COLORADO

Irrigation Statutes
AND
Supreme Court Decisions

1909

D. A. Dean

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IRRIGATION STATUTES

Revised Statutes of Colorado 1908

ALSO

Laws Passed by the Seventeenth General Assembly Relating to Irrigation

AND

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PREFACE

The office of State Engineer was originally created for the purpose of administering the decrees of court, rendered under the irrigation statutes, and it is the duty of the officers of this department to execute these decrees, and in order that the rights of all users of water may be properly protected and to bring about a uniformity in the distribution of water an accurate knowledge of the statutes, as well as the interpretation placed thereon by the courts of last resort, is fundamentally necessary.

The recent compilation of the statutes of Colorado brought the irrigation statutes into compact form, and this bulletin reproduces the chapter on Irrigation from the Revised Statutes of Colorado, 1908, exactly as published.

In the preparation of this work a careful examination has been made of all the decisions relative to irrigation and water rights rendered by the Supreme Court and Court of Appeals of this State, and almost verbatim extracts therefrom have been taken, following the topical headings of the Revised Statutes.

The celebrated decision of the United States Supreme Court in the Kansas-Colorado case, involving the right of the State to the use of the waters of the Arkansas river for irrigation, is likewise included in this work.

The extracts of the decisions of the courts were compiled by Harvey E. Rockwell, Esq., of the Denver Bar.

To assist in the more equitable distribution of water throughout the State, and to meet the constant and increasing demand on the part of the public for the irrigations laws of Colorado in convenient form, this book was compiled, and is now published with the hope that it will prove of benefit in accomplishing the ends which prompted its compilation.

T. W. JAYCOX,
State Engineer.

Oct 15th 1909 D A Dean
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CONSTITUTION OF THE STATE OF COLORADO

Article XVI.

IRRIGATION.

Sec. 5. **Water, public property.**—The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.

Sec. 6. **Diverting unappropriated water—Priority.**—The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.

Sec. 7. **Right of way for ditches—Flumes.**—All persons and corporations shall have the right of way across public, private and corporate lands for the construction of ditches, canals and flumes for the purpose of conveying water for domestic purposes, for the irrigation of agricultural lands, and for mining and manufacturing purposes, and for drainage, upon payment of just compensation.

Sec. 8. **County commissioners fix rates for water.**—The General Assembly shall provide by law that the board of county commissioners in their respective counties shall have power, when application is made to them by either party interested, to establish reasonable maximum rates to be charged for the use of water, whether furnished by individuals or corporations.

CHAPTER LXXII.

IRRIGATION.

I. RIGHT OF WAY—APPROPRIATION—USE OF WATER.

3165. Owners of land on streams entitled to use of water.—Sec. 1. All persons who claim, own or hold a possessory right or title to any land or parcel of land within the boundary of the state of Colorado, as defined in the constitution of said state, when those claims are on the bank, margin or neighborhood of any stream of water, creek or river, shall be entitled to the use

of the water of said stream, creek or river for the purposes of irrigation, and making said claims available to the full extent of the soil, for agricultural purposes. [G. S., §1711; G. L., §1372; R. S., p. 363, §1; L. '61, p. 67, §1.

[Water rights conveyed as real estate, section 669.]
[When ditch exempt from taxation, sections 5545 and 5546.]
[Mechanic's lien attaches to water rights. Section 4031.]

3166. When water to be allotted on alternate days.—Sec. 2. In case the volume of water in said stream or river shall not be sufficient to supply the continual wants of the entire country through which it passes, then the county judge of the county shall appoint three commissioners as hereinafter provided, whose duty it shall be to apportion in a just and equitable proportion a certain amount of said water upon certain or alternate weekly days to different localities, as they may in their judgment think best for the interest of all parties concerned, and with due regard to the legal rights of all. [G. S., §1714; G. L., §1375; L. '70, p. 158, §1; amending R. S., p. 363, §4; L. '61, p. 68, §4.

[Is the above provision for appointment of commissioners superseded by section 3427?]

3167. Right of way through other lands.—Sec. 3. When any person owning claims in such locality has not sufficient length of area exposed to said stream to obtain a sufficient fall of water to irrigate his land, or that his farm, or land used by him for agricultural purposes, is too far removed from said stream, and that he has no water facilities on those lands, he shall be entitled to a right of way through the farms or tracts of lands which lie between him and said stream, or the farms or tracts of land which lie above and below him on said stream, for the purposes hereinbefore stated. [G. S., §1712; G. L., §1373; R. S., p. 363, §2; L. '61, p. 67, §2.

3168. Extent of right of way.—Sec. 4. Such right of way shall extend only to a ditch, dyke or cutting, sufficient for the purpose required. [G. S., §1713; G. L., §1374; R. S., p. 363, §3; L. '61, p. 67, §3.

3169. Condemnation of right of way.—Sec. 5. Upon the refusal of the owners of tracts of land or lands through which said ditch is proposed to run, to allow of its passage through their property, the person or persons desiring to open such ditch may proceed to condemn and take the right of way therefor (under the provisions of chapter thirty-one of these laws concerning eminent domain). [G. S., §1715; G. L., §1376.

[Chapter 31 above referred to is found in its amended form between sections 2415 and 2434.]

[See also Constitution, article 16, sections 5-8.]

3170. No land burdened with more than one ditch, except.—Sec. 6. That no tract or parcel of improved or occupied land in this state, shall, without the written consent of the owner thereof, be subjected to the burden of two or more irrigating ditches constructed for the purposes of conveying water through said property, to lands adjoining or beyond the same, when the same object can feasibly and practicably be attained by uniting and conveying all the water necessary to be conveyed through such property in one ditch. [G. S., §1716; L. '81, p. 164, §1.

3171. Shortest route must be taken.—Sec. 7. Whenever any person or persons find it necessary to convey water for the purpose of irrigation through the improved or occupied lands of another, he or they shall select for the line of such ditch through such property the shortest and most direct route practicable, upon which said ditch can be constructed with uniform or nearly uniform grade, and discharge the water at a point where it can be conveyed to and used upon land or lands of the person or persons constructing such ditch. [G. S., §1717; L. '81, p. 164, §2.

3172. Owner of ditch must permit others to enlarge.—Sec. 8. No person or persons having constructed a private ditch for the purposes and in the manner hereinbefore provided, shall prohibit or prevent any other person or persons from enlarging or using any ditch by him or them constructed in common with him or them, upon payment to him or them of a reasonable proportion of the cost of construction of said ditch. [G. S., §1718; L. '81, p. 164, §3.

3173. When head of ditch may be extended up stream—Condemnation.—Sec. 9. In case the channel of any natural stream shall become so cut out, lowered, turned aside or otherwise changed from any cause, as to prevent any ditch, canal or feeder of any reservoir from receiving the proper inflow of water to which it may be entitled from such natural stream, the owner or owners of such ditch, canal or feeder shall have the right to extend the head of such ditch, canal or feeder to such distance up the stream which supplies the same as may be necessary for securing a sufficient flow of water into the same, and for that purpose shall have the same right to maintain proceedings for condemnation of right of way for such extension as in case of constructing a new ditch, and the priority of right to take water from such stream, through such ditch, canal or feeder as to any such ditch, canal or feeder shall remain unaffected in any respect by reason of such extension: *Provided, however*, That no such extension shall interfere with the complete use or enjoyment of any ditch, canal or feeder. [G. S., §1719; L. '81, p. 161, §1.

[For right of condemnation for new ditch see section 3169.]

3174. Only irrigation ditches referred to in the last above section.—Sec. 10. This act shall apply to and affect only ditches, canals or feeders used for carrying water for the purpose of irrigation, and for no other purpose whatever. [G. S., §1721; L. '81, p. 162, §3.

[The act referred to is found in L. '79, p. 95, et seq.]

3175. Water to be pro rated among consumers.—Sec. 11. If at any time any ditch or reservoir from which water is or shall be drawn for irrigation shall not be entitled to a full supply of water from the natural stream which supplies the same, the water actually received into and carried by such ditch, or held in such reservoir, shall be divided among all the consumers of water from such ditch or reservoir, as well as the owners, shareholders or stockholders thereof, as the parties purchasing water therefrom, and parties taking water partly under and by virtue of holding shares, and partly by purchasing the same, to each his share pro rata, according to the amount he, she or they (in cases in which several consume water jointly) shall be then entitled, so that all owners and purchasers shall suffer from the deficiency arising from the cause aforesaid each in proportion to the amount of water to which he, she or they should have received in case no such deficiency of water had occurred. [G. S., §1722; L. '79, p. 97, §4.

3176. Irrigation of meadows—Right to make ditch—Priority.—Sec. 12. All persons who shall have enjoyed the use of the water in any natural stream for the irrigation of any meadow land, by the natural overflow or operation of the water of such stream, shall, in case the diminishing of the water supplied by such stream, from any cause, prevent such irrigation therefrom in as ample a manner as formerly, have right to construct a ditch for the irrigation of such meadow, and to take water from such stream therefor, and his or their right to water through such ditch shall have the same priority as though such ditch had been constructed at the time he, she or they first occupied and used such land as meadow ground. [G. S., §1723; L. '79, p. 106, §37.

3177. Priority of right to seepage or spring water.—Sec. 13. That all ditches now constructed or hereafter to be constructed for the purpose of utilizing the waste, seepage or spring waters of the state, shall be governed by the same laws relating to priority of right as those ditches constructed for the purpose of utilizing the water of running streams; *Provided*, That the person upon whose lands the seepage or spring waters first arise, shall have the prior right to such waters if capable of being used upon his lands. [L. '89, p. 215, §1.

[Right to water hoisted from mine. Section 4231.]

3178. Water appropriated for domestic purposes shall not be employed for irrigation.—Sec. 14. Water claimed and appropriated for domestic purposes shall not be employed or used for irrigation or for application to land or plants in any manner to any extent whatever; *Provided*, That the provisions of this section shall not prohibit any citizen or town or corporation organized solely for the purpose of supplying water to the inhabitants to such city or town from supplying water thereto for sprinkling streets and extinguishing fires or for household purposes. [L. '91, p. 402, §1.

3179. Penalty for misapplication—Jurisdiction of justice.—Sec. 15. Any person claiming the right to divert water for domestic purposes from any natural stream who shall apply or knowingly permit the water so diverted to be applied for other than domestic purposes to the injury of any other person entitled to use such water for irrigation shall be deemed guilty of a misdemeanor and upon conviction shall pay a fine of not less than fifty dollars and not exceeding two hundred dollars in the discretion of the court wherein conviction is had. Each day of such improper application of water obtained in the manner aforesaid shall be deemed a separate offense. Justices of the peace in their several precincts shall have jurisdiction of the aforesaid offense subject to the right of appeal as in cases of assault and battery. [L. '91, p. 403, §2.

[For right of appeal in cases of assault and battery see section 3869.]

3180. Right to place wheels on streams—Condition.—Sec. 16. All persons on the margin, brink, neighborhood or precinct of any stream of water, shall have the right and power to place upon the bank of said stream a wheel, or other machine for the purpose of raising water to the level required for the purpose of irrigation, and the right of way shall not be refused by the owner of any tract of land upon which it is required, subject of course to the like regulations, as required for ditches, and laid down in sections hereinbefore enumerated. [G. S., §1727; G. L., §1377; R. S., p. 364, §6.

3181. Map of ditch or reservoir to be filed.—Sec. 17. Every person, association or corporation hereafter constructing or enlarging any reservoir or reservoirs, constructing, changing the location of, or enlarging any ditch, canal, or feeder for any ditch or reservoir, for the purpose of furnishing a supply of water for domestic, irrigation, power or storage, or for any other beneficial use, taking water from any natural stream, shall, within sixty days after the commencement of such construction, change of location or enlargement, make filings in the office of the State engineer for each specific claim, in such form as shall seem suf-

ficient and satisfactory to the State engineer, and accompanied by the proper fees, as provided by statute, two duplicate copies, on tracing muslin, or other material adapted for permanent record and preservation, as may be required by regulation of the state engineer, of a map, made with permanent ink, showing the point of location of the headgate, the route of such ditch or canal or the high-water line of such reservoir or reservoirs, and the route of the feeder or feeders to, and ditches or canals from, such reservoir or reservoirs, the legal subdivisions of the land upon which such structures are built or to be built, if on surveyed lands, the names of the owners of such lands, and such courses, distances and corners by reference to legal subdivisions, if on surveyed lands, or to natural objects, if on unsurveyed lands, as will clearly designate the location of such structures. [L. '03, p. 289, §1.

[For fees of state engineer see sections 3206, 3211 and 3332.]

3182. Statement attached to map.—Sec. 18. Upon or attached to such maps shall be duplicate stratements, showing in the case of any ditch, canal or feeder:

First—The point of location of the head-gate of the proposed structure.

Second—The depth, width, grade and length of each ditch, canal or feeder proposed.

Third—The carrying capacity of each ditch, canal or feeder in cubic feet per second.

Fourth—The time of commencement of work on such structures, which time may be the date of the commencement of the surveys therefor, or of the commencement of actual construction.

Fifth—The estimated cost of the proposed project.

In cases when filings are made upon reservoir sites the staements shall show the height of the proposed dam, the estimated cost, with the capacity in cubic feet and the surface area for each foot in depth of water stored up to and including the high-water mark. [L. '03, p. 290, §2.

[Cubic inch of water defined. Section 7026.]

3183. Statement in case of enlargement—Temporary map.—Sec. 19. In case of change, enlargement or extension, such statements shall show the matters required above, referring to the structures before such change or enlargement, and shall then state, also, the information required in the above items second, third and fourth and fifth, referring to the structure as enlarged, and in addition thereto, shall state definitely the increase in capacity to be added to the original capacity by virtue of such enlargement. Whenever, through the necessity for extended surveys requiring long periods of time, it shall be impracticable for the claimant or claimants to file a complete map and statement

within sixty days, as required above, a map and statement as complete as may be practicable shall be filed, with a further statement that a complete map and statement will be filed later, and upon the completion of such survey a full and detailed map and statement, amending the ones first filed, shall be offered for examination and acceptance in the same manner as herein provided for the original filing. [L. '03, p. 290, §3.

3184. Statements must be signed and sworn to.—Sec. 20. Such statements shall be signed by the person or persons in whose behalf they are made, or, in cases where an association or a corporation are the parties interested, the signature shall be the legal title of such association or corporation, signed by some duly authorized agent or officer, who shall also sign his own name, giving his official title, and the truth of the matter shown in such maps and statements shall also be sworn to by the engineer in charge, or person making the survey, before some officer legally qualified for the administration of oaths. [L. '03, p. 291, §4.

3185. State engineer examine maps and statements—Return duplicate—Duplicate filed with recorder.—Sec. 21. The state engineer shall examine the duplicate maps and statements, and if he shall find the data therein contained to be sufficient and satisfactory for a clear presentation of facts concerning the claims made, he shall file one of the maps and statements in his office, and shall return the duplicate map and statement to the claimant with a certificate, stating that it has been examined and approved by him, and that it is a duplicate of the copy filed in his official records, and this duplicate copy shall, within ninety days from the time stated as the date of commencement, be filed by the claimant in the office of the county clerk and recorder in which the headgate of the proposed structure, or in which the proposed reservoir shall lie. [L. '03, p. 291, §5.

3186. Certified copy evidence—Diligent construction.—Sec. 22. A certified copy of the map and statement thus filed in the state engineer's office shall be prima facie evidence in any court having jurisdiction of the intent of the claimant or claimants to make such construction and to utilize such rights as are shown and described in the map and statement; *Provided,* That nothing herein contained shall be so construed as to dispense with the necessity for due diligence in the construction of such projects, or to the injury of those having rights prior to those of the claimants; *And, provided, further,* That nothing herein contained shall be so construed as to prevent proper adjudication of rights in accordance with existing statutes governing such adjudication. [L. '03, p. 291, §6.

3187. Compliance with former act.—Sec. 23. All plats and statements or other documents heretofore filed or recorded in substantial compliance with the provisions or requirements of section 2 of an act entitled, "An act to provide for the extension of the right of way for ditches, canals and feeders of reservoirs in certain cases, and requiring registration of all such hereafter made or enlarged," approved February 11, 1881, shall be taken, deemed and held to constitute a compliance with the provisions of this act. [L. '03, p. 292, §6.

[Section 2 of the act above referred to was held unconstitutional in Lamar Co. v. Amity Co., 26 Colo., 370. The provisions of that section were re-enacted by L. '87, p. 315, which act was superseded by sections 3181-3187.]

DRAINAGE.

3188. Petition to establish or enlarge drain.—Sec. 24. Whenever any person, company or corporation desires the construction, enlargement or extension of a ditch, drain or water course for the purpose of draining and reclaiming seeped or marshy land, they shall file with the board of county commissioners of the county or counties in which such improvement or improvements are to be located, a petition signed by one or more of the land owners who own or represent the major portion of the land which would be affected by the proposed improvement. [L. '03, p. 209, §1.

3189. Contents of petition—Plat.—Sec. 25. Said petition shall set forth the necessity for and probable benefits of such ditch, drain or water course, together with a list of the lands affected by the proposed improvement, and whether such lands so affected are in one or more counties, and therein naming the county or counties where such land is located, or through which said improvement may pass, and the names and addresses of the owners of such lands, and there shall be attached to said petition a plat showing approximately the location, direction, size and length of said drain, ditch or water course. [L. '03, p. 210, §2.

3190. Bond of petitioner.—Sec. 26. The petitioner or petitioners shall give a good and sufficient bond, payable to the county or counties and approved by the county clerk, conditioned, in case said drain, ditch or water course from any cause whatsoever is not constructed, to pay all expenses incurred by the county or counties on account of said proposed improvements. [L. '03, p. 210, §3.

3191. Board of viewers—Duties—Hearing—Notice.—Sec. 27. When such petition plat and bonds are filed the board of county commissioners of each county where such improvement is to be made shall appoint a board of viewers consisting of three disinterested persons, residents of the county where the improvement

is to be, who in turn shall select a competent engineer to assist them, and in the event that such improvement extends into more than one county when the board of commissioners of each county where such improvement is to be made shall take a like action, and the same procedure shall be necessary of each county or board of county commissioners and of all petitioners or parties interested as would be necessary if the entire improvement were to be made in one county only. The board of viewers of each county wherein such improvement is to be made shall then proceed at once to view the line of the proposed appointed drain and the lands affected thereby lying within the county for which they were appointed, and shall cause the engineer to prepare accurate surveys and estimates of the proposed work on the land lying within the county for which they were appointed, and shall set a day and place for hearing the views of all interested parties, receive protests, information, and any matter in relation to the proposed improvements; and the board of viewers shall notify all the resident land holders of their county affected by such improvement by personal service twenty days prior to the date of such meeting and personal service of said notice can not be had, or if any of said land holders are non-residents, then said notice shall be sent through the mail; and shall also cause to be published a copy of said notice in some weekly newspaper in said county for a period of not less than four weeks prior to said meeting. [L. '03, p. 210, §4.

3192. Hearing—Evidence—Report—When joint hearing.—Sec. 28. All persons whose lands may be affected may appear at the time specified for the said meeting before said board of viewers and present such testimony and affidavits as shall relate to the proposed drainage system, with such recommendations and objections as shall to them seem pertinent and necessary. If the proposed improvement extends into more than one county then the viewers appointed by each board of county commissioners of the county wherein a part of such improvement is to be made, shall meet at some point agreed upon by the different boards of viewers of the different counties and there prepare a joint report upon all matters and things required of a board of viewers where the improvement is in a single county, and shall then forward to each board of county commissioners of each county for which they are appointed a copy of said joint report, but this shall not be construed so as to require the persons whose lands are affected thereby by this section to appear before said board when acting jointly unless it would be more convenient for hearing provided for by this section to be a joint one by the different reviewing boards of the different counties. [L. '03, p. 211, §5.

3193. When improvement not feasible.—Sec. 29. If the viewers shall find that the proposed improvement is not feasible, they shall so report to the board of county commissioners, and the costs and expenses incurred shall be paid by the original petitioners, as provided under their bond. [L. '03, p. 212, §6.

3194. When feasible—Report—Appeal.—Sec. 30. If, however, the improvements shall be found feasible and of use and benefit and to be desired by owners representing a major part of the lands affected, the board of viewers shall so report to the board of county commissioners, and shall include in their report a detailed recommendation of the method to be pursued in prosecuting the work, and shall submit plans and specifications for the letting of contracts and fix and recommend the proportionate assessment for each tract of land affected, which assessment shall be proportionate to the benefits accruing to each of such tracts; *Provided, however*, That any person interested therein who shall feel aggrieved at the report and finding of the board of county commissioners shall have the right of appeal to the district court of said county and have such matters passed upon by a jury. [L. '03, p. 212, §7.

3195. Allotment of work—Bond.—Sec. 31. The board of viewers may, by agreement of the land owners, recommend the allotment to each of a portion of the improvement; *Provided, however,* That each said owner shall give a good and sufficient bond for the proper performance of his proportion of the work so alloted. [L. '03, p. 212, §8.

3196. When work let by contract—Advertise for bids—Bond.—Sec. 32. In case no such allotment or division of the work is made, or in case all of it shall not be so allotted, the county commissioners shall cause an advertisement to be inserted in a daily or weekly paper of general circulation in the vicinity for a period of thirty days. Said advertisement shall be a notice to the land owners of the work proposed and shall call for bids on the work, in accordance with the recommendations of the board of viewers, and the contract shall be let to the lowest responsible bidder for the entire work lying within their respective counties, or to the lowest responsible bidders on each of the several portions of the work. The successful bidder or bidders shall file a good and sufficient bond with the board of county commissioners for the faithful performance of their contract. [L. '03, p. 212, §9.

[For appeals from disallowance of claims by commissioners see section 1225.]

3197. Completion—Expense pro rated—County treasurer collect.—Sec. 33. When the work shall have been completed and accepted by the engineer in charge, the county commissioners

shall determine the total cost, damages and other expenses, and divide the same among the several tracts of land affected, in their respective counties, in the proportion determined by the board of viewers, and shall certify to the county assessor or assessors if in more than one county, a list of the lands affected, the total amounts to be assessed against each, with all credits for work or damages due the owner of each tract, with the net assessment of each, and the assessor or assessors if in more than one county shall enter the said net assessment against each of the several tracts of land lying within his county in the same manner as for other taxes, and the county treasurer of each county where such improvement or part thereof is to be made, shall collect the same and reimburse the county for all moneys expended or expenses incurred subject to the right of appeal to the district court as to matters herein as in cases of appeal from disallowance of claims by board of county commissioners. [L. '03, p. 213, §10.

3198. Acceptance—Vouchers.—Sec. 34. Upon the proper acceptance by the engineer or engineers if such improvement is in more than one county the board of county commissioners of each county where such improvement is located, shall cause a voucher to be drawn upon the county treasurer for the amounts due on contracts, for damages and other expenses. [L. '03, p. 213, §11.

3199. Compensation of engineers and viewers.—Sec. 35. Each of the members of the board of viewers shall receive their necessary expenses and three dollars per day for services, and the engineers shall receive their necessary expenses and six dollars per day for each day necessarily employed. [L. '03, p. 213, §12.

3200. Right of eminent domain.—Sec. 36. The right of eminent domain shall extend to all improvements constructed under this act. [L. '03, p. 213, §13.

[See Chapter 45. Eminent Domain.]

RESERVOIRS.

3201. Disposition of water drained.—Sec. 37. All waters gathered by such drainage improvement shall be the property of those from whose lands the same is taken by such drainage canal, and the same shall be pro rated among the different land holders from which such water is taken according to the cost of the improvement assessed against each one. [L. '03, p. 213, §14.

3202. Reservoirs—Right to water—Right of way—Condemnation—Embankments over ten feet submit to county board.—Sec. 38. Persons desirous to construct and maintain reservoirs, for the purpose of storing water, shall have the right to take from any

of the natural streams of the state and store away any unappropriated water not needed for immediate use for domestic or irrigating purposes; to construct and maintain ditches for carrying such water to and from such reservoir, and to condemn lands for such reservoirs and ditches in the same manner provided by law for the condemnation of lands for right of way for ditches; *Provided*, No reservoir with embankments or a dam exceeding ten feet in height shall be made without first submitting the plans thereof to the county commissioners of the county in which it is situated, and obtaining their approval of such plans. [G. S., §1724; L. '79, p. 106, §38.

[Is the above section superseded by section 3205?]

3203. Conducting water in natural streams—Taking out—Allowance for seepage—How determined.—Sec. 39. The owners of any reservoir may conduct the water therefrom into and along any of the natural streams of the state, but not so as to raise the waters thereof above ordinary high water mark, and may take the same out again at any point desired, without regard to the prior rights of others to water from said stream; but due allowance shall be made for evaporation and seepage, the amount to be determined by the commissioners of irrigation of the district; or, if there are no such commissioners, then by the county commissioners of the county in which the water shall be taken out for use. [G. S., §1725; L. '79, p. 107, §39.

[See also section 3225.]

3204. Liability of owners for damage.—Sec. 40. The owners of the reservoirs shall be liable for all damages arising from leakage or overflow of the waters therefrom or by floods caused by breaking of the embankments of such reservoirs. [G. S., §1726; L. '79, p. 107, §40.

3205. Construction of reservoirs—State engineer supervise.—Sec. 41. No reservoir of a capacity of more than seventy-five millions cubic feet of water, or having a dam or embankment in excess of ten feet in vertical height, and covering an area of more than 20 acres shall hereafter be constructed in this state, except the plans and specifications of the same shall first be approved by the state engineer; and the state engineer shall act as consulting engineer during the construction thereof, and shall have authority to require the material used and the work of construction to be done to his satisfaction; and no work shall be deemed complete under the provisions of this act until the state engineer shall give to the owners of such structures a written statement of the work of construction and the full completion thereof together with his acceptance of the same, which statement shall specify the dimensions and capacity of such reservoir or reservoirs. [L. '99, p. 314, §1.

3206. Cost of inspection and supervision paid by owner.—Sec. 42. The owners of such reservoirs shall pay to said state engineer his actual expenses incurred in making personal inspection, and five dollars per day and expenses to any deputy appointed by him to attend to such supervision when necessarily employed for such purpose. [L. '99, p. 314, §2.

3207. Engineer determine amount of water to be stored.—Sec. 43. The state engineer shall annually determine the amount of water which it is safe to impound in the several reservoirs within this state and it shall be unlawful for the owners of any reservoir to store in said reservoir water in excess of the amount so determined by the state engineer to be safe. [L. '99, p. 315, §3.

3208. Water commissioner withdraw excess water—Close inlets.—Sec. 44. In the event of the owners of any such reservoir impounding water therein to a depth greater than that determined by the state engineer to be safe, it shall be the duty of the water commissioner of the district wherein such reservoir shall be located, to forthwith proceed to withdraw from said reservoir so much of the water so impounded therein as shall be in excess of the amount so determined by the state engineer to be safe, and shall close the inlets to the same so as to prevent said reservoir from being refilled to an amount beyond what said state engineer shall have designated as being safe. In the event of the owners of said reservoir, or any other person or persons, interfering with the water commissioner in the discharge of said duty, the said water commissioner shall call to his aid such persons as he deems necessary, and employ such force as the circumstances demand to enable him to comply with the requirements of this section. [L. '99, p. 315, §4.

3209. Complaint that reservoir is unsafe—Duty of engineer.—Sec. 45. Upon complaint being made to the state engineer by three or more persons residing or having property in such a location that their homes or property would be in danger of destruction or damage in the event of a flood occurring on account of the breaking of the embankment of any reservoir within the state, that said reservoir is in an unsafe condition, or that it is being filled with water to such an extent as to render it unsafe, it shall be the duty of the state engineer to forthwith examine said reservoir and determine the amount of water it is safe to impound therein. If upon such examination, the state engineer shall find that said reservoir is unsafe, or is being filled with water to such an extent as to render it unsafe, it shall be his duty to immediately cause said water to be drawn off from said reservoir, to such an extent as will, in his judgment, render the

same safe. If water is then flowing into said reservoir, he shall cause the same to be discontinued. [L. '99, p. 315, §5.

3210. Engineer may use force—Violation of engineer's order.—Sec. 46. The state engineer is hereby authorized and empowered to use such force as is necessary to perform the duties required of him in the preceding section, and to have and exercise all of the powers conferred upon the water commissioner by section 4 of this act. If, after any of such reservoirs shall have been examined by said state engineer, the owners thereof, or any other person or persons, shall fill or attempt to fill them, or either of them to a point in excess of the amount the state engineer shall have determined to be safe, then it shall be the duty of the water commissioner of the district wherein such reservoir is located to proceed as is directed by section 4 of this act. [L. '99, p. 316, §6.

[Section 4 above referred to is section 3208.]

3211. Expense of examination—By whom paid.—Sec. 47. The persons calling upon the state engineer to perform the duty required of him by section 5 hereof shall pay him mileage in advance at the rate of ten cents per mile for each mile actually and necessarily traveled in going to and from said reservoir, and should the state engineer find upon examination that such reservoir is in an unsafe condition, the owners thereof shall be liable for all expenses incurred in such examination. [L. '99, p. 316, §7.

[Section 5 above referred to is section 3209.]

3212. Appeal from decision of engineer.—Sec. 48. In the event of either party being dissatisfied with the decision of the state engineer, they may take an appeal to the county, or district court of the county wherein said reservoir is located, and said court shall hear and determine the matter summarily at the earliest practical time without written pleadings or the aid of a jury; subject to the right of either party to take an appeal or writ of error as in other civil cases; *Provided,* That the judgment of the state engineer shall control until final determination of the cause. [L. '99, p. 316, §8.

3213. Owners liable for damages in case of breakage of reservoir.—Sec. 49. None of the provisions of this act shall be construed as relieving the owners of any such reservoir from the payment of such damages as may be caused by the breaking of the embankments thereof, but in the event of any such reservoir overflowing, or the embankments, dams or outlets breaking or washing out, the owners thereof shall be liable for all damage occasioned thereby. [L. '99, p. 316, §9.

3214. Violation of act—Penalty—Disposition of fines.—Sec. 50. Any reservoir company failing or refusing, after ten days' notice in writing having been given, to obey the directions of the state engineer as to the construction or filling of any reservoir as herein provided, shall be subject to a fine of not less than fifty dollars, for each offense, and each day's continuance after time of notice has expired shall be considered a separate offense; such fines to be recovered by civil action in the name of the people, by the district attorney, upon the complaint of the state engineer, and in the county where the injury complained of occurred, the proceeds of all fines, after payment of costs and charges of the proceedings, shall be paid into the county treasury for the use of the general fund of the county. [L. '99, p. 317, §10.

3215. Survey of reservoir site on arid land.—Sec. 51. It shall be the duty of the county surveyor of each county within this state upon the request of the owner of ten or more acres of arid land lying in such county, to locate and survey an available site for a reservoir upon such land, such reservoir to be used for the storage of water to irrigate the land contiguous thereto and such reservoir to be of a capacity to hold sufficient water to properly irrigate not less than ten acres of such land. [L. '03, p. 262, §1.

3216. Construction of reservoir—County surveyor supervise.—Sec. 52. Within thirty (30) days after such location and survey by the county surveyor, the owner of such land shall begin the construction of such reservoir and shall work continuously thereon until the completion thereof and all of such work of construction and the construction of such dam or dams as may be necessary, and the construction of the outlet to such reservoir shall be done under the direction and supervision of such county surveyor. [L. '03, p. 262, §2.

3217. Completion—Plat filed—Contents.—Sec. 53. Upon the completion of the reservoir it shall be the duty of the county surveyor to file with the board of county commissioners of such county, a map or plat of the land upon which such reservoir is located; describing such land by legal subdivisions and showing thereon the name of the owner, the number of acres of arid land contiguous to such reservoir claimed by such owner; the size or water capacity in cubic feet of such reservoir; the number of acres of land capable of being irrigated by such reservoir; the source and means of supplying such reservoir with water, and indicating the point of location upon the land of such reservoir. [L. '03, p. 263, §3.

3218. Approval of plat—Duty of owner.—Sec. 54. It shall be the duty of such board of county commissioners to, within sixty

(60) days after the filing of such map or plat, to approve the same by resolution spread upon the records of such board. That it shall be the duty of such owner or his tenant, to use such reservoir and keep the same in good repair and in a safe condition. [L. '03, p. 263, §4.

3219. Inspection—Notice to owner—Failure to repair.—Sec. 55. It shall be the duty of the county surveyor to annually inspect each reservoir within his county so constructed under the provisions of this act, and he shall file with the board of county commissioners a report in writing showing the condition of such reservoir and a statement as to whether or not such reservoir was being used during the year of such inspection for the purposes contemplated by this act; and should he find any such reservoir, or dam or outlet thereof, in an unsafe and dangerous condition he shall in writing so notify the owner or tenant thereof as provided in section three hereof; and should such owner or his tenant fail or refuse within the aforesaid period of thirty (30) days to place such reservoir, dam and outlet in a safe and proper condition, then and in that event it shall be the duty of the said county surveyor to immediately let out and release under his direct supervision any and all waters that may have accumulated in such reservoir; and the said county surveyor shall within ten (10) days thereafter file with the board of county commissioners a report in writing of his acts in the premises. [L. '03, p. 263, §5.

[Section 3 above referred to is section 3217.]

3220. Compensation of county surveyor—By whom paid.—Sec. 56. The county surveyor shall be paid for his services at the time of making such survey and location, the sum of ten (10) dollars and all the necessary traveling expenses, and upon the completion of such reservoir and the filing of the map or plat specified in section 3 hereof he shall be paid the further sum of five (5) dollars and all necessary traveling expenses and superintending the construction of such reservoir, dam and outlet, and such payments and traveling expenses shall be borne by said owner or tenant of such reservoir and land; and for annually inspecting and filing his report of the condition of such reservoir within his county as specified in section 4 hereof, the county surveyor shall be paid the sum of five (5) dollars for each of such reservoirs so inspected and so reported upon, out of the general fund of such county. [L. '03, p. 264, §6.

[Sections 3 and 4 above referred to are sections 3217 and 3218.]

3221. Damages.—Sec. 57. County surveyors and members of boards of county commissioners within this state shall not be liable in damages for any act done by them in pursuance of the provisions of this act. [L. '03, p. 264, §7.

3222. Exchange of water, less seepage.—Sec. 58. That whenever any person or company shall divert water from one public stream and turn it into another public stream, such person or company may take out the same amount of water again, less a reasonable deduction for seepage and evaporation, to be determined by the state engineer. [L. '97, p. 176, §1.

[See also section 3232.]

3223. Must maintain flumes and register water.—Sec. 59. Any person or company transferring water from one public stream to another shall be required to construct and maintain under the direction of the state engineer measuring flumes or weirs and self-registering devices at the point where the water leaves its natural watershed and is turned into another, and also at the point where it is finally diverted for use from the public stream. [L. '97, p. 176, §2.

[See also section 3249.]
[Failure to maintain 3249.]

3224. Water commissioner keep record.—Sec. 60. It shall be the duty of the water commissioner of the district in which the water is used to keep a record of the amount of water so turned into his district from any other district. [L. '97, p. 176, §3.

3225. Reservoirs and ditches may exchange.—Sec. 61. When the rights of others are not injured thereby, it shall be lawful for the owner of a reservoir to deliver stored water into a ditch entitled to water or into the public stream to supply appropriations from said stream, and take in exchange therefor from the public stream higher up an equal amount of water, less a reasonable deduction for loss, if any there be, to be determined by the state engineer; *Provided,* That the person or company desiring such exchange shall be required to construct and maintain under the direction of the state engineer measuring flumes or weirs and self-registering devices at the point where the water is turned into the stream or ditch taking the same or as near such point as is practicable so that the water commissioner may readily determine and secure the just and equitable change of water as herein provided. [L. '97, p. 177, §4.

[See also section 3202.]

3226. Changing point of diversion—Petition—Practice and procedure.—Sec. 62. Every person, association or corporation desirous of changing in whole or in part the point or points of diversion of his or its right to use water from any of the streams of the state, shall present a petition to the district court from which the original decree issued, whether the change be from one district to another or not; praying that such change be granted. The practice and procedure upon all petitions, save as

herein provided, shall be the same as if the petition were for an original statutory decree; and if the change be from one district to another, the court in which the petition is filed shall require notice and service in each district intervening between the original and the new points of diversion in the manner as now provided by law for statutory water adjudications in said several districts, save that all process or notice shall be issued from and returnable to the court in which the petition is filed as aforesaid. [L. '03, p. 278, §1.

3227. Notice to parties affected—When change allowed.—Sec. 63. The court shall require proof that all parties who may be affected by the change have been duly notified in the proceeding, as in the case of an original adjudication, and shall hear evidence to determine whether such change will injuriously affect the vested rights of others in and to the use of water, and a decree shall be entered permitting the change as prayed for, unless it appear that such change will injuriously affect the vested rights of others; and if such injury appear, the court shall decree the change only upon such terms and conditions as may be necessary to prevent such injurious effect, or to protect the parties affected or if impossible so to do, may deny said application. [L. '03, p. 278, §2.

[No further publication required in proceedings after decree entered. Section 3289.]

3228. Several applications in one—Consolidation—Process.—Sec. 64. Applications to change two or more points of diversion to the same common point may be embraced in one petition, or if separately made in the same court, may be consolidated; and petitions separately filed in the same court for changes to several points may be consolidated by the court or judge for notice, hearing or otherwise, if it appear practicable so to do; and the court or judge shall have power to extend the time for service, notice and appearance, and to make all necessary or expedient rules in the proceeding as in the case of a statutory water adjudication. [L. '03, p. 279, §3.

3229. Certified copy of decree filed—Notice of change.—Sec. 65. Upon the granting of a decree of change, the petitioner desirous of making the change, shall cause to be prepared certified copies of the decree, and shall cause filings thereof to be made with the county clerk of the county in which the original point of diversion is located, and with the county clerk of the county in which the new point of diversion is, or is to be located, and also in the office of the state engineer. Thereupon the change decreed shall be recognized in the distribution of water, the priority rights being allotted according to the terms of the said decree, and the state engineer shall immediately issue notices

to that effect to the water commissioners in the water districts affected, and to the division superintendent or superintendents in said divisions. [L. '03, p. 379, §4.

[Office of division superintendent abolished and division engineers provided in their place. Section 3335.]

3230. Change to other district—Copy of decree filed.—Sec. 66. In case a change be decreed from one district to another, the petitioner shall file a certified copy of the decree of change in the court having jurisdiction of the statutory water adjudication in the district of the new point of diversion, and thereupon, on motion, the court in which the copy is so filed, shall order a record of the decree of change, and the original decree theretofore entered in said court shall accordingly stand modified as to the matters contained in the said decree of change. [L. '03, p. 280, §5.

3231. Re-arguments, reviews and appeals.—Sec. 67. Re-arguments and reviews of and appeals from decrees entered hereunder may be had as in the case of a statutory water adjudication; *Provided, however,* They be prayed within thirty days from the time of entering the decree complained of. [L. '03, p. 280, §6.

[Sections 3226-3231 supersede sections 1 and 2, p. 235, L. '99, of which act section 3232 was section 3.]

3232. Owner may exchange or loan water right.—Sec. 68. It shall be lawful, however, for the owners of ditches and water rights taking water from the same stream, to exchange with, and loan to, each other, for a limited time, the water to which each may be entitled, for the purpose of saving crops or of using the water in a more economical manner; *Provided,* That the owner or owners making such loan or exchange, shall give notice in writing signed by all the owners participating in said loan or exchange, stating that such loan or exchange has been made, and for what length of time the same shall continue, whereupon said water commissioner shall recognize the same in his distribution of water. [L. '99, p. 236, §3.

II. DUTIES OF OWNERS.

3233. Owner shall maintain embankments—Tail ditch.—Sec. 69. The owner or owners of any ditch for irrigation or other purposes, shall carefully maintain the embankments thereof, so that the waters of such ditch may not flood or damage the premises of others, and shall make a tail ditch, so as to return the water in such ditch with as little waste as possible into the stream from which it was taken. [G. S., §1728.

[The above section is taken from G. S., '83, which gives its origin as L. '72, p. 144, section 1 and L., '76, p. 78, section 2.]

3234. Vested rights not impaired.—Sec. 70. Nothing in this chapter contained shall be so construed as to impair the prior vested rights of any mill or ditch owner or other person to use the waters of any such water course. [G. S., §1729; G. L., §1379; R. S., p. 364, §8.

3235. Owner of ditch crossing highway must maintain bridge.—Sec. 71. Any ditch company constructing a ditch, or any individual having ditches for irrigation, or for other purposes,

wherever the same be taken across any public highway or public traveled road, shall put a good substantial bridge, not less than fourteen feet in breadth, over such watercourse where it crosses said road. [G. S., §1730; G. L., §1381; R. S., p. 364, §10.

3236. Ditch must be bridged in three days—Duty of supervisor.—Sec. 72. When any such ditch or watercourse shall be constructed across any public traveled road, and not bridged within three days thereafter, it shall be the duty of the supervisor of the road district to put a bridge over said ditch or watercourse, of the dimensions specified in section 10 of this chapter, and call on the owner or owners of the ditch to pay the expenses of constructing such bridge. [G. S., §1731; G. L., §1382; R. S., p. 364, §11.

[Section 10 referred to in last above section is section 3235.]

[Penalty for owner failing to place bridge over ditch, section 5829.]

3237. Proceedings against owner for payment—Damages.—Sec. 73. If the owner or owners of such ditch refuse to pay the bill of expenses so presented, the supervisor may go before any justice of the peace in the township or precinct, and make oath to the correctness of the bill, and that the owner or owners of the ditch refuse payment; and thereupon such justice of the peace shall issue a summons against such owner or owners, requiring him or them to appear and answer to the complaint of such supervisor in an action of debt for the amount sworn to be due, such summons to be made returnable and served, and proceedings to be had thereon as in other cases; and in case judgment shall be given against such owner or owners, the justice shall assess, in addition to the amount sworn to be due as aforesaid, the sum of ten dollars, as damages arising from the delay of such owner or owners, such judgment to be collected as in other cases, and to be a fund in the hands of the supervisor of roads, for the repairs of roads in such precinct or district. [G. S., §1732; G. L., §1383; R. S., p. 365, §12.

[For liability of co-owners in caring for ditch and their lien for expense see sections 4051-4060.]

[Ditch companies must keep their ditch in repair. Section 993.]

3238. Owner of ditch must prevent waste.—Sec. 74. The owner of any irrigating or mill ditch shall carefully maintain and keep the embankments thereof in good repair, and prevent the water from wasting. [G. S., §1733; G. L., §1385; L. '76, p. 78, §1.

[See also section 3233.]

3239. Running excess of water forbidden.—Sec. 75. During the summer season it shall not be lawful for any person or persons to run through his or their irrigating ditch any greater quantity of water than is absolutely necessary for irrigating his

or their said land, and for domestic and stock purposes; it being the intent and meaning of this section to prevent the wasting and useless discharge and running away of water. [G. S., §1734; G. L., §1386; L. '76, p. 78, §2.

3240. Penalty for violation of this act.—Sec. 76. Any person who shall wilfully violate any of the provisions of this act shall, on conviction thereof before any court having competent jurisdiction, be fined in a sum of not less than one hundred (100) dollars. Suits for penalties under this act shall be brought in the name of the people of the state of Colorado. [G. S., §1735; G. L., §1387; L. '76, p. 78, §3.

[The act above referred to embraces sections 3238-3240.]

3241. When ditches in cities must be covered.—Sec. 77. That every corporation and company, whether created by special act, or organized under the general incorporation laws of this state, and every partnership, person or persons who now, or may at any time hereafter, own or control any canal or ditch, or any part thereof, being two feet in width or over, and carrying water to the depth of twelve inches or over, which canal or ditch, or any part thereof, is within the corporate limits of any city denominated in the law as of the first class, or any city existing by special charter of a population equal to or exceeding said cities of the first class, or any of the additions thereto, shall, at their own expense, within sixty days after this act shall have taken effect confine, flume, and cover over, all or any part of such canal or ditch, whether located on or across private property, public highways or alleys in said city or additions thereto, in a reasonable and sufficient manner, and with such materials as will render such fluming or covering safe and a sure protection to the lives and property of the inhabitants of said city; and any such corporation, company, partnership, person or persons, shall at all times thereafter keep and maintain any and all such structures, confining, fluming and covering of such canal or ditch in good order and repair, at their own expense. [L. '87, p. 65, §1.

[Cities of the first class embrace those with a population over 15,000, section 6532.]

3242. Head of ditch to be latticed.—Sec. 78. Such corporation, company, partnership, person or persons, shall, at their own expense, safely and securely lattice or slat the head of such flume or covering with proper materials, so that persons or animals cannot accidentally enter such flume or covering at the head thereof, and pass or be carried down the current of said canal or ditch, and shall thereafter maintain and keep the same in good order and repair, at their own cost and expense. [L. '87, p. 66; §2.

3243. Penalty for failure to cover and lattice.—Sec. 79. If any such corporation, company, partnership, person or persons, shall fail or refuse to comply with any of the provisions of the two preceding sections, such corporation, company, partnership, person or persons, shall forfeit and pay to the county, for the use of the common school fund, the sum of fifty dollars for each and every day such failure or refusal shall continue; to be recovered by a civil action in the name of the people of the state of Colorado, in any court of competent jurisdiction; *Provided,* That nothing in this act shall be construed to bar an action for special damages by any person who shall have suffered such damages by reason of any failure to comply with any of the provisions of this act. [L. '87, p. 66, §3.

3244. Owner maintain headgate—Size of timbers.—Sec. 80. That the owner or owners of every irrigating ditch, flume or canal, in this state, shall be required to erect and keep in good repair a headgate at the head of their ditch, flume or canal. Such headgate, together with the necessary embankments, shall be of sufficient height and strength to control the water at all ordinary stages. The framework of such headgate shall be constructed of timber not less than four inches square, and the bottom, sides, and gate or gates, shall be of plank, not less than two inches in thickness. [G. S., §1736; L. '81, p. 165, §1.

[See also section 3248.]

3245. Same—Liability of owner for neglect or refusal.—Sec. 81. Owners of all ditches shall be liable for all damages resulting from their neglect or refusal to comply with the provisions of section one of this act. [G. S., §1737; L. '81, p. 165, §2.

[Section 1 above referred to is section 3244.]

3246. Owner maintain headgates and wastegates—Effect of failure.—Sec. 82. All persons, associations or corporations who have heretofore or who may hereafter divert water for purposes of irrigation from any of the public streams of the state, shall erect and maintain headgates and wastegates in connection therewith, and in case of failure or neglect, or refusal to do so, after five days' notice has been given by the water commissioner or state engineer, then said headgates shall be constructed by the water commissioner of the district within which said ditch, canal or conduit may be located, and if, upon demand, the owner or owners of said ditch, canal or conduit shall neglect or refuse to pay the expenses thereof, then the said water commissioner shall take such proceedings to recover the same as is now provided for by sections seventeen hundred and thirty, seventeen hundred and thirty one and seventeen hundred and thirty-two

of the general statutes of 1883, in the case of failure to build and maintain bridges. [L. '89, p. 161, §1.

[G. S., sections 1730, 1731 and 1732 above referred to are sections 3235, 3236 and 3237 respectively.]

3247. Provide locks for headgate—Effect of failure.—Sec. 83. All persons, associations or corporations shall put and keep suitable locks and fastenings on their headgates, where water is conducted from the public streams or heads of supply, and if said persons, associations or corporations refuse or neglect to provide locks and suitable fastenings for said headgates, after five days' notice by the water commissioner of the district, or by the state engineer, it is made the duty of the water commissioner of the water district, and its superintendent, to provide suitable locks and fastenings, and if the owner or owners of said ditch, canal or conduit shall neglect or refuse to pay the expenses thereof, the water commissioner shall take such proceedings to recover the same as are provided in section one of this act; the keys of said locks to be under the control and in possession of the water commissioner of the district during the season of irrigation or domestic distribution of water. [L. '89, p. 161, §2.

[Section 1 above referred to is section 3246.]

3248. Water not delivered when owner does not maintain headgates and weirs.—Sec. 84. Whenever any owner or owners of any irrigation ditch, canal, flume or reservoir in this state taking water from any stream, shall fail to erect or maintain in good repair, at the point of intake of such ditch, canal, flume or reservoir, a suitable and proper headgate, and measuring flume or weirs, together with the necessary embankments therefor, of sufficient height and strength to control the water at all ordinary stages, with a frame work constructed of timber not less than four inches square at the bottom, sides and gate or gates of plank not less than two inches in thickness, then the state engineer or superintendent of irrigation shall, upon ten days' previous notice in writing duly served upon the owner or owners of such irrigation ditch, canal, flume or reservoir, or upon any agent or employe representing or controlling the same, refuse to deliver to such owner or owners of such irrigating ditch, canal, flume or reservoir, any water from such stream, until such owner or owners shall cause to be erected or repaired the headgate, headgates or measuring flumes of such ditch, canal, flume or reservoir. [L. '01, p. 193, §1.

[See also section 3244.]

[Office of superintendent of irrigation abolished and division engineers provided in their place. See section 3335.]

3249. Owner of ditch or reservoir transferring water must maintain headgate and weirs—Effect of failure.—Sec. 85. Whenever the owner or owners of any irrigation ditch, canal or reservoir transferring water from one public stream to another, or from a reservoir, ditch or flume to a stream, in order that the same may be diverted therefrom for irrigation or any other purposes, shall fail and neglect to construct suitable and proper measuring flumes or weirs for the proper and accurate determination of the amount and volume of water turned into, carried through and diverted out of said public stream, then the state engineer or the superintendent of irrigation shall, upon five days' previous notice in writing duly served upon the owner or owners of any such irrigation ditch, canal or reservoir, or agent or employe thereof, so transferring water from one public stream to another, or from any ditch, canal or reservoir to a public stream for conveyance therethrough, refuse to allow to be taken and diverted therefrom, any water whatever on account of delivery of water thereto, for such time and until such owner or owners shall cause to be erected or repaired such flumes or weirs at the point of delivery to and taking from said public stream so used as a conduit. [L. '01, p. 194, §2.

[See also section 3223.]
[See note, section 3248 as to superintendent of irrigation.]

3250. Rating tables furnished commissioners.—Sec. 86. The state engineer or superintendent of irrigation shall rate the measuring flumes and weirs referred to in sections 1 and 2 of this act, and shall supply the superintendent of the division and the water commissioner of the district in which such measuring flumes or weirs are located, with a rating table, which shall be used by them in measuring water flowing to and from such public stream. [L. '01, p. 194, §3.

[Sections 1 and 2 above referred to are sections 3248 and 3249.]
[See note, section 3248 as to superintendent of irrigation.]

3251. When water not to be stored in reservoirs—Gauge rod.—Sec. 87. The owners or possessors of reservoirs shall not have the right to impound any water whatever in such reservoir during the time that such water is required in ditches for direct irrigation or for reservoirs holding senior rights. A gauge rod shall be permanently fixed and maintained at the outlets of said reservoirs, and if any owner or possessor of any reservoir shall fail or refuse within thirty days after this act goes into effect, to provide, fix and maintain such gauge rod or rods, as aforesaid, then and in that event the owner or possessor of such reservoir shall not be entitled to impound any water whatever in said

reservoir or reservoirs until the provisions of this section are fully complied with. [L. '01, p. 194, §4.

3252. Control of headgates and measuring weirs.—Sec. 88. All headgates and measuring weirs used in connection with canals, flumes, ditches and reservoirs for the measuring and delivery of water therefrom and thereto, shall be under the supervision and control at all times of the state engineer, the superintendent of irrigation of the water division and the water commissioner of the water district wherein such headgate and measuring weirs are located. [L. '01, p. 195, §5.

3253. Survey of reservoirs—Report—Gauge rods—Failure to comply.—Sec. 89. The owner or owners of any reservoir situate upon or in the bed of any natural stream or through which any natural stream runs, for the purpose of storing water to be diverted at a point further down said stream, shall, at the expense of the owner or owners, cause a complete survey of the contour lines of said reservoir to be made by the state engineer, and it shall be the duty of the state engineer to make such survey upon the request of the owner, which said contour lines shall be ascertained for at least every vertical foot in depth, and, in all cases where deemed necessary by the state engineer, for fractions of a foot; and a table to be prepared showing the number of cubic feet, capacity of said reservoir for each foot in depth and fraction thereof; and a gauge rod placed in said reservoir, marked in correspondence with said contour line from which the amount of water stored in, or taken from, said reservoir, may be ascertained. And in case of failure so to do, the said state engineer or superintendent of irrigation shall refuse to be allowed to be taken into, or diverted from, said reservoir, any water whatever; *Provided, however,* That in all cases where for any reason said state engineer may find it impracticable to make said survey, the said owner or owners of said reservoir may continue to store and deliver water upon providing a suitable and proper measuring flume or weir for the accurate ascertainment of the amount of water discharged from said reservoir. [L. '01, p. 195, §6.

3254. Ditch owners provide flow on demand of users.—Sec. 90. Every person or company owning or controlling any canal or ditch used for the purposes of irrigation and carrying water for pay, shall, when demanded by the users during the time from April 1, until November 1 in each year, keep a flow of water therein, so far as may be reasonably practicable for the purpose of irrigation, sufficient to meet the requirements of all such persons as are properly entitled to the use of water therefrom, to the extent, if necessary, to which such person may be entitled

to water, and no more; *Provided, however,* That whenever the rivers, or public streams or sources from which the water is obtained are not sufficiently free from ice, or the volume of water therein is too low and inadequate for that purpose, then such canal or ditch shall be kept with as full a flow of water therein as may be practicable, subject, however, to the rights of priorities from the streams or other sources, as provided by law, and the necessity of cleaning, repairing and maintaining the same in good condition. [L. '93, p. 299, §1; amending L. '87, p. 304, §1.

3255. Ditches to be kept in repair—Outlets.—Sec. 91. The owners, or persons in control, of any canal or ditch used for irrigating purposes, shall maintain the same in good order and repair, ready to receive water by April 15, in each year, so far as can be accomplished by the exercise of reasonable care and diligence, and shall construct the necessary outlets in the banks of the canal or ditch for a proper delivery of the water to persons having paid up shares, or who have rights to the use of water; *Provided, however,* That a multiplicity of outlets in the canal or ditch shall at all times be avoided, so far as the same shall be reasonably practicable, and the location of the same shall be under the control of, and shall be at the most convenient and practicable points consistent with the protection and safety of the ditch for the distribution of water among the various claimants thereof; and such location shall be under the control of a superintendent. [L. '87, p. 305, §2.

[See also section 993.]

3256. Measurement of water.—Sec. 92. It shall be the duty of those owning or controlling such canals or ditches, to appoint a superintendent, whose duty it shall be to measure the water from such canal or ditch through the outlets, to those entitled thereto according to his or her pro rata share. [L. '87, p. 305, §3.

3257. Penalty for refusal or neglect to deliver water.—Sec. 93. Any superintendent, or any person having charge of the said ditch, who shall wilfully neglect or refuse to deliver water, as in this act provided, or any person or persons who shall prevent or interfere with the proper delivery of water to the person or persons having the right thereto, shall be guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine of not less than ten nor more than one hundred dollars for each offense, or imprisonment not exceeding one month, or by both such fine and imprisonment; and the money thus collected shall be paid into the general fund of the county in which the misdemeanor has been committed; and the owner or owners of such ditches shall be liable in damages to the person or persons de-

prived of the use of the water to which they were entitled as in this act provided. [L. '87, p. 305, §4.

3258. Water commissioner measure water—Failure.—Sec. 94. Any water commissioner, or his deputy, or assistant, who shall wilfully neglect or refuse, after being called upon in accordance with section 1758 of the General Statutes of the state, to promptly measure water from the stream, or other source of supply, into the irrigating canals or ditches, in his district, according to their respective priorities, to the extent to which water may be actually necessary for the irrigation of lands under such canals or ditches, shall be deemed guilty of a misdemeanor, and shall be subject to the same penalty as provided in section 4 of this act. [L. '87, p. 305, §5.

[G. S., section 1758 above referred to is section 3430.]
[Section 4 above referred to is section 3257.]

3259. Jurisdiction of justice of the peace.—Sec. 95. In all cases declared misdemeanors by this act, any justice of the peace of the county in which the offense was committed, may, upon complaint being made, as is now required by law, issue a warrant directed to any proper officer of the county for the arrest of any person so charged with any misdemeanor, and upon the arrest of such person or persons, the justice of the peace before whom such person or persons may be brought for trial, shall hear and determine the cause and, if he find the accused guilty, shall assess the fine, and if imprisonment be a portion of the sentence, then to fix the term of imprisonment, or both, as provided in section 4 of this act; *Provided*, The accused may have a trial by jury which shall be summoned as in cases before justices of the peace for assault and battery. [L. '87, p. 306, §6.

[For summoning jury see section 3863.]
[Section 4 above referred to is section 3257.]

3260. No person to receive more water than he is entitled to. Sec. 96. That it shall be the duty of every person, who is entitled to take water for irrigation purposes from any ditch, canal, or reservoir, to see that he receives no more water from such ditch, canal, or reservoir through his headgate, or by any ways or means whatsoever, than he is entitled to, and that he shall, at all times, take every precaution to prevent more water than he is entitled to, coming from such ditch, canal, or reservoir, upon his land. [L. '87, p. 312, §1.

3261. Duty of party receiving more water than he is entitled to.—Sec. 97. That it shall be the duty of every such person, taking water from any ditch, canal, or reservoir, to be used for irrigation purposes, on finding that he is receiving more water from such ditch, canal or reservoir, either through his headgate,

or by means of leaks, or by any means whatsoever, immediately to take steps to prevent his further receiving more water from such ditch, canal or reservoir, than he is entitled to, and if knowingly he permits such extra water to come upon his land, from such ditch, canal or reservoir, and does not immediately notify the owner or owners of such ditch, or take steps to prevent its further flowing upon his land, he shall be liable to any person, company or corporation, who may be injured by such extra appropriation of water, for the actual damage sustained by the party aggrieved; which damages shall be adjudged to be paid, together with the costs of suit, and a reasonable attorney's fee, to be fixed by the court and taxed with the costs. [L. '87, p. 312, §2.

III. RATE OF CHARGE FOR WATER.

3262. Regulating charges—Petition—Affidavits—Proceedings before commissioners.—Sec. 98. The county commissioners of each county shall, at their regular January session in each year, hear and consider any and all applications which may be made to them by any party or parties interested in procuring water for irrigation by purchase from any ditch or reservoir furnishing and selling water or proposing to furnish water for sale, the whole or upper part of which shall lie in such county, which application shall be supported by such affidavit or affidavits as the applicant may see proper to present, showing reasonable cause for such board to proceed to fix the price of water to be thereafter sold from such ditch or reservoir, and if such board of commissioners shall, upon examination of such affidavit or affidavits, or from the oaths of witnesses in addition thereto,

find that the facts sworn to show the application to be in good faith, and that there is reasonable grounds to believe that unjust prices are, or are likely to be, charged for water from such ditch or reservoir, they shall enter an order fixing a day, not sooner than forty days thereafter, nor later than the third day of the next regular session of their board, when they will hear all parties directly or indirectly interested in said ditch or reservoir, or in procuring water therefrom for irrigation, who may appear, as well as all testimony by witnesses, or depositions taken on notice as hereinafter provided, touching the said ditch or reservoir, and the cost of furnishing water therefrom, at which time all persons or corporations interested in said ditch or reservoir, as well as all interested in obtaining water therefrom, or in lands which may be irrigated therefrom, may appear by themselves, their agents, or attorneys, and said commissioners shall then proceed to take action in the matter of fixing such price of water, provided the applicant shall, within ten days from the time of entering such order, cause a copy thereof, duly certified, to be delivered to the owner of such ditch or reservoir, if it be owned by one person, or each of the owners, if it be owned by several persons, or to the president, secretary or treasurer of the company, if it belongs to a corporation or association having such officers, or if such owner cannot be found, he shall cause such copy to be left at his usual place of residence, with some person or member of his family residing there, and over fourteen years of age, and if such ditch officer cannot be found, he shall cause such copy to be left at the office or place of business of the company of which he is such officer, or at his residence, if such company have no place of business, and if such ditch is owned by several owners, not an incorporated company, it shall be sufficient to serve such notice by delivering one such copy each to a majority of them, and such applicant shall make affidavit of the manner in which such copy or copies have been served. Depositions mentioned in section one hereof, to be used before said commissioners, shall be taken before any officer in the state authorized by law to take depositions, upon reasonable notice being given to the opposite party of the time and place of taking such depositions. [G. S., §1738; L. '79, p. 94, §1.

[See also Constitution, article 16, section 8.]

[Section 1 above referred to is the above section.]

[For officers before whom depositions may be taken see Code, section 376, p. 140.]

[Sections 3262 and 3263 are doubtless superseded by sections 3265-3268.]

3263. Powers and duties of commissioners—Hearing—Order—Existing contract.—Sec. 99. Said board shall hear and examine all legal testimony or proofs offered by any of the parties inter-

ested as before mentioned, as well concerning the value of the construction of such ditch or reservoir as the cost and expense of maintaining and operating the same, and all matters which may affect the just price and value of water to be furnished therefrom; and they shall have power to issue subpoenas to witnesses and compel their attendance, which subpoenas shall be served by the sheriff of the proper county when required; and also to compel the production of books and papers required for evidence in as full and ample a manner as the district court now has. They may adjourn the hearing from time to time to further the ends of justice or suit the general convenience of parties. Upon hearing and considering all the matters and facts involved in the case, the board of commissioners shall enter an order naming and describing the ditch or reservoir with sufficient certainty, and fixing a just price upon all water to be thereafter sold, which price shall not be thereafter changed oftener than once in two years; *Provided,* That no price so fixed shall affect the rights of parties, or their lawful assignees or grantees, who may have contracts with the company, association or person owning such ditch or reservoir, or their lessees, grantees or successors, nor the rights of such owners, lessees or grantees under such contract, nor shall it in any way affect or hinder the making of such contract. [G. S., §1739; L. '79, p. 96, §2.

[See note section 3262.]

3264. Right to continue purchasing water—Stockholders—Rights.—Sec. 100. Any person or persons, acting jointly or severally, who shall have purchased and used water for irrigation for lands occupied by him, her or them, from any ditch or reservoir, and shall not have ceased to do so for the purpose or with intent to procure water from some other source of supply, shall have a right to continue to purchase water to the same amount for his, her or their lands, on paying or tendering the price thereof fixed by the county commissioners as above provided, or, if no price shall have been fixed by them, the price at which the owners of such ditch or reservoir may be then selling water, or did sell water during the then last preceding year. This section shall not apply to the case of those who may have taken water as stockholders or shareholders after they shall have sold or forfeited their shares or stock, unless they shall have retained a right to procure such water by contract, agreement or understanding, and use between themselves and the owners of such ditch, and not then to the injury of other purchasers of water from or shareholders in the same ditch. [G. S., §1740; L. '79, p. 96, §3.

3265. County commissioners hear and consider applications.—Sec. 101. The county commissioners of each county shall, at their regular sessions in each year, and at such other sessions as they in their discretion may deem proper, in view of the irrigation and harvesting season, and the convenience of all parties interested, hear and consider all applications which may be made to them by any party or parties interested, either in furnishing and delivering for compensation in any manner, or in procuring for such compensation, water for irrigation, mining, milling, manufacturing, or domestic purposes, from any ditch, canal, conduit, or reservoir, the whole or any part of which shall lie in such county. Which application shall be supported by such affidavits as the applicant or applicants may present, showing reasonable cause for such board of county commissioners to proceed to fix a reasonable maximum rate of compensation for water to be thereafter delivered from such ditch, canal, conduit, or reservoir, within such county. [L. '87, p. 291, §1.

[Sections 3265-3268 doubtless supersede sections 3262 and 3263.]

3266. Commissioners appoint day for hearing parties interested.—Sec. 102. Every such board of commissioners shall, upon examination of such affidavit or affidavits, or from the oaths of witnesses in addition thereto, if they find that the facts sworn to show the application to be in good faith, and that there are reasonable grounds to believe that unjust rates of compensation are, or are likely to be, charged or demanded for water from such ditch, canal, conduit, or reservoir, shall enter an order fixing a day not sooner than twenty days thereafter, nor later than the third day of the next regular session of their board, when they will hear all parties interested in such ditch, or other waterworks as aforesaid, or in procuring water therefrom, for any of the said uses, as well as all documentary or oral evidence or depositions, taken according to law, touching the said ditch, or other work as aforesaid, and the cost of furnishing water therefrom. [L. '87, p. 292, §2.

3267. Hearing—Order fixing date of hearing—Service of order.—Sec. 103. At the time so fixed, all persons interested as aforesaid, on either side of the controversy, in lands which may be irrigated from such ditch, or other work aforesaid, may appear by themselves, their agents, or attorneys, and said commissioners shall then proceed to take action in the matter of fixing such rates of compensation for the delivery of water; *Provided*, The applicant or applicants (if the application be made by a party or parties as aforesaid desirous of procuring water), shall, within ten days from the time of entering the said order fixing the hearing, cause a copy of such order, duly certified, to be

delivered to the owner, or owners, of such ditch, canal, conduit, or reservoir, or to the president, secretary, or treasurer of the company, if it be owned by a corporation or association having such officers. If any such owner cannot be found, a copy shall be left at his usual place of abode, with some person residing there, over twelve years of age; and if such officer of any corporation or association cannot be found, such copy shall be left at the usual place of business of the company of which he is an officer, or at his residence if such company have no place of business; and if such ditch, or other work aforesaid, shall be owned by several owners not being an incorporated company, it shall be sufficient to serve notice by delivering copies to a majority of them. If the applicant be the owner or party controlling such ditch, canal, conduit, or reservoir, such notice shall be given by causing printed copies of such order in hand bill form, in conspicuous type, to be posted securely in ten or more public places throughout the district watered from such ditch, or other work aforesaid (if the water be used for irrigation), and one copy shall be posted for every mile in length of such ditch; but if such ditch, or other work, be for the supply of water for milling or mining, it shall be sufficient to serve such copy on the parties then taking water therefrom. The person or persons making such service or posting such printed copies, shall make affidavit of the manner in which the same has been done, which affidavit shall be filed with the said board of county commissioners. Depositions mentioned in section 2 hereof, to be used before said commissioners, shall be taken before any officer in the state authorized by law to take depositions, upon reasonable notice being given to the opposite party of the time and place of taking the same. [L. '87, p. 292, §3.

[Section 2 referred to is section 3266.]

[Officers before whom depositions may be taken, Code, section 376, p. 140.]

3268. Hearing—Testimony—Commissioners fix maximum rate.—Sec. 104. Said board of commissioners may adjourn or postpone any hearing from time to time as may be found necessary, or for the convenience of parties, or of public business; and they shall hear and examine all legal testimony or proofs offered by any party interested as aforesaid, as well concerning the original cost and present value of works and structure of such ditch, canal, conduit or reservoir, as the cost and expense of maintaining and operating the same, and all matters which may affect the establishing of a reasonable maximum rate of compensation for water to be furnished and delivered therefrom; and they may issue subpoenas for witnesses, which subpoenas shall be served by the sheriff of the county, who shall receive the law-

ful fees for all such service; and said board may also issue a subpoena for the production of all books and papers required for evidence before them. Upon hearing and considering all the evidence and facts, and matters involved in the case, said board of commissioners shall enter an order describing the ditch, canal, conduit, reservoir, or other work in question, with sufficient certainty and fixing a just and reasonable maximum rate of compensation for water to be thereafter delivered from such ditch or other work as last aforesaid, within the county in which such commissioners act, and such rate shall not be charged within two years from the time when they shall be so fixed, unless upon good cause shown. The district court of the proper county, or the judge thereof in vacation, may, in case of refusal to obey the subpoena of the board of county commissioners, compel obedience thereto, or punish for refusal to obey, after hearing, as in cases of attachment, for contempt of such district court. [L. '87, p. 293, §4.

[Doubtless word "charged" in line 18, above, should read "changed."]

3269. False swearing.—Sec. 105. Every person who shall swear or affirm falsely in any matter, or testify falsely after being duly sworn or having affirmed as a witness in any proceeding provided for in this act, shall be deemed guilty of perjury, and on conviction shall be punished accordingly. [L. '87, p. 294, §5.

[Punishment for perjury. Section 1716.]

3270. Repeal.—Sec. 106. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed, but such repeal shall not work any interference with any proceeding by any board of county commissioners now pending, saving that any such proceeding may, at the request of either party, be carried on to completion under the provisions hereof. [L. '87, p. 294, §6.

[Does this repeal sections 3262-3264?]

3271. Bonus deemed an extortionate rate—Recovery.—Sec. 107. It shall not be lawful for any person owning, or controlling, or claiming to own or control any ditch, canal or reservoir, carrying or storing, or designed for the carrying or storing of any water taken from any natural stream or lake within this state, to be furnished or delivered for compensation for irrigation, mining, milling or domestic purposes, to persons not interested in such ownership or control, to demand, bargain for, accept or receive from any person who may apply for water for any of the aforesaid purposes, any money or other valuable thing whatsoever, or any promise or agreement therefor, directly or indirectly, as royalty, bonus, or premium prerequisite or condition

precedent to the right or privilege of applying, or bargaining for, or procuring such water. But such water shall be furnished, carried and delivered upon payment or tender of the charges fixed by the county commissioners of the proper county, as is, or may be, provided by law. Any and all moneys, and every valuable thing, or consideration of whatsoever kind, which shall be so, as aforesaid, demanded, charged, bargained for, accepted, received, or retained, contrary to the provisions of this section, shall be deemed and held an additional and corrupt rate, charge, or consideration for the water intended to be furnished and delivered therefor, or because thereof, and wholly extortionate and illegal; and when paid, delivered, or surrendered, may be recovered back by the party paying, delivering, or surrendering the same from the party to whom, or for whose use, the same shall have been paid, delivered, or surrendered, together with costs of suit, including reasonable fees of attorneys of plaintiff, by proper action in any court having jurisdiction. [L. '87, p. 308, §1.

3272. Penalty for collecting excessive rate.—Sec. 108. Every person owning or controlling, or claiming to own or control, any ditch, canal or reservoir, such as is mentioned in the first section of this act, who shall, after demand in writing made upon him for the supply or delivery of water for irrigation, mining, milling or domestic purposes, to be delivered from the canal, ditch or reservoir, owned, possessed or controlled by him, and after tender of the lawful rate of compensation therefor, in lawful money, demand, require, bargain for, accept, receive or retain from the party making such application, any money or other thing of value, or any promise or contract, or any valuable consideration whatever, as such royalty, bonus, premium, prerequisite or condition precedent, as is by the provisions of this said first section prohibited, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine of not less than one hundred dollars, nor more than five thousand dollars, or imprisonment for a term not less than three months nor more than one year, or both such fine and imprisonment, in the discretion of the court. [L. '87, p. 309, §2.

[Section 1 referred to above is section 3171.]

3273. Penalty for refusal to deliver water.—Sec. 109. Every person owning or controlling, or claiming to own or control, any ditch, canal or reservoir, such as is mentioned in the first section of this act, who shall, after demand in writing, made upon him for the supply or delivery of water for irrigation, mining, milling or domestic purposes, to be delivered from the canal, ditch or reservoir, owned, possessed or controlled by him, and after

tender of the lawful rate of compensation therefor, in lawful money, refuse to furnish or carry and deliver from such ditch, canal or reservoir, any water so applied for, which water can or may be by use of reasonable diligence in that behalf, and within the carrying or storage capacity of such ditch, canal or reservoir, be lawfully furnished and delivered, without infringement of prior rights, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by fine of not less than one hundred dollars, nor more than five thousand dollars, or imprisonment for a term of not less than three months, nor more than one year, or both such fine and imprisonment, in the discretion of the court. [L. '87, p. 309, §3.

[Section 1 referred to above is section 3271.]

[When ditch company must furnish water. Section 992.]

3274. Action when corporation refuses to deliver water.—Sec. 110. When any corporation, in defiance or by attempted evasion of the provisions of this act, shall, after tender of the compensation hereinbefore provided for, refuse to deliver water, such as is mentioned in the third section of this act, to any person lawfully entitled to apply therefor, it shall be the duty of the attorney general, upon request of the county commissioners of the proper county, or upon his otherwise receiving due notice thereof, to institute and prosecute to judgment and final determination, proceedings in quo warranto, for the forfeiture of the corporate rights, privileges and franchises of any such corporation so offending, or by mandamus or other proper proceedings to compel it to its duty in that behalf. [L. '87, p. 310, §4.

[Section 3 referred to above is section 3273.]

3275. "Person" defined—Liability.—Sec. 111. The word "Person," as used in this act, shall include corporations and associations, and the plural as well as the singular number. And every officer of a corporation, or member of an association, or co-ownership, and every agent violating any of the provisions of this act, shall be liable to restore the unlawful consideration extorted, and be punishable under the penal provisions of this act, the same as if the thing done in disobedience to its provisions were done for his own sole benefit and advantage. [L. '87, p. 310, §5.

IV. ADJUDICATION OF PRIORITIES.

A. PROCEEDINGS BEFORE COURT.

3276. Adjudication of irrigation priorities—Jurisdiction of courts.—Sec. 112. For the purpose of hearing, adjudicating and settling all questions concerning the priority of appropriation of water between ditch companies and other owners of ditches drawing water for irrigation purposes from the same stream or its tributaries within the same water district, and all other questions of law and questions of right growing out of or in any way involved or connected therewith, jurisdiction is hereby vested exclusively in the district court of the proper county; but when any water district shall extend into two or more counties, the district court of the county in which the first regular term after the first day of December in each year shall soonest occur, according to the law then in force, shall be the proper court in which the proceedings for said purpose, as here-

inafter provided for, shall be commenced; but where said proceedings shall be once commenced, by the entry of an order appointing a referee in the manner and for the purpose hereinafter in this act provided, such court shall thereafter retain exclusive jurisdiction of the whole subject until final adjudication thereof is had, notwithstanding any law to the contrary now in force. [G. S., §1762; L. '79, p. 99, §19.

[Adjudication of priorities other than irrigation. Section 3280.]

3277. Filing statements of claim.—Contents.—Sec. 113. In order that all parties may be protected in their lawful rights to the use of water for irrigation, every person, association or corporation owning or claiming any interest in any ditch, canal or reservoir, within any water district, shall, on or before the first day of June, A. D. 1881, file with the clerk of the district court having jurisdiction of priority of right to the use of water for irrigation in such water district, a statement of claim, under oath, entitled of the proper court, and in the matter of priorities of water rights in district number —, as the case may be, which statement shall contain the name or names, together with the post-office address of the claimant or claimants claiming ownership, as aforesaid, of any such ditch, canal or reservoir, the name thereof (if any), and, if without a name, the owner or owners shall choose and adopt a name, to be therein stated, by which such ditch, canal or reservoir shall thereafter be known, the description of such ditch, canal or reservoir as to location of headgate, general course of ditch, the name of the natural stream from which such ditch, canal or reservoir draws its supply of water, the length, width, depth and grade thereof, as near as may be, the time, fixing a day, month and year as the date of the appropriation of water by original construction, also by any enlargement or extension, if any such thereof may have been made, and the amount of water claimed by or under such construction, enlargement or extension, and the present capacity of the ditch canal or feeder of reservoir, and also the number of acres of land lying under and being or proposed to be irrigated by water from such ditch, canal or reservoir. Said statement shall be signed by the proper party or parties. [G. S., §1763; L. '81, p. 142, §1.

[Claim must be filed before party can offer evidence, see section 3316.]

3278. Secretary of state make publication—Publisher's certificate.—Sec. 114. The secretary of state shall, without delay, after the passage of this act, cause a certified copy of the foregoing section, giving the date of the approval of this act, to be published in one of the public newspapers published in such county in which part or portion of any water district is or shall be established

by law at the time of such publication; and said section one shall be published as aforesaid, once in each and every week continuously in said paper until said first day of June, A. D. 1881, and in case in the meantime any one of said papers shall cease to be published, then such publication shall be made in some other paper in same county, (if any), and on conclusion of such publication such publisher of such paper shall deliver to the secretary of state his sworn certificate of publication in duplicate showing that such publication has been made in his paper in compliance with the preceding section hereof, and stating the first and last day of such publication; and he shall thereupon be entitled to receive from the secretary of state a certificate of the amount due him for such publication, on presentation of which to the auditor of state he shall draw his warrant for the amount in favor of the holder on the state treasurer, who shall pay the same according to law. [G. S., §1764; L. '81, p. 143, §2.

[Section 1 referred to above is section 3277.]

3279. Secretary's certificate—Where filed—Effect.—Sec. 115. The secretary of state shall file one of said duplicate certificates of publication with the clerk of the district court having jurisdiction of priority of rights to use of water for irrigation in the proper water district, certifying officially that such publication therein mentioned was duly authorized by him, and said clerk shall file the same with the statement of claim provided for in section one thereof, and such certificate of such publisher or any additional certificate of same publisher to same fact in case of loss of the original, shall be proof of the proper publication of said section in the paper therein mentioned. Said secretary of state shall also certify to such clerk of the several district courts having jurisdiction of said priorities of right to use of said water for irrigation throughout the state, the names of the newspapers, and of the county in which he caused such publication to be made, and that the duplicate certificate of publication of the publisher, as herein required are on file in his office, and said certificate shall be sufficient proof of the publication of said section one hereof, as by this act required. [G. S., §1765; L. '81, p. 144, §3.

[Section 1 referred to above is section 3277.]

3280. Adjudication of priorities other than irrigation—Petition.—Sec. 116. That the owner or owners of any water rights derived from any natural stream, water-course or any other source, acquired by appropriation and used for any beneficial purpose other than irrigation, may have his or their right thereto established and decreed by the district court having jurisdiction of the adjudication of water rights for irrigation purposes in the water district in which said water rights are situated, by

petitioning said court in the same manner and by complying with the procedure and the requirements of the law now applicable to the adjudication of water rights for irrigation purposes. [L. '03, p. 297, §1.

[Adjudication of priorities for irrigation. Section 3276.]

3281. Court number water rights.—Sec. 117. The said district court shall number, consecutively and chronologically, all such water rights similar to the system of numbering priorities for irrigation purposes, designating the amount of each appropriation in cubic feet per second of time; and shall specifically state the particular purpose for which said appropriation is granted, that is, whether the same is for power or manufacturing purposes, domestic use, storage purposes, or any other beneficial use of said waters. All of such appropriations, other than appropriations for irrigation purposes, shall be designated by and in the one series of consecutive numbers herein provided for. [L. '03, p. 297, §2.

3282. Protection of vested rights.—Sec. 118. In determining such water rights, it shall be the duty of the court to recognize and protect, as far as possible under the constitution of this state and the decisions of the appellate courts applicable thereto, the vested rights of all appropriations of water for irrigation purposes, especially where such rights have been duly adjudicated by the said court in the statutory proceeding for the determination of the priority of rights to the use of water for irrigation purposes. [L. '03, p. 298, §3.

3283. Distribution by water commissioner.—Sec. 119. It shall be the duty of the water commissioner in each water district to distribute the waters decreed hereunder and to protect the priority rights of the respective owners of water rights for any beneficial purposes from and after their determination by said court, in the same manner as he is now required by law to superintend the distribution of waters throughout his district for irrigation purposes, and he shall receive like compensation for such services from the county in which such water rights are situated; and other counties embraced in his water district shall not be liable for any portion of such service; *Provided, further,* That no water commissioner or irrigation official shall make any division or distribution of any water between the users thereof from the same ditch or reservoir. [L. '03, p. 298, §4.

3284. Petition to adjudicate—Order—Hearing—Decree—Certificate by clerk.—Sec. 120. When, at any time after the first day of June, A. D. 1881, any one or more persons, associations or corporations, interested as owners of any ditch, canal or reservoir in any water district shall present to the district court

of any county having jurisdiction of priority of rights to the use of water for irrigation in such water district according to the provisions of an act entitled "An act to regulate the use of water for irrigation and providing for settling the priority of rights thereto, and for payment of the expenses thereof, and for payment of all costs and expenses incident to said regulation of use," or to the judge thereof in vacation, a motion, petition or application in writing, moving or praying said court to proceed to an adjudication of the priorities of rights to use of water for irrigation between the several ditches, canals and reservoirs in such districts, the court, or judge thereof in vacation shall, without unnecessary delay, in case he shall deem it practicable to proceed in open court, as prayed for, by an order to be entered of record upon such motion, petition or application, appoint a day, in some regular or special term of said court, for commencing to hear and take evidence in such adjudication, at which time it shall be the duty of the court to proceed to hear all evidence which may be offered by or on behalf of any person, association or corporation, interested in any ditch, canal or reservoir, in such district, either as owner or consumer of water therefrom in support of or against any claim or claims or priority of appropriation of water made by means of any ditch, canal or reservoir, or by any enlargement or extension thereof in such district, and consider all such evidence, together with any and all evidence, if any, which may have been heretofore offered and taken in such district in the same matter by any referee heretofore appointed under the provisions of said act above herein mentioned, and also the arguments of parties or their counsel, and shall ascertain and find from such evidence, as near as may be, the date of the commencement of such ditch, canal or reservoir, together with the original size and carrying capacity thereof as originally constructed, the time of the commencement of each enlargement or extension thereof, if any, with the increased capacity thereby occasioned, the time spent, severally, in such construction and enlargement, or extension, and re-enlargement, if any, the diligence with which the work was in each case prosecuted, the nature of the work as to difficulty of construction, and all such other facts as may tend to show the compliance with the law, in acquiring the priority of right claimed for each such ditch, canal or reservoir, and determine the matters put in evidence, and make and cause to be entered a decree determining and establishing the several priorities of right, by appropriation of water, of the several ditches, canals and reservoirs in such water district, concerning which testimony shall have been offered, each according to the time of its said construction and enlargement, or enlargements or extensions, with the amount of water which

shall be held to have been appropriated by such construction and enlargements, or extensions, describing such amount by cubic feet per second of time, if the evidence shall show sufficient data to ascertain such cubic feet, and if not, by width, depth and grade and such other description as will most certainly and conveniently show the amount of water intended as the capacity of such ditch, canal or reservoir, in such decree. Said court shall further order that each and every party interested or claiming any such ditch, canal or reservoir, shall receive from the clerk, on payment of a reasonable fee therefor, to be fixed by the court, a certificate under seal of the court showing the date or dates and amount or amounts of appropriations adjudged in favor of such ditch, canal or reservoir, under and by virtue of the construction, extension and enlargements thereof, severally; also specifying the number of said ditch and of each priority to which the same may be entitled by reason of such construction, extension and enlargements. [G. S., §1767; L. '81, p. 144, §4.

[The act above referred to is found L. '79, p. 95-108.]

3285. Copy of decree—Authority of commissioner—Recording—Copy—Evidence.—Sec. 121. The holder of such certificate shall exhibit the same to the water commissioner of the district when he commences the exercise of his duties, and such water commissioner shall keep a book in which shall be entered a brief statement of the contents of such certificate, and which shall be delivered to his successor, and said certificate, or statement thereof, in his book, shall be the warrant of authority to said water commissioner for regulating the flow of water in relation to such ditch, canal or reservoir. Said certificate shall be recorded, at the same rates of charges as in cases of deeds of conveyance, in the records of each county into which the ditch, canal or reservoir, to which such certificate relates, shall extend; and said certificate, or said record thereof, or a duly certified copy of such record, shall be prima facie evidence of so much of said decree as shall be recited therein, in any suit or proceeding in which the same may be relevant. [G. S., §1767; L. '81, p. 146, §5.

3286. Clerk publish notice—Copies posted.—Sec. 122. Notice shall be given by the clerk of said court, of the time so appointed, by publishing the same in one public newspaper in such county into which such water district may extend; which notice shall be so published in such paper once in each week until four successive weekly publications shall have been made, the last of which shall be on a day previous to the day appointed as aforesaid. Said notice shall contain a copy of said

order, and shall notify all persons, associations and corporations interested as owners in any ditch, canal or reservoir in such water district, to appear at said court at the time so appointed and file a statement of claim under oath, in case no statement has been before filed by him, her or them, showing the ditch, canal or reservoir, or two or more such, in which he, she or they claim an interest, together with the names of all the owners thereof, which statement may be made by any one of the owners of such ditch, canal or reservoir for and in behalf of all; and also that all persons interested as owners or consumers may then and there present his, her or their proofs for or against any priority of right of water by appropriation sought to be shown by any party by or through any such ditch, canal or reservoir, (either as owner or consumer of water drawn therefrom). Ten printed copies of said notice shall also be posted in ten public places in such water district, not less than twenty days before the day so appointed, which copies shall be so posted by the party or parties moving the adjudication. [G. S., §1768; L. '81, p. 147, §6.

3287. Proof of publication and posting copies—Entry by clerk. Sec. 123. Proof of the proper publication of said notice or notices in said public papers shall consist in such case of the sworn certificate of the publisher of such newspaper, showing the publication to have been made in accordance with the provisions of section three of this act, which certificate shall be procured by the party or parties moving the adjudication, at his or their expense, and on said certificate being filed the clerk shall enter the amount of the printer's fee therefor as costs advanced by the party procuring the same, which sum shall be counted to his, her or their credit in distribution of costs. Proof of the posting of said printed copies shall be made by the affidavit of some credible person, certified to be such by the clerk or other officer administering the oath, showing when, where and how said copies were posted. [G. S., §1769; L. '81, p. 147, §7.

[Section 3 referred to above is section 3282.]

3288. Notices served on all parties—How served—Notice by mail.—Sec. 124. The party or parties moving such adjudication shall cause a printed or written copy of the notice aforesaid, published as aforesaid, to be served on every person, association or corporation shown by the statement of claim on file, as provided in section one hereof, which service shall be made within ten days from the time of the first publication by the clerk, by any credible person certified by said clerk or referee to be such, by delivering such copy as aforesaid to the person

to be served, if such person, by due diligence, can be found in the county of his residence. If such person can not be found, as aforesaid, then by leaving such copy at his or her usual place of residence, if he or she have such residence, in charge of some person of the age of fourteen years or over, there residing; and on any corporation, by delivering the copy to the president, or vice-president, or secretary, or treasurer thereof, or the manager, or superintendent in charge of their ditch, canal or reservoir, or authorized agent or attorney, or by leaving such copy at the office or usual place of business of such corporation, and the proof of such service shall be made by affidavit of the person or persons serving said copies, showing when and how such service has been made on such party. In case of parties not served in any manner as aforesaid, the clerk shall deposit in the postoffice, duly enclosed in an envelope with the proper postage stamp thereon, a copy directed to the address of such party, shown in the statement of claim aforesaid, filed by him or her under section one hereof. [G. S., §1770; L. '81, p. 148, §8.

[Section 1 referred to above is section 3277.]

3289. After decree entered no further publication required in subsequent proceedings, unless.—Sec. 125. That in all water right adjudication proceedings brought under the statutes of this state for determining and decreeing priority rights to the use of water for irrigation or any other beneficial purpose, or for the transfer of an adjudicated water right, after a general decree has been entered in such water district, in pursuance of the statutory notice by publication and posting, as now required by law, no further publication or posting of such notice or any notice of such individual subsequent proceedings shall be required unless by order of court upon good cause shown therefor; and in all such proceedings subsequent to the entry of such general decree, written notice shall be given for such length of time and be served upon the parties interested adversely in such manner as is now or may hereafter be provided by law for the service of summons in other civil cases; or in such reasonable time and manner as may be fixed by rule of court; *Provided*, Such notice shall contain the date and amount of the priority right claimed in each case, the source of supply from which same shall be taken, and in case of a transfer of a water right the notice shall contain a brief description of the water right sought to be transferred, the place and ditch, if any, from which and to which the change is desired, and which notice shall give the date that the hearing will be had, and be served not less than fifteen days prior to the date of such hearing; and which notice shall be dated and may be signed

and issued either by the attorney for the petitioner or by the clerk of the district court. This act shall not be construed as a repeal of any of the statutes now existing relative to notice in any water right proceedings; and in any proceedings for any of the purposes herein set forth the petitioner may, at his election, proceed under this act, or under the statutes in force at the time of the passage of this act. [L. '05, p. 244, §1.

[For service of summons see Code, section 40, p. 81.]

3290. Court number all ditches—Reservoirs—Number appropriations.—Sec. 126. The court, in making such decree, as aforesaid, shall number the several ditches and canals in the water district, concerning which adjudication is made, in consecutive order, according to priority of appropriation of water thereby made by the original construction thereof, as near as may be, having reference to the date of each decree as rendered, and shall also number the reservoirs in like manner, separately from ditches and canals, and shall further number each several appropriations of water consecutively, beginning with the oldest appropriation, without respect to the ditches or reservoirs by means of which such appropriations were made; whether such appropriation shall have been made by means of construction, extension or enlargement, which number of each ditch, canal or reservoir, together with the number or numbers of any appropriations of water held to have been made by means of the construction, extension or enlargement thereof, shall be incorporated in said decree and certificate of the clerk, to be issued to the claimants, as provided in section one of this act, so as to show the order in priority of such ditch or canal, and of such reservoir, and also of such successive appropriation of water pertaining thereto, for the information of the water commissioner of the district in distributing water; such numbering to be as near as may be having reference to date of decrees as rendered. [G. S., §1771; L. '81, p. 149, §9.

[Section 1 referred to is section 3277.]

B. PROCEEDINGS BEFORE REFEREE.

3291. When court may appoint referee—What referred.—Sec. 127. If for any cause the judge of said court shall deem it impracticable or inexpedient to proceed to hear such evidence in open court, he shall, instead of the order mentioned in section four of this act, make and cause to be entered of record an order appointing some discreet person, properly qualified, a referee of said court, to whom shall be referred the statement of claim aforesaid on file in said matter, the matter of taking evidence and reporting the same, making an abstract and findings upon the same, and preparing a decree in said adjudication; and also in case of any water district in which a referee has been heretofore appointed, and evidence taken by him under the provisions of the act, the title of which is recited in section four of this act; such evidence so already taken, together with the abstract thereof, and report of the referee who took the same, shall be also referred to said referee, to be appointed as aforesaid, and he shall proceed with his duties as hereinafter provided, first taking an oath of office, such as is required to be taken by referees in other cases under the provisions of the code of civil procedure. [G. S., §1772; L. '81, p. 149, §10.

[Section 4 above referred to is section 3284.]

[For oath of referee see Code section 224, p. 117.]

3292. Referee's notice—Contents—Publication—Posting copies.—Sec. 128. Said referee shall prepare and publish a notice containing a copy of the order appointing him, in which notice he shall appoint a time or times, and place or places, suitable and convenient for the claimants in such water district, at which he will attend for the purpose of hearing and taking

evidence touching the priority of right of the several ditches, canals and reservoirs in said district and notifying all persons, associations and corporations interested as owners or consumers of water to attend by themselves, their agents or attorneys, at the times and places appointed in said notice, and notifying such owners to then and there file a statement of claim in case such statement has not been already filed under the provisions of section one hereof, such as mentioned in section six hereof, and present their proofs touching any priority of right claimed by them for any ditch, canal or reservoir in said district, which notice shall be published in the same manner and times, and in all respects according to the provisions for publication of the newspaper notices mentioned in section six of this act, and proof of such publication shall be made in same manner as is provided in section seven of this act; and he shall also post ten or more printed copies of such notice in ten or more public places in said district, which copies shall be so posted at least twenty days before the time of commencing to take said evidence. [G. S., §1773; L. '81, p. 150, §11.

[Section 6 above referred to is section 3286.]
[Section 1 referred to is section 3277.]
[Section 7 referred to is section 3287.]

3293. Proof of posting notices.—Sec. 129. Proof of the posting of said copies shall be made by the affidavit of said referee or other person certified by him to be a credible witness, which shall show when, where and how the said copies were posted, and shall be filed by him with his report. [G. S., §1774; L. '81, p. 151, §12.

3294. Who may offer evidence.—Sec. 130. Said referee shall attend at the times and places mentioned in his notice for the purpose therein mentioned; and all persons, associations, choosing to do so, and being interested as owners of or consumers of water from any ditch, canal or reservoir in said district, and may also attend by themselves, their agents or attorneys, before said referee, at some one or more of said times and places so appointed, and shall have right to offer any and all evidence they may think advisable for their interests in the matter to be adjudicated, as well in districts in which evidence has been heretofore taken as in other districts. All such evidence as has been heretofore taken, if any, in such district, shall be kept present by said referee, subject to inspection by any party desiring to examine the same for purposes of the investigation. [G. S., §1775, L. '81, p. 151, §13.

[Claim must be filed before party can offer evidence. Section 3316.]

3295. When former evidence may be used.—Sec. 131. Whenever testimony shall or may be taken, in any district created

by this act, for the purpose of procuring decree as to appropriation of water, and priorities thereof, under the statutes of this state, any testimony theretofore taken, before any former referee, may be introduced and shall bt received as evidence. [L. '85, p. 259, §28.

3296. Powers and duties of referee—Books and records, evidence.—Sec. 132. Said referee shall have power to administer oaths to all witnesses, and to issue subpœnas for witnesses and subpœnas duces tecum, which subpœnas may be served by any party, or constable, or sheriff, or deputy sheriff, and may require witnesses to appear at any of the places appointed by said referee for taking evidence. He shall permit all witnesses to be examined by the parties calling them respectively and to be cross-examined by any party interested, and he shall take all testimony in writing and note all objections offered to any part of the testimony taken, with the cause assigned for the objection, and shall proceed in all other respects as in case of taking depositions. He shall certify all books and papers offered by any one in his own behalf, and preserve them with the testimony offered concerning the same, and in case of books and papers offered in evidence, which shall not be under the control of the party desiring the evidence for which such books may be offered, said referee shall make a true copy of the parts demanded and certify the same, and preserve the same, together with the evidence offered concerning the same and concerning said books and papers, as part of the evidence in the matter. [G. S., §1776; L. '81, p. 151, §14.

3297. Refusal to produce books or papers—Effect.—Sec. 133. No person, association or corporation wilfully refusing to produce any book or paper, if in his or their power to do so, when rightfully demanded for examination and copying, shall be allowed the benefit of any testimony or proofs in his, her or their behalf, in making final adjudication, if the court shall be satisfied, from all the evidence shown concerning such refusal, that the same was wilful. [G. S., §1777; L. '81, p. 152, §15.

3298. What facts to be ascertained by proofs.—Sec. 134. Said referee shall also examine all witnesses to his own satisfaction, touching any point involved in the matter in question, and shall ascertain as far as possible the date of the commencement of each ditch, canal or reservoir, with the original size and carrying capacity thereof, the time of the commencement of each enlargement thereof, with the increased carrying capacity thereby occasioned, the length of time spent in such construction or enlargement, the diligence with which the work was prose-

cuted, the nature of the work as to difficulty of construction, and all such other facts as may tend to show compliance with the law in acquiring the priority of right claimed for such ditch, canal or reservoir; and upon all the facts so obtained shall be determined the relative priorities among the several ditches, canals and reservoirs, the volume or amount of water lawfully appropriated by each, as well as by means of the construction, as by the enlargements thereof, and the time when each such several appropriations took effect. [G. S., §1778; L. '81, p. 152, §16.

3299. Contempt before referee.—Sec. 135. Every person present before said referee at any time when he shall be engaged in hearing testimony, who shall wilfully disturb the proceedings; and every person who shall wilfully refuse or neglect to obey any subpœna issued by said referee, when his lawful fees shall be tendered him for his attendance before the referee, shall be guilty of contempt of court appointing such referee, and on complaint, under oath of the referee or other person, before the said district court, or judge thereof in vacation, may be brought before the court or judge and dealt with accordingly. [G. S., §1779; L. '81, p. 152, §17.

3300. Compensation of referee—How paid—Accounts.—Sec. 136. The referee appointed in this act shall be paid the sum of six dollars per day while engaged in discharging his duties as herein provided, and also his reasonable and necessary expenses and mileage at the rate of ten cents for each mile actually and necessarily traveled by him in going and coming in the discharge of his duties as such referee, which said per diem allowance, expenses and mileage shall be paid out of the treasury of the county in which such water district shall lie, if it be contained in one county, and if such water district shall extend into two or more counties, then in equal parts thereof, shall be paid out of the treasury of such county into which such district shall extend. He shall keep a just and true account of his services, expenses and mileage and present the same from time to time to the district court, or judge in vacation verifying the same by oath, and the judge, if he find the same correct and just, shall certify his approval thereof thereon, and the same shall thereupon be allowed by the board of county commissioners of the county in which said water district shall lie, but if said water district extend into two or more counties, he shall receive from the clerk of the district court separate certificates, under seal of the court, showing the amount due him from each county, upon which certificate the board of county commissioners of the respective counties shall

allow the same on presentation thereof. [G. S., §1798; L. '81, p. 160, §36.

3301. Fees of witnesses—By whom paid.—Sec. 137. Every witness who shall attend before said referee under subpœna by request of any party, shall be entitled to the same fees and mileage as witnesses before the district court in the county in which he shall so attend, and shall be paid by the party requiring his testimony. [G. S., §1780; L. '81, p. 153, §18.

[For fees and mileage of witnesses, see sections 2542 and 2543.]

3302. Duties of referee—Rights of parties—Adjournment—Notice.—Sec. 138. The said referee shall take all the testimony offered, and for that purpose shall give reasonable opportunity to all parties to be heard, and may at any place, when the time limited thereat shall expire, adjourn the further taking of testimony then proposed or desired to be offered to the next place in order, according to his said published appointments, and at the last place may continue until all testimony shall be taken, or make further appointments at any former place or places as may seem best and most convenient for all parties, giving reasonable notice thereof. [G. S., §1781; L. '81, p. 153, §19.

3303. Rights of parties against referee for neglect, oppression, etc.—Sec. 139. Every party interested shall have the right to complain to the court of any act of wilful neglect or oppression on the part of the said referee in exercising his powers under this act, whereby such party shall have been aggrieved, either by refusal of said referee to hear or take evidence offered, or by preventing reasonable opportunity to offer such evidence; and the court may order such proceedings in the premises as will give redress of the grievance, at the cost of said referee, if he appear wilfully in fault; otherwise, in case of accident or mistake, costs shall be awarded as to the court shall seem just. [G. S., §1785; L. '81, p. 155, §23.

3304. Report of referee—Contents.—Sec. 140. Said referee, upon closing the testimony, shall proceed to carefully examine the same, together with all testimony and proofs which may have been heretofore taken by any former referee in the same district, if any such shall have been taken, under the provisions of said act, the title of which is recited in section four of this act; he shall make an abstract of all the testimony and proofs in his possession, concerning each ditch, canal and reservoir separately, and shall number each ditch and canal in order, and likewise each reservoir, each class consecutively, and also number the several appropriations of water shown by the evidence, all in manner and form as provided in section nine hereof, and shall make a separate finding of all the facts connected with each ditch, canal

and reservoir, touching which evidence shall have been offered; and he shall prepare a draft of a decree in accordance with his said findings, in substance the same as the decree mentioned in section four of this act, and conformable also to the provisions of section nine hereof, so far as the same are applicable; which decree, so prepared by him, shall be returned with his report to the court, and he shall file his report with said evidence, abstract and findings, and said decree, with the clerk of the court, and inform the judge of so doing, without delay. [G. S., §1782; L. '81, p. 153, §20.

[Sections 4 and 9 referred to above are sections 3284 and 3290.]

3305. Filing report—Court proceed to determine—Exceptions—Approval—Entry.—Sec. 141. Upon the filing of said report the court, or judge thereof in vacation, shall cause an order to be entered setting some day in a regular or special term of said court as soon as practicable, when the court will proceed to hear and determine the report; at which time any party interested may appear by himself or counsel and move exceptions to any matter in the findings or decree made by said referee, and after hearing the same the court shall, if the decree reported be approved, cause the same to be entered of record, or otherwise such modifications thereof or other decree as shall be found just and conformable to the evidence and the true intent of this act, and to so much of any and all former laws of the state as shall be adjudged consistent herewith. [G. S., §1783; L. '81, p. 154, §21.

3306. Court may dismiss referee—Vacancy—New appointment.—Sec. 142. The district court, or judge thereof in vacation, in case of the death, resignation, illness, absence or other disability of the referee hereby provided for, or for any misconduct in him, or other good cause to such judge appearing, shall appoint such other properly qualified person in his stead as he shall deem proper, who shall proceed without delay to perform all the duties of his office, as herein pointed out, which shall remain unperformed by his predecessor in office. [G. S., §1795; L. '81, p. 159, §33.

C. APPEALS.

3307. Who may appeal—Statement—Approval—Order—Bond.—Sec. 143. Any party or parties representing any ditch, canal or reservoir, or any number of parties representing two or more ditches, canals or reservoirs, which are affected in common with each other by any portion of such decree, by which he or she or they may feel aggrieved, may have an appeal from said district court to the supreme court, and in such case the party or parties joining, desiring an appeal, shall be the appellants, and the parties representing any one or more ditches, canals or reservoirs affecting in common adversely to the interests of appellants shall be the appellees. The party or parties joining in such appeal shall file a statement in writing, verified by affidavit properly entitled in such cause in the district court, which statement shall show that the appellants claim a valuable interest in the ditch, canal or reservoir, or two or more of such, which are affected in common with each other by some portion of said decree, also stating the name or names, or otherwise, the description of the same, and the name or names, or otherwise the description of any one or more other ditches, canals or reservoirs, which by said decree derive undue advantage in respect of priority as against that or those represented by appellants; and also setting forth the name or names of the party or parties claiming such other one or more ditches, canals or reservoirs, affected in common by said decree adversely to the interest of appellant or appellants, and praying that an appeal be allowed against such other parties as appellees. If the court or judge in vacation, on examination, find such statement in accordance with the statements of claim filed by the parties named as appellees, mentioned in section one of this act, he shall approve the same and make an order to be prepared and presented by the appellants allowing the appeal and showing the name or names of the appellants and appellees, with the name or names or description of the one or more ditches, canals or reservoirs, claimed by the party or parties appellant or appellee, as shown by their several statements

of claim filed as aforesaid, before the taking of testimony, and fix the amount of the appeal bond, which bond shall be executed by one or more of appellants, as principal or principals, and by sufficient securities, and approved by the court or judge in vacation, and shall be conditioned for the payment of all costs which may be awarded against the appellants or any of them in the supreme court. [G. S., §1789; L. '81, p. 156, §27.

[Section 1 above referred to is section 3277.]

3308. Copy of order served on appellees—Publication and posting copies—Proof.—Sec. 144. The order last aforesaid shall be entered of record, and the appellant or appellants shall cause a certified copy thereof to be served on each of the appellees, by delivering the same to him or her, if he or she may be found, or otherwise serving the same in manner the same as may be at the time approved for serving summons from the district court by the laws then in force, and shall also cause the said order to be published in the same manner as the notices required to be published by the referee mentioned in section eleven of this act, and proof of the publication in any newspaper shall be the same as in case of said referee's notice, and proof of the posting of the ten printed copies in the district shall be by affidavit of the party posting the same, with the certificate of the clerk of the district court appealed from, that the affiant is a known and credible person. [G. S., §1790; L. '81, p. 157, §28.

[Section 11 above referred to is section 3292.]

[For service of summons see Code, section 40, p. 81.]

3309. Proof of service of notice—Supreme court make rules.—Sec. 145. The said proof of the service and publication of said order allowing the appeal shall be filed with the clerk of the supreme court within sixty days after the making of said order, and if not so filed, the supreme court shall, on motion of the appellee or any of the appellees, at any time after such default in filing said proof, and before the said proof shall be filed, dismiss such appeal, and if the transcript of record be not filed within the time limited by section twenty-nine of this act, such appeal shall, on motion, be dismissed. After the filing of the record and proof of service as aforesaid, the cause on appeal shall be proceeded with as the rules of the supreme court, or such special rules as said court may make in such cases, and their order from time to time thereunder may require. Said court shall have power to make any and all such rules concerning such appeals as may be necessary and expedient in furtherance of this act, as well as to preparation of the case for submission as to supplying deficiencies of record, if any, and for avoiding unnecessary costs and delay. [G. S., §1794; L. '81, p. 158, §32.

[Section 29 above referred to is section 3310.]

3310. Transcript to be filed in six months—Bill of exceptions.—Sec. 146. The appellant or appellants shall file the transcript of record of the district court with the clerk of the supreme court at any time within six months after the appeal shall be allowed as aforesaid. Only so much of the decree appealed from, and so much of the evidence as shall affect the appropriations of water claimed by means of the construction or enlargement or re-enlargement of the several ditches, canals and reservoirs mentioned in the order allowing the appeal, need be copied into the bill of exceptions. [G. S., §1791; L. '81, p. 157, §29.

3311. Costs in supreme court.—Sec. 147. The supreme court, on dismissal of such appeal, or on affirming or reversing the parts of the decree appealed from, in whole or in part, shall award costs, as in its discretion shall be found and held to be equitable. [G. S., §1792; L. '81, p. 158, §30.

3312. Supreme court amend or make new decree, or remand.—Sec. 148. The supreme court, in all cases in which judgment is rendered, and any part of the decree appealed from is reversed, and in which it may be practicable, shall make such decree in the matters involved in the appeal as should have been made by the district court, or direct in what manner the decree of that court shall be amended. [G. S., §1793; L. '81, p. 158, §31.

D. GENERAL PROVISIONS

3313. Suits must be brought in four years—Injunctions—Commissioner's duty.—Sec. 149. Nothing in this act or in any decree rendered under the provisions thereof, shall prevent any person, association or corporation from bringing and maintaining any suit or action whatsoever hitherto allowed in any court having jurisdiction, to determine any claim of priority of right to water, by appropriation thereof, for irrigation or other purposes, at any time within four years after the rendering of a final decree under this act in the water district in which such rights may be claimed, save that no writ of injunction shall issue in any case restraining the use of water for irrigation in any water district wherein such

final decree shall have been rendered, which shall affect the distribution or use of water in any manner adversely to the rights determined and established by and under such decree, but injunctions may issue to restrain the use of any water in such district not affected by such decree, and restrain violations of any right thereby established, and the water commissioner of every district where such decree shall have been rendered shall continue to distribute water according to the rights of priority determined by such decree, notwithstanding any suits concerning water rights in such district, until in any suit between parties the priorities between them may be otherwise determined, and such water commissioner have official notice by order of the court or judge determining such priorities, which notice shall be in such form and so given as the said judge shall order. [G. S., §1796; L. '81, p. 159, §34.

3314. After four years suit barred.—Sec. 150. After the lapse of four years from the time of rendering a final decree, in any water district, all parties whose interests are thereby affected shall be deemed and held to have acquiesced in the same, except in case of suits before then brought, and thereafter all persons shall be forever barred from setting up any claim to priority of rights to water for irrigation in such water district adverse or contrary to the effect of such decree. [G. S., §1797; L. '81, p. 160, §35.

3315. Court may make rules—Act liberally construed.—Sec. 151. The district court, or judge thereof in vacation, shall have power to make all orders and rules consistent with this act which may be found necessary and expedient, from time to time during the progress of the case, for carrying out the intent of this act, and of all parts consistent therewith of the said act, the title of which is recited in section four thereof; as well touching the proceedings in court as of the acts and doings of said referee, for the purpose of securing to any party aggrieved by the acts of said referee or any proceeding of the court, opportunity for redress; and this act shall be construed liberally in all courts, in favor of securing to all persons interested the just determination and protection of their rights. [G. S., §1786; L. '81, p. 155, §24.

[Section 4 above referred to is section 3284.]

3316. Party must file claim before offering evidence.—Sec. 152. No persons, association or corporation representing any ditch, canal or reservoir, shall be permitted to give or offer any evidence before said referee until he, she or they shall have filed a statement of claim in substance the same in all respects as is required to be filed under the provisions of section one hereof. [G. S., §1787; L. '81, p. 155, §25.

[Section 1 referred to is section 3277.]

3317. Effect of failure to offer evidence.—Sec. 153. No claim of priority of any person, association or corporation, on account of any ditch, canal or reservoir, as to which he, or she, or they shall have failed or refused to offer evidence under any adjudication herein provided for or heretofore provided for by said act, the title of which is recited in section four hereof, shall be regarded by any water commissioner in distributing water in times of scarcity thereof, until such time as such party shall have by application to the court having jurisdiction, obtained leave and made proof of the priority of right to which such ditch, canal or reservoir shall be justly entitled, which leave shall be granted in all cases upon terms as to notice to other parties interested, and on payment of all costs, and upon affidavits or petition sworn to showing the rights claimed and the ditches, canals and reservoirs, with the names of the owners thereof against which such priority is claimed, nor until a decree adjudging such priority to such ditch, canal or reservoir has been entered, and certificate, such as mentioned in section four hereof, shall have been issued to claimant and presented to the water commissioner. [G. S., §1784; L. '81, p. 154, §22.

[Section 4 referred to is section 3284.]

3318. Re-argument—Review—Limitation two years.—Sec. 154. The district court, or judge thereof in vacation, shall have power to order, for good cause shown, and upon terms just to all parties, and in such manner as may seem meet, a re-argument or review, with or without additional evidence, of any decree made under the provisions of this act, whenever said court or judge shall find from the cause shown for that purpose by any party or parties feeling aggrieved, that the ends of justice will be thereby promoted; but no such review or re-argument shall be ordered unless applied for by petition or otherwise within two years from the time of entering the decree complained of. [G. S., §1788; L. '81, p. 156, §26.

3319. Sheriff not serve writ outside his county.—Sec. 155. Nothing herein contained shall be construed to authorize any sheriff to serve any writ outside the limits of his own county, or give effect to any record by way of notice or otherwise, in any county other than that in which he belongs. [G. S., §1800; L. '79, p. 106, §35.

3320. Fees of district clerk—How audited—Paid.—Sec. 156. The fees of the clerk of the district court for a service rendered under this act shall be paid by the counties interested in the same manner as the fees of the water commissioners, upon the said clerk rendering his account certified by the district judge to the board or boards of county commissioners of the county or

counties embracing the water district in case of which the services shall have been rendered. [G. S., §1801; L. '79, p. 108, §43.

V. STATE ENGINEER.

3321. State engineer—Appointment—Office—Salary—Oath—Bond.—Sec. 157. The governor shall appoint a state engineer, who shall hold his office for the term of two years, or until his successor shall be appointed and qualified. The governor may at any time, for cause shown, remove said state engineer. The said state engineer shall have his office at the state capitol, in suitable rooms to be provided for him by the secretary of state, who shall furnish him with suitable furniture, postage and such proper and necessary stationery, books and instruments as are required to best enable him to discharge the duties of his office. He shall be paid a salary of three thousand dollars per annum, payable monthly by the state treasurer, on warrants drawn by the state auditor. The said state engineer shall, before entering on the discharge of his duties, take and subscribe to an oath, before the judge of a state court of record, to faithfully perform the duties of his office, and file said oath with the secretary of state, together with his official bond, in the penal sum of ten thousand dollars, said bond to be signed by sureties approved by the secretary of state and conditioned upon the faithful discharge of the duties of his office and for delivering to his successor, or other officer authorized by the governor to receive the same, all moneys, books, instruments and other property belonging to the state then in his possession or under his control, or with which he may be legally chargeable as such state engineer. [L. '89, p. 371, §1.

3322. General duties of state engineer.—Sec. 158. The state engineer shall have general supervising control over the public

waters of the state. He shall make or cause to be made careful measurements of the flow of the public streams of the state from which water is diverted for any purpose, and compute the discharge of the same. He shall also collect all necessary data and information regarding the location, size, cost and capacity of dams and reservoirs hereafter to be constructed, and like data regarding the feasibility and economical construction of reservoirs on eligible sites, of which he may obtain information, and the useful purposes to which the water from the same may be put. He shall also collect all data and information regarding the snow-fall in the mountains each season, for the purpose of predicting the probable flow of water in the streams of the state, and publish the same. [L. '89, p. 372, §2.

[Duties appertaining to reservoirs. Sections 3205-3214.]
[Report of engineer on desert land projects. Section 5145.]

3323. Shall approve designs and plans.—Sec. 159. The state engineer shall approve the designs and plans for the construction and repair of all dams or reservoir embankments which are built within the state, which equal or exceed ten feet in vertical height. [L. '89, p. 372, §3.

[Office of division superintendent abolished and division engineers provided in their place. Section 3335.]

3324. Supervision over division engineers and water commissioners.—Sec. 160. The state engineer shall have general charge over the work of the division water superintendents and district water commissioners, and shall furnish them with all the data and information necessary for the proper and intelligent discharge of the duties of their offices, and shall require them to report to him at suitable times their official actions, and require of them annual statements, on blanks to be furnished by him, of the amount of water diverted from the public streams in their respective divisions and districts, and such other statistics as, in the judgment of the state engineer, will be of benefit to the state. [L. '89, p. 373, §4.

3325. Additional duties of engineer.—Sec. 161. The state engineer shall, without any extra pay or compensation beyond the salary provided in section one of this act, perform all duties imposed upon him by law, and shall when called upon by the governor, give his counsel and services, without extra pay or compensation, to any state department or institution; *Provided, however*, That he shall be allowed all actual traveling and other necessary expenses, and the actual cost of preparing necessary maps and drawings, which actual expenses shall be paid by the department or institution requiring his services. [L. '89, p. 373, §6.

3326. Appoint deputy for special work.—Sec. 162. The state engineer shall, on request of any party interested and on pay-

ment of his per diem charges and reasonable expenses, appoint a deputy to measure, compute and ascertain all necessary data of any canal, dam, reservoir or other construction, as required or as may be desired to establish court decrees, or for filing statements, in compliance with law, in the county clerk's records. [L. '89, p. 373, §5.

3327. Deputies—Appointment—Oath—Engineer liable for acts.—Sec. 163. The state engineer may appoint one or more deputies, as he may think proper, for whose official actions he shall be responsible, and may revoke such appointments at his pleasure; and he may also deputize any person to do a particular service; and the said state engineer and his sureties shall be responsible on his official bond for the default or misconduct of his deputies. Such appointment and revocation shall be in writing, under the signature and official seal of the state engineer, and shall be filed in the office of the secretary of state. All persons appointed shall take and subscribe to an oath, before the judge of a court of record, to truly perform the duties of the office to which he is appointed; and such oath shall be filed with his appointment in the office of the secretary of state. In addition to the deputies provided for in this section, the state engineer may employ such assistance in performing the work of his office as he may deem necessary. [L. '89, p. 373, §7.

3328. Pay of deputies and assistants.—Sec. 164. The pay of the deputies and assistants of the state engineer shall not exceed the sum of six dollars per day for each day employed, together with actual expenses, and the whole amount which may be so expended is hereby limited to the sum of forty-five hundred dollars each year. [L. '89, p. 374, §8.

3329. Require owners of ditches to construct and maintain a measuring weir.—Sec. 165. For the more accurate and convenient measurement of any water appropriated pursuant to any judgment or decree rendered by any court establishing the claims of priority of any ditch, canal or reservoir, the owners thereof may be required by the state engineer to construct and maintain, under the supervision of the state engineer, a measuring weir or other device for measuring the flow of the water at the head of such ditch, canal or reservoir, or as near thereto as practicable. The state engineer shall compute, and arrange in tabular form, the amount of water that will pass such weir or measuring device at the different stages thereof, and he shall furnish a copy of a statement thereof to any water superintendents or commissioners having control of such ditch, canal or reservoir. [L. '89, p. 374, §9.

3330. Cubic foot per second, unit of measurement.—Sec. 166. The state engineer shall use in all his calculations, measurements, records and reports, the cubic foot per second as the unit of measurement of flowing water, and the cubic foot as the unit of measurement of volume. [L. '89, p. 374, §10.

[Cubic inch of water defined. Section 7026.]

3331. Report of state engineer.—Sec. 167. The state engineer shall prepare and render to the governor a full and true report of his work, regarding all matters and duties devolving upon him by virtue of his office, which report shall be delivered at the time when the reports of other state officers are required by law to be made, in order that it may be laid before the general assembly at each regular session thereof. [L. '89, p. 374, §11.

[Act of 1889, sections 3321-3331, repealed, G. S., sections 1807-1813.]

3332. Fees collected by state engineer.—Sec. 168. Fees shall be collected by the state engineer for work done in his office as follows:

For the examination, filing and certification to the duplicate of each map and statement describing a claim to a water right and of each judicial decree ordering the transfer of a water right, $1.00.

For each certificate other than that made in the case of original filings requiring official signature and seal, $1.00.

For the examination and filing of each set of plans and specifications for reservoirs, dams, embankments, and other structures for the purpose of utilizing or storing water, $1.00 for each $5,000.00 or fraction thereof of the estimated cost of such structure or structures.

For copies of plats, the sum of $1.00 for each hour or fraction thereof necessary for the making of the same.

For copies of records, 10 cents per folio. [L. '03, p. 294, §1.

[Fee for inspection of reservoir. Sections 3206 and 3211.]

3333. Fees deposited with state treasurer.—Sec. 169. At the end of each month the sum of the fees collected during the month, as provided for in section 1 of this act, shall be deposited with the state treasurer, with a complete statement showing the amounts thus received and the sources from which they are derived, and the said amounts shall be credited by the said treasurer to a fund which shall be known as a gauging fund. [L. '03, p. 295, §2.

[Sections 3332-3334 amend by implication L. '99, p. 348, sections 1-2.]

3334. Application of fees.—Sec. 170. The amount credited to the gauging fund created as hereinbefore provided shall be available for the payment of expenses and salaries required for work of gauging streams, rating ditches, making seepage measurements, or other work connected with the proper distribution of

water or ascertaining desired information concerning the flow of water. Warrants for the payments of such salaries and expenses shall be issued by the auditor of state upon presentation of vouchers regularly drawn and approved by the state engineer. [L. '03, p. 295, §3.

[Sections 3332-3334 amend by implication L. '99, p. 348, sections 1-2.]

VI. IRRIGATION DIVISIONS—DIVISION ENGINEERS.

3335. Appointment of division engineers—Boundaries of irrigation divisions.—Sec. 171. The office of superintendent of irrigation is hereby declared abolished, and in place of such superintendents the governor shall, subject to confirmation by the senate, appoint five persons, who shall be known as irrigation division engineers, who shall be qualified to perform the duties devolving upon them, as hereinafter provided, one of the said officers to have jurisdiction over irrigation division No. 1, comprising all water districts now or hereafter to be formed, consisting of lands in the state of Colorado irrigated by water taken from the South Platte river, the North Platte river, the Big Laramie river, the North and Middle forks of the Republican river, Sandy and Frenchman's creeks, and the streams draining into the said rivers and creeks; one over irrigation division No. 2, comprising all water districts now or hereafter to be formed, consisting of lands irrigated by water taken from the Arkansas river, the South Fork of the Republican river, the Smoky Hill river and the Dry Cimarron river, and the streams draining into the said

rivers; one over irrigation division No. 3, comprising all water districts now or hereafter to be formed, consisting of lands watered from the Rio Grande river and its tributaries; one over irrigation division No. 4, which is hereby created, comprising all water districts now, or hereafter to be formed, consisting of lands in the state of Colorado watered by the San Juan river and its tributaries; and, also, all water districts now, or hereafter to be formed, consisting of lands in the state of Colorado watered by the Grand river and its tributaries, below the mouth of Roan creek, including water district No. 42, and one over irrigation division No. 5, which is hereby created, comprising all water districts now or hereafter to be formed, consisting of lands in the state of Colorado watered by the Grand river and its tributaries above and including Roan creek and water districts Nos. 39 and 45, and, also, all water districts now, or hereafter to be formed, consisting of lands in the state of Colorado irrigated by water taken from the Green river and its tributaries, respectively. And such division engineer shall be appointed from the division over which he has jurisdiction, and he shall have been a resident of the division for at least one year prior to appointment. [L. '03, p. 281, §1.

3336. Jurisdiction of irrigation divisions Nos. 4 and 5.—Sec. 172. Said water districts Nos. 39 and 70 shall be and remain in irrigation division No. 5 and said water district No. 42 shall be and remain in irrigation division No. 4. [L. '05, p. 243, §4.

3337. Examination to fill vacancy.—Sec. 173. The state engineer shall hold examinations whenever a vacancy exists, and such examinations shall be held in at least one place in the territory comprising the division, or divisions, where any vacancy or vacancies exist, and twenty days prior to the date fixed for any such examinations he shall cause notices, for a period of one week, to be inserted in one daily paper of general circulation in any irrigation divisions where any vacancy or vacancies exist; or, if there be no daily paper, then in one weekly paper in the said division. [L. '03, p. 282, §2.

3338. Application for appointment as division engineer.—Sec. 174. Any person desiring the appointment of irrigation division engineer may file with the state engineer a request for an examination as to his qualifications, and the state engineer shall thereupon notify the applicant of the time and place where the next examination is to be held, at which place the applicant must present himself at the time specified, prepared to take such examination. [L. '03, p. 282, §3.

3339. Qualifications of applicant.—Sec. 175. Such examinations shall be for the purpose of determining the qualifications of applicants, and shall comprise:

First—Questions on the measurement of water, which shall include tests in the actual measurements of water in the field, on a basis of 30 per cent. of the total.

Second—Questions on the laws and customs relative to irrigation and water rights in Colorado, and including questions relating to the local conditions of the division for which the examination is being held, on a basis of 30 per cent. of the total.

Third—Questions on his experience and the extent of his practice in matters relating to the use of water in irrigation or for other beneficial purposes, on a basis of 40 per cent. of the total. [L. '03, p. 283, §4.

3340. Examination of papers—Rating certified to governor.—Sec. 176. The state engineer shall examine and rate the examination papers of each applicant, and shall certify to the governor a list of names of all those receiving a rating of 70 per cent. or over, together with the markings of each, and from this list the governor shall, subject to confirmation by the senate, appoint persons to fill vacancies; *Provided*, That such list shall hold good for a period of two years from the date of its certification to the governor, but no longer; *And, provided, further*, That nothing herein contained shall prevent any candidate from taking later examinations for the purpose of reinstatement or of improving his rating. [L. '03, p. 283, §5.

3341. Term of office of division engineer.—Sec. 177. Any irrigation division engineer appointed as hereinbefore provided, shall be appointed for a term of two years, or until his successor shall have been appointed and qualified, and shall be removed only for malfeasance in office, incompetency or neglect of duty. [L. '03, p. 283, §6.

3342. Salaries and expenses of engineers.—Sec. 178. Each irrigation division engineer shall receive the sum of one hundred and twenty-five (125) dollars per month, for the time actually employed in the discharge of his duties, payable monthly upon vouchers, approved by the state engineer, drawn upon the auditor of state, by whom a warrant shall be drawn upon the state treasurer therefor. He shall also receive reimbursements for all necessary expenses, evidenced by vouchers, incurred in the performance of his duties, which expenses shall not exceed the sum of five hundred (500) dollars per annum, and such expenses shall be paid upon vouchers, approved by the state engineer, drawn upon the auditor of state, by whom a warrant shall be drawn on the state treasurer therefor. [L. '03, p. 283, §7.

3343. Oath of office—Bond.—Sec. 179. Before entering upon the duties of his office the irrigation division engineer shall sub-

scribe to an oath before the judge of a court of record that he will faithfully perform the duties of his office, and shall file said oath with the secretary of state, together with his official bond in the penal sum of five thousand (5,000) dollars, said bond to be signed by sureties approved by the secretary of state, and conditioned upon the faithful discharge of the duties of his office and for delivery to his successor or to the state engineer, upon demand, all moneys, books, instruments and other property belonging to the state or to the irrigation divisions under his control. [L. '03, p. 284, §8.

3344. Powers and duties of engineer—Appeal from rulings. —Sec. 180. The duties of the irrigation division engineer shall be as follows: He shall be governed by all acts heretofore enacted relative to superintendents of irrigation and shall have general control over the water commissioners of the several districts within his division. He shall, under the general supervision of the state engineer, execute the laws of the state relative to the distribution of water, in accordance with the right of priority of appropriation, as established by judicial decrees.

He shall, in the distribution of water, be governed by the regulations of this act, and acts that are now in force, but for the better discharge of his duties, he shall have the authority to make such other regulations to secure the equal and fair distribution of water, in accordance with the rights of priority of appropriation, as may, in his judgment, be needed in his division: *Provided,* Such regulations shall not be in violation of any part of this act, or other laws of the state, but shall be merely supplementary to and necessary to enforce the provisions of the general laws and amendments thereto.

Any person, ditch company, or ditch owner, who may deem himself injured or discriminated against by any such order or regulation of such irrigation division engineer shall have the right to appeal from the same to the state engineer, by filing with the state engineer a copy of the order or regulation complained of, and a statement of the manner in which the same injuriously affects the petitioner's interest. The state engineer shall, after due notice, hear whatever testimony may be brought forward by the petitioner, either orally or by way of affidavits, and through the irrigation division engineer shall have power to suspend, amend or confirm the order complained of.

He shall have the right to call out any water commissioner of any water district within his division, at any time he may deem it necessary, and he shall have the power to perform the regular duties of water commissioner in all districts within his division.

And such division engineers shall, further, make measurements of streams; shall measure and rate ditches; shall require the water commissioners under their jurisdiction to make annual reports, as hereinafter provided, on or before the 15th of November of each year; shall collect data concerning reservoirs and reservoir sites, power sites, flow of water in streams, and perform such other duties as the state engineer shall direct and as are of benefit to his division, or divisions, or to the state in general. [L. '03, p. 284, §9; superseding L. '87, p. 295, §§2, 4 and 8.

[Duties of superintendent of irrigation are defined in L. '87, p. 295, and so far as not superseded are found in this compilation as sections 3349-3352.]

3345. Charges against water commissioner—Trial—Suspension—Removal.—Sec. 181. Charges made against any water commissioner for malfeasance in office, neglect of duty, or incompetency to fulfill the duties incumbent upon him, shall be made to the division engineer in writing, setting forth the specific charges against him, who shall hold a fair and impartial trial, after five days' notice to such water commissioner, upon whom a written copy of the charges shall be served. At such trial such water commissioner shall be permitted to appear in person and by counsel, and introduce evidence. Should such water commissioner be found guilty of any of the offenses charged, then, and in that case only, the irrigation division engineer having jurisdiction is hereby empowered to suspend him. All such investigations shall be tried and determined within five days from the date set for trial, and at which trial all oral testimony shall be reduced to writing; *Provided*, That either party may take depositions anywhere in the state and may have them read at said trial by giving the opposite party twenty-four hours' notice of the time and place and names of the parties whose depositions will thus be taken.

Upon such suspension the division engineer shall, within ten days, file all pleadings, papers and testimony with the state engineer for review; whereupon the state engineer shall appoint a competent deputy to at once assume control of the district of the water commissioner so suspended. The said deputy shall retain such control until the disability of the commissioner is removed or a new commissioner is appointed and qualified, and the said deputy shall be paid for his services from the state engineer's assistants' fund. The state engineer shall review the action of the division engineer as expeditiously as possible, and within thirty days from the time of receiving such papers, shall submit his findings to the governor for his action.

In case such suspension of any water commissioner be recommended to be made permanent by the state engineer in his findings, the governor shall, upon the recommendation of the

board or boards of county commissioners, as provided by law, forthwith appoint some suitable and competent person to fill such vacancy.

The person or corporation making any such charges against any water commissioner shall furnish a good and responsible bond in such reasonable sum as may be fixed by the division engineer, conditioned for the payment of the reasonably necessary expenses incurred by the water commissioner in case the charges preferred against him are not sustained by the division engineer.

All division engineers shall be under the control and supervision of the state engineer, and may have charges preferred against them in the same manner, and such charges may be heard and determined by the state engineer upon the same conditions herein provided for like proceedings against the water commissioner. [L. '03, p. 285, §10.

3346. Certified copy of priority decrees furnished engineer.—Sec. 182. The clerk of any court issuing judicial decrees fixing the priorities of appropriation of water for irrigation or other beneficial purposes in any of such divisions shall furnish the irrigation division engineer having jurisdiction with certified copies thereof, as heretofore provided by law in the case of superintendents of irrigation, whereupon such engineer shall make a tabulated statement of such decrees, in a book prepared for that purpose, and shall forward a copy thereof to the state engineer and keep and preserve in his office the certified copy. [L. '03, p. 287, §11.

3347. Meetings of division engineers—Reports.—Sec. 183. There shall be held in the office of the state engineer in November of each year a meeting of the irrigation division engineers and of the state engineer and his chief assistant, at which meeting the reports of the irrigation division engineers shall be presented and a general discussion had of the matters which have transpired during the previous season, and at which a program of the work for the ensuing season shall be discussed and determined upon.

The reports filed with the state engineer shall include all correspondence for the season on all business and official acts for season last past, and shall include the reports of the water commissioners, as hereinafter defined, and other data and information. [L. '03, p. 287, §12.

3348. Report of water commissioners—Contents.—Sec. 184. It shall be the duty of each irrigation division engineer to prepare and tabulate the reports of the water commissioners in his division, which reports shall contain a statement of the actual

carrying capacity and the amount of water actually carried by each ditch or canal in his district for each and every day when water was being so carried, the total number of acres lying under each ditch or canal and the number of acres actually irrigated therefrom. It shall also contain a statement of the kind of crops and the acreage under each decreed ditch or canal, the amount of water stored in each reservoir, the amount used therefrom, with the dates of such storage and use, and the same shall be on blanks, or in books, prepared for that purpose and furnished by the state engineer. They shall contain a written statement of the official acts of the commissioners, and other matters of interest and use, and shall be duly subscribed and sworn to and filed with the irrigation division engineer on or before the 15th day of November of each year. [L. '03, p. 287, §13.

3349. Clerk furnish copies of decrees to division engineer.—Sec. 185. Within thirty days after his appointment, said superintendent of irrigation shall send to the clerk of the district court, within his division, of such counties as have had rendered by the district court of such county, judicial decrees, fixing the priorities of appropriation of water for irrigation purposes for any water district, a notification of his appointment to such office, and shall request of the said clerk a certified copy of every decree of the district court establishing priorities of appropriation of water used for irrigation purposes within that district. Thereupon, it shall be the duty of such clerk, within ten days after the receipt of such request from said superintendent of irrigation, to prepare a certified copy of all decrees of such district court establishing priorities of water rights made within that district, under the provisions of the general statutes of the state of Colorado, and transmit the same to the superintendent of irrigation requesting it. Said superintendent of irrigation shall then cause to be prepared a book to be entitled, "The Register of Priorities of Appropriations of Water Rights for Water Division No....., State of Colorado," within which he shall enter and preserve such certified copies of decrees. Said superintendent of irrigation shall, from such certified copies of decrees, make out a list of all the ditches, canals and reservoirs entitled to appropriations of water within his division, arranging and numbering the same in consecutive order, according to the dates of their respective appropriations within his division, and without regard to the number of such ditches, canals or reservoirs may bear within their respective water districts. Said superintendent of irrigation shall make from his register a tabulated statement of all the ditches, canals and reservoirs in his division whose priorities have been decreed, which statement shall contain the

following information concerning each ditch, canal and reservoir arranged in separate columns. The name of the ditch, canal or reservoir; its number in his division; the district in which it is situated; the number of it in its proper district; and the number of cubic feet of water per second to which it is entitled, and such other and further information as he may deem useful to the proper discharge of his duty. In case any decrees of court establishing priorities of appropriation of water for irrigation purposes are made after the transmittal of the copy of previous decrees to the superintendent of irrigation, it shall be the duty of the clerk of the court wherein such decree is rendered, to transmit to the superintendent of irrigation of the division within which said county is situated, within ten days after it is rendered, a copy of such decree, and the superintendent of irrigation shall enter the same in his register, such register to be filed and kept in the office of the state engineer. [L. '87, p. 297. 87.

[Division engineers succeeded the superintendent of irrigation. See section 3335.]

3350. Commissioners report to engineers.—Sec. 186. All water commissioners shall make reports to the superintendent of irrigation of their division as often as may be deemed necessary by said superintendent. Said reports shall contain the following information: The amount of water necessary to supply all the ditches, canals and reservoirs of that district; the amount of water actually coming into the district to supply such ditches, canals and reservoirs; whether such supply is on the increase or decrease; what ditches, canals or reservoirs are at that time without their proper supply; the probability as to what the supply will be during the period before the next report will be required, and such other and further information as the superintendent of irrigation of that division may suggest. Said superintendent of irrigation shall carefully file and preserve such reports, and shall, from them, ascertain what ditches, canals and reservoirs are, and what are not, receiving their proper supply of water; and if it shall appear that in any district in that division any ditch, canal or reservoir is receiving water whose priority post-dates that of the ditch, canal or reservoir in another district, as ascertained from his register, he shall at once order such post-dated ditch, canal or reservoir shut down and the water given to the elder ditch, canal or reservoir. His orders being directed at all times to the enforcement of priority of appropriation, according to his tabulated statement of priorities, to the whole division, and without regard to the district within which the ditches, canals and reservoirs may be located. The reports of water commissioners by the superintendents of irriga-

tion shall be filed and kept in the office of the state engineer. [L. '87, p. 298, §9.

[Division engineers succeeded the superintendent of irrigation. See section 3335.]

3351. Owner report failure to receive water—Duty of engineer.—Sec. 187. In case any ditch, canal or reservoir, in any district within such superintendent of irrigation's division, shall fail to receive its regular supply of water, the owner or controller of such ditch, canal or reservoir may report such fact to the water commissioner of that district, who shall immediately apportion the water in his district, and send forthwith by telegram, if necessary, a report of such fact to the superintendent of irrigation of his division, and thereupon it shall be the duty of said superintendent to compare such report with his register, and if any ditch, canal or reservoir of any other district of his division is receiving water to which any ditch, canal or reservoir of any other district is entitled, he shall at once order the shutting down of the post-dated ditches, canals or reservoirs, and the water given to the ditches, canals or reservoirs having the priority of appropriation; *Provided, however,* That nothing in this act shall be construed as interfering with the priority of water for domestic use. [L. '87, p. 299, §10.

[See note, section 3350.]

3352. Fees of district clerk.—Sec. 188. The expenses and salary of the superintendents of irrigation shall be paid pro rata by the counties interested, in the same manner as the fees of water commissioners are paid, and the fees of the clerks of the district courts, for services rendered under the provisions of this act, shall also be paid by the counties interested, upon the said clerk rendering his account, certified by the district judge to the boards of county commissioners of the counties embraced in the water divisions in case of which the services have been rendered. [L. '87, p. 299, §11.

[The division engineers' salaries are provided for in section 3342.]

3353. Lands watered constitute districts.—Sec. 189. That the lands now irrigated, or which may be hereafter irrigated from ditches now taking water from the following described rivers or natural streams of the State of Colorado, are hereby declared to constitute irrigation districts. [G. S., §1741; L. '79, p. 97, §5.

[Unlawful to cut trees which conserve snow or water in irrigation district. Section 2626.]

3354. District number one.—Sec. 190. That water district No. 1 shall consist of all lands in the State of Colorado irrigated by waters taken from that portion of the South Platte river between the mouth of the Cache la Poudre river and the west boundary line of Washington county, and from the streams draining

VII. WATER DISTRICTS—WATER COMMISSIONERS.

A. BOUNDARIES OF WATER DISTRICTS.

into the said portion of the South Platte river. [L. '89, p. 212, §13; amending L. '87, p. 303, §1; which amended G. S., §1742; L. '79, p. 97, §6.

3355. District number two.—Sec. 191. That district No. 2 shall consist of land irrigated from ditches taking water from the South Platte river and its tributaries, except Big Thompson, St. Vrain and Clear Creek, between the mouth of the Cache la Poudre and the mouth of Cherry Creek. [G. S., §1743; L. '79, p. 97, §7.

3356. District number three.—Sec. 192. That district No. 3 shall consist of all lands irrigated from ditches taking water from the Cache la Poudre and its tributaries. [G. S., §1744; L. 79, p. 98, §8.

3357. District number four.—Sec. 193. That district No. 4 shall consist of all lands irrigated from ditches taking water from the Big Thompson and its tributaries. [G. S., §1745; L. '79, p. 98, §9.

3358. District number five.—Sec. 194. That district No. 5 shall consist of all lands irrigated from ditches taking water from the St. Vrain creek and its tributaries, except the Boulder, its tributaries, and Coal creek. [G. S., §1746; L. '79, p. 98, §10.

3359. District number six.—Sec. 195. That district No. 6 shall consist of all lands irrigated from ditches taking water from the Boulder and its tributaries, and Coal creek. [G. S., §1747; L. '79, p. 98, §11.

3360. District number seven.—Sec. 196. That district No. 7 shall consist of all lands irrigated from ditches taking water from Clear creek and its tributaries. [G. S., §1748; L. '79, p. 98, §12.

3361. District number eight.—Sec. 197. That water district No. 8 shall consist of all lands irrigated by ditches taking water from Cherry creek, Plum creek and Platte river and their tributaries, except Bear creek, above water district No. 2, and below the forks of the north and south branches of the South Platte river, and including all lands and ditches in Douglas county. [L. '99, p. 430, §1; amending G. S., §1749; L. '79, p. 98, §13.

3362. District number nine.—Sec. 198. That district No. 9 shall consist of all lands irrigated by ditches taking water from Bear creek and its tributaries. [G. S., §1750; L. '79, p. 98, §14.

3363. District number ten—New districts to be formed by governor.—Sec. 199. That district No. 10 shall consist of all lands irrigated from ditches taking water from the Fountain and its tributaries: *Provided*, That said district shall not extend beyond the limits of El Paso county.

Other irrigation districts may be formed from time to time by the governor, on petition of parties interested. [G. S., §1751; L. '79, p. 98, §15.

[The title of the act of April 1, 1885, L. '85, p. 256, purports to amend the above section.]

3364. District number eleven.—Sec. 200. Water district No. 11 shall consist of all lands irrigated by water taken from that portion of the Arkansas river above water district No. 12, and from streams draining into the said portion of the Arkansas river. [L. '89, p. 369, §1; amending L. '85, p. 256, §4.

3365. District number twelve.—Sec. 201. That district No. 12 shall consist of all lands irrigated from ditches or canals taking water from that part of the Arkansas river lying in Fremont county; also, lands irrigated from ditches or canals taking water from the tributaries of said portion of the Arkansas river, except Texas creek, and its tributaries, and that part of Grape creek which lies above the south line of said Fremont county. [L. '95, p. 198, §1; amending L. '93, p. 301, §1; which amended L. '85, p. 257, §5.

L. '93, p. 301, §1; which amended L. '85, p. 257, §5.

3366. District number thirteen.—Sec. 202. That district No. 13 shall consist of all lands irrigated from ditches or canals taking water from Texas creek and its tributaries and that part of Grape creek and its tributaries lying in Custer county. [L. '95, p. 198, §2; amending L. '93, p. 301, §1; which amended L. '85, p. 257, §6.

3367. District number fourteen.—Sec. 203. Water district No. 14 shall consist of all lands irrigated by water taken from that portion of the Arkansas river situated within the boundaries of Pueblo county and from the streams draining into the said portion of the Arkansas river, except the St. Charles and Huerfano rivers and their tributaries, and except also that portion of the Fountain embraced in water district No. 10, and the streams draining into the said portion of the fountain. [L. '89, p. 310, §2; amending L. '85, p. 257, §7.

3368. District number fifteen.—Sec. 204. That district No. 15 shall consist of all lands irrigated from ditches, or canals,

taking water from the St. Charles and its tributaries. [L. '85, p. 257, §8.

3369. District number sixteen.—Sec. 205. That district No. 16 shall consist of all lands irrigated from ditches and canals taking water from the Huerfano and its tributaries. [L. '85; p. 257, §9.

3370. District number seventeen.—Sec. 206. Water district No. 17 shall consist of all lands irrigated by water taken from that portion of the Arkansas river below water district No. 14 and above the mouth of the Purgatoire river, and from the streams draining into the said portion of the Arkansas river, except the Apishapa river and its tributaries. [L. 89, p. 370, §3; amending L. '85, p. 257, §10.

3371. District number eighteen.—Sec. 207. That district No. 18 shall consist of all lands irrigated from ditches and canals taking water from the Apishapa and its tributaries. [L. '85, p. 257, §11.

3372. District number nineteen.—Sec. 208. That district No. 19 shall consist of all lands irrigated from ditches, or canals, taking water from the Purgatoire and its tributaries. [L. '85; p. 257, §12.

3373. District number twenty.—Sec. 209. Water district No. 20 shall consist of all lands irrigated by water taken from that portion of the Rio Grande above the mouth of the Rio Conejos, and from the streams draining into the said portion of the Rio Grande, including Piedra, Spring, Gato and San Francisco creeks, and all other streams that would in time of flood flow into the said portion of the Rio Grande, although at ordinary stages the waters thereof might not flow upon the surface to the Rio Grande, except Alamosa river and its tributaries and the La Jara and Trinchera creeks and their tributaries; *Provided,* That nothing in this act shall be construed as inconsistent with the provisions of the acts creating water districts numbered twenty-five, twenty-six and twenty-seven. [L. '89, p. 218, §1; amending L. '87, p. 301, §§1 and 2, which amended L. '85, p. 258, §§13 and 16.

3374. District number twenty-one.—Sec. 210. That district No. 21 shall consist of all lands irrigated from ditches or canals taking water from the Alamosa and La Jara creeks and their tributaries. [L. '85, p. 258, §14.

3375. District number twenty-two.—Sec. 211. That district No. 22 shall consist of all lands in the state of Colorado irrigated from ditches or canals taking water from Conejos creek and its tributaries. [L. '85, p. 258, §15.

3376. District number twenty-three.—Sec. 212. Water district No. 23 shall consist of all lands in the state of Colorado

being, or to be, irrigated from ditches or canals taking water from the South Platte river, and from any of its direct, or indirect, tributaries, at any point or points above water district No. 8, in the said state, and all lands upon the tributaries of the Arkansas river which lie within the boundaries of Park county. [L. '99, p. 431, §1; amending L. '89, p. 212, 69.

3377. District number twenty-four.—Sec. 213. Water district No. 24 shall consist of all lands in the state of Colorado irrigated by water taken from that portion of the Rio Grande between the mouth of the Rio Conejos and the Colorado state line, from the streams draining into the said portion of the Rio Grande and from Costilla creek, and the streams draining into Costilla creek. [L. '89, p. 370, §4; amending L. '85, p. 258, §17.

3378. District number twenty-five.—Sec. 214. That water district No. 25 shall consist of all lands irrigated by water taken from the San Luis creek and all its tributaries. [L. '99, p. 237, §1; amending L. '89, p. 370, §5; amending L. '85, p. 258, §18.

3379. District number twenty-six.—Sec. 215. That district No. 26 shall consist of all lands irrigated from ditches, or canals, taking water from Saguache creek and its tributaries. [L. '85, p. 258, §19.

3380. District number twenty-seven.—Sec. 216. That district No. 27 shall consist of all the lands irrigated from ditches, or canals, taking water from Tuttle, Carnero, La Garita, and all other creeks, and their tributaries, which have their sources of water supply in the La Garita mountains and flow eastward into the San Luis valley. [L. '85, p. 258, §20.

3381. District number twenty-eight.—Sec. 217. That district No. 28 shall consist of all lands irrigated from ditches, or canals, taking water from the Tomichi and its tributaries. [L. '85, p. 259, §21.

3382. District number twenty-nine.—Sec. 218. That district No. 29 shall consist of all lands lying in the state of Colorado irrigated from ditches, or canals, taking water from that part of the San Juan river, and its tributaries, which lie above the junction of the San Juan river and the Rio Piedra, and including the Rio Piedra. [L. '85, p. 259, §22.

3383. District number thirty.—Sec. 219. That district No. 30 shall consist of all lands lying in the state of Colorado irrigated from ditches, or canals, taking water from that part of the Rio Las Animas river, and its tributaries, which lie in Colorado. [L. '85, p. 259, §23.

3384. District number thirty-one.—Sec. 220. That district No. 31 shall consist of all lands in the state of Colorado irrigated from ditches, or canals taking water from that part of the Los

Pinos river, and its tributaries, which lie in Colorado. [L. '85, p. 259, §24.

3385. District number thirty-two.—Sec. 221. Water district No. 32 shall consist of all lands in the state of Colorado irrigated by water taken from those natural streams which drain into the San Juan river, and are not included in water districts numbers 29, 30, 31, 33 and 34. [L. '89, p. 371, §6; amending L. '85, p. 259, §25.

3386. District number thirty-three.—Sec. 222. That district No. 33 shall consist of all lands lying in the state of Colorado irrigated from ditches, or canals, taking water from the La Plata river, and its tributaries, which lie in Colorado. [L. '85, p. 259, §26.

3387. District number thirty-four.—Sec. 223. That water district No. 34 shall consist of all lands lying in the state of Colorado, irrigated from ditches or canals taking water from the Rio Mancos, and its tributaries; and also all lands irrigated from ditches or canals taking water from that part of the Dolores river within the boundaries of said Montezuma county, and from streams draining into said portion of Dolores river. [L. '97, p. 175, §1; amending L. '85, p. 259, §27.

3388. District number thirty-five.—Sec. 224. That water district No. 35 shall consist of all lands lying in the county of Costilla, in this state, watered by the Trinchera creek, Sand or Medano creek, Big Spring creek, Little Spring creek, Mosca creek, North and South Zapato creeks, Sierra Blanca creek, and all streams draining into the said creeks, and all other streams between said Trinchera creek and said Sand or Medano creek. [L. '99, p. 237, §2; amending L. '87, p. 307, §1.

3389. District number thirty-six.—Sec. 225. That district No. 36 shall consist of all the lands irrigated from water taken from the Blue river and its tributaries. [L. '87, p. 313, §3.

3390. District number thirty-seven.—Sec. 226. That district No. 37 shall consist of lands all lying in the state of Colorado irrigated by waters taken from the Eagle river and its tributaries. [L. '87, p. 313, §4.

3391. District number thirty-eight.—Sec. 227. That district No. 38 shall consist of all the lands lying in the state of Colorado irrigated by water taken from the Roaring Fork river and its tributaries. [L. '87, p. 313, §5.

3392. District number thirty-nine.—Sec. 228. The boundaries of water district No. 39 are hereby defined to include all the tributaries of Grand river on the north side thereof, from the mouth of the Roaring Fork river, westerly to the state line; and

shall consist of all lands lying in the state of Colorado, irrigated by any and all such tributaries, excepting Roan creek, and its tributaries, and all lands irrigated thereby; and excepting also all lands lying in Mesa county. The said water district No. 39 shall include only all the lands in Garfield county, above described, and which are not irrigated from Roan creek or any of its tributaries. [L. '05, p. 243, §1; amending L. '87, p. 314, §6.

[For jurisdiction of district court over district No. 39, see section 3426.]

3393. District number forty.—Sec. 229. That water district No. 40 shall consist of all lands irrigated from ditches taking water from Crystal creek and Smith's fork, Escalante creek, and their tributaries, all lands lying within the boundaries of Delta county irrigated from the Gunnison river and its tributaries, (except lands irrigated from the Uncompahgre river and its tributaries), and all lands in the county of Delta and the county of Gunnison irrigated by ditches taking their water from the north fork of the Gunnison river and its tributaries. [L. '03, p. 296, §1; amending L. '87, p. 311, §2.

3394. District number forty-one.—Sec. 230. That district No. 41 shall consist of all lands irrigated from ditches or canals taking water from the Uncompahgre river and its tributaries, except so much as are within the boundary lines of Ouray county. [L. '87, p. 311, §3.

3395. District number forty-two.—Sec. 231. That district No. 42 shall consist of all lands irrigated from ditches and canals taking water from the Grand and Gunnison rivers and their tributaries within the county of Mesa, except Escalante creek. [L. '03, p. 296, §2; amending L. '87, p. 311, §4.

3396 Same.—Sec. 232. The boundaries of water district No. 42 shall not be construed to include any land hereinabove embraced in either of said water districts, 39 or 70 [L. '05, p. 243, §3.

[For attachment of district 42 for adjudication of priorities, see section 3426.]

3397. District number forty-three.—Sec. 233. That water district No. 43 is hereby established, and shall consist of all lands irrigated by ditches taking water from the White river and its tributaries. [L. '87, p. 307, §1.

3398. District number forty-four.—Sec. 234. That water district No. 44 shall consist of all lands irrigated by water taken from that portion of the Yampa river above the mouth of the Little Snake river and below the mouth of Fortification creek, and from the streams draining into the said portion of the Yampa river. [L. '89, p. 211, §2; amending L. '87, p. 300, §1.

3399. District number forty-five.—Sec. 235. That water district No. 45 shall consist of all lands situated on the south side

of the Grand river and irrigated from ditches or canals taking water from the Grand river and its tributaries, between the mouth of Roaring Fork river and the north line of Mesa county. [L. '89, p. 213, §17.

3400. District number forty-six.—Sec. 236. That water district No. 46 shall consist of all lands irrigated by water taken from that portion of the North Platte river above the mouth of Michigan creek, and from the streams draining into the said portion of the North Platte river. [L. '89, p. 212, §10.

3401. District number forty-seven.—Sec. 237. That water district No. 47 shall consist of all lands in the state of Colorado irrigated by water taken from that portion of the North Platte river between water district No. 46 and the state line of Colorado, and from the streams draining into the said portion of the North Platte river, and fro mGranite and Encampment creeks and the streams draining into the said creeks. [L. '89, p. 212, §11.

3402. District number forty-eight.—Sec. 238. That water district No. 48 shall consist of all lands in the state of Colorado irrigated by water taken from the Big Laramie river and from the streams draining into the said river. [L. '89, p. 212, §12.

3403. District number forty-nine.—Sec. 239. That water district No. 49 shall consist of all lands in the state of Colorado irrigated by water taken from the south fork of the Republican river and the Smokey Hill river, and the streams draining into the said rivers. [L. '89, p. 471, §1.

3404. District number fifty.—Sec. 240. That water district No. 50 shall consist of all lands irrigated by water taken from the Muddy and Troublesome creeks, and from the streams draining into the said creeks. [L. '89, p. 213, §18.

3405. District number fifty-one.—Sec. 241. That water district No. 51 shall consist of all lands irrigated by water taken from the Grand river above the mouth of the Blue river, and from the streams draining into the said portion of the Grand river, except the Muddy and Troublesome creeks and the streams draining into the said creeks. [L. '89, p. 213, §19.

3406. District number fifty-two.—Sec. 242. That water district No. 52 shall consist of all lands on the south side of the Grand river irrigated by water taken from the Grand river below the mouth of Blue river and above the mouth of Roaring Fork river, and from the streams draining into the said portion of the Grand river, except Eagle river and its tributaries. [L. '89, p. 213, §20.

3407. District number fifty-three.—Sec. 243. That water district No. 53 shall consist of all lands on the north side of the Grand river irrigated by water from that portion of the Grand river below the mouth of Muddy creek and above the mouth of Roaring Fork river, and from the streams draining into the said portion of the Grand river. [L. '89, p. 214, §21.

3408 District number fifty-four.—Sec. 244. That water district No. 54 shall consist of all lands in the state of Colorado irrigated by water taken from that portion of the Little Snake river and its tributaries above the most westerly intersection of said river with the Colorado state line. [L. '89, p. 211, §3.

3409. District number fifty-five.—Sec. 245. That water district No. 55 shall consist of all lands in the state of Colorado irrigated by water taken from that portion of the Yampa river below water district No. 44, and from the streams draining into the said portion of Yampa river not included in water district No. 54. [L. '89, p. 211, §4.

3410. District number fifty-six.—Sec. 246. That water district No. 56 shall consist of all lands in the state of Colorado irrigated by water taken from that portion of the Green river embraced within the boundaries of the county of Routt, and from the streams draining into the said portion of the Green river, except the Yampa river and its tributaries. [L. '89, p. 211, §5.

3411. District number fifty-seven.—Sec. 247. That water district No. 57 shall consist of all lands irrigated by water taken from that portion of the Yampa river above water district No. 44 and below the mouth of Elk creek, and from the streams draining into the said portion of the Yampa river. [L. '89, p. 211, §6.

3412. District number fifty-eight.—Sec. 248. That water district No. 58 shall consist of all lands irrigated by water taken from the Yampa river above water district No. 57, and from the streams draining into the said portion of Yampa river. [L. '89, p. 211, §7.

3413. District number fifty-nine.—Sec. 249. That water district No. 59 shall consist of all lands irrigated by water taken from the Gunnison river above the mouth of Tomichi creek, and from all streams draining into the said portion of Gunnison river; also of all lands on the north side of Gunnison river below the mouth of Tomichi creek and above water district No. 40, and from the streams draining into the said portion of the Gunnison river. [L. '89, p. 214, §22.

3414. District number sixty.—Sec. 250. That water district No. 60 shall consist of all lands irrigated by water taken from

the San Miguel river and from the streams draining into the said river. [L. '89, p. 214, §23.

3415. District number sixty-one.—Sec. 251. That water district No. 61 shall consist of all lands in the state of Colorado irrigated from that portion of Dolores river between the mouth of San Miguel river and the county line of Dolores county, and from streams draining into the said portion of Dolores river. [L. '97, p. 175, §2; amending L. '89, p. 214, §24.

3416. District number sixty-two.—Sec. 252. That water district No. 62 shall consist of all lands south of the Gunnison river irrigated by water taken from the Gunnison river below the mouth of Tomichi creek and above water district No. 40, and from the streams draining into the said portion of the Gunnison river. [L. '89, p. 214, §25.

3417. District number sixty-three.—Sec. 253. That water district No. 63 shall consist of all lands in the state of Colorado irrigated by water taken from that portion of the Dolores river below the mouth of the San Miguel river and from the streams draining into the said portion of the Dolores river. [L. '89, p 214, §26.

3418. District number sixty-four.—Sec. 254. That water district No. 64 shall consist of all lands irrigated by water taken from that portion of the South Platte river between the western boundary line of Washington county and the state line of Colorado and Nebraska, and from the streams draining into the said portion of the South Platte river. [L. '89, p. 213, §14.

3419. District number sixty-five.—Sec. 255. That water district No. 65 shall consist of all lands in the state of Colorado irrigated by water taken from the middle and north forks of the Republican river, from Sandy and Frenchman's creeks, and the tributaries of these streams. [L. '89, p. 213, §15.

3420. District number sixty-six.—Sec. 256. That water district No. 66 shall consist of all lands in the state of Colorado irrigated by water taken from the Dry Cimarron and the streams draining into the said river. [L. '89, p. 472, §2.

3421. District number sixty-seven.—Sec. 257. That water district No. 67 shall consist of all lands in the state of Colorado irrigated by water taken from that portion of the Arkansas river below the mouth of the Purgatoire river, and from the streams draining into the said portion of the Arkansas river. [L. '89, p. 472, §3.

3422. District number sixty-eight.—Sec. 258. Water district No. 68 shall consist of all lands irrigated by water taken from that portion of the Uncompahgre river above water district

No. 41, and from the streams draining into the said portion of the Uncompahgre river. [L. '89, p. 213, §16.

3423. District number sixty-nine.—Sec. 259. That water district No. 69 shall consist of all lands lying in the state of Colorado irrigated from ditches or canals taking water from those portions of the Dolores river within Dolores county, and from streams draining into said portion of the Dolores river. [L. '97, p. 175, §3.

3424. District number seventy.—Sec. 260. That water district No. 70 shall consist of all lands irrigated by water taken from Roan creek and all its tributaries situated within the counties of Garfield and Mesa, in this state, and also all lands in Mesa county situate north of Grand river and east of Roan creek. [L. '05, p. 243, §2.

3425. Same—Expenses of commissioner.—Sec. 261. All charges of the water commissioner and his deputies, that may be appointed for said water district No. 70, shall be borne equally between the counties of Garfield and Mesa. [L. '05, p. 244, §6.

3426. Jurisdiction of courts over districts.—Sec. 262. The district court of Garfield county shall retain and have jurisdiction over the adjudication of water rights and priorities in said water districts Nos. 39 and 70, and the district court of Mesa county shall retain and have jurisdiction of water rights and priorities in said water district No. 42. [L. '05, p. 244, §5.

B. WATER COMMISSIONER.

3427. Water commissioners—Appointment—Term of office—Bond.—Sec. 263. There shall be one water commissioner for

each of the above named districts, and for each district hereafter formed, who shall be appointed by the governor, to be selected by him from persons recommended to him by the several boards of county commissioners of the counties into which water districts may extend; and the water commissioner so appointed, shall, before entering upon his duties, give a good and sufficient bond for the faithful discharge of his duties, with not less than three sureties, in a sum not less than one thousand nor more than five thousand dollars, the amount of said bond to be fixed by the county commissioners, and approved by the governor and state engineer. The commissioner so appointed shall hold his office until his successor is appointed and qualified; *Provided, however,* That if such water district shall be embraced in more than one county, and the several counties in which such water district is situated, disagree as to the amount of the bond as herein required of water commissioners, then and in that event the governor shall fix the amount thereof, with the same effect as though fixed by the county commissioners. [L. '87, p, 302, §1; amending G. S., §1752; L. '79, p. 98, §16.

3428. Vacancies, how filled—Removal.—Sec. 264. The governor shall, by like selection and appointment, fill all vacancies which may be occasioned by death, resignation or continued absence from the district, removal, or otherwise. Said county commissioners may, from time to time, recommend persons to be appointed as above provided, and the governor may, at any time, remove any water commissioner, in his discretion. [L. '87, p. 303, §2.

3429. Oath of office within ten days.—Sec. 265. That within ten days after his appointment, and before entering upon the duties of his office, such water commissioner shall take and subscribe the oath of office prescribed by the constitution of this state. [G. S., §1753; L. '79, p. 99, §17.

3430. Commissioner begin work when called on.—Sec. 266. Said water commissioners shall not begin their work until they shall be called on by two or more owners or managers or persons controlling ditches in their several districts by application in writing stating that there is necessity for their action; and they shall not continue performing services after the necessity therefor shall cease. [G. S., §1758; L. '79, p. 107, §42.

[Penalty for failure of commissioner to act. Section 3258.]

3431. Commissioners to devote entire time—Neglect.—Sec. 267. It is hereby made the duty of the water commissioner after being called upon to distribute water, to devote his entire time to the discharge of his duties when such duties are required,

so long as the necessities of irrigation in his district shall require; and it is made his duty to be actively employed on the line of the stream or streams in his water district, supervising and directing the putting in of head-gates, waste gates, keeping the stream clear of unnecessary dams or other obstructions, and such other duties as pertain to a guard of the public streams in his water district; and for wilful neglect of his duty, he shall be liable to fifty dollars fine, with costs of suit. [L. '89, p. 471, §6.

[Report of commissioners. Section 3348.]

3432. Duty of commissioners—Open and shut head-gates.—Sec. 268. It shall be the duty of said water commissioners to divide the water in the natural stream or streams of their district among the several ditches taking water from the same, according to the prior rights of each respectively; in whole or in part to shut and fasten, or cause to be shut and fastened, by order given to any sworn assistant, sheriff or constable of the county in which the head of such ditch is situated, the head-gates of any ditch or ditches heading in any of the natural streams of the district, which, in a time of a scarcity of water, shall not be entitled to water by reason of the priority of the rights of others below them on the same stream. [G. S., §1754; L. '79, p. 99, §18.

[When commissioner shall withdraw excess water from reservoir. Section 3208.]

3433. Powers of commissioner—Commissioner subordinate to state and division engineers.—Sec. 269. Water commissioners shall, in the discharge of their duties, be invested with the powers of constables, and may arrest any person violating his orders relative to the opening or shutting down of head gates, or the using of water for irrigation purposes, and take such offender before the nearest justice of the peace, who may, if such offender be convicted, fine him in any sum not exceeding one hundred dollars, and, in default of the payment of such fine, may imprison him in the county jail not exceeding thirty days; *Provided*, That the orders of the superintendents of irrigation in their respective divisions, and the orders of the state engineer, shall be held at all times superior to the orders of water commissioners, and shall relieve any person acting in accordance with such superior orders from the penalties herein provided; *And provided, also*, That in like manner the orders issued by the state engineer shall be held superior to any order issued by any superintendent of irrigation. [L. '89, p. 469, §1.

[Supervision of state engineer over commissioners. Section 3324.]

3434. Pay of commissioner—Accounts—District in two counties.—Sec. 270. The water commissioner shall be entitled to

pay at the rate of five (5) dollars per day for each day he shall actually be employed in the duties of his office, and be paid by the county or counties in which his irrigating district may lie. Each water commissioner shall keep a just and itemized account of the time spent by him in the duties of his office, and shall present a true copy thereof, verified by oath, to the board of county commissioners of the county in which his district may be, and said board of commissioners shall allow the same; and if said irrigation district shall extend into two or more counties, then such water commissioner shall present his account for his services, verified as aforesaid, to the board of county commissioners into which his district extends, and each board of county commissioners shall pay its pro rata share thereof. [L. '9, p. 470, §2; amending L. '85, p. 254, §1; which amended G. S., §1756. L. '79, p. 106, §36.

[For payment of expenses of commissioner of district No. 70, see section 3426.]

3435. Deputy commissioner—Appointment—Salary.—Sec. 271. The water commissioner is hereby authorized to appoint not to exceed two deputies to speedily make the examinations provided for in section 1 of this act, who shall be entitled to the same compensation, and to be paid in the same manner as is by law provided for the payment of other deputy water commissioners. [L. '95, p. 197, §2.

[Section 1 above referred to is section 3433.]

3436. Commissioner may employ assistance—Salary.—Sec. 272. The water commissioner is hereby given power, whenever he shall deem it necessary, to employ a suitable assistant, or assistants, to aid him in the discharge of his duties; such assistant, or assistants, shall take the same oath as water commissioner, and shall obey his instructions, and shall be entitled to pay at the rate of two dollars and fifty cents ($2.50) per day for every day they are so employed, to be paid by county commissioners upon the certificates of the water commissioners. [L. '89, p. 470, §3; amending by implication, G. S., §1757; L. '79, p. 107, §41.

3437. Accounts kept of assistant's time.—Sec. 273. Each water commissioner shall keep an itemized account of the time of each assistant by him employed, and shall certify the same to the board of county commissioners, who shall pay such assistant, or assistants, in the same manner as provided for payment of water commissioners in section two of this act. [L. '89, p. 470, §4.

[Section 2 referred to is section 3434.]

3438. Commissioner inspect ditches—Waste of water.—Sec. 274. The water commissioners of the several water districts of this state are hereby empowered, and it is hereby made their

duty, upon the application of the owners of one or more ditches in their district, to immediately make, or cause to be made, a thorough examination of all ditches within their district for the purpose of ascertaining what use is being made by the owners of or consumers of water from said ditches; and if at any time he shall ascertain that the owner or owners of any ditch drawing water from the natural streams furnishing water to his district shall be permitting any of the waters flowing in such ditch to go to waste, or to be wastefully, or extravagantly or wrongfully, used by its water consumers, or put to any other use than that to which it is entitled to be used in the order of priority, at such times as the same is being needed by other appropriators, it shall be the duty of such water commissioners to immediately shut off the supply of water in such ditch to such an extent as in his judgment was wasted, or extravagantly, wastefully or wrongfully used. [L. '95, p. 197, §1.

3439. Failure of commissioner to perform duties—Penalty.—Sec. 275. Any water commissioner who fails to perform any of the duties imposed upon him by this act shall be deemed guilty of a misdemeanor, and, upon conviction thereof by a court of competent jurisdiction, shall be fined in a sum not less than fifty (50) dollars nor more than five hundred (500) dollars. [L. '95, p. 198, §3.

[For bribery of water commissioners see section 1723.]

VIII. IRRIGATION DISTRICTS.

3440. Irrigation district.—Sec. 276. Whenever a majority of the resident freeholders owning lands in any district desire to provide for the irrigation of the same they may propose the organization of an irrigation district under the provisions of this act, and when so organized each district shall have the powers conferred or that may hereafter be conferred by law upon such irrigation district; *Provided,* That where ditches, canals or reservoirs have been constructed before the passage of this act, such ditches, canals, reservoirs and franchises, and the lands watered thereby, shall be exempt from the operation of this law, except such district shall be formed to purchase, acquire, lease or rent

such ditches, canals, reservoirs and their franchises. [L. '05, p. 246, §1.

3441. Petition.—Sec. 277. For the purpose of the establishment of an irrigation district as provided by this act, a petition shall be filed with the board of county commissioners of the county which embraces the largest acreage of the proposed district; said petition shall state that it is the purpose of petitioners to organize an irrigation district, under the provisions of this act; said petition shall also contain a general description of the boundaries of such proposed district, the means proposed to supply water for the irrigation of the lands embraced therein, the name proposed for such district and shall select a committee of three of said petitioners to present such petition to the board of county commissioners as provided by law, praying that the said board define and establish the boundaries of said proposed district and submit the question of the final organization of the same to the vote of the qualified electors resident within said proposed district; said petition shall be signed by a majority of the resident freeholders within said proposed district, and who shall also be the owners in the aggregate of a majority of the whole number of acres belonging to the resident freeholders within the said proposed district. The said petition shall also be accompanied by a good and sufficient bond, to be approved by said board of county commissioners in double the amount of the probable cost of organizing such district, conditioned for the payment of all costs incurred in said proceedings in case said organization shall not be effected, but in case such district is so effected, then said expenses incurred by the board of county commissioners shall be paid back to said county by said district. Such petition shall be published for at least two weeks before the time at which the same is to be presented, in some newspaper of general circulation printed and published in the county where said petition is to be presented, together with a notice signed by the committee of said petitioners selected by the petition for that purpose giving the time and place of the presentation of the same to said board of county commissioners. [L. '05, p. 246, §2.

3442. Presentation and allowance of petition.—Sec. 278. When such petition is presented and it shall appear that the notice of the presentation of said petition has been given as required by law, and that said petition has been signed by the requisite number of petitioners as required by this act, the commissioners shall then proceed to define the boundaries of said proposed district from said petition and from such applications for the exclusion of lands therefrom and the inclusion of lands therein as may be made in accordance with the intent of this act;

they may adjourn such examination from time to time not exceeding three weeks in all and shall by final order duly entered define and establish the boundaries of such proposed district; *Provided*, That said board shall not modify such proposed boundaries described in the petition so as to change the objects of said petition or so as to exempt from the operation of this act any land within the boundaries proposed by the petition susceptible to irrigation by the same system of water works applicable to other lands in such proposed district; nor shall any land which will not in the judgment of the board be benefited by such proposed system be included in such district if the owner thereof shall make application at such hearing to withdraw the same, *Provided, also*, That contiguous lands not included in said proposed district as described in the petition may upon application of the owner or owners be included in such district upon such hearing.

When the boundaries of any proposed district shall have been examined and defined as aforesaid the county commissioners shall forthwith make an order allowing the prayer of said petition, defining and establishing the boundaries and designating the name of such proposed district. Thereupon the said commissioners shall by further order duly entered upon their record call an election of the qualified electors of said district to be held for the purpose of determining whether such district shall be organized under the conditions of this act, and by such order shall submit the names of one or more persons from each of the three divisions of said district as hereinafter provided to be voted for as directors therein, and for the purposes of said election shall divide said district into three divisions as nearly equal in size as may be practicable and shall provide that a qualified elector of each of said three divisions shall be elected as a member of the board of directors of said district by the qualified electors of the whole district. Each of said divisions shall constitute an election precinct and three judges shall be appointed for each of such precincts, one of whom shall act as clerk of said election; *Provided*, That in the hearing of any such petition the board of county commissioners shall disregard any informality therein, and in case they deny the same or dismiss it for any reasons on account of the provisions of this act not having been complied with, which are the only reasons upon which they shall have a right to refuse or dismiss the same, they shall state their reasons in writing therefor in detail, which shall be entered upon their records and in case these reasons are not well founded, a writ of mandamus shall, upon proper application therefor, issue out of the district court of said county, compelling them to act in compliance with this act, which writ shall be heard within twenty days from the date of its issuance, and

which twenty days shall be excluded from the forty days given the commissioners herein to act upon said petition. The officers of such district shall consist of three directors, a secretary and treasurer. [L. '05, p. 247, §3.

3443. Notice—Election.—Sec. 279. The board of county commissioners shall thereupon cause a notice embodying said orders in substance signed by the chairman of the board of county commissioners and the clerk of said board to be issued, given and published, giving public notice of said election, the time and places thereof, the matters submitted to the vote of the electors; said notice and order shall be published once a week for at least three weeks prior to such election in a newspaper of general circulation in said county, and if any portion of such proposed district lies within any other county or counties then such order and notice shall be published in a newspaper of general circulation published within each of said counties.

At all elections held under the provisions of this act all persons shall be entitled to vote, who are resident freeholders of agricultural lands within said district, or who are the owners of lands to the extent of forty acres or more within said district and reside within any county into which any part of said district shall extend, and who are qualified electors under the general laws of the state therein and who shall have paid property taxes upon property located within said district during the year preceding any such election. Electors not residing within the district shall be entitled to vote only within the division of such district wherein their lands or a major portion thereof are located; and any person entitled to vote as aforesaid, shall also be eligible to election as a director in and for the division in such district, in which the major portion of his lands are located. The ballots to be used and cast at such election for the formation of such district shall be substantially as follows: "Irrigation District—Yes," or "Irrigation District—No," or words equivalent thereto, and shall also contain the names of the persons to be voted for as members of the board of directors of said district; each elector may vote for three directors, one from each division, and shall indicate his vote by placing a marginal cross upon the ballot for or against any question submitted or name voted upon and opposite thereto at any election held under this act. [L. '07, p. 488, §1; amending L. '05, p. 249, §4.

3444. Same—Canvass of votes—Proclamation.—Sec. 280. The said board of county commissioners shall meet on the second Monday next succeeding such election and proceed to canvass the votes cast thereat; and if, upon such canvass, it appears that

at least a majority of said legal electors in said district have voted "Irrigation District—Yes," the said board shall, by an order entered on their minutes, declare such territory duly organized as an irrigation district, under the name and style theretofore designated, and shall declare the persons receiving, respectively, the highest number of votes for such several offices, to be duly elected to such office. Said board shall cause a copy of such order, including a plat of said district, duly certified by the clerk of the board of county commissioners, to be immediately filed for record in the office of the county clerk of each county in which any portion of such lands are situated and no board of county commissioners of any county, including any portion of such district, shall, after the date of organization of such district, allow another district to be formed, including any of the lands of such district, without the consent of the board of directors thereof; and from and after the date of such filing, the organization of such district shall be complete, and the officers thereof shall immediately enter upon the duties of their respective offices, upon qualifying in accordance with law, and shall hold such offices, respectively, until their successors are elected and qualified. For the purpose of the election above provided for, the said board of county commissioners must establish a convenient number of election precincts and polling places in said proposed district, and define the boundaries thereof, which said precincts may thereafter be changed by the board of directors of such districts, and shall also appoint the judges of election for each such precinct, one of whom shall act as clerk of election. [L. '05, p. 249, §5.

3445. Officers—Election—Bond.—Sec. 281. The regular election of said district, for the purpose of electing a board of directors shall be held on the first Tuesday after the first Monday in December of each year, at which time one director shall be elected for a term of three years. *Provided,* That at the first election held to choose the first board of directors, after the organization of any district shall have been effected, the person having the highest number of votes shall continue in office for the full term of three years; the next highest two years; and the next highest one year. But if two or more persons have the same number of votes, then their term shall be determined by lot, under the direction of the county judge of the county wherein the organization of said district shall have been effected. The person receiving the highest number of votes for any office to be filled at such election is elected thereto. Within ten days after receiving their certificates of election hereinafter provided for said officers shall take and subscribe the official oath and file

the same in the office of the county clerk wherein the organization was effected, and on the first day of January following, shall assume the duties of their respective offices. Each member of the board of directors shall execute an official bond in the sum of three thousand (3,000) dollars which bond shall be approved by the county judge of the county wherein such organization was effected, and shall be recorded in the office of the county clerk thereof. All official bonds herein provided shall be in form prescribed by law for official bonds for county officials, except that the obligee named in said bonds shall be to the district, and shall be filed with the county clerk at the same time as the filing of the oath herein provided. *Provided, further*, That in all irrigation districts heretofore organized and now exercising the powers granted by law, the term of office of two of the members of their boards of directors is hereby extended for a period of one and two years respectively, and it shall be the duty of said board of directors at their regular meeting held in October, 1907, to determine by lot, under the direction of the county judge of the county wherein such organization was effected, which of said directors shall serve the additional one or two years respectively. [L. '07, p. 489, §2; amending L. '05, p. 250, §6.

[See Chapter 99, Official Bonds. See also section 1353.]

3446. Same—Election notice.—Sec. 282. The office of the board of directors shall be located in the county where the organization was effected. Fifteen days before any election held under this act, subsequent to the organization of the district, the secretary who shall be appointed by the board of directors shall cause notice specifying the polling places of each precinct to be posted in three public places in each election precinct, of the time and place of holding the election, and shall also post a general notice of the same in the office of said board, which shall be established and kept at some fixed place to be determined by said board in said county. Prior to the time for posting the notices, the board must appoint from each precinct, from the electors thereof, three judges, one of whom shall act as clerk, who shall constitute a board of election for such precinct. If the board fails to appoint a board of election, or the members appointed do not attend the opening of polls on the morning of election, the electors of the precinct present at that hour may appoint the board, or supply the place of an absent member thereof. The board of directors must, in its order appointing the board of election, designate the hour and the place in the precinct where the election must be held. [L. '05, p. 251, §7.

3447. Same—Election officers' duties.—Sec. 283. One of the judges shall be chairman of the election board and may: *First*—Administer all oaths required in the progress of an election.

Second—Appoint judges and clerks, if during the progress of the election any judge or clerk ceases to act. Any member of the board of election, or any clerk thereof, may administer and certify oaths required to be administered during the progress of an election. Before opening the polls, each member of the board must take and subscribe an oath to faithfully perform the duties imposed upon them by law. Any elector of the precinct may administer and certify such oath. The polls must be opened at eight o'clock in the morning of election and be kept open until six o'clock p. m. of the same day. It shall be the duty of the clerk of the board of election to forthwith deliver the returns duly certified to the board of directors of the district. [L. '05, p. 251, §8.

3448. Same—Canvass of votes.—Sec. 284. No lists, tally paper, or certificates returned from any election shall be set aside or rejected for want of form if it can be satisfactorily understood. The board of directors must meet at its usual place of meeting on the first Monday after election and canvass the returns. If at the time of meeting the returns from each precinct in the district in which the polls were open have been received, the board of directors must then and there proceed to canvass the returns; but if all the returns have not been received, the canvass must be postponed from day to day until the returns have been received, or until six postponements have been had. The canvass must be made in public and by opening the returns and counting the votes of the district for each person voted for, and declaring the results thereof. The board shall declare elected the person receiving the highest number of votes so returned for each office, and also declare the result of any question submitted. [L. '05, p. 252, §9.

3449. Same—Records—Vacancy and term of office.—Sec. 285. The secretary of the board of directors must, as soon as the result of any election held under the provisions of this act is declared, enter in the records of such board and file with the county clerk of the county in which the office of said district is located, a statement of such results, which statement must show: *First*—A copy of the publication notice of said election. *Second*—The names of the judges of said election. *Third*—The whole number of votes cast in the district and in each precinct of the district. *Fourth*—The names of the persons voted for. *Fifth*—The office to fill which each person was voted for. *Sixth*—The number of votes given in each precinct for each of such persons. *Seventh*—The number of votes given in the district for each of such persons. *Eighth*—The names of the persons declared elected. *Ninth*—The result declared on any question sub

mitted in accordance with the majority of the votes cast for or against such question. The board of directors must declare elected the person having the highest number of votes given for each office, and also the result of any question submitted. The secretary must immediately make out and deliver to such person a certificate of election, signed by him and authenticated with the seal of the board. In case of a vacancy in the board of directors, by death, removal, or inability from any cause, to properly discharge the duties as such director, the vacancy shall be filled by appointment by the remaining members of the board, and upon their failure or inability to act within thirty days after such vacancy occurs, then upon petition of five electors of said district the board of county commissioners of the county where the office of said board of directors is situate, shall fill such vacancy or vacancies. Any director appointed as above provided shall hold his office until the next general election of said district, and until his successor is elected and qualified. [L. '05, p. 252, §10.

3450. Board of directors—Officers—General duties—Ratio of water distribution.—Sec. 286. The directors, having duly qualified, shall organize as a board, elect a president from their number, and appoint a secretary. The board shall have power, and it shall be their duty, to adopt a seal, manage and conduct the affairs and business of the district, make and execute all necessary contracts, employ such agents, attorneys, officers and employes as may be required, and prescribe their duties, establish equitable rules and regulations for the distribution and use of water among the owners of said land, and generally to perform all such acts as shall be necessary to fully carry out the purposes of this act. Said board shall have the power in addition to the means to supply water to said district proposed by the petition submitted for the formation of said district, to construct, acquire or purchase any and all canals, ditches, reservoirs, reservoir sites, water, water rights, rights of way or other property necessary for the use of the district. In case of the purchase of any property by such district the bonds of the district hereinafter provided for may be used at their par value in payment without previous offer of such bonds for sale. But no contract involving a consideration exceeding ten thousand (10,000) dollars, and not exceeding twenty-five thousand (25,000) dollars shall be binding, unless such contract shall be authorized and ratified in writing by not less than one-third of the legal electors of said district according to the number of votes cast at the last district election; nor shall any contract in excess of twenty-five thousand (25,000) dollars be binding until such contract shall have been

authorized and ratified at an election, in manner as is provided for the issue of bonds.

The said rules and regulations shall be printed in convenient form as soon as the same are adopted, for distribution in the district. All waters distributed shall be apportioned to each land owner pro rata to the lands assessed under this act within such district. The board of directors shall have power to lease or rent the use of water or contract for the delivery thereof to occupants of other land within or without the said district at such prices and on such terms as they deem best, provided the rental shall not be less than one and one-half times the amount of the district tax for which said land would be liable if held as a freehold; *And provided, further*, No vested or prescriptive right to the use of such water shall attach to said land by virtue of such lease or such rental, provided that any land owner in said district may with the consent of the board of directors assign the right to the whole or any portion of the water so apportioned to him for any one year where practicable to any other bona fide land owner, to be used in said district for use on his land for said year, provided such owners shall have paid all amounts due on assessments upon all such lands. [L. '05, p. 253, §11.

3451. Directors—Meetings—Duties — Domain — Public use.—Sec. 287. The board of directors shall hold a regular quarterly meeting in their office on the first Tuesday in January, April, July and October, and such special meetings as may be required for the proper transaction of business. All special meetings shall be called by the president of the board, or any two directors. All meetings of the board must be public, and two members shall constitute a quorum for the transaction of business; and on all questions requiring a vote there shall be a concurrence of at least two members of said board. All records of the board must be open to the inspection of any elector during business hours. The board, its agents, and employes, shall have the right to enter upon any land in the district, to make surveys and to locate and construct any canal or canals, and the necessary laterals. Said board shall also have the right to acquire all lands, water rights, franchises and other property necessary for the construction, use, maintenance, repair, and improvement of its canals, ditches, reservoirs and water works; and shall also have the right by purchase or condemnation to acquire rights of way for the construction or enlargement of any of its ditches, canals or reservoirs, also lands for reservoir sites. [L. '05, p. 254, §12.

3452. Property—Title.—Sec. 288. The title to all property acquired under the provisions of this act shall immediately and

by operation of law vest in such irrigation district, in its corporate name, and shall be held by such district in trust for, and is hereby dedicated and set apart for the uses and purposes set forth in this act, and shall be exempt from all taxation, and said board is hereby authorized and empowered to hold, use and acquire, manage, occupy and possess said property as herein provided; *Provided*, That when any district contemplated in this act shall find it necessary to procure and acquire a supply of water from outside the boundaries of this state, then and in such event it shall be lawful for said district to contract and pay for the same in the same manner as other property acquired by the district is purchased and paid for. [L. '05, p. 255, §13.

3453. Conveyances—Suits.—Sec. 289. The said board is hereby authorized and empowered to take conveyances or assurances for all property acquired by it under the provisions of this act in the name of such irrigation district to and for the purposes herein expressed and to institute and maintain any and all actions and proceedings, suits at law or in equity, necessary or proper in order to fully carry out the provisions of this act or to enforce, maintain, protect, or preserve any or all rights, privileges and immunities created by this act or acquired in pursuance thereof. And in all courts, actions, suits, or proceedings the said board may sue, appear and defend in person or by attorneys and in the name of such irrigation district. Judicial notice shall be taken in all actions, suits and judicial proceedings in any court of this state of the organization and existence of any irrigation district of this state, now or hereafter organized, from and after the filing for record in the office of the county clerk of the certified copy of the order of the board of county commissioners mentioned in section 3 of this act; and a certified copy of said order shall be prima facie evidence in all actions, suits and proceedings in any court of this state of the regularity and legal sufficiency of all acts, matters and proceedings therein recited and set forth; and any such irrigation district, in regard to which any such order has been heretofore or may hereafter be entered, and such certified copy thereof, so filed for record, and which has exercised or shall exercise the rights and powers of such a district, and shall have had or shall have in office a board of directors exercising the duties of their office and the legality or regularity of the formation or organization whereof shall not have been questioned by proceedings in quo warranto instituted in the district court of the county in which such district or the greater portion thereof is situated within one year from the date of such filing, shall be conclusively deemed to be a legally and regularly organized, established and existing irri-

gation district within the meaning of this act; and its due and lawful formation and organization shall not thereafter be questioned in any action, suit or proceeding whether brought under the provisions of this act or otherwise. [L. '05, p. 255, §14.

[Section 3 above referred to is section 3442.]

3454. Bonds—Elections.—Sec. 290. For the purpose of constructing or purchasing or acquiring necessary reservoir sites, reservoirs, water rights, canals, ditches and works, and acquiring the necessary property and rights therefor, for the purpose of paying the first year's interest upon the bonds herein authorized, and otherwise carrying out the provisions of this act, the board of directors of any such district shall, as soon after such district has been organized as may be practicable, estimate and determine the amount of money necessary to be raised for such purposes, and shall forthwith call a special election, at which election shall be submitted to the electors of such district possessing the qualifications prescribed by this act the question of whether or not the bonds of said district shall be issued in the amount so determined. A notice of such election must be given by posting notices in three public places in each election precinct in said district for at least twenty days, and also by publication of such notice in some newspaper published in the county where the office of the board of directors of such district is required to be kept, once a week for at least three successive weeks. Such notice shall specify the time of holding the election, the amount of bonds proposed to be issued, and said election must be held and the result thereof determined and declared in all respects as nearly as possible in conformity with the provisions of this act governing the election of officers; *Provided*, That no informalities in conducting such election shall invalidate the same if the election shall have been otherwise fairly conducted. At such election the ballots shall contain the words "Bonds—Yes" or "Bonds—No" or words equivalent thereto. If a majority of the legal electors who are freeholders and taxpayers within said district have voted "Bonds—Yes" the board of directors shall immediately cause bonds in such amount to be issued and payable in series as follows, to wit:

At the expiration of eleven years, not less than five per cent. of the whole amount and number of said bonds; at the expiration of twelve years, not less than six per cent. of the whole amount and number of said bonds; at the expiration of thirteen years, not less than seven per cent. of the whole amount and number of said bonds; at the expiration of fourteen years, not less than eight per cent. of the whole amount and number of said bonds; at the expiration of fifteen years, not less than nine per cent.

of the whole amount and number of said bonds; at the expiration of sixteen years, not less than ten per cent. of the whole amount and number of said bonds; at the expiration of seventeen years, not less than eleven per cent. of the whole amount and number of said bonds; at the expiration of eighteen years, not less than thirteen per cent. of the whole amount and number of said bonds; at the expiration of nineteen years, not less than fifteen per cent. of the whole amount and number of said bonds; at the expiration of twenty years, a percentage sufficient to pay off the remainder of said bonds; that the several enumerated percentages be of the entire amount of the bond issue; that each bond must be payable at the given time for its entire amount, and not for a percentage; that said bonds shall bear interest at the rate of not to exceed six per cent. per annum payable semi-annually on the first day of June and December of each year. The principal and interest shall be payable at the office of the county treasurer of the county in which the organization of the district was effected as aforesaid, and at such other place as the board of directors may designate in such bond. Said bonds shall be each of the denomination of one hundred dollars, nor more than five hundred dollars, shall be negotiable in form, executed in the name of the district and signed by the president and secretary, and the seal of the district shall be affixed thereto. Said bonds shall be numbered consecutively as issued, and bear date at the time of their issue. Coupons for the interest shall be attached to each bond bearing the lithographed signatures of the president and secretary. Said bonds shall express on their face that they are issued by the authority of this act, stating its title and date of approval. The secretary shall keep a record of the bonds sold, their number, date of sale, the price received, and the name of the purchaser. *Provided,* Any such district may, by a majority vote of the legal electors of said district, provide for the issuance of bonds that will mature in any number of years less than twenty, and arrange for the payment thereof, in series as above provided; *Provided, further,* That when the money provided by any previous issue of bonds has become exhausted by expenditures herein authorized therefor, and it becomes necessary to raise additional money for such purposes, additional bonds may be issued submitting the question at special election to the qualified voters of said district, otherwise complying with the provisions of this section in respect to an original issue of such bonds; *Provided, also,* The lien for taxes, for the payment of the interest and principal of any bond issue, shall be a prior lien to that of any subsequent bond issue. [L. '05, p. 256, §15.

3455. Bonds—Sale—Proceeds.—Sec. 291. The board may sell bonds from time to time in such quantities as may be necessary and most advantageous to raise the money for the construction or purchase of canals, reservoir sites, reservoirs, water rights and works, and otherwise to fully carry out the object and purposes of this act. Before making any sale the board shall, at a meeting, by resolution declare its intention to sell a specified amount of the bonds and the day and hour and place of such sale, and shall cause such resolution to be entered in the minutes, and notice of the sale to be given by publication thereof at least twenty days in a daily newspaper published in the city of Denver, and in any other newspaper, at their discretion. The notice shall state that sealed proposals will be received by the board at their office, for the purchase of the bonds, till the day and hour named in the resolution. At the time appointed the board shall open the proposals and award the purchase of the bonds to the highest responsible bidder and may reject all bids; but said board shall, in no event, sell any of said bonds for less than ninety-five per cent. of the face value thereof. In case no bid is made and accepted as above provided the board of directors is hereby authorized to use said bonds for the purchase of canals, reservoir sites, reservoirs, water rights and works, or for the construction of any canal, reservoir and works; *Provided,* Such bonds shall not be so disposed of at less than ninety-five per cent. of the face value thereof. [L. '05, p. 258, §16.

[State may purchase ten per cent. of the bond issue. Section 5198.]

3456. Bonds—Payment—Lien.—Sec. 292. Said bonds, and the interest thereon, shall be paid by revenue derived from an annual assessment upon the real property of the district, and the real property of the district shall be and remain liable to be assessed for such payments as herein provided. [L. '05, p. 259, §17.

3457. Board of directors—Levy.—Sec. 293. It shall be the duty of the board of directors, on or before September first of each year, to determine the amount of money required to meet the maintenance, operating and current expenses for the ensuing year, and to certify to the county commissioners of the county in which the office of said district is located, said amount, together with such additional amount as may be necessary to meet any deficiency in the payment of said expenses theretofore incurred. [L. '05, p. 259, §18.

3458. Assessor—Assessment.—Sec. 294. It shall be the duty of the county assessor of any county embracing the whole or a part of any irrigation district, to assess and enter upon his records as assessor in its appropriate column, the assessment of all

real estate, exclusive of improvements, situate, lying and being within any irrigation district in whole or in part of such county. Immediately after said assessment shall have been extended as provided by law, the assessor shall make returns of the total amount of such assessment to the county commissioners of the county in which the office of said district is located. All lands within the district for the purposes of taxation under this act shall be valued by the assessor at the same rate per acre; *Provided*, That in no case shall any land be taxed for irrigation purposes under this act, which from any natural cause cannot be irrigated, or is incapable of cultivation. [L. '05, p. 259, §19.

3459. County commissioners.—Sec. 295 It shall be the duty of the county commissioners of the county in which is located the office of any irrigation district, immediately upon receipt of the returns of the total assessment of said district, and upon the receipt of the certificate of the board of directors certifying the total amount of money required to be raised as herein provided, to fix the rate of levy necessary to provide said amount of money, and to fix the rate necessary to provide the amount of money required to pay the interest and principal of the bonds of said district as the same shall become due; also, to fix the rate necessary to provide the amount of money required for any other purposes as in this act provided, and which are to be raised by the levy of assessments upon the real property of said district; and to certify said respective rates to the county commissioners of each county embracing any portion of said district. The rate of levy necessary to raise the required amount of money on the assessed valuation of the property of said district shall be increased fifteen per cent. to cover delinquencies. For the purposes of said district it shall be the duty of the county commissioners of each county in which any irrigation district is located in whole or in part, at the time of making levy for county purposes, to make a levy, at the rates above specified, upon all real estate in said district within their respective counties. All taxes levied under this act are special taxes. [L. '05, p. 260, §20.

3460. District treasurer.—Sec. 296. The county treasurer of the county in which is located the office of any irrigation district, shall be and is hereby constituted ex-officio district treasurer of said district, and said county treasurer shall be liable upon his official bond and to indictment and criminal prosecution for malfeasance, misfeasance or failure to perform any duty herein prescribed as county treasurer or district treasurer, as is provided by law in other cases as county treasurer. Said treasurer shall collect, receive and receipt for all moneys belonging to said district. It shall be the duty of the county treasurer of each county

in which any irrigation district is located in whole or in part, to collect and receipt for all taxes levied as herein provided in the same manner and at the same time, and on the same receipt as is required in the collection of taxes upon real estate for county purposes; *Provided, however,* That such county treasurer shall receive in payment of the general fund tax above mentioned for the year in which said taxes were levied, warrants drawn against said general fund the same as so much lawful money of the United States, if such warrant does not exceed the amount of the general fund tax which the person tendering the same owns; *Provided, further,* That such county treasurer shall receive in payment of the district bond fund taxes above mentioned for the year in which said taxes were levied, interest coupons or bonds of said irrigation district maturing within the year the same as so much lawful money of the United States, if such interest coupons or bonds do not exceed the amount of district bonds funds tax which the person tendering the same owns. The county treasurer of each county comprising a portion only of the irrigation district, excepting the county treasurer of the county in which the office of said district is located, shall on the first Mondays of every month remit to the district treasurer aforesaid all moneys, warrants, coupons, or bonds theretofore collected or received by him on account of said district. Every county treasurer shall keep a bond fund account and a general fund account. The bond fund account shall consist of all moneys received on account of interest and principal of bonds issued by said district, said accounts for interest and principal shall be kept separate. The general fund shall consist of all other moneys or general fund warrants received by the collection of taxes or otherwise. The district treasurer aforesaid shall pay out of said bond fund, when due, the interest and principal of the bonds of said district, at the time and place specified in said bonds, and shall pay out of said general fund only upon the order of the district, signed by the president and countersigned by the secretary of said district as herein provided. The district treasurer, on the fifteenth day of each month, shall report to the secretary of the district the amount of money in his hands to the credit of the respective funds above provided; the amount of warrants paid during the previous month, and the amount of registered warrants if there be any. All such district taxes collected and paid to the county treasurers as aforesaid, shall be received by said treasurers in their official capacity, and they shall be responsible for the safe-keeping, disbursement and payment thereof the same as for other moneys collected by them as such treasurers; *Provided,* Said county treasurer shall receive as his sole compensation for the collection of such taxes, such amount as the board of directors may allow, to

be not less than twenty-five (25) dollars, nor more than one hundred (100) dollars, which compensation shall be considered as a part of the regular salary of such county treasurer as provided by law. [L. '07, p. 490, §3; amending L. '05, p. 260, §21.

[For treasurer using public money or dealing in warrants see sections 1820-1826.]

3461. Assessment—Collection.—Sec 297. The revenue laws of this state for the assessment, levying and collection of taxes on real estate for county purposes, except as herein modified, shall be applicable for the purposes of this act, including the enforcement of penalties and forfeiture for delinquent taxes. [L. '05, p. 262, §22.

3462. Construction—Contract.—Sec. 298. After adopting a plan for the construction of canals, reservoirs, and works, the board of directors shall give notice, by publication thereof, not less than twenty days in a newspaper published in each of the counties into which any such irrigation extends, provided a newspaper is published therein, and in such other newspapers as they may deem advisable, calling for bids for the construction of said work or any portion thereof; if less than the whole work is advertised, then the portion so advertised must be particularly described in such notice; said notice shall set forth that plans and specifications can be seen at the office of the board, and that the board will receive sealed proposals therefor, and that the contract will be let to the lowest responsible bidder, stating the time and place for opening the proposals, which at said time and place shall be opened in public, and as soon as convenient thereafter the board shall let said work, either in portions, or as a whole, to the lowest responsible bidder, or they may reject any or all bids and readvertise for proposals, or may proceed to construct the work under their own superintendence. Contracts for the purchase of material shall be awarded to the lowest responsible bidder. The person or persons to whom a contract may be awarded shall enter into a bond, with good and sufficient sureties, to be approved by the board, payable to said district for its use, for not less than ten per cent. of the amount of the contract price, conditioned for the faithful performance of said contract. The work shall be done under the direction and to the satisfaction of the engineer in charge, and be approved by the board. [L. '05, p. 262, §23.

3463. Claim—Audit—Payment—Financial report.—Sec. 299. No claims shall be paid by the district treasurer until the same shall have been allowed by the board, and only upon warrants signed by the president, and countersigned by the secretary, which warrants shall state the date authorized by the board and for what purposes; and if the district treasurer has not sufficient

money on hand to pay such warrant when it is presented for payment, he shall endorse thereon "Not paid for want of funds, this warrant draws interest from date at six per cent. per annum," and endorse thereon the date when so presented, over his signature, and from the time of such presentation until paid such warrant shall draw interest at the rate of six per cent. per annum; *Provided,* When there is more than the sum of one hundred dollars or more in the hands of the treasurer it shall be applied upon said warrant. All claims against the district shall be verified the same as required in the case of claims filed against counties in this state, and the secretary of the district is hereby authorized and empowered to administer oaths to the parties verifying said claims, the same as the county clerk or notary public might do. The district treasurer shall keep a register in which he shall enter each warrant presented for payment, showing the date and amount of such warrant, to whom payable, the date of the presentation for payment, the date of payment, and the amount paid in redemption thereof, and all warrants shall be paid in the order of their presentation for payment to the district treasurer. All warrants shall be drawn payable to the claimant or bearer, the same as county warrants. [L. '05, p. 262, §24.

3464. Expense of organization, how defrayed.—Sec. 300. For the purpose of defraying the expenses of the organization of the district, and the care, operation, management, repair and improvement of all canals, ditches, reservoirs and works, including salaries of officers and employes, the board may either fix rates of tolls and charges and collect the same of all persons using said canal and water for irrigation, or other purposes, and in addition thereto may provide, in whole or in part, for the payment of such expenditures by levy of assessments therefor, as heretofore provided, or by both tolls and assessment; *Provided,* That in case the money raised by the sale of bonds issued be insufficient, and in case bonds be unavailable for the completion of the plans of works adopted, it shall be the duty of the board of directors to provide for the completion of said plans by levy of an assessment therefor in the same manner in which levy of assessments is made for the other purposes provided for in this act. [L. '05, p. 263, §25.

3465. Crossing streams, highways, railroads, state lands, etc.—Sec. 301. The board of directors shall have the power to construct the said works across any stream of water, water course, street, avenue, highway, railway, canal, ditch, or flume which the route of said canal or canals may intersect or cross; and if such railroad company and said board, or the owners and controllers of said property, thing or franchise so to be crossed, can

not agree upon the amount to be paid therefor, or the points or the manner of said crossings, the same shall be ascertained and determined in all respects as is provided in respect to the taking of land for public uses. The right of way is hereby given, dedicated, and set apart, to locate, construct and maintain said works or reservoirs, over, through, or upon any of the lands which are now, or may be the property of the state. [L. '05, p. 264, §26.

3466. Officers' salaries—Not interested in contracts.—Sec. 302. The board of directors shall each receive at the rate of two and one-half dollars per day while attending meetings, and their actual and necessary expenses while engaged in official business. The salary of the secretary shall not exceed eight hundred dollars per annum. No director or any officer named in this act shall, in any manner, be interested, directly or indirectly, in any contract awarded or to be awarded by the board, or in the profits to be derived therefrom; nor shall receive any bonds, gratuity, or bribe, and for any violation of this provision, such officer shall be deemed guilty of a felony, and such conviction shall work a forfeiture of his office, and he shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the penitentiary not exceeding five years nor less than one year. [L. '05, p. 264, §28.

3467. Limit of indebtedness.—Sec. 303. The board of directors, or other officers of the district, shall have no power to incur any debt or liability, either by issuing bonds or otherwise, in excess of the express provisions of this act, and any debt or liability incurred in excess of such express provisions shall be and remain absolutely void. [L. '05, p. 264, §28.

3468. Insufficient supply—Distribution.—Sec. 304. In case the volume of water in any canal, reservoir or other works in any district shall not be sufficient to supply the continual wants of the entire district and susceptible of irrigation therefrom, then it shall be the duty of the board of directors to distribute all available water upon certain or alternate days to different localities, as they may in their judgment think best for the interests of all parties concerned. [L. '05, p. 264, §29.

3469. Compensation for property taken.—Sec. 305. Nothing herein contained shall be deemed to authorize any person or persons, to divert the waters of any river, creek, stream, canal, or reservoir to the detriment of any person or persons having a prior right to the waters of such river, creek, stream, canal, or reservoirs, unless previous compensation be ascertained and paid therefor, under the laws of this state authorizing the taking of private property for public use. [L. '05, p. 265, §30.

3470. Boundaries—Change of—Effect.—Sec. 306. The boundaries of any irrigation district now or hereafter organized under the provisions of this act, may be changed in the manner herein prescribed; but such change of the boundaries of the district shall not impair or affect its organization, or its rights in or to property, or any of its rights or privileges of whatsoever kind or nature, nor shall it affect, impair, or discharge any contract, obligation, lien, or charge for, or upon which it was or might become liable or chargeable had such change of its boundaries not been made. [L. '05, p. 265, §31.

3471. Contiguous territory—Annexation—Petition.—Sec. 307. The holder or holders of title, or evidence of title, representing a majority of the acreage of any body of land adjacent to or situate within the boundaries of any irrigation district, may file with the board of directors of said district a petition in writing, praying that such lands be included in such district. The petition shall describe the tracts, or body of land owned by the petitioners, but such description need not be more particular than is required when such lands are entered by the county assessor in the assessment book. Such petition shall be deemed to give the assent of the petitioners to the inclusion in said district of the lands described in the petition, and such petition must be acknowledged in the same manner that conveyances of land are required to be acknowledged. [L. '05, p. 265, §32.

3472. Contiguous territory—Notice—Sec. 308. The secretary of the board of directors shall cause notice of the filing of such petition to be given and published once each week for three successive weeks, in a newspaper published in the county where the office of said board is situate, which notice shall state the filing of such petition and the names of the petitioners, a description of the lands mentioned in said petition, and the prayer of said petitioners; giving notice to all persons interested, to appear at the office of said board at a time named in said notice, and show cause, in writing, if any they have, why the petition should not be granted. The time specified in the notice at which it shall be required to show cause shall be the regular meeting of the board next after the expiration of the time for the publication of the notice. The petitioner, or petitioners, shall advance to the secretary sufficient money to pay the estimated cost of all proceedings under such petition before the secretary shall be required to give such notice. [L. '05, p. 266, §33.

3473. Contiguous territory—Hearing.—Sec. 309. The board of directors, at the time and place mentioned in said notice, or at such time or times to which the hearing of said petition may adjourn, shall proceed to hear the petition, and all objections

thereto, presented in writing by any person, showing cause as aforesaid, why said petition should not be granted. The failure of any person interested to show cause, in writing, as aforesaid, shall be deemed and taken as an assent on his part to the inclusion of such lands in said district as prayed for in said petition. [L. '05, p. 266, §34.

3474. Payment.—Sec. 310. The board of directors, to whom such petition is presented, may require as a condition precedent to the granting of the same, that the petitioners shall severally pay to such district such respective sums, as nearly as the same can be estimated by the board, as said petitioners or their grantors would have been required to pay to such district as assessments for the payment of its pro rata share of all bonds and the interest thereon, which may have previously thereto been issued by said district had such lands been included in such district at the time the same was originally formed or when said bonds were so issued. [L. '05, p. 266, §35.

3475. Boundaries—Orders.—Sec. 311. The board of directors if they deem it not for the best interests of the district to include therein the lands mentioned in the petition, shall by order reject the said petition, but if they deem it for the best interests of the district that said lands be included the board may order that the district be so changed as to include therein the lands mentioned in the said petition. The order shall describe the entire boundaries of the district with the lands so included, if the district boundaries be changed thereby, and for that purpose the board may cause a survey to be made of such portion of such boundaries as may be deemed necessary, *Provided,* If within thirty days from the making of such order a majority of the qualified electors of the district protest in writing to said board against the inclusion of such lands in said district, said order shall be held for naught and such lands shall not be included therein. [L. '05, p. 266, §36.

3476. Order—Record—Effect.—Sec. 312. Upon the allowance of such petition and in case no protest has been filed with the board within thirty days after the entry of said order as aforesaid, a certified copy of the order of the board of directors making such change, and a plat of such district, showing such change, if any, certified by the president and secretary, shall be filed for record in the office of the clerk and recorder of each county in which are situate any of the lands of the district, and the district shall remain an irrigation district, as fully to every intent and purpose as if the lands which are included in the district by the change of the boundaries as aforesaid, had been included therein at the organization of the district; and said district as so changed and all the lands therein shall be liable

for all existing obligations and indebtedness of the organized district. [L. '05, p. 267, §37.

3477. Records—Evidence.—Sec. 313. Upon the filing of the copies of the order and the plat, as in the last preceding section mentioned, the secretary shall record in the minutes of the board the petition aforesaid; and the said minutes, or a certified copy thereof, shall be admissible in evidence with the same effect as the petition. [L. '05, p. 267, §38.

3478. Legal representatives petitioners.—Sec. 314. A guardian, executor or an administrator of an estate, who is appointed as such under the laws of this state, and who, as such guardian, executor or administrator, is entitled to the possession of the lands belonging to the estate which he represents, may on behalf of his ward or the estate which he represents, upon being thereunto authorized by the proper court, sign and acknowledge the petition in this act mentioned, and may show cause, as in this act mentioned, why the boundaries of the district should not be changed. [L. '05, p. 267, §39.

3479. Redivision of district—Election of Officers.—Sec. 315. In case of the inclusion of any land within any district by proceeding under this act the board of directors shall, at least thirty days prior to the next succeeding general election, make an order redividing such district into three divisions, as nearly equal in size as may be practicable, which shall be numbered first, second and third, and one director shall thereafter be elected by each division. For the purposes of election the board of directors shall establish a convenient number of election precincts in said districts, and define the boundaries thereof, which said precincts may be changed from time to time as the board may deem necessary. [L. '05, p. 268, §40.

3480. Exclusion of lands.—Sec. 316. Any tract of land included within the boundaries of any such district, at or after its organization, under the provisions of this act, may be excluded therefrom, in the manner herein prescribed, but such exclusion of land from the district shall not impair or affect its organization, or its rights in or to property, or any of its rights or privileges of whatever kind or nature; nor shall such exclusion affect, impair or discharge any contract, obligation, lien or charge for or upon which it would or might become liable or chargeable, had such land not been excluded from the district. [L. '05, p. 268, §41.

3481. Petition for exclusion.—Sec. 317. The owner or owners in fee of any lands constituting a portion of any irrigation district may file with the board of directors of the district, a petition praying that such lands may be excluded and taken from said district. The petition shall describe the lands which the

petitioners desire to have excluded, but the description of such lands need not be more particular than required when lands are entered in the assessment book by the county assessor. Such petition must be acknowledged in the same manner and form as is required in case of a conveyance of land. [L. '05, p. 268, §42.

[For form of acknowledgment see section 691.]

3482. Same—Notice.—Sec. 318. The secretary of the board of directors shall cause a notice of the filing of such petition to be published for at least three weeks in some newspaper published in the county where the office of the board of directors is situated, and if any portion of said district lie within another county or counties, then said notice shall be so published in a newspaper published within each of said counties; or if no newspapers be published therein, then by posting such notice for the same time in at least three public places in said district, and in case of the posting of said notices, one of said notices must be so posted on the lands proposed to be excluded. The notice shall state the filing of such petition, the names of the petitioners, description of the lands mentioned in said petition, and the prayer of said petitioners; and it shall notify all persons interested to appear at the office of said board at a time named in said notice, and show cause in writing, if any they have, why said petition should not be granted. The time to be specified in the notice at which they shall be required to show cause shall be the regular meeting of the board next after the expiration of the time for the publication of the notice. The petitioner or petitioners shall advance to the secretary sufficient money to pay the estimated cost of all proceedings under such petition before the secretary shall give such notice. [L. '05, p. 269, §43.

3483. Same—Hearing.—Sec. 319. The board of directors at the same time and place mentioned in the notice, or at the time or times to which the hearing of said petition may be adjourned, shall proceed to hear the petition and all objections thereto, presented in writing by any persons, showing cause as aforesaid why the prayer of said petitioner should not be granted. The filing of such petition with such board as aforesaid, shall be deemed and taken as an assent by each and all of such petitioners to the exclusion from such district of the lands mentioned in the petition, or any part thereof. [L. '05, p. 269, §44.

3484. Same—Orders.—Sec. 320. The board of directors, if they deem it not for the best interest of the district that the lands mentioned, in the petition or some portion thereof, should be excluded from said district, shall order that said petition be denied; but if they deem it for the best interest of the district that the lands mentioned, in the petition, or some portion thereof, be excluded from the district, and if there are no outstanding bonds

of the district, then the board may order the lands mentioned in the petition, or some defined portion thereof, to be excluded from the district. *Provided*, If within thirty days from the making of such order a majority of the qualified electors of the district protest in writing to said board against the exclusion of such lands from said district, said order shall be held for naught and such lands shall not be excluded therefrom. [L. '05, p. 269, §45.

3485. Order—Record—Effect.—Sec. 321. Upon the allowance of such petition and in case no protest has been filed with the board within thirty days after the entry of said order as aforesaid, a certified copy of the order of the board of directors making such change and a plat of such district showing such change, certified by the president and secretary, shall be filed for record in the office of the clerk and recorder of each county in which are situate any of the lands of the district, and the district shall remain an irrigation district as fully to every intent and purpose as if the lands which are excluded by the change of the boundaries as aforesaid, had not been excluded therefrom. [L. '05, p. 270, §46.

3486. Division of districts.—Sec. 322. At least thirty days before the next general election of such district the board of directors thereof may make an order dividing said district into three divisions, as nearly equal in size as practicable, which shall be numbered first, second and third, and one director shall be elected for each division by the qualified electors of the whole district. For the purpose of election in such district the said board of directors must establish a convenient number of election precincts, and define the boundaries thereof, which said precincts may be changed from time to time, as the board of directors may deem necessary. .[L. '05, p. 270, §47.

3487. Dissolution of district—Election.—Sec. 323 Whenever a majority of the resident freeholders, representing a majority of the number of acres of the irrigable land, in any irrigation district organized, or hereafter to be organized, under this act, shall petition the board of directors to call a special election, for the purpose of submitting to the qualified electors of said irrigation district a proposition to vote on the dissolution of said irrigation district, setting forth in said petition, that all bills and claims of every nature whatsoever have been fully satisfied and paid, it shall be the duty of said directors, if they shall be satisfied that all claims and bills have been fully satisfied, to call an election, setting forth the object of the said election, and to cause notice of said election to be published in some newspaper in each of the counties or county in which said district is located, for a period of thirty (30) days prior to said election, setting

forth the time and place for holding said election in each of the three voting precincts in said district. It shall also be the duty of the directors to prepare ballots to be used at said election on which shall be written or printed the words: "For dissolution—Yes," and "For dissolution—No." [L. '05, p. 270, §48.

3488. Same—Canvass—Record.—Sec. 324. The board of directors shall name a day for canvassing the vote, and if it shall appear that a majority of said ballots contain the words, "For Dissolution—Yes," then it shall be the duty of said board of directors to declare said district to be disorganized, and shall certify to the county clerk of the respective counties, in which the district is situated, stating the number of signers to said petition. That said election was called and set for the.....day of ....., month of.....year. That said election was held and that so many votes (stating the number) had been cast for, and that so many votes (stating the number) had been cast against said proposition, said certificate to bear the seal of the district, and the signatures of the president and secretary of said board of directors. And it shall be the duty of the said respective clerks to record all such certificates in the records of the respective counties. Should it appear that a majority of the votes cast at said election were "For Dissolution—No," then the board of directors shall declare the proposition lost and shall cause the result and the vote to be made a part of the records of said irrigation district. [L. '05, p. 271, §49.

3489. Judicial examination and confirmation.—Sec. 325. The board of directors of an irrigation district organized under the provisions of this act may commence special proceedings, in and by which the proceedings of said board and of said district providing for and authorizing the issue and sale of the bonds of said district, whether said bonds or any of them have or have not been sold, or disposed of may be judicially examined, approved and confirmed. [L. '05, p. 271, §50.

3490. Same—Petition.—Sec. 326. Board of directors of the irrigation district shall file in the district court of the county in which the lands of the district, or some portion thereof, are situated, a petition, praying, in effect, that the proceedings aforesaid may be examined, approved and confirmed by the court. The petition shall state the facts showing the proceedings had for the issue and sale of said bonds, and shall state generally that the irrigation district was duly organized, and that the first board of directors was duly elected, but the petition need not state the facts showing such organization of the district, or the election of said first board of directors. [L. '05, p. 272, §51.

3491. Same—Notice of hearing.—Sec. 327. The court shall fix the time for the hearing of said petition and shall order the clerk of the court to give and publish a notice of the filing of said petition. The notice shall be given and published for three successive weeks in a newspaper published in the county where the office of the district is situated. The notice shall state the time and place fixed for the hearing of the petition and the prayer of the petitioners, and that any person interested in the organization of said district, or in the proceedings for the isssue or sale of said bonds, may, on or before the day fixed for the hearing of said petition, demur to or answer said petition. The petition may be referred to and described in said notice as the petition of the board of directors of.....irrigation district, (giving its name) praying that the proceedings for the issue and sale of said bonds of said district may be examined, approved and confirmed by the court. [L. '05, p. 272, §52.

3492. Same—Answer—Pleading.—Sec. 328. Any person interested in said district, or in the issue or sale of said bonds, may demur to or answer said petition. The provisions of the code of civil procedure respecting the demurrer and answer to a verified complaint shall be applicable to a demurrer and answer to said petition. The person so demurring and answering said petition shall be the defendant to the special proceeding, and the board of directors shall be the plaintiff. Every material statement of the petition not specifically controverted by the answer shall, for the purpose of said special proceeding, be taken as true, and each person failing to answer the petition shall be deemed to admit as true all the material statement of the petition. The rules of pleading and practice relating to appeals and writs of error provided by the code of civil procedure which are not inconsistent with the provisions of this act are applicable to the special proceedings herein provided for. [L. '05, p. 273, §53.

3493. Same—Determination—Costs.—Sec. 329. Upon the hearing of such special proceeding the court shall find and determine whether the notice of the filing of the petition has been duly given and published for the time and in the manner in this act prescribed, and shall have power and jurisdiction to examine and determine the legality and validity of, and approve and confirm, each and all of the proceedings for the organization of said district under the provisions of said act, from and including the petition for the organization of the district, and all other proceedings which may affect the legality or validity of said bonds, and the order of the sale and the sale thereof. The court, in inquiring into the regularity, legality or correctness of said proceedings, must disregard any error, irregularity or omission which does not affect the substantial rights of the parties to said special

proceedings; and the court may by decree approve and confirm such proceedings in part, and disapprove and declare illegal or invalid other or subsequent parts of the proceedings. The costs of the special proceedings may be allowed and apportioned between the parties, in the discretion of the court. [L. '05, p. 273, §54.

3494. Repeal—Saving Clause.—Sec. 330. That an act entitled an act to provide for the organization and government of irrigation districts, etc., approved April 12th, 1901, and all acts and parts of acts amendatory thereof, be and the same are hereby repealed. *Provided,* Nothing herein contained shall invalidate or affect any act or proceeding done or pending thereunder; but all such pending proceedings may be continued and concluded under such repealed provisions, the same as if this statute had not been adopted, or may be continued or concluded under the provisions of this act; *And, provided, further,* That nothing herein contained shall impair the organization, rights, powers and privileges of any irrigation district organized under any act or provision so repealed. [L. '05, p. 273, §55.

IX. OFFENSES.

3495. Cutting or breaking gate, bank, flume, etc.—Penalty.—Sec. 331. Any person or persons who shall knowingly and wilfully cut, dig, break down or open any gate, bank, embankment or side of any ditch, canal, flume, feeder or reservoir in which such person or persons may be a joint owner, or the property of another, or in the lawful possession of another or others, and used for the purposes of irrigation, manufacturing, mining or domestic purposes, with intent maliciously to injure any person, association or corporation, or for his or her own gain, unlawfully, with intent of stealing, taking or causing to run or pour out of such ditch, canal, reservoir, feeder or flume, any water for his or her own profit, benefit or advantage, to the injury of any other person, persons, association or corporation, lawfully in the use of such water or of such ditch, canal, reservoir, feeder or flume, he, she or they so offending shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not less than five dollars nor more than three hundred dol-

lars, and may be imprisoned in the county jail not exceeding ninety days. [G. S., §1759; L. '81, p. 163, §1.

[Penalty for damaging bridge or flume. Section 994.]

3496. Jurisdiction of justices of the peace.—Sec. 332. Justices of the peace shall have jurisdiction of all offenses under the provisions of this act, saving to any party defendant the right to be tried by a jury as in other criminal cases before such justices, now provided for by law; and also the right to appeal in manner and form as by law, now, or hereafter to be provided for by law, in criminal cases before such justices. [G. S., §1761; L. '81, p. 163, §2.

[For provisions governing appeals see section 3869.]

3497. Penalty for interfering with adjusted headgates.—Sec. 333. Every person who shall wilfully and without authority open, close, change or interfere with any headgate of any ditch, or any water box or measuring device of any ditch for the receiving or delivery of water, after the headgate of the ditch has been adjusted by and is in the control of the water commissioner, or after such water box or measuring device has been adopted by the ditch officer in charge, shall be deemed guilty of a misdemeanor and on conviction thereof shall be fined in a sum not more than $300.00, or imprisoned in the county jail not exceeding sixty days, or both such fine and imprisonment, in the discretion of the court.

Any person who shall be found using water taken through any such headgate, water box or measuring device so unlawfully interfered with, shall prima facie be deemed guilty of a violation of this section. [L. '01, p. 196, §1; amending G. S., §1755; L. '79, p. 108, §44.

3498. Jurisdiction of justice of the peace.—Sec. 334. Justices of the peace shall have jurisdiction to hear, try and determine actions brought for violations of this act, subject to the right of appeal as provided for in cases of assault and battery. [L. '01, p. 197, §2.

[For appeal in cases of assault and battery see section 3869.]
[For bribery of water commissioner see section 1723.]
[Penalty for failure to cover ditch, see section 3243.]
[Penalty for polluting stream, see section 1817.]
[Penalty for allowing water to waste, see section 3240.]
[Unlawful to cut trees which conserve the snow. Section 2626.]

X. STATE CANALS AND RESERVOIRS AND THE CONTROL THEREOF.

3499. Penitentiary commissioners may locate and construct.—Sec. 335. That, for the purpose of reclaiming, by irrigation, state

and other lands, and for the purpose of furnishing work for the convicts confined in the state penitentiary, the board of commissioners of the state penitentiary is hereby authorized to locate, acquire and construct, in the name of and for the use of the state of Colorado, ditches, canals, reservoirs and feeders, for irrigating and domestic purposes, and for that purpose may use convict labor of persons confined, or that may be confined, as convicts in the state penitentiary at Canon City. [L. '89, p. 285, §1.

3500. State engineer shall survey, lay out and locate.—Sec. 336. The state engineer, under the direction of the board, shall survey, lay out and locate a ditch or canal upon the most feasible route on either side of the Arkansas river, which said ditch or canal shall be of sufficient capacity to cover at least thirty thousand acres of good arable land between Canon City and Pueblo; *Provided,* That work shall only be commenced and performed upon one main ditch, canal, reservoir or feeder at a time; that a second shall not be commenced until the completion of the first. [L. '89, p. 285, §2.

3501. Rights and powers given board.—Sec. 337. The said board is hereby given all the rights and powers that an individual or corporation now has, or may hereafter have, under the laws of the state, or of the United States, to acquire the right of way over, upon and to any lands necessary for it to use or occupy in the construction and maintenance of said ditches, canals, reservoirs or feeders. [L. '89, p. 286, §3.

* Only material sections of the original acts establishing ditches and reservoirs are printed. In many cases later appropriations have been made but in most instances the work has been abandoned.

3502. Title shall vest in state.—Sec. 338. That the title to all ditches, canals, reservoirs or feeders, so constructed under this act, shall vest and remain in the state of Colorado, and the proceeds thereof shall be paid into the state treasury. [L. '89, p. 286, §4.

3503. Contract for and lease water rights.—Sec. 339. That when any part of any ditch, canal, reservoir or feeder shall be constructed under this act, said board of penitentiary commissioners may contract for and may lease water rights, upon such terms and under such rules and regulations as may be adopted by said board and approved by the governor of the state, to such individuals or corporations as may desire to lease the same. [L. '89, p. 286, §5.

[The act referred to above includes sections 3499-3504.]
[Is above section amended by sections 3561 and 3562?]

3504. Aiding in the construction.—Sec. 340. That for the purpose of aiding in the construction of said ditches, canals, reservoirs and feeders, the said board is hereby authorized to

receive subscriptions and advancements of money from persons owning land along the line of said proposed ditches, canals, reservoirs and feeders, or persons desiring the construction of the same, and to issue receipts or certificates to such person or persons so advancing money for the amount thereof, which receipt or certificate shall draw interest at the rate of seven per cent. per annum, and both principal and interest shall be payable in water to be taken from said ditches, canals, reservoirs or feeders, under such rules and regulations as may be adopted by said board and the state engineer, and approved by the governor of the state. [L. '89, p. 286, §6.

3505. Board of control canal No. 1—Duties.—Sec. 341. There is hereby created a board to be known as "The board of control of state canal No. 1 and reservoirs connected therewith." The said board shall be composed of the lieutenant governor, who shall be chairman, the state engineer and the warden of the penitentiary. The secretary of the state board of land commissioners shall be secretary of said board of control. Said board is hereby charged with the duty of securing the early completion of state canal No. 1, and reservoirs connected therewith and of the operation and maintenance of the same as herein provided. [L. '93, p. 441, §1.

[Sections 2-7 of the above act have performed their function and are therefore not printed.]

3506. Board of land commissioners assume control.—Sec. 342. Upon completion of said canal and its acceptance and approval, as hereinbefore provided, the said board of control of state canal No. 1 and reservoirs connected therewith, shall turn over the said canal, together with all drawings, specifications, reports and records pertaining to said canal and the action of said board of control, to the state board of land commissioners; whereupon the state board of land commissioners shall assume control of said canal and shall thereinafter control, operate and maintain the same subject to such provisions of law as may hereafter be made and established. [L. '93, p. 445, §8.

[See also section 3561.]

3507. Use of water—Lease of lands.—Sec. 343. It shall be the duty of the state board of land commissioners to cause the waters carried in the state canal No. 1 and reservoirs connected therewith to be applied to the irrigation of the state lands and all other lands lying under said canal at the earliest convenient and practicable times, and as a means among others to effect such use of water, the board of land commissioners are authorized to offer numerous portions of said lands for lease at such reasonable prices, and for such periods, not exceeding twenty

years, as will be conducive to the rapid settlement of such lands and the early use of such waters. [L. '93, p. 445, §9.

3508. Rights and powers of board of control.—Sec. 344. The said board of control of state canal No. 1 and reservoirs connected therewith is here given all the rights and powers that an individual or corporation now has, or may hereafter have, under the laws of the state, or of the United States, to acquire the right of way over, upon and to any lands necessary for it to use or occupy in the construction and maintenance of such canal. [L. '93, p. 445, §10.

3509. Establish annual charges for carriage of water.—Sec. 345. It shall be the duty of the state board of land commissioners to establish from time to time reasonable annual charges for the carriage of waters or sell perpetual rights of water if deemed by it more expedient. [L. '93, p. 446, §11.

[Is the above section superseded by section 3562?]

3510. Title to canal in state.—Sec. 346. The title to the said canal shall vest and remain with the state of Colorado, and any money received for the carriage of water therein shall be devoted to the maintenance and operation of such canal, and surplus over and above the cost of operation, and maintaining such canal, shall be converted into the state treasury and applied by the state treasurer to meeting the certificates of indebtedness herein provided for and interest thereon. [L. '93, p. 446, §12.

3511. Board construct laterals.—Sec. 347. It shall be the duty of the said board of land commissioners to construct from time to time and as rapidly as may seem to such board advisable, lateral ditches and the necessary appurtenances thereto, for supplying the lands of the state lying under said canal with water for irrigation, and to see that all of such lands belonging to the state are brought under cultivation within a reasonable time. [L. '93, p. 446, §13.

3512. Certificates received in lieu of money for charges.—Sec. 348. Any receipts or certificates heretofore issued in return for subscriptions and advancement of money by persons owning land along the line of state canal No. 1, and reservoirs connected therewith shall be received in lieu of money for the lawful and reasonable charges for the carriage of water in the said canal, and all of the certificates hereafter issued as in said canal or for perpetual water rights thereunder. [L. '93, p. 446, §14.

3513. State board of control have traveling expenses.—Sec. 349. The members of the state board of control of state canal No. 1, and reservoirs connected therewith shall be entitled to their reasonable traveling expenses while performing the duties

herein laid upon them for which amounts the auditor shall draw warrants upon the state treasurer, when such amounts shall be duly certified to him by the secretary of the said board of control. [L. '93, p. 446, §15.

3514. Location of Mesa county state ditch.—Sec. 350. The state engineer under the direction of the board of penitentiary commissioners shall lay out, survey and locate a ditch or canal and laterals, reservoirs and feeders as may be necessary or expedient so as to cover all the land practicable in the Grand valley in Mesa county. The headgate of the said ditch or canal shall be located in the Hogback canon, and the water for said canal shall be taken out of the Grand river. [L. '91, p. 335, §1.

3515. Property of the state.—Sec. 351. The said ditch shall be known as the Mesa county state ditch, and during the construction of the same and when constructed shall be the property of the state of Colorado and all revenues derived therefrom shall be turned into the state treasury. [L. '91, p. 336, §2.

3516. Board of penitentiary commissioners may issue and sell certificates.—Sec. 352. It shall be the duty of the board of penitentiary commissioners after said ditch is surveyed to issue and sell for cash certificates bearing seven per cent. interest from the date of the issuance thereof, the principal and interest of which shall be receivable by the state of Colorado as cash for water to be taken out of said canal under such rules and regulations as may be adopted by said board and state engineer and the governor of the state. [L. '91, p. 336, §3.

3517. Construction of ditch.—Sec. 353. That after the subscription of fifty thousand dollars for said certificates has been received by said board and twenty per cent. of the same has been paid in, it shall be the duty of said board to commence the construction of said ditch, and in order to construct the same the said board of penitentiary commissioners shall have the power and authority and it shall be their duty to select from the able-bodied convicts confined in the state penitentiary "As many as are not otherwise employed" none of whom shall be under life sentence, and transport the said convicts to a general headquarters for the construction of said ditch where said board shall make suitable provision for the safe keeping of said convicts and said convicts shall be used under proper guard for the construction of said ditch. [L. '91, p. 336, §4.

3518. Right of way.—Sec. 354. The said board shall have the right and power to purchase, condemn or otherwise lawfully acquire a right of way for the said canal as provided in other cases and for said purpose may sue in the name of the people of the state of Colorado. [L. '91, p. 336, §5.

3519. Cash subscriptions, how used.—Sec. 355. Said board shall have the power to use all cash subscriptions for the purpose of purchasing provisions, tools, teams, etc., for the construction of said ditch or may receive at cash valuation groceries, vegetables, teams, tools, labor and other things necessary in constructing said ditch, on subscription for certificates as provided in section three of this act. [L. '91, p. 336, §6.

[Section 3 referred to is section 3516.]

3520. Convicts returned to penitentiary, when.—Sec. 356. Five days before the expiration of the term of confinement of any convict or convicts employed in the construction of said ditch shall expire, he or they shall be transported to the penitentiary at Canon City and others shall be taken to said work in his or their places. [L. '91, p. 337, §7.

3521. Contracts for transportation.—Sec. 357. Said board of penitentiary commissioners shall have the power and authority to obtain or make a contract with any railroad company for rates for transporting prisoners to and from said work; or for transporting material, goods, wares or merchandise to be used in the construction of said ditch; and in advertising for bids for general penitentiary provisions and supplies, as now provided by law, may stipulate that such proportion of said provisions and supplies as may be necessary for the sustenance of convicts employed in the construction of said Mesa county state ditch shall be delivered at the general headquarters of said ditch. [L. '91, p. 337, §8.

3522. Superintendent of construction—Salary.—Sec. 358. Said board may select one of their number who shall have immediate charge of the construction of said ditch and shall give his personal attention to the same and when so selected the said member of said board shall receive in addition to the present compensation two thousand, five hundred (2,500) dollars per year, payable out of the funds derived from the sale of certificates as provided in section three of this act. [L. '91, p. 337, §9.

3523. Deputy warden in charge of convicts.—Sec. 359. The warden of said penitentiary may appoint a deputy warden who shall have the same power and authority as he now possesses who shall be placed in charge of the convicts employed in the construction of said canal. [L. '91, p. 337, §10.

3524. Manager of ditch—Salary.—Sec. 360. After said canal is fully completed said convicts shall be returned to the penitentiary at Canon City and the governor shall appoint with the advice and consent of the senate a competent person who shall manage and superintend said ditch for and on behalf of

the state and who shall receive fifteen hundred dollars per year salary to be paid out of the income from said ditch upon the order of board of penitentiary commissioners. [L. '91, p. 337, §11.

3525. Lease of water rights.—Sec. 361. When said ditch or any of its reservoirs or feeders shall be constructed under this act said board of penitentiary commissioners may contract for the carriage and delivery of water, and may lease water rights upon such terms and under such rules and regulations as may be adopted by said board and approved by the governor of the state to such individuals or corporations as may desire to lease the same. [L. '91, p. 337, §12.

3526. State engineer locate canal number three.—Sec. 362. The state engineer, under the direction of said board of control, shall survey, locate and lay out a tunnel or canal which shall be known as "State Canal No. 3," commencing at the most feasible point on the Gunnison river below the mouth of the Cimarron river; thence in a westerly direction to the Uncompahgre river valley, thence with laterals running in various directions from said main canal to cover and redeem the greatest body of arable land in said counties of Montrose and Delta. [L. '01, p. 369, §2.

[Canal No. 3 established by the act of 1901 was ceded to the United States by section 6928.]

3527. Feeders for South Platte and Arkansas.—Sec. 363. That there is hereby appropriated out of any funds in the state treasury belonging to the internal improvement fund not otherwise appropriated the sum of three thousand dollars, or so much thereof as is necessary to defray the necessary expenses of a preliminary survey and investigation of the sources of the Grand, Laramie and North Platte river systems, with reference to turning the unappropriated waters thereof eastward, and causing them to flow into and through the tributaries of the South Platte and Arkansas river systems for the purpose of irrigation and other beneficial uses. [L. '89, p. 208, §1.

3528. Property of the state.—Sec. 364. That the said ditches, canals and waterworks, and the waters when so diverted, shall be the property of the state, and the waters so supplied shall be turned into the said South Platte and Arkansas rivers and their tributaries for the purpose of supplying deficiencies of water for appropriations heretofore made or hereafter to be made in the order of such appropriation by the several canals and reservoirs taken from said streams. The state engineer, or in his stead such person or persons as may be duly appointed for that purpose according to law, shall deter-

mine, regulate and provide for the delivery of such waters to such ditches, canals and reservoirs, according to their several appropriations, decrees of court, capacities and necessities. [L. '89, p. 210, §4.

[Survey in Boulder county. L. '89, p. 46.]
[Survey near Walsenburg, L. '07, p. 134.]

3529. Coal Creek reservoir—Rights to water.—Sec. 365. There is hereby appropriated out of any money in the state treasury belonging to the internal improvement permanent fund, and any money which may hereafter be credited to said fund and not otherwise appropriated, the sum of twenty thousand (20,000) dollars, or as much thereof as may be necessary, as is hereinafter provided, for the construction of a reservoir at Coal creek, upon or adjacent to sections twenty, twenty-eight, or thirty-four, township four south, range sixty-five west, in the county of Arapahoe, to store the water of floods for the purpose of irrigation and other beneficial uses; Provided, That no part of said appropriation shall be used for the purchase of land, and that the said reservoir shall not be constructed except upon lands the title to which shall first be re-vested in the state; *And, provided, further,* That all citizens of the state shall have free and equal rights to the use and benefits of said reservoir when constructed, subject only to such reasonable rules and restrictions as may be provided by law for the protection of the property. [L. '89, p. 215, §1.

3530. Property of state—Delivery of water.—Sec. 366. That the said reservoir and waterworks, and the waters when so collected and stored, shall be the property of the state; and the water so supplied shall be turned into Coal creek or canal, for the purpose of supplying water for appropriations heretofore made, or hereafter to be made, in the order of such appropriation, by the several canals and reservoirs taken from said stream. The state engineer, or in his stead such person or persons as may be duly appointed for that purpose according to law, shall determine, regulate and provide for the delivery of such water to such ditches, canals and reservoirs, according to their several appropriations, decrees of court, capacities and necessities. [L. '89, p. 217, §6.

3531. Shall not impair vested rights.—Sec. 367. Nothing in this act shall be construed so as to impair any rights acquired, or that may be acquired, under or by virtue of the irrigation laws of the state of Colorado. [L. '89, p. 217, §7.

3532. Damaging reservoir a misdemeanor.—Sec. 368. Any person interfering with or damaging said reservoir or any of its approaches or appurtenances, shall be deemed guilty of a

misdemeanor, and, upon conviction thereof, shall be fined not exceeding one thousand (1,000) dollars, or by imprisonment in the county jail not exceeding one year. [L. '89, p. 217, §8.

3533. Reservoir—Apishapa creek.—Sec. 369. That there is hereby appropriated out of any moneys in the state treasury belonging to the internal improvement permanent fund and any moneys which may be hereafter credited to said fund not otherwise appropriated the sum of fifteen thousand (15,000) dollars for the construction of a reservoir on the Apishapa creek in the county of Las Animas, for the storage of the surplus waters of said creek, to pay for surveying the same. [L. '91, p. 345, §1.

3534. Location.—Sec. 370. Said reservoir shall be erected at some suitable place, to be determined by the state engineer, west of the Denver and Rio Grande railway, on or near the Apishapa creek. [L. '91, p. 346, §2.

3535. Board of construction.—Sec. 371. The governor, secretary of state and state engineer are hereby constituted a board, under whose supervision and control said reservoir shall be located and constructed. Said board shall take charge of said reservoir, until otherwise provided by law, and make all proper regulations for the sale or disposal of the waters stored therein. [L. '91, p. 346, §3.

3536. Property of state.—Sec. 372. Said reservoir shall be the property of the state, and all lands covered by said reservoir, or required for the use of ditches shall be vested in the state of Colorado, prior to the letting of contracts for construction of such reservoir or ditches. [L. '91, p. 346, §4.

3537. Sale and lease of waters.—Sec. 373. Upon the completion of said reservoir the board appointed in section 3 of this act shall take such steps as shall be necessary to sell or lease such waters as will in the judgment of said board bring in the mot revenue to the state. [L. '91, p. 346, §7.

[Section 3 referred to is section 3535.]

3538. Moneys paid to state treasurer.—Sec. 374. All moneys received from the sale or leasing of the water stored in said reservoir and from any water rights sold, either in connection with lands belonging to the state or otherwise, shall be paid to the state treasurer and by him credited to the internal improvement permanent fund. [L. '91, p. 347, §8.

3539. Reservoir—Hardscrabble creek.—Sec. 375. There is hereby appropriated out of any money in the state treasury belonging to the internal improvement permanent fund, and any money which may hereafter be credited to said fund and not otherwise appropriated the sum of ten thousand (10,000)

dollars, or as much thereof, as may be necessary, as hereinafter provided for the construction of a reservoir, or reservoirs, at the most convenient and suitable place, or places to be selected by the state engineer in township 21 range 69 west in the county of Custer, to store the waters of the Hardscrabble creek, and its tributaries for the purpose of irrigation, and other beneficial uses. [L. '91, p. 350, §1.

3540. Plans and specifications.—Sec. 376. As soon as practicable after the passage and approval of this act, the state engineer shall make the necessary arrangements for measuring the flow of water in said Hardscrabble creek with a view of constructing a reservoir or reservoirs, of sufficient capacity to hold a part or a sufficient quantity of the waters of Hardscrabble creek, and its tributaries above said reservoir or reservoirs. Said state engineer, shall thereafter calculate and determine the required capacity of such reservoir, or reservoirs, to stow the waters flowing in said creek or so much thereof as may be necessary during the months of April, May, and June of each year, and prepare plans and specifications thereof. [L. '91, p. 350, §2.

3541. Board of construction.—Sec. 377. The governor, state engineer, and attorney general, shall be, and hereby are constituted a board for the purpose of constructing said reservoir, or reservoirs, and taking charge of same until otherwise provided by law. [L. '91, p. 350, §3.

3542. Property of state—Disposition of water.—Sec. 378. That the said reservoir, or reservoirs, and waterworks and the waters when so collected, and stored shall be the property of the state, and the water so supplied shall be turned into Hardscrabble creek or canals for the purpose of supplying water for appropriations heretofore made or hereafter to be made in the order of such appropriation by the several canals and reservoirs taken from said stream. The state engineer, or in his stead such person, or persons as may be duly appointed for that purpose according to law, shall determine, regulate and provide for the delivery of such water to such ditches, canals and reservoirs according to their several appropriations, decrees of court, capacities and necessities. [L. '91, p. 351, §6.

3543. Acquired rights not impaired.—Sec. 379. Nothing in this act shall be construed so as to impair any rights acquired, or that may be acquired under, or by virtue of the irrigation laws of the state of Colorado. [L. '91, p. 351, §7.

3544. Maintenance and repair.—Sec. 380. When said reservoir, or reservoirs, are completed, together with the approaches,

the expense of maintaining and keeping them in repair shall be by persons using and having a direct benefit from the use of the water therefrom and persons to whom a greater supply of water is received by the storage of water in the aforesaid reservoir or reservoirs. [L. '91, p. 351, §8.

[Is above section superseded by section 3562?]

3545. Penalty for damaging reservoir.—Sec. 381. Any person interfering with or damaging said reservoir or reservoirs, or parts, or appurtenances thereof, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not exceeding one thousand (1,000) dollars or by imprisonment in the county jail not exceeding one year. [L. '91, p. 351, §9.

3546. Reservoir—Saguache creek.—Sec. 382. There is hereby appropriated out of any money in the state treasury belonging to the internal improvement income fund, and any money which may hereafter be credited to said fund, and not otherwise appropriated, the sum of thirty thousand dollars or so much thereof as may be necessary, for the construction of one or more reservoirs, as is hereinafter provided, on or near the head-waters of Saguache creek, in Saguache county, Colorado, at some suitable point or points within or near township forty-three (43) north of range two (2) east N. M. P. M., or township forty-three (43) north of range three (3) east N. M. P. M. or both to be used for the conservative, storage and distribution of flood waters and waters flowing in said creek for the irrigation of lands which are or hereafter can be irrigated by water taken from said Saguache creek; *Provided,* That no part of said appropriation shall be used for the purchase of land. [L. '91, p. 354, §1.

3547. Board of construction.—Sec. 383. The governor, state engineer and chairman of the board of county commissioners of Saguache county shall be and hereby are constituted a board for the purpose of constructing said reservoir or reservoirs, and shall have power if after the examination and measurements made by the state engineer, as hereinafter provided, they shall conclude that two reservoirs could be constructed with the money hereby appropriated, and that they would more efficiently than one subserve the objects hereby sought to be accomplished, to cause said two reservoirs to be constructed; *Provided,* That the total cost of said two reservoirs shall not exceed the sum of thirty thousand dollars hereby appropriated; *And, provided, further,* That if after proper examination and survey the board shall determine that it is not practicable and feasible to construct any reservoir at the place herein designated, or that the same cannot be properly constructed with the sum appropriated

by this act, together with such private donations and subscriptions as may be tendered to the board, then no portion of said appropriation shall be expended except so much as may have been necessary to defray the expenses of such examination and survey as may have been required by this act or ordered by the board. [L. '91, p. 355, §2.

3548. Property of state—Disposition of waters.—Sec. 384. The said reservoir or reservoirs when so constructed, and the waters therein when so collected and stored, shall be the property of the state, and until otherwise provided by law shall be under the charge, management and control of the said board of construction, and the said waters shall under such rules and regulations as the board may prescribe, be sold or leased, and all moneys received from such sale or lease, whether the same be sold along with state or school land or otherwise, shall be turned into the state treasurer and by him credited to the internal improvement income fund. [L. '91, p. 356, §6.

3549. Acquired rights not impaired.—Sec. 385. Nothing in this act shall be construed so as to impair any rights acquired or that may be acquired under or by virtue of the laws of Colorado. [L. '91, p. 356, §7.

3550. Penalty for damaging reservoir.—Sec. 386. Any person wilfully damaging any reservoir constructed under the provisions of this act, or any of its approaches or appurtenances shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding one thousand dollars or by imprisonment in the county jail for a term not exceeding one year or by both such fine and imprisonment. [L. '91, p. 356, §8.

3551. Reservoir—Monument creek.—Sec. 387. There is hereby appropriated out of any money in the state treasury belonging to the internal improvement permanent fund, and any money which may hereafter be credited to said fund and not otherwise appropriated, the sum of thirty thousand (30,000) dollars, or as much thereof as may be necessary, as is hereinafter provided, for the construction of a reservoir at Monument creek, upon or adjacent to sections fifteen and twenty-two, township eleven, range sixty-seven west, in the county of El Paso, to store the water of floods for the purpose of irrigation and other beneficial uses; *Provided*, That no part of said appropriation shall be used for the purchase of land, and that the said reservoir shall not be constructed except upon lands the title to which shall first be vested in the state; *And Provided, further,* That all citizens of the state shall have equal rights to the use and benefits of said reservoir when constructed, sub-

ject only to such reasonable rules and restrictions as may be provided by law. [L. '91, p. 352, §1.

3552. Property of state—Disposition of water.—Sec. 388. That the said reservoir and the waters when so collected and stored, shall be the property of the state; and the water so supplied shall be disposed of by sale to those desiring the same, the rates per cubic foot per second of time therefor to be fixed by the said board, the payments thereof to be made to said board payable annually in advance on or before May 1st, of each year. The income derived from the sale of such water to be paid into the state treasury and placed to the credit of the internal improvement permanent fund. [L. '91, p. 353, §6.

3553. Acquired rights not impaired.—Sec. 389. Nothing in this act shall be construed so as to impair any rights acquired, or that may be acquired, under the virtue of the irrigation laws of the state of Colorado. [L. '91, p. 353, §7.

3554. Penalty for interfering with or damaging reservoir.—Sec. 390. Any person interfering with or damaging said reservoir or any of its approaches or appurtenances, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding one thousand (1,000) dollars or by imprisonment in the county jail not exceeding one year. [L. '91, p. 354, §8.

3555. Reservoir—Chaffee county.—Sec. 391. There is hereby appropriated out of any money in the state treasury belonging to the internal improvement income fund, and any money which may hereafter be credited to said fund, and not otherwise appropriated, the sum of fifteen thousand dollars, or so much thereof as may be necessary for the construction of one or more reservoirs, to be used for the conservation, storage and distribution of flood waters (and waters flowing in said creeks) and for the purpose of supplying the deficiency existing at certain seasons of the year, in the supply of water flowing in the Cottonwood creek, Chalk creek, and the South Arkansas river, Chaffee county, Colorado, for the irrigation of lands which are or hereafter can be irrigated by waters taken from said creeks; *Provided*, That no part of said appropriation shall be used for the purchase of land. [L. '91, p. 347, §1.

3556. Board of construction—Powers of board.—Sec. 392. The governor, state engineer and chairman of the board of county commissioners shall be and hereby are constituted a board for the purpose of constructing said reservoir or reservoirs, and shall have power if, after the examination and measurement made by the state engineer as hereinafter provided,

they shall conclude that two reservoirs could be constructed with the money hereby appropriated, and that they would more efficiently than one subserve the purposes hereby sought to be accomplished, to cause said two reservoirs to be constructed; *Provided*, That the total cost of said two reservoirs shall not exceed the sum of fifteen thousand dollars hereby appropriated; *And, provided, further*, That, if after proper examination and survey, the board shall determine that it is not practicable and feasible to construct any reservoir at the place herein designated, or that the same cannot be properly constructed with the sum appropriated by this act, together with such private donations and subscriptions as may be tendered to the board, or in the opinion of said board the expenditure of the sum herein appropriated in the construction of said reservoir or reservoirs shall not be deemed expedient, and for the best interest of the whole people of the state of Colorado, then no portion of said appropriation shall be expended except so much as may have been necessary to defray the expenses of such examination and survey as may have ben required by this act or ordered by the board. [L. '91, p. 348, §3.

3557. Property of state—Management—Sale of water—Sec. 393. The said reservoir or reservoirs, when so constructed, and the waters therein, when so collected and stored, shall be the property of the state, and all lands on which shall be constructed said reservoir or reservoirs or the works connected therewith, shall first be vested in the state of Colorado, and until otherwise provided by law shall be under the charge, management and control of the said board of construction, and the said waters shall, under such rules and regulations as the board may prescribe, and shall be sold or leased by said board as said board may deem best, and all moneys received from the sale or lease of said water, whether the same shall be sold along with lands belonging to the state, or otherwise, shall be turned into the state treasurer, and by him credited to the internal improvement income fund. [L. '91, p. 349, §7.

3558. Acquired rights not impaired.—Sec. 394. Nothing in this act shall be construed so as to impair any rights acquired, or that may be acquired, under or by virtue of the laws of Colorado. [L. '91, p. 349, §8.

3559. Penalty for damaging reservoir.—Sec. 395. Any person wilfully damaging any reservoir constructed under the provisions of this act, or any of its approaches or appurtenances, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding one thousand

dollars, or by imprisonment in the county jail for a term not exceeding one year, or by both such fine and imprisonment. [L. '91, p. 349, §9.

3560. Control of Boss lake reservoir.—Sec. 396. The board of county commissioners of Chaffee county shall have charge and control of that certain state reservoir situated in said county and commonly known as the Boss lake reservoir and shall, without expense to the state of Colorado, maintain and keep said reservoir in good condition and provide for the storage of water as contemplated in the act providing for the construction of said reservoir and also for the distribution of said water under the direction of the water commissioner for the district in which said reservoir is situated, at such times as the scarcity of water in the stream known as the South Arkansas demands that the waters in said stream should be replenished for the purpose of irrigating the lands under ditches now, or hereafter to be constructed; *Provided,* That said waiters shall be disturbed by the said water commissioner pro rata without reference to the dates of priorities of water rights and without expense to the consumers thereof; *Provided, further,* That the county of Chaffee assumes and shall be held responsible for any damages resulting from breakage of the dam or water discharges therefrom. [L. '97, p. 119, §1.

3561. Land board control ditches and reservoirs.—Sec. 397. Until otherwise authorized by law, the board of land commissioners is hereby directed to regulate the distribution of water from state canals and reservoirs under such rules and regulations as said board shall deem to be for the best interests of the state. "And to charge and collect rental for the carriage of water therein." [L. '93, p. 404, §1.

[Is this section superseded by section 3562?]
[See sections 3506 and 3509.]

3562. County control of reservoirs.—Sec. 398. The board of county commissioners of any county wherein is situated any state reservoir, shall have charge and control of such reservoir and shall, without expense to the state of Colorado, maintain and keep said reservoir in good condition and provide for the storage of water as contemplated in the act providing for the construction of said reservoir, and also for the distribution of said water under the direction of the water commissioner for the district in which said reservoir is situated, at such times as the scarcity of water in the stream which such reservoir is intended to reinforce demands that the water in said stream should be replenished for the purpose of irrigating the lands under ditches now or hereafter to be constructed; *Provided,* That

said waters shall be distributed by said water commissioner pro rata without reference to priority of water rights and without expense to consumers thereof; *And, provided, also,* That the counties in which said reservoirs are situated assume and shall be held responsible for any damages resulting from breakage of the dams or water discharges therefrom; *And, provided, further,* That the provisions of this act shall not apply to any state reservoir constructed primarily for the purpose of irrigating state lands, but any such reservoir shall remain in the control of the state board of land commissioners. [L. '99, p. 350, §1.

LIENS.

4051. (Rev. Stats., 1908, p. 1027.) **Liability of co-owners of unincorporated ditch.**—Sec. 39. All co-owners of unincorporated irrigating ditches shall pay for the necessary cleaning and repairing of such ditches in the proportion that their respective interests bear to the total expenses incurred in said cleaning and repairing; Provided, that any such co-owner may perform labor in cleaning and repairing such ditch, equivalent in value to his or their share of such expenses as aforesaid; Provided, no co-owner shall be held liable for cleaning or repairing any ditch below the point from which he takes his portion of the water. [L. '93, p. 312, §1.

4052. (Rev. Stats., 1908, p. 1027.) **Request to clean ditch—Liability of co-owners.**—Sec. 40. Upon the failure of any one or more of several co-owners upon written request of the owners of one-third (1-3) of the carrying capacity or board of directors, to assist in cleaning and repairing such ditch, the other co-owner or co-owners shall proceed to clean and repair the same, and shall keep an accurate account of the cost and expenses incurred; and shall, upon the completion of such work, deliver to each of such delinquent co-owners, his agent, lessee or legal representative an itemized statement of such cost and expenses. [L. '93, p. 312, §2.

4053. (Rev. Stats., 1908, p. 1027.) **Lien of co-owner against delinquent.**—Sec. 41. The co-owner or co-owners of any such ditch who shall clean and repair the same, as specified in section two (2) of this act, shall have a lien upon the interest in such ditch owned by such delinquent co-owner for his proportion of such cost and expenses. [L. '93, p. 312, §3.

MEASUREMENT OF WATER.

7026. (Rev. Stats., 1908, p. 1631.) **Water.*** * * Every inch shall be considered equal to an inch square orifice under a five-inch pressure, and a five-inch pressure shall be from the top of the orifice of the box put into the banks of the ditch, to the surface of water; said boxes, or any slot or aperture through which such water may be measured, shall in all cases be six inches perpendicular, inside measurement, except boxes delivering less than twelve inches, which may be square, with or without slides; all slides for the same shall move horizontally and not otherwise; and said box put into the banks of ditch shall have a descending grade from the water in ditch of not less than one-eighth of an inch to the foot. [G. S., §3472; G. L., §2779; L. '74, p. 308, §1, amending R. S., p. 638, §3.

SUPREME COURT OF THE UNITED STATES.

No. 3, Original.—October Term, 1906.

The State of Kansas, Complainant,
vs.
The State of Colorado et al., Defendants. The United States of America, Intervenor.

In Equity.

[May 13, 1907.]

On May 20, 1901, pursuant to a resolution passed by the legislature of Kansas (Laws Kansas, 1901, chap. 425), and upon leave obtained, the State of Kansas filed its bill in equity in this court against the state of Colorado. To this bill the defendant demurred. After argument on the demurrer this court held that the case ought not to be disposed of on the mere averments of the bill, and, therefore, overruled the demurrer without prejudice to any question defendant might present. Leave was also given to answer. 185 U. S., 125. In delivering the opinion of the court the chief justice disclosed in the following words the general character of the controversy, and the conclusions arrived at: (P. 145.)

"The gravamen of the bill is that the state of Colorado, acting directly herself as well as through private persons thereto licensed, is depriving and threatening to deprive the state of Kansas and its inhabitants of all the water heretofore accustomed to flow in the Arkansas river through its channel on the surface, and through a subterranean course across the state of Kansas; that this is threatened not only by the impounding and the use of the water at the river's source, but as it flows after reaching the river. Injury, it is averred, is being and would be, thereby inflicted on the state of Kansas as an individual owner, and on all the inhabitants of the state, and especially on the in-

habitants of that part of the state lying in the Arkansas valley. The injury is asserted to be threatened, and as being wrought, in respect of lands located on the banks of the river; lands lying on the line of the subterranean flow; and lands lying some distance from the river, either above or below ground, but dependent on the river for a supply of water. And it is insisted that Colorado in doing this is violating the fundamental principle that one must use his own so as not to destroy the legal rights of another.

"The state of Kansas appeals to the rule of the common law that owners of lands on the banks of a river are entitled to the continual flow of the stream, and while she concedes that this rule has been modified in the western states so that flowing water may be appropriated to mining purposes and for the reclamation of arid lands, and the doctrine of prior appropriation obtains, yet she says that that modification has not gone so far as to justify the destruction of the rights of other states and their inhabitants altogether; and that the acts of Congress of 1866 and subsequently, while recognizing the prior appropriation of water as in contravention of the common law rule as to a continuous flow, have not attempted to recognize it as rightful to that extent. In other words, Kansas contends that Colorado can not absolutely destroy her rights, and seeks some mode of accommodation as between them, while she further insists that she occupies, for reasons given, the position of a prior appropriator herself, if put to that contention as between her and Colorado.

"Sitting, as it were, as an international as well as a domestic tribunal, we apply federal law, state law, and international law, as the exigencies of the particular case may demand, and we are unwilling, in this case, to proceed on the mere technical admissions made by the demurrer. Nor do we regard it as necessary, whatever imperfections a close analysis of the pending bill may disclose, to compel its amendment at this stage of the litigation. We think proof should be made as to whether Colorado is herself actually threatening to wholly exhaust the flow of the Arkansas river in Kansas; whether what is described in the bill as the 'underflow' is a subterranean stream flowing in a known and defined channel, and not merely water percolating through the strata below; whether certain persons, firms and corporations in Colorado must be made parties hereto; what lands in Kansas are actually situated on the banks of the river, and what, either in Colorado or Kansas, are absolutely dependent on water therefrom; the extent of the water-shed or the drainage area of the Arkansas river; the possibilities of the maintenance of a sus-

tained flow through the control of flood waters; in short, the circumstances, a variation in which might induce the court to either grant, modify, or deny the relief sought or any part thereof."

On August 17, 1903, Kansas filed an amended bill, naming as defendants Colorado and quite a number of corporations, who were charged to be engaged in depleting the flow of water in the Arkansas river. Colorado and several of the corporations answered. For reasons which will be apparent from the opinion the defenses of these corporations will not be considered apart from those of Colorado. On March 21, 1904, the United States, upon leave, filed its petition of intervention. The issue between these several parties having been perfected by replications, a commissioner was appointed to take evidence, and after that had been taken and abstracts prepared counsel for the respective parties were heard in argument, and upon the pleadings and testimony the case was submitted.

In order that the issue between the three principal parties, Kansas, Colorado and the United States, may be fully disclosed —although by so doing we prolong considerably this opinion— we quote abstracts of the pleadings and statements thereof made by the respective counsel. Counsel for Kansas say:

"The bill of complaint alleges that the state of Kansas was admitted into the Union on January 29, 1861, that the state of Colorado was admitted on August 1, 1876, and that the other defendants are corporations organized, chartered and doing business in the state of Colorado; that the Arkansas river rises in the Rocky mountains, in the state of Colorado, and, flowing in a southeasterly direction for a distance of about 280 miles, crosses the boundary into the state of Kansas; that the river then flows in an easterly and southeasterly direction through the state of Kansas for a distance of about 300 miles, then through Oklahoma, Indian Territory and Arkansas, on its way to the sea. Through the state of Kansas the Arkansas valley is a level plain but a few feet above the normal level of the river, and is from two to twenty-five miles in width. Back to the foot hills on either side there are bottom lands which are saturated and sub-irrigated by the underflow from the river, and are fertile and productive almost beyond comparison. The Arkansas river is a meandered stream through the state of Kansas, and under the laws and departmental rules and regulations of the United States it is a navigable river through the state of Kansas, and was, in fact, navigable and navigated from the city of Wichita south to its mouth; and that the complainant is the owner of the bed of the stream between the meandered lines, in trust for

the people of the state; that the complainant is the owner of two tracts of land bordering upon the river, one at Hutchinson and one at Dodge City, upon which state institutions are maintained—one as a reform school and the other as a soldiers' home. That when the state of Kansas was admitted into the Union it became the owner for school purposes of sections 16 and 36 of each congressional township, of which the complainant still owns many thousand acres, much of which borders on the Arkansas river. That by act of Congress of March 3, 1863, the complainant became the owner of each odd-numbered section of land in the Arkansas valley, and has since conveyed the whole of this land for the purposes specified. That by the year 1868 the land in the Arkansas valley began to be taken by actual settlers, and by the year 1875 practically all the bottom lands in the east or lower half of the valley were entered and settled, and title obtained from the United States or the state of Kansas; and by the year 1882 the west or upper half of the valley was so entered and settled and like titles obtained. By the year 1873 a railroad was built through the entire length of the valley, and immediately after their settlement these bottom lands were extensively cultivated, large crops of agricultural products were raised, towns and cities sprang up, population rapidly increased, and by the year 1883 practically all the bottom lands of the Arkansas valley were in a state of successful and prosperous cultivation; that the waters of the Arkansas river furnished the foundation for this prosperity. These waters furnished a wholesome and ample supply for domestic purposes, for the watering of stock, for power for operating mills and factories, for saturating and sub-irrigating the bottom lands back to the uplands on either side of the river, so that crops thereon were not only bounteous but practically certain, and in the western portion of the valley these waters were appropriated and used for surface irrigation, to supplant the scanty rainfall in that region. That by reason of these uses of the waters of the Arkansas river, and the almost unvarying water level beneath these bottom lands being near the surface, the lands in the Arkansas valley in the state of Kansas were of great and permanent value to the owners and settlers thereon, and those upon the tax rolls of the state of Kansas yielded a large and increasing revenue to the complainant for state purposes.

"That after the lands in the Arkansas valley had been settled and raised to a high state of cultivation, all the bottom lands in the valley being riparian lands and directly affected by the presence and flow of the river, and after parts of the flow of the river had been used for manufacturing and milling purposes,

and after the riparian lands had been largely and extensively irrigated in the valley of the river in the western portion of Kansas, and after portions of the land so belonging to the complainant had been sold and conveyed, the state of Colorado and other defendants began systematically appropriating and diverting the waters of the Arkansas river, in the state of Colorado, between Canon City and the Kansas state line, for the purpose of irrigating dry, barren, arid, non-riparian and non-saturated lands lying on either side of the river, and often many miles therefrom, and by the year 1891 all the natural and normal waters and a large portion of the flood waters of the Arkansas river were so appropriated and diverted and actually applied to these dry, barren, arid, non-riparian and non-saturated lands in the state of Colorado, said diversions increasing from year to year, as their means of diversion became more complete and perfect, so the average flow of the river was greatly and permanently diminished and the normal flow of the river, exclusive of floods, was wholly and permanently destroyed, the navigability of the river where navigable before had been ruined, the power for manufacturing purposes greatly diminished, the surface of the underflow beneath the bottom lands has been lowered about five feet, and the water for the irrigation ditches in the western part of Kansas has been entirely cut off. The loss sustained by the complainant and its citizens has been great and incalculable. The benefits of river navigation are gone; the cheap water power has been replaced by the costly steam power; the productiveness and value of the bottom lands have been greatly diminished; the irrigation ditches are left dry and the lands uncultivated, and the revenues of the state of Kansas and its municipalities have been materially decreased. Against this loss and injury the complainant prays the assistance of this court."

In the brief of counsel for Colorado it is said:

"The contention of the defendant, State of Colorado, as to the facts, may be concisely stated as follows: The Arkansas river, popularly so called, is substantially two rivers, one a perennial stream rising in the mountains of Colorado and flowing down to the plains, and this Colorado Arkansas, when the river was permitted to run as it was accustomed to run, prior to the period of irrigation, poured into the sands of western Kansas, and at times of low water the river as a stream entirely disappeared. Its waters were to some extent evaporated, and as to the residue, were absorbed and swallowed up in the sands. So that from the vicinity of the state line between Kansas and Colorado on eastwardly, as far, at least, as Great Bend, if not

farther, at such times of low water there was no flowing Arkansas river. Farther east, however, a new river arose, even at such times of low water, and partly from springs, partly from the drainage of the water table of the country supplied by rainfall, and partly from the surface drainage of an extensive territory, this river gradually again became a perennial stream, so that south of Wichita, and from there on to the mouth of the river, the Kansas Arkansas, as a new and separate stream, had a constant flow. Such, as the river was accustomed to flow, was the Arkansas of the period prior to irrigation. It was a 'broken river.' It is true that at all times in early years, and now, the Arkansas river at times of flood, or of what might be called high water, has a continuous flow from its source to its mouth, but a flow, even in times of flood or high water, which diminishes through the sandy waste east of the Colorado state line above described, so that oftentimes even a flood in Colorado would be completely lost before it had passed over this arid stretch of sandy channel, and high water would always be diminished in flow through the same stretch of country. This river is as if it were a current of water passing over a sieve; if the current be slow and the volume not excessive, all of it sinks through the sieve and none passes on beyond; when the current is rapid and the volume is large, still a large amount sinks in the sieve, and the residue passes on beyond.

"Now, the irrigators of Colorado have confined their actions to the Colorado Arkansas above described. They have taken the waters of the perennial stream before it reaches this sieve, through which it wasted; they have lifted that stream out of the sandy channel in which it had flowed and applied it to beneficial uses upon the land; carried the body of it along at a higher level than where it was accustomed to run, and they finally restore it, practically undiminished in volume, so far as regards practical use, at points in the ancient channel farther east than the river at low water was accustomed to flow before the period of irrigation. The effect of the diversion of this water in Colorado, the carrying of it forward on a higher level, the return of waters, partly through seepage and partly through direct delivery at waste gates, and the effect of this process in extending eastward the perennial flow, will be fully discussed in the course of the argument to follow. It is sufficient in this preliminary statement to say that it is admitted by the complainant that in the course of a twelvemonth there is a vast amount of high and flood waters of the Arkansas that are never captured by man, that are of no use, but are rather of injury to Kansas riparian proprietors, and, so far as any beneficial use is concerned, are ab-

solutely wasted and lost. Kansas does not claim that she has not abundance of water in times of flood or in times of high water; her complaint is based upon the alleged fact that she does not have what she was accustomed to have in periods of low water, whereas, in fact, as contended by the state of Colorado, the diversion of water in Colorado into ditches and reservoirs, continuing, as it does, throughout the year, in times of flood and in times of high water, has the effect, through seepage and return waters, to give perennial vitality to portions of this stream during what would otherwise be periods of depression or suspension of flow."

The substance of the petition in intervention is thus stated by counsel for the government:

"The first paragraph of the said petition describes the Arkansas river from its source to its mouth, and alleges that it is not navigable in the state of Colorado and Kansas nor the territory of Oklahoma, but is navigable in the state of Arkansas and the Indian territory.

"In the second paragraph it is alleged that the lands located within the watershed of the river west of the ninety-ninth degree of longitude are arid lands.

"The third paragraph alleges that within said watershed there are 1,000,000 acres of public lands that are uninhabitable and unsalable.

"The fourth paragraph alleges that said lands can only be made habitable, productive and salable by impounding and storing flood and other waters in said watershed, to the end that the said waters may be used to reclaim said land.

"The fifth paragraph alleges that there is not sufficient moisture from rainfall to render the soil capable of producing crops in paying quantities in the watershed so described, and that they can only be made to produce crops by irrigation; that the common-law doctrine of riparian rights is not applicable to conditions in the arid region and has been abolished by statute and by usage and custom; that there has been established in its stead in said region a doctrine to the effect that the waters of natural streams and the flood and other waters may be impounded, appropriated, diverted, and used for the purpose of reclaiming and irrigating the arid land therein, and that the prior appropriation of such waters for such purpose gives a prior and superior right to the water of the stream.

"The sixth paragraph alleges that legislation of Congress, decisions of courts, and acts of the executive department have sanctioned and approved the use of water for irrigation purposes in the arid region and that he who is prior in time is prior in

right, and that it is recognized that the common-law doctrine of riparian rights is not applicable to the public land owned by the United States in the arid region.

"The seventh paragraph alleges that in accordance with and in reliance upon the doctrine of the use of water for irrigation purposes the inhabitants of the arid portion of the United States have appropriated and used the waters of streams therein to reclaim and make productive and profitable about 10,000,000 acres of land, which now support a population of many millions, and that the inhabitants of Colorado and Kansas within the watershed of the Arkansas river have by irrigation from said river made productive and profitable about 200,000 acres of land, which provide homes for and support a population of many thousands.

"The eighth paragraph alleges that the common-law doctrine of riparian rights is not applicable to riparian lands within the arid region, and that only by the use of waters of natural streams and flood waters for irrigation and other beneficial purposes can the lands in the arid region be made productive, and only by such use can additional areas be reclaimed and rendered productive and salable.

"The ninth paragraph recites the passage of the so-called reclamation act of June 17, 1902.

"The tenth paragraph alleges that about 60,000,000 acres of land belonging to the United States within the arid region can be reclaimed under the provisions of the so-called reclamation act.

"The eleventh paragraph alleges that the amount of land that can be so reclaimed will support a population of many millions.

"The twelfth paragraph alleges that under the operation of the said reclamation act 100,000 acres of public land can be reclaimed within the watershed of the Arkansas river west of the ninety-ninth degree west.

"The thirteenth paragraph alleges that the lands when so reclaimed will support a population of not less than 50,000.

"The fourteenth paragraph alleges that under the operation of the so-called reclamation act about $1,000,000 has been expended in exploring, procuring and setting apart sites upon which reservoirs and dams contemplated by the act can be constructed and maintained; that contracts have been let for the construction of reservoirs, which, when completed, will cost over two millions and will have a storage capacity to reclaim 500,000 acres of arid land, which land when reclaimed will sustain a population of not less than 250,000; that plans are con-

templated for the expenditure of $20,000,000 under said act, to irrigate about 1,000,000 acres of arid public lands.

"The fifteenth paragraph recites that there are $16,000,000 available under the so-called reclamation act.

"The sixteenth paragraph sets forth the contention of Kansas as seen in its amended bill of complaint, viz., that it is entitled to have the waters of the Arkansas river, which rise in Colorado, flow uninterrupted and unimpeded into Kansas.

"The seventeenth paragraph sets forth the contention of Colorado in respect to its claim of ownership, viz., that under the provisions of its constitution it is the owner of all waters within that state.

"The eighteenth paragraph is as follows:

" 'That neither the contention of the state of Colorado nor the contention of the state of Kansas is correct; nor does either contention accord with the doctrine prevailing in the arid region in respect to the waters of natural streams and of flood and other waters. That either contention, if sustained, would defeat the object, intent and purpose of the reclamation act, prevent the settlement and sale of the arid lands belonging to the United States, and especially those within the watershed of the Arkansas river west of the ninety-ninth degree west longitude, and would otherwise work great damage to the interests of the United States.' "

Mr. Justice Brewer delivered the opinion of the court.

While we said in overruling the demurrer that "this court, speaking broadly, has jurisdiction," we contemplated further consideration of both the fact and the extent of our jurisdiction, to be fully determined after the facts were presented. We therefore commence with this inquiry. And first of our jurisdiction of the controversy between Kansas and Colorado.

This suit involves no question of boundary or of the limits of territorial jurisdiction. Other and incorporeal rights are claimed by the respective litigants. Controversies between the states are becoming frequent, and in the rapidly changing conditions of life and business are likely to become still more so. Involving as they do the rights of political communities, which in many respects are sovereign and independent, they present not infrequently questions of far-reaching import and of exceeding difficulty.

It is well, therefore, to consider the foundations of our jurisdiction over controversies between states. It is no longer open to question that by the Constitution a nation was brought into being, and that that instrument was not merely operative to establish a closer union or league of states. Whatever powers

of government were granted to the nation or reserved to the states (and for the description and limitation of those powers we must always accept the Constitution as alone and absolutely controlling), there was created a nation to be known as the United States of America, and as such then assumed its place among the nations of the world.

The first resolution passed by the convention that framed the Constitution, sitting as a committee of the whole, was "Resolved, That it is the opinion of this committee that a national government ought to be established, consisting of a supreme legislative, judiciary, and executive." 1 Eliot's Debates, p. 151.

In McCulloch vs. State of Maryland, 4 Wheat., 316, 405, Chief Justice Marshall said:

"The government of the Union, then (whatever may be the influence of this fact on the case), is, emphatically and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."

See, also, Martin vs. Hunter's Lessee, 1 Wheat., 304, 324, opinion by Mr. Justice Story.

In Dred Scott vs. Sandford, 19 How., 393, 441, Chief Justice Taney observed:

"The new government was not a mere change in a dynasty, or in a form of government, leaving the nation or sovereignty the same, and clothed with all the rights, and bound by all the obligations of the preceding one. But, when the present United States came into existence under the new government, it was a new political body, a new nation, then for the first time taking its place in the family of nations."

And in Miller on the Constitution of the United States, p. 83, referring to the adoption of the Constitution, that learned jurist said: "It was then that a nation was born."

In the Constitution are provisions in separate articles for the three great departments of government—legislative, executive and judicial. But there is this significant difference in the grants of powers to these departments: The first article, treating of legislative powers, does not make a general grant of legislative power. It reads: "Article I, Section 1. All legislative powers herein granted shall be vested in a Congress," etc.; and then in article 8 mentions and defines the legislative powers that are granted. By reason of the fact that there is no general grant of legislative power it has become an accepted constitutional rule that this is a government of enumerated powers.

In McCulloch vs. State of Maryland, supra, p. 405, Chief Justice Marshall said:

"This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted."

On the other hand, in article III, which treats of the judicial department—and this is important for our present consideration—we find that section 1 reads that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." By this is granted the entire judicial power of the nation. Section 2, which provides that "the judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States," etc., is not a limitation nor an enumeration. It is a definite declaration, a provision that the judicial powers shall extend to—that is, shall include—the several matters particularly mentioned, leaving unrestricted the general grant of the entire judicial power. There may be, of course, limitations on that grant of power, but if there are any they must be expressed, for otherwise the general grant would vest in the courts all the judicial power which the new nation was capable of exercising. Construing this article in the early case of Chisholm vs. Georgia, 2 Dall., 419, the court held that the judicial power of the Supreme Court extended to a suit brought against a state by a citizen of another state. In announcing his opinion in the case, Mr. Justice Wilson said (p. 453):

"This question, important in itself, will depend on others more important still; and may, perhaps, be ultimately resolved into one no less radical than this—Do the people of the United States form a nation?"

In reference to this question attention may however properly be called to Hans vs. Louisiana, 134 U. S., 1.

The decision in Chisholm vs. Georgia led to the adoption of the eleventh amendment to the constitution, withdrawing from the judicial power of the United States every suit in law or equity commenced or prosecuted against one of the United States by citizens of another state or citizens or subjects of a foreign state. This amendment refers only to suits and actions by individuals, leaving undisturbed the jurisdiction over suits or actions by one state against another. As said by Chief Justice Marshall in Cohens vs. Virginia, 6 Wheat. 264, 407: "The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought

by states." See, also, South Dakota vs. North Carolina, 192 U. S., 286.

Speaking generally, it may be observed that the judicial power of a nation extends to all controversies justiciable in their nature, the parties to which or the property involved in which may be reached by judicial process, and when the judicial power of the United States was vested in the Supreme and other courts all the judicial power which the nation was capable of exercising was vested in those tribunals, and unless there be some limitations expressed in the Constitution it must be held to embrace all controversies of a justiciable nature arising within the territorial limits of the nation, no matter who may be the parties thereto. This general truth is not inconsistent with the decisions that no suit or action can be maintained against the nation in any of its courts without its consent, for they only recognize the obvious truth that a nation is not without its consent subject to the controlling action of any of its instrumentalities or agencies. The creature cannot rule the creator. Kawananakoa vs. Polyblank, Trustee, Etc., 205 U. S. Nor is it inconsistent with the ruling in Wisconsin vs. Pelican Insurance Company, 127 U. S. 265, that an original action cannot be maintained in this court by one state to enforce its penal laws against a citizen of another state. That was no denial of the jurisdiction of the court, but a decision upon the merits of the claim of the state.

These considerations lead to the propositions that when a legislative power is claimed for the national government the question is whether that power is one of those granted by the constitution, either in terms or by necessary implication, whereas in respect to judicial functions the question is whether there be any limitations expressed in the constitution on the general grant of national power.

We may also notice a matter in respect thereto referred to at length in Missouri vs. Illinois & Chicago District, 180 U. S., 208, 220. The ninth article of the Articles of Confederation provided that "the United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more states concerning boundary, jurisdiction or any other cause whatever." In the early drafts of the constitution provision was made giving to the Supreme Court "jurisdiction of controversies between two or more states, except such as shall regard territory or jurisdiction," and also that the Senate should have exclusive power to regulate the manner of deciding the disputes and controversies between the states re-

specting jurisdiction or territory. As finally adopted, the constitution omits all provisions for the Senate taking cognizance of disputes between the states and leaves out the exception referred to in the jurisdiction granted to the Supreme Court. That carries with it a very direct recognition of the fact that to the Supreme Court is granted jurisdiction of all controversies between the states which are justiciable in their nature. "All the states have transferred the decision of their controversies to this court; each had a right to demand of it the exercise of the power which they had made judicial by the Confederation of 1781 and 1788; that we should do that which neither states nor congress could do, settle the controversies between them." Rhode Island vs. Massachusetts, 12 Pet., 657, 743.

Under the same general grant of judicial power jurisdiction over suits brought by the United States has been sustained. United States vs. Texas, 143 U. S., 621; 162 U. S., 1; United States vs. Michigan, 190 U. S., 379.

The exemption of the United States to suit in one of its own courts without its consent has been repeatedly recognized. Kansas vs. United States, 204 U. S., 331, 341, and cases cited.

Turning now to the controversy as here presented, it is whether Kansas has a right to the continuous flow of the waters of the Arkansas river, as that flow existed before any human interference therewith, or Colorado the right to appropriate the waters of that stream so as to prevent that continuous flow, or that the amount of the flow is subject to the superior authority and supervisory control of the United States. While several of the defendant corporations have answered, it is unnecessary to specially consider their defenses, for if the case against Colorado fails it fails also as against them. Colorado denies that it is any substantial manner diminishing the flow of the Arkansas river into Kansas. If that be true then it is in no way infringing upon the rights of Kansas. If it is diminishing that flow has it an absolute right to determine for itself the extent to which it will diminish it, even to the entire appropriation of the water? And if it has not that absolute right is the amount of appropriation that it is now making such an infringement upon the rights of Kansas as to call for judicial interference? Is the question one solely between the states or is the matter subject to national legislative regulation, and, if the latter, to what extent has that regulation been carried? Clearly this controversy is one of a justiciable nature. The right to the flow of a stream was one recognized at

common law, for a trespass upon which a cause of action existed.

The primary question is, of course, of national control. For, if the nation has a right to regulate the flow of the waters, we must inquire what it has done in the way of regulation. If it has done nothing the further question will then arise, what are the respective rights of the two states in the absence of national regulation? Congress has, by virtue of the grant to it of power to regulate commerce "among the several states," extensive control over the highways, natural or artificial, upon which such commerce may be carried. It may prevent or remove obstructions in the natural waterways and preserve the navigability of those ways. In United States vs. Rio Grande Irrigation Company, 174 U. S., 690, in which was considered the validity of the appropriation of the water of a stream by virtue of local legislation, so far as such appropriation affected the navigability of the stream, we said (p. 703):

"Although this power of changing the common law rule as to streams within its dominion undoubtedly belongs to each state, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a state can not by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far, at least, as may be necessary for the beneficial uses of the government property. Second, that it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. In other words, the jurisdiction of the general government over interstate commerce and its natural highways vests in that government the right to take all needed measures to preserve the navigability of the navigable watercourses of the country, even against any state action."

It follows from this that if in the present case the national government was asserting, as against either Kansas or Colorado, that the appropriation for the purposes of irrigation of the waters of the Arkansas was affecting the navigability of the stream, it would become our duty to determine the truth of the charge. But the government makes no such contention. On the contrary, it distinctly asserts that the Arkansas river is not now and never was practically navigable beyond Fort Gibson in the Indian territory, and nowhere claims that any appropriation of the waters by Kansas or Colorado affects its navigability.

It rests its petition of intervention upon its alleged duty of legislating for the reclamation of arid lands; alleges that in or near the Arkansas river, as it runs through Kansas and Colorado,

are large tracts of those lands; that the national government is itself the owner of many thousands of acres; that it has the right to make such legislative provision as in its judgment is needful for the reclamation of all these arid lands and for that purpose to appropriate the accessible waters.

In support of the main proposition it is stated in the brief of its counsel:

"That the doctrine of riparian rights is inapplicable to conditions prevailing in the arid region; that such doctrine, if applicable in said region, would prevent the sale, reclamation and cultivation of the public arid lands, and defeat the policy of the government in respect thereto; that the doctrine which is applicable to conditions in said arid region, and which prevails therein, is that the waters of natural streams may be used to irrigate and cultivate arid lands, whether riparian or non-riparian, and that the priority of appropriation of such waters and the application of the same for beneficial purposes establishes a prior and superior right."

In other words, the determination of the rights of the two states inter sese in regard to the flow of waters in the Arkansas river is subordinate to a superior right on the part of the national government to control the whole system of the reclamation of arid lands. That involves the question whether the reclamation of arid lands is one of the powers granted to the general government. As heretofore stated, the constant declaration of this court from the beginning is that this government is one of enumerated powers. "The government, then, of the United States can claim no powers which are not granted to it by the constitution, and the powers actually granted must be such as are expressly given or given by necessary implication." (Story, J., in Martin vs. Hunter's Lessee, I Wheat., 304, 326.) "The government of the United States is one of delegated, limited and enumerated powers." (United States vs. Harris, 106 U. S., 629, 635.)

Turning to the enumeration of the powers granted to Congress by the eighth section of the first article of the constitution, it is enough to say that no one of them by any implication refers to the reclamation of arid lands. The last paragraph of the section which authorizes Congress to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof, is not the delegation of a new and independent power, but simply provision for making effective the powers theretofore mentioned. The construction of that paragraph was precisely stated by Chief Justice Marshall in these words: "We

think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional"—a statement which has become the settled rule of construction. From this and other declarations it is clear that the constitution is not to be construed technically and narrowly, as an indictment, or even as a grant presumably against the interest of the grantor, and passing only that which is clearly included within its language, but as creating a system of government whose provisions are 6—5870 ... w,1r.ffi ... designed to make effective and operative all the governmental powers granted. Yet while so construed it still is true that no independent and unmentioned power passes to the national government or can rightfully be exercised by the Congress.

We must look beyond section 8 for congressional authority over arid lands, and it is said to be found in the second paragraph of section 3 of article four, reading: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States, or of any particular state."

The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property. That is implied by the words "territory or other property." It is true it has been referred to in some decisions as granting political and legislative control over the territories as distinguished from the states of the Union. It is unnecessary in the present case to consider whether the language justifies this construction. Certainly we have no disposition to limit or qualify the expressions which have heretofore fallen from this court in respect thereto. But clearly it does not grant to Congress any legislative control over the states, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits. Appreciating the force of this, counsel for the government relies upon "the doctrine of sovereign and inherent power," adding "I am aware that in advancing this doctrine I seem to challenge great decisions of the court, and I speak with deference." His

argument runs substantially along this line: All legislative power must be vested in either the state or the national government; no legislative powers belong to a state government other than those which affect solely the internal affairs of that state; consequently all powers which are national in their scope must be found vested in the Congress of the United States. But the proposition that there are legislative powers affecting the nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the constitution, independently of the amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the constitution is made absolutely certain by the tenth amendment. This amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the national government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future further powers seemed necessary they should be granted by the people in the manner they had provided for amending that act. It reads: "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." The argument of counsel ignores the principal factor in this article, to wit, "the people." Its principal purpose was not the distribution of power between the United States and the states, but a reservation to the people of all powers not granted. The preamble of the constitution declares who framed it, "we the people of the United States," not the people of one state, but the people of all the states, and article 10 reserves to the people of all the states the powers not delegated to the United States. The powers affecting the internal affairs of the states not granted to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, and all powers of a national character which are not delegated to the national government by the constitution are reserved to the people of the United States. The people who adopted the constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and after making provision for an amendment to the constitution by

which any needed additional powers would be granted, they reserved to themselves all powers not so delegated. This article 10 is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning. As we said, construing an express limitation on the powers of Congress, in Fairbanks vs. United States, 181 U. S., 283, 288:

"We are not here confronted with a question of the extent of the powers of Congress, but one of the limitations imposed by the constitution on its action, and it seems to us clear that the same rule and spirit of construction must also be recognized. If powers granted are to be taken as broadly granted and as carrying with them authority to pass those acts which may be reasonably necessary to carry them into full execution; in other words, if the constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power of Congress, that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed, and that language of restriction is to be narrowly and technically construed. Especially is this true when in respect to grants of powers there is as heretofore noticed the help found in the last clause of the eighth section, and no such helping clause in respect to prohibitions and limitations. The true spirit of constitutional interpretation in both directions is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose."

This very matter of the reclamation of arid lands illustrates this: At the time of the adoption of the constitution within the known and conceded limits of the United States there were no large tracts of arid land, and nothing which called for any further action than that which might be taken by the legislature of the state, in which any particular tract of such land was to be found, and the constitution, therefore, makes no provision for a national control of the arid regions or their reclamation. But, as our national territory has been enlarged, we have within our borders extensive tracts of arid lands which ought to be reclaimed, and it may well be that no power is adequate for their reclamation other than that of the national government. But if no such power has been granted, none can be exercised.

It does not follow from this that the national government is entirely powerless in respect to this matter. These arid lands are largely within the territories, and over them by virtue of the second paragraph of section three of article four heretofore quoted, or by virtue of the power vested in the national govern-

ment to acquire territory by treaties; Congress has full power of legislation, subject to no restrictions other than those expressly named in the constitution, and, therefore, it may legislate in respect to all arid lands within their limits. As to those lands within the limits of the states, at least of the western states, the national government is the most considerable owner and has power to dispose of and make all needful rules and regulations respecting its property. We do not mean that its legislation can override state laws in respect to the general subject of reclamation. While arid lands are to be found, mainly if not only in the western and newer states, yet the powers of the national government within the limits of those states are the same (no greater and no less) than those within the limits of the original thirteen, and it would be strange if, in the absence of a definite grant of power, the national government could enter the territory of the states along the Atlantic and legislate in respect to improving by irrigation or otherwise the lands within their borders. Nor do we understand that hitherto Congress has acted in disregard to this limitation. As said by Mr. Justice White, delivering the opinion of the court in Gutierres vs. Albuquerque Land Company, 188 U. S., 545, 554, after referring to previous legislation:

"It may be observed that the purport of the previous acts is reflexively illustrated by the act of June 17, 1902, 32 Stat., 388. That act appropriated the receipts from the sale and disposal of public lands in certain states and territories to the construction of irrigation works for the reclamation of arid lands. The eighth section of the act is as follows:

"'Sec. 8. That nothing in this act shall be construed as affecting or intending to affect or to in any way interfere with the laws of any state or territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the secretary of the interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any state or of the federal government or of any land owner, appropriator or user of water in, to or from any interstate stream or the waters thereof; Provided, That the right to the use of the water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure and the limit of the right.'"

But it is useless to pursue the inquiry further in this direction. It is enough for the purposes of this case that each state has full jurisdiction over the lands within its borders, including the beds of streams and other waters. Martin vs. Waddell, 16

Pet., 367; Pollard vs. Hagan, 3 How., 212; Goodtitle vs. Kibbe, 9 How., 471; Barney vs. Keokuk, 94 U. S., 324; St. Louis vs. Myers, 113 U. S., 566; Packer vs. Bird, 137 U. S., 661; Hardin vs. Jordan, 140 U. S., 371; Kaukauna Water Power Company vs. Green Bay & Mississippi Canal Company, 142 U. S., 254; Shively vs. Bowlby, 152 U. S., 1; Water Power Company vs. Water Commissioners, 168 U. S., 349; Kean vs. Calumet Canal Company, 190 U. S., 452. In Barney vs. Keokuk, supra, Mr. Justice Bradley said (page 338):

"And since this court, in the case of The Genesee Chief, 12 Id., 443, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reasons for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the states by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water."

In Hardin vs. Jordan, supra, the same justice, after stating that the title to the shore and lands under water is in the state, added (pp. 381, 382):

"Such title being in the state, the lands are subject to state regulation and control, under the condition, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce. * * * Sometimes large areas so reclaimed are occupied by cities, and are put to other public or private uses, state control and ownership therein being supreme, subject only to the paramount authority of Congress in making regulations of commerce, and in subjecting the lands to the necessities and uses of commerce. * * * This right of the states to regulate and control the shores of tide waters, and the land under them, is the same as that which is exercised by the crown in England. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas; and also, in some of the states, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and, in Pennsylvania, to all the permanent rivers of the state; but it depends on the law of each state to what waters and to what extent this prerogative of the state over the lands under water shall be exercised."

It may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for

the purposes of irrigation shall control. Congress can not enforce either rule upon any state. It is undoubtedly true that the early settlers brought to this country the common law of England, and that that common law throws light on the meaning and scope of the constitution of the United States, and is also in many states expressly recognized as of controlling force in the absence of express statute. As said by Mr. Justice Gray in United States vs. Wong Kim Ark, 169 U. S., 649, 654:

"In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the constitution. Minor vs. Happersett, 21 Wall., 162; Ex parte Wilson, 114 U. S., 417, 422; Boyd vs. United States, 116 U. S., 616, 624, 625; Smith vs. Alabama, 124 U. S., 465. The language of the constitution, as has been well said, could not be understood without reference to the common law. 1 Kent Com., 336; Bradley, J., in Moore vs. United States, 91 U. S., 270, 274."

In the argument on the demurrer counsel for plaintiff endeavored to show that Congress had expressly imposed the common law on all this territory prior to its formation into states. See, also, the opinion of the Supreme Court of Kansas in Clark vs. Allaman, 71 Kan., 206. But when the states of Kansas and Colorado were admitted into the Union they were admitted with the full powers of local sovereignty which belonged to other states, Pollard vs. Hagan, supra; Shively vs. Bowlby, supra; Hardin vs. Shedd, 190 U. S., 508, 519, and Colorado by its legislation has recognized the right of appropriating the flowing waters to the purposes of irrigation. Now the question arises between two states, one recognizing generally the common law rule of riparian rights and the other prescribing the doctrine of the public ownership of flowing water. Neither state can legislate for or impose its own policy upon the other. A stream flows through the two and a controversy is presented as to the flow of that stream. It does not follow, however, that because Congress can not determine the rule which shall control between the two states or because neither state can enforce its own policy upon the other, that the controversy ceases to be one of a justiciable nature, or that there is no power which can take cognizance of the controversy and determine the relative rights of the two states. Indeed, the disagreement, coupled with its effect upon a stream passing through the two states, makes a matter for investigation and determination by this court. It has been said that there is no common law of the United States as distinguished from the common law of the several states. This contention was made in Western Union Telegraph Company vs.

Call Publishing Company, 181 U. S., 92, in which it was asserted that, as Congress having sole jurisdiction over interstate commerce had prescribed no rates for interstate telegraph communications, there was no limit on the power of a telegraph company in respect thereto. After referring to the general contention, we said (pp. 101, 102):

"Properly understood, no exceptions can be taken to declarations of this kind. There is no body of federal common law separate and distinct from the common law existing in the several states in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of statute law enacted by the several states. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of Congress. * * * Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the common law, as so defined, and are subject to no rule except that to be found in the statutes of Congress? We are clearly of opinion that this can not be so, and that the principles of the common law are operative upon all interstate commercial transactions, except so far as they are modified by congressional enactment."

What is the common law? Kent says (vol. 1, p. 471):

"The common law includes those principles, usages and rules of action applicable to the government and security of persons and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature."

As it does not rest on any statute or other written declaration of the sovereign, there must, as to each principle thereof, be a first statement. Those statements are found in the decisions of courts, and the first statement presents the principle as certainly as the last. Multiplication of declarations merely adds certainty. For, after all, the common law is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes. As Congress can not make compacts between the states, as it can not, in respect to certain matters, by legislation compel their separate action, disputes between them must be settled either by force or else by appeal to tribunals empowered to determine the right and wrong thereof. Force under our system of government is eliminated. The clear language of the constitution vests in this court the power to

settle those disputes. We have exercised that power in a variety of instances, determining in the several instances the justice of the dispute. Nor is our jurisdiction ousted, even if, because Kansas and Colorado are states sovereign and independent in local matters, the relations between them depend in any respect upon principles of international law. International law is no alien in this tribunal. In The Paquete Habana, 175 U. S., 677, 700, Mr. Justice Gray declared:

"International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."

And in delivering the opinion in the demurrer in this case Chief Justice Fuller said (p. 146):

"Sitting, as it were, as an international, as well as a domestic tribunal, we apply federal law, state law, and international law, as the exigencies of the particular case may demand."

One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever, as in the case of Missouri vs. Illinois, supra, the action of one state reaches through the agency of natural laws into the territory of another state, the question of the extent and the limitations of the rights of the two states becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them. In other words, through these successive disputes and decisions this court is practically building up what may not improperly be called interstate common law. This very case presents a significant illustration. Before either Kansas or Colorado was settled the Arkansas river was a stream running through the territory which now composes these two states. Arid lands abound in Colorado. Reclamation is possible only by the application of water, and the extreme contention of Colorado is that it has a right to appropriate all the waters of this stream for the purposes of irrigating its soil and making more valuable its own territory. But the appropriation of the entire flow of the river would naturally tend to make the lands along the stream in Kansas less arable. It would be taking from the adjacent territory that which had been the customary natural means of preserving its arable character. On the other hand, the possible contention of Kansas, that the flowing water in the

Arkansas must, in accordance with the extreme doctrine of the common law of England, be left to flow as it was wont to flow, no portion of it being appropriated in Colorado for the purposes of irrigation, would have the effect to perpetuate a desert condition in portions of Colorado beyond the power of reclamation. Surely here is a dispute of a justiciable nature which must and ought to be tried and determined. If the two states were absolutely independent nations it would be settled by treaty or by force. Neither of these ways being practicable, it must be settled by decision of this court.

It will be perceived that Kansas asserts a pecuniary interest as the owner of certain tracts along the banks of the Arkansas and as the owner of the bed of the stream. We need not stop to consider what rights such private ownership of property might give.

In deciding this case on demurrer we said, referring to the opinion in Missouri vs. Illinois (p. 142):

"As will be perceived, the court there ruled that the mere fact that a state had no pecuniary interest in the controversy, would not defeat the original jurisdiction of this court, which might be invoked by the state as parens patriae, trustee, guardian or representative of all or a considerable portion of its citizens and that the threatened pollution of the waters of a river flowing between states, under the authority of one of them, thereby putting the health and comfort of the citizens of the other in jeopardy, presented a cause of action justiciable under the constitution.

"In the case before us the state of Kansas files her bill as representing and on behalf of her citizens, as well as in vindication of her alleged rights as an individual owner, and seeks relief in respect of being deprived of the waters of the river accustomed to flow through and across the state, and the consequent destruction of the property of herself and of her citizens and injury to their health and comfort. The action complained of is state action and not the action of state officers in abuse or excess of their powers."

It is the state of Kansas which invokes the action of this court, charging that through the action of Colorado a large portion of its territory is threatened with disaster. In this respect it is in no manner evading the provisions of the eleventh amendment to the federal constitution. It is not acting directly and solely for the benefit of any individual citizen to protect his riparian rights. Beyond its property rights it has an interest as a state in this large tract of land bordering on the Arkansas river. Its prosperity affects the general welfare of the state.

The controversy arises, therefore, above a mere question of local private right and involves a matter of state interest, and must be considered from that standpoint. Georgia vs. Tennessee Copper Co., ante.

This changes in some respects the scope of our inquiry. It is not limited to the simple matter of whether any portion of the waters of the Arkansas is withheld by Colorado. We must consider the effect of what has been done upon the conditions in the respective states and so adjust the dispute upon the basis of equality of rights as to secure as far as possible to Colorado the benefits of irrigation without depriving Kansas of the like beneficial effects of a flowing stream. A little reflection will make this clear. Suppose the controversy was between two individuals, upper and lower riparian owners on a little stream with rocky bank and rocky bottom. The question properly might be limited to the single one of the diminution of the flow by the upper riparian proprietor. The lower riparian proprietor might insist that he was entitled to the full, undiminished and unpolluted flow of the water of the stream as it had been wont to run. It would not be a defense on the part of the upper riparian proprietor that by the use to which he had appropriated the water he had benefited the lower proprietor, or that the latter had received in any other respects an equivalent. The question would be one of legal right, narrowed to place, amount of flow and freedom from pollution.

We do not intimate that entirely different considerations obtain in a controversy between two states. Colorado could not be upheld in appropriating the entire flow of the Arkansas river, on the ground that it is willing to give, and does give, to Kansas something else which may be considered of equal value. That would be equivalent to this court's making a contract between two states, and that it is not authorized to do. But we are justified in looking at the question not narrowly and solely as to the amount of the flow in the channel of the Arkansas river, inquiring merely whether any portion thereof is appropriated by Colorado, but we may properly consider what, in case a portion of that flow is appropriated by Colorado, are the effects of such appropriation upon Kansas territory. For instance, if there be many thousands of acres in Colorado destitute of vegetation, which by the taking of water from the Arkansas river and in no other way can be made valuable as arable lands producing an abundance of vegetable growth, and this transformation of desert land has the effect, through percolation of water in the soil, or in any other way, of giving to Kansas territory, although not in the Arkansas valley, a benefit from water as great as that which would enure

by keeping the flow of the Arkansas in its channel undiminished, then we may rightfully regard the usefulness to Colorado as justifying its action, although the locality of the benefit which the flow of the Arkansas through Kansas has territorially changed. Science may not as yet be able to give positive information as to the processes by which the distribution of water over certain territory has operation beyond the mere limits of the area in which the water is distributed, but they who have dwelt in the West know that there are constant changes in the productiveness of different portions of the territory, owing, apparently, to a wider and more constant distribution of water. To illustrate, the early settlers of Kansas territory found that farming was unsuccessful unless confined to its eastern 100 or 120 miles. West of that crops are almost always a failure, but now that region is the home of a large population, with crops as certain as those elsewhere, and yet this change has not been brought about by irrigation. A common belief is that the original sod was largely impervious to water, that when the spring rains came the water, instead of sinking into the ground, filled the watercourses to overflowing and ran off to the Gulf of Mexico. There was no water in the soil to go up in vapor and come down in showers, and the constant heat of summer destroyed the crops; but after the sod had once been turned the water from those rains largely sank into the ground, and then as the summer came on went up in vapor and came down in showers, and so by continued watering prevented the burning up of the growing crops. We do not mean to say that science has demonstrated this to be the operating cause or that other theories are not propounded, but the fact is that, instead of stopping at a distance of 120 miles from the Missouri river, the area of cultivated and profitably cultivated land has extended 150 to 200 miles further west, and seems to be steadily moving towards the western boundary of the state. Now, if there is this change gradually moving westward from the Missouri river, is it altogether an unreasonable expectation that as the arid lands of Colorado are irrigated and become from year to year covered with vegetation, there will move eastward from Colorado an extension of the area of arable lands until, between the Missouri river and the mountains of Colorado, there shall be no land which is not as fully subject to cultivation as lands elsewhere in the country? Will not the productiveness of Kansas as a whole, its capacity to support increasing population, be increased by the use of the water in Colorado for irrigation? May we not consider some appropriation by Colorado of the waters of the Arkansas to the irrigation and reclamation of its arid lands as a reasonable exercise of its sovereignty and as

not unreasonably trespassing upon any rights of Kansas. And here we must notice the local law of Kansas as declared by its Supreme Court, premising that the views expressed in this opinion are to be confined to a case in which the facts and the local law of the two states are as here disclosed. In Clark vs. Allaman, 71 Kan., 206, is an exhaustive discussion of the question, Mr. Justice Burch delivering the unanimous opinion of the court. In the syllabus, which by statute (Compiled Laws, Kansas, p. 317, §14) is prepared by the justice writing the opinion, and states the law of the case, are these paragraphs:

"The use of the water of a running stream for irrigation, after its primary uses for quenching thirst and other domestic requirements have been subserved, is one of the common law rights of a riparian proprietor.

"The use of water by a riparian proprietor for irrigation purposes must be reasonable under all the circumstances, and the right must be exercised with due regard to the equal right of every other riparian owner along the course of the stream.

"A diminution of the flow of water over riparian land caused by its use for irrigation purposes by upper riparian proprietors occasions no injury for which damages may be allowed unless it results in subtracting from the value of the land by interfering with the reasonable uses of the water which the land owner is able to enjoy.

"In determining the quantity of land tributary to and lying along a stream which a single proprietor may irrigate the principle of equality of right with others should control, irrespective of the accidental matter of governmental subdivisions of the land."

And in the opinion, on pages 242, 243, are quoted these observations of Chief Justice Shaw, in the case of Elliott vs. Fitchburg Railroad Company, 10 Cush., 191, 193, 196:

"The right to flowing water is now well settled to be a right incident to property in the land; it is a right publici juris, of such a character, that whilst it is common and equal to all, through whose land it runs, and no one can obstruct or divert it, yet, as one of the beneficial gifts of Providence, each proprietor has a right to a just and reasonable use of it, as it passes through his land; and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it can not be said to be wrongful or injurious to a proprietor lower down. What is such a just and reasonable use may often be a difficult question, depending on various circumstances. To take a quantity of water from a large running stream for agriculture or manufacturing

purposes, would cause no sensible or practicable diminution of the benefit, to the prejudice of a lower proprietor; whereas, taking the same quantity from a small running brook passing through many farms, would be of great and manifest injury to those below, who need it for domestic supply or watering cattle; and therefore it would be an unreasonable use of the water, and an action would lie in the latter case and not in the former. It is, therefore, to a considerable extent a question of degree; still, the rule is the same, that each proprietor has a right to a reasonable use of it, for his own benefit, for domestic use, and for manufacturing and agricultural purposes. * * *

"That a portion of the water of a stream may be used for the purpose of irrigating land, we think is well established as one of the rights of the proprietors of the soil along or through which it passes. Yet a proprietor can not, under color of that right, or for the actual purpose of irrigating his own land, wholly abstract or divert the watercourse, or take such an unreasonable quantity of water, or make such unreasonable use of it, as to deprive other proprietors of the substantial benefits which they might derive from it, if not diverted or used unreasonably. * * *

"This rule, that no riparian proprietor can wholly abstract or divert a watercourse, by which it would cease to be a running stream, or use it unreasonably in its passage, and thereby deprive a lower proprietor of a quality of his property, deemed in law incidental and beneficial, necessarily flows from the principle that the right to the reasonable and beneficial use of a running stream is common to all the riparian proprietors, and so each is bound so to use his common right, as not essentially to prevent or interfere with an equally beneficial enjoyment of the common right, by all the proprietors. * * *

"The right to the use of flowing water is publici juris, and common to all the riparian proprietors; it is not an absolute and exclusive right to all the water flowing past their land, so that any obstruction would give a cause of action; but it is a right to the flow and enjoyment of the water, subject to a similar right in all the proprietors, to the reasonable enjoyment of the same gift of Providence. It is, therefore, only for an abstraction and deprivation of this common benefit, or for an unreasonable and unauthorized use of it, that an action will lie."

As Kansas thus recognizes the right of appropriating the waters of a stream for the purposes of irrigation, subject to the condition of an equitable division between the riparian proprietors, she can not complain if the same rule is administered between herself and a sister state. And this is especially true when the waters are, except for domestic purposes, practically

useful only for purposes of irrigation. The Arkansas river, from its source to the eastern end of the Royal Gorge, is a mountain torrent, coming down between rocky banks and over a rocky bed. Along this distance it is of comparatively little use for irrigation purposes. After it debouches from the Royal Gorge it enters a valley, in which it wanders from one side to the other through eastern Colorado, southwestern Kansas and into Oklahoma, with but a slight descent, and presenting but little opportunities for the development of water power through falls or by dams. Its length in Kansas is about three hundred and fifty miles, and the descent is only 2,320 feet, or less than seven feet to a mile. There are substantially no falls, no narrow passageways in which dams can be readily constructed for the development of water power; and while there are some in eastern Colorado, yet they are of little elevation and mainly to assist in the storing of water for purposes of irrigation. So that, if the extreme rule of the common law were enforced, Oklahoma, having the same right to insist that there should be no diversion of the stream in Kansas for the purposes of irrigation that Kansas has in respect to Colorado, the result would be that the waters, except for the meagre amount required for domestic purposes, would flow through eastern Colorado and Kansas of comparatively little advantage to either state, and both would lose the great benefit which comes from the use of the water for irrigation. The drainage area of the Arkansas river in Colorado is 26,000 square miles; in Kansas, 20,000 square miles; and all this area, unless the stream can be used for purposes of irrigation, would be left to the slow development which comes from the cultivation of the soil.

The testimony in this case is voluminous, amounting to 8,559 typewritten pages, with 122 exhibits, and it would be impossible to make a full statement of facts without an extravagant extension of this opinion, which is already too long, and yet some facts must be stated to indicate the basis for the conclusion to which we have come. It must also be noted that, as might be expected in such a volume of testimony, coming as it does from three hundred and forty-seven witnesses, there is no little contradiction and a good deal of confusion, and this contradiction is to be found not merely in the testimony of witnesses, but also in the exhibits, among which are reports from the officials of the government and the two states. We have endeavored to deduce from this volume those matters which seem most clearly proved, and must, as to other matters, be content to generalize and state that which seems to be the tendency of the evidence.

Colorado is divided into five irrigating divisions, each of which is in charge of a division engineer. That which includes

the drainage area of the Arkansas is District No. 2, divided into eleven districts. Under the laws of Colorado, irrigating ditches have been established in this district, and the amount of water which each may take from the river decreed. In addition, some reservoirs have been built for storing the surplus waters which come down in times of flood, and this adds largely to the amount available for irrigation. The storage capacity of six of these reservoirs is shown to be 8,527,673,652 cubic feet. The significance and value of these reservoirs can be appreciated when we remember that the Arkansas, like many other streams, has its origin in the mountain districts of Colorado, and that by the melting of the snows almost every year there is a flood. The amount of water authorized to be taken by the ditches from the river is, as alleged in the bill, 4,200 cubic feet, and from its affluents and tributaries 4,300 feet. (Whenever this term is used in reference to the flow of water it means the number of cubic feet that pass in a second.) The average flow of the river as it comes out of the Royal Gorge at Canon City, is, as shown by official measurements for a series of years, 750 cubic feet. So that it appears that the irrigating ditches are authorized to take from the Arkansas river much more water than passes in the channel into the valley. It is not clear what surplus water, if any, comes out of the tributaries. There are some twenty-five of them, the average flow from four of which into the Arkansas is 313 cubic feet. Aside from this surplus water some may be returned through overflow of the ditches or from seepage. What either of these amounts may be is not disclosed. Indeed, the extent to which seepage operates in adding to the flow of a stream, or in distributing water through lands adjacent to those upon which water is poured, is something proof of which must necessarily be almost impossible. We may note the fact that a tract, bordering upon land which has been flooded, shows by its increasing vegetation that it has received in some way the benefit of water, and yet the amount of the water passing by seepage may never be definitely known. The underground movement of water will always be a problem of uncertainty. We know that when water is turned upon dry and barren soil the barrenness disappears, vegetation is developed, and that which was a desert becomes a garden. It is the magic of transformation; the wilderness budding and blossoming as the rose. The writer of this opinion recalls a conversation with Bayard Taylor, the celebrated traveler, in which the latter stated that nothing had contributed so much to secure the steady control of the French in Algiers as the fact that after taking possession of that territory they sank artesian wells on the borders of the desert, and thus reclaimed portions of it, for the Arabs

believed that people who could reclaim the desert were possessed of a power that could not be withstood.

Further, adjacent barren ground is slowly but surely affected, and itself begins to increase its vegetation. We may not be entirely sure as to the methods by which this change is accomplished, although the result is undoubted. It may be that water percolating under the surface has reached this adjacent ground. Perhaps the vegetation, which we know attracts moisture from the air, may increase the rainfall, and thus affect the adjacent barren regions.

It appears that prior to 1885 there was comparatively little water taken from the Arkansas for irrigation purposes—certainly not enough to make any perceptible impression on the flow of the river—but about that time certain corporations commenced the work of irrigation on a large scale, with ditches some of which might well be called canals. Thus, in 1884 work was commenced on ditches capable of carrying off 450 cubic feet; in 1887 others capable of carrying off 1,481 cubic feet, and in 1890 still others carrying 1,705 cubic feet. Most of these were completed within two years after the commencement of the several works. By the year 1902, according to the report of the Census Bureau of the United States, there were 300,115 acres, in 4,557 farms, actually irrigated.

The counties in Colorado from Canon City, eastward through which the Arkansas runs are Fremont, Pueblo, Otero, Bent and Prowers. The following tables prepared by the defendants from various census reports show the population, number of acres cultivated and total value of farm products in these several counties for the years 1880, 1890 and 1900:

COUNTY.	Population. 1880.	1890.	1900.
Fremont	4,735	9,156	15,636
Pueblo	7,617	31,491	34,448
Otero	....	4,192	11,522
Bent	1,654	1,313	3,049
Prowers	....	1,969	3,766
Making in the aggregate	14,006	48,121	68,421

COUNTY.	No. of Acres Cultivated. 1880.	1890.	1900.
Fremont	16,160	52,868	109,488
Pueblo	51,894	100,697	478,821
Otero	....	61,347	244,594
Bent	30,921	30,058	118,485
Prowers	....	46,447	217,332
	98,975	291,417	1,168,720

COUNTY.	Value of Farm Products. 1880.	1890.	1900.
Fremont	$ 76,900	$237,980	$ 472,293
Pueblo	136,184	244,580	691,693
Otero	....	208,860	1,089,344
Bent	105,621	35,070	670,541
Prowers	....	60,500	465,688
	$318,705	$786,990	$3,389,559

These tables disclose a very marked development in the population, area of land cultivated and amount of agricultural products. Whatever has been effective in bringing about this development is certainly entitled to recognition, and should not be wantonly or unnecessarily destroyed or interfered with. That this development is largely owing to irrigation is something of which from a consideration of the testimony there can be no reasonable doubt. It has been a prime factor in securing this result, and before at the instance of a sister state this effective cause of Colorado's development is destroyed or materially interfered with it should be clear that such sister state has not merely some technical right, but also a right with a corresponding benefit.

It may be asked why cultivation in Colorado without irrigation may not have the same effect that has attended the cultivation in Kansas west of where it was productive when the territory was first settled. It may possibly have such effect to some degree, but it must be remembered that the land in Colorado is many hundred feet in elevation above that in Kansas; that large portions of it are absolutely destitute of sod, and that cultivation would have comparatively little effect upon the retention of water. Add further the fact that the rainfall in Colorado is less than that in Kansas, and it would seem almost certain that reliance upon mere cultivation of the soil would not have anything like the effect in Colorado that it has had in Kan-

sas, and that the barrenness which characterized portions of the territory of Colorado would have continued for an indefinite time unless relieved by irrigation.

Turning to Kansas, the counties along the Arkansas river, commencing from the Colorado line, are: Hamilton, Kearney, Finney, Gray, Ford, Edwards, Pawnee, Barton, Rice, Reno, Sedgwick, Sumner, Cowley. Taking the same years as are given for the Colorado counties, the population is shown to be:

COUNTY.	Population. 1880.	1890.	1900.
Hamilton	168	2,027	1,426
Kearney	159	1,571	1,107
Finney	....	3,350	3,469
Gray	....	2,415	1,264
Ford	3,122	5,308	5,497
Edwards	2,409	3,600	3,682
Pawnee	5,396	5,204	5,084
Barton	10,318	13,172	13,784
Rice	9,292	14,451	14,745
Reno	12,826	27,079	29,027
Sedgwick	18,753	43,626	44,037
Sumner	20,812	30,271	25,631
Cowley	21,538	34,478	30,156
	104,793	186,552	178,909

We have been furnished by the United States census office with statistics of the corn and wheat crops of those counties from the years 1889 to 1904. Corn, wheat and hay are the leading crops in Kansas. It would unnecessarily prolong this opinion to copy these tables in full, so we give the figures for 1890, 1895, 1900 and 1904:

Acreage and Production of Corn and Wheat in Kansas—Thirteen Counties.

Year.	County.	Corn. Acres.	Corn. Bushels.	Wheat. Acres.	Wheat. Bushels.
1890.	Hamilton	80	400	449	6,636
	Kearney	872	8,720	586	10,658
	Finney	2,423	48,460	1,410	24,740
	Gray	493	2,465	3,335	38,724
	Ford	1,558	12,464	7,190	107,295
	Edwards	2,058	20,580	8,876	168,094
	Pawnee	544	2,720	39,464	591,402
	Barton	3,666	25,662	99,738	1,294,639
	Rice	27,460	329,520	52,941	792,345
	Reno	98,972	989,720	35,121	351,210
	Sedgwick	67,685	744,535	52,506	944,804
	Sumner	19,120	267,680	134,352	2,149,116
	Cowley	63,391	887,474	28,073	282,666
	Totals	288,322	3,340,400	464,041	6,762,329
1895.	Hamilton	404	3,232	4,360	12,576
	Kearney	914	5,698	2,917	6,430
	Finney	2,058	20,580	27,428	69,801
	Gray	1,115	11,150	12,297	12,309
	Ford	12,145	194,320	36,626	109,914
	Edwards	21,222	212,220	47,479	94,958
	Pawnee	19,076	152,608	113,980	342,075
	Barton	103,831	778,732	179,761	359,284
	Rice	153,256	3,371,632	127,200	254,394
	Reno	205,745	7,406,820	89,973	314,573
	Sedgwick	190,646	5,147,442	93,351	279,711
	Sumner	181,642	2,179,704	248,115	619,884
	Cowley	133,745	2,674,900	89,866	673,822
	Totals	1,025,799	22,159,038	1,073,353	3,149,731

Acreage and Production of Corn and Wheat in Kansas—Thirteen Counties—Continued.

Year.	County.	Corn. Acres.	Corn. Bushels.	Wheat. Acres.	Wheat. Bushels.
1900.	Hamilton	266	3,990	155	1,550
	Kearney	538	11,298	506	5,492
	Finney	1,213	18,195	427	4,234
	Gray	2,001	30,015	4,023	59,605
	Ford	11,215	145,795	23,416	444,904
	Edwards	25,032	325,416	43,525	696,400
	Pawnee	16,257	146,313	115,931	1,969,801
	Barton	32,649	261,192	254,130	5,081,352
	Rice	71,151	355,755	148,597	3,120,537
	Reno	199,150	1,991,500	110,404	2,097,276
	Sedgwick	153,635	2,766,430	123,339	2,589,811
	Sumner	102,057	2,143,197	288,133	5,761,260
	Cowley	121,398	2,792,154	79,948	1,439,064
	Totals	736,562	10,991,250	1,192,534	23,271,286
1904.	Hamilton	120	1,800	271	2,297
	Kearney	306	6,120	536	6,244
	Finney	759	7,590	7,012	37,382
	Gray	1,579	25,264	17,268	69,590
	Ford	10,631	170,096	72,917	365,299
	Edwards	23,396	584,900	130,313	1,302,834
	Pawnee	13,272	331,800	162,970	1,629,246
	Barton	26,984	728,568	262,673	3,414,731
	Rice	59,851	1,556,126	160,853	2,251,838
	Reno	138,899	4,028,071	207,002	3,518,752
	Sedgwick	132,374	3,441,724	151,635	1,971,255
	Sumner	79,808	1,995,200	294,489	3,828,192
	Cowley	109,708	2,962,116	68,477	821,652
	Totals	597,687	15,839,375	1,536,416	19,219,312

Comparing the tables of population it will be perceived that both the counties in Colorado and Kansas made a considerable increase in the years from 1880 to 1890; that while the Colorado counties continued their increase from 1890 to 1900, the Kansas counties lost. As the withdrawal of water in Colorado for irrigating purposes became substantially effective about the year 1890, it might, if nothing else appeared, not unreasonably be concluded that the diminished flow of the river in Kansas, caused by the action of Colorado, had resulted in making the land more

unproductive, and hence induced settlers to leave the state. As against this it should be noted, as a matter of history, that in the years preceding 1890, Kansas passed through a period of depression, with crops largely a failure in different parts of the state. But, more than that, in 1889 Oklahoma, lying directly south of Kansas, was opened for settlement and immediately there was a large immigration into that territory, coming from all parts of the West, and especially from the state of Kansas, induced by glowing reports of its great possibilities. The population of Oklahoma, as shown by the United States census, was, in 1890, 61,834, and in 1900, 348,331.

Turning to the tables of the corn and wheat products, they do not disclose any marked injury which can be attributed to a diminution of the flow of the river. While there is a variance in the amount produced in the different counties from year to year, it is a variance no more than that which will be found in other parts of the Union, and although the population from 1890 to 1900 in fact diminished, the amount of both the corn and wheat product largely increased. Not only was the total product increased, but the productiveness per acre seems to have been materially improved. Take the corn crop, and per acre, it was, in 1890, 12 bushels and a fraction; in 1895, 21 and a fraction; in 1900, 15, and in 1904, 28 bushels. Of wheat, the product per acre in 1890 was nearly 15 bushels; in 1895 it was only about 3 bushels. (For some reason, while that was a good year for corn, it seems to have been a bad year for wheat.) But in 1900 the product per acre arose to 19 bushels, and in 1904 it was 12 bushels.

These are official figures taken from the United States census reports, and they tend strongly to show that the withdrawal of the water in Colorado for purposes of irrigation has not proved a source of serious detriment to the Kansas counties along the Arkansas river. It is not strange that the western counties show the least development, for being nearest the irrigation in Colorado, they would be most affected thereby. At one time there were some irrigating ditches in these western counties, which promised to be valuable in supplying water and thus increasing the productiveness of the lands in the vicinity of the stream, and it is true that those ditches have ceased to be of much value, the flow in them having largely diminished.

It can not be denied in view of all the testimony (for that which we have quoted is but a sample of much more bearing upon the question), that the diminution of the flow of water in the river by the irrigation of Colorado has worked some detriment to the southwestern part of Kansas, and yet when we compare

the amount of this detriment with the great benefit which has obviously resulted to the counties in Colorado, it would seem that equality of right and equity between the two states forbids any interference with the present withdrawal of water in Colorado for purposes of irrigation.

Many other matters have been presented and discussed. We have examined and fully considered them, but, as heretofore stated, we shall have to content ourselves with merely general observations respecting them. Evidence has been offered of an alleged underflow of the river as it passes through the state of Kansas, and it seems to be the contention on the part of Kansas that beneath the surface there is, as it were, a second river with the same course as that on the surface, but with a distinct and continuous flow as of a separate stream. We are of the opinion that the testimony does not warrant the finding of such second and subterranean stream. If the bed of a stream is not solid rock, but earth through which water will percolate, and, as alleged in plaintiff's bill, the "valley of the river in the state of Kansas is composed of sand covered with alluvial soil," undoubtedly water will be found many feet below the surface, and the lighter the soil the more easily will it find its way downward and the more water will be discoverable by wells or other modes of exploring the subsurface. Undoubtedly, too, in many places there may be corresponding to the flow on the surface a current beneath the surface, but the presence of such subsurface water, even though in places of considerable amount and running in the same direction, is something very different from an independent subsurface river flowing continuously from the Colorado line through the state of Kansas. It is not properly denominated a second and subsurface stream. It is rather to be regarded as merely the accumulation of water which will always be found beneath the bed of any stream whose bottom is not solid rock. Naturally, the more abundant the flow of the surface stream and the wider its channel the more of this subsurface water there will be. If the entire volume of water passing down the surface was taken away the subsurface water would gradually disappear, and in that way the amount of the flow in the surface channel coming from Colorado into Kansas may affect the amount of water beneath the subsurface. As subsurface water, it percolates on either side as well as moves along the course of the river, and the more abundant the subsurface water the further it will reach in its percolations on either side as well as more distinct will be its movement down the course of the stream. The testimony, therefore, given in reference to this subsurface water, its amount and its flow bears only upon the question of the diminution of

the flow from Colorado into Kansas caused by the appropriation in the former state of the waters for the purposes of irrigation.

Equally untenable is the contention of Colorado that there are really two rivers, one commencing in the mountains of Colorado and terminating at or near the state line, and the other commencing at or near the place where the former ends, and from springs and branches starting a new stream to flow onward through Kansas and Oklahoma towards the Gulf of Mexico. From time immemorial the existence of a single continuous river has been recognized by geographers, explorers and travelers. That there is a great variance in the amount of water flowing down the channel at different seasons of the year and in different years is undoubted; that at times the entire bed of the channel has been in places dry is evident from the testimony. In that way it may be called a broken river. But this is a fact common to all streams having their origin in a mountainous region, and whose volume is largely affected by the melting of the mountain snows. Thus, from one of complainant's exhibits furnished by the United States Geological Survey, the mean monthly flow at Canon City, at the mouth of the Royal Gorge, for the years 1890, 1895 and 1900 is as follows:

ARKANSAS RIVER—CANON CITY. MEAN MONTHLY DISCHARGE IN SECOND FEET.

	1890.	1895.	1900.
January	310	344	*a*345
February	363	361	*a*353
March	320	471	*a*439
April	477	868	736
May	2,090	1,506	2,251
June	2,611	1,900	3,492
July	1,571	1,413	891
August	670	1,095	273
September	519	635	211
October	531	505	241
November	522	499	266
December	502	444	298

a Approximate.

Doubtless the variance at different seasons of the year is more regular and more pronounced than in those streams whose sources are only slightly elevated and the rise and fall of whose waters is mainly owing to rains. Contrasting, for instance, the Hudson with the Missouri, illustrates this. When the June flood comes down the Missouri river it is a mighty torrent. One can stand

on the bluffs of Kansas City and see an enormous volume of water, extending in width from two to five miles to the bluffs on the other side of the river, flowing onward with tremendous velocity and force, and yet at other times the entire flow of the Missouri river passes between two piers of the railroad bridge across the river at that point. No such difference between high and low water appears in the Hudson. In the days when navigation west of the Mississippi was largely by steamboats on the Missouri river, it was familiar experience for the flat-bottomed steamboats, drawing but little water, to be aground on sandbars and detained for hours in efforts to cross them. Gen. Doniphan commanded an expedition which marched from Fort Leavenworth in 1846 up the Arkansas valley and into the territory of New Mexico. He did not enter the valley again until shortly before his death in 1887, and when asked what he recognized replied that there were one or two natural objects like Pawnee rock that appeared as they did when he marched up the valley; the river was the same, but all else was changed, and the valley instead of being destitute of human occupation was filled with farm houses and farms, villages and cities—something that he had never expected would be seen in his day.

Summing up our conclusions, we are of the opinion that the contention of Colorado of two streams can not be sustained; that the appropriation of the waters of the Arkansas by Colorado, for purposes of irrigation, has diminished the flow of water into the state of Kansas; that the result of that appropriation has been the reclamation of large areas in Colorado, transforming thousands of acres into fertile fields and rendering possible their occupation and cultivation when otherwise they would have continued barren and unoccupied; that while the influence of such diminution has been of perceptible injury to portions of the Arkansas valley in Kansas, particularly those portions closest to the Colorado line, yet to the great body of the valley it has worked little, if any, detriment, and regarding the interests of both states and the right of each to receive benefit through irrigation and in any other manner from the waters of this stream, we are not satisfied that Kansas has made out a case entitling it to a decree. At the same time it is obvious that if the depletion of the waters of the river by Colorado continues to increase there will come a time when Kansas may justly say that there is no longer an equitable division of benefits and may rightfully call for relief against the action of Colorado, its corporations and citizens in appropriating the waters of the Arkansas for irrigation purposes.

The decree which, therefore, will be entered will be one dismissing the petition of the intervenor, without prejudice to the

rights of the United States to take such action as it shall deem necessary to preserve or improve the navigability of the Arkansas river. The decree will also dismiss the bill of the state of Kansas as against all the defendants, without prejudice to the right of the plaintiff to institute new proceedings whenever it shall appear that through a material increase in the depletion of the waters of the Arkansas by Colorado, its corporations or citizens, the substantial interests of Kansas are being injured to the extent of destroying the equitable apportionment of benefits between the two states resulting from the flow of the river. Each party will pay its own costs.

In closing, we may say that the parties to this litigation have approached the investigation of the questions in the most honorable spirit, seeking to present fully the facts as they could be ascertained from witnesses and discussing the evidence and questions of law with marked research and ability.

Mr. Justice Moody took no part in the decision of this case.

A true copy.

Test: JAMES H. M'KENNEY,
Clerk of the Supreme Court of the United States.

Supreme Court Decisions.

Right of way.—Right of purely private party to condemn right of way for ditch to convey water to his lands for domestic, mining or agricultural purposes guaranteed by constitution.

> Under 3167 Rev. Stats., p. 861, Sec. 7, Art. 16 of the Constitution, "Plaintiffs were entitled to the right of way over defendants' lands for a ditch upon payment of just compensation therefor." [P. 73.
>
> Tripp et al. vs. Overocker et al., 7 Colo., 1883.

Right of way.—Compensation for injury to settler on public domain.

> The proviso of the act of congress 1866, §9, reads as follows: "'*Provided, however,* That whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.' [14 Pub. Stats., 253; Rev. Stats. of the U. S. (1873-1875), p. 432, §2339." P. 247.
>
> Tynon vs. Despain, 22 Colo., 1896.

Right of way.—Congressional act construed as granting right of way—Is recognition of pre-existing rights rather than establishment of a new one.

> In construing §9 of act of 1866 without the proviso in Broder vs. Water Company, 101 U. S. 274, Held, " 'This act was an unequivocal grant of the right of way, if it was no more.' * * * It was further held that this section of the act 'was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one.' " [P. 248.
>
> Tynon vs. Despain, 22 Colo., 1896.

Right of way.—Condemnation proceedings—Limitation as to necessity—Law constitutional in this respect—Financial success or practicability does not enter into question of necessity.

> "Parties having the constitutional authority may condemn lands, but it is certainly proper to limit this right to the extent of their needs.

"What is proper to consider in determining this question will vary according to the circumstances of each particular case.

"Whether the enterprise is practicable or can be made a success financially does not enter into the question of necessity, nor is it pertinent to inquire what petitioner may be able to accomplish in the way of obtaining water which can be utilized through his proposed ditch and reservoir system." [P. 501.

Gibson vs. Cann, 28 Colo., 1901.

Right of way.—Questions to be determined in condemnation proceedings for right of way.

"The questions here to be determined are: First, the necessity for the construction of the ditch; second, the amount of damages." [P. 522.

"Appellee brought an action to condemn a right of way for a ditch twenty feet long, two feet wide and one foot deep, extending from the lower end of a certain irrigating ditch upon defendant's premises to plaintiff's premises." [P. 520.

"The petition and proofs show the necessity for the use of water and that there was water being wasted which petitioner might obtain.

"As to whether or not there is sufficient water for plaintiff's use, or as to whether or not the plan is a practicable or feasible one, is a matter which cannot be determined in a proceeding of this character.—Gibson vs. Cann, 28 Colo., 499." [P. 522.

Schneider vs. Schneider, 36 Colo., 1906.

Right of way.—Condemnation proceedings—Damages.

"In condemnation proceedings all damages, present and prospective, that are the natural, necessary or reasonable incident of the improvement, must be assessed, not including such as may arise from negligent or unskillful construction or use thereof." [P. 434.

Denver City Irr. & Water Co. vs. Middaugh, 12 Colo., 1889.

Right of way.—Only private ditches subject to enlargement under 3170-1-2 Rev. Stats. of 1908, p. 862, §6, §7 and §8; Mills' Ann. Stats., Secs. 2261-2-3, p. 1381.

"The ditches subject to enlargement and joint use under the statute are strictly private ditches, and such as are used to convey water across the land of another to irrigate the adjoining land of the person or corpora-

tion owning the ditch. This is clearly manifest by the language of the act, and also from its object and purpose." [P. 196.

Durango Ditch Co. vs. Durango, 21 Colo., 1896.

Right of way.—Under 3172 Rev. Stats, 1908, p. 862, §8; Mills' Ann. Stats., §2263, p. 1382, right of way may be procured by condemnation or contract for ditch not taking water from natural stream.

"*** The headgate of the feeder of the reservoir tapped the Larimer and Weld canal and not the stream itself ***. Such a right might be acquired by condemnation in a proper case (Mills' Ann. Stats., sec. 2263; Gen. Stats., sec. 1718) and, of course, by contract." [P. 343.

Water Supply & Storage Co. vs. Larimer & Weld Irrigation Co. et al., 24 Colo., 1897.

Right of way.—3165 Rev. Stats. 1908, p. 861; Mills' Ann. Stats., sec. 2256, p. 1361; Rev. Stats., 363, construed as conferring right of way to convey water over lands of another for purposes of irrigation.

"A right of way to convey water over lands of another for the purpose of irrigating one's land may be acquired under the statute (Rev. Stats., 363), and such right needs not a grant from the owner of the servient estate to support it." [P. 551.

"It was enacted by the first legislative assembly that persons owning claims on the bank, margin or neighborhood of any stream, should have the right of way over adjacent lands for the purposes of irrigation (Laws 1861, p. 62), and this law is still in force." [P. 554.

Yonkers vs. Nichols, 1 Colo., 1872.

Right of way.—Arises out of necessity.

"It seems to me, therefore, the right springs out of the necessity, and existed before the statute was enacted, and would still survive though the statute were repealed." [P. 570.

Yonkers vs. Nichols, 1 Colo., 1872.

Right of way.—3167 Rev. Stats. 1908, p. 861, §3; 2257 Mills' Ann. Stats., p. 1380, granting right of way through other lands modified by act of 1881; Rev. Stats., 3170-1-2, p. 862.

Under 3167 Rev. Stats., the "servient estate could be burdened with one ditch after another until its value would be greatly reduced or perhaps totally destroyed, with no authority in the proprietor to prevent the same." [P. 318.

Modified by act of 1881, providing that no land shall be burdened with more than one ditch. Shortest route must be taken. Owner of ditch must permit others to enlarge.

Downing vs. More, 12 Colo., 1888.

Right of way.—Owner of ditch must permit others to enlarge. 3172 Rev. Stats., 1908, p. 862, §8; 2263 Mills' Ann. Stats., 1382—Unconstitutional is so far as it undertakes to limit or regulate compensation.

"In providing that the owner of an existing ditch upon or across his own land, or the lands of another, shall not prohibit or prevent a third person from using and enlarging the same, the legislative intention evidently was to render more effective the equitable design expressed by the former section (§1716). But in so far as the latter undertakes to limit or direct the compensation to be paid for the property, it is clearly unconstitutional and void. For there are other elements of 'taking or damage' which cannot be ignored in determining the 'just compensation' required by our constitution." [P. 73.

"A careful examination of the entire act convinces us that if the objectionable phrases were stricken out, a good law would remain and the purpose of the legislature would still be accomplished." This act must be considered in connection with other statutes as well as constitutional provisions upon the same subject. And when so construed, omitting the objectionable part, no trouble will be experienced in giving it full force and effect. "The right to enlarge and use the ditch of another already constructed will be enforced in the same manner, and under the same law, as the right to take or damage any other kind of private property." [P. 75.

"By the terms of the constitution (art. II, §15), compensation for taking or damaging private property against owner's consent must be ascertained by a jury or board of commissioners; this requirement is imperative and the legislature is powerless to dispense with it." [P. 75.

Tripp vs. Overocker, 7 Colo., 1883.

Right of way.—Under 3170-1-2 Rev. Stats. 1908, p. 862, §§6, 7 and 8; §§2261-2-3 Mills' Ann. Stats., p. 1381-2. Right to enlarge applies to through ditches, not to ditches constructed by owner to water his lands exclusively.

"It will be noticed that in the first section of the act, provision is made against burdening improved or

occupied lands with two or more ditches for the purpose of conveying water through such lands without the owner's consent; while by section two the route to be selected through said lands is designated. The third section is to give effect to the first and second sections by prohibiting a party who has constructed a ditch to convey water through such lands to lands adjoining or beyond from preventing other parties from enlarging and using such ditch when necessary for the purpose of conveying water through the same lands." [P. 319.

"*** But a farmer in distributing water upon his own lands may have but little regard to the grade of his small ditches or laterals, and the statute does not contemplate the enlargement by others of such ditches, and thus not only burdening his lands with an easement, but compelling him against his will to accept such parties as co-tenants with him." [P. 320.

Downing vs. More, 12 Colo., 1888.

Right of way.—Condemnation proceedings—Waiver of question of necessity.

"In an action to condemn a right of way for an irrigating ditch, by demanding a jury to ascertain and assess the damages caused by the taking of the land, and by a voluntary trial of that question before a jury the respondent waived his right to have the preliminary question of the necessity of taking the land for the ditch submitted to a commission." [P. 243.

Thompson vs. Ditch & Reservoir Co., 25 Colo., 1898.

Right of way.—Verified statement under Mills' Ann. Stats., §§2264-5, is not evidence of title, nor constructive notice of right of way.

"The verified statement filed, hereinbefore referred to, which was introduced in evidence over the objection of defendants, it is admitted was not evidence of title to the right of way, and it can not be held to be constructive notice to the defendant of the existence of such ditch, for the reason that the statute under which the same was filed had been declared unconstitutional. Lamar Co. vs. Lamar Co., 26 Colo., 370; Great Plains Co. vs. Lamar Co., 31 Colo., 96." [P. 59.

Blake vs. Boye, 38 Colo., 1906.

Right of way.—Right of way acquired under Rev. Stats. 1868, chap. 18, §48, p. 130, merely an easement—Not a fee simple.

Under condemnation proceedings for right of way for canal, "We are of the opinion that merely a right of way or easement was acquired." [P. 494.

Smith Canal or D. Co. vs. Colo. Ice & Stor. Co., 34 Colo., 1905.

Right of way.—Right of way becomes vested only upon completion of work in compliance with local customs.

Under §9, act of congress 1866, "It (right of way) becomes vested only upon a compliance on the part of the canal owner with the local laws, customs, etc., and ownership is acquired as the work progresses, and priority to the water, as well as the right of way, becomes vested only upon the completion of the work of construction, and the application of water to a beneficial use." [P. 314.

Jarvis vs. State Bank, 22 Colo., 1896.

Right of Way.—Condemnation proceedings—Right of private party to condemn artificial channel for natural stream.

"The Constitution and statutes confer upon private individuals power of eminent domain for the right of way for irrigation ditches, but neither the Constitution nor any statute authorizes a private individual to maintain a condemnation suit for the benefit of himself and others similarly situated, and as trustee of the public to take lands belonging to still other persons for an artificial channel of a natural stream where the natural channel has been obstructed so as to prevent water from flowing down to the ditch of such private individual." [P. 100.

Ortiz et al. vs. Hansen, 35 Colorado, 1905.

Appropriation.—Constitution obliterated largely common law doctrine of riparian rights.

"* * * The constitution has, to a large extent, obliterated the common law doctrine of riparian rights and substituted in lieu thereof the doctrine of appropriations." [P. 149.

Oppenlander vs. Left Hand Ditch Co., 18 Colo., 1892.

Appropriation.—Doctrine of riparian rights not applicable to Colorado.

"We conclude, then, that the common law doctrine giving the riparian owner a right to the flow of water in its natural channel upon and over his lands, even though he makes no beneficial use thereof, is unapplica-

ble to Colorado. Imperative necessity, unknown to the countries which gave it birth, compels the recognition of another doctrine in conflict herewith." [P. 447.

Coffin et al. vs. Left Hand Ditch Co., 6 Colo., 1882.

Appropriation.—Existence of doctrine of appropriation.

"* * * we think the latter doctrine has existed from the date of the earliest appropriations of water within the boundaries of the state." [P. 446.

Coffin et al. vs. Left Hand Ditch Co., 6 Colo., 1882.

Appropriation.—Act of 1861, p. 35, construed as adopting common law to extent it was applicable to our conditions.

"The adoption of the common law by the territorial legislature of 1861 was limited to the extent that it was applicable to our conditions. The law of necessity rendered the common law doctrine of riparian rights wholly inapplicable in this jurisdiction, and as has frequently been stated, required its abrogation; so that, notwithstanding the declaration of the statute, it has never been recognized as controlling in the matter of water rights." [P. 302.

Crippen vs. White, 28 Colo., 1901.

Appropriation.—Right of diversion and use guaranteed under §5, Art. XVI of the constitution.

"Our constitution dedicates all unappropriated water in the natural streams of the state 'to the use of the people,' the ownership thereof being vested in 'the public.' The same instrument guarantees in the strongest terms the right of diversion and appropriation for beneficial uses." [P. 587.

Wheeler vs. Northern Colo. I. Co., 10 Colo., 1887.

Appropriation.—Priorities only from natural streams recognized by constitution.

"The constitution recognizes priorities only among those taking water from a natural stream." [P. 120.

F. H. L. C. & R. Co. vs. Southworth, 13 Colo., 1889.

Priority under 3177 Rev. Stats., p. 863, §13; M. A. S., 2269, p. 1384.

"Canon de Agua is not a running stream, but water comes entirely from rainfall in the surrounding hills. By use of the water so collected, appellee could irrigate a large portion of his land." [P. 305.

"We think appropriation was a valid one under 2269 of Mills' Ann. Stats.". [P. 306.

Denver, Texas & Ft. Worth R. R. Co. vs. Dotson, 20 Colo., 1894.

Appropriation.—First appropriator has prior right to extent of his appropriation.

"That the first appropriator of the water of a natural stream has a prior right to such water, to the extent of his appropriation, is a doctrine that we must hold applicable, in all cases, respecting the diversion of water for the purpose of irrigation." [P. 103.

Schilling et al. vs. Rominger, 4 Colo., 1878.

Appropriation.—What is an appropriation?

"Appropriation is the intent to take, accompanied by some open, physical demonstration of the intent, and for some valuable use." [P. 616.

Larimer Co. Res. Co. vs. People, 8 Colo., 1885.

Appropriation.—What constitutes a legal appropriation.

"To constitute a legal appropriation, the water must be applied within a reasonable time to some beneficial use; that is, the diversion ripens into a valid appropriation only when water is utilized by the consumer." [P. 531.

Platte Water Co. vs. Northern Colo. I. Co., 12 Colo., 1889.

Appropriation.—What constitutes a reasonable time.

"What shall constitute such reasonable time is a question of fact depending upon the circumstances connected with each particular case." [P. 154.

Sieber vs. Frink, 7 Colo., 1883.

Appropriation.—Application to beneficial use within a reasonable time.

"One of the essential elements of a valid appropriation of water is the application thereof to some useful industry. To acquire a right to water from the date of the diversion thereof, one must within a reasonable time employ the same in the business for which the appropriation is made. What shall constitute such reasonable time is a question of fact depending upon the circumstances connected with each particular case." [P. 154.

Sieber et al. vs. Frink et al., 7 Colo., 1883.

Appropriation.—True test of.

"The true test of appropriation of water is the successful application thereof to the beneficial use designed; and the method of diverting or carrying the same, or making such application, is immaterial." [P. 533.

Thomas vs. Guiraud et al., 6 Colo., 1883.

Appropriation.—Doctrine of relation.

"If the construction of a ditch be prosecuted with reasonable diligence, the right to water therethrough relates back to the commencement thereof." [P. 149.

Sieber vs. Frink, 7 Colo., 1883.

Appropriation.—Right to use of water for irrigation a property right.

"The right to the use of water for irrigating purposes is a right of property, the subject of ownership like any other property. Although the manner of acquiring the right of property in the use of water is peculiar and different from that of other property, such right to use must be determined like any other property right upon the ownership." [P. 477.

Cash vs. Thornton, 3 Colo. Appeals, 1893.

Appropriation.—Property rights in water consist in amount and priority of appropriation.

"Property rights in water consist not alone in the amount of the appropriation, but, also, in the priority of the appropriation. It often happens that the chief value of an appropriation consists in its priority over other appropriations from the same natural stream." [P. 27.

Nichols vs. McIntosh, 19 Colo., 1893.

Appropriation.—Water for domestic use may be appropriated by one not riparian owner.

"The right to water appropriated for domestic use does not depend upon locus of its use for that purpose, but may be diverted by one not riparian owner." [P. 339.

Town of Sterling vs. Pawnee D. Ext. Co., 94 Pac., 1908.

Appropriation.—Domestic use under §6, Art. XVI of the constitution—Use that of riparian owner for himself, his family and his stock.

"* * * §6, Art. XVI of the constitution recognizes a preference in those using water for domestic purposes over those using it for any other purpose. It is not intended thereby to authorize a diversion of water for domestic use from the public streams of the state, by means of large canals, as attempted in this case.

"The use protected by the constitution is such as the riparian owner had at common law to take water

for himself, his family or his stock, and the like. And if the term 'domestic use' is to be given a different or greater meaning than this, then as between such enlarged use and those having prior rights for agricultural and manufacturing purposes, it is subject to that other constitutional provision requiring just compensation to those whose rights are thereby affected." [P. 237.

Canal Co. vs. Loutsenhizer D. Co., 23 Colo., 1896.

Appropriation.—Prior vested rights for irrigation not affected by §§5 and 6, Art. XVI, of the constitution, giving users for domestic purpose a preference.

"* * * do not authorize interference with rights of prior appropriators for irrigation purposes whose rights vested before the adoption of the constitution, in order to supply later comers with water for domestic use." [P. 49.

Armstrong vs. Larimer Co. D. Co., 1 Colo. Appeal, 1891.

Appropriation.—Status of carrier under §8, Art. XVI of the constitution—Not proprietor of water diverted.

"The constitution unquestionably contemplates and sanctions the business of transporting water for hire from natural streams to distant consumers. The Colorado doctrines of ownership and appropriation (as declared in the constitution, statutes and decisions) give the carrier of water an exceptional status, differing in some particulars from that of the ordinary common carrier. * * * For the present it suffices to say that they (rights of carrier) are dependent for their birth and continued existence, upon the use made by the consumer. But giving these rights all due significance, I can not consent to the proposition that the carrier becomes a 'proprietor' of the water diverted." [P. 588.

Wheeler vs. Northern Colo. I. Co., 10 Colo., 1887.

Followed in

Wyatt vs. Irrigation Co., p. 298, 18 Colo., 1893.

"Under the constitution, the carrier is at least a quasi-public servant or agent. It is not the attitude of a private individual contracting for sale or use of his private property." [P. 589.

Wheeler vs. Northern Colo. I. Co., 10 Colo., 1887.

Appropriation.—Prior vested rights not affected by constitution.

"Our conclusion, therefore, that the constitutional provisions (§§5 and 6, Art. XVI of the constitution) relied upon were not intended to affect prior vested rights, but that owners of such rights are entitled to compensation therefor before the same can be taken or injuriously affected."

"Sec. 73, Gen. Stat., p. 974; §6525, Rev. Stat., subd. 73, p. 1519, is instructive as a contemporaneous legislative interpretation of the constitution. If the rights sought to be acquired did not ante-date the adoption of the constitution 'We are not to be understood * * * the rule requiring compensation to be made when such rights are taken for a higher use would be different.'" [P. 74.

Strickler vs. Colo. Springs, 16 Colo., 1891.

Appropriation.—Protection of rights vested by priority of possession which were recognized by local customs, by act of congress.

Act of Congress July 26, 1866, §9. "Said act of congress provides for the maintenance and protection of rights to the use of water which have become vested by priority of possession and which are recognized and acknowledged by the local customs, laws and decisions of the courts." [P. 530.

Platte Water Co. vs. North. Colo. I. Co., 12 Colo., 1889.

Appropriation.—Protection after patent by act of congress.

"July 9, 1870, congress passed an act amendatory of the foregoing act of 1866, in which, inter alia, it was provided that 'all patents granted, or pre-emptions 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 under or recognized by the ninth section of the act of which this act is amendatory.' Pub. Stats. (1870), p. 218, §17; Rev. Stats. U. S. (1873-1875), p. 432, §2340." [P. 247.

Tynon vs. Despain, 22 Colo., 1896.

Appropriation.—Legislature has power to regulate use affecting appropriation.

"While the legislature cannot prohibit the appropriation or diversion of unappropriated water for useful purposes, from natural streams upon the public domain,

that body has power to regulate the manner of effecting such appropriation or diversion." [P. 618.

Larimer Co. R. Co. vs. People ex rel., 8 Colo., 1886.

Appropriation.—Use must be truly beneficial, not speculative. §8, Art. XVI of the Constitution.

"The constitution provides that the water from natural streams may be diverted to beneficial use; but the privilege of diversion is granted for uses truly beneficial, not for purposes of speculation. This is evident from the fact that provision is made for establishing reasonable rates to be charged for the use of water by individuals or corporations furnishing the same. * * * *" [P. 152.

Combs vs. Agricultural Ditch Co., 17 Colo., 1892.

Appropriation.—Right of priority of appropriation not dependent upon locus of application.

"In the absence of legislation to the contrary, we think that the right to water acquired by priority of appropriation thereof is not in any way dependent upon the locus of its application to the beneficial use designed." [P. 449.

Coffin et al. vs. Left Hand D. Co., 6 Colo., 1882.
Affirmed in
Hammond vs. Rose, p. 526; 11 Colo., 1888.

Appropriation.—Priority right protected as well after patent as when public domain.

"The right to water in this country, by priority of appropriation thereof, we think it is, and has always been, the duty of the national and state governments to protect. The right itself, and the obligation to protect it, existed prior to legislation on the subject of irrigation. It is entitled to protection as well after patent to a third party of the land over which the natural stream flows, as when such land is a part of the public domain; and it is immaterial whether or not it be mentioned in the patent and expressly excluded from the grant." [P. 446.

"And we hold that, in the absence of express statutes to the contrary, the first appropriator of water from a natural stream for a beneficial purpose has, with the qualifications contained in the constitution a prior

right thereto, to the extent of such appropriation." [P. 447.

Coffin et al. vs. Left Hand Ditch Co., 6 Colo., 1882.
Affirmed in
Hammond vs. Rose, p. 526; 11 Colo., 1888.

Appropriation.—Rights of appropriators on main stream not subject to rights of subsequent appropriators on tributary.

"The fundamental principle of this system is that priority in point of time gives superiority of right among appropriators for like beneficial purposes. To now say that an appropriator from the main stream is subject to subsequent appropriation from its tributaries would be the overthrow of the entire doctrine." [P. 67.

Strickler vs. Colorado Springs, 16 Colo., 1891.

Appropriation.—Extent of application of above doctrine.

"The rights of a prior appropriator from a stream cannot be impaired by subsequent appropriations of water from its tributaries * * *; and this doctrine is applicable to the subsequent appropriation of water from a tributary which enters the main stream below the point where the prior appropriator makes his diversion when the result of such appropriation from the tributary is to require the prior appropriator to surrender the right to additional water for the purpose of supplying appropriations senior to his below the point where such tributary joins the main stream." [P. 83.

Platte Valley Irr. Co. vs. Buckers Co., 25 Colo., 1898.

Appropriation.—Rights of appropriation acquired under an executed agreement not in writing are unaffected by statute of frauds.

"Parties by their joint acts may acquire common rights to appropriate water for the purposes of irrigation unaffected by the statute of frauds. Such right is not only given by statute, but, in a country with a climate like Colorado, arises ex necessitate rei." [P. 100.

Schilling et al. vs. Rominger, 4 Colo., 1878.

Appropriation.—3165 Rev. Stats., p. 861, §1; act of 1861, p. 67, does not vest title to water in owner of lands. Secures right to divert for purpose of irrigation.

"The act of 1861 does not purport to vest title to water in a stream in the owner of lands thereon. Its object was to secure to such owners the right to divert

water for the purposes of irrigation; * * * that the rights under this act, so far as they relate to irrigation, are limited to a diversion from the stream for that purpose, and vest no title to any given quantity of water flowing therein." [P. 302.

Crippen vs. White, 28 Colo., 1901.

Appropriation.—Use of the surface drainage water.

"Use of the surface drainage water from the irrigation of an adjoining tract of land does not constitute an appropriation of such water, under 3177 Rev. Stats., p. 863; Mills' Ann. Stats., 2269, p. 1384. [P. 189.

Burkart vs. Merbray, 37 Colo., 1906.

Appropriation.—Underflow subject to appropriation—Burden of proof.

"Those acquainted with the arid region know that some of the most important and well-defined streams become almost, and sometimes entirely, dry during a portion of the year, and that there is at all times what is known as the underflow *** and to which rights by appropriation may attach. *** With these physical conditions present, it will be presumed that water flowing in a natural channel, which reaches the banks of a stream and there disappears in the sands of the bed, augments the flow in the main stream by percolation, until the contrary is shown, and the burden of proof is on the party diverting such water to establish that it does not mingle with the waters of the main stream." [P. 82.

Platte Valley Irr. Co. vs. Buckers Co., 25 Colo., 1898.

Appropriation.—The owner of land including a spring constituting a source of supply for a creek is not entitled to divert waters of spring to the injury of prior appropriators.

"Where one of the sources of the water of a creek is a spring, the fact that the volume of the water of the spring has been increased by seepage from irrigated lands above does not entitle the owner of the land including the spring to divert the water of the spring to the injury of prior appropriators of water from the creek." [P. 285.

Clark et al. vs. Ashby et al., 34 Colo., 1905.

Appropriation.—Under 3177 Rev. Stats., p. 863, §13; Mills' Ann. Stats., §2269, p. 1384.—Appropriation of seepage water cannot be made after same has reached the bed of natural stream flowing through claimant's land.

"Whether and to what extent this act is constitutional we decline to say ***." [P. 108.

"If valid at all, it is applicable only to appropriations of waste, seepage and spring waters before they reach the channel or bed of a natural stream, whether by natural surface flow, by percolation or by being artificially turned into the same. After waste waters reach the stream, unless there is then an intention by the owner to reclaim them, they become part of its volume, and insure to the benefit of the appropriators of its waters, to be enjoyed in accordance with their numerical priorities." [P. 109.

La Jara C. & L. S. A. vs. Hansen, 35 Colo., 1905.

Appropriation.—Passive acceptance of water flowing into a canal does not constitute an appropriation.

"*** the plaintiff has not made a valid appropriation *** it took no affirmative steps with that end in view, and its passive acceptance of waters that flowed into its canal *** does not constitute a valid appropriation." [P. 490.

Smith Canal vs. Colo. Ice & Storage Co., 34 Colo., 1905.

Appropriation.—Water appropriated for non-absorbing use and discharged into stream after such use, appropriator making no further claim to it, is abandoned water subject to appropriation.

Water appropriated for a non-absorbing use, such as power, and allowed to discharge after such use into the stream from which it is taken, the appropriator thereafter making no further claim to it, is abandoned water. "It then became subject to appropriation; and when once it was appropriated by a ditch owner below place of discharge, ditch owners higher up the stream are not entitled to it, either during temporary non-use, or after abandonment, though their priorities as to other quantities of water, or for other seasons of the year, may be prior in time." [P. 170.

The Cache La Poudre Reservoir Co. vs. The Water Supply & Storage Co. et al., 25 Colo., 1898.

See Windsor Res. & C. Co. vs. Lake Supply Ditch Co., p. 736., 98 Pac., 1908.

Appropriation.—Water hoisted from a mine subject to appropriation under 4231 Rev. Stats., p. 1064; 2 Mills' Ann. Stats., 3177, p. 1806.—Initiation of rights.

"Our statute has made such water the subject of appropriation." [P. 133.

2 Mills' Ann. Stats., §3177.

"Where it becomes necessary from time to time to construct new tunnels, each lower than the former, in order to drain mines, and a person appropriated the water obtained from the first tunnel for irrigation so long as it flowed, and continued to attempt to likewise utilize that from the succeeding tunnels, such person's appropriation dates back to the time of the first appropriation." [P. 129.

Ripley vs. Park Center L. & W. Co., 40 Colo., 1907

Appropriation.—Water passing through sand and gravel constituting bed of stream, and lands adjacent, not percolating waters as defined by the common law.

"*** water passing through sand and gravel constituting the bed of the stream and the lands so nearly adjacent that the only and natural outlet would be through such channel, are not percolating waters, as ordinarily defined by the common law; but, as already stated, are a part of the waters of the stream." [P. 71.

Buckers Irr. Co. vs. Farmers D. Co., 31 Colo., 1903.

Appropriation.—Presumption as to tributary water reaching main stream—Burden of proof.

"*** it is presumed that the waters of a tributary stream, less evaporation, if not interfered with, will reach main stream either by surface or subterranean flow." [P. 301.

A junior appropriator on a tributary sought to appropriate water, claiming that the water in such tributary, if suffered to flow, would not reach headgate of a senior appropriator on main stream, and hence its diversion would not injure such senior appropriator.

Held; Burden of proof was on junior appropriator to show such facts.

Patterson vs. Payne, 95 Pac., 1908.

Appropriation.—Increase in flow due to personal efforts and expenditures.

"It therefore follows * * * with reference to the stream from Beaver Lake, that to the extent of its original and natural flow, it was a tributary of the river, and * * * the defendants were entitled to the use of the water of this stream to the extent that by their

efforts and expenditures they had increased its average, continuous flow * * *." [P. 82.

Platte Valley Irr. Co. vs. Buckers Co., 25 Colo., 1898.

Appropriation.—Increase water does not mean surface or subterranean flow in channel—Burden of proof.

"It is only the actual increase resulting from the addition of water to a natural stream which would not otherwise pass down either its surface or subterranean channel, which the law recognizes as an increase of that character which can be diverted as against those entitled to its natural flow." [P. 70.

Upon party whose right is based upon increase flow of a natural stream, to clearly establish that they have increased flow of stream. [P. 70.

Burkers Irr. Co. vs. Farmers Ditch Co., 31 Colo., 1903.

Appropriation.—Underflow is governed by same rules of law as streams flowing upon the surface—Fact that surface bed is not visible does not change rules.

"The subterranean volume of water which finds its way through the sand and gravel constituting the beds of the streams which traverse the country adjacent to the mountains of this section, are recognized as a part of the waters of the stream to the same extent as though flowing upon the surface. That the surface bed of such a stream may not be visible does not change the rule with respect to this class of flowing waters. Underground currents of water which flow in well-defined and known channels, the course of which can be distinctly traced, are governed by the same rules of law as streams flowing upon the surface." [P. 326.

Medano Ditch Co. vs. Adams, 29 Colo., 1902.

Appropriation.—Right to enter stream to remove obstruction.

"The appellant (appropriator) had the right to enter the bed of the stream above the ditch and to remove sediment or obstructions which may have changed or obstructed the course of the current so as to prevent it from entering his ditch."

"The appropriation of the water at the point named carried with it an implied authority to do all that should become necessary to secure the benefit of the appropriation; to this extent the appropriator acquired an easement in the adjoining lands; but the right thus acquired

is one which is held to the narrowest limits compatible with the enjoyment of the principal easement, which is the right to the use of the water." [P. 596.

Crisman vs. Heiderer, 5 Colo., 1881.

Appropriation.—Joint filing and construction of ditch, but separate application of water to individual property—Not tenants in common in such water right.

A joint filing of claim to water and a joint building of a ditch to convey water, and at place of application water to be divided one-half upon the separate individual property of each——

Held: They are not tenants in common in the water right, but each had a separate and several right to one-half the water appropriated. [P. 355.

City of Telluride vs. Davis, 33 Colo., 1905.

Appropriation.—Change in point of diversion—Does not affect original priority.

"A change in point of diversion on the same stream does not affect the priority acquired by the original appropriation, provided the quantity of water diverted remains the same, and no intervening appropriator is injured." [P. 149.

Sieber vs. Frink, 7 Colo., 1883.

Appropriation.—Map and statement law so called, or Session Laws 1881, p. 161, M. A. S., Sec. 2264—Unconstitutional.

"Under Sec. 12, Art. XXV, of the constitution, Sessions Laws of 1881, p. 161, M. A. S., Sec. 2264, held unconstitutional. Sec. 2 of said laws is not clearly stated in title of said act." [P. 347.

Lamar Canal Co. vs. Amity D. & I. Co., 26 Colo., 1889.

Appropriation.—Right of carrier to demand a bonus or royalty after tender of rate fixed by commissioners.

"Any unreasonable regulations or demands that operate to withhold or prevent the exercise of this constitutional right by the consumer must be held illegal, even though there be no express legislative declaration on the subject." [P. 591.

Wheeler vs. Northern Colo. I. Co., 10 Colo., 1887.

Appropriation.—Effect of climatic conditions upon appropriation.

"The appellee's appropriation was of an amount of water necessary for the operation of the machinery used

in his mill, to wit, 140 miner's inches of water flowing in Mill Creek, subject to any prior appropriation of such waters. The fact that the volume of water, by reason of climatic conditions, is sufficient for the use intended during certain portions of the year only, does not, of itself, limit the appropriation to such periods of time, but is available whenever, by reason of the flow, there is sufficient water for such beneficial use." [P. 355.

City of Telluride vs. Davis, 33 Colo., 1905.

Appropriation.—Taxation, water mains, pipes and hydrants in public streets are realty for purposes of taxation.

"Under our statute, §2380, Gen. Stats. (2 Mills' Ann. Stats., §3782; 5540 Rev. Stats., §13, p. 1302), and irrespective of such statute, water mains, pipes and hydrants laid in the public streets and alleys of a city, and the machinery connected therewith and necessary to the operation of a water works plant, are realty for the purpose of taxation." [P. 352.

C. F. & I. Co. vs. Pueblo Water Co., 11 Colo. Appeals, 1898.

Appropriation.—Canal exempt from taxation under §3, Art. 10 of the constitution.

"This provision was adopted to relieve from separate taxation only those canals which are exclusively used for irrigating the lands owned by those who own the canals, either in whole or in part." [P. 249.

Empire Canal Co. vs. Rio Grande Co., 21 Colo., 1895.

Appropriation.—Taxation.

"The fact still remains that so long as the company is interested in the ditch with water rights remaining unsold, it is its purpose to make use of the ditch as a means through which to derive a profit from the sale of further water rights. The provision of the constitution upon which the ditch company relies was adopted for the sole benefit of those canals which are exclusively used for irrigating lands owned by those who own the canal in whole or in part." [P. 430.

Murray vs. Montrose County, 28 Colo., 1901.

Appropriation.—Technically, at common law a water right is not an appurtenance.

"The right to the use of water for irrigation from an artificial canal for conveying it, can not be regarded

as appurtenant to the land, technically, not at common law." [P. 218.

Bloom vs. West, 3 Colo. Appeals, 1893.

Appropriation.—Conveyances of water rights—Rules to determine whether or not a water right passes as an appurtenance.

"A water right is a distinct subject of grant, and may be conveyed separate and apart from the land upon which it is utilized; but, nevertheless, whether a deed to such lands conveys such right depends upon the intention of the grantor, to be determined from the terms of the deed, or, when the latter is silent as to said right, from the circumstances surrounding the transaction." [P. 188.

Arnett vs. Linhart, 21 Colo., 1895.

"'Although a water right may be appurtenant to land, it is the subject of property and may be transferred either with or without the land.' P. 61, Strickler vs. City of Colorado Springs, 16 Colo. Being, therefore, a distinct subject of grant, and transferable either with or without the land, whether a deed to land conveys the water right depends upon the intention of the grantor, which is to be gathered from the express terms of the deed; or, when it is silent as to the water right, from the presumption that arises from the circumstances, and whether said right is or is not incident to and necessary to the beneficial enjoyment of the land * * * and it is now stare decisis with us. We are satisfied with it and again approve it." [P. 442.

Bessemer I. D. Co. vs. Woolley, 32 Colo., 1904.

Appropriation.—Conveyances of water rights—Statute of frauds—Question of statute purely personal.

"The transfer of a water right, in order to avoid the statute of frauds, should be in writing signed by the party making it; but a stranger to such an agreement can not object that it was not so evidenced. The question is purely personal and can not be raised by those who were neither parties nor privies to the agreement." [P. 64.

Daum vs. Conley, 27 Colo., 1899.

Appropriation.—Conveyance of water rights—Construction of habendum clause in deed of trust.

"'To have and to hold same * * * and all the estate, right, title, interest, claim or demand in and to the same, either now or which may hereafter be ac-

quired,' does not grant any after acquired property, but merely confirms in the grantee any title to the property specifically conveyed which grantor might afterwards acquire. Such clause could not operate to convey a water right afterwards acquired and applied to the land conveyed." [P. 439.

Bessemer I. D. Co. vs. Woolley, 32 Colo., 1904.

Appropriation.—Conveyance of water rights—Sheriff's deed under foreclosure.

"Where a sheriff's deed did not purport to convey the water right, and he had the right to levy thereon, but did not do so, neither the sheriff's nor purchaser's intention can control, * * * the water right is not conveyed." [P. 104.

Cooper vs. Shannon, 36 Colo., 1906.

Appropriation.—Conveyance of water rights—A water right used to irrigate lands may pass as an appurtenance.

"A water right which is used in irrigating lands may pass as a grant of the lands themselves under word 'appurtenances,' if such was the intention of the grantor." [P. 494.

King vs. Ackroyd, 28 Colo., 1901.

Appropriation.—Conveyance of water rights—Right of purchaser under forclosure sale.

"Failure of trustee to secure a transfer of stock in an extension ditch, used only as a carrier of stockholders' water in an original ditch, does not give purchaser under foreclosure a right to have water carried in such extension ditch, notwithstanding a clause in trust deed purporting to convey all rights used as a means of conveying water to mortgaged premises." [P. 291.

Oligarchy D. Co. vs. Farm Inv. Co., 40 Colo., 1907.

Appropriation.—Conveyance of water rights—Conveyance of land only does not transfer interest in ditch.

"A conveyance of land without mention of a water right can not be taken to transfer an interest in a ditch, although the water carried may have been used upon the land.

"In this state it is regarded as an independent right, which may be the subject of sale and conveyance, but a technical transfer is essential to vest in the transferee a title to the water." [P. 119.

Child vs. Whitman, 7 Colo. Appeals, 1895.

Appropriation.—Conveyance of water rights—Grantee's acceptance of a deed with reservation as to reservoir priority—Where such priority had not been secured does not estop grantee from claiming priority of its own for such reservoir.

"A grantee's acceptance of a deed containing a reservation to the grantor of a priority or appropriation of water for a certain reservoir where no priority or appropriation has been secured, did not estop the grantee to claim an appropriation of its own for such reservoir." [P. 730.

Windsor Res. & Canal Co. vs. Lake Supply D. Co., 98 Pac., 1908.

Appropriation.—Conveyance of water right.

"Where a party owns a half interest in a certain irrigating ditch, and the water decreed to such ditch, which he used to irrigate certain land, and also owned 20 inches of water decreed to another ditch which, by consent of the parties interested, he diverted through the former ditch and used in irrigating the same land, a deed conveying said land, together with one-half interest in the ditch, and 'one-half interest in the water belonging to said ditch, or that is entitled to run through the same either by decree, appropriation or ownership,' conveyed the 20 inches of water." [P. 112.

Fluke et al. vs. Ford, 35 Colorado, 1905.

Appropriation.—Abandonment—What constitutes

"To constitute an abandonment there must be a concurrence of an intention to abandon with actual relinquishment of the property." [P. 1.

Nichols vs. Lantz, 9 Colo. Appeals, 1896.

Appropriation.—Abandonment—Failure to use for an unreasonable time creates presumption—Not conclusive, however.

"A failure to use (water) for a time is competent evidence on the question of abandonment, and if such non-use be continued for an unreasonable period, it may fairly create a presumption of intention to abandon; but the presumption is not conclusive, and may be overcome by other satisfactory proofs." [P. 154.

Sieber et al. vs. Funk et al, 7 Colo., 1883.

Appropriation.—Abandonment—Burden of proof.

"It is elementary that in claiming a right under abandonment, the burden of proof is upon the party asserting it, and before it can be sustained, the aban-

donment must be shown by a preponderance of proof." [P. 364.

Hall vs. Lincoln, 10 Colo. Appeals, 1897.

Appropriation.—Abandonment applies only to completed appropriations.

"The question presented in this connection (conditional decree) is not one of abandonment, as that term when employed in our irrigation law applies only to completed appropriations of water, and there can be no abandonment of that which never existed." [P. 306.

Conley vs. Dyer, 95 Pac., 1908.

Appropriation.—Abandonment of priority—Decree res judicata.

"The volume of the priorities awarded in the adjudication proceedings must be treated as res judicata, and none of the facts upon which that award was predicated can be inquired into for the purpose of determining the question under consideration."

Platte Valley Irr. Co. vs. Central Trust Co., 32 Colo., 1904.

Appropriation.—Abandonment matter of intention—Evidence.

"Abandonment is a matter of intention, and, therefore, the intent with which the acts claimed to operate as an abandonment were done is immaterial." [P. 457.

B. & W. R. D. Co. vs. L. C. D. & R. Co., 36 Colo., 1906.

Appropriation.—Abandonment of construction—Effect of.

"Upon abandonment of the construction of a proposed canal without intention of resuming, all incipient rights lapse and revert to the public, and are not thereafter capable of being sold or transferred."

The Colo. L. & W. Co. vs. The Rocky Ford C., R., L., L. & T. Co., 3 Colo. Appeals, 1893.

Appropriation.—Re-entry and prosecution after negligence.

"If, by neglect to apply the water within a proper time, the right to apply was forfeited, the water reverted, and any one could proceed to appropriate and apply it; but such right could only attach while the right of the former claimant was in abeyance by reason of his negligence, and the second party must have availed himself of the right before the re-entry and

prosecution of the enterprise by the first party." [P. 135.

The Beaver Brook Res. & C. Co. vs. St. Vrain Res. & Fish Co., 6 Colo. Appeals, 1893.

Appropriation.—Abandonment—Evidence of non-user and similar acts before rendition of decree is proper for purpose of showing intention after proving subsequent abandonment by legal evidence.

"Abandonment as applied to property rights consists of non-user and intention."

"Though evidence of non-user and similar acts before a decree establishing priorities to the use of water by the owner of an irrigation ditch is improper for the purpose of proving his right to use a less volume of water than that decreed to him, as well as the purpose of showing the element of non-user in a subsequent abandonment relied on by another appropriator suing for diversion of water, yet where there is sufficient legal evidence as to the element of non-user subsequent to the decree, evidence of non-user and similar acts by such owner before the decree for the purpose of showing his intent in not using what was awarded to him, is proper and not prejudical." [P. 1112.

Alamosa Creek Canal Co. vs. Nelson, 93 Pac., 1908.

Forwald vs. Nelson. Same as above.

Appropriation.—Abandonment under 3318 Rev. Stats. to Right of Review.

See Peterson vs. Durkee, p. 258, 15 Colo. Appeals, 1900.

Appropriation.—Contracts—Status of consumer under contract with carrier.

"His contract with the company (carrier) is not the purchase of a given volume of water, but the purchase of the right to use the canal as a means to conduct a given volume, or so much thereof as may be necessary to irrigate a certain number of acres." [P. 329.

Wright vs. Platte Val. Irrigation Co., 27 Colo., 1900.

Appropriation.—Contracts—Contract limiting application of water to particular lands upheld under 2283, Mills' Ann. Stats., p. 1388; 3239 Rev. Stats., p. 873, §75.

"We are unable to see wherein such limitation is against public policy, or is in any sense an illegal or un-

reasonable exaction on the part of the ditch company. * * * And is directly in line with the policy prescribed by the legislature upon this subject.—Sec. 2283, Mills' Ann. Stats., p. 1388." [P. 330.

Wright vs. Platte Val. Irrigation Co., 27 Colo., 1900.

Appropriation.—Contracts—Effect of contract upon priorities—Waiver.

Consumer of water under decree by original construction may by contract waive priority and be compelled to prorate with consumer using water under decree for extension. [P. 489.

O'Neil vs. Ft. Lyon C. Co., 39 Colo., 1907.

Appropriation.—Contracts—Measure of rights, duties and liabilities thereunder.

"To be found in statutes of the state and in the contract, not in rules of the company." [P. 385.

Downey vs. Twin Lakes L. & W. Co., 41 Colo., 1907.

Appropriation.—Contracts—Provision in water contract that upon refusal of carrier to furnish water, consumer may do so, is void.

A provision in a water right contract between a ditch company and consumer, to the effect that if a ditch company should at any time refuse to furnish water, the consumer may take it himself, is void. [P. 191.

"* * * As being inconsistent with statute law of this state." (An act regulating distribution of water, 1887.) [P. 196.

White vs. Highline Canal Co., 22 Colo., 1896.

Appropriation.—Contracts—Where the owner of a reservoir, who also owns the land upon which it is situated, contracts to deliver to two grantees, each a specific quantity of water, such contract is the measure of their rights unaffected by rights of users from natural stream.

"A contract between the owners of a reservoir, who are likewise owners in fee of the land on which the same is situate, of the one part, and two grantees of definite quantities of water to each, * * * is conclusive of such rights * * * and can in no manner be affected by the rights of user, which may be acquired to the waters of a running stream under the constitution and statutes of the state." [P. 396.

Rockwell vs. Highland Ditch Co., 1 Colo. Appeals, 1892.

Appropriation.—Contracts—Carrier under contract liable in damages for failure to deliver water due to negligence—Vis major only will relieve carrier.

"* * * The party contracting to supply it (water) should not be exonerated from a failure to perform, except under circumstances clearly showing that the failure was chargeable to vis major, and not to negligence and inattention." [P. 427.

Pawnee, etc., Canal Co. vs. Jenkins, 1 Colo. Appeals, 1892.

Appropriation.—Contracts—Failure of carrier to deliver water.

"Where the owner of land, which was entitled to a supply of water through an irrigation ditch, leased the land, covenanting in the lease to supply sufficient water for irrigation, such owner is the real party in interest, and entitled to sue for a failure of the ditch owners to deliver the water necessary for the raising of crops on the land, whereby the lessees were unable to pay the stipulated rent to the owner. [P. 237.

Farmers' H. L. Co. vs. New Hamp. Co., 40 Colo., 1907.

Appropriation.—Contracts—Relation between irrigation company and its stockholders that of implied contract.

"The relation between an irrigation corporation and its members is one of implied contract, from which arises a trust with which the corporation is charged to conduct the common business in the interests of the stockholders. Each share of stock, in respect to the benefits (in this case water for irrigation) to which it entitles its shareholders, is equal to every other share." [P. 30.

Rocky Ford C. R. L. & L. Co. vs. Sampson, 5 Colo. Appeals, 1894.

Appropriation.—Contracts—Contract making stock in ditch company do double duty is void.

"A contract whereby certain stockholders in a ditch company sold their stock to a reservoir company, the vendors to continue in possession of their certificates, and to divert water for the use of their land to the same extent theretofore enjoyed, and the reservoir company to have the right to divert for storage and direct irrigation the difference between the quantity of water actually needed by the vendors and the maximum represented by the certificates in the priorities of the ditch,

was invalid as requiring the water rights evidenced by the shares of stock to do double duty." [P. 317.

Cache la Poudre Irr. Co. vs. Hawley, 95 Pac., 1908.

Appropriation.—Contracts—Rule for interpretation of contracts—Application.

"As a guide to a correct interpretation the law permits the subject matter of a contract, the situation of the parties at the time of its execution, and all surrounding facts and circumstances to be taken into consideration." [P. 46.

Plaintiff granted canal company a right of way in consideration of use of water equivalent to 20 shares of the capital stock, at time of entering into contract, equivalent to 3.6 cubic feet of water. Afterwards company acquired other priorities.

Held: The 20 shares did not carry with it any invariable quantity of water; it carried only the right to 3.6 cubic feet of water, provided the prorata share of water going to 20 shares amounted to 3.6 cubic feet, and that he had no right to share in priorities acquired after contract was made. [P. 48.

True vs. Rocky Ford C. R. & L. Co., 36 Colo., 1906.

Appropriation.—Contracts—Rule for interpretation of contracts—Application.

"In order to determine this (the true intent and meaning of the contract) the terms used must be read in the light of the circumstances surrounding the parties at the time of their execution, the subject matter thereof, and the purposes and objects to be accomplished thereby." [P. 309.

Wyatt vs. Larimer & Weld Irr. Co., 18 Colo., 1893.

"The controversy arises upon the meaning to be given to the words, 'estimated capacity to furnish water.'" [P. 310.

"In the light of the purpose, therefore, to be accomplished, we think the words 'estimated capacity,' limited and modified as they are (in contract) by the words 'to furnish,' must be construed as meaning the ability of the canal to supply or deliver water." [P. 313.

. Supra.

Appropriation.—Contracts.

Status of a company organized to take title in canal for benefit of purchasers of water rights up to canal's estimated capacity in regard to purchaser of deed for a water right in the canal after the estimated capacity had been sold.

See Blakely vs. Ft. Lyons Canal Co., p. 225, 31 Colo., 1903.

Appropriation.—Contracts—Right of carriage of water a continuing easement under executed agreement to enlarge.

A ditch company, in consideration of its carriage of water, enlarged a ditch, putting in all necessary dams, flumes and headgate at its own expense—the two companies prorating maintenance charges of enlarged ditch and in common—unrestricted as to time such agreement should run.

Held: Their right is clearly an easement * * * not an easement revocable at the pleasure of owner of ditch before enlargement, but a continuing one, of which the company enlarging could enforce the quiet enjoyment. [P. 281.

Chicosa Irr. D. Co. vs. El Moro D. Co., 10 Colo. Appeals, 1897.

Appropriation.—Contracts—A perpetual right to the use of water from an irrigating ditch, acquired or reserved under contract, is an easement.

"A perpetual right to the use of water from an irrigating ditch, acquired or reserved under contract, constitutes an easement in the ditch, which cannot be lost by non-user alone, short of the period of limitation for action to recover such property." [P. 213.

People ex rel. Standart vs. Canal Co., 25 Colo., 1898.

Appropriation.—Contract with city or town for water works.

See Grand Junction Water Works Company vs. City of Grand Junction, p. 425-14, Colo. Appeals.

Appropriation.—Contracts—A perpetual right to have a certain quantity of water flow through an irrigating ditch is an easement and a freehold estate.

"A perpetual right to have a certain quantity of water flow through an irrigating ditch is an easement in the ditch, an incorporeal hereditament descendible by inheritance, and a freehold estate." [P. 298.

Held: Supreme Court has jurisdiction on appeal under §388, p. 206, Code 1887, in controversies involving such right.

Wyatt vs. Larimer & Weld Irr. Co., 18 Colo., 1893.

Appropriation.—Contracts—Easement created by.

"The owners of an irrigation ditch and their lessees in a contract covenanted jointly and severally, for themselves, and each of them, their successors, assigns, etc., to furnish water for the lands of certain adjoining landowners, their heirs, executors, administrators, assigns, etc., for a certain price. The contract further provided that the covenants on the part of the owners and the lessees of the ditch touching the furnishing of the water should run with the right of way and ditch and with the lands, forever, and be obligatory upon and in favor of the owners and proprietors of the ditch and lands; and that, by virtue thereof, the owners of the land should, at all times, receive from the ditch all the necessary water for the irrigation of the lands, any change in the ownership, control or management of the ditch notwithstanding. The contract was duly recorded. Held, that such contract created an easement and covenants running with the land, binding upon the owners of the ditch." [P. 476.

Farmers' H. L. Co. vs. New Hamp. Co., 40 Colo., 1907.

Appropriation.—Under the constitution of the state of Colorado.—Rev. Stats., 1908, §§3165-3232, p. 861.—Right to use stream bed as a reservoir site.

"The word 'divert' must be interpreted in connection with the word 'appropriations' and other language used in the remaining sections of that instrument (constitution) referring to the subject of irrigation. We think there may be a constitutional appropriation of water without its being at the instant taken from the bed of the stream." [P. 616.

Larimer Co. R. Co. vs. People ex. rel., 8 Colo., 1885.

Use of water.—3175 Rev. Stats. 1908, p. 862, §11—2267 Mills' Ann. Stats., p. 1384.—Prorating statute constitutional.

"All co-consumers taking water within a reasonable time have priorities of even date with each other." [P. 120.

"There may, of course, be secondary diversions (to which the rights of secondary consumers relate) through

subsequent lawful enlargements of the quantity of water legally taken in the first instance." [P. 120.

"The word 'co-consumer' will * * * be applied exclusively to consumers taking from same artificial stream." [P. 119.

"The prorating statute, which we are asked to declare unconstitutional, does not take away the consumer's right to water; it simply regulates the use of this right. The consumer's constitutional rights must, of course, be preserved; but it is hardly less important that the legislative authority to adopt regulations which shall advance the wise purpose of the constitutional provision, and promote the true interests of the consumers themselves, be maintained." [P. 129.

"I do not say that under no circumstances can any portion of this provision be challenged as unconstitutional, but I do say that the present arraignment thereof is unfounded." [P. 129.

F. H. L. C. & R. Co. vs. Southworth, 13 Colo., 1889.

Use of water.—Constitutional limitation of operation of prorating statute.

"'The appropriations of water by consumers who receive the same through the same ditch do not necessarily relate to the same time; but, on the contrary, such consumers may have different priorities of right.' Thus, in effect, the prorating statute, so-called (Gen. Stats., 1883, §1722), was upon constitutional grounds, limited in its operation." [P. 26.

Nichols vs. McIntosh, 19 Colo., 1893.

Use of water.—As to decree being in violation of prorating statute of 1879.

"It is also claimed that the decree is in violation of the prorating statute of 1879. We do not so consider it. It is admitted in this case that this ditch is entitled to priorities as of date of the original construction, and by reason of its several enlargements. These priorities are protected by the constitution, and cannot be interfered with by legislative action. The most favorable view that can be taken of the statute is that in times of scarcity of water it may be resorted to to compel the prorating of water among consumers having priorities of the same, or nearly the same, date. Farmers' High Line Canal & Reservoir Co. vs. Southworth, 13 Colo., 111." [P. 491.

Larimer & Weld Irr. Co. vs. Wyatt, 23 Colo., 1897.

Use of water.—Appropriators of water through same ditch may have different priorities, based upon the time of the several appropriations.

> "It may, therefore, be considered as stare decisis in this jurisdiction that there may be circumstances in which water consumers from the same ditch may not be compelled to prorate with each other." [P. 119.
>
> Farmers' Highline Canal & Res. Co. vs. White, 32 Colo., 1904.

Use of water.—Loan statute, 3232 Rev. Stats., L. '99, p. 236, §3; 3 Mills, §2273c—Constitutional.

> "* * * Such provision only permits an exchange or loan of water under conditions which do not injuriously affect vested rights of other appropriators, and therefore, is not in violation of section 6, art. 16, Colorado Constitution * * *." [P. 247.
>
> Bowman vs. Virdin, 40 Colo., 1907.

Use of water.—Construction of loan or exchange statute, 3232 Rev. Stats., 1908, p. 871, §68; 2273c 3 Mills, p. 650.—Confers no new right.—Right under statute is subject to the limitation that vested rights of others be not impaired.—Burden of proof upon party asserting rights under statute.

> "* * * This section neither adds to, nor takes from, any rights which owners of ditches and water rights had before the act was passed. * * * They had * * * the right to make a sale of water rights separate from the land in connection with which the right was initiated and became perfected, and to change the point of diversion, place and character of use; provided, always, that in its exercise the rights of others are not injuriously affected. It would seem to follow from this that the lesser right temporarily to exchange or loan water should be attended with the same results, and be subject to the same limitation, if, indeed, it exists in a given case. * * * The right * * * if it exists at all * * * is just as much subject to the qualification that the vested rights of others are not to be impaired as in the case of an attempted permanent change in the point of diversion. And when it has been made, though it may be effected without first obtaining a decree therefor, it is incumbent upon the party asserting rights under the loan or exchange, when challenged by an action in court, affirmatively to show that

it can be exercised without interfering with, or impairing, the rights of others." [P. 401.

Fort Lyon Canal Co. vs. Chew, 33 Colo., 1905.

Use of water.—An action to change point of diversion, question as to amount of interest, may be determined in same action. —Construction of transfer decree in time of scarcity.

"* * * But after the appropriations have been determined and settled and the owner of any portion thereof desires to change the point of diversion or place of use, of so much of the appropriation as he is entitled to, the question as to the amount of his interest is material and must be determined at the time or before the change is permitted. There is no good reason why this may not be determined in one preceeding." [P. 33.

"In the event of the supply of water becoming insufficient to supply the appropriation, the decree permitting the transfer will be construed as permitting only such portion of the appropriation as the amount transferred bears to the whole." [P. 34

Hallet vs. Carpenter, 37 Colo., 1906.

Use of water.—3226 Rev. Stats., p. 870, §62; acts of 1899 and 1903, S. L. '99, p. 235; S. L. '03, p. 278—Not invalid as ex post facto law.

"* * * Is not invalid as ex post facto law, although they may apply to changes already made, as these acts are purely remedial." [P. 535.

Ashenfelter vs. Carpenter, 37 Colo., 1906.

Use of water.—Under act of 1899, S. L. '99, p. 235, a transfer decree must first be obtained before right of change of point of diversion will be recognized, notwithstanding change was made prior to the passage of the act.

"We are, therefore, of the opinion that before an appropriator can obtain a decree permitting a substantial change in the point of diversion, which he can enforce against other appropriators, or require the officer charged with the duty of distributing water to obey, even though he made such change before the act of 1899 went into effect, he must proceed in the manner provided by that act." [P. 533.

New Cache la Poudre Irr. Co. vs. Arthur Irr. Co., 37 Colo., 1906.

Use of water.—In a proceeding under 3226 Rev. Stats., merely right to have change made can be determined—Right ap-

plies to shareholder in a mutual ditch company—Notice, where published when district extends into more than one county.

"We are of opinion that if, under the evidence, there is any basis for these contentions (that ditch was not entitled to quantity of water which decree gave and abandonment after rendition of decree), the statute under which the present proceeding is being conducted did not contemplate their determination. Merely the right of the petitioner to have such change made can be determined." [P. 61.

"We know of no reason why discrimination should be made against the right claimed when the one who asserts it is under a mutual ditch." [P. 61.

The requirement that notice shall be published in a public newspaper "in such county" evidently refers to the county in which is held the court that has jurisdiction to adjudicate, the one in which the proceeding was properly instituted. [P. 66.

"The court, however, under its power to make proper rules, might well order publication to be made in one public newspaper in each of the counties constituting the district, and such course is advisable." [P. 67.

Wadsworth D. Co. vs. Brown, 39 Colo., 1907.

Use of water.—District court has jurisdiction to render decree changing point of diversion from one water district to another. [S. L. 1899, chap. 105; amended 3230 Rev. Stat., p. 871, §66.

"We may also say here that it is unfortunate that this remedial statute did not contain a provision for giving notice to those outside the particular water district when a change from one district to another is sought and that it lacked the specific directions for giving effect to the decree which the curative act (S. L. 1903, p. 278) contains. But these omissions and defects do not destroy the property right of a water right owner to have the point of diversion changed from one water district to another, although it may effect the conclusiveness of the decree * * *." [P. 218.

Lower Lathan D. Co. vs. Bijou Irr. Co., 41 Colo., 1907.

Use of water.—Appropriator for mining purposes may change point, place and character of use.

"We think that the rule announced in Kidd vs. Laird (15 Cal., 162-180), that in the absence of in-

jurious consequences to others, any change which the party chooses to make is legal and proper.

"The right to change, so limited, includes the point of diversion, and place, and character of use." [P. 19.

Fuller vs. Swan River P. M. Co., 12 Colo., 1888.

Use of water.—Rule as to change in point of diversion applies to agricultural appropriations.

"In Fuller vs. Swan River Mining Co., 12 Colo., 12, * * * It was there held that one who has the right by appropriation to divert the waters of a stream may change the place of diversion and also the place of use; for although the decision is based upon diversion for mining purposes, no reason is perceived why the rule in reference to appropriation for agricultural uses should not be the same; the requirement in all cases being that the water diverted from the stream shall be applied to a beneficial use." [P. 68.

Strickler vs. Colo. Springs, 16 Colo., 1891.

Use of water.—Change from one agricultural use to another—Under certain limitations, water under priorities for direct irrigation may be stored during the direct irrigation season for a later use in same season.

"If the right to change from agricultural to domestic, and from mining to agricultural uses, and vice versa, is legal, certainly no good reason can be advanced why the change from one agricultural use to another may not be allowed."

"We are of the opinion that the appellant is entitled to so utilize these priorities; that is to say, entitled to store, during the direct irrigation season, the quantity of water, measured by volume and time, which it would be entitled to divert during that period for the purpose of direct irrigation." [P. 387.

Upon petition for rehearing, opinion states:

"This does not enlarge the use of the priorities of appellant, either in time or quantity; neither does it confer upon it the right to divert and store the water represented by its priorities every day during the irrigation season, or to convert such priorities into a storage right during the non-irrigating season, as contended by counsel, but limits its rights strictly to the diversion of water, both as to volume and time, to the same quantity and the same time we have indicated." [P. 389.

Seven Lakes R. Co. vs. N. L. & G. I. & L. Co., 40 Colo., 1907.

Use of water.—Act of April 1899, p. 235, providing for change of point of diversion, is constitutional. [3226-3231, p. 870, Rev. Stats., supersede §§1 and 2, p. 235, L. 99.

> "This court has held that our so-called irrigation statutes for the ascertainment of priorities, and placing the distribution of water for irrigating purposes under control of state officers, are constitutional, though they affect rights which accrued before the enactments were made, and place upon their enjoyment limitations from which they were theretofore exempt. These statutes are upheld as a rightful exercise of the police power of the state.
>
> "This remedial statute, therefore, may be upheld upon the same principle." [P. 475.
>
> Irrigation Co. vs. Water S. & S. Co., 29 Colo., 1902.

Use of water.—Qualification of rule allowing change in point of diversion applies to subsequent appropriators.

> "* * * General rule is that an appropriator of water for any beneficial purpose may change the place of diversion at his pleasure, provided the rights of others are not injuriously affected. * * * This qualification, moreover, was not by the courts annexed to the right to change for the protection or benefit of prior appropriators. * * * It is peculiarly applicable to subsequent appropriators, and they are in a position to complain if their rights are infringed. * * * A subsequent appropriator has a vested right as against his senior, to insist upon the conditions that existed at the time he made his appropriation; and if a change of place of diversion by a senior interferes with, or changes those conditions to the prejudice of, a subsequent appropriator, the latter may justly complain." [P. 518.
>
> Handy Ditch Co. vs. Louden Canal Co., 27 Colo., 1900.

Use of water.—Priority to the use of water for agricultural purposes is a right of property, and may be transferred by sale.

> "We grant that the water itself is the property of the public; its use, however, is subject to appropriation, and in this case it is conceded that the owner has the paramount right to such use. In our opinion this right may be transferred by sale so long as the rights of others, as in this case, are not injuriously affected thereby. If the priority to the use of water for agricultural purposes is a right of property, then the right

to sell it is as essential and sacred as the right to possess and use." [P. 70.

Strickler vs. Colo. Springs, 16 Colo., 1891.

Use of water.—User of water—License.

A user of water for irrigation after same has been used for placer purposes, before it returns to stream, is a mere licensee as against placer appropriator (while this action appears to have been acquiesced in by the then owners, there is evidence to the effect that parties so taking water should never assert a legal claim or right thereto, nor should his use of water interfere with the use of the placer), and acquires no right such as would sustain an injunction for pollution against such placer appropriator. [P. 125.

Fairplay Hydraulic & Mfg. Co. vs. Weston, 29 Colo., 1901.

Use of water.—Use of surface drainage on adjoining tracts of land—Appropriator may make further use before it escapes his control.

"After defendants' appropriation has done duty to their own land, they can not, even by grant, confer upon plaintiff the right to use it, or any of it, as against the superior claims of other appropriations from the same stream. By mere acquiescence on their part, to plaintiff's use, after waste water has passed from their lands, they have not estopped themselves thereafter to intercept and make beneficial use of it before it escapes from their control." [P. 190.

Burkart vs. Meiberg, 37 Colo., 1906.

Use of water.—Change in place of storage analogous to change in place of use, as far as rights of appropriators are concerned.

"Change of place of storage or use of water appropriated for irrigation from one reservoir to another, so far as rights of appropriators are concerned, is analogous to a change of place of use from one tract of land to another." [P. 730.

Windsor Res. & Canal Co. vs. Lake Supply D. Co., 98 Pac., 1908.

Use of water.—Priority for direct irrigation cannot be changed to that of storage.

"Appellants seek to convert their appropriation for immediate irrigation into one for storage purposes,

and to get for the latter a priority which belongs to them only for the former purpose." [P. 174.

Finley vs. New Cache la Poudre Irr. Co., 98 Pac., 1908.

Use of water.—Right of town or city to take water for domestic use is not superior to the extent it may be taken without compensation from a farming community or individual who has appropriated it for a similar or other use. 6525 Rev. Stats., p. 1511, §13, subd. 73.

"Mills' Annotated Statutes, §4403, subd. 73, p. 2295, authorizing a town to take water from any stream or spring for domestic purposes, and providing that, when the taking shall interfere with the vested rights of any person, the town shall first obtain his consent, or acquire the right by condemnation, does not give the town a right to divert water for the use of its inhabitants superior to the rights of an individual or a farming community to divert water for domestic or other purposes, in the sense that the town may take the water for that purpose from those who have previously appropriated it for the same or other beneficial use without compensation." [P. 339.

Town of Sterling vs. Pawnee D. Ext. Co., 94 Pac., 1908.

Use of water.—Domestic use incident to riparian ownership can not be sold separate from land.

"The preference right to use water for domestic purposes incident to riparian ownership can not be conveyed separate and apart from the land, nor diverted from such use by a company through a pipe line." [P. 541.

Broadmoor Dairy & Live Stock Co. vs. Brookside Water & Imp. Co., 24 Colo., 1898.

Use of water.—Appropriation upon a larger acreage does not presumptively establish an enlarged use of such water.

"* * * The mere fact that it is the intention of appellee to apply the water, diverted from its original headgate into the new headgate and new ditch, upon a larger acreage does not even presumptively establish that more water, measured in time or quantity, will be used than was diverted through the original headgate, nor will it presumptively establish injury to the vested rights of others." [P. 591.

Fulton M. D. Co. vs. Meadow Island D. Co., 35 Colo., 1906.

Duties of owners.—Must not allow water to escape to damage of other property—3233 Rev. Stats., p. 872, §69; 2274 Mills' Ann. Stats., p. 1386; 3238 Rev. Stats., p. 873, §74; 2282 Mills' Ann. Stats., p. 1388.

"* * * The above sections of the statute, properly construed, impose upon the owners a duty, and that 'every ditch company is required to keep their ditch in such good repair and condition that the water of the same can not readily and easily escape therefrom to the injury of any property; and especially such owners must not allow or permit the water to escape therefrom to the damage of other property.'" [P. 553.

Greeley Irrigation Co. vs. House, 14 Colo., 1890.

Duties of owners.—Police power of city does not extend to compelling ditch owner to flume in order to prevent injury to property along ditch line.

It is not within the police power of a city to compel ditch owner, who has a vested right to its use and enjoyment, to confine and reconstruct said ditch by boxing and fluming for purpose of preventing the washing and cutting away of property situate along ditch line, and belonging to other parties, within corporate limits of city. [P. 184.

Platte & Denver C. & M. Co. vs. Lee, 2 Colo. Appeals, 1892.

Duties of owners.—Duty to keep in repair.

"Where a ditch is enlarged and extended by a new and different set of proprietors, the duty of keeping in repair the headgate and ditch to its original terminus is upon both sets of owners, the expense to be adjusted upon an equitable basis; but beyond this the first set of owners have not interest and no duty." [P. 511.

Patterson vs. Brown & Chapman, 3 Colo. Appeals, 1893.

Duties of owners.—Duty of ditch owners to furnish headgates at expense of consumers, under 3255 Rev. Stats., p. 876, §91; Mills' Ann. Stats., 2288, p. 1389.

"It is readily seen from this section that it is the duty of the ditch company to furnish headgates for those having a right to use the water. The statute authorized the regulation of the distribution of water, but it does not authorize a company to arbitrarily refuse to deliver water at all * * *." [P. 392.

Downey vs. Twin Lakes L. & W. Co., 41 Colo., 1907.

Duties of owners.—5829 Rev. Stats., page 1372, §43; 3962 Mills' Ann. Stats., p. 2086, applies only where ditch crosses highway.

> "The statute * * * says that ditch companies * * * must keep highways open for safe and convenient travel; it requires this to be done only by constructing bridges. The provision of the statute only becomes applicable where a ditch crosses a highway, or at least encroaches so much upon it as to interfere with travel. It was never intended to cover cases like this, where the ditch and the roadway are parallel for a thousand feet. * * * Moreover, the statute applies only to ditches constructed after its passage." [P. 29.
>
> Highline Canal Co. vs. Westlake, 23 Colo., 1896.

Duties of owners.—The act of 1887, entitled, "An Act Regulating the Distribution of Water, Etc.," Rev. Stats., 3255-6-7-8, p. 876, §§91-2-3-4—Declared to be within police power of the state.

> "Although it is difficult to define the boundaries of the police power of the state, such regulations as those prescribed by the statute under consideration are by the decisions of the highest courts declared to be within such power." [P. 197.
>
> White vs. Highline Canal Co., 22 Colo., 1896.

Rate of charge for water under constitution of state of Colorado and Rev. Stats., 1908, §§3262-3275, p. 877.

Defining power of county commissioners to fix rates of charge for water, under §8, Art. XVI, of the constitution.

> "* * * Under the constitution they (county commissioners) cannot be vested with authority to establish the exact rate to be charged, or to specify either the time or conditions of payment. The commissioners may be empowered to fix the maximum amount of the rate; that is, they may be authorized to announce a limit beyond which the carrier cannot go." [P. 593.
>
> Wheeler vs. Northern Colo. I. Co., 10 Colo., 1887.

Rate of charge for water.—3262 Rev. Stats. 1908, p. 877, §98; 2295 Mills' Ann. Stats., p. 1391—Regulating charges—Constitutional.

> "No fault is claimed from a constitutional point of view with the substance of this legislation; none could be found with its purpose. The specific grounds of objection are, that the title of the act contains more than one subject, and that the matter of fixing maximum rates is not clearly referred to therein." [P. 147.

"The requirement that the subject 'shall be clearly expressed in the title,' is sufficiently complied with."

"It is enough if the bill treats of but one general subject, and that subject is expressed in the title." [P. 149.

Golden Canal Co. vs. Bright, 8 Colo., 1884.

Rate of charge for water.—Limitation upon power of county commissioners to fix rate—3265 Rev. Stats., 1908, p. 879, §101; 2298, Mills' Ann. Stats., p. 1394—"Reasonable compensation" implies that something must be given for the service—Rate affording no profit to ditch owner may be enjoined.

"While the legislature attempted to confer upon the county commissioners the power to fix a reasonable maximum rate of compensation for water to be delivered from irrigating ditches, this does not give to them the authority to confiscate the property of the ditch owner; neither does it give them the authority to compel the ditch owner to carry the water without compensation. * * *." [P. 175.

"* * * If there is no compensation to the ditch owner at all, there can scarcely be said to be a reasonable compensation. The very term 'reasonable compensation' implies that something must be given for the service." [P. 172.

"Where the rate fixed by the board of county commissioners for the use of water is such that the owner of the ditch can make no profit therefrom, its enforcement may properly be enjoined, * * *." [P. 167.

The Board of County Commissioners of Montezuma County vs. The Montezuma Water and Land Co., 39 Colo., 1907.

Rate of charge for water.—No appeal from rate fixed by board of county commissioners.

"The irrigation law itself makes no provision for an appeal from the decision of the board of county commissioners fixing the rates to be charged and paid for water." [P. 152.

Golden Canal Co. vs. Bright, 8 Colo., 1884.

For injunctive relief see:

Board of County Commissioners of Montezuma County vs. Montezuma Water and Land Co., 39 Colo., p. 167.

Rate of charge for water.—Under 3264 Rev. Stats. 1908, p. 878, §100; 2297 Mills' Ann. Stats., p. 1393, purchaser's right not limited by fact that he can procure water from another source.

"By this statute the subject is governed; its provisions specify the conditions upon which the right conferred is to be exercised; but it makes no exception where the consumer mentioned can procure the water from some other source; and we must presume that the legislature intended to confer the privilege specified unlimited by any such qualifications." [P. 151.

Golden Canal Co. vs. Bright, 8 Colo., 1884.

Rate of charge for water.—Under 3264 Rev. Stats. 1908, p. 878, §100; 2297 Mills' Ann. Stats., p. 1393—Prior purchaser does not have to acknowledge equity of all rules of carrier as a condition precedent to exercise right conferred by this statute.

"Section 1740 of the general statutes confers an affirmative right upon the prior purchaser, who has complied with the provisions thereof, to continue his purchase of water, and he cannot be required, as a condition precedent to the exercise of this right, to acknowledge the equity of all the rules adopted by the ditch owner; to say that he could, would be, in a measure, to place him at the mercy of such proprietor, for he could thus be coerced into compliance with the most oppressive and unjust regulation." [P. 149.

Golden Canal Co. vs. Bright, 8 Colo., 1884.

Rate of charge for water.—Under 3264 Rev. Stats., p. 878, sec. 100; Mills' Ann. Stats., p. 1393, a duty is imposed upon carrier to sell.

"A specific right is conferred upon relator (user) by the same provision, in our judgment, a corresponding duty is imposed upon respondent (ditch-owner)." [P. 152.

Golden Canal Co. vs. Bright, 8 Colo., 1884.

Rates of charge for water.—Under 3264 Rev. Stats., 1908, p. 878, sec. 100, does not repeal sec. 311 Gen. Stats. (992 Rev. Stats. 1908, p. 398, sec. 148). It is simply an assurance of the right to continue, under specified circumstances, a use already exercised.

"It (1740 Gen. Stats.) does not operate to repeal section 311 of the General Statutes (992 Rev. Stats., p. 398, sec. 148); this section expressly commands ditch companies, having water in their canals not taken, to furnish the same to the class of persons using it, in the manner named by the articles of incorporation, upon payment of the established rate; the declaration therein that this rate shall be fixed by the county commissioners must be taken with the constitutional condition attached, viz.: 'Where application is made to them by either party

interested.' * * * Section 1740 does not give him the right to water, even when the maximum rate has been fixed by the commissioners."

"(1740 Gen. Stats.) is simply an assurance of the right to continue, under specified circumstances, a use already exercised." [P. 595.

Wheeler vs. Northern Colo. I. Co., 10 Colo., 1887.

Rate of charge for water.—Act of 1887, entitled, An Act to Define, Prohibit, Punish and Restrain Extortion and Other Abuses in the Management of Ditches, Canals and Reservoirs; 3271-2-3-4-5, Rev. Stats., p. 800-1; in no way impairs rights of consumers under sec. 1740, Gen. Stats., 1883; sec. 3264, Rev. Stats., p. 878.

"The statute of 1887 is entitled, 'An Act to Define, Prohibit, Punish and Restrain Extortion and Other Abuses in the Management of Ditches, Canals and Reservoirs.' It is purely penal and makes it an offense punishable by fine and imprisonment for any person or corporation to demand or accept any royalty, bonus or premium as a condition precedent to the right to procure water. It declares such exactions illegal, but in no way impairs the rights of consumers as they existed prior, or that accrue subsequent, thereto, under section 1740, Gen. Stats., 1883." [P. 456.

Northern Colo. Irr. Co. vs Richards, 22 Colo., 1896.

Rate of charge for water.—Under 3263 Rev. Stats. 1908, p. 878, section 99; 2296 Mills' Ann. Stats., p. 1392, parties who have never been consumers may petition for the establishment of a rate."

"The statute permits parties having land under carrier's canal, who have never previously been consumers therefrom, to petition for the establishment of a maximum water rate, and take advantage thereof, if the carrier's diversion be not exhausted." [P. 309.

S. B. & R. C. D. Co. vs. Marfell, 15 Colo., 1890.

Rate of charge for water.—Refusal of carrier to sell upon tender of rate—Measure of damages.

"We think that upon the facts as they appear in evidence the proper criterion by which to judge of plaintiff's damage under the second cause of action is the difference between the amount realized from the crops the land did produce, and the amount that would have been realized therefrom has the water been furnished, less

the added cost of raising, harvesting and marketing the product; the loss of trees and the loss of the use of that portion of the 120 acres which plaintiff was prevented from cultivating." [P. 461.

Northern Colo. Irr. Co. vs. Richards, 22 Colo., 1896.

Rate of charge for water.—Proviso of act under 3263 Rev. Stats. 1908, p. 878, sec. 99; 2296 Mills' Ann. Stats., p. 1392, does not contemplate mere options, but relates to definite, existing and valid contracts.

"Our view is that the legislative proviso in question and that of the commissioners as well, relate to existing, definite and valid contracts binding upon both parties. They do not contemplate mere options, such as the one before us * * *." [P. 308.

S. B. & R. C. D. Co. vs. Marfell, 15 Colo., 1890.

Rate of charge for water.—3273 Rev. Stats. 1908, p. 881, sec. 109; 2306 Mills' Ann. Stats., p. 1397. Penalty for refusal to deliver water.—Prosecution under.

"* * * An information which charges the offense in the language of the statute is insufficient. It is necessary that the information should show that the applicant for the water is of the class of persons entitled to demand of and receive from the ditch owner the water upon compliance by him with the terms of the statute, and it must designate the land for which the water was demanded as being so situate that it is the duty of the ditch to furnish water for its irrigation, and so that the ditch owner might ascertain its location and deliver the water." [P. 493.

Schneider vs. People, 30 Colo., 1903.

Rate of charge for water.—Assessment—Failure to pay—Sale of stock. See Grand Junction Irr. Co. vs. Fruita Imp. Co. [P. 483.

37 Colo., 1906.

Adjudication of priorities.—Statutes adjudicating priorities—Nature of police regulations—Authority of legislature to enact statute.

"Acts of 1879 and 1881 are in the nature of police regulations to secure the ordinary distribution of water for irrigation purposes, and to this end they provide a system of procedure for determining the priority of rights as between carriers." [P. 134.

"The authority of the general assembly to enact laws regulating the distribution of water to actual appro-

priators, provided they do not substantially affect constitutional or vested rights, is undoubted." [P. 137.

F. H. L. C. & Res. Co. vs. Southworth, 13 Colo., 1889.

Adjudication of priorities.—Statutory proceeding is in the nature of an action in rem—Reason of four years statute of limitation. [3313 Rev. Stats., p. 892, §149.

"A conclusive adjudication at a time when the practical application of the proceeding was a matter of conjecture might have been disastrous. To guard against results such as these, it is not unreasonable to suppose that the legislature would make some provision. And we think those portions of the statute relied upon by the district court to overthrow the plea of res judicata and to support its jurisdiction are clearly referable to an intent to provide against the conclusive character of the statutory proceeding for the period of four years, but in no way to interfere with the exclusive jurisdiction of the court first acquiring jurisdiction, or to be construed as giving permission to a party to such an adjudication to ignore the same and maintain an independent action * * *." [P. 113.

Louden Canal Co. vs. Handy Ditch Co., 22 Colo., 1896.

Adjudication of priorities.—Object of irrigation statutes of 1879 and 1881 (3276-3290 Rev. Stats., omitting 3280-2 inclusive)—Does not confer new property rights—Decree rendered thereunder cannot be reopened after expiration of time limited by act for any material change.

"The object of these irrigation statutes was to settle questions of the relative priorities of the claimants of water for the purposes of irrigation. The decrees rendered thereunder do not purport to grant any new property rights, but rather embody in a permanent form the evidence of those previously acquired; while the statutes further provide certain regulations for the distribution by the state of the water according to the priorities thus ascertained. Yet, after the expiration of the time limited by this act, the decree cannot be reopened by a party thereto, in the absence of proof of fraud, for the purpose of reducing the quantity of water therein awarded, or for any other material change or correction." [P. 361.

New Mercer Ditch Co. vs. Armstrong, 21 Colo., 1895.

Adjudication of priorities.—Who is a party under adjudication proceedings.

"* * * One is a party to these proceedings who has due notice thereof, or who appears therein, or files his statement of claim; and the fact that he does not see fit to offer proof in support thereof, or fails to have his rights adjudicated, make him as much a party to the proceedings as though he offered proofs and obtained a decree for his claimed priority." [P. 455.

"It thus seems clear that one who is a party to a statutory adjudication who appears in the proceeding and files his verified statement of claim but refuses to offer proof, cannot be heard thereafter to object, unless within the statutory period of two years he applies for a re-argument or a review." [P. 454.

Crippen vs. N. Y. Irr. D. Co., 32 Colo., 1904.

Adjudication of priorities.—Character of testimony.

"An arbitrary standard by which all cases are to be determined cannot be fixed * * *. On the facts of each case must the appropriate decree rest, governed, of course, by those general rules of weighing evidence and applying legal principles common to all legal controversies."

Ditch Co. vs. Irrigation Co., 25 Colo., 1898.

Adjudication of priorities.—Decree limited to actual necessity.

"Both the law under which this decree was rendered and the decree itself contemplate that no claimant shall be entitled to the use of a quantity of water in excess of that actually needed for the purpose for which appropriation was made." [P. 362.

New Mercer D. Co. vs. Armstrong, 21 Colo., 1895.

ADJUDICATION OF PRIORITIES.

Adjudication of priorities.—District courts had jurisdiction to hear and determine water priorities under Sec. 11, Art. 16, of the constitution, and acts of 1879 and 1881 do not attempt to limit or extend the jurisdiction.

"Sec. 11, Art. XVI, of the Constitution, clothed with 'original jurisdiction of all causes, both at law and in equity,' and, therefore, has full and complete jurisdiction to hear and determine water priorities. These acts (irrigation acts of 1879 and 1881) were passed for the purpose of establishing a system of procedure whereby the appropriators of water on any particular

stream could have their priorities and rights determined in one proceeding; and they do not attempt to limit or extend the jurisdiction of the district court to such rights." [P. 545.

Broadmoor D. Co. vs. Brookside W. & I. Co., 24 Colo., 1898.

Adjudication of priorities.—Under 3376 Rev. Stats. 1908, p. 882, §112; 2399 Mills' Ann. Stats., p. 1409, jurisdiction of court is exclusive.

"* * * Which was the proper court in which to institute proceedings for that purpose, and * * * was the court in which proceedings had been duly begun (by order appointing referee to take testimony), and were pending when appellee instituted this proceeding (for adjudication of a water right in same district but another county), and so its (court where action was first begun) jurisdiction is exclusive." [P. 52.

Presbyterian College vs. Poole, 25 Colo., 1898.

Adjudication of priorities.—Jurisdiction not subject to collateral attack.

"We are of the opinion that plaintiff is not entitled * * * to question jurisdiction of the district court of Boulder county in this collateral proceeding." [P. 337.

Handy D. Co. vs. South Side D. Co., et al., 26 Colo., 1899.

Adjudication of priorities.—The courts of this state have no jurisdiction to award priorities to the use of water to a ditch intended to water lands outside the state, although the ditch has its headgate within the state.

"The statutes under which this proceeding was instituted, those creating the various water districts, and our entire irrigation law, must be taken together, and, if possible, the different provisions so interpreted as to give effect to all, and make them harmonious, the one with the other. It is not to be supposed that the state was legislating for the reclamation, or irrigation, of lands beyond its boundaries, or making provisions by the way of police regulations * * * over a territory beyond its jurisdiction." [P. 204.

Lamson vs. Vailes, 27 Colo., 1900.

Adjudication of priorities.—Acts of 1879-1881 (3276 Rev. Stats., §112, to 3320, omitting 3280 to 3283) applies to irrigation purposes only.

"The irrigation acts of 1879 and 1881 were intended as a system of procedure for determining the priority of rights to the use of water for irrigation between owners of ditches, canals and reservoirs taking water from the same natural stream. The proceedings under said acts are purely statutory and cannot be resorted to for the purposes of determining the claims of parties to the use of water for domestic or other purposes not fairly included within the meaning of the term 'irrigation.'

"* * * Our legislators used the term 'irrigation' in the acts under consideration according to the common parlance of our people—in its special sense as denoting the application of water to lands for the raising of agricultural crops and other products of the soil." [P. 529.

Platte W. Co. vs. Northern Colo. I. Co., 12 Colo., 1889.

Adjudication of priorities.—Was publication of 3277 Rev. Stats. necessary as condition precedent to vest jurisdiction in district courts adjudicating priorities when notice under 3286 Rev. Stats. had been given and parties thereafter filed statement of claim? Held: Court had jurisdiction of both parties and subject matter.

"The evident purpose of the provision of §2 in regard to publication of §1 was to advise parties of its enactment, that they might protect their rights to the use of water by filing statement of claim as therein provided; but nothing therein indicates that a failure to file such statement should in any way prejudice their rights or preclude them from thereafter filing the same in any proceeding that might be instituted under §4 of the act. It is specially provided in §6 that notice shall be given to all parties interested as owners in any ditch of the time appointed for any hearing to appear in court or before the referee, at the time so appointed and file a statement under oath in case no statement had theretofore been filed." [P. 545.

Broadmoor D. & L. S. Co. vs. Brookside Water and Improvement Co., 24 Colo., 1898.

Adjudication of priorities.—District court having obtained jurisdiction, such jurisdiction is exclusive and cannot be reviewed by another district court under Code action.

"Where a district court properly obtains jurisdiction and proceeds under the statute to adjudicate the

priorities of water rights in a water district and enters a decree awarding priorities, its jurisdiction is exclusive, and as between parties to such decree another district court has no jurisdiction in an ordinary civil action to review such decree or to pass upon questions of priority to the use of water between the parties thereto * * *." [P. 521.

Ditch & Res. Co. vs. Irr. & Land Co., 27 Colo., 1900.

Adjudication of priorities.—Jurisdiction of courts under 3276 Rev. Stats., p. 882, §112.—Acts of 1879 and 1881—Statutory proceedings to regulate priorities is not an ordinary civil action; it is a proceeding sui generis. The acts provide for a separate adjudication for each irrigation district.

"In an ordinary civil action or proceeding where the jurisdiction of a superior court of record has attached, it will not be divested by the mere passage of a legislative act changing district or county boundaries. But the statutory proceeding to adjudicate priorities of right to the use of water, under the irrigation acts of 1879 and 1881, is not an ordinary civil action or proceeding; it is a proceeding sui generis, to which the rules governing ordinary civil actions are not always applicable." [P. 598.

"The irrigation acts provide for a separate adjudication of priorities for each irrigation district, but not for the settling of priorities beyond the limits of the district. Act of 1879, §§16-19; act of 1881, §§4, 9." [P. 599.

Irrigation Co. vs. Downer, 19 Colo., 1894.

Adjudication of priorities.—Modification of decree for error of referee as to weight of testimony.

"In an adjudication by a referee, under statute as to priority of water rights, the decree may be modified for error of the referee in his judgment upon the weight of testimony." [P. 79.

Dorr vs. Hammond, 7 Colo., 1883.

Adjudication of priorities.—Capacity not determining element in adjudicating priorities.

"The capacity of the several ditches enumerated in the decree to convey water seems to have been the criterion by which the court was governed." "A diversion unaccompanied by an application gives no right. This principle applied to the record in this

case is fatal to the decree rendered by the district court." [P. 3.

Ft. Morgan Land & Canal Co. vs. Ditch Co., 18 Colo., 1892.

Adjudication of priorities.—Question of exchange of water cannot be determined in adjudication proceedings for storage purposes—Error to grant two reservoir priorities to same reservoir as result of same construction.

"Question of exchange of water between the same or different owners of reservoirs can not be determined in a statutory action to establish relative priorities of right to store water in reservoir within the district."

"It was error to grant two separate reservoir priorities of the same capacity and date to same reservoir as the result of the same construction and act of storing." [P. 730.

Windsor Res. & C. Co. vs. Lake Supply D. Co., 98 Pac., 1908.

Adjudication of priorities.—One filling of reservoir each season—3284 Rev. Stats., p. 884, §120; 2403 Mills' Ann. Stats.; 3290 Rev. Stats., p. 886, §126; 2408 Mills' Ann. Stats.—Capacity under.

"A senior reservoir is entitled to but one filling during the same season on the same priority before junior reservoirs are filled once."

"The term 'capacity' in Mills' Ann. Stats., §2403 * * * means not amount of water needed by the reservoir to irrigate lands of the owner, but the amount the reservoir will hold when filled once." [P. 730.

Windsor Res. & C. Co. vs. Lake Supply D. Co., 98 Pac., 1908.

Adjudication of priorities.—Prior vested rights can not be enlarged or changed to injury of junior appropriators.

"An appropriator of water from a stream already partly appopriated acquires a right to the surplus or residuum he appropriates, and those in whom prior rights in the same stream are vested, cannot extend or enlarge their use of water to his prejudice, but are limited to their rights as they existed when he acquired his * * *, because in such case, each with respect to his particular appropriation is prior in time and exclusive in right." [P. 49.

"* * * If the evidence established that no appropriation had been made by the irrigation company for the express purpose of storage, which antedated the priority of plaintiff, then, although the right of the irrigation company under the decree, to divert water for the purpose of irrigation, may have been prior to that of plaintiff, and by that decree its right for that purpose conclusively settled, it could not thereby exercise that right to the detriment of the latter by an enlarged or another use, measured by either volume or time, which would result in depriving plaintiff of its appropriation under that decree." [P. 51.

Mill. & E. Co. vs. Irrigation Co., 26 Colo., 1899.

Adjudication of priorities.—Decree not absolute verity—Does not protect claimant from abandonment.

"So that this decree as to a claimant thereunder—no more than does a deed of conveyance to a grantee from one unquestionably the owner—affords no protection as to the waters thus diverted, if they are not within a reasonable time applied to a beneficial use. Nor does the decree, being, as is a deed, merely one kind of evidence of a right to the thing owned, possess such verity as to protect a claimant thereof against the consequences of an abandonment, applicable as well to this class of property obtained by appropriation as to other kinds of property acquired by grant."

"The law of the case, independent of the decree, is to this effect, and would be read into the decree by this court." [P. 366.

New Mercer Ditch Co. vs. Armstrong.

Adjudication of priorities.—Authority of district court to give to any ditch a fixed carrying capacity before application to a beneficial use.

"There may be some uncertainty as to whether, under our irrigation statutes, the district court in making these decrees had the authority to give to any ditch any fixed carrying capacity before the water was actually applied to a beneficial use; but there scarcely can be any serious contention that the court had authority to give any definite decree in favor of a ditch not then completed, and, if such decrees were to be entered now, it is probable that the courts would require not only that the ditch be completed, but the water through

it be actually applied to a beneficial use, before awarding to it any priority." [P. 351.

Water Co. vs. Tenney, 24 Colo., 1897.

Adjudication of priorities.—Authority to vacate decree pending determination of the review, under 3318 Rev. Stats., p. 893, §154; 2425 Mills' Ann. Stats., p. 1420.

"On an application under section 2425, Mills' Ann. Stats., for review of a decree adjudicating water rights, the court has authority to vacate the decree pending the determination of the review. And where an order vacating the decree was entered and the application for review was afterwards dismissed, the court should have re-entered the original decree." [P. 258.

Peterson vs. Durkee, 15 Colo. Appeals, 1900.

Adjudication of priorities.—Statutory proceeding adjudicating priority rights does not authorize inquiry into relative rights of co-claimants in same ditch.

"The statute invests the court with jurisdiction to establish the rank of the several ditches with relation to each other, based upon the different dates of appropriation of water, the quantity appropriated, and the means employed to utilize it; and to award to each the priority to which it may be entitled; but it does not authorize inquiry into the relative rights of co-claimants in the same ditch, or any adjustment of their disputes among themselves." [P. 441.

Putnam vs. Curtis, 7 Colo. Appeals, 1896.

Adjudication of priorities.—3313 Rev. Stats., p. 892, §149; 2434 Mills' Ann. Stats., p. 1422; 3314 Rev. Stats., p. 892, §150; 2435 Mills' Ann. Stats., p. 1423, applies to different appropriators taking water from same stream in different districts.

"Ample provision is made for protection of the rights of parties in the same district, but none of the provisions relating to this class relate to appropriators in different districts, as between each other * * * For this purpose sections 2434 and 2435 were enacted. Thereby opportunity was afforded to adjust such rights by an independent action, but wisely the period within which such action could be commenced was prescribed; otherwise, rights as between appropriators of water in different districts where rights have been adjudicated, under the statutory proceedings, would remain unsettled indefinitely." [P. 338.

Ft. Lyon C. Co. vs. Ark. V. S. B. & I. L. Co., 39 Colo., 1907.

Adjudication of priorities.—A decree embraces rights of both consumers and carriers and operates as an estoppel upon consumers in establishing their separate rights .

> "The decree embodies the rights, not only of carrier, whatever they may be, but also the rights of its consumers. By the former decree it is determined that the priority of defendant company is superior to that of (plaintiff) and that decree is binding not only upon both of those companies as carriers, but upon consumers of water under their ditches." [P. 431.
>
> Combs vs. Farmers H. L. C. & R. Co., 38 Colo., 1906.

Adjudication of priorities.—An action requesting modification of decree not proper action for the purpose of determining respective rights of parties therein.

> "The rights, if any, which plaintiff here asserts, must be determined in an appropriate action brought for that purpose, and not in a proceeding to amend or modify a former decree that in no way affects their separate and individual interests in priorities expressly decreed to the ditches as such." [P. 95.
>
> Evans vs. Swan, 38 Colo., 1906.

Adjudication of priorities.—Court has power of determining date of priority of uncompleted canal.

> "We have decided that in these special proceedings the court is without authority to award to a ditch or canal in advance of its completion any definite quantity of water. (Water Co. vs. Tenney, 24 Colo., 344, 352.) But we have not decided that it is wrong for the court to fix the date of the priority of a canal begun, but not completed, at the time the decree is rendered. This is precisely what was done under the decrees we are considering, and we see no objection to it from a jurisdictional standpoint." [P. 277.
>
> Waterman vs. Hughes, 33 Colo., 1905.

Adjudication of priorities.—Priorities and rights established by Mills' Ann. Stats., §2264, Session Laws 1881 (map and statement law), are protected.—Future rights and those undergoing adjudication, how determined.

> "Rights, if any, which have become vested; priorities, if any, which have been established by decree of court upon the basis of this act and by the lapse of time cannot be reviewed, are certainly protected." [P. 377.

"Other rights, if any, which have been settled by judicial decree, but not so as to be beyond the reach of review, or such as are now in process of adjudication, will be determined in accordance with the law as it is and always has been, and not as this invalid act prescribes." [P. 377.

" * * * * We have deemed it best, in the conflict of the testimony and the uncertainty that necessarily must be present when it is considered that the court below in establishing and fixing the dates of the priorities proceeded upon an improper basis, not to attempt a reformation of the decree, but rather to remand the proceeding with instructions to the district court to vacate the decree * * * and to proceed either upon the testimony now before it * * * or to take additional evidence and upon all of the evidence to make findings and enter a decree * * *." [P. 378.

Larimer Canal Co. vs. Amity D. & I. Co., 26 Colo., 1899.

Adjudication of priorities.—Erroneous decrees not subject to collateral attack.

"We base our opinion upon the ground that the decree of 1889 and the amendment of 1890 were not void, but erroneous merely, and are not subject to collateral attack." [P. 518.

Lake Fork D. vs. Haley, 28 Colo., 1901.

Adjudication of priorities.—Decree for agricultural purposes does not include right of storage of same date in reservoir not constructed.

"A decree fixing priority of right of a ditch to the use of water for agricultural purposes does not give to it the priority of right to store water in reservoirs which thereafter it might build, as of the date belonging to ditch. [P. 529.

Irr. & Land Co. vs. Ditch & Res. Co., 27 Colo., 1900.

Adjudication of priorities.—Mills' Ann. Stats., §§2270, 2403, 2408, 2453, 2456, and Rev. Stats., §§3202, 3277, 3290, 3349 and 3351, provide for decrees for storage purposes independent of decrees for direct irrigation.

"While the statutes of this state contemplate that one may, by complying with their provisions, acquire and have decreed to him a priority of right for storing water in reservoirs, it is also clearly their design that

this right shall not be dependent upon, or measured by, a right which he may have to a decree for his ditch of a priority for diverting water for immediate irrigation, though the ditch may, in addition to being used as a vehicle for carrying water for immediate use, be also utilized at some time as a feeder for the reservoir. 1 Mills' Ann. Stat., §§2270, 2403, 2408, 2453, 2456." [P. 531.

Irr. & Land Co. vs. Ditch & Res. Co., 27 Colo., 1900.

Adjudication of priorities.—Conditional decree vests inchoate right.

"Where a prior decree awarding water rights allowed an appropriation of 425 cubic feet proportionately as the parties increased their irrigable land, and provided that such increase and the uses of the proportionate additional amount of water appropriated therefor should be made with reasonable diligence, such decree only vested in the appropriators an inchoate right to the water contained in such appropriation which could become fixed only on their applying same to a beneficial use within a reasonable time." [P. 304.

Conley vs. Dyer, 95 Pac., 1908.

Adjudication of priorities.—Priorities attach to ditch—No attempt is made to designate owners of priorities—The quantity awarded a ditch is res judicata as far as rights of junior appropriators who were parties to the proceeding are concerned.

"It is to be observed that, under these adjudications awarding priorities, the decreed priority attaches to the ditch, and a certain quantity of water is decreed to it, and no attempt is made to designate the person or persons who are the owners of the priority, or what proportion belongs to each; and, indeed, the statute contains no warrant for determining the ownership of the ditch or the relative rights of the water consumers thereunder. In so far as concerns the rights of junior appropriators who were parties to the proceeding, the quantity of water awarded to a ditch is res adjudicata." [P. 150.

Irrigation C. vs. Reservoir Co., 25 Colo., 1898.

Adjudication of priorities.—Decrees rendered under acts of 1879 and 1881 (3276 to 3320 Rev. Stats., omitting 3280 to 3283 inclusive) not res judicata as to parties.

"* * * That decrees rendered under acts of 1879 and 1881, determining the priorities and the amount of the appropriations of the several ditches in an irrigating district, are not intended to designate the person or persons entitled to the use of the water thus appropriated. Such decree is not res judicata as to the party or parties entitled to the control of a particular ditch or to the use of the water conveyed through the same, but only as to the priority and amount of appropriation of such ditch." [P. 147.

Oppenlander vs. Left Hand D. Co., 18 Colo., 1892.

Adjudication of priorities.—Capacity res judicata after right of review and appeal have elapsed, even though mistake in computing capacity was made by court.

"* * * The present action is not for the purpose of reforming the decree upon ground of mistake or fraud * * * it is in the nature of a collateral attack upon the decree after the statutory time for their reformation or review in the court of original jurisdiction * * * has long gone by, and when right of appeal is also lost by lapse of time.

"If a mistake was made by the court in computing the capacity of the ditch, such a mistake cannot be corrected in this proceeding. The capacity is res judicata * * *" [P. 329.

Water Supply & Storage Co. vs. Larimer & Weld Irrigation Co., 24 Colo., 1897.

Adjudication of priorities.—Evidence, etc., taken before referee in adjudication proceeding is admissible in determining respective rights of owners in action brought for that purpose.

"Though, on adjudicating water rights in a water district, a court could not determine the amount of the appropriation of each individual and could only fix the amount to which the respective ditches were entitled, evidence, etc., taken before referee and relating to a particular ditch, is admissible in an action to determine the respective rights of the owners of the ditch; the appropriation to the ditch in the first proceeding being presumably based upon the amount applied by the owners to a beneficial use, and the rights of the parties being determinable, not according to the ownership in the ditch, but according to the amount of water which they respectively used when the decree was rendered in the first proceeding." [P. 932.

Woods vs. Sargent, 95 Pac., 1908.

Adjudication of priorities.—Questions to be determined under—3315 Rev. Stats., p. 892, §151; Mills' Ann. Stats. 2423, p. 1419—Court may make rules—Act liberally construed.

See Windsor Res. & Canal Co. vs. Lake Supply Co., 98 Pacific, 1908.

Adjudication of priorities.—Duty of supreme court on appeal to examine entire record where cases are tried upon proofs taken and reported by referee.

"The case was tried in the district court mainly upon proofs taken and reported by a master or referee; it is, therefore, our duty to sift and weigh all the evidence with a view to a just determination, uninfluenced by the proposition that the court below had superior facilities to judge of the credibility of witnesses." Miller et al. vs. Taylor et al., 6 Col., 45." [P. 152.

Sieber et al. vs. Frink et al., 7 Colo., 1883.

Adjudication of priorities.—Under 2432 Mills' Ann. Stats., p. 1422; 3309 Rev. Stats., p. 891, §145, time to file proof cannot be extended beyond limit prescribed by the statute.

"We cannot grant the extension. The provision as to time is mandatory. Needle Rock D. Co. vs. Crawford-Clipper D. Co., ante, p. 209. While the mere failure of appellant to file the proof within sixty days after the order of allowance is made, does not ipso facto work a dismissal of the appeal, yet if appellees should interpose a motion to dismiss after such default and before such proof is filed, this court would be obliged to grant it." [P. 501.

Baer Bros. L. & C. Co. vs. Wilson, 32 Colo., 1904.

Adjudication of priorities.—Statute of limitation (3313 Rev. Stats., p. 892, §§149 and 150) does not apply to decree obtained by fraud.

"To hold that a decree obtained by fraud could not be attacked and set aside, provided the party perpetrating the fraud could succeed in concealing his fraudulent conduct for the period of four years, would be to furnish unprincipled people with a sword to be wielded in the destruction of the property rights of others, and offer a premium to knavery. These statutes which are to be construed together were never intended to have the construction indicated." [P. 224.

Ditch Co. vs. Ditch Co., 19 Colo., 1893.

Adjudication of priorities.—Statute of limitation—§26 of the act of 1881 (3313 Rev. Stats., p. 892, §149) does not apply to

original proceeding by party who has never had his day in court, and his prior rights are not affected by lapse of time where such rights are not denied or abridged by enforcement of decree rendered in such proceedings.

> " * * * Section 26 of the act of 1881 * * * limits the review or re-argument of such decrees to the period of two years from their entry; section 35, also, provides that after the lapse of four years from such entry all parties whose interests are thereby affected shall be deemed to have acquiesced in the same, etc. But these sections do not apply to an original proceeding for an adjudication of priorities by a party who has never had his day in court. * * * The prior rights of a party not served with process or notice in proceedings to adjudicate priorities cannot be held to be affected by the lapse of time, so long as such rights are not actually denied, abridged, or interfered with, by the enforcement of the decree entered in such proceedings." [P. 27.
>
> Nichols vs. McIntosh, 19 Colo., 1893.

Adjudication of priorities.—Two year statute of limitations applies only to final and absolute decrees. Mills' Ann. Stats., §2425, p. 1420; 3318 Rev. Stats., p. 893, §154.

> "The two years statute of limitations does not apply to a conditional decree wherein date of priority only has been determined. * * * It may be invoked only to an attempt to review a final and absolute decree." [P. 277.
>
> Waterman vs. Hughes, 33 Colo., 1905.

Adjudication of priorities.—3313 Rev. Stats. 1908, p. 892, §149; Mills' Ann. Stats. 2434, p. 1422, requiring suits to be brought in four years—Applies to actions by one not a party to an original proceeding.

> "By §2421 of the act (3317 Rev. Stats., p. 892, §153) opportunity is given for hearing by any person on application, who has failed or refused to offer evidence before the referee." [P. 235.
>
> "By §2425 (3318 Rev. Stats., p. 892, §154) an apportunity for reargument and review of the decree rendered in the statutory proceedings, with or without additional evidence, is afforded parties aggrieved at any time within two years from the time of entering the decree." [P. 236.

"§2427 (3307 Rev. Stats., §143) provides for an appeal from the decree by any party feeling aggrieved thereby." [P. 236.

"We think, in view of the ample opportunities thus afforded the parties to the proceeding for a rehearing and review, that §2434 (3313 Rev. Stats., p. 892, §149) had in contemplation an action by a person, association or corporation that was not a party to the prior proceeding, or if a party thereto, whose right of action grows out of matters arising subsequent to the decree." [P. 236.

Canal Co. vs. Loutsenhizer D. Co., 23 Colo., 1896.

Adjudication of priorities.—Modification of a general decree warranted under 3313 Rev. Stats., p. 892, §149; 2434 Mills' Ann. Stats., p. 1422—Limitations.

Question: Whether, in a proceeding against two ditches or individuals, an adjudication could be had modifying the general decree regulating the distribution of water in the entire district.

"We are of the opinion that this action is warranted by §1796 Gen. Stats., page 583 (Rev. Stats., p. 892, §149) when, * * * No interests are involved or affected, save those of persons who are parties to the adjudication." [P. 309.

Greer vs. Heiser, 16 Colo., 1892.

Adjudication of priorities.—Appeals—Method of taking regulated by 3307 Rev. Stats., p. 890, §143; Mills' Ann. Stats. 2427, p. 1420, but not by the Code.

"The method of taking appeals of this character is regulated by §2427 Mills' Ann. Stats. By this section obtaining an order allowing an appeal is an ex parte proceeding. On presentation of a statement by those desiring an appeal * * * an order is made out allowing it and fixing amount of appeal bond. * * * A recital in the order on the referee's report, that they were given ninety days in which to perfect their appeal, was without any effect." [P. 60.

Daum vs. Conley, 27 Colo., 1899.

Adjudication of priorities.—Appeals—Time within which an appeal must be prosecuted, under 2427 Mills' Ann. Stats; 3307 Rev. Stats., 1908, p. 890, §143—Time of filing of transcript with clerk of Supreme Court, under Mills' Ann. Stats. 2429, p. 1421; 3310 Rev. Stats., p. 891, §146—Verification of statement of appeal under §2427 Mills' Ann. Stats., p. 1420; 3307 Rev. Stats.—Appli-

cation for review under Mills' Ann. Stats. 2425, p. 1420; 3318 Rev. Stats., p. 893, §154, does not waive right of appeal.

"§2427 * * * is silent on that question, but impliedly it must be limited to some period with respect to the date of the decree, either by some other provision of the statute, or to a reasonable time after that date."

"The period within which appellants were required to lodge their transcript of record with the clerk of this court would begin with the date their appeal was granted." [P. 60.

"§2427 * * * does not direct by whom the statement of appeal shall be verified. It merely says it shall be. * * * A pleading should be verified by the party presenting it, but this rule is not inflexible, for the verification of another may be substituted when good cause is shown therefor."

"Appellants, by availing themselves of the provisions of §2425, Mills' Ann. Stats., in applying for a rehearing and review of the decree, have not waived their right to an appeal." [P. 61.

Daum vs. Conley, 27 Colo., 1899.

Adjudication of priorities.—In absence of fraud or intentional neglect, right of appeal under 3307 Rev. Stats., p. 890, §143; Mills' Ann. Stats. 2427, does not apply to consumers but to owner.

"This provision does not contemplate that any one interested in a ditch to which an award has been made, may have an appeal, but that the party or parties representing such ditch may exercise that right. The party representing the ditch means the owner or one controlling it, and not the different consumers. It is the party thus interested who may appeal." [P. 432.

Randally vs. Rocky Ford D. Co., 29 Colo., 1902.

Adjudication of priorities.—Decree not appealed from, though erroneous conclusion was reached, cannot be set aside.

"But whether the district court thus limited the priority because of this statute, or whether upon general principles it held that due diligence in the prosecution of the work was not observed, is quite immaterial. The decree thus limiting the appropriation was pronounced by a court having jurisdiction of the subject-matter, of the persons, and to enter the particular judgment. It has not been appealed from, and cannot be set aside now, even though an erroneous conclusion was reached."

Water Co. vs. Tenney, 24 Colo., 1897.

Adjudication of priorities.—Appeal under Mills' Ann. Stats., §2425, p. 1420; 3318 Rev. Stats., p. 893, §154, must be taken within two years from time a decree is rendered in such proceeding.

> "By §2425, Mills' Ann. Stats., provision is made for a reargument or review of such decrees, with or without additional evidence, within two years after rendition. By §2434, Mills' Ann. Stats. (3314 Rev. Stats., p. 892, §150), it is provided that original actions relating to rights affected by such decrees may be maintained within four years after entry. It seems clear from these provisions, that it was the intent of the legislature that such decrees should not be disturbed after the lapse of two years from date of entry, except by original proceedings. For this reason, the statement for an appeal in such cases must be presented within that period, as an appeal is not a new action, but a continuation of the original." [P. 215.
>
> Canal Co. vs. Ft. Morgan R. & I. Co., 27 Colo., 1900.

Adjudication of priorities.—Appeals—Procedure under 3310 Rev. Stats., p. 891, §146; Mills' Ann. Stats. 2429, p. 1421, requiring transcript to be filed within six months.

> "We will not attempt to determine all the formalities which must be observed in order to bring the evidence introduced below properly before this court on an appeal * * * when a decree is challenged upon the ground that it is contrary to the evidence. It is clear, however, that the transcript of the evidence heard below must be certified as containing all the evidence in any manner affecting the ditches named in the order allowing the appeal, and that a certificate to that effect must be signed and sealed by the trial judge." [P. 459.
>
> Kerr vs. Dudley, 26 Colo., 1899.

Adjudication of priorities.—Appeals—Objections should be filed at time decree is rendered, though statute gives two years in which to appeal.

> "If a party knowingly and intentionally neglects to appraise a court of his objection to a decree at the time it is rendered, when he has full opportunity to do so, even though he may be given by the statute two years within which to file a petition to reopen it, we think the right to do so, in so far as it is based upon a cause existing at the time the decree is rendered, is conditioned upon his having at that time made an objection

to it, and saved an exception to an adverse ruling upon his objection." [P. 230.

Rio Grande L. & C. Co. vs. Ditch Co., 27 Colo., 1900.

Adjudication of priorities.—Petition for appeal under 3318 Rev. Stats., p. 893, §154; Mills' Ann. Stats. 2425, p. 1420, must show a cause of action.

"The statute allowing a review of a decree contemplates that a good cause must be shown therefor; that a petition for this purpose must state a cause of action." [P. 157.

Crippen & Lawrence vs. Burroughs, 27 Colo., 1900.

Adjudication of priorities.—Appeals — Appellate practice — Bill of exceptions.

"On appeal from a statutory proceeding adjudicating priorities of water rights, an objection that the evidence is not sufficient to uphold the findings and decree, will not be considered where the bill of exceptions is not certified by the judge as containing all the evidence affecting the ditches in controversy." [P. 168.

Means vs. Gotthelf, 31 Colo., 1903.

Adjudication of priorities.—Appeals—3309 Rev. Stats., p. 891, §145; 2432 Mills' Ann. Stats., p. 1422; and 3310 Rev. Stats., p. 891, §146; 2429 Mills' Ann. Stats., p. 1421, are mandatory and are jurisdictional requirements.

"By section 2432 appellant must file with clerk of supreme court, within sixty days after making order of appeal, proof of the service and publication thereof.

"Section 2429 requires appellant to file a transcript of record of the district court with clerk of supreme court at any time within six months after appeal is allowed.

"Section 2432 says if such transcript is not filed within that time such appeal shall on motion be dismissed. These provisions with reference to the filing of transcript and proof of service and publication are mandatory. * * * They are jurisdictional requirements." [P. 210.

Needle Rock D. Co. vs. Crawford-Clipper D. Co., 32 Colo., 1904.

Irrigation divisions.—Creating water divisions and providing for appointment of Superintendent of Irrigation, under §2440 to §2446-7, superseded by 3335 Rev. Stats. 1908, p. 896, §171, abol-

ishing Superintendent of Irrigation and creating Irrigation Divisions, and providing for appointment of Irrigation Division engineers—Duty of, under 2448 Mills' Ann. Stats., p. 1425 (3344 Rev. Stats., 1908, p. 284, §9).

"Unfortunately, the water districts as originally established did not in each instance embrace the entire drainage of a main stream. To obviate the difficulties resulting from these conditions, water divisions were created, which practically embrace all the drainage of a given stream. Provision has also been made for the appointment of an official in each of these divisions whose duty it is to direct that the waters of the streams of each division be distributed in accordance with the adjudication decrees of the districts included in each water division, so that in effect these decrees are to be treated as one, and the water distributed accordingly." [P. 271.

Lower Latham D. Co. vs. Louden I. C. Co., 27 Colo., 1900.

Division engineer.—Appointment by governor and filing oath of office and bond constitutes such person an officer de facto—Such appointment not subject to collateral attack.

"Having been appointed by the governor and having filed his oath of office and bond pursuant to statute, he becomes an officer de facto, and the question of his appointment cannot be determined in an action brought by him to recover his salary." [P. 213.

Montezuma County vs. Wheeler, 39 Colo., 1907.

Water commissioners.—Status of, under 3407 Rev. Stats. 1908, p. 925, §333 (2385 Mills' Ann. Stats., p. 1406); 3433 Rev. Stats. 1908, p. 908, §269 (2386 Mills' Ann. Stats., p. 1406)—Not officer of court.

"Under above statute, and the decisions of this court, it may well be said that the water commissioner is a police officer of the state in the discharge of his official duties, vested with the powers of a constable, with authority to arrest persons interfering with him in the discharge of his official duties, which would seem to provide ample remedy, * * * without resorting to proceedings as for contempt of court." [P. 125.

Robertson vs. People, 40 Colo., 1907.

Water commissioners.—Duty of, under 3432 Rev. Stats. 1908, p. 908, §268; 2384 Mills' Ann. Stats., p. 1405.

"In times of security (scarcity), he is required to divide the waters of the streams in the district among the ditches taking water therefrom according to the

prior rights of each respectively. 1 Mills' Ann. Stats., §2384." [P. 84.

Platte Valley Irr. Co. vs. Buckers Co., 25 Colo., 1898.

Water commissioners.—Memorandum kept by water commissioners not public record—Object of reports kept by commissioners.

"The statutes do not require the keeping of such a book. They do require that the commissioner report to the state engineer, among other things, the amount of water coming into district and the ditches which are inadequately supplied. The object of these reports is to enable the state engineer to perform his duty, and are for his guidance, and not for the purpose of creating or perpetuating testimony." [P. 357.

Big Thomson & Platte River D. Co. vs. Wayne, 36 Colo., 1906.

Water commissioners.—Pay of, under 3434 Rev. Stats. 1908, p. 908, §270 (L. '89, p. 470, §2) amending L. '85, p. 254, §1, which amends Gen. Stats., §1756, L. '79, p. 106, §36.

"Under §2 of act approved March 25, 1889 (Sess. Laws 1889, p. 470) each county into which a water district extends is liable for an equal amount of the compensation of the water commissioner." [P. 508.

County Commissioners vs. Locke, 2 Colo. Appeals, 1892.

Water commissioners.—Not required to make any division of water between users of same ditch.

"A water commissioner is not required, nor is it his duty, to make any division or distribution of the water between the users thereof from the same ditch, neither has he the authority to interfere with the internal management of the affairs of a ditch company; but it is his duty to turn no more water into a ditch to which it may be entitled by virtue of any decree than is necessary to serve the needs of the consumers under such ditch, and to refuse to turn water into any ditch for the use of one not entitled thereto." [P. 318.

Cache la Poudre Irr. D. Co. vs. Hawley, 95 Pacific, 1908.

Water commissioner—Duty of.

"It is the duty of the water commissioner to keep the natural streams of his district clear of unnecessary dams or other obstructions which prevent the flow of

the water in such stream, and said commissioner may remove such an obstruction without an order of Court or a ditch owner who is deprived of water by such obstruction may by legal action compel the removal thereof." [P. 100.

Ortiz vs. Hansen, 35 Colo., 1905.

Water commissioners.—Can not claim compensation for services performed outside his own district.

"We hold that the act creating district No. 42 was, in a legal sense, a later expression of the legislative will than the act by which No. 39 was organized."

"It logically follows that the plaintiff (water commissioner for water district No. 39), having no jurisdiction outside his own (district), can not claim compensation for services performed in some other district." [P. 74.

Fravert vs. Mesa C., 39 Colo., 1907.

Irrigation districts.—Validity of act of 1901, creating irrigation districts—Construction of portions of act—Notice.

As to constitutionality of Irrigation District Law of 1901, see Anderson vs. Grand Valley Irr. Dist., p. 525. 35 Colo., 1906.

Ahern vs. Board of Directors of The Highline Irr. Dist., p. 409; 39 Colo., 1907.

Pleadings, parties and actions. — Quieting title to water rights.

"A bill in equity will lie to quiet title to water rights." [P. 333.

Kimball vs. Northern Colo. Irr. Co., 94 Pac., 1908.

Pleadings, parties and actions.—Necessary allegations in action to quiet title under Mills' Ann. Code, c. 22.

"In an action to quiet title to water rights, a complaint is sufficient under Mills' Ann. Code, c. 22, which alleges ownership and possession without setting up facts constituting a valid appropriation." [P. 333.

Kimball et al. vs. Northern Colo. Irr. Co., 94 Pac., 1908.

Pleadings, parties and actions.—Quieting title—Possession—Equity Jurisdiction.

"Where a court of equity acquires jurisdiction of a cause to restrain interference with a water right, it may properly retain jurisdiction and determine all the rights of the parties; and may, independent of the statute, enter

a decree quieting plaintiff's title to such water right although plaintiff is not in actual possession thereof." [P. 421.

Gutheil P. I. Co. vs. Montclair, 32 Colo., 1904.

Pleadings, parties and actions.—In action to quiet title court has not power to decree change in point of diversion.

"The district court * * * whose primary object was to obtain a decree quieting title to water right, had not the power to adjudicate that a change in the point of diversion thereof might be made. That can be done only under the act so providing." [P. 117.

Williams vs. Conroy, 36 Colo., 1905.

Pleadings, parties and actions.—Sufficiency of complaint—Presumption as to duty of Superintendent of Irrigation.

"It will be presumed that a superintendent of irrigation of a water division through the water commissioners under his control distributes the water according to the priority of appropriation, as expressly enjoined by 1 Mills' Ann. Stats., §2448 (3335 Rev. Stats.) * * *, a complaint which alleged that defendants (superintendent of irrigation and water commissioners under him) cut off plaintiffs' supply and ran the water past their headgates for the use of ditches in another district, does not state a cause of action, since the presumption is that plaintiffs' headgates were closed so as to supply senior priorities further down the stream, as directed by law." [P. 16.

McLean, Water Commissioner, et als. vs. Farmers Highline Canal & Res. Co., 98 Pac., 1908.

Pleadings, parties and actions.—Necessary parties to suit seeking to enjoin water commissioner from diverting water loaned.

"In a suit brought by appropriators of water to enjoin a water commissioner from diverting water in a stream loaned to subsequent appropriators by prior appropriators, such subsequent and prior appropriators are necessary parties." [P. 302.

Squires, Water Com., vs. Livezey, 36 Colo., 1906.

Note—This case reviews other cases pertaining to parties plaintiff and defendant.

Pleadings, parties and actions.—Limitation of actions—Accrual of Right of Action barred after five years, by 2912 Mills' Ann. Stats. (4073 Rev. Stats., p. 1030, sec. 13).

'Plaintiff's right was initiated by purchase May, 1887. Subsequently, and prior to April, 1893, * *

* those rights in excess of the estimated capacity of the canal were sold and evidenced by contracts or deeds. What, then, was the earliest date at which an action might have been maintained by plaintiff or his grantors to annul or set aside these contracts * * * We think * * * immediately after these contracts and deeds were issued. * * * The right * * * accrued not later than April, 1893, or more than eleven years prior to the date this action was instituted." [P. 179.

Patterson vs. Ft. Lyon Canal Co., 36 Colo., 1906.

Pleadings, parties and actions.—Complaint under 3 Mills' Ann. Stats., sec. 2273c (3232 Rev. Stats., 1908), is fatally defective which fails to show water so loaned will be used without injury to later priorities.

"A complaint is fatally defective in an action to restrain defendants from interfering with the plaintiff using water loaned to him by other appropriators, which fails to allege that water so loaned can and will be used by plaintiff without injuring the vested rights of defendants owning later priorities." [P. 247.

Bowman vs. Vriden, 40 Colo., 1907.

Pleadings, parties and actions.—When decree is res adjudicata—When not a bar.

A decree entered on demurrer when such decree goes to the merits of the action, is res adjudicata, but if for lack of jurisdiction, or mistake in remedy, or some technical ground, it is not a bar. [P. 288.

Laguna Canal Co. vs. Rocky Ford Ditch Co., 95 Pac., 1908.

Pleadings, parties and actions.—Necessary parties in injunction proceedings.

"In an action to enjoin irrigation officers from enforcing an order closing plaintiffs' headgate and diverting the water to other consumers, the other consumers were indispensable parties to the action, since the judgment would determine their rights to the water as against plaintiffs', and they should have been brought in under Mills' Ann. Code, sec. 16, requiring the court to order other parties brought in when a complete determination can not be had without their presence." [P. 16.

McLean, Water Com., et al. vs. Farmers Highline Canal & Res. Co., 98 Pac., 1908.

Pleadings, parties and actions.—Right to intervene under sec. 22, Mills' Ann. Code.

See Cache la Poudre Irr. D. Co. vs. Hawley, 95 Pac., p. 319.

Pleadings, parties and actions. — Preliminary injunction — Purpose of.

"The purpose of a preliminary injunction is to preserve the status quo or protect rights pending the final determination of a case, and should not be granted unless it clearly appears necessary to protect the applicant from loss or injury." [P. 16.

McLean, Water Com. vs. Farmers Highline C. & Res. Co., 98 Pac., 1908.

Pleadings, parties and actions.—Action to quiet title cannot be maintained by administrator.

"The water right being real estate, at once, upon his death, it passed to Hollister's heirs or devisees, subject only to the payment of his debts, and an action to quiet title, or to recover possession, does not lie at the instance of the administrator. For this reason alone the decree as entered must be reversed.

"It was proper, however, for the administrator to sue for rents, and his right to a recovery depends upon the ownership of the principal thing out of which the rent issues, and, in this view, we must ascertain whose property the water right is." [P. 363.

Insurance Co. vs. Childs, 25 Colo., 1898.

Water works.

Right of city or town to purchase or erect under 6525 Rev. Stats.

See Thomas, assignee of City of Grand Junction, 13 Colorado Appeals. [P. 80.

Chapter 161.

DRAINAGE DISTRICTS.

(S. B. No. 38, by Senators Drake and Jones.)

An Act in Relation to Drainage Districts.

Be it Enacted by the General Assembly of the State of Colorado:

Section 1. Whenever a majority of the holders of title or evidence of title herein provided, to agricultural lands, which are susceptible of one general mode of drainage by the same system of works, desires to provide for the drainage of such lands they may propose the organization of a drainage district under the provisions of this act, and when so organized such district shall have the powers, rights and duties conferred, or which may be conferred by law upon such drainage districts. The equalized county assessment roll next preceding the presentation of a petition for organization of a drainage district under the provisions of this Act shall be sufficient evidence of title for the purposes of this Act.

Section 2. A petition shall first be presented to the board of commissioners of the county in which the lands, or the greatest portion thereof, are situated, signed by the required number of the holders of title or evidences as above provided of title of such proposed district, which petition shall set forth and particularly describe the proposed boundaries of such district, and shall pray that the same be organized under the provisions of this Act; Provided, however, that such petition shall be accompanied with a map (drawn to a scale of two inches to the mile) of the proposed district, together with a statement thereon attached thereto which shall be prepared by the county surveyor of the county in which the major portion of the lands proposed to be included in such district shall be situated from actual preliminary surveys showing generally the proposed drainage ditch or works by which it is intended to drain the lands included in the proposed district, also showing about the point of beginning and the terminus thereof, giving the names of the owners of the lands and the description thereof through which lands such drainage works are proposed to be constructed; Provided, also the petitioners must accompany the petition with a good and sufficient bond, to be approved by said board of county commissioners in double the

amount of the probable cost of organizing such district, conditioned for the payment of all costs incurred in said proceedings in case said organization shall not be effected, but in case such district is so effected, then said expenses incurred by the board of county commissioners shall be paid back to said county by said district, or said board of county commissioners may in their discretion require the petitioners to pay into the treasury of the county from time to time such sum or sums of money as in their judgment may be required to pay the cost and expenses that may be incurred in the formation of such district; Provided, also the petition shall contain the name proposed for such district, and the petitioners shall select a committee of three of said petitioners, which committee shall consist of resident freeholders of the proposed district, to present such petition to the board of county commissioners as provided by law, praying that the said board define and establish the boundaries of said proposed district and submit the question of the final organization of the same to a vote of the holders of title of lands lying within said proposed district; Provided, that such voters shall have paid a property tax in said district within the year preceding such proposed organization; said petition shall be signed by a majority of the holders of title of lands within said proposed district whether such holders of lands are resident or non-resident; Provided, also that such petitioners shall also be owners in the aggregate of a majority of the whole number of acres proposed to be included within said proposed district. Such petition shall be published at least two weeks before the time at which the same is to be presented in some newspaper of general circulation, printed and published in the county where said petition is to be presented, together with a notice signed by the committee of said petitioners selected by the petitioners for that purpose, giving the time and place of the presentation of the same to said board of county commissioners and the said committee shall mail said printed notice to each of the non-resident holders of lands within said proposed district to their address as shown on the tax rolls of the county or counties within said proposed district.

Section 3. When such petition is presented, the Board of Commissioners shall hear the same, and may adjourn such hearing from time to time, not exceeding four weeks in all, and on the final hearing may make such changes in the proposed boundaries as they may find to be proper, and shall then enter an order on the records which shall define and establish such boundaries; Provided, that such board shall not modify such boundaries so as to except from the operation of this Act any territory within the boundaries of the proposed district which is susceptible of drainage by the same system of works applicable to the other

lands in such proposed district; nor shall any land which will not, in the judgment of said board, be benefited by drainage by such system, be subjected to the operation of this Act; Provided, that any person whose lands are susceptible of drainage by the same system of works, may, in the discretion of the board, upon application of the owner, have such lands included in such district. Said board shall, when requested in the petition, by its order, divide such district into three or more divisions, as nearly equal in size as practicable, which divisions shall be numbered consecutively, and one director, who shall be an elector and a resident free-holder of the division shall be elected by his division; Provided, that when requested in the petition, three directors, residents, electors, and freeholders of the district, shall be elected at large by the qualified electors of the district. Said board of county commissioners shall then establish a convenient number of election precincts for said proposed district, define the boundaries thereof, and designate the polling places therein, which precincts and polling places may thereafter be changed by the board of directors. The board of county commissioners shall also appoint for each precinct, from the electors thereof three judges who shall constitute a board of election for such precinct, with the powers and duties usually performed by like boards. Said board of county commissioners shall then give notice of an election to be held in such proposed district, for the purpose of determining whether or not the same shall be organized under the provisions of this Act. Such notice shall designate the name of the district and describe the boundaries thereof and the boundaries of the precincts established therein, together with a designation of the polling place and board of election for each precinct; and shall require the electors of the proposed district to cast ballots which shall contain the words "Drainage District—Yes," or "Drainage District—No" or words equivalent thereto, and also the names of one or more persons (according to the divisions of the proposed district as prayed for in the petition and ordered by the board) to be voted for to fill the office of director. Such notice shall be published for at least three weeks preceding such election in a newspaper of general circulation within said county; and if any portion of such proposed district lie within another county or counties, said notice shall also be similarly published in a newspaper of general circulation published within each of said counties. No person shall be entitled to vote at any election held under the provisions of this Act unless he shall possess all the qualifications required of electors under the general election laws of this state. Except as herein provided such election shall be conducted as nearly as practicable, in accordance with the

general election laws of this state; provided that no particular form of ballot shall be required.

The officers of such district shall consist of three directors, a secretary and treasurer.

Section 4. The said board of county commissioners shall meet on a second Monday next succeeding such election and proceed to canvass the votes cast thereat; and if, upon such canvass, it appears that at least a majority of said legal electors in said district have voted "Drainage District—Yes" the said board shall by an order entered on their minutes, declare such territory duly organized as a drainage district under the name theretofore designated, and shall declare the persons receiving, respectively, the highest number of votes for such several offices, to be duly elected to such office. And no action shall be commenced or maintained or defense made, affecting the validity of the organization of such district, unless the same shall have been commenced or made within one year after the making and entering of said order. Said board shall cause a copy of such order including a plat of said district, duly certified by the clerk of the board of county commissioners, to be immediately filed for record in the office of the county clerk of each county in which any portion of said lands are situated, and no board of county commissioners of any county, including any portion of such district, shall, after the date of organization of such districts, allow another district to be formed, including any of the lands of such district, without the consent of the board of directors thereof; and from and after the date of such filing, the organization of such district shall be complete, and the officers thereof shall immediately enter upon the duties of their respective offices, upon qualifying in accordance with law, and shall hold such offices, respectively, until their successors are elected and qualified.

Section 5. The regular election of said district shall be held on the first Tuesday after the first Monday in January in each calendar year thereafter, at which said officers shall be elected. The person receiving the highest number of votes for any office to be filled at such election is elected thereto. Within ten days after receiving their respective certificates of election hereinafter provided for, said officers shall take and subscribe the official oath, and file the same in the office of the clerk of the county where the organization was effected and thereupon immediately assume the duties of their respective offices. Each member of said board of directors shall execute an official bond in the sum of $2,000, which bond shall be approved by the judge of the county court of said county where such organization

was effected and shall be recorded in the office of the county clerk thereof. All official bonds herein provided for shall be in the form prescribed by law for official bonds for county officers except that the obligee named in said bond shall be the said district.

Section 6. The office of the board of directors shall be located in the county where the organization was effected. Fifteen days before any election held under this act, subsequent to the organization of the district, the secretary who shall be appointed by the board of directors shall cause notice specifying the polling places of each precinct to be posted in three public places in each election precinct, of the time and place of holding the election, and shall also post a general election notice of the same in the office of said board, which shall be established and kept at some fixed place to be determined by said board in said county. Prior to the time for posting the notices, the board must appoint from each precinct, from the electors thereof, three judges, one of whom shall act as clerk, who shall constitute a board of election for such precinct. If the board fails to appoint a board of election, or the members appointed do not attend the opening of polls on the morning of election, the electors of the precinct present at that hour may appoint the board, or supply the place of an absent member thereof. The board of directors must, in its order appointing the board of election, designate the hour and the place in the precinct where the election must be held.

Section 7. One of the judges shall be chairman of the election board and may: First, administer all oaths required in the progress of an election. Second, appoint judges and clerks, if during the progress of the election any judge or clerk ceases to act. Any member of the board of election, or any clerk thereof, may administser and certify oaths required to be administered during the progress of an election. Before opening the polls, each member of the board must take and subscribe an oath to faithfully perform the duties imposed upon them by law. Any elector of the precinct may administer and certify such oath. The polls must be opened at eight o'clock in the morning of the election and be kept open until six o'clock P. M. of the same day. It shall be the duty of the clerk of the board of election to forthwith deliver the returns duly certified to the board of directors of the district.

Section 8. No lists, tally paper, or certificates returned from any election shall be set aside or rejected for want of form if it can be satisfactorily understood. The board of directors must meet at its usual place of meeting on the first Monday

after election and canvass the returns. If at any time of meeting the returns from each precinct in the district in which the polls were open have been received, the board of directors must then and there proceed to canvass the returns; but if all the returns have not been received, the canvass must be postponed from day to day until the returns have been received, or until six postponements have been had. The canvass must be made in public and by opening the returns and counting the votes of the district for each person voted for, and declaring the results thereof. The board shall declare elected the person receiving the highest number of votes so returned for each office, and also declare the result on any question submitted.

Section 9. The secretary of the board of directors must, as soon as the result of any election held under the provisions of this act is declared, enter in the records of such board and file with the county clerk of the county in which the office of said district is located, a statement of such results, which statement must show: First, a copy of the publication notice of said election. Second, the names of the judges of said election. Third, the whole number of votes cast in the district and in each precinct of the district. Fourth, the names of the persons voted for. Fifth, the office to fill which each person was voted for. Sixth, the number of votes given in each precinct for each of such persons. Seventh, the number of votes given in the district for each of such persons. Eighth, the names of the persons declared elected. Ninth, the result declared on any question submitted in accordance with the majority of the votes cast for or against such question. The board of directors must declare elected the person having the highest number of votes for each office, and also the result of any question submitted. The secretary must immediately make out and deliver to such person a certificate of election, signed by him and authenticated with the seal of the board. In case of a vacancy in the board of directors, by death, removal, or inability from any cause, to properly discharge the duties as such director, the vacancy shall be filled by appointment by the remaining members of the board, and upon their failure or inability to act within thirty days after such vacancy occurs, then upon petition of five electors of said district the board of county commissioners of the county where the office of said board of directors is situate, shall fill such vacancy or vacancies. Any director appointed as above provided shall hold his office until the next general election of said district, and until his successor is elected and qualified.

Section 10. The directors having duly qualified shall organize as a board, elect a president from their number, and appoint a secretary and treasurer. The board shall have power and it

shall be their duty to adopt a seal, manage and conduct the affairs and business of the district, make and execute all necessary contracts, employ such agents, attorneys, officers and other employees as may be required and prescribe their duties and generally to perform all such acts as shall be necessary to fully carry out the purpose of this act. Said board shall have the power to survey, lay out, construct and to acquire any and all ditches, drainage works required by such district, and rights of way or other property by purchase, condemnation or otherwise as may be needed for such work, but no contract involving a consideration or expense exceeding $5,000, and not exceeding $10,000, shall be binding unless such contract shall be authorized and ratified in writing by not less than a majority of the legal electors in such district, according to the number of votes cast at the last district election; nor shall any contract in excess of $10,000 be binding until such contract shall have been authorized and ratified at an election in the manner as is provided for holding elections under this Act. The said rules and regulations shall be printed in convenient form as soon as the same are adopted, for distribution among the electors of such district.

Section 11. Upon the adoption of a plan of drainage by the board of directors of any district organized under the provisions of this Act, said board shall prepare an assessment book for such district, with proper headings, in which must be listed all lands within the district, specifying in separate columns and under appropriate heads:

First. The name or names of the owner or owners to whom the land is listed. If the name or names is not known to the board, the land shall be listed to "unknown owners."

Second. A description of each forty-acre tract or lot by township, range, section, and fractional section, and when such tract or lot is not a congressional subdivision, by metes and bounds, or other description, sufficient to identify it, giving the locality and an estimate of the number of acres.

Third. City and town lots, naming the city or town, and the number and block, according to the system of numbering or designating in such city or town.

Said assessment book shall also contain proper columns and headings for entries, showing:

First—The respective amounts of assessments of expense as fixed by the board of directors on each 40-acre tract or lot, or fraction thereof.

Second—The amount of assessment of expense fixed by said board on each city and town lot.

Third—All changes made by the board in estimating the expense chargeable against each tract or lot.

Fourth—The total amount of all assessments of expense on all of the lands affected by such plan of drainage.

Fifth—Such other matters as the board may deem proper.

The board of directors shall deliver a certified copy of such assessment book when completed, to the county assessor of each of the counties into which such district shall extend, together with their report showing the total estimated cost, including expenses of organization and of purchases or condemnation of property, of the work contemplated in the plan of drainage adopted for the district and the estimated cost for repairs and maintenance thereof and the incidental expenses of such district, for the ensuing ten years. The county assessor or assessors shall thereupon as soon as practicable, proceed to ascertain, estimate and determine and assess upon each 40-acre tract or fraction thereof, and each city or town lot within the district affected by such drainage system an assessment in proportion to the entire cost, as estimated by the board of directors and the benefits to be derived from drainage to each tract, fraction, city or town lot as reported by said board and enter such amount, estimate, in United States gold coin, in the proper column in the assessment books, and certify the same, with the columns added up to the board of county commissioners of the county in which the district was originally organized. Such board of county commissioners shall immediately give notice of the reception of said assessment, and of the time they acting as a board of equaliaztion will meet to equalize assessments (which meeting may be a special meeting) by publication in a newspaper of general circulation published in each of the counties into which such district may extend. The time fixed for such meeting shall not be less than ten nor more than thirty days from the first publication of such notice and in the meantime such assessment book must remain in the office of such board of county commissioners for the inspection of all persons interested. Upon the day specified in the notice required by this section for the meeting of the board of commissioners which is hereby constituted a board of equalization for that purpose, shall meet and continue in session from day to day (excluding Sundays) as long as necessary not to exceed ten days to hear and determine such objections to the valuation and assessment as may come before them and to equalize the assessment and such board may change the valuation as may be just, having due regard for the benefits that may accrue by such plan of drainage to the respective tracts of land or lots proposed to be affected thereby. The secretary of the board together with the secretary of the board of directors of

such district must be present during the session of such board of equalization and note all changes made in the assessment, and in the names of persons whose property is assessed and within ten days after the close of the session such secretaries shall have the total values and assessments, as finally equalized by the board of equalization, extended into columns and added up. The sums thus fixed against each 40-acre tract or fraction thereof and each city and town lot shall be the basis for all assessments within such district for the next ensuing ten years; Provided, that the board of directors of such drainage district may thereafter, whenever in their judgment a new assessment of all the land within the district becomes necessary, order such new assessment to be made and shall report their reasons therefor together with a new schedule to be prepared by them to the assessors of the county or counties included in such district when the same plan of procedure shall be followed as in the case of the original assessment. After the assessment has been determined as herein provided for, the board of directors of the district shall then determine the portion of the costs and expenses estimated, it will be necessary to raise for the ensuing fiscal year and shall report such determination and estimate to the board of county commissioners which acted as a board of equalization which latter board shall at their first regular meeting levy an assessment upon the equalized sums or valuation charged up on each tract or lot listed in the assessment book sufficient to raise the amount so determined; and shall annually thereafter, whenever further assessments for such purposes are necessary (when an estimate shall have been submitted by the board of directors, requesting same) levy the same in like manner and the clerk of such board of county commissioners shall certify such levy or levies to the county treasurer of the county or counties included in such district which certified report shall be deemed and treated by such county treasurer as the tax roll for collecting such assessments and when such assessments are collected such funds shall be reported and paid to the county treasurer of the county where the district was organized and the county treasurer thereof shall place the same to the credit of the district in a fund to be called the "Fund of.....Drainage District," and shall be responsible upon his official bond for the safe keeping and disbursement of the same as in this act provided. He shall pay out of the same only upon warrants of the board of directors of the drainage district signed by the president and attested by the secretary. When any warrants of the district are presented to such treasurer and there are no funds in his hands subject to the payment thereof he shall stamp the same in the same manner as ordinary county warrants are stamped and they shall draw interest from the true date of their presentation

at the legal rate of interest until paid. Such treasurer shall report in writing at each regular meeting of the board of directors and as often thereafter as requested by the board, the amount of money in the fund, the amount of receipts since his last report, and the amounts paid out together with a list of the warrants presented since his last report; such report shall be verified and filed with the secretary of the board. The assessment authorized by this section is a lien against the property assessed from and after the date when the same is made and entered in the assessment book by the board of equalization as provided in this section, and such lien shall continue until such assessment is paid or the property assessed is sold for the payment thereof.

Section 12. The revenue laws of this State for the assessment levying and collecting of taxes on real estate for county purposes except as herein modified, shall be applicable for the purposes of this act, including the enforcement of penalties, sales of property and forfeiture for delinquent assessments. All taxes levied under this Act are special taxes to be levied according to the benefits to accrue to the lands against which the same are assessed and levied.

Section 13. The board of directors shall hold a regular quarterly meeting in their office on the first Tuesday in January, April, July and October, and such special meetings as may be required for the proper transaction of business. All special meetings shall be called by the president of the board, or any two directors. All meetings of the board must be public, and two members shall constitute a quorum for the transaction of business; and on all questions requiring a vote there shall be a concurrence of at least two members of said board. All records of the board must be open to the inspection of any elector during business hours. The board, its agents and employes shall have the right to enter upon any land in the district, to make surveys and to locate and construct any drainage ditch or ditches and the necessary drainage laterals.

Section 14. The title to all property acquired under the provisions of this act shall immediately and by operation of law vest in such drainage district, in its corporate name, and shall be held by such district in trust for, and is hereby dedicated and set apart for the uses and purposes set forth in this act, and shall be exempt from all taxation, and said board is hereby authorized and empowered to hold, use and acquire, manage, occupy and possess said property as herein provided.

Section 15. The said board is hereby authorized and empowered to take conveyances or assurances for all property acquired by it under the provisions of this Act in the name of

such drainage district to and for the purposes herein expressed and to institute and maintain any and all actions and proceedings, suits at law or in equity, necessary or proper in order to fully carry out the provisions of this Act or to enforce, maintain, protect or preserve any or all rights, privileges and immunities created by this Act or acquired in pursuance thereof. And in all courts, actions, suits, or proceedings the said board may sue, appear and defend in person or by attorneys and in the name of such drainage district. Judicial notice shall be taken in all actions, suits and judicial proceedings in any court of this State of the organization and existence of any drainage district of this State, now or hereafter organized, from and after the filing for record in the office of the county clerk of the certified copy of the order of the board of county commissioners mentioned in section 3 of this Act; and a certified copy of said order shall be prima facie evidence in all actions, suits and proceedings in any court of this State of the regularity and legal sufficiency of all acts, matters and proceedings therein recited and set forth; and any such drainage district, in regard to which any such order has been heretofore or may hereafter be entered, and such certified copy thereof, so filed for record, and which has exercised or shall exercise the rights and powers of such a district, and shall have had or shall have in office a board of directors exercising the duties of their office and the legality or regularity of the formation or organization whereof shall not have been questioned by proceedings in quo warranto instituted in the District Court of the county in which such district or the greater portion thereof is situated within one year from the date of such filing, shall be conclusively deemed to be a legally and regularly organized, established and existing drainage district within the meaning of this Act; and its due and lawful formation and organization shall not thereafter be questioned in any action, suit or proceeding whether brought under the provisions of this Act or otherwise.

Section 16. It shall be the duty of the board of directors, on or before September 1 of each year, to determine the amount of money required to meet the maintenance, operating and current expenses for the ensuing year including any expense of construction that may have been theretofore done or may be under way and the expense of which has not been otherwise provided for and to certify to the county commissioners of the county in which said district was organized, said amount, together with such additional amount as may be necessary to meet any deficiency in the payment of said expenses theretofore incurred, including bond interest unpaid.

Section 17. It shall be the duty of the county assessor of any county embracing the whole or a part of any drainage district, to assess and enter upon his records as assessor in its appropriate column the assessment of all real estate, exclusive of improvements, situate, lying and being within any drainage district in whole or part of such county and to make and certify such assessment schedule together with the special schedule as provided for in this Act, to the county commissioners of his county. Immediately after said assessment shall have been extended as provided by law, the assessor shall make returns of the total amount of such assessment to the county commissioners of the county in which the office of said district is located. All lands classified for assessment purposes with reference to the benefits to accrue thereto within the district for the purposes of taxation under this Act shall be valued by the assessor at the same rate per acre, that is to say all lands of the same class shall be assessed alike; Provided, that in no case shall any land be taxed for drainage purposes under this Act, which from any natural cause can not be drained by the drainage system of said district.

Section 18. Said board of directors shall keep a registry of all warrants or orders drawn by them showing the date, amount, name of payee, and for what purposes drawn and no warrant or order shall be issued except upon an itemized voucher duly verified stating the services rendered or material furnished the district and by whom ordered or contracted.

Section 19. For the purpose of constructing a drainage system and necessary works for any district and acquiring the necessary property and rights therefor, for the purpose of paying the first year's interest upon the bonds herein authorized, and otherwise carrying out the provisions of this Act the board of directors of any such district may estimate and determine the amount of money necessary to be raised for such purposes and are hereby empowered to call a special election at which election shall be submitted to the electors of such drainage district possessing the qualifications prescribed by this Act the question of whether or not the bonds of said district shall be issued in the amount so determined; Provided, however, That the notice of such election, the manner of conducting the same, the issuance of the bonds, charter and denominations of the bonds and all matters pertaining thereto shall be conducted under and in accordance with the plan providing for the voting, issuance, sale, disposition, character of lien, exchange of bonds for work and all other particulars pertaining thereto shall be identically the same as that provided for in the matter of

issuing the bonds of irrigation districts created under the laws of the State of Colorado and when so issued shall be binding obligations of said district to all intents and purposes as fully as though the procedure for their issuance were set out in this Act.

Section 20. The county treasurer of the county in which is located the office of any drainage district, shall be and is hereby constituted ex-officio district treasurer of said district and said county treasurer shall be liable upon his official bond, and to indictment and criminal prosecution, for malfeasance, misfeasance or failure to perform any duty herein prescribed as county treasurer or district treasurer as is provided by law in other cases as county treasurer and shall perform the duties of such district treasurer as provided for the discharge of the duties of the district treasurer of irrigation districts in the State of Colorado.

Section 21. After adopting a plan for the construction of a drainage system or works in any district the board of directors shall pursue the same procedure and in the same manner as is provided for the construction of canals, reservoirs and works by irrigation districts in the State of Colorado except as modified by this act.

Section 22. The board of directors shall have the power to construct the said works of any drainage district across any water courses, street, avenue, highway, railway, canal or ditch which the route of such drainage system or any branch thereof may intersect or cross; and if any railroad company and said board, or the owners and controllers of said property, thing or franchise so to be crossed, cannot agree upon the amount to be paid therefor, or the points or the manner of said crossings, the same shall be ascertained and determined in all respects as is provided in respect to the taking of land for public uses. The right of way is hereby given, dedicated, and set apart, to locate, construct and maintain said works, or reservoirs, over, through, or upon any of the lands which are now, or may be the property of the State.

Section 23. The board of directors shall each receive at the rate of two and one-half dollars per day while attending meetings and their actual and necessary expenses while engaged in the business of the district. The salary of the secretary shall not exceed five hundred dollars per annum. No director or any officer of said district shall in any manner, be interested, directly or indirectly, in any contract awarded or to be awarded by the board, or in the profits to be derived therefrom; nor shall receive any bond, gratuity or bribe, and for any violation of this provision,

such officer shall be deemed guilty of a felony, and such conviction shall work a forfeiture of his office, and he shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the penitentiary not exceeding five years nor less than one year.

Section 24. The board of directors or other officers of the district, shall have no power to incur any debt or liability whatever by any method in excess of the express provisions of this Act, and any debt or liability incurred in excess of such express provisions shall be and remain absolutely void.

Section 25. Compensation for property taken by the district, change of boundaries of any drainage district by the inclusion or exclusion of lands, dissolution of district, judicial examination and confirmation of any proceedings, issue and sale of bonds shall be controlled and in accordance with the provisions of the irrigation district laws of Colorado pertaining to the matters herein specified.

Section 26. The manner of contesting any election held under the provisions of this act shall be the same as provided for the trial and the hearing of elections of county officers other than county judge.

Section 27. All water gathered by such drainage improvement shall be the property of those from whose lands the same is taken by such drainage ditches or canals, and the same shall be pro-rated among the different land owners from which such water is taken, according to the cost of the improvement assessed against each one, so far as is reasonably possible; Provided, however, That nothing in this act contained shall be construed to affect, interfere with or impair any accrued or vested rights of any kind or character except in so far as the same may be affected by condemnation as in this act permitted.

Section 28. Owners of land which requires combined drainage may provide for the construction of drains, ditches or water courses upon their own land whenever the owners of lands which may require a combined system of drainage shall unanimously and mutually agree in writing among themselves upon a system of drainage and the character of work necessary to be done to drain their lands and the amount of money each shall contribute towards said proposed works; they may reduce their agreement to writing specifying the boundary lines of said voluntary district and the lands therein in 40 acre tracts or smaller tracts if necessary, if giving the names of the owners of each tract of land and also specifying the work which they propose shall be done, and naming three persons among their number who shall act as directors until the annual election, and may agree upon any other lawful matter or thing which they may deem pertinent to the

work proposed. They shall submit such voluntary agreement to the board of county commissioners of the county wherein the major part of the lands proposed to be included in such district may be situated, and shall submit with such agreement a plat of the land giving a general description of the same, and the said board of county commissioners as soon thereafter as may be practicable shall carefully consider all questions involved, and shall make a personal inspection of the land proposed to be included in said voluntary district or may employ some competent engineer or surveyor to examine and report to said board on the same and the expense of such surveyor or engineer, including any expense that the county commissioners may incur in the examination of such project shall be paid by the parties to such voluntary agreement, and the board of county commissioners may require a deposit to be made with the county treasurer of the county to protect the county against such expense, if such board of county commissioners shall become satisfied that the plan proposed is practicable and will not interfere substantially with the interests of the public and that the agreement submitted is fair and equitable in all respects considering the benefits which the respective lands will receive from such voluntary drainage system, then the board of county commissioners shall enter an order upon their records approving such agreement and shall file the same with the county clerk with the accompanying plat in the office of the county where the major portion of the land of said proposed district may be situated, and if such district extends into more than one county a certified copy of the agreement and plat together with the approval of the county commissioners of the county where the major portion of the land is situated shall be filed by the parties entering into such agreement with the county clerk of such other county or counties, and thereupon the said drainage district shall be deemed fully organized and established by law and shall have all the powers of drainage districts organized by petition as hereinbefore provided for, and such directors so named in said agreement shall then possess all the powers and proceed in like manner as before designated in the case of directors of districts organized by petition, and the agreement herein provided for shall constitute a charter of authority of such voluntary district and all lands subscribed to and voluntarily included in said district shall be considered as a unit or but one tract of land in the determination of any question or right or duty as between said voluntary district and any lands outside thereof, whether lying above or below said district or adjacent thereto or otherwise.

Approved April 24, 1909.

Chapter 176.

IRRIGATION DISTRICTS—FORMATION.

(H. B. No. 159, by Mr. Weiser.)

An Act to Amend an Act Entitled "An Act in Relation to Irrigation Districts," Approved May 3, 1905.

Be it Enacted by the General Assembly of the State of Colorado:

Section 1. That section eleven (11) of an Act of the General Assembly of the State of Colorado, entitled "An Act in Relation to Irrigation Districts," approved May 3, 1905, is hereby amended and re-enacted to read as follows:

"Section 11. (Board of Directors—Officers—General Duties—Ratio of Water Distribution.) The directors, having duly qualified, shall organize as a board, elect a president from their number, and appoint a secretary. The board shall have power, and it shall be their duty, to adopt a seal, manage and conduct the affairs and business of the district, make and execute all necessary contracts, employ such agents, attorneys, officers and employees as may be required, and prescribe their duties, establish equitable rules and regulations for the distribution and use of water among the owners of said land, and generally to perform all such acts as shall be necessary to fully carry out the purposes of this act. Said board shall have the power in addition to the means to supply water to said district proposed by the petition submitted for the formation of said district, to construct, acquire, purchase, or condemn any and all canals, ditches, reservoirs, reservoir sites, water, water rights, rights of way, or other property necessary for the use of the district, or to acquire by condemnation, or otherwise, the right to enlarge any ditch, canal or reservoir already constructed or partly constructed. In case of the purchase of any property by said district, when it shall be proposed by the board of directors to purchase a system of irrigation already constructed or partially constructed, and to enlarge and complete the same adequate to the needs of the district, the board may in such case embody in one contract the matter of the purchase, the enlargement, and the completion of such irrigation system without inviting bids for such construction and completion; and in case of the purchase of such property as aforesaid by said district, the bonds of the district hereinafter pro-

vided for may be used at their par value in payment without previous offer of such bonds for sale. But no contract involving a consideration exceeding ten thousand dollars, and not exceeding twenty-five thousand dollars, shall be binding, unless such contract shall be authorized and ratified in writing by not less than one-third of the legal electors of said district according to the number of votes cast at the last district election; nor shall any contract in excess of twenty-five thousand dollars be binding until such contract shall have been authorized and ratified at an election, in manner as is provided for the issue of bonds.

The said rules and regulations shall be printed in convenient form as soon as the same are adopted, for distribution in the district. All waters distributed shall be apportioned to each land owner pro rata to the lands assessed under this act within such district. The board of directors shall have power to lease or rent the use of water or contract for the delivery thereof to occupants of other lands within or without the said district at such prices and on such terms as they deem best, provided the rental shall not be less than one and one-half times the amount of the district tax for which said land would be liable if held as a freehold, and provided further no vested or prescriptive right to the use of such water shall attach to said land by virtue of such lease or such rental, provided that any land owner in said district may with the consent of the board of directors assign the right to the whole or any portion of the water so apportioned to him for any one year where practicable to any other bona fide land owner, to be used in said district for use on his land for said year, provided such owners shall have paid all amounts due on assessments upon all such lands.

The board of directors shall further have power to lease or rent the use of water or to contract for the delivery thereof to settlers upon or occupants of the public domain on the terms hereabove provided; provided that in such case the board of directors shall have the further power to make a contract on behalf of the district with such settler or occupant to the effect that such settler or occupant shall, upon receiving full title to his lands and upon the payment of his proportionate share of the bond assessments as provided in Section 35, include his lands within said district, and shall upon such inclusion be entitled to all the rights and privileges of a member of said district. Before the execution of such contract the board of directors shall cause notice of such contract to be given substantially as provided in section 33 of this act, with such changes in the form of the notice as may be necessary, and a hearing upon said contract and all objections thereto shall be had as provided in section 34 of this act. If upon said hearing the board of directors deem it not for

the best interests of the district to execute said contract, they shall by order refuse to execute said contract; but if they deem it for the best interests of the district that said contract be executed, the board may execute said contract, and in such case said contract shall be valid and binding upon all parties thereto, and when the said settler or occupant shall have complied with said contract and obtained title to his lands, the board shall, upon proof of such compliance and obtaining of title, and without any further notice or hearing upon the matter, enter an order of inclusion of said lands as provided in section 36 of this act; provided, if within thirty days from the execution of said contract, a majority of the qualified electors of the district protest in writing to said board against the execution of said contract, said contract shall be held for naught, and shall not be binding upon any party thereto."

Section 2. That section 36 of said act is hereby amended and re-enacted so as to read as follows:

"Section 36. (Boundaries—Orders.) The board of directors if they deem it not for the best interests of the district to include therein the lands mentioned in the petition, shall by order reject the said petition, but if they deem it for the best interests of the district that said lands be included, the board may order that the district be so changed as to include therein the lands mentioned in the said petition. The order shall describe the entire boundaries of the district with the lands so included, if the district boundaries be changed thereby, and for that purpose the board may cause a survey to be made of such portion of such boundaries as may be deemed necessary, Provided, If within thirty days from the making of such order a majority of the quailfied electors of the district protest in writing to said board against the inclusion of such lands in said district, said order shall be held for naught and such lands shall not be included therein. Provided that in the case of inclusion of government land according to the provisions of section 11, said protest must be made within thirty days of the date of the execution of the contract therein provided for."

Section 3. The acts and parts of acts inconsistent herewith, are hereby repealed.

Section 4. In the opinion of the General Assembly, an emergency exists; therefore, this act shall take effect and be in force from and after its passage.

APPROVED April 13th 1909.

Chapter 177.

IRRIGATION DISTRICTS—PRIORITY OF RIGHT.

(H. B. No. 199, by Mr. McCaskill.)

An Act to Amend Sections 11 and 12 of an Act Entitled "An Act to Repeal Section Five (5), of an Act Entitled 'An Act to Provide for the Appointment of a State Engineer, and to Define His Duties and Regulate His Pay, and for the Appointment of His Assistants, and the Establishment of Water Divisions,' Approved March 5, 1881; the Same Being Section 1806, of the General Statutes, 1883; and Also to Amend Section Fifteen (15), of an Act, Entitled 'An Act to Regulate the Use of Water for Irrigation, and Providing for Settling the Priority of Right Thereto, and for Payment of the Expenses Thereof, and for the Payment of All Costs and Expenses, Incident to Said Regulation of Use,' Approved February 19, 1879; and to Establish the San Juan Water Division; Also, to Create Water Districts in Established Water Divisions; Also, to Provide for Utilizing Testimony Heretofore Offered as Evidence in the Adjudication of Water Rights," Approved April 1, 1885, and to Amend Section 3 of an Act Entitled "An Act to Amend Sections Four, Seven, Ten, Seventeen, Eighteen and Twenty-five of an Act Entitled, An Act to Repeal Section Five (5), of an Act Entitled 'An Act to Provide for the Appointment of a State Engineer, and to Define His Duties and to Regulate His Pay, and for the Appointment of His Assistants and the Establishment of Water Divisions,' Approved March 5, 1881, the Same Being Section Eighteen Hundred and Six of the General Statutes, 1883; and Also to Amend Section Fifteen (15), of an Act Entitled, 'An Act to Regulate the Use of Water for Irrigation and Providing for Settling the Priority of Right Thereto, and for Payment of the Expenses Thereof, and for the Payment of All Costs and Expenses Incident to Said Regulation of Use,' Approved February 19, 1879, the Same Being Section Seventeen Hundred and Fifty-one of the General Statutes of 1883, and to Establish the San Juan Water Division; Also to Create Water Districts in Established Water Divisions; Also to Provide for Utilizing Testimony Heretofore Offered as Evidence in the Adjudication of Water Rights,' Approved April 1, 1885," Approved April 6, 1889.

Be it Enacted by the General Assembly of the State of Colorado:

Section 1. That sections 11 and 12 of an act entitled "an act to repeal section five (5), of an act, entitled 'an act to provide for the appointment of a State Engineer, and to define his duties and regulate his pay, and for the appointment of his assistants, and the establishment of water divisions,' approved March 5, 1881; the same being section 1806, of the General Statutes, 1883; and also to amend section fifteen (15), of an act entitled 'An act to regulate the use of water for irrigation, and providing for settling the priority right thereto and for payment of the expenses thereof, and for the payment of all costs and expenses, incident to said regulation of use,' approved February 19, 1879, the same being section 1751, of the General Statutes of 1883; and to establish the San Juan water division; also, to create water districts in established water divisions; also, to provide for utilizing testimony heretofore offered as evidence in the adjudication of water rights," shall be amended so as to read as follows:

"Sec. 11. Water district No. 18 shall consist of all lands irrigated by ditches or canals, taking water from that portion of the Apishapa river and its tributaries, south of the south boundary line of Pueblo county."

"Sec. 12. Water district No. 19 shall consist of all lands irrigated by ditches or canals, taking water from that portion of the Purgatoire river and its tributaries, south of the north boundary line of Las Animas county."

Section 2. That section 3 of an act entitled "An act to amend sections four, seven, ten, seventeen, eighteen and twenty-five of an act entitled, an act to repeal section five (5), of an act entitled, 'An act to provide for the appointment of a State Engineer, and to define his duties and to regulate his pay, and for the appointment of his assistants and the establishment of water divisions," approved March 5, 1881, the same being section eighteen hundred and six of the General Statutes, 1883; and also to amend section fifteen (15) of an act entitled, 'An act to regulate the use of water for irrigation and providing for settling the priority of right thereto, and for payment of the expenses thereof, and for the payment of all costs and expenses incident to said regulation of use,' approved February 19, 1879, the same being section seventeen hundred and fifty-one of the General Statutes of 1883, and to establish the San Juan water division; also to create water districts in established water divisions; also to provide for utilizing testimony heretofore offered as evidence in the adjudication of water rights, approved April 1, 1885," is amended to read as follows:

"Sec. 3. Water district No. 17 shall consist of all lands irrigated by ditches or canals taking water from that portion of the Purgatoire river north of the north boundary line of Las Animas county; and all lands irrigated by ditches or canals taking water from that portion of the Arkansas river below water district No. 14, and above the mouth of the Purgatoire river, and from the streams running into the said portion of the Arkansas river, except that portion of the Apishapa river and its tributaries, south of the south boundary line of Pueblo county."

APPROVED April 5, 1909.

Chapter 178.

IRRIGATION, COLLEGE AND SCHOOL LANDS.

(H. B. No. 267, by Mr. Clark.)

An Act to Provide For the Admission of Agricultural College and Public School Lands Into Irrigation Districts; Providing for and Authorizing the Assessment of Agricultural College and Public School Lands Within Irrigation Districts for Irrigation District Purposes; and Providing for the Payment of Such Assessment So Levied.

Be it Enacted by the General Assembly of the State of Colorado:

Section 1. For the purpose of furnishing water and securing water rights for agricultural college and public school lands, lying within or adjacent to the boundaries of any irrigation district now organized, or which may hereafter be organized, the State Board of land commissioners is hereby authorized to petition all such lands into such irrigation districts.

Section 2. All such petitions shall be in the form now provided by law for the petition of other lands into such irrigation districts, and shall be signed, sealed and acknowledged by the register of the State board of land commissioners, on behalf of said board, and shall in addition be countersigned by the Governor of the State, on behalf of the State, and when so signed, sealed, acknowledged and filed with the board of directors of any irrigation district, shall be deemed to give the assent of said State board of land commissioners and the State

of Colorado to the inclusion of all lands therein described in said irrigation district.

Section 3. All such lands so included in any irrigation district in this State, shall be assessed for irrigation district purposes in the same manner and at the same rate as other lands in such irrigation districts.

Section 4. It shall be the duty of the county treasurer of each and every county in this State wherein any irrigation district is located, and in which such lands have been so included, to notify the register of the State board of land commissioners, on or before the first day of February of each and every year of the amount of district assessments due on such lands, giving therein the exact description of each tract of land so assessed and the amount of assessments due thereon. Immediately upon receiving such notice it shall be the duty of the register of said State board of land commissioners to place the same before said board at their next regular meeting, who shall examine said notice of assessments due, and if the same be found correct, they shall certify the same to the State Treasurer who shall pay the same out of any of the moneys in his hands belonging to said respective land funds howsoever derived, and charge the same to said respective funds. Such payment shall be by warrant from the State Treasurer to the proper county treasurer, and when so received by him, he shall issue his receipts therefor in the name of the State board of land commissioners, and shall in addition issue a duplicate receipt to said State Treasurer.

Section 5. Upon the receipt of such receipts from said county treasurers, it shall be the duty of the register of the State board of land commissioners to enter and charge the same against each tract of land so paid on, in a book to be kept by him for that purpose, showing the amount paid, date of payment and to whom paid, and whenever any of said tracts of land shall be sold, the purchaser thereof, in addition to the purchase price therefor, shall pay all of such accrued assessments so paid as aforesaid, together with interest thereon, from the date of payment at the rate of 6 per centum per annum, such accrued assessments and interest thereon to be included in the total purchase price to be paid by said purchaser. Provided, That this section shall not apply to such assessments as shall have been paid by the lessees of any such tracts of land, theretofore leased from the State as hereinafter provided.

Section 6. In the event that any such tracts of land so included within any irrigation district, shall be leased from the State board of land commissioners, then and in that case all

such lessees shall in addition to the rental paid to said State board of land commissioners, pay such an additional amount to said board as will equal the district assessments levied upon such lands for the year in which such rental shall be paid; and such moneys when so received by the register of the State board of land commissioners, shall be turned into the State Treasurer and be by him kept in a separate fund for the payment of such assessments aforesaid.

Section 7. All contracts for the sale of any such lands included within any irrigation district shall, in addition to the purchase price to be paid, provide that such purchaser shall on or before the first day of March in each and every year, until he shall have secured a patent for such lands, pay unto the register of the State board of land commissioners such an amount as will equal the district assessments so levied upon such lands for the year in which such payment is to be made, and such moneys when so received by said register, shall be turned in to the State Treasurer and be by him kept in a separate fund for the payment of such assessments aforesaid.

APPROVED April 5th 1909.

Chapter 179.

JACKSON COUNTY.

(H. B. No. 342, by Mr. Greenman.)

An Act to Establish the County of Jackson and the Temporary County Seat Thereof; Providing for the Appointment of Its Precinct and County Officers, Fixing the Terms of Court Therein, and Attaching the Same to Certain Congressional Senatorial, Representative, Judicial and Normal Districts.

Be it Enacted by the General Assembly of the State of Colorado:

Section 1. That so much of the county of Larimer as is included within the following described boundaries shall be set apart and is hereby established as a county to be called the county of Jackson, and the boundaries are as follows, to-wit:

Beginning on the north boundary of the State of Colorado at the point where the present counties of Larimer and Routt

meet, thence in a southerly direction along the summit of the Snowy range to the northwest corner of Grand county at the point where the counties of Grand, Routt and the present county of Larimer join, thence easterly along the north boundary of Grand county, which is the summit of the Continental divide or Snowy range, to the point where the said Snowy range intersects the Medicine Bow range, thence northerly along the summit of the Medicine Bow range, to the north boundary of the State of Colorado, thence west along said north boundary of Colorado to the place of beginning. All of which said Jackson county being that portion of the present county of Larimer which lies west of the Medicine Bow range.

Section 14. In the opinion of the General Assembly an emergency exists; therefore, this act shall take effect and be in force immediately after its passage and approval.

APPROVED May 5th 1909.

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NOTE—In the index to statutes will be found sections which do not appear in this compilation, owing to the fact such sections were not revised under chapter entitled "Irrigation."

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