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## Determination of Water Titles and the Water Commission Bill.<sup>1</sup>

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OUR water supplies in many places are in full use and very valuable, and yet priorities are often complicated. One aspect of this we touched upon when considering the possible solution of complicated situations by apportionment among all existing users, cutting a way by making priorities of minor importance.<sup>2</sup> But present sentiment, instead, favors holding to the doctrine of priorities, and, to straighten complicated situations, looks forward to a general effort to ascertain officially and put into a list, once for all, the priorities between appropriators throughout the state. So long as priority remains the governing principle, if priorities can thus be authoritatively and permanently listed it should, of course, be done. It will be of great benefit to priority-owners, who at present seldom have anything in documentary form to show for their rights, and it will benefit the rest of the public by washing the slate clean of unfounded and speculative priorities, thereby furnishing authoritative information for new appropriators.

2. The simplest expedient to get an authoritative list would be to require owners to voluntarily register their titles under pain of forfeiture. Beside the invitation, in that, to register excessive claims, it is not practical for other reasons. Statutes were passed at an early period declaring land transfers void if not recorded, and today we have recording acts for deeds and the like, which usually declare all unrecorded transfers void. These statutes were (according to a ruling of the pioneer Supreme Court of Califor-

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<sup>1</sup> Read before the law students of the University of California, Boalt Hall of Law, Berkeley, January 22, 1914.

<sup>2</sup> 27 Harv. Law Rev. 530.

nia)<sup>3</sup> to remove all doubts of title at a sale, and to make the public records conclusively show who the landowners are, by destroying titles not of record. Experience thwarted this main purpose; it was found that the recording system can not work except in favor of a bona fide purchaser. To allow anyone else to assert the statute but opened the way for fraud, so that courts have long had to hold unregistered sales good against anyone who had other notice, or who acquired the property subsequently by gift, paying nothing for it. The record owner and the real owner of land are consequently often different. Transfers of water rights are within the ordinary recording acts, as well as land, but this threat of forfeiture has everywhere failed to work, as is the usual fate of harsh or overbearing legislation, and our county records are often but a fragmentary record of either existing water titles or land titles.

3. Nor has litigation furnished the desired authoritative list, because litigation is usually confined to parties having some active contention, omitting any against whom they feel no quarrel. The decree only binds the parties litigant, and leaves the rights of other appropriators open and unsettled.

This is inherent in the nature of litigation, especially litigation among appropriators of water. The statutes enact among them only that priority gives the "better right". They are governed by priority of possession, and where possession is the law, ownership in its absolute sense is subordinate. Controversies are settled upon whether you *had* the thing when your opponent came and took it. Perhaps you yourself had taken it in turn from a third person, but no matter. The third person could recover it from both of you, but in the meantime your possession will be protected against another who interferes with it. A possessory law is a law of "better right" in its comparative sense, and settles controversies in this way "for better or worse" between the actually contesting parties, without looking for any "best" right that would bind the world in the sense of entire ownership.

To illustrate, A, B, C, and D have located upon a stream in their respective order, each claiming the whole flow. A sues B, and, being a prior appropriator as to B, gets a decree for the whole flow against B. In turn B sues C, and, being a prior claimant as to C, gets a decree for the whole flow against C. In like manner

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<sup>3</sup> Mesick v. Sunderland (1856), 6 Cal. 297, 315.

C gets a decree for the whole flow against D. If you collect these decrees you think the court has decreed the stream to flow three times its actual capacity. The courts, upon this ground, have often been improperly attacked for making absurd water decrees. But the court has decreed the actual ownership of none of the water. That could be done only if they were all involved in one suit. It has decreed only the "better right" between the individual disputants in each separate case, without actually settling or attempting to settle the final ownership in anyone.

Where a lawsuit over water can be confined to one or two in this way, it usually is. If a farmer or a water-power operator or a mine-pro prospector finds the water running low in summer, he goes up stream to see what is going on, and if he sees that the trouble is due to a neighbor who has enlarged his ditch, the suit is for an injunction against that individual alone, and affects that individual only. Hence court decrees are not, as a rule, a final settlement of ownership among all, but settle only a quarrel between the litigating parties, so long as all claimants upon the stream are not gathered together in the same suit.

4. In order to get a complete settlement of ownership, all claimants must hence be brought into court in the same suit. That can be done, and sometimes is done today, under ordinary court procedure, by an ordinary suit to quiet title among all appropriators upon the stream. Our code of civil procedure contains provision under which such suits to quiet title are brought.<sup>4</sup> It is, of course, expensive and usually consumes several years before it is finished; hence it is not done until the case becomes aggravated. Nevertheless, where the trouble has been allowed to accumulate among many users whose takings have enlarged by degrees, now coming to a head, the suit will be against a good many defendants, and occasionally the slow growth of confusion on some streams has been such that the suit is brought by one against all other users simply to clear the matter up, in which case an order is made that all interplead, and a decree is rendered settling the rights of each against all. Such a decree is a close approach to adjudication of complete ownership.

5. Where the doctrine of prior appropriation has been in operation any length of time, a sentiment has always grown up that it is of sufficient public importance to have this gone over once

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<sup>4</sup> Cal. Code of Civ. Proc., §§ 738 et seq.

for all for every stream in the state, if some more practical plan to do it than the ordinary suit to quiet title can be arranged. The first state to take action was Colorado, in 1889. The Colorado act provided a special procedure for a lawsuit upon each stream, bringing in all claimants, like an action to quiet title, but under a special procedure which the Colorado act provided. Its chief result was that the new procedure itself had to be litigated before its working could be settled. The amount of technical procedural litigation has been great, and has not stopped yet. It rather increased the difficulty.

A modification of the Colorado plan is in the *Bien Code*, drafted by Mr. Morris Bien, of the United States Reclamation Service, a California engineer and lawyer, prominent in this field of work. When the Service began, it had to proceed for its water-rights under state laws, and found titles upon streams often in confusion. Mr. Bien drafted a code for states to pass, containing a method of determination by general suit in court, like Colorado, with the important additional feature that the state engineer was required officially to gather the evidence upon which the court decrees were to be based. This has not gone far in practice; in Utah for example, where a similar plan is tried, the state engineer reports after eight years no stream yet determined, while in South Dakota the Supreme Court held the code unconstitutional.<sup>5</sup>

6. Twenty-three years ago (1890) Wyoming tried a different system and created a water commission to make the determination. With the purpose of taking controversies over water titles out of the courts, the Wyoming Constitution itself, upon the admission of the state in the Union, created the board of control, as it is called, for waters. Among those familiar with the subject, the resulting system is known as the "Wyoming System". A water administration is created with subordinate divisions and subdivisions for the different parts of the state, having the power and duty not only to determine the rights of appropriators, but to license or refuse new ones, and to supervise use among all. The Wyoming statute goes considerably into detail in all these matters. It was put into successful operation by Dr. Elwood Mead, soon to be head of the irrigation department of this university, Wyoming's

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<sup>5</sup> *St. Germain Irr. Co. v. Hawthorn D. Co.* (S. D., 1913), 143 N. W. 124.

state engineer for several years. In 1909 Oregon adopted the Wyoming system, most of the way re-enacting section after section of the Wyoming laws, but in the matter of determination of rights the Oregon system supplemented the determination of the water commission by requiring a confirmation in the district court. The new California act, passed in 1913<sup>6</sup> and this year to come to referendum vote, has the Oregon plan in mind, although reaching it by another way. The new California act creates a water commission, and has twelve sections upon determination of existing rights, the first seven dealing with the determination by the water commission, and the next five dealing with the confirmation thereof in court.

7. And first, as to the hearing before the commission, the California act provides as follows:

The commission has discretion what streams it will determine rights upon (§ 24), and shall notify claimants by mail (§ 24). (Apparently it is left to the discretion of the commission to notify and determine the rights of only a part of the claimants, if it sees fit, which would leave the situation unimproved, and I proceed on the assumption that all known claimants are to be notified and their rights determined at once.) The commission is then to take evidence of such kind and in such manner as it deems proper, and notify the claimants by registered mail that the evidence is open to inspection. The water commission is to record its determination, so far as uncontested, in its own office (§ 31). Any dissatisfied party may protest and have a hearing before the commission if he desires, but protest before the commission is not compulsory (§ 26). This is the substance of the seven sections of the act dealing with proceedings before the commission (§§ 24-31).

As will be seen, it does not go into the matter in detail, but leaves the procedure to be worked out by the commission as it acquires experience. The statute then contains five sections (§§ 32-36) upon the proceedings which are to follow in the superior court.

8. The hearing before the commission is, for practical purposes, the more important of the two. When the work is begun it will be found that there are thousands of water diversions in the state. Irrigation alone covers three million acres of land, to say

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<sup>6</sup> 1913 Stat. Cal. 1012.

nothing of farm houses and stock watering, mining rights, water-power developments, municipal supplies, and so on. To gather this data in the first place can only be done by adopting whatever expedients may offer. To try to cover the whole state under legal rules of evidence and procedure, so guarded (and perhaps over-guarded) to protect owners from wrong findings, would take many years, if it could be done at all. To give the commission a free hand is shown by experience to be the most expedient way of getting the information. Its findings are less guarded, but more expeditious. It has worked in Wyoming, Nebraska and Oregon with expedition, and although much of their water supplies still remain uncovered, yet the results are a marked improvement upon Utah, for example, where the evidence is gathered by the state engineer for proceedings in court without the intervention of a commission.<sup>7</sup> Consequently it is more practical to have a somewhat informal determination by the commission. Experience has shown that results can more rapidly be had that way.

When objection is made to doing such work by commissions, it is claimed that it is dangerous to put such large power into a few hands without the safeguard that time has thrown about procedure in court. Power which is strong enough to do good is also strong enough to do harm, if abused either by wrong-doing or by incapacity.

But the desire for such a commission seems to be general in the state, and public opinion will operate strongly upon it and go far to rectify its course if it becomes incompetent or oppressive. The courts, moreover, will, as we shall see, remain open to applicants for relief. Consequently, believing that the work of a water commission, if done well, would be beneficial to the public, I would like to see a water commission given a chance.

9. Besides the moral weight attaching in Wyoming and other states to the commission's determination of existing priorities, they are also in law deemed *prima facie* correct, and anyone disputing them has the burden of proof. The California act so

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<sup>7</sup> "Compare this record in Oregon with the record we have been able to make in Utah—it is with the utmost chagrin that we have to acknowledge that although we have spent, in the collection of the necessary field data to adjudicate water-rights that had accrued prior to 1903, a far greater sum in aggregate than has been spent by the State of Oregon for like purposes, as against her 89,000 acres of adjudicated water-rights we cannot show a single acre." Eighth Biennial Report, State Engineer to the Governor of Utah, 1911-1912, p. 23.

specifies (§ 32), but it would probably be so anyway, since administrative officers acting within a legitimate sphere cannot be controlled by the courts except for abuse of discretion. They can also be made pretty nearly conclusive in practice by means of the statute of limitations, shortening the time in which contest in court can be brought (although the pending California act does not attempt that).<sup>8</sup>

10. While a good commission could consequently carry much moral and practical weight to its determinations, it is generally accepted that they cannot have final conclusive force in themselves. There are two chief constitutional reasons: one is the requirement of due process of law in affecting rights, and the other is the structural division of our form of government into three departments.

11. As to due process of law, both the state and federal constitutions deny to the legislature power to authorize the taking of property from any citizen without due process of law, and one of the first requirements of that is a due notice that one's rights are to be affected and a chance to be heard in one's own behalf. This is absolutely guaranteed to every citizen. The hearing before a commission does not and can not guarantee it. The basis of the proceeding is the assumption that the owners are largely unknown and in confusion. With the informal methods which the commission must necessarily adopt, some will unavoidably be skipped by the commission, some notices will miscarry in the mail, some owners will be out of the state. And with these unprovided for, their rights remain outstanding, uncovered by the commission's determination, and will affect adversely every other owner on the same stream. Likewise, the commission, with the best of work, cannot help making mistakes in a few cases, giving water to one which belongs to another, which the requirement of due process of law prohibits.

12. As to distribution of governmental powers, if an attempt should be made to cover the guaranty of due process of law by enacting the same process as obtains in courts for bringing in owners, and by declaring the commission's decision final even if mistaken, the tribunal established would be a court of law, in

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<sup>8</sup> The California act requires the confirmation suit, hereafter mentioned, to be brought within one year, but that has no effect upon other forms of contest, and rather weakens the commission's findings than strengthens them, as hereafter noted.

violation of the constitution of the state which declares that there shall be certain courts only, and the legislature cannot create a new court without constitutional amendment, nor can it empower an administrative body, like a water commission, to exercise judicial powers. The state constitution declares that the powers of government are divided into executive, judicial and legislative departments, and that no one of them shall exercise the functions of the other.<sup>9</sup> This is an oft-repeated principle in our present form of government. It is consequently beyond the power of the legislature to make the commission's determination of rights itself final and conclusive.<sup>10</sup>

This objection could be met by constitutional amendment making the water commission one of our courts, as has been done with the railroad commission; but that is not now attempted. The practical thing to do, in my view, is consequently to leave the matter with the commission so far as the commission can go, recognizing that its decisions are not theoretically final or conclusive, but trusting that if it does its work capably its findings will carry sufficient moral weight to be generally accepted in practice and not often contested in court.

13. But the desire of these acts is usually for a final and conclusive list for the whole state, and various expedients have been

<sup>9</sup> Cal. Const., art. iii, § 1.

<sup>10</sup> The Supreme Court of California said: "Again, it will be observed that in other states statutes providing for the determination of titles, under the Torrens system by administrative officers have been assailed and declared void upon the ground that the power of determining such titles was essentially judicial and to be exercised only by the courts." *Title etc. Co. v. Kerrigan* (1906), 150 Cal. 289, 321, 88 Pac. 356, 365, 8 L. R. A. (N. S.) 682, 692, citing cases from Illinois, Ohio, Massachusetts, and Minnesota.

" . . . although it was incumbent on the commissioner before acting to satisfy himself on the question, his decision, or a failure to appeal therefrom, did not cut off the right of the interested parties to contest the matter in some proper proceeding in the courts, nor divest the courts of their general jurisdiction in the premises." *Hamp v. State* (1911), 19 Wyo. 377, 118 Pac. 653, 658. See also, *Willey v. Decker* (1903), 11 Wyo. 496, 73 Pac. 210; *Ryan v. Tutty* (1904), 13 Wyo. 122, 78 Pac. 661.

"The authority of the state engineer is administrative, and not judicial; and hence he has no power to impair vested rights nor would his decision as to what the existing rights are be conclusive. Any action taken by him would be open to collateral attack in court by injunction or other process as would also the action of the defendant Hicks should he be authorized to take water from the said stream . . . Thus appears the inherent weakness and indecisive character of any right or privilege granted by the state engineer prior to judicial action . . . " *Gay v. Hicks* (1912), 33 Okl. 675, 124 Pac. 1077, 1081.



enacted to press the matter to the theoretical limit. One plan is being tried in Oregon, of having the commission make its decision as in Wyoming, but then deposit it with the district court, allowing an appeal to that court. This Oregon procedure has not been passed upon and is questionable. Since the commission is an administrative tribunal, an appeal from it is a continuance of administrative action, that is, it is an administrative appeal, and, even if the appeal is heard by judges, cannot have the finality of a judicial decree. Judges, as such, cannot entertain administrative appeals when the constitution prohibits judges from exercising administrative powers.<sup>11</sup>

The California act recognizes this and aims at the result in another way, that is, bringing into court the possible objecting parties not simply as a so-called appeal, but as an independent new suit, as though the objectors of their own accord had prayed for an injunction or other entirely new proceeding. The statute upon this is as follows: The act provides that the commission file its evidence, findings and decision in the superior court of each county in which said water is appropriated (§§ 25 and 31). Within one year either the attorney general or any individual claimant may begin a suit thereon; the former to quiet title to the rights of the state in the stream; the latter to quiet title to his own right; in either event the proceedings are to be "as in other cases heard and determined in said court, and in accordance with the provisions of the Code of Civil Procedure of this state."<sup>12</sup>

As is seen, the act declares that an action to quiet title may be based upon the commission's determination by the state or by any individual claimant.

14. If the determination is to be pressed to the limit of possible conclusiveness, without a constitutional amendment, some such independent proceeding in court seems to me theoretically a necessity, as this new California statute attempts. Questions come up, however, whether the suit provided furnishes the proper procedure, and this is an important subject of consideration.

A very carefully worked out type of suit that might have been adapted to the case, if the matter is to be pressed to a court

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<sup>11</sup> "The appeal to the superior court, when provided for by the legislature, can only be from a court—either a justice or inferior court—and the right of appeal cannot be given from any other tribunal." *Chinn v. Superior Court* (1909), 156 Cal. 478, 481, 105 Pac. 580, 581.

<sup>12</sup> 1913 Stat. Cal. 1012, § 32.

determination, is furnished by the McEnerney Act, which establishes titles in San Francisco. The purpose of the two is much alike, to establish ownership where no record exists. The McEnerney Act has been upheld by both the Supreme Court of California and the Supreme Court of the United States, and should have furnished some ideas. There is also the Torrens suit to be guided by. Both the McEnerney Act and the Torrens Act, in dealing with these matters, find it advisable to have something more effective than the ordinary quiet-title suit, and a system for settling water titles ought to try to profit by that experience, which the pending act does not do.

Another thing is that the statute requires the quiet-title suit, if brought, to be brought in each county in which part of the water is appropriated. The California Constitution would seem to require that.<sup>13</sup> But several separate courts will have difficulty in arriving at harmonious decrees over parts of the same stream. It might be that, after being begun in each county, a change of venue could be made to one of them. In Colorado the matter is handled by districting the state according to the water drainage, and one suit is had for each drainage system as a whole. The pending California statute leaves it an open question.

There is no provision made regarding costs. In another section (§ 35), hereafter referred to, costs are to be taxed against the water-users by the court, and presumably that is likewise intended in the confirmation suit, although not expressed. There is a conflict of decision how far the water-users, being in no fault, can be made to bear these expenses. In Idaho and Oregon it is held that the water-users may be made to pay the costs. South Dakota has just held the contrary.<sup>14</sup> Beside the question of cost, the water-users at all events must bear the time involved, and for a large drainage system experience has shown that several years are required,<sup>15</sup> putting me in mind of something I came across not long ago.<sup>16</sup> If we remember the right of appeal to the

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<sup>13</sup> Cal. Const., art. vi, § 5.

<sup>14</sup> *St. Germain Irr. Co. v. Hawthorn D. Co.* (S. D., 1913), 143 N. W. 124, 127.

<sup>15</sup> "Some idea of the expense and labor necessary to take the evidence and formulate a decree in some of our water districts may be gathered from the statement that, in some districts, not only months, but years, have been consumed in doing the necessary work incident thereto . . . ." *Louden Irr. Co. v. Handy D. Co.* (1895), 22 Colo. 102, 43 Pac. 535, 539.

<sup>16</sup> When Littleton prayed judgment in a *quare impedit*, Year Book, Mich. 35 Hen. VI, Prescott, Chief Justice, protested: "I marvel mightily

Supreme Court of the state and to the Supreme Court of the United States, we may hope that the statute, if passed, will be supplemented by later acts simplifying and shortening the procedure if it is reasonably possible. The framers of the act seem to have had doubts upon the matter themselves, for, while placing a limitation of one year upon bringing the confirmation suit, they do not require the suit to be actually brought. Assuming (but passing discussion thereof)<sup>17</sup> that the state has a title which can be quieted, the bringing of the suit is not made compulsory upon either the state or the individual, with the result that if not brought within one year this part of the act is ineffective. The water commission determination then stands unconfirmed. The aim of the drafters seems to be, and it is the main hope under this statute, that the commission will do its work so well that no one will want to go to court.

15. Let us suppose, now, that the commission has determined and the court has quieted all water-rights upon some stream, say the Yuba River. The character of questions that have thereafter arisen in states having experience therein, is interesting. There are three main classes of such questions, viz.: 1, enforcement of the decree; 2, causes of variation from the decree; 3, matters not within the scope of the decree.

As to the first (enforcement of the decree) the experience of Wyoming and Colorado has shown (what in theory we would have supposed) that an administrative set of officers is necessary to police the stream to see that the determination is complied with. The proposed California act has a number of sections upon licensing new users, but the question of forcing obedience to the determined rights by old users is not specifically worked out. Section 37 near the end of the act reads: "The power to supervise the distribution of water in accordance with the priorities established under this act, when such supervision does not contravene the authority vested in the judiciary of the state, is hereby vested in the state water commission."<sup>18</sup>

The Wyoming and other statutes go into this in detail, covering the organization of the force, whether appointive or elective;

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that you are so hasty in this matter; for it is a weighty matter, and I have seen similar matters pending for twelve years, and this matter has been pending only three-quarters of a year." *Ram. Judgm.*, p. 387.

<sup>17</sup> See *Palmer v. R. R. Commission* (Jan. 20, 1914), 47 Cal. Dec. 201, 138 Pac. 997, apparently holding adversely.

<sup>18</sup> 1913 Stat. Cal. 1012, § 37.

the question who bears the expense; the powers of the officers to open and shut owners' headgates and to make arrests. At the hearings before the conservation commission drafting the California act, some of which I attended, there was a promise of opposition to the bill if such provisions went into it, and Dr. Pardee, chairman, in a spirit of conciliation, rested with the general clause quoted. The clause implies that the commission will let the matter be until the time comes to act thereon, but there is a legal question in that course which will probably come up. That is, the clause says in effect that the commission may create a system of enforcement of the determination "so far as not vested in the judiciary". What seems to me more important is that the law will add "so far as not vested in the legislature". So far as the creation of a policing system is legislative in its nature, it must be created by the legislature, and (if legislative in nature) should have been worked out in the statute, in view of the constitutional distribution of powers already mentioned, which prohibits the delegation of legislative (as much as judicial) powers to an administrative commission. I would not say how far the power to create a system of water police is legislative in this case, but it is a question pretty sure to be raised.

The second class of questions are those concerning how far the decree, once made, will be permanent, and remain free of variation. The chief means to secure this is to require that all questions involving water-rights thereafter shall be heard first before the commission. This is a requirement which water codes usually contain, and it is valid.<sup>19</sup> It is contained in section 24 of the California act. The commission may thus take future contests off the hands of the courts to a large extent, and a good commission and police system may go far to stop contests from arising in the first place. When they do arise, however, whether before the commission or in court, we must expect them to begin to disturb the determination decree. Suppose A, awarded 20 inches by the general decree, thereafter asserts that someone abandoned 30 inches and that he (A) thereafter was in use of that also, making 50 inches, when B, above him, enlarged a ditch and took the disputed 30 inches from A. On such proof A must be given the disputed 30 inches against B. No other decree could be en-

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<sup>19</sup> *Pacific Live Stock Co. v. Silvies R. Irr. Co.* (Ore., 1912), 200 Fed. 487.

tered in justice between A and B, and yet it might later turn out, in a contest by a third person (C) against A, that the 30 inches belonged in fact to C, who had never abandoned them. The record, in the meantime, would be made to show 50 inches in A, and conflict with the original determination. In other words, subsequent contests must of necessity return, under the law of prior appropriation, to the test of "better or worse" between the two disputants alone, leaving the record without a showing of absolute ownership, because of the omitted parties. Some codes, to meet this, contain a further provision that in every subsequent contest that arises, all claimants shall again be made parties, the same as in the original determination proceedings, but that, it seems to me, cannot work. It is impossible to make everybody on a stream litigate every time any two of them get into a quarrel. The pending California act (§ 35) contains such a provision wherever the state is a party.<sup>20</sup> The practical result of it most likely will hinder the state from suing, for the state could not, under it, sue to enjoin, as a public nuisance, a chemical works claiming the right to pollute the Sacramento River with poisonous refuse, without suing (so it would seem) every water-user from Suisun Bay to Red Bluff.

We must expect to see the determination decree subsequently varied from other causes. Sales will be made, in the first place. Usually, in codes of this kind, sales are required to be recorded with the water commission, but, as remarked at the beginning, that cannot be entirely conclusive, just as the county records today are not conclusive. Still it would help, although I find no requirement of such record of sales in the new California act. Other variations will occur which recording could not prevent. That is, a sale will be made of land carrying a water-right as an appurtenance without mention; other rights will be abandoned by non-use; others will change hands by prescription. So that the determination will in time begin a process of wear and tear. The ideal would be a permanently fixed arrangement of priorities in numerical order, but the Oregon state engineer has found that the variances are disturbing the numerical arrangement, and he recommends designating priorities by date only. In Colorado they are

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<sup>20</sup> "In any suit wherein the state is or the people of the state are a party for the determination of a right to the use of the water of any stream, stream system, lake or other body of water, or of any portion of any stream, stream system, lake or other body of water, all who claim the right to use such water shall be made parties." 1913 Stat. C:l. 1012, § 35.

going back and readjusting their old decrees because they find that they have been put out of shape by various matters which have come up in later years, such as omitted parties, abandonment of rights, more economical use, increase of flow by seepage, and other things of that kind.

The third class of questions deals with matters not within the scope of the decree. Unless flowing in a defined channel, underground water is not affected (§ 42). Nor does the determination settle rights of way, ditches and conduits, but only water-rights, and the means of access to the stream must be the subject of separate litigation. Another consideration which has given difficulty in other states is, how far the determination shall run upon consumers taking water from a canal, or whether it shall run only upon the main canals taking from the stream. In Colorado the determination runs only upon the stream, defining rights of carriers, as they are called, or companies, but not including consumers. The California act, as worded, seems to contemplate the same thing, so that the hope should not be held out to farmers under the distributing canals that the new statute would in effect, as it is sometimes pictured to them, "give them a water deed from the state for the water, the same as they have a deed for their land".<sup>21</sup>

16. What I have heretofore said has referred to the rights of appropriators, and the act seems to contemplate that such shall be the case, at least to a great extent. There are some implications in the act that the water commission shall recognize the rights of riparian owners in its conclusions, but the main way in which the act undertakes to deal with riparian rights is to abolish them at the end of ten years.<sup>22</sup> In about half the western states, following Colorado and Wyoming (in contrast to California), riparian rights were never recognized in the beginning.<sup>23</sup> In the other states, however, after once recognizing them, statutes abolishing them have hitherto been un-

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<sup>21</sup> See 2 Cal. Law Rev. 273.

<sup>22</sup> "If any portion of the waters of any stream shall not be put to a useful or beneficial purpose to or upon lands riparian to such stream for any continuous period of ten consecutive years after the passage of this act, such non-application shall be deemed to be conclusive presumption that the use of such portions of the waters of such stream is not needed upon said riparian lands for any useful or beneficial purpose; and such portion of the waters of any stream so non-applied, unless otherwise appropriated for a useful and beneficial purpose is hereby declared to be in the use of the state and subject to appropriation in accordance with the provisions of this act." 1913 Stat. Cal. 1012, § 11.

<sup>23</sup> See 1 Cal. Law Rev. 11.

successful. Such statutes were held unconstitutional in Nebraska (streams of certain width), North Dakota, South Dakota (non-use for three years), Washington and Wisconsin. The Oregon Supreme Court has come closest to upholding such statute abolishing riparian rights, but not actually. In the Supreme Court of California, Justice Sloss has said that the legislature has not the power,<sup>24</sup> while Justice Henshaw, in the court's most recent decision, intimated that it would be valid.<sup>25</sup> The California statute does not attempt it for ten years yet, and in the meantime the question of the effect of this provision will probably be discussed. At the same time, it seems unfortunate that for ten years the water commission will avoid riparian owners. There is no reason for that, as public regulation among riparian owners is as proper and feasible as among appropriators.

17. In closing, it seems that the listing of existing priorities of water appropriators throughout the state for an official record of water-right owners can best be done for average practical purposes by an administrative commission; that such action is not absolute or entirely final without a judicial confirmation so long as the state constitution remains as it is, and the pending California act is inadequate for such judicial confirmation. For practical purposes, beneficial results to come from the statute will rest with the way the water commission does its work. It may early require amendment of the statute, but it cannot shift the blame, if it fails, upon the courts.

And, later on, the segregation in this way of a fixed and circumscribed quantity of water to each user in severalty, according to priority, may some day be superseded by some plan of apportionment from time to time by public officials, with priority reduced from its present controlling position.

*Samuel C. Wiel.*

San Francisco, California.

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<sup>24</sup> *Miller & Lux v. Madera Canal etc. Co.* (1909), 155 Cal. 59, 99 Pac. 502, 22 L. R. A. (N. S.) 391.

<sup>25</sup> *Miller & Lux v. Enterprise Canal and Land Co.* (Dec. 20, 1913), 47 Cal. Dec. 1. Since this was written a rehearing has been granted upon the point in the course of which the intimation was made.