted each order nisi; the same Counsel appeared on each application, and there can be no doubt that the transcript exhibited to Knowles' affidavit furnished a substantial part of the material on which each was granted. In these circumstances I think it proper to exercise the discretion I have to receive the affidavit of Mr. Massola as sufficient on the return of the order nisi. (c/f. Atherton v. Jackson's Corio Meat Packing Pty. Ltd. 1967 V.R. at pp.853-4).

I am therefore required to determine whether the order nisi was obtained out of time. I have found the decision of this question much more difficult. Examination of the authorities must begin with Scott v. Commercial Hotel Merbein Pty. Ltd. (1930) V.L.R.

25. There the Full Court held that the application should be made within one month to a Judge and that application must be based on materials showing a prima facie case of error or mistake. The material in the present case presented on 6th September 1972 consisted of Mr. Massola's affidavit. It is here necessary to state that Mr. Knowles' affidavit, to which the transcript referred to by Mr. Massola was exhibited, was filed in the Prothonotary's office on 1st September 1972 as is shown by the date on the cancellation of the duty stamp. The transcript was therefore an exhibit to an affidavit already filed in the Court. The application in Knowles' case came before Master Collie on the same day and was adjourned by him for hearing before Master Brett, according to Master Collie's endorsement on Mr. Knowles' affidavit. While it may be very doubtful whether the actual exhibit remained in the Court, I have decided that I should conclude that the materials in Iggulden's case did on 6th September 1972 include the transcript and therefore did show a prima facie case of error.

The real problem is whether on that day an application was made to the Master. Here the judgment of Macfarlan, J., one of the judges comprising the Full Court in Scott v. Commercial Hotel Merbein Pty. Ltd., is important. I quote the relevant passage in full:-

> "The applicant must have his material on the file and apply on that material within one month to a Judge of the Supreme Court. The application may be then and there heard and determined by that Judge or may be adjourned expressly by him or by reason of the Court arrangements and routine for subsequent determination by himself or another Judge of the Court". (The underlining is mine).

The jurisdiction of the Judge in these matters may now of course be exercised by a Master. It is I think apparent from this passage in the first place that if Counsel having lodged his materials with the Associate, were to attend seeking to be heard before a Judge and the Judge rose before he could mention the

matter, he would have satisfied the requirements by reason of the second alternative in the passage I have underlined. Lodging of the affidavit with the Associate in Chambers is a sufficient filing (see Burns v. Bowman 1960 V.R. 470). The application is made to a judge, according to the terms of the Act, i.e. to a Judge in Chambers. While application of this nature are most frequently made in Melbourne in the Practice Court, they may be and are at times made to a Judge sitting in his private Chambers. If the Judge were so hearing a series of applications and, the affidavit having been filed with the Associate, Counsel was informed by the Associate that the Judge would hear no more applications that day, I am of the opinion that the same result would follow. Counsel would not in fact have been at any time coram judice, but he would have applied to him through his associate. The fact that he was not admitted to the Judge's presence should not I think affect the matter.

In the present case the articled clerk was in effect refused admittance to the presence of the Master. It is not to the point to question the wisdom of entrusting an application of this kind to the hands of one so junior. Someone more experienced or bolder might have sought another Master or even a Judge. Had he mentioned the application to the Master and the Master intimated that it was adjourned, no question would arise. Were the application one of the matters which the Masters' clerks had authority to adjourn under Order 54 Rule 23 (as it is not) it might have been easier.

It appears from a direction published in the Law Institute Journal for December 1972, which will fortunately obviate in future like occurrences, that the Masters have taken the view that the application would not have been made by the attendance of a solicitor's clerk on the Master's secretary with a signed request for an adjournment. I agree with this, but that is not the present case according to Mr. Massola's affidavit of 12th September 1972 describing what occurred on 6th September 1972, the effect of which I have set out above.

Not without some doubt I think that in the present case I should say that the application in the order nisi was made within the time limited, which expired on 7th September 1972 (McPherson v. Lawless 1960 V.R. 363) I think that it is within the spirit and intendment of the second alternative stated by Macfarlan, J. in Merbein Scott v. Commercial Hotel Pty. Ltd. that I should do so: it is no doubt extending the application of His Honour's reasoning to facts beyond those he envisaged.

The views expressed obiter in the two cases of Wilkes v. Perks 5 M. & Gr. 376 and Nazer v. Wade 1 B. & S. 728 confirm me in my conclusion. In the former case an attorney attended at the office of the Court of Common Pleas to sign judgment in default of pleading on 3rd January 1843. The officer suggested that a doubt existed whether Christmas Day and the three following days (on which days by Statute the office was closed) were to be reckoned in the time for pleading. The Attorney went away. In fact the days were to be reckoned and the time for pleading to the declaration expired on 2nd January 1843 so that the plaintiff was on 3rd January 1843 entitled to sign judgment. The defendant however died on that same day. Tindal, C.J. in refusing to allow the plaintiff to sign judgment nunc pro tunc said:- "Plaintiff might have had ground for the present application if the officer had refused to sign judgment, but he merely suggested a doubt which it was in the option of the Attorney to assent to or not".

In Nazer v. Wade (supra) plaintiff's attorney attended at the office of the Queen's Bench to have a writ renewed on the day of its expiration and paid the appropriate fee. He was suddenly called away and failed to get the seal impressed: he did not discover his mistake until too late to keep the writ alive by resealing so as to save the Statute of Limitations. After consulting a majority of judges of the other Courts, Blackburn, J. for the Court of Queen's Bench said that the Court had no power

to direct the officer to impress the seal on the writ as of the day when the attorney applied: but it would have been otherwise if the omission to reseal the writ had been occasioned by a fault of the officer of the Court.

In the present case, the Master's secretary should not have taken it upon himself as he in effect did to refuse the articled clerk admission to the Master himself: he should at any rate have referred the matter to the Master personally.

I therefore make the Order Nisi absolute in Iggulden's case also; the order below is set aside with costs $200 and in lieu thereof the information is dismissed.

I conclude by pointing out that my decision on the merits deals only with the highly technical question of whether the defendants were guilty of trespass. I am not concerned with anything else.