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especially undesirable to adopt such a distinction in a field already confused by the distinction between governmental and proprietary functions.

—Elizabeth Kline.

WATER RIGHTS: PRESCRIPTIVE RIGHT TO THE USE OF WATER IN MONTANA

A recent Montana decision, *Cook et. al. v. Hudson,*[1] involving litigation over water rights, raises again the question as to what is the nature of the adverse use of water necessary to gain a prescriptive right to it in this jurisdiction.

It is clear that a prescriptive right to the use of water may be acquired in Montana.[2] This was recognized at an early date.[3] But it is not so clear what facts must be shown in order to make the rule applicable, and the question remains whether a prescriptive right to the use of water may be perfected in actual practice as easily as it is in theory.

The general practice is for the plaintiff appropriator to allege his right of appropriation by himself or through his chain of title. The adverse claimant must plead his right as affirmative matter.[4] The burden of proof is on the latter,[5] and he must prove his prescriptive right by a preponderance of the evidence.[6]

Adverse user is initiated by taking water which by priority belongs to another at a time when it is so scarce that all the users cannot be supplied,[7] hence a use will not be adverse where there is water enough for all users.[8] Mere proof that the claimant used water and claimed the right to use it, is no proof whatsoever of adverse use.[9] An adverse right will never result from a permissive use,[10] nor may it be shown where the diversion is below that of the complainant.[11] But the adverse user will not

[1](1940) 110 Mont. 263, 103 P. (2d) 137.
[2]State v. Quantic (1908) 37 Mont. 32, 94 P. 491.
[3]Smith v. Hope Min. Co. (1896) 18 Mont. 432, 45 P. 632.
[4]State v. Quantic (1908) 37 Mont. 32, 94 P. 491.
[5]Smith v. Duff (1909) 39 Mont. 374, 102 P. 981, 133 Am. St. Rep. 582; Irion v. Hyde (1938) 107 Mont. 84, 81 P. (2d) 353.
[6]Boehler v. Boyer (1925) 72 Mont. 472, 234 P. 1086.
[7]Zosel v. Kohrs (1925) 72 Mont. 564, 234 P. 1089; Smith v. Duff (1909) 39 Mont. 374, 102 P. 981, 133 Am. St. Rep. 582; Talbott v. Butte City W. Co. (1903) 29 Mont. 17, 73 P. 1111.
[8]Smith v. Duff (1909) 39 Mont. 374, 102 P. 981, 133 Am. St. Rep. 582.
[9]Galiger v. McNulty (1927) 80 Mont. 339, 260 P. 401.
[10]Irion v. Hyde (1938) 107 Mont. 84, 81 P. (2d) 353.
[11]Norman v. Corbley (1905) 32 Mont. 195, 79 P. 1059; Talbott v. Butte City W. Co. (1903) 29 Mont. 17, 73 P. 1111.

have to pay taxes under Section 9024 of R. C. M., 1935, in order to gain a prescriptive right to the use of water.[12]

In order for the claimant of a prescriptive right to the use of water to prevail, he must show that it was: 1. continuous for the statutory period of ten years;[13] 2. exclusive (uninterrupted, peaceable);[14] 3. open (notorious);[15] 4. under claim of right (color of title);[16] and 5. an invasion of another's rights (hostile, adverse), which the prior user has an opportunity to prevent.[17]

> "All of the foregoing elements must exist before a court is justified in declaring a superior right by adverse user or prescription, and no one element may be omitted without being fatal in the proof of adverse user."[18]

As to the Necessity of the Use Being Continuous: It is obvious that, owing to the climactic extremes in this state, actual continuous user is, at least as far as agricultural uses are concerned, virtually a physical impossibility. Hence the court must use the word *continuous* in another sense. While the court has not been definite or specific as to what is continuous, a study of the cases seems to reveal what it has in mind. It has said that the prior appropriator must have been able, during the entire statutory period, to maintain an action against the party claiming the prescriptive right.[19] It would, therefore, seem that the court is saying that the adverse use must damage the prior appropriator to the extent that he have a right of action either at law or in equity against the prescriptive claimant, such right of action existing in the appropriator at all times during the ten year period of Section 9024.

The question then arises: what must the prescriptive claimant do in order to give the prior appropriator a continuous right of action against him during that period? Wherever an appropriator has been materially damaged by an invasion of his right by wrongful diversion, he will have an action at law for damages. The question of continuity may, therefore, be governed by Subdivision 2 of Section 9033, R. C. M. 1935, which requires that

[12]Verwolf v. Lowline Irrig. Co. (1924) 70 Mont. 570, 227 P. 68.
[13]§9024, R. C. M. 1935. Irion v. Hyde (1938) 107 Mont. 84, 81 P (2d) 353; Boehler v Boyer (1925) 72 Mont. 472, 234 P. 1086; Featherman v. Hennessy (1911) 42 Mont. 535, 113 P. 751; Smith v. Duff (1909) 39 Mont. 374, 102 P. 981, 133 Am. St. Rep. 582; Bullerdick v. Hermsmeyer (1905) 32 Mont. 541, 81 P. 334.
[14]Cases cited in note 13, *supra.*
[15]Cases cited in note 13, *supra.*
[16]Cases cited in note 13, *supra.*
[17]Cases cited in note 13, *supra.*
[18]Irion v. Hyde (1938) 107 Mont. 84, 88, 81 P. (2d) 353.
[19]Cases cited in note 13, *supra.*

a legal action for damages to real or personal property be brought within two years from its initiation. It would seem to follow from this conclusion that the adverse use must be, in minimum, at least once every two years so that the appropriator would, at any time, during the statutory period, have a right of action in damages against the prescriptive claimant. Suppose, however, that the appropriator's right of action is about to be barred by Section 9033. Then there must be a new adverse user or else the adverse claimant must create such an immediate threat of diversion that the appropriator is entitled to injunctive relief.[20] In case there is no new adverse user within two years from the original adverse user, it would be necessary that the threats of diversion made before the expiration of the two years be continuous and culminate in an actual diversion giving a new legal right of action to the appropriator. This would be necessary in order to start Section 9033 operating for the following two years. In other words, some right of action must, at all times, lie in the appropriator and against the adverse user, the adjudication of which would interrupt the running of Section 9024. However, California seems to hold that adverse user should occur at least once a year.[21]

The appropriator is given an additional remedy under Section 7105, R. C. M. 1935. This statute provides that:

> "In any action hereafter commenced for the protection of rights acquired to water under the laws of this state, the plaintiff may make any or all persons who have diverted water from the same stream or source, parties to such action, and the court may in one judgment settle the relative priorities and rights of all parties to such action . . ."

Under this provision it seems possible for an appropriator to have his rights adjudicated whether they have been materially invaded or not.[22] Hence, it may be argued that a mere user with adverse claim is sufficient to cast the prior right in doubt, thereby giving the prior appropriator a right to an adjudication un-

[20]POMEROY, EQUITY JURISPRUDENCE (5th ed., Symons, 1941) §1351.

[21]Nelson v. Robinson (1941) ..... Cal. App. ....., 118 P. (2d) 350. The Defendant claimed prescriptive right to have seepage from his ditch flow on to plaintiff's land.

Utah seems to put a different construction upon the concept of continuity. While the court did "not hold that defendants should have used the water continuously every month of the year" it was "of the opinion it was at least incumbent upon them to maintain their ditches open and visible, so that a person of ordinary intelligence could distinguish as a ditch used for the purpose of conveying water." Ephraim etc. Co. v. Olson (1927) 70 Utah 95, 258 P. 216. And see 25 CAL. JUR., *Waters*, §192, P. 1177.

[22]Wills v. Morris (1935) 100 Mont. 504, 50 P. (2d) 858.

der Section 7105, *supra*. Such being the case the claimant to the prior right has an opportunity at any time during the ten year statutory period to prevent the perfection of a prescriptive right against himself. The only action left for the court under this theory is to lay down some arbitrary line whereby an adverse use will be either continuous or not continuous. It is possible, from this point of view, that the Montana court would invoke the California rule and require, at least, an annual adverse user.

AS TO THE USE BEING EXCLUSIVE (UNINTERRUPTED, PEACEABLE): The court has never had an occasion to apply this requirement. However, there are decisions elsewhere involving its application, which the Montana court may be expected to follow. It would seem clear that mere verbal objections by an appropriator would be insufficient to constitute an interruption of the ten year statute.[23] A comparatively recent California case has stated that, "... in order to interrupt the running of the statute of limitations, as to flowing water, there must be a resumption of the possession under a claim of right brought home to the adverse claimant either by express notice or by conduct so notorious and unequivocal as to imply such notice. In other words, the interruption of possession must rise in dignity and character to that required to initiate an adverse possession."[24] It is to be observed, however, that earlier cases declared that any interruption of an adverse user, however slight, is sufficient to prevent the acquisition of a prescriptive right.[25]

AS TO THE USE BEING OPEN (NOTORIOUS): A subsequent appropriation is not a sufficient notice of an adverse claim.[26] It is not absolutely necessary that there be actual notice served upon the prior appropriator that the water is being taken adversely and against his rights,[27] but an "adverse user cannot be initiated until the owner of the prior right is deprived of its use in such a substantial manner as to notify him that his right is being invaded. . .,"[28] and "one who never told anyone of his adverse claim to another's right must show possession of such a character as to give the owner notice of his hostile claim."[29] The implication of the foregoing language is that there may be such

[23]Armstrong v. Payne (1935) 188 Cal. 585, 206 P. 638, 643.
[24]Note 23, *supra*.
[25]Ball v. Kehl (1892) 95 Cal. 606, 30 P. 780 and cases cited.
[26]Sherlock v. Greaves (1938) 106 Mont. 206, 76 P. (2d) 87.
[27]St. Onge v. Blakeley (1926) 76 Mont. 1, 245 P. 532.
[28]Zosel v. Kohrs (1925) 72 Mont. 564, 577, 234 P. 1089.
[29]Cook v. Hudson (1940) 110 Mont. 263, 282, 103 P. (2d) 137.

factual circumstances as would charge the prior appropriator with knowledge.[80]

AS TO THE USE BEING UNDER CLAIM OF RIGHT (COLOR OF TITLE): The Montana court has never had to apply this requirement, but it has been so well settled in other jurisdictions that the position of the court seems indicated. As to the use of waters it has been said that mere declarations of right are sufficient, or that the claim may be shown by acts, statements or the relations of the parties.[81]

THE USER MUST BE AN INVASION OF ANOTHER'S RIGHTS (HOSTILE, ADVERSE), WHICH THE PRIOR USER HAS AN OPPORTUNITY TO PREVENT: Under our doctrines of appropriation the appropriator has no right to the use of the water unless he has need of it.[82] Hence, where an adverse user takes water which a prior appropriator needs and which he has the prior right to use, there is a hostile or adverse use, an invasion of a right which gives rise to a cause of action.[83] It must be assumed as a necessary corollary to this proposition that the prior appropriator was damaged, for if he was not, he could show no need. Therefore, where a prior appropriator's right has been invaded, he is given a right of action in order to prevent future invasions and to recover his damages.[84] His remedy may be in equity to quiet title and prevent future invasions, under Section 7105,[85] or it may be at law for damages. In the latter case it would seem that he is effectively adjudicating his prior right because he can maintain no recovery unless he shows the superior right.

The *Cook* case indicates that the court has laid down another rule permitting a party to gain a prescriptive right. It contains this decisive fact: the plaintiff had been in uninterrupted, exclusive and peaceable use of the water for a period in excess of the statutory period but could show no instrument of title. Said the court: "The undisturbed possession for a period of time in excess of the time necessary to acquire title by prescription, standing alone, is sufficient to vest clear title," citing Sections 6817 and 6818, R. C. M. 1935. The fact that the use was greatly in excess of the statutory period does not seem a

[80]Smith v. Gaylord (1918) 179 Cal. 106, 175 P. 449.
[81]CAL. JUR., *Waters*, §188.
[82]Mont. Const., Art. III, §15; Conrow v. Huffine (1914) 48 Mont. 437, 138 P. 1094.
[83]Featherman v. Hennessy (1911) 42 Mont. 535, 113 P. 751.
[84]Tucker v. Missoula Lt. and Ry. (1926) 77 Mont. 91, 250 P. 11.
[85]R. C. M. 1935.

valid distinction between this rule and the principal one heretofore under discussion.[36]

Where one gains a prescriptive right to the use of water, the question may arise as to his status in relation to other appropriators on the stream junior to the right which he has usurped. It seems to be a live possibility wherever a prescriptive right is gained on an over-appropriated stream.

Wiel, in his treatise on water rights, suggests two possible theories with respect to the rights of adverse users, namely, a *presumed grant* theory and a *junior disseisee* theory; and he concludes that the latter theory is to be preferred. He says:

> "The question of priority as concerns a right obtained by adverse use has not arisen, but seems a point that may well give difficulty. On the presumed grant theory, the newly-acquired right would retain the priority of the original appropriation, as a grant in writing transmits the right without loss of priority. But if that fiction is laid aside, it would seem that the adverse use gives a new right only from the start of the adverse use, as a new appropriator by actual diversion, as in the case of a parol sale. (Citing Section 555 of his work). It has been said that the right obtained by adverse use dated only from the first diversion, (citing *Lavery v. Arnold* (1899) 21 Ore. 1, 57 P. 906; *Oregon etc. Co. v. Allen etc. Co.* (1902) 41 Ore. 209, 69 P. 455, 93 Am. St. Rep. 701) and that '*where a right rests upon the statute of limitations, "the disseisor acquired a new title founded on the disseisin. He does not acquire or succeed to the title and estate of the disseisee, but is vested with a new title and estate founded on and springing from the disseisin."* ' " (Citing *Alhambra etc. Co. v. Richardson* (1887) 72 Cal. 598, 14 P. 379).[37] (Italics supplied).

[36]The language used in the Cook case is unfortunate. It is difficult to see what bearing §§6817 and 6818 have on the subject of prescription in water law. The statutes operate on the possession of real property—a tangible object. It is hard to conceive of a person occupying an intangible right to the use of water. Up to the decision in this case the cited statutes had never been applied in a question of prescription under the law of appropriation.

[37]WIEL, WATER RIGHTS IN THE WESTERN STATES (3rd ed. 1911) §580. Wiel's *junior disseisee* theory is also cited in 25 CAL. JUR., *Waters*, §164. It is probable that it was because of his influence that such rule has been declared by the California court. It is interesting to note the authority cited by CALIFORNIA JURISPRUDENCE for each rule. For the *junior disseisee* doctrine, two cases involving real property are cited: People v. Banning Co. (1911) 169 Cal. 542, 147 P. 274; Becket v. Petaluma (1915) 171 Cal. 309, 153 P. 20; and one decision involving ditch rights, Bashore v. Mooney (1906) 4 Cal. App. 276, 87 P. 553. On the side of the *presumed grant* doctrine are five cases involving appropriators, Yankee Jim's Union W. Co. v. Crary (1864) 25 Cal. 504; American Co. v. Bradford (1865) 27 Cal. 361; Los Angeles v. Baldwin (1879) 53 Cal. 469 (Concurring opinion); Lakeside Ditch Co. v. Crane

Wiel's conclusions, in part, are based on the California rule on parol sales.[38] Their rule is not in harmony with the Montana rule. The former's is that a parol grant of a water right dates from the time of the first user by the grantee.[39] In Montana a parol grant operates as a link in the chain of prior titles.[40]

The cases cited by Wiel to support his conclusions do not seem to be controlling. The *Lavery* case involved litigation wherein the defendant was attempting to prove a prescriptive right by adverse user against the plaintiff—the question being whether, as against the plaintiff, an adverse user was initiated by construction of a ditch or by the actual use of the water. The court held that the adverse use could commence only with the actual use of the water, a rule entirely in harmony with the appropriation doctrine.

The *Allen* case and the *Alhambra* case involved disputes between claimants of prescriptive rights and riparian owners. There appears to be a clear distinction between such disputes and those concerning two appropriators. The right of a riparian is corporeal;[41] the right of an appropriator, incorporeal.[42] The court in the *Allen* case makes the distinction more obvious with this language:

> "... we are confronted with the anomalous proposition that plaintiff has lost a corporeal hereditament appurtenant to its land by reason of the operation of the statute of limitations, and the defendant has acquired an easement appurtenant to its lands by virtue of the same statute, in other words, the statute has operated to convert a corporeal here-

(1889) 80 Cal. 181, 22 P. 76; Smith v. Hawkins (1895) 110 Cal. 122, 42 P. 453. In two cases the complainants were riparians; the defendants were adverse claimants, Pabst v. Finmand (1922) 190 Cal. 124, 211 P. 11; Stepp v. Williams, (1921) 52 Cal. App. 237, 198 P. 661. Hanson v. McCue (1871) 42 Cal. 303, 10 Am. Rep. 299, involved percolating waters on plaintiff's land; defendant was adverse claimant. Riverside etc. Co. v. Jansen (1885) 66 Cal. 300, 5 P. 486 and Allen v. San Jose etc. Co. (1891) 92 Cal. 138, 28 P. 216, 15 L. R. A. 93 involved ditch rights. While the judicial statements upon the precise question are all dicta, the weight of all statements pertinent thereto leans heavily towards the *presumed grant* doctrine.

[38]It should be kept in mind that California and Oregon are jurisdictions invoking a dual doctrine in water law, i.e., they apply riparian law and appropriation law side by side. Montana applies a pure doctrine of appropriation. This in the majority of the cases will serve to distinguish decisions of California and Oregon courts from those of Montana on this question.

[39]WIEL, *supra* note 37, §555.

[40]Featherman v. Hennessy (1911) 42 Mont. 535, 113 P. 751; Wood v. Lowney (1897) 20 Mont. 270, 50 P. 794; McDonald v. Lannen (1897) 19 Mont. 78, 47 P. 648.

[41]TIFFANY, REAL PROPERTY (3rd ed. 1939) §721 and cases cited.

[42]Verwolf v. Lowline Irrig. Co. (1924) 70 Mont. 570, 227 P. 68.

ditament into an incorporeal hereditament and at the same time to divest plaintiff of one and invest defendant with the other.'"[43]

It would seem clear that as against riparian owners the prescriptive title holder could date his right only from the initiation of the adverse use.

Wiel's strongest authority is the *Alhambra* case, which says:

"... if the controversy had been concerning the land which Wilson had conveyed, the declarations of the grantor would probably have been admissible. The defendants cannot claim by virtue of the conveyance of Wilson. Their right to it arises from their use of it, which was a right acquired adversely to Wilson, not through him. *Where a right rests upon the statute of limitations, 'the disseisor acquires a new title founded on the disseisin. He does not acquire or succeed to the title and estate of the disseisee, but is vested with a new title and estate, founded on and springing from the disseisin.'* (Citing *Williams v. Sutton* (1872) 43 Cal. 73). This being the case, the declarations sought to be proven were mere declarations of a party in his own favor, and were properly excluded."[44]

The case is distinguishable on three grounds: 1st, as stated before, it involves a riparian owner and a claimant by adverse use; 2d, it will be seen from the quotation that the rule was invoked for the purpose of striking out evidence; lastly, the case cited as authority concerns real property. It is an early case and as such inconsistent with later statements by the California court.[45]

It is likely that Montana would invoke the *presumed grant* theory, for the court has said that, in order to constitute adverse user, an invasion of a right must be shown, from which a grant may be presumed.[46]

But, in the last analysis, the relative soundness of the *presumed grant* doctrine or of the *junior disseisee* doctrine depends upon the results desired.

The result reached under the *presumed grant* theory maintains the *status quo* in relation to other appropriators. If a contrary rule were invoked, the result would be that the rights of

[43]Oregon etc. Co. v. Allen etc. Co. (1902) 41 Ore. 209, 69 P. 455, 458, 93 Am. St. Rep. 701.
[44]72 Cal. 598, 14 P. 379, 384. Italics supplied. Note with this quotation from Wiel, page 140, *supra*.
[45]See distinguished cases in note 37, *supra*.
[46]Boehler v. Boyer (1925) 72 Mont. 472, 476, 234 P. 1086. And see Gibbs v. Gardner (1938) 107 Mont. 76, 80 P. (2d) 370, and State v. Quantic (1908) 37 Mont. 32, 94 P. 491.

the junior appropriators would be improved while the adverse claimant, who pioneered the prescription and bore the brunt of the litigation, would go to the "foot of the class" to await his turn to the water. Under such a rule, he would, in order to achieve the place in which the *grant* theory places him, have to perfect a prescriptive right against every appropriator on the stream. Where, as here, the relative priorities on a stream create substantial differences in the values of land, there would, under the *junior disseisee* rule, be raised a certain taint of unjust enrichment in favor of the junior appropriators.

There is another consideration, too. In a great many cases the prescriptive right, in natural position, will be above those of many junior appropriators. Where, as in this country, many of the streams are on sandy or gravelly semi-arid terrain, the resulting loss from evaporation or seepage is great, and to allow the lower appropriators the prior right would be to lose much of the benefits of the water. The *junior disseisee* doctrine would, therefore, be subversive of the fundamental purpose of the appropriation doctrine, namely, to get the greatest amount of benefit from the available supply of water, for in the greater number of cases the prescriptive appropriator will be in a position to make the most effective use of the water.[47]

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[47]In the Montana Reports there are only two decisions in favor of the adverse claimants under the rule as enunciated by the Montana court. The first, State v. Quantic (1908) 37 Mont. 32, 94 P. 491, was decided on the pleadings and not on the merits. The second case, Verwolf v. Lowline Irrig. Co. (1924) 70 Mont. 570, 227 P. 68, was apparently decided on the merits. The litigants were grantees of a former irrigation company. The defendant irrigation company claimed the right under their conveyance and that of the plaintiff's to treat the latter as one of the stockholders of the defendant company (actually he was not, though the defendant set stock aside for him which he never accepted) and thus able, when necessary, to pro-rate the water among user stockholders, plaintiff included. It did so for a period in excess of the ten year statute; all this with the plaintiff's knowledge. Under these facts, the Montana court found that the defendant had perfected a prescriptive right against the plaintiff. On the facts as reported, there appears to have been a misapplication of the rule, for there was no showing that the defendant had ever deprived the plaintiff of water at a time when the latter needed it, which is necessary before adverse user can be initiated. ". . . the parties did not . . . prove one of the most essential elements in their alleged right, it may be said the most essential element, if any distinction is permissible. . . " Smith v. Duff (1909) 39 Mont. 374, 382, 102 P. 981, 133 Am. St. Rep. 582. The decision appears justified only on the alternative ground invoked by the court, that of laches, for it appears that plaintiff, by his silence, had induced the defendant to make contracts for the sale of more water than to which it actually possessed the right.

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