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Some Suggestions Concerning the California Law of Riparian Rights*

IN THE development of the law of water rights, the Supreme Court of California has a record of constructive juridical accomplishment unexcelled by that of any other court in the United States. It is a long honorable record, including many controversies with important interests and eminent counsel arrayed on each side, and many determinations which precedents had not made obvious and which required a measure of judicial statesmanship. A reference only to three of these cases, *Lux v. Haggin*,¹ *Katz v. Walkinshaw*,² and *Antioch v. Williams Irrig. Dist.*,³ will suffice to illustrate and emphasize this statement. In the course of solution of problems of riparian rights, of appropriation and of underground waters, the court has not only evolved a coherent system for California, but has produced precedents that have had great influence on the law of other states.

Neither perfection nor permanence is attainable in social institutions, and therefore it is not surprising, even in view of the great labor, logical thought, and ingenuity spent in developing the water law of California, that it now is under bitter attack at many points. If there were no other reason for adverse criticism, the great changes in social and economic conditions in the state since the turn of the century would have brought a demand for a corresponding change in the law. As the state has increased in population and industry the uses of the water resources have increased until there has arisen a pressing need for measures of economy and coördinated adjustment of uses. Likewise there has been a shifting of the relative importance to the state of various sorts of competing demands on some of the sources of supply. Consequently we have in near prospect the adoption of a scheme or schemes for works designed to permit more efficient use of some of our streams and to serve at once meritorious competing claims. The hope

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¹ (1884) 69 Cal. 255, 4 Pac. 919.

² (1903) 141 Cal. 138, 70 Pac. 663.

³ (1922) 188 Cal. 451, 205 Pac. 688.

of engineers—a comprehensive, scientific plan of development and conservation, with an adjustment of uses in some order of economic merit unhampered by technical vested rights of little public advantage—is still a pious hope only; but at least a beginning of the passage from the chaos of casual individual initiative and insistent competing claims will soon be made. In this period of dissatisfaction and of discussion of projects, some comment on certain undesirable uses of our present water law and some suggestions of remedies may be of interest.

Elementary knowledge of the common law of riparian rights is part of the professional equipment of all well-trained lawyers. It is generally known also that riparian rights are recognized by the law of California and that it supports another large and even more important class of water rights called appropriation rights. In the opinion of most engineers the system of appropriation of water is better adapted to satisfy the needs of the people of our western states than is the riparian right system. Indeed they believe that the California courts have caused much economic loss and much confusion in the law by adopting the system of riparian rights, instead of discarding it as the courts of Colorado, Nevada, Utah, Wyoming, Montana, Idaho, New Mexico and Arizona have done. However, there are strong advocates of riparian rights, among whom may be mentioned for his zeal, Mr. Samuel C. Wiel, author of the well known text book *Water Rights in the Western States*. It does not lie within the purposes of this article to enter the debate over this point of legal history. The article takes the water law as it finds it, with the riparian system established beyond controversy, and will attempt to show some detrimental effects of the system upon development of the uses of our streams and to suggest how, to some degree, these effects may be avoided.

It will aid my purpose to direct attention to the salient differences between a riparian right and an appropriation right. Independently of legislation an appropriation right is initiated by an expression of intention to put water from a certain source of supply to a definite use. The use must be made within a reasonable time, or the priority of the right will not date from the initiation of the project, but only from use of the water. The right does not depend on possession of land. It is a right to use for the appropriation purpose at any place, near the stream or far from it; diversions or uses of the stream which do not actually interfere with a prior appropriation use will not violate the prior appropriation right.⁴

⁴ *Basey v. Gallagher* (1875) 20 Wall. (87 U. S.) 670; *Maeris v. Bicknell* (1857) 7 Cal. 262; *White v. Todd's Valley Water Co.* (1857) 8 Cal. 443; *The Bear River & Auburn Water & Mining Co. v. Boles* (1864) 24 Cal. 359; *Smith v. O'Hara* (1872) 43 Cal. 371; *Seaward v. Pacific Live Stock Co.* (1907) 49 Ore. 157, 88 Pac. 963.

In all these respects a riparian right differs from an appropriation right. The title to a riparian right does not require use of the water or intention to use, but is dependent simply on the possession of riparian land—that is, land in contact with the stream or other source of supply. Independently of prescription or other special acquisition, an upper or lower diverter or user obtains no priority over a riparian because of priority of use.⁵ This is a defect in our water law in the opinion of most irrigation engineers, since it denies to an early developer of an irrigation project protection against a much later riparian use.⁶ The law of prescription mitigates this hardship for prior upstream diverters, and the period of prescription in California is short—five years—but prior diverters downstream generally cannot gain a prescriptive title against an upper riparian, since their use will not be adverse—*i.e.*, wrongful—as against the upper riparian, and prescription in California law is founded on adverse use.⁷ However, a riparian right pertains only to uses on riparian land. Uses elsewhere than on the particular riparian land, to which the right throughout its duration is inseparably attached, cannot be protected or justified under it.⁸ This is a point of considerable weight in appraising the value of a riparian right in eminent domain proceedings or in computing damages for violation of such a right. It has importance also in other phases of controversies between riparian and non-riparian users.

In estimating the effect of California water law upon the use of streams it is convenient to start with the premise that, except insofar as their natural rights have been postponed or extinguished by prescription, condemnation, release, reservation, contract, or other specific adverse titular fact, the riparian possessors have the first priorities of private use of these water resources. But it is also important for the purposes of this article to emphasize the limitations of these prior riparian rights. The natural rights of the riparians extend to as much of the flow of the stream as can be beneficially used on the riparian lands, but no further. This limitation is implicit in any sensible ap-

⁵ *Pabst v. Finmand* (1922) 190 Cal. 124, 211 Pac. 11; *Mason v. Hill* (1832) 3 Barn. & Adol. 304.

⁶ *Reno Smelting, Milling & Reduction Works v. Stevenson* (1889) 20 Nev. 269, 21 Pac. 317; Grunsky, *The Riparian Doctrine in California* (1930) 4 CALIF. STATE BAR J. Nos. 8, 9, pp. 178, 204.

⁷ *Hargrave v. Cook* (1895) 108 Cal. 72, 41 Pac. 18; *Pabst v. Finmand*, *supra* note 5; *Oliver v. Robnett* (1922) 190 Cal. 51, 210 Pac. 408; *Scott v. Fruit Growers' Supply Co.* (1927) 202 Cal. 47, 258 Pac. 1095.

⁸ *Heinlen v. Fresno Canal & Irrig. Co.* (1885) 68 Cal. 35, 8 Pac. 513; *Gould v. Stafford* (1888) 77 Cal. 66, 18 Pac. 879; *Bathgate v. Irvine* (1899) 126 Cal. 135, 58 Pac. 442, 77 Am. St. Rep. 158; *Duckworth v. Watsonville Water & Light Co.* (1907) 150 Cal. 520, 89 Pac. 338; *Stockport Water-Works Co. v. Potter* (1864) 3 H. & C. 300.

prehension of the riparian doctrine and I believe is well established by California decisions, but it has not always been clearly perceived and there are many loose statements in judicial opinions and in text books which may seem opposed to it. One of the chief objectives of this article is to demonstrate the validity of the limitation and its value for obviating some of the uneconomic riparian opposition to development of uses of the water resources of the state.

One of the most frequent expressions concerning riparian rights is that the riparian is entitled to the flow of the water by his land as it was wont to flow without material (sometimes the word "sensible" or "perceptible" is used) diminution or alteration. "*Aqua currit et debet currere ut currere solebat*" is the Latin maxim which is quoted to add the dignity of antique learning to this dogma. There is truth behind the dogma of course, else it would not be so often repeated, but it expresses only a fragment or phase of that truth. It is not a definition of the riparian right, but a preliminary observation on it which needs much elaboration and qualification before a correct statement of the law will be completed. A riparian is entitled to the stream as it was wont to flow but his right so casually indicated is subject to various limitations, qualifications, and exceptions of which this dogma gives no hint. Nevertheless we find it repeated even in the opinions of cases between two riparians and sometimes given the credit of being an accurate expression of the law of England and the Eastern states.⁹ Yet the law of the Eastern states and England does not differ in general on this point from the law of California, and it is as easy to find cases in those jurisdictions as in California where one riparian is permitted to alter materially the flow of a stream for riparian use as against another riparian without liability.¹⁰ Indeed the riparian doctrine does not concede to the lowest riparian a fuller right of use against the upper riparian than the upper riparian may claim against him, as seems to be implied in the dogma. The rights of riparians *inter se* are correlative and entitle them to proportional shares in the uses of the stream. The upper possessor's use may thus quite materially diminish the flow of the stream and yet he will have a valid defense against the lower riparian if he can establish that his use is no more than his proper share.¹¹

⁹ McFarland, J., in *Harris v. Harrison* (1892) 93 Cal. 676, 29 Pac. 325; Lord Tenterden, C. J., in *Mason v. Hill*, *supra* note 5; *Roberts v. Gwyrfaei Dist. Council* [1899] 1 Ch. 583.

¹⁰ *Wiggins v. Muscupiabe Land & Water Co.* (1896) 113 Cal. 182, 45 Pac. 160, 32 L. R. A. 667; *Weston v. Alden* (1811) 8 Mass. 135; *Pitts v. The Lancaster Mills* (Mass. 1847) 13 Metc. 156; *Dumont v. Kellogg* (1874) 29 Mich. 420; *Hayes v. Waldron* (1863) 44 N. H. 580, 84 Am. Dec. 105; *Bullard v. The Saratoga Victory Co.* (1879) 77 N. Y. 525.

¹¹ *Ibid.*

Furthermore, insofar as one of the riparian possessors is not using or benefiting from the stream to the maximum permitted him under his correlative right, the uses of the other riparians on their riparian lands may be extended without liability.¹² These well-established points should suffice to dissipate entirely the hasty apprehension that a riparian, regardless of present use on or benefit to his riparian land or possibility of such use or benefit in the future, is entitled to have the stream flow as it was wont to flow. This is not, and never has been, the law of England or of any American state, as far as I know. In support of an opinion contrary to mine can be cited only such loose, general statements as I have indicated above; against a contrary opinion there are numerous well decided cases from many jurisdictions.¹³

If there were a general definite realization and acknowledgment that at common law the principle of beneficial use applies to all water rights and therefore to riparian rights as well as appropriation rights, the lawyer's, the judge's, and the legislator's task of determining and developing the water law of the state would be much simplified. It is true that commonly riparian possessors have prior rights in the streams of the state, but these rights are only rights of use on or for the benefit of the riparian lands to which the rights pertain.¹⁴ They are not rights of arbitrary monopoly and do not support an insistence on economic waste. Therefore the extent of the priority of the riparian possessors as against competing subsequent non-riparian rights of use is properly determinable by reference to the possibility of use on or benefit to the riparian lands.

In the light of this fundamental idea, the decisions of our state supreme court in cases involving conflicting riparian and non-riparian claims to flood waters are easily understood and reconciled, and in turn these cases admirably illustrate and support the principle which I have emphasized.¹⁵ Nevertheless they have puzzled many lawyers. In conversation with experts in water law and in the arguments of cases,

¹²Half Moon Bay Land Co. v. Cowell (1916) 173 Cal. 543, 160 Pac. 675; Pabst v. Finmand, *supra* note 5; cf. Seneca Cons. Gold Mines Co. v. Great Western Power Co. (1930) 209 Cal. 206, 287 Pac. 93.

¹³But see Miller v. Miller (1848) 9 Pa. 74, 49 Am. Dec. 545.

¹⁴Heimlen v. Fresno Canal & Irrig. Co.; Duckworth v. Watsonville Water & Light Co.; Stockport Water-Works Co. v. Potter, all *supra* note 8.

¹⁵Modoc Land & Live Stock Co. v. Booth (1894) 102 Cal. 151, 36 Pac. 431; Fifield v. Spring Valley Water Works (1900) 130 Cal. 552, 62 Pac. 1054; Miller & Lux v. Madera Canal & Irrig. Co. (1907) 155 Cal. 59, 99 Pac. 502, 22 L. R. A. (N.S.) 391; San Joaquin & Kings River Canal & Irrig. Co. v. Fresno Flume & Irrig. Co. (1910) 158 Cal. 626, 112 Pac. 182, 35 L. R. A. (N.S.) 832; Gallatin v. Corning Irrig. Co. (1912) 163 Cal. 405, 126 Pac. 864; San Joaquin & Kings River Canal & Irrig. Co. v. Stevinson (1912) 164 Cal. 221, 128 Pac. 924; E. Clemens Horst Co. v. Tarr Mining Co. (1917) 174 Cal. 430, 163 Pac. 492.

and even in some judicial opinions, I encounter a confused impression of the purport of these precedents. Generally the confusion seems to proceed from an assumption that essentially the decisions turn on some occult distinction between flood waters and the "ordinary flow of the stream." Some of the language in the opinions may inspire or encourage the assumption, but a careful comparison of decisions and distinguishing of issues should dissipate it entirely.

It is true that the riparian right does not extend to water which is not considered part of the flow of the watercourse, but is "surface water," although that surface water may contribute to the flow of the stream.¹⁶ Accordingly, if floods overflow the banks of the stream and spread over the surrounding country, such parts of this flood water as become stagnant or do not move along with the stream in its general course, are "surface waters" as distinguished from stream waters, and therefore are not subject to riparian rights. Nevertheless riparian rights do extend to overflow waters which still move with the stream in its course.¹⁷ The reason that in some cases diversion of such flood waters has been held not to infringe a riparian priority, is that the diversion left enough water in the stream to satisfy all possible uses of the riparians. Indeed the opinions commonly emphasize that the flood waters were a detriment and not a benefit to the riparians and the diversion therefore was a benefit as far as the scope of riparian use was concerned.¹⁸ In the leading case of *Miller & Lux v. Madera Canal & Irrig. Co.*,¹⁹ on the contrary, the riparian claim was supported on the ground that the floods benefitted the riparian lands.

On principle it should make no difference that the flood contributing to a water course was unusual or casual, instead of "ordinary," or "natural," or "recurring," and it is submitted that any such distinction in the law would be very difficult of application under the climatic conditions of California. It would tend to become vague and illusive and would merely furnish an additional constant ground for litigation. Yet generally the opinions, in cases where a riparian's claim to flood waters against an appropriator is upheld, emphasize not only the fact that the waters were useful to the riparian, but also that the floods were "natural," "ordinary" and "recurring." The causes of this, I think, are the fact that the principle of possible use or benefit has not been often firmly stated as the foundation of the determination of the extent of riparian rights, and a passing confusion of the two distinct

¹⁶ *Broadbent v. Ramsbotham* (1856) 11 Ex. 602.

¹⁷ *Miller & Lux v. Madera Canal & Irrig. Co.*, *supra* note 15.

¹⁸ *Modoc Land & Live Stock Co. v. Booth*, *supra* note 15.

¹⁹ *Supra* note 15.

questions in cases like *Miller & Lux v. Madera Canal & Irrig. Co.* Those two distinct questions are: (1) Are the flood waters part of the flow of the stream or are they vagrant surface waters to which riparian rights do not extend? (2) Granted that the flood waters are a part of the stream, will diversion of them be a detriment to the riparians? If the flood waters are not part of the stream but are segregated from it, rights do not extend to them, and frequently there are such waters in the case of casual or "unusual" floods. If the waters are part of the flow of the stream, their flood character has a bearing only insofar as it supports the argument that they are not a benefit, but perhaps rather a detriment to riparians.

Applying the fundamental principle of beneficial use we may outline the priority of riparians against subsequent appropriators by the following formula. First, determine all uses and benefits on or to the riparian lands which might be derived from the stream (without improper waste). This includes prospective possible as well as actual present uses and benefits. So much of the flow of the stream as would be necessary to supply these uses and benefits if they all were presently required is devoted to the priority of the riparians as against appropriators. As a matter of convenience let us now adopt a phrase to which we attach a technical meaning that should be remembered carefully throughout our subsequent discussion. The phrase is "material alteration of the stream." Any artificial change in the stream which renders it less usable or beneficial to the riparians, that is, which leaves it insufficient to afford all the riparian uses and benefits which might be derived from it if the fullest possible uses were being demanded presently on all the riparian lands, is a "material alteration" of the stream. Any change which leaves the stream as sufficient as before in this sense is an immaterial alteration. If the immaterial alteration is a permanent diversion of part of the water of the stream, we may say that it is a diversion of surplus water, which can be taken by an appropriator without an infringement of riparian rights. It is only then a *material* alteration of the stream in this sense which raises a cause of action in favor of a riparian.²⁰

If there is a material artificial alteration of a stream as it flows by riparian land, the riparian possessor has *prima facie* a cause of action against the person responsible although the change has not resulted in

²⁰ *Modoc Land & Live Stock Co. v. Booth*; *San Joaquin etc. Co. v. Fresno Flume Co.*, both *supra* note 15; *Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 22 P. (2d) 5; *Elliot v. The Fitchburg R. R.* (Mass. 1852) 10 Cusb. 191; *Stratton v. Mount Hermon Boys' School* (1913) 216 Mass. 83, 103 N. E. 87, 49 L. R. A. (N.S.) 57.

present detriment to a riparian use.²¹ Against the *prima facie* cause of action, however, there may exist any of various nullifications. The person responsible may have a superiority of title and priority covering the alteration by prescription, release, contract, estoppel, or condemnation under eminent domain, or he may be a co-riparian who has caused the alteration as a necessary incident of his fair share of riparian use of the stream. Indeed, if he has caused the alteration by use on riparian lands only and claims under the riparian right pertaining to those lands, he has a complete defense no matter how much he alters the stream without present damage to the opposing riparian interest, for a riparian, insofar as his co-riparian would have no present use or benefit from the stream, may increase his riparian use accordingly without liability.²² Correlatively, as other riparian uses increase, the particular riparian may have to diminish his prior use to avoid liability, for co-riparians originally have equal priorities.²³ Similarly as between two appropriators, the prior cannot maintain a claim to continued flow of the stream if he does not need it for his appropriation use.²⁴ Damage to his appropriation use is an element of a cause of action in his favor. Beneficial use is the foundation, measure and limit of the appropriation right. But if the stream is materially altered at riparian land by an appropriation use which is subsequent in priority to the riparian right, the riparian at common law has a cause of action against the person responsible although there is no present damage to the riparian interest.²⁵ This rule that present damage is not an element in a riparian's cause of action against a non-riparian is a troublesome feature of California water law on which I proceed to offer some suggestions.

If as between co-riparians and as between two appropriators of different priorities an alteration of the stream will not be actionable unless the plaintiff suffers actual damage, why should a riparian have a cause of action against a non-riparian (appropriator) although the non-riparian diversion has not caused damage to the plaintiff? Would it not be better policy for the law to permit an appropriator to use the stream as long as the riparians are not actually damaged? What possible justification is there for assessing liability against an appropriator for putting water to use which otherwise would run to waste? The answer to these questions lies partly in knowledge of the origin of this

²¹ *Anaheim Union Water Co. v. Fuller* (1907) 150 Cal. 327, 88 Pac. 978, 11 L. R. A. (N.S.) 1062.

²² *Half Moon Bay Land Co. v. Cowell*, *supra* note 12; *Pabst v. Finmand*, *supra* note 5.

²³ *Dumont v. Kellogg*, *supra* note 10; *Mason v. Hill*, *supra* note 5.

²⁴ *The Bear River & Auburn Water & Mining Co. v. Boles*, *supra* note 4.

²⁵ *Huffner v. Sawday* (1908) 153 Cal. 86, 94 Pac. 424.

rule of liability and partly in appreciation of its purpose and limitations.

The origin of the rule was not a desire to give a monopoly of the stream to riparians against non-riparians regardless of present needs. It is part of the history of the English law of prescription. In most American states today one element of a good prescriptive title is adverse use for the prescriptive period—and an adverse use in this sense generally is a wrongful use.²⁶ But this was not so in the early English law of prescription. Under that law a prescriptive right was founded on use for time out of mind and the use needed not to be adverse in the sense mentioned above. In the latter part of the eighteenth century the well known "lost grant" fiction was devised to broaden the law of prescription by shortening its period to that of the provision of the statute of limitations applying to actions of ejectment. After the adoption of this fiction the courts developed gradually the modern English law of prescription and concomitantly our American doctrine was developed under which generally adverse use is an element of title. In the first half of the nineteenth century the English law of prescription was still in the flux of development and it was not clear just what qualities a use must have to suffice for a short term prescriptive title. The great leading case of *Angus v. Dalton*,²⁷ which played a decisive part in settling the modern English doctrine had not yet arisen. Therefore, when in this transitory period the leading English cases on the law of riparian rights were decided, in which the question was raised whether damage was an essential element of a riparian's cause of action against a non-riparian, the courts denied that damage was essential and the judges gave as their reason that otherwise the non-riparian use might ripen into a prescriptive title before the riparian had legal ground to maintain an action in assertion of his right.²⁸ Of course, today in most American jurisdictions this argument is of no logical force, because if the use is not adverse prescription will not run, and the use will not be adverse unless it gives a ground of action to the other party. Therefore to say that an action must be given the riparian to prevent prescription running against him, under the American law of prescription is to put the cart before the horse. If the cause of action is not given prescription will not run. Nevertheless, the decisions in these leading English water right cases have been followed universally in American

²⁶ *Hanson v. McCue* (1871) 42 Cal. 303; *Hargrave v. Cook* (1895) 108 Cal. 72, 41 Pac. 18; *Pabst v. Finmand*, *supra* note 5; *Oliver v. Robnett*, *supra* note 7.
²⁷ (1881) 6 App. Cas. 740.

²⁸ *Wood v. Waud* (1849) 3 Ex. 748; Lord Cairns, L. C., in *Swindon Water Works Co. v. Wilts & Berks Canal Navig. Co.* (1875) L. R. 7 H. L. 697, at 705; *cf. Williams v. Morland* (1824) 2 B. & C. 910; *Mason v. Hill* (1833) 5 Barn. & Adol. 1.

states, and when a justifying reason is given, it is that of the English opinions, *i.e.*, if an action is not given, prescription may run against the riparian right without a preventive legal remedy.²⁹ A similar argument, similarly unsound today, might have been advanced to give a prior lower appropriator a right of action against a subsequent upper appropriator diverting from the stream during periods of non-use by the prior appropriator; but here the courts were deciding a new question not covered by precedent exactly in point and they were clear on their law of prescription. No cause of action exists without damage in this case; and consequently prescription does not run in favor of the upper use since it is not adverse (wrongful).³⁰

It should be clear, then, that the legal right of action of a riparian who has suffered no damage is an anachronism. At least judges should cease to justify it by the traditional formula which is nonsense in our modern American law of prescription. The rule may be too well established by precedent to be subject to obliteration, but if its origin, purpose, and proper limitation are clearly perceived, certain pernicious effects can easily be avoided.

There is one argument that might be advanced for maintaining the rule, limited as I shall explain that it is. It is an argument in reverse to the traditional one. In our law of water rights, and in property law in general, the sound old principle applies that what has been done for long without objection, for that reason, should be permitted to continue unless some stronger countervailing argument applies. This is the foundation idea of prescription and of many other legal institutions. Now an upper appropriation use may have continued many years before a riparian is damaged and raises an objection. The riparian may not have been using, or other riparian uses may not have been sufficient in the past to bring about a condition where the added appropriation use caused damage.³¹ If after all these years of untroubled use the appropriator suddenly can be enjoined from a continuance, it may be that a great hardship will be visited on him quite contrary to the fundamental principle of law with which I began the argument of this paragraph. Indeed the public interest may be involved because the appropriation use may be a great power project whose promoters would

²⁹ *Stanford v. Felt* (1886) 71 Cal. 249, 16 Pac. 900; *Ulbricht v. Eufaula Water Co.* (1888) 86 Ala. 587, 6 So. 78, 4 L. R. A. 572.

³⁰ *The Bear River & Auburn Water & Mining Co. v. Boles*, *supra* note 4; *Smith v. Duff* (1909) 39 Mont. 374, 102 Pac. 981; *Boehler v. Boyer* (1925) 72 Mont. 472, 234 Pac. 1086; *Masterson v. Kennard* (1932) 140 Ore. 288, 12 P. (2d) 560; *Spring Creek Co. v. Zollinger* (1921) 58 Utah 90, 197 Pac. 737; *Mally v. Weidensteiner* (1915) 88 Wash. 398, 153 Pac. 342.

³¹ *Anaheim Union Water Co. v. Fuller*, *supra* note 21.

have to purchase releases from all riparians below, including those who may never have any use for the stream, or face the possibility of successful suits at remote times. This would tend, of course, to increase the cost of the project and therefore the rates of service. To cut down these possibilities of suits in the indefinite future, if releases are not obtained from unobjecting lower riparians, it is arguable that prescription should be caused to run against these riparian claims from the time the appropriation alteration of the stream begins. To accomplish this result, it is necessary to give the riparian a cause of action without the element of present damage, thus making the appropriation use adverse. The same argument is not as strong in the case of the rights of lower appropriators prior to the power project appropriation, because generally an appropriator uses frequently and if the power appropriation is a detriment to this use, the damage will occur soon. Indeed, under our present California law, if an appropriator's non-use continues for a period of three years without reasonable justification, he loses his right by non-use.³² A riparian, on the contrary, independently of legislation, may hold his riparian right without use for a century or longer and no extinguishment results.³³

I am not sure, therefore, that the traditional rule giving a riparian a cause of action without present damage is not sound policy, although the traditional reason for it does not fit sensibly into our law. I am sure, however, that the rule should be closely limited to its purpose. How may this limitation be accomplished?

Uniformly the riparian has been given a cause of action against an appropriator of inferior priority whose use materially altered the stream at the plaintiff's land, irrespectively of present damage. Uniformly on the representation that such a remedy was necessary to avoid multiplicity of suits and afford adequate relief, the California courts have enjoined the appropriator to cease to cause a material alteration of the stream,³⁴ unless the appropriator paid the full value of a release of the infringed riparian rights to the plaintiff, in cases where the appropriator possessed eminent domain rights and asserted them by proper procedure or had erected permanent works under circumstances justifying an estoppel against the demand for a

³²Smith v. Hawkins (1895) 110 Cal. 122, 42 Pac. 453; Cal. Stats. 1917, p. 746, CAL. GEN. LAWS (1923) act. 9091, §20a.

³³Hargrave v. Cook, *supra* note 7; Mason v. Hill, *supra* note 5.

³⁴Stanford v. Felt, *supra* note 29; Gould v. Eaton (1897) 117 Cal. 539, 49 Pac. 577; Southern California Invest. Co. v. Wilshire (1904) 144 Cal. 68, 77 Pac. 767; Anaheim Union Water Co. v. Fuller, *supra* note 21; Roberts v. Gwyrfai Dist. Council, *supra* note 9.

permanent unconditional injunction.³⁵ Clearly if the riparian is entitled to this relief he can force a cessation of the appropriation use above although it has not caused him damage and may never interfere with any use of the stream on his riparian land. This would run counter to the fundamental idea underlying all water law. A stream is a natural resource available for uses. Rights to use should be recognized and protected; but no private claimant should be conceded a right to prevent a use of the stream which in no way interferes with his use or affects detrimentally his right to use.³⁶ Rights to demand that the stream flow to waste, when appropriators wish to use it, should not be upheld by the courts. So evidently against public policy are such rights where water is scarce as compared with needs, that law declarers who maintained such absurd claims would be defenseless against the charge of incompetence.³⁷ It is my belief that our California judges have not established such rights by their decisions and that proper defense by counsel will establish that no riparian is entitled to an injunction merely to prevent defendant from using stream water which otherwise would run to waste. If I am right in this, an appropriator who proposes to alter materially the flow of a natural stream, need not obtain a release from riparians who may never be damaged. He may at his option await the time when damage to the riparian is imminent and then purchase a

³⁵ *Newport v. Temescal Water Co.* (1906) 149 Cal. 531, 87 Pac. 372, 6 L. R. A. (N.S.) 1098; *Conaway v. Yolo Water & Power Co.* (1928) 204 Cal. 125, 266 Pac. 944, 58 A. L. R. 674; *Collier v. Merced Irrig. Dist.* (1931) 213 Cal. 554, 2 P. (2d) 790; *Peabody v. City of Vallejo* (1933) 86 Cal. Dec. 371, 25 P. (2d) 454.

³⁶ *Modoc Land & Live Stock Co. v. Booth*, *supra* note 15; *Elliot v. The Fitchburg R. R.*, *supra* note 20.

³⁷ A practitioner of any other learned profession, or even a mechanic, who uses his tools clumsily with unhappy results is commonly denounced as a bungler. Is there any sound reason why judges who by their decisions seriously affect not only private fortunes, but great public interests should be free from similar just criticism when they use inefficiently their tools of precedents (which they are free even to overrule if they see fit) and remedial and procedural devices? Honesty and a good intent in our judges are essential to a sound administration of justice, but courage and efficient intelligence also are very important. It is high time that attention was turned by vigorous thoughtful criticism to the racketeering within the law which inefficient and timorous judges encourage by their decisions. These judges and lawyers who advocate such socially unsound but successful causes contribute to justification of a growing sense of disgust with our present social order.

"I have known judges," once said Chief Justice Erle, "bred in the world of legal studies, who delighted in nothing so much as in a strong decision. Now a strong decision is a decision opposed to common-sense and to common convenience." SENIOR, CONVERSATIONS WITH DISTINGUISHED PERSONS (1880) 314. Compare the following excerpt from the opinion of Lord Nottingham, C., in *Duke of Norfolk's Case* (1882) 2 Cas. Ch. 1: "Pray let us so resolve cases here, that they may stand with the reason of mankind, when they are debated abroad. Shall that be reason here that is not reason in any part of the world besides?"

release. This course obviously will reduce the condemnation charges of a large power project considerably, for many of the riparians will never use water from the stream although they may be quite ready to demand a fancy price from the power company in return for yielding their claim of right to a presently operative injunction. The juridical policy which I advocate would also enable appropriators, who have not eminent domain rights and who cannot force a sale and release of the riparian plaintiff's right, to use for irrigation or other purposes water which otherwise would run unused past riparian lands to waste. The point therefore is of great practical importance and I proceed to establish it by precedent and reason.

What is the purport of the precedents which give a riparian, who has not been damaged by an appropriator's diversion and who may never have a use for the water, a cause of action at law for nominal damages and also an injunction in equity against a continuance of the diversion? It is clear on the authorities that the purpose of both remedies is to establish and quiet the riparian's priority against the appropriator and only this.³⁸ There is no purpose to establish in the riparian an arbitrary, royal prerogative to devote the stream to waste as against attempts to use it on non-riparian land. The right of action at law was given to prevent postponement of the riparian right to the appropriation by prescription before the riparian might have occasion to use the stream. The injunctive relief was conceded to quiet the title of the riparian so that he would not have to sue at law periodically. Now it is evident that all this can be accomplished under California procedure by a declaratory decree establishing the priority of the riparian's right to use whenever he shall have occasion to use and enjoining an interference with the riparian use whenever that use arises.³⁹ This decree will

³⁸ *Stanford v. Felt*, *supra* note 29; *Modoc Land & Live Stock Co. v. Booth*, *supra* note 15; *Anaheim Union Water Co. v. Fuller*, *supra* note 21; *Newhall v. Ireson* (Mass. 1852) 8 Cush. 595; *Wood v. Waud*, *supra* note 28; *Roberts v. Gwyrfai Dist. Council*, *supra* note 9.

³⁹ This is the usual practice in the analogous case of conflicting appropriation and *quasi*-riparian claims to percolating waters. The possessors of lands overlying a mass of percolating water have rights in the water similar to riparian rights. These rights do not depend on prior use, but simply on possession of the overlying land. Appropriations of the water may be made and the relative priorities of such appropriations and the rights of the possessors of overlying lands are determined analogously to the determination of the relative priorities of riparian rights and appropriation rights in surface streams. Nevertheless a non-using possessor of overlying lands who sues to confirm his priority against an appropriator for use at a distance will not be given an injunction against the defendant's appropriation use which is causing no present damage. The plaintiff will be given only a declaratory decree establishing his priority of right to use whenever he chooses in the future and any further protection to that right of future use which the circumstances of the case justify. *Katz v. Walkinshaw*, *supra* note 2, *rel'g.*, (1903) 141 Cal. 116, 74 Pac. 766; *Burr v. Maclay Rancho Water Co.* (1908) 154 Cal. 428, 98 Pac. 260.

not prevent a continuance of the appropriation use except at times when an infringement of the declared riparian priority of use would result. Thus the purpose of protecting the riparian priority is accomplished without violating the fundamental principle of our water law, *i.e.*, no waste of our water resources is included in private water rights. This is the solution of the problem adopted in the leading case of *Ulbricht v. Eufaula Water Co.*⁴⁰ Strangely enough a clear-cut contest over the principle of this case has never arisen in California litigation and therefore that principle has never been formally announced by judicial opinion as part of our non-statutory riparian right law. That it would not have been adopted and followed if counsel on occasion had argued for it is almost unbelievable. The fact that, in all California riparian right cases where an injunction has been asked, a presently operative injunction has been granted, should not militate against adoption of the principle of the *Ulbricht* case, because (1) in many of these cases present damage to the riparian was an element, and (2) apparently in none of them was the argument for a declaratory decree only made. The contest always was over the bare question—injunction or no injunction.

It is true also that in many American states the *Ulbricht* decision cannot be duplicated independently of legislation. This is because in those jurisdictions traditional procedure does not include the remedy of a declaratory decree in such cases.⁴¹ California procedure permits of such a decree and it is peculiarly adapted to the sort of case which we are now discussing. Here then is one important constructive aid which our courts could give to the solution of our water law puzzles without the assistance of legislation.

But, the practitioner in this field may say, this does not go far in dissolving difficulties, for quite generally the riparian proves that the stream as it was wont to flow afforded a present use or a benefit to his riparian land and that the defendant's material alteration has deprived him of this use or benefit. In short, he proves present damage, however slight, as an element of his case and then demands and secures an injunction, and if the defendant has power of eminent domain or has the advantage of an estoppel to force a sale or a release of the riparian right, the riparian proceeds to prove all possible uses and advantages of the stream to his land including uses never made, as a basis for

⁴⁰ *Supra* note 29.

⁴¹ Borchard, *The Declaratory Judgment—A Needed Procedural Reform* (1918) 28 YALE L. J. 1; Harrison, *California Legislation of 1921 Providing for Declaratory Relief* (1921) 9 CALIF. L. REV. 359; Sunderland, *A Modern Evolution in Remedial Rights—The Declaratory Judgment* (1917) 16 MICH. L. REV. 69; Notes (1921) 12 A. L. R. 52; (1927) 50 *ibid.* 42; (1930) 68 *ibid.* 110.

determining the price of a release. There is truth in this reply to my suggestion and it opens a further, though related, field for comment. If the fundamental idea which I have emphasized is firmly apprehended and applied, a reasonable solution of these irritating cases also should be possible. No water right should entitle the holder to insist on a waste of the water of a natural stream or to speculate or racketeer at the expense of another claimant of a right to use. A riparian is entitled to remedies to maintain and protect his riparian right, but the primary riparian right covers only *bona fide* uses of the stream.⁴² It does not include prevention of another's use or increase in the cost of another's use except insofar as this is a consequence of the riparian's use. Prevention of another's use through legal remedies is a secondary right which the law gives the riparian only to maintain and protect his primary right to use within his priority. Therefore, in affording remedies in particular cases it is incumbent on the courts, if they are to prove themselves efficient, to see that these remedies are limited to their proper purposes and not misused to force an expense on appropriators which tends to hamper the development of the fullest and most economical uses of the water resources of the state, and in some cases to increase the capital cost of public service undertakings and therefore the rates to consumers or the taxes which are levied to meet the cost. To clarify these statements let us consider in succession two variant type cases:

P, a riparian, is making no use of his land or, if he is using his land, that use is not affected by the alteration of the stream and therefore is irrelevant. The stream irrigates part of the riparian tract near it and causes grasses to grow which conceivably might be used to graze cattle. *P* has no cattle and makes no use of the grass. It does not serve any useful purpose. *D*, an appropriator, diverts water from the stream above *P*'s land and thus materially alters the stream at *P*'s land. *D* uses the water for irrigating non-riparian land, or stores it in a pond in furtherance of a non-riparian power use, or supplies customers at a distance who use it for irrigation or domestic purposes. *P* sues *D* for infringing his riparian rights and asks damages and an injunction against a continuance of the material alteration of the stream.

The ordinary result of a case of this type is that *P* is granted the relief demanded, except in cases where *D* has eminent domain powers and asserts them by proper procedure or *P* by his conduct has raised an estoppel against his demand for an unconditional injunction. In

⁴² *Heinlen v. Fresno Canal & Irrig. Co.*; *Duckworth v. Watsonville Water & Light Co.*, both *supra* note 8.

these cases the injunctive relief is subject to a condition that *P* accept from *D* the value of a release of his riparian priority against *D*'s use in satisfaction of this phase of his claim. The injunction is issued merely to secure payment of these damages and is terminated upon payment. The measurement of the damages allowed is not merely the value of the grasses destroyed, nor the value of raising such grasses indefinitely into the future; *P* is permitted to recover much more than this. Having established his right to a conditional injunction, he is permitted to recover the full value of his riparian priority and this value will be estimated by comparing the values of the riparian land with and without the riparian priority. Evidence of all possible uses that might be made of the stream on the riparian land within the riparian right is admissible whether or not the uses have ever been made or dreamed of by the riparian.⁴³

What objection can be offered to such a disposal of such a case as a matter of sound justice or as a matter of the law?

First as a matter of sound justice. The premises of justice should include not only an appraisal of the individual interests of the adversaries in the case, but also the larger element of social and public economic advantage. It should be clear that the demands of such a justice are not efficiently met by the usual disposal of this type of case which I have outlined above. If *D*'s case does not entitle him to force a sale of a release of *P*'s priority against *D*, *D* is prevented by injunction from using the stream to the economic advantage of himself and the public in order that *P* may derive the hypothetical satisfaction of growing unused grasses. *P* has no actual desire that the grasses grow. His motivation is a desire to force *D* to pay him what he demands for a release of his priority. In essence it is what the man in the street calls a racket. *P*'s legitimate interests would be protected adequately by a judgment for such reasonable damages, assessed by the judge, as result from the loss of the grass and a declaratory decree establishing his riparian priority to use for other purposes whenever in the future he may desire to use. Since in many cases a *bona fide* future use by the riparian is highly improbable, a denial of a presently operative injunction in such suits will tend greatly to discourage them, for it nullifies the racket motive.

If the case is one in which the injunction is issued to secure a sale of the riparian priority at the option of the defendant appropriator, the comment of the last paragraph applies with the following addition.

⁴³ *City of Santa Ana v. Harlin* (1893) 99 Cal. 538, 34 Pac. 224; *Seneca Cons. Gold Mines Co. v. Great Western Power Co.*, *supra* note 12; *San Joaquin & Kings River Canal & Irrig. Co. v. Stevenson*, *supra* note 15.

Practically the purchase is forced by the terms of the injunction and often increases the expense of a public service. Furthermore, generally the estimate of the price is made by a jury and often is affected by a natural prejudice in favor of the individual landowner and against a power company or distant municipality which is putting a great burden of use on the stream to the detriment of development of possible future local irrigation uses.

How about the law of such cases? I believe that independently of specific legislation our courts have sufficient powers to dispose of these cases efficiently. Courts of equity always have been free to grant or deny injunctive relief in accordance with the demands of justice in the particular case. If the injunction will cause injustice to the defendant and detriment to the public interest and if the plaintiff's rights can be sustained and protected adequately without an injunction, it is well within the powers of a court of equity to deny an injunction.⁴⁴ In the cases under consideration, the plaintiff's claim to damages for the loss actually suffered can be satisfied easily, and a presently operative permanent injunction is not necessary to quiet his right, since a declaratory decree will have that effect.⁴⁵ The cases differ materially from those where the plaintiff sues to prevent occupation or use of his land, *e.g.*, by a railroad or highway, unless he is paid the full value of the permanent use of the land. In such cases the plaintiff has been deprived of possession of his land or his possession has been infringed by an adverse use and occupation which practically is exclusive. That he has never used this land himself and may never do so is no detriment to his case, because the legal premise is well established that a land possessor is entitled to full protection of his rightful possession regardless of whether the land is used or unused by him. On the contrary a riparian right is only a right to use the stream on or for the benefit of the riparian land. The riparian has no possession of the water of the stream before it reaches his land.⁴⁶ His riparian uses should be protected, but this does not mean that he is entitled to play dog in the manger against appropriators as a land possessor is entitled to do against adverse claimants. In giving damages in the land case, the full value of the land taken must be given as a logical consequence of the land possessor's exclusive right; in a riparian right case, there is no legal necessity for giving damages for more than the value of uses with which the de-

⁴⁴ Lord Cairns, L. C., in *Swindon Water Works Co. v. Wilts & Berks Canal Navig. Co.*, *supra* note 28; POMEROY, *EQUITY JURISPRUDENCE* (4th ed. 1918) §1338.

⁴⁵ *Burr v. Maclay Rancho Water Co.*, *supra* note 39.

⁴⁶ *Heinlen v. Fresno Canal & Irrig. Co.*; *Duckworth v. Watsonville Water & Light Co.*, both *supra* note 8.

fendant has already interfered. To allow possible interferences with possible future riparian uses never yet contemplated by the plaintiff to enter into the estimate of damages is to give the plaintiff more than justice and to invite racketeering litigation. Of course, if the right to interfere with such possible future riparian uses is not purchased by the defendant, the plaintiff is entitled to a declaratory decree quieting his priority to them; but the defendant should be permitted at its option to await the course of events and thus avoid the necessity of paying for releases of rights which never may be used. It is a fallacy to treat the riparian right as a unit; it really is a bundle made up of a multitude of particular rights of use, and a release of each of these multitudinous rights may be sold and purchased separately. Thus, if I am a riparian, I may release to an upper manufacturer my right to restrain the pollution of the stream by him in a certain way which interferes with some of my riparian uses but not others, or I may release to him my right against him to have the stream flow to me, excepting certain times and certain of my present or possible future uses. Furthermore, my releases to him will not affect my rights against other appropriation users except in certain incidental respects in some cases of adjustment of relative priorities.⁴⁷ This should suffice to illustrate the truth of my dictum that the riparian "right" is not single and indivisible, but is a bundle of multitudinous particular rights of use against multitudinous possible adversaries, each of which particular rights may be released or retained separately. A similar statement would be true, of course, of a land possessor's rights, but in the case of adverse possession or occupation of land the land possessor is at once ousted of his possession or occupation completely, while a riparian's water right is not adversely taken by an appropriator, nor is it infringed except as to the particular uses adversely affected by the defendant's use, and the plaintiff's possible future uses properly come into the suit only for the purpose of protection against prescription and to prevent multiplicity

⁴⁷Such a release of a riparian priority is not a conveyance of the riparian rights. Indeed a conveyance of riparian rights is impossible except as an incident of transfer of possession of the riparian land. *Stockport Water-Works Co. v. Potter*; *Duckworth v. Watsonville Water & Light Co.*, both *supra* note 8. Therefore the releaser still holds the riparian rights subject, however, to a postponement of priority to the releasee's appropriation right because of the release. Similarly there is no transfer of riparian rights but only a relative postponement of priority effected by the running of prescription in favor of an appropriator, *Southern California Invest. Co. v. Wilshire*, *supra* note 34; or by release of the riparian priority enforced through condemnation by a public service company. Failure to perceive clearly this distinction between a conveyance of a riparian right or its utter extinction on the one hand and a mere postponement of its relative priority in favor of a certain appropriation on the other, is a fertile source of confused thinking and muddled opinions.

of suits. Prevention of multiplicity of suits is not a universal dominating consideration and yields always to the counter arguments of injustice and public disadvantage.

Whether I am right or wrong in my opinion of the adequacy of the inherent powers of a court of equity to dispose efficiently and justly of these cases without specific authorization by legislation, there should be little doubt that our California courts now have power to do so as a result of the amendment to article 14 of the state constitution, adopted November 6, 1928. This amendment added a new section, 3, to the article, which reads as follows:

"Section 3. It is hereby declared that because of the conditions prevailing in this state the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or watercourse in this state is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or watercourse attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the legislature may also enact laws in the furtherance of the policy in this section contained."

In the recent case of *Gin S. Chow v. City of Santa Barbara*,⁴⁸ the opinion of the supreme court, *per* Shenk, J., declares a policy of so construing this constitutional amendment as to justify a disposal of riparian right cases which runs in the direction of my suggestions. The opinion affirms the validity of the amendment, assuming that it abolishes existing rights of riparians to insist on the flow of the stream to waste against appropriators who wish to divert and use the water. Such a modification of riparian rights, the opinion says, could be justified under federal constitutional law as an exercise of the state's police power. That the opinion of the court is sound on this point should be beyond controversy in view of the citation of authorities in the opinion. It is quite clear that the United States Supreme Court would consider the matter one of local water law on which, following a consistent long-established policy, it would not overturn the determinations of the

⁴⁸ *Supra* note 20.

state courts.⁴⁹ It would have been more in accordance with the traditions of a strong, efficient court, however, if the opinion had added that the dicta on which the plaintiffs relied, if literally and broadly interpreted to support their claims, were not good law, that the decisions in their cited cases were distinguishable, and that the constitutional amendment was merely a safety device (*sotto voce*) insuring what would be the law anyway against a possible timorous and fumbling use of precedents.

The second sort of case, which I propose for discussion, is like the first in all respects except that *P* is using the stream for certain valuable purposes and these uses are interfered with by *D*'s use. This difference strengthens *P*'s case from the social and ethical viewpoint. Certainly it greatly diminishes the suspicion of a racketeering motive for the suit. *P* should obtain, of course, damages for the past interference with his uses, a declaration of his priority, and an injunction against continuance of the interference, for in this case the damage is quite material and not merely a technical basis for compelling a purchase of a release. If, however, the case is one in which *D* can force a sale of a release because of an estoppel against *P*'s claim for an unconditional injunction or because *D* has eminent domain power, *P*'s relief should be directed by the principles which I have advocated in discussing my first hypothetical case. *P* should not be given damages based on hypothetical possible future uses other than a continuance of those which he has made in the past, unless *D* elects to purchase a release of the right against *D* to make these other uses, for these other uses may never be desired by *P* or his successors in interest and to permit *P* to recover their value will increase the cost of *D*'s use unjustly on a speculative basis which encourages a racketeering motive in *P*. If *D* chooses to exclude releases of the rights to these other uses from his purchase, of course these rights of *P* to future uses should be protected by a declaration of his surviving priority in the decree. For this suggested solution of my second case also, I believe the inherent traditional powers of a court of equity are quite sufficient; but if my opinion on this point is deemed wrong as a matter of law because of the current of disposition of such cases in California in the past, then I offer as a base for a change in method of disposition, the recent constitutional amendment discussed above. There will be involved no taking of property without due process of law or without compensation in so applying the legislation, for none of *P*'s substantive rights are taken without

⁴⁹ See opinion of Holmes, J., in *Hudson County Water Co. v. McCarter* (1908) 209 U. S. 349; *Fox River Paper Co. v. Railroad Comm. of Wisconsin* (1927) 274 U. S. 651.

compensation. Those not paid for under the terms of the decree are maintained in unimpaired priority by the terms of the decree. Indeed the legislature has police power to readjust competing private claims to uses of land to quite an extent without compensation; and the case for such legislative power over the adjustment of competing claims to uses of water from natural sources of supply is at least as strong, for the right to take and use water from a natural source of supply does not include possession of the water before it is taken. Possession is not invaded or modified therefore in changing the details of remedies in support of rights to use of water in the interests of a better adjustment of competing uses.

Two or three further suggestions remain for brief statement before I close this article.

Often it will be possible to satisfy *P*'s requirements for present use by some adjustment or substitution without a discontinuance of *D*'s use. Such adjustments have been ordered by the courts and adequate substitutions of supply at expense of *D* have been permitted in satisfaction of *P*'s priority, as between contesting riparians and as between contesting appropriators.⁵⁰ It seems clear that similar adjustments should be made between an appropriator and a riparian.⁵¹ They serve the fundamental policy of promoting the fullest use of our natural water resources with economy, and especially without waste, and they discourage unjust assertions of claims by a riparian which increase the expense of the appropriator.

In spite of a dictum in the opinion in a leading case, it also seems clear that the principle of economy of uses should apply against a riparian and in favor of an appropriator. Should a riparian be permitted to make or demand a use of water on his land for irrigation by a method which is very wasteful of water, when appropriators of subsequent priorities need the water for their uses? One riparian is not entitled to do so against the present needs of another riparian; nor is an appropriator entitled to do so against the present needs of a subsequent appropriator or riparian.⁵² Why should a riparian have a special privilege to waste water against the present need of a subsequent appropriator? A riparian does not possess the stream or any part of it.

⁵⁰ *Wiggins v. Muscupiabe Land & Water Co.*, *supra* note 10; *Hufford v. Dye* (1912) 162 Cal. 147, 121 Pac. 400; *Comstock v. Larimer & Weld Co.* (1914) 58 Colo. 186, 145 Pac. 700; *United States v. Caldwell* (1924) 64 Utah 490, 231 Pac. 434.

⁵¹ *Colorado Power Co. v. Pacific Gas & Elec. Co.* (1933) 86 Cal. Dec. 116, 24 P. (2d) 495; *Crum v. Mt. Shasta Power Corp.* (1933) 86 Cal. Dec. 235, 24 P. (2d) 801, *reh'g granted*, Sept. 25, 1933.

⁵² *Gould v. Stafford*, *supra* note 8; *Barrows v. Fox* (1893) 98 Cal. 63, 32 Pac. 811.

His right, like an appropriator's, is a right of use only. It differs from an appropriation right in the circumstances of its title and in a related confinement of scope of uses under it to the riparian land, but in *general* nature it is the same sort of right as an appropriation right. With confidence the opinion may be ventured that the inference which may be drawn from the dictum in the opinion on rehearing of *Miller & Lux v. Madera Canal & Irrig. Co.*,⁵³ is not the law. The courts cannot draw and apply that inference as a matter of decision without violating common sense and a very important public and social interest, and competent courts are not wont to do this. Therefore, even had section 3 not been added to article 14 of our state constitution, one could have predicted with some confidence that the easy broad interpretation of Judge Sloss's dictum would not have been supported by decisions of our supreme court.⁵⁴ Indeed the broad interpretation of Judge Sloss's dictum is not, I think, the proper one. In spite of the sweeping terms of his statement I doubt that he meant that a riparian could waste water which an appropriator needed for use or demand water for a wasteful use against an appropriator in all cases where the riparian priority is superior. In the *Madera Co.* case the riparian was demanding a valuable use—the natural deposit of silt on its riparian land by the overflowing stream, as against the defendant's diversion for non-riparian use above. The argument was not directed against the plaintiff's method of taking this use as wasteful for it was the only method by which the particular benefit could be obtained, but against such a benefit, however useful to the plaintiff, being taken at the expense of depriving appropriators above of all uses of the stream. The problem was a different one from that which I now am considering, although a broad general argument of economy in use of our natural water resources can be applied to both problems. The problem to which Judge Sloss's dictum refers is this: Among the uses made of a stream, by methods which involve no undue waste to obtain the use in question, some will be found to place a burden on other users disproportionate to the benefit resulting from the particular use. Should not an indefeasible right to some such uses be denied on the ground that they unduly burden the fullest development of uses of the stream against

⁵³ *Supra* note 15.

⁵⁴ An appropriator who has acquired a prescriptive priority of use against all lower riparians may enjoin a damaging diversion by an upper riparian of superior priority to that of the plaintiff's appropriation, insofar as the diversion exceeds the riparian's needs measured economically. *Arroyo Ditch & Water Co. v. Baldwin* (1909) 155 Cal. 280, 100 Pac. 874. This decision would seem directly opposed to the loose broad interpretations often made of dicta like that of Sloss, J., in *Miller & Lux v. Madera Canal & Irrig. Co.*, *supra* note 15. See also comment of WIEL, *WATER RIGHTS IN WESTERN STATES* (3d ed. 1911) §822, p. 876, n. 1.

the principle of economy of use in the general social interest? This is the problem which was solved in the affirmative as between appropriators in the leading case of *Schodde v. Twin Falls Land & Water Co.*⁵⁵ and also in the later California case of *Antioch v. Williams Irrig. Dist.*⁵⁶ It is to this problem that Judge Sloss perhaps intended his dictum to be confined; and this problem is the subject matter for my next suggestions.

Let me interpret by restatement Judge Sloss's dictum as a starting point for my suggestions concerning the applicability of the principle of the last two decisions to riparian rights.

It is contended that the plaintiff's claim to have the water flow over its land in times of flood so that its land may be fertilized by the deposits of sediment and moistened sufficiently to bear crops without further irrigation, is unreasonable as against claims of appropriators above who desire to divert otherwise unused flood waters for non-riparian use, and that the maintenance of the plaintiff's claim will tend to obstruct the fullest development of the water resources of the state and, by preventing uses far more beneficial in their totality than the plaintiff's use, will result in waste of these resources. This argument is unsound as a matter of law, since the principles of reasonable adjustment of uses and of relative economy of uses is not applicable to a controversy between a riparian and a subsequent appropriator.

"The doctrine that a riparian owner is limited to a reasonable use of the water applies only as between different riparian proprietors. As against an appropriator who seeks to divert water to non-riparian lands, the riparian owner is entitled to restrain any diversion which will deprive him of the customary flow of water which is or may be beneficial to his land. He is not limited by any measure of reasonableness. . . . But the riparian owners have a right to have the stream flow past their land in its usual course, and this right, so far as it is of regular occurrence and beneficial to their land, is, as we have frequently said, a right of property, 'a parcel of the land itself.' Neither a court nor the legislature has the right to say that because such water may be more beneficially used by others it may be freely taken by them. Public policy is at best a vague and uncertain guide, and no consideration of policy can justify the taking of private property without compensation."⁵⁷

There is much in this dictum as a statement of existing law with which it is impossible to disagree. Of course, the mere fact that the defendant's non-riparian use is more beneficial or more important to the public than the plaintiff's use should not lead to a denial of the plaintiff's right to priority for his use over the defendant's use, and in general, assuming the plaintiff's right of priority, he should not be

⁵⁵ (1911) 224 U. S. 107.

⁵⁶ *Supra* note 3.

⁵⁷ *Supra* note 15, at 64, 99 Pac. at 511.

deprived of it to the profit of the defendant without compensation. But this does not hit the target of the problem. Consider the decisions in *Schodde v. Twin Falls Land & Water Co.* and *Antioch v. Williams Irrig. Dist.* In the first of these two cases a prior appropriator had placed water wheels in the stream to lift a small amount of water to a ditch for irrigating his land. The defendant, a subsequent appropriator, diverted a larger volume from the stream for supplying distant landholders with water for irrigation. After this diversion, the current was no longer sufficient to turn the plaintiff's water wheels, although there was sufficient water left in the stream to supply the plaintiff's irrigation needs. He sued to enjoin the defendant's diversion. The court denied him relief on the ground that to support the plaintiff's demand of a priority to use the full natural current to turn the water wheels as against the defendant's appropriation use would be wasteful of the stream as a natural resource for uses. It would prevent the development of large possible uses above the plaintiff's wheels to supply the plaintiff's relatively unimportant use of turning the wheels. The plaintiff's appropriation was held not valid to an extent justifying his suit.

Similarly in *Antioch v. Williams Irrig. Dist.*, the plaintiff city was a prior appropriator which diverted water from the Sacramento River near its mouth for purposes of a city water supply. Large diversions by the defendants, subsequent appropriators above, for irrigating rice fields so diminished the current of the river that its opposition to the tides was no longer sufficient to keep the salt water out of the plaintiff's pipes. The court held, however, that the plaintiff's claim of a right to have the current unimpaired to keep the tides from salting the water at the plaintiff's pump was a claim to a use of the stream which so much diminished the possibility of development of uses above that it should not be supported against such upper subsequent uses.

Unquestionably these decisions are sound as a matter of economic policy and therefore they are sound law. Why should not a similar disposition be made of similar cases where the plaintiff has a prior riparian right instead of a prior appropriation right? Why should not a riparian's legal priority of right be limited as to uses as against appropriators as well as co-riparians by the principle of these cases? A prior appropriator has as firmly a vested right as a riparian. The problem in either case is a primary one of determining how far the right extends. Is it absolute as to uses and their effects regardless of consequences to the public interest or is it subject, as all other legal rights are, to controlling considerations of the public or general economic and social interest? Should a single riparian be able to prevent all private exten-

sive non-riparian uses of a large river, with a flow ample for satisfaction of all reasonable demands of riparians and others, merely to secure some relatively trivial and perhaps bizarre and wasteful use on his riparian lands? Judge Sloss's dictum seems to answer this question in the affirmative; but if it does and he is right, then our courts have proved inefficient in this particular in developing our common law, for there can be no question that such private rights of obstruction of beneficial development of our natural resources are highly pernicious and do not appeal to common sense.⁵⁸

At any rate section 3 of article 14 of the state constitution, added in 1928, should furnish a sufficient basis for decisions in accord with sound policy on this point, in spite of Judge Sloss's dictum against the state's legislative power to thus ameliorate the law. Since this legislation is a state constitutional provision it settles the law except insofar as the federal constitution may nullify the provision; and it is highly improbable that the United States Supreme Court would hold the provision invalid in any respect. It has been a consistent policy of that Court to leave private water right questions which do not involve federal or interstate interests, such as may arise with respect to navigable or interstate streams, to the control of local law policies of the individual states. The sort of cases with which I am now concerned are not strong for the contention that a federal question is involved; for (1) no federal legislation except the Constitution is involved, (2) legislation is really not necessary except to encourage the California judges to adopt policies which they had power before to develop as part of the common law, and (3) federal constitutional law recognizes in the several states a wide and flexible legislative police power to readjust

⁵⁸ This argument does not necessitate disapproval of decisions such as *Huffner v. Sawday*, *supra* note 25, and *Peabody v. City of Vallejo*, *supra* note 35, for on balancing considerations of justice and policy including those potent ones of common prejudices and usages it may reasonably be decided that riparians at present have against subsequent appropriators a prior right (1) to saturation of the bed of a stream so as to carry sufficient of the surface flow to their lands to satisfy their riparian needs and (2) to the full pressure of the flow to cause sub-irrigation of their lands. On the other hand, as the need for economy of uses increases, the time may come when the waste involved in such uses will cause common sense to adjudge that the expense of a proper conservation and economical adjustment of uses so as to save the losses inherent in the "natural" method of using water down stream—*e.g.*, saving by piping in one of the cases, *supra*, and by surface irrigation in the other—should be shared by all the holders of water rights interested and not wholly by the holder of the subsequent priority as the price of his desired use.

The present point is that each type of case presenting this problem is to be carefully considered on its merits in the light of the prejudices of common sense affecting it. Decidedly the cases should not all be settled one way by an abstract sweeping formula.

the conflicting claims of use of opposing property owners as governmental policy dictates without providing compensation.⁵⁹

My conclusions then are:

1. Riparian rights do not offer such an insurmountable or such an expensive obstacle to a satisfactory development of economical uses and conservation of our water resources as is sometimes thought by pessimistic observers.

2. For the purposes of this development no legislative changes of the fundamental principles of our water law are necessary. In the main, legislation should be directed to making more efficient the procedure for determining and quieting water right priorities and keeping an adequate record of these priorities and to authorizing the organization and equipment of needed development and conservation projects in the public interest.

3. Essential to a satisfactory solution of our water problems is a policy of intelligent, progressive, and constructive judicial statesmanship on the part of our judges. If they take a narrowly biased view of the law, the expense of a just and adequate development will be increased tremendously to the profit of racketeering litigants and certain members of the legal profession, but to the detriment of the public interest. That a liberal and constructive spirit will influence their decisions seems almost certain, not only in view of the policies of all the other western courts in that direction, but also from the opinion of the supreme court, *per* Shenk, J., in the recent case, *Gin S. Chow v. City of Santa Barbara*. Apparently Justice Shenk and the majority of the justices of the supreme court believe that article 14, section 3 of the state constitution is valid and forms a sufficient basis for accomplishing the legal results for which this article argues. There should be no doubt that the burden of progress or frustration is on the legal profession and principally on the judges, because if they have the ability and courage for sound decisions, there is no barrier to them. Certainly they have the power, as all judges have, to develop the law in accord with sound social and economic policy except insofar as they are hampered by legislation, and there is no legislation which hampers them in solving the problems within the scope of this article. On the contrary, legislation has been drafted with great care and circumspection to urge them to proper decisions without in any way impairing the legitimate interests of any holder of a water right. The opinion in *Gin S. Chow v. City of Santa Barbara* is a welcome announcement that the supreme court purposes to do its part.

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⁵⁹ See the cases cited in the opinion of Shenk, J., in *Gin S. Chow v. City of Santa Barbara*, *supra* note 20; *Ex parte Maas* (1933) 86 Cal. Dec. 602, 27 P. (2d) 373.