

UPHOLDS IRRIGATION LAW

Supreme Court Reverses Former Decision in the Crawford Case.

STATE IRRIGATION BOARD A LEGAL BODY

Modifies Ruling on the Broad Doctrine of Riparian Rights While Upholding the General Principle Involved.

(From a Staff Correspondent.)

LINCOLN, Feb. 4.—(Special.)—The supreme court today decided the case of the Crawford company against Hathaway, from Dawson county, which for so long has been in the hands of the court. The decision is in favor of the Crawford company. Judge Holcomb wrote the opinion. It upholds the constitutionality of the State Board of Irrigation and upholds the doctrine of riparian rights to a limited extent, thus giving both these bodies controlling for state control of water and riparian rights some encouragement. The former opinion of the court is reversed and the case is remanded for trial.

Similar questions were decided in the cases of Jen. C. Mene against Charles Coffey et al., and the Cattle Rock Irrigation Canal and Water company against Philip Jurisch. Judge Pound wrote the opinion in the first named and Judge Sedgewick the opinion in the latter.

Court States Case.

In discussing the case the court says:

"Briefly, the appellant, who was plaintiff below, bears an action equitable in character to have adjudicated the rights of different persons made parties to the action to the use of the water flowing in a stream called White river, and to enjoin the defendant, Hathaway, from a threatened interference with plaintiff's headwater and works connected with an irrigating canal now being constructed by him. The plaintiff claimed the right to divert the waters of the stream mentioned for irrigation purposes and to supply the town of Crawford, situated near its proposed canal, with water for municipal purposes. Defendant Hathaway, owning and operating as been in the stream, which had been utilized for power purposes, denies plaintiff's alleged right of appropriation and claims a right to the continued use of the water ordinarily flowing in the stream as a riparian proprietor. Numerous other defendants claim some right to the use of the water as riparian owners or by appropriation, were also made defendants with a view of having adjudicated the rights of all the parties to the litigation. The trial court refused to take jurisdiction and try the case on its merits for the reason that the water rights of the respective parties had not first been determined by the State Board of Irrigation under the provisions of the irrigation act of 1896. On defendant's appeal an injunction was granted against plaintiff restraining it from diverting the water of the stream into its irrigation canal and the temporary injunction granted in its favor and against Hathaway was dissolved. From these several orders the plaintiff appeals.

"The arguments in this case have taken an exceedingly broad range. Narrowed to its simplest terms, the matters in dispute relate to conflicting rights and interests as between riparian owners and those claiming as appropriators of the waters in the streams of the state for irrigation and other beneficial purposes. Incidental to the main question thus stated there is involved the constitutionality of the irrigation act of 1896, creating and providing for a state board of irrigation, defining its duties, powers and authority and establishing the portions of the act which empowers such board to determine and adjust the amount and priority of right to the use of water by appropriation for irrigation purposes.

Syllabus of Case.

"The doctrine of the civil law with respect to the right of acquiring an interest in the use of water by prior appropriation and the application thereof to a beneficial use has never become a part of the laws of this state; and this without regard to whether the doctrine was ever in existence as a part of the law in force in the territory acquired by this state, known as the Louisiana purchase.

"The common rule with respect to the rights of private riparian proprietors has been a part of the laws of the state ever since the organization of a state government.

"It cannot be said that the common law rule defining the right of riparian proprietors is inapplicable to the conditions prevailing in the state because irrigation is found essential to successful agriculture in some portions of the state.

"A riparian's right to the use of the flow of the stream passing through or by his land is a right inseparably annexed to the soil, not as an easement or appurtenance, but as a part and parcel of the land, and right being a property right and entitled to protection as such, the same as private property right generally.

"The legislature has not abolished, nor does it possess the power to abolish, the rights of riparian proprietors which have become vested, except as such rights have been taken or impaired for public use in an exercise of the power of eminent domain, for which compensation must be made for the injury sustained.

"The provisions of section 41, article II, chapter xxxii, compiled statutes, 1901, and of section 21, article I of the constitution, authorize the condemnation of the right of a private riparian proprietor to the use and enjoyment of a natural stream flowing past his land or its impairment by an appropriation of such water for irrigation purposes, and such riparian proprietor may recover damages in the same way and subject to the same rules as a person whose property is affected injuriously by the construction and operation of a railroad.

Can Recover Damages.

"The irrigation act of 1896 authorizes and regulates the appropriation of the waters of this state for irrigation and other purposes which are declared to be a public use, and in making appropriation for water as contemplated by the act, a riparian owner whose property rights are appropriated or impaired is entitled to compensation for the injuries actually sustained, to be recovered in a suitable action or a proceeding instituted for that purpose.

"As to those streams of water flowing through the state which may be classed as interstate rivers, and along the banks of which meander lines have been run by the government in its survey of the public lands, the question is left open as to whether or not the waters of such streams

may not be treated as waters of navigable rivers in which riparian rights of an adjoining land owner would not attach against the right of the public to use the waters thereof by its appropriation and application to beneficial purposes.

"While as an abstract proposition of law a riparian proprietor has the right to the ordinary flow of the stream, this rule would furnish no basis for compensation where water is appropriated for irrigation purposes; in order to entitle a riparian owner to compensation he must suffer an actual loss or injury to his riparian estate by the law recognizes as belonging to him by reason of his right to the use and enjoyment of the water of which he is deprived.

"Ordinarily a riparian proprietor's right to the use of water of a stream is limited to its use for domestic purposes, and if applied to the irrigation of riparian lands a reasonable use for such purpose in view of an equal right to use belonging to all other riparian proprietors. The right of a riparian proprietor as such to use water for irrigation purposes is limited to riparian lands.

"The right cannot be extended to lands contiguous to the riparian lands nor can water be diverted to non-riparian lands which might be used on riparian lands but is not.

Defines Riparian Lands.

"Land to be riparian must have the stream flowing over it or along its borders.

"The extent of riparian land cannot in any event exceed the area acquired by a single entry or purchase from the government, and whether in view of the policy of the government in the disposition of its public lands such riparian lands may exceed the smallest legal subdivision of a section—that is, forty acres, or in lieu thereof if an irregular tract, a designated numbered lot, which is bordered by a natural stream or water which it flows, quere.

"The true doctrine of water rights, one the right of a riparian proprietor and the other the right of appropriation and application to a beneficial use by a non-riparian owner may both exist concurrently in this state.

"The common law rule of riparian rights is underlying and fundamental and takes precedence of appropriation of water if prior in time. The riparian owner acquires title to his riparian interest in the water when he secures the land to which it is an incident, and appropriator acquires title by appropriation and the application of the water to some beneficial use. The time when either right attaches determines the superiority of title as between conflicting claimants.

"The irrigation acts of 1889 and 1896 abrogated the law of private riparian rights as theretofore existed and substituted in its stead a law providing for the appropriation of the water of the state and their application to the beneficial uses therein contemplated.

"The legislative enactments referred to did not have the effect of abolishing vested rights of riparian proprietors, but affected only such rights as might have been acquired in the future under the law as theretofore existing.

"The court will take judicial notice of the fact that since the early settlement of the western portion of the state, where irrigation has been found essential to successful agriculture, that a custom or practice has existed of appropriating and diverting waters from the natural channels thereof into irrigation canals and the application of such waters to the soil for agricultural purposes, whether vested rights have been acquired thereby must depend on the facts and circumstances as disclosed in any particular case.

"The right to the use of water when acquired by appropriation is in its nature a property right and becomes a superior and better title to the use and enjoyment of such water than that of a riparian proprietor whose right attaches subsequently.

"The act of congress of July 26, 1886, granted to those appropriating water on the public domain for agricultural purposes a right in and to the use of such waters when made according to local custom where such right is recognized by the laws of this state or the decisions of the courts.

"The act of 1877, session laws of 1877, page 168, was an implied recognition of the rights to appropriate the waters on the public domain according to the custom prevailing in the arid states immediately west of us, and the irrigation acts of 1889 and 1896 expressly recognized and preserved the rights of those who had appropriated the public waters and applied them to agricultural uses.

Upholds Irrigation Board.

"The duty of the state board of irrigation as provided for in the irrigation act of 1896, chapter xlv, session laws, are administrative and judicial; the sections of the statutes creating such board is not unconstitutional as conferring judicial powers on executive officers.

"Where a large number of persons claim rights to use or divert the waters of a stream, by virtue of their title, appropriation, prescription or otherwise, a suit in equity to determine such rights and enjoin infringement, under color thereof, of rights acquired thereof under the irrigation act, may be maintained to avoid multiplicity of suits.

"The plaintiff in such a suit may offer to do equity by compensating riparian owners whose rights are affected by the construction and operation of a canal without leaving them to their actions at law; and in that way the amounts due the several parties by way of damages may become a proper subject of inquiry and adjudication therein.

"The term 'domestic purposes,' as used in section 42, article II, chapter xxxii, compiled statutes 1901, has reference to the use of water for domestic purposes permitted to the riparian proprietor at common law, which ordinarily involves but little interference with the water of a stream or its flow, and does not contemplate diversion of large quantities of water in canals or pipe lines.

"The common law does not give to a riparian owner an absolute and exclusive right to the flow of all the water of the stream in its natural state, but only a right to the benefit and advantage of the water, which he has a right in all other riparian owners."

"A riparian owner having a superior title to the use of the water of a stream as against an appropriator is not entitled to maintain an injunction to prevent the diversion of the stream or flood waters of the stream, and thereby prevent its occupation to a beneficial use as contemplated by the statute.

"There is no such thing as a prescriptive right of a lower riparian owner to receive water as against upper owners. Riparian owners hold a stream for a certain number of years does not give a prescriptive right that will prevent reasonable use of its waters by an upper owner."

Friday, or the 13th day of the month, has no terrors for the present adjutant general. In addition to the order issued today, which follows, he has called a meeting of the military board for the same day, Friday, February 13, and an election will be held the same day to choose a successor to Major Boshaw, whose election as lieutenant colonel, has been approved. The commanding general is composed of Captain Harry Hull, company A, First regiment; Lieutenant Rawlins, company K of Columbus, and Adjutant General Colby. An election of commissioned officers has been called for the Millard meeting, to occur at their next regular meeting. Adjutant General Colby issued this order today:

Pursuant to section 24, chapter I of the Compiled Statutes of Nebraska, a board of examination will convene in the adjutant general's office, Lincoln, Neb., at 10 o'clock a. m. on Friday, February 13, 1903, for the purpose of examining such officers as may be ordered before it as to their qualifications for commissions as officers of the Nebraska National Guard.

The following officers are detailed for such board: Brigadier General F. H. Barry, First brigade; Colonel H. L. Archer, First infantry regiment; Lieutenant Colonel V. Chittenden, Second infantry regiment; Major Charles A. Vickers, First infantry regiment; Major R. Emmett Gilman, Second infantry regiment; Captain Hartigan, company D, Second infantry regiment; Captain Fred J. Mack, company M, Second infantry regiment.

The examination ordered in the foregoing paragraph will be made in accordance with general orders No. 7, A. G. O., series of 1897, with such modifications as may be ordered by the board of examination by the adjutant general.

The following officers of the Nebraska National Guard will report to the adjutant general, with side arms, for examination to the president of the board, convened by paragraph 1 of this order, convened by John W. McDonnell, Second infantry; Lieutenant Colonel J. E. McLaughlin, First infantry; Major Ell Hodgin, Second infantry; Captain Samuel E. Yoder, Battery (Light); Captain Jesse C. Farwell, company G, First infantry; Captain George A. Eberly, Stanton rifle; Captain James C. Elliott, West Point rifle; Captain William R. Brooks, engineering and signal corps; Captain John A. Deane, company C, First infantry; Captain Walter F. Sammons, company A, Second infantry; Captain Simeon C. Creder, company D, Second infantry; Captain Oliver G. Osborne, company G, Second infantry; Captain George E. Sues, Millard rifle; Captain John Newman, company H, Second infantry; Captain Ernest H. Tracy, company A, Second infantry; Captain Charles A. Eberly, company G, First infantry; Captain Frank W. P. Schmitt, company D, Second infantry; Captain Clifford W. Walden, surgeon, Second infantry; First Lieutenant Nelson N. Barber, company A, Second infantry; First Lieutenant First Lieutenant Daniel Templeton, company I, Second infantry; First Lieutenant Iver S. Johnson, Stanton rifle; First Lieutenant William H. West Point rifle; First Lieutenant William E. Easer, company L, First infantry; First Lieutenant Joseph L. Schmitt, company B, Second infantry; First Lieutenant J. Rex, Henry, engineering and signal corps; First Lieutenant Edward E. Hult, company D, Second infantry; First Lieutenant James A. Allen, company G, Second infantry; First Lieutenant Raymond J. Pool, company D, First infantry; First Lieutenant Clinton W. Gardner, battery A; First Lieutenant Frank H. Brown, assistant surgeon, Second infantry; First Lieutenant James E. Hunte, assistant surgeon, First infantry; First Lieutenant Frank S. Nicholson, assistant surgeon, battery A, First infantry; First Lieutenant Tagg, South Omaha cavalry; First Lieutenant Robert A. Brown, company I, First infantry; First Lieutenant Karl M. Shankland, company H, Second infantry; First Lieutenant Justin Smith, quartermaster, Second infantry; First Lieutenant Roy H. Walker, Millard rifle; Second Lieutenant Lewis B. First, company B, First infantry; Second Lieutenant Amos Thomas, troop A, Second infantry; Second Lieutenant Fred J. Fayerherm, Stanton rifle; Second Lieutenant Ralph H. Doch, company I, First infantry; Second Lieutenant George F. Bredtfuehrer, company K, First infantry; Second Lieutenant Fred Hillis, engineering and signal corps; Second Lieutenant Harry W. Majors, company L, First infantry; Second Lieutenant Lawrence E. Jones, company A, First infantry; Second Lieutenant M. on Post, company E, Second infantry; Second Lieutenant Edmund H. Mullenweg, company A, Second infantry; Second Lieutenant Clara D. Pfeiffer, company H, First infantry; Second Lieutenant Oliver A. Fairchild, company A, Second infantry; Second Lieutenant William Disting, company G, Second infantry; Second Lieutenant E. M. Blumstein, West Point rifle; Second Lieutenant Edward L. Fodge, company D, First infantry; Second Lieutenant Charles W. Taylor, company B, First infantry; Second Lieutenant James H. Duncanson, South Omaha cavalry; Second Lieutenant Anton Honke, company H, Second infantry; Second Lieutenant Hardy B. Klump, company M, First infantry; Second Lieutenant Albert Herman Barker, company E, Second infantry; Second Lieutenant Edward V. Cooper, Millard rifle.

The officers comprising the board of examination and the officers acting under its authority will be furnished with transportation from their home stations to Lincoln and return.

By command of the governor,
I. W. COLBY,
Adjutant General.

TELEPHONE WAR IS NOW ON

Fremont Authorities Out Wire and Chop Down Poles of Bell Company.

LINEMAN ATTEMPTS TO BLOCK THE GAME

Slides to the Ground When He Discovers Officer is Really Chopping the Pole Down—Company Does Not Show Hand.

FREMONT, Neb., Feb. 4.—(Special.)—

There have been no developments in the telephone war here today. Yesterday afternoon on account of the storm the Bell people did not do much. This morning Local Manager Cummings sent out several gangs of men in different parts of the city to work on the lines. Street Commissioner Mackey, an expert lineman in the employ of the city, and the police went with them. At the corner of Main and Eighth streets eight new wires were put up. The city's lineman climbed the pole and cut them with a pair of nippers. Wherever the street commissioner found that any new work had been done since Saturday night he tore out the wires, and by noon he had disabled a lot of new work. The Bell men went out as usual this afternoon scattering around through the city, and as fast as possible the wires were cut by the commissioner or under his direction.

Yesterday Mr. Mackey found two new poles which had just been set. A man was still working on top of one of them. He was ordered to come down, but informed the commissioner that he would do so when he was ready, and not before. Mackey then started to saw the pole down, and the man bent it over so that the saw pinched. He had an axe with him, however, and chopped on the other side until the lineman became alarmed, and slid to the ground as fast as he knew how. The other pole was sawed off.

There has been no hard feeling between the Bell men and the city authorities. It was rumored this morning that the trouble would be brought to a head by the arrest of the Bell linemen for the violation of a city ordinance which prohibits any person, company or corporation from setting any poles or stringing any wires within the limits of the city without first procuring the consent of the mayor and council under a penalty of a fine not less than \$10 or more than \$50, but no warrants have been issued and it is evidently the plan of the city to compel the Bell company to take the first step to put a stop to the present state of affairs.

Local Manager Cummings says that he has instructions to go ahead with his work as usual, doing repairing and putting in new poles the same as before, and Street Commissioner Mackey is also acting under instructions to tear out every piece of new work put in. A careful examination of the records of the city council fails to show where any right or franchise was granted the Bell people. The city is in the fight to a finish and stoutly denies that the Bell company is subject to no restrictions or regulations whatsoever.

Independent Telephone Meeting.

NEBRASKA CITY, Neb., Feb. 4.—(Special Telegram.)—The members and managers of the independent telephone companies of southeastern Nebraska held a meeting in this city this afternoon.

DEMAND DEFEAT OF THE LOBBY

Democratic Editors Go on Record in Opposition to Railroad Interference.

GRAND ISLAND, Neb., Feb. 4.—(Special.)—

At their session last night the democratic editors discussed the revenue law revision situation thoroughly, and finally adopted unanimously the following resolutions, which were drawn by a committee of which C. J. Bewley of the Crete Democrat was chairman:

"We denounce the attempt of the railroad lobby to deceive the public with respect to house roll 171, now pending before the Nebraska legislature, the same being a bill designed to require railroad companies to bear their just proportion of taxation in cities of the metropolitan class.

"The attempt on the part of the railroad lobby to make it appear through editorials, admitted by writers of the Crete Democrat by the railroads, that this measure, if enacted into law, would affect taxes to be paid by railroads for state, county and school purposes is indefensible and deserves prompt and vigorous rebuke at the hands of all who believe in the public good, and known with respect to every public measure and who object to the escape of taxation by the railroads for state, county, city or school purposes.

"We believe it to be the duty of every democratic member of the legislature to vote for house roll 171 and register his protest in an effective way against the attempt of the railroads to deceive the people, and through such deception, escape their proportion of taxation.

"The democratic party was organized for the purpose of winning for every citizen 'equality before the law.' Recognizing the gross inequality in the levying of taxes in this state, we urge the democratic members of the state legislature to labor for the enactment of a revenue law which will lay the burden of taxation equally upon all classes of property."

Dies as Result of Burns.

WEST POINT, Neb., Feb. 4.—(Special.)—Miss Mary Liermann, the young woman so severely burned above the body by the explosion of a can of gasoline with which she was trying to kindle a fire, succumbed to her injuries last night at the National hotel in this city, where she was moved immediately after the accident. She was 17 years of age and the daughter of William Liermann, a prominent farmer, and was attending school in the city at the time. She was an exceptionally bright and lovable girl.

Ban on Slot Machines.

NEBRASKA CITY, Neb., Feb. 4.—(Special Telegram.)—Mayor Bartling today issued orders to the police to suppress all the slot machine traffic in this city. This order includes the trade machines also and practically kills the slot machine business here.

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YOUNG WIFEHOOD



After I had been married about four months I felt my health generally decline. I seemed to lose the light step and dragged along wearily instead. My appetite failed me and I lost health and strength. I was nervous and had shooting pains through my limbs, and stomach pain and constant headaches added to my misery. The menstrual flow became more and more profuse and I was unable to attend to my daily duties. My husband called in three different physicians and I took medicine enough to kill or cure a dozen women, but it all had no effect on me whatever, until I took Wine of Cardui. In a few days I felt a change for the better, my general health improved and at the next time of my period my flow was more natural and I was in less pain. Gradually I recovered my health and strength and am now in perfect health. I take an occasional dose of Wine of Cardui which keeps me well. I am happy to give you this endorsement.

Mrs. Bertha Ricker

Wine of Cardui brought Mrs. Ricker good health. That is why she has so much faith in it that she never is without Wine of Cardui in her house.

The first months following marriage are full of peril for the young wife and a dose of Wine of Cardui every day is a great reinforcement to her strength. Why don't you try for the same health Mrs. Ricker has? It is easy to secure if you take Wine of Cardui according to directions. Wine of Cardui strengthens weak and worn-out women of any age and assists the mother and housewife to bear her exacting duties. It is a great strain to give birth to children and to perform household, but Wine of Cardui makes women fit for all the duties of womanhood.

It will relieve the pains of irregularity, cure falling of the womb, leucorrhoea, ovarian troubles, and has been known to remove what physicians considered dangerous tumors. Women who use Wine of Cardui do not suffer at the monthly periods. No shock or strain lays them up in bed for days or weeks with nervous prostration. They do not suffer hysterical attacks, because Wine of Cardui gives them strong nerves freed from the irritation of female suffering.


A \$1.00 bottle of Wine of Cardui purchased from your druggist will keep you free of female ailments.

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