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Prescriptive Water Rights in California and the Necessity for a Valid Statutory Appropriation

Gavin M. Craig*

More than a quarter of a century has elapsed since the California Legislature declared that no right to appropriate or use water subject to appropriation could be acquired except upon compliance with the statutory permit procedure. It seems surprising that during the intervening years the California courts have never been called upon to determine the relationship of this statute to the acquisition of a prescriptive right to the use of water based only upon adverse use for a period sufficient to bar a cause of action to protect an existing right. This subject cannot indefinitely escape judicial inquiry.

A literal interpretation and full application of the statute would require that as a prerequisite to acquisition of a prescriptive water right, a permit to appropriate water be issued to the adverse user. However, since the view has been expressed that the statute should not be given such interpretation and application, and that it does not affect prescriptive water rights based only upon adverse use, further analysis is justified.

The Nature and Basis of Title by Prescription

Title by prescription in California is not based upon a fictitious lost

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1 All private rights in flowing water are usufructuary. CAL. WATER CODE § 102; Rancho Santa Margarita v. Vail, 11 Cal.2d 501, 81 P.2d 533 (1938); Lindblom v. Round Valley Water Co., 178 Cal. 450, 173 Pac. 994 (1918).

2 CAL. WATER CODE § 1225 (based on Cal. Stats. 1923, p. 162). Other provisions of the act, now contained in the Water Code, make it clear that this provision does not extend to the use of percolating ground water but applies only to surface water and to subterranean streams flowing through known and definite channels. See CAL. WATER CODE § 1200. This study is accordingly restricted to the scope of the statute and wherever the term “water” is used herein, unless otherwise indicated, reference is to water subject to the permit and license procedure set forth in Part 2, Division 2 of the CAL. WATER CODE.

grant but rests upon the more realistic statutes of limitation. The process by which possession of real property, together with the loss by another of the means of protecting his title to that property, results in vesting of title thereto in the possessor, has an important and perhaps determinative bearing upon the subject of this article.

A prescriptive title must either be derived in some manner from the former title or it must be a new and independent title. The occasional ill-considered statements that a presumed grant is the basis of a prescriptive right, together with the assertion that a prescriptive title is "as effectual as a conveyance from the owner," have sometimes led to the erroneous assumption that the owner of a prescriptive title is a successor in interest to the former record owner. However, it has long been settled that the running of the statute of limitation not only extinguishes the remedy of the true owner but annihilates his title as well and vests a new title in the one in possession. It is a complete, perfect title in every respect based upon possession coupled with unlimited right of possession. This is the effect given by the majority of decisions even though the statute of limitation

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4 The fiction of a grant from the record owner to the possessor, since lost, was invented by English courts to justify the title of the latter at a time when the statutes of limitation by their terms did not apply to incorporeal hereditaments. Angus v. Dalton, 3 Q.B.D. 85, 90, 104 (1877). See 3 WASHBURN, REAL PROPERTY § 52 (4th ed. 1876); 2 TIFFANY, LAW OF REAL PROPERTY § 514 (2d ed. 1920); ANGELL, LIMITATIONS, ch. 1 (5th ed. 1869); 2 BL. COM., ch. XVII. It is neither necessary nor proper to presume a fictitious grant where the statute of limitation covers all forms of real property interests [Angus v. Dalton, supra at 94, and see Ricard v. Williams, 7 Wheat. 59 (U.S. 1822)] as it does in CAL. CODE CIV. PROC. § 318. California courts, while recognizing that the presumption of a lost grant is obsolete, have based their decision on CAL. CIV. CODE § 1007 which provides that occupancy of property for the prescriptive period confers a title thereto which is sufficient against all, rather than on the more fundamental but less obvious ground that there has never been a reason to invoke the presumption in this state. People v. Banning Co., 167 Cal. 643, 140 Pac. 587 (1914); Beckett v. City of Petaluma, 171 Cal. 309, 153 Pac. 20 (1915); Thomas v. England, 71 Cal. 456, 12 Pac. 491 (1886).

6 Alhambra Addition Water Co. v. Richardson, 72 Cal. 598, 14 Pac. 379 (1887); Churchill v. Louie, 135 Cal. 608, 67 Pac. 1052 (1902); People's Water Co. v. Anderson, 170 Cal. 683, 151 Pac. 127 (1915).

7 Armstrong v. Payne, 188 Cal. 585, 206 Pac. 638 (1922); Strong v. Baldwin, 154 Cal. 150, 97 Pac. 178 (1908); Langford v. Poppe, 56 Cal. 73 (1880); Smith v. O'Hara, 43 Cal. 371, 376 (1872); Alper v. Tormey, 7 Cal. App. 8, 93 Pac. 402 (1908); 1 CAL. JUR. 610-611 and cases cited.

8 2 KINNEY, op. cit. supra note 6.

9 Williams v. Sutton, 43 Cal. 65, 73 (1872); Alhambra Addition Water Co. v. Richardson, 72 Cal. 598, 608, 14 Pac. 379, 384 (1887); accord, 2 TIFFANY, LAW OF REAL PROPERTY 1980 (2d ed. 1920); 3 WASHBURN, REAL PROPERTY 128-129 (4th ed. 1876); Ballantine, Title by Adverse Possession, 32 HARV. L. REV. 135, 142 (1918); 3 AMERICAN LAW OF REAL PROPERTY § 15.2 (1952).
does not provide for transfer of title in express terms. The theory upon which this result is based has been authoritatively stated as follows:  

True property or ownership consists of possession coupled with the unlimited right of possession, and when one person is dispossessed by another only the right of possession remains vested in the former, and the dispossessor has complete ownership except for this outstanding right of possession. When the period of limitation has run, the statute, by forbidding the exercise of this right, virtually annihilates it, and the imperfect title thereupon becomes perfect.

Despite certain language that appears to signify a contrary view, the Supreme Court of California at an early date elected to follow this majority view in respect to the effect of the statute of limitation upon title to land. In Arrington v. Liscom, the court notes that, as was then true, there was no express statutory provision that adverse possession for the time prescribed shall extinguish the former title and vest the possessor with the fee. Yet this was conceived to be the effect of the California statute limiting the time within which an action to recover possession of real property could be commenced.

The owner is simply required to sue within a limited period. If he does not, he cannot maintain an action to recover the property. In such event the disseizor, being in possession, can maintain his right against the whole world. He could always prevail over all save the true owner, and when the owner cannot sue his title has become unassailable. ... Title by possession, good against all the world save the true owner, defendant already had. He has only the same title after the statute has run, but the true owner has then lost his right of action.

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10 Tiffany, op. cit. supra note 9, 1978, quoting Ames, Lectures on Legal History 193, 198 (1913); accord, 3 American Law of Real Property 759-760 (1952); Ames, The Disseisin of Chattels, 3 Harv. L. Rev. 313, 318 (1890); Ballantine, supra note 9; Perry v. Clissold (1907) A.C. 73; 2 Br. Com. 195-199.

11 See Akley v. Bassett, 189 Cal. 625, 209 Pac. 576 (1922) and Billings v. Hall, 7 Cal. 1 (1857) to the effect that statutes of limitation affect the remedy but not the right.

12 34 Cal. 365, 94 Am. Dec. 722 (1868).

13 After reviewing authorities from other jurisdictions in support of this conclusion, the court states: "... when a party's means of obtaining possession, or maintaining the possession when obtained, have been extinguished by an adverse possession, it would seem to follow that his title is effectually and substantially extinguished in fact, whatever his condition theoretically may be. And the party who has acquired an absolute right of possession, which will not only shield him in his possession against the attacks of all the world, but, when ousted, will restore him to, and protect him in, his just possession, even against the party having the written title, would seem to have a substantial title." Id. at 385, 94 Am. Dec. at 737; accord, Cannon v. Stockman, 36 Cal. 535, 540, 95 Am. Dec. 205 (1869).

The basis of title obtained by adverse possession for a period beyond that in which the true owner is permitted to maintain an action founded upon his title, is the following:

(1) A degree of title, albeit the lowest, derived from actual possession, subject to attack only by the true owner.

(2) Extinguishment of the true owner's right of possession by lapse of his means of obtaining possession by legal process, resulting in:
   (a) Vesting of the absolute right of possession in the possessor which right is now immune from attack by anyone, and
   (b) Vesting of complete title in the possessor by union of actual possession and absolute right of possession. The empty "right of property" without right of possession can no longer exist; it follows the right of possession.

The final result, vesting of complete title, is dependent upon absolute right of possession in the possessor, and the first step, a degree of title by mere possession, is a prerequisite for such absolute right. This is inherent in all of the analyses that have been undertaken by courts and legal scholars of the process of perfecting a title by adverse possession. Therefore, the problem in determining the soundness of a title by prescription to any species of real property or interest therein would appear to be to ascertain whether simple possession gives a right of possession good against all except the true owner (as in the case of land). If so, and the possession continues for the period prescribed as sufficient to bar the remedy of the true owner, a new and perfect title arises, a title by prescription (adverse possession). If not, an essential element of title is absent which cannot be supplied by mere possession no matter for how long it may be continued.

There remains for consideration the possible effect of California Civil Code Section 1007 upon the suggested criteria for determining the validity of a title by prescription. On its face, this provision appears to provide for a right good against the whole world, secured by possession for the statutory period of five years, without regard to whether possession of the particular kind of property in question gives a right good against everyone but the true owner prior to the expiration of the limitation period. However, the section is but declaratory of the common law rule which prevailed prior to the enactment of that legislation in 1872.16

(4th ed. 1919); CAL. CIV. CODE § 1006. Prior to the amendment to CAL. CIV. CODE § 1006, it was held that actual occupation of land under claim of ownership was sufficient basis for an action to quiet title against a claimant with no title. Morris v. Clarkin, 156 Cal. 16, 103 Pac. 180 (1909); Burns v. Clark, 133 Cal. 634, 66 Pac. 12 (1901); McGovern v. Mowry, 91 Cal. 383, 27 Pac. 746 (1891).

16 CAL. CIV. CODE § 1007 provides in part: "Occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar any action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all . . . ."

It is a well-established principle of interpretation that "a statute in affirmation of a rule of common law will be construed, as to its consequences, in accordance with such law,"\(^\text{17}\) and that "the best construction of a statute is to construe it as near to the rule and reason of the common law as may be."\(^\text{18}\) It would seem reasonable to assume that the Legislature, by enacting Section 1007 of the Civil Code, did not intend its provisions to apply to situations not within the reason or scope of the identical rule of the common law, especially if the exclusion of a particular species of interest in real property from that rule was by virtue of legislation subsequently enacted.\(^\text{19}\)

**The Law of Prescription Pertaining to Water**

Prescriptive rights to the use of water assumed a position of major importance in California at an early date. This was a result of the full recognition of the riparian doctrine. Originally, all rights to the use of waters of the streams in this state were vested in the riparian owners,\(^\text{20}\) subject only to appropriations made on the public domain. All appropriations of water on private lands were in the first instance wrongful and constituted a trespass against the rightful owners, the riparians.\(^\text{21}\) No right to use water could be acquired by a mere appropriation, that is, by diversion and beneficial use, as against an existing riparian owner.\(^\text{22}\) Because of the acquiescence of the Government as evidenced by acts of Congress,\(^\text{23}\) appropriative rights might be obtained on public lands;\(^\text{24}\) but even these were not superior to or in derogation of those rights attaching to riparian lands held in private ownership at the time of the appropriation.\(^\text{25}\) However, no one but a riparian could assert the superiority of his right to a right based upon an appropriation so that in a suit between rival appropriators, the fact that the appropriation of one or both parties might be subject to existing riparian

21. Fall River Valley Irr. Dist. v. Mount Shasta Power Corp., 202 Cal. 56, 259 Pac. 444 (1927); City of San Bernardino v. City of Riverside, 186 Cal. 7, 198 Pac. 784 (1921); Palmer v. Railroad Com., 167 Cal. 163, 138 Pac. 997 (1914); Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 Pac. 978 (1907).
22. City of San Bernardino v. City of Riverside, supra note 21.
rights could not be urged by either in order to defeat rights acquired by virtue of the appropriations.\textsuperscript{26}

Thus, although an initial appropriation of water was good against everyone but the prior riparian owners, a right based upon an appropriation was always subject to attack by them; however, by continued adverse use for a period of five years or more, the riparians would lose their right to object to an appropriation, and the appropriator would then obtain a perfect title denominated a title by prescription. In other words, a prescriptive title was acquired by virtue of a valid appropriative right, for which no formalities were required, originally good as against everyone without better right,\textsuperscript{27} which had become immune to attack by those with better right who had been injured thereby. The basis, measure and limit of the prescriptive right, like the appropriative right which preceded it, was the beneficial use to which the water had been actually applied.\textsuperscript{28}

The principles of the law of adverse possession pertaining to land have been generally applied to adverse use of water.\textsuperscript{29} This was done in the first instance simply because a right to use water is an interest in real property.\textsuperscript{30} For the same reason, after enactment of Section 1007 of the California Civil Code in 1872 its provisions were held to apply to a right to the use of water acquired by adverse use.\textsuperscript{31}

\textbf{The Necessity for a Valid Statutory Appropriation}

As has been shown, the effect of occupancy for a period sufficient to bar an action for the recovery of the property as conferring a perfect and complete title sufficient against all without exception, was a logical and necessary corollary of the rule that occupancy short of that period conferred a title sufficient against everyone except those who had a legal right to oust the occupant and recover possession for themselves.

As long as title to the use of water was acquired against everyone except the true owner by mere "occupancy" for any period, that is, by actual diversion of water to beneficial use, it was not improper to liken a prescrip-

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\textsuperscript{26}Duckworth v. Watsonville Water and Light Co., 150 Cal. 520, 89 Pac. 338 (1907); Fogarty v. Fogarty, 129 Cal. 46, 61 Pac. 570 (1900).
\textsuperscript{27}Ibid. Also see De Necochea v. Curtis, 80 Cal. 379, 20 Pac. 563 (1889), which declares that a right is gained by use of water as against all the world until a superior right is shown.
\textsuperscript{28}See text at notes 44 and 46 infra.
\textsuperscript{29}In Wutchumna Water Co. v. Ragle, 148 Cal. 759, 764, 84 Pac. 162, 164 (1906), it was stated that the doctrine announced in Arrington v. Liscom, 34 Cal. 365, 94 Am. Dec. 722 (1868) "has been uniformly held applicable as to the prescriptive right to divert water." See also Palmer v. Railroad Com., 167 Cal. 163, 171, 138 Pac. 997, 1000 (1914) where this similarity is discussed and diversion of water is said to be "the equivalent of possession."
\textsuperscript{30}Alhambra Addition Water Co. v. Richardson, 72 Cal. 598, 14 Pac. 379 (1887).
\textsuperscript{31}E. Clemens Horst Co. v. Tarr Mining Co., 174 Cal. 430, 163 Pac. 492 (1917); Wutchumna Water Co. v. Ragle, 148 Cal. 759, 84 Pac. 162 (1906); Montecito Valley Water Co. v. City of Santa Barbara, 144 Cal. 578, 77 Pac. 1113 (1904).
\end{flushright}
tive water right to a prescriptive title to land or other interest in real property and to conclude that both could be acquired in the same manner. But since this analogy to adverse possession of real property was last declared the law has been changed in California and a good title or right to use water (other than percolating ground water) can no longer be acquired against anyone by mere occupancy, that is, by simply diverting and beneficially using water. Short of full compliance with the permit procedure set forth in the Water Code for acquisition of a right to the use of water no such right can now be acquired by use. In other words, mere occupancy (use) no longer confers a title to water sufficient against all except the true owner as does occupancy of land and other interests in real property. Does it follow that "occupancy" of water for a period sufficient to bar an action by the true owner to oust the trespasser and recover possession, no longer confers a good title sufficient against all, including subsequent appropriators who by virtue of compliance with statutory procedure assert title in themselves?

This question has not been presented to or decided by any court of this state. A right by prescription initiated solely by actual use commencing subsequent to the effective date of the Water Commission Act (December 19, 1914) has never been involved in litigation against a subsequent appropriator of water before the appellate courts of California. Application of the conclusion heretofore expressed that a prescriptive title is sufficient against all only where possession itself gives a title good against everyone but the true owner, would require the decision that a true prescriptive title to the use of water cannot now be acquired in California without a valid statutory appropriation.

As we have seen, the acquisition by B of a prescriptive right against A does not give B any new right which did not theretofore exist. His right is the same as it was before, except A has lost his right to object to B's use of the water. Prior to loss of A's right, B may or may not have had a right to use water of the source involved. If B's right was formerly valid and prior to everyone but A, he now has an unassailable title. Conversely, if B's use of the water was not immune from attack by others, loss by A of his right to object could not clothe B's right with an immunity which it did not previously enjoy as to others. In the words of Professor Ballantine, the statute of limitation "simply quiets that title which the adverse possessor already has by virtue of his possession, and the doctrine of relation does not cure any defects in the possessory title except the former owner's right to recover possession."33

Under existing California law no title is acquired by mere use of water

32 CAL. WATER CODE §§ 1052, 1225; Crane v. Stevinson, 5 Cal.2d 387, 54 P.2d 1100 (1936).
33 Ballantine, Title by Adverse Possession, 32 Harv. L. Rev. 135, 145 (1918).
prior to the running of the statute of limitation. Section 1052 of the California Water Code provides:

The diversion or use of water subject to the provisions of this division other than as authorized in this division is a trespass, and the department may institute in the superior court in and for any county wherein such diversion or use is attempted appropriate action to have such trespass enjoined.

These provisions are plain and certain. They originally formed Section 38 of the California Water Commission Act which was enacted in 1913 and, by referendum, became effective the following year. In 1923 they were implemented by the addition of Section 1c to the Water Commission Act, now found in Water Code Section 1225 which reads:

No right to appropriate or use water subject to appropriation shall be initiated or acquired except upon compliance with the provisions of this division.

To the extent these provisions evidence a determination by the Legislature to place acquisition of rights to the use of water under state supervision and control and to prevent the vesting of any right to use except subject to such supervision and control, they negative a claim to a right to the use of water based upon use, no matter for how long continued, without a showing of compliance with statutory procedure.

The California Supreme Court has commented that:

In section 38 of the Water Commission Act, now Water Code Section 1052, any unauthorized diversion of water subject to the provisions of the act is declared to be a trespass and the Department of Public Works is authorized to proceed in the superior court to have such trespass enjoined. There need be no apprehension therefore lest rights become vested, by prescription or otherwise, in an excessive use of water or in a use for unauthorized purposes.

This language might be interpreted as a confident prediction by the supreme court that the department would in all instances exercise the authority bestowed upon it and would vigilantly police every stream and every source of water within its jurisdiction (amounting to at least hundreds of separate sources and covering thousands of lineal miles of flowing water and the use of water upon millions of acres of land) and would file actions to enjoin all unauthorized diversions of water existing throughout the entire state within the time limited by statute, thus preventing the acquisition of any rights based upon unlawful use.

However, another meaning may be given to the court’s statement which

34 Cal. Stats. 1913, c. 586, p. 1032.
35 Cal. Stats. 1923, c. 87, p. 162.
36 Meridian, Ltd. v. City and County of San Francisco, 13 Cal.2d 424, 450, 90 P.2d 537, 550 (1939) (emphasis added).
does not involve an obvious physical impossibility. Certainly so long as the use is subject to being declared a trespass and to an injunction at the instance of the state it cannot be said that any right or title has been acquired against the world, including the state by reason of such unauthorized diversion. Under the familiar principle that a statute of limitation does not run against an action upon a continuing nuisance or trespass, the state's cause of action under Section 1052 may not become barred by the passage of time and, if this is true, an unauthorized use of water could never ripen into the good and perfect title which true prescription imports. It follows that it may no longer be possible to draw a proper analogy, with respect to the title that results, between adverse possession of land for the statutory period and adverse use of water without first perfecting a valid right to appropriate the water.

Courts of other western states have indicated a doubt whether title to the use of water can be acquired by adverse use in light of statutes prescribing an exclusive method for acquiring rights to the use of water.38

California Decisions Are Not Decisive

Among the California cases decided since 1914 which refer to prescriptive water rights in surface bodies of water, only those cases in which the use was initiated subsequent to 1914 could be decisive of the problem now

37 See 16 CAL. JUR. 495-497 for discussion of rule and citation of authorities. Whether the acts mentioned in CAL. WATER CODE § 1052 constitute a continuing, as distinguished from a permanent, trespass is an open question. No action has ever been instituted under this section. CAL. CODE CIV. PROC. § 425 makes applicable to the state the limitation upon an action for trespass.
38 Tudor v. Jaca, 178 Ore. 126, 164 P.2d 680, 690 (1945); Campbell v. Wyoming Development Co., 55 Wyo. 347, 395, 100 P.2d 124, 139 (1940); Pioneer Irrigation Ditch Co. v. Blashk, 41 New Mex. 99, 102, 64 P.2d 385, 390 (1937). The decision in Wyoming Hereford Ranch Co. v. Hammond Packing Co., 33 Wyo. 14, 236 Pac. 764 (1925), that under a statute similar to CAL. WATER CODE § 1225 a lawful appropriation could not be made without application to the Board of Control, is in close accord with Crane v. Stevinson, 5 Cal.2d 387, 54 P.2d 1100 (1936), and has been referred to in In re Filippini, 66 Nev. 17, 202 P.2d 535 (1949), as a decision that a water right cannot be acquired by adverse possession. But cf. Hammond v. Johnson, 94 Utah 20, 66 P.2d 594 (1937); Wrathall v. Johnson, 86 Utah 50, 40 P.2d 755 (1935). The law construed in the Filippini decision, supra, is clearly distinguishable.
39 Locke v. Yorba Irr. Co., 35 Cal.2d 205, 217 P.2d 425 (1950); Moore v. Cal.-Ore. Power Co., 22 Cal.2d 725, 140 P.2d 798 (1943); Thompson v. Simmonds, 68 Cal. App.2d 151, 155 P.2d 870 (1945); Wood v. Davidson, 62 CAL.2d 885, 145 P.2d 659 (1944). Seneca Cons. Gold Mines Co. v. Great Western Power Co., 209 Cal. 206, 287 Pac. 93 (1930) has been cited as a "direct holding" that no permit is necessary for a prescriptive water right in California, on the assumption that because defendant's dam was constructed in 1913, without filing an application for a permit to appropriate water, "the prescriptive period occurred after the passage of the Water Commission Act" and yet the court held that defendant had acquired a prescriptive water right. 39 CALIF. L. REV. 369, 374 (1951). However, because of submission to referendum the act did not take effect until December 19, 1914. Therefore, defendant acquired a valid right by appropriation under the law as it existed in 1913, which right was perfected against plaintiff's right by use adverse thereto for the statutory period.
under discussion. However, they fail to decide the question because in none of them except Locke v. Yorba does it appear from the facts stated in the opinion that the adverse user had not secured a permit to appropriate water. In Locke this issue was not raised or discussed.40

The decisions relate only to controversies between an adverse user and a person formerly entitled to the use of the water. If the view is adopted that the statute of limitation is not itself affected by the provisions of the Water Code, it would follow that, whether or not a true prescriptive title may be acquired without a permit, the cause of action of those whose water rights have been injured by the acts of others is lost by failure to sue within the statutory period.41

The fact that in only a few cases have prescriptive rights to the use of water, based upon use commenced since 1914, been asserted and adjudicated indicates that adverse use, as a means of securing a right to use of water, may have lost its former position of importance in California.42

A Taking Contrary to Law Confers No Title

A taking of water contrary to the policy of the law confers no title no matter for how long continued.43 Thus, no right can be acquired by prescription to the use of water not reasonably necessary for the beneficial purpose of the appropriator44 because it is expressly provided by statute45 and is the policy of the law that an appropriation must be for some useful

40 It appears plaintiff had no reason to secure a permit since her right was based on use antedating the Water Commission Act.


42 This is confirmed by the records of the California Division of Water Resources, which disclose that seldom is a prescriptive right to use water, based only upon use since 1914, without permit therefor, asserted and relied upon as grounds for protest against applications by others for permission to appropriate water.

43 Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal.2d 489, 547, 45 P.2d 972, 997 (1935) and cases cited note 46 infra.


45 CAL. WATER CODE § 1240, formerly CAL. CIV. CODE § 1411, provides: "The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose the right ceases."
or beneficial purpose and that upon cessation of such use, the right ceases.\textsuperscript{46} This established principle presupposes a lawful appropriation as a prerequisite for a prescriptive water right. The basis of the principle is that one who purports to appropriate water is limited in his claim of right to that water which can be lawfully appropriated in accordance with the policy of law and, since use under claim of right is essential to establish a prescriptive title,\textsuperscript{47} use contrary to the law of appropriation is ineffectual. A riparian owner cannot be held to have notice of any greater claim than that authorized by law.\textsuperscript{48}

Likewise, since a right of appropriation initiated subsequent to the effective date of the Water Commission Act (December 19, 1914) cannot be acquired without compliance with the provisions of that act and issuance of a permit, and since it is the policy of the law to require compliance with the statutory procedure in order to obtain an appropriative right, one pretending to be an appropriator has no claim of right and title, and cannot therefore acquire a right to the use of water, without such compliance.

The state has limited the right to appropriate the waters of a stream to those who have obtained a permit so to do from the State Engineer. A diversion of water except pursuant to a valid permit is contrary to the policy of our law and unauthorized, and is a taking without right. Insofar as the taking is pursuant to the terms of a permit or license, it is a diversion authorized and sanctioned so far as the state is concerned, and, if the diversion is continued for the requisite time under such circumstances as to give title by prescription it will extinguish riparian and appropriative rights with which it conflicts. In each of the foregoing respects there is a close analogy to the situation before the court in California Pastoral & Agri. Co. v. Madera Canal and Irr. Co.,\textsuperscript{49} where the court correctly diagnosed the true nature and basis of a prescriptive right to the use of water under California law. It is a right by appropriation originally good against the whole world except the owners of prior rights to the extent authorized by law, but

\textsuperscript{46} Meridian, Ltd. v. City and County of San Francisco, 13 Cal.2d 424, 90 P.2d 537 (1939); Tulare Irr. District v. Lindsay-Strathmore Irr. Dist., 3 Cal.2d 489, 48 P.2d 972 (1935); Bazet v. Nugget Bar Placers, 211 Cal. 607, 296 Pac. 616 (1931); Joerger v. Pacific Gas & Electric Co., 207 Cal. 8, 721, 138 Pac. 718 (1914).

\textsuperscript{47} For the general rule see 25 CAL.JUR. 1173 and cases there cited.

\textsuperscript{48} Cal. Pastoral & Agri. Co. v. Madera Canal and Irr. Co., 167 Cal. 78, 86, 138 Pac. 718, 721 (1914); WIEL, WATER RIGHTS IN THE WESTERN STATES § 586 (3d ed. 1911). Cf. Beckett v. City of Petaluma, 171 Cal. 309, 153 Pac. 20 (1915), wherein it was held that unlawfulness of the possession of land is not a bar to acquisition of title by adverse possession and in fact is necessary to such acquisition. The true distinction may be between "unlawful" in the sense of a private tort and unlawful because contrary to public interest and to the policy of the law.

\textsuperscript{49} 167 Cal. 78, 138 Pac. 718 (1914).
only to that extent, which right has become good against the former owners as well through adverse use for the prescribed period of time accompanied by the requisite conditions. A use other than or in excess of a use authorized by law cannot be the basis of a valid claim simply because it has endured for a long period of time.

Unless there is some reasonable ground for distinguishing between an appropriation unauthorized because contrary to California Water Code Section 1240 and one unauthorized because contrary to Section 1225 of that code, the conclusion seems unanswerable that an attempted appropriation and use of water contrary to the latter statute can confer no right no matter for how long it is continued. If the same reasoning that has caused the courts to deny prescriptive rights to the use of water which is not reasonably necessary for beneficial use, is applied to the use of water claimed by one acting as an appropriator under a diversion unauthorized by other provisions of the law, a title by prescription cannot be obtained by such claimant even as against lower prior users as to whom the unauthorized use was in fact adverse, because the same essential element—use under a claim of right—is lacking.

Several decisions by California courts since passage of the Water Commission Act restate the familiar prerequisites for acquisition of a prescriptive water right—use that is actual, open and notorious, continuous and uninterrupted, exclusive, hostile and adverse, and under claim of right (or title) for a period of not less than five years. The requirement that use be authorized by permit from the state has not been listed. However, this omission is not considered significant, for likewise these decisions did not consider it necessary to refer to the settled rule that in order to acquire a prescriptive title to the use of water the use must be reasonably necessary for a beneficial purpose. The elements listed by these decisions are only those which are required to give rise to a cause of action by the owners of existing rights and which set in motion the statute of limitation; they do not exclude other prerequisites which are based upon policies of the law.

Public Policy Requires State Control and Supervision of Water

Statutes of limitation and prescription are supported by public policy and convenience "which require that long continued possession shall not be disturbed." Rights by adverse possession and prescription were origi-
nally recognized to prevent fraud and controversy. Statutes of limitation are statutes of repose and it has been said that application of such statutes in a manner to give complete title by adverse possession is "best calculated to give full effect to the wise policy of such statutes by putting an end to vexatious litigation and affording repose to those who have been suffered by the laches of adverse claimants to remain for a long time in the possession of the soil under a claim or right."

The regulatory provisions now contained in Divisions 1 and 2 of the California Water Code are expressions of another public policy—one concerning the need for strict control by the state of the acquisition of private rights in water—a precious and limited natural resource, the corpus of which belongs to the people of the state.

An awareness of the paramount importance of effective public control over the acquisition of rights to the use of water as a means to insure more efficient development, conservation and use of the state's water resources has been constantly increasing in keeping with increased demand for water. Gone are the days when the economy of the state could be adequately satisfied by relatively simple and inexpensive diversion and storage facilities upon natural streams, when huge flows wasting into the ocean were of no concern, and it was left to each man, as a matter of right, to take such water as he chose for any beneficial use without regard to the relative reasonableness of his use or method of use or method of diversion. Recognition of the public interest involved in the use of water and in its optimum development has been acknowledged by the Legislature, the Judiciary and the people themselves. The Legislature first declared public ownership of water in 1911 by amending Civil Code Section 1410 and in 1913 it reaffirmed this principle in Section 11 of the Water Commission Act.

The purpose of the Water Commission Act was to provide an orderly

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65 Ballantine, Title by Adverse Possession, 32 Harv. L. Rev. 135 (1918).
69 See Meridian, Ltd. v. City and County of San Francisco, 13 Cal.2d 424, 90 P.2d 537 (1939).
70 Cal. Civ. Code § 1410: "All water or the use of water within the State of California is the property of the people of the State of California, but the right to the use of running water flowing in a river or stream or down a canyon or ravine may be acquired by appropriation in the manner provided by law; ..." (Repealed 1943. Cal. Water Code § 102 is similar.
71 Section 11 as originally enacted read: "And all waters flowing in any river, stream, canyon, ravine or other natural channel, excepting so far as such waters have been or are being applied to useful and beneficial purpose upon, or in so far as such waters are or may be reasonably needed for useful, and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is and are hereby declared to be public waters of the State of California and subject to appropriation in accordance with the provisions of this act."
method for the appropriation of the unappropriated waters of the state by creating a system for issuing permits and licenses for the appropriation of surplus water. The method employed to accomplish this purpose was the creation of the State Water Commission, empowered to issue permits to appropriate water upon application therefor made in a prescribed form. As originally enacted, no hearings were provided and no express discretion was conferred upon the commission to withhold its approval of an application in due form. In 1917 provisions were added delegating to the commission power to determine whether the proposed appropriation would be detrimental to public welfare and to withhold its approval of an application if the determination was unfavorable in that respect. Four years later the discretion of the commission was enlarged and defined by adding provisions declaring public policy in regard to preferences between uses of water, directing that the commission be guided by that policy in issuing permits to appropriate water, authorizing the commission to impose terms and conditions which in its judgment would "best develop, conserve and utilize in the public interest the water sought to be appropriated," and requiring the commission to reject an application when "in its judgment the proposed appropriation would not best conserve the public interest." Finally, in 1923, after the California Supreme Court had inferred from the absence of provisions for a hearing that only supervisorial discretion was intended and that the duty of the commission to approve an application in proper form was ministerial only, the Legislature made its intention clear and unmistakable by expressly authorizing the commission "to grant or to refuse to grant a permit and to reject any application after hearing," and by requiring, as a prerequisite for issuance of a permit, that there be unappropriated water available to supply the applicant. At the same time, it was provided that the Water Commission Act prescribed the only method by which the rights to appropriate or use water subject to the provisions of the act could be initiated or acquired.

In 1921, the Legislature declared:

... that the people of the State have a paramount interest in the use of all the water of the State and that the State shall determine what water of the State, surface and underground, can be converted to public use or controlled for public protection.

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62 Bloss v. Rahilly, 16 Cal.2d 70, 104 P.2d 1049 (1940).
64 Cal. Stats. 1917, ch. 133, p. 194.
This was supplemented in 1925 by the declaration: ⁶⁹

... that protection of the public interest in the development of the water resources of the State is of vital concern to the people of the State and that the State shall determine in what way the water of the State, both surface and underground, should be developed for the greatest public benefit.

Thus, there has been a persistent effort by the Legislature, implemented from time to time as necessity arose, to direct and control the use of the public water of the state through an administrative agency which is empowered to issue permits and licenses authorizing the use of water when the agency finds that there is unappropriated water available to supply the applicant and that a proposed use is consistent with public interest.⁷⁰

In 1928, by constitutional amendment, the people of the State of California expressed a policy concerning the use of water and required that all rights thereto should conform to that policy.⁷¹ The constitutional provisions have been incorporated into Sections 100 and 101 of the California Water Code, and in Section 1050 of that Code the Legislature expressly declares that the permit procedure is in furtherance of the constitutional policy of the state.⁷²

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⁷⁰ The California Department of Public Works succeeded to the duties and powers of the California Water Commission. Cal. Stats. 1921, ch. 607, p. 1040, adding § 363e to the CAL. POL. CODE. This section of the Political Code was repealed by Cal. Stats. 1951, ch. 655, p. 1832, as obsolete in view of CAL. WATER CODE, Divisions 1 and 2, providing for the exercise of all functions of the former Water Commission by the Department of Public Works, acting through the State Engineer, who is the Chief of the Division of Water Resources in the department.
⁷¹ CAL. CONSTR. Art. 14, § 3, provides as follows: "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."
⁷² CAL. WATER CODE § 1050: "This division [Division 2 which contains the permit procedure] is hereby declared to be in furtherance of the policy contained in Section 3 of Article XIV of the Constitution of the State and in all respects for the welfare and benefit of the people of the State, for the improvement of their prosperity and their living conditions, and the department and its agencies shall be regarded as performing a governmental function in carrying out the provisions of this division."
The courts have long and constantly recognized the importance to public welfare of the water resources of the state and the necessity for conserving them to the fullest extent possible without interfering with vested rights.73

The new policy established in the 1928 constitutional amendment was first judicially noted in *Gin S. Chow v. City of Santa Barbara* where the court said:74

The conservation of other natural resources are of importance, but the conservation of the waters of the state is of transcendent importance. Its waters are the very life blood of its existence.

In *Meridian, Ltd. v. City and County of San Francisco*, it was declared that the Water Commission Act was a recognition of the paramount importance of the conservation of the water resources of the state.75 The court said it was undoubtedly the purpose of the proponents of the 1928 constitutional amendment to make it possible to marshal the water resources of the state and make them available for the constantly increasing needs of all of its people. It was further declared that when demands on a stream for lawful purposes by riparians and appropriators are fully met and an excess of water exists, "it is for the state to say whether, in the conservation of this natural resource in the interest of the public, the diversion is excessive."76

To the extent there may be a conflict between the public policy underlying prescription and the public policy upon which our water laws are based, the relevant statutes must be examined to determine which shall prevail. If any ambiguity or uncertainty exists in the expressed will of the Legislature, judicial expressions and established principles of statutory construction may be looked to for guidance.

The statutory recognition of the doctrine of prescription in California is found in Sections 1006 and 1007 of the Civil Code, which themselves are declaratory of the common law.77 They were enacted in 1872 and the origi-
nal language remains unchanged although each section has been amended once by the addition of qualifying language. These sections concern occupancy of property generally and purport to cover all types of property and interests therein. The provision in Section 1007 that occupancy of property for a sufficient period confers a prescriptive title which is "sufficient against all" is opposed by the special provisions of the Water Code, founded upon the Water Commission Act, which declare that no right to appropriate or use water subject to appropriation shall be initiated or acquired except upon compliance with the procedure set forth in the Water Code, and that any diversion or use of water except as authorized in the Water Code is a trespass which may be enjoined in an action brought for that purpose on behalf of the state. Under well-known principles of statutory construction it would appear that to the extent there is any conflict or inconsistency between the general provisions of the Civil Code and the special provisions of the Water Code the former must yield to the latter.

The contention might possibly be advanced that the effect of Water Code Section 1225 is strictly limited by its terms to water "subject to appropriation" and that therefore it does not affect acquisition by adverse use of rights to the use of waters that have previously been subject to private ownership. It is not believed that the contention, if made, would be seriously considered by the courts. First, its companion statute, Water Code Section 1052, is not so limited but applies to all water "subject to this division," which is elsewhere defined to include all surface water flowing in streams, lakes, or other bodies of water and subterranean streams flowing through known and definite channels. Only percolating ground water is excluded. Of more significance is the consideration that the purpose of the Legislature would be defeated if such strict construction of Section 1225 were to be adopted. Furthermore, the reason for inserting "subject to ap-

78 CAL. WATER CODE § 1225.
79 CAL. WATER CODE § 1052.
80 CAL. CIV. CODE § 1007 "merely fixes the time in which a right by prescription shall be acquired, but does not alter the requisites which before the Code were essential to the growth of a prescriptive right." Thomas v. England, 71 Cal. 456, 12 Pac. 491 (1886); cf. Woodruff v. Mining Co., 18 Fed. 753 (C.C. Cal. 1884). Thus, this section and CAL. CODE CIV. PROC. § 325 are correlated and are to be construed together with the result that mere "occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar any action for the recovery of the property" does not confer a title by prescription thereto in the absence of payment of taxes as required by the Code of Civil Procedure. People's Water Co. v. Anderson, 170 Cal. 683, 151 Pac. 127 (1915); cf. Akley v. Bassett, 189 Cal. 625, 209 Pac. 576 (1922). In the same manner, CAL. CIV. CODE § 1007 should be correlated and construed with CAL. WATER CODE §§ 1052 and 1225 with the result that mere "occupancy for the period . . . " does not confer a title by prescription to the right to the use of water in the absence of compliance with the procedure prescribed by the Water Code for the initiation of such right.
81 See text following note 33 supra.
82 CAL. WATER CODE § 1200.
propriation” in the section was probably to make it clear that riparian rights were not intended to be affected and thus save the statute from opposition and a possible charge of unconstitutionality.

The Effect of Forfeiture Statutes

In 1917, Section 20a was added to the California Water Commission Act. It has been codified as Water Code Section 1241 and provides:

When the person entitled to the use of water fails to beneficially use all or any part of the water claimed by him, for which a right of use has vested, for the purpose for which it was appropriated or adjudicated, for a period of three years, such unused water reverts to the public and shall be regarded as unappropriated public water.

So long as water is used by an adverse claimant it is, of course, not used by the person lawfully entitled thereto. Therefore, it can be contended that after a period of three years adverse use by another, the former right, if itself initiated by application for permit filed subsequently to 1917, becomes forfeited, in which event the water “reverts to the public” as unappropriated public water and the adverse use is thereby cut off before it can possibly ripen into a prescriptive title. After such reversion, the original appropriator loses his right to prevent use of the water by another. In the absence of a cause of action to prevent use of water, its use is not adverse and a prescriptive right to use it therefore cannot be acquired. Such a contention appears logically sound but has not been tested before the courts of California. It could be defeated upon either of two theories: (1) that unauthorized use by another is a circumstance beyond the control of the owner to prevent, or (2) that the statutory forfeiture does not become effective until there has been a formal judicial determination of nonuse and declaration of forfeiture therefor.

At such time as the issue is presented the California courts may determine whether wrongful, open and notorious, hostile and adverse use of

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83 Cal. Stats. 1917, c. 554, p. 748.
84 See Hutchins, SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS 400 (1942). It has been held that a right to use water formerly appropriated and forfeited to the public for nonuse can only be initiated by making a new appropriation. Whitmore v. Welsh, 114 Utah 578, 201 P.2d 954 (1949).
85 A long line of cases so hold, e.g., City of Pasadena v. City of Alhambra, 33 Cal.2d 908, 207 P.2d 17 (1949); City of Los Angeles v. City of Glendale, 23 Cal.2d 68, 142 P.2d 289 (1943); Pabst v. Finmand, 190 Cal. 124, 211 Pac. 11 (1922).
water by another under claim of right for a continuous period of three years of a character to interfere with the right of the true owner and to afford him a legal remedy, is "a cause beyond the control of the owner." 87

The Supreme Court of New Mexico has determined the foregoing question in the affirmative, although the case cited as authority for the decision does not appear to support it. 88

The Supreme Court of Utah determined that a seven year forfeiture statute did not prevent acquisition of prescriptive water rights in light of a statute of limitation of the same period. 89 Because the time for acquiring a right by adverse use and the period for forfeiture were the same under the law construed by the Utah court, the question which is of concern under California law was not involved or determined. The court's conclusion that so long as water is put to beneficial use by someone, the state has no interest in the identity of the user, 90 apparently overlooks the point that more is involved than mere personal identity. The right of the state to supervise and regulate the method of diversion and the use or purpose of use and to impose conditions upon the use in the public interest is at stake and is denied where rights acquired by use without first complying with statutory procedure are recognized.

If forfeiture for nonuse of water is effective only upon a judicial declaration to that effect it would seem that continuous nonuse for any period without such declaration would not result in forfeiture so as to interrupt use adverse to the former owner and would therefore not prevent acquisition of a prescriptive water right. There are no California decisions directly in point. It has been held elsewhere that there is no forfeiture if the owner resumes his use of water before a third party claims it 91 and that before

87 See Bloss v. Rahilly, supra note 86, wherein the court characterizes an upstream diversion of water by a stranger to the litigation as a cause for nonuse by plaintiff beyond his control. It does not appear whether the upstream use was wrongful, however.


89 Hammond v. Johnson, 94 Utah 20, 28, 29, 66 P.2d 894, 900, 901 (1937). Compare, In re Filippini, 66 Nev. 17, 28, 202 P.2d 535, 540-41 (1949), wherein the Nevada Supreme Court stated: "... adverse use is wholly unwarranted, unnecessary and clearly dangerous to the appropriation and distribution of public property. The travail through which the Nevada water law of this state has passed in the last forty-six years to bring order out of chaos will be of no avail if the old rule of 'might makes right' in the appropriation of water is to continue. That the decisions of the Utah court relied upon by the appellant, i.e., Hammond v. Johnson, supra, and Wellsville East Field Irr. Co. v. Lindsay Land & L. Co., supra, did not receive legislative sanction is shown by the fact that in 1939 the Utah legislature amended the Utah water law so as to prevent prescriptive water rights... [Laws of Utah 1939, c. 111, § 1]. Surely the simple matter of making an application to the state engineer for a permit to appropriate water or to determine the applicant's right to use the water is orderly and serves almost immediately to advise the applicant whether there is some public water to which he may acquire right." (Emphasis added.)

90 94 Utah 20, 33, 66 P.2d 894, 900 (1937).

there can be a forfeiture for nonuse there must be a formal declaration thereof—until then the owner still retains title. Wiel expresses the opinion that under the forfeiture statutes nonuse ipso facto causes loss of right. His statement has been quoted, but without application to facts.

Equity Does Not Favor an Adverse User

Argument has been made that statutory provisions prescribing an exclusive method for the acquisition of rights to the use of water should be ignored in the name of equity. Certainly, equity is ever-vigilant to protect the innocent from oppression and wrong, from fraud and dishonesty of others. These matters are considered to be outside the scope of the subject under review, however, and adequate protection to the innocent can be afforded in a proper case without doing violence to the law. Mr. Samuel C. Wiel, in an article entitled "Unregistered Water Appropriations," written 15 years after his authoritative work on water rights was published, wherein he argues for recognition of water rights irrespective of compliance with statutory procedure, distinguishes between what he calls private interests and state interests and in discussing the former calls attention to situations under statutes of enrollment and of frauds wherein equity has relieved against fraud, actual or constructive. He describes as an example of a situation in which the appropriation statutes should not be applied to an actual water user, the unfaithful servant who, employed by an honest farmer to obtain a permit to appropriate water for him, instead secures issuance of the permit to himself. Obviously, upon those facts the court would not hesitate to declare a trust, require assignment of the permit to the principal, and thus afford complete relief. No problem of statutory interpretation or application is involved in this or other examples of fraud. Mr. Wiel recalls that actual possession is generally considered notice to subsequent purchasers of land even in the face of recording statutes. He fails to state that possession is notice of the actual right or interest of the possessor—not a fancied right. He ignores the inequity in charging a water user with notice of all existing diversions from the source regardless of their distance from his own point of diversion and fails to note the many well-known dissimilarities between the fixed nature of land and the notice possession of land usually imparts to a purchaser thereof, on the one hand, and use of the vagrant, wandering and ever-fluctuating flow of a stream of water which may not be of a sort calculated to give notice to the most careful and prudent appropriator from that stream, on the other hand.

93 1 Wiel, WATER RIGHTS IN THE WESTERN STATES § 578 (3d ed. 1911).
94 In re Manse Springs, 60 Nev. 280, 108 P.2d 311 (1940).
95 14 Calif. L. Rev. 427 (1926).
The noted author's gravest error is his comparison of the permit and license procedure of the California Water Commission Act with recording laws. However, in fairness to him it should be pointed out that the latest decision of the California Supreme Court at the time he wrote was Tulare Water Company v. State Water Commission in which then existing amendments to the Water Commission Act were overlooked and it was held that under the act as enacted in 1913 the Commission had no discretion to refuse a permit to appropriate water upon an application properly made and accompanied by the required fees. Mr. Wiel failed to note or consider that the Legislature at its first session after this decision, in 1923, further amended the Water Commission Act so as to vest in the Commission "authority to grant or to refuse to grant a permit and to reject any application after hearing." A later decision of the California Supreme Court, referring to the 1917 and 1921 amendments to Section 15 of the Water Commission Act, declared that it has been long recognized that the Legislature may delegate to administrative agencies certain discretionary powers "respecting matters which required findings of fact and the deducing of conclusions therefrom in much the same manner as judicial processes are employed by the courts." Thus, an analogy between the present procedure for issuance of permits to appropriate water and recording statutes would be wholly irrational and any conclusion based upon such analogy would be necessarily defective.

Mr. Wiel seems to concede that the attempted foregoing analogies and the arguments following therefrom that rights to the use of water based upon actual use without securing a permit from the state should be recognized, do not pertain to the state's interest in the regulation of appropriations and use of water. Nevertheless, he takes the position that the state's interest cannot be considered in an action between private interests in the absence of state intervention; that although the state could appear in such litigation, assert its interest and prevent recognition of rights based on use

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96 187 Cal. 533, 202 Pac. 874 (1921).
97 Cal. Stats. 1917, c. 133, p. 194, and Cal. Stats. 1921, c. 329, p. 443, amending Section 15 of the California Water Commission Act by giving the Commission power to allow appropriations "under such terms and conditions as in the judgment of the Commission will best develop, conserve and utilize in the public interest the water sought to be appropriated. . . . The Commission shall reject an application when in its judgment the proposed appropriation would not best conserve the public interest." Now codified in CAL. WATER CODE §§ 1253-1255. See text at note 64 supra.
98 Cal. Stats. 1923, c. 86, p. 181; CAL. WATER CODE § 1350.
99 Note 97 supra.
101 The "inaptness" of the attempted analogy is further demonstrated by Johnson, The Challenge to Prescriptive Water Rights, 30 TEX. L. REV. 669, 681 (1952).
alone, when it fails to do so the rights of the parties must be defined and determined without regard to the provisions of the Water Commission Act. If this view were accepted private water rights would be acquired or not, dependent upon exercise of administrative discretion by a public official or failure to exercise a mandatory duty if that is imposed. This would indeed be a novel criterion for determination of property rights and one that is not likely to receive judicial approval. Mr. Wiel’s argument would be more convincing if it were confined to water rights claimed by the state in a proprietary capacity.

The position expounded by Mr. Wiel is not dependent upon use of water for any length of time or upon elements of prescription other than actual use. However, a recent article upon prescriptive water rights in California expresses high praise for Mr. Wiel’s views and repeats his arguments based upon the recording acts and the statute of frauds as authority for the position that prescriptive water rights may still be acquired in this state without securing a permit to appropriate water. A proper analogy between recording acts and the permit procedure of the California Water Code is assumed without analysis or reason and upon this basis the so-called “private interests” are summarily dismissed, while of the “public interest,” Mr. Wiel’s contention is repeated that unless the state intervenes, its interests cannot be properly considered. The author predicts that the probable result of a suit by the state to enjoin an unauthorized diversion of water by a non-permittee would be “that equity would decree a retroactive permit on behalf of the negligent appropriator.”

In this prediction is involved the assumption that a court in issuing a permit to appropriate water would, as a necessary prerequisite, determine that the appropriation best conserves the public interest and devise the terms and conditions which will “best develop, conserve and utilize in the public interest the water sought to be appropriated,” and thus usurp to itself the administrative jurisdiction specifically conferred upon the State Engineer. The only other alternative would be that wherever water has been used without permit for five years or more, a vested right of use could be acquired and formalized by a court-created permit without regard to the public interest. This would effectively contravene legislative recognition of the public interest involved in the appropriation and use of the state’s water resources and would defeat the Legislature’s program designed to place acquisition of private rights to the use of such water under public control and supervision.

The assertion that the public interest cannot be considered in a suit be-

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104 Id. at 373.
105 CAL. WATER CODE §§ 1253, 1255.
tween private water users ignores the declarations contained in the state constitution, statutes, and court decisions that the public has a deep and continuing interest in the development, conservation and use of its water resources and overlooks the fact that the Water Commission Act was an expression of that interest.\(^5\)

Throughout these defenses of water rights without permit runs the theme that equity should protect the innocent against fraud and wrongdoing and that a literal application of the law should yield to this beneficial purpose. However, in what respect innocence, fraud and wrongdoing are involved is not explained.\(^0\)

Without the establishment of the premise upon which the ultimate conclusion is based, the position fails to carry conviction. It may be the advocates have confused the traditional innocence of a \emph{bona fide purchaser for value} from one in possession of land, without notice of an outstanding record title, with the motive of one who \emph{initiates} a diversion of water without applying for a permit from the state and who is necessarily acting through either ignorance of the law or deliberate intent to circumvent the law. These advocates apparently would pour all such diverters into one mold and give to all a perfect right to the use of water without distinction and without regard to their motives or to the actual facts.\(^7\)

\textbf{Conclusions}

The following conclusions concerning prescriptive water rights under California law are considered justified:

The prescriptive title is not properly based upon a "lost grant" and is not otherwise in succession to the former title; it is a new and independent title based upon beneficial use for the required time and under the required circumstances.

The title is acquired by union of possession, right of possession and right of property. Without unlimited right of possession, no complete title can be acquired no matter how long actual possession is continued. Use of water is generally considered the equivalent of possession of land.

The title results from a possession which itself gives a right of possession against everyone without a better title, followed by loss of cause of action on the part of those with better title to protect their title, with the result that their right of possession and property is lost and their title is

\(^{105}\) See text at notes 62–76 supra.


therefore destroyed, leaving only the title of the possessor which becomes complete and perfect because it is no longer subject to any other title.

No right of possession is secured by possession or use which is contrary to the policy of the law and such possession or use cannot therefore result in any property right. The same result may be reached by reasoning that a use contrary to the policy of law is not, as a matter of law, under a claim of right and therefore cannot be the basis of a prescriptive title.

No "right of possession" is acquired by use of water without a permit from the state because such use is contrary to the policy and letter of the law. It follows that no prescriptive title "good against the world" is acquired from such use by reason of the running of the statute of limitation against the cause of action of the former owner.

The effect of the forfeiture statute upon acquisition of prescriptive water rights in California is uncertain.

Beneficial use of water pursuant to a permit from the state is in accord with the policy of the law and secures to the user a right of possession good against everyone except owners of prior rights. If their rights become lost by operation of the statute of limitation the user acquires a good and complete prescriptive title and right to the use of water to the extent it has been applied to beneficial use in accordance with law and the terms and conditions of the permit.

Surplus or excess waters constitute the public waters of the state to be used, regulated, and controlled by the state or under its direction.