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BEECHWORTH WATER RIGHTS.

REPORT OF THE COMMISSION APPOINTED TO ENQUIRE INTO THE
SUBJECT OF WATER RIGHTS IN THE BEECHWORTH DISTRICT.

Ordered by the Legislative Assembly to be printed, 21st February, 1861.

REPORT of the Commission appointed to enquire into the origin of the system of Water Rights now prevailing in the Beechworth Mining District; the best means of preventing litigation with regard to Water Rights; and the mode in which the right to take water for mining purposes from springs and creeks shall be regulated in future.

THE Commission appointed by His Excellency the Governor "to enquire into the origin of the system of water rights now prevailing in the Beechworth Mining District, the best means of preventing litigation with regard to water rights, and the mode in which the right to take water for mining purposes from springs and creeks shall be regulated in future," have the honor to submit the following report:—

Origin of the system of Water Rights prevailing in the Beechworth Mining District.

The first permit granted for the diversion of water in the Beechworth district was a verbal one from Mr. Commissioner Morphy to Reiley and party, authorizing them to cut a race and divert water for mining purposes. The water was obtained from the Nine-mile creek (Snake Valley), and for a short time after the completion of the race was sold by Riley to the cradlers at Nuggety Gully and other localities, which could not be worked without an extraneous supply, at the rate of from five shillings to seven shillings and sixpence per cradle for the day, according to the distance from the head of the race. This permit was granted early in 1853, but it was not until the following year that a written sanction was made out by the Commissioner, which was dated not from the period of the original grant but from the day of its issue in 1854. Mr. Morphy stipulated, in giving permission to Reiley's party, that the water should be turned into the creek if required there, and that it should be used for mining purposes only; but no mention is made as to the number of hours per diem the water should run, or the quantity to be diverted. The history of this, the oldest right in the Ovens District, will serve as an example of the majority of those granted up to the establishment of the Local Courts in 1855, when a regular system of issue and registration was first laid down. Reilly's race has changed owners by successive transfers several times, and is supposed to be worth at present with a secure title at least £2000.

Page 81. Foster's evidence.

Great diversity of practice existed amongst the Commissioners with regard to the conditions under which they sanctioned the diversion of water. Some granted permission to divert free from any restriction, others made the permit depend upon the avoidance of waste from neglect, upon respect for public interests, and prior rights.

Some twenty-four hours' rights were granted, in consideration of the expense the applicants had been put to in constructing the works necessary to render the water available, and the loss they were supposed to be liable to from soakage, leakage, and evaporation. Night and day rights, each for twelve hours, with the exceptions above-mentioned, were made separate grants on the Snake Valley, Three-mile Creek, and Spring Creek divisions.

Permits were also in many instances given to parties to sluice in the beds of creeks, some of which have been subsequently used upon the banks, and are, at the present moment, held as bank rights. An example of this exists at Reid's Creek, in the case of a permit granted by Mr. Commissioner Puckle to James and party to cut a race from the head of Reid's Creek to a point a mile below. The water conveyed in it was to be used for sluicing in the bed of the creek. This right is now claimed to be the oldest bank right from Reid's Creek, and is, at the present moment, used as such.

The only evidence now discoverable as to the system of dealing with water rights by the Commissioners consists in a short code of regulations drawn up by Captain Murray, for the Nine-mile division. Whether these rules were adopted generally cannot now be ascertained, but it appears probable that they were to some extent recognised by the other Commissioners in the district. In Captain Murray's regulations, water rights are declared to be transferable under certain conditions, the quantity of water to be diverted, is fixed, control-over-tail water is refused by implication in Rule 7, and the circumstances entailing the forfeiture of the right are clearly set forth.

Copy attached to
evidence, page
400.

In 1854, some of the Commissioners, believing that a greater number of miners might thereby share in the advantages of a diverted water supply, endeavored to establish what has been termed the "shifting right system," that is, the restriction of the use of the water diverted to a particular claim or locality, which, being worked out, the applicant next on the roster held the right under similar conditions.

The Yackandandah Local Court, apparently considering that all water rights in their district had been granted on this principle, adopted it as the most suitable, and it was applied by them to all permissions granted antecedently as well as to those issued under their rules. Judge Noel, however, decided that the Local Court did not possess power to deal with rights issued prior to its formation, and quashed a conviction in the case of Lafontaine *versus* Smart (General Sessions, Beechworth, 22 October, 1857), based upon Regulation No. 9 of the Yackandandah Local Court. It may be stated here that the priority of Yackandandah rights is rated as follows: 1st, washing rights in the creek and flats; 2nd, motive rights in the creek; 3rd, washing rights for hill claims. In some other creeks also a few exceptional privileges for motive power have been obtained by usage.

It appears that the only authority possessed by the Commissioners to authorize the use of water is contained in the regulations issued in 1853 and 1854 for the management of the gold fields. By these regulations Commissioners were authorized to sanction sluice washing at running streams, but there is not a word relative to the diversion of water. For about nine months after the discovery of gold on the Ovens, cradling was the only means adopted for its extraction, and no distinction was then made between bank and creek, a claimholder on one having as good a right to the water as the claimholder on the other, until the creeks and their immediate banks were gradually worked out.

Many miners left the district despairing of payable ground being discovered within a reasonable distance from water. The commissioners seem then to have felt it incumbent upon them, in the interests of the miners, to give the most extended signification to the regulations, and numerous permits to cut races and divert water were accordingly granted. The population again increased rapidly, and large numbers of miners have been, and still are, enabled to earn a comfortable livelihood on ground which would otherwise be utterly unworkable. On the Buckland this has been pre-eminently the case: when the original bed of the river was worked out there were no means of working the adjacent banks without bringing the water from points several miles up the river. Among the races cut for this purpose, one of the most remarkable is the Judge's race, which runs along steep sidelings for 14 or 15 miles, crossing the river on substantial flumes erected at considerable expense to the projectors, the cost of the works being over £3000; and it is very clear that the persons undertaking such a work must have had faith in the validity of their rights. This belief was destined, however, to be severely tried, for his honor Judge Cope, in the case of Hooper *versus* Mayzen, tried in August, 1858, intimated that in his opinion the use of water, and the diversion also, were illegal, if diverted from a creek or river upon which land had been alienated, or where land had been taken up under miner's right on or in such creeks or rivers. So much has public confidence been shaken by this in the value of permits, that many right-holders, who hold by transfer find it impossible to sell out their rights, except at a serious loss, and there is no doubt that much capital which would have been employed in increasing the water resources of the district has, from the uncertain tenure of rights, been withheld or diverted into other channels of speculation.

To show the important nature of the water right interest, it may be stated that the value of the rights in the Beechworth District has been variously stated from £150,000 to £200,000; the works of the Yackandandah Pioneer Company alone, still incomplete, having already cost above £7000.

The continuous and expensive litigation which has occurred in the Owens District on the subject of the water supply has, in the opinion of the Commissioners, been caused—

- 1st. By the absence of any statute law defining the conditions under which water might be diverted from rivers, creeks, or springs, and the uses to which such water, when diverted, might be applied. This has led to most of the litigation between miners working in the beds of creeks and rivers, and those diverting water.
- 2nd. The uncertain tenure under which the right to divert water (supposing such diversion to be legal) has been and is held—some of the holders of such rights claiming from the date of occupation by *verbal* permission, others holding under written permits, and others under a system of registration.
- 3rd. The confusion which exists with respect to some of the oldest rights, the Commissioners of the gold fields having in some instances stated in the written permits issued to the holders that the water was to be returned to the creek or river at a specified point; in others, that the water was to be used in a certain locality, &c.; and subsequently, having given verbal permission to extend the races, and convey water to other points and localities not specified—which custom, and the absence of the restriction of rights to specific localities in subsequent permits, have led to the belief among the diverters of water that all such restrictions have actually ceased to exist.
- 4th. The fact that many persons have tunnelled or cut deep drains into hills and the banks of creeks, and obtained a supply of water to which they claim an exclusive right, on the ground that it has been obtained from springs, while other persons assert that the water so obtained is a portion of the natural supply of such creeks.

The law on the subject of water supply, as laid down in the Court of Mines, and the decision lately given in the British House of Lords, in the case of *Chasemore v. Richards*, *Law Times Report*, vol. , p. , has not tended to lessen the amount of litigation, but rather to increase the difficulties connected with this subject, for the spirit, if not the letter, of the Gold Fields Act, legalizes the diversion of water for mining purposes; but the words of the Act in connection with this subject are ambiguous, as they only admit of such water being diverted and used as Her Majesty may lawfully divert and use; while it has been laid down as good law, that Her Majesty may not lawfully divert and use water for mining purposes, if the water be required in the natural channel for any purpose by the owner of land, or claimholders on or in the stream.

Suggestions on the best means of preventing litigation with regard to Water Rights, and the mode in which the right to take Water for Mining Purposes from Springs and Creeks shall be regulated in future.

The Commission have devoted much attention to discovering a remedy for the excessive litigation complained of by water right holders, the following series of resolutions, carried in almost every instance unanimously, embodies the views of the Commission on the subject:—

- 1st. That the diversion and use of water be legalised.
- 2nd. That the Government appoint a Commission, to take evidence on oath as to the nature of each right now claimed, and that such commission should be entitled to issue titles with a secure tenure.
- 3rd. That the Commission consist of three local wardens.
- 4th. That the holders of existing rights receive sufficient notice from the Commission of Wardens of the time at which evidence will be taken respecting the particulars of such rights; that a fee of £5 be charged to each claimant of a water right to cover advertising expenses, and £10 to cover the cost of objections which may be sustained; that no objection to the priority, title, &c., be entertained unless the objector lodge £10 with the Commission to cover the cost of entertaining such objection if not sustained. The deposits of the successful parties to be returned, and the balance (if any) of the unsuccessful parties' deposits not required to defray necessary expenses, to be returned.
- 5th. That the works connected with future water rights shall not revert to the Crown; that the tenure shall be lease for a term not exceeding ten years; that the mode of issuing leases shall be similar to that in force for mining leases, with the addition that the lease shall date from the day when the water is rendered available; that at the expiration of leases the rights be submitted to public competition; that the exclusive right to collect water on defined areas be open to lease, Government reserving to the public the right to use such areas for any purpose other than gathering water to be leased under the above terms; that sites for reservoirs be leased under the same terms; that reservoirs intended to contain more than one million gallons of water shall not be used until a competent hydraulic engineer, appointed by Government, has certified that they are safe; that a local board, appointed by Government, shall receive all water rents, and shall apply them to the superintendence and increase of the water supply in the district in which they are raised.
- 6th. That any water right lessee may obtain a lease for the works in connection with his water right, should he prefer doing so, to holding them under the miner's right; said lease to be renewable from term to term of ten years. Lessee to pay costs of advertisements, survey, and notices, and a fee of £10 for the lease and £10 fine on

- renewals for all works the estimated cost of the construction of which shall not exceed £1000, and £5 additional for every £500, or portion thereof, in excess of that sum ; all leases for works or water to be printed on parchment not less than 16 inches square, with blank places for filling in the conditions, &c. ; the names of all parties, and all transfers, sales, mortgages, &c., to be noted on the back of the lease in the presence of a justice of the peace. All these particulars are also to be registered in books kept in the warden's office for the purpose, so that persons lending money upon or purchasing such leases may know exactly what charges are upon them ; such charges when paid off to be receipted on the lease and entered in the books ; no sale, mortgage, or transfer to be valid except entered in the way prescribed and with the consent of all parties or their authorised agent ; others than partners to produce a written order from one of the partners to inspect the registry of a lease ; such registers to be kept under lock and key.
- 7th. No lessee or person interested in a lease of a water right shall on that account be prevented from competing on perfectly equal terms with non-leaseholders on applying for other leases, nor shall any one be prevented from holding more than one lease.
- 8th. Leases to be granted for ten years.
- 9th. All rights to water in the creek and existing bank rights under the new system to terminate on the same day, namely, at the termination of the leases to be granted to the bank right-holders, which are then to be submitted to public competition. No distinction to exist henceforth between bank and creek claims with regard to supply of water.
- 10th. Creek claims to be placed in two categories—1st, those on which extraordinary expenses amounting to not less than £500 have been incurred in cutting tail races or erecting machinery ; 2nd, ordinary creek claims : the former to be entitled to a reasonably sufficient supply of water to be determined by the Commission of three Wardens, the latter to be entitled to a fixed quantity of water to be determined by the mining board—no creek to receive this supply unless demanded by not less than twelve men, *bonâ fide* intending to work that creek, through the warden.
- 11th. That the Commission of Wardens shall decide in what creeks wheels shall be possessed of exceptional rights, and also what exceptional wheel rights exist in other creeks. The commission to allot a reasonably sufficient supply in such cases in accordance with the bye-laws in force at the time, such exceptions to cease at the expiration of the leases proposed to be granted for existing rights.
- 12th. That when the leases are granted, either to existing or future right holders, a separate list be kept of those diverting water from such creek (showing the order of their priority) in the office of the warden of the division, and that a board be placed in a convenient position in the vicinity of such creek, having inscribed upon it the order of the rights of that creek. Any prior right-holder short of a supply shall first call on the junior right diverting water to cease doing so, and if the supply is still insufficient, then upon the next junior, and so on in the order of priority : any breach of this to be made penal.
- 13th. By "prior right" shall be understood a right superior to another in the class to which it belongs, or belonging to a class which is superior to some other class of rights.
- 14th. That the lessee shall have power to convey the water from its natural watershed subject only to prior rights.
- 15th. That water diverted under a lease may be used for any purpose whatever.
- 16th. That every lease shall specify the quantity of water to which the holder is entitled, unless for springs, in which case the quantity shall not be limited.
- 17th. That every lessee shall have power to transfer the lease, and let or sell the use of the water at any point until it reaches the channel of a creek.
- 18th. Any lessee diverting water, and not using, storing, letting, or selling the same, shall be liable to a penalty.
- 19th. That where a miner in sinking a shaft comes on water, and lifts the same by mechanical power, he shall be entitled to use it without a lease, but such use shall be restricted to the washing of auriferous earth or quartz obtained from the claim in which such shaft is situated ; or if such water is lifted from a depth of 60 (sixty) feet or more, the owner of the claim shall have the right to use the whole supply without restriction.
- 20th. No rights to divert water shall be held under the miner's right.

The Commission are of opinion that any Act having any reference to water rights should contain provisions by means of which lessees may be enabled to prevent others from cutting tunnels within a certain distance of the source of their water supply, or taking any means (within a distance to be defined by the Mining Board), of depriving the lessee of his proper supply.

Increase of Water Supply to the Ovens District.

Though not, strictly speaking, within the limits of the enquiries prescribed to the Commission in the Honorable the Attorney General's letter of instructions, they feel that their Report would be incomplete without some reference to the important subject of an increased Water Supply.

The Commission are of opinion that this result may be more easily obtained by giving such security to leaseholders and capitalists as is proposed in the resolutions, than by Government stepping in to take the place of private enterprise. Rare cases may occur, where, for a great public benefit, the State might guarantee interest upon a fixed amount of capital for a limited time; but the Commission are of opinion that if the Government only afford reasonable facilities to private individuals and companies to undertake works for the supply of water, and hamper them with as few restrictions as possible, applications for such a guarantee are not likely to be very numerous. The careful selection and early appointment of a competent hydraulic engineer cannot be too strongly insisted upon. He should be personally acquainted with the great irrigation works of India and Italy, and should be a first class man in his profession.

More money is wasted, more labor thrown away at present for want of knowledge of the subject than would suffice to double the supply of the district. It should be the duty of this officer to act with the local water boards, and to prepare plans, surveys, and estimates of works under their directions for the gathering of water, and its conveyance to the localities where most urgently required.

Plans of gathering areas, and the courses of creeks and rivers, should be open to public inspection, but parties wishing access to working plans or estimates should be made to pay an equivalent fee for the privilege. The appointment of such an officer, it is believed, would be of great service to the agricultural as well as the mining portion of the community, and the important nature of the services it would be in his power to render make his appointment highly desirable. That such an engineer would not engage at a mediocre rate of salary is very clear, but the advantage to be derived from his professional acquirements would far more than counter-balance any outlay of the kind.

Beyond these recommendations the Commission do not think their task extends. Any indication of the works most necessary to be executed would come more fitly from the local water board, whose establishment has been recommended. The Commission, in concluding its labors, would urgently impress upon the Government the necessity for early action in the water-right question, as every day's delay is injurious not only to individual interests but to the public of the Beechworth District generally, owing to the uncertainty and insecurity generally felt.

W. DRUMMOND, Chairman.

PETER WRIGHT.

EDWARD BOVILL CHANDLER.*

WILLIAM WILSON.

JOHN DONALD.*

WALTER THOMSON.*

* Subject to Protest attached.

Messrs. Donald, Thompson, Chandler, were in favor of granting leases for twelve years, for existing rights.

Mr. Donald was in favor of the works reverting to the Crown, being of opinion that the term of lease should be commensurate with the expense necessary for the execution of such works, and that such works should revert to the Crown, with the water, at the termination of the leases.

Messrs. Thompson and Donald were of opinion that the disposal of the water at the expiration of the leases should be regulated as the Government of the day may think most conducive to the public interest.

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