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The Power of the Denver Water Board to Enact Penalty Regulations

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The Water Board's misapprehension of its authority stems from two sources. First, realizing that the Charter could have given the Board legislative power—which of course a legislature could not do—the Board too readily concludes that it has done so. Second, because of its preconceived belief that it has legislative power, the Board misinterprets the Charter, attaching no significance to the words, "in the matter of".

The Board is by Charter given authority to acquire, conduct and operate a water system and everything incidental thereto, and to make rules and regulations for the use and distribution of water. This cannot be considered a grant of general legislative power. It is a grant of authority similar to that in the *Diaz* case, *supra,* given to the Commissioner of Airport Management. The Water Board is an administrative agency of the people of Denver—no more.

Being an administrative agency, we must look to the case law to determine whether the Board has authority to make penalty regulations. From the cases we learn that unless an agency is specifically given authority to make penalty regulations, it cannot do so.

With the exception of penalizing for late payment or nonpayment of water bills, the Charter gives the Water Board no authority to make penalty regulations. Therefore, it would seem that the penalty regulation of June 24th is invalid.

THE POWER OF THE DENVER WATER BOARD TO ENACT PENALTY REGULATIONS

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On June 24, 1954, the Board of Water Commissioners of the City and County of Denver supplemented their rules and regulations with the following rule, set forth below in full:

> Whenever the management shall discover a use of water contrary to the rules and regulations of the Board, a notice of such misuse shall be given to the occupant of the premises where the misuse occurs informing the occupant of the time and type of misuse. Whenever during a calendar year a second occurrence of misuse shall be found at any premises, a special charge of five dollars ($5.00) shall be imposed upon those premises without regard to whether or not the second misuse was of the same or a different character than the first. Notice of such charge shall be given to the occupant at the time of such second misuse. In case of a third misuse during the same calendar year, a similar procedure shall be followed but the special charge shall be twenty-five dollars

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($25.00). If further misuse occurs, similar procedures shall be followed but thereafter the special charge shall be one hundred dollars ($100.00) on each occasion of misuse.

The rule was apparently adopted in order to enforce other recent regulations by which the hours during which lawns could be irrigated were sharply restricted. An examination of the rules and regulations as a whole has shown that all rules relating to use of water are designed to prevent waste. The awareness of the value of economy of water was, of course, brought about by the impending critical shortage of water due to the general climatic conditions in this area.

The purpose of this paper is to examine the power of the Board of Water Commissioners to assess the *special charge* described in the rule. The *special charge* will be treated herein as a pecuinary penalty, since it bears no relationship to the cost of the water, is coercive in nature, and is increased with each violation.

Before discussing the structure and powers of the Board, it is necessary to consider the operation and effect of rules and regulations of water systems in general.

Rules and Regulations of Water Companies

A privately owned water company has the right to formulate reasonable rules and regulations for the conduct of its business, in order to protect itself against injury and fraud. This right is said to be inherent in the company because of the relationship of vendor-vendee that exists between the company and its customers, and because of the very nature of its business, as a utility impressed with a public interest. A water company operating under a franchise enjoys a legally recognized monopoly to supply a vital necessity of life, and it cannot go out of business without permission from the legislative authority of the area it serves. Because of its obligation to remain in business and to supply its customers' needs to the best of its ability, it must necessarily have the power to protect its property and its business by means of reasonable rules and regulations binding upon its customers.[1]

It appears to be generally accepted that a water company may enforce its rules and regulations by discontinuing or refusing service. If the rule is reasonable, the consumer will not be entitled to damages he might incur as a result. Such action by the water companies is frequently taken for failure to pay or refusal to pay, but service has also been discontinued if the fixtures and appliances do not meet the requirements of the company's regulations, or if water is put to an unauthorized use.[2] It might be observed that discontinuance of service is a nonpecuniary penalty of extraordinary severity.

[1] 56 Am. Jur. 569, § 84 et seq.
[2] 67 Corpus Juris 1228, § 760.

The rules and regulations must be fair and reasonable, and not arbitrary and unjust. In the relationship of supplier and consumer the company has the superior position by reason of its ability to withhold service from those who fall under its disfavor. Therefore, the legislative branch of the government may, by the exercise of its police power to protect the public health, welfare, and safety, intervene to protect the consumers from fraud and oppression. It may establish the rates for which water is furnished, based upon a fair return from a reasonable valuation.[3] It may prohibit the operation of rules and regulations if they are unfair, oppressive, extortionary, or unjust.[4] It may enact ordinances regarding the use of water to preserve sanitary and other standards conducive to good public health.[5]

Since the supply of water to a municipality or a municipal area is a matter of local concern, the regulatory powers are vested in the city council or legislative department of the city. Thus it has been held that a rule of a water company which amends, abrogates, or changes a city ordinance, or one which is repugnant to its charter, cannot be adopted. The city council may exercise the regulatory powers itself, or it may delegate this duty to a commission or some other administrative body.

A municipality owning and operating its own water plant does so in its proprietary, as opposed to its governmental capacity.[6] As such it has the same powers and is subject to the same restrictions as a private company. There appears to be no distinction between the two. If a municipal water company enacts a regulation in its proprietary capacity, that is, a rule that a private company would be empowered to make by virtue of its inherent powers, it can have no more effect than a regulation of a private company. A water company as such acquires no additional regulatory powers by reason of municipal ownership alone.[7]

When a municipality acquires its own water plant, one must remain aware of the distinction between its proprietary and governmental powers. On the one hand, it conducts the operations in its quasi-private capacity, in a manner consonant with sound business judgment, having due regard for the public character of its charge. On the other, it exercises its police power to protect the public health, welfare, and safety by protection of the consumer against unfair and extortionary rates and unreasonable and oppressive rules; and in addition it may pass ordinances controlling the use of water to protect the public health, this latter function being of no legitimate concern to the waterworks as a business. The creation, duties, and powers of the Board of Water Commissioners must be viewed against this background.

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[3] Denver v. Denver Union Water Co., 246 U. S. 178 (1918).
[4] 12 McQuillan, *Municipal Corporations* 375, 3rd edition 534-120.
[5] *Ibid.*
[6] *Ibid.* Ch. 35.
[7] *Ibid.* § 34, 120.

THE BOARD OF WATER COMMISSIONERS

Prior to 1918, the water supply for the residents of Denver was supplied by the Denver Union Water Company, a privately owned corporation. In that year, after years of negotiation and litigation not here material, the voters of Denver, by charter amendment, authorized the purchase of the existing waterworks, and a bond issue to provide payment therefore.[8]

By the same amendment, there was created "a non-political board of water commissioners of five members, to have complete charge and control of a water works system and plant for supplying the city and county of Denver and its inhabitants with water for all uses and purposes; . . . " The Board was "to have and exercise all the powers given to the public utilities commission . . . of the city and county of Denver by Article XIX of the charter" as amended. (The public utilities commission was created to have control of the public utilities of Denver and was authorized to acquire a water works system). The Board was to "have and exercise all the powers of the city and county granted by the constitution and laws of the state of Colorado and by the charter, in the matter of purchasing, acquiring, constructing, leasing, extending and adding to, maintaining, conducting and operating a water works system for all uses and purposes, and everything necessary, pertaining, or incidental thereto."

It was further provided that "It shall fix the rates for which water shall be furnished for all purposes, and shall provide rules and regulations relative to the use and distribution thereof." The rates were to be "as low as good service will permit," and roughly equivalent to the cost of operations, maintenance, and betterments. The Board "shall provide penalties for failure to pay promptly and for non-payment."

Upon reading the amendment as a whole, the Board of Water Commissioners emerges as more than just a water company and also more than just an administrative agency. There can be no doubt that the Board was given complete charge and control of all the proprietary functions of the water company, with all the powers implicit in its operation. In addition, it was given a portion of the legislative powers in regard to rates, and rules and regulations. As we have seen, the municipality ordinarily acts in its governmental capacity to fix rates (fair return based on a reasonable valuation) and as a negative check on abuse of consumers by unreasonable rules and regulations. The provision regarding rate-fixing, and the one regarding rules and regulations, with standards to be applied for the rates, in the context in which they are found, must be construed as meaning that those legislative functions were taken from the City Council and vested in the Board of Water Commissioners. In other words, the Board was intended to act in a dual capacity: (1) as proprietors of a water works, and (2) as a legislative and regulatory body.

[8] Municipal Code, *Charter*, § 297B.

It is not within the scope of this paper to explore the problems of the power of the City Council, in which the legislative power is vested,[9] to fine for violations of water regulations or to adopt the rules and regulations of the Board *en masse* as police ordinances. It is noted that the City Council has enacted an ordinance forbidding the waste of water,[10] and providing that "any use of water in violation of a rule or regulation of the Board of Water Commissioners is conclusively presumed to be unlawful." [11] For the purposes of this paper suffice it to say that if the conservation of water is a proprietary function, the Board has power to make and enforce a corrective regulation, and the City Council has no power to enforce an ordinance to the same effect; and if the conservation of water is a governmental function, the reverse is true.

Prevention of waste of water should be considered a proprietary function. To consider this matter in the proper perspective we must return to the analogy of the privately owned water company. Technically it sells water service; water is the physical subject matter of its business. It has possession, at least, if not legal ownership of water en route to the customers. Its very business is the efficient and equitable distribution of water, subject to additional duties imposed by operation of law. It has the duty of treating all customers alike, and to insure a safe and pure supply. The primary responsibility of conserving and if need be, rationing water rests upon the company as a natural and logical business operation.

The day to day operations and practices of a water company are illustrative of this. A moment's reflection will show that meters are primarily a device for enforcing a policy of conserving water. The amount of water used has little relation to the cost of the service furnished. In an aggravated case of waste, it cannot be doubted that the company has the power to discontinue its service until the situation is corrected. Rates themselves are frequently designed to discourage inefficient use.

In *City of Englewood v. City and County of Denver*,[12] citizens of Englewood, buying water from Denver, sought unsuccessfully to enjoin the following action: "In 1948, Denver, through its Board of Water Commissioners, notified the Englewood consumers that an increase of thirty per cent in the flat rate would be invoked and would prevail until such time as the consumer would install meters." That case involved the sale of water outside of the city on a yearly basis, allowed by the Charter.[13] The court refused to declare Denver a public utility as to outside consumers, pointing out that the Colorado Public Utilities Commission had already correctly decided it had no jurisdiction over the municipal

[9] Municipal Code, *Charter*, § 209.
[10] Municipal Code, *Ordinances*, § 850.13-I.
[11] *Ibid*, § 850.13-2.
[12] 123 Colo. 290, 295, 229 P. 2d 667, (1951).
[13] Municipal Code, *Charter*, § 297B.

water system in municipal Denver. The court further said: "In the matter here involved, Denver has acted in its proprietary or quasi-private capacity, as distinguished from the exercise of governmental power beyond the municipal boundary."

It can be seen that the injury to the public by a shortage of water would be due to the failure of the company to efficiently manage and maintain its business. Water companies are charged with a positive duty to know their business, to know the supply and consumption of water, and to guide their operations accordingly.

If a water company, whether private or municipal, were compelled to rely upon the legislative body of their service area to enforce their rules as to waste of water, it would be caught in a cruel dilemma. If the council failed to act, or did not act as strenuously as the situation required, the business of the company would become seriously impaired, and possibly wrecked, with resulting loss and disaster to the community it is pledged to serve. And such a situation would be radically different from the ordinary type of legislative controls. Instead of a negative check against oppressive and unfair practices, or the enactment of police ordinances on matters solely relating to the public health and safety, it would mean the introduction of the police court as an integral part of a business enterprise.

The rule in question, considered with the rules and regulations as a whole, is no more than a provision for a private and commercial penalty attached to the regulations of the Board. As such, it is subject to the substantive law of private penalties, and not to the requirements of due process as applied to city ordinances.

Under Art. XX, Sec. 6, of the Colorado Constitution, there appears to be a complete delegation of legislative powers to the *home-rule* cities as to matters of local and municipal concern. Once the power is found to exist, that is, that the subject matter *is* one of local or municipal concern, the same presumption of validity would attach as would be applicable to acts of the state legislature. If the end is legitimate, and the means adopted are reasonably calculated to achieve that end, the act cannot be overthrown.

On the other hand, penalties are not favored in the law. The law will not ordinarily uphold a penalty between private parties unless there is a showing that a necessity exists for the imposition of one, and that the amount of the penalty is appropriately balanced with the wrong threatened. No attempt is made in this article to determine the reasonableness of the rule in question. It might be said in its behalf that it has two factors in its favor: (1) the specter of unfair profit is not present to deter the courts, as the Board is not in business for gain; (2) it has whatever additional force it may acquire by the presumption raised by the Board's approval in its regulatory capacity. On the other hand, the amount is unusually high, particularly the hundred dollar part, and may have to undergo some modification.