Chapter 5 - Prior Appropriation

A. *Roots and Evolution*

Matthew W. Irwin v. Robert Phillips and others

Supreme Court of California.

5 Cal. 140 (1855).

Heydenfeldt, J., delivered the opinion of the Court. Murray, C. J., concurred.

The several assignments of error will not be separately considered, because the whole merit of the case depends really on a single question, and upon that question the case must be decided. The proposition to be settled is whether the owner of a canal in the mineral region of this State, constructed for the purpose of supplying water to miners, has the right to divert the water of a stream from its natural channel, as against the claims of those who subsequent to the diversion take up lands along the banks of the stream, for the purpose of mining. It must be premised that it is admitted on all sides that the mining claims in controversy, and the lands through which the stream runs, and through which the canal passes, are a part of the public domain, to which there is no claim of private proprietorship, and that the miners have the right to dig for gold on the public lands was settled by this Court in the case of Hicks et al, v. Bell et al., 3 Cal., 219.

It is insisted by the appellants that in this case the common law doctrine must be invoked, which prescribes that a water course must be allowed to flow in its natural channel. But upon an examination of the authorities which support that doctrine, it will be found to rest upon the fact of the individual rights of landed proprietors upon the stream, the principle being both at the civil and common law that the owner of lands on the banks of a water course, owns to the middle of the stream, and has the right in virtue of his proprietorship to the use of the water in its pure and natural condition. In this case the lands are the property either of the State or of the United States, and it is not necessary to decide to which they belong for the purposes of this case. It is certain that at the common law the diversion of water courses could only be complained of by riparian owners, who were deprived of the use, or those claiming directly under them. Can the appellants assert their present claim as tenants at will? To solve this question it must be kept in mind that their tenancy is of their own creation, their tenements of their own selection, and subsequent, in point of time to the diversion of the stream. They had the right to mine where they pleased throughout an extensive region, and they selected the bank of a stream from which the water had been already turned, for the purpose of supplying the mines at another point.

Courts are bound to take notice of the political and social condition of the country, which they judicially rule. In this State the larger part of the territory consists of mineral lands, nearly the whole of which are the property of the public. No right or intent of disposition of these lands has been shown either by the United States or the State governments, and with the exception of certain State regulations, very limited in their character, a system has been permitted to grow up by the voluntary action and assent of the population, whose free and unrestrained occupation of the mineral region has been tacitly assented to by the one government, and heartily encouraged by the expressed legislative policy of the other. If there are, as must be admitted, many things connected with this system, which are crude and undigested, and subject to fluctuation and dispute, there are still some which a universal sense of necessity and propriety have so firmly fixed as that they have come to be looked upon as having the force and effect of res judicata Among these the most important are the rights of miners to be protected in the possession of their selected localities, and the rights of those who, by prior appropriation, have taken the waters from their natural beds, and by costly artificial works have conducted them for miles over mountains and ravines, to supply the necessities of gold diggers, and without which the most important interests of the mineral region would remain without development. So fully recognized have become these rights, that without any specific legislation conferring, or confirming them, they are alluded to and spoken of in various acts of the Legislature in the same manner as if they were rights which had been vested by the most distinct expression of the will of the law makers; as for instance, in the Revenue Act "canals and water races" are declared to be property subject to taxation, and this when there was none other in the State *147 than such as were devoted to the use of mining. Section 2 of Article IX of the same Act, providing for the assessment of the property of companies and associations, among others mentions "dam or dams, canal or canals, or other works for mining purposes." This simply goes to prove what is the purpose of the argument, that however much the policy of the State, as indicated by her legislation, has conferred the privilege to work the mines, it has equally conferred the right to divert the streams from their natural channels, and as these two rights stand upon an equal footing, when they conflict, they must be decided by the fact of priority upon the maxim of equity, qui prior est in tempore potior est injure. The miner, who selects a piece of ground to work, must take it as he finds it, subject to prior rights, which have an equal equity, on account of an equal recognition from the sovereign power. If it is upon a stream the waters of which have not been taken from their bed, they cannot be taken to his prejudice; but if they have been already diverted, and for as high, and legitimate a purpose as the one he seeks to accomplish, he has no right to complain, no right to interfere with the prior occupation of his neighbor, and must abide the disadvantages of his own selection.

It follows from this opinion that the judgment of the Court below was substantially correct, upon the merits of the case presented by the evidence, and it is therefore affirmed.

Notes and Questions

In 1850, California adopted a common-law reception statute. It provides: "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States or the constitution or laws of this State, is the rule of decision in all courts of this State." Why doesn't this statute require the recognition of riparian rights?