Political Water Rights

WHEN a stream flows through a city the claim at times appears that the city as a political subdivision of the state has the property right of a riparian owner; that its political boundaries secure water rights to the city as would boundaries of ownership.

As the city boundaries are not in fact boundaries of ownership by the city, and are boundaries only of political organization, such water rights (as distinguished from those of the lot-owners bordering the stream) would necessarily be of political origin—"for reasons of state" as distinguished from ownership.

It would be, moreover, an attribute denied to the boundaries of other branches of the state's organization. Cities would be the only subdivisions of the state with boundaries having that force,—unless the ascending scale came to be followed. Followed accordingly, irrigation districts, which are quasi-municipal bodies, would acquire vast water supplies by simply incorporating. They would neither buy nor appropriate, for their organization would wipe out appropriations within their borders. And so of school districts or sanitary districts, so far as they need for schools or sanitation. Above them, the county would become the paramount owner of all water bodies in the county, regardless of prior rights; and over that the state, and over the state the nation, so that we would have nationalization of water rights, and state socialism in water by the magic of the word "riparian" or "overlying," without the process of any Plumb Plan. The city, districts, county, state, nation, would become, through successive layers of paramountcy, a communistic system effectually confiscating private ownership, and fee-simple tenures would disappear.

The way to the contrary was paved in California by Palmer v. Railroad Commission,[1] when it was there enunciated by the Supreme Court that the geographical location of a political body (in that case the discussion was relative to water rights of a state) gives it no water rights as a political body, but only such as attach to specific parcels of land of which it is proprietor.

The statutory declaration that waters "are the property of the people of the state," which that case was considering, was given its legitimate jurisdictional and not a communal or proprietary sig-

[1] (1914) 167 Cal. 163 at 172 and 175-176, 138 Pac. 997.

nificance. Political divisions have sovereignty, jurisdiction, or regulative power; but ownership they usually have only of such property as they acquire like individuals. Even the power of eminent domain is only a power and "does not partake of the nature of an estate or interest in the property" until the power is exercised.[2] When it is said that the state owns the wild game and all waters it may have reference to distinguishing between the state and nation, in which the state has prevailed. Or it has reference to distinguishing the *corpus* of the waters from the *usufruct* thereof in order to emphasize the right of state control over the use. In either event it but emphasizes the power of the state to regulate, and, the court held, is not—and could not constitutionally be—an assumption of property ownership of any waters by the mere fact of the waters' geographical location within the state's political borders.

Such proprietorship includes, of course, parks, school lots, county buildings, state farms, and the like. Each such specific parcel carries whatever it would have in the hand of anyone. In jurisdictions having the riparian doctrine, a city riparian claim is occasionally based upon owning streets abutting on the stream. The fee of so small a strip might carry riparian rights for the parts of the streets in the vicinity of the crossing, or even for a reasonable distance back of it, but not for the length of the street.[3] And the fee being, in fact, in abutting owners, the city has not even that.[4]

In California the nearest expression upon a city's claim to be a riparian owner until recently had been in a Los Angeles case. The expression was that Los Angeles as a city "has not the right of a riparian owner to have the water of a stream flow as it is accustomed to flow without any regard of its use."[5] On a petition for rehearing riparian rights were found to be outside the issues and the expression was omitted; but announcement to the same effect has been lately made in the case between the city of San Bernardino and the city of Riverside.

Riverside had for a long time been taking its water supply from an artesian basin by means of artesian wells therein and by

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[2] Contra Costa W. Co. v. Van Ransselaer (C. C. N. D. Cal. 1907) 155 Fed. 140 at 141.

[3] Miller v. Baker (1912) 68 Wash. 19, 122 Pac. 604; McCartney v. Londonderry Ry. [1904] A. C. 301-311-313.

[4] Wright v. Austin (1904) 143 Cal. 236, 76 Pac. 1023, 101 Am. St. Rep. 97, 65 L. R. A. 949; 37 Cyc. 203.

[5] Los Angeles v. Los Angeles Water Company (1899) 124 Cal. 368 at 383, 57 Pac. 210, 57 Pac. 571.

means of the flow of Warm Creek which drained out of the basin. More recently the city of San Bernardino developed its water supply by wells in the same basin, for which it chose a location a few hundred feet from the most productive wells of Riverside, taking some of their water; and later still, pressed by a rapid growth from a small country town to a city equal in size to Riverside—about 18,000 people in each—San Bernardino brought suit against Riverside to exclude Riverside from the artesian basin entirely on the ground that San Bernardino is located inside the artesian basin while Riverside is located outside, and Warm Creek flows through San Bernardino and does not flow through Riverside. San Bernardino claimed by its geographical location as a political body the precedence of an "overlying landowner" in respect to the percolating water, and of a "riparian owner" in respect to Warm Creek.

As a landowner, with the rights laid down for landowners, few parcels of land belonged to plaintiff. There were a park, a few school lots, and the like. So much it held as a landowner comparable to other landowners. But this was a small matter in comparison to the claim which it made to be put in the position of an overlying landowner for the width of its political jurisdiction irrespective of its ownership. If it could accomplish that, it believed that it would not only have exclusive right to all water in its vicinity now, but all within its boundaries as its expansion might enlarge them from time to time hereafter, on the principle that the rights which the courts of California recognize for overlying landowners are not governed by use at any specific time. It therefore in its briefs waived any claim to priority of appropriation under existing conditions relative to use and development.

The Supreme Court was thus tendered by plaintiff for decision the question, purely a question of law: Does the court mean to extend to political boundaries the water rights heretofore laid down for landowners? In reply the Supreme Court said through Mr. Justice Shaw:

> "As heretofore suggested, the court below was apparently of the opinion that the waters of this basin were by law subject to public use. Possibly in this connection it may have considered the legislative declaration on the subject in 1911, amending section 1410 of the Civil Code. The section, as amended, opens with this declaration: 'All water or the use of water within the State of California is the property of the people of the State of California.' Taken literally, this would include all water in the state privately owned, and that pertaining to lands

of the United States, as well as that owned by the state. It should not require discussion or authority to demonstrate that the state cannot in this matter take private property for public use. See Palmer v. R. R. Com., 167 Cal. 175. The Constitution expressly forbids it. Article 1, Sec. 14. The water that pertained to or was contained in the lands of the State was already the property of the people when this amendment was adopted. The statute was without effect on any other property. . . .

"With respect to the waters taken from the artesian basin for public use, each party stands in the character of an appropriator, and its rights therein are to be determined by the law relating to appropriators, *and are not to be measured either by the law regarding riparian rights or by the law concerning the rights of the landowner in water underlying his land.*"[6]

In the later case of the Town of Antioch (in which a rehearing was granted, probably on other grounds, and is now pending), the San Bernardino case was cited and the opinion by Mr. Justice Shaw had expressed the law as follows:

"The fact that the City of Antioch is situated upon the San Joaquin River is wholly immaterial in the consideration of its rights in this case. The rights in a stream or body of water which attach to land because it abuts thereon are not of a political nature, but are private rights. They are vested exclusively and only in the owner of the abutting land and they extend only to the use of the water upon the abutting land and none other. There are cases in some of the eastern states which, upon somewhat strained reasoning, have held that a municipality whose boundaries extend to a stream of water has some rights by reason of that situation, to apply the water of the stream to public uses within the city, rights similar in nature to that of a riparian proprietor to use the water of such stream upon his land. We need not go into the discussion of the soundness of the reasoning of those cases. The litigation which has arisen in this state from the doctrine of riparian rights has been of great volume and it is sufficient to warn us that we should not extend the doctrine so as to make it political and confer it upon cities abutting on a stream, but owning no land abutting thereon. Such cases are contrary to the common law doctrine as settled in this state whereby such rights are confined exclusively to the owner of the abutting land and are wholly of a private nature. The status of the City of Antioch in this action, therefore, and its rights in the San Joaquin river are those of a diverter and user of the water thereof for beneficial purposes, and nothing more. (San Bernardino v. Riverside, 198 Pac. 787, clauses 1, 3, 9 and 10a.)

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[6] San Bernardino v. Riverside (1921) 61 Cal. Dec. 706, 198 Pac. 784 at 793-794.

"An affidavit was filed at the hearing in the court below, stating that the city owns a small tract of land bordering on the river, upon which its pumping plant is situated and that it makes some use of the water of the river on that land for the flushing of the sewers. But the complaint does not allege any of these facts and does not claim protection for that right."[7]

There is a unique exception in the case of the city of Los Angeles by survival of a feature of Mexican and civil law, which emphasizes the general rule of common law by the contrast which the exception affords.

In the civil law as represented by the French Civil Code there is a provision for preference rights of villages to water from springs, to which reference was made in the briefs in the Antioch case.

"He [the proprietor of the spring] cannot, moreover, use of the same in a way to deprive the inhabitants of a commune, village or hamlet of the water that they used; but if the inhabitants have not acquired or prescribed for the use of it, the proprietor may demand an indemnity, which is determined by experts."[8]

The French writers say its appearance in the French Code was without antecedents, and that it is narrowly applied. "This provision did not exist in the project submitted to the Council of State. It was Regnault who proposed it. . . . And it is a very remarkable provision, for the proprietor of the spring sees himself deprived of disposition over it without ground of condemnation for public use. *It is a grave derogation from common right.* . . . For the same reason that it is in derogation of common right, article 642, section 3, should be interpreted in a restrictive manner, conformably to the rule that an exception is subject to the strictest interpretation."[9]

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[7] Town of Antioch v. Williams Irr. Dist. (S. F. 9737, Sept. 13, 1921) 62 Cal. Dec. 321. Rehearing granted Oct. 13, 1921.

[8] Code Napoleon, originally article 643; now article 642, par. 3, reading: "Il ne peut pas non plus en user de manière à enlever aux habitants d'une commune, village ou hameau, l'eau qui leur est nécessaire; mais si les habitants n'en ont pas acquis ou prescrit l'usage, le propriétaire peut réclamer une indemnité, laquelle est réglée par experts."

[9] Baudry-Lacantinerie et Chauveau, *Traité de Droit Civil, des Biens,* page 575, section 847, reading: "Cette disposition n'existait pas dans le project soumis au conseil d'Etat. Ce fut Regnault qui la proposa, et il la motiva sur ce qu'il y avait des villages, dans lesquels les fontaines et les abreuvoirs publics étaient alimentés par des eaux de source découlant d'un fonds supérieur. . . . Et il y a ceci de fort remarquable que le propriétaire de la source se verra privé de son droit de disposition, sans qu'il y ait lieu de procéder contre lui par l'expropriation pour cause d'utilité publique. C'est une dérogation grave au droit commun. Elle s'explique

As elucidated by the French commentators, the town's right is a preferential right paramount to riparians rather than a riparian right. Applying only to communes, villages or hamlets, large cities are not included, they say; it refers to rural settlements of small extent; and as it entitles the upper owner to indemnity, it is apparently more of a summary condemnation proceeding than anything else.

There seems to be no connection between this French provision and the provision of Mexican law from which arose the Los Angeles "Pueblo Right."

The Pueblo Right of the city of Los Angeles arose under Mexican law as a political body in succession to the Mexican "Pueblo de Los Angeles."[10] The Los Angeles Pueblo Right is of Mexican origin by special circumstances relative to the Mexican Pueblo of 1781, to which Los Angeles traced its title.[11]

The pueblos were colonizations of public land on the uninhabited frontiers, and four square leagues of land were set apart within the pueblo upon its foundation, to be communal lands belonging to the future pueblo. "In this respect the difference is almost startling" (the court says in the Vernon case[12]). "So far as communal ownership would answer the purpose of the community it was preferred. As water was one of the things thus held, we may understand better the nature of the right which the Pueblo had to it by considering other properties so held."

The water title to a stream flowing through the common lands was a part of the title to the common land. By virtue of owning the four square leagues of land through which the stream flowed, the pueblo owned a right to supply the pueblo out of such stream. The four square leagues of land were owned by the pueblo under

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par l'urgence des besoins auxquels il s'agit de satisfaire. L'eau est un élément essentiel de la vie, comme l'air. La loi n'a pas voulu qu'une communauté d'habitants pût en être temporairement privée, jusqu' à l'issue d'une procédure régulière en expropriation.

848. Par cela même qu'il déroge au droit commun, l'art. 642 sec. 3 doit être interprété d'une manière restrictive, conformément à la règle *Exceptio est strictissimae interpretationis.*"

[10] The discussion of this is contained in Feliz v. Los Angeles (1881) 58 Cal. 73; Vernon Irrigation Co. v. Los Angeles (1895) 106 Cal. 237, 39 Pac. 762; Los Angeles v. Pomeroy (1899) 124 Cal. 597, 57 Pac. 585; Los Angeles v. Hunter (1909) 156 Cal. 603, 105 Pac. 755; and other cases. See 1 Wiel, Water Rights in the Western States (3d ed.) § 68.

[11] Los Angeles Company v. Los Angeles (1910) 217 U. S. 217, 54 L. Ed. 736, 30 Sup. Ct. Rep. 452.

[12] Supra, n. 10.

the "Plan of Pitic," a local Mexican (Sonoran?) organization for colonization of uninhabited regions.

The difference between this pueblo right under Mexican law, and the situation of municipal corporations under American law, has its origin as a land doctrine, therefore, rather than as a water rule. In pueblos the "city limits," to the extent of four square leagues, were lines of title and communal ownership by the pueblo; whereas in American cities the lands are privately owned. In the pueblo the commercial water title followed as an incident to or appurtenance of the land held in common, and because the land was held in common.[13] It differs also from the French Code provision. The "Plan of Pitic" was pronounced in 1781, twenty-five years before the French Code, and was a local matter of a distant region unknown in France. Further, the pueblo organized under the Plan of Pitic was a formal organization created by official decree, whereas the French section is not dependent upon organization, but extends to any settlement of a number of people whether organized or not,[14] and is unrelated to any land owned by the commune.

If California cities today could be held to own all the water within their boundaries without the need of tracing a Mexican pueblo title, the ruling would evidently apply to so holding respecting the land throughout the cities. Owning, like a Mexican pueblo, something that is "part and parcel" of all land in the city merely because it is in the city, would be the same in kind and different only in degree from owning like a pueblo the whole of the land. Wanting a park, the city might then take it without payment because the city overlies the location; the city might similarly cut a new street through rows of houses to the park and at the other end of the street sink a well for its water supply in the middle of a private garden; all on the Mexican theory that it is coming into its own and does not have to pay either the occupant of the land taken or the water user whose use of the water is destroyed.

Before the communal revolutions in Europe of recent years, there was more hospitality in America toward communal theories in water law than today. There was attraction in the phrase "the greatest good with the least harm for all." Since the foreign experiments with communism the impression has become more

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[13] Lux v. Haggin (1886) 69 Cal. 255 at 326-7, 329, 334, 4 Pac. 919, 10 Pac. 674.

[14] Baudry-Lacantinerie et Chauveau, *Traité des Biens,* page 575 et seq.

apparent that the greatest good with the least harm for all reduces all to one level, or the good and the harm would not be the greatest and least for all; a low level owing to the limit on the amount of property in the world, far short of the demand. The phrase omitted the necessary restrictions requiring consistency with the paramount right. But even if it be thought that the Mexican or communal system of water rights would have been preferable if taken over at the beginning before a different system grew up, yet the recognition of vested rights cannot be now set aside.

The preponderance of authority in other states concurs in the rule which the Supreme Court of California has adopted. So do the text writers.[15]

There is some conflict of authority, however, which one line of cases particularly illustrates; namely where the city complains of interference with its water supply by riparian owners above it. The city complains particularly when riparian owners bathe in the water or otherwise contaminate it.

The preponderant ruling is that the city must protect itself by some other claim than the assumption of being itself a riparian owner.[16]

The decision in the Supreme Court of the United States cited in the foregoing note illustrates that when relief is granted to the city it is sustainable upon other than proprietary reasons as riparian owner. A state statute in the nature of a police regulation was the

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[15] Farnham, Waters and Water Rights, pp. 603, 609-612; 40 Cyc. 764-765; 37 L. R. A. (N. S.) 312, extended note; Dillion, Municip. Corp. §§ 264n, 266n, 268n, 1212 note.

[16] FOR THE UPPER OWNER: *California*—See People v. Elk River Co. (1895) 107 Cal. 214, 40 Pac. 486, 48 Am. St. Rep. 121; Same v. Same (1895) 107 Cal. 221, 40 Pac. 531, 48 Am. St. Rep. 125. *Connecticut*—Pleasure resort, pollution. Public supply below must condemn both at common law and under statute. Rockville Co. v. Koelsch (1916) 90 Conn. 171, 96 Atl. 947. *Florida*—Bathing in a lake. City ordinance against it is ineffective. Pounds v. Darling (1918) 75 Fla. 125, 77 So. 666. *Kansas*—Upper consumption. Wallace v. City of Winfield (1915) 96 Kan. 35, 149 Pacific 693. *Michigan*—Bathing. People v. Hulbert (1902) 131 Mich. 156, 91 N. W. 211, 100 Am. St. Rep. 588, 64 L. R. A. 265; City of Battle Creek v. Goguac Etc. Assn. (1914) 181 Mich. 241, 148 N. W. 441.

FOR THE CITY: *Minnesota*—May stop drainage of a lake on which its *streets* abut. In re Judicial Ditch Etc. (1918) 140 Minn. 233, 167 N. W. 1042. *New York*—May make rules restricting upper owner to some degree. George v. Village of Chester (1911) 202 N. Y. 398, 95 N. E. 767. Compare Commonwealth Water Co. v. Brunner (1916) 161 N. Y. Supp. 794. *Vermont*—Bathing. State v. Morse (1911) 84 Vt. 387, 80 Atl. 189. *United States*—State Statute regulating timber cutting near watershed. Perley v. State of North Carolina (1919) 249 U. S. 503, 63 L. Ed. 731, 39 Sup. Ct. Rep. 359.

These lists are examples only, and are not exhaustive.

decision's basis—the same police power as would have justified regulation because of fire danger or conservation of timber as much as because of purity of water. None of these items of the police power requires public ownership of the forest or of the water to sanction the authority.

The substance seems to be that political boundaries exist for civil and criminal jurisdiction, but have no relation to proprietary rights. If such boundaries *ipso facto* drew to themselves water rights they would be political water rights, which the law does not recognize.

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