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One Aspect of the Colorado River Interstate Agreement

IT WAS contended by Colorado, in *Wyoming v. Colorado*,¹ and again, so it is reported, in the Colorado River Interstate Treaty negotiations, that because the continental divide—where so many of the rivers of the surrounding states have their source—is in Colorado, therefore all the water of those rivers is owned by Colorado, to consume as she needs.

We venture to suggest that the importance of the agreement to California in this respect does not lie chiefly in its being another ruling that Colorado's contention is erroneous. It is more important if Colorado, by joining in the agreement, admits the error; a point which this paper endeavors to illustrate by two California instances within the writer's notice.

1. That Colorado's contention was error seems, by the very recent decision of the Supreme Court of the United States in *Wyoming v. Colorado*, sufficiently demonstrated in principle; yet our first illustration is devoted to the principle because of an unusual conjunction of facts giving it illustrative force. These rulings, which we will call the Bear River cases,² passed upon the relative superiority, in the waters of Bear River, of the claims of the Wheatland hop fields, the largest in California, situated at the lower end of the river, and the prescriptive claims of the Pacific Gas and Electric Company in the mountains.

Plaintiffs' lands were a Mexican Grant of 1845. About twelve miles above plaintiffs' the main river and a branch, called Wolf Creek, came to a confluence out of the mountains.

¹ *Wyoming v. Colorado* (1922) 66 L. Ed. 660, 42 Sup. Ct. Rep. 552.

² *E. Clemens Horst Co. v. Tarr Mining Co.* (1917) 174 Cal. 430, 163 Pac. 492; *E. Clemens Horst Co. v. New Blue Point Mining Co.* (1918) 177 Cal. 631, 171 Pac. 417.

The diagram on the page opposite condenses the features involved. On the main river or south branch the defendant power company has various dams, built in pioneer days, beginning with 1851, to supply water to miners south of the river. But not until 1857, when the plaintiffs' Mexican Grant was patented, could prescription have begun to run against plaintiffs' riparian rights.³ In the meantime something else happened.

Contemporary with the building of these dams, owing to the rapidity with which the gold excitement spread in the days of "Forty Nine," mining began also at the head of Wolf Creek. The town of Grass Valley lies there, and the various mines located about that mining center. Water was brought to Grass Valley from another river, the Yuba River, to supply the town and these mines. This water after serving the uses of the town and the mines at the head of Wolf Creek, and being abandoned by them, came into Wolf Creek and flowed down that branch to its junction with the other branch. This happened in 1858.

As a result, although the dams diverted the south branch, yet below the confluence of the two branches and at plaintiffs' lands the river was restored to its original condition. For one year after patent to plaintiffs' lands their lands were dry, but for one year only. The replenishment then came in, and for the twelve miles from the confluence to plaintiffs' lands Bear river for fifty years, from 1858 down to 1909 flowed undiminished in its original volume and uninterrupted, sometimes even more than originally, but never less.

With this continuous and undiminished flow of Bear River at their lands plaintiffs' ranches were watered for near two generations, in plenty and security, until the summer of 1910. That year the river declined. The lowest ranch sued a ranch above, only to find that the latter also was getting very little water; they then together sent a party of inspection into the mountains.

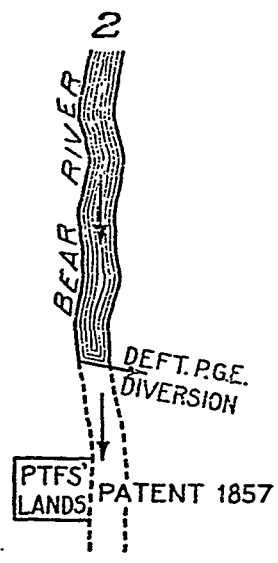
They saw that on Wolf Creek a mining company newly organized had gone to a decayed and long abandoned mining ditch, restored and enlarged it, and was taking the replenishing waters that were coming from Grass Valley. Plaintiffs filed suit and joined as defendants the takers of water above them anywhere on the river, including the power company on the other branch. The power company claimed prescription.

Plaintiffs replied: There could be no prescription until our

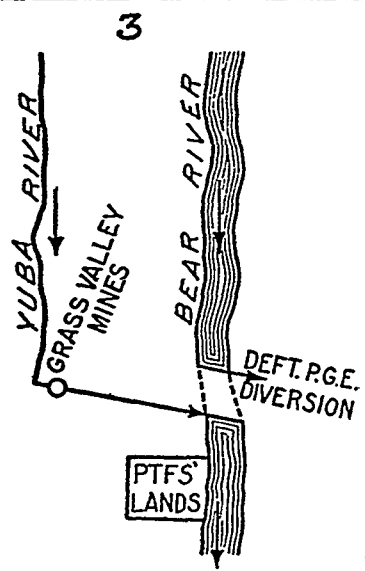
³ Pope v. Kinman (1879) 54 Cal. 3; Tuffree v. Polhemus (1895) 108 Cal. 670, 675, 41 Pac. 806, 57 Pac. 69.



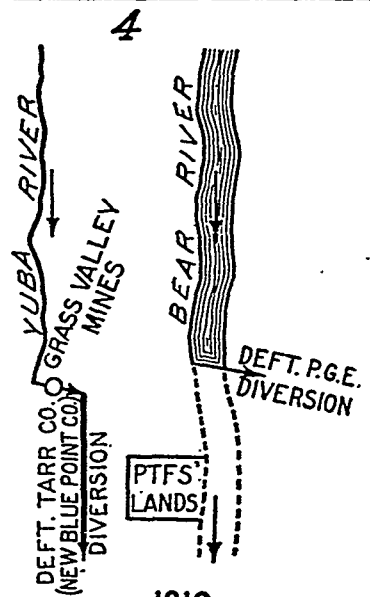
1851



1851-1858



1858-1909



1910

riparian rights had suffered, for five years after patent to our lands, an invasion on which to sue, and there had been no invasion for more than one year; relying upon the following statement of the law by the Supreme Court of California: "It [the riparian right] enables the owner to enjoin an injurious interference with the stream, but it does so only when such interference affects the river *where it passes by his land*. If he cannot show this, he cannot complain of the interference. A use of the stream above, if it does not affect it where it passes his land, is no violation of his right."⁴ Plaintiffs received upon this the approval of the trial court. The Supreme Court reversed the decision.⁵

The replenishment of the flow had occurred within the prescriptive period, and had continued undiminished ever since, until just before the filing of the suit. Plaintiffs' contention, therefore—and does it not conform to the previous statement of the law as above quoted?—had evidently taken consideration of every factor save one. That one was the *source*. Nothing else had been changed, but that was changed permanently.

The source never came back to what it was by nature. By not suing for it before, they were held to have lost their right to it, although everything else had been immediately restored, and during fifty years since their patent issued there had never for any five years been any change of the river at their lands, nor any damage, loss of use, or even diminution of flow—a singularly forceful illustration that the right to the natural source is inherent *per se* in a right in a natural stream, irrespective of where the source may be, and however far away and unvisited.

Of course this does not mean that any part of the land or water there belongs to the lower owner. The source, it should be noted, is not a tangible object. Water rights are intangible—usually classed with easements, as in California Civil Code section 801 for example. Their subject-matter is neither water nor land, but movement or flow. The common parlance that one owns "water" of a river by reason of owning a water-right is a figure of speech; the water in a natural stream is always "publici juris," the property of no one. Ownership is in its faculty of movement, continual renewal, or flowing; and the right in the stream's source, of which we speak, is of the same incorporeal nature. It is neither land there nor even water there, but the right of having this natural faculty of motion remain

⁴ San Joaquin etc. Co. v. Stevinson (1912) 164 Cal. 221, 128 Pac. 924.

⁵ E. Clemens Horst Co. v. Tarr Mining Co., *supra*. n. 2.

uninterrupted at the highest point on the stream no less than at the lowest. The Supreme Court of the United States, in the passage quoted in the notes, puts it in the terse language that the river is but a single stream *throughout its course*.

2. But while Colorado's contention that claims on the lower river may be dissociated from the source was established to be untenable in principle by *Wyoming v. Colorado*,⁶ there is a large difference between having the law ruled and getting the rule translated into action. The "peace terms" may be settled, but "the practical details of their application" may be just as disturbing. Analogous to the Colorado view, the contention that he upon whose land water lies owns the water as a corpus between his boundary lines, cut off from the source if the source be elsewhere, once governed underground percolating waters. "He who owns the land owns everything above and beneath it—*cujus est solum ejus est usque ad caelum et ad inferos*." The last fifteen or twenty years have consisted of vehement repudiation of this.⁷ Yet it continually reappears aboveground as well as underground.⁸

Reiterated disapproval has not brought rest. We will illustrate from other California cases—cases where the flow involved was as small as in the Colorado-Wyoming case it was large, and yet enduring the same prolonged history of litigation. We will call them the Chase Creek cases. They lasted seven years, and took three trials and two appeals to reach their end in the sheriff's cutting off the defendant's pipe and sending the water down the stream.⁹

⁶ "The contention of Colorado that she as a state rightfully may divert and use, as she may choose, the waters flowing within her boundaries in this interstate stream, regardless of any prejudice that this may work to others having rights in the stream below her boundary, cannot be maintained. The river throughout its course in both states is but a single stream wherein each state has an interest which should be respected by the other. A like contention was set up by Colorado in her answer in *Kansas v. Colorado* and was adjudged untenable. Further consideration satisfies us that the ruling was right." *State of Wyoming v. State of Colorado* (1922) 66 L. Ed. 660, 666, 42 Sup. Ct. Rep. 552, 558.

⁷ *Snake Creek Mining & Tunnel Co. v. Midway Irrigation Co.* (1923) 67 L. Ed. 237, 43 Sup. Ct. Rep. 215 applies the Utah law, denying the old common law right to percolating waters; *Public Utilities Commission v. Natatorium Co.* (1922) 211 Pac. 533 (Idaho), on the other hand, applies the old common law rules to percolating waters under private lands. Probably this Idaho case does not conclusively determine the policy of the Idaho law. It is a pleasure to note the reference therein to California Law Review by Mr. Chief Justice Rice.

⁸ In the new field of aviation the American Bar Association has a committee to prevent it from getting into the air also, and contaminating it "even up to heaven."

⁹ *Parker v. Swett* (1919) 40 Cal. App. 68, 180 Pac. 351 (first appeal). On the second appeal, *Parker v. Swett* (1921) 35 Cal. App. Dec. 757; *Parker v.*

There was a tract of land through which a small stream called Chase Creek flowed, partitioned in 1890, giving one-half of the water to each party by the partition deed. Subsequently the upper partitioner acquired a third tract farther above, on which he diverted the whole stream. He carried it to and consumed it all upon his part of the original tract to which was partitioned only one-half of the water. Thereby he used on his half of the partitioned tract all the water, in face of the partition.

Moreover, as shown by the diagram on the page opposite, he could not have used water on the third tract, except in negligible quantity, because that tract was incapable of use. It was a small piece of stony, rugged character on a mountainside; a steep cliff ran through it and made it almost inaccessible to man or animals.

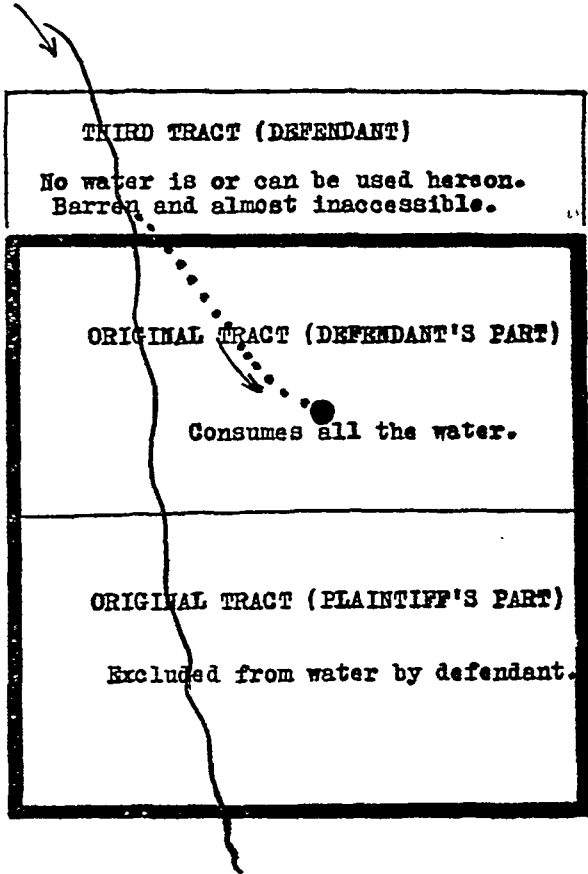
This third tract was the main point in the rulings on the two appeals. The plaintiff brought his suit for half of the water and was nonsuited in the first trial. The District Court of Appeal for the First District, Division One, said the nonsuit was wrong as to the parts of the original tract, but right as to the new tract. It reversed the case and ordered a new trial, except that "as to the third tract we think the nonsuit was properly granted." What did this mean?

From the appellate opinion defendant might contend (and at the new trial did accordingly contend) that the intention of the District Court of Appeal was to direct a division of this stream by dividing the corpus of the water by a cut across the stream at the boundary line between the old and new tracts. Defendant laid particular stress upon the appellate opinion's italics of certain words. The opinion upheld the right of plaintiff to have his share of water that was "on said premises," referring to the original tract, and italicized "*on said premises.*" Quoting the opinion:¹⁰

Appellate states that the third tract, afterward acquired by Chase, contained some of the headwaters of the stream of water which flows upon the land partitioned, and argues that a half interest in the entire stream was granted by the partition deed, and therefore the predecessor of the defendants having later acquired title to a portion of the thing which he had previously granted Thompson, that later-acquired title would redound to the benefit of his grantee Thompson and his successors in interest under the provisions of Section 1106, Civil Code.

Carlston (1921) *ibid*, 760, both vacated on petition to the Supreme Court. In the Supreme Court, Parker v. Swett and Parker v. Carlston (1922) 63 Cal. Dec. 405, 456, 512, 205 Pac. 1065.

¹⁰ Parker v. Swett (1919) 40 Cal. App. 68, 180 Pac. 351.



THIRD TRACT (DEFENDANT)

No water is or can be used hereon.
Barren and almost inaccessible.

ORIGINAL TRACT (DEFENDANT'S PART)

Consumes all the water.

ORIGINAL TRACT (PLAINTIFF'S PART)

Excluded from water by defendant.

And the opinion intimates that the code section would be applicable if an interest in the entire stream had been thus granted, for it rules that such is not the purport of the grant; the opinion proceeds:

It is very clear from the entire instrument and from the situation of the parties themselves, that there was no intention to convey anything but the right to the use of the *water* which was upon the northern half of the original tract of land. ["The water," said defendant, construing this "no use of the source."] Indeed, the deed itself, after describing the premises constituting the northern half of the original tract, grants the "right to take, use, appropriate, divert, lead and carry away in pipes or otherwise, one-half of the waters flowing or that may flow in the stream *on said premises*, to be taken," etc.

The first italics are ours, but the last italics are by the court, emphasizing, according to defendant, the court's alliance to the corpus on each side of a transverse line, disassociated from connection with the source. Declining to view the stream as a unit, pendant from its source, the opinion (so said defendant) divides the corpus of the water into two parts, one above and one below a certain boundary line.

It is precisely the Colorado argument which the Supreme Court of the United States rebuked by saying that a river throughout its course is but a single stream. It is as though one would divide a railway train in half. The part containing the engine would still be a train and go on, but the other half would be dead. View of a stream as a thing that can be cut across into slices is a visual illusion, no less illusory than the judgment of Solomon cutting the babe into parts for division between the two maternal claimants. There may be historical interest in the fact that the Solomon precedent and Colorado contention have an equal in the judgment of a court of ancient Rome. In the Roman case "The discovery of a statue of Pompey, ten feet in length, was the occasion of a lawsuit. It had been found under a *partition* wall; the equitable judge had pronounced that the head should be separated from the body to satisfy the claims of the contiguous owners; and the sentence would have been executed, if the intercession of a cardinal and the liberality of a pope had not rescued the Roman hero from the hands of his barbarous countrymen."¹¹

By this "Colorado" contention (and the probability of defendant asserting it was foreseen by plaintiff), the ruling would be

¹¹ Gibbon, Roman Empire, vol. 6, p. 539.

made to say that plaintiff had been awarded a bankbook without the money in the bank; an automobile without the engine that keeps it going; the bond envelope, eliminating the bond; the mine but not the ore that constitutes it; the stream *on* the premises, eliminating its source and flow. It would be sending plaintiff back with the declaration, which the appellate court had given him, of his right to half of the stream "on said premises," with the repugnancy that the main source of its flow may be severed, turning this into a ruling that the grant of the tree does not purport to sell its leaves and branches; giving to plaintiff the form of a reversal and withholding the main means by which it could be made effective; "keeping the word of promise to his ear and breaking it to his hope."

To foreclose any chance of giving to the opinion this "Colorado" interpretation, plaintiff petitioned the court for a rehearing, and, on its denial, petitioned the Supreme Court. Defendant (disappointed that, with his nonsuit "as to" the third tract sustained, a new trial was nevertheless ordered) also petitioned for a hearing by the Supreme Court. The Supreme Court denied both petitions without comment. Accordingly a new trial was approached on the basis of the opinion as rendered.

Two ways of proceeding were considered by plaintiff. He might either rely upon evidence of the barren nature of the new tract at the retrial and define the right that might inhere in such barrenness and award it, the remainder of the flow being divided by the same decree between the two parts of the original tract; *or let the decree adjudge a paramount right to the third tract for whatever undefined rights it might have, and leave them to later determination by a separate suit.* The latter alternative was adopted as the maximum insurance against any possible interference with the third tract at that time, in conflict with the appellate opinion that it was nonsuited.

The decree accordingly divided the water half and half between the two parts of the original tract, and closed with a strong proviso taking the "nonsuited" third tract out of the burden of the decree, and restraining operation of the decree to the two parts of the original tract as between themselves alone.¹² Then a separate suit to define the rights of the third tract resulted in a decree that they were rights for use on the third tract but not elsewhere, and for the reasonable use of that tract and for no other purpose; cut-

¹² Clause XVII of the decree reads: "This decree is without prejudice to any valid right and claim against plaintiff which said defendant Swett may have (if any) appurtenant to or parcel of the following described parcel of

ting off defendant's hope to own all the water because the third tract had the source, and then consume it all upon the original tract in defiance of the partition.

Defendant now appealed both decrees. On the former appeal the case had been in Division One of the District Court of Appeal for the First District; the second appeal came to Division Two thereof. Division Two reversed both decrees and ordered more trials. It is said the decrees violated the first ruling. They infringed upon the third tract.¹³

This time the Supreme Court granted a hearing before it and with a slight modification affirmed both decrees. Chief Justice Shaw wrote the Supreme Court opinion. The right of plaintiff, declared by the first appellate ruling, the Supreme Court interpreted as follows:¹⁴

" . . . this right would constitute an interest in the *stream* flowing at that point." And "his [defendant's] ownership of that land [the third tract] of itself confers on him as against other riparian land on the stream no right in the stream, except to take a reasonable part of the water for any beneficial use on that land, and not elsewhere."

The Colorado contention that a stream could be partitioned by a transverse line at a boundary, like cutting a pipe into segments, or separating the links of a sausage, or something of the sort, and that the lower right in the stream was not entitled to take into consideration the source, was declared to be an untenable interpretation when the cases finally reached their conclusion.

Yet the prolonged litigation that had to be gone through shows the difficulty, in dealing with water questions, of getting this ruling, however often reiterated, translated into action. There was no more than an inch of water in this little creek; yet the litigation took seven years and three trials, and narrowly escaped two more.

3. In the Colorado River situation California is at the lower end of the river. California contains the bulk of existing irrigation development from the river. The lower river, however, has no

land, hereinafter called Tract Three, or in any way validly existing in said defendant by virtue of or because of or in reference to said Tract Three, and without prejudice to any act done or to be done by her under such right or claim, *anything else in this decree notwithstanding*. Said Tract Three lies between said Tracts One and Two of defendant Swett and is situate in said County of Napa and particularly described as follows:" (description). Clerk's transcript 9559, page 59.

¹³ Parker v. Swett (1921) 35 Cal. App. Dec. 757; Parker v. Carlston (1921) *ibid.* 760.

¹⁴ Parker v. Swett (1922) 63 Cal. Dec. 405, 407, 205 Pac. 1065, 1066.

water of its own in the sense of a source within California or the lower basin. The source of the Colorado River is the continental divide; a large part of it lies in Colorado; and again Colorado, as in the Wyoming case, in the negotiations leading up to the agreement claimed to own all the water within its borders by absolute right.

The agreement adverse to this contention would seem to be no more than recognition of an elementary principle. The illustrations which have been given might show, however, that if California gets this principle accepted and settled in practice it will have accomplished a good deal. It took eleven years for Wyoming to get it recognized on a scale as large as the other illustration here discussed is small. In neither case was it a new question. It is not safe to assume that California would have an easier experience if she, also, had to sue Colorado.

Physical control over the source retains the advantage of possession. A maxim of Bismarck's, said to have been his favorite, is: "*Beati sunt possedentes*—Blessed are the possessors." The French are applying it in their turn. Argument about the fourteen points preliminary to the Armistice, the French passed over. Germany thus succeeded in selecting the nominal basis or theory or law upon which peace was to be made; but with the enemy in the power of the French by terms of armistice, the French interpreted peace terms and Wilson and all these points and speeches as they chose. And the party at the upper end of the stream is always in possession of the lower owner's stronghold. The party below never has anything more than the "fourteen points"—the privilege of a lawsuit. He has only an argument, while his opponent's dam has possession of the water; and a lawsuit is a poor match for a dam as a means by which water can be secured. As lands become settled the water thus flows up-stream.

The water that reaches the lower end grows less and less from year to year. Controlling physical advantage exists in the possessor's upper location on the stream, whatever the law may say. In the Colorado River Agreement as an instance, Colorado's concurrence in assuring that all legal rights will be respected, even if that concurrence were all that the agreement accomplished, must seem to benefit the entire West, in a substantial manner. Action by Congress on its ratification was deferred until next session to permit Colorado and Arizona to act on the proposal. California, Nevada, New Mexico, Utah and Wyoming have ratified. Officials anticipate industrial expansion throughout the Colorado basin under the compact.

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