

PRIORITY OF APPROPRIATION
AS REGARDS RIGHTS IN WATER FOR IR-
RIGATION IN THE STATES AND TERRITO-
RIES OF THE ARID REGIONS.

By

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Priority of Appropriation as regards Rights in Water for Irrigation in the States and Territories of the Arid Regions.

The common law of England has ever been considered by the courts of this country to embody the rules which are to guide them in the administration of justice. This is true, however, only in so far as these rules are in a general nature applicable to our institutions and to the requirements of any particular community. To meet such requirements, it frequently becomes necessary to modify or even repeal the common law rules by legislative enactment.

In the statutes of many of the states this principle is expressly declared and incorporated in so many words.

By the authority of many eminent writers on English common law, not only from one's own study of the matter, it is observed that the law of water, while a branch most interesting to the student, is also one of the most perfect of the many theories of the common law. Yet,

paragon as it is, upon the opening up of the arid regions of the United States it was cast aside as utterly insufficient to meet the requirements of this vast region; a region more than thirteen times greater than the country that formulated the common law doctrine of water rights.

I. RIGHTS IN WATER AT COMMON LAW. At common law those, and those only, who held lands bordering on a natural stream or lake had the right to the use of the water. They could only use it to the extent of what was considered a reasonable use for their necessary purposes. If they diverted the water they must return it to the stream before it left their lands practically unchanged in quality and quantity. There was no such thing as the doctrine of priority of appropriation. The last man to hold lands on a stream had equal rights to it with the first settler.

Judge Story said in one of his famous decisions reported in 4 Mason, 397, that there may be an appropriation of a thing common by nature, such as water, by general consent or by grant, but that no exclusive right resulted by means of mere priority of appropriation of running water, where it appeared that no such consent or grant existed. The common law for ages had assured to

the riparian proprietor the right to use the water of the stream in common, as incident to the land he occupied, and the person who sought to found an exclusive use must establish his right to such appropriation in some manner recognized and admitted by the law. But the law only recognizes a grant from all the proprietors of lands along the stream, or a long exclusive enjoyment without interruption, affording a just presumption of right. The theory of priority of appropriation in itself has no place in the law as expressed by this eminent jurist.

This rule laid down by Judge Story has not in every instance appeared at all clear to many courts. There are many cases in the books that go almost to the extent of the doctrine in the states and territories of the arid region. A right of a riparian proprietor to use the water for the purposes of irrigation with little regard to the manner in which it affects a proprietor situated farther down the stream seems to have been recognized. It has been held in this country that a riparian owner may lawfully use the water of the stream for purposes of husbandry including irrigation, and if the owner below has been wronged thereby, the wrong is not of such a nature as to merit a remedy at law.

In *Weston vs. Alden*, 8 Mass., 136, the court gave it as its opinion that a man owning land on an "ancient brook" may lawfully use the water thereof for the purposes of husbandry, "as watering cattle, or irrigating his close"; and he could put the water upon his land for purposes of irrigation either by dipping it up from the stream and pouring it upon his land or else by making ditches and running it upon his land, and if, by so doing, he worked a damage to the owner of land below him on the stream, it was damnum absque injuria.

The same controversy has arisen in England in a few cases. There seems to be a tendency in these decisions to favor the doctrine that one may by grant or prescription gain the right to abstract water from a water course for the purpose of fertilizing land. Yet these cases imply that the water must not be taken so as to materially diminish the quantity of water which naturally runs in the water course. A person could not, under this rule, use water for irrigation.

In stating the opinion of the court, in *Elliot vs. Fitchburg R. R. Co.*, 10 Cush., 194, Justice Shaw said that sometimes the question arose whether a riparian proprietor had the right to divert water from a running stream, for purposes of irrigation. In his opinion it

was an abstract question which could not be answered either in the affirmative or the negative, as a rule applicable to all cases. That a portion of the water of a stream might legally be used to irrigate land, he thought was well established under the common law as one of the rights of the proprietors of the land along or through which the stream passed. But he would not admit that the proprietor, could legally, under color of that right or for the actual purpose of irrigating his own land, entirely abstract or divert the water, or take such an unreasonable quantity of water, or put it to such unreasonable use as would deprive other proprietors of the substantial benefits which they might derive from it if not diverted or put to unreasonable use.

Long ago it was decided that a riparian owner might take advantage of a stream running through his land to irrigate and fertilize his meadows, provided he does not deprive the adjoining proprietor or any owner holding land below on the same stream of a sufficiency of water for household purposes, or for watering cattle; provided also that the water, thus diverted for irrigation, shall ---unless absorbed on the land--- be returned to its natural channel before the stream leaves his land. In

such a case it was held that he would have a prior right if he were first on the stream and had the first opportunity.

Perkins vs. Dow, 1 Root(Conn.), 535.

In Angell on Watercourses, where this case is discussed, the writer does not state whether the prior owner on the stream must make use of this first opportunity in order to support his right. According to the report this consideration does not seem to be touched. It would appear then that this point was left uncertain and that some courts might hold that from his priority of settlement he would be considered as having the right to use the water for the purpose above considered, even though a subsequent settler had actually begun to use the water for irrigation, while the prior settler had not as yet used it for that purpose.

Of course there would be no question, according to the later English decisions, if the subsequent settler had used it for a time sufficient for him to support his right upon the ground of prescription.

Haywood vs. Mason, 2 Swift's Syst., 87.

Kent in his Commentaries says that streams of water are for the use, comfort and enjoyment of man; but it

would be unreasonable and in opposition to the sense of the generality of mankind to debar every riparian owner from the application of water to domestic, agricultural and manufacturing purposes; with this proviso, that the use of the water be so limited that he does no material injury or annoyance to his neighbor below him, who has an equal right to the subsequent use of the same water.

3 Kent's Com. 439, 440.

"If a stream be unoccupied, I may erect a mill thereon, and detain the water; yet not so as to injure my neighbor's prior mill, or his meadow: for he hath by the first occupancy acquired a property in the current." So states Blackstone.

2 Blackstone, 402.

Some courts have found his meaning here somewhat obscure, but even in its broadest construction it does not meet the requirements of the law of water in countries where irrigation is practiced.

In Williams vs. Mortund, 2 B. and C., 913, and in 7 Bing. 692, one finds dicta to the effect that according to the law of England the proprietor who makes a prior appropriation of any part of the water flowing through his land to his own use has a right to the use against

any other of so much as he thereby appropriates. But this we must observe is merely dicta and should be taken only in that light.

I have noticed above some of the cases which possibly in a sense should be called extreme cases under the common law rules of the law of water. I notice them because they seem as near the boundary toward the doctrine of the law of the arid regions as it would be possible to apply common law rules. There are scores of other cases in both England and the United States which show that the law of water, upon the point in question, falls short, in a sense, of the stand taken by the cases above cited.

The conclusion to be drawn seems to be that under the common law a prior appropriation of water does not give superior rights, unless it has been continued a sufficient period of time to maintain a presumption of a grant.

Martin vs. Bigelow, 2 Ark., 187.
Platt vs. Johnson, 15 Johns., 213.
Gilman vs. Tilton, 5 N. H., 231.

We notice in all these considerations that it is only the riparian proprietors that are recognized as having rights to the stream on the banks of which they hold property. This is another point in which the common law

is inadequate to the needs of the west.

The proprietor who holds land at some distance from the stream must have some means whereby he can make that land productive.

II. THE DEVELOPMENT OF THE NEW THEORY. In the development of the new theory we see shown in these latter times the manner in which all law is created. First came the custom and afterwards the courts recognized the custom and it becomes law. Finally, that there may be no dispute, legislative acts are passed which establish the law beyond dispute.

In regard to this legislation, Mr. Pomeroy says that it has "wholly abandoned and abrogated all the common law doctrines regarding private property in streams and lakes and concerning the riparian rights of riparian proprietors". In express terms these statutes are made to apply to all streams, whether running through public lands or bordered by lands owned by private individuals. A person owning lands on the banks of streams has no legal advantage under the statutes over his neighbor occupying lands remote from the streams. Unless he has actually appropriated and diverted the water for beneficial use on his land, he is liable to have perhaps the whole stream appropriated and diverted for use upon his

neighbor's lands which do not border on the stream, but may be at any distance from it.

Pomeroy's "Riparian Rights", 2.
West Coast Rep., 594.

The doctrines as to the rights in water gained by priority of appropriation and contrary to the common law rights of riparian owners originated from the customs and necessities of the placer-miners on the public domain. No person could hold the public lands or streams or any rights in them to the exclusion of any other except by some grant, patent or license from the government, unless it be by some well recognized custom or usage of the locality. At an early date in the history of the development of the country of the far west the custom was firmly established and vigorously upheld, even before courts were organized in the new country, that priority of possession and appropriation gave priority of right in both land and water; only so long, however, as the claimant made continuous and beneficial use of the same. The courts of the new states and the territorial courts, upon their organization or at least at a very early date, recognized this custom.

Lobdell vs. Simpson, 2 Nev., 274.
Schilling et al. vs. Rominger, 4 Colo., 100.
Bear River Co., vs. N. Y. Min. Co., 8 Cal., 327.

Congress passed acts which recognized these inchoate rights. These statutes took different forms, some referring to mining claims and locations and pre-emption claims and the like. These of course did not touch directly upon the subject in consideration, but in July, 1866, Congress legislated expressly upon the question of the pre-emption of water in the natural streams and lakes of the public domain. The enactment was as follows:

"U. S. Rev. Stat. 2339 (Vested rights --- Right of way). Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of the courts, the possessors and owners of said vested rights shall be maintained and protected in the same, and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed".

In 1870 Congress further enacted:

"U.S. Rev. Stat. , 2340 (Patents, subject to vested rights). All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used

in connection with such water-rights, as may have been acquired under or recognized by the preceding section".

It is to be noticed that these statutes merely declare or recognize a pre-existing right. It is not left to be implied. The words of the statute expressly acknowledge the right gained by priority of possession. They merely formulate a rule of construction "which the courts would have applied without the passage of these laws."

Broder vs. Natoma Water Co., 11 Otto (U.S.), 274.
Osgood vs. Eldorado Water Co., 56 Cal., 571.
Coffin vs. Left-Hand Ditch Co., 6 Colo., 446.
Carpenter's Law of Water for Irrigation in Colo., 10.

These statutes apply only to streams wholly within the public domain. And, as in the case of pre-emption of lands, they do not make provision as to how these rights in water should be defined and secured. It lies wholly with the courts and legislatures of each state or territory to determine these matters which form the whole part and parcel of the new theory. Hence the operation of these statutes seems merely to be a relinquishment by the general government of rights which it might claim as liege lord of the public domain.

For this reason there may be found a lack of conformity in the laws of the different states and territories of the arid region. Yet these differences seem only to be on minor points and the main theory of the law is

the same throughout all. Regarding Colorado, Mr. S. W. Carpenter says: "In this state(Colorado) the courts have from the first denied the existence of any private property in water, or the flow thereof, in riparian owners as such. In the case ~~of~~ Schilling ~~et. al.~~ Rominger, 4 Colo., 100, which was the first case in which our supreme court passed on this point, and in which the right accrued prior to the adoption of our state constitution, the court held: 'that the first appropriator of the water of a natural stream has a prior right, to the extent of ~~xx~~ his appropriation, is a doctrine that we must hold applicable in all cases respecting the diversion of water for the purpose of irrigation;' and they place their ruling on the grounds that, 'in a country with a climate ~~wxxx~~ like ours the right arises ex necessitate rei;' and hence the statute may be regarded as declaratory merely of the law of necessity in this respect, and as regulating the right thus acquired."

Carpenter's Law of Water for Irrigation in Colo., 11.

With reference to the United States statutes above cited, in 6 Colo., 447, Coffin vs. Left-Hand Ditch Co., the court says: "The right to water in this country by priority of appropriation thereof -- is entitled to protection as well after patent to a third party of

the land over which the natural stream flows, as when such land is part of the public domain; and it is immaterial whether or not it is mentioned in the patent and expressly excluded from the grant."

A good discussion of the development of the new theory of water rights may be found in the case of Atchison vs. Peterson, 20 Wallace, 507. It is a case that arose in Montana.

The waters of natural streams are, as a rule, the waters subject to appropriation, and of course the majority of the rulings are upon rights regarding such waters. The Constitution of the state of Colorado provides that "the water of every natural stream not heretofore appropriated," within the state, is public property, dedicated to the use of the people of the state to be appropriated by them to whatever beneficial uses they may desire..

Const. of Colo., Art. XVI., Sec. 5.

It says further that the right to divert unappropriated water shall never be denied, and that priority of appropriation shall give a better right as between persons using the water for the same purpose. If there is not a sufficient amount of water for all who wish to use it, then those using it for domestic purposes shall

be preferred over those using it for any other purpose, and those using it for agricultural purposes over those using for manufacturing purposes.

Const. of Colo., Art. XVI., Sec. 6.

The right to divert the water and the doctrine of priority were law in that state previous to the adoption of the constitution.

Schilling et al. vs. Rominger, 4 Colo., 100.

A natural stream within the meaning of the law of water for irrigation must be one in which the water usually flows in a certain direction and in a well defined channel.

It appears that it need not be shown that the water flows continually, the bed of the stream may be dry at times. It must appear, however, to have "a well defined and substantial existence."

Barns vs. Sabron, 10 Nev., 217.

The same rules apply to underground currents of water provided their course is well defined and their existence known.

Hanson vs. McCrue, 42 Cal., 303.

III. PRIORITY OF RIGHT --- HOW OBTAINED, AND FROM WHEN PRIORITY DATES.

Appropriation dates from the time that work is actually commenced. There are statutory regulations which

direct just what is to be done in order to create a legal appropriation and thus bar other parties. A person beginning a construction is usually required, within a certain time after the beginning of the work, to file with certain specified officers a map showing in general the location of head gate of ditch and the route of such ditch, with such other specifications as will clearly describe the location and course of ditch. There must be upon or attached to such map a statement showing certain things about such ditch as the statutes may require. This statement in general contains, in most of the states and territories, the name, of the canal or ditch; its situation, course, size and grade; carrying capacity in cubic feet of water per second of time; when work of construction began; names of owners. This statement after being drawn up is signed by the person or persons upon whose behalf it is made, and the truth of the matters set forth therein must be sworn to before the proper officer by some person or persons who shall have personal knowledge of the truth of the same. In Colorado the officers, with which such map and statement are filed, are the county clerk and recorder of the county in which the head gate of such ditch may be situated, and

the state hydraulic engineer.

These statutory provisions in general apply to reservoirs and feeders to them and the ditches from them,

These rules also apply in case of enlargement of an old canal. To meet the requirements of the enlarged ditch or canal there is really a new appropriation, dating from the time work was begun on the enlargement.

Under the statutes of Colorado it would seem that the date of the beginning of the survey of the line of the future ditch or canal may be taken as the time of beginning work within the meaning of the rule.

But in California it has been held that the line upon which the ditch is actually to be constructed must be run within a reasonable time after the date of the running of the line of the preliminary survey, in order to make the right date back to the beginning of the survey.

Parke vs. Kilham, 8 Cal., 77.

It would appear from the 7 Colo., 153, that in this connection the rule adopted in California and Nevada obtained also in this state. Even though appropriation is not considered complete until actual diversion or use of the water, still, if the work had been prosecuted with reasonable diligence, it would be held that the

right related back to the first step taken to secure it.

18 Nev., 436; 56 Cal., 571; 15 Cal., 271;

9 West Coast Rep. (Utah), 798; 1 Mont., 535.

It is held that if it is necessary to do certain work in order to complete the appropriation, a reasonable time is allowed in which to do such work and the rights are protected by relation to the time when the first act was done. If there has not been proper diligence in the prosecution of such work, the date of appropriation will be held to be from the time when the work is completed.

4 Nev. 534.

In all cases there must be a successful application to the beneficial use for which the canal or ditch was constructed, and this must be within a reasonable time after the commencement of the work. To determine what is reasonable time in each case, the question of due diligence must be considered.

6 Colo., 530; 15 Cal. 271.

It is also necessary, at the time of beginning the construction of the ditch or canal, that there is a present bona fide design to use the water appropriated for some beneficial purpose. It is sufficient if there is a present bona fide contemplation of a future appro-

priation. There can, however, be no appropriation for speculative purposes merely.

14 Nev., 167; 7 Colo., 148; 15 Cal., 271.

IV. PRIORITY OF RIGHT --- HOW LOST. From what has been noticed above, it appears that priority may be lost through the want of due diligence in prosecuting the work of appropriation.

In order to acquire a right to water from the date of diversion, one must, within a reasonable time, use it for the purpose for which it was diverted or appropriated. Failure to use the water, subject to the rule above stated, is held to be competent evidence of the abandonment of the right thereto, so if continued for an unreasonable period it will raise a presumption of intentional abandonment. Such a presumption is by no means conclusive, however, and may be overcome by satisfactory evidence.

7 Colo., 148; 9 West Coast Rep.(Colo), 527;

2 New Mex., 480.

There may be an adverse use of the water by another for a sufficient period to bring it within the statute of limitations and thus defeat the priority of a former appropriator.

16 Nev., 312.

Priority may be lost by a failure to comply with the provisions of the statute.

Carpenter's Law of Water for Irrigation in
Colorado, 33.

If a prior appropriator has for a long time neglected to use the water and permits another to divert such water and does not notify the subsequent appropriator of his prior appropriation, he is presumed to have abandoned the same.

7 Colo., 79; 9 West Coast Rep. (Utah), 798.

This right held by an appropriator is an interest in land and hence an attempted verbal sale or transfer of his right is held to operate as an abandonment of his priority. For the reason that it conveys nothing to the other party and at the same time it shows an intent on the part of the prior appropriator to relinquish his right.

Smith vs. O'Hara, 43 Cal., 341.

Barclay vs. Tiekele, 2 Mont. , 59.

A mere change in the point of diversion on the same stream or a change in the use to which the water is applied will not defeat the priority of an appropriation. But this rule will not apply in case there has been a change in the amount of water taken or in its

quality when returned to the stream; neither must intervening appropriators' rights be affected.

32 Cal., 26; 7 Colo., 148.

It is held that one may appropriate water and return it to the natural stream with the intention of taking it out below and it will be regarded as one and the same appropriation. In this the intention to retake seems to be the vital point.

Richardson vs. Kier, 37 Cal., 263.

Davis vs. Gale, 32 Cal. , 26.

In this brief survey of a portion of the law regarding the priority of appropriation of water we notice many questions that may be raised which are as yet unsettled. These questions, ever arising, bid fair to keep the courts, of the states interested in such matters, busy for many years to come. Since the law upon this subject is comparatively new the action of the courts will be watched with unflagging interest.