SOME PRINCIPLES OF WATER LAW IN THE SOUTHEAST*

By ROYAL G. SHANNONHOUSE**

INTRODUCTION

There is some uncertainty about the origin of the basic doctrines respecting the use of water by competing landowners, but it seems clear that decisions of the early American courts before and after the formation of the United States contributed significantly to the development of the law. This is, therefore, one area of the law in which the English are as indebted to us as we to them.

The whole subject of water rights law cannot be encompassed in a paper of this length. The present survey will be limited to some basic principles respecting the use of natural, nonnavigable watercourses on and below the surface of the earth and a glance at some judicial rules about diffuse surface waters, lakes and ponds.

Two basic principles may be simply stated at the outset:

The right to use water in its natural state is appurtenant to the ownership of land underlying the water or through which it flows. This is the fundamental principle of the "riparian rights doctrine"—the doctrine that is the essential point of beginning to an understanding of water rights law in the Southeast.

Riparian rights are commonly misunderstood as limited to the right of an owner of land bordering a watercourse to use and consume the water therein. More accurately, the term refers to the rights of a landowner in the banks, bed and waters of a watercourse or any other body of water in or on his land.

WATERCOURSES

A watercourse is a body of water flowing generally in a well-defined channel on or below the surface of the earth. The channel may sometimes be dry and the water may, at some point, spread over level ground without a definite shoreline before flowing again in a channel, without

*Adapted for publication from a paper prepared for and presented to the Southeastern Water Law Conference at the Georgia Center for Continuing Education in Athens on November 8, 1961.

**Assistant Professor of Law, Lumpkin Law School, University of Georgia. A.B., University of North Carolina, 1950; J.D., 1955. Member of the North Carolina Bar.

losing its identity as a watercourse.[1] The principles and rules discussed in this paper apply to subterranean streams as well as to those on the surface;[2] but, in the absence of proof that it follows a defined channel, subterranean water is presumed to be percolating or diffuse ground water.[3]

The title to land bounded by a watercourse includes the bed of the stream to the thread or center of the main channel, nothing to the contrary appearing in the landowner's instrument of title.[4] Accordingly, a conveyance of land bounded by a watercourse, in which the river or stream is referred to as one of the boundaries, carries title to the middle of the main channel of the watercourse, unless the grantor's title is otherwise limited or an express reservation to the contrary is stated in the deed of conveyance.[5]

A landowner's title to the middle of a stream bed, acquired under the operation of the foregoing rule, follows gradual changes in the course of the stream, whether this increases or decreases the amount of land owned. But if the watercourse suddenly takes a new channel, for whatever reason, the landowner's boundary remains the imaginary line which marks the former center thread of the stream.[6]

Rights in General

The Georgia court has stated that the "(t)itle to streams not navigable is in the owner of the land through which such streams run. . . ."[7] The Alabama court, somewhat more accurately, has held that *the bed* of a nonnavigable stream belongs to the owner of the land through which it runs.[8] In either case, *the State* has no title to the bed of a nonnavigable stream, unless it owns land upon or through which the stream runs.[9]

The interest of a landowner in the watercourses in or adjacent to his

1. Barber Pure Milk Co. v. Young, 38 Ala. App. 13, 81 So.2d 324 (1954); Libby, McNeil & Libby v. Roberts, 110 So.2d 82 (Fla. 1959); Pelham Phosphate Co. v. Daniels, 21 Ga. App. 547, 94 S.E. 846 (1918); Lawton v. South Bound R. Co., 61 S.C. 548, 39 S.E. 752 (1901).
2. Tampa Waterworks Co. v. Cline, 37 Fla. 586, 20 So. 780, 53 Am. S. Rep. 262 (1896), 33 L.R.A.376; Saddler v. Lee, 66 Ga. 45, 42 Am. Rep. 62 (1880).
3. Shahan v. Brown, 179 Ala. 425, 60 So. 891 (1913); Stoner v. Patten, 132 Ga. 178, 63 S.E. 897 (1909).
4. Cape Romain L. & I. Co. v. Ga.-C. C. Co., 148 S.C. 428, 146 S.E. 434 (1928). Ga. Code Ann. § 85-1302 (1955 Rev.).
5. State v. Ga. Ry. & P. Co., 141 Ga. 153, 80 S.E. 657 (1913); Wheeler v. Wheeler, 111 S.C. 87, 96 S.E. 714 (1918).
6. Ga. Code Ann. § 85-1302 (1955 Rev.).
7. Seaboard Air Line Ry. v. Sikes, 4 Ga. App. 7, 9, 60 S.E. 868, 869 (1908). In paragraph three of the syllabus, the court stated more accurately the nature of the landowner's interest, as follows: "The owner of land is entitled to the *free and exclusive enjoyment* of all water courses not navigable flowing over his land; . . ." (Emphasis added.)
8. Hood v. Murphy, 231 Ala. 408, 165 So. 219 (1936).
9. *Ibid.*

land, as distiguished from his interest in the bed and banks of such watercourse, is in the nature of a right of use, rather than an absolute title. But such right to use of water in watercourses arises out of the ownership of the land containing or adjacent to the watercourse[10] and is an incident thereof in the nature of an easement.[11] It is, moreover, a right of property of which the owner may not be deprived, even by the State, without compensation.[12] The Georgia legislature specifically has repudiated its power to ". . . compel or interfere with the owner of a nonnavigable stream, in its lawful use, for the benefit of those above or below him on the stream, except to restrain nuisances."[13]

The modern "riparian rights doctrine" may be referred to as the "natural flow subject to a reasonable use doctrine." It is summarized conveniently in a section of the Georgia Code[14] as follows:

> The owner of land through which nonnavigable watercourses may flow is entitled to have the water in such streams come to his land in its natural and usual flow, subject only to such detention or diminution as may be caused by a reasonable use of it by other riparian proprietors; and the diverting of the stream, wholly or in part, from the same, or the obstructing thereof so as to impede its course or cause it to overflow or injure his land, or any right appurtenant thereto, or the pollution thereof so as to lessen its value to him, shall be a trespass upon his property.

The right of every riparian owner to enjoy the natural flow of the watercourses which traverse his land, unimpaired in quality and undiminished in quantity except to the extent necessarily resulting from a reasonable use of such watercourses by other riparian owners, seems to be recognized by all of the states in the Southeast.[15]

The right to the natural flow of watercourses includes the right to have a stream flow away from one's land as well as the right to have it flow to one's land.[16] It also includes the right to have a stream flow unenhanced in volume as well as undiminished in volume.[17] The right to

10. Rome Ry. & Lt. Co. v. Loeb, 141 Ga. 202, 80 S.E. 785, Ann. Cas. 1915C 1023 (1914).
11. Ulbricht v. Eufaula Water Co., 86 Ala. 587, 6 So. 78, 11 Am. S. Rep. 72 (1889), 4 L.R.A. 572.
12. Drake v. Lady Ensley Coal, Iron & R. Co., 102 Ala. 501, 14 So. 749 (1894); Thiesen v. Gulf, F. & A. Ry. Co., 75 Fla. 28, 78 So. 491 (1918); Davis v. Cobb County, 61 Ga. App. 712, 7 S.E. 2d 324 (1940).
13. GA. CODE ANN. § 85-1305 (1955 Rev.).
14. *Id.* § 105-1407 (1956 Rev.).
15. Stein v. Burden, 29 Ala. 127, 65 Am. Dec. 394 (1856); Tampa Waterworks Co. v. Cline, 37 Fla. 586, 20 So. 780, 53 Am. S. Rep. 262 (1896), 33 L.R.A. 376; Davis v. Cobb County, 61 Ga. App. 712, 7 S.E.2d 324 (1940); White v. Whitney Mfg. Co., 60 S.C. 254, 38 S.E. 456 (1901).
16. Cole v. Bradford, 52 Ga. App. 854, 184 S.E. 901 (1936).
17. Fewell v. Catawba Power Co., 102 S.C. 452, 86 S.E. 947 (1915).

use the water in a reasonable manner is common to all riparian proprietors,[18] regardless of the sequence in which they acquired their riparian land or put the water to use.[19] But riparian rights may not be conveyed to non-riparian landowners, except by conveyance of riparian land.[20]

The rule that the use to which the water is put must be "reasonable" has led to some confusion and to difficulty in establishing clear criteria for making the determination without litigation. Ultimately, a jury must decide what is a reasonable use of a watercourse. In seeking the answer to this question, a jury may consider the surrounding circumstances,[21] such as whether a diversion or pollution of water is temporary or permanent and the extent of injury caused to other riparian owners. The rule requiring reasonable usage by riparian landowners has been stated as follows:

> Riparian proprietors have a common property right in the waters of the stream, and the necessities of the business of one cannot be the standard of the rights of another, but each is entitled to the reasonable use of the water with respect to the rights of others, and any unlawful interference by one with the enjoyment by another of such common property right gives a cause of action.[22]

Natural Obstructions

The natural flow doctrine requires each riparian owner to permit a watercourse to flow to his land and from his land, without altering the flow of the water so as to injure upper and lower riparian lands, subject to each riparian owner's right to make a reasonable use of the water. It logically follows that a riparian owner is not liable for damages resulting from natural obstructions, such as might be caused by dead limbs falling into the stream, naturally accumulating sand, leaves and other debris.[23] At least two courts have stated, however, that a riparian owner should permit entry upon his land for the purpose of removing such obstructions by other riparian owners interested in clearing the watercourse at their own expense.[24] The question of a riparian owner's liability to other riparian owners whose interests were affected adversely by such stream-clearing operations should be carefully con-

18. Elmore v. Ingalls, 245 Ala. 481, 17 So. 2d 674 (1944).
19. Hendrick v. Cook, 4 Ga. 241 (1848). *Semble,* Hendricks v. Johnson, 6 Port. 472 (Ala. 1838).
20. Hendrix v. Roberts Marble Co., 175 Ga. 389, 165 S.E. 223 (1932).
21. *Semble,* Price v. High Shoals Mfg. Co., 132 Ga. 246, 64 S.E. 87 (1909).
22. Roughton v. Thiele Kaolin Co., 209 Ga. 577, 578, 74 S.E.2d 844, 846 (1953).
23. Cole v. Bradford, 52 Ga. App. 854, 184 S.E. 901 (1936).
24. Cole v. Bradford, 52 Ga. App. 854, 184 S.E. 901 (1936) (dictum); Parrish v. Parrish, 21 Ga. App. 275, 94 S.E. 315 (1917).

sidered before any owner follows this advice. A riparian owner may be liable for removing natural obstructions, if such action results in injury to other riparian owners, as by depriving an upper owner of the accustomed volume or by flooding lower lands with the additional flow thereby released.[25]

Artificial Obstructions

The riparian rights doctrine prohibits a landowner from either obstructing or enhancing the natural flow of watercourses adjacent to his land so as to injure other riparian landowners. Every such landowner has a right to make a reasonable use of the watercourse, however, limited by the necessity for respecting the equal rights of other riparian owners. The construction of an obstruction which serves no useful purpose or of a useful obstruction which unreasonably imposes upon the rights of other riparian owners may be restrained by an injunction.[26] One who creates such an obstruction is also liable in damages for any injury caused thereby,[27] or for injury caused by negligent construction thereof.[28] Blocking a spring so as to stop the flow of a stream is as much an obstruction of the stream, for purposes of liability, as is an artificial obstruction placed in the bed of the watercourse.[29]

The liability of one who obstructs a watercourse is not dependent upon negligent conduct, nor upon substantial actual damages, but upon the unauthorized infringement of the rights of other riparian landowners.[30] One who places a structure in, upon or across a watercourse so as to obstruct the flow of the water only in times of unusual volume may yet be liable for any damages caused thereby, if the unusual condition was reasonably foreseeable.[31]

One who acquires riparian land, without notice of an unauthorized obstruction in the watercourse, is not liable for damages caused by such obstruction unless he performs some affirmative act with respect to the obstruction or knowingly maintains it after notice that its existence infringes the rights of other riparian owners.[32] The question of the rea-

25. Grant v. Kuglar, 81 Ga. 637, 8 S.E. 878, 12 Am. S. Rep. 348 (1889), 3 L.R.A. 606.
26. Roughton v. Thiele Kaolin Co., 209 Ga. 577, 74 S.E. 2d 844, 846 (1953).
27. Barber Pure Milk Co. v. Young, 263 Ala. 100, 81 So. 2d 328 (1955); Roughton v. Thiele Kaolin Co., 209 Ga. 577, 578, 74 S.E. 2d 844, 846 (1953); Hand v. Catawba Power Co., 90 S.C. 267, 73 S.E. 187 (1911). Ga. Code Ann. § 105-1407 (1956 Rev.).
28. American Agr. Chem. Co. v. Cobb, 153 Fla. 538, 15 So. 2d 188 (1943).
29. Davis v. Cobb County, 120 Ala. 501, 14 So. 749 (1894).
30. Mobile & O. R. Co. v. Red Feather Coal Co., 218 Ala. 582, 119 So. 606 (1928); Johnson v. Williams, 238 S.C. 623, 121 S.E. 2d 223 (1961).
31. Davis v. Ivey, 93 Fla. 387, 112 So. 264 (1927); Hunter v. Pelham Mills, 52 S.C. 279, 29 S.E. 727 (1898).
32. Shores v. Southern Ry. Co., 72 S.C. 244, 51 S.E. 699 (1905).

sonableness of the obstruction and whether an injury resulting therefrom was the result of the defendant's act are questions for a jury to answer.[33] Consequently, there is no way to determine with certainty in advance of litigation whether or not a contemplated use of a watercourse by means of a structure in, on or across the same will be, in law, a reasonable one. A survey of many judicial decisions in which this question was decided indicates that, generally, if (1) an obstruction is created for a reasonable and beneficial purpose, (2) it is used to detain water only for a period of time necessary to accomplish that purpose, (3) the water detained is returned to its original channel before it reaches the next lower riparian land and (4) the injury to other riparian landowners is small in relation to the benefit of the use to the obstructor, then no liability will be imposed upon him.[34]

The right to use a watercourse in a particular way which imposes upon the riparian rights of upper and lower landowners may be acquired by the express consent of such upper and lower owners, or by their failure to object for a number of years prescribed by statutes in each state, or by the exercise of the power of eminent domain.[35] One who exceeds the privilege of using or obstructing a watercourse acquired in such a manner is liable in damages to the extent that injuries to other riparian owners result from *exceeding* the privilege to which he was entitled.[36]

Dams are only a particular class of "artificial obstruction", as to which there are some special regulations in addition to the general principles discussed above. The construction and maintenance of dams is regulated by statute in some states,[37] but no statute has been found which exempts dam owners from liability for injury to other riparian landowners caused thereby. Such a statute has been held not to authorize the creation of a nuisance.[38]

A conveyance of a dam includes the easement of flowage, in the absence of a reservation of this right.[39] One who acquires property subject to such an easement with notice of its existence takes the property subject thereto. He is neither entitled to damages for injury caused thereby

33. Barber Pure Milk Co. v. Young, 263 Ala. 100, 81 So. 2d 328 (1955); Western & A. R. R. v. Hassler, 92 Ga. App. 278, 88 S.E. 2d 559 (1955); Standard Warehouse Co. v. Atlantic Coast Line R. Co., 222 S.C. 93, 71 S.E. 2d 893 (1952).
34. *E.g.*, Pool & Lufburrow v. Lewis, 41 Ga. 162 (1870).
35. Bobo v. Young, 258 Ala. 222, 61 So. 2d 814 (1952); Anneburg v. Kurtz, 197 Ga. 188, 28 S.E.2d 769 (1944), 152 A.L.R. 338; Reid v. Courtenay Mfg. Co., 68 S.C. 466, 47 S.E. 718 (1904).
36. Thomas v. Greenville-Carolina Power Co., 105 S.C. 268, 89 S.E. 552 (1916).
37. *E.g.*, FLA. STAT. ANN. § 347.01 (1958); GA. CODE ANN. §§ 85-1306 (1955 Rev.) and 5-409 (Supp. 1958).
38. Ga. Power Co. v. Moore, 47 Ga. App. 411, 170 S.E. 520 (1933).
39. Lewis v. Bowen, 209 Ga. 717, 75 S.E. 2d 422 (1953).

nor to an injunction to have the dam removed.[40] If the right to maintain a dam is acquired by prescription,[41] the rights of the dam owner and the obligations to him of other riparian landowners are limited to the extent of the privilege of flowage and detention acquired by prescription. Any substantial alteration in the manner of maintaining the dam or in its capacity may subject the dam owner to liability.[42] But if the right to maintain the dam is acquired by other means, such as by grant, the right may be measured by the capacity of the dam, regardless of the period of time during which it is used at less than its capacity.[43]

Diffuse Surface Water

Diffuse surface water is that which stands or flows on the surface of the earth but which is not tidewater or a lake, pond or watercourse. If flowing, it has no definable channel; if standing, it either has no definable boundaries or is impermanent or both. The source of diffuse surface water may be rain, melting snow, a spring or "seep", a watercourse or any combination of these.[44] Diffuse surface water is distinguished from a temporary flood which will recede into the channel from which it overflowed and from water which flows over the land for a definite distance between two well-defined channels. Such flood waters are considered to be part of the watercourses from which they sprang and to which they must return.[45]

Rights in General

The basic legal doctrines which prescribe a landowner's rights and duties with respect to the control of diffuse surface water are known as the Common Law or "common enemy" doctrine, which is followed in South Carolina,[46] and the Civil or Roman Law doctrine, which prevails in Georgia,[47] Alabama[48] and probably, Florida; although the point apparently has not been settled in the latter state.[49]

40. Phillips v. Rogers, 153 Ga. 472, 112 S.E. 369 (1922).
41. *I.e.*, by the open, continuous, exclusive use of the dam under a claim of the right to do so for a period of years prescribed by law in each state.
42. Ga. Power Co. v. Moore, 47 Ga. App. 411, 170 S.E. 520 (1933); Ellington v. Bennett, 59 Ga. 286 (1877).
43. Maguire v. Baker, 57 Ga. 109 (1876); Baker v. Maguire, 53 Ga. 245 (1874).
44. Barber Pure Milk Co. v. Young, 263 Ala. 100, 81 So. 2d 328 (1955); Libby, McNeil & Libby v. Roberts, 38 Ala. App. 13, 81 So. 2d 324 (1954); Aetna Ins. Co. v. Walker, 98 Ga. App. 456, 105 S.E. 2d 917 (1958).
45. See note 1, *supra*.
46. Lawton v. South Bound R. Co., 61 S.C. 548, 39 S.E. 752 (1901); Edwards v. Charlotte, C. & A. R. Co., 39 S.C. 472, 18 S.E. 58 (1893).
47. Mayor of Albany v. Sikes, 94 Ga. 30, 20 S.E. 257 (1894).
48. Vinson v. Turner, 252 Ala. 271, 40 So.2d 863 (1949).
49. *Semble*, Willis v. Phillips, 147 Fla. 368, 2 So. 2d 732 (1941); Dade County v. South Dade Farms, Inc., 133 Fla. 288, 182 So. 858 (1938).

The Common Law rule treats diffuse surface water as the "common enemy" of every landowner and permits everyone to protect himself from such water as he sees fit. This rule imposes liability only for creating a nuisance or injuring another's land by unreasonable or negligent conduct in controlling the flow of water.[50]

The Civil Law rule imposes a right and a duty upon every landowner to receive water naturally flowing onto his land from that of his neighbor.[51] But no landowner has the right to increase the volume or velocity of flow of surface water from his property to the injury of lower land[52] or to cause the water to become polluted.[53] The limitation of the Civil Law doctrine has been stated as follows:

> . . . one landed proprietor has no right to concentrate and collect it [surface water], and thus cause it to be discharged upon the land of a lower proprietor in greater quantities at a particular locality, or in a manner different from that in which the water would be received by the lower estate if it simply ran down upon it from the upper by the law of gravitation.[54]

Practically all of the litigation involving surface water arose with respect to rights and duties of landowners who wished to control the flow of such water. The question of proprietary rights remains unsettled, although the usual broad statement is that a landowner has a right to collect and use diffuse surface water by virtue of his ownership of the land on which it lies or over which it flows.[55] The courts of the Civil Law jurisdictions would probably limit a landowner's right to detain and use surface water which would otherwise flow onto his neighbor's land by holding that such detention must be for a legitimate and "reasonable" domestic use which does not result in a substantial injury to the lower landowner.[56] The courts of South Carolina and other jurisdictions recognize a less restricted right of a landowner to detain and use surface water because that rule embraces no duty to permit the natural flow of such water.[57]

The limitation imposed upon the right to divert or obstruct the flow of surface water is also more severe in the Civil Law jurisdictions than it is in the Common Law states. For example, a landowner in Georgia

50. Mayor of Albany v. Sikes, 94 Ga. 30, 20 S.E. 257 (1894).
51. Mallard v. Pye, 215 Ga. 645, 112 S.E.2d 620 (1960).
52. See note 48, *supra;* Dade County v. South Dade Farms, Inc., 133 Fla. 288, 182 So. 858 (1938).
53. Rinzler v. Folsom, 209 Ga. 549, 74 S.E.2d 661 (1953).
54. Mayor of Albany v. Sikes, 94 Ga. 30, 20 S.E. 257 (1894).
55. See 56 AM. JUR. *Waters* § 66 (1947).
56. See Goodyear Tire & Rubber Co. v. Gadsden Sand & Gravel Co., 248 Ala. 273, 27 So.2d 578 (1946); Rinzler v. Folsom, 209 Ga. 549, 74 S.E.2d 661 (1953).
57. See note 46, *supra.*

may not divert the natural flow of water onto adjoining land or obstruct it so that it backs onto land which, in either case, is not the natural route of the water's flowage.[58] It makes no difference whether such diversion is caused by artificial devices[59] or by changing the grade or elevation of the land.[60] But this rule almost undoubtedly does not apply to water whose flow has been artificially enhanced in volume or velocity or which has been polluted. A landowner should be allowed to protect himself from such waters by any reasonable method which does not impose the burden upon an innocent party who did not cause the enhancement or pollution.[61] In South Carolina, on the other hand, these qualifications apparently do not exist, and a landowner may protect himself from the natural flow of unpolluted surface water by obstructing or diverting it whenever he desires to do so.[62] Even in South Carolina, however, as in the Civil Law jurisdictions, a governmental agency must pay a reasonable compensation to the owner of private property damaged or destroyed by the agency's diversion or obstruction of the flow of surface water.[63]

Both the Common Law rule and the Civil Law doctrine deny the right of a landowner to pollute surface water so as to create a nuisance upon his own or another's land.[64] An example of conduct incurring liability is that of the landowner who deposits offensive waste upon his own property, whence it is washed by surface water onto the land of another. One court stated the limit of liability in this respect in the following terms: "Impurities, which are naturally added to surface water, in the processes of husbandry, or in its reasonable domestic use, while being discharged from the owner's premises, would not operate to make a trespass or nuisance against an adjoining owner."[65] The distinction between "impurities" resulting from "reasonable domestic use" and pollution sufficient to support a civil action for relief has not always been sharply drawn by the courts.

Rights of Urban Landowners

Georgia, South Carolina and Florida apparently apply their rules consistently with respect to surface water control in rural and in urban

58. Farkas v. Towns, 103 Ga. 150, 29 S.E. 700, 68 Am.S.Rep. 88 (1897).
59. Morris v. Cummings, 216 Ga. 426, 116 S.E.2d 592 (1960).
60. Farkas v. Towns, 103 Ga. 150, 29 S.E. 700, 68 Am.S.Rep. 88 (1897).
61. See City of Mobile v. Lartigue, 23 Ala. App. 479, 127 So. 257 (1930).
62. Edwards v. Charlotte, C. & A. R. Co., 39 S.C. 427, 18 S.E. 58 (1893).
63. Mayor of Albany v. Sikes, 94 Ga. 30, 20 S.E. 257 (1894); Milhous v. State Highway Dept., 194 S.C. 33, 8 S.E.2d 852 (1940).
64. Holmes v. City of Atlanta, 113 Ga. 961, 39 S.E. 458 (1901); Deason v. Southern Ry. Co., 142 S.C. 328, 140 S.E. 575 (1927).
65. Exley v. Southern Cotton Oil Co., 151 F. 101, 104 (C.C.S.D. Ga. 1907).

areas. Georgia follows its Civil Law rule, which is generally and frequently stated with respect to urban property, as follows: "Where two city lots adjoin, the lower lot owes a servitude to the higher, so far as to receive the water which naturally runs from it, provided the owner of the latter has done no act to increase such flow by artificial means."[66]

South Carolina apparently follows its Common Law rule without modification, allowing every city lot owner to defend his property from the "common enemy" of naturally flowing surface water as best he can, regardless of resultant injury to adjacent property owners.[67] In Florida this point has not been settled; however, Florida will probably follow the Civil Law rule as to urban property, although at least one Florida court has applied the Common Law rule to land in the muckland area of the state.[68] Alabama recognizes a distinction in the law of water control between urban and rural property, holding that the Civil Law rule is inappropriate in cities and allowing a city lot owner to improve his property as he pleases, even if such improvements interfere with the natural flow of surface water to the detriment of adjoining property.[69]

Lakes and Ponds

A lake is an essentially permanent body of standing water enclosed by land.[70] A pond is a small lake. In Georgia, a "private pond" has been legislatively defined as "a body of water being wholly on or within the lands of one title, where the fish cannot go up stream or down stream or to the lands of another."[71] A lake or pond may occur naturally or by the industry of man in damming or diverting a watercourse or flowing surface water.[72] Only nonnavigable lakes and ponds are considered in this paper.

The beds of nonnavigable lakes and ponds are subject to private ownership[73] and the usual Common Law rule is that land bordered by a nonnavigable lake carries title to the center of the water ratably with all other littoral owners.[74] This rule apparently has not been established by judicial decision in South Carolina or Alabama, however. Georgia and Florida courts seem to have adopted the rule that title to land de-

66. Goldsmith v. Elsas, May & Co., 53 Ga. 187 (1874).
67. Edwards v. Charlotte, C. & A. R. Co., 39 S.C. 472, 18 S.E. 58 (1893).
68. Babcock v. Red Cattle Co., 6 Fla. Supp. 113 (1953).
69. Shahan v. Brown, 179 Ala. 425, 60 So. 891 (1913); Hall v. Rising, 141 Ala. 431, 37 So. 586 (1904).
70. Libby, McNeil & Libby v. Roberts, 110 So.2d 82 (Fla. 1959).
71. Ga. Code Ann. § 45-102(e) (Supp. 1961).
72. Libby, McNeil & Libby v. Roberts, 110 So.2d 82 (Fla. 1959).
73. Osceola County v. Triple E Development Co., 90 So.2d 600 (Fla. 1956). Fla. Stat. Ann. § 271.09(2) (Supp. 1961); Ga. Code Ann. § 45-102(e) (Supp. 1961).
74. 56 Am. Jur. *Waters* § 51 (1947).

scribed as bordered by a nonnavigable lake extends only to the normal low water mark at the date of execution of the deed, in the absence of a specific provision to the contrary in the instrument of conveyance.[75]

Gradual, natural additions to the bank of a lake or pond are generally recognized as belonging to the owner of the land increased by such accretion or reliction.[76]

The owner of the bed of a private pond has the exclusive right to use the water overlying his land and to exclude therefrom all others, including other littoral owners.[77] But the owner of a portion of the bed of a nonnavigable lake is entitled to a reasonable use of all of the water of the lake, as long as he does not unreasonably interfere with the similar rights of other littoral owners.[78] This right of reasonable use is not limited to the owner himself, but may be enjoyed by his guests. It has not been decided how far the interpretation of "guests" will be extended, but it seems probable that it will be carried on the back of "reasonableness" so far as to permit a littoral owner to admit the members of a private club and, perhaps, even the public, for a fee, as long as such use does not "unreasonably" interfere with the rights of other littoral owners.[79] Obviously, such a rule leads to uncertainty and litigation, for only a jury can determine what is "reasonable" under all of the circumstances of any case.

The right of reasonable use of lake or pond water may be non-consumptive (*e.g.*, boating, swimming, fishing) or consumptive (*e.g.*, stock-watering, irrigating), but every littoral owner is entitled to have the water remain substantially at its natural level.[80] The rights of a consumptive user of water are no greater than those of a recreational or non-consumptive user. An owner, therefore, may construct a drain to protect his property from unusually high water and may restrain another owner from withdrawing so much water as to increase the area of frontage upon the water.[81] A Florida statute requires the written consent of all littoral owners on lakes of more than two square miles in area as a prerequisite to any withdrawal which would lower the level of such lakes.[82]

Conclusion

This cursory review of some of the principles of water rights law in

75. *Semble,* Osceola County v. Triple E Development Co., 90 So.2d 600 (Fla. 1956); Boardman v. Scott, 102 Ga. 404, 30 S.E. 982 (1897).
76. *E.g.,* Feig v. Graves, 100 So.2d 192 (Fla. 1958).
77. 93 C.J.S. *Waters* § 105 (1956).
78. Duval v. Thomas, 114 So. 2d 791 (Fla. 1959).
79. Florio v. State ex rel. Epperson, 119 So.2d 305 (Fla. 1960).
80. Taylor v. Tampa Coal Co., 46 So.2d 392 (Fla. 1950).
81. Tilden v. Smith, 94 Fla. 502, 113 So. 708 (1927).
82. Fla. Stat. Ann. § 298.74 (1943).

the Southeast was prepared for presentation at the Southeastern Water Law Conference in Athens, Georgia, in November, 1961. It was intended to serve as a background against which the discussions of water rights legislation, water pollution control programs, and the other program topics would be focused, thereby identifying needed legislation and problems obstructing the development of sound water-control policies.

A leading national authority on water rights law said in 1955 that

> The courts of various eastern states have rendered decisions respecting riparian rights, but on the whole the development in this region of principles that govern rights to the use of water under the riparian doctrine has been meager. The fact that something else is needed to achieve best utilization of water supplies is indicated by the rather widespread interest currently shown in trying to work out forms of suitable legislation.[83]

The paucity of clearly defined guideposts in the decided cases has, perhaps, been imperfectly demonstrated in this paper. It is hoped that it will serve to stimulate further research and discussion in this increasingly important area of economic and social life in the southeast.

---

83. Hutchins, *The Development and Present Status of Water Rights and Water Policy in the United States,* 37 J. FARM ECON. 866, 869 (1955).