

procure the testimony of said witnesses, and that thereafter the State and its alleged grantees after closing its case, and over the objections of the settler claimants, was permitted to reopen the same and put upon the stand certain of the witnesses included in said stipulation, and give full force and effect to said admission, it will be observed that McConaughy, Hale, Jones and Kistler were called and examined as witnesses, the admission, therefore, fails as to them. Brown, Conn. Sanders and Colvig were witnesses at the former trials, and the State of Oregon et al, have introduced in evidence, transcript of testimony given by them, entirely inconsistent with the testimony it is alleged each of them would give. Brown's and Sanders' testimony in the former trial tend to show that the land herein involved was included in the bed of an apparently permanent lake, while Colvig's testimony showed clearly that he was without any definite knowledge as to the location and character of the land, as he was suffering from a fractured arm and was conveyed in an ambulance when in the vicinity of the land, it needed he was ever in sight thereof.

The testimony of the witnesses at the trial of the case, Jones, Peterson, Kistler, McConaughy and others, tends to show that the lands involved herein were situated in a basin or valley, subject to annual overflow; that in the spring of the year, the said lands would become inundated, and that in the planting, growing and harvesting season said lands were in the early days, either covered with water or were too wet for cultivation, etc., and that after obtaining its flood height in the springs the waters of the marsh or lake began to gradually recede, until late in the fall, when hogs, cattle, etc., found their way across the margin of the marsh or lake for some distance into its interior. But there is neither an accurate description of the line of the greatest subsidence of the waters, nor even an approximate estimate thereof. In other words no attempt was made to show to what extent the water subsided, and what lands were left uncovered thereby.

Jones and Peterson were called in many of the individual cases, and their testimony given at such trials where the State and its alleged grantees in whose behalf they were called, were endeavoring to establish the fact that the lands herein involved formed the part of the bed of a permanent shallow lake, to wit: Lake Warner, is somewhat difficult to reconcile with that given in this case, wherein a diametrically different fact is sought to be shown by those at whose instance they were called.

It is not deemed necessary to further comment on their testimony, except to suggest that when they appeared at the last hearing, some ten years had elapsed and that the impressions formed on their minds by the conditions of the country in the early sixties, had correspondingly grown dimmer, or in other words, according to them full faith and credit, their testimony at the former trials is entitled to more weight than that given at the rehearing, wherein there is conflict, because at that time their memories were less apt to be at fault.

The testimony of Jones, Peterson, Sanders, Brown, Dodge, Burns, Lohrenhel, Henderson, Light, Lambert and others, given at the former trials of the individual cases and introduced in evidence by the State of Oregon and its alleged grantees, the Warner Valley Stock Company, to prove the character of said lands generally, and especially certain described tracts thereof, taken alone, shows beyond the shadow of a doubt that said lands formed a part of Lake Warner from 1864 to 1881. Where said lands are referred to as marsh by said witnesses, they almost if not invariably speak of its waters as spreading out and covering the land, etc., showing that it was a lake and not a swamp during said time.

The claim that it was a physical impossibility for the land involved in the controversy to have been the bed of an apparently permanent lake on March 12, 1860, because it was indicated by a line of levels said to have been run by George S. Nickerson in 1860, that the elevation at the southeast corner of Sec. 18, T 40 S, R 24 E, was then more than thirty-two feet greater than the water level at the Stone Bridge in Sec. 24, T 37 S, R 24 E, will now be considered. Mr. Nickerson was not an engineer, nor was he a professional surveyor. At the time the work was done, he was engaged in the practice of the law. It was, however, shown that he was acquainted with the use of instruments and had some considerable experience in surveying and leveling. Admitting that Nickerson was thoroughly competent to do the work, the manner in which it was performed, would subject it to close scrutiny if not suspicion. His chain bearings were furnished by the Warner Valley Stock Company, and the flagman was an officer and stockholder in said corporation. He was employed and paid by said corporation to make the survey, and its agents were his only assistants. And the work was done without notice to the settler claimants. But even if the work had been done conscientiously by an expert engineer, with the best instruments, assisted by tried and trusted men, the great distance of the line—almost thirty miles—run through water, mud, cane and tules, would render it almost impossible for absolute accuracy to have been obtained.

Conceding, however, that so far as it was practically possible to obtain it, by the most approved processes of civil engineering, that the water level at the Stone Bridge was thirty-two feet below that of the land level at the southwestern extremity of the land in controversy, in 1860, such fact would not establish the contention that the land in controversy was not covered by water on March 12, 1860, because it was not known at what height the water stood at the Stone Bridge in 1860, nor was it shown to what extent sedimentation was responsible for the elevation of the land at the southwestern extremity of Sec. 18, et al, in 1860, thirty-nine years after. It is a matter of universal knowledge and observation that the inland

streams and lakes of this country have undergone a marked change within the last forty years. Streams that were in 1860 navigable for small crafts have become almost dry, and lakes and ponds covering thousands of acres have disappeared entirely. The clearing of the forests for cultivation and the loosening of the soil by the plow, have contributed in no small degree to this result. It is not, however, a matter of speculation in this case. Numerous witnesses introduced by the State and its alleged grantees, the Warner Valley Stock Company, testify to the filling in of the basin by silt and sediment and show that for years thousands of head of cattle fed around the margin of this lake, and perhaps as many hogs were observable loosening the ground in obtaining subsistence from the tules and other roots. It was shown that the subsidence of the waters amounted to a distance of ten feet perpendicularly, and Peterson, one of the witnesses for the State, et al, testified that the depth of the water at the Stone Bridge was at one time so great that in attempting to cross it, he lost his team, and saved himself from drowning by swimming.

Moreover the results of instrumental levelings must yield to actual visible facts, or in other words, as found by you, the condition shown to have existed by the testimony of numerous witnesses, must be taken as against a theory deduced from measurement. See Gould on Waters, 209 and 344, Decorah Woolen Mills Co. vs Greer et al, 49 Iowa, 490, and 58 Iowa, 86.

In the case cited, supra, the question at issue was the abatement of a milldam so that it would not interfere with the claimed prior water rights of the complaining party. The defendant maintained that the dam should not be abated below a stated height, asserting that it had been established by surveys that the abatement of the dam to the height indicated, would relieve the interference with the plaintiff's right. The Court held:

It appears very plain to us that the true height at which defendant's dam ought to be allowed to stand, should be determined rather by experiments than upon theoretical conclusions drawn by surveys. The instruments used by engineers are more or less imperfect and mistakes and errors in their use are almost certain to happen. Angel on Water courses, p 106, Brown vs Bush, 45 Pa St 61. A slight variation from the true level resulting from these causes would lead to important errors in the final results of the survey. The only true test is found in experiments after the work based upon the leveling is done.

The court in the above case had held, 49 Iowa, 490, that the plaintiff was entitled to have the dam of the defendant so abated that it would not interfere with his previously acquired water rights, and as above indicated, adopted the practical view that in according relief, the sheriff should reduce the dam, until the injury complained of had ceased to exist, even though in so doing he would remove more of the dam than was indicated as necessary by instrumental leveling. In Angel on Water Courses the opinion of the court in the case of Brown vs Bush, Pa St 61, was quoted as the law of the case. In holding that mathematical calculations would have to give way to actual and visible facts, the court in said case is quoted as saying:

We do not undervalue scientific measurements, but the history of all engineering in Pennsylvania has shown that, whenever science has disregarded and set aside the testimony of local experience and observation, it has blundered, and has had to do its work over again. Its conclusions may be fortified by the nicest experiments and the minutest calculations, but there are the fallibility of instruments, the unsteadiness of the hand or eye that uses them, the carelessness of assistants, and other causes which affect the result. And then Nature has her own secrets which she has not revealed even to science. Who can calculate for what the water men call the piling of water? No doubt the levelling was well done, but if in spite of it, the water would make other marks than it did when obstructed only by the stone row, it was a tell tale that could not be contradicted.

With nothing shown as to the level the water obtained at the Stone Bridge on March 12, 1860, with the acknowledgment that the waters of the basin in which the land is situated, have been conducted into Surprise Valley, California, and otherwise diverted, and have as a consequence, greatly reduced within the past few years, with the proof that the reliction of the waters was largely caused by sedimentation, and without any information as to the difference between the land levels of the Willey tract in Sec 18, T 40 etc, in 1860 and 1869, with an understanding of the manner in which the survey by Nickerson was made, the character and interests of his assistants, and the length of the line and the difficulties that had to be overcome in establishing it, and with the light of the cases and the authorities cited, supra, but little weight can be given the levels said to have been run by Nickerson, as against the testimony of those who were on the land and observed its condition. In the office decision of November 6, 1900, in which much weight was given this line of levels favorable to the State, there was no recital and no comment of that material evidence in the case as to sedimentary deposits from the hills in time of flood in late years, nor was there mention of the several facts now emphasized, and which tend to impeach the accuracy of said levels, or if probable, which most unquestionably prove the existence of physical conditions at the time of the leveling in 1860, which did not exist long prior thereto.

Moreover, the line levels run by Mr. Taylor in 1890, disclosed that the difference then in elevation between the Willey tract and the Stone Bridge, was eighteen feet, and both the surveys of Mr. Taylor and Mr. Moore, indicated that the fall from the outer extremity, or that portion bordering on the meandered line, to the inner or lake side of

the Willey tract, was eight feet, and the survey of Nickerson also indicates that while there was a general or continuous decline to the north, the fall was greatest during the first five miles from the initial point.

Whether the difference in elevation between the Willey tract and the Stone Bridge shown by the surveys of Taylor and Nickerson, made respectively in 1890 and 1899, was caused by a further subsidence of the waters at the Stone Bridge, and the additional accumulation of silt and sediment on the Willey tract, or was due to mistake in one or both surveys, is not shown. The evidence however, of the surveys agreeing in main, that the portion of the valley showing the most pronounced declination, was that near the outer boundary, strongly corroborates the testimony of the witnesses that the subsidence of the waters was materially affected by sedimentary deposits since the silt and soil brought in from the mountains, hillsides and outer margin of the lake, would naturally sink and form where the waters that brought them first found a level. The sediment and silt deposited in this manner, would form a new bank for the lake, and by this means the waters would be gradually, but surely, pushed further into the interior of the basin, as year by year the soil of the surrounding foothills and the outer margin of the lake, disturbed by cattle and loosened by hogs, was brought down into the basin by the spring floods. That the bed of the basin in the vicinity of the Stone Bridge would not be affected in the same degree as the lands in controversy, if at all, by sedimentary deposits, is manifest since said Bridge is situated between twenty and thirty miles from said lands, near which are the principal inlets of the basin. The material substances brought in the lake by the high waters would inevitably sink, as the force of the current was spent, and little, if any, solid matter would reach the bed of the lake near the Stone Bridge.

To avail the claimant under the Act of March 12, 1860 (12 Stat. 3) the documentary evidence extracted from the journal of General Fremont proves nothing or too much. There is serious doubt so far as this record discloses whether that intrepid explorer and soldier passed the lands in controversy during the latter part of 1845, but admitting that he did, and that his line of travel has been correctly delineated and explained, it is difficult to see in what way his memoranda aids those in whose behalf it is invoked. His description of the land in the valley, over which he passed, in no wise shows that it was "swamp and overflowed" within the meaning of the law. He makes no mention of swamp life or conditions, but, on the other hand, he states that "chenopodiaceous shrubs constituted the growth and made again our firewood." While the variety of the plants answering the above description is very extensive, yet the leading species are greasewoods, found in the desert and alkali plains of this and other countries, and from the uses to which the shrub was put, it cannot be doubted that greasewood was the plant referred to. If General Fremont was actually in the vicinity of those lands and found them covered with greasewood—a distinctive desert growth—in 1845, it is inconceivable in what way such facts tend to establish the contention that said lands were of the character contemplated by the Act of September 26, 1850, on March 12, 1860. It would tend to establish the original contention of the settlers, that said lands were dry or meadow on March 12, 1860, but does not in any wise aid the theory that they were swampy and overflowed, too wet for cultivation, and yet not covered by an apparently permanent body of water. That a shallow and narrow lake extending almost fifty miles after a series of dry seasons, such as it is shown are common to this vicinity, might present the appearance indicated by General Fremont, is much more likely than that a permanent swamp of such magnitude, with its characteristic growths and distinctive appearances, should escape his tireless attention.

Viewed in the light that it tended to discredit the theory that said lands were covered by an apparently permanent body of water, it still is without merit to establish the gist of the contention, i. e., that said lands were swampy and overflowed on March 12, 1860, and, on the other hand, it indicates the negative of such proposition. It was not enough that the State of Oregon should cast doubt upon the proposition that said lands formed the part of the bed of an apparently permanent lake, the burden of proof upon it to show by a fair preponderance of the testimony that all of said lands or the greater portion of the smallest legal subdivision of any part thereof was swamp and overflowed on March 12, 1860.

The lands involved herein are situated in the southern part of a narrow basin that extends in an almost due north and south direction for nearly fifty miles. Said basin is locked or walled in on the east and west by parallel mountain ranges and high hills. It is a reservoir having no outlet, into which flows the drainage of the adjacent mountains and hills. Its principal inlets are at its

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