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Significant Decisions at Nisi Prius

Dicta Editorial Board

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(Decree of Hon. Paul L. Littler, District Judge, on Jan. 29, 1947, overruling a preliminary motion to dismiss Civil Action 7327 in the District Court of Mesa County, In the Matter of the Application of J. Lewis Ford for an Adjudication in Water District No. 42. Final decree and award entered August 23, 1948.)

Petitioner made application for an adjudication of a priority to the use of water from an artesian well located on his property, representing that the water was used both for domestic purposes in his own household and for sale to the general public for domestic purposes.

Adjacent landowners, the Board of County Commissioners of Mesa county, and the Orchard Mesa Irrigation District all filed objections to the petition, seeking dismissal of the proceedings on the grounds that the court was without jurisdiction under the Constitution and laws of Colorado to adjudicate priorities for appropriation of waters flowing from artesian wells.

A government geologist had made a study of the artesian water system in the Mesa county area, and his evidence was made a part of the record of proceedings, thus establishing with a fair degree of definiteness the source of supply and the extent of the structure.

The question of beneficial use and waste on the part of the petitioner were matters for determination in the adjudication proceeding, the right to have which was challenged at the outset by the motions to dismiss. The court overruled these motions and proceeded to adjudicate priorities for the various artesian wells on the basis of the following reasoning:

"The only question which is deserving of serious consideration is whether or not the doctrine of priority of appropriation should be applied to artesian water. The other questions raised do not go to the jurisdiction of the Court. Whether or not the common law is applicable to conditions in Colorado has always been considered a judicial question. *(Coffin v. Left Hand Ditch Co.,* 6 Colo. 443, 446). *(Morris v. Fraker,* 5 Colo. 425) * * *

"Our courts have held that before the Constitution was adopted, and separate and apart from any legislation, that the Common Law doctrine of riparian rights along surface streams was not applicable to the conditions in this state, and in lieu thereof applied the doctrine of priority of appropriation. Many years ago we applied the doctrine of appropriation to seepage water and spring water, both of which are at one stage of their existence percolating water and one type of ground water.

"The difference between seepage and spring water on one hand, and artesian water on the other, is a very technical one without real substance. Seepage water is ordinarily quite near the surface and more often in a soil or shale formation than in rock. Spring water is more often, in reality,

artesian water, which has found a natural opening through which to escape to the surface. I can see no real difference between water which thus escapes naturally and water which escapes through an artesian well which is no more than an artificial opening instead of a natural one.

"These artesian wells are used primarily, if not entirely, for domestic culinary purposes. And this water is just as essential, if not more so, than water used for irrigation. The Constitution gives priority to water for domestic purposes over that for irrigation thus recognizing its superior importance. Since the doctrine of priority of appropriation has been held applicable to surface streams regardless of constitutional or statutoy provisions, there seems to be no reason why this doctrine should not also be applicable to artesian water.

"As was said in *McClellan v. Hurdle*, 3 C. A. 430, 434: 'It makes no difference whether water reaches a certain point by percolation, subterranean channel or surface channel, it is subject to appropriation.' "

And the court concluded by quoting from a Utah case, *Wrathall v. Johnson*, 86 Utah 50, 40 P. (2d) 755, which also applied the appropriation doctrine to artesian waters.

Give The Reporter A Break

By H. N. WOODMAN

Editor's Note: Friendly "Woody" Woodman, reporter in Judge Knauss' Division of the District Court, is well-known to most Denver lawyers. Recently Mr. Woodman was invited to speak his mind before a meeting of the Law Club. His remarks on that occasion are reprinted below.

Mr. President and Gentlemen: For many years I have been recording the remarks of members of the legal profession in the court room, and now for me to appear before you in the role of speaker is a unique experience indeed. However, in this inverse procedure, I may be able to offer a few sidelights on our mutual relationships.

You have been taught the fundamentals, the higher and broader outlook in the practice of law; some of you are teaching it; yet through many years of court room proceedings, I might comment and offer suggestions on some of the lesser things in our daily court room life.

My suggestions will deal mainly with jury cases. The judges, you know, hear so many cases that they become experts in judging human nature and the integrity of witnesses; and in the ordinary court case, through active participation, they can promptly separate the wheat from the chaff and arrive at a speedy, correct decision.

Jury cases, however, are more formal. The procedure of the selection of the jury and the parade of witnesses before juries, interspersed with the maneuvers of counsel, is interesting and enlightening.