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Natural Resources

Stanley B. Allper

distinction that the defendant therefore did not as a matter of law have a *right* to have venue removed to the county of her residence. The change in the statutory language from "shall" to "may" manifested legislative intent to make the formerly mandatory provision now merely permissive.

NATURAL RESOURCES

Natural Resources—Right to Waters of Once-Diverted Stream Flowing in Natural Channel. *Wallace v. Weitman*[1] was a contest concerning the rights of abutting landowners in the waters of an unnamed stream, tributary to the Snake River. One Lee, predecessor in interest to both plaintiffs and defendants, had owned sixteen hundred acres of land, including the entire course of the stream. In 1914 he diverted water from the natural bed of the stream into a ditch on another part of his property, so that all the water flowed through the ditch into the Snake River and none remained in the natural bed of the stream at any point below the diversion. Beginning in 1941, Lee conveyed his land to others in parcels, and through mesne conveyances plaintiffs acquired land containing the natural stream bed in 1952, while defendants were granted in 1954 the abutting parcel upon which was the ditch. At some time between 1914 and 1952, the stream had been rediverted into its natural channel, since at the time plaintiffs went into possession, the stream was again in its natural bed. The original diversion had taken place above the land of either of the present parties, but still on part of the land which the common predecessor had owned. No part of the natural stream bed was located on the defendants' land. Defendants proceeded, at a point above plaintiffs' boundary, to divert the stream back into the old ditch, pursuant to a permit granted by the supervisor of water resources. Plaintiffs at no time had a permit; they claimed as riparians.

Later in 1955 plaintiffs applied for, and were granted, an injunction which commanded defendants to allow plaintiffs a suffcient constant flow of water to supply fifty head of cattle. In so acting, the trial court sustained plaintiffs' demurrer to an affirmative defense of prior appropriation and excluded the testimony of three witnesses, which would have tended to prove that plaintiffs' land was not riparian to the stream. While affirming the decree, the supreme court skirted discussion upon, and left unanswered, several difficult problems in Washington water rights law, preferring instead to rely upon the rather incomplete findings of fact obtained at the trial.[2]

[1] 152 Wash. Dec. 514, 328 P.2d 157 (1958).
[2] 152 Wash. Dec. 514, 516, 328 P.2d 157, 158 (1958).

The problems presented include the following: 1) Whether plaintiffs' land was in fact riparian to the stream; 2) whether either the 1914 or the 1955 diversion of water from the natural channel was, as defendants contend, a valid appropriation; 3) whether the 1917 Water Code[3] had any effect on any of the later reroutings of water between the two courses; and 4) whether, in any event, a decree can be had *apportioning* the rights of the parties in the water involved. These considerations are quite interrelated and must be treated simultaneously.

Generally, the law of water rights in Washington is a product of several influences,[4] some of which include: Federal law pursuant to acquistion of the northwestern corner of the United States[5]; territorial law of Oregon and, later, Washington territories[6]; the constitution[7] and laws of the State of Washington; the common law[8]; and the necessity of water for irrigation and mining, which is peculiar to the arid land of the Western United States.[9]

The riparian right is an incident of ownership of land abutting a non-navigable stream or lake and is real property.[10] Essentially, the riparian owner is entitled to the use of all the waters of a stream for domestic uses[11] and to a reasonable beneficial use for such purposes as irrigation.[12] There have been dicta in Washington that domestic uses are superior to irrigation uses.[13] Without a showing of actual damage, a lower riparian has an absolute right to enjoin a non-riparian, non-permit appropriation.[14]

If plaintiffs' land was riparian to the stream, it becomes evident that, subject to existing modifications, they were entitled to the entire, undiminished flow of its waters, rather than merely the by-pass decreed by the trial court. If defendants' land was not riparian to

[3] Now codified as RCW Title 90, WATER RIGHTS.

[4] For a more thorough coverage than is expedient here, see Horowitz, *Riparian and Appropriation Rights to the Use of Water in Washington*, 7 WASH. L. REV. 197 (1932).

[5] Under the June 15, 1846, treaty with England.

[6] In 1856 the territorial legislature of Washington abrogated Oregon law then in Washington Territory by the provision (Sess. Laws 1856-6 p. 2), "That the common law, in all civil cases, except where otherwise provided by law shall be in force."

[7] WASH. CONST. Art. I § 16.

[8] See Benton v. Johncox, 17 Wash. 277, 49 Pac. 495 (1897).

[9] Benton v. Johncox, 17 Wash. 277, 282-3, 49 Pac. 495, 498 (1897), and cases cited therein.

[10] United States v. Ahtanum Irr. Dist., 124 F. Supp. 818 (WD Wash. 1954).

[11] Hunter Land Co. v. Langenour, 140 Wash. 558, 250 Pac. 41 (1926). These uses include cleaning, household and culinary uses, and the feeding of livestock.

[12] Nesalhous v. Walker, 45 Wash. 621, 88 Pac. 1032 (1907).

[13] State *ex rel.* Kennewick Irr. Dist. v. Superior Court, 118 Wash. 517, 217 Pac. 23 (1923).

[14] Mally v. Wiedensteiner, 88 Wash. 398, 153 Pac. 342 (1915).

the stream and if, as discussed below, there was no valid appropriation, it would not be improper to take away irrigation waters completely.[15] Pursuing this premise, the redefinition of riparian rights in *Brown v. Chase*,[16] to the effect that the riparian owner had the right only to that amount of water which he could *beneficially* use, would allow defendants the mere *possibility*, by a legal appropriation, of using for irrigation only as much water as plaintiffs could not beneficially use. The permit to divert water, which was applied for by defendants' immediate grantor and issued to defendants, would be of no practical effect if plaintiffs were making a beneficial use of the entire flow of the stream.[17] The permit not only allowed to defendants more water than flowed in the stream[18], but also was in derogation of the property right[19] plaintiffs had as riparian owners.

It becomes necessary, therefore, to examine chronologically, so far as available facts disclose, the claims of the respective parties. Claims to the stream must arise from among four possibilities: (1) As a riparian[20]; or as an appropriator under (2) custom,[21] (3) notice,[22] or (4) permit.[23]

When Lee made the diversion in 1914, the land was riparian to the stream in its entirety, and remained so until he conveyed parcels of it not continguous to the stream. The parcels abutting the stream remained riparian. The opinion and briefs are unclear as to what point in time the water ceased to be diverted into the ditch and was restored to its natural course. However, plaintiffs, whose title antedated that of defendants, purchased land over which the stream was then flowing and over which it had formerly naturally flowed. Defendants' land, although riparian when in the possession of Lee, was no longer riparian, as it was not, at the time defendants purchased it,

[15] In Alexander v. Muenscher, 7 Wn.2d 557, 561, 110 P.2d 625, 628 (1941), the court said, "Non-riparian owners have no right to divert water from a watercourse even though they are using it by grant or license from a riparian owner."

[16] 125 Wash. 542, 217 Pac. 23 (1923).

[17] Issuance of the permit is not an adjudication of private rights, Funk v. Bartholet, 157 Wash. 584, 289 Pac. 1018 (1930). See also Eikenbary v. Calispel Light & Power Co., 132 Wash. 255, 231 Pac. 946 (1925), which holds that issuance of the permit does not preclude the diverter from liability to the riparian owner for wrongful diversion.

[18] "This permit was for .46 cfs of water, which was more than the stream flowed." Brief of Appellants, P.10, Wallace v. Weitman, 152 Wash. Dec. 514, 328 P.2d 157 (1958).

[19] Benton v. Johncox, 17 Wash. 277, 49 Pac. 495 (1897).

[20] The riparian right may be divided into two subclassifications: (a) use, (b) consumptive. This dichotomy is created purely for the purposes of this Note.

[21] Appropriation by custom has been recognized in Washington from the earliest date. Thorpe v. Tenem Ditch Co., 1 Wash. 566, 20 Pac. 588 (1889).

[22] The notice system was instituted by Laws of 1891, c. 21, and was superseded by the 1917 Water Code. See *In re* Icicle Creek, 159 Wash. 524, 294 Pac. 245 (1930).

[23] RCW 90.04.020.

continguous to the stream, having been severed in an earlier conveyance. Once severed from the stream, the land can never be restored to its riparian character, even by acquisition of a corridor.[24] Presumably defendants' grantor, Eggers, had the *same* non-riparian status, else he would not have applied for the permit.

Defendants' claim: Defendants could not claim as riparians since their parcel of land had been severed from the stream.[25] As to appropriative rights, there was no appropriation by custom, the original mode of appropriation, which required an intent to appropriate and reasonable diligence thereafter in applying the water to a beneficial use.[26] No appropriation by this method was valid after the permit system was instituted in 1917,[27] and the 1914 appropriation did not qualify, as it did not take place on public land.[28] No appropriation by notice could be contended, since there was no notice posted at the point of the 1914 diversion.[29] Thus, the only appropriation under which defendants might have claimed was that pursuant to the permit issued. This, too, must be ruled out, since an existing riparian right cannot be defeated by a subsequent appropriation[30] and because the Code did not alter rights existing prior to its enactment.[31] Additionally, any appropriative use of water without prior procurement of a valid permit is a misdemeanor under the Code.[32]

Plaintiffs' claim. The claim of plaintiffs, when held up to the above criteria, has substance. Although an appriative right was neither claimed nor discovered, the riparian right incident to their land was never lost. Owning the land bordering the stream, plaintiffs' right extended at least to the use of the water as it flowed by.[33] Whether plaintiffs' consumptive right[34] could have been terminated by beneficial use of the waters of the stream on non-riparian land is an open question in Washington and one which the court did not consider in

[24] Mally v. Wiedensteiner, 88 Wash. 398, 153 Pac. 342 (1915); Yearsley v. Cater, 149 Wash. 285, 270 Pac. 804 (1928).
[25] Note 24, *supra.*
[26] *In re* Alpowa Creek, 129 Wash. 9, 224 Pac. 29 (1924).
[27] RCW 90.04.020.
[28] Benton v. Johncox, 17 Wash. 277, 49 Pac. 495 (1897).
[29] See note 22, *supra.*
[30] Sander v. Bull, 76 Wash. 1, 135 Pac. 489 (1913).
[31] RCW 90.04.020 states, "Nothing in this title shall lessen, enlarge, or modify the rights of a riparian owner existing as of June 6, 1917, . . ."
[32] RCW 90.32.010.
[33] *E.g.*, for such purposes as fishing, bathing, washing clothes. This elementary use may extend to the taking of small quantities from the stream for culinary uses or watering domestic animals.
[34] Note 20, *supra.*

the instant case. The history of the use of the stream between 1941 and 1952 is not in the record, so no generalization is possible.

Assuming that proper application of the law vested both the use right and the consumptive right in plaintiffs, subject to the beneficial use limitation previously noted,[35] plaintiffs still may not be able to use the stream for livestock watering without a permit, since the statute,[36] in referring to "any person," does not exclude riparian owners from its requirements.[37] The consumption of water from a stream by a herd of livestock is usually deemed an appropriation.[38]

The injunction granted plaintiffs was therefore consonant with the general rule that a riparian can enjoin a non-riparian from diverting water, even when the diversion does not injure the riparian.[39] However, since the land was arid and practically useless without water, some provision could have been made to allow use of the surplus by defendants. Drafting the decree to conform with the law would have appropriately provided for the parties. Control over the stream should have remained in plaintiffs, the riparian owners, with the surplus then allocated to defendants. Both would need permits for their respective uses.

From the state of the evidence gathered, only partial answers can be suggested to the four questions posed earlier. It is submitted that whatever authority there is in *Wallace v. Weitman* must be restricted to congruent factual situations.[40]

STANLEY B. ALLPER

PARTNERSHIPS

Partnership—Contribution to Loss in Absence of Agreement. The recent case of *Richert v. Handly*, 153 Wash. Dec. 104, 330 P.2d 1079 (1958), was an action for an accounting and dissolution of a logging partnership in which one of the partners contributed the capital, while the other agreed to manage the concern. The receipts of the partnership were not sufficient to cover the capital contribution. Upon finding that the parties had not agreed upon a basis for sharing losses or whether the claims of one partner were to take priority over the claims of the other, the trial court concluded

[35] Brown v. Chase, 125 Wash. 542, 217 Pac. 23 (1923).

[36] RCW 90.20.010. However, if plaintiffs' riparian right dates prior to 1917, a permit may not be needed.

[37] After 1917 even a riparian owner could not appropriate without a permit. Proctor v. Sim, 134 Wash. 606, 236 Pac. 114 (1925).

[38] Steptoe Livestock Co. v. Gulely, 53 Nev. 163, 295 Pac. 772 (1931); Empire Water Co. v. Cascade, 205 F. 123 (8th Cir. 1913).

[39] See, *e.g.*, Mally v. Wiedensteiner, 88 Wash. 398, 153 Pac. 342 (1915).

[40] For an authoritative treatment of the general subject of water rights in Washington, see Horowitz, *Riparian and Appropriative Rights to the Use of Water in Washington*, 1 WASH. L. REV. 197 (1932); Morris, *Washington Water Rights—A Sketch*, 31 WASH. L. REV. 243 (1956).