Legal Regime of Underground Water, 2008

NOTES AND COMMENTS

Legal Regime of Underground Water Resourses

Water exists in nature in different forms and in different places on earth including the underground. Underground water forms the part of the soil in which it exist. Common law leaves it to the landowner to decide what is to be done with the water available in his land. It is the absolute right of the owner of the property to tap the underground water to any extent even if it causes depletion of the water in his neighbourís property. A landowner under common law could dig a well on his land even at the cost of diminishing water in his neighbourís well.[1] This is the result of the position taken by the law that water, while moving or motionless in the earth, is not, in the eye of the law, distinct from the earth.[2] This could also be explained on the fact that in those days, a century ago, before the science of ground water hydrology came into being, it was beyond the human comprehension the facts about underground water. It was observed thus:

> ìThe secret, changeable and uncontrollable character of underground water, in its operations, is so diverse and uncertain that we cannot well subject it to the regulations of law, nor build upon it a system of rules, as is done in the case of surface streams.î[3]

The phenomenon of recharging and discharging of water resources of the sub surface soil is one not amenable for human control. It is because

1. *Greenleaf* v. *Francis*, 35 Mass (18 Pick) 117 (1836); *Roath* v. *Driscoll*, 20 Conp.533, 540,(1850), as cited in Robert Emmet Clark (Ed.), *Water and Water Rights*, Vol. 1, The Allen Smith Company Publishers, Indiana (1967) at p. 71.
2. *Roath* v. *Driscoll*, 20 Conn. 533,541, (1850); *Chatfield* v. *Wilson*, 28 Vt. 49,53(1855) as cited in Robert Emmet Clark. *Ibid*.
3. *Frazier* v. *Brown*, 12 Ohio St. 294 (1861) as cited in Robert Emmet Clark. *Ibid*.

of this reason that the common law left it unregulated. It is to be noted that the rule emanated from the practical wisdom, which warns against venturing to execute the impossible.

This being the position of law the deprivation of water to the owner of a spring, fed by percolations from a neighbourís land on which the latter abstracted the water, was *damnum absque injuria*.[4] Outcome of the legal regime evolved by common law is that the owner of soil is not answerable to any damage caused to his neighbour by his ìexcessiveî tapping of sub terrain water in his own land through any means. Law of easements is also not applied to water flowing underneath the soil. A right to underground water not passing in a defined channel cannot be acquired by prescription. A right to draw water from a well to irrigate the field cannot be acquired as an easement right by prescription.[5] Section 17 (d) of the Easements Act[6] lays down that there could not be any prescriptive right in underground water, not passing in a defined channel. The law on this question is discussed at great length in the case of *Acton* v. *Blundell*,[7] and reasons were assigned why the law of underground percolation should differ from the law of natural streams as regards riparian rights. It was decided in this case that the owner of a field, whose underground water percolating in undefined channels is exhausted by the mining operations of a neighbour, has not got such interest in water to maintain action against his neighbour. It would be noted that this case negatives any natural right in waters percolating in undefined channels under oneís field. Nor could any easement be prescribed for in the underground water in undefined

4. *Ibid.*
5. *Het Singh* v. *Anar Singh*, A.I.R. 1982 All. 468.
6. Indian Easement Act, 1882, s. 17 reads : Rights which cannot be acquired by prescription - Easements acquired under section 15 are said to be acquired by prescription, and are called prescriptive rights. None of the following rights can be acquired-(d) a right to underground water not passing in a defined channel.î
7. (1843) 12 M&W 324 as cited in G.C. Mathur (Ed.) *Amin and Sastryís Law of Easements*, Eastern Book Company, Lucknow (5th edn., 1984), p. 434

channels. In *Mst. Manturabai* v. *Ithal Chiman,*[8] it has been held that no easement right can be acquired over percolating water unless it runs in a defined stream.

It has been held in the case of *Chasemore* v. *Richards*[9] that no grant could be presumed as regards such underground water flowing in an undefined course. The reason why no such grant could be presumed is in the words used in *Ballard* v. *Tomlinson*[10], that ìpercolating water below the surface of earth is a common reservoir in which nobody has any property but of which everybody has (as far as he can) the right of appropriating the whole.î As there is no natural or prescriptive right in underground waters flowing in undefined channels, it is not an actionable nuisance to disturb or appropriate them. And it makes no difference to this rule according to the case of *English* v. *Metropolitan Water Board,*[11] that the undefined percolations eventually reach a defined channel of which the water could be and is the subject of natural and prescriptive rights.

Right of inhabitants of a town to take water from a certain well belonging to plaintiff was held not to be easement or a *profit a prendre* but customary right capable of being acquired by long user.[12] In India a right to draw water from a well can be a customary right.[13] As pointed out in the Madras case of *Malayam Patel* v. *Lakka Narayan Reddi,*[14] an agricultural custom whereby a subterranean stream is tapped at certain points by inhabitants of certain villages is perfectly valid and the English rule against the existence of rights in underground waters would have no

8. A.I.R. 1954 Nag. 103
9. (1859) 7 HLC 349 as cited in G.C. Mathur, *supra* n.7.
10. (1885) 29 Ch.D. 126
11. (1907) 1 K.B. 588 as cited in G.C. Mathur, *supra* n.7.
12. (1892) 2 Mad.L.J. 290 (291) (DB)
13. A.I.R. 1981 All. 438.
14. A.I.R. 1934 Mad. 284

application. It is also clear that Section 17(d)[15] has no application because it is prohibitory of prescriptive rights and not customary rights.

The historical reason for the evolution of these rules is the lack of knowledge of hydrology, which prompts one to leave it out of control precisely because you do not know what it is and how to regulate them. Since the, mechanisms for tapping under ground water was not much improved the chance of extraction of too much water was not in existence and as such it is unlikely to cause any serious social problem which requires mediation through law. Both these reasons no longer exist. The science of hydrology developed fast and now the processes involved in the recharge and discharge of underground water and the quantity of water available in a region are matters within human knowledge. The behaviour of underground water is no longer a mystery. Availability of powerful mechanical devices for drawing under ground water has also resulted in tilting the balance. Does this change called for a change in the attitude of the law and the legal system?

The legal system, which is worth its name, shall have the capacity to mould itself to meet the felt needs of the society. If an application of a rule results in perpetuating injustice and adds to the suffering of the people there should be ways and means available within the system to cushion it. This is what was done by many of the courts in America which rejected the concept of absolute right of the land owner to take unlimited quantity of underground water from his land even at the cost of depletion of water from the well of his neighbour. It is observed thus:

ìThe absolute-ownership rule respecting percolating ground water generally followed through the 1850ís and then, apparently for the first time, it met a sudden reversal. In 1855 and 1861, decisions from Vermount and Ohio, respectively, held specifically that the law recognised no correlative rights in the owners of lands overlying percolating waters.[16]

15. Indian Easement Act, 1882, s. 17, See *supra* n. 6.
16. *Chatfield* v. *Wilson*, 20 Vt. 49,53(1855); *Frazier* v. *Brown*, 12 Ohio St. 294, 300 (1861) as cited in Robert Emmet Clark, *supra* n.1. at p. 73.

Then in 1862 the New Hampshire court rejected the doctrine of absolute ownership of percolating waters in oneís land and adopted a rule of reciprocal reasonable use.[17]î

The new rule came to be known as the *American rule of reasonable use*, as contrasted with the *English rule of absolute ownership*, and was eventually adopted in various other states.

The old law books defined water as a movable, wandering thing, which because of its nature must remain common property subject to usufructuary rights only. The United States Supreme Court said:

> ìAs long as the Institute of Justinian, running waters, like the air and the sea, were *res communis*-things common to all and property of none. Such was the doctrine spread by civil-law commentators and embodied in the Napoleonic Code and in Spanish law. This conception passed into the common law. From these sources, but largely from civil-law sources, the inquisitive and powerful minds of Chancellor Kent and Mr. Justice Story drew in generating the basic doctrines of American Water Law. î[18]

The American courts through the rule of reasonable use insist limited use. This rule insists that the use of underground water shall be in such a manner as to make it possible for others to exercise similar rights. Under this rule, the landowner, in the exercise of his right, might dig a well on his land even though it drew water from the land or well of a neighbour. This is subject to the qualification that this right be exercised in consonance with the similar rights of other owners of lands overlying the same supply of ground water. It therefore entitles each overlying landowner to make a withdrawal of water from the common supply that is reasonable in relation

17. *Bassett* v. *Salisbury Mfg. Co*., N.H. 569,572, 82 Am. Dec 179(1862); as cited in Robert Emmet Clark, *ibid.*
18. *Id*., at pp. 8-9.

to the rights of all.[19] This rule restricts each to a reasonable exercise of his own right, a reasonable use of his own property, in view of the similar rights of others.[20]

This doctrine is capable of rendering justice in between parties who are falling back on same aquifer for their needs. In a way this rule will work against overexploitation by any single user to the detriment of others. In countries where such a course is not adopted by the Judiciary in evolving or interpreting the rules it requires statutory intervention to introduce changes in the legal principles. This is also necessary in a country adopting common law rules as its basic principles. This is so because the concept of liberty in common law is such that a person is free to do anything, which is not prohibited by law. And since there being no prohibition as to the extent to which an owner of property can exploit underground water, utilisation of underground water by him is an aspect of exercise of his liberty available in common law. Liberty under common law can only be limited or controlled by introducing law for that purpose. It is possible for the state to insist reasonable use of the underground water and can forge methods of control in this regard. Validity of such a law, of course, is not open for challenge in UK, but in many other common law countries there is a possibility of such a challenge in the light of constitutionally guaranteed rights of citizens. However this possibility may be further limited or controlled by the Constitutional Scheme adopted by the concerned national states. And perhaps the preferred freedoms, a concept wherein one could arrange freedoms in heirarchy and prefer one freedom over another, or justifying the regulatory measures on the specified grounds on which reasonable restrictions could be introduced for safeguarding public interest may become helpful in sustaining the regulation of unrestrained use of underground water.

19. *Ibid.*
20. *Ibid.*

Under an exercise of the police power, a state may abolish the rule of absolute ownership of percolating ground waters and substitute the doctrine of appropriation for beneficial use under state supervision. The only qualification is that the public welfare requires conservation and preservation of the water supply and the regulation adopted must not be unreasonable or arbitrary.[21] The same decision says that there is no necessity that irreparable damage be done before action can be taken to conserve and preserve.[22]

There could be situations wherein the available water resources may not be sufficient to meet all the demands. In such cases it may require regulation of the exploitation of the available water resource. In such a context the legislature may have to intervene to preserve the identifiable present use. It would be within the proper sphere of the legislature, to enact the statute in order to preserve lands presently in cultivation rather than to allow the water to be withdrawn in unlimited quantities to be used on lands potentially reclaimable where the supply of water was not adequate for both uses.[23]

With in the existing Constitutional Scheme of India there is possibility of evolving legal norms to control unfettered interference with natural resources to the detriment of the general public. One such tool, which is forged and developed by the Indian Judiciary, is the application of Article 21 of the Constitution of India. Through case law it has been accepted by the courts that every person has got a fundamental right to potable water as well as clean environment. Access to water is access to life and any interference, which adversely affects availability of potable water is an interference with the life of the persons thereby, deprives the constitutionally guaranteed right to life. The decision rendered by the High Court of Kerala

21. *Knight* v. *Grimes*, 80 SD 517 (1964) as cited in Robert Emmet Clark, *Id*. at p. 364.
22. *Ibid*.
23. *Id.* at pp. 364-365.

in *Attakoya Thangal* case[24] is a notable pronouncement based on fundamental rights. The Court restrained the Lakshadweep administration from tapping excessive ground water for the reason that it would interfere with the peopleís right to get potable water.

The point to be noted in this context is the real task of the constitutional rights and the methods through which those tasks are performed by the Constitution. The pertinent question in this context is that the constitutional norm addresses whom? Whose conduct the Constitution wants to check? The answer is that the constitutional rights check state action. Fundamental rights, being restrictions on state power, addresses state and enjoin the state to honor it in its actions. Failure to honour these rights will make the ìstate actionî unconstitutional and hence void. In any case of enforcement of fundamental rights through the extraordinary writ jurisdiction the petitioner has to establish that it is claimed against the state and the state instrumentality is the responsible person who infringed the fundamental rights of the petitioner. This position remains intact, though there could be instances where the court goes with the petition without bothering whether there is ìstate actionî or not. This tendency is evident in cases decided by the Supreme Court as well as various High Courts. It would be difficult to establish a direct involvement of state in cases where the acts complained against is not an act of state but that of private individuals in exercise of their proprietary rights.

Another dimension of the legal development in India is the adoption of the Public Trust doctrine as part of Indian law by the Supreme Court through a well-known decision rendered by it in *M.C.Mehta* v. *Kamal Nath*[25]. The public trust doctrine applies to public authorities in their dealings with public property. This doctrine acts as a limitation on the power of public authorities. It lays down that in specified categories of

24. *Attakoya Thangal* v. *Union of India*, 1990 (1) K.L.T. 580; see also *F.K.Hussain* v. *Union of India*, A.I.R. 1990 Ker. 321.
25. (1997) 1 S.C.C. 388.

property where the public has acquired rights of enjoyment it is not open to the Government and public authorities to assign the properties to private individuals whereby they infringes the rights of the general public. Such properties are held by the public authorities in trust and have to keep it as such so that the purpose of such trust is not violated. However it is to be noted that this doctrine will have no application where the person involved is a private individual and the property involved is one under his private proprietorship. However it is to be noted that in *M.P.Rambabu v. The District Forest Officer, E.G. District*,[26] it was held that enjoyment of the right by the owner could not be in a manner, which would be injurious to health or otherwise hazardous.[27] It was ruled by the court that deep underground water belongs to the state. And in such a context the doctrine of public trust extend thereto. The court made the position clear that the holder of a land could only have a right of user. That being the position he could not ask any action or do any deeds so as to affect the rights of others. Even the right of user, the court further added, would be confined to the purpose for which the land was held by him and not for any other purpose.[28]

In dealing with the issue of extraction of excessive water by the Coco-Cola Company in *Plachimata* the single judge in *Perumatty Grama Panchayat* v. *State of Kerala*[29]*,* seems to have relied on Article 21, evolving Environmental Jurisprudence, as well as on Public Trust doctrine adopted in *Kamalnathís case*[30]. This approach has its own weaknesses. The question pertinent in the context of exploitation of underground water by the Coco Cola company is the possibility of putting limitations that could be imposed on the proprietor, the company, in its

26. A.I.R 2002 A.P. 256
27. *M.P.Rambabu* v. *The District Forest Officer, E.G. District*, A.I.R. 2002 A.P. 256 at p. 267
28. *Ibid*.
29. 2004 (1) K.L.T. 731.
30. *M.C.Mehta* v. *Kamal Nath,* (1997) 1 S.C.C. 388.

exercise of property right. The court, while deciding the issue dismissed the validity of common law rules governing extraction of ground water by the private individual from his own property and observed thus:

The principles applied in those decisions cannot be applied now, in view of the sophisticated methods used for extraction like bore-wells, heavy duty pumps etc. Further, those decisions and above contentions are incompatible with the emerging environmental jurisprudence developed around Article 21 of the Constitution of India.[31] The Court further ruled :

> ìThe underground water belongs to the public. The State and its instrumentalities should act as trustees of this great wealth. The State has got a duty to protect ground water against excessive exploitation and the inaction of the State in this regard will tantamount to infringement of the right to life of the people guaranteed under Article 21 of he Constitution of India. The Apex Court has repeatedly held that the right to clean air and unpolluted water forms part of the right to life under Article 21 of the Constitutionî.[32]

The Court added further thus:

> ì...even in the absence of any law governing ground water, I am of the view that the *panchayat* and the State are bound to protect ground water from excessive exploitation. In other words the ground water under the land of second respondent does not belong to it. Normally, every landowner can draw a reasonable amount of water, which is necessary for his domestic use and also to meet the agricultural requirements. It is a customary rightî.[33]

I feel that the extraction of ground water, even at the admitted amounts by the second respondent is illegal. It has no legal right to extract

31. *Id*. at para. 13.
32. *Ibid.*
33. *Ibid*.

this much of national wealth. The *Panchayat* and the State are bound to prevent it. The duty of the *Panchayat* can be correlated with its mandatory function No.3 under the third schedule to Panchayat Raj Act namely, ìMaintenance of traditional drinking water sourcesî and that of the State of Article 21 of the Constitution of India[34].

Undoubtedly the single judge tried to base the decision on public law jurisprudence. This is done with an aim to evolve a set of norms through which exercise of property rights by private individuals are kept within bounds. This venture, if successful, will safeguard the public interest involved therein. The courts assertion that the underground water belongs to public is really an assertion of a principle in variance with the common law position that the property owner has got absolute right over underground water. This position to become acceptable should be founded on a very strong jurisprudential basis. This basis is lacking in Indian context which is the reason perhaps which lead to discrediting the decision by the Division Bench in *Hindustan cococola Beverages (P) Ltd.* v. *Perumatty Grama Panchayath,*[35] which dealt with the decision in appeal. The appeal Court asserted thus:

ì We have to assume that a person has the right to extract water from the property, unless it is prohibited by a Statute. Extraction thereof cannot be illegal. We do not find justification for upholding the finding of the leaned judge that extraction of ground water is illegal. It is definitely not something like digging out a treasure trove. We cannot endorse the finding that the Company has no legal right to extract this ëwealthí. Abstract principles cannot be the basis for the court to deny basic rights unless they are curbed by valid legislation. Even reference to mandatory function, referred to in the third schedule of the *Panchayat Raj* Act, namely ìMaintenance of traditional drinking water sourcesî could not have been

34. *Ibid*.

35. 2005 (2) K.L.T. 554 *per* M.Ramachandran and K.P.Balachandran, JJ.

envisaged as preventing an owner of a well from extracting water there from, as he wishes. The *panchayat* had no ownership about such private water sources, in effect denying the property rights of the occupier and the proposition of law laid down by the learned judge is too wide for unqualified acceptanceî.[36] If such restriction is to apply to a legal person, it is to apply to a natural person as well. The Court continued :

> ì We hold that ordinarily a person has right to draw water, in reasonable limits, without waiting for permission from the *Panchayat* and the Government. This alone could be the rule, and the restriction an exception. The reliance placed by the learned judge in *Kamal Nathís case* (*M.C. Mehta* v. *Kamal Nath*, (1997) 1 SCC 388) is not sufficient to dislodge the claim. The observation in paragraph 13 that the ground water under the land of respondent does not belong to it may not be a correct proposition in lawî.[37]

Thus the Division Bench has tilted the possibility of laying down a new rule of law in tune with the requirements of modern time. This approach allowed the private owner to go ahead with his exploitation of underground water without any hindrance. In this context one has to observe that the results of the case as laid down by the Division Bench, though technically right one, is not an inevitable one. There was scope for the court to develop a new legal principle in tune with the felt needs of the society. It is unfortunate that property jurisprudence was considered by the court as sacrosanct. The court refused to open up the issue and look the whole controversy in a new light though there was very strong need to do so. Thus the court lost an opportunity to mould the law to suit the needs of the present day society.

There are some hints in the decision itself, which shows that the judge is not accepting the absolute right of the landowner to extract water

36. *Id.* at para. 35.

37. *Id*. at para. 40.

as he pleases. A careful reading of the observation of the court would make it clear that what the court considered as uncontrolled right is *ì to draw water, in reasonable limits, without waiting for permission from the Panchayat and the Government.*î [38] What is the meaning of the term *ìin reasonable limitsî* as used by the court? Does it not envisage limitation to be put on the right of the landowner in extracting ground water, which goes beyond the *ì reasonable limitsî*? If that is so can we take this decision as one, which rejects impliedly the common law rule of absolute right? If this is to be taken as a decision rendered by the court based on *ìright to reasonable useî* a rule in tune with the American law of groundwater we may say that Indian law is making a turn to a more reasonable rule to govern tapping of underground water resources. In paragraph 53 of the judgment the court observed:

> For the year 2005-06, taking notice of the average rain fall that had been there in the locality, the company will be entitled to draw ground water not exceeding 5 lakhs of liters per day, without any right for accumulation in case of non-user per day. The *Panchayat* will be entitled to carry out inspection as coming within its jurisdiction, including the limits of use of water per day in a manner at their discretion, of course, without unduly interfering or inconveniencing the company. The company shall satisfy the *Panchayat* about the intake of water per day, keeping up-to-date log books and records.î[39] The Court further observed in paragraph 54 of the judgment thus:
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> ìÖwe have to direct that the company should actively involve in the community development programmes for the people residing in the locality, especially in the matter of health and drinking water supply at the supervision of the *Panchayat*Ö.Since the early settlers and general public are apprehensive about the shortage of drinking water, this becomes an essential duty of the company. The factory is drawing water resources from the *Plachimada* watershed, and also perhaps from other regions of *Chittur Taluk* through suction. Therefore a reasonable amount of the water so drawn are to be utilized for benefit of general public, and as directed from *Panchayat* from time to time. This work of water supply is to be undertaken and commenced before 30th of June 2005. The restriction imposed for its own consumption will not be applicable when water is drawn for this additional requirement.î[40]

38. Emphasis added.

39. *Supra* n. 37, at para. 53.

This observations made by the court definitely not in tune with the legal proposition on which the decision seems to have been rendered. For example see the assertion made by the court about the finding of the single judge. It reads thus:

> ì We have to assume that a person has the right to extract water from the property, unless it is prohibited by a Statute. Extraction thereof cannot be illegal. We do not find justification for upholding the finding of the leaned judge that extraction of ground water is illegal.î

If this is the legal basis of the decision rendered by the court in this writ appeal there is no scope for canvassing a position for *ì reasonable limitî* of the extraction of ground water. This is clearly an indication of the confusion in the mind of the Judge as well as his unhappiness about the existing rule of absolute right of landowners to extract ground water. It is unfortunate that the Division Bench does not care to articulate the concerns and attempt to formulate the right principles of law to be applied in the modern context. The decision in express terms reject any control on land holders right over underground water, in the absence of any statutory prescription to that effect and by implication gives effect to a concept of *ì reasonable useî* leaving the law student in confusion as to the exact *ratio* of the case.

40. *Id*. at para. 54.

It is to be noted that the Kerala Legislature took note of the need to intervene in the matter and to lay down rules to regulate tapping of underground water courses. It is unfortunate that this legislation and the scheme of control envisaged therein were not available in the present case for the reason that the legislation was not made applicable to the concerned region. If any remedy is to be availed under the legal provisions it could only be under this legislation. However it is to be noted that it may be possible for the Supreme Court to develop new jurisprudence of human rights and environmental law to bring into existence new principles to meet the ends of justice.

Even in cases where the legislature intervenes to bring in a statutory scheme for the control and regulation of extraction of ground water, it is essential to spell out the priority of use so that in extreme scarcity there will be a legally sanctioned way of prioritization of water distribution and appropriation. American water law provides for it.

Preferences to certain uses must be taken into consideration, and it is clear that a statute is not needed to recognize human uses as the highest use. There may be an adequate supply of water to meet the demands of several classes of users, but in order to ensure domestic supply, the law may put restrictions on the rights of some uses. The law may establish a hierarchy of preferences to certain uses based upon human needs, economic considerations of supply and demand, and maximum utilization of resources to meet community needs.[41]

The natural-flow theory, or English rule, when pressed to its logical extreme would not have permitted any uses of a stream if each riparian owner were to receive the stream flow unimpaired in quality and undiminished in quantity. The rule in this form could not provide for consumptive uses. It was made workable because it permitted ìnatural usesî that is, those necessary to support human life, and another class of ìartificial usesî was established which included those uses designed for

41. *Id*. at p. 360.

manís profit and comfort. These uses were permitted only when ìnatural useî claims were satisfied.

In this context a preference is a beneficial use that receives a special, or higher, priority or value than some other beneficial use. Not all beneficial uses have equal value to the community. The concept of preference was recognized in the common law by separating ìartificialî or extra ordinary uses from ìnaturalî or ordinary uses which were preferred because essential to human survival. Domestic uses were preferred to extent of allowing a riparian to reduce or deplete a stream flow for his household uses despite injury to lower riparian owners.[42]

A system similar of this prioritization could be adopted in case of extraction of ground water recourses also. This scheme is seen absent in the Kerala legislation governing ground water extraction.

Conclusion

The law governing underground water in India is based on the principles of English law of absolute proprietorship. This rule though justified in its origin no longer holds water. The present day society, which faces the scarcity of water resourses, needs different sets of rules to cater the needs of the society. The decision of Kerala High Court in Coco cola case is one based on the common-law principle of absolute proprietorship. What is required is the formulation of a law, which puts regulatory measures on the absolute right of the landowners. This is what exactly being done by the Kerala legislation on underground water. The statute fails to provide prioritsation of use. In this regard the law requires an amendment.

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42. *Id.* at p. 369.

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