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## Unregistered Water Appropriations at Law and in Equity

*"There has not, of course, been any conscious intentional abrogation or rejection of equity on the part of the courts. The tendency, however, has plainly and steadily been toward . . . ignoring, forgetting, or suppression of equitable notions." 1 Pomroy, Equity, 4th ed., page xii.*

PERSONS desiring to appropriate natural streams for domestic use, irrigation, water power and the like are required by current practice to make application to a public administrative office for a permit.<sup>1</sup> The statute prescribing this requirement is usually worded in the imperative,<sup>2</sup> occasionally with criminal provision against departure.<sup>3</sup>

Yet cases disclose themselves of uses arising without application for a permit. Four courts have had to pass upon their status, and are equally divided in result. The situation is the subject of the present paper.

1. An unregistered use can hardly have escape at law. The wording of the bar is too universal, or (in the expression coming from the French) it includes "all the world". The statute speaks of "no right", "no person", "not otherwise". It forbids exception.

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<sup>1</sup> The administrative office is conducted usually by the State Engineer. In California it is conducted by the Division of Water Rights in the Department of Public Works, formerly the State Water Commission.

<sup>2</sup> The California Water Commission Act, Statutes 1913, Chapter 586, § 1c, as amended in 1923, says: "No right to appropriate or use water which is subject to the provisions of this act shall be initiated or acquired by any person, firm, association, or corporation except upon compliance with the provisions of this act." The Utah statute enacts: ". . . rights to the use of the unappropriated public water in the state may be acquired by appropriation, in the manner hereinafter provided, and not otherwise." Chapter 67, Laws of Utah, 1919, § 41.

<sup>3</sup> ". . . wilfully take, divert or appropriate any of the water of this state, or the use of such water, for any purpose, without first complying with all the provisions of this act, shall be deemed guilty of a misdemeanor." Texas Stat. 1913, 33rd Legislature, H. B. 37.

The Supreme Court of Wyoming in a recent case accordingly rules: "Until such an application be approved, no appropriation can be lawfully made."<sup>4</sup> Use without a permit secures no water that may not be intercepted by a later permittee above (or be required to cease in favor of a later permittee below).

In the Supreme Court of Utah a recent ruling is to the same effect. The first user was an Indian homesteader, using the water on his farm, when a water company, presumably knowing this, made application for the water to the State Engineer. The Indian settler (doubtless being moved by this to visit a lawyer and there learning of the filing law) filed an application for the water a few weeks after his opponent. The Supreme Court of Utah says by Gideon, C. J., apparently the official opinion:

"We are of the opinion, and so hold that the Legislature of Utah, by the act of 1903, intended to limit the method of acquiring any rights to the unappropriated public waters of the state to the method or means prescribed in that act. The rights attempted to be acquired by respondent Hoopiania *by actually diverting the water and applying the same to a beneficial use must therefore be held to be subject to the right of appellant who will acquire the first right by completing its appropriation initiated by its application filed in the state engineer's office on April 25, 1918.*"<sup>5</sup>

Among the expressions used in the opinion and concurring opinion are: "the language is apparently susceptible of but one construction"; "what else could it (the Legislature) have done or what more could it have said than has been done and said through all this course of legislation down to the present time?"; "plain, emphatic, unequivocal language"; "the truth is the statute is so plain from the beginning to the end of the whole course of procedure that there is no occasion for resorting to rules of construction."

The Wyoming and Utah rulings adhere to the legislative enactment, and on the "law" side they are necessarily right.

2. Suppose, then, a Wyoming or Utah farmer, desiring to bring water to his place from a spring, employs an agent to obtain a permit. The agent reports that he has obtained it. Upon completion of the

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<sup>4</sup> Wyoming Ranch Co. v. Hammond etc. Co. (1925) — Wyo. —, 236 Pac. 764, 770.

<sup>5</sup> Deseret Co. v. Hoopiania (1925) — Utah —, 239 Pac. 479. (Italics inserted.)

In Montana a statute enacted that anyone appropriating water became bound by decrees theretofore rendered on the stream between others. The court says: "The method prescribed must be held to be exclusive." Anaconda Nat. Bank v. Johnson (1926) — Mont. —, 244 Pac. 141, 143-144.

diversion the agent discloses that his report is false; that he has fraudulently had the permit issued to himself; and demands to be bought out. In a suit for the water from the fraudulent permittee, the latter walks forward and backward in the court and says: "Look at the statute." It clearly says that the plaintiff has no title, since he has no administrative permit. "No right to appropriate or use water shall be initiated or acquired except upon permit," and "Rights may be acquired in the manner in this statute provided *and not otherwise*."

One would expect every court to protect the plaintiff. Allowing, therefore, as we surely must, that there are contingencies in which the result of the statute will not be allowed to stand, a new question at once arises. We have to make the inquiry how extensive is this class. A door is opened into a room whose contents must be explored.

This obvious denial of the benefit of the statute to the fraudulent permittee certainly does not come by interpretation. What the Supreme Courts of Wyoming and Utah have said of that is too clearly true. The statute says every person and every occasion; its universality is ruthless and without mercy. The defeat of the fraudulent permittee must come in some other way than interpretation, and historical analogies may indicate where the explanation lies.

The historical examples of statutes of universal wording are the Statute of Enrollments which said that no conveyance shall be made or take effect unless enrolled, and the Statute of Frauds which said the same unless in writing. Their wording is equally absolute; there are the same universal words carrying down the good and the bad indiscriminately.<sup>6</sup> Their relation to a case of fraud had to be examined very soon after they were enacted; and in dealing with the Statute of Frauds the Lord Chancellor said: "In cases of fraud, equity should relieve *even against* the words of the Statute."<sup>7</sup> He gave his relief "even against" those words; and the course of equity was much the same with respect to registration acts. As an instance, an act of Parliament voided unregistered sales of ships. The seller's endorsement was necessary before registry, and in order to defraud his vendee the seller became a bankrupt, disabling himself from endorsing and therefore from recording. Lord Eldon said: "Next,

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<sup>6</sup> The Statute of Enrollments, 27 Henry VIII: "No conveyance by way of bargain and sale shall be made or take effect unless enrolled." The Statute of Frauds, 29 Chas. II: "No leases, estates or interests shall be assigned, granted or surrendered unless it be by deed or note in writing" (§ 3). . . . "no action shall be brought . . . upon any contract or sale of lands, tenements, or hereditaments or any interest in or concerning them . . . unless the agreement upon which said action shall be brought . . . shall be in writing." Ibid, § 4.

<sup>7</sup> *Montacute v. Maxwell* (1719) 1 Peere Wms. 618, 24 Eng. Rep. R. 235.

as to the power of a court of equity, my opinion is, that, if this is a case of fraud, . . . this case is to be decided with reference to *what courts of equity are in the habit of doing in cases where instruments are rendered null by statute.*" He referred to the Statute of Frauds and Statute of Enrollments. If, on a hearing, it was proved to be fraud, he declared that he would decree for the vendee notwithstanding the Statute of Registry.<sup>8</sup>

This "habit" of equity became imbedded in the subject, to act "even against" the words of the statute where fraud appeared. It is familiar that the chancellors explained that this was not usurpation; that they did not literally stop the operation of the statute, nor was there any resort to construction or interpretation. The direct wording of the statute was acknowledged. The chancellors therefore allowed the fraudulent party to receive the property, but they imposed a trust upon him to return it. The statute being too inclusive to leave room for relief by interpretation, fraudulent cases were "taken out" of the statute by the power of the chancellor to control the person of the fraudulent party, and compel him to make restitution even in contravention of the statute. Upon this foundation of defeating fraud, a *dispensing power* of equity to mitigate the universality of statutes became part of our institutions.<sup>9</sup>

3. Less in degree than fraud, but like in nature, was reliance upon the Statute of Frauds after performance of a contract had been set in motion. While cases of part performance are not held in equity to involve fraud in the inception, they are held to involve "near fraud" (or, as Professor Pomeroy calls it, "equitable fraud") in the conclusion; and a like principle existed upon which equity took cases out of the recording acts. One expression is made to say: "A buys an estate from B, and forgets to register his purchase-deed. If C, with express or implied *notice of this*, buys the estate for a full price, and gets his deed registered this is *fraudulent*, because he assists B to injure A."<sup>10</sup>

We therefore, by trailing fraud, find ourselves at the realization

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<sup>8</sup> *Mastaer v. Gillespie* (1805) 11 Ves. Jr. 622, 32 Eng. Rep. R. 1230. See also, *Mullet v. Halfpenny*, *Precedents in Chancery*, 404, and 2 Vern. 373.

<sup>9</sup> 27 C. J. 340.

<sup>10</sup> Lord Mansfield in 1 Burrows. 474. While he was a common law judge, Professor Kidd comments upon the use of this quotation by saying: "Lord Mansfield seems to me to have been a better equity judge than most of the chancellors. I should let footnote ten stand as it is. There is a very serious danger that in interpreting statutes the court will overlook equity. If a perfectly absurd case arises, such as the one you mentioned, the court would, of course, know what to do with it. But in the meantime a series of precedents may grow up which would never have been made had the courts realized the inherent powers and duties of a court of equity."

that the theory of notice is based upon closing the door to fraud. *Taking property with notice that absence of registry is the only defect in another's right to it, is historically related to bad faith.* It is expounded as follows by authority upon the subject.

"Another illustration of the principle may be seen in the doctrine established by courts of equity concerning the effect of the registry or recording acts. . . . In giving this effect to notice, the courts of equity do not assume to nullify the provisions of the recording act; they admit that a subsequent grantee has, by means of his record, obtained the complete title, which cannot be directly set aside nor disturbed; *but they say that the notice of the prior conveyance makes it unconscientious for him to hold and enjoy that legal title for his own benefit*, and they impose upon his conscience the obligation of holding it for the benefit of the prior unrecorded grantee.

"This principle, which I have attempted to explain and illustrate in the preceding paragraph, and which underlies a very large part of the remedial action of equity, was stated with his usual clearness and accuracy by Lord Westbury in the following passage: . . . Although Lord Westbury here speaks only of a case where the equitable rights of one person arise from the fraud of another who has thereby obtained the legal estate, *yet the principle applies, whatever be the grounds and occasion of the equitable interests and claims which are asserted in opposition to the one having the legal title.*"<sup>11</sup>

It is a corollary that when a person is visibly in possession of property it is notice; and possession of ditches and a water system is possession of the water right so far as the intangible nature of that right will permit.<sup>12</sup>

"But where one has actually diverted water, and is using it, the right to its use may, by analogy, be likened unto the doctrine that one purchasing real estate must take notice of the rights of those in possession, *notwithstanding the recording statutes.* Water diverted from a stream naturally diminishes the volume. One seeking to acquire the right to the use of water must take notice of the amount available and visible, and it must be conclusively presumed that he inquires into the extent of the supply from which the water is to be drawn, and how that supply has been diminished by others whose rights are prior in time."<sup>13</sup>

4. The inquiry must therefore be carried into: How much of the aspect of a new instance of this class has the permit act? A

<sup>11</sup> Pomeroy, Equity (4th ed.) §§ 430, 431. The foundation precedent is *Le Neve v. Le Neve* (1747) Amb. 436, 3 Atk. 646, 1 Ves. Sr. 64, 27 Eng. Rep. R. 893.

<sup>12</sup> *Bear Gulch Co. v. Walsh* (1912) 198 Fed. 351 (Mont.); *Conger v. Weaver* (1856) 6 Cal. 548.

<sup>13</sup> *Morris v. Bean* (1906) 146 Fed. 423. (Cir. Ct.)

party who has constructed works upon a stream is visibly in possession; the notice thereby afforded is the same as in occupation of land, so that a later applicant for the same water necessarily has notice that he is asking a permit for what another is using.

Do the considerations which the Wyoming and Utah cases note, make the force of this different here than in other established connections?

The considerations with which they mainly deal are two. One is a consideration of private interests between the individuals; the other is a consideration of the state's interest in regulation and discipline; and to these the discussion must proceed.

5. The private consideration is the pressure for giving property owners the protection of a record, as a benefit to individual security—certainty and finality for private titles. This, we may confidently say, presents no distinction from the ground of the Statute of Frauds and Recording Acts. In California, when the general Recording Acts were first under judicial consideration the court said:

"The recording act of this state was designed to establish one system of notices, by which every one would be able to ascertain what incumbrances existed upon real estate, and by affording a convenient depository for liens and conveyances of land (to which all might have access) substitute the constructive notice, thus established by operation of law, *in place of all other kinds of notice.*"<sup>14</sup>

The attitude very closely expresses the Wyoming-Utah arguments upon private considerations under the permit acts, that the statute closes the door to every consideration except registry. But in the next volume of the California reports Chief Justice Murray, who wrote the foregoing opinion, yielded to notice its equity effect. "So far," he said, "as the opinion of the court in *Mesick vs. Sunderland* militates against this position it is erroneous, and cannot be sustained on principle or authority."<sup>15</sup> It became admitted that recording acts cannot be made to remove all doubts of title and retain justice.<sup>16</sup> The realization that the theory of notice is an "*exception established by the courts to the registration act*" became permanently accepted.<sup>17</sup>

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<sup>14</sup> *Mesick v. Sunderland* (1856) 6 Cal. 297.

<sup>15</sup> *Stafford v. Lick* (1857) 7 Cal. 490.

<sup>16</sup> See, *Dutton v. Warschauer* (1863) 21 Cal. 628; *Lastrade v. Barth* (1862) 19 Cal. 660.

<sup>17</sup> *Smith v. Yale* (1866) 31 Cal. 180.

When we look to the Statute of Frauds in California we find this history repeated. Part performance came very early before the pioneer Supreme Court of California, and the view which advanced to take control was:

"We therefore decide that an unwritten contract for the sale of land is void *by the express declaration* of the Statute of Frauds, and a court of equity has no power to enforce a specific performance of it." And much more to this effect.<sup>18</sup>

But inevitably this was soon overruled.<sup>19</sup> In so doing Judge Field said: "We do not feel any embarrassment in departing from its conclusions", and "*there would be a great defect in the administration of justice* if, under the circumstances, the defendants [setting up the part performance as an equitable defense] could have no relief." Ever since, this has been sustained. "That part performance takes a contract *out of the operation* of the Statute of Frauds is too well settled in this country and in England to require further comment."<sup>20</sup>

The argument upon private considerations—certainty and finality of private titles—is thus one whose inconclusiveness the Statute of Frauds and Recording Acts represent. The preamble of the Statute of Frauds says its requirement of a paper is enacted "for the prevention of many fraudulent practices which are commonly endeavored to be upheld by perjury and subornation of perjury." The resort to considerations of private security under the permits acts says in much the same words that to rely upon possession and use rather than upon paper is "the bungling antiquated method", attended with "evils and opportunities for perjury and other forms of abuse"; that "it cannot be denied that a system whereby a complete record is required of rights and titles to the use of water is infinitely superior to a system, if it can be called a system, in which the evidence of title rests entirely in parol and depends solely upon the memory of man." The argument thus repeats in close parallel the preamble of the Statute of Frauds, from which equity has long had to relieve because the superiority of record over possession is more easily assumed than practice can sustain.

Writing, recording, surveying, and every other precaution have to give way to possession at times. The Wyoming-Utah rule recognizes this so far as the record cannot be perfect and must fail when the controversy is between two claimants neither of whom has a

<sup>18</sup> *Abel v. Calderwood* (1854) 4 Cal. 90, by Judge Heydenfeldt.

<sup>19</sup> *Arguello v. Edinger* (1858) 10 Cal. 150.

<sup>20</sup> *McCarger v. Rood* (1873) 47 Cal. 141.

permit.<sup>21</sup> Many other cases also must lie in parol, as estoppels, prescriptions, and the like. If paper invariably controlled over possession "the confusion of lines and titles that would follow would cause consternation in many communities. Indeed, the mischiefs that must follow would be simply incalculable, and the visitation of the surveyor might well be set down as a great public calamity." This was said by Judge Cooley, speaking of the establishment of boundary lines by referring only to records.<sup>22</sup>

The Water Codes' assumption of absolutism of a record as a panacea for titles, as also in the very similar Torrens Acts for land, represents the recurrent belief in ritual as the sure road to individual happiness, almost ecclesiastical in its hardness. It is always tempted to go to harsh extremes, for a beatitude beyond reach.<sup>23</sup>

6. It seems, therefore, that there is no distinction from other recording acts so far as private interests are the consideration, and no reason why the equity doctrine of notice should be less applicable under the permit acts; and the Supreme Court of Idaho has, by a line of precedents, established for Idaho that it is applicable. This court holds that, although one has never applied for an administrative permit, still his right is superior to any right that a subsequent appro-

<sup>21</sup> "We thus have the situation of two rival claimants to the use of the same water, one of which is clearly prior to the other in time of diversion and use, and neither of whom has complied with the formalities of the statute relating to appropriations. . . . Upon plain principles of reason and justice we conclude that as between the parties to this appeal the city may not object to the claim of the cemetery association for failure to comply with the statute when it is in precisely the same predicament with reference to its own claim. The claims of the parties must therefore be determined by the rule that as between appropriators the one first in time shall be first in right. The claim of the cemetery association is clearly prior in point of time and therefore superior and prior in right to the claim of the city, and the decree should have been entered accordingly." *Mt. Olivet Cemetery Ass'n v. Salt Lake City* (1925) — Utah —, 235 Pac. 876 at 879-880. Compare *Chicago etc. Co. v. McPhileamey* (1911) 19 Wyo. 425, 118 Pac. 682; *Converse v. Portsmouth Co.* (1922) 281 Fed. 981 (Va.).

A vast array of like authorities may be found in the pioneer water rulings on the public domain. The appropriations were made without Federal authority. Priority of possession was upheld until either party should secure a patent from the United States. In the meantime both parties stood alike and the absence of a patent was of no bearing. Wiel, *Water Rights*, 3d ed., Chap. 5. "Neither can allege that the other is a trespasser against the Government without at the same time invalidating his own claim." *Basey v. Gallagher* (1874) 87 U. S. (20 Wall.) 670, 22 L. Ed. 452, per Mr. Justice Field.

Criminal provision for diversion without permit may have an unexpected result. If the principle of *pari delicto* be thereby imported, neither party could have relief, and the result would be that the up-stream claimant would get the water. Instead of compelling registration, the insertion of criminality may be but putting a premium on the higher geographical elevations.

<sup>22</sup> Concurring in *Diehl v. Zanger* (1879) 39 Mich. 601. See 4 California Law Review, 293.

<sup>23</sup> See Professor Kidd's article in 7 California Law Review, 75.



priator can procure, even though the latter secures the administrative's permit to appropriate and divert the water of the stream.<sup>24</sup> The like ruling was made by Judge Whitson of the Federal Court for Montana, construing Wyoming law.<sup>25</sup> Some other analogous rulings may be noted.<sup>26</sup> These rulings preceded the recent Wyoming and Utah decisions heretofore mentioned.

The Idaho cases have been disposed to reach the result by a line of interpretation. Before the permit system a statute provided for posting a notice on the ground. This was construed to aim at enabling the diversion, when completed, to *relate back* to the notice, thus protecting the appropriation from opposition intervening during construction work; and posting notice was therefore irrelevant to a diversion completed without opposition.<sup>27</sup> Idaho interprets the permit statute<sup>28</sup> as substituting in this doctrine the application for a permit in place of posting a notice, restricting the permit act by interpretation to fixing an exclusive method by which an appropriator of water "*should be entitled to the benefit of the doctrine of relation.*"<sup>29</sup>

We have to repeat our admission, with the Supreme Courts of Wyoming and Utah, that this was not the statute's intention. The statute declares itself to be universal, without regard to the state or

<sup>24</sup> *Basinger v. Taylor* (1922) 36 Idaho, 591, 211 Pac. 1085; *Rabido v. Furey* (1920) 33 Idaho, 56, 190 Pac. 73, 74, dictum; *Sarret v. Hunter* (1919) 32 Idaho, 536, 185 Pac. 1072; *Reno v. Richards* (1918) 32 Idaho, 1, 178 Pac. 81; *Newport Co. v. Kellogg* (1918) 31 Idaho, 574, 174 Pac. 603; *Washington Co. v. Goodrich* (1915) 29 Idaho, 26, 147 Pac. 1073; *Crane Co. v. Snake Co.* (1913) 24 Idaho, 63, 77, 133 Pac. 655; *Furey v. Taylor* (1912) 22 Idaho, 605, 127 Pac. 676; *Young v. Regan* (1911) 20 Idaho, 275, 118 Pac. 499; *Neilson v. Parker* (1911) 19 Idaho, 727, 115 Pac. 488.

<sup>25</sup> *Morris v. Bean* (1906) 146 Fed. 423; 159 Fed. 651.

<sup>26</sup> *California*. Query what is the significance of the following passage: "Under the law in force prior to the adoption of this act (Civ. Code, §§ 1410-1422) no permission was required for the appropriation of waters of the State. All that was required to create a preferential right to such water was to actually appropriate it to some authorized beneficial use, OR to make a water filing to be followed with due diligence by an actual user. *The obvious aim of the Water Commission Act was not to abolish*, but to regulate and administer this privilege." *Tulare Water Co. v. State Water Com. of California* (1921) 187 Cal. 533, 536, 202 Pac. 874 (*Italics inserted*). Mr. Sharp says in 25 *California Jurisprudence*, 1018: "The courts have already held this underlying assumption unconstitutional, and recently have decided that the attempt to regulate appropriation was no more than regulatory of the former method, notwithstanding the contention of the state that thereby the State Water Commission would be shorn of power."

*U. S. Land Office*. On application for canal rights of way on public land, between rival applications the first in activity, and not the first in making filings will be approved. *De Weese v. Henry Inv. Co.* (1910) 30 Land Dec. 27; *Anderson v. Spence* (1909) 38 Land Dec. 338.

<sup>27</sup> *Dripp v. Allison Co.* (1919) 45 Cal. App. 95, 187 Pac. 448, citing cases.

<sup>28</sup> "All rights to divert and use the waters of this state for a beneficial purpose shall hereafter be acquired and confirmed under the provisions of this chapter."

<sup>29</sup> *Reno v. Richards*, 32 Idaho, 1, 178 Pac. 81, 84; *Crane Falls Co. v. Snake Co.*, *supra*, n. 24.

progress of the work, money expended, duress, fraud, or other cause. Its ruthless universality defies statutory interpretation, and prepares us by the same token for the necessary alternative. We are in the presence of the compulsion long operating in equity to decide, as the early Chancellor said, "*even against the words of the statute*"; the dispensing power in equity jurisdiction to mitigate the rigors of such "exceptionless" statutes by "taking cases out" of them.

It may be easier to say with the Idaho court that the legislature did not mean what it said. But the legislature may reply by rewording the statute more explicitly, and interpretation is thus an insecure foundation.

So far as justice between individuals is the consideration it is, therefore, secured only by accepting the Idaho and Whitson result in preference to the Wyoming or Utah result, but it is secured legitimately and permanently on the equity principle alone—the one that has satisfied many generations before, and has a deeper significance than statutory interpretation—the principle of defeating fraud or its associates.

It may be assumed that the administrative office in all jurisdictions will use any discretion that is reposed in it to refuse a permit having that object. But beside the insecurity of leaving that to discretion, it must be noted that discretion to choose is not always given to the administrative office by the statute, and where it is not given, "water jumping" will be unremedied. The administrative office will have to enforce a reversal of the use, the same as the courts.<sup>30</sup> The first in use may even have applied for a permit, and yet the Wyoming-Utah rule would let a second applicant prevail if the first application had a flaw; or the same may happen under a first permit actually issued, if the permit have a flaw.<sup>31</sup> Or when the first in use under a good permit, though breaking its provisions for diligence yet completes his use before any other claim arises, he will forfeit the water to the latter under the Wyoming and Utah ruling.<sup>32</sup>

The Utah case denies that there is anything wrong in these results. It says: "there has been no clamor to the contrary among the masses of the people, for if there had been their senators and representatives

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<sup>30</sup> "The State Engineer would, in such a case, be powerless to protect the original user . . ." Mr. Justice Frick, dissenting in *Deseret Co. v. Hoopiana*, — *Utah* —, 239 Pac. 479.

<sup>31</sup> In Idaho, on the other hand, appropriation under a faulty administrative license will, when completed, prevail against a later claimant, as an appropriation by actual diversion without following the statutes. *Basinger v. Taylor*, 36 Idaho, 591, 211 Pac. 1085, 1086-1087.

<sup>32</sup> In Idaho, on the other hand, after permit is obtained, failure to comply with it carries only the effect that priority vests from use instead of from the permit. *Washington Co. v. Goodrich*, *supra*, n. 24.

in the legislature would long ago have demanded a change in the wording of the statute, and the change would have been made." If we wish to support the equity rule we shall have several answers. The people using without permit are country people not likely to know the statute; the silence would be due to being ignorant that it was the law until this decision spoke, and the decision also may be slow in filtering into the consciousness of country people. Then again, the failure to demand any amendment in Idaho would equally show popular approval of the Idaho rule, neutralizing the argument by proving opposites.

It would also seem that if there be an injustice it would be unwelcome although the remonstrances be few. If acting on notice is allied to fraud, such as has moved courts of equity to take such cases out of other registration acts, it may be suggested that its frequency or infrequency does not affect its standing.

7. There remains, nevertheless, the second consideration noted in the Wyoming and Utah cases, and it is one which the foregoing discussion has not affected. This consideration is of the State's interest—its right to secure its administrative regulation and discipline. We must begin here, as before, with recognizing that the first step of the Wyoming and Utah rulings is necessarily correct.

The recognition before was that the wording of the statute is universal, pronouncing against the unlicensed use without exception because of any cause. The recognition now must be further that the State's right to so enact is undeniable under the settled principle that it has constitutional power to regulate the subject. The Water Codes have created the administrative office primarily for a governmental object. Private considerations of title-security are in fact secondary; the water-permit acts are primarily concerned with insuring the State's authority. Issuing or refusing permits is part of a governmental plan to make the will of the State control private action, and the equity rule does not reach the length of dictating governmental policy. If the State is intent upon this even to the extreme of abandoning an unlicensed user to fraud, it would be a defect of policy rather than law, to which the equity rule does not extend. Whenever, therefore, the State appears to assert its governmental interest, there can be no effect given to notice which the statute has not recognized.

This premise of the Wyoming-Utah rulings being accepted, it is a capital matter, however, that the State has not appeared in the litigation with which the decisions under review are dealing. The State has a right to enact a suit to abate the unpermitted use if the

State desires, for which the California Act makes due provision.<sup>33</sup> The Supreme Court of the United States has recently noted in an analogous situation that there may be "a substantial property right" in waters "which may be enjoyed *until* taken away in the appropriate exercise of a paramount authority."<sup>34</sup> And in such an abatement or forfeiture suit by the State, discipline would not require more than to allow the unregistered party, as an alternative to forfeiture, to cure the record by applying for a permit with the priority that his use originally had.

The regulatory interest of the State seems therefore accounted for without justifying the Wyoming-Utah result. The controversy under review is between individuals, in which the rights of the State can not be prejudiced nor be at issue.

This conclusion rests upon accepting that the State's remedy against unlicensed use is by suit to abate it.<sup>35</sup> If we may assume that the State has the alternative remedy of using physical force to uphold its authority, we will not achieve much advantage. We would be adverting to the police power and saying that the second user is applying this police power on behalf of the State. This, in order to reach the Wyoming-Utah result, would entail assumptions that the State may authorize a person not a public officer to exercise the police power, and that the permit act may be construed as making such a delegation. But there is much difficulty in allowing these assumptions. The cases under review certainly do not suggest them, nor attempt to proceed along this line. And while the present writer has not searched this possibility very far elsewhere, such authority

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<sup>33</sup> "The diversion or use of water subject to the provisions of this act other than as it is in this act authorized is hereby declared to be a trespass, and the state water commission is hereby authorized to institute in the superior court in and for any county wherein such diversion or use is attempted appropriate action to have such trespass enjoined." California Water Commission Act, § 38.

<sup>34</sup> "There is an essential difference between a substantial property right which may be enjoyed *until taken away in the appropriate exercise of a paramount authority*, and an uncertain and contingent privilege which may not be allowed at all." U. S. v. River Rouge Improvement Co. (1926) 46 Sup. Ct. Rep. 144, 147.

<sup>35</sup> "There can be no forfeiture of property unless the forfeiture is judicially determined. Even where under statute the forfeiture takes place at the time of the commission of the offense, it is not fully and completely operative and effective and the title of the state or the government is not perfected until there has been a judicial determination. A statute or ordinance which allows the seizure and confiscation of a person's property by ministerial officers without inquiry before a court or an opportunity of being heard in his own defense is a violation of the elementary principles of law and the constitution. Where the forfeiture is to a private person, the necessity that it shall be judicially granted to him is all the more apparent." 25 C. J. 1172-1173.

as is at hand indicates that the police power cannot be delegated to individuals, and can only be exercised by public officers. There seems applicable the statement that complainants have no standing to vindicate the rights of the public, but only to protect and enforce their own rights. Redress for public grievances must be sought by public agents, not by private intervention.<sup>36</sup>

While, therefore, the State's authority seems hardly disputable, the consideration of it in private contests seems validly rejected by a previous Utah case.<sup>37</sup> In the later Utah case the first user either had to abandon his place, or, more probably, had to buy the water back from the second. The latter, who took it from him, was a water company. The decision's result must have been the creation of a money payment for failing to register, paid not to the State but to a private adversary.

8. The conclusions submitted therefore are:

(a) The unlicensed use is at the mercy of the State, which may enact a suit by officers of the State to abate it.

(b) In all controversies between private persons in which the State is not a party of record, the unlicensed use's liability to be

<sup>36</sup> Telephone Co. v. Railroad Com. (1913) 174 Mich. 219, 140 N. W. 496 at 498. "The police power of the State cannot be delegated to private persons," it is said in 12 C. J. 911. It may be, perhaps, analogous to forcible abatement of a public nuisance, concerning which it is declared: "A private person may not of his own notion, abate a strictly public nuisance under any circumstances. *The offense is one which can only be reached and prevented by indictment or by proceedings in equity at the suit of the people by its proper officers.*" Wood on Nuisances, § 732. In order for a private person to abate it he must be suffering a special damage such as would support an action for damages to himself independently of its public illegality (Ibid, § 733; 29 Cyc. 1215).

<sup>37</sup> Skeen v. Warren Irr. Co. (1913) 42 Utah, 602, 132 Pac. 1162, saying: "If it be assumed that the state could interfere with the proposed use of the water [without a permit], yet plaintiffs cannot, for that reason, insist upon championing the rights of the state, whatever they may be, in this action. Upon the other hand, it is not at all likely that the state will interfere with any one who is or is attempting to apply water which is running to waste to a lawful use or purpose, even though it could do so. But it is time enough to consider that question *when the state attempts to interfere.*" This was a suit by a stockholder to enjoin corporate expenditures as being incurred upon invalid water rights.

Compare Keru Co. v. U. S. (1921) 257 U. S. 147, 66 L. Ed. 175, 42 Sup. Ct. Rep. 60, 63; Spokane Co. v. Washington Co. (1910) 219 U. S. 166, 55 L. Ed. 159, 31 Sup. Ct. Rep. 182; Union etc. Co. v. U. S. (1919) 257 Fed. 635; U. S. v. Whitney (1910) 176 Fed. 593 (Idaho); Administrative Ruling (1918) 46 Land Dec. 418; Allen v. Denver Power etc. Co. (1909) 38 Land Dec. 207, 211; Kern River Company (1909) 38 Land Dec. 302; Application of T. A. Sullivan (1910) 38 Land Dec. 493; Hatfield v. Peoples W. Co. (1914) 25 Cal. App. 502, 144 Pac. 300; Same v. Same, 25 Cal. App. 711, 145 Pac. 164; O'Riley v. Noxon (1910) 49 Colo. 362, 113

abated by the State is irrelevant. Such private controversies are determinable upon private considerations only, for which the equity doctrine of notice exists.

(c) The Idaho-Whitson rule is defective in obscuring the right of the State to an action of its own, but it is sounder than the Wyoming-Utah rule for controversies between private persons,—the situation with which these cases were dealing. Both rules alike are defective in leaving the principles of equity jurisdiction undiscussed.

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Pac. 486; *Hurst v. Idaho etc. Co.* (1921) 34 Idaho 342, 202 Pac. 1068 at 1070; 25 C. J. 1172-1173, 1177, 1286; 32 Cyc. 808-810.

"At first glance one is tempted to express himself against the claimant who has contravened the law in executing works without authorization; can an illegal act produce juristic effects in favor of one who is the author thereof? Here it is necessary to remember to what end the law requires the intervention of the administrative authority. It is to safeguard the general interests. *Therefore only the administration, guardian of these interests, can avail itself of the failure to observe the law.*" Laurent, *Principes de Droit Civil*, Vol. 7, § 334.