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THE BOOK CENTRE

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Southern Rhodesia

**THE
RHODESIA AND NYASALAND
LAW JOURNAL**

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THE BOOK CENTRE

FIRST STREET

SALISBURY

SOUTHERN RHODESIA

WATER RIGHTS IN SOUTHERN RHODESIA — I

BY

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This is the first of a series of articles on the water law of Southern Rhodesia, and traces the historical development of the legislation, culminating in the Water Act, 1927, which is Chapter 251 of the Revised Edition of the Statutes.

Although considerably amended over the years, the Water Act has in general stood the test of time remarkably well. One of the main difficulties encountered by legal practitioners in its application has been the lack of any textbook to supplement the Act in those many respects in which it differs from the corresponding South African legislation.

Judge Hoffman, who has presided over the Water Court for many years, will remedy this lack of a textbook in this series of articles.

HISTORICAL INTRODUCTION

Prior to the introduction of any legislation on water in this Colony the common law of the Colony of the Cape of Good Hope, in force as on the 10th of June, 1961, applied: Order in Council, 1898, section 49(2).

In the Royal Charter that issued to the British South Africa Company on the 29th of October, 1889, that Company was specially authorised and empowered from time to time

“To improve, develop, clear, plant, irrigate and cultivate any lands within the territories of the Company”: article 24(VI).

In his “Notes on the Water Law of Southern Rhodesia”, 1936 *Rhodesian Agricultural Journal* 788, Mr. Justice McIlwaine wrote:

“In the earlier years of settlement there was not a great deal of competition for the use of water and consequently little litigation. This may also have been partly due to the form of land title commonly issued which, in the case of farms bounded by rivers, fixed the river bank of the stream as the boundary and so avoided controversy as to the respective rights of riparian owners. Further, in what is known as the Gold Belt, it was usual to restrict the use of water by landowners.”

By the Order in Council, 1898, section 81:

“The Company shall from time to time assign to the natives inhabiting Southern Rhodesia land sufficient for their occupation whether as tribes, or portions of tribes, and suitable for their agricultural and pastoral requirements, including in all cases a fair and equitable proportion of springs or permanent water.”

As to the fair and equitable proportion of springs or permanent water, Ordinance 1 of 1914 introduced more detailed protection of the interests of the occupants of Native Reserves. The present position is that these interests continue to be protected by section 112 of the Water Act, Chapter 251, as amended, which reads:

“Whenever any decision or award of a Water Court in respect of any application for water or combined irrigation scheme or any other matter is likely, in the opinion of the Water Court, substantially to affect the requirements for primary use of the inhabitants of a native reserve or of the special native area as described from time to time in the Sixth Schedule of the Land Apportionment Act, 1941, such decision or award shall not take effect unless and until the approval of the Board of Trustees for Native Reserves or of the Minister of Native Affairs, as the case may be, has been obtained.”

Water requirements for local authorities received early attention in the Towns Management Ordinance, 1894, Regulations providing for the constitution of Municipalities, 1897, and the Village Regulations, 1898.

An ordinance to consolidate and amend the laws relating to mines and minerals, Ordinance 19 of 1903, provided that the control of the flow, diversion and use of all water, which may be flowing or exist on any land in any mining district, subject to certain provisions in favour of the miner as to water from subterraneous workings of any mining location or flood water stored, vested in the Mining Commissioner. He was empowered to apportion the use of water under certain conditions which protected the occupier or owner of land but conferred no ownership in such water and in the event of the water supply being limited gave preference to the wants and requirements of the occupier or owner of land or the holder of a mining location, who first appropriated and used the water: *ibid*, section 80.

In 1904, by amendment of the Mines and Minerals Ordinance, rights to water vested in the Administrator and were exercisable through the Secretary for Mines: Ordinance 10 of 1904, sections 2 and 3.

In 1908 further amendments repealed the vesting of these rights in the Administrator and provided for miners and land owners either agreeing to such use or having their rights determined by arbitration.

These rights were then registered in the office of the Mining Commissioner: Ordinance 15 of 1908, sections 11–16.

Thus as a result of this and previous enactments miners derived their authority to use water for mining purposes in a variety of ways. Some were authorised to do so by Mining Commissioners, others by the Administrator and others again by agreement or failing agreement by arbitration.

In 1927 the Water Act of that year set out the terms and conditions under which miners became entitled to use public water. From then onwards miners received grants from the Water Court or in cases of urgency from a Mining Commissioner subject to confirmation by a Water Court: sections 18 and 32.

From the earliest legislation on water for the miner he has always received preferential treatment for its use other than for primary purposes. This position is reflected in current legislation as the miner may receive a grant to the use of water beneficially used for secondary purposes by any other person on payment of compensation: section 19 of the Water Act.

The water requirements for railways received attention by Ordinance 9 of 1910, now The Right to Private Water (Railways) Act, Chapter 264. This Act was followed by later Acts giving the Railways rights to water for specific railway undertakings. In addition to this many grants have been issued by the Water Court authorising the Railways to use public water: see more fully notes to section 20 of the Act.

The Municipality of Salisbury in 1911 was authorised to take, impound, divert, appropriate and convey water from the Makabusi river and its catchment area. In later years many local authorities were authorised to use public water under specific Acts of Parliament as well as through grants issued by the Water Court: see notes to section 22 of the Act.

In 1911 an attempt was made to introduce new water legislation (see *Hansard*, 1911, page 11) but the Bill was postponed and later withdrawn. In this regard Sir Robert McIlwaine in his "Notes on the Water Law of Southern Rhodesia", *ibid*, at 788–9, says:

"In 1911 a Bill designed to deal with water rights in a comprehensive way was introduced in the Legislative Assembly. In the course of its discussion emphasis was laid on the desire to make provisions which would avoid the constant litigation which had taken place elsewhere in South Africa. Notwithstanding that, it embodied some of the outstanding features of the Union law. Eventually the Bill was withdrawn in order that members of the

Council and the people might have more time to consider the important principles involved. Thereafter the Government very carefully went into the whole question and as a result of an exhaustive study of the laws of other countries it was decided that the best course was to make a complete departure from South African precedents and, save as to existing rights, to vest all public water in the State and prescribe the conditions on which it should be apportioned to users."

In 1903 Sir William Willocks who had visited South Africa wrote:

"It would be a misfortune if in the twentieth century were to be passed an irrigation Act which overlooked the experience gained in India and Egypt, in Italy, Spain and France, and in the arid and semi-arid regions of North America." A. D. Lewis, *Water Law, its Development in the Union of South Africa*, p. 59.

For South Africa Sir William Willocks sought "the abolition of riparian rights for other than domestic purposes", stating "These riparian rights were introduced by barbarians of the type of Front de Boeuf, and should have died with them." *Ibid*, at 59.

In 1913 by Ordinance 13 of that year a most important statute was passed to determine and control the ownership and use of water and for the promotion of irrigation.

This legislation, however, did not go far enough in recognizing State ownership as overriding the principle of riparian rights. Sir Robert McIlwaine, *op. cit.* p. 789, says of this Ordinance:

"In its passage through the Council, although the principle of State ownership of public water was adopted, for reasons which it is now difficult to appreciate, a number of amendments were introduced preserving the old doctrine of riparian rights and other common law features which largely destroyed the underlying principles of the measure."

As to "other common law features" an article in 1947 *South African Law Journal* 480, "The Development of Water Rights", has this to say on the Roman-Dutch law:

"The doctrine of State ownership of rivers, which appears to have been generally accepted in the seventeenth century, persisted throughout the eighteenth, and Kersteman states that all rivers at that time (1768) were acknowledged to belong to the sovereign and, except for the purposes of irrigation, their use was in no wise free for the general public."

Dealing with the earlier rule of the Dutch East India Company in South Africa the article continues at 482:

"It is clear that no conception of riparian ownership as a basis

of water rights had as yet arisen; State control was still the dominant principle."

After tracing the history of the development of water rights in South Africa the following conclusion is reached:

"The influence of Roman-Dutch law upon the formation of our water law has been slight, and the disappearance of the Dutch idea of State ownership of public streams can fairly be attributed to English law conceptions of the rights of land owners." *Ibid*, at 486.

The article ends with these words:

"There have been several far-reaching amendments, the latest of which is an effort to restore, to a limited degree, the old principle of State control." *Ibid*, at 487.

Dr. the Hon. C. G. Hall, author of this article, in a letter to me in which he kindly gives his permission to include the above quotations, has this to say apropos the present position in South Africa as compared with that when the article was written:

"It was written before the passing of the Water Act, 54 of 1956, which made a sweeping change in the position of State control. I would refer you to sections 61 and 62 of the Act which you will find on pages 158-162 of the third edition of my book. There has been a further amendment of section 62 by section 11 of Act 56 of 1961 in which the controls appear to be intensified."

He also points out that State control has reasserted itself and become re-established in the Republic of South Africa "where it is becoming a dominant factor for future irrigation schemes, e.g. Orange River development."

Reverting to the 1913 Ordinance and its deficiencies in respect of the full recognition of State control Sir Robert McIlwaine has this to say:

"Notwithstanding this unfortunate result the advocates of reform did not abate their efforts, and a further Bill was introduced in 1920 with the object of restoring the principal features which had been previously rejected. It was then possible to point to the deficiencies of the 1913 Act, as experienced in administration, and the amending Bill received the approval of a sympathetic House." *Op. cit.*, at 789.

The amending Ordinance 8 of 1920 was introduced to Parliament by the Solicitor-General who was none other than Sir Robert McIlwaine himself.

"On the passing of the 1920 Act the law operated with general satisfaction, but the farmer still felt that the rights possessed by miners under special laws were an unnecessary obstacle to meeting

the reasonable requirements of land owners. After protracted negotiations between the interested parties a large measure of agreement was reached. It was the aim of the Government to amend the law generally in the light of the experience now available and to bring the rights, not only of farmers and miners, but also urban authorities requiring water within the compass of one general law. This was accomplished by a consolidating and amending Act in 1927 This Act also provided the terms on which rights to public water could be acquired by the miners, railways and local authorities." *Ibid*, at 789-90.

As to the position prior to the introduction of this Act an article on the Water Act, 1927, by Mr. C. L. Robertson, the first Director of Irrigation in the Colony, puts the position very neatly when he writes:

"The legislation regarding the apportionment of water was in an unsatisfactory condition, as there was no single authority responsible for the control of public water. For example, public water was available for apportionment under any one of the following four methods:—

(a) The water for irrigation purposes was dealt with under the Water Ordinance, 1913, as amended in 1920, and grants were issued after consideration by a properly constituted Water Court.

(b) Water for mining purposes was dealt with under the Mining Law Amendment Ordinance, 1908, and grants were issued by the Secretary for Mines and Works on the advice of mining commissioners.

(c) The Railways possessed rights to water under powers conferred by the Right to Water (Railways) Ordinance, 1910.

(d) Local authorities requiring public water for town supplies could only obtain legal rights by means of a special Act.

If this condition of affairs were allowed to persist indefinitely, it is evident that mutually incompatible grants might be issued which would be difficult of interpretation and would result in a serious conflict of interests. Under the present Act this has been remedied, and the control of all public water required for these various purposes is vested in the Water Court composed of a Water Court judge and two assessors." 1928 *Rhodesia Agricultural Journal* 45.

Act 22 of 1927, now Chapter 251, introduced a great many new features that will be considered in detail, later in this work, where these and other additional sections of Chapter 251 are discussed.

The Act rests on the firm foundation of State ownership of all water other than private water, widens the scope of the Water Court and deals very fully with rights to water.

It is no small tribute to those responsible for the passing of this statute that its basic principles still remain in force. Amendments, passed from time to time, are for the most part merely a natural evolution dictated by experience and the increasing requirements of a rapidly expanding economy.

A feature of the 1927 Act which disappeared later is found in the duties and responsibilities of a Water Court in respect of soil conservation generally and the protection of public streams under the proviso to section 4, section 42(e), Part V and section 114. With the advent of the Natural Resources Act, 9 of 1941, these provisions were all repealed by section 48 and this work came within the functions of the Natural Resources Board. This Act, however, provided for appeals from decisions of the Natural Resources Board to the Natural Resources Court which is presided over by a Water Court Judge: sections 2 and 3 of Act 9 of 1941.

Finally, in more recent years the work of the Water Court itself has been made easier by the increase of staff in the Division of Irrigation, the availability of more and more hydrological data and the creation of a Department of Conservation and Extension. Officers of these departments present comprehensive reports which are of considerable assistance in assessing more accurately the value of applications for water and deciding them to the best advantage of all concerned.



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