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SOME LEGAL ASPECTS OF PUBLIC AND PRIVATE WATERS IN MINNESOTA

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FOREWORD

Sometime ago Mr. Michaelson allowed me to read the manuscript of a lecture that he had delivered, in the spring of 1949, before one of the classes of the St. Paul College of Law. I was impressed by the able manner in which this little-understood and controversial subject was presented and believe that the dissemination of this information will be helpful to engineers, state, county and municipal officials, and, in fact, anyone who has to do with water problems. It has been reproduced with the author's permission and is now presented as Bulletin No. 4 of the Division of Waters.

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Division of Waters

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Since time immemorial mankind has made uses of water not only to sustain life but as a means of easing his burdens incident to the mode of living then existing. In past ages the oceans, bays, lakes, rivers, and their tributary streams have been useful to man as the primary means of communication, transportation and travel. Sustenance of life depended in part upon the right to use waters for fishing and fowling. As time passed, these ancient uses continued and to them new uses were added, meeting new needs arising out of a more complex way of life. These ever changing conditions, social, industrial and governmental, have from time to time presented new problems and questions, both legal and legislative, which have been met in the light of the need and necessity of surrounding circumstances and conditions.

The Chief Justice of the Supreme Court of Maine aptly said:

> "The inexhaustible and ever changing complications in human affairs are constantly presenting new questions and new conditions which the law must provide for as they arise; and the law has expansive and adaptive force enough to respond to the demand thus made of it, not by subverting, but by forming new combinations and making new applications out of its already established principles, the result being only 'the new corn that cometh out of the old fields'".

In the application of legal principles, waters are placed into two classes, navigable and non-navigable, or, as sometimes referred to, public and private waters. The terms public and navigable are used interchangeably, and the terms private or non-navigable have the same

legal import. All waters which are not navigable within the rule or test by which such determination is to be made are non-navigable waters.

Under the common law of England the title to all waters of the sea, the arms of the sea, and the rivers where the tide ebbs and flows, and all of the lands below high-water mark, within the jurisdiction of the Crown of England, was in the King. The ownership was absolute in the King with unrestricted power of alienation.

Minnesota, like many other states, has adopted the common law of England with certain modifications pertaining to navigable waters. In Lamprey v. State, 52 Minn. 181, the court said:

> "Our state has adopted the common law on the subject of waters, with certain modifications, suited to the difference in conditions between this country and England."

In England the test of navigability was the ebb and flow of the tide. A comprehensive discussion of the common law of England and of its modification by the courts of its states may be found in a lengthy opinion of Mr. Justice Gray in Shively v. Bowlby, 153 U. S. 1. In the course of this opinion it is stated:

> "In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea, below ordinary high-water mark, is in the King, except so far as an individual or a corporation has required rights in it by express grant, or by prescription or usage; and that this title, whether in the King or in a subject, is held subject to the public right, of navigation and fishing.
>
> "It is equally well settled that a grant from the sovereign of land bounded by the sea, or by any navigable tide water, does not pass any title below high-water mark, unless either the language of the grant, or long usage under it, clearly indicates

that such was the intention."

When the revolution took place and the 13 states declared their independence, the people of each state became sovereign under themselves, and in that character became possessed in their soverign capacity of the absolute right and title to all navigable waters and the soil beneath, within their boundaries, in trust for their common use, subject only to the rights since surrendered under the federal constitution, to the federal government.

The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people by Amendment X to the federal constitution.

The specific powers delegated to the United States to regulate and control navigable waters, particularly navigation thereon, is found in Article I, Section 8, Clause 3, as follows:

"The Congress shall have power:

"To regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

Every state upon admission to the Union becomes vested of the title to all beds below ordinary low-water mark under all navigable waters within its boundaries, thereby acquiring the same rights therein as the original 13 states. Pollards Lessee v. Hagan, 3 Howard 212, Martin v. Waddell, 16 Peters, 367.

It has been presumed that states, bordering on waters where the tide ebbs and flows, upon admission to statehood became possessed of a marginal three-mile strip along its coast, and as to such a strip its title therein was the same as its title to the bed under navigable waters within its boundaries. Many states acted upon this presumption and granted leases and other rights to explore for and take oil, sponges and corals from within the three-mile marginal strip.

The theory of the three-mile strip along the coast of a country orginated prior to our colonial days when it was recognized amongst countries that it was necessary for each country to own such a strip as a means of protection, and to have exclusive control and ownership of a three-mile strip along its shores. When the 13 colonies became free and independent states it was presumed that each state bordering upon tidal waters became possessed of such three-mile strip with the same rights therein and thereto as were vested in the Crown of England. This marginal strip has been considered in the same class as navigable bodies of inland waters.

The United States Supreme Court, in a recent decision, has set these questions at rest and decided adversely to the contentions of the states. In United States v. California, 332 U. S. 19, the court held that California is not the owner of a three-mile marginal belt along its coast, and that the federal government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under the water area, including oil. Actions of a similar nature have been brought by the United States and are pending against other states involving the ownership and control of the three-mile marginal strip. These decisions, however, do not intend nor purport to affect the state's ownership of navigable waters and underlying beds within the borders of a state.

The state's ownership and control of navigable waters and underlying beds which attached to and became inherent in each of the original 13 states upon their independence, and to each succeeding state upon admission to the Union as a sovereign state have been pointed out. A new state upon admission to statehood as a sovereign state came into the union upon an equal footing with the original 13 states.

Under the common law of England all waters where the tide ebbed and flowed were navigable waters, and the soil beneath belonged to the Crown. This common law rule has been modified in the United States to meet different geographical and geological conditions; only those states that border on the sea or arms of the sea are affected by the tide, and if the test of navigability should be limited to the common law rule of England, then all inland waters, irrespective of area or capacity, would fall within the class of private or non-navigable waters. The test of navigability of waters within the United States is to be determined by the federal rule applied as of the time when a state was admitted to the union as a sovereign state. The federal rule has been repeatedly stated by the United States Supreme Court and followed and applied by the courts of the states. In United States v. Holt State Bank, 270 U.S. 56, 70 L. Ed. 469, there was involved the question of navigability of Mud Lake situated in the state of Minnesota. The court said:

> "The rule long since approved by this Court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used or susceptible of being used in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had--whether by steamboats, sailing vessels or flatboats--nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce."

Whenever a waterway is once determined to be navigable it continues to remain so. The uses and purposes to which waters may be put to meet the test of navigability vary from the carrying of ocean liners to floating out of logs. The density of the traffic of waters may vary widely, and all of these factual conditions must be taken into account in determining navigability. United States v. Appalachian Electric Power Company, 311 U. S. 405, 85 L. Ed. 252, State v. Brace, 36 N. W. (2d) 330 (N.D.), decided March 30, 1949. State v. Longyear Holding Company, 224 Minn. 451, is the last work of our Supreme Court on the rights of the state in navigable waters and beds thereunder, and the rule by which navigability is to be determined. A writ of certiorari was applied for to the United States Supreme Court in this case, and the application was denied.

In Minnesota the determination as to whether a stream or lake is navigable must be determined under the federal rule, and as of the date when Minnesota was admitted to the Union, which is May 11, 1858. Obviously, there are few, if any, persons living today who have personal knowledge of the conditions of our streams and lakes in the year 1858. The uses and purposes that were made of lake and streams in Minnesota in the year 1858 were limited to travel by water in birch bark canoes by the Indians and early fur traders in transporting furs, etc. The early explorers and missionaries made use of these streams and lakes as a means of travel. There were no highways within the state; only a few trails existed and travel thereon was infrequent. The only other use to which our inland waterways were put was for logging purposes. The use of our streams and lakes for the purpose of transporting furs and as a means of travel by the early explorers and missionaries and for floating logs from the forests to the mills are facts, and, if established, are sufficient to sustain navigability.

Clearly, all inland streams and lakes could not be used for carrying on the type of trade and commerce of which the Great Lakes are susceptible, and therefor the law has recognized the necessity of considering the uses and purposes to which a body of water may be put to determine navigability, with due regard to the type or kind of trade or commerce within the area wherein such water is situated. That is why the court said that the uses to which a stream may be put to test navigability may vary from ocean-going steamers to the floating of logs.

It is provided in Art. II, Sec. 2, of our constitution that the State of Minnesota shall have concurrent jurisdiction in all waters which form a common boundary with other states, and that such rivers and waters and all navigable waters leading into the same shall be common highways and forever free, as well to the inhabitants of this state as to other citizens of the United States, without any tax, duty, impost, or toll therefor.

The right to use navigable waters is a public and not a private right. All persons have the common right, subject to reasonable restrictions, to use public waters for the ordinary purposes of life, such as boating, fishing, fowling, skating, and taking ice for domestic or agricultural purposes. It is the settled policy of this state to preserve its inland waters for the recreation and enjoyment of the public if such waters are susceptible of a beneficial public use.

Lands abutting a stream or lake are riparian lands, and the owner is known as the riparian owner or proprietor. Fee title of riparian owners to lands bordering upon navigable bodies of water extends to the ordinary low-water mark, subject to an easement in favor of the public to the area between the ordinary high-water mark and the ordinary low-water mark. The state may make use of this area for public purposes, or to aid navigation without payment of any compensation to the riparian owners. These rights which are in the public in

navigable waters are superior to the rights of the riparian owners. The riparian owner, however, may at all times use this area of land for such purposes as he may desire, provided that such use does not interfere with or impair the public use of the same. A riparian owner may construct and maintain docks or piers for his use and convenience in the waters adjoining his property up to the point of navigability. Such riparian owner has the right to the uninterrupted and full use of the water as it flows naturally past his land. This is not an absolute right but a natural one, qualified and limited by the existence of like rights in other riparian owners. These rights of riparian owners to the waters of a running stream are correlative and equal, each being entitled to the reasonable use thereof. What constitutes reasonable use is a question of fact to be determined with reference to the circumstances of the particular case. The use necessarily must vary according to the reasonable use of each riparian owner. The general rule is that the use of running water by a riparian owner must not be inconsistent with or prejudice the rights of other riparian proprietors to the use of the stream. No proprietor has the right to use the water to the prejudice of other proprietors above or below or opposite unless he has title to such an exclusive enjoyment. These rights of a riparian owner being attached to the riparian land may be sold and conveyed. They are rights which an owner may protect in the same manner as his rights in other real estate when the same have been damaged or destroyed.

The easement which exists in favor of the public to that area between ordinary high-water mark and ordinary low-water mark is one for a public as distinguished from a private purpose. Thus the riparian owner may forbid trespassing thereon by individuals for hunting pruposes. Hunting being an individual rather than a public use.

The public has certain rights in waters which must be observed not

only by riparian owners but by the public. There are certain statutes which forbid certain acts relating to waters, which statutes are not only for the protection of the riparian owners but also for the protection of the public. MS 1945, Sections 144.35 to 144.41 delegate certain powers to the state board of health in connection with the control and sanitation of waters of the state. These statutes provide that it shall be unlawful to pollute or contaminate certain waters. Section 144.377, subd. 6, prescribes penalties for violation of these statutory provisions.

Obstructing navigable or other waters may, under certain conditions, constitute a public nuisance, under the provisions of Section 616.01, and such nuisance may be abated.

Section 616.16 forbids depositing unwholesome substances in or near water courses, or upon the ice of lakes or streams, and provides that any violation of this statute shall constitute a gross misdemeanor.

Summarizing briefly what has been said, the state owns the title to all beds underlying navigable waters within its borders in trust for the benefit of its people, and without the right or power of absolute alienation. Riparian land owners bordering on navigable waters own to the ordinary low-water mark, subject to an easement in the public for public uses of that area between ordinary high and ordinary low-water marks.

It has been pointed out that the absolute title of a riparian owner extends to the ordinary high-water mark. Nature may enlarge the lands owned by riparian owners by accretions and relictions. Thus where from natural causes the shore is built up by the deposit of material as the result of wave, water, and wind action, such accumlations are known as accretions. Reparian owners are entitled to the accretions to their lands made by the water contiguous thereto

The reason for this rule is founded upon the broad principle of preserving the fundamental riparian right of having access to the water. Lamprey v. State, 52 Minn. 181; Minneapolis Trust Co. v. Eastman, 47 Minn. 301, Gilbert v. Eldridge, 47 Minn. 210.

Riparian owners are entitled to relictions made by the recession of water from their lands. Upon the theory of accretions and relictions resulting from natural causes the area of the riparian ownership of lands may be thereby extended. If as a result of natural causes there is an imperceptible recession of the water, the ownership of riparian lands is correspondingly increased and may extend as far as to the thread of a stream. By the thread of a stream is meant the thread of the current or the center of the current. In lakes the ownership of riparian lands is extended by reason of recession from natural causes in the same manner as lands bordering upon a stream.

Where a patent, grant or conveyance is made to lands abutting navigable waters of this state, irrespective of the description contained therein the instrument does not and cannot convey or grant absolute title beyond the ordinary high-water mark. The state does not have the power to convey and transfer unconditionally its title to the bed under navigable waters. The state may grant certain rights and privileges therein which are not inconsistent or incompatible with the public trust for which the title is held by the state. A lease by the state authorizing the removal of iron ore deposits from the bed of a navigable lake has been held by the supreme court as not being a sale or conveyance of such an interest therein so as to materially affect the trust theory of the state's title. State v. Korrer, 127 Minn. 60; Union Depot v. Brunswick, 31 Minn. 297; State v. Evans, 99 Minn. 220.

The term ordinary low-water mark has never been defined by the

Supreme Court of our state. Climatological conditions vary in the different parts of the United States. Experience in this state, and of which there is knowledge, show that this part of the country is subject to periods of extreme drought and periods of excessive precipitation and rainfall. Public records which disclose rainfall and precipitation have been kept in this state since the year 1837. At that time an observing and recording station was established by the United States Department of Agriculture at Fort Snelling. Daily records are available since that time showing rainfall and precipitation as recorded and observed at that station. At the present time numerous stations are maintained at favorable points in this state by the United States Weather Bureau and daily readings and recordings are made. There is also kept and maintained by the United States Geological Survey gauging stations, in cooperation with the state and other federal agencies, in all of the principal streams and rivers in this state. Some of these stations are automatic and record every fluctuation of the stream flow. The other stations are read daily and records are made and kept. These gauging stations record the stage of the stream and from measurements of discharge the volume of flow passing the gauging station is computed. These records are valuable to determine factual conditions of the mean daily and annual discharge of the water. From these records of rainfall and the volume of stream flow it is found thereform that in this state there are periods of drought and periods of excessive rainfall and runoff, and that the water elevation of lakes and streams vary accordingly. In times of extreme drought such as persisted from 1922 - 1941, many of our navigable streams were dry or nearly so. Many of the navigable lakes had dried up to such an extent that the lake beds were used for cropping purposes. These conditions reflect

extreme low-water in abnormal years, and do not reflect a true condition of ordinary low water conditions.

At the present time precipitation tends to be normal or above. The years 1942 and 1943 were years of unprecedanted rainfall and runoff. The low-water mark during such unusual and unprecedented years would not constitute the ordinary low-water mark.

For want of a judicial definition by our own court it is believed that the ordinary low-water mark means ordinary low water, neither extreme low during drought years, nor extreme low during years of excessive precipitation, but normal, natural, customary or ordinary low water, uninfluenced by special seasons, winds or other like influencing causes or conditions. This is substantially the language of the Supreme Court of Virginia in Scott v. Doughty, 124 Va. 358, 97 S. E. 802.

Our Supreme Court in two recent cases held that no liability results from flooding caused by unprecedented rainfall and water conditions such as occurred in 1942 and 1943. Poynter v. County of Otter Tail, 223 Minn. 121; Mitchell v. City of St. Paul, 225 Minn. 390.

Ordinary high-water mark referred to by text writers and the courts as high-water mark has been defined by our Supreme Court and the courts of other states. It has a definite and well-fixed meaning in law. In Minnetonka Lake Improvement, 56 Minn. 513.521, the court said:

> "'High water', as applied to the sea, or rivers where the tide ebbs and flows, has a definite meaning. It is marked by the periodical flow of the tide, excluding the advance of the water above the line, in the case of the sea, by winds and storms, and, in the case of the river, by floods and freshets. But, in the case of fresh-water rivers and lakes,--

in which there is no ebb and flow of the tide, but which are subject to irregular and occasional changes of height, without fixed quantity or time, except that they are periodical, recurring with the wet or dry seasons of the year,--high-water mark, as a line between a riparian owner and the public, is to be determined by examining the bed and banks, and ascertaining where the presence and action of the water are so common and usual, and so long-continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as respects the nature of the soil itself."

"'High-water mark' means what its language imports--a water mark. It is co-ordinate with the limit of the bed of the water; and that, only, is to be considered the bed which the water occupies sufficiently long and continuously to wrest it from vegetation, and destroy its value for agricultural purposes. Ordinarily, the slope of the bank and the character of its soil are such that the water impresses a distinct character on the soil, as well as on the vegetation. In some places, however, where the banks are low and flat, the water does not impress on the soil any well-defined line of demarcation between the bed and the banks. In such cases, the effect of the water upon vegetation must be the principal test in determining the location of high-water mark, as a line between the riparian owner and the public. It is the point up to which the presence and action of the water is so continuous as to destroy the value of the land for agricultural purposes by preventing the growth of vegetation, constituting what may be termed an ordinary agricultural crop."

This is the rule or test to be applied to the facts as observed upon the ground in determining ordinary high-water mark. Sometimes the facts are not easily ascertainable, as in cases where there is a scarcity of vegetation along the shore. In such cases it becomes necessary to examine the banks or the shore, and the character of the vegetation and soil along the shore. Trees, being the longest and most permanent expression of upland vegetation, furnish one of the most reliable and permanent criteria for determining the limits of water action. The action of the water causes a sloughing away of the earth at the base of the trees, leaving the roots on the side toward the water exposed. Usually there is little upland vegetation growing between the roots of the trees and the water's edge. Where there is vegetation growing along the bank or the shore, then high-water mark is the line between the growth of aquatic vegetation and upland vegetation, in all, ordinary years.

Exploring and assembling facts from which to determine ordinary high-water mark is a problem that is usually left for the consideration of persons who are expert in this subject. When the facts have been ascertained, then it is for the court to apply the rule stated to the facts for the purpose of determining ordinary high-water mark, and when determined it fixes the extent of the unqualified title of riparian owners. Between this line and the ordinary low-water mark the riparian land owners own the fee, subject to a public easement therein for navigation and public uses.

Some confusion exists in regard to the significance of meandered lakes and rivers. Meandering a lake or a stream does not constitute such body of water as being navigable water. Non-meandered lakes or streams may be navigable in fact, and bodies of water that have been meandered may be either navigable or non-navigable. Meandering has

no effect upon the question of whether the body of water is navigable or non-navigable.

During the early stages of our nation the movement of our population was to the West. Lands were being settled upon primarily for agricultural purposes. It was necessary for the federal government to cause surveys to be made so as to fix the boundary lines of townships and sections. Lands had to be classified according to the character of land and its topography. Lands that were marshy or swampy were classified as such, and lands suitable for agricultural purposes were classified as such, either as class 1, 2, or 3, depending upon the kind, quality and character of the soil, having regard to its adaptability for agricultural purposes. These surveys and classifications of lands were made by persons presumed to be competent under a contract with the United States Land Office, and pursuant to rules and regulations of the land office. These rules and regulations required that township lines be established as well as section lines, and that suitable monuments be located from which the corners as established could be located. These rules and regulations further provided that all streams, creeks, and lakes traversed in making such survey be located and described in the field notes, and that all lakes in excess of 25 acres be meandered and meander lines established with suitable monuments so that the same could be found in later surveys. The original field notes and maps prepared at the time of the original survey are on file with the secretary of state, and are available to the public. The 40 acre tracts which in part were covered by water are not full but fractional 40's. Such tracts of land, when the original survey was made and which were affected by a lake in excess of 25 acres, were required by the rules and regulations to be meandered. After the meander lines were established the fractional 40's

bordering on each lake and within the same section were given numbers beginning with one, for purposes of identification. When a survey was made of a township and there was an over-run or shortage in the acreage, such excess or shortage was adjusted by increasing or diminishing the north tier of 40's in the township, and each 40 of each section was numbered and the acreage thereof shown upon the government field notes or upon the plat. The same practice was followed with respect to the tracts upon meandered lakes, that is, the acreage of each tract was recorded in the field notes or upon the plat.

A meander line is not as a general rule a boundary line, but the boundary of fractional lots cannot be indefinitely extended where they appear from the government plat or field notes to abut on a body of water. In many instances the government field notes or plat or both may be erroneous, yet the acreage as shown for a particular fractional 40 is controlling. Security Land & Exploration Company v. Burns, 87 Minn. 97.

A contour line is a line which connects points upon the ground having the same elevation. Contour lines appear upon maps with the elevation of the line shown thereon. The base from which the elevation is obtained is known as the zero point or the datum. The survey contour lines are important and useful in determining the slope of the ground and the difference in elevation between various points shown upon a map.

When either the ordinary low-water mark or the high-water mark has been determined, the same is identified by elevation from a fixed point and the elevation of the contour line which follows the ordinary high water mark fixes the extent of the unqualified ownership of the riparian owners. A description in a deed or other instrument where one of the boundaries is fixed by reference to either the ordinary low-water mark

or the ordinary high-water mark is a good description, and when so used in a description of an instrument the same can be located by a survey if the datum is given and benchmarks are available.

Thus far this discussion has been confined to various legal aspects relating to navigable and non-navigable waters. Other legal problems arise out of the existence and control of surface waters.

Surface waters consist of waters from rains, springs, or melting snow which lie or flow on the surface of the earth, but which do not form a part of a well-defined body of water or a natural water course. In urban sections of our state legal problems arise from the discharge of rain or snow through spouts or pipes attached to buildings, and such water is permitted to flow in accord with nature's law of water seeking its own level.

With respect to surface waters, Minnesota has evolved the rule of reasonable use, and follows neither the rule of common law nor that of the civil law. The courts have at times inaccurately referred to it as merely a modification of the common law rule, but obviously it has obtained a distinct and independent status. The leading case on the subject of surface waters is Sheehan v. Flynn, 59 Minn. 436, which has been amplified by later decisions. When the Flynn case was decided surface waters were regarded as a common enemy, and everyone had the legal right to get rid of the same as he saw fit without incurring any legal liability from the results which might follow. The present rule is that in effecting a reasonable use of one's land for a legitimate purpose, landowners acting in good faith may drain their land of surface waters and cast them as a burden upon the land of another, although with such drainage comes waters which would otherwise have never come that way but would have remained on the land until they were absorbed by the soil or evaporated in the air if-

1. There is reasonable necessity for such drainage;
2. If reasonable care be taken to avoid unnecessary injury to the land receiving the burden.
3. If the utility or benefit accruing to the land drained reasonably outweighs the gravity of the harm resulting to the land receiving the burden, and
4. If, where practical, it is accomplished by reasonably improving and aiding the normal and natural system of drainage according to its reasonable carrying capacity or, if in the absence of a practical natural drain a reasonable and feasible artificial drainage system is adopted.

The legal problems arising out of the disposal of surface waters involves an infinite variety of factors and circumstances, and therefore the reasonable use rule cannot be reduced to a cut and dried formula, but must remain flexible according to the full and normal implication of the term "reasonable use" to allow for a consideration of each individual case according to its own peculiar facts. No one factor or circumstance can be made controlling. What is reasonable use in disposing of surfaces waters must be resolved according to the special circumstance of each particular case.

The liability of a municipality for diversion of surface waters in the improvement of its streets is the same as that of a private owner. Rieck v. Schamamski, 117 Minn. 25, Bush v. City of Rochester, 19 Minn. 591, Enderson v. Kelehan, 226 Minn. 163.

In recent years there has been a marked expansion of municipalities engaging in the field of furnishing utility services such as light, power, heat and water to its inhabitants. When a municipality engages in those activities it does so in a proprietary or corporate as distinguished from its governmental capacity. Generally there is no liability which results from damages when a municipality is performing governmental functions. On the other hand, when a municipality is engaged exclusively in a proprietary or corporate function it becomes liable for its wrongful acts in the same manner as an individual. When a municipality is providing water exclusively for fire protection to its inhabitants it is then

engaged in performing a governmental function and is not liable for ordinary torts resulting therefrom. However, when a municipality furnishes, for a consideration, water for domestic use to its patrons, it then acts in its proprietary or corporate capacity, and becomes liable for its negligent acts. A municipality has been held liable for negligence in furnishing contaminated water to its patrons through its water works. Keever v. Markert, 113 Minn. 55, Frasch v. New Ulm, 130 Minn.