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Irrigation and Wild Animals

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Far apart as the subjects at first seem to be, it has been a source of interesting speculation to me, as to just how far, if at all, Colorado pronouncements of principles of irrigation law have been influenced, perhaps unconsciously, by fundamental conceptions as to property rights in animals *ferae naturae*—whether the doctrines of appropriation are not merely adaptations of the law of the chase. At least there are many striking resemblances in the two subjects, which, so far as I know, have gone unnoticed.

The law of the chase, of course, is ancient indeed, and has its sources far back of the dawn of history among primitive man. Its discussion in Blackstone follows closely the pattern found in Justinian, where it is treated as the law of nature.

Under the Roman law, wild animals belonged in common to all citizens of the state[1] and might be reduced to private ownership by capture "so long as it remains in your power, but when it has escaped and recovers its natural liberty, it ceases to be yours, and again becomes the property of him who captures it."[2] The same rule prevailed at common law.[3] "All these things [wild animals], so long as they remain in possession, a man may enjoy, but if they escape him, or if he abandons their use, they return to the common stock, and another man may seize them."[4]

But the development of the law of water followed an entirely different channel of thought under the common law. Reduction to ownership was not a part of the system, and instead there was developed the theory of riparian rights, whereby one on a water course was entitled to have the stream continue "undiminished and undefiled." Said Blackstone, "It is a nuisance to stop or *divert* water, that runs to another's meadow or mill, by erecting a dye house or lime pit in the upper part of

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[1]Greer v. Connecticut, 161 U. S. 319, 16 S. Ct. 600, 40 L. ed. 793 (1896).

[2]JUSTINIAN INST. lib. 2, tit. 1, §12.

[3]2 BLACKSTONE COMM. c. 25.

[4]2 BLACKSTONE COMM. c. 1.

the stream, or in short to do any act therein, that in its consequences must necessarily prejudice one's neighbor."[5]

It is true, the irrigators of the arid West were not the first to adopt theories of rightful use of water from streams for consumptive use in agriculture. The ancient Peruvians, and certain other agricultural Indians, made use of water for irrigation of their fields, and constructed vast systems for its beneficial enjoyment. But these systems, it seems likely, were socialistic in organization and use and adapted to a scheme of land tenure entirely at variance with the individualistic land ownership of the common law. Indeed, the dim pages of earliest recorded history contain references to irrigation as a going concern, and evidences of well established systems are found among the ruins of long forgotten civilizations wherever climatic conditions required supplement to natural rainfall. We cannot be sure as to the laws under which most of these early systems operated, but it is at least probable that private property rights themselves were not a part of earlier civilizations, and certainly not of primitive man. It is probable that the first property right, aside from personal adornments and implements of the chase, was in the product of the chase—wild animals. Private ownership in things, whether real or personal, was not a part of early systems, and the enjoyment of things, of whatever nature, was merely a right in him who had, and could maintain, possession. As land, animals and objects passed into ownership, it still had to do only with land which could be occupied; with objects which could be hoarded; or with animals which could be herded and controlled, or which, by domestication, had lost the will to be free. Probably as the last remnant of laws formerly extending to all man's dominions, there remained, and still remains, the law as to property rights in wild animals, which arise with capture and end with escape. But, is this not also the law of water under the doctrine of appropriation?

Stemming, as they did, from well watered countries, and steeped as they were in the doctrines of the common law, it is not likely that our early law-makers, judicial or legislative, were much influenced by irrigation laws of other places, ancient or modern. They were, on the other hand, familiar with the doctrine of riparian rights, which was not applicable to their condition. In the face of that doctrine, and in violation of

[5] 2 BLACKSTONE COMM. c. 13.

it, necessity compelled them to take water from the stream, and "take a chance." Having taken it, where look for justification?

Among pioneer people, who look to furs and venison for their cash crop and daily bread, the law of the chase assumes considerable importance. Its every nicety is known. And here on mountain side and in valley was another life-sustaining element—water, as sly at capture as fox or beaver; as difficult to tame and enjoy as wolf or wildcat. The slithering stream, chained today with frail diversion dams and transported to place of use in weak and makeshift ditches, might rise in the night to break its chains and quickly return to its native habitat and channel. Captured for a season, it might escape, or its temporary owner abandon its use. Like the deer in the woods, it belonged to him who might take it, but when it escaped again, ownership was no more feasible than ownership of the escaped deer.

Since it was useful to use, it was natural that man's dominion should be extended to cover water, as his dominion had been extended to other objects of need or desire. Riparian rights to undiminished flow had no place here because not useful. So, of necessity, some other rule must be applied. What more natural then, than the application of the law of the chase, already familiar to all? And, without knowing it, did not those who made the new rules, merely apply to water the rules they already applied to their trap lines and to the game all about them?

Note the similarity:

Game belongs to the public; unappropriated water "is hereby declared to be the property of the public."[6] It is so declared by our constitution, but was true before the Constitution was written.

Property rights in wild animals arise from capture; property rights in water arise from appropriation.

Property rights in wild animals are lost by escape back to nature; property rights in water are lost when it escapes to the stream again.

But, "If a deer reclaimed has a collar or other mark upon him, and goes and returns at his pleasure, remaining not long absent, the owner's property in him still continues," says Blackstone. So, also, water diverted from a stream and "collared and marked" by measurement, may

[6]COLO. CONST. Art. XVI, §5.

be let into another natural stream, and the property right therein continue so that it may be taken out and used by the original appropriator.

"He has a transient property in game within his own domains, but when they leave such locality, the property ceases," says Blackstone. The spring of water upon one's land belongs to him, if it does not naturally flow to a common stream; then it, too, is subject to appropriation, and the property right ceases.

We have no individual ownership of wild animals in the forest. We have no individual ownership of water in a stream, unless like a wild animal, we put it there marked or measured for identification.

Game taken from the forest may be loosed in an enclosed park, and property rights remain while the fence holds. Water taken from a stream may be impounded in a reservoir, and property rights remain till the dam breaks.

One who has captured a wild animal is liable for the damage it may do. One who takes water from a stream is liable for its damage under about the same circumstances.

"But," says Blackstone, "this right [to take game] may be restricted by positive laws for the benefit of the community." Like game laws, the state may also regulate the matter of appropriation, storage and use of water, in the public interest.

The laws as to taking by trespass seem to be similar in cases of wild animals and water. One may exclude the trespasser, but one taking by trespass owns, notwithstanding. "For," says Justinian as to game, "natural reason gives to the first occupant that which has no previous owner." A like rule applies to unappropriated water.

Is not the doctrine which dates back priority rights to the date of commencement of construction, if diligently pursued, but the old doctrine of the "hot trail" of the chase?

And so, the speculation continues.

I have never heard of anyone citing the law of wild animals in an irrigation case, but some day, in absence of something better, I'm going to try it. It looks to me from where I sit like better authority than some I have seen followed, and maybe the courts will yet recognize the applicability of the law of the chase as controlling in the matter of the pursuit after equally furtive and elusive water for irrigation purposes.

Sustaining Memberships Created in State Bar

Sustaining memberships were authorized under an amendment to the by-laws proposed at the recent convention at Colorado Springs and the machinery to put them into effect has been approved by the Board of Governors. The plan calls for contributions of $25.00 for each year by those members of the association who decide to become sustaining members, and a committee will soon be announced by the president to solicit these memberships. Funds received from sustaining members will be used to expedite the activities of the Colorado Bar Association. George Corlett of Monte Vista, a member of the Board of Governors, became the first sustaining member when he enclosed his check for $25.00 when voting for the plan as a member of the Board of Governors. A list of sustaining members will be printed in DICTA.

Too Straight, Maybe

The witness was on the stand to testify as to the good character of the accused, who was on trial for shooting a police officer. The usual preliminary questions were asked and answered in the affirmative. Then came the chief question, propounded with great gusto:

"Now, what is this man's general reputation?"

The witness responded with equal gusto:

"He was known everywhere as a straight shooter!"

Northwestern Bar Adopts Minimum Fees

A meeting of the Northwestern Colorado Bar Association was held in Glenwood Springs on September 27, 1941, at the Cosgriff Hotel. Fifty-one members and guests were present. Judge John R. Clark of the Ninth Judicial District gave a full report of the meeting held by the state association at Colorado Springs on September 12 and 13. John L. J. Hart of Denver spoke on the new federal revenue tax law and W. W. Platt, president of the state association, also addressed the meeting. Resolutions were adopted extending sympathy to the family of the late E. T. Taylor, Congressman for the Fourth District. At the annual ban-

quet, held at the Hotel Colorado in Glenwood Springs on August 7, 1941, the following officers were elected: Allyn Cole of Glenwood Springs, president, Fred Videgon of Craig, first vice-president, Percy Rigby of Meeker, second vice-president, Sadie H. Korn of Glenwood Springs, secretary-treasurer, and Judge William Atha Mason of Rifle as a member of the Board of Governors of the Colorado Bar Association. Matters pertaining to minimum fees for the Ninth Judicial District were discussed and adopted. The association also favored a county law library in Garfield and Rio Blanco counties. —*Sadie H. Korn.*

Opposition

Our friends G. Dexter Blount and Arthur R. Morrison were on opposite sides of a will contest which was being tried in the District Court in Fairplay. The testator had been a prominent pioneer mining man and almost the whole town turned out for the trial. It was midsummer and all the windows on three sides of the little court room were open. Both attorneys were relatively unacquainted in the community and both were making the greatest effort to create a favorable impression with the spectators as well as with the jury. Mr. Blount was making his opening statement. Suddenly a stray burro, which was grazing just outside the court house, set up a loud braying. At first Dexter attempted to sandwich his remarks in between outbursts from the outside, then raised his voice as the heehaws settled into a steady rhythm. There were titters from the spectators, then laughter and finally everyone in the court room—judge, jury, counsel and spectators were convulsed in laughter.

In a slight pause, created principally by the burro, Mr. Morrison turned to Mr. Blount and in a hoarse whisper, obviously intended to be heard over the entire room, said, "It seems you have serious opposition."

"Yes," replied Mr. Blount quickly, "one outside and one inside."

The Berries

Judge Arlington Taylor of Fort Morgan reports a case recently filed in Morgan County, "J. P. Curry, plaintiff, v. Frank D. Berry, Mary B. Berry, *Elda* Berry, *et al.*, defendants."