

MAINE STATE LEGISLATURE

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August 29, 1940

Hon. Andrew J. Beck
Bank Commissioner
State House
Augusta, Maine

Dear Sir:

You inquire as to whether "water rights" acquired by a mill owner under a contract for the use of water taken from a ditch or canal in connection with his mill operations, can be considered "real estate" under the provisions of Paragraph XIV, Chapter 57 of the Revised Statutes, as amended by Chapter 101, Public Laws 1937. My answer must be in the negative.

It is evidently well settled that a water right acquired by the use of water under a contract is "an incorporeal hereditament". Wyatt v. Lorimer Irrigation Co., 18 Colo. 298. In the very carefully considered case of Whitlock v. Graecen, 48 N. J. Equity, 359, it was said:

"The word hereditaments embraces everything that may be inherited, be it corporeal or incorporeal. The difference, however, between a corporeal and an incorporeal hereditament is wide and vital. *****"

And Kent says:

"Corporeal hereditaments are confined to land * * * and that incorporeal hereditaments comprise certain inheritable rights, which are not, strictly speaking, of a corporeal nature, or land, although they are, by their own nature, or use, annexed to corporeal inheritances, and are rights issuing out of them or concern them."†

The word land has in law a well-settled meaning. It includes the surface of the ground and everything that is on it and under it, but does not comprehend incorporeal hereditaments. Under a charter giving a corporation power to take land, by the exercise of the right of eminent domain, it has been repeatedly held, here and elsewhere, that a mere incorporeal hereditament could not be taken, and that this was so because land, according to its well-settled legal signification, was not broad enough to comprehend an incorporeal hereditament, but simply embraced things corporeal."

Very truly yours,

Sanford L. Fogg
Deputy Attorney General

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