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THE BALANCE OF CONVENIENCE DOCTRINE IN THE SOUTHEASTERN STATES, PARTICULARLY AS APPLIED TO WATER

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An article in the August 1952 issue of The National Geographic Magazine points up the growing importance of water to all of us. The writer has this to say:[1]

> "Though our average citizen drinks less than half a gallon of liquid a day, he uses about 1,100 gallons of water daily for all domestic, agricultural, and industrial purposes, not counting hydro power . . . .
>
> "In Texas the population nearly tripled in the 50-year period ending in 1940, but use of water increased 71 times on an average for all purposes. For industries and municipalities the increase was 30 times; for irrigation, about 55 times; for water power, about 85 times."

It has been predicted in the authoritative journal of the American Water Works Association that ten years from now industrial demand for water will be doubled, but that this doubled demand will still represent only about 25 to 35 per cent of the total water intake of the country, since the writer predicts that the demand for other uses, such as for irrigation and steam power, will correspondingly increase.[2] We may certainly expect a tremendous increase in industrial demand in the Southeast, since two of our growing industries, pulp and paper, and steel, lead all others in industrial water requirements;[3] and the use of water for irrigation, while as yet in its

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1. Vol. CII, No. 2, p. 269.

2. Wolman, *Characteristics and Problems of Industrial Water Supply,* 44 J. AM. WATER WORKS ASS'N 279, 280 (1952). The writer is Professor of Sanitary Engineering at Johns Hopkins University and former Chairman of the National Water Resources Committee. See also Green, *Water Use in Industry,* 43 J. AM. WATER WORKS ASS'N 591 (1951).

3. See Powell and Bacon, *Magnitude of Industrial Demand for Process Water,* 42 J. AM. WATER WORKS ASS'N 777, 782 (1950). Wolman, *supra* note 2, points out that four types of industry, electrical, pulp and paper, petroleum products, and steel, account for 80% of the total industrial water intake.

infancy in this region,[4] has already shown signs of rapid and vigorous growth.[5]

It is apparent that, with this tremendous increase in the amount of water being used in the Southeast today, serious legal problems may arise in connection with the distribution of available water supplies.[6] Now where does the balance of convenience doctrine fit into this picture? This doctrine has been employed principally as a limitation upon the availability of one type of sanction used for the enforcement of water rights — the injunction. Before discussing the effect of the balance of convenience doctrine, therefore, it will be well to first examine briefly the use of the injunction in water rights cases to see how important a part that sanction plays in the enforcement scheme. Next will be considered the historical development of the doctrine in its relationship to the granting of unjunctive relief. Third, and more important, will come the application of the doctrine to date in our Southeastern states. Fourth and finally, realizing that the doctrine has so far been applied in the Southeast for the most part in cases involving damage through pollution of water supplies, a study will be made of the place of the balance of convenience doctrine in relation to the growing problem of regulating the use of water for irrigation and industry in the Southeast.

PLACE OF THE DOCTRINE IN THE SCHEME OF REGULATORY ENFORCEMENT

What remedies are available for the enforcement of water rights, and how does the injunction fit into that scheme of remedies? The remedies may, in general, be divided into two classes: (1) specific relief through equitable remedies; and (2) actions at law, including, in appropriate cases, the extraordinary remedies of prohibition

4. As of 1950 nearly 95% of the total land irrigated in the United States was within the area generally referred to as the 17 Western states. See 3 REPORT OF THE PRESIDENT'S WATER RESOURCES POLICY COMMISSION, WATER RESOURCES LAW 152 (1950).

5. See p. 168 *infra*.

6. The increasing importance of water in the Southeast has already resulted in considerable examination by our law journals of the legal problems connected with the use of water in this area. See Wilcox, *Authority of the State of Florida over Her Waters,* 12 FLA. L. J. 319 (1938); Notes: 3 ALA. L. REV. 248 (1950); *Extent of Private Rights in Non-Navigable Lakes,* 5 U. OF FLA. L. REV. 166 (1952); *Waters: Surface Water Drainage,* 2 U. OF FLA. L. REV. 392 (1949); *Irrigation in Kentucky as Affected by the Law of Riparian Rights,* 40 KY. L. J. 423 (1952); *The Rule in Kentucky as to Surface Water,* 35 KY. L. J. 86 (1946); *Rights and Remedies in the Law of Stream Pollution,* 35 VA. L. REV. 774 (1949).

and *quo warranto*[7] and actions in ejectment,[8] but primarily the common law action for damages.[9] In those relatively few cases in which there is a contract between the parties specific relief may be had by way of specific performance,[10] and the balance of convenience doctrine is incidentally applicable to those cases.[11] The majority of the cases, however, sound in tort, and the preferred type of relief against such torts is by way of injunction rather than action for damages.[12] The primary reason for this preference is that injunctive relief is preventive. It can furnish relief before, instead of after, a threatened violation. Moreover, in many cases involving water rights preventive relief by way of injunction may be the only effective sanction, because an action for damages will, if successful, result in such a small judgment as to be valuable only as a means

7. A discussion of these extraordinary remedies is beyond the scope of this article. They are covered in detail in 3 KINNEY, IRRIGATION AND WATER RIGHTS (1912); see §§ 1649 (mandamus), 1651 (prohibition), 1653 (quo warranto). In general, mandamus may be used in appropriate cases to compel a water company to furnish water for irrigation, or to compel a state engineer or water commissioner to distribute water as provided by law. Prohibition may be used when an inferior court wrongfully takes jurisdiction of a water dispute. *Quo warranto* may be used to test the validity of reclamation or irrigation districts, or to annul the franchise of a water company that improperly fails to supply water as required by its charter.

8. This action may be useful to prevent the unlawful exclusion of a riparian owner from the use of a stream. Glassell v. Hansen, 135 Cal. 547, 67 Pac. 964 (1902); see 3 KINNEY, IRRIGATION AND WATER RIGHTS § 1654 (1912).

9. Again, coverage of this remedy is beyond the scope of this article. Kinney devotes approximately 100 pages to this subject, 3 KINNEY, IRRIGATION AND WATER RIGHTS 3052-3146 (1912). In addition to these actions at law, there is often the possibility of enforcement through criminal prosecution, *id.* § 1657. This possibility does not, however, preclude a civil action for equitable or legal relief. People v. Trukee Lumber Co., 116 Cal. 397, 48 Pac. 374 (1897); *accord,* Murphy v. United States, 272 U. S. 630 (1926); Pompano Horse Club v. State, 93 Fla. 415, 111 So. 801 (1927); see Note, 2 U. OF FLA. L. REV. 250 (1949).

10. Thus specific performance may be had of a contract by a water company to supply water for irrigation. Ulrich v. Pateros Water Ditch Co., 67 Wash. 328, 121 Pac. 818 (1912). Since the water is generally not available elsewhere, the remedy at law is inadequate in these cases and the equitable remedy is accordingly available. See 3 KINNEY, IRRIGATION AND WATER RIGHTS § 1650 (1912).

11. Taylor v. Florida E. C. R. R., 54 Fla. 635, 45 So. 574 (1907); Rockhill Club v. Volker, 331 Mo. 947, 56 S. W. 2d 9 (1932). "Public interest, therefore, must always be carefully appraised when it really has a place in cases of specific performance," GLENN AND REDDEN, CASES ON EQUITY 537 n. (1946).

12. Since injunctive relief is equitable in nature, it is necessary to establish a basis for equity jurisdiction in these cases. This basis is easily found, however, since water rights have long been regarded as a type of real property right and hence the subject of equitable protection as a matter of course. See 3 TIFFANY, REAL PROPERTY 117 (3d ed. 1939); 1 WIEL, WATER RIGHTS IN THE WESTERN STATES 20-21 (3d ed. 1911).

of preventing the gaining of a prescriptive right by the defendant,[13] whereas an injunction may completely stop the violation. In addition, the damages that could be obtained in an action at law can be obtained as an adjunct of the specific relief given in an injunctive suit.[14]

Having seen the importance of the injunction in the enforcement scheme, it is now appropriate to examine the relationship of the balance of convenience doctrine to the granting of injunctive relief. In this connection it should first be realized that this doctrine is simply one of a group of limitations on the use of the injunction. The next question is, what are those limitations and to what extent does their application lie within the discretion of the court in which injunctive relief is being sought?[15] In addition to the balance of convenience doctrine, they include the doctrine of laches;[16] the refusal of injunctive relief when the court recognizes that the injunction is being sought primarily to be used as a club for the purpose of extorting an exorbitant settlement from the defendant violator;[17] and the application of the *de minimis* principle,[18] under which in some jurisdictions the court may refuse to grant equitable relief when no substantial damage is alleged or proved, leaving the complainant to his action for damages at law to prevent the running of the prescription period.[19]

13. WALSH, TREATISE ON EQUITY 178-182 (1930); see Wiel, *Injunction without Damages as Illustrated by a Point in the Law of Waters*, 5 CAL. L. REV. 199 (1917); *see* Webb v. Portland Mfg. Co., 29 Fed. Cas. 506, No. 17,322 (C. C. D. Me. 1838).

14. Abbott v. The 76 Land and Water Co., 161 Cal. 42, 118 Pac. 425 (1911); WALSH, *supra* note 13, at 179-180.

15. One such limitation is found in all jurisdictions in the interlocutory injunction cases when it is universally recognized that the trial court can refuse to grant an injunction *pendente lite* in the absence of a showing that a refusal of injunctive relief at this stage in the proceedings will work serious hardship on the complainant. Boatwright v. Town of Leighton, 231 Ala. 607, 166 So. 418 (1936); Sanders v. Textile Workers Organizing Committee, 187 S. Car. 66, 196 S. E. 543 (1938); 5 POMEROY, EQUITABLE JURISPRUDENCE and EQUITABLE REMEDIES § 1949 (4th ed. 1919).

16. Under this doctrine a complainant may be refused injunctive relief if he has slept on his rights while defendant acted to his prejudice, as, for example, by preparing expensive works for the use of the water in question. New York City v. Pine, 185 U. S. 93 (1902); *accord,* Brooks v. Patterson, 159 Fla. 263, 31 So. 2d 472 (1947).

17. Edwards v. Allouez Mining Co., 38 Mich. 46 (1878); McCann v. Chasm Power Co., 211 N. Y. 301, 105 N. E. 416 (1914); *cf.* Platte Valley Irr. Dist. v. Tilley, 142 Neb. 122, 5 N. W. 2d 252 (1942).

18. *De minimis non curat lex* (The law does not concern itself with trifles), McCann v. Chasm Power Co., 211 N. Y. 301, 105 N. E. 416 (1914). *Contra:* Gering Irr. Dist. v. Mitchell Irr. Dist., 141 Neb. 344, 3 N. W. 2d 566 (1942).

19. McCann v. Chasm Power Co., 211 N. Y. 301, 105 N. E. 416 (1914); *cf.* Chow v. Santa Barbara, 217 Cal. 673, 22 P. 2d 5 (1933). *Contra:* Amsterdam Knitting Co. v. Dean, 162 N. Y. 278, 56 N. E. 757 (1900); Mann v. Willey, 51 App. Div. 169, 64 N. Y. Supp. 589 (3d Dep't 1900), *aff'd,* 168 N. Y.

The most important limitation on preventive relief for our purposes, however, is the balance of convenience doctrine. What is this doctrine? It is difficult to define, since many varying factors are involved in its application in different cases. The language of Mr. Justice Brandeis in a 1933 nuisance case, however, may provide a key to its general meaning. In *Harrisonville v. Dickey Clay Manufacturing Company* he states:[20]

> "For an injunction is not a remedy which issues as of course. Where substantial redress can be afforded by the payment of money and issuance of an injunction would subject the defendant to grossly disproportionate hardship, equitable relief may be denied although the nuisance is indisputable."

In other words, in jurisdictions applying the doctrine, an injunction does not necessarily follow in all cases in which a legal right is violated. The problem will be to determine in what type of water right cases injunctive relief may be or is likely to be withheld.

HISTORICAL DEVELOPMENT

The adoption of the term "balance of convenience" was perhaps unfortunate. Its use has in the past resulted in criticism on the ground that courts should deal in legal rights, not conveniences,[21] and the very idea of balancing conveniences has been rejected by some courts as something beyond the judicial power. In fact the American Law Institute would have us drop the term "conveniences" and talk instead of balancing "injuries" on grounds of "relative hardship".[22] Whether this change in terminology will in itself make the doctrine more palatable to members of the imperative school of jurisprudence is to be doubted, but the trend toward the acceptance of the balancing of equities doctrine by American courts has been quite widespread during the past several decades.[23] This shift is

664, 61 N. E. 1131 (1901). It is interesting to note that in cases of interference with riparian rights, as in trespass cases, damage is presumed from the interference, so that the action for damages will lie without proof of actual injury, and likewise the period of prescriptive user begins to run when the use commences, regardless of its effect on the lower owner. Cape v. Thompson, 21 Tex. Civ. App. 681, 53 S. W. 368 (1899); 2 FARNHAM, WATERS AND WATER RIGHTS § 541a (1904); see Lewis, *Injunctions Against Nuisances and the Rule Requiring the Plaintiff to Establish his Right at Law,* 56 U. OF PA. L. REV. 289, 311 n. (1908).

20. 289 U. S. 334, 337, 338 (1933).

21. See McClintock, *Discretion to Deny Injunction against Trespass and Nuisance,* 12 MINN. L. REV. 565, 569 (1928); Note, *The Trend — To Balance the Injuries,* 4 S. CAR. L. Q. 540 (1952).

22. RESTATEMENT, TORTS § 941, comment a (1939).

23. *See* Storey v. Central Hide & Rendering Co., 148 Tex. 509, 515, 226 S. W. 2d 615, 619 (1950); Note, 4 S. CAR. L. Q. 540, 542 (1952).

probably the result of a change in the attitude of the courts themselves from a *laissez faire* philosophy, with its emphasis on strict protection of real property rights,[24] toward a jurisprudential approach along the lines of Dean Pound's theory of social interests,[25] an approach which recognizes the importance of social interests other than real property rights, or what Dean Pound refers to as the security of acquisitions, and likewise recognizes the necessity of balancing these social interests when they conflict, with preference being given to those interests that weigh most heavily in our present civilization.[26] An examination of the balance of convenience cases over the past century shows a similar trend.

Forgetting that the English chancery court in its inception acted as a balance against the overly technical application of common law rules, much as Aristotle's *epieikeia* or equity was designed "as a correction of law, where law is defective by reason of its universality",[27] the nineteenth century chancellors, succumbing to the demands of predictability, pushed the principle of *epieikeia* into the background, leading to what Dean Pound characterized in 1905 as the decadence of equity.[28] During this period the idea that the chancellor could balance the relative hardships of the parties, even when a strong public interest dictated such a course, was usually rejected.[29] As Pomeroy stated at this time, "The weight of authority is against allowing a balance of injury as a means of determining the propriety of issuing an injunction".[30]

While the majority of the cases rejecting the balancing doctrine were in the field of nuisance, there were a number of water rights cases, particularly in the pollution area, which took the same strict position.[31] It is interesting to note, however, that most of these

24. Thus Locke took the position that governments exist solely for the protection of property. LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT 122, 168 (Hafner ed. 1947).

25. Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1 (1943); see Patterson, *Pound's Theory of Social Interests*, in SAYRE, INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 558-573 (1947).

26. See PATTERSON, AN INTRODUCTION TO JURISPRUDENCE 290 (3d Mimeo ed. 1949).

27. ARISTOTLE, ETHICS, Bk. V, 10, 1137b (Chase's trans., Everyman ed. 1911).

28. Pound, *The Decadence of Equity*, 5 COL. L. REV. 20 (1905).

29. Whalen v. Union Bag Co., 208 N. Y. 1, 101 N. E. 805 (1913); Walters v. McElroy, 151 Pa. 549, 25 Atl. 125 (1892).

30. 5 POMEROY, EQUITY JURISPRUDENCE and EQUITABLE REMEDIES § 530 (3d ed. 1905).

31. Woodruff v. North Bloomfield Gravel Mining Co., 18 Fed. 753 (C. C. D. Cal. 1884); Arizona Copper Co. v. Gillespie, 12 Ariz. 190, 100 Pac. 465 (1909); Whalen v. Union Bag Co., 208 N. Y. 1, 101 N. E. 805 (1913). In Hill v. Standard Mining Co., 12 Idaho 223, 231, 85 Pac. 907, 908 (1906), it was said: "It is earnestly urged by counsel for respondents that . . . it [an injunction]

so-called majority decisions were handed down in the industrial North and West, whereas three of our Southeastern States, Alabama,[32] Kentucky,[33] and North Carolina,[34] early joined what one writer referred to as the "weak minority",[35] denying relief in the absence of substantial injury to the complainant.

Today, especially in code jurisdictions in which it is recognized that injunctive relief is simply one among available remedies and therefore its denial is not necessarily a bar to other relief, the concept that the court has a discretionary power to balance the equities when determining whether to grant the injunction is again coming into ascendancy,[36] with the American Law Institute leading the way in endorsing this development away from the mechanical jurisprudence of the late nineteenth century.[37]

APPLICATION OF THE DOCTRINE TO WATER CASES IN THE SOUTHEAST

Has the trend toward flexibility in the granting of injunctive relief been exemplified in water cases in the Southeastern states? In attempting to answer this question it may be well to consider the types of water rights which are subject to equitable protection. Such rights may exist in either subterranean or surface water, and these rights may be interfered with either by pollution[38] or by diversion,

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would result in 'the depopulation of Shoshone County, the abandonment of all mining and milling therein, and the consequent bankruptcy of the inhabitants thereof'. Deplorable as this might be—if true—it furnishes no excuse for the court to shirk its responsibilities in disposing of the question before us on its merits. The law is no respector of persons, corporations or individuals, and in its creation and enforcement reaches out and protects the lone settler in his rights, let them be ever so meager . . . . The law does not measure the rights of litigants by the amount involved, nor the manner in which it may affect others not parties to the litigation".

32. Clifton Iron Co. v. Dye, 87 Ala. 468, 6 So. 192 (1889) (refusal of the injunction was also justified on the basis of laches); Ulbricht v. Eufaula Water Co., 86 Ala. 587, 6 So. 78 (1889).

33. Louisville & N. Ry. v. Beauchamp, 19 Ky. L. Rep. 398, 40 S. W. 679 (1897) (judgment for damages reversed in absence of showing of injury from diversion of water).

34. Harris v. Norfolk & W. Ry., 153 N. C. 542, 69 S. E. 623 (1910) (judgment for defendant in action for damages affirmed in absence of material injury from diversion).

35. Comment, 4 TEX. L. REV. 231, 232 (1926). But the leading writer in the field of water rights at the time favored this minority view, 3 KINNEY, IRRIGATION AND WATER RIGHTS 3016 (1912).

36. See Note, *The Trend—To Balance the Injuries,* 4 S. CAR. L. Q. 540 (1952).

37. RESTATEMENT, TORTS § 933 and introductory note to c. 48 (1939).

38. For a survey of the present extent of this problem see Water Pollution in the United States, Ser. 1, U. S. Pub. Health Serv. Pub. No. 64 (1951). See also Note, *Rights and Remedies in the Law of Stream Pollution,* 35 VA. L. REV. 774 (1949).

detention, or appropriation of the water to which complainant lays a claim of right. As yet the injunction has not been widely used in the Southeast for the protection of rights in subterranean water supplies, though the conservation of such supplies is becoming a real problem;[39] but it has been sought in many cases to prevent pollution of surface waters, and there are a scattering of Southeastern cases involving the use of the remedy as a means of preventing diversion or appropriation of such waters.

POLLUTION CASES

In the pollution cases public interest often bulks large, since the offenders are usually municipalities or large industries intimately tied in with the economy of the jurisdiction; and in cases of this sort we should not be too surprised to find the courts refusing to grant an injunction the result of which would be to shut down an important industry or leave a city without a means of sewage disposal. The fact that a municipality, if enjointed, might obtain a right to continue its pollution through eminent domain proceedings is of course a factor in some of the decisions to balance the equities; but, even in the case of private defendants, if the public interest in continued operation is strong enough the injunction has usually been denied in the more recent cases. Thus we find the Alabama Supreme Court in a 1952 case refusing to sanction injunctive relief against pollution by a limestone company on a complaint of interference by agricultural interests;[40] a 1940 Arkansas case denying injunctive relief against pollution of a stream by a barium mill;[41] a 1940 Florida case balancing the equities in favor of allowing a municipality to continue polluting a stream through operation of a sewage disposal plant;[42] and a 1934 Louisiana case refusing to

39. See Black and Eidsness, *Industrial Water Supply in Florida,* Economic Leaflets, Univ. of Fla., Vol. XI, No. 2, Jan. 1952. The authors point out that, while industry in the United States uses daily 25,000,000,000 gallons of water, of which only 5,000,000,000 gallons is ground water, Florida's two largest water-using industries, the pulp and paper mills and the phosphate industry, derive most of their water supply from wells. Because of Florida's tremendous ground water supply, no overall shortage is likely to occur, but extensive pumping of ground water may cause local shortages and concurrent legal problems. Thus withdrawals by the phosphate industry in Polk County have resulted in completely drying up Kissengen Springs, which previously had an average flow of approximately 20,000,000 gallons per day. *Ibid.* See *Springs of Florida,* Fla. Geological Bull. No. 31, p. 142 (1947).

40. Montgomery Limestone Co. v. Bearden, 256 Ala. 269, 54 So. 2d 571 (1951).

41. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 206 S. W. 2d 442 (1947).

42. Lakeland v. Harris, 143 Fla. 761, 197 So. 470 (1940). The Court in this case did order the municipality to take all feasible measures to cut down the amount of pollution.

enjoin the operation of a paper mill despite resulting stream pollution.[43]

DIVERSION AND APPROPRIATION CASES

In the diversion and appropriation cases there is evidence of a similar trend toward balancing the relative hardships in determining whether injunctive relief should be granted, though with some reservations. Again, if the public interest intervenes, as when a municipal water supply is involved, the tendency, as evidenced in a 1934 Kentucky case,[44] is to refuse injunctive relief and leave the complainant to his remedy by way of damages, though some jurisdictions, including Virginia, have stayed injunctive relief only on condition that the municipality proceed to obtain the needed water rights through eminent domain proceedings.[45]

When only private parties are involved, however, and the basic interest of the public is not apparent, our courts have been much more reluctant to consider the possibility of balancing the equities; and in cases of this sort both the Georgia[46] and West Virginia[47] courts have taken a strong position against the right of the court to weigh the relative hardships. It seems only fair to add, however, that West Virginia, along with South Carolina,[48] still apparently considers herself bound by the traditional imperative approach which denies the court's power to balance the equities in any case in which injunctive relief is applied for,[49] whether that case involves the in-

43. Young v. International Paper Co., 179 La. 803, 155 So. 231 (1934); *cf.* National Container Corp. v. State, 138 Fla. 32, 189 So. 4 (1939) (same result accomplished on different legal basis).

44. Kentucky Elec. Devel. Co. v. Wells, 256 Ky. 203, 75 S. W. 2d 1088 (1934).

45. Purcellville v. Potts, 179 Va. 514, 19 S. E. 2d 700 (1942); *accord,* Mayor of Baltimore v. Brack, 175 Md. 615, 3 A. 2d 471 (1939); Hartzell v. Village of Hambury, 155 Misc. 345, 279 N. Y. Supp. 650 (Sup. Ct. 1935), *aff'd,* 248 App. Div. 667, 289 N. Y. Supp. 910 (4th Dep't), *modified,* 272 N. Y. 234, 5 N. E. 2d 801, *modified,* 273 N. Y. 476, 6 N. E. 2d 411 (1936).

46. Robertson v. Arnold, 182 Ga. 664, 186 S. E. 806 (1936); City of Elberton v. Hobbs, 121 Ga. 749, 49 S. E. 779 (1905); Chestatee Pyrites Co. v. Cavenders Creek Gold Mining Co., 118 Ga. 255, 45 S. E. 267 (1903).

47. McCausland v. Jarrell, 68 S. E. 2d 729 (W. Va. 1951). The court does say that it will balance the equities in an appropriate case, but on the facts as brought out in the dissenting opinion it would be hard to find a more appropriate case.

48. Davis v. Palmetto Quarries Co., 212 S. C. 496, 48 S. E. 2d 329 (1948); Williams v. Haile Gold Mining Co., 85 S. C. 1, 66 S. E. 117 (1909); State v. Columbia Water Power Co., 82 S. C. 181, 63 S. E. 884 (1909). For recent dicta that the court may balance the equities in an appropriate case *see* Forest Land Co. v. Black, 216 S. C. 255, 266, 57 S. E. 2d 420, 426 (1950); Sprouse v. Winston, 212 S. C. 176, 185, 46 S. E. 2d 874, 878 (1948).

49. Board of Comm'rs v. Elm Grove Mining Co., 122 W. Va. 442, 9 S. E. 2d 813 (1940); Ritz v. Woman's Club, 114 W. Va. 675, 173 S. E. 564 (1934) (both cases admit the possibility of using the doctrine in an extremely meritorious

vasion of water rights or any other tort against which injunctive relief may be sought.[50]

PLANNING FOR THE FUTURE

With the advent of modern portable irrigation systems and pumping machinery, the possibilities for utilizing available water supplies in the Southeast have increased tremendously. Whereas in the past we have generally considered our water resources to be more than adequate, we may now be approaching a situation where our supply will fall short of meeting the demands placed upon it. In this new situation new means must be devised to handle the legal problems involved in obtaining maximum benefits from the water available to us.

To point up the growing seriousness of this problem, it may be appropriate to examine some recent developments in Kentucky and South Carolina. Data gathered in Kentucky by the United States Weather Bureau shows that in only two out of every five years is the rainfall so distributed as to produce a good crop yield.[51] In the other three the crop yield can be increased tremendously by irrigation. For instance, in 1951, which was not considered a drought year, farmers who used irrigation were able to double their tobacco yield as well as greatly improve the quality of their crop.[52] Since the amount of acreage that can be placed in tobacco is rigidly controlled by federal regulations, the practice of irrigating to increase crop yield will no doubt mushroom rapidly. A recent South Carolina survey shows that in that state demand for water for industrial uses has increased fourfold since 1945, and the demand for agricul-

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case). One early Georgia case indicates that the court considers itself to have some discretion to balance the equities, at least in the limited situation in which the evidence of complainant and defendant is in practical equipoise, Everett v. Tabor, 119 Ga. 128, 46 S. E. 72 (1903).

50. In Mississippi, on the other hand, while the doctrine has apparently not yet been considered in connection with water cases, dicta in several recent decisions indicate a more liberal approach toward it in appropriate cases; *see* Smith v. Fairchild, 193 Miss. 536, 547, 10 So. 2d 172, 174 (1942); Williams v. Montgomery, 184 Miss. 547, 556, 186 So. 302, 304 (1939); Reber v. Illinois Cent. R. R., 161 Miss. 885, 898, 138 So. 574, 577 (1932). Early North Carolina and Tennessee cases indicate that those states may also be prepared to take a liberal stand on the application of the doctrine. See Brown v. Carolina C. R. R., 83 N. C. 128 (1880); Lassater v. Garrett, 63 Tenn. 291, 4 BAXT. 368 (1874).

51. Note, 40 KY. L. J. 424 (1952), quoting Thaxton, *Irrigation Study on Pastures in Kentucky*, Feb. 17, 1951.

52. *Ibid.*

tural purposes has doubled in the same period.[53] Similar figures might be produced for most of our other Southeastern states.[54]

PRESENT STATE OF AMERICAN LAW

Before discussing possible solutions of this problem of obtaining maximum use of available water supplies, it may be well to consider the three different judicial approaches to use of water from running streams.[55] The oldest is the English "natural flow" rule, under which an upper riparian owner may not alter the natural flow of a stream except in so far as he makes use of the water for purely domestic purposes. This approach was introduced into Anglo-American law through the writings of Kent and Story.[56] It was adopted in England at a time when the use of water for industry and irrigation was still on a very minor scale, and prevention of damage to streams through pollution was the predominant problem.[57] In such an economy the rule was adequate to meet the social problems of the time. This natural flow rule received early acceptance in the eastern United States[58] but was almost at once rejected in the Western and Rocky Mountain states in favor of the second doctrine, that of "prior appropriation".

Under the prior appropriation doctrine, which had its inception in the needs of the early gold miners for large quantities of water to carry on their operations,[59] a riparian or other owner could "ap-

53. See BUSBY, THE BENEFICIAL USE OF WATER IN SOUTH CAROLINA, A PRELIMINARY REPORT 6 (1952).

54. See Black and Eidsness, *supra* note 39.

55. For a more detailed discussion of these three theories relative to the use of water from watercourses see Busby, *supra* p. 106, particularly pp. 107-109.

56. The first authoritative statement of the rule is found in the opinion of Mr. Justice Story in Tyler v. Wilkinson, 24 Fed. Cas. 472, No. 14,312 (C. C. C. R. I. 1827). Story's decision was buttressed by Kent a year later in 3 KENT'S COMM. 353 *et seq.* (1828). See *Wiel, Waters: American Law and French Authority,* 33 HARV. L. REV. 133 (1919). For a recent Supreme Court case outlining the background of the doctrine, see United States v. Gerlach Live Stock Co., 339 U. S. 725, 744-745 (1950).

57. Mason v. Hill, 5 B. & Adol. 1, 110 Eng. Rep. 692 (1833); Wood v. Waud, 3 Ex. 784, 154 Eng. Rep. 1047 (1849); Miner v. Gilmour, 12 Moore C. P. 131, 14 Eng. Rep. 861 (1858); see Wiel, *supra* note 56, at 144-146.

58. Stein v. Burden, 29 Ala. 127 (1856); Roberts v. Martin, 72 W. Va. 92, 77 S. E. 535 (1913). The Alabama court quickly shifted its emphasis to the reasonable use aspect of Kent's theory; see Ulbricht v. Eufaula Water Co., 86 Ala. 587, 6 So. 78 (1889). West Virginia now apparently also stresses that aspect; *see* McCausland v. Jarrell, 68 S. E. 2d 729, 740 (W. Va. 1951). But the natural flow rule has also recently been reiterated in some of our Southeastern states, Robertson v. Arnold, 182 Ga. 664, 186 S. E. 806 (1936); Purcellville v. Potts, 179 Va. 514, 19 S. E. 2d 700 (1942); *cf.* Harris v. Norfolk & Western Ry., 153 N. C. 542, 69 S. E. 623 (1910).

59. POMEROY, RIPARIAN RIGHTS §§ 14-15 (1887); see Wiel, *Fifty Years of Water Law,* 50 HARV. L. REV. 252, 254 (1936).

propriate" the right to use as much water as he could successfully divert and beneficially employ, so long as his appropriation was prior to that of others, in which case his right, on a sort of first-come, first-served basis, might in an extreme case extend to exhausting the flow of the stream.[60] This doctrine is now confirmed by legislation in most Western states.[61]

The third approach is through the theory of "reasonable use", under which a riparian complainant is entitled to protection only when defendant's diversion unreasonably interferes with complainant's use of the water.[62] Under this doctrine emphasis is placed on full use of the available water supply, and each riparian owner is entitled to make beneficial use of the water for any purpose to the extent that his use does not unreasonably interfere with the beneficial uses of others.

POSSIBLE SOLUTIONS

The problem of obtaining maximum use of available water supplies in the Southeastern states can be met in two ways. The first way, suggested in the South Carolina Preliminary Report,[63] is through legislative repudiation of the antiquated natural flow theory and the substitution in its stead of the doctrine of prior appropriation under the direction and control of a state administrative agency.[64]

60. 44 COL. L. REV. 437, 438 (1944).

61. For excellent summaries of the water law doctrines of the 17 Western states, with constitutional and statutory citations, see 3 REPORT OF THE PRESIDENT'S WATER RESOURCES POLICY COMMISSION, WATER RESOURCES LAW, App. 3 (1950).

62. See 4 RESTATEMENT, TORTS c. 41, Topic 3, Scope Note (1939). For a recent southeastern application of the doctrine see Dunlap v. Carolina Power & Light Co., 212 N. C. 814, 195 S. E. 43 (1938).

63. See BUSBY, THE BENEFICIAL USE OF WATER IN SOUTH CAROLINA, A PRELIMINARY REPORT (1952).

64. See Busby, *supra* note 63, at 51-52. Such legislation would probably include provisions for injunctive enforcement. Would the balance of convenience doctrine be applicable as a discretionary judicial check on this enforcement machinery? The Texas court has held in Biggs v. Red Bluff Water Power Control Dist., 131 S. W. 2d 274 (Tex. Civ. App. 1939), a case involving the enforcement of an anti-pollution statute, that the court cannot refuse relief "on equitable considerations". In other words, the discretion provided by the balance of convenience doctrine has no place in injunctive law enforcement. But the Tennessee court in a series of nuisance cases has held that when a statute provides for an injunction or damages the court has the authority to balance the hardships and deny injunctive relief, leaving the complainant to his alternative statutory remedy by way of damages. Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 83 S. W. 658 (1904); Union Planters' Bank & Trust Co. v. Memphis Hotel Co., 124 Tenn. 649, 139 S. W. 715 (1911). As yet this problem as to the existence of judicial discretion has apparently not been faced by our courts in connection with the enforcement of legislation affecting the use of water. It is submitted that when the problem does arise adoption of the more liberal view of the Tennessee court in the nuisance cases would be most in consonance with the modern balance of convenience problem

This approach may provide the most feasible solution in those jurisdictions, such as South Carolina, that have apparently rejected the balance of convenience doctrine as a means of preventing injunctions against minor violations of riparian rights.[65]

There is a second approach possible in those jurisdictions in which the balance of convenience doctrine is available and the law concerning appropriation of surface waters is not too rigidly bound up with the early common law rule that all riparian owners are entitled to the natural flow of a stream, whether they have any need for such flow or not. This is to settle such disputes on the basis of the doctrine of reasonable use, which affords the upper owner the right to a beneficial use when there is no appreciable damage to the lower owner,[66] or in some cases when the lower owner is damaged but the overwhelming utility of the competing use militates against cutting off that use.[67] A sensible application of the balance of convenience doctrine may be a very useful adjunct in the development and application of the reasonable use rule in those jurisdictions that are free to adopt it.

LESSONS FROM FEDERAL LAW

It may help to examine briefly the development of the law as applied by the Supreme Court of the United States in cases involving disputes over the use of water in interstate streams. This examination should be doubly rewarding, since the remedy sought in the

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in the Southeast. But if the question should arise as a result of an administrative request for injunctive enforcement of an agency order, the discretion of the agency may replace the traditional discretion of the enforcing court. This presents a problem beyond the scope of this article. See DAVIS, ADMINISTRATIVE LAW § 240 (1951).

65. See note 48 *supra*. In this connection, however, a judicious application of the *de minimis* principle might provide the court with some discretion in such cases.

66. This doctrine was developed from one aspect of the natural flow rule as enunciated by Story and Kent, and the first American case applying the reasonable use doctrine cites Story's opinion in *Tyler v. Wilkinson*, 24 Fed. Cas. 472, 473, No. 14,312 (C. C. C. R. I. 1827) and KENT'S COMMENTARIES as authorities, Elliot v. Fitchburg R. R., 10 Cush. 191, 196 (Mass. 1852). See note 56, *supra*. The doctrine has been recently restated in Dunlap v. Carolina Power & Light Co., 212 N. C. 814, 195 S. E. 43 (1938).

67. Dumont v. Kellogg, 29 Mich. 420 (1874) (stream depletion from erection of dam); Minnesota Loan & Trust Co. v. St. Anthony Falls Water Power Co., 82 Minn. 505, 85 N. W. 520 (1901) (minor change in channel below dam); Snow v. Parsons, 28 Vt. 459 (1856) (tanbark residue from tannery discharged into stream). See 3 REPORT OF THE PRESIDENT'S WATER RESOURCES POLICY COMMISSION, WATER RESOURCES LAW 161-162 (1950), to the effect that the recent legislative trend in ground water law is toward the adoption of the reasonable use doctrine.

great majority of interstate suits has been the injunction[68] and the Supreme Court has frequently applied the balance of convenience doctrine in working out its concepts of the law as applied to the use of interstate waters.[69]

The Supreme Court has usually handled such cases on the basis of equitable apportionment, a doctrine closely allied to that of reasonable use. As Mr. Justice Holmes put it in the case of *New Jersey v. New York*,[70]

> "A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it . . . . The different traditions and practices in different parts of the country may lead to varying results but the effort always is to secure an equitable apportionment without quibbling over formulas."

If the dispute is between states following the prior appropriation doctrine the Court has felt free to apply that doctrine in the settlement of the dispute,[71] but even in cases of this sort the Court does not consider itself bound by the municipal law of such states[72] and has turned to the equitable apportionment doctrine in cases in which

68. Kansas v. Colorado, 320 U. S. 383 (1943); Wyoming v. Colorado, 298 U. S. 573 (1936); Washington v. Oregon, 297 U. S. 517 (1936); Arizona v. California, 283 U. S. 423 (1931); New Jersey v. New York, 283 U. S. 336 (1931); Connecticut v. Massachusetts, 282 U. S. 660 (1931); Wisconsin v. Illinois, 281 U. S. 179 (1930); Wisconsin v. Illinois, 278 U. S. 367 (1929); Tennessee v. Arkansas, 249 U. S. 588 (1919); Kansas v. Colorado, 206 U. S. 46 (1907); Missouri v. Illinois, 200 U. S. 496 (1906); Kansas v. Colorado, 185 U. S. 125 (1902); Missouri v. Illinois, 180 U. S. 208 (1901); South Carolina v. Georgia, 93 U. S. 4 (1876).

69. Application of the doctrine appears evident in the following cases, though the doctrine is not always referred to by the Court: Kansas v. Colorado, 320 U. S. 383 (1943); Washington v. Oregon, 297 U. S. 517 (1936); New Jersey v. New York, 283 U. S. 336 (1931); Connecticut v. Massachusetts, 282 U. S. 660 (1931); Wisconsin v. Illinois, 281 U. S. 179 (1930); Kansas v. Colorado, 206 U. S. 46 (1907); Missouri v. Illinois, 200 U. S. 496 (1906); Kansas v. Colorado, 185 U. S. 125 (1902).

70. New Jersey v. New York, 283 U. S. 336, 342-343 (1931). See also 3 REPORT OF THE PRESIDENT'S WATER RESOURCES POLICY COMMISSION, WATER RESOURCES LAW 58-64 (1950).

71. Wyoming v. Colorado, 259 U. S. 419 (1922). The argument supporting the application of the doctrine is found at p. 470.

72. As the Court put it in a dispute between Connecticut and Massachusetts, both of which recognized the natural flow theory, "For the decision of suits between States, federal, state and international law is considered and applied by this court as the exigencies of the particular case may require. The determination of the relative rights of contending states in respect of the use of streams flowing through them does not depend upon the same considerations and is not governed by the same rules of law that are applied in such states for the solution of similar questions of private right . . . . And, while the municipal law relating to like questions between individuals is to be taken into account, it is not to be deemed to have controlling weight". Connecticut v. Massachusetts, 282 U. S. 660, 670 (1931).

it considered that this doctrine provided a more equitable basis for the settlement of the dispute. The most recent of these cases is *Kansas v. Colorado*,[73] decided in 1943. The Court applied this version of the reasonable use doctrine and balanced the equities in favor of allowing Colorado to continue diversion of a considerable portion of the Arkansas River when Kansas failed to show that such diversion substantially injured Kansas users.[74]

Although these federal cases are of persuasive value only in most intrastate controversies as to the right to divert and use stream waters, it is well to remember that if the water in question is being diverted from a navigable stream the Federal Government rather than the state may have the last say as to the continuance of the diversion. If the appropriation affects the navigability of an interstate stream it may be enjoined at the behest of the United States;[75] and this is true even though the proposed diversion is in the non-navigable upper reaches of the stream.[76] Authority to allow diversion of the waters of such streams rests with the Secretary of the Army, and it is apparently within his discretion to say how much of the water of navigable streams may be diverted.[77] In these cases, therefore, the discretion of the Secretary replaces the discretion of the chancellor.

If the stream, though navigable, lies wholly within a state, the mere fact of navigability does not vest jurisdiction in the Secretary, and the waters of the stream are subject to the state's control until the Federal Government specifically assumes jurisdiction through Congressional legislation asserting the reserved authority of the Federal Government over intrastate navigable streams.[78] One reason for assumption of federal authority over intrastate navigable streams is for flood control purposes,[79] as, for example, the present Central and Southern Florida Flood Control Project.[80] Irrigation water

73. 320 U. S. 383 (1943).

74. *Id.* at 398. In some of the cases equitable relief has been refused on other discretionary grounds, *e. g.*, City of New York v. Pine, 185 U. S. 93 (1902). The use of the *conditional* injunction as a means of effecting a complete settlement of the problem is also illustrated in this case.

75. Sanitary Dist. of Chicago v. United States, 266 U. S. 405 (1925).

76. United States v. Rio Grande Irr. Co., 174 U. S. 690, 708 (1889).

77. 30 STAT. 1151 (1899), 33 U. S. C. § 403 (1946), Ilhenny v. Broussard, 172 La. 895, 135 So. 669 (1931).

78. Pound v. Turck, 95 U. S. 459 (1878); Egan v. Hart, 165 U. S. 188 (1897); *accord,* Leitch v. Chicago, 41 F. 2d 728 (7th Cir.), *cert. denied,* 282 U. S. 891 (1930).

79. 49 STAT. 1570 (1936), 33 U. S. C. § 701a (1946); 58 STAT. 887 (1944), 33 U. S. C. § 701-1 (1946), as amended, 61 STAT. 501 (1947), 33 U. S. C. § 701-1 (Supp. 1952). See 3 REPORT, *supra* note 70, c. 4.

80. See *Summary of the Central and Southern Florida Flood Control Project,* Water Survey and Research Paper No. 4, Fla. State Bd. of Conservation,

made available by such projects comes within the jurisdiction of the Secretary of the Army.[81]

Concluding this consideration of federal water law, there is one more valuable lesson to be studied by our Southeastern states. That lesson may be drawn from the pattern of settlement of interstate water disputes. We have already briefly considered the judicial handling of this subject. The Constitution, however, provides for another method of working out such disputes — through interstate agreements or compacts.[82] Such compacts, worked out between the states, along with machinery for their application, usually provide a much more satisfactory method of settlement than does sporadic litigation over isolated points of disagreement.[83] Similarly, in intrastate disputes contractual arrangements between the parties will often provide the most workable solution, especially if sufficient foresight is exercised to work out such arrangements as a part of planning for operations requiring extensive use of water.[84] And it is well to remember that, if it becomes necessary to seek judicial enforcement of agreements through a suit for specific performance, the balance of convenience doctrine will be available in most of our jurisdictions as a tempering factor in the granting of such relief.[85]

THE CALIFORNIA EXPERIENCE

It must be realized that the doctrine of reasonable use has one serious practical defect. While under it an injunction will be refused to one not actually or prospectively using the available water, if lower riparian owners should decide to make such use and should take definite steps toward that end, they would then be entitled to

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Aug. 1950. For a note on the state law related to this problem see Note, *Waters: Surface Water Drainage,* 2 U. OF FLA. L. REV. 392 (1949).

81. 58 STAT. 890 (1944), 33 U. S. C. § 709 (1946), as amended, 61 STAT. 501 (1947), 33 U. S. C. § 709 (Supp. 1952).

82. U. S. CONST. Art. I, § 10, "No State shall, without the consent of the Congress . . . enter into any agreement or Compact with another State . . . ." Congress has given blanket consent to the states to negotiate compacts for the control of pollution, 62 STAT. 1155, 1156 (1946), 33 U. S. C. 466a(c) (Supp. 1952). See Watson, *Ohio River Compact and Other Interstate Agreements,* 41 J. AM. WATER WORKS ASS'N 18 (1949). In Hinderlider v. LaPlatte River & Cherry Creek Ditch Co., 304 U. S. 92, 106 (1938), the Court points out that Congress had as of 1938 consented to 15 compacts for apportionment of waters in interstate streams. See also 3 REPORT, *supra* note 70, at 64-70.

83. See Frankfurter and Landis, *The Compact Clause of the Constitution, A Study in Interstate Adjustments,* 34 YALE L. J. 685, 707 (1925).

84. See Powell and Bacon, *Magnitude of Industrial Demand for Process Water,* 42 J. AM. WATER WORKS ASS'N 777, 785 (1950). Such planning may be encouraged by wise state legislation, *e. g.,* through the authorization of cooperative irrigation districts, as in Florida. See FLA. STAT. §611.38 (1951).

85. See note 11 *supra.*

a fair share of the water, even though this might seriously impede beneficial uses already being made by upper riparian owners.[86] Fear of being cut off from such uses in turn may discourage upper riparians from establishing extensive irrigation systems or using the water to irrigate adjacent riparian lands and thus result in failure to make full use of the available supply.[87]

Application of the prior appropriation doctrine can solve this problem, since once an appropriator begins diverting water of a stream, he gains a right to continue indefinitely. Unless, however, some method is provided for divesting a prior appropriator of his right to continue diversions when changed conditions demand the prior appropriation doctrine may eventually become as stifling to progress as the older natural flow theory.[88] The California experience with the latter doctrine may serve to illustrate this point.[89]

In California early judicial application of the natural flow theory in favor of lower riparian owners who required the full flow of mountain streams in spring and early summer for flooding and fertilizing their lowland pastures had resulted in shutting down the large hydraulic gold mining industry of the 1880's.[90] But by the 1920's it had become apparent that requiring that all the water be left in

86. Thus in an earlier decision on the Kansas and Colorado dispute the Supreme Court, while denying Kansas equitable relief, provided that its petition could be renewed upon a showing of real injury. Kansas v. Colorado, 206 U. S. 46, 117, 118 (1907).

87. See BUSBY, *supra* note 53, at ix. This difficulty can be obviated to some extent by contractual arrangements between the riparians similar to the interstate water compacts. See p. 174 *supra*.

88. The validity of this criticism is recognized by A. P. Black, Head Professor of Chemistry, Univ. of Florida, a former president of the American Waterworks Association, who supports legislative adoption of the prior appropriation doctrine in the area of ground water regulation. As Black puts it, in *Basic Concepts in Ground Water Law*, 39 J. AM. WATER WORKS ASS'N 989, 994 (1947), "This principle [of prior appropriation] without question offers the greatest protection to large investors whose appropriations are dependent upon an adequate supply of water. On the other hand, it inevitably leads at times to the use of water by a senior appropriator which would have been better used by a junior, and we are faced again with the fact that the rule of reasonable use must have a place in the administration of the doctrine".

89. For an excellent article on this experience see Wiel, *Fifty Years of Water Law*, 50 HARV. L. REV. 252 (1936).

90. Woodruff v. North Bloomfield Gravel Mining Co., 18 Fed. 753, 756, 774 (C. C. D. Cal. 1884); People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 4 Pac. 1152 (1884). The crux of these "debris" cases was not so much diversion or appropriation as the prevention of pollution, but another famous case of the same era, Lux v. Haggin, 69 Cal. 255, 4 Pac. 919 (1884), *aff'd*, 69 Cal. 255, 10 Pac. 674 (1886), led to the recognition of the strict natural flow theory as the law governing private riparians in California. The court, in a 200-page opinion, rejected the prior appropriation doctrine as to such owners, preferring to protect the "property rights" of the lower riparians without regard to relative value of the use to which the water was being put. See Wiel, *Fifty Years of Water Law*, 50 HARV. L. REV. 252, 254-259 (1936).

the streams for the valley cattle interests was wasteful when much of it could be better utilized for year-round irrigation in the uplands. The upshot was a constitutional amendment in 1928 declaring that "reasonable use" was the test for use of water resources in California.[91]

It was, of course, predicted that the new doctrine would be impossible of administration,[92] but by taking the position that *reasonable* use does not necessarily mean *equal* use by all riparians,[93] and refusing injunctions in favor of damages on the balance of convenience theory,[94] or applying the *de minimis* principle to "nuisance value" claims,[95] the California Court, using a reference procedure under which it obtains the advice of the State Department of Public Works through the State Engineer in difficult cases,[96] has made the amendment work. Of course, if the injunction is refused the injured party always has his action at law for damages, but parties with no real injury have found the juries no more sympathetic than the chancellors.[97]

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91. CAL. CONST. Art. XVI, § 3; see Peabody v. Vallejo, 2 Cal. 2d 351, 366, 40 P. 2d 486, 490 (1935). This rule of reasonable use is modified to the extent that California continues to recognize the right of prior appropriation as applied to waters of streams in the public domain, a right established by legislation in 1872. In addition, excess flow in watercourses above the quantities to which riparian and other lawful rights attach have been held to be public waters of the state and hence subject to its control and regulation. Meridian v. San Francisco, 13 Cal. 2d 424, 90 P. 2d 537 (1939). See 3 REPORT, *supra* note 70, at 715-721.

92. "If every person owning land over a water-bearing area shall be permitted to share with every other person wherever he shall see fit to drive his well, it is very probable, if not quite certain, that as the process of development goes on, many, if not all, will find themselves restricted in their use of the water they have brought to the surface to the extent of ruination". Justesen v. Olsen, 86 Utah 158, 169-170, 40 P. 2d 802, 807 (1935).

93. Peabody v. Vallejo, 2 Cal. 2d 351, 375, 40 P. 2d 486, 495 (1935). The Supreme Court has taken a similar position concerning the application of the equitable apportionment doctrine in the interstate cases. As the Court put it in Connecticut v. Massachusetts, 282 U. S. 660, 670 (1931): ". . . such disputes are to be settled on the basis of equality of right. But this is not to say that there must be an equal division of the waters of an interstate stream among the states through which it flows. It means that the principles of right and equity shall be applied having regard to the 'equal level or plane on which all states stand, in point of power and right, under our constitutional system' and that, upon a consideration of all the pertinent laws of the contending States and all other relevant facts, this Court will determine what is an equitable apportionment of the use of such waters". See Wiel, *Fifty Years of Water Law*, 50 HARV. L. REV. 252, 279 (1936), *Theories of Water Law*, 27 HARV. L. REV. 530, 536, 540 (1914).

94. Peabody v. Vallejo, *supra* note 93; Collier v. Merced Irr. Dist., 213 Cal. 554, 2 P. 2d 790 (1931).

95. Chow v. Santa Barbara, 217 Cal. 673, 22 P. 2d 5 (1933); see Wiel, *Fifty Years of Water Law*, 50 HARV. L. REV. 252, 286 (1936).

96. CAL. WATER CODE §§ 2000-2050; see Waldo, *Evaluation of California Water Right Law*, 18 So. CALIF. L. REV. 267, 268-269 (1945).

97. Wiel, *Fifty Years of Water Law*, 50 HARV. L. REV. 252, 288, n. 93 (1936).

CONCLUSION

Any system of water law, if it is to serve the Southeast over the years, must be sufficiently flexible to adjust itself to the changing social needs of the times. Inability to so adjust the natural flow doctrine in California led to its downfall in that state. It had provided certainty at the expense of flexibility or *epieikia,* and, like other mechanical concepts of jurisprudence, it eventually fell of its own weight.

Perhaps a new version of the prior appropriation rule, applied under the guidance of a wise administrator, may be the solution in states like South Carolina and Georgia, where the balance of convenience doctrine is not available as a tool to aid in developing the reasonable use theory.[98] But one thing is certain: flexibility is essential if we are to build a system of water law that will stand for future generations. The reasonable use theory allows for necessary revisions.[99] Moreover, the California experience has demonstrated that the reasonable use theory, applied by a judiciary working with a technically qualified state agency and free to control that theory through the balance of convenience doctrine, can provide a workable solution of the growing demand.[100] It would, therefore, seem reasonable to conclude that, in those of our Southeastern states where the balance of convenience doctrine is now accepted, that doctrine can become a most valuable tool in the construction of a sound water law keyed to the demands of a modern democratic society.

98. See notes 46, 48 *supra.*

99. New Jersey v. New York, 283 U. S. 336, 348 (1931); see 2 WIEL, WATER RIGHTS IN THE WESTERN STATES §§ 752, 769 *et seq.* (3d ed. 1911). It may be argued that the prior appropriation theory also allows for revision, inasmuch as appropriative rights may be lost by non-use, but loss by non-use and surrender of such rights in favor of a more reasonable use in view of changed social conditions are two entirely different methods of change.

100. A complete revision of local water law is probably unnecessary in most of our Southeastern states, where water supplies are relatively abundant. A more likely development is legislative revision as applied to certain critical areas where shortages are likely to occur. Such statutes might well be patterned after recent ground water legislation in New Jersey and some of our Western states. See ARIZ. CODE ANN. §§ 75-145 *et seq.* (Cum. Supp. 1939); NEV. COMP. LAWS §§ 7993.11-7993.21 (Supp. 1949); N. J. STAT. ANN. tit. 58, §§ 4A-1 to 4A-4 ( ). See also *Current Developments in Ground Water Law,* 41 J. AM. WATER WORKS ASS'N 1002 (1949). If such area-type legislation is enacted, provision for reasonable use in critical areas under the immediate supervision of a state water control commission would seem more in harmony with existing water law in the Southeast, and consequently more likely of enactment, than a change to the prior appropriation doctrine.

ADDENDUM

Riparian Lands

Should the courts and legislatures in the Southeastern states have under consideration defining riparian lands and consider limiting these to the smallest tract held under one title in the chain of title leading to the present owner, then the following citations may be of some help:

It appears that the first statement of this limitation in the form above given was made by the California Supreme Court, in *Rancho Santa Margarita v. Vail,* 11 Calif. (2d) 501, 529, 81 Pac. (2d) 533 (1938). However, much earlier, Wiel on Water Rights, sec. 771, states that the California decisions "lean toward holding the extent of riparian land to the smallest parcel touching the stream in the history of the title while in the hands of the present owner". This was written in 1911.

The statement in the *Santa Margarita* case, *supra,* however, is a logical summation of the results of various California decisions. The court in that case cited only one authority — *Boehmer v. Big Rock Irr. Dist.,* 117 Calif. 19, 48 Pac. 908, in which 14 quarter-sections of public land were granted to the same party, but by separate patents, each based on a separate entry. Some parcels were contiguous to a stream; others were contiguous to the (riparian) parcels but not to the stream. The court held that for the purpose of determining riparian rights, there were 14 distinct tracts, and that "mere contiguity cannot extend a riparian right which is appurtenant to one quarter section to another, though both are now owned by the same person". The court relied on *Lux v. Haggin,* 69 Calif. 255, 424-425, 10 Pac. 674, 773-774 (1886), wherein it was held that certificates of purchase issued by the California State Land Office were admissible as showing ownership of land riparian to a watercourse, but that "All the sections or fractional sections mentioned in any one certificate constitute a single tract of land. If, however, lands have been granted by patent, and the patent was issued on the cancellation of more than one section, the patent can operate by relation (for the purpose of this suit) to the date of those certificates *only,* the lands described in which border on the stream". This has been relied upon in subsequent cases as a holding that the riparian right extends only to land embraced within a single grant from the government, and that such grant establishes the initial riparian title; and

as leading to the conclusion that annexation of a detached parcel to a parcel contiguous to the stream cannot extend the riparian right of the latter even if physical conditions were favorable to use of the water on the previously detached parcel.

Wiel severely criticizes the reliance upon *Lux v. Haggin, supra*, for this principle, and strongly disapproves of the principle, which he says did not exist either at the common law or the civil law. See particularly secs. 770-772. Notwithstanding his disapproval, and the esteem in which his work has been generally held by the California Supreme Court, that court has since reaffirmed its adherence to the principle. (See *Miller & Lux v. James,* 180 Calif. 38, 51, 179 Pac. 174, 180 (1919); *Title Insurance & Trust Co. v. Miller & Lux,* 183 Calif. 71, 82, 190 Pac. 433, 437 (1920).)

A riparian tract in California, then, cannot exceed the original grant from the government, regardless of watershed limitations. It can be reduced from the area originally so granted, but cannot be extended after a reduction. This rule is based upon various decisions of the California courts, of which some important ones follow:

It is stated in *Anaheim Union Water Co. v. Fuller,* 150 Calif. 327, 331, 88 Pac. 978 (1907), that:

> If the owner of a tract abutting on a stream conveys to another a part of the land not contiguous to the stream, he thereby cuts off the part so conveyed from all participation in the use of the stream and riparian rights therein, unless the conveyance declares the contrary. Land thus conveyed and severed from the stream can never regain the riparian right, although it may thereafter be reconveyed to the person who owns the part abutting on the stream, so that the two tracts are again held in one ownership. * * *

The finality of such severance is repeated in *Rancho Santa Margarita v. Vail,* 11 Calif. (2d) 501, 538, 81 Pac. (2d) 533 (1938). And see *Hudson v. Dailey,* 156 Calif. 617, 624-625, 105 Pac. 748 (1909).

Preservation of the riparian right in a parcel thus detached from a riparian tract and from contiguity to the stream may be effected by the deed of conveyance, even as against other riparian owners (*Miller & Lux v. J. G. James Co.,* 179 Calif. 689, 691-692, 178 Pac. 716 (1919). See also *Strong v. Baldwin,* 154 Calif. 150, 156-157, 97 Pac. 178 (1908); *Hudson v. Dailey,* 156 Calif. 617, 624, 105 Pac. 748 (1909).) Likewise, if the circumstances are such as to show that the parties so intended, or such as to raise an estoppel (see *Hudson*

v. Dailey, supra, at 156 Calif. 624). It is preserved in a partition decree (*Verdugo Canyon Water Co. v. Verdugo,* 152 Calif. 655, 662-663, 93 Pac. 1021 (1908); *Frazee v. Railroad Commission,* 185 Calif. 690, 693-694, 201 Pac. 921 (1921); see *Strong v. Baldwin, supra,* at 154 Calif. 156-157), even when the decree is silent as to the division of riparian rights (*Rancho Santa Margarita v. Vail, supra,* 11 Calif. (2d) at 540). And preservation is effected by conveyance of the riparian right to a mutual irrigation company and sale of parcels of land to individuals, accompanied by their proportional part of the mutual company stock (*Copeland v. Fairview Land & Water Co.,* 165 Calif. 148, 161, 131 Pac. 119 (1913).)

It would follow, it would seem, that only the smallest tract held under one title in the chain of titles leading to the present owner could claim riparian rights. The reduction in area, of course, relates to recession toward the stream. The rule would not be affected if A were to purchase riparian tracts B and C from separate owners D and E. It would apply independently to tracts B and C, A being simply the "present owner" of both tracts.

In other states there are very few pertinent decisions.

A few citations follow:

Oregon — *Jones v. Conn,* 39 Oreg. 30, 39-41, 64 Pac. 855, 65 Pac. 1068 (1901), states the view that an owner of land contiguous to a stream should be entitled to riparian rights "without regard to the extent of his land, or from whom or when he acquired his title". In view of the decline and fall of riparianism in Oregon, this statement is interesting but not of practical import.

Washington — *Yearsley v. Cater,* 149 Wash. 285, 288-289, 270 Pac. 804 (1928), holds that a parcel of land detached from a riparian tract and no longer touching the stream thereby loses its riparian status; and that a tract, not riparian when title is acquired, cannot be made riparian by coming under the ownership of the owner of land lying between it and the stream.

Nebraska — Riparian rights are limited to land acquired by a single entry or purchased from the government (*Crawford Co. v. Hathaway,* 67 Nebr. 325, 93 N. W. 781 (1903); *McGinley v. Platte Valley Public Power & Irr. Dist.,* 132 Nebr. 292, 297, 271 N. W. 864 (1937).) The right cannot be enlarged or extended by acquisition of adjoining lands (*Crawford Co. v. Hathaway, supra,* 67 Nebr. at 353).

Kansas — Riparian land is confined to the watershed, but within that physical limit it is not controlled "by the accidental matter of governmental subdivisions of the land" (*Clark v. Allaman,* 71 Kans. 206, 244-245, 80 Pac. 571 (1905).)

Texas — The riparian right cannot extend beyond the original land survey, and "is restricted to land the title of which is acquired by one transaction" (*Watkins Land Co. v. Clements,* 98 Tex. 578, 585, 86 S. W. 733 (1905).