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Samuel L. Prince

REMARKS OF SAMUEL L. PRINCE AS MODERATOR

In this symposium we are dealing primarily with the law of water rights in the Southeastern area of our country. It is to be observed, however, that water law is far from uniform in America — the law of the Western states being sharply different from that of the Eastern states. In the United States we find two separate and distinct systems of water rights, water management and control. One of the systems is based on what we call the riparian doctrine and the other is based on what is called the prior appropriation doctrine. These two doctrines are inconsistent with each other and have separate origins.

The riparian doctrine or theory is generally spoken of as deriving from the English common law applicable to water courses and diffused surface water. This is not exactly correct, for its real origin is in the Code Napoleon. Story and Kent adopted the theory from the Code Napoleon but with some modifications, and thereafter the views of these two eminent jurists were followed in England. (It is also observed that the Code Napoleon was directly adopted in the State of Louisiana.) By adopting the basic theories of water law as contained in the Code Napoleon but with modifications, the English judges and Story and Kent thereby rejected the prior appropriation doctrine of Blackstone. In following these earlier pronouncements many of our states thereby incorporated into their common law the limitations of the riparian doctrine. The result of these decisions is the rule of property followed in the Eastern states.

We turn to our Pacific Coast and Great Plains states to find the source of the prior appropriation doctrine. Here appear the Spanish and Mexican influences and the influence of Indian customs and of uses in irrigation and mining. The Indians and miners and irrigators applied the doctrine of prior appropriation, which is not dependent upon ownership of land at or near the source of the water. Though the Pacific Coast and Great Plains states adopted what we call the English common law of water upon their being admitted to the Union, these two systems were diametrically opposed to each other and produced conflicts which had to be resolved under pressure. The prior appropriation system apparently is chiefly concerned with the artificial use of water by owners, whether riparian or not, and the riparian doctrine is chiefly concerned with the natural use of water. By natural use we mean the use on his land by the owner

of land on a stream, of the water of the stream for domestic and household purposes, for drinking water and watering domestic animals. Every other use of the water, whether by the riparian owner or by someone else, appears to be classified as an artificial use. In the West adjustments have had to be made between these two theories or systems, and in the adjustment vested rights have had to be fully protected.

In the Eastern states conflicts are now beginning to appear between water users — users for natural purposes and users for artificial purposes, and in both fields — ground water and surface water. It is entirely possible that the experience in the Western states in adjusting these conflicting theories may be of aid in thinking out the solutions of these problems in the Eastern states.

As confusing as the announced principles in water law in America and England may be — and these pronouncements have been varied — nevertheless, we find something that is fairly constant. Each pronouncement or decision has been materially influenced, if not controlled, by what were at the time local, economic and technological conditions, the customary uses of water, and the relative sufficiency of the water supply.

Water has been and still is plentiful in the Southeastern area; but the marked increase in use needs for industry and agriculture and for municipalities is here and there producing conflicts. Our water supplies are remaining fairly constant and regular, while at the same time the uses and needs are vastly increasing. It is certain that this section will continue to develop, and that the needs for water will ever be multiplied. The differential between supply of water and beneficial use needs will constantly be lessening, and the stresses between rights of users will constantly become greater.

In this symposium the effort has been to discover where we are in the Southeast in the matter of water law and to bring out in bold relief the conflicts in the varying legal theories which may be applicable.

Apparently, very broad principles will have to be determined upon, and some control authority or administrative agency will be needed. Vested property rights will have to be determined and protected. If the present and future inhabitants of a state are to obtain the greatest beneficial use of its water resources, we perceive that there must be some agency that can survey and determine just what these resources now are, how they may be protected, and probably what they will be in the future. Such an agency should be able (within the broad and appropriate principles laid down by legislative authori-

ty of the state) to determine who are riparian owners, what are their riparian rights and prescriptive rights, and to what lands these rights are appurtenant. Such an agency should have the power to allocate water not only to riparian owners but to others, for artificial uses in agriculture and industry, for municipalities, for fishing, and even for recreation. It should also apply the "balance of convenience" doctrine. Decisions by such an administrative body should be reviewable by the courts. The agency should have the right to modify any allocation that it may have previously made, and to regulate practices and instrumentalities in such uses. In making allocations there should be such a degree of permanence as to give assurance to investors that they are justified in making large outlays of money dependent upon such allocation. All of this machinery should be set up with a view of preventing waste and making it certain that the people shall obtain the greatest beneficial use from this vital resource. Another reason for early action is that as time goes on an increasingly large number of vested property rights conceivably may be established in the matter of water uses, thereby making less flexible regulations for the allocation and management of water.

There can be no question but that the State has power of regulation in these matters with due regard for the powers of the Federal Government in the field and subject to the constitutional protection of vested rights.