South Carolina Law Review

Volume 21 | Issue 5 Article 3

1969

The Riparian Rights Doctrine in South Carolina

Edward P. Guerard Jr.

NOTES

THE RIPARIAN RIGHTS DOCTRINE IN SOUTH CAROLINA*

I. Introduction

With an expanding population and rapid development of the state's industrial sector, new and greater demands are being placed upon South Carolina's water resources. Although South Carolina is blessed with a plentiful supply of water, many problems arise in the disposition of this resource when such rapidly increasing demands are superimposed upon an antiquated legal framework. The riparian doctrine of water law adopted by South Carolina 130 years ago has been steadily losing ground in its attempt to keep pace with the demands placed upon it. In light of technological advancement and the population explosion, the import of the gap between the capabilities of the riparian system and the present needs of society becomes apparent. However, this inadequacy of the riparian system has been eclipsed by a reportedly "abundant" supply of water. For how long can such "abundance" be taken for granted? Not only does the system of riparian rights result in gross waste of a valuable resource but it also culminates in the many inequities suffered by the riparian proprietor. The individual and the state are the losers.[1]

The introduction of the basic riparian concept into American jurisprudence is attributed to Story and Kent. At one time the doctrine was thought to have developed primarily from the Code Napoleon[2] but recent scholars believe that the doctrine originated in the United States.[3]

*This paper was written as part of a South Carolina water law research project funded by the Office of Water Resources Research of the Department of the Interior, under a matching grant agreement with the Water Research Institute of Clemson University. The School of Law of the University of South Carolina is undertaking the research for the Institute.

1. *See* Water Policy Committee of the General Assembly of South Carolina, A New Water Policy, Report of the Water Policy Committee Submitted to the General Assembly of South Carolina 9-12 (1954).

2. *See* Busby, *American Water Rights Law: A Brief Synopsis of Its Broad Trends with Special Reference to the Beneficial Use of Water Resources*, 5 S.C.L.Q. 106 (1952); Lauer, *The Common Law Background of the Riparian Doctrine*, 28 Mo. L. Rev. 60 (1963).

3. Restatement of Torts, Explanatory notes § 850-64, at 342 (1939).

The definition of riparian rights is elusive because of the variety of factual situations to which the doctrine applies.[4] At the risk of oversimplification the principal tenet of the riparian doctrine is that:

> [A] riparian proprietor is one whose land is bounded or traversed by a natural stream [with such inherent rights as the] right to the flow of the stream in its natural course and in its natural condition in respect of both volume and purity, except as affected by reasonable use by other proprietors, the right of access to and use of the stream or water . . . .[5]

Riparian rights include the rights of the proprietor in the banks and beds of the water course as well as in the water itself.[6]

The South Carolina Supreme Court adopted the doctrine of riparian rights in *Omelvany v. Jaggers*[7] in which it expressly rejected the contention "that the person erecting the first mill thereby acquired any superior rights"[8] (*i.e.* the doctrine of prior appropriation).[9] In considering whether the prior appropriator or the upper riparian would prevail the court quoted at length from Chancellor Kent:

> Every proprietor of lands on the banks of a river, has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to flow . . . without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but

4. 93 C.J.S. *Waters* § 5 (1956).
5. 56 AM. JUR. *Waters* § 273 (1947).
6. Shannonhouse, *Some Principles of Water Law in the Southeast,* 13 MERCER L. REV. 344 (1961), in SOUTHEASTERN WATER LAW CONFERENCE, UNIVERSITY OF GEORGIA, 1961, WATER LAW AND POLICY IN THE SOUTHEAST 6 (1962).
7. 2 Hill 634 (S.C. 1835).
8. *Id.* at 640.
9. Basically water rights as determined under the doctrine of prior appropriation arise through the creation of a priority of beneficial use and not through the possession of riparian lands. The southeastern states have generally adhered to the common law riparian rights doctrine whereas the western states have developed their own water law systems dependent upon their own particular needs and requirements. In states such as California, there evolved another line of thought which resulted in a somewhat inconsistent combination of priority and riparian rights. *See* 6-A AMERICAN LAW OF PROPERTY § 28.58 (A.J. Casner ed. 1954); Busby, *American Water Rights Law: A Brief Synopsis of Its Origin and Some of Its Broad Trends with Special Reference to the Beneficial Use of Water Resources,* 5 S.C.L.Q. 106,117 (1952).

> a simple use of it while it passes along. . . . Though he may use the water while it runs over his land, he cannot reasonably [sic] detain it or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw back the water upon the proprietors above, without a grant, or an uninterrupted possession of twenty years, which is evidence of it.[10]

After its adoption in South Carolina, the riparian rights doctrine evolved in the common law tradition of case by case development. Since the rights of the land owner are dependent upon the river, stream, etc. which flows through or by his land, perhaps the best place to begin a discussion of the evolution of riparian rights is with the concept of the natural water course.

II. NATURAL WATER COURSES

A. Nature, Classification and Ownership

Our court has defined a natural water course as follows:

> To constitute a water course there must be a stream usually flowing in a particular direction, though it need not flow continually. It may sometimes be dry. It must flow in a definite channel, having a bed, sides or banks, and it naturally discharges itself into some other stream or body of water. It must be something more than mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary causes . . . . It is essential to the existence of a water course that there should be a well defined bed or channel, with banks. If these characteristics are absent, there is no water course, within the legal meaning of the term; hence natural depressions in the land through which surface water from adjoining lands naturally flows are not water courses.[11]

10. 2 Hill at 640, *quoting from* 3 KENT'S COM. 353 (1928). As pointed out in White v. Whitney Mfg. Co., 60 S.C. 254, 266, 38 S.E. 456, 460 (1901), there is a serious misprint in the *Omelvany* quotation in that the word "reasonably" has been substituted for the word "unreasonably."

11. Lawton v. South Bound R.R., 61 S.C. 548, 552-53, 39 S.E. 752, 753-54 (1901). In a fairly recent decision, Johnson v. Williams, 328 S.C. 623, 634, 121 S.E.2d 223 (1961), involving the issue of whether a drainway was a natural water course, the court used the *Lawton* definition as its basic guide in deciding the question.

To assert riparian rights, it must first be determined whether the water in question is part of a natural water course or merely surface water.[12] This basic distinction is important because if the fundamental elements of a water course are not present, then the water is generally regarded as surface water to which the applicable law of surface water will apply. For example the obstruction of the flow of surface water is not actionable in itself, whereas the obstruction of the flow of a natural water course is actionable, provided of course that the riparian owner is able to show damages as a result of the obstruction.[13]

Once it has been established that a natural water course does exist, then it must be determined whether the stream is navigable or non-navigable.[14] The determination of navigability bears directly upon the ownership of not only the water but also the bed and banks of the water course. The waters and the beds of

12. Surface waters are defined as being:

> [W]aters of a casual and vagrant character, which ooze through the soil or diffuse or squander themselves over the surface, following no definite course. They are waters which, though customarily and naturally flowing in a known direction and course, have nevertheless no banks or channels in the soil, and include waters which are diffused over the surface of the ground . . . .

Lawton v. South Bound R.R., 61 S.C. 548, 552, 39 S.E. 752, 753 (1901). In determining whether a natural water course exists, the courts consider all of the factors present in each case. The above definitions are not all encompassing but are used as guides with primary attention focused upon the presence or absence of banks or a channel. As an example of the factors considered by the court, it has been held that the presence of catfish in a drainway in which water had accumulated did not conclusively prove that the ditch was a natural water course. Rivenbark v. Atlantic Coast Line R.R., 124 S.C. 136, 117 S.E. 206 (1923).

13. *See, e.g.*, Baltzeger v. Carolina Midland Ry., 54 S.C. 242, 32 S.E. 358 (1899); Edwards v. Charlotte & R.R., 39 S.C. 472, 18 S.E. 58 (1893). The court in Johnson v. Williams, 238 S.C. 623, 121 S.E.2d 223 (1961), gives a full discussion of the differences between surface waters and natural water courses and the resulting legal consequences. Also, the *Baltzeger* and *Johnson* decisions are discussed by Means, *Property*, 1961-1962 *Survey of South Carolina Law*, 15 S.C.L. REV. 168, 170, 173 (1962).

An even more fundamental classification involves the artificial water course as opposed to the natural water course. There is authority for the proposition that riparian rights do not attach to artificial water courses. *See* 2 WASHBURN, REAL PROPERTY § 194 (6th ed. 1902). For a discussion of the various ramifications of this concept see Evans, *Riparian Rights in Artificial Streams*, 16 MO. L. REV. 93 (1951).

14. It is not within the scope of this note to go into the various aspects of navigability. The above textual statement is presented to briefly illustrate the connection between navigability and riparian rights. However, brief statements concerning navigability are deceptive in their simplicity in that they give no insight into the multifarious problems which exists in the area of ownership of lands between the high and low water marks. *See* note 15 *infra*. There are extended discussions of the various facets of navigability in Logan & Williams, *Tidelands in South Carolina: A Study in the Law of Real Property*, 15 S.C.L. REV. 657 (1963), and Horlbeck, *Titles to Marshlands in South Carolina*, 14 S.C.L.Q. 288, 335 (1962).

tidal navigable water courses (navigable in the technical sense, waters subject to the ebb and flow of the tide) are the property of the State;[15] however, such property is subject to the rights of the Federal government[16] and riparian proprietors.[17] The beds of water courses navigable in the popular sense, but not

---

15. Woodbridge, *Rights of the States in Their Natural Resources Particularly as Applied to Water,* 5 S.C.L.Q. 130, 132 (1952). Although the beds of navigable streams are owned by the state, there is a dispute over whether state ownership extends to the high or low water mark. Dean Woodbridge cites State v. Pacific Guano Co., 22 S.C. 50 (1884), for the proposition that state ownership extends to the high water mark. Woodbridge, *supra* at 139. However, in that case the main question before the court was whether the riparian proprietor had any rights as such to the bed of a navigable tidal stream. The court said that the bed—"soil lying below low water mark"—was held by the state in trust for the public. Alhough the court discussed state ownership in relation to the high water mark, that question was not properly before the court. *See* State v. Pacific Guano Co., *supra* at 80-1. The subsequent decisions of Cape Romain Land & Improvement Co. v. Georgia-Carolina Canning Co., 148 S.C. 428, 146 S.E. 434 (1928), and Rice Hope Plantation v. South Carolina Pub. Serv. Authority, 216 S.C. 500, 59 S.E.2d 132 (1950), however, cast some doubt on the vitality of the *Pacific Guano* holding.

> In the *Rice Hope* case, in rejecting the contention that the state has not such a servitude as the United States has in the bed of a navigable stream, the court repeated the *Cape Romain dictum* that lands between high and low water mark are held in trust by the state; whereas beds of tidal navigable streams were clearly and properly defined in the *Pacific Guano* case as "the bottom proper" or "the soil lying below low water mark" so that the trust referred to should not and does not extend to lands between low and high water marks. The *Cape Romain dictum* was a fundamental departure from the *Pacific Guano* case.

Horlbeck, *supra* note 14, at 360; *accord,* Logan & Williams, *supra* note 14, at 666-67.

Another controversy arose over the ownership of marshlands adjacent to a navigable river. The plaintiff established his chain of title from a grant by King George II which made no reference to the low water mark. However, the state stipulated that the controverted marsh was within the area delineated in the grant, and therefore, rendered the question of ownership moot. Lane v. McEachern, 162 S.E.2d 174 (S.C. 1968).

16. Thus while the states own their navigable waters this ownership is subject to the commerce power, the war power, the proprietary property rights, the treaty making power, the general welfare power of the federal government, the doctrine of equitable apportionment where the stream is an interstate one, to any inter-state compacts that have been made as well as the rights of riparian owners.

Woodbridge, note 15 *supra,* at 138. *See* Trelease, *Federal Limitations on State Water Law,* 10 BUFFALO L. REV. 399 (1961); Baldwin, *The Impact of the Commerce Clause on the Riparian Rights Doctrine,* 16 U. FLA. L. REV. 370 (1963). For a concise discussion of a riparian owner's "personal property" rights in the water of a navigable stream versus the federal government's dominant servitude see 9 S.C.L.Q. 293 (1957).

17. Jones v. Seaboard Air Line Ry., 67 S.C. 181, 45 S.E. 188 (1903). The court said that "[e]very riparian owner has rights with respect to a navigable stream, in addition to his rights in common with the public to unobstructed navigation. One of these is the right to have a free access of the stream over his own lands and the undisturbed use of these lands." *Id.* at 193-94, 45 S.E. at 192.

tidal, are owned by the riparian proprietors under South Carolina law;[18] this is a minority position in the United States. Although there is still some doubt as to the ownership of the beds of navigable tidal waters, the ownership of the beds of non-navigable waters and navigable non-tidal waters lies in the adjoining properties.[19] If the non-navigable water course forms the boundary of a certain tract of land, the proprietor of that tract owns the bed to midstream.[20] If the proprietor owns the land on both sides of the non-navigable stream, he owns the entire stream bed in fee.[21]

Some courts have defined the status of a riparian proprietor with reference to the watershed of the stream, holding that land which is not within the confines of a stream's watershed is not riparian even though it is part of a larger tract that is contiguous to the stream.[22] South Carolina, however, has not so defined the riparian owner. Our court places the primary emphasis upon the property being contiguous to the water course and no consideration has yet been given to the watershed of the water course.

Yet another unanswered problem in South Carolina in this area involves the divisibility and severability of riparian lands and the attendant consequences. It would seem that with the emphasis placed upon contiguity, South Carolina would follow the generally accepted line of cases which hold that the incidents of riparian ownership are dissolved with the division or severance of the riparian lands—where the conveyed property is no longer adjacent to the water course.[23]

B. Extent of Right to Use of Water

General Considerations. The reasonable use doctrine was developed in *White v. Whitney Manufacturing Co.*[24] which qualified the *Omelvany* rule[25] as follows:

18. State v. Columbia, 27 S.C. 137, 3 S.E. 55 (1887).
19. Woodbridge, *supra* note 15, at 139.
20. *E.g.*, Cape Romain Land & Improvement Co. v. Georgia-Carolina Canning Co., 148 S.C. 428, 146 S.E. 434 (1928); Wheeler v. Wheeler, 111 S.C. 87, 96 S.E. 714 (1918).
21. [1954-55] S.C. ATT'Y GEN. ANNUAL REP. 218.
22. *See* Agnor, *Riparian Rights in the Southeastern States*, 5 S.C.L.Q. 141 (1952); *see, e.g.*, Gonzales v. Arbelbide, 155 Cal. App. 2d 721, 318 P.2d 746 (1957). In *Gonzales* the court said that the status of a riparian owner was contingent upon (1) land being contiguous to the water course, (2) land (smallest tract) being under one title in the chain of title which leads to the present owner and (3) land being within the watershed of the water course.
23. 93 C.J.S. *Waters* § 8 (1956).
24. 60 S.C. 254, 38 S.E. 456 (1901).
25. The court in *White* described the *Omelvany* definition as follows:

> The owner must so use and apply the water as to work no material injury or annoyance to his neighbor below, who has an equal right to the subsequent use of the same water. Streams of water are intended for the use and comfort of man; and it would be unreasonable and contrary to the universal sense of mankind to debar every riparian proprietor from the application of the water to domestic, agricultural and manufacturing purposes [such uses would be subject to the prescribed limitations in the *Omelvany* rule], and there will, no doubt, evidently be, in the exercise of a perfect right to the use of the water, some evaporation and decrease of it, and some variations in the weight and velocity of the current . . . and a right of action by the proprietor below, would not necessarily flow from such consequences, but would depend upon the nature and extent of the complaint or injury, and the manner of using the water.[26]

Moreover the court said that the right of redress depends upon whether the use of the water is reasonable in relation to the corresponding rights of the upper and lower riparian. The reasonableness of the use is the test to determine the extent of the right to use the water and the determination of reasonableness must be made in light of the total circumstances. Factors to be considered as attendant circumstances are the capacity of the

---

"This is the clear and settled general doctrine on the subject, and all the difficulty that arises consists in the application." 60 S.C. at 265, 38 S.E. at 460. Later in the opinion Chief Justice McIver said, "the quotation from the case of *Omelvany v. Jaggers* . . . is misleading, as it takes no notice of the limitation or qualification of the general rule . . . ." *Id.* at 270, 38 S.E. at 462.

26. *Id.* at 265-66, 38 S.E. at 460. Two theories concerning the right to use water have evolved from the riparian rights doctrine—the reasonable use theory discussed in the text and the natural flow theory.

> Generally speaking . . . under the natural flow theory, a riparian owner can take water for domestic purposes only, such as water for the family, livestock, and gardening, and he is entitled to have the water in the stream or lake upon which he borders kept at normal level.

Harris v. Brooks, 225 Ark. 436, 283 S.W.2d 129, 133 (1955). For a general comparison of the two theories see 4-A AMERICAN LAW OF PROPERTY §§ 28.56-.57 (A.J. Casner ed. 1954). By definition "[t]he natural flow theory is nonutilitarian and prevents full beneficial use of valuable water resources." *Id.* at § 28.56. The South Carolina Supreme Court discussed the natural flow theory in *White* saying that:

> Such a rule could not be the law so long as equality of right between the several proprietors was recognized, for it is manifest it would give to the lower proprietor superior advantages over the upper, and in many cases give him in effect a monopoly of the stream.

White v. Whitney Mfg. Co., 60 S.C. 254, 267, 38 S.E. 456, 461 (1901), *quoting from* Dumont v. Kellogg, 29 Mich. 420, 423 (1874).

waterway (size and volume), the adaptation of machinery to the waterway, the necessity of use and the general usage or custom of the locality.[27] Each of these questions turns upon its own particular factual situation and is to be determined by the trier of fact.[28]

Domestic Purposes. Apparently there are no South Carolina decisions in this area. The emphasis placed upon the use of water for domestic purposes is considerably less in a state that follows the reasonable use doctrine rather than the natural flow theory.[29]

Agricultural Purposes. It is generally felt that the diversion of water by a riparian owner is permissible if used for irrigation.[30] Since there are no cases in South Carolina dealing specifically with irrigation, the extent of a riparian's right to divert water for irrigation must be measured by its reasonableness. As previously stated, the question of reasonableness is a factual determination based upon the totality of the circumstances.[31]

The court in Jordan v. Lang[32] considered the right to divert water for irrigation but did so only within the confines of a prescriptive right. Later the right was briefly discussed in an attorney general's opinion concerning the appropriation of waters from the Edisto River for irrigation and the procedure for establishing an irrigation district.[33] The attorney general expressed his advice on the two questions presented as follows:

> (a) [T]he fundamental principle of the system of "riparian rights" is that each riparian proprietor has an equal right to make a reasonable use of waters of stream subject to equal right of other riparian proprietors likewise to make a reasonable use.

27. *See, e.g.,* United States v. 531.13 Acres of Land, 366 F.2d 915 (4th Cir. 1966); White v. Whitney Mfg. Co., 60 S.C. 254, 38 S.E. 456 (1901).

28. *E.g.,* McMahan v. Walhalla Light & Power Co., 102 S.C. 57, 86 S.E. 194 (1915); Griffin v. National Light & Thorium Co., 79 S.C. 351, 60 S.E. 702 (1908).

29. *See* note 26 *Supra.*

30. 30 AM. JUR. *Irrigation* § 9 (1940); 4-A AMERICAN LAW OF PROPERTY § 28.57 (A.J. Casner ed. 1954).

31. *See* Agnor, *Riparian Rights in the Southeastern States,* 5 S.C.L.Q. 141, 145 (1952).

32. 22 S.C. 159 (1885). In this case all of the water was withdrawn from a ditch to cultivate rice, and was never returned. The defendant had maintained this diversion for 30 years, and the court allowed him to continue his use on the theory that he had obtained a prescriptive right. The court said, "It seems to us that the easement to use water for the purpose of irrigation is somewhat analogous to that of backing water for mill privileges." *Id.* at 165.

33. [1945-46] S.C. ATT'Y GEN. ANNUAL REP. 172.

> (b) The General Assembly has not, so far, declared itself as to the procedure to be followed by those desiring to organize for the purpose of irrigation or to engage in irrigation as a private undertaking. I feel that it will take laws similar to those now in existence as to drainage districts to authorize and outline the procedure for organizing irrigation districts.[34]

The opinions of the attorney general and the court[35] are illustrative of the uncertainty inherent in the riparian system. The prospective riparian user is afforded no assurance that capital expenditures made to construct irrigation works will be protected. There is always the risk that a court will find his use unreasonable with respect to present or future riparian uses.[36]

Commercial Purposes. Most of the South Carolina cases in this area have involved questions of pollution. Generally these cases have said that manufacturers are entitled to reasonable use of riparian waters for industrial waste disposal. However, this statement is true only to the extent that the polluting use does not create a nuisance nor inflict substantial injury upon the lower riparians.[37]

> Owners of land on the banks of a stream are entitled to the reasonable use of the stream; that they can use the stream for their own purposes to a reasonable extent; that while it is true that a stream must not be polluted, still this does not mean that nothing can be

34. *Id.* at 172-73.

35. The courts should not be criticised in regard to their decisions in this area. Although they may not have handled the problem directly, they could not act otherwise in light of the existing legal framework. To reach a different result here would involve a change in policy which would properly be within the domain of the state legislature. *See* Murphy, *A Short Course on Water Law for the Eastern United States,* 1961 WASH. U.L.Q. 93, 110.

36. Agnor, *Riparian Rights in the Southeastern States,* 5 S.C.L.Q. 141, 146 (1952). Professor Agnor proposes two alternative courses of action for the proprietor who finds himself confronted with the problem presented in the text: (1) purchase easements from the lower riparians; (2) use the water, and litigate the matter. He says: "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." *Id.*

37. *See* United States v. 531.13 Acres of Land, 244 F. Supp. 895 (W.D.S.C. 1965), *rev'd on other grounds,* 366 F.2d 915 (4th Cir. 1966); Lowe v. Ottaray Mills, 93 S.C. 420, 77 S.E. 135 (1912); Griffin v. National Light & Thorium Co., 79 S.C. 351, 60 S.E. 702 (1907); White v. Whitney Mfg. Co., 60 S.C. 254, 38 S.E. 456 (1901); [1959-60] S.C. ATT'Y GEN. ANNUAL REP. 404. The reasonable use of the waters from a natural water course governs the liabilities of the user in that all riparian users, including industrial consumers, will incur liability if the use results in the pollution of the waters to the extent that lower riparian proprietors are injured.

> put in the stream; but that *nothing can be put therein that will deprive the landowners below to the reasonable use of the stream.*[38]

The unreasonable polluting of a stream has consistently been found to constitute a nuisance, and may be enjoined[39] where damages are inadequate.[40]

In addition to the common law protection of the individual,

---

38. United States v. 531.13 Acres of Land, 336 F.2d 915, 919 (4th Cir. 1966) (emphasis added), *quoting from* Duncan v. Union-Buffalo Mills Co., 110 S.C. 302, 306, 96 S.E. 522, 524 (1917). The court approved the above charge to the jury.

39. Williams v. Haile Gold Mining Co., 85 S.C. 1, 66 S.E. 117 (1910); Mason v. Appalache Mills, 81 S.C. 554, 62 S.E. 399 (1907); Threatt v. Brewer Mining Co., 49 S.C. 95, 26 S.E. 970 (1897) (injunction as matter of right). *Contra,* Note, *The Trend—To Balance the Injuries,* 4 S.C.L.Q. 540, 545 (1952) (injunction granted as a matter of grace). *See, e.g.,* Standard Warehouse Co. v. Atlantic Coast Line R.R., 222 S.C. 93, 71 S.E.2d 893 (1952). In Dill v. Dance Freight Lines, 247 S.C. 159, 146 S.E.2d 574 (1966), the court refused to overrule the *Williams* case, and quoted with approval the following statement in *Williams* dealing with the balance of convenience doctrine:

> Whatever may be the doctrine in other States, under the provisions of the Constitution of this State, that private property shall not be taken for private use without the consent of the owner, the Court could not have considered, in deciding whether to grant or refuse the injunction, the question raised by the defendant as to the balance of convenience, or of advantage or disadvantage to the plaintiff and defendant and the public at large, for the defendant's use of the stream.

Williams v. Haile Gold Mining Co., 85 S.C. 1, 7, 66 S.E. 117, 118 (1910), *quoted in* Dill v. Dance Freight Lines, 247 S.C. 159, 162, 146 S.E.2d 574, 575-76 (1966). These cases are discussed in *Property, 1966-1967 Survey of S.C. Law,* 19 S.C.L. REV. 95, 97 (1967). The South Carolina court's reluctance to balance conveniences is discussed in Note, *The Trend—To Balance the Injuries,* 4 S.C.L.Q. 540, 548 (1952).

There is still some confusion in this area, especially in light of the decision in Johnson v. Williams, 238 S.C. 623, 121 S.E.2d 223 (1961), which was not discussed in the *Dill* opinion. The *Johnson* court granted a mandatory injunction to remove an obstacle from a natural water course and did so under the balance of convenience doctrine. The court said that such an action was a matter of discretion. Also this case involved no public interest. For a discussion of whether public interests and convenience are prerequisites to balancing see Note, *The Trend—To Balance the Injuries,* 4 S.C.L.Q. 540, 545 (1952); *Property, 1966-1967 Survey of S.C. Law,* 19 S.C.L. REV. 95, 97 n. 17 (1967). The *Johnson* case is discussed briefly in Means, *Property, 1961-1962 Survey of S. C. Law,* 15 S.C.L. REV. 168, 173 (1962), and the wisdom of the decisions preceding *Johnson* is questioned at 174 n. 15.

See Maloney, *The Balance of Convenience Doctrine in the Southeastern States, Particularly as Applied to Water,* 5 S.C.L.Q. 159 (1952), in which the author points out the flexibility achieved by combining the reasonable use doctrine with the concept of balancing conveniences.

40. The injunctive relief sought to terminate the abusive and negligent operation of a waste disposal plant should extend only to the unlawful operation of the plant and not to the total operation. *See* Dill v. Dance Freight Lines, 247 S.E. 2d 574 (1966); Conestee Mills v. City of Greenville, 160 S.C. 10, 158 S.E. 113 (1931); Duncan v. Union-Buffalo Mills Co., 110 S.C. 302, 96 S.E. 522 (1918).

the public is protected by statute.[41] However, reasonableness of use is still the basic test. The Water and Air Pollution Act provides that:

> Causes of action resulting from the violation of the prohibitions contained in this chapter inure solely to and are for the benefit of the people of the State and it is not intended in any way to create new or enlarge existing common law or statutory rights for riparian owners or others . . . .[42]

In *United States v. 531.13 Acres of Land*[43] it was decided that:

> An upper riparian owner may discharge waste into a stream in South Carolina only so long as this does not interfere with a reasonable use being made of the stream by a lower riparian owner. The offensive use of the stream may be terminated either by an owner through common law remedies or the state through the Water Control Board. Neither amounts to a taking of property for which compensation must be paid.[44]

Obstructions, detentions and diversions, whether for commercial purposes or otherwise, are analyzed in the same manner as all other uses—the common law standard of reasonableness.[45] The legislature has also acted in this area but to a somewhat limited and specialized degree. The South Carolina Code imposes a duty upon landowners to clean out their streams at least twice a year and makes it a misdemeanor to obstruct the flow of a stream through improper maintenance or otherwise.[46] Regulations are also provided for the backing up or overflowing of

41. S.C. CODE ANN. §§ 70-101 to -139 (1962), *as amended*, § 70-101 *et seq.* (Supp. 1968).
42. S.C. CODE ANN. § 70-138 (1962). See Williams v. Pendleton, 244 S.C. 228, 136 S.E.2d 291 (1964) (judge's failure to charge the above code section constituted reversible error).
43. 366 F.2d 915 (4th Cir. 1966), *rev'g* 244 F. Supp. 895 (W.D.S.C. 1965).
44. 19 S.C.L. REV. 286 (1967).
45. *See, e.g.*, Hilton v. Duke Power Co., 254 F.2d 118 (4th Cir. 1958); Standard Warehouse Co. v. Atlantic Coast Line R.R., 222 S.C. 93, 71 S.E.2d 893 (1951) (diversion).
> There is no doubt of the right of a riparian 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.

Agnor, *Riparian Rights in the Southeastern States*, 5 S.C.L.Q. 141, 144-45 (1952).
46. S.C. CODE ANN. §§ 70-1 to -6 (1962), *as amended*, S.C. CODE ANN. §§ 70-5, -6 (Supp. 1968).

waters by the erection of dams.[47] Particular diversions by riparian owners have been authorized, but these diversions have been allowed only when they do not exceed eight per cent of the stream's flow; also, the diversions must not interfere with existing reasonable uses.[48] This legislation has been described as moderate when compared to strong and limited regulation of other states.[49]

III. CONCLUSION

If the state is to keep abreast of the water requirements of its rapidly increasing population and industrial complex, which way is it to turn? To answer this question it is necessary to ask three more: (1) Where are we now? (2) Where do we want to go? (3) How do we get there?

In 1954 the South Carolina legislature considered but did not pass, a proposal that the state adopt a system of prior appropriations in lieu of the existing riparian rights system.[50] Also, the doctrine of balance of convenience apparently has been rejected in this state even though "[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 . . . ."[51] Those statutes which have been passed in the areas of pollution, obstruction and diversion, although still subject to the common law riparian rights, are at least a step in the right direction toward effective water management. The present riparian rights system, however, results in considerable waste because of the system's inability to effectively use the state's water resources.

The state through its courts and legislature must decide in which direction to go.

> [S]ome of the over-all goals might be to adopt, modify, or continue such laws and other measures as will pro-

47. S.C. CODE ANN. §§ 18-5 to -8 (1962).
48. S.C. CODE ANN. §§ 70-471 to -491 (1962), *as amended,* S.C. CODE ANN. § 70-475.1 (Supp. 1968).
49. Heath, *Water Management Legislation in the Eastern States,* 2 LAND AND WATER L. REV. 99 (1967).
50. The proposed legislation is discussed in Ellis, *Some Current and Proposed Water-Rights Legislation in the Eastern States,* 41 IOWA L. REV. 237 (1956); Marquis, Freeman, & Heath, *The Movement for New Water Rights Law in the Tennessee Valley States,* 23 TENN. L. REV. 797 (1955). The proposed act is set out and explained in WATER POLICY COMMITTEE OF THE GENERAL ASSEMBLY OF SOUTH CAROLINA, A NEW WATER POLICY, REPORT OF THE WATER POLICY COMMITTEE SUBMITTED TO THE GENERAL ASSEMBLY OF SOUTH CAROLINA (1954).
51. Maloney, *The Balance of Convenience Doctrine in the Southeastern States, Particularly as Applied to Water,* 5 S.C.L.Q. 159, 171 (1952).

> mote the beneficial, efficient, and safe use, and conservation, of the available water supplies, and to help develop any additional water supplies that may be needed in different areas. A part of the problem in developing any new legislation would appear to involve questions as to how to provide sufficient certainty and security in water rights to encourage desired investment, while also providing a legally sound, practicable, and reasonably equitable system of water rights, and a system sufficiently flexible to keep abreast of changing conditions.[52]

If change is to be limited to modification of the rules that make up the riparian system as opposed to adopting a new system, then the opportunities for uniform and flexible changes are severely reduced. However, valid and effective choices are still open to South Carolina. The effectiveness of the choices must naturally depend upon the various needs—present and future—of the state's economy.

Two alternatives in particular may be of benefit to South Carolina, and both alternatives would draw upon the established riparian base. The first alternative involves an extension of the reasonable use doctrine[53] to permit a use, whether riparian or non-riparian, to be maintained so long as it does not contravene the reasonable use of others. Also under this proposal riparian rights would be devisable and transferable. This extension of the reasonable use doctrine would be consistent with the *White* formulation[54] of the rule and there is no South Carolina precedent to hinder it.[55] Moreover the new doctrine would greatly increase the utilization of water in that nonriparians could participate. Loosening the basic riparian standard would give the existing statutes a more flexible foundation since these statutes are subject to common law rights.

The second alternative would be to follow the path of states such as California and Washington where there has been a blending of the benefits of the appropriation system with the

---

52. Ellis, *supra* note 50, at 263.
53. Marquis, *supra* note 50, at 833.
54. Note 26, *supra*.
55. Note 23, *supra*. It should be noted that there is a relationship between the right of a riparian to sue a non-riparian user and the beginning of the running of the prescriptive period. In theory a non-riparian user can be enjoined by a riparian user without a showing of damages.

benefits of the riparian system.[56] Under the "California" system surplus water (water in excess of riparian needs) may be appropriated. Riparian rights are maintained in the base flowage.[57]

Under the existing application of South Carolina law, the use of water is spread so thinly among so many people that, generally speaking, no one can beneficially use it. Thus this valuable resource is allowed to flow into the sea where it is lost and will remain until an economical reclamation and distribution system can be developed.

EDWARD P. GUERARD, JR.

56. *See, e.g.*, Beuscher, *Appropriation Water Law Elements in Riparian Doctrine States*, 10 BUFFALO L. REV. 448 (1961); Busby, *American Water Rights Law: A Brief Synopsis of Its Origin and Some of Its Broad Trends with Special Reference to the Beneficial Use of Water Resources*, 5 S.C.L.Q. 106 (1952); Johnson, *Riparian and Public Rights to Lakes and Streams*, 35 WASH. L. REV. 580 (1960); Marquis, *supra* note 50; Trelease, *Coordination of Riparian and Appropriation Rights to the Use of Water*, 33 TEXAS L. REV. 24 (1954).

57. Marquis, *supra* note 50, at 834-35.