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Riparian Rights in Appropriation States

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are not the constitutional "self-incrimination" and "illegal searches and seizures" problems presented, in the case of the speedmeter, which harry the former line of cases. In Wyoming, moreover, large, legible signs along the highway[49] warn the motorist that his speed may be checked by radar, and the Wyoming Highway Patrol so far has confined its radar operations to these posted areas. Thus the driver cannot be heard to yell, "Speedtrap!"

One court aptly stated that we live in a world where many wonderful scientific devices are controlled by pushbutton, but that there is no reason to have pushbutton justice.[50] How true this is! But neither should the courts trip themselves up in the roots of antiquity. As a matter of public policy the radar speedmeter can be of great value in law enforcement. Something must be done about the senseless slaughter on the highways, which is at least partly attributable to high speed.[51] The speedmeter is basically accurate, as has been concluded in the majority of decided cases on the subject, and if this accuracy is proven in court, there seems to be no good reason why evidence of speed based on use of the speedmeter should not be admissible.

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RIPARIAN RIGHTS IN APPROPRIATION STATES

Eight western states, Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah and Wyoming, professedly do not recognize the common law doctrine of riparian rights. In this arid section of the country, a major concern is the utilization of water for beneficial purposes such as irrigation, mining and power. The fear has always been that what little water there is will not be used to the fullest extent possible. As a result, the term "water rights" has acquired a local technical definition such as the one set out in a Wyoming statute:[1] "A water right is a right to use the water of the state when such use has been acquired by the beneficial application of water." It is not surprising, therefore, that in these states which follow the doctrine of prior appropriation, the doctrine of riparian rights has been thought of by the courts mainly in the terms of the right to the use of water. However, many other rights of persons owning the banks of a stream have been called riparian rights.

Black's Law Dictionary[2] defines riparian rights as ,"The rights of the owners of lands on the banks of water courses, relating to the water, its

49. Printed in black and white.
50. People v. Offermann, 204 Misc. 769, 125 N.Y.S.2d 179 ((1953).
51. Col. William R. Bradley of the Wyoming Highway Patrol estimates that a good-sized, perhaps a majority, of accidents occurring on Wyoming highways are one-car, no collision accidents, and that speed is responsible for a large number of these accidents.

1. Wyo. Comp. Stat. 1945, Sec. 71-312.
2. Black's Law Dictionary, 4th Ed. 1490 (1951).

use, ownership of soil under the stream, accretions, etc." Such rights of riparian owners as to the right to fish,[3] the ownership of the bed of a stream,[4] the ownership of accretions,[5] the right to unpolluted waters,[6] the right to protect banks against erosion,[7] the right not to have the current of the stream diverted against a riparian's banks,[8] not to have the stream obstructed so that it will overflow riparian lands,[9] and the right to access to the stream[10] have all been sustained on the basis of the common law doctrine of riparian rights. The purpose of this article is not to examine the doctrine of prior appropriation nor to weigh its advantages or disadvantages, but to show that many incidents of riparian ownership which have been called riparian rights in other jurisdictions do exist and are recognized in these appropriation states.

In each of these states the courts have said that the doctrine of riparian rights does not exist in the jurisdiction.[11] The earliest decision which repudiated any part of the doctrine was *Coffin v. The Left Hand Ditch Co.*,[12] a Colorado case decided in 1882. All of the other appropriation states leaned heavily on this decision for precedent in deciding the cases in which they stated that the doctrine of riparian rights did not apply in their jurisdictions. However, the conflict in the *Coffin* case was only between one type of riparian right and the doctrine of appropriation. The right in conflict was the right of a riparian owner to the uninterrupted flow of the stream, subject only to reasonable uses of the riparian owners above.

3. City of Birmingham v. Lake, 243 Ala. 367, 10 So.2d 24 (1942); Millsbaugh v. Northern Indian Public Service Co., 104 Ind. App. 540, 12 N.E.2d 396 (1938).
4. U. S. v. Elliott, 131 F.2d 720 (C.C.A. Okla. 1943); City of Birmingham v. Lake, 243 Ala. 367, 10 So.2d 24 (1942); Sutton v. Teret, 301 Ky. 506, 192 S.W.2d 382 (1946); Mix v. Tice, 164 Misc. 261, 298 N.Y.S. 441 (1937).
5. Sutton v. Terret, 301 Ky. 506, 192 S.W.2d 382 (1946); Holmes v. Haines, 231 Iowa 634, 1 N.W.2d 746 (1942); Smith v. Whitney, 105 Mont. 523, 74 P.2d 450 (1938); Frank v. Smith, 138 Neb. 382, 293 N.W. 329, 134 A.L.R. 458 (1940).
6. Inland Steel Co. v. Isaacs, 283 Ky. 770, 143 S.W.2d 503 (1940); Jessup and Moore Paper Co. v. Zeitler, 180 Md. 395, 24 A.2d 788 (1942); Squaw Island Freight Terminal Co. v. City of Buffalo, 273 N.Y. 119, 7 N.E.2d 10 (1937).
7. Archer v. City of Los Angeles, 19 Cal.2d 19, 119 P.2d 1 (1941); Spencer v. O'Brien, 25 Tenn. App. 429, 158 S.W.2d 445 (1942).
8. Spencer v. O'Brien, 25 Tenn. App. 429, 158 S.W.2d 445 (1942); Bass et al. v. Taylor et al., 126 Tex. 522, 90 S.W.2d 84 (1936).
9. Palmer v. Massengill, 177 Ala. 612, 58 So. 918 (1953); Flader v. Central Realty & Investment Co., 114 Neb. 161, 206 N.W. 965 (1926).
10. Ferry Pass Inspectors' and Shippers' Association v. White's River Inspectors' and Shippers' Association, 57 Fla. 399, 48 So. 643, 22 L.R.A. (N.S.) 345 (1909); Revell v. People, 177 Ill. 468, 52 N.E. 1052 (1898).
11. Glough v. Wing 2 Ariz. 371, 17 Pac. 453 (188); Pima Farms Co. v. Proctor, 30 Ariz. 96, 245 Pac. 369 (1926); Maticopa County, etc. v. Southwest Cotton Co., 39 Ariz. 65, 4 P.2d 369 (1931); Coffin et al. v. Left Hand Ditch Co., 6 Colo. 443 (1882); Pac. 168 (1909); Snyder v. Colorado Gold Dredging Co., 181 Fed. 62 (C.C.A. 8th, 1910); Montrose Canal Co. v. Loutsenhizer Ditch Co., 23 Colo. 233, 48 Pac. 532 (1896); Drake et al. v. Earhart, 2 Ida. 750, 23 Pac. 541 (1890); Reno Smelting, Milling, and Reduction Works v. Stevenson, 20 Nev. 269, 21 Pac. 317 (1889); In re Humboldt River, 49 Nev. 357, Pac. 692 (1926); Snow v. Abolos, 18 N.M. 681 140 Pac. 1044 (1914); Stowell et al. v. Johnson et al. 7 Utah 215, 26 Pac. 290 (1891); Whitmore v. Salt Lake City, 89 Utah 387, 57 P.2d 726 (1930); Spanish Fork v. Westfield Irr. Co. v. District Ct., 99 Utah 527, 104 P.2d 353 (1940); Moyer v. Preston, 6 Wyo. 308, 44 Pac. 845 (1896); Farm Investment Co. v. Carpenter et al., 9 Wyo. 110, 61 Pac. 258 (1900).
12. 6 Colo. 443 (1882).

The Colorado court in deciding the case restricted its holding to the facts when it stated,

> "We conclude, then, that the common law doctrine giving the riparian owner a right to the flow of water in its natural channel upon and over his land, even though he makes no beneficial use thereof, is inapplicable to Colorado."

Most courts cite the case for the proposition that no riparian rights existed in Colorado. Even though none of the fact situations which have confronted these courts have called for much broader language than that used in the *Coffin* case, they have made statements to the effect that the doctrine of riparian rights did not apply in their jurisdictions, statements which go beyond the facts of the cases in which they were made and are merely dicta.[13]

The basis of rationale generally used for the abrogation of the doctrine of riparian rights in these states is that the common law has been adopted only when and where it was suited to the conditions and topography and was not in conflict with the state statutes or constitutions. It is said that the doctrine of riparian rights is not suited to an arid clime and that it is inconsistent with statutory or constitutional provisions establishing the doctrine of prior appropriation.

Admittedly one of the many rights which have been classified as riparian is not suited to the climatic conditions of these states and is in direct conflict with the doctrine of appropriation for beneficial use. This was the right which Colorado repudiated in the *Coffin* case. However, the right at common law of a riparian owner to have a stream flow in its natural volume subject only to reasonable use by upper riparian owners is the only phase of riparian rights which would lead to the wasting of water or conflict with the doctrine of prior appropriation. The other riparian rights are subject to neither of these criticisms. They do not subject a stream to restrictions which would in any way prevent the fullest utilization of its waters; neither do they come in conflict with the appropriation of the waters of the stream for beneficial use. There is no reason, therefore, why the common law doctrine of riparian rights as it pertains to these nonconflicting rights should not apply in appropriation jurisdictions.

The first group of rights to be considered is composed of those which deal with riparian owners' title to land. Many title rights have been held to be incidents of riparian ownership. One of the more important of such rights granted under the common law is the ownership of the bed of a nonnavigable stream from the riparian's bank to the thread of the stream.[14]

This right of the riparian owner has been recognized in many of the appropriation jurisdictions.[15] Colorado, the jurisdiction in which the

13. See note 11, supra.
14. See note 4, supra.
15. Hartman v. Tresise, 36 Colo. 146, 84 Pac. 685, 4 L.R.A.(N.S.) 872 (1905); Fischer v. Davis et al., 19 Ida. 493, 116 Pac. 412 (1911); Heinbecker v. City and County of

Coffin case was decided, held in *Hanlon v. Hobson*[16] that the riparian owner held to the thread of a non-navigable stream. This holding was against the contention that since the doctrine of riparian rights did not exist in Colorado the riparian owner could not have the title to the bed of the stream. The court cited *City of Denver v. Pearce*[17] in holding that the original patent included title to the bed of a non-navigable stream and that there was a presumption that subsequent conveyances included the bed of the stream. Although many of the courts in these appropriation states have never had to decide whether a riparian owner owns to the thread of the stream, they have decided that riparian and littoral owners, when their grant shows a meander line as a boundary, own to the actual water line of a stream or a lake.[18]

Another title right which in riparian states is considered an incident of riparian ownership is the right to accretions, which has been recognized in several of these western states as a corollary to this rule of ownership to the actual water line. In *Poynter v. Chipman*,[19] a Utah case decided in 1893, the court said, "A littoral owner is entitled to the accretion lying between the meander line and the edge of the waters." It can be seen that the court has made the actual boundary the water line by using the common law theory of accretions. In *Smith v. Whitney*,[20] decided in Montana in 1938, the court said, "Accreted lands . . . along the banks of navigable or non-navigable streams belong to the riparian owner."

A second phase of riparian rights has to do with rights relating to the flow of the stream. Excluding the right to an undiminished flow which conflicts with the doctrine of prior appropriation, there are still many rights of riparian owners relating to the flow of the stream, most of which have been recognized in this region. In *Hutchinson v. Watson Slough Ditch Co.*,[21] a case decided in Idaho in 1909, the defendant, an appropriator, cut off the flow of a natural stream. This action was independent of the exercise of his right of appropriation. The defendant, a riparian owner, brought the suit to enjoin the plaintiff's interference with the stream. The court held for the plaintiff, saying, "The riparian owner's right to use the water for domestic and culinary purposes and waternig his stock, and to have the water flow by or through his premises is such a right as the law recognizes as inferior to a right acquired by appropriation, but superior to any right of a stranger, intermeddler, or interloper."

Denver, 90 Colo. 346, 9 P.2d 280 (1932); City of Denver v. Pearce, 13 Colo. 383, 22 Pac. 774, 6 L.R.A. 541 (1889); Halon et al. v. Hobson, 24 Colo. 284, 51 Pac. 443, 42 L.R.A. 502 (1897); A. B. Moss & Bros. v. Ramey, 25 Ida. 1, 136 Pac. 608 (1913), *aff'd*, 36 S.Ct. 183, 239 U.S. 538, 60 L.Ed 425 (1916); Johnson v. Johnson, 14 Ida. 561, 95 Pac. 499, 24 L.R.A.(N.S.) 1240 (1908).

16. 24 Colo. 284, 51 Pac. 433, 42 L.R.A. 502 (1897).
17. 13 Colo. 383, 22 Pac. 774, 6 L.R.A. 541 (1889).
18. Bode v. Rollwitz, 60 Mont. 491, 199 Pac. 688 (1921); Smith v. Whitney, 105 Mont. 523, 74 P.2d 450 (1938); Poynter v. Chipman, 8 Utah 442, 32 Pac. 690 (1893); Hinkley v. Peay, 22 Utah 21, 60 Pac. 1012 (1900); Johnson Irr. Co. v. Ivory, 46 Wyo. 221, 24 P.2d 1053 (1933).
19. 8 Utah 442, 32 Pac. 690 (1893).
20. 105 Mont. 523, 74 P.2d 450 (1938).
21. 16 Ida. 484, 101 Pac. 1059 (1909).

The riparian owner has the right to protect his lands from erosion restulting from the flow of the stream. Various means may be used to accomplish this result, but there is also a corresponding riparian right that water shall not be diverted so as to throw the current against banks with greater force than is natural. Therefore, a party protecting his land must be careful that he does not deflect the current against his neighbors' land. Both of these rights have been recognized in this region when the problem has arisen.[22] In deciding *Fischer v. Davis,* a 1913 Idaho case, the court put the right to protect the banks of a stream on a common law basis of riparian ownership. In a later case[23] between the same parties, the court in holding, said, "A riparian owner has the right to maintain an action for an obstruction in such stream which diverts the stream against his banks causing him damage."

A riparian owner also has the right that a stream shall not be so obstructed as to cause it to back up and flood his lands. In *Big Horn Power Co. v. State,*[24] decided in Wyoming in 1915, the court ordered the removal of a superstructure on a dam which caused water to flood riparian railroad tracks. Although the court based its decision on the grounds of nuisance, the same right has been upheld upon the grounds of riparian ownership,[25] not only in riparian states, but also in Arizona. In *Kroeger v. Twin Buttes Railroad Co.*[26] the court of that state, after talking about climatic conditions just as it did in refuting the doctrine of riparian rights to use water, said, ". . . we think the rule of common law relative to the obstruction of running streams to the injury of adjacent lands is applicable in this territory . . . and it is a well settled rule of the common law that the waters of a natural stream or water course may not be so obstructed by a lower proprietor as to flow back to the detriment of those above him."

In addition to title rights and rights relating to flow, there are riparian rights to purity of water, of fishery and of access to the stream. Both Idaho and Montana have held that a riparian owner has a right of action against one who pollutes a stream to the riparian's damage.[27] A recent Idaho case[28] decided in 1953 was a suit by a grocery owner whose store was on the bank of a stream which had been polluted with sugar beet pulp by the defendant. The court allowed recovery on the theory that the pollution constituted a nuisance. At common law the recovery would have been based on the riparian right of purity. Regardless of the label imposed upon

22. Fischer v. Davis, 24 Ida. 216, 133 Pac. 910 (1913) ;; Ladd v. Redle et al., 12 Wyo. 362, 75 Pac. 691 (1904).
23. See note 21, supra.
24. 23 Wyo. 271, 148 Pac. 1110 (1915).
25. Palmer v. Massengill, 177 Ala. 612, 58 So. 918 (1953); Flader v. Central Realty & Investment Co., 114 Neb. 161, 206 N.W. 965 (1926); Zalabach v. City of Kingfisher, 59 Okla. 222, 158 Pac. 926 (1916).
26. 13 Ariz. 348, 114 Pac. 553, Ann. Cas. 1913 E 1229, 14 Ariz. 269, Ann. Cas. 1914 A 1289 (1911).
27. Fitzpatrick v. Montgomery, 20 Mont. 181, 50 Pac. 416, 23 Am.St.Rep. 622 (1897); Hill v. Standard Mining Co., 12 Ida. 223, 85 Pac. 907 (1906); Conley v. Amalagamated Sugar Co., 74 Ida. 416, 63 P.2d 705 (1953).
28. Conley v. Amalgamated Sugar Co., supra note 27.

the recovery, the significant point is that a riparian owner, without an appropriation right, recovered for the pollution of the stream by an upstream appropriator.

The exclusive right of fishery in non-navigable water bounded by lands of the riparian owner was another common law riparian right which has been recognized in some of these appropriation jurisdictions.[29] Even Colorado, a state in which the tourist trade is a major industry and which holds out fishing as one of its major tourist attractions, has held that the riparian owner has a right to fish which is superior to that of the public. In the case of *Hartman v. Tresise*,[30] the Colorado court, in spite of heavy opposition by sportsmen's groups, upheld a decision allowing a landowner whose land bounded the stream in question, to recover in trespass against a fisherman who was standing in the middle of the stream fishing. In holding for the riparian landowner, the court not only said that the title to the bed of the stream was in the riparian owner, but also stated that he had a right to fish in the stream, where bounded by his lands, superior to that of the public. Montana has also upheld the superiority of a riparian's right to fish in non-navigable waters.[31] Although the New Mexico court, in the case of *State v. Red River Valley Co.*,[32] held that riparian owners do not have the exclusive right of fishery, it was by a split decision of three to two. The majojrity relied on the common law rule that there was no riparian right of fishery in public waters, and held that this rule had been applied to all New Mexico waters by a New Mexico constitutional declaration that all waters in the state were public waters. The two dissenting judges differed with this construction of the word "public" and thought that the riparian had the exclusive right to fish in waters that overlay his land.

As for access, in *Shepherd v. Couer d'Alene Lumber Co.*,[33] the defendand had constructed a log boom which made a lake inaccessible from the plaintiff's riparian lands. The court in holding for the plaintiff stated that a riparian owner had the right of ingress and egress to and from the water that was a property right which the court would protect.

Occasionally a court will reject the dictum that riparian rights are abolished and point out that riparian owners have common law rights even in appropriation jurisdictions. In the *Hutchinson* case[34] it was said, "This court has on several occasions recognized some of the incidental common law rights of riparian ownership in cases where those rights are not in conflict with the right of appropriation." In the *Red River Valley* case[35] both the majority and minority opinions state that those phases of riparian rights

29. Herrin v. Sutherland, 74 Mont. 587, 241 Pac. 328 (1925); Hartman v. Tresise, 36 Colo. 146, 84 Pac. 685, 4 L.R.A. (N.S.) 872 (1905).
30. See note 29, supra.
31. Herrin v. Sutherland, 74 Mont. 587, 241 Pac. 328 (1925).
32. State v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945).
33. 16 Ida. 293, 101 Pac. 591 (1909).
34. See note 21, supra.
35. See note 32, supra.

that do not conflict with the doctrine of prior appropriation are in full force as a part of the common law as adopted in New Mexico.

Even though the courts in the other appropriation jurisdictions have not been so thorough as the New Mexico and Idaho courts in their analysis of the problem and have been content to echo the dicta of early cases, it can be seen that a large number of riparian rights have been recognized. In each of these states the courts have upheld one or more of these rights and together they have given effect to almost every riparian right that existed at common law. Although these states pride themselves on their appropriation doctrine, there is no reason why the mere mention of the word "riparian" should immediately give rise to hostility and suspicion in their courts. Those riparian rights which do not in reality conflict with the doctrine of prior appropriation should be recognized in these states even if put squarely on a common law riparian basis.

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