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Waters and Water Courses - Abrogation of Common Law Doctrine - Recognition of Vested Rights

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volved statutes which either expressly or impliedly declared the mayor to be a member of the council, thus giving him the power to vote.

The North Dakota Constitutional provisions are almost identical to those of Montana, Michigan, and Kansas.[9] Where two constitutional provisions seem to be irreconcilable, as could very well be found in North Dakota, the courts must try to render every word operative rather than to leave any words of the constitution idle or nugatory.[10]

North Dakota courts have never been called upon to litigate a case of this nature. It is the writer's opinion that the better construction would be to follow the Montana court's lead and allow the lieutenant governor to give the "casting vote." It would seem unjust to declare all deadlocks by the senate to have defeated the legislation when Section 77 of Article III of the North Dakota Constitution expressly gives the lieutenant governor the right to break the tie with his vote.

It is further recommended that a clarification of the North Dakota Constitutional provisions[11] would prevent this problem.

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WATERS AND WATER COURSES — ABROGATION OF COMMON LAW DOCTRINE — RECOGNITION OF VESTED RIGHTS — Plaintiff brought an action to enjoin the city of Wichita from drilling and pumping a water well in the Wichita well-field area under the provisions of the 1945 Water Appropriation Act[1] providing for the appropriation of underground water. Plaintiff maintained said well would allow the defendant to divert subterranean percolating water from under his land causing irreparable damage and is therefore an unconstitutional taking of his property. From an adverse judgment of the district court the city appealed. The Kansas Supreme Court *held,* one

8. Siegel v. City of Belleville, 349 Ill. 240, 181 N.E. 687 (1932); City of Carrollton v. Clark 21 Ill. App. 74 (1886).

9. N.D. Const. art. III, § 77. "The lieutenant governor shall be the president of the senate, but shall have no vote unless they be equally divided. . . ."; N.D. Const. art. II, § 65. "No bill shall become a law except by a vote of a majority of all the members-elect in each house. . . ."

10. I COOLEY'S CONSTITUTIONAL LIMITATIONS 128 (8th ed. 1927).

11. **Supra** note 9.

1. Kan. Laws 1945, ch. 390; Gen. Stat. §§ 82a-701 to 82a-725 (1961 Supp.).

judge dissenting, that the 1945 Water Appropriation Act does not violate any constitutional provision of the Kansas or United States Constitutions. The dissent argued that the Water Appropriation Act in abrogating the common-law theory that every landowner had a vested property right in the water underlying his land deprived the plaintiff of property without compensation and is therefore unconstitutional. *Williams v. City of Wichita,* 374 P.2d 578 (Kan. 1962).

The instant case illustrates a basic problem inherent in applying the doctrine of appropriation[2] in jurisdictions where other theories of water ownership have previously been in effect. In those jurisdictions which recognize the common-law theories of water rights, the landowner not only has a vested property right in the water underlying his land,[3] but also, as a "riparian" owner, has certain vested property rights in the waters flowing by or through his land in a natural stream.[4] This discussion will concern itself with the difficulties involved in imposing the appropriation doctrine upon the previously recognized concept of vested riparian rights.

The riparian system was found to be unsuited for the arid western states and consequently nineteen states[5] have recognized the appropriation doctrine. However, seven of these states[6] have also recognized riparian rights in one form or another.

It is well settled that a state under the police power may abrogate the common-law riparian system.[7] In doing so, however, it is necessary that certain constitutional requirements be adherred to. Pre-existing riparian rights must be protected[8] and compensation paid to the owner if they are destroyed to insure the constitutionality of such abrogation.[9]

2. 56 Am. Jur. 742 ". . . one who first diverts and applies to a beneficial use the waters of a stream has a prior right thereto, to the extent of his appropriation."

3. See Acton v. Blundell, 12 Mees. & W. 324, 152 Eng. Rep. 1223 (1843); Huber v. Merkel, 117 Wis. 355, 94 N.W. 354 (1903).

4. See Lux v. Haggin, 69 Cal. 255, 10 Pac. 674 (1886).

5. Hutchins, **Riparian-Appropriation Conflicts in the Upper Midwest,** 38 N.D. L. Rev. 278 (1962).

6. HUTCHINS, SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST, 30 (U.S. Dept. of Agriculture, 1942).

7. State **ex rel.** Emery v. Knapp, 167 Kan. 546, 207 P.2d 440 (1949); California-Oregon Power Co. v. Beaver Portland Cement Co., 296 U.S. 142 (1935); Brown v. Chase, 125 Wash. 542, 217 Pac. 23 (1923).

8. Baumann v. Smrha, 145 F. Supp. 617 (D. Kan. 1956); **In re** Willow Creek, 74 Ore. 592, 144 Pac. 505 (1914).

9. Hilt v. Weber, 252 Mich. 198, 233 N.W. 159 (1930); St. Germain Irrigating Ditch Co. v. Hawthorne Ditch Co., 32 S.D. 260, 143 N.W. 124 (1913); State **ex rel.** Wausau St. Ry Co. v. Bancroft, 148 Wis. 124, 134 N.W. 330 (1912).

In rejecting the riparian doctrine it is generally held that a state may validly require a riparian owner to make an application for the preservation and registration of his vested right.[10] The Model Water Use Act provides for such an application after notice of such a requirement has been given to the riparian by publication and registered mail.[11]

North Dakota apparently recognizes both the riparian[12] and appropriation[13] doctrines. As a result much confusion exists as to what degree the conflicting theories will be followed. Apparently N. D. Cent. Code § 61-01-01.1,[14] which was enacted in 1955, was an attempt to restrict the riparian doctrine and pave the way for a pure appropriation doctrine state. This statute presents a serious constitutional question because it limits the riparian right and makes no provision for compensation for the destruction of existing vested rights.

Because the appropriation doctrine is more adapted to the semi-arid conditions of North Dakota it is suggested that North Dakota repeal sections 47-01-13 and 61-01-01.1 to eliminate the conflict and constitutional question the respective statutes now present. It would then be necessary to

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10. State **ex rel.** Emery v. Knapp, **supra** note 7; Pacific Live Stock Co. v. Lewis, 241 U.S. 440 (1916).

11. Model Water Use Act, § 304.

12. N.D. Cent. Code. § 47-01-13 (1961). "The owner of the land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream. Water running in a definite stream formed by nature over or under the surface may be used by him as long as it remains there, but he may not prevent the natural flow of the stream or of a natural spring from which it commences its definite course, nor pursue nor pollute the same."

13. N.D. Cent. Code, § 61-01-01 (1961). "All waters within the limits of the state from the following sources of water supply, namely:

1. Waters on the surface of the earth excluding diffused surface waters but including surface waters whether flowing in well defined channels or flowing through lakes, ponds, or marshes which constitute integral parts of a stream system, or waters in lakes; and
2. Waters under the surface of the earth whether such waters flow in defined subterranean channels or are diffused percolating underground waters; and
3. All residual waters resulting from beneficial use, and all waters artificially drained; and
4. All waters, excluding privately owned waters, in areas determined by the state engineer to be noncontributing drainage areas. A noncontributing drainage area is hereby defined to be any area which does not contribute natural flowing surface water to a natural stream or watercourse at an average frequency oftener than once in three years over the latest thirty year period;

belong to the public and are subject to appropriation for beneficial use and the right to the use of these waters for such use, shall be acquired pursuant to the provisions of chapter 61-04.

14. N.D. Cent. Code, (1961). "The several and reciprocal right of a riparian owner, other than a municipal corporation, in the waters of the state comprise the ordinary or natural use of water for domestic and stock watering purposes."

amend section 61-04-22[15] to provide for the registration of all vested rights together with means of informing the riparian that such an application is necessary to preserve his rights. Such legislation would eliminate much of the confusion presently existing in the water law of this state. Also, the ability of the State Engineer to determine the amount of the unappropriated water in the state would certainly be an aid in luring industry into North Dakota.

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15. N.D. Cent. Code, (1961). "Any person, firm, corporation, or municipality which used or attempted to appropriate water from any watercourse, stream, body of water or from an underground source for mining, irrigating, manufacturing or other beneficial use over a period of twenty years prior to January 1, 1934, shall be deemed to have acquired a right to the use of such water without having filed or prosecuted an application to acquire a right to the beneficial use of such waters. Such use or attempted use of the waters is hereby declared to be a prescriptive water right and is hereby confirmed and established as such. Any such prescriptive water right acquired under this section shall be subject to forfeiture for nonuse as prescribed by law.