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Waters and Water Courses - The Effect of the Desert Land Act of 1877

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WATERS AND WATER COURSES—EFFECT OF DESERT LAND ACT.—The Act of March 3, 1877, generally known as the Desert Land Act, provides for the sale of desert lands to persons who agree to irrigate and cultivate such lands. The act defines desert lands as lands which will not, without some irrigation, produce crops, and provides that the Commissioner of the General Land Office shall determine what may be considered as such lands; it provides also that the right to the use of water on such lands shall depend upon appropriation, and continues as follows: "and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands * * * shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights." Defendants were appropriators of water from Spearfish Creek, and plaintiffs (apparently since March 3, 1877) had acquired title to lands bordering on that stream; defendants diverted all the water in the stream during a dry summer, in order to satisfy their appropriations, and plaintiffs brought an action to determine their riparian rights. It did not appear that either the riparian lands of plaintiffs or the lands on which the defendants used the appropriated water had been obtained under the Desert Land Act. *Held*, that no riparian rights exist in connection with any public lands granted by the government after the passage of the Desert Land Act. *Cook et al. v. Evans et al.* (S. D., 1921), 185 N. W. 262.

In a similar case in California appropriators sued to prevent the use

of water by upper riparian owners who had obtained title from the government after 1877. *Held*, that as defendants' title was not obtained under the Desert Land Act, that act did not apply, and defendants could use the water as riparian owners. *San Joaquin & Kings River Canal & Irrigation Co., Inc., v. Worswick et al.* (Cal., 1922), 203 Pac. 999.

The opposed views of the two cases reflect the condition of the previous decisions on this point. In *Hough v. Porter*, 51 Ore. 318, which is cited in both cases and followed by the South Dakota court, the supreme court of Oregon held that all lands settled upon after March 3, 1877, "were accepted with the implied understanding that the first to appropriate and use the water for the purposes specified in the act should have the superior right thereto." On the other hand, the supreme court of Washington, in *Stil v. Palouse Irrigation & Power Co.*, 64 Wash. 606, held that the provisions of the statute applied only to desert lands as defined therein, and did not apply to lands (or to streams thereon) title to which was obtained from the government under other statutes. Both decisions have been followed and affirmed by later cases in the same jurisdictions. There is no actual authority in the United States courts. *Winters v. U. S.*, 143 Fed. 740, though sometimes cited as opposed to *Hough v. Porter*, *supra*, is decided on another ground. In *Boguvillas Land & Cattle Co. v. Curtis*, 213 U. S. 339, the court finds it unnecessary to decide the question raised in the two principal cases, but refers to the decision in *Hough v. Porter*, *supra*, as being based on "plausible grounds." As to the text writers, Mr. Kinney (Sec. 817) criticises *Hough v. Porter*, while Mr. Wiel (Secs. 128-130) merely refers to the doctrine of that case as "a new phase of the law," and Mr. Long (Sec. 306) rather hazily inclines to Mr. Kinney's views. It seems clear that the question is still an open one.