ELEMENTS OF WESTERN WATER LAW

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BY

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PREFACE

The following chapters were published as separate articles in the Journal of Electricity, Power and Gas. They present in abbreviated form part of a course in "Irrigation Institutions" given to advanced students in the Colleges of Agriculture and Civil Engineering of the University of California.

As the western law of waters has been developed by the courts it is necessary to quote freely from the cases, although the text is intended for those untrained in jurisprudence.

Owing to the restricted space available for the articles as first published, only the leading cases on each point have been cited, but an attempt has been made to refer to important cases not following the established rule.

So great is the public interest in our water resources today that no explanation is deemed necessary for the publication of a book on a legal topic to be read by laymen.

A. E. CHANDLER.

San Francisco, December, 1912.

CONTENTS

CHAPTER VIII.

CHAPTER IX.

CHAPTER X.

CHAPTER XI.

CHAPTER X.

CHAPTER XIII.

EARLY DEVELOPMENT OF THE DOCTRINE OF APPROPRIATION.

The doctrine of appropriation is one recognized in the law of waters as governing a class of rights markedly distinct from the riparian rights of the common law. It grew out of the occupancy of the public domain during the mining period and is not accepted outside of the western mining and irrigation States. Although of so recent origin as far as our own people are concerned, the following quotation from Clough v. Wing (2 Ariz. 371) shows its long standing in America:

> And the right to appropriate and use water for irrigation has been recognized longer than history, and since earlier times than tradition. Evidences of it are to be found all over Arizona and New Mexico in the ancient canals of a prehistoric people, who once composed a dense and highly civilized population. These canals are now plainly marked, and some modern canals follow the track and use the work of this forgotten people. The native tribes, the Pimas and Papagos and other pueblo Indians, now, as they for generations have done, appropriate and use the waters of these streams in husbandry, and sacredly recognize the rights acquired by long use, and no right of a riparian owner is thought of. The only right in water is found in the right to conduct the same through their canals to their fields, there to use the same in irrigation. The same was found to prevail in Mexico among the Aztecs, the Toltecs, the Vaquis, and other tribes at the time of the conquest, and remained undisturbed in the jurisprudence of that country until now. Clough v. Wing, 17 Pac. 453.

As was to be expected from the great rush to the gold fields following the discovery in January, 1848, legal controversies early arose not only in regard to the mining claims but also in regard to the ditches and water rights used in connection therewith. One

of the very early cases often quoted is Irwin v. Phillips (5 Cal. 140) decided in 1855 and the following extract from the opinion clearly shows the necessity for the doctrine of prior appropriation:

> Courts are bound to take notice of the political and social condition of the country which they judicially rule. In this State the larger part of the territory consists of mineral lands, nearly the whole of which are the property of the public. No right of intent of disposition of these lands has been shown either by the United States or the State governments, and with the exception of certain State regulations, very limited in their character, a system has been permitted to grow up by the voluntary *occupation* of the mineral region has been *tacitly assented to* by the one government, and heartily *encouraged* by the expressed legislative policy of the other. If there are, as must be admitted, many things connected with this system, which are crude and undigested, and subject to fluctuation and dispute, there are still some which a universal sense of necessity and propriety have so firmly fixed as that *they have come to be looked upon as having the force and effect of res judicata.* Among these the most important are the rights of miners to be protected in the possession of their selected localities, and the rights of those who, by prior appropriation, have taken the waters from their natural beds, and by costly artificial works have conducted them for miles over mountains and ravines, to supply the necessities of gold diggers, and without which the most important interests of the mineral region would remain without development. So fully recognized have become those rights, that, without any specific legislation conferring or confirming them, they are alluded to and spoken of in various acts of the legislature in the same manner as if they were rights which had been *vested* by the most distinct expression of the will of the lawmakers * * * This simply goes to prove what is the purpose of the argument, that however much the policy of the State, as indicated by her legislation, has conferred the privilege to work the mines, it has equally conferred the right to divert the streams from their natural channels, and as these two rights stand upon an equal footing, when they conflict, they must be decided by the fact of priority, upon the maxim of equity, *"Qui prior est in tempore, potior est in jure."*

Elsewhere in the above mentioned opinion it is stated: