

# WATER RIGHTS IN THE PHILIPPINES

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## FOREWORD.

One word or two will not be amiss to refute the blind statement that water rights lack importance or that the subject is "dry." Perhaps one way to show the falsity of the statement would be to point out the importance which they have at present in America and in other countries where agriculture, mining and other industries to which water is indispensable either as a vital element or as a power, are in a more developed condition; perhaps another way would be to direct the attention to the importance of agriculture in the Philippines, where immense tracts of virgin land lie uncultivated, and to the fact that, in spite of the fertility of the soil, frequent droughts occur which are tremendously disastrous to our farmers and whose effects can be avoided, in a large measure, by an intelligent development of irrigation systems. It is also proper to observe that provisions for the protection of water rights are embodied in the earliest legislation and are developing in importance as civilization advances and the needs of the community are multiplied. To those who think that the subject of water rights is "dry" I may answer that there is nothing dry when it is studied attentively, for study develops interest. But there is no space or time for refutation, so let this be enough.

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## PRELIMINARY STATEMENT

In taking up the task of discussing water rights in the Philippines at present, the writer has found it to be the best plan to examine the Law of Waters itself and determine what articles of the same remain in force and what are repealed, making such annotations as may throw light on the subject. But the writer has also deemed it necessary to expand the subject under general principles, and in this connection has made use of American jurisprudence applicable to the same.

What the writer has endeavored to do is to present the law in the Philippines regarding water rights, not the naked law as it stands on the statute book, but the law as interpreted and applied. Many difficulties have been encountered by the writer in his attempt, due to the comparative scarcity of decided cases in our jurisprudence, so that it has been made necessary to go into a work of comparison and application by bringing in American cases which are deemed applicable to actual conditions. The work is, therefore, divided into two main parts: first, a comprehensive treatment of the subject, and, second, an analytical discussion of the Law of Waters of 1866.

## P A R T O N E

## CHAPTER I.

## NATURE, OWNERSHIP AND CLASSIFICATION.

**1. Nature and Ownership.**—Water is a special kind of property; it gives rise to peculiar rights and liabilities which do not arise in any other kind of property. Though there has been much academic discussion as to whether or not it may be the subject of private ownership, our law has settled the question by declaring that it may be so. (As to what are public waters, see arts. 407, 412, C. C.; 31, 33, 34, 38, 44, 45, 67, 72, 75, Law of Waters. As to waters of private ownership, see arts. 408, C. C.; 30, 34 (1), 44, 45, 67, 72, 73, 75, 78, L. W.)

From a perusal of the Law of Waters and the Civil Code, it seems to be the rule adopted by the legislator that waters follow the condition of the land wherefrom they spring, or whereon they flow or are found (arts. 407 (1) and (8), 408 (2), (3) and (4), Civil Code; 30, 31, 33 (1), 34, 44, 45, L. W.). However, this rule is subject to certain limitations, due to the peculiar characteristics of waters: a person may have the contingent use but not always the ownership of waters flowing on his land, and as soon as running waters leave a private land, they become public even if they pass over an intermediate private estate. (See arts. 408 (1) with 407 (8), 412, C. C.; arts. 30, 34, 35, 36, L. W.)

**2. Classification.**—A stream is a body of water running between defined banks as contradistinguished from stagnant water.

A river is a water course of considerable size, larger than a brook, creek, or rivulet, and having a greater or less volume of water flowing in a current in a defined channel between banks or sides toward its outlet into the sea, lake or other streams.

A floatable stream is a fresh water stream capable of being used for the purpose of floating down logs to the mills or to market, but too small to admit of navigation in the ordinary sense.

An estuary is that part of the mouth or lower course of a river flowing into the sea which is subject to tides, and, specifically, an enlargement of the river channel toward its mouth, in which the movement of the tide is very prominent.

## CHAPTER II.

## NATURAL WATERCOURSE.

## A. IN GENERAL.

A natural watercourse is a stream of water fed from permanent or periodical natural sources and usually flowing in a particular direction in a defined channel, having a bed and banks, or sides, and usually discharging itself into another stream or body of water. In determining whether a stream is a natural watercourse, its size is not a material element, either in respect to the volume of water carried or the length of its course; and while the element of *permanence* is necessary, great age is

not an essential attribute of a watercourse. It is immaterial whether the supply of a watercourse comes from springs or flowing wells or from another stream, provided it is permanent or, at least, periodical (*Rait v. Furrow*, 74 Kan. 101). It is essential to constitute a watercourse that it should have a distinct and substantial channel, with well defined banks, presenting unmistakable evidence to the eye of the frequent action of running water; and that the channel should follow the course of natural depression in the soil or should have been worn by the action of the running water and not made by the hand of man (*Green v. Carlotta*, 72 Cal. 267). And the fact that it may dry up entirely on occasions or at particular seasons of the year does not alter its nature (*County of Sierra v. County of Nevada*, 155 Cal. 1).

#### B. RIPARIAN RIGHTS.

1. **In General.**—Riparian rights are those of riparian land owners; they are vested rights of property of which the riparian proprietor cannot be deprived even by the State without compensation (*McCord v. High*, 24 Iowa 336; *People v. Hurlbet*, 131 Mich. 156; see, also, 3 Manresa 229). The rights which the riparian proprietor has with respect to the water of the watercourse are derived from and are dependent on his ownership of land abutting on the watercourse (*St. Louis Pub. Schools v. Risley*, 10 Wall (U. S.) 91; *Williams v. Wadsworth*, 51 Conn. 277; *Charming v. Rose*, 70 Cal. 189).

2. **Nature of Riparian Rights.**—The riparian proprietor is entitled to the natural flow of the water of the running stream through or along his land in its accustomed channel, undiminished in quantity and unimpaired in quality except as may be occasioned by the reasonable use of the stream by other like proprietors (*People v. Elk Riv. M. Co.*, 107 Cal. 221; *Lux v. Haggin*, 69 Cal. 255; *Durby v. Adam*, 102 Ill. 177). This does not imply any right of ownership over the water, but simply the right to the beneficial use thereof.

Under settled principles, both of the civil and the common law the riparian proprietor has a usufruct in the stream as it passes over his land. (*Pope v. Kinman*, 54 Cal. 3.)

The principles contained in the maxim *cujus est solum ejus usque ad celum* gives to a riparian owner an interest in a stream which runs over his land. But this is not a title to the water; it is a usufruct merely; a right to use it while passing his land. The same right pertains to the land of every other riparian proprietor on the same stream and its tributaries; and as each has a similar and equal usufructuary right, the common interest requires that the right should be exercised and enjoyed by each in a reasonable manner as not to injure unnecessarily the right of any other owner above or below. (*Hagawan Canal Co. v. Edwards*, 36 Conn. 476.)

3. **Right to Use the Water.** (a) *In General.*—A riparian owner has the right to make use of the water so long as he does not inflict any substantial injury upon

those below him (*Canal Trustees v. Haven*, 11 Ill. 554; *Gillet v. Johnson*, 30 Conn. 180). In navigable rivers the riparian rights are substantially the same as in non-navigable streams (*Holyoke Water Power Co. v. Lyman*, 15 Wall. 500).

(b) *Preference and Limitations to the Right to Use Water*.—Our Supreme Court, in the case of *Bautista v. Alarcón*, 23 Phil. 631, laid down the following doctrine:

Where it is proven that a watercourse is public property, it is proper to prohibit the occupation and usurpation of the same by any private individual or by the owners of land along the streams, and it is unlawful for persons occupying any such lands to reduce the width of the stream or to infringe any of the legal provisions for the protection of the public ownership, use and common enjoyment of rivers, watercourse or lakes.

All owners of land along a canal or water course which is a branch of a large stream, have a right to use the flowing water upon their respective properties, but no one of them may make exclusive use of such waters without violating the law.

The Law of Waters provides that public waters crossing private estates are subject, while passing thereover, to the reasonable use by the owners thereof, and the latter may freely carry out any plans necessary for contingent enjoyment of the same, provided they do not use any other banking material than earth and loose stones, and that the quantity consumed by each does not exceed 10 liters per second (art. 371). They may, however, use more, provided the other riparian owners are not prejudiced or do not object. The owners above stream have a preferential right of use to such waters over those lower down the stream, except in cases where the lower owners have already acquired a better right by the use of the waters for the period of one year and one day and the order of preference is in accordance with the order of their location from the source of the stream. The owner of waters springing from his land who allows twenty years to pass from the promulgation of Law of Waters, without making any use of them or who after said twenty years have passed uses them but stops from using them for a period of a year and a day and owners of estates lower down the stream have used said waters for the same period of one year and one day, the latter acquire a preferential right to use such waters and the former is bound to respect that right. But the right of preference acquired by the owner lower down the stream, is limited to the quantity he used for the space mentioned (see arts. 41, 42, L. W. and 415, C. C.). However, the owner of waters springing from his land may use all the water if he wishes and he does not lose a preferential right over such waters as against a lower riparian owner who has been using the waters for the above space of time. He loses them only by prescription of ten years; but as to the part not used, he must let it go out of the estate in its natural course and he cannot deflect it (arts. 34 and 35, L. W. See, also, 334 (8), C. C.; sec. 14, C. C. P.)

4. **Right to Construct Bridges and Ferries**.—See Art. 259, L. W.

5. **Right to Accretion by Alluvion**.—(Will be discussed under Bed and Banks of rivers).

### 6. Right to Construct Protective Works Against Public Waters.

7. **Proceedings to Determine and Protect Rights.**—If the controversy is upon the right to use the water of a stream, it shall be submitted to the Secretary of Commerce and Police through the Director of Public Works (sec. 4, Irrigation Act). But if the right is a settled one or one which has already been adjudicated or determined, an invasion or a threatened invasion of that right may be remedied by a writ of injunction (*Lux v. Haggin*, 69 Cal. 255; *Great v. Moak*, 94 N. Y. 115).

## C. OBSTRUCTION; DETENTION AND FLOODING OF LANDS.

### 1. Right to Natural Flow.

#### Law of Waters:

The private ownership of the channels of surface waters does not carry with it the right to construct thereon works that might turn the natural course of the waters to the injury of third parties or the destruction of which by the force of floods might cause serious injuries to estates, factories or establishments, bridges, roads or towns lying lower down (art. 69).

The owner of the lower or servient estate shall also be entitled to construct upon such estate any dykes, dams and embankments, which without interfering with the course of the waters, serve to regulate the same, or to make their use more profitable (art. 113).

Lower estates are obliged to receive waters which naturally and without the work of man flow thereon from higher up, as well as the stones and earth swept down in their course. \* \* \* (Art. 111.)

Every riparian owner is entitled to have the stream continue to flow through or along his lands in its accustomed channel and natural volume, without any obstructions of the channel or detention of the waters by other owners (*Central, etc., v. Champion*, 160 Cal. 517; *Miller v. Madera Canal, etc., Co.*, 155 Cal. 59). But we must bear in mind the provisions of our law, by which every riparian owner, as a matter of strict right, can have only the contingent use of ten liters per second (art. 37) and the preferential rights established by said law. They are limitations upon their general rights. To determine when a partial obstruction or detention is injurious to a riparian owner we must bear in mind those provisions. For example, it is not injurious to any right of a riparian owner lower down the stream when, before he has acquired any right of prescription in the waters, the owner of the estate where the waters spring from uses all of them, thus depriving the owner lower down of the use thereof (art. 34 (31)). But it would be injurious to the rights of an owner lower down the stream when, after he has acquired a preferential right, another riparian owner deprives him of his use.

2. **Right to Obstruct or Detain.**—A riparian owner has, however, the right to detain the water temporarily by means of a dam, so far as it is necessary and reasonable for rightful purposes (*North Alabama, etc., Co. v. Jones*, 156 Ala. 360), and the fact that such detention causes a slight disturbance of the current does not give rise

to any cause of action (*Hinkley v. Nickerson*, 117 Mass. 213; *De Baun v. Bean*, 29 Hun. (N. Y.) 236). But if the consequence of such detention is to substantially injure other owners on the stream, either by depriving them of the beneficial use of the water to which they are entitled or by flooding their lands, the dam or obstruction constitutes an actionable injury (*Wallace v. Farmers' Ditch Co.*, 130 Cal. 578; *Back v. Frazier*, 111 Ky. 909; *Eaton v. Boston and Concord R. Co.*, 51 N. H. 504, *Thayer's C. L. C.*, p. 1064). Our Law of Waters provides that the owners of the lower or servient estates may construct upon such estates any dams, dykes or embankments which, without interfering with the course of the water, serve to regulate the same, and in the same way the owners of the dominant or higher estates may do likewise for the purpose of regulating or mitigating the current of the waters (arts. 113, 114).

**3. Remedies Against Obstruction and Overflowing of Lands.** (a) *Removal or Abatement of Obstruction.*—Where a riparian proprietor has been injured in his rights by the unlawful obstruction of a natural watercourse, he is entitled to a decree ordering the removal of the obstruction and for damages (*Bautista v. Alarcón*, 23 Phil. 637). But he must do as little damage as possible and avoid a breach of the peace (*Butte Table Mt. Co. v. Morgan*, 19 Cal. 609; *Colburn v. Richards*, 13 Mass. 420).

(b) *Action for Damages for Overflowing Lands.*—The flooding of one's property is the "taking of property to the extent of the damage suffered" and an action for damages will lie (*Eaton v. Boston Concord, etc., R. Co.* (*ante*); *Bautista v. Alarcón, supra*).

(c) *Injunction to Restrain or Abate an Obstruction.*—A court of equity may give relief by injunction against an obstruction of a watercourse, and this remedy is available not only to restrain the continuance of the obstruction already commenced (*Farris v. Dudley*, 78 Ala. 124) but also to prevent the erection of the obstruction which is threatened (*Ogletree v. McQuaggs*, 67 Ala. 580). The complaint must show an irreparable injury, present or threatened, for which an action at law will not furnish an adequate remedy (*Preregoy v. McKissick*, 79 Cal. 572; *Smith v. King*, 61 Conn. 511).

#### D. POLLUTION.

**1. Right to Purity of Water.**—Every riparian proprietor has an equal right to have the stream flow in its natural state of purity, and any interference which defiles or pollutes it to such a degree as essentially to impair its purity and to prevent its use for any of the reasonable and proper purposes to which running water is usually applied, creates a continuous and actionable nuisance. (*Ala. Cons., etc., Co. v. Turner*, 145 Ala. 639; *Lewis v. Stein*, 16 Ala. 214.)

**2. Prescriptive Rights.**—The right to use the water of a stream in such a manner as to pollute it to the prejudice of lower riparian proprietors may be acquired by prescription (*Mass. Temp. Ass. v. Harris*, 79 Me. 250, 9 Atl. 737; *Jones v. Crow*, 32 Pa. St. 398). The use must be injurious, uninterrupted, adverse, under a claim of

right and with the actual or imputed knowledge of the lower proprietor and for the statutory period. (*Lockwood v. Lawrence*, 77 Me. 297, 52 Am. Rep. 763; *Jones v. Crow*, *supra*; see, also, Act 190, sec. 41.) Such a prescriptive right can be acquired only in the manner and to the extent to which pollution has begun and continued, and cannot warrant any further or greater pollution (*Jones v. Crow*, 32 Pa. St. 398).

**3. Remedies.** (a) *Action for Damages for Pollution*.—Any riparian owner especially and individually injured by the pollution of the stream may maintain an action for damages (*Drape v. Lady, etc., Co.*, 102 Ala. 501; *Straight v. Hoover*, 79 Ohio 263).

(b) *Injunction to Restrain Pollution*.—Injunction is a proper remedy to prevent a threatened pollution of a watercourse (*Columbia Ave., etc., Trust Co. v. Georgia, etc., Commission*, 92 Fed. 801). It is not a condition precedent that the right of the complainant should have been established in an action at law (*Dwight v. Hayes*, 150 Ill. 273).

#### E. DIVERSION.

**1. In General.**—A riparian proprietor has a right to the natural flow of the stream through his land without any material diminution in quantity except as necessarily results from a proper and reasonable use of the water by the other riparian owners. (*Ala. Cons. Coal, etc., Co. v. Turner*, 145 Ala. 639; *New England, etc., Co. v. Laurel Lake Mills*, 190 Mass. 48; *Bautista v. Alarcón*, *supra*.)

**2. Prescriptive Rights.**—A right to divert the waters of a stream may be acquired by prescription (*Hayes v. Silver Creek, etc., Co.*, 136 Cal. 238; *McLean v. Hapgood*, 85 Cal. 555). But in order that this may take place, there must be uninterrupted use, adverse and injurious to the other riparian owners, for the full prescriptive period (*Mathews v. Ferrea*, 45 Cal. 51).

#### 3. Remedies for Unlawful Diversion.

##### (a) Abatement.—

Where a party attempts to construct a dam on a creek for the purpose of diverting the water at that point, and such a diversion is illegal as against another party, who has a dam lower down, the latter may oust the former from the possession of the ground on that ground, and prevent the construction of the dam. (*Butte Table Mt. Co. v. Morgan*, 19 Cal. 609; see, also, *Preston v. Hull*, 77 Iowa 309.)

(b) *Action at Law for Damages*.—(See *Stein v. Burden*, 24 Ala. 130.) Plaintiff's right must be injuriously affected by the diversion (*Ellis v. Tone*, 58 Cal. 289; *Hinkle v. Avery*, 88 Iowa 47).

##### (c) Injunction.—

To divert or unreasonably obstruct a watercourse is a private nuisance, actionable at law, and in such case equity will interfere by injunction to prevent irreparable injury and avoid a multiplicity of suits. (*Ulbrith v. Eufaula Water Co.*, 86 Ala. 587.)

To be entitled to an injunction to restrain the diversion of a stream, the complainant must show his title to the riparian lands affected, or, at least, possession and such interest in the land as will be injuriously affected by the diversion (*Gould v. Stafford*, 91 Cal. 146; *Heilborn v. Fowler Switch Canal Co.*, 75 Cal. 426). And the injury must be such as cannot be compensated by an award of damages in an action at law (*Burden v. Stein*, 27 Ala. 104; *Lux v. Haggin*, 69 Cal. 255).

## BED AND BANKS OF STREAMS, LAKES, PONDS AND POOLS.

### 1. In General.—

#### (a) *Beds.* (1) *Nature.*

The natural bed or channel of surface streams of rain waters is the ground which such waters cover during ordinary floods in ravines, sand beds, or other natural channels. (Art. 66, L. W.)

The natural bed or channel of a creek or river is the ground covered by its waters during the highest floods. (Art. 66, L. W.)

The natural bed or basins of lakes, ponds or pools, is the ground covered by their waters when at their highest ordinary depths. (Art. 74, L. W.)

(2) *Ownership.*—In general. It may be accepted as a general principle that the bed follows the condition of the waters that flow thereover. (Arts. 407 (1) and (8), 408 (2), (3), (4), C. C.; 30, 31, 33 (1), 34, 44, 45, L. W.) However, par. 5 of art. 408 must be held to be an exception to this rule. Subsection (2) of art. 47 provides that "continuous or discontinuous waters of springs and rivulets running in their natural channels and these same channels, belong to the public," while subsection (5) of art. 408 provides that the beds or channels of running waters, continuous or discontinuous, formed by rain water, and those of rivulets which cross lands not belonging to the State, are of private ownership. (See 3 Manresa 364.) The following are the provisions of law relating to this point:

The natural channels referred to in the next preceding article (art. 66), if not of private ownership belong to the public domain. (Art. 67.)

The natural channels of rain waters passing through private estates are private property. (Art. 68, L. W.; 408 (5), C. C.)

The water beds of all creeks belong to the owners of the estates or lands over which they flow. (Art. 71.)

The water beds on public land, of creeks through which spring waters run, are part of the public domain. (Art. 72, L. W.; see 407 (3), C. C.)

The beds of lakes, ponds and pools not belonging to the State or to some private individual under special title, belong to the owners of the adjacent estates. (Art. 75, L. W.; 408 (2), C. C.) The beds of lakes, ponds and pools which originally were private property remain private. (Danvila, "Aguas," p. 64.)

Public water channels which become dry in consequence of works done under any special concession belong to the concessioners unless otherwise provided. (Art. 80.)

Lands accidentally inundated by the waters of lakes, or by creeks, rivers and other streams shall continue to be the property of their respective owners. (Art. 77.) But

The new channel opened in private property by a river navigable by boats or rafts, which naturally changes its course, belongs to the public. The proprietor may recover the ownership of the channel if the waters should again leave their bed either naturally or by means of works executed to that end. (Art. 79, L. W.; 372, C. C.)

If the owner does not construct any work to regain the bed newly opened, he may lose his right to do so by prescription. (See 3 Manresa 254.) Even though there is no specific provision of law with reference to new channels opened by non-navigable rivers, it is inferable from the provisions of the Law of Waters (art. 72 (2) ) that the new bed opened in private property by a river which naturally changes its course, belongs to the public. Said art. 72 (2), provides that the natural beds or channels of rivers belong to the public. (See 3 Manresa 252.) This is, however, contrary to the American theory, according to which "where a non-navigable stream flows over the land of a private owner, he has title to the whole bed of the stream within the boundaries of his land." (People v. Economy Light, etc., Co., 241 Ill.) The American theory is that the owner of both banks of a non-navigable river is the owner of the bed, and if he only owns one bank, his title extends to the middle of the bed of the stream. (Latig v. Scot, 17 Ida. 506.)

(b) *Banks of Streams.* (1) *Definition.*

By the phrase "banks of a river" is understood those lateral strips or zones of its bed which are washed by the stream only during such high floods as do not cause inundations. (See art. 73, L. W.)

(2) *Ownership.*—Although there is no specific provision on this point in the Civil Code or Law of Waters, it may, however, be inferred from their provisions that banks adjacent to private lands belong to private individual and those adjacent to public lands, belong to the public. (Arts. 81-84, L. W.; 366, 368, 373, C. C.)

(3) *Easements on Banks.*

*Salvage fishing and navigation.* The private ownership of the bank is subject to an easement in favor of the public, over a zone of three meters, in the general interest of navigation, of fishing and salvage. Nevertheless when the conditions of the ground make it necessary or advisable, this zone shall be made narrower or broader, the different interests concerned being reconciled. (Art. 73.)

Of aqueduct. (Art. 117 *et seq.*)

Of conduit. (Art. 123 *et seq.*)

Of buttresses. (Art. 142 *et seq.*)

Of tow path. (Art. 152 *et seq.*)

(4) *Protective Works Against Public Waters.*

The owners of estates adjacent to public water channels are at liberty to plant trees on their respective margins or banks, and to erect protective palisades against the action of the water whenever they deem these necessary, duly notifying the local authorities thereof. \* \* \*  
(See art. 89, *et seq.*)

**2. Accretion and Alluvion.** (a) *Nature and ownership.*—For antecedent legislation we find in the Digest the following provisions:

There is a species of possession called "pro suo" (proprietary), for in such manner we possess all those things which we capture in sea, earth or sky or which becomes ours by alluvion (D. Bk. 41, Tit. 10 L. 2. See, also, Bk. 41, Tit. L. 7, p. 1).

and the Law of Waters provides:

Accretion deposited gradually upon lands contiguous to creeks, streams, rivers and lakes by accessions or sediments from the waters thereof belong to the owners of such lands. (Art. 84.)

Civil Code.

The augmentation which the banks of a river gradually receives from the current of the waters belongs to the owners of lands adjacent thereto.

There are, therefore, two elements for this kind of accession: (1) the land which is augmented must be situated along the banks of the river; (2) the augmentation must be the successive and gradual result of the current of water.

The easement to which the banks of a river are subject for the purposes of navigation, floatation and fishing does not divest the owner of the adjacent land of his right to the accession by alluvion in favor of those enjoying the easement (3 Manresa 228). However—

(b) *Public Rights in Alluvion.*—Where lands along the banks of a river, constitute a public highway or are otherwise devoted to public uses, accretions to them partake of the same character and are subject to the same uses (3 Manresa 227). This principle is adopted by the common law. (Cook v. Burlington, 30 Iowa 94.)

(c) *Division of Land Formed by Accretion.*—

The channel of a river abandoned by reason of a natural change in the course of its waters, belongs to the owner or owners of the land lying along its course. If the abandoned channel separates the estates of the different owners, the new dividing line shall run equidistantly between such estates. (Art. 78, L. W.; 370, C. C.)

Islands formed in rivers by the successive accumulations of deposits from above belong to the owners of the banks nearest to each one, or to the owner of both banks if the island is in the middle of the river, in which case the dividing line shall run longitudinally through its center. If a single island thus formed should be farther from one bank than from the other, it shall be solely and entirely the property of the owner of the nearest bank. (Art. 83, L. W.; 371, C. C.)

(d) *Actions to Establish or Protect Rights in Alluvion.*—The ordinary actions would lie. (Percy v. Bybee, 20 Oreg. 385.) But the claimant must show that he is a riparian proprietor having title to the bank to which the addition has been made. (Buras v. O'Brien, 42 La. Ann. 527, 7 So. 632.)

**3. Avulsion.**—Avulsion is the removal of a considerable quantity of earth from the lands of one proprietor and its deposit upon or annexation to the land of another suddenly and by the perceptible action of the water. The following are the provisions of our Law of Waters on this subject:

When the current of a creek, stream, or river removes from its bank an appreciable part of the soil and transfers it to the estates situated on the other side or lower down the stream, the owner of the soil so transferred preserved his right thereto intact. (Art. 81. See 368, C. C.)

If an appreciable part of the soil so removed from the bank remains isolated in the channels, it continues to be unconditionally the property of the original owner. The same is the case when the river divides into two branches, thus surrounding and isolating certain lands. (Art. 82. See 368, C. C.)

Trees uprooted and transported by the current belong to the owner of the land upon which they are deposited, unless claimed within one month by their former owners, who shall then pay any expense arising out of the recovery of the trees and of their preservation in a safe place. (Art. 87. See 369, C. C.)

It is proper to notice herein the view of precedent legislation on this point. Both the Digest and the Partidas provide that the owner of the segregated portion of land or trees uprooted and carried to the land of another, loses his right in case such portion of land and trees are merged and form part of the latter. But our Law of Waters and Civil Code did not accept the view that the original owner loses his right to reclaim the land, because of the difficulty of establishing when the land or the trees are annexed and form part of the realty to which they are carried. The land segregated may be lost by prescription of ten years and by virtue of the right of accretion provided for in article 353, the segregated land becomes a part of the land to which it is annexed. (3 Manresa 239.) And where the owner of the segregated land is not known and does not reclaim the land, the latter becomes the property of the owner of the land to which the former is annexed, under article 353, because in this case article 368 does not apply, the owner not being known (3 Manresa 240). Said article 368 would not have application to great quantities of earth and gravel which are carried away and which can not be identified. They become part of the realty to which they are annexed by virtue of accession, under art. 253.

**4. Reliction.**—Reliction is the gradual withdrawal or recession of the waters of a stream, lake or sea. In case of streams, the land exposed belongs to the riparian owners (see art. 370, C. C.); in the case of lakes, riparian owners do not acquire the land exposed (art. 367, C. C.). In case of shores the land exposed remains the property of the State (art. 4, L. W.; *Ker v. Cauden*, 6 Phil. 732). The American common law principle is somewhat different. (See *Hagan v. Campbell*, 8 Port. 6; 33 Am. Dec. 267.)

**5. Batture.**—This term is used in the Civil Code to denote a bottom of sandstone or rock, mixed together, and rising toward the surface of the water, or an eleva-

tion of the bed of the river under the surface of the water, and, sometimes, the elevation of the bank when it has emerged from the water or becomes as high as the adjoining lands; in the latter sense it is synonymous with alluvion and belongs to the owner of the adjacent property. (*Zeller v. Southern Yacht Club*, 34 La. Ann. 837; see, also, 3 Manresa 228.) In the former case the same rule would apply as in the case of the formation of an island.

It is proper to quote an illustrative provision of the Digest regarding this matter:

"In three ways an island may form in a river: \* \* \* third, when little by little it (river) raises a place by accretion in the bed and enlarges it from the flow. \* \* \* By the other two methods (including the third) the island becomes the property of those whose fields were the nearest when the island first appeared." (D. 41, 130, 2.)

6. **Stranded or Floating Property.**—A riparian owner has an exclusive right, as against third persons, to seize wood and timber floating down the stream over his land and may appropriate it unless seasonably claimed by the owner thereof (*Rogers v. Judd*, 5 Vt. 223).

Brush-wood, branches and firewood floating down the stream, or deposited thereby in the water bed or upon the land of the public domain, belong to the first person who takes possession of them; wood deposited on lands or water-banks of private ownership, belongs to the owners of the corresponding estates (art. 86; see *Op. Atty. Gen.* of Oct. 23, 1908).

Trees uprooted and transported by the current belong to the owner of the land upon which they are deposited unless claimed within one month by their former owners who shall then pay any expense arising out of the recovery of the trees and of their preservation in a safe place. (Art. 87; see 369 C. C.)

### CHAPTER III.

#### SUBTERRANEAN AND PERCOLATING WATERS.

##### A. RIGHTS IN UNDERGROUND WATERS.

1. **Percolating Water.**—The term percolating water includes all waters which pass through the ground beneath the surface of the earth without a definite channel and does not appear to be supplied by a definite flowing stream (*Los Angeles v. Hunter*, 156 Cal. 603).

2. **Water Flowing in Defined Channels.**—Where a subterranean stream flows in a distinct and well defined channel it is governed by the same rules that apply to a natural watercourse on the surface; and the owners of the land beneath which it flows have the same rights with respect thereto as riparian proprietors have with respect to a stream on the surface. (*Miller v. Bay Cities Water Co.*, 157 Ca. 256; *Hebron, etc., Co. v. Harvey*, 90 Ind. 192.)

3. **Ownership.**—The Law of Waters provides:—

The owner of an estate has absolute dominion over subterranean waters obtained therefrom by means of ordinary wells, whatever may be the contrivance employed in the extraction of such waters. (Art. 45.)

He may develop the waters by means of artesian wells, passages or galleries, provided that he does not draw off or divert public waters from their natural course (arts. 48, 49). The question now arises, when are subterranean waters public? There is no doubt that when they are beneath public lands, they are public; but, is there any case in which subterranean waters running beneath private lands are public? The limitation prescribed in art. 49 suggests its existence. The general rule that the owner of land is also the owner of the things above and beneath it finds in this case an exception, for it is not believed that a different rule, in the civil law, will govern subterranean waters than the one governing surface waters. Nowhere in the Law of Waters or the Civil Code is a difference suggested. I believe the same rule, as in common law, applies to both cases, and, in fact, subterranean waters may be as much a natural watercourse as surface waters so that the general rule regarding watercourses should apply equally to both. Therefore, I may repeat that the owner of an estate beneath which run subterranean waters can not divert, obstruct or pollute the same, but his rights thereto are subject to the same limitations as those of riparian owners of surface waters. But when the subterranean waters are not running streams, but are lakes or ponds, then the owner of the land may make absolute disposition of them. (Art. 44 (2); 75, L. W.; 408 (2), C. C.) The same rule applies to percolating waters which are subject to the absolute disposition of the owner of the realty where they are found, and the adjoining owners have no right to have such water reach or flow into his land (*Brown v. Illius*, 27 Conn. 84; *Bloodgood v. Ayers*, 108 N. Y. 400).

#### B. OBSTRUCTION AND OTHER INJURIES.

1. **Obstruction and Diversion.**—The following are the provisions of the Law of Waters:

Any land owner may, within his own estate, sink wells freely and erect works for the raising of water, even though the waters of his neighbors be diminished thereby. He must, however, preserve a distance of two meters between well and well in towns and villages, and of fifteen meters in the country between any fresh excavation and the permanent wells, tanks, bridges and irrigating canals of his neighbors. (Art. 46.) The owner of any land may develop and appropriate without restriction, by means of artesian wells, or of passages and galleries, the water existing beneath the surface of his estate, provided that he does not draw off or divert public waters from their natural course. (Art. 49-1.)

The works referred to in the preceding article for the artificial development of waters, shall not be carried on within one hundred meters of another artesian well, passage or gallery, fountain, canal, or irrigating ditch, or public water place, without proper permission of the owner, or of the Municipal Council. \* \* \* (Art. 50-1.)

As we may see from the first and last articles above cited, a certain distance is provided for between a well passage or gallery which is intended to be opened and those already existing for the obvious reason that the former may injure the latter.

Formerly, in the laws of the Partidas (from which art. 46 was copied), the limitation on the owner of an estate who wanted to sink a well was that of *malice* instead of *distance*. According to the Partidas, a man could sink a well in his estate no matter if a fountain or another well in his neighbor's premises was thereby diminished, unless the person wishing to make the new well had no need of it, and acted maliciously, with the intention of doing harm to the other, in which case the latter could prevent the work from being done. Our Law of Waters did not adopt the test of malice, which is always very difficult to ascertain, and did adopt the easier test of distance, and so long as the distance prescribed is preserved, the right of the owner to make the works aforesaid is absolute, and he is subject to no liability even though he acted with malice and his neighbors' wells or passages were injured thereby. But article 49 expressly provides that the right of the owner of an estate to develop subterranean waters is subject to the paramount right of the public, and he can never divert public waters.

**2. Pollution.**—The pollution of subterranean or percolating water constitutes an actionable injury and makes the party causing the same liable in damages (*Brown v. Illius*, 27 Con. 81; *Kinnaird v. Standard Oil Co.*, 89 Ky. 468; *Bell v. Nye*, 99 Mass. 582).

#### C. REMEDIES

**1. Action at Law.**—For one to maintain an action for pollution or diversion of subterranean waters it is necessary to show title; possession is sufficient (*Long v. Louisville, etc., R. Co.*, 128 Ky. 26). Plaintiff must, however, show that defendant had knowledge by notice or otherwise of the injurious effects of his acts (*Brown v. Illius*, 25 Conn. 583; *Bell v. Nye*, 99 Mass.).

**2. Injunction.**—In *Miles v. Bay Cities Co.*, 157 Cal. 256, it was held that injunction may be available of to prevent a diversion or pollution of subterranean waters in the same way as in the case of surface waters; but plaintiff must show that there is no adequate remedy in law (*Newport v. Temescal Water Co.*, 149 Cal. 531); and where the rights of plaintiff are doubtful, relief will be denied (*Roath v. Priscoll*, 20 Conn. 533).

### CHAPTER IV.

#### A. WHAT ARE LAKES AND PONDS

##### 1. In General.—

A lake is a body of perpetual water.

A pond is a temporary body of still water which generally gathers in winter.

A lake, a pond \* \* \* may be public. (D. 43, 14, 1-2, 6.)

A lake is an inland body of water of considerable size, occupying a natural basin or depression on the earth's surface below the ordinary drainage level of the region, fed by either surface or subterranean stream or springs and having little or no current or motion of the waters in any particular direction.

A pond has the same characteristics except that it is of relatively small size and may be either natural or artificial.

#### B. RIGHTS IN LAKES AND PONDS

1. **In General.**—The owners of land adjacent to lakes and ponds have generally the same rights as riparian owners of watercourses (*Turner v. The James Canal Co.*, 155 Cal. 82; *Robinson v. Davis*, 169 N. Y. 577), and their right to make use of the waters must be reasonable so as not to prejudice the equal rights of others (*Hyatt v. Albro*, 121 Mich. 538). Any one may use the waters for washing, bathing, or watering animals (art. 166); they may fish thereon (art. 169), or in case of navigable lakes, they may freely navigate on same (art. 179). They have the right to construct protective works on their banks (art. 89.)

2. **Right to bed and Banks.**—If the beds of non-navigable lakes do not belong to the State or to some private individual under a special title, they belong to the owners of the adjacent estates (art. 75). They are subject to the easements of salvage and navigation (art. 76). But the owners of the adjacent lands do not acquire the land uncovered by the natural diminution of the waters, neither do they lose the lands accidentally inundated (art. 367, C. C.; 77, L. W.)

3. **Accretion and Reliction.**—Accretions deposited gradually upon lands contiguous to lakes by sediments from the waters thereof belong to the owners of such lands. (Art. 84-1.)

The owners of lands contiguous to lakes and ponds do not acquire the land uncovered by reliction. (Art. 362, C. C.)

4. **Outlets.**—When a stream issues from a great pond or lake and is used by riparian owners, the owner of the pond or lake has no right to interfere with such riparian rights either by damming the outlet or diverting the water into another watercourse; neither do the riparian owners have the right to draw the waters of the lake below its natural channel because in that case, the rights of the public in the lake will be prejudiced (*Hick v. Parnclee*, 21 Conn. 86; *Fernald v. Knox Woolen Co.*, 82 Me. 48, 7 L. R. A. 460; *Smith v. Youmans*, 96 Wis. 103, 65 Am. St. Rep. 30; *Mohr v. Ganet*, 10 Wis. 513; 78 Am. Dec. 687). It is not lawful to obstruct the outlet of a lake when in so doing the waters of the lake are set back and overflow the land of another (*Chapman v. Thames Mfg. Co.*, 13 Conn. 269).

#### C. INJURIES AND REMEDIES

1. **In General.**—When a lake or pond is covered by the deepening or enlarging of an outlet by another person, an action for damages will lie in favor of those who have acquired rights in the original level of the lake or pond (*The Cedar Lake H. Co. v. Water Power Co.*, 33 Conn. 460). A similar action lies in favor of riparian owners of the stream issuing from the lake or pond against persons diverting the water into another channel. (*Castle v. Madison*, 113 Wis. 346). On the same principle, an action lies in favor of owners of land flooded by waters caused to set back (Birming-

ham Riv., etc., Co. v. Dor, 131 Ala. 177). But plaintiff must show special damage (Potter v. Howe, 141 Mass. 357.)

2. **Injunction.**—Injunction will be granted to restrain the maintenance of a dam whereby the water of the lake or pond may be raised above its natural level at high water, in favor of a person who has suffered special injury (Potter v. Howe, 141 Mass. 357); Proprietors, etc., v. Brantree, etc., Co., 149 Mass. 478). But there must be no other adequate remedy (Fernald, etc., v. Knox Woolen Co., 82 Me. 48; 7 L. R. A. 459; Stock v. Hillsdale, 155 Mich. 475).

## CHAPTER V.

### RAIN WATERS

#### A. NATURE

By rain water we mean water that falls from the sky and also that which has its origin in rain. \* \* \* (Digest 39, 3, 1.) "Rain waters are those which fall directly from the sky" (Danvila, *Aguas*). Rain waters have always been governed by different rules than these of streams or lakes.

#### B. RIGHTS AND LIABILITIES

##### 1. Acquisition and Ownership.—

###### Law of Waters:

Rain waters which fall or collect upon an estate belong to the owner while flowing over the said estate. He may, therefore, construct upon his property cisterns, tanks, pools or reservoirs to hold such water, provided that he does not thereby cause any injury to the interest of the public or of third parties. (Art. 30.)

Rain waters running in torrents or through sand beds, wherever the channels thereof form part of the public domain, shall belong to the public. (Art. 31.)

###### Civil Code:

To the public domain belong:

Rain waters running through ravines or sand beaches and their beds.

##### 2. Natural Flow or Drainage and Obstruction Thereof.—

###### Law of Waters:

Lower estates are obliged to receive waters which naturally and without the work of man flow thereon from higher up, as well as the stone and earth swept down in their course. \* \* \* (Art. 111.)

The private ownership of the channels of rain waters does not carry with it the right to construct thereon works that might turn the natural course of the waters to the injury of third parties or the destruction of which by force of the floods might cause serious injury to estates, factories or establishments, bridges, roads, towns or villages lower down. (Art. 69; see Art. 413, C. C.)

This article needs some comment for this points out the main difference between rain water and natural watercourses. The inquiry is, when are the rights of third

parties injured? Has an owner of an estate lower down the right to the natural flow of rain waters running through an upper estate? Has he the same contingent use of rain waters as allowed by arts. 34 *et seq.*, regarding natural watercourses? The Supreme Court of Spain in its sentence of Feb. 28, 1865, held that upper estates always have preference in the enjoyment of rain waters over those lower down, unless the owners of lower estates have acquired a *special title* to said waters. And in its sentence of Feb. 26, 1865, the same Court held that no preferential right can be obtained in rain waters by the lower estates. Therefore, the contingent enjoyment provided for by arts. 34 *et seq.* does not apply to rain water and the owner of the estate where rain waters may fall or collect can make absolute disposition of the same, may turn the course of the waters, and may do anything which will not cause a *positive* injury to the other parties. He may do anything with regard to the use of such waters but without aggravating the burden of the lower estates (art. 534, C. C.). Merely depriving third parties the benefit of rain waters does not constitute the injury referred to in this article and in article 413, C. C. (See 3 Manresa 614.) The following provisions of the Digest regarding this matter illustrate the point:

Inasmuch as a structure that harasses my field with rain water gives me a right to the action of *acquae pluviae arcendae*, so on the contrary, it may be asked whether the action lies if my neighbor makes a structure to prevent water that otherwise flowing onto my fields would benefit me. Ofilius and Labeo do not think the action can be brought even though I am interested in having the water reach me. Therefore the action lies if the rain water injures, not if it fails to benefit. (Dig. 39, 3, 1, 32.)

But if a neighbor builds a structure and, afterwards, taking it away, the water flowing to a lower field does harm, Labeo thinks the action *aq. plu. ar.* will not lie because there always rests the servitude upon a lower field of receiving water flowing naturally down to it. Labeo admits, however, that the action would plainly lie if by reason of the removal of the structure the water would flow more vehemently or be massed. (Dig. 39, 3, 1, 32.)

### C. REMEDIES.

**1. Action for Damages.**—This action will lie in favor of the one having title to or possession of the land affected, for obstructing the course of the water off the land of another (Louisville, etc., and Co. *v.* Hodye, 6 Bush (Ky.) 141; Choctaw, etc., R. Co. *v.* Rice, 7 Ind. Terr. 514; 104 S. W. 819), and notice to the wrong-doer is not necessary (Lion *v.* Baltimore City Pass. R. Co., 90 Md. 266, 47 L. R. A. 127).

**2. Injunction.**—The owner of a lower tract of land has not right to throw back surface water naturally flowing down his land from an upper tract, to the damage of the latter, and a court of equity may enjoin such an act (Nininger *v.* Norwood, 72 Ala. 277); and injunction will lie when another threatens or it is shown that he has the intention of obstructing, on his land, the waters coming from an upper estate (Robertson *v.* Lewis, 77 Conn. 345).

An injunction will also lie against the owner of an upper estate who attempts to increase the burden of the servient estate in receiving waters coming from the former (*Elser v. Village of Gun Port*, 223 Ill. 230; *Nicks v. Sulliman*, 93 Ill. 255). But in order to grant injunction, evidence of the right of plaintiff must be clear (*Ranking v. Stultz*, 140 Iowa 272).

## CHAPTER VI APPROPRIATION AND PRESCRIPTION.

### A. RIGHT OF APPROPRIATION.

**1. Origin of the Right.**—Under the common law priority of appropriation was not recognized. It arose out of mining customs and regulations recognized and applied by the courts because adherence to the common law rule was not beneficial to the country. The greater mining interests were to be encouraged, and it was for their benefit and convenience that the rule that prior appropriation of the waters gives a better right thereto, was unanimously recognized by the courts and later sanctioned by Congress in its Act of July 26, 1866. Although said Act recognized only priority of appropriation for mining and agricultural uses, it was later held by the courts to extend to other uses.

#### **2. Basis of the Right.**—

Before the passage of Act of July 26, 1866, the rule of prior appropriation could not be based on any statute or grant. Hence the courts, in order to protect the vast interests which have grown up under mining systems and to give legal sanction to rights thus acquired, invoked the common law doctrine of presumption, and implied, from all the circumstances, a license from the United States to appropriate water, commensurate with the rights which he could justly claim. (*Lux v. Haggin*, 69 Cal. 255.)

**3. Waters Subject to Appropriation.**—The rule of priority of appropriation applies only to waters having a defined channel and does not apply to surface nor percolating waters (*Brown v. Kistler*, 190 Pa. St. Rep. 499; *Dickey v. Maddux*, 48 Wash. 411).

**4. Who May appropriate.**—Persons occupying the land as a mere lessee could appropriate; they need not be the owner thereof (*Sayre v. Johnson*, 33 Mont. 15).

### B. HOW AN APPROPRIATION IS EFFECTED.

**1. Elements of Appropriation.**—(a) Intent to apply the water to beneficial use (*Smith v. Duff*, 39 Mont. 382); but notice of intention is not necessary to establish priority of right (*Wells v. Mantes*, 99 Cal. 583, *Lower Tule, etc., Co. v. Angiola, etc., Co.*, 149 Cal. 496).

#### (b) Physical Acts.—

The method of acquiring the right to the use of water by posting and recording notice of appropriation provided in section XX, Civil Code, is not exclusive. One may by a prior, actual and complete appropriation

and use, without proceeding under the Code, acquire a right to the water beneficially used, which will be superior and paramount to the title of one making a subsequent appropriation in the same stream in the manner provided by the Code. (*Lower Tule, etc., Co. v. Angiola, etc., Co.*, 149 Cal. 496.)

Possession or actual appropriation, therefore, must be the test of priority in all claims to the use of the water, and there is no such thing as constructive possession (*Kelly v. The Natoma Water Co.*, 6 Cal. 105).

**2. Compliance with Statute.**—Where there is a statute prescribing the means and methods by which water may be diverted, appropriated and applied to a beneficial use, the appropriator is required to comply with the terms of the statute in order to perfect such appropriation (*Speer v. Stephenson*, 16 Ida. 707). So in the Philippine Islands, where Act 2152 prescribes the method by which appropriation may be effected, the title of an appropriator is not complete and perfect until after he has complied with the methods prescribed. But these methods have nothing to do with the priority acquired by actual appropriation for beneficial use, and a person who actually appropriates water has a preferential right over one who after said appropriation proceeds under the statute; and, I believe, that even after the granting of certificate to another under section 18 of the Act, the right of a prior appropriation is valid as against him, though perhaps it will be otherwise if the certificate is recorded and third parties have acquired an interest in it. (See *Rasmussen v. Blust*, 85 Nebraska 198.) A grave doubt, however, arises from the language of section 14 of the Act, which provides that a person wishing to appropriate water must "previously" make an application. Does this mean that an actual appropriator who does not comply with that provision, but who intends to do so after a reasonable time, does not acquire a right of priority to the waters appropriated? Or does it mean only that an application is a preliminary step to perfect the appropriation with a view of securing a certificate from the government? I believe the latter is the sounder interpretation, *i. e.*, a person making an actual beneficial use of the waters acquires a priority of right over one who filed the application provided in said section 14. I believe this point is definitely established by the adjudicated cases in the United States, wherefrom we have borrowed our system of appropriation. (See *Lower Tule, etc. Co. v. Angiola, etc. Co.*, 149 Cal. 496; *Speer v. Stephenson*, 16 Ida. 707.) Besides, section 15, last paragraph, of the same law provides that failure to make a protest shall not work to the detriment of prior rights to the appropriation or use of water. As to what is meant by prior rights it is hard to determine, but I think it has reference to the rights of an actual appropriator. If so, then an actual appropriator has a better right than one making a subsequent application. If so, one may appropriate public waters without previously making an application. However, an application and all the successive steps prescribed by the law are necessary to perfect his right to such waters. This view is strengthened by the consideration that what the law is after is the beneficial use of the waters in order to facilitate the development of the resources of the country, and this purpose can be better

accomplished by giving to an actual appropriator a preferent right to the waters appropriated.

**3. When is Appropriation Complete.**—The appropriation is complete after all the steps prescribed by the statute are complied with, but the rights of an appropriator relate back to the first preliminary steps which he has taken. In the Philippines, the title is complete upon the granting of the certificate provided for in section 18 of Act 2152; the record provided for therein is merely for the purpose of giving notice to third parties. According to our statute, the rights of the appropriator relate back to the time of filing the application. (*Speer v. Stephenson*, 16 Ida. 707; *Osgood v. El Dorado, etc., Co.*, 56 Cal. 573.)

**4. Riparian Rights Protected.**—We have seen in the early discussion of this subject that riparian owners have a right to the natural flow of the waters of a stream and to the purity of the same, and that this is a vested right running with the land. This right is protected as against appropriators above or below the stream, so that one making an appropriation of public waters does not acquire a right to the same when said appropriation is injurious to riparian owners (*Davis v. Martin*, 157 Cal. 657; *Senior v. Anderson*, 130 Cal. 29; *Crawford v. Hathaway*, 67 Neb. 325). However, a prior appropriator of the waters of a stream holds a preferential right over a subsequent person who, by purchase or grant of riparian land, becomes a riparian owner.

**5. Proceeding to Protect Rights** (a) *Action for Damages.*—An action for damages will lie against one diverting waters already appropriated (*Cohen v. La Canada Land, etc., Co.*, 142 Cal. 437). But it was held that until a claimant is himself in a position to use the waters of a stream subject to appropriation, the right to the water does not exist in the sense that the mere diversion of the water by another is a ground of action, either to recover the water or for damages for its diversion.

(b) *Action to Quiet Title.*—It is not necessary, in order to maintain an action to quiet title to a water right that there should be an actual interference with the plaintiff's rights. The assertion of an adverse claim is all that is required (*Peregoy v. Sullick*, 79 Cal. 568).

(c) *Injunction.*—Injunction will lie for diminishing the supply to which an appropriator is entitled (*Williams v. Altnow*, 57 Oreg. 275).

In action for the diversion of waters where there is a clear violation of an established right and a threatened continuance for such violation, it is not necessary to show actual damage, or a present use of the water, in order to authorize a court to issue an injunction and make it perpetual (*Brown v. Ashley*, 16 Nev. 311; *Franklin v. Pollard Mill Co.*, 88 Ala. 318).

**6. Effect of Act 2152 on Appropriations Made Prior to Its Enactment.** (a) *Extent of Appropriation Allowed Under Spanish Law.*—As a general rule riparian owners could use public waters provided they did not employ other banking materials than earth and loose stones and that the quantity of the waters used did not exceed ten liters per second. If riparian owners wanted to use other devices than the above,

then the permission of the governor was necessary, said permission being in the nature of concession. (Arts. 37 and 233 (1).) An exception, however, was made in the case of navigable streams and in the case of railroads. In the former case, the riparian owners could freely establish *norias*, pumps or any other device intended to draw the water necessary for the irrigation of their abutting properties, provided they did not obstruct navigation, and in the latter case the railroad companies could take a volume of water corresponding to the land occupied and paid for by the company. And in case of rain waters no limitation as to quantity was adopted so long as the appropriation was effected by means of dykes of earth and loose stones or movable dams, but in case permanent devices were constructed a concession was necessary. There was a distinction between appropriations allowed (1) to villages or towns, (2) to railroads, and (3) to irrigation systems. In the first case the village or town could freely use public waters not exceeding ten liters a day per inhabitant, beyond that amount a concession being necessary; in the second case proper permission was always necessary except in the case provided by article 223; and in the last case, the general rule laid down in article 37 applied with the exception of navigable rivers, in which event the riparian owner could freely carry on any works for the appropriation of waters which did not obstruct navigation (art. 233).

We note from the above that under the Law of Waters of 1866, the appropriation of public waters was always limited even in the case where no damage was caused to third parties. However, since there was no law expressly enjoining and making unlawful the excessive use of public waters, and those limitations being only for the purpose of protecting rights of third parties, these rights could be waived, and in case a person had enjoyed the use of public waters, more than the quantity allowed, for the space of twenty (now ten) years, without objection on the part of interested parties or the government, he thereby acquired a vested right in the continuous enjoyment of said waters, of which he could only be divested by proper expropriation proceedings. (See art. 194.) It seems that under the Spanish law the rule adopted in the United States that a prior appropriator holds a better right than subsequent ones, to the use of the waters appropriated, was not recognized. In fact, this rule was not the common law rule and became established in the United States by statute.

(b) *Adoption of United States Rule of Prior Appropriation.*—We have seen that according to the rule of appropriation in the United States, as sanctioned by the Act of Congress of 1866, prior appropriators even without the consent of the government acquired a right of preference in the enjoyment of the waters, but that this title was not complete until a grant was secured from the government. I think that this rule has been introduced in our system of legislation.

The first step given to this effect may be found in the Philippine Bill, sec. 50, which is copied almost literally in Act 926, sec. 75, which reads:

Sec. 75. The beneficial use of water shall be the basis, the measure and the limit of all rights thereto in said Islands and the patents herein granted shall be subject to the right of the Government of these Islands

to make such rules and regulations for the use of such waters and the protection of the water supply, and for other public purposes, as it may deem best for the public good. Whenever, by *priority of possession, rights to the use of water* for mining, agricultural, manufacturing, or other purposes *have vested and accrued*, and the same are recognized and acknowledged by the local customs, laws and decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same, and all patents granted under this act shall be subject to any vested and accrued rights to ditches and reservoirs used in connection with such water rights as may have been acquired in the manner above described, prior to April 11, 1899.

Finally came Act 2152 and definitely established the principle:

Sec. 3 Priority of appropriation shall give the better right as between two or more persons using the public waters. In determining the priority, the non-user of the waters for a period of five years shall extinguish any claim of priority unless such non-user shall have been caused by force majeure. \* \* \*

Also in sec. 15, last paragraph it is provided:

Provided, however, that failure or omission to file such protest shall not work to the detriment of prior rights to the appropriation or use of such waters.

The former provides how prior rights may be acquired and the latter provides that those prior rights are not prejudiced by failure to file a protest against an application. That is, a person who actually applies the water to beneficial use has a preferent right to the same even as against one who subsequently files an application and proceeds under the statute.

(c) *Effect on Appropriations Made Before Passage of the Act.*—Do the above quoted provisions have a retroactive effect? In other words, will an appropriator before the passage of Act 2152 acquire a preferential right to the use of the waters over subsequent ones? There is not the least doubt in my mind that it has a retroactive effect. Section 5 provides that the Director of Public Works shall as soon as practicable prepare for such streams in the Philippine Islands as may be designated by the Secretary of Commerce and Police a list of the appropriations of waters *according to priority*, and that section, together with sections 6, 7 and 8, provides for the procedure to be followed in making an investigation of priorities. Lastly, section 8 empowers the Director of Public Works or any official by him thereunto specifically authorized, in the investigations made to *determine the priority* of appropriation, to examine witnesses under oath. Now, to what kind of appropriation do articles 5 and 8 refer? It is clear from the language of these articles that they refer to appropriations made prior to the passage of Act 2152. Sections 5 to 13 of said Act have exclusive reference to appropriations made previous to said Act and they provide the method for perfecting such appropriations. This becomes more apparent by reading sections 9 and 18. Both sections provide for the granting of a certificate to appropriators, but section 9 refers to appropriations of water before the passage

of Act 2152 and which are perfected under the provisions of the Act, and section 18 relates to appropriations made after and pursuant to the irrigation Act. Now, can priority of appropriation referred to in sections 5 and 8 which, as we have seen, relate to those appropriations made prior to the enactment of the Irrigation Act be acquired? Or, in other words, how is the right of priority of appropriation made before the passage of Act 2152 determined? There is only one provision in the Act with regard to this point, and what sections 5 and 8 mention as prior appropriations can refer only to that section (section 3, above quoted) and which, consequently, recognizes as valid appropriations made before said irrigation Act was passed and priority of right in appropriators in conformity with the provisions of said sec. 3.

### C. PRESCRIPTION.

(a) *In General.*—The waters of a stream may be acquired by prescription. Art. 194, L. W. provides:

Art. 194. Any person who has enjoyed the use of public waters for a term of twenty (now 10) years without objection on the part of the authorities or of any third person, shall continue in its enjoyment even though he may not be able to show that he secured proper permission. (See Civil Code, Art. 409 (1); see Op. Atty. Gen. Nov. 25, 1908, unpub.)

(b) *Elements of Prescription.* (1) *Duration.*—It must be for the full statutory period. In the Philippines, it is ten years (sec. 41, Act. 190), waters being considered as real estate (art. 334 (8), C. C.); (2) *Continuity* (sec. 41, Act. 190), *Smith v. Duff*, 39 Mon. 374; (3) *Adverse Character* (sec. 41, Act 190); (4) *Notice to Owners* (*Stewart v. White*, 128 Ala. 202).

(c) *By Whom and Against Whom Prescriptive Rights Acquired.*—The person acquiring the right by prescription need not be a riparian owner. (*Laurie v. Silliby*, 76 Vt. 240.) It seems that in the Philippines it is available even against the government. (See Art. 194, L. W.)

(d) *Nature and Extent of the Right.*—

In title by prescription a grant is conclusively presumed and such a title is as valid and as indefeasible as a title by deed and embodies the same attributes of ownership. This includes the right to go upon the premises of another to remove that which constitutes a source of injury, or nuisance doing no wanton or unnecessary damage to prevent the injury it may do. (*Pyot v. State*, 170 Ohio St. 294.)

(e) *Subterranean and Percolating Waters.*—Underground waters percolating, oozing or filtrating through the ground are not subject to prescription. (*Frazier v. Brown*, 12 Ohio St. 294.)

(To be concluded.)