

# Origin and Comparative Development of the Law of Watercourses in the Common Law and in the Civil Law

(CONTINUED FROM MAY ISSUE)

9. Takings of water as between riparian owners are further necessarily affected according to their relative position upon the stream, namely, in the relation of a riparian owner (a) to those above him; (b) to opposite riparian owners; (c) to lower riparian owners.

(a) As against upper riparian owners, if a riparian owner cannot get the water onto his land without diverting it upon or across upper land, he is, as against the protest of the owner of the upper land entered upon, prohibited in the French law (although there is some difference of opinion) from going upon the upper land.<sup>3</sup> But he may make such diversion if he has the consent of that upper owner on whose land the diversion is made, or if the diversion is upon upper lands of his own.<sup>4</sup> And although the French statute of 1845 for rights of way (hereafter noted) does not apply to making such diversion itself, yet when a diversion has been so made by consent he may then acquire a right of way over

---

<sup>3</sup> Picard, *Traité des Eaux*. (2d ed.), Vol. I, p. 382, citing *Cour de Cassation*, req., 11 avril 1837, *Blain c. Alexandre et autres*; req., 7 janvier 1845, *de Villefranche c. Bartat*; civ., 14 mars 1849, *Giraud-Agnel c. de Brunet*; req., 21 novembre 1864, *Angueles-Forgettes c. Aumont*; *Daviel*, *Traité des Cours d'eau*, tome II, n° 588 bis; *Demolombe*, *Traité des servitudes*, tome 1<sup>er</sup>, n° 147.

<sup>4</sup> "The taking of water effectuated under article 644 pertains normally to the right of the riparian land, but it is possible that the proprietor finds himself in the presence of natural obstacles which would practically deprive him of his right of use, or at least would make the exercise thereof very difficult; may he not in this case, take the water on upper riparian land, in case he has obtained from the owner thereof the necessary authority, or in case the upper land belongs likewise to himself? In general, the affirmative is indicated and the decisions of the courts have pronounced equally to the same effect." The original reads: "La prise d'eau affectuée en vertu de l'art. 644, a lieu normalement au droit de l'héritage riverain; mais il est possible que le propriétaire se trouve en présence d'obstacles naturels, qui le privent en fait de son droit d'usage, ou du moins en rendent l'exercice très difficile; ne peut-il dans ce cas

intermediate lands under the law of 1845.<sup>5</sup> In making such diversion the rights of use of other riparian owners must not be prejudiced by him." Under all circumstances, he must respect the right of use of the intermediate proprietors, if there are any; he must not, it must be well understood, prejudice either his opposite riparian owner, nor riparian owners situated above the lower land, whose opportunities may not be impaired by the change of point of diversion."<sup>6</sup>

This is equally the California law under the rule of *Turner v. James Canal Company* and *Miller & Lux v. Enterprise Company*.<sup>7</sup>

(b) As between opposite riparian owners, where each possesses only one of the banks, the Code Napoleon, as already quoted, confines the use of each to "serving himself from it *in its passage* for the watering of his property" (article 644); that is, neither can turn all the water away from the other. But he can take from it a reasonable amount.<sup>8</sup> And he may use the water

pratiquer la prise d'eau sur un fonds supérieur, soit qu'il obtienne, du propriétaire l'autorisation nécessaire, soit que le fonds supérieur lui appartienne également? En général l'affirmative est enseignée et c'est également dans ce sens que s'est prononcée la jurisprudence." Labori, *Repertoire de Droit Français*, Vol. 5, p. 414.

<sup>5</sup> Picard, *Traité des Eaux* (2d ed.), Vol. I, p. 384, citing *Cour de Cassation*, Civ. 14 mars 1849, *Giraud-Angel c. De Brunet*. See also Labori, V. 414.

<sup>6</sup> "Il doit dans tous les cas respecter le droit d'usage des propriétaires intermédiaires, s'il y en a; il n'a, bien entendu, à s'inquiéter ni du coriverain, ni des riverains places audessous du fonds inférieur, dont le sort ne peut être aggravé par le déplacement du point de prise d'eau: *Cas*. 14 mars 1849, *présité*. On admet, en général, que le riverain inférieur peut invoquer la loi du 29 avril 1845, pour amener sur son fonds l'eau qu'il a puisée en un point du fonds supérieur, à travers les fonds intermédiaires: *Cas*. 14 mars 1849, *présité*." Labori, Vol. V. p. 414.

<sup>7</sup> *Turner v. The James Canal Co.* (1909), 155 Cal. 82 at 92, 99 Pac. 520, 132 Am. St. Rep. 59, 17 Ann. Cas. 823, 22 L. R. A. (N. S.) 401. See also *Rose v. Mesmer* (1904), 142 Cal. 322, 75 Pac. 905; *Turner v. East Side Co.* (1914), 168 Cal. 103, 142 Pac. 69. Compare *Miller & Lux v. Enterprise Co.* (1915), 169 Cal. 415, 147 Pac. 567; *Miller v. Baker* (1912), 68 Wash. 19, 122 Pac. 604.

<sup>8</sup> "The Court also concedes, and the matter is evident, that the upper proprietor who serves himself with the water for irrigation is not obliged to return the same quantity of water that he has received, since the land will absorb part thereof; but he must always use his right in such a way as to preserve in a just measure to the lower proprietors the exercise of their right in the waters." The original in French reads: "La cour admet encore, et al chose est evidente, que la propriétaire supérieur que se sert des eaux pour l'irrigation ne peut être tenu de rendre la même quantité d'eau qu'il a reçue, puisque la terre en absorbe une partie; toujours est-il qu'il doit user de son droit de manière à ménager, dans une juste mesure, aux propriétaires inférieurs l'exercice de leur droit sur les eaux." *Laurent Principes de Droit Civil*, Tome 7, p. 346. See also p. 337. The Spanish

for other purposes than irrigation. The fact that the Code Napoleon mentions only irrigation as between opposite owners is held not exclusive, but indicates only that irrigation is the most usual use in France, and, moreover, water power usually is operated in the stream itself without requiring a diversion.<sup>9</sup> But this does not extend to purposes of mere ornament.<sup>10</sup>

Can one of the opposite owners extend his dam across the

law is laid down likewise by Escriche. "If running water passes between the properties of different owners, each one of the latter can use it for the irrigation of his property, or for any other object; not entirely, however, but only in the part that belongs to him, because all have equal rights, and consequently, they can prevent each other from taking more than their respective shares." Escriche, "Aguas."

<sup>9</sup> "While the Code speaks only of irrigation, this is because ordinarily the law makes provision only for the usual things, and usually the water serves for irrigation. But what proves that the legislator did not exclusively occupy himself with the interests of agriculture, is that article 645 (Code Napoleon), which follows article 644, anticipating the conflict which might arise between the diverse interests, establishes that the judge should harmonize 'the interest of agriculture with the respect due to property.' This emphasizes, as we have already said, that the riparian owners are proprietors of non-navigable watercourses. According to this view, not the least doubt can remain upon the right which they have to serve themselves for all purposes of use, provided that in absorbing the waters they do not carry their right to excess or abuse." Laurent, Vol. 7, pp. 338-339.

"In practice the Administration accords, to the riparian owners of a single bank, authorizations to establish mills, and this practice has been confirmed by the Cour de Cassation." Labori, Vol. 5, pp. 412-413. The French original follows:

"Si le code ne parle que de l'irrigation, c'est que d'ordinaire la loi ne prévoit que des faits usuels; or, habituellement l'eau sert à l'irrigation. Mais ce que prouve que le législateur ne s'est pas préoccupé exclusivement des intérêts de l'agriculture, c'est que dans l'article 645, qui fait suite à l'article 644, prévoyant le conflit qui pourrait s'élever entre les intérêts divers, il décide que le juge doit concilier l'intérêt de l'agriculture avec le respect dû à la propriété. Cela implique, comme nous l'avons dit ailleurs, que les riverains sont propriétaires des cours d'eau non navigables. Dans cette opinion, il ne peut pas rester le moindre doute sur le droit qu'ils ont de s'en servir à toute espèce d'usage, sauf à ne pas abuser de leur droit en absorbant les eaux." Laurent, Principes de Droit Civil, Tome 7, pp. 338-339. "Enfait l'administration accorde aux riverains d'un seul côté des autorisations d'établir des usines et cette pratique a été consacrée par la Cour de Cassation." Labori, Repertoire de Droit Français, Vol. 5, pp. 412-413.

Accord, Picard (2d ed.), Vol. I, p. 353, citing Daviel, Traité des Cours d'eau, Tome II, n<sup>o</sup>. 626;—Demolombe Traité des Servitudes, Tomer Ier, n<sup>o</sup>. 156; Cour de Cassation, Req., 4 mai 1887, Weill c. Weill et Bellet;—Req., 17 janvier 1888, Challeton et Conoville c. Thirouin et Cie.

<sup>10</sup> "But the riparian owner of a single bank may not employ the water for uses of pure ornament, as may the proprietor whose land is traversed by the water." Labori, Vol. 5, p. 413. The French original reads: "Mais le riverain d'un seul côté ne pourrait employer les eaux à des usages de pur agrément, comme le peut faire le propriétaire dont l'héritage est traversé par le cours d'eaux." Labori, Repertoire de Droit Français, Vol. 5, p. 413.

stream beyond the middle? Of the Spanish law it is said that he cannot without the other's permission.<sup>11</sup> In France there is a statute of 1847, hereafter noted, authorizing condemnation for this purpose, being a companion of the Statute of 1845, already noted, for obtaining rights of way for irrigation ditches. So far as the question may arise under general law aside from the Statute, it was once contended that "temporary brush structures" and the like were permitted.<sup>12</sup> Even that is now discarded. An opposite owner cannot extend his dam across the stream beyond the middle except upon payment of indemnity under the Act of 1847.<sup>13</sup> In

<sup>11</sup> "None of the riparian proprietors can construct works on the property of another without his consent, nor even raise on it a weir or dam to cause the waters to enter more abundantly on his property." Escriche, "Aguas."

<sup>12</sup> "... we believe even that he may have the right to place temporarily for this purpose, upon the opposite bank, brush or other material, serving the purpose of holding back the waters, to the end that they may be raised to the height necessary for watering his land, for in a large number of circumstances the right of irrigation could not otherwise be exercised. But in order thus to serve himself therefrom, this does not extend to the right to change the bed, or to arrest the flow in a manner harmful to the neighbor; in a word, the use of the water should be equal in favor of both." Pardessus, *Servitudes*, Vol. I, p. 260. The French text reads:

"... nous croyons même qu'il auroit la faculté d'appuyer momentanément pour cet usage, sur la rive opposée, les bois ou d'autres matières servant à retenir les eaux, afin qu'elles puissent s'élever à la hauteur nécessaire pour arroser son héritage; car dans un grand nombre de circonstances, le droit d'irrigation ne peut s'exercer autrement. Mais s'en servir ainsi, ce n'est pas avoir droit d'en changer le lit, ou d'en arrêter l'écoulement d'une manière nuisible au voisin; en un mot l'usage des eaux doit être égal en faveur des deux." This was written before 1847.

<sup>13</sup> "Another question is whether he who is owner of only one bank may erect dams on the opposite bank. The question was controverted under the régime of the Civil Code; it has been settled by the subsequent laws concerning irrigation. According to general principles, it is necessary to conclude, without hesitation, that the riparian owner has not the servitude of erecting such dam, for this is a veritable servitude, and there can be no servitude except by virtue of some formal provision of law; understanding, of course, that there is presented no servitude derived from the act of man. The absence of all title constituting any servitude is decisive of the question." The French reads: "Autre est la question de savoir si celui qui n'est propriétaire que d'une rive peut appuyer des barrages sur la rive opposée. La question était controversée sous l'empire du code civil; elle a été tranchée par les lois nouvelles concernant l'irrigation. D'après les principes généraux, il faut décider, sans hésiter, que le riverain n'a pas le servitude d'appui, car c'est une véritable servitude, et il n'y a de servitude légale qu'en vertu d'un texte formel; nous supposons naturellement qu'il n'y a pas de servitude dérivant du fait de l'homme. L'absence de tout titre constitutif d'une servitude décide la question. (Voyez les autorités citées par Aubry et Rau. t. III, p. 50 et notes 21 et 22, et par Dalloz, au mot Servitude, n<sup>o</sup>. 198)" Laurent, *Principes de Droit Civil*, Tome 7, p. 340.

"A dam may not, upon principle, be erected upon the opposite bank

California we do not recall that it has been made a subject of discussion, although upon analogous questions the decisions seem to accord with these authorities elsewhere, against such extension of a dam onto another's land.<sup>14</sup>

(c) As against lower riparian owners, the requirement is that the surplus be returned to the stream by the upper riparian owner. If the upper owner owns both banks of the stream, the French code section (644) gives him liberty to turn the stream at will within his land, subject to returning it to the natural channel. A reasonable diminution of the return is proper,<sup>15</sup> but he cannot take it all. The obligation to return the water to its ordinary course at its departure from his property applies throughout the code section although only expressed in its second sentence. Picard declares: "This is a principle admitted by all the authors and invariably sanctioned by the judicial decisions."<sup>16</sup> And it is equally received in the Spanish law.<sup>17</sup>

Another such point in reference to lower riparian owners is in giving particular meaning to the requirement that the water must be returned "at its departure from his land." As in favor

(excepting, of course, if it belongs to the same owner); the contrary opinion had been put further before the law of 1847. But it found numerous opponents and it has been implicitly condemned by the foregoing law, which does not authorize the establishment of a dam except by the method of indemnity and in virtue of a species of condemnation or eminent domain." Labori, Vol. 5, p. 414. "Le barrage ne peut en principe, être appuyé contre le rive opposée (sauf bien entendu si elle appartient au même propriétaire) l'opinion contraire avait été enseignée avant la loi du 11 juillet 1847; Delvincourt, t. 1, p. 380; Pardessus, t. 1, n. 105.—Mais elle avait trouvé de nombreux contradicteurs et elle a été implicitement condamnée par la loi précitée qui n'autorise l'établissement de l'appui du barrage que moyennant indemnité, et en vertu d'une sorte d'expropriation." Labori, Répertoire de Droit Français, Vol. 5, p. 414.

Accord, Picard (2d ed.), Vol. I, p. 376, citing Cour de Cassation, Req., 17 juin 1850, Galand c. Galand, C. C., 2 décembre 1829, Bras-Dumas c. Capelle; Req., 17 juin 1850, Galand c. Galand.

<sup>14</sup> Wiel, Water Rights in the Western States (3d. ed.), Ch. 10.

<sup>15</sup> "This proprietor will not have to return the same quantity of water which he has received, or any certain quantity of water determined, but he must economize and use water in a just measure so that the proprietors of lower lands may exercise their rights also." Cassation decision of August 21, 1844. See Des Annales des Ponts et Chaussées Laws and Decrees, 1847.

<sup>16</sup> Picard, (2d ed.), Vol. I, p. 386.

<sup>17</sup> "When the water passes within a property, the owner can use it arbitrarily, for, since the both banks are his, he has not to subject himself to the interests of an opposite riparian owner; but at the outlet of his estate he must return it to its natural or ordinary channel, without having power to absorb it or entirely consume it, nor give it another direction, because it does not belong to him as a property, but only to the extent of the use which he can make of it in its passage." Escriche, "Aguas."

of the lower owner, this rule has been construed in California to mean above the lower owner's boundary,<sup>18</sup> and likewise in the French authorities: "Even though the literal text of article 644 obliges him who turns the water on his property to return it again to its natural course at its departure from his land, nevertheless it seems to us that the law is sufficiently fulfilled if, the position of the land presenting obstacles, he returns the water by an outlet made on land not owned by him, if he has the consent of the owner thereof."<sup>19</sup> Again, another commentator holds that under the words "at its departure from his land," where a man owns a riparian tract containing both banks at its upper end and only one bank at its lower end, he can, as against lower owners, turn the whole stream within his upper part and carry it so turned through the lower part also, if he re-establishes the natural course at the end of the latter.<sup>20</sup> In other words, the restrictions of the law between riparian owners, whether relative to upper owners, opposite owners, or lower owners, are available only to the riparian owners harmed by their violation, under the principle that violation of the rights of third persons is immaterial. The same general doctrine is the law of California under *Turner v. James Canal Company*.<sup>21</sup>

The California law of the rights of riparian owners among themselves is therefore proceeding here as elsewhere upon the same lines as the civil law has it.

11. The consequences following an excessive use between riparian owners do not differ from the common law. An excessive use by one riparian owner being unlawful, it gives an immediate right of action to lower riparian owners; whether they are using the water or not, any excessive use by another is in excess of the latter's right and an invasion of the rights of the others.

---

<sup>18</sup> *Bathgate v. Irvine* (1899), 126 Cal. 135, 144, 58 Pac. 442, 77 Am. St. Rep. 158.

<sup>19</sup> "De même, encore bien que le texte littéral de l'article 644 oblige celui qui détourne l'eau sur sa propriété, à lui rendre son cours naturel à la sortie de son fonds, si, la position du terrain présentant quelques obstacles, il ne rendoit l'eau que par une sortie pratiquée sur un autre fonds dont il n'est pas propriétaire, mais avec le consentement du maître de ce fonds, le vœu de la loi nous sembleroit être suffisamment rempli." Pardessus, *Traité des Servitudes*, Vol. I, p. 263.

<sup>20</sup> Demolombe, *Traité des Servitudes*, Vol. I, no. 167; *contra*, Picard, *Traité des Eaux* (2d. ed.), Vol. I, p. 352. Cf. Labori, Vol. 5, p. 412.

<sup>21</sup> *Supra*, n. 7.

Laurent says (citing authorities): "In the case where the riparian owner is responsible for works that he has put in operation, may another, whose right is infringed thereby, proceed immediately to demand the abatement of the works? If these works are harmful in their nature, the affirmative is not open to doubt; for such works constitute a violation of the right of the riparian proprietor whom they menace; he has no need to await the occurrence of actual damage to demand redress. We believe that the same is to be said when a riparian proprietor erects structures which jeopardize or interfere with the common use of the riparian owners, even though no actual damage has yet resulted."<sup>22</sup> Some question is made in the French authorities in reference to the form of remedy of the wronged riparian owner during his nonuse. In California by a recent ruling a present injunction is refused, the remedy being by a declaration of right to demand the use whenever actually desired.<sup>23</sup> And presumably he may have a present judgment for nominal damages at law.

For the same reason, if the action is not brought at all, the excessive use will ripen into an exclusive right against the lower riparian owners by prescription. "But the riparian proprietor, who may formally renounce the right of use which is given to him by law, may equally renounce it in a tacit manner, and this tacit renunciation is presumed when a sufficient contradiction of his right, to call upon the riparian owner to take action for his protection, has been followed for thirty years by a failure to take such action on his part; under such circumstances a prescription will arise"<sup>24</sup> This passage from Labori is similar to the following

---

<sup>22</sup> "Dans les cas ou le riverain est responsable des ouvrages qu'il exécute, celui dont le droit est lésé peut-il agir immédiatement pour demander la destruction des ouvrages? Si ce sont des travaux offensifs, l'affirmative n'est pas douteuse; car ces travaux portent atteinte au droit de propriété du riverain qu'ils menacent; il n'a pas besoin d'attendre que le dommage soit causé pour en demander la réparation. (Rion, 10 février 1830; Dalloz, au mot Propriété, no. 576.) Nous croyons qu'il en faut dire autant lorsqu'un riverain fait des travaux qui compromettent ou empêchent l'usage commun des riverains, bien qu'il n'en résulte pas un dommage actuel." Laurent, *Principes de Droit Civil*, Tome 7, pp. 350-351.

<sup>23</sup> *Supra*, n. 94. See also *Burr v. Maclay Rancho Water Co.* (1908), 154 Cal. 428, 98 Pac. 260.

<sup>24</sup> "Mais le riverain, qui peut formellement renoncer au droit d'usage que lui reconnaît la loi, peut également y renoncer d'une manière tacite, et cette renonciation tacite se présume lorsqu'une contradiction suffisante pour mettre le riverain en demeure de faire valoir ses droits a été suivie pendant trente ans de l'inaction de celui-ci: alors seulement il y a prescription." Labori, *Repertoire de Droit Français*, Vol. 5, p. 415.

statement of Laurent: "If one of the riparian owners has made such exclusive enjoyment of the waters as to render use by his co-riparian owner an absolute impossibility, he will certainly have acquired a prescription that will extend to the unlimited use of the waters. For that which one may acquire by agreement, one may also prescribe for. In other words, nothing prevents a riparian owner from completely parting with his right to the waters; if this right may be sold, it may also be the subject of prescription."<sup>25</sup> In California, and under the general common law, the same rule is generally laid down.<sup>26</sup>

The French authorities further discuss the question how far orders of administrative officers may aid a prescription, or how far the violation of such orders may militate against a prescription. Under the California and other Western Statutes establishing water commissions, such questions will have to be answered with us as well, but this paper cannot be extended beyond the main elements of the subject.

12. We may next turn to the definition of riparian land in the Civil law.

The first thing immediately met is that the land, to be riparian, must touch the stream. The French Code section (644) requires the land to "border" on the watercourse (one bank), or that the water "cross" it (both banks). This is universally construed to mean contact with the water. "The condition upon this use is that the water, in its natural course, *touch* the property of him who would avail himself thereof."<sup>27</sup> Under the Mexican law "the waters of innavigable rivers, while they continued such, were subject to the common use of all *who could legally gain access to them* for purposes necessary to the support of life."<sup>28</sup>

<sup>25</sup> "Par contre, si l'un des riverains avait joui exclusivement des eaux en mettant le coriverain dans l'impossibilité absolu d'en user, il aurait certes prescrit la jouissance illimitée des eaux. Car ce que l'on peut acquérir par convention, on peut aussi le prescrire. Or, rien n'empêche un riverain d'aliéner complètement son droit aux eaux; si ce droit peut être vendu, il peut aussi être prescrit." Laurent, *Principes de Droit Civil*, Tome 7, p. 373. Id. pp. 363, 367, 369-370.

<sup>26</sup> Webb v. Portland Mfg. Co., supra; Callaher v. Montecito Valley Water Co. (1894), 101 Cal. 242, 244, 245, 35 Pac. 770. See also Lux v. Haggin, supra, n. 92.

<sup>27</sup> "La condition de cet usage est que l'eau, dans son cours naturel, touche la propriété de celui qui veut en profiter." Pardessus, *Servitudes*, I, 261-262, citing Arrêt du 12 juillet 1787, cite par M. Henrion de Pansey, *De la compétence des juges de paix*, ch. 26, § 2.

<sup>28</sup> Lux v. Haggin, supra, n. 92.



Under the French law, again: "The right of use which article 644 gives to the riparian owners pertains to them because of the inconveniences and dangers which the presence of the waters often cause; this again presupposes a contiguity."<sup>29</sup> In the common law the same requirement is firmly held. In the leading case of *Lyon v. Fishmongers' Company*, it is said: "It is of course necessary to the existence of a riparian right that the land should be in contact with the flow of the stream."<sup>30</sup>

The time when the test of contact is applied is laid down by the French authorities to be *the time when the right of use is attempted to be exercised*; an undeniable and self-evident test which furnishes a key to most of the questions arising in the definition of riparian land. Aubry and Rau, a work whose successive editions have stood for half a century as a leading commentary on French civil law, lay down: "To solve the question what is contemplated by riparian land, one must look to the state of things at the time the claim of use is made."<sup>31</sup> And so in other works: "In order to use the water under the terms of article 644 (Code Napoleon), it is necessary to be riparian to the stream, and the riparianty must exist on the day when one undertakes to exercise the right."<sup>32</sup> "It is an application of the principle that the judge determines the rights of the riparians according to the state of their properties at the time of suit;"<sup>33</sup> a principle equally fundamental in the common law, wherein it is said: "Plaintiff must therefore recover, if at all, according to the status of his rights at the time of the commencement of the

---

<sup>29</sup> "Est-ce un droit d'usage que l'article 644 accorde aux riverains, ce droit leur appartient à raison des inconvénients et des dangers que présente souvent le voisinage des eaux: cela suppose encore la contiguïté. (Toulouse, 26 novembre 1832; Dalloz, 1847, 4, 445. Comparez les auteurs cités par Dalloz, n. 201.)" Laurent, *Principes de Droit Civil*, Tome 7, p. 327.

<sup>30</sup> (1876) (L. R.), 1 App. Cas. 662, 683; *Accord, Lux v. Haggin*, supra, n. 92; *Wholey v. Caldwell* (1895), 108 Cal. 95, 41 Pac. 31, 49 Am. St. Rep. 64, 30 L. R. A. 820, (stream shifting its channel so as to cease to touch land); *Gutierrez v. Wege* (1905), 145 Cal. 730, 735, 79 Pac. 449, (stream drying up before reaching the land); *Duckworth v. Watsonville etc. Co.*, n. 2, supra (likewise). These are a few out of many.

<sup>31</sup> Aubry et Rau, *Droit Civil Français* (4th ed.), Vol. III, p. 48.

<sup>32</sup> "Pour pouvoir user des eaux dans les termes de l'art. 644, il faut être riverain du cours d'eau, et la riverain été doit exister au jour où on prétend exercer le droit d'usage." Labori, *Repertoire de Droit Français*, title Eaux, p. 412 § 127. Citing Aubry et Rau, supra, inter alia.

<sup>33</sup> Laurent, *Principes de Droit Civil*, Vol. VII, p. 330, par 275.

action, and ordinarily the same rule applies with regard to the rights and defenses of the defendant."<sup>34</sup>

With this key in hand, the problems of defining riparian land unlock themselves, equally as to the effect of interior matters such as enclosures, texture of the land and topography, and exterior changes of boundary either on the stream side of the land or on the off side of the land.

As to the interior matters, the French authorities are that whether the tract contains within it enclosures around some parts like fences or hedges dividing it into fields for convenient use, or whether the texture of parts varies, or whether it be cultivated as a whole or in alternating areas, are all immaterial; all of a tract which at that key time (the time of attempted use) is owned in one body touching the stream is riparian in title. Its internal arrangement concerns no one but its owner. "A hedge or fence placed by a proprietor between two contiguous parcels and at their common limits does not overcome the contiguity of these parcels, and does not interfere with their constituting a single tenement."<sup>35</sup> "The proprietor may supply himself from the waters for the irrigation of all the lands which form but a single and same riparian estate, so that if he possesses, without break of continuity, a meadow along the bank, then a cultivated piece of land, and after that another kind of meadow, he has the right to make ditches across his cultivated land to conduct the water to the last named meadow; for this meadow is part of a riparian estate. It is in this general sense that the law says that the riparian owner may use the water for the irrigation of his properties."<sup>36</sup> "It is thus, for example, that the riparian owners possessing in succession receding from the river, an uncultivated meadow, a cultivated area, and a second uncultivated meadow,

---

<sup>34</sup> 1 C. J. 1149.

<sup>35</sup> "La haie placée par un propriétaire entre deux fonds contigue, et sur leur limite commune, ne supprime pas la contiguïté de ces héritages, et elle n'empêche pas qu'ils constituent un seul tènement. Req., 24 janvier 1865, S., 65, 1, 62, D., 65, 1, 178." Aubry et Rau (5th ed.) Vol. III, p. 82.

<sup>36</sup> "Le propriétaire peut se servir des eaux pour l'irrigation de tous les fonds qui ne forment qu'un seul et même domaine riverain; de sorte que s'il possède sans solution de continuité, une prairie le long la rive, puis une terre labourable, et après cela une prairie artificielle, il aura le droit de pratiquer des rigoles au travers de sa terre en labour pour conduire l'eau dans la prairie artificielle; car cette prairie fait partie d'un domaine riverain. (Demolombe, T. XI, p. 178, n. 147). C'est en ce sens général que la loi dit que le riverain peut se servir des eaux pour l'irrigation de ses propriétés." Laurent, Principes de Droit Civil, Tome 7, p. 336.

has the right to conduct the waters upon this second uncultivated meadow by open conduits across the cultivated area. The existence of division enclosures does not have the effect of breaking the contiguity of the parcels and to give interference with the riparian right."<sup>37</sup> "The right of use of the riparian owners applies contestably to all parts of the estate which the stream crosses or borders; it matters little that the nature of their exploitation differs, that parts are more elevated than others, so long as there is no break of continuity and the portion of the area which the riparian owner proposes to irrigate is in actual contiguity with the area which the river borders or crosses."<sup>38</sup>

The California rule in *Alta etc. Company v. Hancock and Charnock v. Higuerra*<sup>39</sup> is to the same effect.

We find the topographical element treated by the French authorities, as it has been treated by the Supreme Court of Oregon, as a circumstance to be considered in determining what is a "reasonable use" upon the land,<sup>40</sup> rather than as a factor in the definition of riparian land; an element of fact rather than of law. Says the French authority: "It may also happen that by reason of this configuration of the land it is not possible for him to return the surplus waters to their ordinary course. These would be, in this case, waters lost to the lower riparian owners, which to them is an injury and per consequence a violation of their rights. Is it to be said that the riparian owner may not use the water when he cannot return them to their ordinary course? That would sacrifice the rights of the upper riparian owner. There

<sup>37</sup> "C'est ainsi, par exemple, que le riverain possédant successivement a partir de la rive une prairie, une terre labourée et une seconde prairie, a la faculté de conduire les eaux sur cette deuxième prairie, par des rigoles ouvertes au travers de la terre en labour. L'existence de clôtures séparatives n'a pas pour effet de rompre la contiguïté des parcelles et de porter atteinte au droit du riverain. (C. C., Req., 24 janvier 1865, Dorguin-Delaveau c. Daudon). Picard, (2d. ed.).

<sup>38</sup> "Le droit d'usage des riverains s'applique incontestablement à toutes les parties des fonds que traverse ou borde l'eau courante; peu importe que la nature de l'exploitation change, que des séparations aient été élevées, du moment qu'il n'y a pas solution de continuité et que la portion de terrain que le riverain prétend arroser est bien attenante avec le terrain qui borde ou que traverse la rivière; Pau, 16 mars, 1887 (D. 87.2.256)—Cass., 24 janvier, 1865. (S. 65.1.62; D. 65.1.178.)" Labori, Répertoire de Droit Français, Vol. 5, p. 413.

<sup>39</sup> (1890), 85 Cal. 219, 230, 24 Pac. 645, 20 Am. St. Rep. 217; (1896), 111 Cal. 473, 44 Pac. 171, 52 Am. St. Rep. 195, 32 L. R. A. 190.

<sup>40</sup> *Jones v. Conn* (1901), 39 Ore. 30, 64 Pac. 855, 65 Pac. 1068, 87 Am. St. Rep. 634, 54 L. R. A. 630. See the discussion of this case in *Wiel, Water Rights in the Western States* (3d ed.), § 774.

is a very simple way of looking at this conflict, and this is to govern the amount of water which the riparian owner may take so as to confine him to water strictly necessary, leaving in the river a quantity equivalent to what, under ordinary circumstances, would return thereto after irrigation."<sup>41</sup> The California rule<sup>42</sup> which fixes the watershed as an absolute limit instead of a relative one in each case is, however, a convenient rule for practical use. In practice, use beyond the watershed would seldom be found "reasonable" as a fact, even where it is viewed as a question of fact and not of law. The result would seldom be different.

13. As to exterior changes in riparian land, by change of boundary either upon the river side of the land or upon the off side of the land, the key test of the condition at the time of attempted use renders conclusive service.

The change may be (a) on the river side, by a shift of the channel away from the land; (b) on the off side by a shift of the exterior boundary inward causing a contraction of area; (c) by a shift of the exterior boundary outward causing an expansion of the area. We shall take these up in their order.

(a) Where the boundary changes on the river side by a shift of the channel away from the land, the rule of both civil law and common law is that the former contact ceases to avail; there is no contact at time of suit, and this is conclusive. The French law is laid down: "To exercise the right of irrigation, it is necessary to be a riparian proprietor. If, then, a watercourse comes

---

<sup>41</sup> "Il se peut aussi qu'à raison des circonstances du terrain, il ne lui soit pas possible de rendre à leur cours ordinaire les eaux restantes. Ce seront, en ce cas, des eaux perdues pour les riverains inférieurs, ce qui est pour eux un préjudice et par conséquent une atteinte à leurs droits. Est-ce à dire que le riverain ne puisse pas se servir des eaux quand il ne peut pas les rendre à leur cours ordinaire? Ce serait sacrifier les droits du riverain supérieur. Il y a un moyen bien simple de vider ce conflit, c'est de régler le volume d'eau que le riverain est autorisé à prendre, de manière qu'il n'ait que l'eau strictement nécessaire, en laissant dans la rivière une quantité équivalente à celle que, dans une situation ordinaire, il y a ferait rentrer après l'irrigation." (Metz, 5 juin 1866, (Dalloz, 1866, 2, 124). Demante T. II, p. 580, no. 495 bis. IV. Aubry et Rau, T. III, p. 50 et notes 24 et 25. Demolombe, T. XI, p. 191, no. 155.)" Laurent Principes de Droit Civil, Tome 7, p. 341.

<sup>42</sup> Chauvet v. Hill (1892), 93 Cal. 407, 28 Pac. 1066; Silver Creek etc. Co. v. Hayes (1896), 113 Cal. 142, 45 Pac. 191; Wiggins v. Muscupiabe Land and Water Co. (1896), 113 Cal. 182, 45 Pac. 160, 54 Am. St. Rep. 337, 32 L. R. A. 667; Supra, n. 18; Southern Cal. etc. Co. v. Wilshire (1904), 144 Cal. 68, 77 Pac. 767; Pomona etc. Water Co. v. San Antonio Water Co. (dictum), (1908), 152 Cal. 618, 93 Pac. 881; Miller v. Bay Cities Water Co. (1910), 157 Cal. 256, 107 Pac. 115, 27 L. R. A. (N. S.) 772.

to change its bed, the proprietors who are no longer on the new bed no longer preserve upon it the right of taking water for irrigation, nor, consequently, of making constructions to conduct the waters upon their properties."<sup>43</sup> This is the rule in California under *Wholey v. Caldwell*<sup>44</sup> and other cases.<sup>45</sup>

Similarly, if a public highway comes to be built between the land and the river, the weight of civil law opinion is that the land cannot be considered riparian thereafter, having (in any controversy thereafter arising) no contact with the river. "It is the same when an estate is separated from the flow of the water by a public highway. It cannot be said that this estate borders on the flow of the water and still less that the water crosses the estate; therefore it does not come within the terms of article 644."<sup>46</sup> Labori, whose eminence in French jurisprudence became widely known through his leadership of the defense in the Dreyfus Case, says in his *Encyclopedia of the law of France*: "In order to use the water under the terms of article 644, it is necessary to be riparian to the stream, and the riparianty must exist on the day when one undertakes to exercise the right; if, then, the flow of the water shifts, the old riparian proprietors lose all their rights of use in the waters. As the riparianty has to be immediate, it is sufficient, to take away the right of use, that an estate be separated from the river by a public highway."<sup>47</sup>

<sup>43</sup> Dalloz, "Jurisprudence," Vol. 40, Word "Servitude." Likewise, Pardessus, *Servitudes*, Vol. I, p. 262.

<sup>44</sup> (1895), 108 Cal. 95, 41 Pac. 31, 49 Am. St. Rep. 64, 30 L. R. A. 820.

<sup>45</sup> Thus, if a contact existing while the stream flows full, is broken in the dry season because the water disappears before it reaches his land, the winter contact is of no avail for a suit upon the summer flow. *Gutierrez v. Wege* (1905), 145 Cal. 730, 735, 79 Pac. 449. "His land did not at those times border upon any stream." *Duckworth v. Watsonville Co.* (1907), 150 Cal. 520, 89 Pac. 338. See also *Clarke v. City of Providence* (1888), R. I., 15 Atl. 763.

<sup>46</sup> "Il en est de même lorsqu'un héritage est séparé du cours d'eau par un chemin public. On ne peut pas dire que ce fonds borde une eau courante, et moins encore que l'eau traverse le fonds; donc on n'est pas dans les termes de l'article 644." Laurent, *Principes de Droit Civil*, Tome 7, p. 327.

<sup>47</sup> "Pour pouvoir user des eaux dans les termes de l'art. 644, il faut être riverain du cours d'eau, et la riveraineté doit exister au jour où on prétend exercer le droit d'usage: Aubry et Rau, t. 3, sec. 246, texte 3;—si donc le cours d'eau s'est déplacé, les riverains anciens perdent tout droit d'usage sur les eaux; Cass. 11 fév. 1813 (S. chr. S. 15, 1. 100).—D'ailleurs la riveraineté doit être immédiate, il suffit qu'un fonds soit séparé de la rivière par un chemin public pour que le droit d'usage disparaisse: Toulouse 26 nov. 1832 (S. 33, 2. 572),—Bordeaux 2 juin 1840 (S. 40, 2. 355),—Angers, 28 janv. 1847 (S. 47, 2. 256; D. 47. 4. 445),—

This seems the weight of opinion in the civil law authorities.<sup>48</sup> In the common law authorities the point relative to a highway seems not yet settled.<sup>49</sup>

(b) Where the boundary changes on the exterior side of the tract, by a shift inward causing a contraction of area, the key

Dijon 23 janv. 1867 (S. 67, 2. 259; P. 67, 2. 929 D. 67, 2. 216)—Pau 15 juin 1886 (D. 87, 2. 65).—Duranton, t. 5, n. 209; Daviel, t. 2, n. 598; Garnier, t. 3, n. 771; Demolombe, t. 11, n. 139; Aubry et Rau, t. 3, § 246, texte et note 8; Picard, t. 1, p. 344—*contra*: Proudhon, *Domaine public*, t. 1, n. 105. v. cep: T. 4, n. 1421.—Toutefois nous verrons que cette règle est tempérée par le pouvoir qui appartient à l'administration de délivrer des autorisations de prise d'eau au profit de fonds non riverains." Labori, *Repertoire de Droit Français*, Vol. 5, p. 412. See, accord, Labori, V, 413, 428; Bertin, *Code des Irrigations*, p. 298 (in Villeroy et Mullen *Manuel de l'irrigateur*); Picard, *Traité des Eaux* (2d ed.), Vol. I, p. 350.

<sup>48</sup> A contrary opinion by Proudhon is, however, cited by Labori, *supra*, and the opinion of Pardessus is: "Especially, if it is not separated from the watercourse except by a public highway, and if the administration should permit him to conduct over the highway an aqueduct such as enables him to use the waters, we should be inclined to believe that he could enjoy the same advantage as the immediate riparian owner." Pardessus, *Servitudes*, I, 261. The original in French reads as follows: "Toutefois s'il n'était séparé du cours d'eau que par un chemin public, et si l'administration lui permettoit de construire sous ce chemin un aqueduc propre à lui faciliter l'usage des eaux, nous serions portés à croire qu'il doit jouir du même avantage que le riverain immédiat. (Capolla, tr. 2, cap. 56, n. 4—Golijs, quaest. 21, n. 15)." Pardessus, *Traité de Servitudes*, Vol. I, pp. 261-262.

This passage is explained, with apparent justification, by Picard as resting upon a grant from the highway administration, wherein it must grant rights against other riparian owners. Picard's comment is: "Pardessus has indicated the contrary doctrine for lands that are not separated from the river except by a public highway, when the administration authorizes the passage of the waters over the highway. But his opinion has not prevailed, or at least, those who have supported it have considered the right to take the water as derived from a concession granted by the riparian administration, and not as flowing direct from article 644 (Code Napoleon); we shall examine later on the question whether the riparian owners can thus transmit their rights to third persons." Picard (2d ed.), I, 350. The French original reads as follows: "Pardessus a enseigné la doctrine contraire pour les heritages qui ne sont séparés de la rivière que par un chemin public, lorsque l'Administration autorise le passage des eaux sous ce chemin (tome 1<sup>er</sup>, n<sup>o</sup> 105.) Mais son opinion n'a point prevalu, ou du moins ceux qui s'y sont ralliés ont considéré le droit de prise d'eau comme derivant d'une cession consentie par l'administration riveraine et non comme decoulant directement de l'art. 644; nous examinerons plus loin la question de savoir si les riverains peuvent ainsi transmettre leurs droits à des tiers." Picard, *Traité des Eaux*, Vol. I, (2d ed.), p. 350.

<sup>49</sup> Authorities (none directly in point however) have been found for either view. See Wiel, *Water Rights in the Western States* (3d ed.), § 768. In California the nearest seems to be *Half Moon Bay Co. v. Cowell* (1916), 173 Cal. 543, 547, 160 Pac. 675, saying: "It is unnecessary to determine whether or not a conveyance of land to a railroad for a right of way would cut off riparian rights from land thereby wholly severed from the stream."

test—the condition at time of attempted use—is again conclusive. The parts cast out by contraction cease, while so severed, to be riparian by both the civil law and the common law authorities, since the detached parcels cease to have contact or access of their own to the river while so separated from it.

This occurs when parts of a tract are sold off or are divided by will without including any of the bank of the stream in the transfer. In California it is the rule of *Anaheim Water Company v. Fuller*.<sup>50</sup> In the French authorities there is full accord to the same effect.<sup>51</sup> The detachment of parts shifts the exterior boundary inward, with a resulting contraction of the riparian area so long as the condition continues.

Stipulations in the detaching transfer often occur, whereby the grantor or testator stipulates that the detached parcels may continue to have water. This binds the parties to the transaction and their privies, without doubt; and such stipulation is, moreover, implied from the existence of ditches and other works at the time of transfer, whereby the use upon the detached parcels was being carried on.<sup>52</sup> But the great weight of the French authorities is that such stipulation can operate only between the parties and privies to it, and is without force against outstanding claimants upon the stream. The leading expression is that of Pardessus, cited and reviewed by all the subsequent commentators.<sup>53</sup> A contrary opinion which had been expressed by a prominent work was formally withdrawn in its later editions, with the following expressions: "When a proprietor of a riparian estate has alienated a part, his right to use the water is reduced proportionately to his estate, and the purchaser with whom he has dealt cannot claim a quantity of water corresponding to this difference, assuming, of

---

<sup>50</sup> (1907), 150 Cal. 327, 88 Pac. 978, 11 L. R. A. (N. S.) 1062.

<sup>51</sup> Authorities below quoted.

<sup>52</sup> "When a property on a river bank is divided among several joint or common owners, in such manner that the portions which are assigned or sold to any of them and which now form other small properties, do not bound on the stream, they preserve nevertheless, one with another, their right to the water in the same proportion that they had before the division, even when nothing should have been stipulated on this subject." Escriche, "Agua."

<sup>53</sup> Daviel, II, 590; III, 770; Proudhon, IV, 1259; Demolombe, XI, 153, 154; Pardessus, I, 106; Bertin, Code des Irrigations, no. 78; Aubry et Rau (5th ed.), Vol. III, p. 83.

Picard, *Traité des Eaux* (2d ed.), Vol. I, pp. 371-373, contra, cites other authorities, pro and con, but the weight of authority is with Pardessus.

course, that the parcel sold does not at any point touch the stream. It matters little that works may have been erected prior to the alienation, for the distribution of the water over the whole property, or that a clause of the deed of sale may have expressly reserved to the purchaser the use of a part of the water. The vendor cannot, in the absence of a prescription, create by his own act, to the prejudice of lower riparian owners, a right to a greater quantity of water than that which is proper for the land of which he remains the owner. The proposition formulated in the text seems to us to be the logical and necessary corollary of that which is announced in the preceding paragraph, (that the matter must be determined by the state of things at the time the claim of use is made.) Therefore we have deemed it our duty on this point to modify the opinion put forth in our preceding editions. A similar solution applies to the case of the division of the riparian estate as the result of a partition."<sup>54</sup>

In the Supreme Court of California the binding force of the stipulation between the parties has been repeatedly recognized, in harmony with the rules elsewhere. The Court has not yet had occasion to pass upon its inapplicability to third persons; its force as to third persons has been up to the present reserved for consideration.<sup>55</sup> Upon the inapplicability of the stipulation to bind third persons who are strangers to it, the leading common law

---

<sup>54</sup> "Inversement, lorsque le propriétaire d'un fonds riverain en a aliéné une partie, son droit à l'usage des eaux se trouve réduit proportionnellement à son héritage, sans que l'acheteur avec lequel il a traité puisse réclamer l'attribution d'une quantité d'eau correspondant à cette différence, à supposer, bien entendu, que la parcelle vendue ne confine par aucun point au cours d'eau. Il importerait peu que des travaux eussent été exécutés antérieurement à l'aliénation, pour distribuer l'eau sur l'ensemble de la propriété, ou qu'une clause de l'acte de vente eût expressément réservé à l'acheteur la jouissance d'une partie de cette eau. En effet, le vendeur ne peut, en dehors du cas de la prescription, se créer par son propre fait au préjudice des riverains inférieurs, un droit à une quantité d'eau plus considérable que celle qui est due à l'héritage dont il est propriétaire. La proposition formulée au texte nous paraît être le corollaire logique et nécessaire de celle qui est énoncée à l'alinéa précédent. Aussi, avons nous cru devoir, sur ce point, modifier l'opinion émise dans nos précédentes éditions. Voy. en ce sens: Pardessus, I, 106, Bertin, op. cit., 78. Laurent, VII, 275. Baudry-Lacantinerie et Chauveau, 852. Voy. en sens contraire: Daviel, II, 590, et III, 770. Proudhon, IV, 1259. Demolombe, XI, 153 et 154. Besançon, 4 juillet 1840, sous Req., S. 43, 1, 319. Une solution analogue s'appliquerait au cas de la divisions d'un fonds riverain par l'effet d'un partage." Aubry et Rau (5th ed.), Vol. III, p. 83.

<sup>55</sup> Copeland v. Fairview etc., Co. (1913), 165 Cal. 148, 161, 131 Pac. 119.



authority, *Stockport W. W. v. Potter*,<sup>56</sup> is in accord with the French authority.

(c) The same key test—"the situation at time of attempted use"—solves the converse question, where adjoining land has been added to bank land. A leading French work reviews the authorities as follows: "To solve the question what is contemplated by riparian land, one must look to the state of things at the time the claim of use is made. Consequently, when the proprietor of a riparian estate has increased it by new acquisitions, or the owner of an estate separated from the flow of a stream has acquired the intervening land joining this estate with another one bordering on the stream, the right to use the water may be claimed for all the parcels thus united into one."<sup>57</sup>

The rulings upon this in the Supreme Court of California, will, on examination, be found to be in substantial harmony with this principle. In *Anaheim Union Water Company v. Fuller*, the latest of these California cases, the union of ownership between the bank land and the adjacent land was not made until after suit had been brought and was therefore held not to avail.<sup>58</sup> The ruling is upon the subsequent time of the union relative to the time of suit, and therefore in holding that the subsequent union was of no avail the decision is in agreement with the principle named. The key test that the position of the boundary at time of suit is what governs, is thereby re-enforced. This being the test applied by the case, it supports without difficulty the outward shifting of the riparian boundary if it is already existent at the time of suit, and the principle requires no more. It is, therefore, for the same reason, authority against an earlier expression which had made use of very general words against the principle.<sup>59</sup>

---

<sup>56</sup> (1864), 3 H. & C. 300.

<sup>57</sup> Pour résoudre la question de savoir ce qu'il faut entendre par fonds riverains, on doit s'attacher à l'état des lieux tel qu'il existe au moment ou est formée la réclamation tendant à l'usage des eaux. Ainsi, lorsque le propriétaire d'un fonds riverain l'a augmenté par de nouvelles acquisitions, ou que le propriétaire d'un fonds sépare du cours d'eau en a opéré la jonction avec un fonds qui y touche, le droit à l'usage des eaux peut être réclame pour l'ensemble des héritages ainsi réunis en un seul." Aubry et Rau, *Droit Civil Français* (5th ed.), Vol. III, p. 82; citing Daviel II, 586, Bertin *Code des Irrigations*, nos 70 à 74. Demolombe, XI, 152. Laurent, VII, 274. Huc, IV, 279 et suiv. Baudry-Lacantinerie et Chauveau, 852. Limoges, 9 août 1838, D., 39, 2, 37. Voy. en sens contraire: Duranton, V, 235; Proudhon, op. cit., IV, 1426; Du Caurroy, Bonnier et Roustain, II, 271.

<sup>58</sup> *Supra*, n. 50.

<sup>59</sup> *Boehmer v. Big Rock Irrigation Dist.* (1897), 117 Cal. 19, 27, 48 Pac. 908.

This earlier case, being based exclusively upon a passage in *Lux v. Haggin*<sup>60</sup> which does not support it, stands without the support it relied upon, on the one hand, and is inconsistent with the key test which formed the basis of the later decision (*Anaheim Union Water Company v. Fuller*) on the other hand. The State of California authorities, therefore, seem to be more in harmony with the principle that the key test is the position of the boundary *at the time the controversy arises*, than opposed to it.<sup>61</sup> Both *Lux v. Haggin* and *Anaheim Union Water Company v. Fuller* turned upon this test, and made it the basis of their decision, and both cases are therefore in substantial harmony with the principle found likewise laid down in the Civil law commentaries.<sup>62</sup>

A very interesting exposition of both phases of this question of inward and outward shifting of the exterior riparian boundary is given by Laurent, professor at University of Ghent, and a commentator of recognized high character and authority. "The riparian land increases or diminishes; do these changes exercise an influence on the right of the proprietors? If the land is increased by new acquisitions, does the right to the waters extend in proportion to the new needs? The question is controverted, but there is not, in our view, serious reason for doubt. The law gives a right to the riparian proprietors, without limiting it to the extent of their estates at such or such time; whereas if it were thought that the riparian proprietor could not use the waters

---

<sup>60</sup> (1886), 69 Cal. 255, 424, 425, 4 Pac. 919, 10 Pac. 674.

<sup>61</sup> The misinterpretation of *Lux v. Haggin* made in *Boehmer v. Big Rock Irrigation District* consisted in overlooking that the expression in *Lux v. Haggin* (like that in *Anaheim Water Co. v. Fuller*) referred to the *time* of the extension. The time element was involved in *Lux v. Haggin* by the circumstances that numerous parcels were involved and some of them had become united before and some after the hostile water appropriation by defendant had been made. The Court ruled that unions made subsequent to the appropriation would not affect the defendant, the Court assuming that "the rights of these parties are to be determined by the decision of the question: Did the plaintiffs acquire a right to their lands *before* the defendant appropriated the waters?" etc. 69 Cal. 255, 430, 4 Pac. 919, 10 Pac. 674. This time element is what the *Boehmer* case overlooked.

The time element was the basis of both *Lux v. Haggin* and *Anaheim Union Water Co. v. Fuller*. Both are strong authority that the *Boehmer* case overlooked an essential element, and are both in support of the principle that the key test is the time element, namely, position of the boundary *at the time the controversy arises* (or the time of attempted use, or the time of suit, according as the connection may require discrimination in the time element.)

<sup>62</sup> See preceding note.

except for the estate which he possessed at a given period, it would become necessary to fix that period even if, as Daviel says, one would have to go back to the deluge. To say the truth, the law could not take count of these things, for it is not by reason of the extent of their estates that the law gives the right to the riparian proprietors, it is simply by reason of their position. There are, however, excellent minds which think that the quantity of water formerly assigned to a riparian owner may not be increased to the prejudice of other riparian owners. . . . Proudhon gives an explanation that has an appearance of juristic quality: The servitude of use, he says, which is established for a particular tract may not be extended to other tracts. For this argument to have any weight, it is necessary first to show that the right of the riparian owners is a right of servitude. That is not all; it would be necessary to prove further for what tract it was established, which in turn leads us back to the difficulty in chief, as to the point of time to which one should go back. For the simple reason that the law does not fix any point of time, it must be concluded that none exists. We are again brought back to the proposition that in case of a dispute between the riparian owners over the volume of water that each has a right to take, it is necessary to consider the state of the riparian properties at the moment of the litigation. The decisions of the Courts are to this effect."<sup>63</sup> In the same vein is the exposition of the principle by

---

<sup>63</sup> "Le fonds riverain augmente ou il diminue; ces changements exercent-ils une influence sur le droit des propriétaires? Si le fonds est augmenté par de nouvelles acquisitions, le droit aux eaux s'étend-il dans la mesure des nouveaux besoins? La question est controversée, mais il n'y a pas, à notre avis, de motif sérieux de douter. La loi donne un droit aux riverains, sans le limiter à l'étendue de leurs héritages, à telle ou telle époque; or si, dans sa pensée, le riverain n'avait pu se servir des eaux que pour l'héritage, qu'il possédait à une époque donnée, elle aurait dû déterminer cette époque, sinon, comme le dit Daviel, il faudrait remonter jusqu'au déluge. A vrai dire, elle ne pouvait pas tenir compte de ces changements, car ce n'est pas à raison de l'étendue des héritages qu'elle accord un droit aux propriétaires, c'est uniquement à raison de leur position. Il y a cependant d'excellents esprits qui pensent que le quantité d'eau primitivement attribuée à un riverain ne peut pas augmenter au préjudice des autres riverains. (Ducaurroy, Bonnier et Roustain, t. II, p. 182, no. 271.) Si l'on demandait à Ducaurroy quel est cette époque primitive. Il faudrait évidemment un texte pour la déterminer. Proudhon donne un motif juridique en apparence: la servitude d'usage, dit-il, qui n'est établie que pour un fonds ne peut être étendue à d'autres. (Proudhon, *Du Domaine Public*, t. IV, n. 1426.) Pour que l'argument eût quelque valeur, il faudrait d'abord démontrer que le droit des riverains est un droit de servitude. Cela ne suffirait pas; il faudrait prouver pour quel fonds elle a été établie, ce qui nous ramène à

Labori: "There arises the question whether, in the case where a riparian owner makes acquisition of a tract adjoining his riparian land, he might invoke the right which article 644 confers, not only in what concerns the original riparian land, but also in what concerns the land formerly non-contiguous. It has been explained as a servitude which may pass from one tract to another. But this conception appears inexact: the provision of article 644 is not connected with the theory of servitudes; it deals with a rule of substantive law which all the riparian owners may invoke without having to distinguish according to the extensiveness of their property. Besides, properties have no personality in the French law, and the diverse origin of the lands joined under one hand is without influence so long as they are the property of but a single holder."<sup>64</sup> The "Code of Irrigation" by Bertin reads: "The riparian proprietor may use the running waters that border upon or cross his property, not only for the irrigation of lands to the advantage of which the right happens to be devoted by possession and use, but also for the irrigation of lands of which he makes subsequent acquisition, even though these lands were not previously irrigated. In vain might one contend against this, that a proprietor might, by successive acquisition, absorb to the detriment of lower lands a considerable volume of water. Article 644 of the Civil Code accords to each riparian proprietor in a

---

la difficulté capitale de l'époque à laquelle on devrait remonter. Par cela seul que la loi ne fixe pas d'époque, il faut décider qu'il n'y en a pas. Ce qui revient à dire qu'en cas de contestation entre les riverains sur le volume d'eau que chacun a le droit de prendre, il faut considérer l'état des propriétés riverains au moment du litige. (Aubry et Rau, t. III, 47 et note 10 et les auteurs qui y sont cités.) La jurisprudence est en ce sens. (Limoges, 9 août 1838, (Dalloz, au mot servitude, n. 210.))" Laurent, Vol. 7, pp. 329-330.

<sup>64</sup> "Cependant on s'est demandé si dans le cas où un riverain faisait acquisition d'un fonds jouxtant le fonds riverain, il pouvait invoquer le droit que lui confère l'art. 644, non seulement en ce qui concerne le fonds riverain des l'origine, mais encore en ce qui concerne le fonds primitivement non contigu. On a prétendu qu'il y avait là une servitude qui pouvait passer d'un fonds à une autre: Proudhon, *Domaine public*, t. 4, n. 1426; Duranton, t. 4, 235; Ducaurroy, *Bonnier et Roustain*, t. 2, n. 271.—Mais cette conception paraît inexacte: la disposition de l'art. 644 ne se rattache pas à la théorie des servitudes; il s'agit d'un attribut de la souveraineté que tous riverains peuvent invoquer sans qu'il y ait à distinguer suivant l'étendu de leurs propriétés. D'autre part les propriétés n'ont en France aucune personnalité, et l'origine diverse des terrains réunis dans une même main est sans influence du moment qu'ils sont d'un seul tenant. D'ailleurs le pouvoir que l'art. 645 confie aux juges permet d'empêcher les abus: Daviel, t. n. 587; Bertin, *Code des Irrigations*, t. 25, n. 70; Demolombe, t. 11, n. 152; Aubry et Rau, t. 3, § 246; texte et n. 8; Picard, t. 1, p. 352.—Comp: Limoges 9 août 1838 (D. 39. 2. 38.)" Labori, *Repertoire de Droit Français*, Vol. 5, p. 413.

general and absolute manner, the right to use running waters for the irrigation of their properties without distinguishing new properties from old ones. Besides, how would the distinction be made so as to determine the portion of the property that is to benefit by the irrigation? Moreover, article 645 gives to the tribunals the right to repress any abuse of enjoyment if it comes to manifest itself. The judges should, in this case, in facilitating the attempts at improvement made by the proprietor who has increased his holding, accord all possible guarantees to the other riparian owners. On its part, the authority can, by public administrative regulations, confine the enjoyment of the water to just limits. For the reasons that we will indicate hereafter, the land which has profited by irrigation as a result of its re-union with the lands riparian to the watercourse, may cease to have the right of enjoying the waters if it ceases to belong to the same proprietor. It is the same with respect to the parcel of the land having profited by irrigation and which, for any reason, should become detached therefrom by the proprietor of the land riparian to the stream."<sup>65</sup>

The various arguments that are made in opposition to the rule are declared by Picard, another recent authority and member of the Council of State, to be unsound and easily refuted. Discussing them he says: "Nevertheless controversies have arisen

---

<sup>65</sup> "Le riverain peut user des eaux courantes qui bordent ou traversent sa propriété, non-seulement pour l'irrigation des fonds, au profit desquels ce droit se trouve consacré par la possession et l'usage, mais encore pour l'irrigation des terrains dont il fait l'acquisition ultérieurement, et encore que ces terrains ne fussent pas antérieurement arrosés. Vainement opposerait-on qu'un propriétaire pourrait, par des acquisitions successives, absorber, au détriment des héritages inférieurs, un volume d'eau considérable. L'art. 644 du Code Civil accorde à chaque riverain, d'une manière générale et absolue, le droit d'user des eaux courantes pour l'irrigation de leurs propriétés sans distinguer les propriétés nouvelles des anciennes. D'ailleurs, comment établir la distinction et déterminer la portion de propriété qui devrait bénéficier de l'irrigation? Au surplus, l'art. 645 donne aux tribunaux le droit de réprimer les abus de jouissance s'il vient à s'en manifester. (V. n. 151 et suivants.) Les juges devront, dans ce cas, en facilitant les tentatives d'amélioration faites par le propriétaire qui a agrandi son domaine, accorder toutes les garanties possibles aux autres riverains. (Daviel, des Cours d'eau, t. II, n. 587.) De son côté, l'autorité peut, par des règlements d'administration publique, restreindre dans de justes limites la jouissance d'eau. (V. n. 159 et suivants.) Par les raisons que nous venons d'indiquer, le fonds qui a profité de l'irrigation au moyen de sa réunion avec le fonds riverains du cours d'eau, droit cesser d'avoir la jouissance des eaux, s'il cesse d'appartenir au même propriétaire. Il en serait de même de la parcelle du fonds ayant profité de l'irrigation et qui, par un motif quelconque, viendrait à en être détachée par le propriétaire du terrain riverain du cours d'eau." Bertin, Code des Irrigations, in Villeroy et Mullen, "Manuel de L'Irrigateur," pp. 301-302.

upon the question whether, in case of attachment of a non-riparian tract to lands riparian, that tract might share in the benefit of the use of the waters. The authors who have held the negative have rested upon two principal arguments. For one they have made point that as a general rule a servitude acquired for one tract cannot be extended to another tract, even when these two tracts should become reunited so as to form a single tract. Again, they have invoked the liability to abuse of enterprises to which certain riparian owners might lend themselves, as a result of successive acquisitions, and the prejudice that might result therefrom as much for the co-riparian owners as for the lower riparian owners. These arguments are easily refuted. The first rests upon an inexact assimilation between conventional servitudes and the rights of use conferred upon riparian owners by article 644 (Code Napoleon); the second disregards the powers with which article 645 has invested the tribunals, for the repression of abusive enterprises and the equitable apportionment of the waters among those interested. Moreover, as Daviel observes, private property is subject to a continual process of subdivision and recomposition. The reunion of a nonriparian parcel to a riparian parcel often consists in only a return to a prior state of things, modified by a temporary separation; it is then nothing but a restitution to the riparian owner of rights of which he was deprived during a period more or less long. Under the system that we are criticizing, to what time would one have to resort to determine the respective rights of the riparian owners? Would one be confined to a period of thirty years? All this would be impossible from a legal standpoint, as it would be impossible from a practical standpoint. It is, consequently, with reason that today the doctrine does not contest with the riparian owner the right to conduct the waters upon the lands adjoining his lands, without separation of contiguity. No distinction can besides be made between the case of the reunion resulting from the acquisition of riparian land by the riparian proprietor, and that which results from the acquisition of riparian lands by the proprietor of non-riparian land. In the latter case, the proprietor who is not riparian becomes so, and reaps all the attributes of riparianity.”<sup>66</sup>

---

<sup>66</sup> “Cependant des controverses se sont élevées sur la question de savoir si, en cas d’adjonction d’une terre non riveraine au fonds riverain, cette terre pouvait participer au bénéfice de l’usage des eaux. Les auteurs

That the common law is in harmony with the Civil and French law in favor of the union of the adjacent lands is stated by American works,<sup>67</sup> and appears further from the work of an English commentator upon the common law, of high standing, who reviews both phases of shifting exterior riparian boundary as follows: "Riparian rights are attached to riparian land only so long as it remains riparian. Therefore, if riparian property becomes divided between two owners, so that one portion no longer

qui ont soutenu la negative se sont appuyes sur deux arguments principaux. D'une part, ils ont fait valoir qu'en règle générale la servitude acquise a un fonds ne peut être étendu à un autre fonds, quand même ces deux fonds viendraient à être réunis pour n'en former qu'un seul. D'autre part, ils ont invoqué le caractère abusif des entreprises auxquelles certains riverains pourraient se livrer sur les cours d'eau, à la suite d'acquisitions successives, et le préjudice qui en résulterait tant pour les riverains que pour les riverains inférieures. Ces arguments sont faciles à refuter. Le premier repose sur une assimilation inexacte entre les servitudes conventionnelles et les droits d'usages conférés aux riverains par l'art. 644; le second fait abstraction des pouvoirs dont l'art. 645 a investi les tribunaux, pour la repression des entreprises abusives et l'équitable repartition des eaux entre les intéressés. Au surplus, comme le fait observer Daviel (T. II, n. 587), la propriété privée est soumise à un mouvement perpétuel de morcellement et de recomposition. La réunion d'une terre non riverains à un fonds riverain ne constitue souvent que le retour à un état de choses antérieur, modifié par une disjonction temporaire; elle ne fait alors que restituer au riverain des droits dont il avait pu être dépouillé pendant un délai plus ou moins long. Dans le système que nous critiquons, à quelle époque faudrait-il se reporter pour la détermination des droits respectifs des riverains? Remonterait-on à la date de la promulgation du Code Civil? Se bornerait-on à une période trentenaire? Tout cela serait impossible au point de vue du droit, comme au point de vue de la pratique. C'est donc avec raison qu'aujourd'hui la doctrine ne conteste plus au riverain la faculté de conduire les eaux sur les terres adjointes à son fonds, sans solution de continuité (Daviel, tome II, n. 587;—Demolombe, Traité des servitudes, tome 1er, n° 152.) Aucune distinction ne doit d'ailleurs être faite entre le cas où la réunion résulte de l'acquisition de la terre non riveraine par le propriétaire riverain et celui où elle résulte de l'acquisition du fonds riverain par le propriétaire de la terre non riveraine. Dans ce dernier cas, le propriétaire qui n'était pas riverain le devient et recueille tous les attributs de la riveraineté." Picard, Traité des Eaux, Vol. 1, (2d ed.), p. 358.

<sup>67</sup> "Enlargement of Area by Subsequent Acquisition. Subject always to the limitations that the use of water by one riparian owner must be reasonable with respect to the rights of other riparian owners, it would seem on principle that all land forming a continuous tract belonging to the owner of the bank of the stream should be considered as riparian, however far back from the bank it may extend, at least to the limit of the watershed of the stream, and this notwithstanding the fact that the land constituting such tract may have been acquired by such owner in separate parcels at different times." Long on Irrigation (2d. ed.), pp. 97-98.

"One who owns land bordering on a stream may enlarge the area of his 'riparian' property by the acquisition of lands adjacent to those first owned, although not themselves contiguous to the stream." 40 Cyc. 559. Accord, Wiel, Water Rights in the Western States (3d ed.), §§ 769-772.

adjoins the stream, that portion no longer retains any riparian rights. Conversely, land which adjoins riparian land may become itself riparian by becoming united therewith in ownership."<sup>68</sup> A request having been made to Mr. Salmond for the authorities upon which this is based, we feel fortunate in being able to add his reply, which is here appended.<sup>69</sup>

14. This paper can but touch the main points of the law of waters, and must leave much of the field for some other opportunity. We have already extended this paper to considerable length as it is, and will close with a word upon the following topics, namely, (a) grants of water by riparian owners; (b) prescription in favor of nonriparian owners; (c) condemnation of rights of way by nonriparian owners upon payment of compensation, and (d) public administrative regulation.

(a) Grants by riparian owners are, in the French authorities, freely allowed to bind the parties thereto and their privies. "Can the riparian proprietor grant the use of the water either to other riparian owners or to proprietors who possess no land whatever upon the river? It is everywhere admitted that the riparian owners may make, among themselves, such agreements as they choose concerning the use of the waters. There is not the shadow

---

<sup>68</sup> Salmond, "Law of Torts," (4th ed.), p. 294.

<sup>69</sup> "Solicitor-General's Office, Wellington, 19th Dec., 1916. I am in receipt of your letter of the 6th November with reference to the passage contained in my book on the Law of Torts to the effect that land which adjoins riparian land may become itself riparian by becoming united therewith in ownership: Third Edition, p. 267, Fourth Edition, p. 294. In reply I have to say that I am not aware of any direct authority in support of this proposition. It seems to me, however, sufficiently clear in principle. You will notice that I merely say 'may become itself riparian' and not 'will become.' The statement is to be read in conjunction with the discussion contained in the next section under the head of 'Abstraction for nonriparian uses,' paragraph 4, p. 298, Fourth Edition. As there indicated the boundary of riparian land does not necessarily extend to the whole of an area which belongs to the same owner and any part of which is in contact with the stream. A single ownership or occupation is clearly necessary but is not sufficient. The area and configuration of the land is to be taken into account in determining whether it is riparian. If, however, in point of area and configuration it would otherwise be riparian land I cannot think that any portion of it will be held to be deprived of riparian rights because of the fact that at some previous period it had been separated in ownership or occupation from the land immediately adjoining the banks. The case of *McCartney v. Londonderry etc. Railway Company* [1904] A. C. 301, is so far as it goes an authority for the view taken by me. The passage in Lord MacNaghten's Judgment of page 311 as to the riparian rights of a railway line is not consistent with the supposition that a former severance of ownership would deprive land of riparian rights. I trust that these somewhat cursory remarks may be of some use to you in this matter. Yours very sincerely, (Signed) John Salmond."



of a doubt upon this."<sup>70</sup> "The agreements constitute regulations upon the water whose validity is not contestable."<sup>71</sup> As put by another authority: "If there is any stipulation it is to be followed; the deed makes the law of the parties."<sup>72</sup> The common law puts the proposition thus in *Whitehead v. Parks*:<sup>73</sup> "In the case of *Northam v. Hurley*,<sup>74</sup> it was settled that where rights to water are created under a deed, the Court cannot take into consideration the rights which the parties would have had as riparian proprietors or otherwise; but the nature and extent of their interest must be regulated wholly by the deed." The same has been often applied in California.<sup>75</sup>

But upon third persons the grant or stipulation has no binding force. As in the common law, so by the weight of authority in the French and Civil law (although in both systems there are minority opinions) the grant of water by a riparian owner to a nonriparian owner is binding only between the parties and privies to the grant, and is not good against outstanding riparian owners on the stream.<sup>76</sup> "The administration, following a certain advisory opinion of the Council of State, does not consider diversions of water as transferable except by virtue of a decree declaring a public use, which changes the right of the other riparian owners into a right to an indemnity."<sup>77</sup> "Rights to take water are not today considered transferable except by virtue of a decree declaring a public use, which overthrows the rights of the co-riparian owner

<sup>70</sup> "Les riverains peuvent-ils concéder l'usage des eaux soit à d'autres riverains, soit à des propriétaires qui ne possèdent aucun fonds sur la rive? Tout le monde admet que les riverains peuvent faire entre eux telles conventions qu'ils veulent concernant l'usage des eaux. (Aubry et Rau, t. III, p. 51 et n<sup>o</sup>. 26. Duranton, t. V, p. 206 n<sup>o</sup> 221. Demolombe, t. XI, p. 216 n<sup>o</sup> 174. Arrêt de rejet du 2 août 1827 (Dalloz, au mot Eaux, n<sup>o</sup> 559, 1<sup>o</sup>.) Cela ne fait pas l'ombre d'un doute." Laurent, *Principes de Droit Civil*, Tome 7, pp. 355-356.

<sup>71</sup> "Les conventions constituent des règlements d'eau dont la validité n'est pas contestable." Labori, *Repertoire de Droit Français*, Vol. 5, p. 414.

<sup>72</sup> "S'il y a quelque convention, elle doit être suivie; l'act fait la loi des parties." Pardessus, *Servitudes*, I, 264-265.

<sup>73</sup> (1858), 2 H. & N. 870, 157 Eng. Rep. R. 358, Pollock C. B.

<sup>74</sup> (1853), 1 El. & Bl. 665, 22 L. J. Q. B. 183, 17 Jur. 672, 118 Eng. Rep. R. 586.

<sup>75</sup> The leading case is *Yocco v. Conroy* (1894), 104 Cal. 468, 471, 38 Pac. 107.

<sup>76</sup> Wiel, *Water Rights in the Western States* (3d ed.), §§ 847-851; § 1027.

<sup>77</sup> "L'administration, à la suite d'un certain nombre d'avis du Conseil d'Etat, ne considère les prises d'eau comme transmissibles qu'en vertu d'un décret déclaratif d'utilité publique, qui transforme le droit des autres riverains en un droit à une indemnité." Labori, *Repertoire de Droit Français*, Vol. 5, p. 413.

and lower users and changes them into a right to an indemnity."<sup>78</sup> "It is useless to say that any one may renounce the rights which the law gives him; when a right is given in the quality of riparian owner, this right may not be transferred to those who are not riparian. The quality of being riparian does not transfer itself by means of the agreement to those who do not possess anything along the river, hence the rights attached to the quality of being riparian are equally nontransferable to others as well as to riparian owners."<sup>79</sup> This is in accord with the weight of Civil law authority.<sup>80</sup> The same ruling has already been noted where stipulations for water accompany detachment of part of a riparian tract.

The authorities under the common law hold to the same ineffectuality of grants by a riparian owner as against outstanding riparian owners.<sup>81</sup>

(b) As at common law, so in the French and Civil law, prescription, as has already been said, can run between riparian

<sup>78</sup> "Les droits de prise d'eau ne sont considérés aujourd'hui comme transmissibles qu'en vertu d'un décret déclaratif d'utilité publique, qui fait tomber les droits du riverain et des usagers in férieurs et les transforme en droit à indemnité." Picard, *Traité des Eaux*, Vol. I (2d ed.), p. 370.

<sup>79</sup> "Vainement dit—on que chacun peut renoncer aux droits que la loi lui donne; quand un droit est attaché à la qualité de riverain, ce droit ne peut pas être cédé à ceux qui ne sont pas riverains. La qualité de riverain ne se transporte pas par voie de convention à ceux qui ne possèdent rien sur la rive, donc les droits attachés à la qualité de riverain sont également incessibles à d'autres qu'aux riverains." Laurent, *Principes de Droit Civil*, Tome 7, p. 356.

<sup>80</sup> Daviel, II, 588; Demante, Cours, II, 495, lis. IV; Demolombe, XI, 155. C. pr. Req., 11 avril, 1837, Sir. 37, 1, 493; In the Spanish and Mexican law: "A riparian owner cannot, without the consent of the other riparian owners interested, concede to a third party, to the injury of the former, the power to take water in the same current or on his estate." Hall's Mexican Law, § 1399, which is a translation of Eschriche "Aguas," § 4. Again, "If a proprietor does not make use of his shares, the water not utilized remains with the common store for the common use of other proprietors. This idea is so rooted in the spirit of the populace that the administrators of the water assured us they had never been troubled with such a question." Aymard, *Spanish Irr.*, pp. 36, 37.

This goes back as far as the Digest of Justinian, even though, as already noted, no law of riparian rights as such had been developed therein. In the Digest it is provided: "For the validity of the concession for the right of taking water onto his property, it is necessary to have the consent, not only of those in whose lands the water rises, but, further, of those who have the right of the use of this water—that is to say, of those who have a right of servitude upon this water . . . And, in general, it is necessary to have the consent of all those who have a right upon the stream or upon the land where the water rises." Digest, Lib. 39, title 3, § 8.

<sup>81</sup> *California Pastoral etc. Co. v. Madera etc Co.* (1914), 167 Cal. 78, 86, 138 Pac. 718; *Duckworth v. Watsonville Water and Light Co.* (1910), 158 Cal. 206, 217, 110 Pac. 927; *Same v. Same* (1907), 150 Cal. 520, 89

owners among themselves, and it may be added that the same is open to nonriparian owners. "By means of a prescription, when it has become complete, the right of use may be acquired by a nonriparian owner; there does not seem reason to confine its effects to the benefit of riparian owners." . . . "The prescriptive period is thirty years, commencing with the completion of the works or of the last act making up the violation of the right—provided there is no natural interruption—or even a civil interruption by bringing suit."<sup>82</sup>

Thirty years being the prescriptive period, there is also a statute of limitations of one year upon possessory actions. The relation of this to prescription the present writer has not worked out.<sup>83</sup>

(c) Supplementary to the riparian system for waters, France has facilitated the acquisition of rights of way for conducting the water, by a special system of condemnation with payment of compensation to the owner of the land to be crossed by the conduit. This consists in an exercise of the power of eminent domain under two specific acts always referred to in connection with the riparian law, namely, the Act of 1845 and the Act of 1847. Subordinate to the Code Napoleon with its riparian doctrine for waters, these acts provide for obtaining rights of way and rights for dams against non-consenting parties, by paying compensation after a formal hearing.

Pac. 338; Gould v. Eaton (1897), 117 Cal. 539, 543, 49 Pac. 577, 38 L. R. A. 181; Heilbron v. Seventy Six Land Co. (1889), 80 Cal. 189, 194, 22 Pac. 62; Heilbron v. Fowler etc. Co. (1888), 75 Cal. 426, 432, 17 Pac. 535, 7 Am. St. Rep. 183; Anaheim etc. W. Co. v. Semi Tropic Co. (1883), 64 Cal. 185, 30 Pac. 623. Among the English cases, Stockport Water Works Co. v. Potter (1864), 3 H. & C., 300, 10 Jur. (N. S.) 1005, 10 L. T. 748, 159 Eng. Rep. R. 545; Omerod v. Todmorden etc. Mill Co. (1883), L. R. 11 Q. B. 155; Swindon Water Works Co. v. Wilts. etc. Canal Co. (1875), L. R. 7 E. & I. App. Cas. 697.

<sup>82</sup> "Au moyen de la prescription, elle qu'elle vient d'être décrite, le droit d'usage peut être acquis même par un nonriverain; il ne semble pas qu'il y ait de raisons pour en restreindre les effets our profit de riverains." . . . "La durée de la prescription serait de trente années a compter de l'achèvement des travaux ou du dernier acte contradiction—sans qu'une interruption naturelle—ou même civile par l'exercice de l'action en justice—se soit produite." Labori, Répertoire de Droit Français, Vol. 5, p. 415.

<sup>83</sup> "Article 23 of the Code of Civil Procedure is explicit: Possessory actions can not be received unless filed within the year of the controversy. The Court of Cassation has particularly decided that a new controversy can not revive the year's delay, and that the construction of works whose existence goes back to more than a year is not capable of starting a possessory action." The original passage in French is as follows: "L'art. 23 du Code de Procedure Civile est formel: les actions possessoires ne sont recevables qu'autant qu'elles ont été formées dans l'année du trouble.

We cannot here go further into this, as we are already near any proper limit of this paper. All the French writers agree that these acts are supplementary only, and do not derogate from the sections of the Code Napoleon nor from the rights of riparian owners thereunder in the *water*.<sup>84</sup> Fuller mention of these acts has been made elsewhere.<sup>85</sup>

(d) Finally, it would not do to close without a word concerning the French public administrative system applied to waters, because of its similarity to our recently created Water Commissions. While our commissions give attention only to nonriparian uses as yet (owing to the prevalent disbelief in the riparian system), the French administration gives its attention to riparian owners and nonriparian owners alike.

We have, in the West (including California since 1913), water commissions and administrative systems to whom application for uses must be made under various circumstances, who issue or refuse permits, and otherwise supervise use of streams; and the universal rule with us has been that the administrative officers cannot authorize destruction of vested rights, and here again the French law is a counterpart. There the administrative officers regulate construction of works and supervise use of all stream claimants, riparian owners especially, a point to which the California law has not yet reached. But the administrative officers are restricted to police powers, to facilitate the free passage of the water, and prevent damage from the waters when they are retained at too great a height by dams; to regulate the height of dams, etc.; but not to interfere with private rights. Their actions, so far as they be simply devoted to the field of private

La Cour de cassation a décidé notamment qu'un trouble nouveau ne pouvait faire revivre le délai annal (C. C. Civ., 27 juin 1864, Mesnel c. Briant) et que la reconstruction d'ouvrages dont l'existence remontait à plus d'une année n'était point susceptible de motiver une action possessoire. (C. C., Req., 26 février 1839, ville de Sainte-Marie c. Pommes.)" Picard, *Traité des Eaux* (2d ed.), Vol. I, p. 485.

Compare: "It is understood that those lower and bordering properties which shall have anticipated the utilization by a year and a day, cannot be deprived of it by another, although it may be found situated higher upon the course of the water; and that no casual employment can interrupt or attack rights previously acquired over the same waters in a lower district." Articles 7 and 10, General Water Law of Spain of 1879.

<sup>84</sup> Aubry et Rau, *Droit Civil* (4th ed.), Vol. III, p. 22; Labori, *Repetoire de Droit Français*, Vol. V, 457; Picard, *Traité des Eaux* (2d ed.), Vol. I, p. 361.

<sup>85</sup> Wiel, *Water Rights in the Western States* (3d ed.), § 614.

rights, are void.<sup>86</sup> "The permits of the police do not create any right to the profit of the users who have applied for and obtained them. The rights of third persons are and remain always expressly reserved."<sup>87</sup> "As we have indicated at various places, while the administration remains always freed of responsibility in the matter, their measures for the regulation of works leave unaffected the private rights which third persons may assert in opposition to the permittees and vice-versa.<sup>88</sup> Nor have the administrative authorities jurisdiction to determine such controversies between permittees, or between permittees and other owners. They are decided in the courts only.<sup>89</sup> Such is the like ruling by the weight of authority in America as well. We discuss it in America upon constitutional grounds; but the similar result in France implies that it is not an arbitrary position, but one resting in the general requirements of property rights.

#### IV.

#### CONCLUSION.

The riparian law of watercourses has developed in California in a comparatively short time—mainly since 1886 when the decision in *Lux v. Haggin*<sup>90</sup> settled the existence of the doctrine in this State against the attacks made upon it. Since then it is evident that the thought and attention of the Supreme Court of California have unfolded the subject in a manner that stands comparison with the ablest jurists of a country as liberal as France, from which the doctrine came, and where it has been worked over for more than a century. The comparison fails seldom (if at all) to confirm its conclusions.

The foreign books quoted in this paper are several of them on the shelves of the Law Library of the University of California,

---

<sup>86</sup> *Droit Civile Français*, by Aubry et Rau (4th ed.), Vol. III, pp. 60, 61. See also, Smith's "Italian Irrigation." Vol. II, p. 256.

<sup>87</sup> "Les permissions de police ne créent aucun droit au profit des usagers qui les ont sollicitées et obtenues. Les droits des tiers sont et demeurent toujours expressément réservés." Picard, *Traité des Eaux*, (2d. ed.), Vol. I, p. 501.

<sup>88</sup> "Mais, comme nous l'avons indiqué à diverses reprises, si l'Administration doit toujours demeurer indemne, les dispositions qu'elle arrête pour la réglementation des ouvrages laissent in tact les droits privés que les tiers auraient à faire valoir vis-à-vis des permissionnaires et réciproquement." Picard, *Traité des Eaux* (2d. ed.), Vol. II, p. 59.

<sup>89</sup> Labori, V. 417-418; Laurent, VII, 394-395, and authorities supra.

<sup>90</sup> (1886), 69 Cal. 255, 4 Pac. 919, 10 Pac. 674.

in Boalt Hall, Berkeley, and therefore available to those who might be interested in further investigation. There is plenty of room for that. This paper is at best but an introduction. If followed up, we believe this line of inquiry will be sure to prove a mine of new and useful material in the law of waters and comparative law, not leaving out the administrative topics that are crowding upon us. In order, however, not to leave this paper incomplete regarding the material used, we quote here, in the footnotes, the passages in their original, which we have in the body of the paper presented in translation.<sup>91</sup>

*Samuel C. Wiel.*

San Francisco, 1918.

---

<sup>91</sup> The writer extends acknowledgement to Professor Orrin K. McMurray, for his interest and assistance in gathering the authorities from French authors herein used.