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A. R. White

Will Wilson

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THE FLOW AND UNDERFLOW OF MOTL V. BOYD —
THE CONCLUSION

by

A. R. White* and Will Wilson†‡

Part I

ANALYSIS OF APPLICABLE AUTHORITIES — USED AND
UNUSED BY THE COURT

In a previous article,¹ the authors sought to sketch briefly the
physical, economic, governmental and general legal aspects
of the water law problem. The conflicting interests and the com-
plicating factors are many, particularly in a state such as Texas
which has wide variations in rainfall, climate and topography,
and a mixed heritage, applicable to most of its major streams,
of the civil and common law. It was in this setting that Motl v.
Boyd² was decided. While in some respects the decision is a con-
tribution to the literature on the subject of water law, it has had
its flow of confusion and uncertainty with which most lawyers,
engineers and water officials interested in this area of the law are
familiar. With its underflow—those sustaining authorities and
arguments used by the courts—such persons may not be quite
so familiar. It is the purpose of this paper to examine minutely
those authorities as well as others overlooked by the court but
which bear vitally on the issues involved.

In order that the significant issues of the case may be thor-

*LL.B., Southern Methodist University; Dean, University of Houston College of Law.
†B.S., University of Oklahoma; LL.B., Southern Methodist University; Associate
Justice, Texas Supreme Court.
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travel and translations involved in the preparation of this article.
¹ 9 Sw. L. J. 1 (1955).
² 116 Tex. 82, 286 S. W. 458 (1926)
oughly understood, it is necessary to set out fully its facts. In
1886 one Nasworthy owned a 914-acre farm riparian to Spring
Creek, a navigable Texas stream. In that year one Lackey con-
tracted to buy the farm if he could arrange for water to irrigate
it. This arrangement was made by Lackey with one Lee who
owned 160 acres, patented by the state to his remote grantor in
1857, lying riparian to Spring Creek some four miles above the
larger tract. Lee gratuitously authorized Lackey to construct an
impounding dam on his farm and the necessary headgate and
irrigation ditch to convey the water to the 914-acre farm below.
This Lackey did and he and his successors in title, the Motls
being the last, openly and continuously used the water so im-
pounded to irrigate their farm for a period of 35 years. Spring
Creek carried storm waters and nearly continuous flow from
springs. The dam impounded both and both were used for irri-
gation. In 1889 the then irrigator of the 914-acre farm filed the
affidavit necessary to comply with the Irrigation Act of that year.
No issue of any kind arose until the year 1920 when R. W. Boyd
and H. C. White purchased the 160-acre tract on which the dam
was located. This purchase was made with full knowledge of the
presence of the dam and the use being made of it by the Motls.
Boyd and White made a preliminary effort to get the permission
of the Motls to pump water from behind the dam, which effort
was not followed through, and then sought from, and were denied
by, the Board of Water Engineers, permission to appropriate
“storm” waters from the same source. They then installed a pump
and began drawing water from behind the dam to irrigate por-
tions of their 160 acres. The Motls sought and obtained a tempo-
rary injunction against them and on a failure of the court to dis-
solve on motion, Boyd and White appealed. The court of civil
appeals reversed the trial court and a writ of error was granted
by the supreme court.

3 The stream was navigable in accordance with the then applicable Texas statute
which read:

“All lands surveyed for individuals, lying on navigable water courses, shall front one-
half of the square on the water course and the line running at right angles with the gen-
eral course of the stream, if circumstances of lines previously surveyed under the laws
will permit; and all streams, so far as they retain an average width of thirty feet, shall be
considered navigable streams within the meaning hereof, and they shall not be crossed
by the lines of any survey.” Tex. Rev. Civ. Stat. (1879) art. 3911. This article has been
The opinion of the court of civil appeals attracted much attention and numerous briefs on both sides of the lawsuit were filed in the supreme court by its friends. The case was on file in that court for four years. The supreme court, in an extensive opinion by Chief Justice Cureton, reached two major conclusions of interest to us here. First, the court concluded that the original grantees of all riparian lands in Texas prior to 1895, whether from Spain, Mexico or Texas, acquired, as a part of their grants, a vested property right to the use for irrigation of certain of the waters in the streams to which their lands were then riparian, and that such right passed by conveyance to subsequent grantees to the extent that the land of the original grants remained riparian.4

Second, the court held that the long, open, continuous use by Motl and his predecessors in title of the waters from behind the dam on the 160-acre tract with the knowledge and acquiescence of its owners, estopped the latter from questioning in 1920 the continuance of the practice, and, in effect, constituted a grant of the riparian rights to Motl and his predecessor in title.5 Specifically it is with these two aspects of the opinion that this paper deals.

This article consists of Parts I and II. The general plan of Part I is to discuss and analyze the authorities relied on by the Court to sustain its conclusion on riparian rights including the modern Texas statutes, the text citations from Hall's *Mexican Law*, the statutes of Mexico and Coahuila and Texas and three Texas cases. The meaning of the laws of Mexico and Coahuila and Texas will be sought, first, as a matter of pure statutory construction, second, in the light of the language used in other related statutes enacted by the same legislative bodies, and third, in the light of the contemporaneous practices by those Mexican officials charged with their administration. The paper will then analyze some early

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4 It will be remembered that the term “riparian rights” is commonly used to refer to a cluster of specific rights, including the right to flow, to fish, to navigate, to use water for irrigation and for domestic purposes, and the rights of accretion and avulsion. The nature and extent of the right to use water for irrigation is the only one of these rights specifically dealt with by the court and in this paper.

5 The holding of the court included two other major points. One was the holding that the action of the Board of Water Engineers in passing upon an application for a permit to appropriate water was administrative and not judicial. Another was its holding that riparian rights attached only to the ordinary flow and underflow of watercourses. These are major holdings but are not of particular significance to the central theme of this paper.
Texas irrigation statutes substantially ignored by the court and indicate the bearing it is believed those statutes had, or should have had, on the water law of our state.

The conclusion drawn in Part I of the paper is that the first of the two above pronouncements of the court, the one on the origin, nature and extent of the riparian’s rights, is largely erroneous dictum. The general plan of Part II of the paper is, in search of the correct conclusion, to trace from their ancient Spanish origins the irrigation laws, practices and customs out of which our early Texas irrigation law grew, and to draw conclusions therefrom, as to the true state of such law during the time the great majority of our Texas public lands were granted. Lastly, the status of Motl v. Boyd as authority will be discussed in the light of all previous conclusions reached by us.

The exact phraseology of the court’s conclusion on riparian rights is as follows:

That all grantees of public lands became invested, by reason of the lands granted, with riparian rights to the waters of the streams... Not only for his (their) domestic and household use but for irrigation as well.6

The whole tenor of the opinion makes it clear that the court by the term “all grantees of public lands” meant only as well as all grantees of public lands riparian to streams of watercourses.

Do the authorities relied on by the court sustain the conclusion reached? It is submitted that they do not, but, on the contrary, that such conclusion is neither the most reasonable nor the most logical one, nor even the one most strongly indicated by the authorities and practices existing at the time of the grants.

Let us now examine the statutory authority on which the court relied. One such group of statutes were those enacted on and after 1879 regulating the sale of the public lands of Texas.7 Generally speaking, these statutes took into consideration the relationship of public lands to a permanent water supply in classifying them for the purposes of price or the amount of land which any one person would be allowed to buy. Little need be said of

6 Motyl v. Boyd, 106 Tex. 82, 286 S. W. 458, 467 (1926).
7 See discussion 286 S. W. at 466-467. These statutes should not be confused with the Texas irrigation statutes discussed infra.
these statutes. The primary justification for not doing so is the fact that they were not in existence in 1857 when the 160-acre tract of land involved in *Motl v. Boyd* was patented by the state. Consequently they could have no direct bearing on the issues involved in that case and probably little, if any, indirect bearing. A reading of them, however, discloses that they do not refer to irrigation. That such statutes have no significance on the point of the riparian’s right to water for irrigation is illustrated by the fact that after Texas by statutes in 1889 and 1895 had declared certain waters in certain areas of the state to be the property of the public and available for appropriation, subject only to the rights of riparians to waters for *domestic use*, the state continued to provide for taking into consideration in classifying and evaluating its public land the relationship of such land to “streams and other sources of water supply.” But of more significance still is the fact that during the period covered by these statutes there were Texas statutes in effect dealing specifically with irrigation which were completely ignored by the court, and which were more directly pertinent in ascertaining the state’s statutory policy on irrigation. The first of these statutes was enacted in 1852, and, as a later analysis of them will demonstrate, they have never specifically recognized any right in a riparian to waters for irrigation superior to that of a nonriparian, and that through 1895 their language was inconsistent with the existence of such right.

Another source of authority relied upon by the court was Hall’s *Mexican Law* from which it quoted as follows:

> Waters which are not nor cannot be private property belong to the public. Such were the waters of the rivers which by themselves or by accession with others follow their courses to the sea. These may be navigable or not navigable. If they are navigable, nobody can avail himself of them so as to hinder or embarrass navigation; but if they are not, the owners of the land through which they pass may use the waters thereof for the utility of their farms or their industry.

The court, in the paragraph above quoted, does not include all

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8 Act 21st Leg. §§ 1-2 at 100.
9 TEX. REV. CIV. STAT. (1895) art. 3115. See also arts. 3117 and 3124.
10 TEX. REV. CIV. STAT. (1895) art. 4218a.
11 Acts. 4th Leg. at 80; 3 GAMMEL’S LAWS OF TEX. at 958.
12 HALL, MEXICAN LAW Art. 1388 (1895).
of Art. 1388 of Hall. An important qualification on the use by
adjoining owners reads as follows:

Without prejudice to the common use or destiny which the towns on
their course shall have given them, and with the modifications pro-
vided in the laws, orders, and decrees which are spoken of under the
word “Acequia.” Who, how, and when they can fish in the waters
which belong to the public will be seen under the word “fish” (pesca).

The portion quoted by the court plus the omitted portion indi-
cated is in every material respect an exact reproduction of Es-
criche’s Diccionario, Title “Agua,” sub-topic 111, “Public
Waters.”12 It should be noted that:

1. Escriche and Hall in this paragraph were discussing “Pub-
lic Waters,” which, by their own definition, would seem to in-
clude practically all of the water available for irrigation.

2. No use could be made of such waters from navigable
streams that would embarrass navigation.

3. If such waters were not in navigable streams, they were
first subject to whatever use the extensive towns of that day might
see fit to make of them.13 Apparently this would be true of waters
in navigable streams to the extent such waters could be used for
irrigation.

4. That all uses, apparently of riparians and nonriparians
alike, were subject to further orders, laws, and decrees. This is
substantially inconsistent with the riparian having a vested prop-
erty right in the waters for irrigation.

A second paragraph quoted from Hall by the court is as fol-
lows:

If running water passes between estates of different owners, each one
of these can use it for the irrigation of his estate or for any other object,
but not the whole of it, but only the part which corresponds to him,
because both have equal rights, and the one can consequently oppose
the use of it all by the other, or even a part considerably more than his
own.14

12 The edition of Escriche used is that of Libreria de Garnier Hermanos, Paris
(1896).

13 The town holdings or terminos, were frequently extended regions of country in
the olden time, and ‘there was a great deal of municipal law regulating the use of
water...’ HALL, Irrigation Development 370 (1885). This Hall is not the same as
the Hall who compiled the Mexican law from which the court quoted.

14 HALL, Mexican Law Art. 1391 (1885).
The above quoted paragraph is a reproduction of Escriche’s *Diccionario*, Title, “Aqua,” sub-topic IV, paragraph three. A correct understanding of this paragraph can be had, however, only if we consider the introductory paragraph to subtopic IV of Escriche which is carried identically by Hall as Art. 1389. It reads:

Municipal Law... The use of the running waters which requires a license which are not of those which anybody can avail himself without a license from the authority, must be regulated by the provisions of the municipal ordinances, or by the uses and customs of the country; but in default of ordinances and customs, equity and the interest of agriculture indicate the following rules...

It should be noted concerning this introductory paragraph that:

1. It announces Escriche’s rules, of which Art. 1391 was one, based on his sense of equity concerning non public waters which required a license. Rivers by definition in Title 111 are public and therefore are taken out of this category.

2. Such waters are subject first, to municipal ordinances; second, to “the uses and customs of the country,” and it is only when those do not control that Escriche’s rules conceived in equity are to apply.

Consequently, the second paragraph quoted by the court from Hall applies to the use of non public, non-navigable waters to which no municipal ordinances or uses and customs were applicable. It is a gross misuse of the article to take it out of context and out of the general Spanish irrigation pattern and make it broadly applicable to the whole river system of Texas.

It was noted above that the quoted articles from Hall are simply translations of corresponding portions of Escriche’s Title, “Aqua.” If Hall comes from Escriche, from what source does Escriche on this subject come? It has been said that his statements “seem to have been very largely his own views...founded on French [rather] than on Spanish law” and that his according to

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15 This subtopic heading in Escriche reads: “Of the Use of the Waters which Pass Along the Border of or Through an Estate.” These streams are commonly referred to as “small streams.” HALL, IRRIGATION DEVELOPMENT (1885).

16 Mr. Neal King, an attorney in Mission, Texas, has stated in an unpublished writing that Arts. 1368-1400 of HALL, MEXICAN LAW (1885) is nothing more than a translation of Escriche’s entire title, “Aqua.”
"all riparian proprietors on small streams an equal right of servitude to the waters, [is] the French law, but for which I find no sufficient authority in the old Spanish laws." So at best, the quotations from Hall can have only very limited significance to a consideration of our Texas irrigation problem.

If we analyze the quotations from Hall from another point of view, it seems apparent that they provide us little assistance in the solution of our crucial problem. Except under the old common law rule that a riparian was entitled to have waters flow by his land as nature provided, undiminished in quantity or quality, there has existed little question that riparians, in the absence of contrary government regulations, could use the waters of adjoining streams and that such right or privilege of use, as the case might be, was correlative in nature. That is no more than a statement of the privilege that any citizen has to enjoy similar public properties held by the state for the common benefit of all its citizens. And the waters in the Indies, which included Texas, were public under Spanish law. A decree of the Spanish Crown provided: "We have ordained that...waters, shall be common in the Indies." What was meant by "common" is revealed by Art. 23 of such laws and decrees which reads:

We hereby declare, that the wild fruits be common, and that everyone may gather them, and carry away the plants to place them within their improvements and estates.

So if the quotations from Hall are fully accepted they throw only faint light on the relative status of the riparian's claim to water for irrigation as compared to that of any other citizen who might legally get access to the waters, or on the character of the riparian's right or privilege in the face of efforts of the state to distribute its waters among its citizens generally.

The principal foundation, however, on which the court rested its conclusion appears to be the particular phraseology of the early colonization laws of Mexico and Texas and Coahuila. Since

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17 Hall, Irrigation Development 382 (1885). "Escríche's Diccionario of Spanish law is, upon the subject of waters, not much more than a commentary upon the Code Napoleon...." Wiel, The Origin and Comparative Development of the Law of Watercourses in the Common Law and in the Civil Law, 6 CALIF. L. REV. 245, 256 (1918).
18 Art. 22, Laws and Decrees of Spain, 1 Sayles' Early Laws of Texas at 26.
19 Sayles Early Laws of Texas at 27.
these laws are crucial to the question under consideration, their relevant parts as quoted by the court are here fully set out. Art. 6 of the Mexican Colonization law of 1823 reads:

In the distribution made by government, of lands to the colonists, for the formation of villages, towns, cities, and provinces, a distinction shall be made between grazing lands, destined for the raising of stock, and lands suitable for farming or planting, on account of the facility of irrigation. 20

On March 18, 1824, the central Mexican government adopted a decree which authorized the Mexican states, subject to certain limitations, to distribute the lands within their jurisdictions. Art. 12 of the decree, which contains one of those limitations, reads as follows:

It shall not be permitted to unite in the same hands with the right of property, more than one league square of land, suitable for irrigation, four square leagues in superficies, of arable land without the facilities of irrigation, and six square leagues in superficies of grazing land. 21

Pursuant to the authority contained in Art. 12 of the central government statute Texas and Coahuila, on March 24, 1825, decreed:

Art. 12. Taking the above unity as a basis, and observing the distinction which must be made between grazing land, or that which is proper for raising of stock, and farming land, with or without the facility of irrigation; this law grants to the contractor or contractors, for the establishment of a new settlement, for each hundred families which he may introduce and establish in the State, five sitios of grazing land, and five labors at least, the one-half of which, shall be without the facility of irrigation, but they can only receive this premium for eight hundred families, although a greater number should be introduced, and no fraction whatever, less than one hundred, shall entitle them to any premium, not even proportionately. (Emphasis added.)

Art. 22. The new settlers as an acknowledgment, shall pay to the state, for each sitio of pasture land, thirty dollars; two dollars and a half for each labor without the facility of irrigation, and three dollars and a half for each one that can be irrigated, and so on proportionately according to the quantity and quality of the land distributed. 22

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20 As quoted in Motl v. Boyd, 116 Tex. 82, 100; 286 S. W. 458, 463 (1926). Italics supplied by the court.

21 As quoted by the court, 286 S. W. 464. Italics supplied by the court.

22 Ibid. Italics supplied by the court.
The court by no means exhausted the materials containing such phraseology. Elsewhere in the laws of Coahuila and Texas are to be found similar expressions concerning Texas lands. We find "irrigable tillage land" and "not irrigable" in Art. 12 of Decree No. 16 of the Constituent Congress of Coahuila and Texas;\footnote{Laws and Decrees of Coahuila and Texas at 17 (1839).} "Not irrigable" and "is irrigable" in Art 22 of such decree,\footnote{Id. at 19.} and the terms, "tillage land, not irrigable" and "irrigable tillage land" in Art. 24 thereof.\footnote{Ibid. at 19.} In Art. 10 of Decree No. 9 of the Constitutional Congress of Coahuila and Texas we find the term, "for cultivation, irrigable or not irrigable";\footnote{Ibid. at 71.} in Art. 2 of Decree No. 62 of such laws the term, "labor of irrigable land";\footnote{Id. at 106.} in Art. 14 of Decree 190, the term "tillage land, not irrigable";\footnote{Id. at 190.} in Art. 15 of such Decree the term "tillage land, not irrigable" also appears.\footnote{Id. at 191.}

Note precisely the terminology used. Nowhere is the word "riparian" used, although it was well known to the civil law.\footnote{Wiel, supra, note 17 at 251.} The total absence will be noted of such words and phrases as "adjoining," "along," "bordering on," "adjacent to," etc.

In no one of these laws or decrees dealing with irrigation was any term used suggesting that the right to water for irrigation was to be confined to riparian lands. If by the use of such terms as "irrigable," "suitable for irrigation," or "facility for irrigation," the lawmakers intended to say all land, and only lands, "along," "fronting on," "adjoining," "bordering on," or "riparian to" rivers and streams, it seems fair to observe that it was a quaint and obscure way of saying it. It becomes all the more difficult to believe that they so meant when we realize that the language from the decrees above quoted was not the language of one person, written at one time, to whose idiosyncracy the language used can be attributed; but it was the language of a Congress composed of many men, and of succeeding Congresses in which we can reasonably assume there was some turn over of personnel. If these
Congress had meant what the court concluded they meant, surely someone in all this host of men would have realized, and would have called the attention of Congress to the fact, that they were expressing themselves most awkwardly.

It becomes unbelievable that this ambiguous method of expression was used to mean all riparian and only riparian land when we observe that some of the Congresses involved were quite familiar with a more exact phraseology for expressing the riparian concept, and could aptly use it when it conveyed what they wished to say. For example Art. 29 of Decree No. 190 of the Laws and Decrees of Coahuila and Texas reads:

The survey of vacant lands that shall be made upon the borders of any river, running rivulet or creek, or lake, shall not exceed one fourth of the depth of the land granted, should the land permit.\textsuperscript{31}

And Art. 22 of Decree No. 272 of such Laws and Decrees reads:

"Lands fronting on permanent creeks, rivers, large lakes, bays and the sea shore, shall run back double the extent of their front."\textsuperscript{32} (Emphasis added.)

From the foregoing it seems to be too clear for argument that as a matter of pure statutory construction, the use of such terms as "irrigable," "suitable for irrigation," and "facility of irrigation" in those very early land laws did not mean, and was not intended to mean, all lands, and lands only, riparian to rivers, streams and similar water sources.

If there is any doubt on this matter as one of pure construction, it should be dispelled when we contemplate the topography along our Texas rivers and other streams. It is common knowledge that much of the land riparian to the Rio Grande, the Pecos, the Colorado and some other of our Texas rivers and streams is not "irrigable" even now, as a practical matter, by any stretch of the imagination. It was much less so at the time such lands were granted in view of the fact that gravity flow was depended upon almost entirely to get water from its source onto the lands to be irrigated. It seemed to be a common practice of the Spanish and Mexican governments to lay out lands so as to get as many own-

\textsuperscript{31} Laws and Decrees of Coahuila and Texas at 192 (1839).

\textsuperscript{32} Id. at 250.
erships as possible on watercourses whether the land was or was not regarded as irrigable. The most striking example of this practice are the porciones along the Rio Grande. These Spanish grants were of long, narrow strips of land fronting for approximately one mile on the river, but extending away from it for a distance of eight or ten miles. None of these examined was classified as irrigable.\(^3\)

That some of such riparian lands were not regarded as irrigable by the Mexican lawmakers themselves is borne out by other laws enacted by them. Frequently, as in Art. 12 of Decree No. 16 of the Constituent Congress of Coahuilo and Texas\(^4\) the terms “grazing lands” and “irrigable tillage lands” were used to show the Congress was drawing a sharp distinction between the two. It is meaningful then when we find Art. 1 of Decree No. 320 of the Constitutional Congress of Texas reading in part: “In sitios of grazing land upon the opposite sides of Rio Bravo, of which the crossing called Pacuache, on the road leading to Bexar, shall be the center are hereby granted ...”\(^5\) (Emphasis added.) Here the authority relied on by the court in Motl v. Boyd, the Mexican Congress, to show that “irrigable” lands meant \textit{all} granted lands along our watercourses, itself made a specific grant of land bordering on the Rio Grande which is exactly to the contrary and decisively shows it held no such view.

It is also of equally common knowledge that much land along many of our Texas rivers which is not, and never has been riparian, is highly “suitable for irrigation.”\(^6\)

What is done under any law by its contemporaries who are charged with the responsibility for its administration is highly significant in ascertaining its meaning. We therefore turn to the administration of the colonization laws construed by the supreme court in the Motl case to see what those contemporaneous with their enactment, and immediately charged with the responsibility

\(^3\) See \textit{infra}, text and notes at 415-422.
\(^4\) Laws and decrees of Coahuila and Texas at 17 (1839).
\(^5\) \textit{Id.} at 307. Rio Bravo is one of the names by which the Mexicans called the Rio Grande.
\(^6\) For illustrations, see 1955 applications on file with the Texas State Board of Water Engineers of Hidalgo County Water Control and Improvement District No. 15 and the South Texas Canal Company. Much of the land involved in the latter application is outside the watershed of the proposed source of supply.
of their administration, interpreted them to mean by their official actions.

Mexico gained its independence from Spain in 1821. The colonization laws construed by the court were enacted by the Mexican government following its independence. It should be helpful, however, in understanding what the Mexicans did to examine the land grant practices of the Spaniards before them.

The Spaniards and the Mexicans after them, classified the lands granted by the state into three major categories. One was "irrigable land," or land with the "facilities of irrigation."\(^3\) A second category of lands was "temporal" or arable lands which were those suitable for farming though dependent only on natural rainfall. The third category was "Agostadero" or pasture lands. These were regarded as suited primarily for use as pasture for some type of livestock.

Only twenty-three Spanish grants have been examined. One in Nacogdoches County, was classified as: "It has running water for irrigation."\(^3\) All of the remainder were classified, \textit{though on rivers or streams}, as either arable or pasture land, or in some cases, the same grant would be classified as having lands of each of these categories.\(^8\) The Concepcion de Carricitos Grant\(^4\) made by the government of Spain in 1780 consisted of in excess of twelve leagues of land bordering on the lower Rio Grande River, but it was all classified as "pasture land". In 1790 proceedings were had preliminary to, and involving the granting of the Llano Grande and La Feria Grante.\(^4\) The former is located in what is now Hidalgo County and the latter in what is now Cameron County. Both of these grants had extended frontage on the Rio Grande. The proceedings involved the taking of testimony of persons familiar with such lands and the purposes for which it was adapted

\(^3\) As a matter of pure definition it would seem that the two terms have different meaning, but a reading of hundreds of classification statements by the officials of the two governments does not reveal any basis for giving the two terms separate and distinct meaning.

\(^8\) Vol. 37, at 201, Spanish Archives, General Land Office, State of Texas.

\(^9\) Fourteen of the twenty-three Spanish grants examined were in Nacogdoches County; three were in Angelina County; and five were in the Rio Grande Valley.

\(^4\) Book A at 160, Real Estate Records, Cameron County, Texas.

\(^4\) These proceedings are recorded in Vol. X (letter) 10-105, Supplemental Deed Records, Cameron County, Texas.
in order that it might be properly classified. One Domingo Guerra testified that

the center of said Agostadero as well as all of its borders are overgrown with thick woods and have many brakes very brisy... all of said lands are very well adapted to the raisings and caring of stock of all species because they are covered with an abundance of pasturage, water and wood and repredos and they cannot be used for other purposes on account of the risk of inundation already referred to.

...that said Rio Grande river is where the cattle and horse stock get water,... Being asked if these lands or any part of them were suitable for farming, he answered and: that based on the experience that he has had with them, they are not perfectly adapted for farming by reason of the fact... that during the winter they cannot be farmed because on account of the passing of the water over them, a certain baking and a hardening of the surface takes place which will not permit the seed to sprout, and also the lack of water for irrigating at that time, and it being impossible to take the water out of said river, esteros or lagoons.42 (Emphasis added)

A second witness, one Jose Matias Tijerina similarly testified that

...they are lands very appropriate for breeding as they have a great deal of pasture and good protection and cannot serve for any other thing.... that the cattle and horse stock generally water at the Rio Grande, besides the lack of water for irrigating purposes at such times impede it, and it is impossible to take it out of the river, esteros or lagunas, there being many obstacles to prevent it.43 (Emphasis added.)

The judge of the proceedings, Jose Antonio de la Garza Falcon, assisted by Salvador Salamea and Ygnacio Anastacio de Ayala, made a personal inspection

...and examined those lands to see whether they were good for farming... we found that they were not entirely good for sowing because the land was not adapted thereto, nor did they possess any irrigation, nor could they be irrigated from any of the places where there is water, nor do they possess any other benefit, and they are only good at times for the breeding of all classes of stock.44 (Emphasis added.)

This same opinion of the lands generally along the Rio Grande was shared by a gentleman very prominent in Texas history,
Stephen F. Austin. In a letter written by him in 1829 to his cousin, Captain Henry Austin, he made this observation:

As regards the country on the Rio Grande, so far as my information extends it is calculated entirely for pastoral purposes and can never be valuable as an agricultural section. The soil is rich and fertile, but the seasons are dry and so very irregular as to destroy everything like certainty in crops, unless where there are facilities for irrigation, and these can only be obtained by means of machinery for raising the water out of the river—an expedient which would be expensive and I think inadequate—tho many have had it on contemplation, as I have been told, to use of steam for this purpose.\(^45\) (Emphasis added.)

Moving from deep South to deep East Texas, we find that in 1810 Vincente Michelli received a confirmation to the lands now comprising the Vincente Michelli Survey on both sides of the Angelina River in Angelina and Nacogdoches Counties. The investigator appointed by the governor, in addition to revealing that the lands were not regarded as "suitable for irrigation," informed us that some of our current East Texas pests have an ancient and robust ancestry. He reported, "It has good pasture the whole year round, very good soil for farming, water only in the Angelina River, but not suitable for irrigation—it is well timbered land; it is liable to the epidemic of horse flies, mosquitos, gallinipers and other insects interfering with cattle raising."\(^46\) (Emphasis added.)

The grants made by the Mexican state of Coahuila and Texas are numerous and available for inspection though primarily still in Spanish. We examined the classification statements of in excess

\(^{45}\) As quoted in Horgan, The Great River, 482 (1954). In 1767 experts appointed in connection with the classification and granting of the Carmago porciones along the Rio Grande stated that the lands were "without irrigation or special distinction and here they have tried to take water." It appears that an irrigation ditch had been dug from the San Juan river but that the water ran down it a short way and disappeared. Copy and Translation of Charter "Visita General" granting Carmago Porciones, 194, 197, Spanish Archives, General Land Office, State of Texas. Similarly experts in the same year indicated the Mier Porciones of Starr County were not irrigable and indicated that the watering of cattle was the reason for having all such porciones front on the river. They said "No irrigation except as may be detailed at occurrence of storms... that a watering place at the river be given to everyone, otherwise the cattle will certainly perish and the porciones of lands become useless." Copy and translation of Charter "Visita General" granting Mier Porciones at 163-164, Spanish Archives, General Land Office, State of Texas.

\(^{46}\) Vol. 37 at 385, Spanish Archives, General Land Office, State of Texas.
of 750 of the grants.\textsuperscript{47} With very limited exceptions, all of these grants fronted or bordered on our rivers or other major Texas streams.

Of those bordering on our watercourses, but not on an irrigation ditch, 26 received no classification; one was classified in this language,

There are on the Geronimo a considerable quantity of lands subject to irrigation—say ten labors of richest lands and twenty-five labors without the facility of irrigation—making on the whole thirty-five labors\textsuperscript{48} and the remainder, a number in excess of 700, or approximately ninety-five per cent, were all classified, \textit{though bordering on a river or other stream}, either as arable or pasture land. For examples the grant in 1835 to Wm. D. Benham was described as being “situated on left bank of Frio River—One-third league of pasture which includes our labor of arable.”\textsuperscript{49} The grant in 1827 to David Hamilton was described and classified as “situated on Peach Creek and along the west side of the San Bernado without the facility of irrigation.”\textsuperscript{50} The grant of two leagues of land made in 1824 to Alexander Jackson was described and classified as “On the Colorado River, both without the facilities of irrigation, only with the use of permanent water.”\textsuperscript{51} The grant of eight leagues fronting on the San Antonio River made in 1834 to the heirs of Juan and Simon Arocha contained the statement that, “There are at least fourteen labors of land suitable for cultivation, but all without the facility of irrigation.”\textsuperscript{52} On the opposite bank of the San Antonio river and immediately across from the Arocha Grant lies the grant of two leagues made in 1834 to Maria

\textsuperscript{47} The necessity for giving a detailed listing of these grants does not seem to be great enough to justify the space that would be required to do so. They are available on request. These grants were distributed as follows: Angelina County, 49; Bexar County, 27; Colorado County, 48; Dewitt County, 48; Goliad County, 54; Guadalupe County, 38; Harris County, 86; Jackson County, 87; Lavaca County, 60; McMullen County, 12; Matagorda County, 109; Victoria County, 66; Wharton County, 50; Wilson County, 22; and an undetermined number estimated to be in excess of 50 scattered throughout other south and east Texas counties.

\textsuperscript{48} Grant State of Coahuila and Texas to Antonio Maria Esnaurizar, Vol. 28 at 49, Spanish Archives, General Land Office, State of Texas. Through footnote 56 volume and page only of these records will be cited.

\textsuperscript{49} Vol. 59, at 19.

\textsuperscript{50} Vol. 2, at 552.

\textsuperscript{51} Vol. 1, at 122.

\textsuperscript{52} Vol. 3, at 47.
Calvillo which states that "the tract is all pasture land."\textsuperscript{58} The one league of land on the east bank of the Colorado River granted to Jacob Betts in 1824 was "without the facility of irrigation and only with the use of permanent waters of the River"\textsuperscript{54} as was the land granted in 1827 on the west bank of the Colorado to John Crier.\textsuperscript{55}

The fact that the grant was of rich bottom land did not seem to alter the classification. The description and classification of the one league of land granted in 1831 to John G. King stated that "There are about two labors of timbered bottom and prairie bottom lands fit for cultivation but not having the facility of irrigation."\textsuperscript{56} And the grant made in 1824 to James Cummins states "One league and one labor of land for rearing cattle without means of irrigation and only with the use of permanent water on the east bank of the Colorado River and the labor on the west bank of said river..."\textsuperscript{57}

The Coahuila and Texas grants examined which were located off rivers, and not on irrigation ditches, were all classified as arable or pasture land. Three tracts in Bexar County located off a river but on an irrigation ditch were granted as irrigable land. These tracts were originally parts of the old Spanish missions of San Antonio and were granted to private persons following the secularization of such missions in the latter part of the eighteenth century. The tract granted to Manuel Yturre Carrillo in 1824 was described as being "three sections of 100 varas each in the abandoned Mission of Conception with 3 days of water. Limited on the north by the irrigation gate; on the south by the land of Erasmo Seguin; on the east by the San Juan Road; on the west by the old Concepcion Mission Road."\textsuperscript{58} Similarly the tract granted in 1824 to Jose Maria Escalera got one day of water though "limited by the Espada Road on the west; on the south

\textsuperscript{58} Vol. 31, at 75.
\textsuperscript{54} Vol. 2, at 512.
\textsuperscript{55} Vol. 2, at 594.
\textsuperscript{56} Vol. 12, at 27.
\textsuperscript{57} Book A, at 78-83, Deed Records, Colorado County, Texas. The number of such grants could be multiplied from those examined, but those selected are on well known rivers and typical of others that might be set out.
\textsuperscript{58} Vol. F-1, at 105-200, Deed Records, Bexar County, Texas.
by the lands of Juan Martin de Veramendi; on the east by the
drainage ditch and on the north by royal land."\(^5\)

Still another grant should be mentioned though its classifica-
tion and the reasons given therefor are somewhat ambiguous. It is the grant to Jose Sandoval the location of which with refer-
ence to the San Antonio River and the Espada irrigation ditch can be best understood by reference to Map 1 accompanying this
article.\(^6\) It will be noted that the tract borders on the San An-
tonio River, the Espada ditch and Minita Creek. The grant from Coahuila and Texas states "The tract on the right side of Minita
creek can be considered arable or irrigable because of the ease
with which water can be diverted from the labor of the Mission
through Minita Creek, since Jose Sandoval owns the last suertes
of the Mission lands adjoining this tract."\(^7\) We interpret this
language to mean that the portion of Sandoval's grant along the
southwest bank of the San Antonio River and adjoining the Espada
ditch and Minita creek was irrigable because of the ease with
which the water could be brought to this portion of the lands from
the ditch through Minita Creek, while that portion bordering the
northeast bank of the San Antonio River, but not on an irrigation
ditch, was not irrigable. If that interpretation is the correct one,
it seems that the relation to an irrigation ditch—a "facility of
irrigation"—was a more important factor in determining the
irrigability of land by the contemporary administrators of the
colonization laws under consideration than was its proximity to
a river.

Consideration of two other tracts of land in this area may
throw light on this issue. Reference at this point should be made
to Map 2 accompanying this article. The first is the tract of land

\(^5\) Vol. C-1, at 202-205, Deed Records, Bexar County, Texas. See also grant to Jose

\(^6\) Maps 1 and 2 are reproductions of a map obviously of great age found in the files
of the Stewart Title and Guaranty Company Offices, San Antonio, Texas. Its inscrip-
tion states that it shows the "Names of the original claimants to the irrigable lands comprised
in the labores of the Missions of Conception, San Jose, San Juan and La Espada, lying
below the City of San Antonio, Bexar County, Texas." The map bears the date of 1874
and was certified to in that year as correct to the best of their knowledge by F. Giraud,
former District Surveyor, Bexar County, Texas; by Sam L. Smith, District Clerk, Bexar
County, Texas; and by L. C. Navarro, District Surveyor, Bexar County, Texas. Designa-
tions have been made in some instances to supply omissions resulting from these maps
being only portions of a larger map.

\(^7\) Vol. 31, at 237, Spanish Archives, General Land Office, State of Texas.
there shown to belong to "Manuel Yturri" which is believed to be the off-river-but-on ditch tract described above as granted to Manuel Yturri Carrillo. It will be recalled that the grant carried irrigation water rights.

The second tract to be noted in this connection is the tract shown on Map 2 as belonging to Jose Gomo (probably Gomes) and lying along and between the east bank of the San Antonio River and the Mission Concepcion road which is indicated by the dotted line. The grant, though on the river and between the river and a grant which carried water rights, did not itself receive a grant of water rights or privileges. It was described by Gomes as "temporal" land in his application for a grant.

While the possibility of error regarding the identity of the tracts is recognized, it is believed that the great preponderance of likelihood is that the tracts are as assumed.

The classification of these three tracts when contrasted with the classification of the more than 750 other tracts hereinabove described, constitutes strong evidence that the location of land on a canal, though off any river, had much more to do with it being regard as "irrigable" or as having the "facilities of irrigation" than did being on a river alone.

In reality the issue of whether a tract of land was "irrigable" or had the "facilities of irrigation" was one of fact and not a legal result which automatically followed from the one fact that a tract of land bordered on a watercourse. This is illustrated by an experience recorded in 1756. In that year the Spanish government explored the possibilities of establishing a settlement on either the lower Trinity or lower San Jacinto or both. The lengthy record of the proceedings which took place are on file in the Nacogdoches Archives, State Library of Texas Archives, Austin, Texas, under the title "Order to proceed to Survey the Borders

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62 It is recognized that there are substantial variations in both names and descriptions. But we were told by a number of persons in the course of our investigation that it was not at all unusual for there to be two or three versions of the name of the same Mexican person. And there is some similarity of names and both descriptions are of a tract in the Concepcion Mission and the one on the map under the name of Manuel Yturri is the only one in such Mission lands under a name faintly resembling that of Manuel Yturri Carrillo and which approximately fits the description of that tract.

of the Trinity River and select the most Convenient Place to Establish a Settlement of fifty families and a Mission." The activities of the expedition are recorded in great detail, but this extract from the statement of the governor made on September 3, 1756 is indicative of the approach used. He stated that he had

used every possible means to examine closely said spring of water, which it was found impossible to withdraw, in as much as he had investigated, as much by the large and high hill as by the disproportionateness of all its terrain, by the heights and depths of it, and that besides this the surface of the land is too high, which will not fall to ten varas from the height of the side of the spring of water, by which reason it carries its course of altitude; and that by reason of his obligation, he not only has examined what was possible from said spring of water, but that by its margins it had arrived at the San Jacinto River, where he had examined closely a withdrawal of water . . .

So the issue was simply whether there was a supply of water which, in view of elevation and grade, could be used to irrigate the lands in the vicinity.

The court, not so much as authority as by way of corroboration of the conclusion reached by it in construing the colonization laws, cited three Texas cases. These will be analyzed briefly to see whether they support the broad conclusion reached by the court. The first of these cases is Watkins Land Co. v. Clements. This case, involving land in the arid portion of the state, was a suit by a lower riparian irrigator to enjoin an upper riparian irrigator from uses of such extent as to interfere with his original irrigation practices. It appears that both parties were either using the waters of the stream involved on nonriparian lands or were selling it to someone who was doing so. The court squarely held that waters could not be so diverted to nonriparian lands. The following observations about the case, however, are pertinent to the question of the extent of its authority for the broad conclusion reached by the court in the Motl case. All of the lands involved in the Clements case were granted by the State of Texas

64 98 Tex. 578, 86 S. W. 733 (1905).
after 1840. If the limited adoption in 1840 of the common law as the rule of decision in Texas automatically changed the substantive law of riparian rights, this would mean that the issue before the court in the Clements case in no way involved the interpretation of Spanish and Mexican law as applied to Texas lands. Consequently it could hardly be cited as authority for any conclusion on riparian rights involving such law. It therefore seems to follow that the case, at best, could be no authority for the court's conclusion in the Motl case concerning the nature and extent of riparian rights under Spanish, Mexican and Coahuila and Texas grants. It could be only a common law authority, and affect at best only those grants made in Texas after 1840 and before 1895. This is fortified by the fact that the court nowhere discussed the civil law nor did it cite any civil law authorities.

If, on the other hand, the limited adoption in 1840 of the common law as a rule of decision in Texas did not, because of the wide divergence of conditions in Texas from those in England and the subsequent passage of Texas irrigation statutes, change the then existing Spanish and Mexican laws of riparian rights in Texas, then the court in the Clements case wholly ignored a discussion of the applicable Spanish and Mexican law and authorities, and the decision would be nothing more than judicial fiat and would not be a sound authority for any purpose. It is believed that this latter alternative more accurately evaluates the case as authority as is more fully demonstrated later in this paper.

65 The earliest grant in Reeves County, in which the land in suit was located, was in 1860. See Vol. 8 at 1176 "Abstracts All Original Land Titles Comprising Grants and Locations to August 31, 1941," a publication of the General Land Office, Austin, Texas.

66 "That the Common Law of England (so far as it is not inconsistent with the Constitution or Acts of Congress now in force) shall, together with such acts be the rule of decision in this Republic, and shall continue in full force until altered or repealed by Congress." 2 Gammel's Laws of Texas 177.

67 Supra note 66, and Tex. Rev. Civ. Stat. (1925) art. 7619, which reads: "Nothing in this Chapter contained shall be construed as a recognition of any riparian right in the owner of any lands the title to which shall have passed out of the State of Texas subsequent to the first day of July, A. D. 1895."

68 See discussion infra at 402-411.

69 See discussion infra at 423-425.
The second case relied on by the court is that of *Martin v. Burr*. The land in this suit appears to have been granted by the State of Coahuila and Texas, but the court did not even mention either the Spanish or Mexican law of irrigation. It could hardly be regarded as a well considered case on the point. But the self-sufficient reason why this case could not be authority for the conclusion reached by the court in the *Motl* case concerning the vested right of a riparian to waters of the adjacent stream for irrigation, is the fact that the case did not involve that issue. It was a suit by a lower riparian owner to establish his right to the use of the stream’s waters for domestic use and to enjoin an upper riparian from interfering with that use by the diversion of excessive amounts for irrigation. The court simply held that the right to waters of a flowing stream for domestic use was superior to one’s claim to the waters for irrigation. There is no semblance of a statement anywhere in the opinion to the effect that the original grantee of riparian lands got from the sovereign a vested right in the waters of the adjoining stream for irrigation.

The third case cited by the court is that of *Board of Water Engineers v. McKnight*. The court there unquestionably and necessarily proceeded on the assumption that a riparian had a vested right in the waters of the adjoining stream for irrigation. Here again the lands involved were granted after 1840, and the court cited to support its assumption the *Clements* case hereinabove discussed, and *McGee Irrigation Ditch Co. v. Hudson*, which contains some statements supporting the position for which

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70 111 Tex. 57, 228 S. W. 543 (1921)
71 Vol. 5 at 127, 227, 235, and 243, Minutes of the District Court, Kinney County, Texas.
72 228 S. W. at 544.
73 Ibid.
74 The closest the court got to such a statement was to say that the plaintiff’s cause of action was not one “for recovery of real estate” within the meaning of our limitation statutes “though the riparian rights (here a right to waters for domestic use) should be regarded as part and parcel of the land itself.” 228 S. W. at 545.
75 111 Tex. 82, 229 S. W. 301 (1921).
76 229 S. W. at 304.
77 This statement may be open to question. The suit arose in Reeves County where no grants were made prior to 1860. See *supra* note 65. It appears from a reading of the case, however, that lands of more than one county were involved. It is common knowledge, however, that little land in this area was granted by either the Spanish or Mexican governments.
78 85 Tex. 587, 22 S. W. 398 (1893).
it is cited. But as a subsequent analysis of this case reveals, such statements when fully analyzed are of puzzling significance.\footnote{See discussion infra at 408-409.}

While in the \textit{McKnight} case it might be fairly said that the state was a party since the Board of Water Engineers was in court represented by the Attorney General of Texas, it is of novel and arresting interest to note that the state was not a party to the \textit{Watkins Land} case, the \textit{McGhee Irrigation Ditch} case, or \textit{Martin v. Burr}. When these cases were decided, on which the court relied in the \textit{Motl} case to establish a vested right of a riparian to waters for irrigation neither gained by use nor lost by nonuse, the state, the statutorily designated owner of at least some of the waters in issue,\footnote{See infra at 407.} and also the representative of the public, was not even a party to the suit nor otherwise in court. Thus we have the puzzling situation of suits involving great overriding issues of public policy of vital interest to the state as a whole—the rights in uses of public property—being decided in private litigation between upper and lower riparians without the owner of such property, the public, having an opportunity to present its position. On the point of the existence of riparian rights to irrigate superior to that of the state to provide for the conservation and most efficient use of its water supply, these cases were not true adversary proceedings. The situation pungently points up the incongruities and difficulties encountered in attempting to define, through the medium of private litigation, the usufructuary rights in a forever fugitive substance not capable of being owned in the usual sense of property ownership. The skimpy consideration given by the court in these cases to the pertinent authorities and historical background necessary to a proper decision of the issue for which they were cited in the \textit{Motl} case strikingly illustrates the undesirability of having the court establish through purely private litigation policies of such vital and widespread importance. If it be conceded that the judgments are binding on the parties before the court, surely it would not be urged that the state in its proprietary capacity is bound.

If rightly decided, the cases relied on by the court do provide the conclusion reached in the \textit{Motl} case with some measure of
support even when so discounted. It is believed, however, that the decisions of such cases, even on a common law theory, are erroneous.\textsuperscript{81} If that is correct, neither \textit{Motl v. Boyd} nor any of the Texas cases relied on by it, have any solid legal basis to support them.

If we turn from those cases and pre-statehood statutes to those state statutes which specifically refer to and deal with irrigation\textsuperscript{82} we find little, if any, support for the position that the right, or privilege as the case may be, to waters for irrigation was confined to the owners of riparian lands. The Act of 1852\textsuperscript{83} is the first of such statutes and it authorized the

County courts...to order, regulate and control the time, mode and manner of erecting, repairing, cleaning, guarding and protecting the dams, ditches, roads and bridges, belonging to any irrigation farms...owned conjointly by two or more different persons...and) situated outside of a corporation having jurisdiction thereof.\textsuperscript{84}

and authorized such courts to

\begin{quote}
assess and collect fines for breaches of any regulations...recognized by said Court as \textit{consistent with ancient usage} and the law of the State and may regulate the right of way, the stoppage and passage of the water, and the right distribution of the shares of said water.\textsuperscript{86} (Emphasis added.)
\end{quote}

It further provided that

\begin{quote}
Upon application of the owners of any suitable lands and water...the commissioners' courts are authorized...to license such owners to proceed and dam the water, and to ditch, fence and irrigate their lands.\textsuperscript{86}
\end{quote}

It further provided for the condemnation for dams and ditches of the land of "any person refusing to consent thereto," and for the extension of irrigation ditches for the irrigation of farms "at

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\textsuperscript{81} See discussion \textit{infra} at 423-425.
\textsuperscript{82} These are the statutes referred to supra at 380-381. They are the ones to which it seems the court should have looked for the state's policy on irrigation rather than to those post 1879 public land statutes on which it in part relied.
\textsuperscript{83} 3 \textsc{Gammel's Laws of Texas} 958.
\textsuperscript{84} Id. § 1.
\textsuperscript{85} Id. § 2.
\textsuperscript{86} Id. § 4.
and below, or at the sides of other such property.”

It might be urged that the term “owners of any suitable lands and water” indicated that the whole statutory scheme pertained to riparians only. This seems doubtful, however, in view of the fact that there were “suitable lands” for irrigation not riparian, and that the view has never been entertained with respect to Texas lands that the adjoining owners actually owned the water in statutorily navigable streams. So the legislature must have meant owners of any lands suitable for irrigation from an available source of supply. This is consistent with the tenor of the remainder of the statute and particularly those parts which provide for the condemnation of a right-of-way over the lands of objecting persons, and that which provides for the extension of irrigation to farms “at and below, or at the sides of other such property.” If in fact, however, the statute comprehended a plan for riparians only, it indicates they were to get water for irrigation as a matter of grace and not as a matter of right.

Chief Justice Morrill, in speaking of this statute in the case of *Tolle v. Correth* stated, “The Act of February 10, 1852, Articles 3945 to 3952, (Paschals Dig.) concerning irrigation property, shows that the legislature regarded the irrigation of lands as of primary importance, and intended to carry out the principles of the Mexican Laws.”

Irrespective of any finespun arguments about the exact language used, we have here our first state irrigation statute, something of a major effort, passed only seven years after statehood, and before any Texas court decision dealing with riparian rights, which contains no mention of vested irrigation rights of riparians and contains no indication that any distinction was to be made between riparians and non-riparians in the use of the waters of our streams for irrigation. The preponderating tenor seems to be clearly otherwise. And it is highly significant that this law was

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87 Id. § 5.
88 It is quite possible, as the irrigated tract in the Motl case reveals, that all the lands to be irrigated from a ditch crossing other lands could be riparian, but such would not necessarily be the case.
89 31 Tex. 362 (1868). The court reporter in this case used the term riparian which, in so far as our search reveals, is the emergence of the term into our case law terminology.
authorized by Representative Maverick of San Antonio\textsuperscript{90} and was moved through the House on motions of Representatives Browder of El Paso and Neighbors of San Antonio, \textsuperscript{91} and was steered through the Senate by Senator Rufus Doane of El Paso.\textsuperscript{92} The basis is exceedingly strong for assuming that these legislators were familiar with the irrigation systems as they were operating in their respective home districts. \textsuperscript{93} Such systems, as we have seen,\textsuperscript{94} apparently made no distinction between riparian and nonriparian lands in the distribution for irrigation of the waters of the normal flow and underflow of the rivers involved. Apparently these legislators were concerned about legalizing an administrative set up for \textit{going irrigation systems} in their districts, systems which originated under the Mexican Government, and providing a similar administrative structure for "any new projects of irrigation"\textsuperscript{95} anywhere in the state.

The fact that this law was authored and sponsored by legislators familiar with such early Texas systems and was passed by a legislature consisting of a substantial number of men, all of whom, who were as much as forty years of age, could have had first hand knowledge of irrigation practices throughout the most active period of Texas colonization, makes it likely that few, if any, of that date regarded the riparian, especially the riparian only, as having a superior right in the waters of our streams for irrigation. Since this law of 1852 was carried forward verbatim in the revisions of our irrigation statutes until repealed in 1913,\textsuperscript{96} and since until 1875 this statute contained our sole legislative policy on irrigation and was the only statute governing irrigation at the time of grant of the lands involved in the \textit{Motl} case, the court's ignoring it is difficult to understand. From 1875 until its repeal in 1913, it constituted only a part of our statutory law, but such other parts contained nothing inconsistent with its policy.

\textsuperscript{90} House Journal 4th Texas Legislature, proceedings for December 3, 1851.
\textsuperscript{91} Id., proceedings for January 17, 1852.
\textsuperscript{92} Senate Journals, 4th Texas Legislature, proceedings for January 26, 27 and 31, 1852. It will be recalled that the area including El Paso did not become a part of Texas until the treaty of Guadalupe Hidalgo in 1848. This was one of the early sessions of the Legislature of Texas participated in by these El Pasos.
\textsuperscript{93} See discussion \textit{supra} at 393-397 and \textit{infra} at 416-419.
\textsuperscript{94} See maps 1 and 2 and discussion references \textit{supra}, note 93.
\textsuperscript{95} \textsc{3 Gammel's Laws of Texas} 959.
\textsuperscript{96} Acts 1913, at 358, \S 101.
As such it was the principal legislative determination of public policy on irrigation during the period when most of the land in Texas was granted. It should have become the guide to our courts, wherever pertinent, in the decision of cases involving irrigation, anything in the common law to the contrary (if in fact it was) notwithstanding, for the common law, whatever it was, was to be the rule of decision only "until altered or repealed." 97

The legislature added to our statutory irrigation law in 1875, 98 but since, for our purposes, that law is identical with its 1876 revision, 99 only the latter will be analyzed. The purpose of this act was to encourage the construction of canals for "navigation or irrigation." Land grants were provided as the enducement. 100 It classified as first class those canals which carried a stream of water thirty feet wide and five feet deep. 101 The minimum length of any canal, including the smallest, (to carry a stream six feet wide and two and one half feet deep) which could qualify its builder for a grant of land was two miles. 102 A right of way was granted over public lands for such canals as well as the free use of construction materials therefrom. 103 Such act further provided: "Any such canal company shall have the free use of the water of the rivers and streams of this state..." 104 that such companies "shall have the right to cross all roads and highways necessary...", 105 and that:

All persons owning lands adjacent to and irrigable from said canal or ditch shall have the right, to use the water of said canal or ditch... 106

(Emphasis added.)

This law does not state specifically that irrigation is to proceed without distinction between riparians and nonriparians, but no other reasonable conclusion can be drawn from its terms. If only those contiguous to the streams were to be served, it is unlikely

97 Supra note 66.
98 Act March 10, 1875, at 77.
100 Id. Art. 2989.
101 Id. Art. 2991.
102 Ibid.
104 Id. Art. 2998.
105 Id. Art. 2999.
106 Id. Art. 3000.
that a canal carrying a stream of water thirty feet wide and five feet deep would have been contemplated. And there was no statutory restraint on canal builders going into nonriparian lands, thus giving nonriparians on the canal a "right" to the waters for irrigation.

True, navigation was involved also, but that canals of such size were contemplated for irrigation only is indicated by the fact that such act contained a special provision for "canals for navigation" having a width of 40 feet and a depth of four feet. Furthermore the minimum length of two miles of even the smallest canals; the provisions for rights of way across public lands and across private property; the fact that they could cross roads and highways, while not wholly inconsistent with the idea of all the lands being riparian, strongly suggests the contrary. Finally, the fact that it was provided that all those along the canal were to have water from it as a matter of right seems highly inconsistent with the recognized existence of a vested property right in such waters as a riparian. If those "adjacent to" the canals and those owning lands adjoining natural watercourses, were one and the same, then this statutory provision was unnecessary if the riparian had vested irrigation rights. If the two groups were not the same then the riparian and nonriparian were being lumped together for the sharing of waters for irrigation. It is believed that the legislature proceeded on the latter position and contemplated the participation of nonriparians and that it did not legislate on the theory that riparians had a superior vested property right in such waters for irrigation.

It is realized that the argument could be made that a riparian could have a vested property right to the use of the waters from the stream and not from the canal making it necessary for the statute to confer such right upon him, and this might be so, but the entire absence of any expressed consciousness of a different status for irrigation purposes of riparians and nonriparians is highly significant. Such omission is particularly revealing in that provision that provides that such companies "shall have the free use of the water of the rivers and streams of this state."  

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107 Id. Art. 2990.
108 Supra note 104.
is nothing here about the riparians' vested rights to irrigate. Even if all those served by a single irrigation project and at a particular point on the stream were riparians, no protection is afforded for those riparians lower down.

It is in the Act of 1889 that we find the first legislative consciousness of riparians as a group. Section one of such act provided that:

The unappropriated waters of every river or natural stream within the arid portions of the state of Texas, in which, by reason of insufficient rainfall, irrigation is necessary for agricultural purposes, may be diverted from its natural channel for irrigation, domestic, and other beneficial uses; provided, that said water shall not be diverted so as to deprive any person who claims, owns, or holds a possessory right or title to any land lying along the bank or margin of any river or natural stream of the use of the water thereof for his own domestic use.\(^{109}\) (Emphasis added.)

Section two of the act provided:

The unappropriated waters of every river or natural stream within the arid portions of the state, as described in the preceding section of this act, are hereby declared to be the property of the public, and may be acquired by appropriation for the uses and purposes as hereafter provided.\(^{110}\)

Thus the riparian made his entrance into our legislative history, but with such entrance came a statutory definition of his rights. There was vouchsafed to him water for his domestic use. The act proceeded to set up and provide for the operation of a system of prior appropriation of waters for irrigation without distinction between riparians and nonriparians. In fact section nine of such act expressly negatives such distinction in its provision that where one has once perfected his rights to waters by appropriation, it shall be "unlawful for any other person... except for domestic use by one entitled thereto, to so divert the flow" of such streams as to deprive the appropriator of his "priority of use of the water to which [he] may be so entitled."\(^{111}\) (Emphasis added.) Thus the riparian was recognized as having a right to water only for domestic use as against a prior appropriator. The act further

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\(^{109}\) Act March 19, 1889, 21st Leg. at 100.

\(^{110}\) Ibid.

\(^{111}\) Ibid.
provided that as between appropriators the first in time is the first in right, but that appropriative rights would be lost by a cessation of use.\textsuperscript{112}

The Act of 1889 was discussed in the case of \textit{McGhee Irrigating Ditch Co. v. Hudson}.\textsuperscript{113} “Section 2 of the Act,”\textsuperscript{114} said the court, cannot operate, and probably was not intended to operate, on the rights of riparian owners existing when the law was passed, but was intended to operate only on such interests as were in the state by reason of its ownership of lands bordering on rivers or natural streams,\textsuperscript{115}

and indicated some other sections of the act might have to be so limited. It is believed that the court’s conclusion on what the legislature intended is patently unsound. The whole tenor of the statute is at war with the court’s interpretation, and it would be wholly impractical to apply the court policy on a river having a patchwork of public and private ownership. The court spoke of the riparians’ right to “have the water flow through their land in its accustomed channel and to use it for all purposes for which a riparian proprietor may use water so flowing.”\textsuperscript{116} The court spoke elsewhere concerning riparians of the “right to use the water for proper purposes” and of the diverting by others of water being “in effect” a taking “of land” of the riparian for which compensation would have to be paid.\textsuperscript{117}

Even if the case is rightly decided, it is a bit difficult to ascertain the effect of the court’s statements for our purposes. Whether section one\textsuperscript{118} which provided broadly for the diversion of stream waters subject to the riparian’s right to waters for “domestic use” was one of those “other” sections to be limited, and, if so, to what extent, is not clear. The reservation to riparians of waters for “domestic use” may have made it satisfactory. The court did not state that the riparian had a vested property right in the waters for the extraordinary use of irrigation. It will be noted from the above fragmentary quotations from the opinion, that

\begin{footnotes}
\item[112] Act March 19, 1889, 21st Leg., §§ 3 and 4.
\item[113] 85 Tex. 587, 22 S. W. 967 (1893).
\item[114] Quoted \textit{supra} at 407.
\item[115] 22 S. W. at 968.
\item[116] \textit{Ibid.}
\item[117] \textit{Ibid.}
\item[118] Quoted \textit{supra} at 407.
\end{footnotes}
the court was very emphatic that the riparian had some rights of use, but was matchingly vague on what those rights were. One might surmise that "domestic use" was all the court had in mind by way of riparian rights else section one would seem to have been the most likely target for the court's disapproval instead of section two. In addition to the statements of the court being of uncertain significance, it is believed that they are wrong in so far as they might be construed to be a holding that the riparian had a vested right, superior to that of the state to declare unappropriated waters to be the property of the public, to have the waters of the adjoining stream flow by in its "accustomed channel" in order that he might later make use of it for irrigation. The lands involved in this suit are located in Sterling County and were granted by the State of Texas after 1852. In view of the irrigation history of Mexico and Texas prior to that date, and the perpetuating significance of the irrigation statute enacted in that year, it is submitted that there would be no semblance of authority to support the court's language if so construed. The court cited no authority and no prior Texas case had so held.

Next followed the Act of 1895. The act divided the waters of streams into "ordinary flow or underflow" and "storm or rain waters." Section 3 of chapter two of such act also provided "that such flow or underflow of water shall not be diverted to the prejudice of the rights of the riparian owner without his consent, except after condemnation." The act did not address itself specifically to the definition of the riparians rights, but section 10 provides that after appropriation has been perfected as provided for by the act, "it shall be unlawful for any person... to... divert any such water... except that the owner whose land abuts on a running stream may use such water therefrom as may be necessary for domestic purposes." (Emphasis added.) Thus the
riparian's right to water for irrigation is, by clear implication, made subordinate to that of a prior appropriator. Section 11 of such act deals with the formation of irrigation corporations. Some light is shed on who is entitled to water for irrigation by the language used. It provided that corporations could be formed for the purpose of constructing, maintaining and operating canals, ditches, flumes, feeders, laterals, reservoirs, dams, lakes and wells, and of conducting and transferring water to all persons entitled to the same for irrigation, mining, milling...

All persons who own or hold a possessory right or title to land adjoining or contiguous to any canal, ditch, flume or lateral constructed or maintained under the provisions of this chapter, and who shall have secured a right to the water in said canal, ditch, flume, lateral, reservoir, dam or lake, shall be entitled to be supplied from such canal, ditch... with water for irrigation of such land... (Emphasis added.)

There is nothing here to indicate that the legislature had in mind any distinction between riparians and nonriparians regarding their rights to waters for irrigation. It seems that both were on an equal footing in "securing a right" to the waters involved.

Thus through 1895, it appears that, on the whole, the legislature was little concerned with distinctions between riparians and nonriparians, and that when the legislature took note of the riparian at all, it was to preserve to him as against the appropriator, waters for his domestic use only. The remainder of the statutes down to date will not be subjected to detailed analysis. It will suffice to say that these statutes have been read and nowhere has our legislature ever expressly and specifically recognized that the riparian had a right to waters for irrigation superior to those of a non-riparian who legally obtained access to such waters. The legislature has included a provision in all its general enactments preserving "vested rights," but it has never defined those rights. The closest it has ever come to it is the provision in the Act of 1913 which states in effect that nothing in the act shall be construed to impair riparian rights as recognized by the laws of the state "as construed by the decisions of our supreme court."

124 The terminology has varied but the meaning in all the statutes is essentially the same.
125 Acts Texas Legislature 1913, § 98a.
So the court in Motl v. Boyd, in ignoring these irrigation statutes, had lost to it the most fertile source for getting the legislative appraisal of riparian rights at and subsequent to 1852, the period in which the land involved in the Motl case was granted. Instead it turned to struggle with Mexican statutes from which, because of inadequate research, background and training, it drew a grossly erroneous conclusion. Nothing cited by the court soundly supports its conclusion that all riparian lands and riparian lands only acquired a right to waters for irrigation from our Texas streams.

Part II

Texas Irrigation Law Historically Considered and the Effect of Motl v. Boyd Under the Rule of Stare Decisis

If the authorities relied on by the court did not support the conclusions reached, what was the civil law, as modified by Mexican Law and practice, with respect to the rights of the waters of rivers and other streams to the time of 1840 when, generally speaking, we adopted the common law of England as the rule of decision?

Continuity and understanding of the Mexican Civil Law on irrigation will be aided if we see it against the Spanish law background. The Spanish law and practice of irrigation prior to 1840 was strongly local in character and had its roots deep in the ancient civilization of the Moors.126

The survival and vigor of these local customs was no doubt contributed to by the weakness and instability of the Spanish central government. There were revolts and counter revolts, and often it was difficult to ascertain the status as law of any decree of the central government, or worse still, to find the decree it-

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126 "On the expulsion of the Moors, as I have said, the provinces retaining part of the Moorish or mixed blood populations, were permitted to cultivate their fields and to operate their canals with the waters allotted to them by the Moorish governments, and their customs were not set aside by the general laws of the country. Thus the foundation was laid for the present local customary laws in the irrigation regions. The people clung to their peculiar privileges." HALL, IRRIGATION DEVELOPMENT 364 (1885) (hereinafter cited as HALL).
self. But by such general law as there was, running waters were made the common property of all men though its use was subject to regulation. Towns, which were often extended countrysides, controlled much of the water supply and this precluded the existence of a riparian status based upon vested property rights protectable by due process through the medium of private litigation. On the contrary when the law of waters was codified in 1879, it appears that the continued right in any community of irrigators to continue the use of waters for such purposes was determined not primarily by riparian status but was dependent on their formation of an association. Certainly any effective voice

127 "Indeed, the whole system of administration has undergone so many shocks and revolutions during the present century that it is not always easy to determine the precise location even of the archives themselves, through which the course of any particular legislation is to be traced. So many councils have been modified, abolished, and recreated with new functions, and the duties of all and each have been so often altered and transferred that, even after ascertaining the date and origin of a decree or order, it is next to impossible, often to discover in what vortex of the documentary chaos the authoritative original may be revolving." Wallis, The Institutions, Politics, and Public Men of Spain, 69 (1853).

"The government of Spain is a constitutional monarchy, but its apparent stability as such is of but very recent dating. Constitutional principles were advanced and crystallized into a constitution in 1812, and Ferdinand swore to support it, but one of his first acts were to overthrow the instrument and banish its supporters. It was revived in 1820, but only to be again stricken down and replaced by autocracy more complete.

"At the death of Ferdinand in 1833, his widow, Maria Christine, grasped the reins of government in the interest of her infant daughter, Isabella. To make friends against the king's brother, Don Carlos, the representative of the party opposed to all reform, the regent Christina courted the support of the constitutionalists, and promulgated a sort of constitution in 1834. But this did not satisfy the liberals; so in 1836 the constitution of 1812 was readopted. The constituent cortes immediately framed another fundamental law, which was promulgated in 1837. The civil war ended in 1839, and with it, for the time, the pretensions of Don Carlos. Cristina, after a popular outbreak, fled the country in 1840, and renounced the regency." Hall at 435-36.

128... "The laws of the Partidas as given in the Institutes and also embodied in the Recopilacion, show 'the division of things with respect to propertyship' to have been the same with the early Spaniards as with the Romans before them: running waters were a common property of all men; and rivers, a public property of the nation.

"Other classes of the common property were free to the use of every citizen of the town, without rent, but much use was subject to regulation of the town councils, and to supervision by the alcaldes and their subordinates." Hall 366-67.

129 "Now the town holdings or terminos, were frequently extended regions of the country in the olden time, and 'there was a great deal of municipal law regulating the use of water, and officers to take control of it.' So that the general laws respecting watercourses were often overlooked and unknown, as compared to municipal regulations and customs on the subject. . . .

"Under these circumstances, where the use of water in one town holding interfered with that in another, the dealings were as between the communities and not between the individuals. . . .

"All running waters available for irrigation, within their terminos, belonged to the towns, notwithstanding apportionment. Hence, there was no conflict by reason of riparian claims, for under such circumstances there was no riparian right." Hall 370-71.

130 Arts. 226-228, General Law or Code of Spain on Watercourses, Waters, and Irrigation. Printed as Appendix III, Hall 589.
in the administration and distribution of such waters was dependent on being a member of such an organization.\textsuperscript{131}

The law of waters in Spain before and through our period of colonization was, in so far as it is of substantial importance to us here, divided into the law of rivers and their waters and of small streams and their waters.\textsuperscript{132} A river was classified as a stream which "runs perpetually and from time immemorial." Their waters were public, and, unless the government had appropriated the waters for its own use, any person could, respecting the prior rights of others, take waters from them for his use. There is no indication that this privilege was limited to riparians. It was strongly indicated however that use by anyone was the measure of the water to be taken. Navigation was protected always,

But should the river not be navigable any resident of a town through which it passes may take out a portion of its waters, and construct a ditch for the irrigation of his lands, or to move his mill or water wheel, or for other purpose that may interest him, provided he does it without any injury to the common use, or the destination that the town may have given the waters, and under the understanding that if the ditch has to cross lands not his own, of the royal patrimony, or of the municipality, the permission of the owner, of the king, or of the municipal council will be indispensable.\textsuperscript{133} (Emphasis added.)

The owners of lands bordering non-navigable rivers could use such waters for the benefit of their estates provided it did not interfere with the communal use, the use by the towns,\textsuperscript{134} and was done subject to law and government regulation. At most it seemed to be a privilege of use, but which, as appeared to be true of all other established uses, would be protected once it had begun and only so long as it continued.

Let us turn now to the law of small streams. Hall introduces his discussion of "Small streams and Riparian Rights" with the statement that the use of the waters of small streams

\textsuperscript{131} Id. Arts. 230-241, at 505.

\textsuperscript{132} Unless otherwise indicated, the comments made on these two subdivisions of the Spanish law will be based upon HALL 371-76, and his citations from the various works of Escriche. Specific citations will not be made.

\textsuperscript{133} Escriche as quoted by HALL 372-73.

\textsuperscript{134} That the use of "towns" was quite extensive and probably included waters for the irrigation of such nonriparian property is indicated supra note 129.
Was left very much to municipal ordinances and ancient local custom, and of course these varied in different ports of Spain, but Escriche made a code governing rights on these streams, as applicable where no such ordinances or customs prevailed, which he “founded on equity and the interests of agriculture,” and on the laws which he refers to. I present translated extracts, without comment except to call attention to the fact that on several important points the new law of waters has certainly not been framed on this author’s writings as an authority.

It will be recalled that these streams were very small and of only limited importance in Spain’s economy. The following quotations from Escriche as set out by Hall give the heart of the law of waters of small streams as Escriche has formulated it.

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

The riparian proprietor cannot without the consent of the other riparian owners interested, concede to a third party, to their injury, the power of taking water from the same stream or on his estate, nor himself use the water to irrigate another property which belongs to him, but which is not situated on the bank; although this right can be acquired by prescription.

If Escriche is accepted as authoritative on this phase of Spanish water law, and if the above is confined to its niche in the Spanish legal structure on the subject, it is apparent that it was of very limited significance. How insignificant, or at least how insecure the privilege was, is shown by the fact that it was essentially ignored in the codification of the water law of Spain in 1879. It is only when the two above paragraphs quoted from

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135 Hall 374.
136 Supra at 381-383.
137 Hall 374-75.
138 That Hall entertained serious doubts about Escriche as an authority in this particular area is indicated by this comment: “Those parts translated under the headings ‘Of Small streams and Riparian Rights’... seem to have been very largely his (Escriche’s) own view of what ought to be, for the sake of ‘equity and agriculture’; and, hence, I have presented translations, and not abridgements of them. His system of riparian rights seems to have been founded on French rather than on Spanish law; for he accords all riparian proprietors on small streams an equal right of servitude to the waters which is the French law but for which I find no sufficient authority in the old Spanish laws.” Hall 382.
139 See discussion supra at 381-383.
140 Supra at 412-413; infra note 147.
Escriche are taken out of context, out of the overall Spanish irrigation setting of that day, freed from the limitations and conditions imposed on them there, and applied broadly to all water courses in countries such as ours that they take on sweeping importance.

Local self government in irrigation matters was at first only tolerated in Spain, and at times very reluctantly, but was later adopted as a national policy. It should be helpful, therefore, to briefly examine the operations at Valencia, one of those local systems. The irrigated garden plain is several miles in width consisting of 26,350 acres and the property is, in the main, minutely subdivided. Irrigation water is taken from the Turia by eight main canals, lateralling off from each of which is a network of smaller distributing ditches. Irrigation was practiced here before the thirteenth century, but in that century the Spanish King granted to and confirmed the right of the local inhabitants to the waters and canals in that community. The irrigators dependent on each canal formed separate communities with governmental structures containing the essential legislative, executive and judicial elements. The chief legislative body is the biennial assembly of all the irrigators. The principal administrative officer is the syndic who is an elected laborer of the irrigation community and who is the active superintendent of the works, and who, with other syndics, comprise an administrative court. When a shortage of water develops, the syndics of the Valencia area meet with others from irrigation communities up stream to work out an apportionment of waters. The provisional government is alert to keep the peace. When the division has been agreed

141 "During the last century, several governmental attacks on the irrigation administration system prevalent in the eastern provinces, were made. The people of other quarters wished to adopt the system of local self government, and establish 'tribunals of waters,' or 'juries of irrigation;' but the government held that the town authorities were the proper local administrative bodies for community irrigations, and that special courts of waters were incompatible with the national judiciary system. Attempts were even made to abolish the water court of Valencia—the parent of all the institutions of this kind—but these failed, as we have seen. Then came the time when the opposition gradually ceased. This was through the period heretofore written of as that of early constitutional development. Following on has been a term when the principles of constitutional monarchy have been apparently victorious in Spain, and with their triumph has risen and been adopted, as a part of the national law, the principle of local self government in irrigation." HALL 487.
142 HALL 384.
143 HALL 386.
upon, the syndics return to their communities to administer their allotment. The complaints of, and disputes between, the irrigators are heard by a unique body known as the Tribunal of Waters which is composed, as stated above, of the elected syndics of each community.  

It is noticeable that in the entire description by Hall of this local system, riparians are never mentioned. Obviously, they were not the only ones receiving irrigation waters in an irrigated valley several miles in width containing more than 26,000 acres, where the property was minutely subdivided. In times of shortage apparently all suffered alike. Hall describes eight other local systems, and in none does it appear that riparians were thought of or treated as a class apart. In this connection it is significant that the 1879 water law of Spain vouchsafed to the riparian on small streams an amount of water (0.35 cubic ft. per second of time) which would probably not fill more than what would now be classified as domestic needs. The situation on navigable streams was controlled by Art. 184 of that law which provided that riparians could install, without governmental permission, pumps, other than steam pumps, for the purpose of withdrawing water for irrigation. Art. 185 required special permission to construct any sort of permanent dam, weir, etc. in any type of stream. As a practical matter this no doubt gave the riparian on navigable streams only a very limited statutorily confirmed right to its waters for irrigation. And the statute speaks in terms of permission and limitation rather than in terms of recognition of a non-touchable property right.

The significance of all this lies in the probability that the local

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144 Hall 387-96.
145 Hall 398-432.
146 Supra note 130.
147 "Now, this amount of water is very small; it would be carried in a stream 1 foot wide and 4½ inches deep, flowing at an average rate of one foot per second—a mere little trough of water, such as is used in the irrigation of a garden patch.

"The extent of the unrestricted privilege of the most favored riparian proprietor upon a small stream, below the tract of the water-source, therefore, is to divert and use a little more than one third of a cubic foot per second, and to construct, for the purpose, in the channel, a dam or barrier of earth or loose stone, which would be carried out by the first freshet, and in no way affect the flood regime of the stream. Going beyond this, he must obtain permission from the administration. Here comes in the principle of governmental control and authorization, more fully treated of under a subsequent heading; but with respect to the practice as applied to proprietors on small streams, it is well to close the subject here." Hall 448-49.
irrigation system with which the Spaniards were familiar migrated with them to America rather than Escriche’s views of what, for the sake of “equity and the interests of agriculture,” the law ought to be. An observer of the systems in both countries found much similarity between those in Spain and those of the New World. Our information confirms that similarity.

Limitations of time, money for translations, together with the disorganized state of the records in which some of the research had to be done, has kept us from having all the information needed for making a detailed comparison of the old Spanish irrigation systems, such as Valencia above described, with those of the New World, but all the information available points to the fact that they were quite similar. The similarities will be apparent if, with the Valencia system in mind, we list the principal features of the San Antonio system. It will be noticed from Maps 1 and 2 that each major ditch or acequia served a community of irrigators. Within the framework of the general government there was a self-governing organization for each such community. It will also be noted from Map 2 that the gravity

148 Supra note 138.
149 “The Spaniards had themselves been taught how to farm with the aid of irrigation by the Moors, who held southern Spain from the eighth to the fifteenth century, and who, in the early part of their occupation of that country, laid out those magnificent irrigation works which exist to the present day. Having passed several years of my life in Spain, I have had abundant opportunities of studying the ancient systems of irrigation as there practiced, and during a long residence in the Mesilla Valley I have been able to compare the two systems, which I find almost identical.” F. C. BARKER, IRRIGATION IN MESILLA VALLEY, NEW MEXICO, 10-14 Water Supply Papers, U. S. G. S.

It is recognized that the Mesilla Valley is not a grant of Texas, but both areas were for a long time under the jurisdiction of Spain and later Mexico, and the early irrigation systems in both were developed under the same governmental systems.

150 Beginning at 46 of CORNER, SAN ANTONIO DE BEXAR (1890), there is an interesting description of the building of the upper labor ditch in Bexar County. The following are two brief excerpts from that description:

“He (Governor Ripperda) accordingly issued an ordinance requesting the neighbors and those who may wish to contribute to the taking of the water, to enlist themselves forthwith, contributing every one any ‘necessary utensils’ and the Baron promises that the partition of the lands ‘will be made with the due equity of chance.’ He insists that the person who may take charge of the work must possess intelligence and experience; the election of the Acequiero to be decided by a plurality of votes among the shareholders. The Acequiero elected shall be entitled to an extra portion or suerte of land, but he shall furnish two additional men.

“In the meanwhile, we may surmise that things went along smoothly for a while, for nothing more is heard of the Upper Labor Ditch and its construction until July 13th, 1776, when we learn of the second election, in which one Angel Galin is elected over his opponent, Bartholome Seguin, to take the place of Toribio Puentes, who, for ‘reasons by him exposed, which were found sufficient,’ makes application to be relieved and to be awarded the emoluments in land, etc., to which he was entitled. He is relieved on July 15th, on the condition that he put two men daily on the work of construction until the
method of irrigation was used which resulted in tapping the river much above the lands to be irrigated. In fact it is doubtful that with the then known and feasible methods of irrigation it would have been practical to take water directly from the river onto the adjoining land for irrigation. And finally it will be observed that a number of the tracts of land obviously served by these mother ditches were not riparian to the river. And in all the literature read concerning the San Antonio irrigation systems and their operations, as was true of that regarding the operation of the Spanish systems, riparians were never once mentioned as a class.

In the transcript filed in the San Antonio Court of Civil Appeals in the case of the City of Ysleta v. Babbitt, we find an informative description of the irrigation layout in the Ysleta area. While the description appears in the plaintiff's original and amended petitions, the facts of significance to us here do not appear to have been seriously controverted. The Town of Ysleta seemed to be at that time one of those sprawling, Spanish type towns referred to previously which contained an abundance of irrigated farm land. The ditch or acequia seemed to serve a community of irrigators whose right to water was based upon having done work in constructing and repairing the ditch and in being a riparian thereto. The map in the transcript is a bit ambiguous on the point, but it appears that plaintiff's land was not riparian to the river. And from the defendant's answer, it appears that the history of this ditch and its community of irrigators reaches back into the Mexican past from which it brought for-

151 Supra note 129.
152 "That plaintiff is a resident and citizen of the City of Ysleta and has a farm within the limits of said city and adjacent to the irrigation ditches...and (defendant: City of Ysleta) has been accustomed to furnishing his said farm with water for irrigation. Transcript of Record, pp. 2, 6, City of Ysleta v. Babbitt, 28 S. W. 702 (Tex. Civ. App. 1894)."
153 "That plaintiff with others in former years constructed and made said ditch, and has during the term of more than ten years last past... aided by labor and money in maintaining, repairing and keeping in effective operation the said acequia, and is a riparian owner of said acequia and is entitled to his proportion of the waters flowing through same." (Emphasis added.) Transcript of Record, p. 6, City of Ysleta v. Babbitt, supra note 152.
154 Id., p. 36.
ward a system of administration by "alcaldes" suggestive of that by the syndics of Valencia.\textsuperscript{165}

When we turn to the legal writers on Mexican water law, we find the conclusions consistent with the physical operations. We have noted that by Spanish decree, the waters of the Indies, which included Texas, were declared to be the common property of all.\textsuperscript{166} This is in keeping with the Spanish law announced as follows in the Partidas:

The things which belong in common to the creatures of the world are the following, namely; the air, the rainwater, and the sea and its shores, for every living creature can use each of these things according as it has need of them.\textsuperscript{157}

There was undoubtedly a close kinship and much overlapping between Spanish, Mexican and early Texas irrigation law and practice. Kinney states with respect to the Mexican law on riparian rights:

By the time the civil law had been sifted down through the various transformations down to the Government of Mexico, at the time of the Treaty of Guadalupe Hidalgo, the civil law rules upon the subject of waters had been modified in a number of ways. Under the Mexican law at this period the rivers and streams belonged to the nation, the use of the waters to the inhabitants in common. That is to say, as long as the waters were flowing in their natural channels they were 'publici juris,' 'res communes,' 'bonum vacans,' or the common property of all the inhabitants.\textsuperscript{158}

Elsewhere he states,

However, according to the Mexican law, the Mexican government possesses the power of retaining the waters in their natural channels; or, by way of convenience, of conferring the exclusive use of a portion or the whole of the waters of a certain stream to individuals or corporations upon such terms and conditions and with such limitations as it saw fit to establish by law, and that, too, whether they were riparian owners or not. ... In a number of respects, however, rights were acquired in Mexico which were a departure from and at variance with the ancient civil law rules. Among these was the exclusive right which might be

\textsuperscript{155}Id., p. 13.
\textsuperscript{156}Supra at 384.
\textsuperscript{157}Las Siete Partidas, Part III, Tit. XXVIII, Law III.
\textsuperscript{158}Kinney, Irrigation and Water Rights § 577 (2d ed. 1912).
acquired in the waters of a stream to irrigate nonriparian lands.\textsuperscript{159}
(Emphasis added.)

The Mexican law permitted diversion from the rivers and streams not
navigable, and by those who were not riparian owners, and for the irri-
gation of lands not riparian.\textsuperscript{160} (Emphasis added).

In the case decided by the Supreme Court of the United States of
Guiterres v. Albuquerque Land and Irrigation Co., 188 U. S. 545, 47
L. Ed. 588, 23 Sup. Ct. Rep. 338, it was conceded by both sides that, by
the laws of Mexico in force when the territory of New Mexico was ceded
to the United States, the use of waters of both navigable and non-naviga-
ble streams was not limited to riparian lands but extended as well to
lands which did not lie upon the banks of rivers and streams.\textsuperscript{161}

That the riparian's position was one of some superiority is
indicated by this additional quotation from Kinney:

Upon the examination of the Mexican law of waters, there can be no
question but what there were certain rights which might be acquired
by virtue of the ownership of the land along the stream. These rights
were somewhat analogous to the common law of riparian rights ... But
as we understand the law of waters to have been under the Mexican
law, the use of nonnavigable streams was under the control of the Mex-
ican Government, and, as we have stated in a previous section, it had
the power of retaining the waters in their natural channels for the sole
use of riparian owners; or, by way of concession, the right of confer-
ing the exclusive use of a portion or the whole of the waters of such
a stream to individuals or corporations, for use on non-riparian
lands.\textsuperscript{162} (Emphasis added.)

Our courts have uniformly said that the law in effect at the
time of the grant of public lands determines the extent and na-
ture of the estate acquired by the grantee.\textsuperscript{163} Consequently, on
the basis of the quotations from Kinney and the other authorities
noted, the following can be said of all public lands granted along
rivers and streams in Texas at least prior to 1840:

\textsuperscript{159} Id. § 577.
\textsuperscript{160} Id. § 578.
\textsuperscript{161} Id. § 580.
\textsuperscript{162} "It is conceded on behalf of appellant (the appellees' case being based on such
position) that, by the laws of Mexico in force when the territory of New Mexico was
ceded to the United States, (1848) the use of the waters both of navigable and unnavig-
able streams was not limited to riparian lands, but extended as well to lands which did
not lie upon the banks of the rivers, and that such use was subject to be regulated and
controlled by the public authorities." Guiterres v. Albuquerque Land and Irrigation
Company, 188 U. S. 545 (1902).

\textsuperscript{163} KINNEY, IRRIGATION AND WATER RIGHTS 1000 (2d ed. 1912).

\textsuperscript{163} Manry v. Robinson, 122 Tex. 213, 56 S. W. 2d 438, 442 (1932); Miller v. Letz-
erich, 121 Tex. 248, 49 S. W. 2d 404, 407 (1932).
1. The riparian unquestionably acquired a choice means of access to the water for all lawful purposes which constituted a superior position of value.\textsuperscript{164}

2. That all the rights or privileges which riparians acquired were subject to a congenital infirmity because of the superior power of the government to grant the exclusive right to obtain and use a portion or all of such water by riparians on nonriparian land or by nonriparians on nonriparian lands.\textsuperscript{168}

3. That these infirmities of the riparian as to lands granted prior to 1840 continued after that date, and the concomitant power of government over such lands continued automatically in the Texas government.\textsuperscript{166}

The force of Kinney's conclusions on the status of pertinent Mexican laws on irrigation is enhanced by the fact that all of the pieces of the puzzle now fit together. All "irrigable" lands or lands "suitable for irrigation," whether riparian or nonriparian, commanded a better price than nonirrigable lands simply because under the law of Mexico and of Texas to 1840, water could be acquired for their irrigation without regard to their riparian nature. By the same token, land "not irrigable" or "without the facilities of irrigation," whether riparian or nonriparian, commanded a lesser price. As the above analysis of pre-1840 grants reveals, the overwhelming majority of riparian lands which were classified fell into the latter category.\textsuperscript{167} Under the interpretations of Mexican law as advanced by Kinney, the early irrigation practices in Texas and Mexico were legal and not frontier practices in defiance of the law. Similarly, the administration of the colonization laws and decrees by the early land commissioners become correct and proper instead of inaccurate and irresponsible. And

\textsuperscript{164} See note 4 supra.

\textsuperscript{165} Kinney does not discuss the problem of access but Part III, Tit. XXXI Law IV of the Partidas states that one estate was subject to a servitude in favor of another for the construction of canals for irrigation. The Partidas was part of the basic law of Mexico. \textit{Kinney, Irrigation and Water Rights} 990 (2d ed. 1912).

\textsuperscript{166} Airhart v. Massieu, 98 U. S. 491 (1878); Manry v. Robinson, 122 Tex. 213, 56 S. W. 2d 438 (1932); Miller v. Letzerich, 121 Tex. 248, 49 S. W. 2d 404 (1932); Musquis v. Blake, 24 Tex. 461 (1859); Kilpatrick v. Sisneros, 23 Tex. 113 (1859); McMullen v. Hodge et al, 5 Tex. 34 (1849); Wharton, \textit{Early Judicial History of Texas}, 12 Texas L. Rev. 311, 324 (1934). Also the act of 1840 adopting the common law as the rule of decision in Texas and repealing some of its prior laws especially preserved those on grants and the colonization of lands. Sayles' \textit{Early Laws of Texas}, Vol. 1, at 334; Sayles' \textit{Real Estate Laws of Texas}, Vol. 1, at 21.

\textsuperscript{167} \textit{Supra} at 388-398.
perhaps of greatest significance of all, the irrigation acts of our various legislatures as heretofore analyzed, and particularly those of 1852, 1876, and 1889, become consistent with such laws and practices instead of an attempt to chart a new course in irrigation law and to destroy vested property rights.

It should be recalled that Chief Justice Morrill stated in *Tolle v. Correth*\(^{168}\) that the legislature by the Act of February 10, 1852, "intended to carry out the principles of the Mexican laws."\(^{169}\)

About 120,000,000 acres of Texas' estimated 172,687,000 acres were included originally in grants issuing from the Spanish and Mexican governments. Approximately 100,000,000 of those acres were granted by the Mexican government between 1821 and 1836.\(^{170}\) Title to all of the lands under these grants could not be perfected under the laws of Texas, however, but 26,280,000 acres of such lands are now being held under those grants.\(^{171}\) This is slightly more than 1/7 of the land acreage of Texas; and it is common knowledge that these lands are so massed in the southern part of Texas and along its rivers as to constitute a much higher fraction of the irrigable land area than of the state as a whole.

This means, however, that the title to most of our lands in Texas rest on grants made after 1840. What of the law after that year? In that year the Congress of the Republic of Texas enacted that:

The common law of England (so far as it is not inconsistent with the constitution or the acts of congress now in force), shall, together with such acts, be the rule of decision in the republic, and shall continue in full force until altered or repealed by congress.\(^{172}\)

That all Laws in force in this Republic, prior to the first of September one thousand eight hundred and thirty six (except for the laws of consultation and provisional government, now in force, and except such laws as relate exclusively to grants and the colonization of lands in the state of Coahuila and Texas....) be, and the same are hereby repealed.\(^{173}\)

\(^{168}\) 31 Tex. 362, 364 (1868).
\(^{169}\) Id. at 364.
\(^{171}\) TEXAS ALMANAC 350 (1954-1955 ed.).
\(^{172}\) Act January 20, 1940, § 1.
\(^{173}\) Id. § 2.
The state of the law in Texas from 1840 to 1852 on riparian rights generally and on irrigation rights in particular, is the first problem presented. The common law of England during this period appeared to be that:

Every owner of a riparian tenement on a natural watercourse flowing in known and defined channel, whether on the surface of the land or below it, or in an artificial channel of a permanent character, has as an incident to his property in the riparian land a proprietary right to have the water flow to him in its natural state in flow, quantity, and quality, neither increased nor diminished, whether he has yet made use of it or not.\(^{174}\)

That state of the law has little appeal or utility in Texas, where, if adhered to, it would provide our riparians with floods in seasons of peak rainfall, with a water famine in the dry seasons, and with a scenic river to admire in times of reasonable flow. Some of the courts have paid some lip service to this statement of the law,\(^{175}\) but under the uniformly announced policy of our courts to apply in Texas only so much of the common law of England as is consistent with our institutions and will best serve the interests of our people,\(^{176}\) it is safe to assume that such has never been the law of Texas. The rule of the common law above quoted from Halsbury was not applied to prevent all diversions in England prior to 1851, but before that date it had never been decided that a riparian could divert any part of the waters of the stream for irrigation. In the course of the oral argument in the case of *Embrey v. Owen*,\(^{177}\) Parke, Baron, remarked:

It has not yet been decided in this country that a riparian proprietor has a right to take the water for the purpose of irrigating his land.\(^{178}\)

In this case the court held it was reasonable for the upper riparian to divert small amounts of the water from the stream in the season of plentiful flow for the purpose of fertilizing his pac-

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174 33 HALSBURY’S LAWS OF ENGLAND 593-594 (2d ed.).
175 “Without the consent of the adjoining proprietors, he (the riparian) cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below…” Hass v. Choussard, 17 Tex. 588, 590 (1856).
176 Turner v. Big Lake Oil Co., 128 Tex. 155, 96 S. W. 2d 221, 224-225 (1936); Motl v. Boyd, 116 Tex. 82, 115, 286 S. W. 458 (1926); Clarendon Land Co. v. McClelland Bros., 89 Tex. 433, 34 S. W. 98 (1896).
178 Id. at 582.
ture, the surplus being returned to the stream, and refused to enjoin such practice at the suit of a lower mill operator whose operations were concededly unaffected by the diversion.

So it seems safe to say that the common law of England on riparian rights and irrigation between 1840 and 1852, being so at variance with our irrigation history and practices, and so clearly unsuited to our conditions, was not the law of Texas. In 1852 our Texas Legislature passed an irrigation law,\textsuperscript{179} which, in its broad outlines, appears to be in keeping with the law in Texas prior to 1840 as this article has concluded it to have been. The legislative tenor of irrigation law continued in that vein throughout the period when most of our public lands were being granted.\textsuperscript{180} Thus it seems clear that to apply the common law of England to grants made after 1852 would directly violate the specific condition attached to the adoption of such common law that it was to be the rule of decision only \textquoteleft until altered or repealed by Congress.\textquoteright\textsuperscript{181}

Under these circumstances what could be more reasonable and proper than for our Texas courts independently, or in construing a statute to hold that the law of riparian rights on irrigation were the same between 1840 and 1852 as they were prior to 1840, and as our early legislature indicated them to be after 1852. Only in that manner can we get correctly a reasonable consistency in our law on the subject. If we construe grants before 1840 in accordance with the Spanish or Mexican law in effect at the time of grant; the grants between 1840 and 1852 in accordance with the common law of England before \textit{Embrey v. Owen}, or even as slightly relaxed by that decision, and revert to a consistency with our legislative enactments after 1852 in construing grants after that date, we will have an impractical patchwork of law applicable along some of our main streams which will rival grandma’s quilt for variety. It is submitted that there is nothing in the history of the water law of Texas which requires such a result. In fact it is believed that Texas, because of the limited and qualified nature of riparian rights in this state, is substantially free to

\textsuperscript{179} \textit{Supra} at 402.
\textsuperscript{180} \textit{Supra} at 402-410.
\textsuperscript{181} \textit{Supra} at 422.
adopt whatever system of irrigation it elects.\textsuperscript{182} If the conclusions herein reached are correct concerning the qualified nature of the riparian's rights, and the inherited power of the state government over the waters of its streams, the state has the right to declare its waters public subject only to perfected appropriations and the rights of riparians to waters for domestic use. There is no doubt that Texas did so by the Irrigation Act of 1889\textsuperscript{183} and the adoption in 1917 of Sec. 59a, Art. XVI of the Texas Constitution which reads in part:

\begin{quote}
The conservation and development of all of the natural resources of this state, including the control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams, for irrigation, power and all other useful purposes, the reclamation and irrigation of its arid, semi-arid and other lands needing irrigation, ... and the preservation and conservation of all such natural resources of the state are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto. (Emphasis added.)
\end{quote}

It is confidently asserted that so long as Texas respects the riparian's right to waters for domestic use and perfected appropriative rights, there is nothing the State of Texas cannot constitutionally do with respect to the distribution of all the waters of its streams so long as the action taken bears a reasonable relationship to the efficient and beneficial use of such waters.

If the conclusion of this paper that Motl v. Boyd is clearly wrong on the origin and extent of riparian rights, and that the true state of the law required a different conclusion, the question still exists as to its status as a rule of property. Courts are more reluctant to overrule a decision which announced a rule of property than to overrule one of any other type. Still the policy against doing so is not inflexible. The question is one of balancing interests. American Jurisprudence announces the issue thus:

\begin{quote}
While it is true that long acquiescence in an erroneous decision, so that it has become a rule of property or practice, may raise it to the dignity of law, thereby preventing the courts from overruling such a decision wherein the rule established has become a rule of property under which rights have been acquired and adjusted, yet it must not
\end{quote}

\textsuperscript{182} Kansas v. Colorado, 206 U. S. 46 (1906).
\textsuperscript{183} Supra at 407.
be understood that a previous line of decisions affecting even property rights can in no case be overthrown. Where the error of a previous decision is recognized, but the rules therein have become rules of property, the question whether the rule of stare decisis shall be adhered to becomes a simple choice between relative evils. The rule should be adhered to unless it appears that the evil resulting from the principle established must be productive of greater mischief to the community than can possibly ensue from disregarding the previous adjudications upon the subject.\textsuperscript{184}

Our own supreme court has indicated, though somewhat indirectly, a similar position. It stated:

Bahn v. Starcke was decided nearly forty years ago, and, in so far as we know, has neither been modified nor overruled. Many sessions of the legislature have met since the decision, and the statutes have twice been codified. Neither the statute law nor the constitutional provision has been changed since the decision. In fact, it may be said that the law as announced in Bahn v. Starcke has become a rule of property in this state, \textit{and should not be changed in the absence of other controlling circumstances}, even though good reason might be given for a different holding.\textsuperscript{185} (Emphasis added.)

The case of \textit{Motl v. Boyd} will now be examined in the light of this pronouncement. If the conclusions of this paper are correct, a fundamental weakness of the case as a precedent is that it is wholly erroneous in its major conclusions on the origin, nature and extent of riparian rights affecting Texas lands. A basically wrong conclusion so vital to the public welfare of the state as a whole, and affecting nonriparian lands as well as those riparian, should ascend very slowly to the stature of an entrenched rule of law. The subject matter of the case is strongly affected with a public interest. The property of the public, its water, is involved. So we are here concerned about more than a rule of property affecting only the immediate private interests of the transactions litigated.

The second major infirmity of this case on the points here under discussion is that it was obiter dictum. This is true for two reasons. First, the holding of the court on the point of estoppel\textsuperscript{186}

\textsuperscript{184} \textit{Am. Jur.}, \textit{Courts} § 126 (1939).
\textsuperscript{186} \textit{Supra} at 379.
was controlling regardless of the nature and extent of the riparian interest, if any, owned at any time by the defendants. Consequently a determination of the nature and extent of that interest was wholly unnecessary to a decision of the case. The court could have simply noted the arguments of counsel on those points and have stated that it was unnecessary to decide the points raised, since, if the interests of the defendants were conceded to be that of the highest order of property ownership known to the law, it was lost to them by the conduct of their predecessors in title giving rise to an estoppel against them.

This obiter dictum by the court on the origin, nature and extent of riparian rights, was pronounced pursuant to issues raised, was deliberate and the product of much study, but it was nevertheless clearly unnecessary to a decision of the case.

Second, the conclusion was obiter dictum as to much of our Texas lands because the conclusion of the court on the nature and extent of riparian rights covered those lands beginning with the earliest of Spanish grants through those of Coahuila and Texas and Texas alone, including both those before and after 1840, whereas the land involved in the Motl case was granted by the State of Texas in 1857. This would seem to make obiter dictum everything said with respect to lands granted at all times other than the period of our water law history in which 1857 falls. This clearly would be the period following 1852. Assuming the common law applied during this period, which seems to be wholly inadmissible, the court gave a very limited and inconclusive discussion of such law as it existed in 1840 or on any date thereafter. After pointing out that the state made a limited adoption of the common law of England as the rule of decision in 1840, the court observed:

Since all land sales subsequent to the adoption of the common law as a rule of construction must be considered in the light of that adoption, we deem it unnecessary to enter into a detailed analysis of the various laws of the State authorizing grants or sales of land. (Emphasis added.)

There followed a brief analysis of some such land laws of

187 The following distinct periods can be identified: 1. Spanish Civil law as administered in the New World until 1821; 2. Law of Mexico from 1821 to 1840; 3. Law of Texas from 1840 to 1852; and 4. The law of Texas after 1852.

188 Motl v. Boyd, 116 Texas 82, 106.
Texas the earliest of which was 1877. No discussion was had of the *common law of England* in 1840 or at any time thereafter, or of the irrigation statutes of Texas, beginning in 1852, which were clearly more pertinent to the state of the law in 1857 than of those dealing with the sale of public lands enacted in 1877 and thereafter.

The constitutional and statutory setting in which the case was decided detracts from the strength of the decision and lessens the basis for a claim to continue it as a rule of property law. The pre-*Motl v. Boyd* irrigation statutes involved were analyzed earlier, and what was said there will not be repeated. It is sufficient to recall that the whole legislative history on irrigation beginning in 1852 and continuing through 1926, when the case was decided, was hostile in varying degrees to the conclusions reached on riparian rights. This legislative policy reached its zenith when it was enacted that no riparian rights would be construed to attach to lands granted by the state subsequent to July 1, 1895. It also seems that the concept of a vested property right to water for irrigating that is neither acquired by use nor lost by disuse throughout the ages is wholly inconsistent with the philosophy embodied in the above quoted sec. 59A of Art. XVI of the state constitution, adopted by the people in 1917.

While our supreme court should follow, and on the whole has followed, its decisions tending to establish rules of property, it has not always done so. Examples of such failure can be found in the general area of water law. In construing what is now Art. 5302 of our civil statutes, the supreme court, in *City of Austin v. Hall*, clearly held that the riparian under the statute owned to the edge of the *stream* of water contained in the river bed.

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189 Ibid.
190 See *supra* at 380-381 for a discussion of the lack of significance of the latter statutes.
191 *Supra* at .......
192 Acts 1913 § 97.
193 *Supra* at 425.
194 *All lands surveyed for individuals, lying on navigable water courses, shall front one-half of the square on the water course and the line running at right angles with the general course of the stream, if circumstances of the lines previously surveyed under the laws will permit. All streams so far as they retain an average width of thirty feet from the mouth up shall be considered navigable streams within the meaning hereof, and they shall not be crossed by the lines of any survey. All surveys not made upon navigable water courses shall be in a square, so far as lines previously surveyed will permit.* Acts 1837, at 63; Pasch. Dig. 4529, G. L. vol. 1, at 1405.
195 93 Tex. 591, 57 S. W. 563, 564, 565 (1900).
so far as the decision could do so, it vested in riparians the land to the water’s edge. That decision stood until the Motl case, a period of 26 years, at which time all owners of lands in the state riparian to streams to which the statute was applicable, were “divested” of the lands between the water’s edge and the bank, as defined in the Motl case, and an easement over such lands was substituted therefor. There was not so much as a mention of the Hall case. There is strong indication that such reversal of position was not inadvertent, however. In Diversion Lake Club v. R. W. Heath et al, it was noted in an opinion by the commission of appeals that it was held in the Hall case that the riparian on a navigable stream owned to “the water line of such stream” but that in Motl v. Boyd “the court deliberately adopted” a position which restricted his ownership to the bank as therein defined. This opinion was adopted by the supreme court. Chief Justice Cureton, who wrote the opinion in the Motl case, was chief justice when the Diversion Club Lake opinion was adopted.

Again, the supreme court in Tolle v. Correth and Mud Creek Irrigation, Agricultural and Manufacturing Company v. Chas. Vivian et al concluded that irrigation was a natural use and that a riparian could use all the waters of his adjoining stream without regard to the needs of other riparians for a similar purpose. In 1905, 37 years after the Vivian case and during which time much public land was granted by the state, the supreme court held in Watkins Land Co. v. Clements, that irrigation was not a natural use and thus “divested” such right as the riparians had acquired under the rule of the prior cases. If we say that the state-

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196 “So when the statute says that the average width shall be 30 feet between the banks, it does not mean the space covered by the water at a low tide or flow, but the entire bed of the stream as above defined. The fact that at times and places there may be some distance between the bordering banks which limit the survey lines, and the water does not militate against the right of the riparian owner to have access to the water. When the riparian rights were granted, they carried therewith the right to use the water, and this is adequate to give access to it at all stages.” Motl v. Boyd, 116 Tex. 82, 109, 286 S. W. 458, 467, 468 (1926).

197 Ibid.

198 126 Tex. 129, 86 S. W. 2d 441 (1935).

199 Supra note 195.

200 126 Tex. at 140, 86 S. W. 2d at 446.

201 Ibid.

202 31 Tex. 362 (1868).

203 74 Tex. 170 (1889).

204 98 Tex. 578, 86 S. W. 733.
ments in the *Tolle* and *Vivian* cases were both erroneous and dictum, we do not alter matters since what was said in *Motl v. Boyd* here under consideration was erroneous and also dictum for more than one sufficient reason.\(^{205}\)

And finally there is the case of *Miller et al v. Letzerich et al.*,\(^{206}\) the opinion in which may be a two edged sword. As early as 1889, the Texas Supreme Court in *Gross v. City of Lampasas*,\(^{207}\) adopted the "common enemy" doctrine as applied to surface waters. This doctrine was reaffirmed in *Barnett v. Matagorda Rice and Irrigation Company*,\(^{208}\) and was later followed in eleven cases decided by various courts of civil appeals as to five of which the supreme court denied writs of error.\(^{209}\) This doctrine unquestionably creates a servitude over the upgrade estate in favor of the downgrade estate. But the legislature in 1915 enacted a statute\(^ {210}\) making it unlawful to divert surface waters by unnatural means onto the land of another so as to cause damage. The supreme court in the *Letzerich* case\(^ {211}\) upheld the statute, and took the opportunity to state that the earlier cases were erroneous.\(^ {212}\)

The decision either means that an erroneous decision involving a rule of real property vests no interest at all or that it does not vest one which the legislature cannot take away in the reasonable exercise of the police power. Under this doctrine such rights, if any, as have "vested" under the *Motl* doctrine, if the dictum in that case is erroneous as it is believed to be, are subject to revision or abolition by legislative enactment or by judicial correction.

The authors, while entertaining convictions based upon the work done by them, do not contend that they have exhausted the research possibilities in this area. The work done has impressed us, however, with how incomplete has been the research done heretofore. Research and study trips to Spain, Mexico, and further study in the Spanish Archives dealing with the Nacogdoches settlement and the San Antonio and Ysleta irrigation systems

\(^{205}\) *Supra* at 427-428.
\(^{206}\) 121 Tex. 248, 49 S. W. 2d 404 (1932).
\(^{207}\) 74 Tex. 195, 11 S. W. 1086.
\(^{208}\) 98 Tex. 355, 83 S. W. 801 (1904).
\(^{209}\) See *Miller et al v. Letzerich et al*, 121 Tex. 248, 262, 49 S. W. 2d 404, 411 (1932).
\(^{210}\) *New Tex. Rev. Civ. Stat.* Art. 7589 (1925). This statute after being passed in 1915 was omitted from the codification of 1925 but was reenacted in 1927.
\(^{211}\) *Supra* note 209.
\(^{212}\) *Miller v. Letzerich*, 121 Tex. 248, 262-263; 49 S. W. 2d 404, 412 (1932).
should be rewarding. The strength of our convictions has come primarily from the singleness of direction in which the results of our research have pointed and the basic good sense of the indicated irrigation law for the countries out of which our irrigation law came, and for our own state to which it is now to be applied. Perhaps it would be helpful to summarize our major conclusions. They are:

1. That the relation of our public lands to a natural watercourse had essentially nothing to do with whether or not it was classified as "irrigable" or as having the "facilities of irrigation" at the time it was granted.

2. That being on an irrigation ditch was of much importance if not controlling.

3. That whether land was "irrigable" or had "facilities of irrigation" was an issue of fact pure and simple to be determined in the light of all the facts and circumstances. Location on a river was only one of those facts and apparently of little importance in producing an affirmative answer. It was not a legal conclusion following automatically from the one fact that the land bordered on a stream.

4. That under Spanish and Mexican law, the riparian had a position of substantial value including the valuable rights of accretion, avulsion, and probably to the use of riparian waters for domestic purposes. His location also gave him a valuable advantage of access to the watercourse for the purpose of fishing, navigating, running a mill, and even for irrigating his farm. There is no persuasive authority or practice, however, to support the position that he had a vested property right to the waters of adjoining streams for irrigation, independent of established and recognized use, superior to that of anyone else who could legally obtain access thereto, or superior to the power of the state to give such access and to regulate the distribution of its public waters as it concluded to be in the public interest.

5. That the use of such terms as "irrigable" and with the "facilities of irrigation" in the classification provisions of the Spanish and Coahuila and Texas colonization laws, was solely for the purpose of determining the price to be paid the government and had nothing to do with the creation or conveyance of a vested
property interest in the sense we have come to know the term.\textsuperscript{213}

6. That the conclusion of the court in \textit{Motl v. Boyd} "That all grantees of public lands became vested, by reason of the lands granted, with riparian rights to the waters of the streams...not only for his (their) domestic and household use but for irrigation as well"\textsuperscript{214} is not only unsupported by the authorities and practices above detailed, but is overwhelmingly refuted by them.

7. That the conclusion reached in \textit{Motl v. Boyd} on the nature of the riparian right is not only erroneous but is dictum.

8. That the subject matter of the suit was the statutorily declared public waters of the state, but that the case was decided without the state, the appropriate representative of the public, being a party to the suit.

9. That while the case on the point involved has necessarily acquired some stature as a rule of property, it has no more than should be accorded to a twenty-nine year old pronouncement of erroneous dictum made in a case of great public interest having a defect of parties.

Thus the flow from \textit{Motl v. Boyd} is judicial uncertainty as to the status of water law in Texas, and legislative uncertainty as to what can be done to provide for the harnessing of our restless and ever moving water supply to provide for its greatest utilization, and, in turn, for our greatest statewide prosperity. It is believed that this flow rests upon an underflow of erroneous legal and historical doctrine which should never have existed, but which the legislature has full, complete and adequate power to revise and the courts to correct. It seems incredible that the laws controlling the utilization of our water, a natural resource with bil-

\textsuperscript{213} There is substantial evidence to support this position. The grant to Stephen F. Austin of record in Vol. 2, at 608 of the Spanish Archives, General Land Office, State of Texas, contains no classification. This was probably due to the fact that Art. 22 of the Texas and Coahuila colonization law of March 24, 1825, under which Austin's Grant was made, exempted empresarios, of which Austin was one, from paying for their lands. If the classification had been significant in determining the nature of the property right obtained by Austin, it would have been necessary to classify the land though no payment was to be made. And in the proceedings recorded in Book A. at 33-41, Deed Records, Colorado County, Texas, by which Henry Austin obtained some lands along the Colorado River, an official was instructed as to "classifying at first their quality for the price he must pay the state," and it was determined as to some lands along the river that "they belong to the class of arable land 131 labores to that of pastures which will serve to classify it for the price he must pay for them to the State according to Article 22 of said law..."

\textsuperscript{214} Motl v. Boyd, 116 Tex. 82, 286 S. W. 458 (1926).
lions of dollars of potential, is to be forever restricted by the simple, prosaic, workaday fact that our early courts did not have before them all of the applicable law and the facts necessary for its interpretation. To adhere to stare decisis under all the circumstances surrounding this case is not to honor that doctrine—it is to make a fetish of it.