Syllabus.

But the cavity must be made smaller than the pencil and so constructed as to encompass its sides and be held thereon by the inherent elasticity of the rubber. This adds nothing to the patentable character of the invention. Everybody knew, when the patent was applied for, that if a solid substance was inserted into a cavity in a piece of rubber smaller than itself, the rubber would cling to it. The small opening in the piece of rubber not limited in form or shape, was not patentable, neither was the elasticity of the rubber. What, therefore, is left for this patentee but the idea that if a pencil is inserted into a cavity in a piece of rubber smaller than itself the rubber will attach itself to the pencil, and when so attached become convenient for use as an eraser?

An idea of itself is not patentable, but a new device by which it may be made practically useful is. The idea of this patentee was a good one, but his device to give it effect, though useful, was not new. Consequently he took nothing by his patent.

The decree of the Circuit Court is

AFFIRMED.

ATCHISON *v.* PETERSON.

1. On the mineral lands of the public domain in the Pacific States and Territories, the doctrines of the common law, declaratory of the rights of riparian proprietors respecting the use of running waters, are inapplicable or applicable only in a very limited extent to the necessities of miners, and inadequate to their protection; there prior appropriation gives the better right to running waters to the extent, in quantity and quality, necessary for the uses to which the water is applied.
2. What diminution of quantity, or deterioration in quality, will constitute an invasion of the rights of the first appropriator will depend upon the special circumstances of each case; and in controversies between him and parties subsequently claiming the water, the question for determination is whether his use and enjoyment of the water to the extent of the original appropriation have been impaired by the acts of the other parties.

Statement of the case.

3. Whether, upon a petition or bill asserting that the prior rights of the first appropriator have been invaded, a court of equity will interfere to restrain the acts of the party complained of, will depend upon the character and extent of the injury alleged, whether it be irremediable in its nature, whether an action at law would afford adequate remedy, whether the parties are able to respond for the damages resulting from the injury, and other considerations which ordinarily govern a court of equity in the exercise of its preventive process of injunction.

APPEAL from the Supreme Court of the Territory of Montana.

Atchison and others filed a bill in the District Court of the Territory just named, for an injunction to restrain Peterson and others from carrying on certain mining operations on a creek in the county of Clark and Lewis, in the said Territory, known as the Ten-Mile Creek. The bill alleged that the water, diverted by the complainants from the stream for mining purposes, was deteriorated in quality and value. It appeared from the evidence that the complainants were the owners of two ditches or canals, known respectively as the Helena water-ditch and the Yaw-Yaw ditch, by which the creek mentioned was tapped and the water diverted and conveyed a distance of about eighteen miles to certain mining districts, known as the Last Chance and Dry Gulches, and there sold to miners. The parties through whom the complainants derived their interests, asserted a claim to the waters of the creek in November, 1864, and during that year commenced the construction of the ditches and continued work thereon until August, 1866. The work was then suspended, for want of means by the parties to continue it, until the following year, when it was resumed, and in 1867 the ditches were completed and put into operation. Their cost was $117,000.

Whilst this work was progressing, and in the summer of 1865, there was some mining on the Ten-Mile Creek about fifteen miles above the point where the ditches of the plaintiffs tap the stream, but there was no continued mining at that place until 1867. From that period until the present time the defendants had been working and were still working mining ground situated at that point on the creek. In

that work they in some places washed down the earth from the side of the hills bordering on the stream; in other places they excavated the earth and threw such portions as were supposed to contain gold into sluices upon which the water was turned. The earth from the washing on the hillsides and from the sluices, designated in the vocabulary of miners as "tailings," and the water mixed with it was carried into the creek and affected its whole current, which at that point has a volume of only about two hundred inches, according to the measurement of miners, filling the water with mud, sand, and sediment, and impairing its value at that point for further mining.

The bill alleged that the "tailings" thus thrown into the current were carried down the stream into the ditches of the complainants, thereby obstructing the flow of the water through the ditches, and injuring it in quality and value; and they insisted that as prior appropriators of the waters of the stream, they were entitled to its use without such deterioration; and for the protection of their rights, they asked an injunction to restrain the defendants from the further commission of the alleged grievances.

The evidence showed that the volume of water in the creek, which at the point where the defendants worked their mining claims was, as above said, only about two hundred inches, according to the measurement of miners, was increased at the point where the ditches of the complainants tapped the creek, by intervening tributary streams of clear water, to about fifteen hundred inches. Of this water the Helena ditch diverted about five hundred inches, and took it about eighteen miles, to the places where it was sold to miners. The water as it entered the ditch was in some degree muddied and affected with sand, and the evidence was conflicting as to the influence of the mud and sand upon the value of the water. The great preponderance of the evidence, however, was to the effect that the injury in quality from this cause was so slight as not, in any material extent, to impair the value of the water for mining, nor render it less salable to the miners at the places where it was carried. A

majority of the witnesses testified that it was first-class water for mining purposes, and some of them that it was good water even for domestic uses.

Persons who had cleaned out the Helena ditch and examined it, testified that there were no tailings or sediment of consequence in it, and that the most that there was ran into the ditch from the hillsides along the ditch and stream. A preponderance of the evidence also showed that no extra labor was required on the ditch on account of the muddy character of the water, or at most only the additional labor of one person for a few minutes each day, and that a sand-gate was necessary at the head of the ditch whether or not there was mining above on the stream.

With respect to the water diverted by the Yaw-Yaw ditch, it was shown that its deterioration, so far as the deterioration exceeded that of the water in the Helena ditch, was caused by sand and sediment brought by a tributary which entered the creek below the head of the Helena ditch.

The mining claims of the defendants were shown to be worth from $15,000 to $20,000 each, and it appeared that the defendants were responsible and capable of answering for any damages the complainants might sustain.

The District Court denied the injunction, and the Supreme Court of the Territory affirmed its decree. From the latter court an appeal was taken to this court.

Mr. Robert Leech, for the appellants; Mr. G. G. Symes, contra.

Mr. Justice FIELD delivered the opinion of the court.

By the custom which has obtained among miners in the Pacific States and Territories, where mining for the precious metals is had on the public lands of the United States, the first appropriator of mines, whether in placers, veins, or lodes, or of waters in the streams on such lands for mining purposes, is held to have a better right than others to work the mines or use the waters. The first appropriator who subjects the property to use, or takes the necessary steps for

that purpose, is regarded, except as against the government, as the source of title in all controversies relating to the property. As respects the use of water for mining purposes, the doctrines of the common law declaratory of the rights of riparian owners were, at an early day, after the discovery of gold, found to be inapplicable or applicable only in a very limited extent to the necessities of miners, and inadequate to their protection. By the common law the riparian owner on a stream not navigable, takes the land to the centre of the stream, and such owner has the right to the use of the water flowing over the land as an incident to his estate. And as all such owners on the same stream have an equality of right to the use of the water, as it naturally flows, in quality, and without diminution in quantity, except so far as such diminution may be created by a reasonable use of the water for certain domestic, agricultural, or manufacturing purposes, there could not be, according to that law, any such diversion or use of the water by one owner as would work material detriment to any other owner below him. Nor could the water by one owner be so retarded in its flow as to be thrown back to the injury of another owner above him. "It is wholly immaterial," says Mr. Justice Story, in *Tyler* v. *Wilkinson*,* "whether the party be a proprietor above or below in the course of the river; the right being common to all the proprietors on the river, no one has a right to diminish the quantity which will, according to the natural current, flow to the proprietor below, or to throw it back upon a proprietor above. This is the necessary result of the perfect equality of right among all the proprietors of that which is common to all." "Every proprietor of lands on the banks of a river," says Kent, "has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*) without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him, unless he has a prior right

* 4 Mason, 379.

to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere ut currere solebat.* Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors he cannot divert or diminish the quantity of the water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above without a grant or an uninterrupted enjoyment of twenty years, which is evidence of it. This is the clear and settled doctrine on the subject, and all the difficulty which arises consists in the application."*

This equality of right among all the proprietors on the same stream would have been incompatible with any extended diversion of the water by one proprietor, and its conveyance for mining purposes to points from which it could not be restored to the stream. But the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common-law doctrine of riparian proprietorship with respect to the waters of those streams. The government, by its silent acquiescence, assented to the general occupation of the public lands for mining, and, to encourage their free and unlimited use for that purpose, reserved such lands as were mineral from sale and the acquisition of title by settlement. And he who first connects his own labor with property thus situated and open to general exploration, does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor. So the miners on the public lands throughout the Pacific States and Territories by their customs, usages, and regulations everywhere recognized the inherent justice of this principle; and the principle itself was at an early period recognized by legislation and enforced by the courts

* 3 Kent's Commentaries, 439, side paging.

in those States and Territories. In *Irwin* v. *Phillips*,* a case decided by the Supreme Court of California in January, 1855, this subject was considered. After stating that a system of rules had been permitted to grow up with respect to mining on the public lands by the voluntary action and assent of the population, whose free and unrestrained occupation of the mineral region had been tacitly assented to by the Federal government, and heartily encouraged by the expressed legislative policy of the State, the court said: "If there are, as must be admitted, many things connected with this system which are crude and undigested, and subject to fluctuation and dispute, there are still some which a universal sense of necessity and propriety have so firmly fixed as that they have come to be looked upon as having the force and effect of *res adjudicata*. Among these the most important are the rights of miners to be protected in their selected localities, and the rights of those who, by prior appropriation, have taken the waters from their natural beds, and by costly artificial works have conducted them for miles over mountains and ravines to supply the necessities of gold diggers, and without which the most important interests of the mineral region would remain without development. So fully recognized have become these rights, that without any specific legislation conferring or confirming them, they are alluded to and spoken of in various acts of the legislature in the same manner as if they were rights which had been vested by the most distinct expression of the will of the law-makers."

This doctrine of right by prior appropriation, was recognized by the legislation of Congress in 1866. The act granting the right of way to ditch and canal owners over the public lands, and for other purposes, passed on the 26th of July of that year, in its ninth section declares "that whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and

* 5 California, 140.

acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same."*

The right to water by prior appropriation, thus recognized and established as the law of miners on the mineral lands of the public domain, is limited in every case, in quantity and quality, by the uses for which the appropriation is made. A different use of the water subsequently does not affect the right; that is subject to the same limitations, whatever the use. The appropriation does not confer such an absolute right to the body of the water diverted that the owner can allow it, after its diversion, to run to waste and prevent others from using it for mining or other legitimate purposes; nor does it confer such a right that he can insist upon the flow of the water without deterioration in quality, where such deterioration does not defeat nor impair the uses to which the water is applied.

Such was the purport of the ruling of the Supreme Court of California in *Butte Canal and Ditch Company* v. *Vaughn*,† where it was held that the first appropriator had only the right to insist that the water should be subject to his use and enjoyment to the extent of his original appropriation, and that its quality should not be impaired so as to defeat the purpose of that appropriation. To this extent, said the court, his rights go and no farther; and that in subordination to them subsequent appropriators may use the channel and waters of the stream, and mingle with its waters other waters, and divert them as often as they choose; that whilst enjoying his original rights the first appropriator had no cause of complaint. In the subsequent case of *Ortman* v. *Dixon*,‡ the same court held to the same purport, that the measure of the right of the first appropriator of the water as to extent follows the nature of the appropriation or the uses for which it is taken.

What diminution of quantity, or deterioration in quality,

* 14 Stat at Large, 253. † 11 California, 143.

‡ 13 California, 33; see also Lobdell *v.* Simpson, 2 Nevada, 274.

will constitute an invasion of the rights of the first appropriator will depend upon the special circumstances of each case, considered with reference to the uses to which the water is applied. A slight deterioration in quality might render the water unfit for drink or domestic purposes, whilst it would not sensibly impair its value for mining or irrigation. In all controversies, therefore, between him and parties subsequently claiming the water, the question for determination is necessarily whether his use and enjoyment of the water to the extent of his original appropriation have been impaired by the acts of the defendant.* But whether, upon a petition or bill asserting that his prior rights have been thus invaded, a court of equity will interfere to restrain the acts of the party complained of, will depend upon the character and extent of the injury alleged, whether it be irremediable in its nature, whether an action at law would afford adequate remedy, whether the parties are able to respond for the damages resulting from the injury, and other considerations which ordinarily govern a court of equity in the exercise of its preventive process of injunction.

If, now, we apply the principles thus stated to the present case, the question involved will be of easy solution. It appears from the evidence that there is at the point where the defendants work their mining claims only about two hundred inches of water in the creek, according to miners' measurement; that between that point and the point where the Helena ditch taps the creek the distance is about fifteen miles; and that between those points the creek is supplied by several tributary streams of clear water, so that at the point where the water is diverted its volume amounts to about fifteen hundred inches. Of this water the Helena ditch diverts five hundred inches, and conveys it nearly eighteen miles to the localities where it is sold. Running water has a tendency to clear itself, and that result is often produced by a flow of a few miles. But in this case the

* This is substantially the rule laid down in Hill v. Smith, 27 California, 483; Yale on Mining Claims and Water Rights, 194.

evidence shows that the water as it enters the Helena ditch is muddied and to some extent is affected by sand. At the same time there is a great preponderance in the evidence to the effect that the deterioration in quality from this circumstance is very slight and does not render the water to any appreciable extent less useful or salable for mining purposes at the localities to which it is conveyed; and that no additional labor is required on the ditch on account of the muddied condition of the water. There is also much doubt left by the evidence whether the sand carried into the ditch does not to a very great extent come from the hillsides lying between it and the mining of the defendants, or lying along the course of the ditch. A sand-gate at the head of the ditch is necessary, whether there is or is not mining on the stream above; and the accumulation of sand from all sources, from the hillsides as well as from the mining of the defendants, only requires the additional labor of one person for a few minutes each day. The injury thus sustained, and which is only to a limited extent attributable to the mining of the defendants, if at all, is hardly appreciable in comparison with the damage which would result to the defendants from the indefinite suspension of work on their valuable mining claims. The defendants are also responsible parties, capable, according to the evidence, of answering for any damages which their mining produces, if any, to the plaintiffs. Under these circumstances we think there was no error in the refusal of the court below to interfere by injunction to restrain their operations, and in leaving the plaintiffs to their remedy, if any, by an action at law.

With respect to the water diverted by the Yaw-Yaw ditch, it is shown that its deterioration, so far as the deterioration exceeds that of the water in the Helena ditch, is caused by sand and sediment brought by a tributary which enters the creek below the head of the Helena ditch.

DECREE AFFIRMED.