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Underground Water

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NOTES

UNDERGROUND WATER

The plaintiff had been obtaining water from an artesian well on his land since 1907. The artesian basin from which he appropriated his water was twelve miles long and six miles wide and supported about six thousand wells. The plaintiff's well had always supplied about fifty gallons of water a minute of which about four gallons was used to satisfy his domestic purposes, and the balance was used as a source of power to operate a hydraulic ram which circulated the water throughout his domestic water system. The water used as power escaped into a ditch and was not thereafter used. In 1934, the defendant sank a well which temporarily retarded the plaintiff's flow to approximately four gallons a minute, necessitating the installation of a pump which he continued to use in subsequent years, although the defendant did not interfere with the plaintiff's flow after 1934. *Held,* that the plaintiff was not entitled to recover as damages the cost of installing and operating the pump because of the temporary nature of the defendant's interference. *Hansen v. Salt Lake City,* 205 P. (2d) 255 (Utah 1949).

The opinion of Justices Wade and McDonough includes dictum[1] to the effect that where a subsequent appropriator lowered the static pressure of a prior appropriator's well so that it became necessary to make permanent changes in his method of diversion to satisfy his previously established beneficial use, the subsequent appropriator must bear the additional expense.[2] The question which was

1. Hanson v. Salt Lake City, 205 P. (2d) 255 (Utah 1949). The varied reasoning of the members of the court prevented any one opinion from being the opinion of the court.
2. Salt Lake City v. Gardner, 39 Utah 30, 114 Pac. 147 (1911).

decided in this opinion was whether the subsequent appropriator must pay for a permanent improvement which was installed to cope with a temporary, partial interference with the flow of water.

In a concurring opinion Mr. Chief Justice Pratt expressed the view that the water which the senior appropriator had been beneficially using arrived at the point of diversion, and that the junior appropriator could not be held to account for the senior appropriator's means of appropriating the water.[3] Mr. Justice Wolf, who also wrote a concurring opinion, reasoned that the senior appropriator was not legally injured if he could obtain the amount of water appropriated by reasonable means, and that under a policy which encourages the full development of the resources, a reasonable method of diversion is imperative, and if the junior appropriator were required to maintain the static pressure of a senior appropriator's well, or pay the cost of pumping apparatus to take the place of lost pressure, the policy which encourages the full development of the resources would be defeated.[4] Another opinion, concurring in result, but dissenting in reasoning, written by Mr. Justice Latimer, attacked the majority opinion as being unrealistic. He reasoned that in an artesian basin which produces water for more than six thousand wells, each well lowers the pressure and decreases the flow of the other wells, and, therefore, any subsequent appropriation interferes with the rights of the existing owners. To require the last appropriator to maintain the conditions under which the prior appropriators had obtained their supply, or to make an equitable adjustment in damages, would be prohibitive, and impede the development of the state. He concluded by saying that a prior appropriator should be protected in the amount of water which he was beneficially using, if it were obtained by reasonably efficient means. However, if the original means of diversion had become inconsistant with the development of the area, the prior appropriator should bear the additional cost imposed on him by reason of the changed conditions.[5]

In Utah, prior to 1935, percolating waters were not part of the waters of the state and were not subject to appropriation.[6] It was held that subterranean waters and those of artesian basins were not subject to appropriation, but belonged to the owners of the land. Each owner in an artesian district was entitled to a proportionate share of the water according to his surface area as compared to the whole.[7] This was recognized as the law governing the use of waters from artesian basins until 1935. In that year the court held in *Wrathall v. Johnson*[8] that artesian basin waters were flowing in sufficiently defined channels to be included as the property of the public and subject to appropriation. The holding in this case was later incorporated into the laws of Utah.[9]

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3. Supra Note 1 at 268.
4. Ibid. at 272.
5. Ibid. at 273.
6. Cresent Mining Co. v. Silver King Mining Co., 17 Utah 444, 54 Pac. 244 (1898); Willow Creek Irrigating Co. v. Michealson, 21 Utah 248, 60 Pac. 943 (1900).
7. Horne v. Utah Oil Refining Co., 59 Utah 297, 202 Pac. 815 (1900).
8. 86 Utah 50, 40 P. (2d) 755, 788 (1935).
9. Utah Code Annotated, 1943, sec. 100-1-1. "All the waters in this state, whether above or under the ground are hereby declared to be the property of the public, subject to all the existing rights to the use thereof."

The courts of Arizona,[10] California,[11] and Idaho[12] have been called upon to decide the question of the extent to which the first appropriator is protected in maintaining the conditions under which he first began to divert his groundwater, and as to whether he was entitled to compensation for the additional cost of pumping if the later appropriator reduced the common supply. In each instance the prior appropriator was protected in maintaining the conditions under which he first pumped his water; and in each case such protection was in the form of an injunction against the junior appropriator who sought to interfere with these conditions. The California and Idaho courts indicated that the senior appropriator would be entitled to compensation for the additional cost of diverting his appropriation if the later appropriator caused the common supply to be permanently reduced. Although a Colorado case[13] gave the junior appropriator a vested right in the conditions existing when he first made his appropriation, it would seem that he could have no greater right than that of the senior appropriator. Therefore, it would be logical to assume that the senior appropriator must also have a vested right in the conditions under which he first made his appropriation. Under this line of reasoning, the Colorado court could reach the same result as those stated in the foregoing cases.

In a recent California case[14] all appropriators were pumping water from a single water basin. The prior appropriators sought to enjoin the subsequent appropriators from lowering the water table below the safe point of yield. The court found that the subsequent appropriators had taken more than the unappropriated water for a greater time than the statutory period, and had acquired a prescriptive right to some of the water claimed by the prior appropriators. The court entered an order requiring all appropriators to cut their consumption twenty-five percent so that the water table would not be lowered below the safe point of yield. While this case seems to follow no specific rule, it does achieve an equitable distribution and promotes the expansion and development of the area by encouraging the fullest use of the water, though the dissent says that while past cases were "based upon a philosophy of rugged individualism" . . . [this case] "is based on a philosophy of bureaucratic communism."[15]

Since the rights in water changed from riparian to appropriation, several factors have been considered in the relative rights of the takers. Among these factors are priority of appropriation, beneficiality of use to user, reasonableness of the means of diversion, and benefit to the state of a whole. The first of these is held controlling in the ruling opinion here, in general, though modified in this case as to damages because of the temporary nature of the interference. The others are stressed in the various concurring opinions. In order to have no confusion in the matter the state legislature or the courts will have to state which principle is controlling. It is impossible to arrive at consistant decisions in a

10. Prima Farms Co. v. Proctor, 30 Ariz. 96, 245 Pac. 369 (1926).
11. City of Lodi v. East Bay Municipal Utility District, 7 Cal. (2d) 316, 60 P. (2d) 439 (1936).
12. Noh v. Stoner, 53 Idaho 651, 26 P. (2d) 1112 (1933).
13. Faden v. Hubbell, 93 Colo. 358, 28 P. (2d) 247 (1933).
14. City of Pasadena v. City of Alhambra, Cal. 1949, 207 P. (2d) 17 (1949).
15. Id. at 37.

series of cases if the courts have no ruling principle to follow. Utah seems to have given priority of appropriation the greatest weight by statute. Apparently, had the interference by the defendant been permanent in this case, the plaintiff could have obtained injunctive relief or collected damages to pay for his conversion to a modern means of diversion. Had the facts differed so that this was the case, one gathers that the plaintiff would have been entitled to relief by Justices Wade and McDonough, but not by the concurring judges, who outnumbering them, would have been the majority, in which case possibly the cases relied on by Justices Wade and McDonough would have been directly overruled.

In his opinion, Justice Wade admits that the burden placed upon the subsequent appropriator of reimbursing all the prior appropriators for any damages seems bad, but states that "it is not so bad as it may appear"*16* for though each appropriator does lower the static head pressure of all the prior wells, it is often not noticeable and so does not harm the former appropriator. Carrying the prior appropriator control theory to its logical conclusion: if one thousand wells were in existance, the one thousand and first appropriator would have to pay for any adjustments which the one thousand prior appropriators might have to make. He would probably settle in some other state.

In his opinion, Justice Latimer, in arguing that such extreme weight given to the priority of appropriation hurts state development, admits that the prior appropriator will be hurt in the interest of the state as a whole, and says, much like Justice Wade, that "it is not as harsh as it appears"*17* for if the prior appropriator, himself, had been forced to pay all the appropriators prior to him, he never would have obtained any water in the first place.

In both justices opinions, the reasons following the "not so bad" clause seem weak. The weakness of these reasons is undoubtedly the cause of the present confusion as to which factor shall rule. If the subsequent appropriator is to pay for the changes necessitated, appropriations may be forced to stop, and the whole state will be injured. If the appropriator must pay for such damages, his rights are adversely affected. It seems to lead to the ancient problem of property (prior appropriation, here) rights versus public policy. In the long run, public policy must be served.

It is readily apparent that much of the confusion and embarrassment experienced by the Utah court could have been avoided if the legislature had required that a survey be made of the various artesian basins, and the number, use, and depth of the wells had been limited so that they would not have been depleted below the safe point of yield.*18* Every appropriator would then have been put on notice as to his rights in relation to all other appropriators and the present dilemma might never have arisen.

Wyoming can escape the labyrinth of conflicting rights as they now exist between the appropriators of underground waters and the appropriators of sur-

16. Supra Note 1, at 262.
17. Id. at 275.
18. Id. at 270.

face waters by requiring that all the waters of the state be governed, as nearly as practicable, by the same laws. On the basis of this premise, the State should make an initial survey of the underground waters of the State so as to determine the safe point of yield in a given area.[19] This the State Engineer may now do. Permits should be granted to prevent users in the area on the basis of priority of appropriation and beneficiality of use, under our present underground water statute.[20] Subsequent appropriators, however, should be required to obtain a permit before drilling for water, and the granting of such permit should be predicated upon the findings of the State Engineer in regard to the safe yield of the area and as to reasonableness of the proposed depth and pumping capacity.[21] The courts should not hold that a prior user gains a vested right in his method of diversion; these rights should be held tentative and flexible so that they can be adapted to future contingencies which may arise.[22] Such policies are in complete accord with the purpose of conservation; they provide for the complete use of underground water without fear of dissipating the resources of the State.

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ONE ASPECT OF SECTION 117 J RELIEF

This paper is an evaluation of the Commissioners attempt to have livestock excluded from the benfits of Section 117 J of the Internal Revenue Code relief.

Farmer Jones is in the dairy and hog raising business. He maintains his dairy herd at a constant amount by adding calves the herd produces and selling old cows that are no longer useful as well as the excess young calves. The hog breeding herd is replaced annually (as is the custom in the industry) with the farmer's own young sows and a purchased boar

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19. Wyo. Comp. Stat. 1945, Supp. 1949, sec. 71-416, "The State Engineer is hereby authorized and directed to proceed with the determination of the capacity of the various underground pits, geological structures of formations in the State to yield such waters. After the boundaries and capacities of any such pit or formation or other geological structure containing underground water have been fixed by such determination, the State Engineer shall give notice of such determination to the State Board of Control, which Board shall then proceed with the adjudication of said water within the area supplied from this particular underground pit . . . Interested parties must show . . . proof of benficial application of the water derived therefrom . . ."

20. Wyo. Comp. Stat. 1945, Supp. 1949, sec. 71-412, "In order that all parties may be protected in their lawful rights to the use of underground water for beneficial purposes, every person . . . shall . . . file . . . a statement of claim . . . which . . . shall contain . . . the nature of the use on which the claim is based . . ., the location of the well or wells by legal subdivisions, depth to the water table, size of well, type of well, . . . type and method of pumping, horsepower of pump, amount of water pumped each year, the amount of water claimed and a log of the foundations encountered in drilling or digging of the well; . . ."

21. National Resources Planning Board, State Water Law in the Development of the West, United States Government Printing Office, 1943, p. 84.

22. Hutchins, Selected Problems in the Law of Water Rights in the West, (1942) p. 178.