

6-1894

# Irrigation Laws of the West

George Harrison De La Vergne  
*Cornell Law School*

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IRRIGATION LAWS OF THE WEST.

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THESIS FOR DEGREE OF LL.B.

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GEORGE HARRISON DE LA VERGNE, Ph. B.

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CORNELL UNIVERSITY.

JUNE.            1894.

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## IRRIGATION LAWS

## OF THE WEST.

Of the great region lying west of the Mississippi, only a very small portion can be cultivated without the aid of irrigation. Vast areas in Colorado, Arizona and California are parched, alkaline and arid. The small mountain streams serve to mark here and there the brown plains with a vivid line of green; and the greater streams like the Arkansas and the Platte hurl themselves tumultuously from out their dark, narrow canons, to be swallowed up only too soon in the thirsty desert. The clouds which float in white masses over the plains hardly distill more than a passing shower upon the parched earth. Little wonder that in such a region water should be considered almost as valuable as the gold or silver hidden within the depths of the mountains. And in dealing with the subject of irrigation the assemblies of the people have a most serious matter for legislation and the courts for construction.

naturally in the process of application of the law, to an entirely new and strange situation, several different theories have arisen. Since some adopt the Common law, and some employ it with variations and yet others have displayed a startling originality of their own in dealing with the subject, the result is interesting but slightly complicated. Prof. Pomeroy is the only jurist who has explored systematically the western wilderness of decisions relating to irrigation and his lectures on "Riparian Rights" will prove a valuable guide to anyone investigating this new field open to legal study.

In dealing with the laws relating to irrigation I shall consider them under the following heads:

- A. Common law theory of Riparian Rights.
- B. Irrigation in relation to the public domain.
- C. The system in California and Nevada.
- D. Colorado system.

## COMMON LAW THEORY OF RIPARIAN RIGHTS.

In dealing with such an unstable element as water the common law found an excellent subject for its well-known subtlety of interpretation and distinction.

The common law started with the premise derived from the Roman Law that water was *publici juris*, an element wherein the people had an interest which extended to the use of it but it was in no sense *bonum vacans*, so that the first occupant could make his right absolute to the exclusion of the interest of others.

A few of the early English cases follow the civil law which holds that water is the property of the prior appropriator to the extent of his appropriation and this is adopted by many of the western states. But the true doctrine of the common law as adopted by the English courts regard the proprietors as possessing only a usufructuary interest in the waters of a stream whereby he could use a reasonable amount provided the stream was not lowered appreciably which would constitute an injury to others holding lands upon the same stream.

In Embrey v Owen ( 3 EX. 353.), an important case, the court says as to the amount which may be utilized by the consumer. "It is entirely a question of degree and it is impossible to define precisely the limits which separate the reasonable from the wrongful use of the water."

This right of the riparian proprietor to the use of the water is a corporeal hereditament it is "inseparably annexed to the soil and passes with it not as an easement or appurtenance but as parcel, use did not create it and disuse cannot destroy it."

Yet this right is in the nature of an easement as the proprietors estate is dominant when he makes use of the water and servient to the right of others to have the water flow over his land so that they may use it.

It is understood that the natural rights of the proprietors may be affected by the appropriation of the water by one of their number in derogation of their claims for the space of twenty years. This is title obtained by prescription and presupposes a grant. Also the riparian proprietor has the right at common

law to the use of the water for his natural wants, to supply his family and stock with an amount sufficient to their needs, though the entire stream should be consumed.

It was ingeniously argued in *Evans v Merriweather* ( 3 Scune 496. ) that in arid regions like the West the use of water for irrigation would be a natural want and therefore would justify the use of the water to the limit of the necessity. This was rejected in Texas and California, but it forms part of the foundation on which the doctrine by priority of appropriation rests. The doctrine of the common law prevails, as stated above generally through out the United States with the exceptions of certain jurisdictions which will be mentioned further on.



## IRRIGATION IN RELATION TO THE PUBLIC DOMAIN.

The Act of Congress passed the 10th, of July 1866 is the basis of all water rights on the public lands; it is as follows:

"Whenever by priority of possession, rights to the use of water for manufacturing, mining, agriculture or other purposes have accrued and the same are recognized and acknowledged by the local customs, laws and decisions of the courts, the possessor and owner of such vested rights shall be maintained and respected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and enjoined."

Amendment July 9th, 1870.;

"All patents granted or prescriptions or homesteads allowed, shall be subject to any vested rights or accrued water rights or rights to ditches and reservoirs used in connection with such water rights as may have been acquired under or recognised by the ninth section of such act as this is amendatory."

The working of this statute is as the

supreme court remarks rather unfortunate. And its construction has given rise to a considerable uncertainty in interpretation by the courts. Though Congress grounds the rights of the miners and settlers on the customs, statutes and decisions of the several states, the real basis for the doctrine of appropriation on the public domain is the recognition by the states of an implied license, to the appropriation by prior right on the public domain, by the United States, to use the water—as the government is in fact the only party who has the right to object. For in California the statute and decisions of the courts which are of more authority than the customs of the settlers, adopt the common law system of water rights which is diametrically opposed to the doctrine of appropriation and yet the latter controls on the public lands.

The courts of the Western states following the supreme court of the United States decide that priority of appropriation is valid against the patentee of the government who obtains his patent subsequent to the passage of the act of 1866 and if the prior appropriation of the water of a stream is

subsequent to the said act it will avail against a later patent.

But suppose the priority of appropriation and the issuing of the patent to the land both antedate the statute what effect will this have on the relation of the prior appropriator and the patentee from the government. If A. appropriates the water of a stream to his beneficial use in 1860 and B. in 1864 obtains land upon the stream under government patent, must B's right as a riparian owner be subject to A's use of the water. This question was first decided in the important cases of Van Sickle v Haines ( 7 Nev. 249. ) and Lux v Haggin ( 10 Pa.Rep. 614. ). Judge Lewis of the Nevada court in an elaborate opinion held, that a patent issued prior to 1866 conveyed to the patentee not only the land but the right to the use of the water of the stream flowing through it. Since the United States has the absolute and perfect title to land and there can be no prescription against the government it follows that the prior appropriation before the statute must yield to the subsequent patentee. The statute of 1866 is prospective in its action and

relates to rights arising after its passage. But this case is overruled in Jones v Adams ( 19 Nev. 86.) as touching the doctrine above stated. The Supreme court of the United States has not had this question directly before it. In Broder v Water Co. ( 101 U.S. 274.) it was said that the act of 1866 "was rather a recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one." On this case and especially this clause the Colorado and Nevada courts <sup>based</sup> have their decisions that the appropriators before the statute has the right to water as against the subsequent patentee of the government. But in Lux v Haggin the California court holds that this language cannot be construed as a recognition by the court of vested rights in appropriators of water created by mere appropriation and independent of statute." Also Gould on Waters to the same effect. "The statute is prospective in its operation and does not affect a patent issued before its passage or a patent subsequently issued to a person who had paid for the land prior to the act."

The language of the United States court in

Broder v Water Co. shows a tendency toward the recognition of the doctrine of appropriation as pre-existent to the statute and the amendment of 1870., when it says that patents ,homesteads, etc. are subject to "such water rights as may have been acquired under or recognized by the ninth section of such act", it seems especially intended to protect the interest of the prior appropriator at whatsoever time he may have acquired the right to the water. It must be remembered that the act of 1866 was framed to give protection to those who depending on the implied license of the government had taken water sometimes at great expense and used it in mining or the cultivation of the soil and the act was merely confirmative of this license. The State courts have recognized expressly that the doctrine of appropriation obtains on the public land of the United States aside from any that may exist under the state statutes. It is certain that so far as the United States has recognized any doctrine as applicable to the streams on the public domain it has been the doctrine of appropriation and not the common law theory of riparian rights.

If however both parties are mere occupants and have acquired no title to the land from the government there is no question, that as between them, the one making the prior appropriation of the waters of a stream cannot be disturbed in his right to the amount appropriated by a subsequent appropriator though the latter should hold his land on the banks of the stream, while the prior appropriator should dwell at a distance and transport the water by means of ditches.

## THE CALIFORNIA AND NEVADA DOCTRINE.

The common law theory of water rights, rendered venerable by precedent and secure by authority seemed destined for a time to hold a large part of the West against the encroachments of the new doctrine of appropriation by priority of use. Judge Mckinstrey of the California supreme court and Judge Lewis of the Nevada court, two of the most eminent jurists the west has <sup>produced</sup> provided, joined the shields of their protection over the common law theory. Also Prof. Pomeroy, with his great learning and extraordinary grasp of legal principles came to the aid of <sup>the</sup> California and Nevada courts. But in spite of these distinguished champions, the common law theory has lost ground until finally it has retreated to its last stronghold in California.

The California Code from section 1410 to 1421. enacts expressly that priority by appropriation shall prevail and providing <sup>the</sup> the methods by which it shall be accomplished. But section 1422 of of the civil code is as follows:

" The rights of riparian proprietors are not affected by the provisions of this title."

Lux v Haggin ( 10 Pa. Rep. 739.), a case which has been rightly said, constitutes a thorough treatise on water rights, holds that this section protects not only riparian rights of those who acquired a title to land from the state after the adoption of the code and before appropriation of water in accordance with the provisions of the code." Our conclusion" says Judge McKinstry " on this branch of the case is that section 1422 saves and protects the riparian rights of all those who under the land laws of the state shall have acquired from the state the right of possession to a tract of riparian land prior to the initiation of proceeding to appropriate water in accordance with the provisions of the code. The State might have reserved from her grants of land the waters flowing through them for the benefit of those who should subsequently appropriate the waters, but the statute has not made such reservation. The water rights of the state as riparian proprietor, are not reserved to the state by section 1422 (whenever the State has not already parted with its right to those who have acquired from her a legal title to riparian lands [the provisions of the code confer the State's rights to the flow on those appropriating water in the



manner prescribed by the code."

This construction takes all the force from the statutes. There exists two systems then in California, but the common law one prevails to the greatest extent. For if the State grant land on a stream to a person; he immediately obtains the rights of a riparian proprietor and his estate shuts off all subsequent attempts at appropriation, for they would of necessity diminish his right to the flow of the stream. The common law idea of water rights was then saved in California by a strained construction of the statute. But it has not escaped without modification

In *Harris v Harrison* (93 Cal. 631.), it was held that the reasonable use of the water of a stream permits so much to be taken as to appreciably diminish the flow to the lower riparian proprietor. This is a derogation from the strict construction of the rights of a riparian proprietor at common law.

Prof. Pomeroy when he published his lectures on riparian rights in 1897, classed Nevada with California and based his statement on the case of *Van Sickle v Haine*. But this has been subsequently overruled both as regards the right of the appropriator to water as against the patentee of the government whose

patent was issued prior to 1866, and the declaration that the common law furnished the principles for water rights in the state of Nevada.

Pierce Stamp works v Stevenson ( 20 Nev. 273. ).

In this latter case appropriation by priority is expressly adopted.

## THE COLORADO SYSTEM.

The following are the sections of the Colorado constitution, wherein the theory of appropriation is declared.

Sec. 510. " The water of every natural stream, not heretofore appropriated, within the state of Colorado is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the State subject to appropriation as hereinafter provided.

Sec. 511. The right to divert the unappropriated waters of any natural stream for beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose, but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes."

This system is formulated in the above sections, yet it is not based upon them for the right

is a prior one , it exists aside from any statute and can only be denied by express enactment.

Accordingly it would seem that when the early settlers took the water from the stream, it was done not by sufferance of the state but by a natural right inherent in the conditions of a new country.

The <sup>place</sup> ~~laws~~ of the application of the water is not material to the appropriation. The water may be conveyed by a ditch from a stream, across an intervening divide to some distant ranche. This illustrates the radical difference between this new theory and the one which prevailed at common law; for the latter is based on the rights of the riparian proprietors to the water. This method of distribution is perfectly logical under the Colorado system. Since it is the prior beneficial use of the water that confers the right to it, there can be no difference whether it is applied on the land near the stream or at a great distance. The water is the appropriators to apply to a certain purpose and not to a particular place. In a country like England which lies swathed in heavy clouds during all seasons of the year it would be undoubtedly an invasion of private right to conduct the water away from the riparian proprietor; but

throughout the West water is an imperative necessity for the pursuit of agriculture and use not position give the right to the water.

Coffin v Left Hand Ditch Co. ( 6 Colo. 446. )

We must now inquire more particularly as to what constitutes appropriation, so as to be valid against subsequent parties. The right does not date from the actual application of the water to the soil, but from the time the first step is taken if it is followed up with reasonable promptness. Thus, if a ranchman begins the construction of his ditch on July first, and by the middle of August has the water flowing on his fields the appropriation dates from July 1st, providing there has been no unreasonable delay in prosecuting the work.

"Although the appropriation is not deemed complete until the actual diversion of the water still if such has been prosecuted with reasonable diligence, the right relates to the time when the first step was taken to secure it."

Liker et al v Fink et al ( 7 Colo. 151. )

The next element in the theory of appropriation is the application of the water to some useful purpose. The prior appropriator will not be

allowed to waste the water merely because he was the first to take it from the stream. But so long as he applies the quantity originally appropriated none can complain, though the last drop of water be consumed.

It is however provided by statute that in time of *drought*: when the water becomes low those living on the <sup>stream</sup> can use all of it if necessary for domestic purposes; even if the prior appropriator has none for his land. A manufacturer who has a certain amount of water appropriated for his purposes must in times of scarcity of water give way to the needs of the ranchmen for irrigation. This is but just and equitable, and is declared by the common law doctrine as well.

#### THE RIGHTS OF DITCH COMPANIES.

When the Colorado Court came to consider the status of ditch companies conveying water for the use of the ranchmen it was confronted with a question, complex and difficult.

The Company does not have any ownership in

the water. It is merely an agent to carry the water to the consumer. But as regards the outside world and subsequent appropriators its priority of right to the water cannot be assailed. It is not strictly an agent, common carrier, or owner but combines some of the elements from these three legal conceptions.

*Wheeler v Northern Colo. I. Co.* is the first case which considers systematically the rights of the ditch corporations under the system of appropriation. Judge Helm states the conclusion of the courts as follows: "After appropriation the title to this water, save perhaps as to the limited quantity that may be actually flowing in the consumers ditch or lateral remains in the general public while the paramount right to its use unless forfeited continues in the appropriation. The Colorado doctrine of ownership and appropriation as declared in the constitution, statutes and decisions necessarily gives the carrier of water an exceptional status; a status differing somewhat from that of the ordinary carrier. Certain peculiar rights are acquired in connection with the water diverted; they are dependent for their birth and continued existence on the use made by the consumer. But the carrier does not become the proprietor of the water

diverted. The carrier does not possess a saleable interest in the water.

Under the constitution the carrier is a quasi-public servant or agent. It is not the attitude of a private individual contracting for the sale or use of property. It is permitted to acquire certain rights against those subsequently diverting from the same natural stream. It may exercise the power of eminent domain. It is charged with a public trust only to exact reasonable rates."

This is as full and clear an exposition of the right of water carriers as the reports furnish. Yet it impresses one as a composite photograph of a group of legal conceptions and perhaps it is futile to expect a true unity in such a blending. It is not a carrier strictly because compensation is not paid for the carrying of the water but for its use and the property is neither in the carrier or the consumer. It is not the owner because the state occupies that position though it possesses some of the rights of ownership. It is not strictly an agent because the initiative lies with the company and as regards the



status it is more nearly a trustee.

There is force in the view taken by Judge Reed, in the case of Wyatt v Laimer ( 1 Colo. Ct. of Appeals.),, that the company is in no wise a common carrier but is a corporation with the title to the water and subject to legislative control on account of its quasi-public functions. However the Supreme court overruled this case in Wyatt v Irrigation Co. ( 18 Colo. 308.).

A moot question has arisen as to the privities of consumers taking water from the canal of the carrier. Judge Helm in F.H.L.C. & R.Co. v Southworth ( 13 Colo. 112, held that the consumers have priority of even date and the statute requiring that consumers shall pro rata in times of scarcity is not affected by the claim to priority by a consumer ,because he may have used the water from the ditch before some other. The appropriation is completed by the consumer putting the water to a beneficial use and the priority vests for its protection in the ditch company against the claims of the other companies or individuals who are subsequent appropriators .

Judge Elliott held on the other hand

that there was priority of appropriation among the consumers. In the same manner as if they were taking the water from the natural stream. The carrier is strictly an agent. The water of the natural stream irrespective of the mode of diversion is dedicated to the public. There are two priorities,- the carriers established by statute as a matter of convenience and the consumers priority based on the law of nature. And the statute in regard to pro-rating applies only where the ditch is constructed as a common enterprise by the various consumers.

This appears well enough in theory, but as Judge Helm pointed out it would lead to perplexing results in practice. Since the determination of numerous priorities arising so close together in time would lead to endless litigation. It would also seem that the system of double priorities is illogical. For the cases have declared that the doctrine of appropriation by priority is derived from the natural law and the statutes are merely declarations of this right and it cannot be divisible into a priority by convenience and by natural right. There cannot be two separate priorities existing in the same water at the

same time , as the priority of the canal company and the consumer. This question has not yet been decided in the Colorado court, since in this case Judge Hayt placed his decision on a technicality. But the practical necessities of the situation will doubtless lead the court to adopt the view of Judge Helm.

#### PROPERTY IN WATER.

The next question that arises in the consideration of this subject is the exact nature of the right to water acquired by appropriation. At common law the water of a stream passed as incident to the land. It was a parcel of it and not regarded as appurtenant. Under the theory which we are considering the right to the use of the water is admitted to be property ,but of what kind is an unsettled question.

" The right to water acquired by appropriation is a species of the realty and requires for its transfer the same form and solemnity as is required for the conveyance of any other part of the real estate." Smith V O'Hara ( 43 Cal. 371.)

" The appropriators right to have the

water flow in the natural stream to the head of the ditch is an incorporeal hereditament appurtenant to his ditch." ( 116 Cal. 408.).

In Colorado the decisions have gone further in developing the idea that water acquired by priority of appropriation is a distant property right. "Water instead of being a mere incident to the soil rises when appropriated to the dignity of an usufructuary estate, or right in property."

Coffin v Left Hand Ditch Col ( 6 Colo.).

In the leading case of Strikler v Colo. Springs ( 16 Colo. 61.), it was held " That water originally applied to specific land for irrigation could be sold and taken out at a different point, could be carried in a different ditch in no way connected with the land and could by the purchaser be applied to a different and distant use. It logically follows, that the right to the use of the water for irrigation is a right not so inseparably connected with the land that it may not be separated there from. The authorities seem to concur in the conclusion, that the priority to the use of water is a property right. To limit its transfer would in many cases destroy its value. What difference can it make to other S

whether the owner of the priority in this case uses the water on his own land or sells it to others."

This case shows a tendency to regard this property in water as separate personal property. This view is followed out in 1 Colo. ~~ct.~~<sup>of</sup> Appeals 494 where the water is regarded as a chattel subject to the same rules as govern personal property.

This was however overruled in 13 Col 308. , where it was decided that the property in water was an easement and passed as appurtenant to the land , except that its source of supply and place of use might be changed. " The natural water course or the ditch occupies the position of the servient estate and the very existence of a water right requires a use which constitutes the dominant estate."

The phrase "property right" as applied by the courts to the water acquired by appropriation is vague and unsatisfactory . And when a closer definition is attempted confusion results. It is difficult to see how an easement can arise , since prescription cannot run against the State, and the water is not taken by grant but through appropriation. Also an easement is generally regarded as being

appurtenant to a particular estate and is hardly transferable at will. Nor is a stream strictly a servient estate for an estate implies an individual owner and the stream is public juris.

Whatever confusion may arise as to the exact nature of the property in water there is one essential characteristic that must always be found, that is the continued application of the water to a beneficial use. There can be no absolute title conveyed to the water and on failure to use it, as required, the water becomes again subject to the public juris.

Prof. Pomeroy in his work on Riparian Rights has predicted the <sup>direct</sup> consequences which must logically arise under the Colorado system.-

1. Private lands are invaded for the construction of ditches, but this is regulated by statute so that the lands of the individual proprietor cannot be burdened by more than one ditch. It is understood that the land condemned for right of way must be paid for.
2. As the country becomes more thickly settled there will be endless litigation and controversies arising

out of disputed claims to priority.

As matter of fact, there are comparatively few cases in the western reports on the subject of irrigation. But it was to be expected that in fixing the rules of a new system there would be a certain amount of litigation. It is the price paid for development along original lines.

3. No legislation can be just or practical or can tend to peace and prosperity which attempts to violate and override natural laws and natural rights, the immutable truths which exist in the regular order of nature!'

None would care to take issue with this earnest declaration of the preeminence of the natural law in legal jurisprudence or in the order of nature. But this natural law is not attained by deduction from the apriori principles handed down by some teutonic philosopher but is reached through induction. The peculiar conditions and requirements of a new country are facts from which new principles of natural law are derived. The common law of England is not of necessity the common law of America. The system of

appropriation is the most recent illustration of the common law in the western states rising out of natural conditions peculiar to those states.

It is true that this system has certain inconsistencies, but this is to be expected of a theory in the process of construction. But when the scaffolding furnished by the older theories is removed the doctrine of appropriation by priority will stand complete without incongruity or inconsistency.

*Geo. H. De la Vergne*

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