THE DECISION IN THE CASE OF THE HELENA WATER CO.

Jesse E. Taylor, et al., vs. John Stewart, et al. } Third Dist. M. T., Dec. 27, 1867, at Chambers.

This is an application by the plaintiffs (commonly known as the Helena Water Company,) on behalf of themselves and citizens of Helena, for a perpetual injunction restraining John Stewart and seven others who claim a right to run a drain ditch through, and to collect and control a certain ground in what is called Mountain District, lying at and below the junction of Oro Fino and Grizzly Gulches, in which ground the springs claimed by the plaintiffs are situated, and from which the citizens of Helena are now partially supplied with water for domestic purposes.

The importance of this case, together with the conflicting claims and rights of party litigants, as well as a widespread general interest felt in the result, induced me to call to my counsel and assistance in the trial upon the facts Judges Chumasero and Campbell, that I might the better satisfy myself and the parties as to where the rights of the case lay; and after several days of patient hearing, in which both parties had the fullest latitude without restriction by the rules of evidence, or in number of witnesses, and after a personal examination of the ground and matters in controversy, the committee find, among others, (see their report on file), the following facts:

1st. That the plaintiffs and citizens of Helena are entitled to the use and natural flow of the waters from the springs in controversy for domestic and culinary purposes, by virtue of prior appropriation as against the defendants.

2d. That the defendants are entitled to the ground pre-empted by them for mining purposes, as against the plaintiffs; but that they took the same subsequent to the appropriation of said springs by the plaintiffs.

3d. That the full, unrestricted enjoyment of rights by defendants to drain and mine said ground would probably sink said springs, and render them useless for the purposes for which they were appropriated.

4th. That the water from said springs are essentially necessary for the convenience, comfort, and health of the citizens of Helena.

5th. That the springs are situated in the ground claimed by the defendants for mining purposes.

The finding of facts in this case discloses an antagonism of interests and rights in these parties, a full and complete enjoyment of which by either party possibly might, and probably would, work an extinguishment of rights of the other. Hence the plaintiffs entitled to the relief prayed for while under, so to speak, a *contingent liability* to be injured in the sinking of their springs by the drainage and mining of the ground as contemplated by the defendants.

No one branch of the law has been so fruitful of perplexing litigation, and none more difficult for jurists and publicists to exactly define by arbitrary lines, than that which pertains to water courses, both natural and artificial; and while the rights and liabilities of adjacent land-owners in respect to streams of water flowing upon the surface have come under frequent cognizance by courts both in this country and England for a period of time almost as long as courts have been known, and the law relating thereto comparatively well settled, the law regulating the use and enjoyment of springs and currents of water *under ground* have been but little discussed, and not until of recent date has there been a distinction made between under ground waters and those which flow upon the surface.

The question here involved pertains more directly to *under-ground* currents—to the secret, hidden sources of supply to the springs, and the liability and probability of the supply being sapped and diverted by the defendants, that the plaintiffs ask the interference of this court, by a perpetual injunction restraining the further work thereon by the defendants.

Assuming at the outset that the plaintiffs, by *priority* of appropriation, have a right to the waters and natural flowage of the springs, and that the defendants, by subsequent appropriation or pre-emption, acquired mining rights in the ground, I propose to discuss the nestion, by the aid of such judicial lights as I have t command, and see how far one independent right ay absorb, control, or extinguish another independent right. No authority has been cited by counsel a their elaborate briefs on either side, and it is presumed none can be found in the books exactly parallel o the case at bar. The authorities cited refer to controversies between *adjoining proprietors*, where each ad an *equal title* to the ownership of the soil, and consequently an equal right to use it as he pleased in lawful, proper manner.

Any one will see at a glance a distinction between *but* class of cases and the one under consideration.—here the question is not between *adjoining proprietors*, but between *co claimants to distinct, independent rights growing out of the same soil*—viz., the right to the use and flowage of the water in its natural way to and from the springs by one party; and the right o mine by the other, and neither party owning or claiming feesimple title to or interest in the soil, the title still remaining in the Government), further than s necessary to the enjoyment of their distinctive ights incident thereto. Other distinctive rights may ikewise grow up to other claimants out of the same oil, such as a right for building thereon, a right for agricultural, horticultural, or grazing purposes, and one may be claimed, possessed, and enjoyed by different ersons, yet manifestly they would not be equal in extent. One, in the nature of things, must be subordinate to another, and when they clash in interest, the loctrine of *priority of* appropriation, ordinarily, will letermine the issue.

Are the rights of these parties co-equal in extent nd duration? If they are, then either party may exercise them, regardless of consequences to the other. If not equal, then wherever they come in conflict the esser must be subservient, and give way to the greater.

I think the *say rior* right in this case is with the plaintiffs, both by *priority of appropriation* and *actual duration*. It is a *continuing* right during the natural flowage of the springs, presumptively of long duration, unless interfered with by artificial means; while the right to mine out the ground around and in neath the springs is a *temporary* right, exhausted by the extraction of the gold, or a *speculative* right to prospect and see whether golden deposits may be there found or not. The one has a *present and perfective, positive, ascertained value*; the other, having it all that can be claimed for it, has but a *hitherto, something, temporary value*. Again, the right to secure interrupted enjoyment of one of the *natural elements* essential to the preservation of health, is by all writers considered one of the highest rights of man, or next even than the acquisition of gold, when such acquisition stands in the way of, or interferes with, the enjoyment of one of the necessary elements for health or happiness.

The plaintiffs, in appropriating the springs for the uses and purposes aforesaid, in law take so much ground as is reasonably necessary for its enjoyment, and the defendants, by subsequently taking up the ground for *mining purposes*, took it as they found it, and subject to the acquired and, so to speak, vested rights of the plaintiffs.

Can these rights be separately enjoyed by each of these parties without detriment to the other? If so, it is the duty of the Court to so administer the law as not to throw obstacles in the way of such enjoyment. If they cannot be fully enjoyed, then to allow such partial enjoyment as probably would not produce the threatened mischief. From the evidence in the case and the finding of the Committee, I am satisfied that the full exercise of the rights claimed by the defendants, would, in all probability, and to a reasonable certainty, work a serious if not irreparable injury to the plaintiffs and those for whom they act; but from the same evidence, I am in hopes that a partial exercise of the rights claimed by defendants would not produce the injury sought to be avoided.

Where, then, should the line be drawn so as to protect the rights of the one and encourage the industry of the other. Here lies the hidden difficulty of this case,—upon which human judgment is fallible and the wisest liable to err. We can no more determine the hidden, secret supply sources to these springs, than we can determine the amount of treasure imbedded in these mountains. It may be from the percolating waters from springs far up the gulch; it may be from fissures in the rock far up the mountains on either side of the gulch; or, it may come from some deep subterranean passage vein, below the reach of the hand of industry.

At Saratoga, waters of different chemical and medicinal properties, and of different temperature, come upon the surface of the ground within a few feet of each other from different fountain heads, known to the eye of science or philosophy; while in other localities, particularly on the Pacific slope of these mountains, large streams and lakes sink away into subterranean passages, perhaps to issue their appearance again in boiling springs in some distant latitude or zone.

The great artesian well at the Arsenal in Grenelle, in Paris, is said to draw its supply from a distance of forty miles under ground.

The case of Acton vs. Blundell, reported in 12 Mason & Welsby, was a case where the sinking and working of a coal mine cut off the underground veins and current of water which supplied a well three hundred and a mile distant.

The case of Wheatley vs. Baugh, reported in 25 Penn R, was a case where the workings of a copper mine, 330 yards distant, cut the supply source of a spring and ruined it.

The boring for oil in one locality in Pennsylvania, has stopped the supply in both oil and water wells in a distant locality.

The books are full of instances where the sinking of a shaft, or drain ditch, have tapped the water vein which fed and supplied wells and springs hundreds of yards distant, and the water ever afterwards ceased to flow therefrom.

Not an unfamiliar example occurred in the sinking of the plaintiff's spring below those in controversy. This spring was supposed to derive its supply from mountain courses, but the pick and shovel of the miner, in a subterranean passage, struck its water vein and it failed; other springs have continued their flow when human reason would have assigned them an earlier decay.

These examples show that the exciting cause of injury or liability to innate, is not always confined to the immediate proximity to the thing effected; and hence the difficulty in drawing the line at just *the* point where ample protection can be secured to one, and the fullest enjoyment of rights to the other. To draw the line beyond any *possibility* or risk, might prevent any further work up the gulch or Hill sluices for a great distance, as we have seen by the foregoing examples; and to draw no restrictive line, in the opinion of witnesses on both sides, would, in all human probability, sink and destroy the springs.

Now, to say that miners should not develop their mines in Last Chance, Oro Fino or Grizzly gulches, on account of the *possibility*, fear or apprehension of damage to the plaintiffs, by miners striking the supply source of the springs, would be as unreasonable an exercise of power by the Court as it would be unreasonable to refuse assistance to prevent the threatened danger. The Court in dealing with matters of this kind, should look at the reasonableness of the demand, the rational probabilities surrounding the case, and draw the line where it shall seem, according to the best lights we have, to be most compatible with the ends of justice to all parties.

When this is done there should be no cause of complaint or harsh judgment because parties do not obtain the extent of their demands.

Washburne, in his recent work on easements and servitudes, in discussing "rights in subterranean waters," says: "Courts clearly and unequivocally recognize the right to have a well or spring upon one's own land, supplied by underground sources, as so far an existing right, which the law will protect and punish the invasion of; that if a stranger, who has no right in the same, goes upon an adjacent lot from which this supply is derived, and cut it off, he will be liable therefor," and he illustrates this principle, by the case of Parker vs. the Boston & Maine R. R., (among others) where the company, in constructing their R. R. across the land of A, adjoining the land of B, by excavating, cut off the sources of supply of B's well, which had been derived through A's land, and they were held responsible for the damages, while the weight of authority of no prescriptive right intervenes would have exonerated A for the same offence, for the reason that A and B had an *equality* of rights in the soil each owned.

But when a stranger interferes, or a person whose rights are subordinate to those of the person upon whom the injury comes, he is liable for the injury, and subject to the orders of Court by injunction.

All the witnesses in this case concur in the opinion, that this ground cannot be worked or drained, with safety to the springs, in from 100 to 300 or perhaps 300 feet, taking the outside limits in their testimony. The Committee find the plaintiffs have, for themselves and citizens of Helena, by prior appropriation, a right to the flowage of the spring in its natural and accustomed way, as against the defendants.

The defendant's witnesses testify and claim, that the general course of their drain ditch will not run within about 125 feet of the spring in question.

With the finding of the Committee, the evidence of parties on both sides, the law of the case, and a desire to so administer the law as shall best subserve the ends of justice, I hereby order, adjudge and decree, that the plaintiffs, on behalf of themselves and citizens of Helena, have, as against the defendants, the *free* and *unrestricted* use of the water for drinking and culinary purposes, from the springs in controversy, situated between the point of rocks and the junction of Oro Fino and Grizzly gulches, where, as in said complaint alleged, and the finding of the Committee, they now obtain water for such purposes, by means of aqueducts and other means.

And it is hereby further ordered and decreed, that the said defendants, their agents, servants and employees, be, and they hereby are prohibited and enjoined from constructing their said drain ditch within one hundred and twenty-five feet, in an air line from said spring; and that they be enjoined and prohibited from tunneling, shafting, or mining said ground within said distance, until the further order of this Court in the premises; and further, that each party pay the costs of their own witnesses; and that the plaintiff's pay the fees of the referees—Chumasero and Campbell.

L. E. MUNSON,
Judge Third District, M. T.