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RIPARIAN RIGHTS IN THE SOUTHEASTERN STATES

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Mr. Leo Aikman, writing in the Atlanta Constitution of Wednesday, August 13, 1952, included the following account in his column:

"Follow Prayers with Sprayers

"My farmer friend, Paul Lovinggood, of Lost Mountain community, Cobb County, lost his home by fire a few years ago. Not long after he had his family established in a new house, he had a spell of sickness that slowed him down a little. But those setbacks didn't keep Paul Lovinggood from whistling at his work or from making himself a better farmer or from working for the good of his community. Knowing the fiber of this son of the soil, I was not surprised to read that he didn't let the drought lick him, either. Mark Waits tells the story in The Cobb County Times.

"Paul knows, along with all farmers, that cows give more milk when they stay on green grass. He knows, too, that the grass doesn't stay green without water. Searching the skies in vain for signs of rain, he put in his own sprinkler system.

"Drawing from his experience with irrigation as a truck farmer and from his reading of farm news, he took a pump down to the creek, hooked some pipe to one end of the pump and his tractor to the other and soon had showers falling on a portion of the pasture. With this system, daily he poured 21,000 gallons of water on his grazing plot, moving the sprinkler as one would the hose on his front lawn.

"As a result, the grass stayed lush and green, the cows stayed contented and milk production at the Lovinggood dairy didn't slack off.

"Paul liked the system so well that he will expand it. Eventually, he hopes to dam the creek to create a small reservoir and insure a water supply in case of a prolonged dry spell which cuts the flow in the creek.

"Other Georgia farmers have tried the same trick. Glenn Florence in Douglas County and R. B. Gilbert in Meriwether are notable examples. More farmers will follow the example as the advantages of irrigation become apparent."

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This activity of the Cobb County farmer presents the subject of the present dicussion. Did he act within his legal rights and could anyone else object to his actions?

It is necessary to include some definitions of terms as used in this discussion and to limit its scope. Only natural watercourses are considered. The cases reveal that it is not easy to define a watercourse.[1] For present purposes, the term "watercourse" is taken to mean a stream of water flowing in a definite direction or course, with a channel, in a bed with banks, having a substantial degree of permanence and continuity, and all of natural origin. A "riparian proprietor" is a landowner whose land is either bounded or crossed by a watercourse. The description of his land must actually "touch the water" in order for him to be a riparian proprietor. This riparian proprietor has certain legal rights and privileges in connection with the watercourse which are not common to the citizens at large and which are known as "riparian rights". Since this discussion concerns only riparian rights in connection with the water in the watercourse, matters of accretion, reliction and avulsion are not herein considered.

This discussion will also be limited to non-navigable watercourses or streams. The landowner whose land is bounded by navigable water has many riparian rights that are found in connection with non-navigable streams, but these rights are subject to the right of navigation in the general public, as set out in State and Federal legislation, so that they differ in many ways from the present subject of discussion.

It might be well to consider what are riparian lands. Suppose that a large single tract of land touches a stream. This tract has riparian rights in the stream, but the question remains as to whether the entire tract is entitled to be benefited thereby. There appears to be a distinction between land outside the watershed of the stream and land within the watershed. Land within the watershed of a stream is riparian land, while land outside the watershed of the stream is considered to be non-riparian land, even though it is contiguous to riparian land.

Riparian rights are appurtenant to riparian land as a natural and inherent incident of the ownership of such land. They are sometimes called "natural rights," as they owe their existence to the nature of the land rather than to any contractual relationship between two landowners. Certain rights in connection with watercourses may arise

1. 56 AM. JUR., Waters, §§ 6-11.

from a contractual relation or by means of adverse user, but when they do they are servitudes and not true riparian rights. They depend upon the contract or prescription that created them and are so construed. This discussion is concerned with the reciprocal rights, liabilities and privileges of riparian proprietors in the waters of a stream or watercourse, where these relations are based on the ownership of land alone with no other legal relation between the proprietors.

The exact origin of our present day law with regard to riparian rights is rather obscure. It has been said that Story and Kent seized on the Roman Law, introduced it into American cases and that this law then found its way into the English cases.[2] The Restatement also tries to distinguish between a natural flow and a reasonable use theory. It has also been stated that the common law of England has been adopted by most jurisdictions in this country.[3] Regardless of its birthplace, and whether the reasonable use theory or a combination of theories is followed, the present statement of the law seems to be generally followed in most American jurisdictions. Each riparian proprietor is entitled to have the watercourse flow by or through his land in its natural course, quantity, and quality, subject only to reasonable use by other proprietors. He, in turn, is entitled to make use of the water in the stream while on his land in any way he sees fit, provided that he does not by such use unreasonably affect the rights of an upper or lower riparian proprietor.[4]

The nine common law states in the Southeast seem to follow this general rule.[5] The civil law rule in Louisiana seems to be about the same general statement.[6] There are many statutes in these states dealing with specific matters such as pollution, but very few which cover or deal with general riparian rights. The Georgia statute is possibly the only one and reads as follows:

> "The owner of land through which non-navigable watercourse may flow is entitled to have the water in such streams come to

2. RESTATEMENT, Torts, Vol. IV, p. 342 (1939).
3. 56 AM. JUR., Waters, § 284.
4. *Ibid.*, § 273; RESTATEMENT, Torts, Vol. IV, pp. 339-350 (1939).
5. Ulbricht v. Eufaula Water Co., 86 Ala. 587, 6 So. 78 (1889); Mobile Docks Co. v. Mobile, 146 Ala. 198, 40 So. 205 (1906); Tampa Waterworks Co. v. Cline, 37 Fla. 586, 20 So. 780 (1896); Robertson v. Arnold, 182 Ga. 664, 186 S. E. 806, 106 A. L. R. 681 (1936); Fackler v. Cinc., N. O. & T. P. R. Co., 229 Ky. 330, 17 S. W. (2d) 194 (1929); Miss. Central R. R. Co. v. Mason, 51 Miss. 234 (1875); Pernell v. City of Henderson, 220 N. C. 79, 16 S. E. (2d) 449 (1941); Omelvany v. Jaggers, 2 HILL (S. C.) 634 (1837); White v. Whitney Mfg. Co., 60 S. C. 254, 38 S. E. 456 (1901); Cox v. Howell, 108 Tenn. 130, 65 S. W. 868 (1901); Town of Purcellville v. Potts, 179 Va. 514, 19 S. E. (2d) 700 (1942).
6. LA. CIVIL CODE OF 1870, § 661.

his land in its natural and usual flow, subject only to such detention or dimunition as may be caused by a reasonable use of it by other riparian proprietors; and the diverting of the stream, wholly or in part, from the same, or the obstructing thereof so as to impede its course or cause it to overflow or injure his land, or any right appurtenant thereto, or the pollution thereof so as to lessen its value to him, shall be a trespass upon his property."[7]

Since the theme of this discussion concerns the use of water for irrigation, the various other matters that may arise will be considered very lightly first. It should be understood that they are considered based on the law in the Southeastern States.

Each riparian proprietor is entitled to make such use of the entire flow of a stream as he may see fit for the purpose of water power.[8] However, he is not permitted to detain an unreasonable amount of the flow of a stream for that purpose, nor is he entitled to place obstructions in the stream which will unreasonably reduce the flow. In one case,[9] the upper riparian proprietor maintained a dam to supply power to his cotton mill. By means of this dam he cut off the entire flow of the stream from 6 p. m. each night until 6 a. m. the next morning. This was held to be unreasonable as applied to a lower riparian proprietor who operated a grist mill.

One of the cardinal rights of a riparian proprietor is to have the waters of the stream come to him in its natural purity.[10] Any pollution of the water seems to violate the rights of all lower riparian owners. The cases are in agreement that a pollution of the stream is an actionable infringement of such right.[11] There are many cases dealing with pollution of waters, but in most of them the individual lower proprietors have been forced to initiate the action with little or no governmental aid. So long as our municipalities are one of the chief offenders, it will be difficult to solve the problem of pollution of the streams.

The major problem to be considered here is that of diversion of the flow of the stream. There is no doubt of the right of a riparian

7. GA. CODE, 1933, § 105-1407.
8. Alabama Consolidated Coal & Iron Co. v. Turner, 145 Ala. 639, 39 So. 603 (1905).
9. Price v. High Shoals Mfg. Co., 132 Ga. 246, 64 S. E. 87 (1909).
10. 56 AM. JUR., Waters, § 405.
11. Alabama Consolidated Coal & Iron Co. v. Turner, 145 Ala. 639, 39 So. 603 (1905); Hodges v. Pine Products Co., 135 Ga. 134, 68 S. E. 1107 (1910); Beaver Dam Coal Co. v. Daniel, 227 Ky. 423, 13 S. W. (2d) 254 (1929); Miss. Mills v. Smith, 69 Miss. 299, 11 So. 26 (1892); City of Durham v. Eno Cotton Mills, 141 N. C. 615, 54 S. E. 453 (1906); Bowling Coal Co. v. Ruffner, 117 Tenn. 180, 100 S. W. 116 (1907); Arminius Chem. Co. v. Landrum, 113 Va. 7, 73 S. E. 459 (1912).

proprietor to divert the flow of a stream while on his land, so long as he does not materially diminish or detain it and returns it to the lower riparian proprietor through the natural channel. Our question, however, concerns itself with a diversion of the flow of a stream which does consume a part of the water and both diminishes and detains it, since there can be no real irrigation without storage of water. It has been held that to take part of the flow of a stream for use in railroad locomotives did not materially diminish the flow so as to give any cause of action to a lower riparian owner, even where a detention by means of a dam was involved.[12] On the other hand, it has been held that to take some of the flow of a stream to supply water for the inhabitants of a town was a violation of the rights of lower riparian proprietors.[13] This view may have been due in part to the fact that the water was being used on non-riparian land.

It has been stated that:

> "Subject to certain qualifications hereinafter noted, it is a universally recognized rule that a riparian proprietor may lawfully divert the water of a stream for the purpose of irrigating his lands."[14]

The qualifications stated are generally that such right is a limited one, to be exercised with a reasonable regard for the equal rights of other proprietors. The general statements in the Southeastern States seem to bear out this rule of the "reasonable use of the water for domestic, agricultural, and manufacturing purposes".[15] Very few cases in this area have even considered the idea of irrigation. One court did say:

> "But it cannot be withdrawn for the purpose of irrigation, or for any other secondary and artificial purpose, except in such a reasonable and legitimate way as not to interfere unjustifiably with its general use."[16]

However, this statement was not material to the issue before the court. There seems to be a lack of authority in the Southeastern States on the problem of irrigation under the doctrine of riparian rights.

12. Fackler v. Cinc., N. O. & T. P. R. Co., 229 Ky. 330, 17 S. W. (2d) 194 (1929); Harris v. Norfolk & W. Ry. Co., 153 N. C. 542, 69 S. E. 623 (1910).
13. Ulbricht v. Eufaula Water Co., 86 Ala. 587, 6 So. 78 (1889); Town of Purcellville v. Potts, 179 Va. 514, 19 S. E. (2d) 700 (1942).
14. 3 AM. JUR., Irrigation, § 9.
15. Ulbricht v. Eufaula Water Co., 86 Ala. 587, 6 So. 78 (1889).
16. Anderson v. Cincinnati Sou. Ry., 86 Ky. 44, 5 S. W. 49 (1887). See also Jordan v. Lang, 22 S. C. 159, 37 S. E. 69 (1885).

Applying general principles, it seems to be clear that no water could be used for irrigation on non-riparian land, since such non-riparian use has been refused in other situations.[17] Quite a problem would be presented in connection with the amount of water that any one riparian proprietor could take from the flow of a stream for the purpose of irrigation. It would have to be reasonable, with regard to the rights of all other riparian proprietors. This would have to be determined by a jury in each case. As said by one court:

> "The question as to whether or not the use of the water by the first proprietor is reasonable, being necessarily dependent upon the character and size of the stream, the uses to which it is subservient, and the varying circumstances of each case, is one of fact for determination by the jury."[18]

Where does this leave Mr. Lovinggood? What protection does he have next year if he impounds and detains a portion of his stream with a dam to use for irrigation? As well as can be stated from the present status of the law in the Southeastern States, he has only two courses open to him. First, he could purchase from the lower riparian proprietors as far down the stream as they would be affected an easement to detain and divert the water of the stream. This assumes that they would be willing to grant such an easement. Second, he could build his dam and wait until a lower riparian proprietor brought an action against him. In that case a jury would finally determine whether his actions were reasonable. Neither of these courses of action appear to answer his problem. It must be concluded that the present status of the law with regard to riparian rights in the Southeastern States does not permit proper use of waters for irrigation, or at least practical use.

It is the purpose of this discussion to raise the problem, not to answer it. However, it might be well to look at some possible solutions without drawing any final conclusions. It might be possible by legislation to set out standards as to what is reasonable use of a stream for irrigation. The administration of such legislation would be difficult. Some of the States have provided for Irrigation Districts with the power to condemn such water rights as they may need.[19] Such public quasi-corporations, however, have not been too successful generally.

17. Town of Gordonsville v. Zinn, 129 Va. 542, 106 S. E. 508, 14 A. L. R. 318 (1921).
18. White v. East Lake Land Co., 96 Ga. 415, 23 S. E. 393 (1895).
19. *E. g.*, La., R. S., 1950, § 38:2101 *et seq.*

It has been suggested that the doctrine of prior appropriation that exists in the arid Western States would be the answer to the problem in the Southeastern States. Space does not permit much consideration of this doctrine of prior appropriation and of the Federal Desert Lands Act, commonly called the Carey Act,[20] or the Federal Reclamation Act.[21] The essence of this doctrine is "First come, first served". The first person to appropriate the waters of a stream to a beneficial use is entitled to the full flow of the stream. He does not have to be a riparian proprietor, may use the water on non-riparian land, and may even sell the water to others. This doctrine appears to have been exclusively recognized in place of the doctrine of riparian rights in the states of Montana, Idaho, Wyoming, Nevada, Utah, Colorado, Arizona, and New Mexico. It exists along with limited riparian rights in California, Kansas, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Washington.[22] It should be noted that in these states the doctrine of prior appropriation existed in connection with public lands especially and that in any event most of the land was settled under this doctrine. In Oregon and Kansas the doctrine of prior appropriation was adopted in recent years. This raises the question of whether a state where the doctrine of riparian rights is in force could by legislation change to the doctrine of prior appropriation.[23] It might be well to look at the situation in Oregon and Kansas. The Oregon case[24] that is generally cited as sustaining the statute of appropriation concerned a plaintiff who took the lands after the statute. The court also said that the statute was valid "except as such change may affect some vested rights". This still leaves some doubt. In Kansas the court held the statute valid and said that vested riparian rights did not matter.[25] However, the court cited only four cases, and those on another point, and entirely ignored an earlier Kansas case which had held that riparian rights could not be taken without due process of law and that a statute could not change to the doctrine of prior appropriation without just compensation for vested riparian rights.[26] Also, the California court held a statute invalid which sought to substitute appropriation for vested riparian rights.[27]

20. Act Aug. 18, 1894, Chapt. 301, § 4, 28 STAT. AT L. 422, 43 U. S. C. A. § 641.
21. 43 U. S. C. A. Chap. 12, § 371 *et seq.*
22. 20 A. L. R. 2d 656, 660.
23. 56 A. L. R. 277.
24. In re Hood River, 114 Ore. 112, 227 Pac. 1065 (1924).
25. Emery v. Knapp, 167 Kan. 546, 207 Pac. (2d) 440 (1949).
26. Clark v. Allaman, 71 Kan. 206, 80 Pac. 571 (1905).
27. Fall River Valley Irr. Dist. v. Mt. Shasta Power Corp., 202 Calif. 56, 259 Pac. 444 (1927).

Could a Southeastern State change to the doctrine of prior appropriation without giving just compensation for vested riparian rights? It would appear unlikely. One court stated: "We have said that the rights of a riparian owner at common law constituted property of which he could not be deprived without just compensation".[28] It has also been held that a statute declaring a non-navigable stream to be navigable and thus depriving riparian proprietors of some of their riparian rights was a taking of property without just compensation.[29] Also, a statute permitting the floating of logs on streams was invalid for the same reason.[30] The case of *City of Birmingham v. Lake*[31] is more recent. Here the statute in question had sought to grant all fishing rights on waters in the state to the public. The statute was held to be invalid, since the beds of non-navigable streams belong to riparian owners and their exclusive fishing rights cannot be divested and granted to the public by legislative fiat. Thus it would appear unlikely that the doctrine of prior appropriation could be adopted in a Southeastern State by legislative enactment.

It is suggested that the problem of proper irrigation under our present system of riparian rights is one that needs more consideration, both by the bar of our several states and in the law schools.[32] Some solution must be found to Mr. Lovinggood's problem. The present status of the law in regard to riparian rights seems inadequate. It is hoped that this discussion has at least presented the problem, even though no solution is offered. This problem has at least received considerable study in one state, the State of South Carolina.[33]

28. Thiesen v. Gulf, F. & A. Ry. Co., 75 Fla. 28, 78 So. 491 (1918).
29. Olive v. State, 86 Ala. 88, 5 So. 653 (1889); Murray v. Preston, 106 Ky. 561, 50 S. W. 1095 (1899).
30. Allison v. Davidson, 39 S. W. 905 (Tenn. 1896).
31. 243 Ala. 367, 10 So. (2d) 24 (1942).
32. The writer used the following question on an examination in Rights in Land in June, 1952, which included many things here under discussion: "George has purchased a large lot on the west side of River Road, containing about two acres. The land slopes from north to south, with lots owned by Frank just north of his lot and by Jack north of Frank's lot, both being higher in elevation than his lot, and with a lot owned by Harry just south of his lot and lower in elevation. A small stream, known as Mud Creek, flows from north to south across all four lots. Surface water from River Road and from Frank's lot flows through a low place on George's lot to Mud Creek. George wants to build a house on his lot. Mud Creek makes a sharp horseshoe bend on George's lot toward River Road. George wants to change the channel of Mud Creek so that it will have a bend away from River Road, but will flow onto Harry's lot at the same point as at present. George also wants to use water from Mud Creek to irrigate a garden he plans to have at the rear of his lot. George also wants to fill in the low place on his lot. If he does so, the surface water which now runs across his lot will run across Frank's lot to Mud Creek. It appears that Jack has an automobile service station on his lot. He pours old crankcase oil into Mud Creek so that there is a film of oil on the water. George consults you. What are his rights? Discuss."
33. BUSBY, C. E., THE BENEFICIAL USE OF WATER IN SOUTH CAROLINA, 1952.