WATER- -RIGHTS.

An Able Decision Rendered This Morning By Judge Street.

In The Case of Elijah Clifford, Et al vs. L. Larrieu.

In The County Court.

ELIJAH CLIFFORD, JOSEPH ARMON, AND P. A. LOFTGREEN, PLAINTIFFS; AGAINST L. LARRIEU, DEFENDANT.

Goodrich & Smith, for the plaintiffs. C. Herring, for the defendant.

This action was brought by the plaintiffs for themselves and thirty eight others forming the community of St. Davids, against the defendant to enjoin him from diverting the waters of the San Pedro river.

The complaint in effect alleges that plaintiffs are a community of people engaged in agricultural pursuits, and are cultivating large quantities of land in the San Pedro valley; that in order to cultivate and improve it is necessary to irrigate it, and for the purpose of irrigating the same, they, in the spring of the year 1880, diverted a sufficient quantity of water from the San Pedro river to irrigate their lands, by building a dam across the river and constructing a ditch two feet wide by one and a half feet deep, and conducting the water through upon their lands; and that the uninterrupted flow of water to the full capacity of the ditch is necessary to their use.

They allege that afterwards in the fall of 1881, or the spring of 1882, defendant, at a point about three miles above their dam, diverted water from the San Pedro river by means of a dam and ditch, and notwithstanding plaintiffs' prior appropriation, but in violation of their prior rights he continues to divert the water from the bed of the river to the destruction of plaintiffs' crops.

The answer of defendant, being epitomized, makes denial of plaintiffs' allegations, and makes defence:

First—That since the inception of his rights by diversion, the plaintiffs have enlarged their ditch, and that if plaintiffs ditch were not enlarged there would be sufficient water for both.

Second—That the diminution of plaintiffs' supply is not caused by defendant's wrongful diversion but by the wrongful diversion of others, and specifies: 1st, that the Union ditch, which is conceded an older ditch than either plaintiffs' ditch or defendant's ditch, and taken out at a point between the two, has been enlarged since the inception of defendant's rights, and 2nd, that many other ditches above plaintiffs' ditch had been enlarged and many other diversions of water had taken place since the defendant had first diverted the water by his dam and ditch, which singly and together were the real causes of the diminution of the water in plaintiffs' ditch—and that if such were not the facts there would be a sufficient supply of water for both plaintiffs' and defendant.

The case was tried to the court with the aid of a jury upon special issues.

The issues submitted to the jury were as follows:

1st. Issue—When was the water in the ditch of plaintiffs' first appropriated, and to what amount as to the size of ditch?

2nd. Issue—How often, when and to what extent has plaintiffs' ditch been enlarged or extended in length?

3rd Issue—When was the water in the ditch of defendant first appropriated and to what amount as to size of ditch?

Upon which issues the jury, after having listened to evidence for eight days rendered the following special verdict or findings:

1st Issue—We find that water in ditch of plaintiffs' was first appropriated in the spring of 1880, and the amount as regards the size of ditch being 10 feet wide and 1½ feet deep.

2nd. Issue—In 1881 the ditch was extended to Rock house; in 882 and spring of 1883 it was extended to its present terminus and made 7 feet at bottom and 3½ feet deep, sufficient to carry 10 feet by 1½ feet of water as appropriated at head of ditch.

3rd. Issue—Larrieu appropriated water in December, 1881, and finished his ditch in January, 1882; capacity of ditch, 3 feet wide by 10 inches deep; capacity of flume connecting with ditch, 11 inches deep by 24 inches wide.

The lands through which the water in dispute runs, and the lands of plaintiffs' and defendant are the unsurveyed public lands of the United States; but settled upon, occupied cultivated and improved by the parties hereto with a view to purchasing the same when they shall be offered by the government for sale.

The title to such lands being in the United States, the only rights or property which any of the parties have thereto or therein are the rights and property of peaceable and quiet enjoyment, maintained for them by the Territorial Legislature in its act "Concerning Possessory Rights in Public Lands."—Compiled Laws, page 518.

Riparian proprietors are those who own the land contiguous to the running water of streams, navigable and unnavigable, as well as those who own the soil over which the water flows; and it is the common law doctrine that a riparian proprietor has no "property" in the flowing water but has: First; the "right" to the "ordinary" use of the water flowing past his land for the purpose of supplying his natural wants, and that without any material diminution in quantity, or alteration of the channel, or perversion of the quality; and, Second; the right to the "extraordinary" use of the water for irrigation, manufactures and other purposes.

Which right to the "extraordinary" use is inferior to the right to the ordinary use and can only be exercised; 1st, after all the other riparian proprietors have exercised their right to the ordinary use; and 2nd, reasonably, and with a proper regard to the rights of others in their "extraordinary" use. Gould on Waters, 279-329-1-2.

Whether this doctrine would have been modified by legislation, or what changes would have taken place in the various incidents of the common law doctrine of riparian proprietors, in the irrigable and mining countries of the West coast, had the "fee" to the land been in individuals instead of in the United States when those countries were being settled, can only be a matter of conjecture.

But owing to the peculiar condition of the settlers and miners on the public lands in the Pacific States and Territories, the common law rule very early became changed, so that the right to running water existed without private ownership of the soil and resting on "prior" location of the land, or "prior" appropriation of the water.

Gould on Waters, 407.

As between persons who claim the waters of a stream flowing through the public lands by the prior appropriation of the water itself, he has the best right who is first in time.

7 Cal. 49; 7 Cal. 148; 8 Cal. 445; 8 Cal. 223; 10 Cal. 217; 11 Cal. 143; 13 Cal. 22; 16 Cal. 58; 15 Cal. 145.

Rules adopted by other uniform authorities in that State and in Nevada and Colorado which rule is recognized by the Supreme Court of the United States.

20 Wall. 327.

The right to divert water from its natural channel is also well recognized that in 1865 an act of the legislature of the Territory of Arizona, the organic act of that Territory recognized and confirming the rights to water and ditches.—Compiled Laws page 519.

Section 1—All rivers, creeks and streams of running water in the Territory of Arizona are hereby declared public and applicable for the purposes of irrigation and mining, as hereinafter provided.

Section 2—All inhabitants of the Territory who may or possess mills and irrigating canals shall have the right to construct public or private "acequias" and to use as much water for the same from any convenient river, creek or stream of running water.

Section 7—When any ditch or "acequia" shall be taken out for the 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. * * * *

The title to the public lands being in the United States it became apparent, that, when the title passed out of the United States into private hands, these rights, which had grown up under the customs, decisions and statutes of the West Coast, would be at the mercy of the legal title, and that the buyer thereof from the government would take it with all the common law incidents which surrounded it when it emanated in the United States.—Id. 329.

To avoid such a result and to protect the prior rights which had so grown up, Congress passed a statute preservative of those rights, and thus expressly gave assent to the doctrine above set forth and established its validity beyond dispute.

Revised Statutes of U. S. sec 2339-2349.

Sec. 2339—Whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same. * * * * *

Sec. 2340—All patents granted, or preemptions or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights as may have been acquired and or recognized by the preceding section.

The right to divert water from its natural channel is "limited" first to a reasonable amount and second, to the necessary quantity for the beneficial use, and the "extent" to the reasonable use of the amount actually appropriated, provided a smaller quantity appropriated for longer time shall not be held for the entire land in dispute.

Every extension of the use, or increase in size of the necessities, or enlargement of the ditch, flume or gate through which the water originally flowed, makes a new appropriation as to the water thus newly diverted.

When one makes an appropriation of water he must do so in reference to the then existing rights of others; and when referring to and therein, when the existing rights of others are not interfered with, it is permissible for him to build as large a dam and ditch and gate-way, and thus divert as much water as is necessary for his beneficial use.

And as much time is given him to perfect his appropriation as is required for the perfection thereof through ordinary and diligent means; and every one appropriating water after the inception of those rights must make such appropriation in subordination to the general plan and scope of such prior appropriation, as was contemplated at the inception thereof, and as shall be perfected through diligence.

With this law before us what are the relative rights of the parties to this action?

Under the issues submitted to them, the jury, in effect, found, that in the year 1880 the plaintiffs appropriated water through a ditch 10 feet wide, by 1½ feet deep; that this plant was fully perfected in the spring of 1882, and that since that time it has not been enlarged; that in December, 1881, defendant appropriated water through a ditch 3 feet wide, by 10 inches deep and that he perfected his appropriation in January, 1884.

Without discussing the evidence the Court finds facts in addition to the special verdict or findings of the jury, as follows:

First—That plaintiffs' ditch is taken out at a certain point on the San Pedro river and diverts the waters thereof.

Second—That at the time plaintiffs' first appropriated the water for their ditch they put a log dam across the river which forms a gate-way five and sixty-five hundredths feet (5.65 feet) wide, by twenty-two inches (22 in.) high.

That plaintiffs then appropriated so much water as will pass through a water-way 5.65 feet wide, by 22 inches high, under a pressure of water raised four (4) inches above the top of the water way—or the bottom of the gate which raised 22 inches.

Fourth—That the ditch of plaintiffs, as found by the verdict of the jury, will carry fifty cubic feet of water.

Fifth—That the amount of water passing through that water-way, 5.65 feet wide by 22 inches high, under a pressure of water when raised 4 inches above the top of the water way, is sixty-one and eighty-seven hundredths (61.87) cubic feet per second, or two hundred and forty-seven and five tenths (247.5) miner's inches per second, equivalent to a discharge of 2.0594 cubic feet per second.

Sixth—That plaintiffs use said water for irrigating and enriching their lands.

Seventh—That the aggregate amount of land irrigated by plaintiffs is not less than six hundred acres.

Eighth—That when they are raising crops only 1/4 of the full amount of water which can flow in their gate-way and ditch is necessary to irrigate the crops.

Ninth—That the defendant's ditch is taken out at a certain point on the San Pedro river and diverts the water therefrom, about three miles above the point where plaintiffs' ditch is taken out.

Tenth—That at certain seasons of the year, to wit: in the months of May, June and July, there is not sufficient water in the San Pedro river to supply a full amount of water to both plaintiffs' and defendant's ditches.

Eleventh—That since the construction of the defendant's ditch the water coming to plaintiffs' ditch has diminished in amount and that such diminution is affected by the flow of water through defendant's ditch.

Twelfth—That since the construction of defendant's ditch the diminution of water in plaintiffs' ditch has not been materially affected by the flow of water in the Union ditch or any other ditch, or ditches, or by any wrongful acts of their owners.

Thirteenth—That the defendant uses the water flowing through his ditch for beneficial purposes in irrigating land.

As a conclusion of law from the verdict of the jury and the findings of the Court—

The Court finds:

First—That plaintiffs, at all seasons of the year, are entitled to just so much water and no more, as may be necessary for them to use to irrigate their lands, not exceeding an amount tested by either one of the following measurements:

1st. 247.5 miner's inches per second, or

2nd. 247.5 miner's inches per second upon the basis that one miner's inch equals a discharge of .0249 cubic feet per second; or,

3rd. Such an amount of water as can flow through a gate-way 5.65 feet wide, by 22 inches high under a pressure of water raised 4 inches above the top of the water-way—or above the bottom line of the gate which raised 22 inches.

Second—That defendant should be perpetually enjoined from in any way interfering with plaintiffs' right to the use of such water.

Third—That plaintiffs should have judgment against defendant for costs of this action.

Let judgment and decree be entered accordingly.

WILLIAM STREET,
County Judge.

Death of Michael Heller.

Michael Heller, a native of Germany, and a pioneer by trade, who has been confined to his room in the rear of the American house with the hydrophobia fever, for the past ten days, was removed to the county hospital yesterday afternoon after he was to moved Mr. Heller had a maniac, and was attended before his death by Dr. Dunn, who did everything in his power to alleviate the poor man's sufferings. His friends were attended to every day by Miss Dimmond, who has her dress-making rooms in the front portion of the American house. Major Bowers, J. V. Vickers and several others were frequent visitors to his bed side. Mr. Heller stated that he had money to pay his way with and did not want to go to the hospital, and that that could be done for him was done by his neighbors. He leaves a son and daughter in San Francisco to mourn his loss.

Judge Robinson and Sev. Drewett went to Bisbee yesterday on a little business. They will return this evening.

James Echo, who was shot by a Mexican in Bisbee recently, is reported to be very low.

The wife of Billy Sprague received a letter from him last evening, in which he states that his health is much better since his arrival in San Francisco, and he hopes he will be well and strong again in a short time. He also wished to be remembered to his many friends in this city, who helped him in his hour of need.

43 INDIANS

Captured by Capt. Hatfield, of Co. D. 4th Cavalry.

The Gallant Captain With Forty-Seven Men and Four Scouts Do Battle With Geronimo's Braves.

Several Indians Killed and Forty-Three Bucks Captured, Who Will be Turned Over to the Civil Authorities.

From Mr. W. P. Davis, from the firm of Comer & Davis, freighters, this city, we arrived in this city last night from his ranch on the west side of the Huachuca, we learn that night before last a courier who was bearing dispatches from Capt. Hatfield, who is stationed in the Chiricahua mountains in Sonora, to the commander at Fort Huachuca, passed his house and took him that Capt. Hatfield had overtaken a band of about sixty Indians in the Cananea and had a fight with them, and had killed several of them and captured forty-three bucks, and that he was then on his way to Fort Huachuca with dispatches and prisoners. As it was quite late when he passed, and as he felt not considerable distance to go, Mr. Davis did not have an opportunity to learn any facts or account of the fight, but was satisfied that what he had been told was true.

Yesterday morning, while Mr Davis was on his way to Tombstone, he met another courier, who was on his way from Fort Huachuca to Capt. Hatfield's command with dispatches. This courier confirmed the report made by the other courier the night before. This last courier stated that it was understood that the captives would be turned over to the civil authorities at Tucson; but as they have committed their depredations principally in Sonora and Cochise county, we believe that they should be brought to this city and tried in our courts, where we feel assured that they will not kill any more settlers. We have a gallows here that will accommodate nine or ten at a time, and we know that it works well, as five men have been dropped off of it at one time. If this news is true, and we think that it is, it will probably settle the Indian war, and if the captives are turned over to the civil authorities, there will be no more Crook policy with them, at least.

Perfect Scholars.

Following are the lists of pupils at the public school who have been marked perfect during the week just ended:

Advance Grade—Cora Fulkerson, Berta Herring, Maggie H. L. Minnie Hall, Gertrude Howe, Minnie Jones, Willie Ashley, Sam Cummins, Walter Fulkerson, Erwin Fleming, Lee Lowry, Herman Stone, Frank Williams.

First Grade—Frank Anderson, Mary Baker, Cora Goodrich, Etta Herring, Jason McAlister, Mary M. Cornick, Jane Street, Georgie Plummer, Nettie Bettes, Hunter Jones, Addie Slaughter.

Second Grade—Emma Ashman, Alfred Binks, Roy Brown, Nettie Chinn, Thomas Fryer, Rose Hodges, Mary McHenry, Otis Pollock, Cory Storm, Herbert Wesson, Julius Block, Clarence Coffman, Nellie Broderick, Willie Dean, Frank Gird, Arthur Hawkins, George Hank, Rose Palmer, John Stephens, George Lucas, Frank Cronan, Annie Kennedy, Effie Fleming, Roy Gee, Steve Jones, Eugene Norris, Herbert Simmons, Nora Wickstrom, Lizzie Wittig.

Third Grade—Cassie Arthur, Jamie Brown, Tom Bates, Carrie Bigg, Lizzie Bates, Eva Cowan, Doris Contreras, Virginia Fetterman, Frank McAlister, Emma Stump, Josie Sims, Katie Tenney, Mary Waters, Richard Woods, Norman Denton.

Fourth Grade—Annie Hill, Rose Wickstrom, Maggie Noonan, Eddie Sims, Minnie Brady, Willie Dunbar, Mollie Bauer, Fannie Mank, Charles Daigh, Bernice Dewitt, Anna Walsh, Tommie Cummins, Willie Cowan, Annie McAdoo, Johnny Storms, Birdie Roberts, Christina Wilson, Nellie Monsomier, Annie McAdoo, Eddie Burns, Sara Escandy, Albert Riley.

Rooms to Rent.

Having leased the Way Up lodging house on Allen street, and renovated the same, I am now prepared to rent rooms by the day, week or month, at reasonable rates. Give me a call.

LOTHIE EGAN.

SHORT BITS

THAT ARE ENCOUNTERED EVERY DAY

By our Very Efficient Corps of Reporters who are Always on the Spot

When anything Occurs that Is of Infrest To our Readers

O. L. Pain and D. H. Peterson arrived in this city today from Dchonville.

Just received at the Crystal Palace Saloon some of Lemp's St. Louis beer, ice cold, on draught.

Charles Sullivan and Mr. Pete Gerpheim are expected to arrive in this city this evening.

The Crystal Palace Saloon will be ready to serve cool cocktails with the finest of Lemp's ice-cold beer on draught.

The hoisting works of the Head Center are being removed to the Tranquility grounds.

Fresh stock for the celebrated New Orleans coffee house on Allen, Ashmun & Walker have just received a new supply.

Ashmun & Walker have purchased the saloon fixtures of the Eagle, and will shortly open the same as a first class saloon.

Just received at Ashmun & Walker's cigar store, one box of those celebrated Estrella cigars, 25 cents. tf

Chewing tobacco, pipes, knives and in fact everything to be found in a first class tobacco store, for sale at Ashmun & Walker's cigar store at reasonable prices. tf

The opera war in this city has commenced with the Messrs. Comer & Wehrfritz having just received a car load of beer direct from St. Louis.

Miss Rose Smith, Santa Fe; Chas. Collins, Los Angeles; N. H. Ramsey, Benson; Geo. H. Judd, Willcox; A. B. Biddwell, Hershaw; M. C. Fogle, Fairbank; P. G. Watcher, American Ranch, Mexico, are registered at the Occidental hotel.

BENSON NEWS.

Virginia House arrivals: Wm McBride, New York; C. E. Brewer, Colfax; H. Kossin, Ohio; H. Arnold, San Francisco; J. T. Gibs, Trinidad, Mexico; Henry Hewitt, Wisconsin; A. Phelps, Kansas City; Wm Willis, Lordsburg.

Mr. Hugh McCrann, wholesale liquor dealer, San Francisco, passed through Benson yesterday, en route to Fort Huachuca.

Mr. German, lately of El Paso, Texas, has opened a skating rink here, which is being well patronized.

When Sheriff was asked why he let the rink so early last evening, he said his right arm was a little tired, and as it was Nye 10 o'clock he felt the boys would excuse him.

A. C. Rogers, of the firm of Rogers & Bros, contemplates a trip to California the first of October.

Mrs. Baker, of Tombstone, starts today for San Francisco, on a visit. Tracy, old boy, cheer up. She will return.

C. L. Finch and wife are spending the day in Tucson.

There will be a social dance to night at the skating rink.

Agent Crouch is occasionally troubled with somnambulism, and the other evening under the supposition that his beat was singing "Meet me by moonlight alone," he got up and took a walk in his sleep on the depot platform. He was now wearing Congress shoes.

We note with pleasure that Messrs. Dyer & Blevins have decided to close their store on Sundays after the first of October. Right Bros. intend to do likewise, and we hope soon to see Sunday observed with respect by the rest of our merchants.

The Knights of Pythias are gaining a strong foothold in Benson, and at present have about forty members in good standing.

George has taken Dickens' advice to beware of widows, and Zeff's society is waning.

It has been unusually warm for the past two weeks.

We have had very little rain this summer, and as a natural consequence hay will be very scarce.

Can't some of our sister towns send us a widow. Major is disconsolate.

Cal is trying to beat the boys out of a little inn, and has sent over here for his betterhalf to come to Tucson, where they intend residing for a couple of weeks, but we have made arrangements with the Knights of Pythias of that burg to give them the intended surprise. Cal, out boy, we sake.

W. W. Baldwin has returned from the Conference, which was held in Tucson.

Anti Chinese Resolutions.

From the Phoenix Gazette.

The Anti Chinese Labor Association of Maricopa County, Arizona, in mass convention assembled, do adopt the following resolutions:

1st. Resolved, That in the future as in the past, the prosperity of our country is based upon the industry and intelligence of the white laboring masses of our citizens, to whom we owe, in a great measure, our present national greatness and prosperity.

2d. Resolved, That we extend to down trodden Caucasian residents of every continent who seek our land for a home, the hand of labor, the hand of welcome, and bid them come and abide within liberty's asylum, on a new continent, and equally partake of the blessing of a free republic.

3d. Resolved, That we look with foreboding and horror upon all public manifestations in favor of Chinese immigration, for their touch is social and moral pollution; their presence is a perpetual menace of the public peace; their labor is in the exclusive interest of their own country, and it is a growing and blighting curse to our whole free Caucasian labor system, which is the foundation of the prosperity of our republic.

4th. Resolved, That a demand should be made by the combined white laboring masses of our country, for such modification of our treaty with the Chinese empire, or such legislation by Congress as will entirely prevent the further importation to the United States of the Chinese race, and the enactment of such laws as will absolutely prohibit the return to our country of all Chinamen who leave our country for any purpose whatever.

5th. Resolved, That we express to the great mass of white laboring people of California and the other states and territories of the west our earnest sympathy and co-operation in their efforts to rid themselves of the curse of Chinese labor and coolie servitude, and we do hereby pledge ourselves to do all in our power to secure the passage of such laws by Congress as will totally prohibit Chinese immigration to our country.

6th. Resolved, That we request the citizens of the several counties of our Territory to unite with us in forming anti Chinese labor associations throughout the Territory.

Resolved, That the newspapers of the Territory be requested to publish these resolutions.

A. N. PEOPLES, A. J. LAW.
W. E. WILLIAMS, P. COSAD,
CHAS. L. MOSHER.
Committee.

Cruel Joke.

About 4 o'clock this morning, as Mr. Billy Tennenson was wending his way homeward, after completing his arduous as foreman on the Record-Epitaph, he was accosted by a stranger, who spoke pleasantly to him, saying, "Hello, Bill, come with me to the Fountain and have some oysters." Bill assented, and entered the restaurant, whereupon they both ordered a stew. While the cook was engaged in preparing the stew, the stranger excused himself and stepped out, leaving old boy Bill to wrestle with the two stews and dig down in his pocket and pay for the same. Billy says he did not mind eating the stews, but when he had had to dig up one hundred, he was angry.

After breakfast, to make yourself feel happy, go to Ashmun & Walker's and purchase a choice imported cigar.

The Pioneer mills flour, Sacramento, is the best in the market. For sale at the Cash Store of WOLCOTT & MESSICK.

For Sale.

One fine American Milch Cow at Grand Branch Water Station.

For sale.

A house of three rooms on Sweetnut St., back of Bunn's lumber yard. The property is well fenced in. Has nice front and back yard. Will be sold for $300 if called for at once. Apply to Della Clark, three doors from second street, or at this office.

For Sale

The undersigned being desirous of engaging other business, offers the old established Eclipse Bakery of this city for sale, and will sell it at a bargain if called for soon. Call or address. J. M. NAGL.
Tombstone, A. T.

Card of Thanks.

The undersigned desire to express their thanks to the business men of Tombstone for their liberality in contributing to the fund for paying the funeral expenses of the late Mrs. Burke, the victim of Monday's fire.

P. H. BRACKEN.
B. MCARDLE.

Public Warning.

All persons are hereby notified not to purchase a certain mill property to be secured by mining and other considerations, at Banning's Station, County of Cochise, Territory of Arizona, and dated about July 1st 1884, and supposed to be in the possession of A. Fortiouns or Cadwell & Stanford of Tombstone, as the same is void for want of consideration.

W. F. BANNING,
Banning's Station, Aug. 11, 1885.