LAW OF WATER RIGHTS

The young lawyer who expects to practice in the far western States ought to take special care to study the underlying principles of the law of water rights. In Colorado, North Dakota, Montana, Wyoming, Washington, Nevada, California, Oregon, Utah, Idaho, Arizona and New Mexico, rights to the use of water have become most valuable properties, and litigation concerning them is important and not easy of settlement.

The student will find that, from time to time, as settlement throughout the West has extended, each State and Territory has enacted laws of its own, attempting to meet peculiar local conditions by defining the rights of appropriation of the streams within its borders. In the Rocky Mountain States, however, the legislation is substantially the same. To illustrate the character of questions presented, let us take this case arising in Montana: Two ranchmen, A and B, severally own in fee simple distinct parcels of land, lying on either side of a mountain creek. Each has access to the creek. Neither has diverted any portion of the water. A wants to construct a dam to use in connection with an electric light plant that he wishes to build; so he proceeds under the State laws of eminent domain and of right to appropriate water. Now, inasmuch as there will be some overflow upon B's land, it is conceded by A that he must pay B some damages; but they cannot agree upon the measure of compensation. Inquiry must therefore be had into the extent and quality of B's property. And thus will arise the serious question whether, in the State of Montana, B has a right to have the water of the creek flow in its customary channel without impediment? or, stated in another form, what rights, if any, has B as riparian owner against A, who is about to appropriate the water?

We start with the common law rule that B possesses the right as riparian proprietor to have the stream flow by his land without interference, and that the common law right gave him the natural and usual flow of the water, the right being annexed to the soil, passing with the land as part of it. The right is a corporeal one: a hereditament. But we are met immediately with the question whether B's rights are to be tested by the common law, or whether they have been so affected by statutory legislation that he will be denied the ancient privilege of having the natural flow of the waters

through his lands. It will be found that in Montana and several of the other far western States, the common law was adopted as a basis of jurisprudence. There was a provision of the statutes of Montana Territory to the effect that the common law was adopted so far is it was applicable and of a general nature, and not in conflict with the special enactments of the Territory. But the doctrine was soon recognized that the common law was not to be taken in all respects to be the law of America. "Our ancestors," said Justice Story, in *Van Ness v. Packard, 2 Peters 144,* "brought with them its general principles and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation." See *Star v. Child, 4 Hill, N. Y., 369.*

The student will find, too, that the Supreme Court of the United States has at various times limited the rule of adoption of the common law with respect to water rights. In a case originating in Montana (*Basey v. Gallagher, 20 Wallace 461*), it was declared that the use of water for mining, agricultural and manufacturing purposes was subject to control by the statutes of the Territory of Montana, and that the doctrines of the common law touching riparian owners were inapplicable, or, at least, applicable only to the extent of the necessities of the inhabitants of the locality. Like rule was established in *Atchison v. Peterson, 20 Wallace, 507.* It will be found, too, that in the statutes of the States where there are large bodies of arid or semi-arid lands, the common law rule that the riparian owner has the right to the natural and usual flow of water is abrogated, and that of actual appropriation of the water upheld. Furthermore, the courts have steadily held that the right to the use of running water may be had only for beneficial uses, and can be acquired only by actual appropriation. This tendency on the part of judicial decision has become more pronounced as the settlement of the country has advanced; and as it has become more apparent that the actual user of water is the person who should be favored, as against one who would hold or appropriate without actual use.

It has been argued that one who acquires the public domain by title from the United States is assured of a right to the use of the water unappropriated at the inception of the title, and that the State cannot, by statute or custom, deprive the grantee of the United States of such right, and that the rights of the United States are passed by patent, and have become vested in the water to the grantee, and that, therefore, there is a right to its uninterrupted flow, which

cannot be taken away except for a public use and under eminent domain statutes.

When analyzed, this contention really is that the principles of the common law are applicable, except, perhaps, in instances where, prior to the origin of the grantee's rights, there has been actual appropriation. Whatever force there may be in this argument, still it does not answer the question what property passed to the settler by the grant from the United States. It follows that the student is driven to the necessity of considering what is the effect of a patent from the United States. Is the United States, in Montana, or in other States with similar legislation, possessed of the common law rights of a riparian proprietor? When the United States issues a patent to a settler whose lands are adjacent to a creek, does it grant common law rights as inseparable from the land itself? One branch of the argument is that the State cannot pass a law which would embarrass the right of the general government in the disposition of the public domain. But that does not dispose of the underlying question whether the laws of the State constitute an interference with the right of the general government to dispose of the public lands and waters thereon.

Now, a grantee takes, generally, subject to the conditions, limitations and reservations contained in or annexed to the grant. It would seem to be indisputable, too, that a riparian owner may grant his land to one and the water incident to the land to another. This involves separation of the water and right to the use of the water from the land itself; but this is neither impracticable, nor is it uncommon in the customs of the western States.

Of course, there may be a reservation of a riparian right or of a right to the use of the water, or there may be no reservation, and the conveyance may pass the use of the water in whole, leaving the fee of the land vested in the grantor. *Cross v. Kitts, 69 Cal. 222.* Again, when the United States grants patents to lands in Montana, it annexes to the grant the condition that it is subject to the customs, laws and decisions of the courts of the State relating to the appropriation and use of water. Such grants must, therefore, be read as if containing that condition, so that the grantee shall be deemed to take the full legal title to the land itself, and such title to the water flowing over the land as is acknowledged by such customs, laws and decisions. But he takes no more.

We find that Congress has recognized the laws and customs concerning water rights. Act of July 26, 1866, and July 9, 1870, R. S. U. S., Sections 2338, 2339, 2340; Act of March 3, 1877,

1 Supplement R. S. U. S. 137; Act of March 3, 1891, 1 Supplement R. S. U. S. 946; Act of March 2, 1884, 1 Supplement R. S. U. S. 698, 946. It would make this article too long to quote the statutes, but they are very important in their relation to the question.

The principle just stated was denied in the elaborate opinions of the Supreme Court of California in *Lux v. Haggin, 4 Pac. 919,* and by the Supreme Court of Nevada, in *Van Sickle v. Haines, 7 Nevada 249;* and, perhaps, intimations denying the scope of the doctrine may be found in *Stur v. Beck, 133 U. S. 541.* But the Supreme Court of Nevada overruled *Van Sickle v. Haines* in *Jones v. Adams, 19 Nev. 78,* and in *Reno Smelting Works v. Stevenson, 20 Nev. 269.*

The Supreme Court of California has modified the doctrine of Lux v. Haggin, if not overruled it, by the decision in *Modoc Co. v. Booth, 36 Pac. 431.* The case of Stur v. Beck, referred to, must be construed with reference to the statutes of Dakota, which seem to have recognized the appropriation of water as having been made subject to the right of the riparian owner.

It can be safely said, however, that it is laid down now by learned courts that a grantee of the United States has not the right to the usual and natural flow of the water over his land as against one who appropriates the water after patent issues. The following opinions will be found interesting and helpful: *Coffin v. Left Hand Ditch Co., 4 Colo. 443; Jones v. Adams, and Reno Smelting Works v. Stevenson, supra; Clough v. Wing (Arizona), 17 Pac. Rep. 453;* and the very able dissenting views of Judge Ross in *Lux v. Haggin, supra; Kinney on Irrigation, Secs. 145, 148, 203, 221, 272, 287.*

The precise question involved never has been considered by the Supreme Court of the United States, but it is believed that the doctrine outlined as the correct one will be upheld.

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