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There seems to be some confusion, or difference of opinion, among the attorneys of the State as to the extent or effect of the decision of Judge Littler in a proceeding lately pending in the District Court of Mesa County, Colorado, with relation to the adjudication of underground water rights.[1] It is apparently assumed by some that this decision constitutes a departure from, or a different application of, the established principles and rule of law heretofore adopted by our appellate courts upon this subject.

As I read the opinion, findings, conclusions and decree, this judgment presents no new or novel interpretation of our laws, but merely follows and reiterates the controlling principles heretofore promulgated by our Supreme Court in a number of decisions. I have not had the opportunity of reading the record in this proceeding, and my opinion is based entirely upon the findings of fact and conclusions of law as they appear from the rulings and decree of the trial court.

This proceeding was initiated by the filing of a petition in the District Court of Mesa County, the court of primary and exclusive jurisdiction for the adjudication of priorities of right to the use of water in Water District No. 42 of the State of Colorado. It appears from the allegations of the petition that the petitioner seeks to have adjudicated a priority of right to the use of water for domestic purposes by pumping the same from a well sunk into the source of supply which is alleged to be "an artesian basin or strata of artesian water underlying a part of said county, which is not tributary to any natural stream."

Several motions to dismiss the petition were filed by other water users in the Water District, chiefly challenging the jurisdiction of the court to hear, adjudicate and determine priorities of right to the use of so-called artesian waters in a statutory proceeding for the adjudication of priorities of right to the use of water for beneficial purposes. These motions were overruled by the trial court and his reasons therefore were set forth in quite an elaborate and well-reasoned written opinion. Further proceedings were had in which testimony was heard and on August 23, 1948, the court entered a final decree awarding and decreeing to the petitioner, and the other owners of wells diverting their supply of water from the same or a similar source in the same area, priorities in order of their respective appropriations for the amounts shown to have been respectively beneficially used. Apparently, no appeal was taken from that decision.

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[1] In the Matter of the Application of J. Lewis Ford for an Adjudication in Water District No. 42, reported in 26 Dicta 92 (April, 1949).

The material and controlling findings of fact entered by the court may be stated substantially as follows:

1. The source of supply for the appropriations involved is underground water found in three separate and distinct sands, known as the Morrison sand, the Entrada sand and the Wingate sand; that these sands lie above an impervious strata in the order above named; these water-saturated sands have no connection with each other and are separated by an impervious structure, so that no water seeps or percolates from one to the other.

2. That the waters so found in each of these sands constitute a separate and distinct source of supply in said Water District No. 42, which the court, for lack of a better term, designates as Zones Nos. 1, 2 and 3.

3. That no part of these waters are tributary to or constitute a part of the waters of any natural stream.

The material conclusions of law arrived at by the trial court based upon the foregoing findings of fact are, in substance:

That the doctrine of priority of right to the use of water for beneficial uses applies to underground water the same as to surface waters flowing in a natural stream.

That the trial court, therefore, has jurisdiction of the subject matter to adjudicate and determine these rights in the same manner and upon the same basis as in the adjudication of surface flows.

Assuming that the findings of fact above referred to are supported by the evidence, I am of the opinion that the conclusions of law based thereon as above set forth are clearly stated and accurately applied.

There seems to be difference of opinion among irrigation lawyers and engineers as to whether or not the waters denominated herein as "artesian," strictly and technically fall within the class of underground water known to the geologists as "artesian." In my opinion this is of no importance or consequence. Whether or not the source of supply, may be artesian, underground streams, underground ponds, percolating waters or diffused underground waters the same legal rules and principles should apply to the appropriation and utilization thereof for beneficial purposes in exactly the same manner and with exactly the same effect .

In the instant case, in my judgment, the problem resolves itself into a single question of fact, i. e. whether these waters are from a closed basin which prevents them from becoming tributary to, or a part of, the waters of a natural flowing stream either upon or underneath the surface. The trial court found that the water involved herein was not tributary to any natural stream. Hence, the application of the proper rule of law is *stare decisis* in Colorado. This class of water has come to be known as "developed" water, when appropriated. The settled law of the state upon that subject is that when waters are not and cannot become a part of a stream, either by surface or subterranean flow, an appropriator who first develops this water and puts

it to a beneficial use is entitled to a priority of right to the use thereof as against the world. And further, that the same rules of law apply to the appropriation of underground waters which do not and cannot reach the stream and become a part thereof as are applied to the appropriation and adjudication of rights in the waters of surface streams.

Among the numerous decisions of our Supreme Court in which the foregoing rule was announced and applied, may be cited: Ripley vs. The Park Center Land & Water Co., 40 Colo. 129; San Luis Valley Irr. District vs. Rio Grande D. District, 84 Colo. 99; Leadville Mine Dev. Co., vs. Anderson, 91 Colo. 536; Dalpez vs. Nix, 96 Colo. 540; De Haas vs. Bennish, 116 Colo. 344.

In conclusion, it seems clear to me that the trial court in this proceeding has logically reasoned and accurately adopted and applied the existing rules of law to the specific problem with which it had to deal.

John G. Johnson, Lawyer

By HENRY MCALLISTER
of the Denver Bar

I read in the March, 1948, *Dicta* a very interesting address on "Judah P. Benjamin, Lawyer and Statesman" by Hon. John W. Delehant, Judge of the United States District Court for Nebraska.

After reading it, I concluded that when time permitted I would submit to *Dicta* some remarks concerning a man who, in my opinion, was the greatest lawyer ever produced in America, measured by the magnitude of his labors in and out of the courts. That I undertake now.[1]

This man's career ended only by his death in 1917, about 30 years ago, and as indicative of the fleeting reputation of a great lawyer, I doubt whether prior to that time 10% of his contemporary Colorado attorneys ever heard of him. I reduce that percentage now to 5% of the present members of the bar.

His name was John G. Johnson, born in 1841, at Chestnut Hill, a suburb of Philadelphia, the son of a blacksmith and a milliner in straightened circumstances. He died at the age of 76, still active in his profession in Philadelphia. He graduated from a Philadelphia high school, studied law in a law office and before he was thirty years old, was one of the outstanding lawyers at the Philadelphia bar, proverbial for its eminence. From that time on, by extraordinary genius and labor, he advanced rapidly in his profession and when he died, was acknowledged by all who knew, or knew of, him as the unquestioned leader of the entire American bar. Upon his death many columns of Eastern newspapers, especially in Philadelphia and New

[1] For many statements in this article I am indebted to the biography of "John G. Johnson", by Barnie F. Winkelman of the Philadelphia bar. (Univ. of Pa. Press, 1942.)