SOMETHING ABOUT WATER

THE RIGHT TO THE USE OF WATER FOR IRRIGATION IN ARIZONA.

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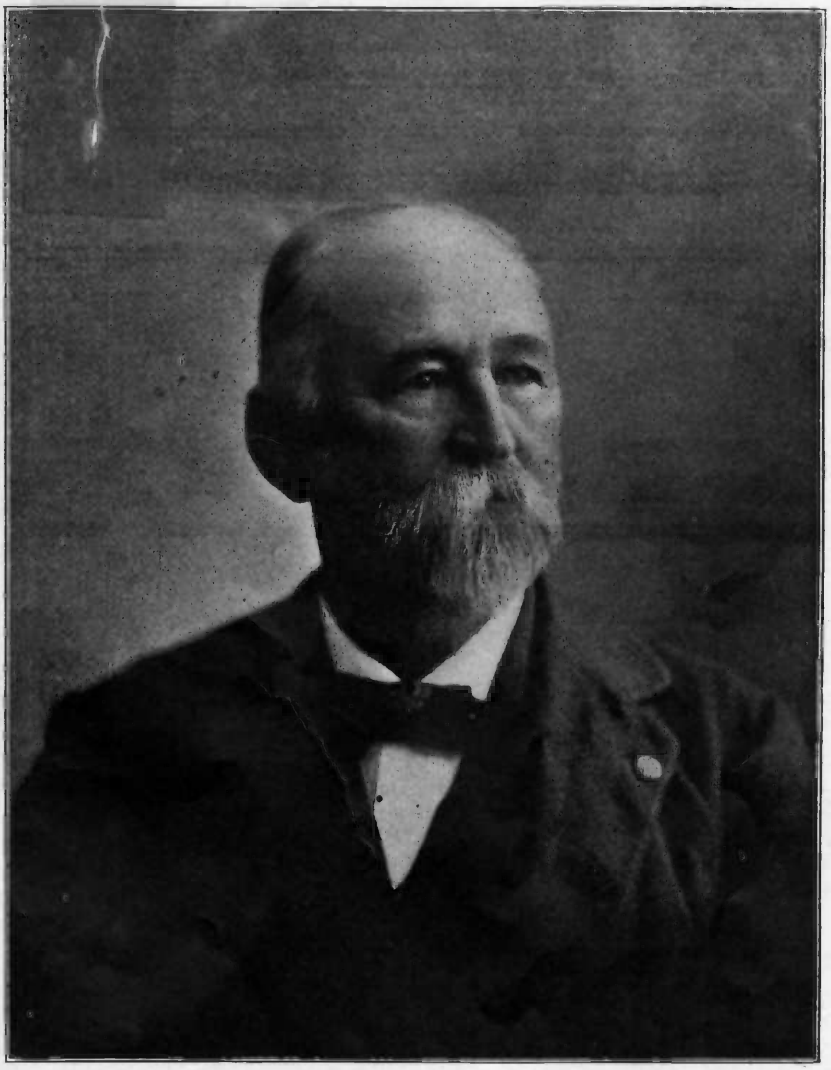

Adolf Harnack

The first great and important principle that the court, as well as the layman, should consider is what right does the appropriator of water acquire? What constitutes an appropriation may be considered at the same time and as a part o fthe same subject.

The statute, Howell Code of Arizona, 1864, declares that "All rivers, creeks and streams of running water in the territory of Arizona are hereby declared public, and applicable to the purposes of irrigation and mining as hereinafter provided." Again, in the same chapter, it is declared that "All rights in acequius, or irrigating canals, heretofore established shall not be disturbed, nor shall the course of such acequias be changed without the consent of the proprietor of such established rights."

Again, in section 7 of the same chapter, "Where any ditch or acequia shall be taken out for agricultural purposes, the person or persons so taking out such ditch or acequia shall have the exclusive right to the water, or so much thereof as shall be necessary for such purposes, and if at any time the water so required shall be taken for mining operations, the person or persons owning said water shall be entitled to damages, to be assessed in the manner provided in section 6 of this chapter."

Section 6. referred to provides that the amount of the damages may be settled by arbitration or by the probate judge, as the parties interested shall agree, and in case such agreement cannot be made then the party injured may bring suit for damages, as he would be entitled to do in other cases where his property rights are infringed upon.

From the foregoing it will be seen that in the Howell Code, the original statute of Arizona, the appropriation of water by persons constructing canals for the irrigation of land, and the ownership of water by such persons to the extent required, is recognized as a property right that cannot be disturbed by subsequent legislation. It recognized the ownership of water by the person or persons constructing the canals, to the same extent that it recognizes the ownership of land, and provides the same damages for the interference with the water and the canals, as it does for the interference with or the unlawful occupancy of land in the lawful possession of another.

It is admitted that all the land and all the streams of running water, all natural lakes and ponds of water over which the United States of America acquired dominion by the treaty of Paris, and subsequently by treaty, purchase or conquest, except as far as the title to the same was vested in private individuals at the time the United States of America acquired dominion over it, was the property of the public, and subject to appropriation or sale under such restrictions as congress with the approval of the president might from time to time adopt.

In the course of time the government enacted laws providing for the appropriation of its lands by settlers, or its sale to citizens of the United Ststes, or those who had declared their intention to become citizens. The government also recognized the right of citizens to appropriate the water of the streams, lakes and ponds for irrigation and other useful purposes, and recognized the right of the people to erect and construct dams upon and across innavigable streams and to construct canals for the diversion of and the conveyance of water upon and across the public domain. By the act of March 3rd, 1891, especially provided for the construction of dams and canals by individuals or corportions for the storage of the surplus and flood waters of the various streams and rivers and the conveyance of the same upon the land for irrigating or other useful purposes. In this act the method of procedure is definitely set forth from the initiation of the claim to its conclusion, when it becomes a complete and valid easement upon the land, both for the reservoir and the right-of-way for the canal. For all practical purposes it is a perfect title to the reservoir site and the right-of-way for the canal, as well as the water stored and conveyed thereon, so long as the reservoir and canals are maintained by the persons or corporations constructing them for the purposes provided for in the act.

Since the enactment of this act of congress, approved March 3rd, 1891, the legislature of the territory of Arizona has enacted laws of a similar character, providing for the storage of the unappropriated and surplus flood waters of the various rivers of the territory, again recognizing the fact that the water already appropriated is no longer the subject of lesiglation in that respect.

The act of the legislature expresses in plain language what is implied by the act of congress, to-wit: That the water stored by persons or corporations constructing the reservoirs and canals shall belong exclusively to the persons or corporations who have thus appropriated it, and the persons or corporations can sell, hire, let or rent the same to the people for irrigating, mechanical or domestic purposes, and no restriction as to price, teams or conditions is placed upon the owners of the reservoirs and canals, except that they must keep their waterways for

the delivery of the water in repair, and and must not sell or rent water in excess of what they can impound in their reservoirs, or deliver through their canals. It futher provides that if the owners of the reservoirs and canals do sell or rent water in excess of what they are able by means of their reservoirs and canals to impound and deliver to the consumers of water they shall be liable for the full amount of damages sustained by the consumers for the non-delivery of the water called for in their contracts.

It will thus be seen and understood by all canal and reservir companies in Arizona that extreme caution must be exercised in making contracts for the sale or rental of water to the various consumers, whether for irrigation or other useful purposes. The laws in regard to the appropriation and distribution of water in the different states and territories in the arid and semi-arid regions of the United States are different in regard to some very material matters. So the decisions of the courts of last resort in the various states and territories are conflicting in regard to some vital questions.

The provisions of the constitution of Colorado in regard to water and the manner of its appropriation for beneficial purposes is in many respects similar to the provisions in the statutes of Arizona. It provides that the unappropriated water in all the streams is the property of the public and is subject to appropriation for beneficial purposes. It also provides that all existing rights by appropriation must be protected, and that prior appropriation shall constitute the better right. The decisions of the courts of Colorado are consequently in many respects applicable in Arizona.

In Kidd vs. Laird, 15th Colo. 162, it is said: "The court has never departed from the doctrine that running water, so long as it continues to flow in its natural course, is not, and cannot, be made the subject of private ownership. A right may be acquired to its use which will be regarded and protected as property, but it has been distinctly declared in such cases that the right carries with it no specific property in the water itself."

Mr. Gould, in his work on water rights, at section 234, says: "The right to water acquired by priority is the subject of property, and may be sold and conveyed."

Pom. 207, Riparion Rights, Par. 58: "The exclusive right to divert and use the water of a stream as well as the ditch or other structure through which the diversion is effected, may be transferred and conveyed like other property or rights annalogous to property.'

In Strickler vs. City of Colorado Springs, Pacific Report. 1313, the court says: "That the right to the use of water for irrigation is a right not so inseparably connected with the land that it may not be separated therefrom. The right has been treated and held as a property right in numerous cases. The authorities seem to concur in the conclusion that the priority to the use of water is a property right. To limit its transfer as contended by appellee, would in many instances destroy much of its value. It may happen that the soil for which the original appropriation was made has been washed away and lost to the owner, as the result of a freshet or otherwise. To say under such circumstances, that he could not sell the water right to be used upon other land would be to deprive him of all benefit from such right. We grant that the water itself is the property of the public. Its use, however, is subject to appropriation, and in this case it is conceded that the owner has the paramount right to such use. In our opinion this right may be transferred by sale, so long as the rights of others, as in this case, are not injuriously affected thereby. If the priority to the use of water for agricultural purposes is a right of property, then the right to sell it is as essential and as sacred as the right to possess and use. * * * What difference can it make to others whether the owner of the priority in this case uses it upon his own land or sells it to others to be used upon other lands?"

In chapter 5 of Angell on water courses, a number of instances are cited where at common law water rights were declared to be the subject of sale, and although with us such rights are acquired by appropriation rather than by grant or prescription, as at common law, this certainly cannot effect the right of alienation."

In the case of Armstrong vs. Larimer County Ditch Co., 27th Pacific 235, in speaking of the right to water by appropriation, the court quotes from the 6th Colorado 446, where it is said: "The right itself and the obligation to protect it existed prior to legislation on the subject of irrigation. * * The right to the use of water is property; the title accrues by legal appropriation and becomes vested as of the date of such approprtation."

In the case of Rocky Ford Canal, Reservoir, Land and Trust Co. vs. Simpson, Pacific Reporter 36, p. 638: 'A stockholder of an irrigation company organized to furnish water exclusively to its stockholders is entitled to the proportion of water carried through its irrigation canal that the amount of his stock bears to the whole amount of the stock of the company."

From this it would appear that the rights of the stockholders in the canal company does not depend upon the priority of their use of the water nor upon the number of acres of land they own or posses but on the other hand it depends entirely upon the amount of their interest in the canal. In other words if one shareholder has 320 acres of land and but one share of the company's stock he is not entitled to any more water from the canal than his neighbor who has but 160 acres of land with one share of the company's stock. It follows that if he (the last mentioned) does not need the full amount of water from his share of stock he may sell or rent it to another neighbor who does need it.

In the case of Wyatt vs. Larimer & Weld Irrigation Co., Pacific Reporter 29, 906, the court says: "No competent court could or would attempt to assert that the functions, attributes; and responsibilities of a canal company were identical with those of a common carrier. * * * Certain peculiar rights are acquired in connection with the water diverted. It is unnecessary now, however, to enumerate these rights in detail. For the present it suffices to say that they are dependent for their birth and continued existence upon the use made by the consumer. In a case like the present the facts and conditions stated in the complaint divests the appellee (the canal company) of every legal element necessary to constitute it a common carrier. Take the earliest definition of a "common carrier" and we have "To render a person liable as a common carrier he must exercise the business of carrying as a public employment, and must undertake to carry goods for all persons indiscriminately, and hold himself out as ready to engage in the transportation of goods for him as a business." This position is sustained generally in all American decisions.

Am. Law Dictionary—Common Carrier: "One who undertakes for hire or reward, to transport the goods of such as choose to employ him from place to place."

In Dwight vs. Brewster, 1 Pick, 53: "If the carrier be employed for one or a definite number of persons, by way of a special undertaking, he is only a private carrier."

These definitions are so elementary that they would not be stated except for purposes of illustration, to show that in the case presented the corporation is not brought within the definition, in any respect, of either 'common" or "private carrier;" coming nearer the definition of "private" than "common" carrier, but lacking several ndispensible elements of either. In rder to constitute a carrier of either class, (1) the goods or thing to be carried must be the property of the bailor; (2) the thing must be delivered by the bailor to the carrier to be transported; (3) the carrier must transport and deliver to the consignee the identical goods delivered to him for transportation; (4) a person who contracts to transport and deliver to another at any given place a certain portion of a common lot of material, to be separated from it at the place of the consumer, to which the consumer had no title prior to the transportation and delivery, is in no legal sense a carrier, but a vendor of the commodity. * * * The provisions of the constitution are so plain that no construction whatever is needed. All unappropriated waters belong to the state—the public, the people. Any person wishing to (appropriate) any unappropriated water for a beneficial use has a constitutional right to do so; that cannot be denied. The title right, property, ownership, remains in the state, in the public generally, until some person diverts it, segregates it from the volume of the stream, and applies it to beneficial use, by some legal method. The title of the state, of the public, to the water so appropriated is then divested. The appropriator becomes the proprietor of the water or the use of the water, it is immaterial which term is used; they are in effect the same, and he remains the proprietor, owner, of the use, so long as the beneficial use to which it was appropriated continued. While it so remains it is the subject of exclusive ownership and control—the property of the appropriator in every legal aspect." * * * "The constitutional convention * * * ordained that the ownership of water should remain in the public, with a perpetual right to its use free of charge in the people. Here is an attempt to discriminate and make the "public" and the "people" distinct and separate identities, one of whom is invested with the title perpetually, and the other perpetually invested with the right of use. If the two are separate and distinct there is error, for it requires the interpolation of the provision that the ownership of the water should remain in the public inalenable.

No such provision is contained in the constitution, nor is any such intention disclosed. The inference is the other way—that the ownership should pass to the people by the first appropriation to a beneficial use. * * When thus appropriated, the party appropriating was regarded as having a proprietary interest, a right of property in, and the title to, the water appropriated and diverted, with the right to use, sell or loan it, like other property. By such appropriation and by reason of the

diversion and separation of the water from the volume of the stream, the title of the public was divested and the appropriator became the owner.

Cleared of all embarrassment, by reason of the supposed double ownership, we find the rights declared in the constitution to be the same that were recognized and acted upon by the people before its adoption. Later decisions of the supreme court seem at variance with the leading case (Wheeler vs. Irrigation Co.) and seem to sustain our construction, that by appropriation, diversion and application to a beneficial use, the canal company, the approriator, has a proprietary right to the water diverted. It is unimportant by what name such right is designated, the party has the control subject to law and the rights of others. He has property in a commodity that he can deal with, transfer and deliver to the consumer or user. This view appears to be sustained in Fuller vs. Mining Co., 19th Pacific Rep. 836, where the following from the opinion in Davis vs. Gale, 32 Colo. 27, is cited and approved: "Appropriation, use and non-use are the tests of his right; and place of use and the character of use are not. When he has made his appropriation he becomes entitled to the use of the quantity which he has appropriated at any place where he may choose to convey it, and for any useful and beneficial purpose to which he may choose to apply it. Any other rule would lead to endless complications, and would materially impair the value of water rights and privileges."

The language here used is absolutely incompatable with the theory that the appropriator has not a proprietary interest in and title to the water appropriated. In the opinion of Helm C. J., 21 Colo. 1028, It is said: "* * The constitution recognizes priorities only among those taking water from natural streams." Therefore to constitute an appropriation such as is recognized and protected by that instrument, the essential act of diversion, with which is coupled the essential act of use must have reference to the natural stream.

The requirements of the constitution is fulfilled when the water is diverted for a beneficial use, when a corporation diverts and legally appropriates the water, constructs a canal thirty to fifty miles in length as a vehicle for the transportation of the water to arid desert lands, conveys and delivers the water to actual users of it for the purpose of irrigation, and all the water carried is delivered and used. There can be no question in regard to the beneficial use for which the appropriation was made, nor do we think that the acts of the canal company must combine with the acts of the user of water to constitute a beneficial use. Such beneficial use is complete by the acts of the canal company.

"* * * If the right to the use of water carries with it an absolute control of it, with the right to divert, carry, apply, consume, and sell the water, and is property that can pass by sale and transfer, so as to give the purchaser a legal right to redivert at another channel, and consume in another way, it must be a matter of indifference to the owner of the 'right' who owns the water. There can be on the part of the owner no assertion of any right pertaining to ownership and property, no reversion. The public holds the naked title divested of all the attributes of ownership. The distinction attempted to be drawn between the right to use water and the title to it is purely mythical and imaginary, and the sooner it is dropped and the two treated as identical the better, and less confusion will exist."

I have quoted pretty extensively from the Colorado decisions because I consider them applicable in many respects to conditions here. I consider them applicable to our conditions because of the similarity of the statutes.

The statutes of Arizona in its very language recognizes the exclusive right to and ownership of the water diverted by the canal or so much as shall be necessary for the purposes intended by the diversion. In Colorado the ownership is implied from the language of the statutes. The exclusive right to its use is granted.

Diversion and beneficial use combined constitute appropriation, and under ths statutes of Arizona confer ownership of the water diverted "or so much thereof as shall be necessary for said purposes." It therefore must follow that when the person diverting the water no longer has a beneficial use for all the water he diverts to that extent he must cease diverting, or in other words, to that extent his property right in the water is abandoned.

So on the other hand if the appropriator ceases to divert the water his right to the water is abandoned. The exercise of common sense in construing the meaning of words and sentences in the English language inevitably leads to this conclusion.

In case 708 in the district court of Maricopa county the only questions raised or decided by the learned judge related entirely to the rights of the canals, and the only question decided by the judge was the priority of appropriation by the canal companies based upon the date of the respective locations, the capacity of the canals and the priority of the devotion of the

water to a beneficial use by the respective canal companies, parties to the suit. That case was never taken to the supreme court and consequently may be ignored by the supreme court in any case that comes before it, in which the title to water or the right to the use of water may be involved.

In case No. 3325 the supreme court reversed the decision of the lower court for reasons stated in the opinion. From the opinion of the court, which was concurred in by two members of the court only, and from the pleadings so far as the nature of the pleadings appear in the decision it does not appear what the contention in the case really was. By the decision of the district court it appears that the plaintiff lost. By the decision of the supreme court the plaintiff in the court below and the appellant in the supreme court won. Just what he won or to what extent he was benefited by the decision of the supreme court in his favor it is difficult to conceive. Probably he avoided the payment of the costs in the district court. If he won any substantial benefit beyond that I cannot see where it comes in.

In considering the question of water and the right to the use of water for irrigation in Arizona, I must to some extent consider the decision of our supreme court in this case because questions are involved in it that have some bearing upon the question of water and the right to the use of water in our territory. In the decision in this case the court in presenting the facts of the case starts off by giving a copy, in part, of the articles of incorporation of the defendant, the Salt River Valley Canal Company. Then it tells something about the Swilling Canal Company, the predecessor, in part, of the Salt River Valley Canal Company. It is quite evident from the statement of facts in this regard that the facts were not all properly presented to the trial court, or that the court overlooked some very material facts in regard to the Swilling Canal Company, its organization, what its intentions were and what it accomplished. It is admitted that the Swilling Canal Company made the first attempt to divert the waters of Salt river for irrigation or any other beneficial or useful purpose, in the Salt River valley in November, 1867.

At that time about eleven men came into the valley and established a camp at the head of the valley on the north side of Salt river at a point that is now known as the old Swilling ranch. These men organized what they denominated the Swilling Canal Company, as an association. The objects of the company were set forth in very nearly the same language as appears from the decision to have been set forth in the articles of incorporation of the defendant canal company. The Swilling Canal Company elected a board of three directors, to whom was delegated the power of managing and directing all the affairs of the company. The by-laws adopted by the company were in accordance with the agreement entered into by these eleven pioneers. Under and by virtue of this agreement the company, by and through its board of directors constructed the Swilling canal and its dam across Salt river and diverted a certain amount of water from the Salt river, and through the instrumentality of its board of directors, its zanjero and other agents and employes, delivered the water to farmers in the Salt River valley for irrigating purposes. At the time of the organization of the Swilling Canal Company as heretofore stated, and at the time of the location and construction of the Swilling canal, not one of the persons engaged in the enterprise owned or possessed any land bordering on Salt river or in the Salt River valley. At that time the land in the Salt River valley had not been surveyed and subdivided into sections and quarter sections by the government of the United States. At the time of the organization of the Swilling Canal Company by these eleven men its capital stock was divided into sixty shares. The company gave notice that it claimed the right to divert from Salt river 6,000 miners' inches of water, and each share was intended to represent an interest in the canal that would entitle the owner thereof to a quantity of water sufficient for the irrigation of one-quarter section of land. In accordance with this agreement the by-laws provided that the shareholders receiving water from the canal should be assessed for such an amount per share upon the shares used by him as would maintain the canal and dam in good repair. After the land in the valley was surveyed in 1868 these original pioneers selected and located upon various quarter sections of land in Salt River valley.

Subsequently other settlers came into the valley, selected and located upon land in the valley that could be irrigated from the Swilling canal, and secured shares in the Swilling Canal Company, subject to the original agreement, and the by-laws of the company. Still later the dam and head of the Swilling canal being swept away by freshets in Salt river, a new location was made for the head some distance above the old head and a canal of much greater capacity was constructed down to intersect the old canal and in connection with this new enlarged head a large branch was constructed extending further to the north by per-

sons who had located upon land outside of and above the old Swilling canal. This branch was owned and controlled by a portion of the shareholders in the Swilling canal, who constructed it for the purpose of conveying the water which they were entitled to by virtue of their shares of stock in the Swilling Canal Company to their land. The Dutch ditch, so-called, was also a lateral or branch from the original Swilling canal, constructed and owned by a few farmers through which the water to which they were entitled from the Swilling canal was conveyed to their land. These conditions existed until the year 1875, when the Salt River Valley Canal Company and the Maricopa Canal Company were incorporated and these corporations became the owners of the different branches of the Swilling canal, respectively, with all the rights and privileges that the old Swilling Canal Company originally possessed. These corporations also assumed all the obligations of the old Swilling Canal Company in regard to the diversion and delivery of water to their respective shareholders.

In view of these facts and the laws of the territory of Arizona, when and by whom, if at all, was the water appropriated that the Salt River Canal Company now diverts from Salt river and delivers to its shareholders and patrons. The Swilling Canal Company was a stock company, and the interest of each of the individuals constituting the company was represented by certificates of stock that were transferable by endorsement in the same manner as the stock of any corporation might be transferred to any person for value received. The purchaser might or might not be an owner or possessor of land that could be irrigated from the canal. He might be an inhabitant of the territory of Arizona or an inhabitant of any other state or territory of the United States, or he might be an inhabitant of any foreign country, yet when he received the certificate of stock he was the owner of the one-sixtieth part of all the property of the Swilling Canal Company, with all the rights and privileges of any other shareholder. Suppose the purchaser was the owner or possessor of land bordering on or adjacent to Salt river acquired by location under United States land laws several years after the diversion of the water from Salt river, did he then become an appropriator of the water or did he become simply a user or consumer of the water diverted from Salt river by the Swilling Canal Company several years prior to his purchase of any interest in the company, and then for the first time delivered to him? He had undoubtedly acquired a right to the use of water diverted from the Salt river by and through the Swilling canal. It was a property right, and his right was just as full and complete as his right to the land he had located or purchased. He could use or rent it. He could use a part of it upon his own land and rent the remainder to a neighbor less fortunate than he, and the neighbor could use it on his land. He could hold the Swilling Canal Company, through its directors, responsible for the delivery of the water to him at the head of his lateral ditch, or headgate, as well as for any damages he might suffer by reason of the non-delivery of the water, provided he complied with the rules, regulations and by-laws of the company.

In view of what has already been stated, was the Swilling Canal Company in any respect a public carrier or a public agency? It gave notice of its intention to construct the Swilling canal, and thereby divert 6,000 inches of water from Salt river for agricultural, mechanical and other purposes. In pursuance of such notice it did construct the Swilling canal and by means of its canal did divert water from the Salt river and deliver it to the farmers in the Salt River valley under its own rules and regulations, as provided in section 27 of the Howell Code. The same section is now found in the Revised Statutes of Arizona in chapter two, title 63, page 561, and it is in force at this time.

The Swilling Canal Company maintained its canal and continued to divert water from the Salt river and deliver it to its shareholders or those representing its shares, until the canal passed into the hands of the Salt River Valley Canal Company, a corporation, the shareholders of which company were the successors in interest of those who organized the Swilling Canal Company and owned its capital stock.

If the Swilling Canal Company was a public agency it would follow that the Salt River Valley Canal Company is a public agency, and vice versa. Neither one of the companies have ever handled public property except to divert public water from Salt river for a beneficial purpose, and section 7, chapter 2, Revised Statutes of Arizona, very plainly says that the person or persons so taking out such ditch are the owners of the water diverted. I cannot conceive why either one of the companies named was or is a public agency in any respect whatever. If a corporation owning a flouring mill undertakes to deliver to sixty separate farmers in this valley a certain amount of flour or any other comodity, daily, at a fixed rate, for a specified time, under its own rules and regulations, set forth in a written contract, is a public agency, then the canal

company would be a public agency. To me the cases seem to be very similar, and the same rule should apply.

From some cause a portion of our people have never rightly understood our statutes, and in some cases the courts have been disposed to give too much consideration to that portion which relates to public acequias.

As the court says in case 3325, the public acequia is somewhat analogous to the public road, in this, that it is under the control and management of public officers. It would appear from the statutes that if constructed it would be a new public channel to divert the water from the natural public channel, to more convenient points for the farmer to divert it to his land.

One error that some of the people, and perhaps in some cases the courts, seem to fall into results from the misapplication of section 17, chapter 2, title 63, which reads as follows: "During years when a scarcity of water shall exist owners of fields shall have precedence of the water for irrigation, according to the dates of their respective titles or their occupation of the lands by themselves or their grantors. The oldest titles shall have precedence always." This very justly applies to public acequias for the the reason that "All owners and proprietors of arable and irrigable land bordering on or irrigable by, any public acequia, shall labor on such public acequia, whether such owners or proprietors cultivate the land or not. All persons interested in a public acequia, whether owners or lessors of land shall labor thereon in proportion to the amount owned or held by them, and which may be irrigated or subject to irrigation." See sections 9 and 10, chapter 2, title 63, Revised Statutes.

The canal is constructed by the public and maintained by the public and all persons owning or in the occupation of land subject to irrigation by such canal are taxed for its construction and maintenance in proportion to the amount of land owned or occupied by each, whether they choose to cultivate the land and use the water or not. Hence it may be just that when he does commence the cultivation and irrigation of his land his precedence to the water should take rank according to the date of his ownership of the land. This appears to be the plain language of the statute, although it is somewhat in conflict with the theory entertained by some of our people, that the right to the water shall take rank from the date of the cultivation and irrigation of the land rather than the date of its occupation or ownership.

As we have no public acequias here these matters are not of interest to us except so far as some of the people and the courts in some cases have sought to apply the statute relating to public acequias. to canals owned and managed by corporations and other associations organized for that purpose.

To have applied such a rule to the canals that have been constructed in this valley would have worked a great hardship upon the canal companies and the owners or occupants of land subject to irrigation by the various canals who were the owners of shares in the canals. With very few exceptions, if any, the canals have been located by a company composed of a small number of persons, but having a large number of surplus shares, and the canals were constructed with a capacity for diverting water sufficient to supply the number of shares rather than the number of persons then constituting the company.

Subsequent settlers purchased some of these shares, thus becoming joint owners in the canal, having a pro rata interest in the canal, the water it diverted and all the property and franchises the company owned or possessed. The land which these subsequent purchasers of shares in the canal, occupied or owned, and which they proposed to irrigate with the water which they were entitled to receive from the canal company by reason of their interest in the company, was occupied or owned several years subsequent to the occupation and ownership of other older settlers on land subject to irrigation by the canal. Could the company discriminate between the shareholders? Would it be just, would it be lawful for the company in times of scarcity of water to refuse to prorate the water diverted by it to all its shareholders, and thus leave these subsequent purchasers of shares, who owned a pro rata interest in the canal, the water and all the rights and privileges owned or possessed by the company without water in times of scarcity. Such a proposition would be too absurd to consider.

In the decision in case No. 3325 the court say: "The theory under which the plaintiff claims the relief sought is that he is the appropriator of water, and as such is entitled to the service of the defendant company in the delivery of the water called for by this appropriation, upon the payment of the fixed charges of the company for such service, and that the defendant company not being itself the owner of the water diverted by it, and being but a public agency for the carriage of water and delivery of the same to appropriators owning or possessing land under it, in the order of the priority of their appropriations cannot refuse him such service."

From the statement of facts in the

case as given in the decisions, it does not appear that the plaintiff or his grantors, ever diverted any water from Salt river for the irrigation of the land he now owns, and for which he claims the right to the water. It does, however, appear that at one time this land was irrigated with water from the Chivarri ditch supposedly diverted from Salt river by the Chivari Ditch Company. It does not appear that plaintiff's grantor had any interest in said Chiverri ditch except such interest as the ownership of stock or shares in the company constructing said Chivarri ditch would confer.

It appears also that the plaintiff obtained water rights in the Monterey canal for the irrigation of his land for a time. Just what this right was does not appear. Whether it was the right of an appropriator or the right of a user or consumer of water is perhaps immaterial. Subsequently he obtained water from the Farmers' ditch. What plaintiff's rights were in the Farmers' ditch, or upon what terms and conditions he obtained water from the Farmers' ditch does not appear from the statement of the plaintiff in this case. If the plaintiff or his grantors, ever directly or in connection with other persons, diverted water from Salt river for the irrigation of his land it does not so appear in the statement of facts as set forth in the decision. It appears that at different times the land he now owns has been irrigated with water from four different canals, two of which have long since become extinct, and another one has practically been abandoned.

In the decision the court say: "The circumstances under which plaintiff changes his use from the Farmers' canal to the Salt River Valley canal are shown to have been, or to have resulted from, the difficulty in maintaining the Farmers' canal, and the scarcity of water at its head, due to the diversion by the defendant company and other companies owning canals which headed further up the river." It is evident that what was presented to the court as the facts upon this point of the case was not a full and fair showing of the facts. When the Farmers' canal was in course of construction and two of the parties interested had then expended upward of $3,300 each, being residents in the valley, discovered that for about six months in the year very little, if any, water in Salt river reached the head of that canal. Those two men at once decided to abandon the proposition and advised the other interested parties to do so. Their advise was not followed and the canal was completed and stock was issued to the investors in proportion to the amount of money invested by the respective parties. Some exceedingly wet years followed and considerable irrigation was accomplished from this canal. Subsequently the water failed at the head of the canal as early as the 20th of April. The irrigators complained that the canal was deprived of water by the diversion of junior canals above. All the canals above, both new and old, united in a proposition to close their gates and open their dams for the water to flow down to the lower canals. This was done for a period of forty-eight hours, and yet no water reached the head of the Farmers' canal. At the end of forty-eight hours the irrigators below notified the upper canals that it was of no avail to them, and if they, the upper canals, could take any water from the river for their use they were at liberty to do so without further protest from the irrigators below.

The Salt River Valley canal, the Maricopa canal, the Tempe canal, the San Francisco canal and perhaps the Utah and Mesa canals, to some extent resumed the diversion of water from the river. The Grand Canal Company did not make any effort to divert water again until December, after the commencement of the winter rains. Now if the Chivari ditch, the Monterey ditch or the Farmers' canal had sought to divert water from the Salt river at any point above the places of their original diversion, even though it was above the head of the original Swilling canal, from which the Salt River Valley canal derived its appropriation, either one of them would have been entitled to do so, and divert water from Salt river for the lands under their respective canals, provided it did not interfere with the rights of prior appropriators. The facts in case 3325 show that no such thing was done.

On the other hand it appears that all of these canals were abandoned and no effort was made to preserve their rights, if any they had. Many of the irrigators or consumers of water under these canals sought and obtained interests in the Salt River Valley canal, the Maricopa canal and some even in the Grand canal, and obtained water through the canals for their land. It appears from the statement of facts in case No. 3325 that the plaintiff in that case at one time acquired an interest in the Salt River Valley canal and we infer that it was for the purpose of obtaining water from that canal for the irrigation of his land. If he did so obtain an interest in the Salt River Valley canal it was a property right of which he could not be deprived without just compensation, unless he voluntarily sold or abandoned it. If he had maintained and continued to hold his right in that canal then he would

have been entitled to demand from the management of that canal the delivery of water for his land pro rata to the extent of his interest upon the payment of customary water rates.

The court says: "The various congressional acts pertaining to water and water rights beginning with the act of July 26th, 1866, have recognized the local laws, customs and decisions of the courts, as controlling in the matter of the acquisition, enjoyment and disposition of rights to the use of water on the public lands, and hence do not need to be considered."

The custom in regard to locating canals and appropriating water for irrigation in this valley and throughout the territory so far as my knowledge extends has been, for a few persons, some of them perhaps the owners or possessors of land, but in the majority of cases, persons who did not own or possess any arrable and irrigable land whatever, to unite together and organize a company, either an association or a corporation, and the location of the canal and the claim for the appropriation of the water would be made in the name of the company. The company would proceed under the management of its board of directors to construct the canal and divert the water from its natural or public channel and deliver it to its shareholders according to the respective interests of the shareholders, or in accordance with the demands of the shareholders. In many instances one person would own several shares in the company, each share being entitled to water sufficient for 160 acres of land, and he would only ask for water on one share. In the course of time he would dispose of his surplus shares to others (subsequent settlers), and they would demand and receive from the company the pro rata share of water to which their stock in the company entitled them. The people, the community, were thus admitting that the appropriation of the water was made by the canal companies, and evidently such was the construction given to the statutes of Arizona by the people.

In case 708 in this county, where the rights of nine of the canals were involved, the court recognized these conditions. The question raised by the pleadings was the priority of rights to the water of the respective canal companies, and the decision of the court was to the same effect. In that case the court apparently was not guided by a strict construction of the statutes. Nevertheless its decision was accepted and so far as the water of Salt river is concerned. At times when there has been a scarcity of water, it has been distributed to the various canals by a commissioner appointed by the court under the decision in that case. It has been awarded to the canal companies and distributed to them by the commissioner appointed by the court. Further than that the court did not have and did not claim to have any jurisdiction. In the decision in case 3325 the judge refers to sections 1, 3 and 7, chapter 55 of the compiled laws of Arizona, which is the same as chapter 2, title 63, Revised Statutes. In quoting section 7 he says: "Section 7 reads: 'When any ditch or acequia shall be taken out for agricultural purposes, the person or persons so taking out such ditch or acequia shall have the exclusive right to the water or so much thereof as shall be necessary for said purposes,' etc." The remainder of the section, which the judge did not quote, reads as follows: "And if at any time the water so required shall be taken for mining operations, the person or persons owning said water shall be entitled to damages, to be assessed in the manner provided in section six of this chapter."

Section six referred to, reads as follows: "Where reduction works or other mining apparatus shall be placed upon lands previously held for agricultural purposes, the person or persons so holding such lands shall be entitled to remuneration from the person or persons erecting or owning said reduction works or mining apparatus. The amount of remuneration shall be adjudged by three or five disinterested persons, or by the probate judge, as the parties interested shall agree, and in case such agreement cannot be made, then the party injured may bring suit for damages."

Taking these two sections together it will be seen that the statute recognizes the ownership of water by the person or persons who construct or take out an acequia for agricultural purposes, and it puts the ownership of water in the same class as the ownership or possession of land. It seems to me unfortunate that the court in considering the case should have overlooked the latter part of section 7. If it had considered the whole of that section and section 27 of the same chapter in connection with the course pursued by the first settlers of this valley, which has been followed by the people, the inhabitants of the territory, until it has become the local custom recognized by the act of congress referred to, the court would have undoubtedly reached the same, or at least practically the same, conclusion as it did, by a more simple, much plainer, more direct and much shorter route than it traversed in its long, and, (I hope the court will pardon me if I say) somewhat rambling, course of argument.

In closing I must say that the rea-

sonable conclusions for the court in case 3325 to have arrived at were very tersely stated in Wyatt vs. Larimer & Weld Irrigation Co.: "If the doctrine of the Strickler case is the correct one, then the title to the water and the right to its use are identical, and it is a chattel, a commodity, and is subject to the same legal rules that govern other personal property, and is at once stripped of all embarrassing technicalities." The court continues: "Under the facts stated in the complaint we conclude: First, That the canal company is in no legal sense a common or private carrier. Second, That the canal company, by reason of its diversion, appropriation and the application of the water to a beneficial use, became the proprietor of the water, and as such could sell, transfer and deliver it to be used by those who required it for irrigation, and that such right could only be defeated by a subsequent failure to apply it or cause it to be applied to a beneficial use. Third, That the users of water from the canal under the contracts having made no appropriation of water from a natural stream and asserted no right to water prior to the appropriation by the canal company, have no constitutional rights by virtue of citizenship that can be enforced against the corporation."

If our people will recognize these inevitable truths in regard to water and water appropriation and cease their worse than useless litigation over the mythical questions that are engendered by the wrong construction given to the law by some who seek to construe it to meet their own selfish purposes, it will be much better for all parties and we shall be better able to enlist the aid of much needed capital to develop the many natural advantages with which we are surrounded.

WM. A. HANCOCK.