The Power of the State to Control the Use of Its Natural Resources

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WATER and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals feriae naturae. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner." Due to the fact that wild animals, water, gas, and oil have as a rule no permanent situs upon the land of any one, the courts have been engaged in determining in what way property rights in them and public control over them differ from the private rights and public control in relation to other resources of the state, such as coal and timber, which have a fixed situs.

We shall seek in the first installment of this article to ascertain the nature of the property in wild animals, water, gas, and oil and, where the state has a proprietary interest, the extent of its power to control the use of its resources by reason of such interest. In the second installment we shall endeavor to learn the extent of state control independent of any proprietary interest. Whether the state has or has not a proprietary interest in the resources we have named, there are two possible limitations upon its power. These are private rights and the federal power to regulate interstate and foreign commerce. In each installment we shall deal separately with these limitations.

THE EXTENT OF THE POWER OF THE STATE TO CONTROL BY REASON OF ITS PROPRIETARY INTEREST

The state has control over some of its natural resources by reason of its proprietary interest in those resources. The state is said, for example, to be the owner of the game and fish within its borders. This ownership is declared to be in the state "not as proprietor but in its sovereign capacity as the representative and for the benefit of all its people in common." The game and fish are common property; that is, they belong to no one, not
even the state, as private property. The state, however, owns them as trustee for the members of the public who have the beneficial interest.

This peculiar kind of ownership by the state rests upon a theory of property of the common law. Blackstone elaborates the theory in considerable detail. The idea of individual property developed with the gradual abandonment under the stress of circumstances, such as the growth of population and more settled modes of life, of the notion of common property. Occupancy became the basis of the right of individual property in a thing which previously "belonged to everybody but particularly to nobody." For the use of common property was substituted private ownership of the substance of the thing itself. However, because of the nature of certain things—their "fugitive nature," to use Blackstone's expression—permanent occupancy of them is unusual and only usufructuary interest or qualified property in them possible and they are still common property excepting only during the period they remain in the actual possession of the first occupant. Among such things are not only wild animals but light, air, and water. This whole theory had been developed by writers on natural law long before Blackstone wrote his Commentaries.

This theory has been vigorously criticized as a mere fiction. Justice Field of the United States Supreme Court has said:

"I hold that where animals within a State, whether living in its waters or in the air above, are, at the time, beyond the reach or control of man, so they cannot be subjected to his use or that of the State in any respect, they are not the property of the State or of anyone in a proper sense."

But the theory is only a way of stating that by reason of the public interest the state does not recognize a vested private property in certain natural resources, that "conservation and socially advantageous use of these things, regarded as natural resources of society, requires that no one be suffered to acquire any property in them or any property right in the use of them, but that they be administered by the state so as to secure the largest and widest

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2 Blackstone, Commentaries, ch. 1.
3 See Baron Puffendorf, Of the Law of Nature and Nations, Bk. 4, chaps. 4-6 and Hugo Grotius, De Jure Belli et Pacis, Bk. 2, chaps. 2 and 3.
and most beneficial use of them consistent with conserving them."

1. As Against Private Rights.

The proprietary interest of the state is the basis of laws for the preservation of fish and game. Under the theory of the common law the individual has no property right in them. And the fact that the game or fish are on his own land or even in his possession gives him no property right for the state under that theory can prevent any property from vesting. Thus one of the fundamental limitations—vested property rights—on the ordinary exercise of the police power of the state is absent.

The interest acquired by the reduction of wild animals to possession is usually called qualified property for it is lost by loss of possession. Such qualified property according to the common law was of two kinds.  

1. Property per industriam. It was acquired by taking possession or by making the wild animals tame. The qualified property was lost by the escape of the wild animals and by the escape of such animals after they had been made tame "if they do attain their natural liberty and have not animus revertendi."  

2. Property ratione impotentiae et loci. It is the property of the owner of the soil by reason of the inability of the animal upon it to escape. The case of the young of wild animals is an example.

However, it is sometimes stated that a qualified property in wild animals can be acquired ratione soli. But properly speaking, no property, it is submitted, is acquired in such a case. A well-considered English case, *Blades v. Higgs*, decided in the House of Lords, is explicit on this point. In reference to what some have called qualified property ratione soli, Lord Westbury, the Lord Chancellor, said in that case:

"I apprehend that the word 'property' can mean no more than the exclusive right to catch, kill and appropriate such animals which is sometimes called by the law a reduction of them into possession."

Lord Chelmsford in the same case said that:

"Where a person is merely the owner of land without any other privilege attached to it than that which ownership confers,

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6Lord Coke in the Case of Swans, (1592) 7 Coke 15b.
7See Animals, 3 C. J., sec. 21-22.
8(1865) 11 H. L. 621, 34 L. J. C. P. 286, 12 L. T. 615, 13 W. R. 927.
he can have no property in the wild animals on the land, so long as they are in a state of nature and unreclaimed. Indeed this notion of the existence of property in wild animals, is inconsistent with the whole current of authorities, from the year books downwards, which almost invariably show that no action lies merely for taking away hares, conies, pheasants, and partridges.”

Again in the same case he said:

“With respect to wild and unreclaimed animals, therefore, there can be no doubt that no property exists in them so long as they remain in the state of nature. It is also equally certain that when killed, or reclaimed by the owner of the land on which they are found, or by his authority, they become at once his property, absolutely when they are killed, and in a qualified manner when they are reclaimed.”

If the owner of the land obtains only a qualified property when he reduces a wild animal to possession it is submitted that he has no property right prior thereto although of course he has the right to exclude as trespassers those who would come on his land to hunt or fish.

The leading case in this country on the power of the state over wild animals is *Geer v. Connecticut,* decided by the United States Supreme Court in 1896. The court reviews the authorities and says:19

“Undoubtedly this attribute of government to control the taking of animals ferae naturae, which was thus recognized and enforced by the common law of England, was vested in the colonial governments, where not denied by their charters, or in conflict with grants of the royal prerogative. It is also certain that the power which the colonies thus possessed passed to the States with the separation from the mother country, and remains in them at the present day, in so far as its exercise may not be incompatible with, or restrained by, the rights conveyed to the federal government by the constitution.”

This case deals, however, primarily with the relation of state control to interstate commerce and will be discussed later in that connection.

A leading Minnesota case on the point is that of *State v. Rodman.*11 A statute made the possession of deer for more than five days after the open season unlawful. The defendant was convicted for having in his possession sixteen deer contrary to the

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9(1896) 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793.
10Ibid., at p. 527.
11(1894) 58 Minn. 393, 59 N. W. 1098.
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statute. The deer were lawfully killed and taken during the open season. The statute was declared constitutional and the conviction upheld. The court said that not only could the state regulate the taking and killing of game but could impose "limitations upon the right of property in such game after it had been reduced to possession. Such limitations deprive no person of his property, because he who takes or kills game had no previous right of property in it, and, when he acquires such right by reducing it to possession, he does so subject to such conditions and limitations as the legislature has seen fit to impose." 

To enforce effectively prohibitions against taking or possession of game certain subsidiary regulations may be necessary. Such regulations are within the power of the state to enact because of its proprietary interest. The legislature of California provided that "any person who ships any of the wild birds or wild animals or fish by parcel post is guilty of a misdemeanor." In order to prevent the unlawful taking of game the statutes provided for inspection, etc., before shipment. As pointed out by the supreme court of the state, such "provisions as to inspection and seizure of game shipped or offered for shipment cannot be enforced as to shipments by mail." Hence the prohibition against shipment by parcel post. In upholding the prohibition the court said:

"It is a reasonable complement of the regulations as to inspection, without which the inspection in course of transportation could be had only as to such game as is shipped by some other means than the United States mail. The person having game in his possession which he desires to ship, acquires and holds it subject to the conditions that he will not ship it by parcel post, and no property right in such game is violated by a law which makes it a crime for him to do so. We are entirely at a loss to see how a person's property right to use the United States mail for all lawful purposes is violated by a law which prohibits his use thereof for the purpose of transmitting property which he has acquired and holds subject to the condition that he shall not so transmit it."

Inasmuch as the state is the proprietor, in its sovereign capacity as the representative and for the benefit of its people, of fish and game it follows that it can discriminate against non-residents of the state and even exclude them entirely from the enjoyment of

12Ibid., at p. 400.
13There are many cases in accord. See Gentile v. State, (1868) 29 Ind. 409; Ex parte Maier, (1894) 103 Cal. 476, 37 Pac. 402.
14In re Phoedovius, (1918) 177 Cal. 238, 170 Pac. 412.
15In re Phoedovius, (1918) 177 Cal. 238, 244, 170 Pac. 412.
what is the common property of the people of the state. The enjoy-
ment of such property is not a privilege or immunity to which a
citizen of another state is entitled under section 2 of article IV
of the federal constitution.

In re Eberle is a case in point. Eberle was a citizen of Iowa
and was imprisoned in Illinois for violation of the law of that
state which required from non-residents of the state a license
fee for hunting of $10, a fee which was not required of residents.
The case came before the federal court on a petition by Eberle for
a writ of habeas corpus, the petitioner claiming that the statute
was void because conflicting with section 2 of article IV and the
fourteenth amendment of the federal constitution. The court,
however, held that the discrimination made by the statute was
not unconstitutional. It further held that the fact that the peti-
tioner was a member of a club, an Illinois corporation, authorized
to own real estate in Illinois and to use the same as a game and
fish preserve and that petitioner was convicted for hunting upon
the land belonging to the club was immaterial.

In the leading case of McCready v. Virginia McCready was
a citizen of Maryland and was convicted of violating a statute of
Virginia which forbade any person other than a citizen of Vir-
ginia to take or plant oysters in the waters of the state. The
defendant planted oysters in the Ware river, a stream in Virginia
where the tide ebbs and flows. The court in affirming the judg-
ment held that the state not only owned the waters and fish in
the river but also the beds of all tide waters within its jurisdiction
and, as to section 2 of article IV, that “the citizens of one state
are not invested by this clause of the constitution with any interest
in the common property of the citizens of another state.”

An interesting case on the point of discrimination against non-
residents is State v. Mallory. The defendant was a citizen of
Tennessee but was the owner of land in Arkansas. A statute of
the latter state made it “unlawful for any person who is a non-
resident of the state of Arkansas to shoot, hunt, fish or trap at
any season of the year.” In violation of the statute defendant
hunted squirrels on his land and also took fish from the waters
on the land. The court held that the statute in so far as it pre-
vented the enjoyment by defendant “of the property right afforded

16(C. C. Ill. 1899) 98 Fed. 295.
17(1876) 94 U. S. 391, 24 L. Ed. 248.
18(1904) 73 Ark. 236, 83 S. W. 955, 67 L. R. A. 773.
the more fortunate resident landowner it is a denial of 'equal protection of the law', within the meaning of the constitutional guaranty, and cannot be enforced, and taking away of this right because of his non-residence is 'without due process of law.'"

Two of the five members of the court dissented. The court did not hold that the defendant was deprived of any privilege or immunity to which he was entitled as a citizen of another state. The basis of the court's decision was that the defendant has a property right in the fish and wild game on his own land. This is contrary to the opinion expressed by the judges in the leading English case of Blades v. Higgs, which we have already adverted to. The better opinion, it would seem, is that no property ratione soli can be acquired in wild animals. The contention that such a property exists fails to distinguish between the right to exclude trespassers and property in the animals.

There exists, however, one important fundamental limitation upon the proprietary interest of the state in wild animals. It may be overridden by the treaty-making power of the United States government. Congress in 1918 enacted the Migratory Bird Treaty Act to give effect to a treaty between the United States and Great Britain. The treaty aimed at the protection—by closed seasons and in other ways—of the many birds, valuable both as a source of food and as destroyers of insects harmful to vegetation, which migrated over parts of this country and Canada. The act of Congress prohibited, except under certain conditions, the killing of the birds protected by the treaty. The validity of both the treaty and the act was upheld by the United States Supreme Court in the case of Missouri v. Holland. Said the court:

"The State, as we have intimated, founds its claim of exclusive authority upon the assertion of title to migratory birds, an assertion that is embodied in statute . . . The whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away. If we are to be accurate we cannot put the case of the State upon higher ground than that the treaty deals with creatures that for the moment are within the state borders, that it must be carried out by officers of the United States within the same territory, and that but for the treaty the State would be free to regulate this subject itself."
As the proprietary interest of the state is the basis of laws for the preservation of fish and game, likewise it is the basis of much of state control over the streams and other bodies of water within its borders. A leading case is *McCarter v. Hudson County Water Co.* The case arose in New Jersey. The legislature of the state had enacted a statute making it "unlawful for any person or corporation to transport, or carry through pipes, conduits, ditches or canals, the waters of any fresh-water lake, pond, brook, creek, river or stream of this state into any other state for use therein." Thereafter the Hudson County Water Co. contracted with the city of New York to supply one of its boroughs with water. The company was about to divert the water from the Passaic river of New Jersey in fulfillment of the contract when the attorney general of the state sought to enjoin such diversion as a violation of the statute. The vice chancellor issued an injunction and the case was affirmed by the court of errors and appeals of the state and later by the United States Supreme Court. The case necessarily dealt not only with the power of the state to prevent the entrance of water into interstate commerce but also its power as against private rights. At this point we are only concerned with the latter. The former will be discussed later.

In the *McCarter case* the vice chancellor said:

"Thus it appears from immemorial times running water, as one of the elements of life, health and comfort, has been esteemed common property, subject to the usufructuary use by the owners of land over which it passed."

And on appeal Judge Pitney for the court said:

"But in view of the transient and flowing nature of water the landowner's property therein is not absolute, but qualified. In a sense he owns it while it is upon his land, but his ownership is limited to a usufructuary interest, without right to divert any from its natural course, saving for the limited uses that naturally and of necessity pertain to a riparian owner, such as the supply of his domestic needs, the watering of his cattle, the irrigation of his fields, the supplying of power to his mill, and the like. The right


of user is limited to so much as shall be reasonably necessary, and is qualified by the obligation to leave the stream otherwise undiminished in quantity and unimpaired in quality. The common law recognizes no right in the riparian owner, as such, to divert water from a stream in order to make merchandise of it, nor any right to transport any portion of the water from the stream to a distance for the use of others.\textsuperscript{27}

The state however is owner only as trustee for the people and is not the absolute proprietor. This is well illustrated and fully considered in the case of Rossmiller v. State by the supreme court of Wisconsin.\textsuperscript{28} The legislature of the state by statute declared that ice\textsuperscript{29} formed upon the meandered lakes of the state was the property of the state and prohibited the cutting of ice from any such lakes for shipment out of the state except by license and on payment of ten cents to the state for each ton so shipped. The defendant was prosecuted for a violation of the act. The court held the act unconstitutional. The title to the beds of the lakes, and therefore the title to the ice, was admitted to be in the state but the court held that such title was the "mere naked legal title," that "the whole beneficial use thereof, including the use of the ice formed thereon, is vested in the people of the state as a class." The state is the trustee of the common property. It may exercise its police power to protect the common right. The whole case is based on the character of state ownership and its discussion of that point is valuable but it is difficult to see why the act of the legislature cannot be justified as the act of the state in its capacity as trustee. If the state may absolutely prohibit the exportation of water beyond its borders as was held in McCarter v. Hudson County Water Co.,\textsuperscript{30} why may it not attach as a condition to such exportation a license fee? The money derived from the license fee was paid into the state treasury and was consequently

\textsuperscript{26}The rule of prior appropriation in some western states is of course a modification of the common law in this regard. Farnham, The Law of Waters, Chap. 22.

\textsuperscript{27}As to the nature of property in water see also 3 Kent's Commentaries (13th Ed.) 439 and Baron Parke in Embrey v. Owen, (1651) 6 Exch. Rep. 353, 368. The same rule holds where the water is non navigable. Pinney v. Luce, (1890) 44 Minn. 367, 46 N. W. 561. The proprietary interest of the state extends not only to the water itself, but, in navigable waters, to the bed also. Farnham, Law of Waters, Chap. IV. Courts differ as to what should be the test of navigability. Lamprey v. State, (1893) 52 Minn. 181, 53 N. W. 1139.

\textsuperscript{28}(1902) 114 Wis. 169, 89 N. W. 839, 58 L. R. A. 910.

\textsuperscript{29}The title to ice is in the owner of the soil beneath the water. Wood v. Fowler, (1882) 26 Kan. 682, 40 Am. Rep. 330; Waters, 40 Cyc. 844.

\textsuperscript{30}(1906) 70 N. J. Eq. 693, 65 Atl. 489, 14 L. R. A. (N.S.) 197.
for the benefit of the people of the state, the beneficial owners of its waters.\footnote{A state may require a license fee for taking water out of a stream by a 
 reasonable use will be found in Elliot v. Fitchburg R. Co., (1852) 10 Cush. (Mass.) 191 and Sanborn v. Peoples Ice Co., (1900) 82 Minn. 43, 84 N. W. 641.}}

It has been shown that both game and water are regarded by the law as common property. There are, however, two important characteristics of streams and other bodies of water which distinguish them from that other species of common property. Streams and other bodies of water have what we may call permanence and unity.

Although the water itself moves, the course or bed is a permanent feature of the lands on which it is located. This fact accounts for the difference between the rights of the owner of the soil in relation to the water on his land and his rights in relation to the wild animals which happen to be upon it. The animals do not partake of the nature of the soil as does the water flowing in a bed on or by the land. Hence the owner of the soil has certain vested rights—called riparian rights—in water while he has no vested interest in game or fish on his land. Riparian rights constitute a fundamental limitation upon the legislative power of the state to control the use of the waters within its borders.

In addition to permanence a stream or other body of water has unity. By diverting, polluting, or obstructing one part of it other parts may be affected. Hence there has been built up a great body of law designed to mark out the correlative rights of the riparian owners—and those of the public also if the water is navigable. Only by viewing a watercourse as a unit can the rights of all be made effective. No one owns the water although certain individual property rights exist in it. To permit ownership would be inconsistent with the enjoyment of a usufructuary interest by all.\footnote{Interesting illustrations of the practical nature of the rule of reasonable use will be found in Elliot v. Fitchburg R. Co., (1852) 10 Cush. (Mass.) 191 and Sanborn v. Peoples Ice Co., (1900) 82 Minn. 43, 84 N. W. 641.}

Thus although riparian rights are a limitation upon the legislative power of the state such rights also, because of the fact that they are correlative and therefore in a sense self limiting, dispense to a large extent with the need of the exercise of legislative power to control the use of waters.

In navigable water riparian rights are subject to certain public rights. Such water "is subject to the common use of all citizens
who can obtain access to it." Such use includes not only the right of navigation but also "the common right to fish, boat, gather ice, and other increments from the water, and use such small quantities of it for special purposes as can be used without materially affecting the character of the water body."

The law as to waters above ground does not apply, however, to underground percolating waters. Subterranean waters are divided in law into two classes—those with a defined and known channel and those without such a channel. To the former the law of waters above ground applies. The latter are called percolating waters and it is with them that we are concerned at this point.

The fundamental rules of the law as to percolating waters are in strong contrast to those relating to watercourses. Instead of the rights of the public and the correlative rights of the owners of the soil we find that in accordance with the maxim, cujus est solum, ejus est usque ad coelum et ad inferos, the general rule is:

"An owner of the soil may divert percolating water, consume or cut it off, with impunity. It is the same as land, and cannot be distinguished in law from land. So, the owner of the land, is the absolute owner of the soil and of percolating water, which is a part of, and not different from the soil. No action lies against the owner, for interfering with or destroying percolating or circulating water, under the earth's surface."

The following language of Judge Cooley expresses the reason of the rule:

"It cannot be held consistent with the authorities, or perhaps with reason, that adjoining proprietors have rights in the water percolating through the soil, corresponding to those they may have in a running stream which crosses their several estates. Such a rule would raise questions of reasonable use, and create difficulties both of evidence and of application that would make the right to such waters more troublesome than valuable. The courts have doubtless been right in declaring that one proprietor cannot insist

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231 Farnham, The Law of Waters, sec. 133. And see Lamprey v. State, (1893) 52 Minn. 181, 53 N. W. 1139; and Embrey v. Owen, (1851) 6 Exch. Rep. 353. Minnesota has gone further than most jurisdictions by holding that a diversion from a navigable stream for a municipal water supply is a proper public use and that the state can without providing compensation to riparian owners authorize such diversion. Minneapolis Mill Co. v. Board of Water Commissioners, (1894) 56 Minn. 485, 58 N. W. 33.

24 Waters, 40 Cyc. 625-627; Gould, Waters, secs. 280-281.

26 All underground waters are presumed to be percolating waters. Waters, 40 Cyc. 626.

27 Pixley v. Clark, (1866) 35 N. Y. 520, 526.
on another keeping his estate as a filter for the use of the former, nor be heard to complain if the use by his neighbor of his own estate draws off the secret particles of water which otherwise he might have gathered. These waters belong to no one until they are collected, and they may be appropriated by the one who collects and puts them to use."

The rule of complete control by the owner of the soil is rigidly adhered to in England. But the rule has been modified in many jurisdictions in this country. A case which well represents the tendency to modify what it calls the English rule is Meeker v. East Orange. Chancellor Pitney reviews a large number of the cases, both English and American, and concludes that the strong tendency of the more recent American decisions is toward the repudiation of the English rule and the adoption of the doctrine of "reasonable user."

A good deal of vagueness and confusion and also some conflict of authority exists as to the nature of the property in gas and oil in the earth. The cases which deal with the subject are of course comparatively recent.

When the courts were confronted with the necessity of dealing with these new subjects and of applying rules to determine rights with reference to them they had several courses open to them. They could apply strictly the maxim cujus est solum, ejus est usque ad coelum et ad inferos. That is, they could regard gas and oil merely as other minerals, as part of the land and identified with it. "Oil," said the supreme court of Pennsylvania, "is a mineral, and being a mineral is part of the realty . . . In this it is like coal or any other natural product which in situ forms part of the land."

Many courts seized upon the similarity of gas and oil to percolating waters and tended to apply the rules already developed in that connection. The similarity between oil and gas on the one hand and percolating water on the other is obvious. All three exist underground in undefined areas. Also an area extending under the lands of many persons may in many cases be brought to the surface at one point. The analogy has been frequently

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38 Alb. L. Jour. 57, 63.
pointed out in the cases and the rules as to property and rights in
gas and oil borrowed from the law of subterranean waters.\textsuperscript{42}

In an article on "Has a Landowner any Property in Oil and Gas in Place?"\textsuperscript{43} Professor Simonton has classified the various
holdings of the courts as to the nature of the property of the land-
owner into three theories.

"1. That the landowner owns the oil and gas beneath the sur-
face of his land absolutely just as he owns solid minerals.

"2. That the landowner has title to the oil and gas while they
are beneath his land, but loses such title if they pass beneath the
surface to the land of another. It follows that the latter gains
title just as soon as they come within his boundaries.

"3. That the landowner does not have title to the oil and gas
in place beneath his land, but within his own boundaries he has the
exclusive right to reduce these minerals to his possession."

These he calls the absolute property theory, the qualified prop-
erty theory, and the no-property theory, respectively.

In regard, to the absolute property theory this writer says:

"If title is thus lost when the mineral crosses the boundary,
then the absolute property theory becomes nothing more than the
qualified property theory. It is submitted that there is no juris-
diction which follows the absolute property theory."

Also Justice White of the United States Supreme Court\textsuperscript{44} has this
to say about the claim of property in the oil itself:

"But it cannot be that property as to a specified thing vests in
one who has no right to prevent any other person from taking or
destroying the object which is asserted to be the subject of the
right of property."

The following is an expression by the supreme court of Penn-
sylvania, often quoted in the cases, of the view that a qualified
property exists in gas and oil:

"They [water, oil, and gas] belong to the owner of the land,
and are part of it, so long as they are on or in it, and are subject
to his control; but when they escape, and go into other land, or
come under another's control, the title of the former owner is
gone."\textsuperscript{45}

\textsuperscript{42}People's Gas Co. v. Tyner, (1892) 131 Ind. 277, 31 N. E. 59, 16
L. R. A. 443; Wood County Petroleum Co. v. West Virginia Transporta-
\textsuperscript{43}27 W. Va. L. Quart. 279.
\textsuperscript{44}Ohio Oil Co. v. Indiana, (1900) 177 U. S. 190, 201, 20 Sup. Ct. 576,
44 L. Ed. 729.
\textsuperscript{45}Westmoreland & Cambria Natural Gas Co. v. DeWitt, (129) 130
The theory that the owner of the soil has no property in gas and oil so long as they remain in the earth is thus stated by the United States Supreme Court:

"Although in virtue of his proprietorship the owner of the surface may bore wells for the purpose of extracting natural gas and oil, until these substances are actually reduced by him to possession, he has no title whatever to them as owner. That is, he has the exclusive right on his own land to seek to acquire them, but they do not become his property until the effort has resulted in dominion and control by actual possession."

But the court held that "the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property."

But no court, whatever may have been its theory of the nature of property in gas and oil, has held that they are the common property of the public with the state acting as trustee "in its sovereign capacity as the representative and for the benefit of all the people." "Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals ferae naturae. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner." But the analogy cannot be carried to the extent of holding that public ownership exists in gas and oil. Such a result was expressly repudiated by the United States Supreme Court in the following language which has never been disputed:

"But whilst there is an analogy between animals ferae naturae and the moving deposits of oil and natural gas, there is not identity between them. Thus, the owner of land has the exclusive right on his property to reduce the game there found to possession, just as the owner of the soil has the exclusive right to reduce to possession the deposits of natural gas and oil found beneath the surface of his land. The owner of the soil cannot follow game when it passes from his property; so, also, the owner may not follow natural gas when it shifts from beneath his own to the property of some one else within the gas field. It being true as to both animals ferae naturae and gas and oil, therefore, that whilst the right to appro-

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46 Ohio Oil Co. v. Indiana, (1900) 177 U. S. 190-208, 20 Sup. Ct. 576, 44 L. Ed. 729.
48 Ohio Oil Co. v. Indiana, (1900) 177 U. S. 190, 209, 20 Sup. Ct. 576, 44 L. Ed. 729.
priate and become the owner exists, proprietorship does not take
being until the particular subjects of the right become property
by being reduced to actual possession. The identity, however, is
for many reasons wanting. In things ferae naturae all are en-
dowed with the power of seeking to reduce a portion of the public
property to the domain of private ownership by reducing them
to possession. In the case of natural gas and oil no such right
exists in the public. It is vested only in the owners in fee of the
surface of the earth within the area of the gas field. This dif-
ference points at once to the distinction between the power which
the lawmaker may exercise as to the two. In the one, as the public
are the owners, every one may be absolutely prevented from seek-
ing to reduce to possession. No divesting of private property,
under such a condition, can be conceived because the public are
the owners, and the enacting by the state of a law as to the public
ownership is but the discharge of the governmental trust resting
in the state as to property of that character. On the other hand,
as to gas and oil, the surface proprietors within the gas field all
have the right to reduce to possession the gas and oil beneath.
They could not be absolutely deprived of this right which belongs
to them without a taking of private property."

2. As Against the Federal Power to Regulate Interstate
Commence.

Prior to 1896 there was a conflict of authority as to whether
a state could prohibit the transportation of animals ferae naturae
beyond its borders. The supreme courts of Kansas and the terri-
tory of Idaho had held that it could not, that such a prohibition
was a violation of the commerce clause of the Constitution of the
United States.

"A law," declared the Kansas court, "which allows prairie
chickens to be caught and killed, and thereby to become the subject
of traffic and commerce, and at the same time directly prohibits
their transportation from the state to another state, is unconstitu-
tional and void."

On the other hand, the supreme courts of Minnesota, Arkans-
s, and Connecticut had upheld statutes prohibiting the exporta-
tion from the state of various kinds of animals ferae naturae. The
answer of the Minnesota court to the claim of unlawful interfer-
ence with interstate commerce was "that the fish had never become

49 State v. Saunders, (1877) 19 Kan. 127; Territory v. Evans, (1890)
2 Id. 658.
44 State v. Northern Pacific Express Co., (1894) 58 Minn. 403, 59
N. W. 1100; Organ v. State, (1892) 56 Ark. 267, 19 S. W. 840, State v.
Geer, (1891) 61 Conn. 144, 22 Atl. 1012, 13 L. R. A. 804.
articles of commerce, within the meaning contended for by defendant's counsel. Under the laws of the state they had, it is true, become private property, but of a qualified and limited character; one of the attached limitations being that they should not be shipped out of the state,—that is, should not become the subject of interstate commerce.\textsuperscript{52} The Arkansas court said that "the restriction was imposed by right of ownership, and not in the exercise of any assumed power to regulate the commercial uses of private property."\textsuperscript{53}

The Connecticut case went to the United States Supreme Court and that court, in the case of \textit{Geer v. Connecticut},\textsuperscript{54} settled the law on the point. The statutory offense charged was the possession of certain game birds for the purpose of transporting them beyond the state. It was admitted that the birds had been lawfully taken and killed within the state. The issue was therefore squarely presented. In the language of the court it was this:

\begin{quote}
"Was it lawful under the constitution of the United States (section 8, Article I) for the state of Connecticut to allow the killing of birds within the state during a designated open season, to allow such birds, when so killed, to be used, to be sold and to be bought for use within the state, and yet to forbid their transportation beyond the State?"
\end{quote}

The answer of the court was that it was lawful for Connecticut to do so. It said:

\begin{quote}
"The sole consequence of the provision forbidding the transportation of game, killed within the state, beyond the state, is to confine the use of such game to those who own it, the people of that state. The proposition that the state may not forbid carrying it beyond her limits involves, therefore, the contention that a state cannot allow its own people the enjoyment of the benefits of the property belonging to them in common, without at the same time permitting the citizens of other states to participate in that which they do not own."
\end{quote}

The court held that if the state could control the ownership in game it could impose the restriction upon such ownership that the game should not enter into interstate commerce. Private ownership from the moment it was acquired was subject to that condi-

\textsuperscript{52}State v. Northern Pacific Express Co., (1894) 58 Minn. 403, 405, 59 N. W. 1100.
\textsuperscript{53}Organ v. State, (1892) 56 Ark. 267, 270, 19 S. W. 840.
\textsuperscript{54}(1896) 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793.
\textsuperscript{55}(1896) 161 U. S. 519, 522, 16 Sup. Ct. 600, 400 L. Ed. 793.
\textsuperscript{56}(1896) 161 U. S. 519, 529, 16 Sup. Ct. 600, 400 L. Ed. 793.
The rule announced by this case has never since been questioned or modified.

The statute of Connecticut involved in the Geer case unconditionally prohibited exportation from the state. Some cases have arisen which involved statutes that did not go so far. An Alabama statute prohibited, except under certain conditions, the shipment beyond the limits of the state of oysters taken from the waters of the state while the same were in their shells. Defendant was charged with a violation of this law. The supreme court of the state held that the statute was not unconstitutional as violation of the commerce clause. If the state, the court said, has the power to prohibit the exportation of its oysters absolutely, a fortiori, it may limit the shipment of such oysters to such as may have been shelled. What the policy of the legislature may have been in enacting the statute the court said it was not called upon to determine although it did point out that oyster shells are capable of being utilized for many purposes.

A different sort of statute was enacted in Louisiana. It provided that "no person, firm, or corporation shall ship oysters out of this state for canning or packing out of this state." This statute was declared unconstitutional by the supreme court of the state on the ground that it violated the commerce clause. The defendant had shipped oysters in the shell from Louisiana to Mississippi for the purpose of canning and packing them in the latter state. The trial court had held that if the state could prohibit exportation of oysters it could permit exportation subject to conditions and limitations and that the prohibition of the statute in the case not only prevented depletion of the oysters in the state but also increased the assets of the state by forcing canning factories to be established in the state. But the appellate court reversed the decision. It held that the fact that the state might prohibit exportation did not authorize the conditions which had been attached by the statute. The state, it said:

The opinion was written by Justice White. Justices Field and Harlan dissented and Justices Brewer and Peckham took no part in the decision. Justice Brewer was a member of the Kansas supreme court when State v. Saunders, (1877) 19 Kan. 127, was decided.

State v. Harrub, (1891) 95 Ala. 176, 10 So. 752, 15 L. R. A. 761.

Ibid., at p. 187.


Ibid., at pp. 1038 and 1041.
be actuated by one purpose or another . . . Here, the apparent
purpose is not to preserve a valuable food supply, but to secure
to those so engaged, in this state, a monopoly of the business of
packing and canning Louisiana oysters, and thereby increasing
the assessable property and revenues of the state.63

In line with this decision is Elmer v. Wallace.64 As sum-
marized by the federal district court an Alabama statute provided
as follows:

"First, that this legislation invites or permits any one to catch
shrimp in Alabama waters not to be shipped out of the state in
fresh or raw condition, by water, upon the payment of a license
and a tax of 5 cents per barrel; second (a) that if the shrimp
cought are for transportation beyond the state, then the transpor-
tation of them out of the state, by water is made unlawful, unless
the price of shrimp at the point to which they are shipped in an-
other state is greater than the price in Alabama; and that then
(b) the tax is quadrupled upon each barrel of fresh shrimp if
the transportation is by water."

The court found that the whole purpose of the act was to build
up the shrimp packing industry in Alabama by discriminating
against the industry in other states. It admitted that the shrimp
are the property of the state but distinguished the case from the
Geer case because the purpose of the Alabama statute was not to
conserve the shrimp but by interference with interstate commerce
to foster a state industry. This case and the Ferrandau case indi-
cate a tendency to limit the interference with interstate commerce
sustained in the case of Geer v. Connecticut to where the inter-
ference has the purpose of conservation of state property. If it
goes beyond with the ulterior motive of seeking to build up a
collateral state industry it cannot be sustained.

A state statute, however, imposing a severance tax of two per
cent on the value of all skins and hides taken from wild furbearing
animals or alligators within the state has been upheld by the United

63 The oysters shipped in this case had been "grown in private beds." However, the court does not stress this fact in its reasoning. The stat-
ute had declared that "all beds and bottoms of rivers, bayous, lagoons,
lakes, bays, sounds and inlets, bordering on, or connecting with, the Gulf
of Mexico within the jurisdiction of the state of Louisiana, including all
natural oyster reefs and oysters and other shell fish growing thereon
shall be construed and remain the property of the state of Louisiana,
except as otherwise provided." The reasoning of the court left no part
of the statute stand which prohibited exportation for canning or packing.

64 (D.C. Ala. 1921) 275 Fed. 86.
States Supreme Court both as against the commerce and the due process clauses of the federal constitution.64

"The legislation," said the court,65 "is a valid exertion of the police power of the state to conserve and protect wild life for the common benefit. It is within the power of the state to impose the exaction as a condition precedent to the divestiture of its title and to the acquisition of private ownership. Expressly, the tax is imposed upon all skins and hides taken within the state. This includes those, if any, sold for manufacture in the state as well as those shipped out."66

It is now settled that a state can prohibit the exportation of the waters of its streams and lakes. We have already referred to McCarter v. Hudson County Water Co.,67 the leading case on the subject. We noted that the case involved the validity of a statute of New Jersey prohibiting the exportation of the waters of any fresh water body in the state into any other state and that an injunction to prevent a violation of the statute was upheld by the court of errors and appeals of New Jersey and by the United States Supreme Court.

It is interesting to note that the vice chancellor held that even independent of the statute an injunction should be granted. He emphasized the rights of the state as lower riparian owner.68 He said:

"Being convinced that the state, as the lower riparian owner, has the right to have the water of streams flowing into tidal rivers reach its property undiminished in quantity . . . I can see no reason why it may not regulate and control the manner of the disposition of its property rights, for acquiescence in the diversion of water which of right ought to flow to its lands is a surrender of property interests, the extent of which it may limit."

Justice Pitney in the opinion of the court of errors and appeals, after pointing out the limited amount to which riparian owners were entitled, said that the statute69 was "not in violation of the interstate commerce clause of the federal constitution, because until the water is lawfully abstracted it does not become

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65Ibid., at p. 550.
67(1905) 70 N. J. Eq. 523, 61 Atl. 710; (1906) 70 N. J. Eq. 695, 65 Atl. 489, 14 L. R. A. (N.S.) 197.
68(1905) 70 N. J. Eq. 525, 529, 61 Atl. 710.
69(1906) 70 N. J. Eq. 695, 719, 65 Atl. 489, 14 L. R. A. (N.S.) 197.
the subject of legitimate commerce." The court stated⁷⁰ that the "present case is closely parallel to Geer v. Connecticut."

The decision of the United States Supreme Court⁷¹ affirming that of the New Jersey court was put upon grounds independent of the proprietary interest of the state. We shall note them in the next installment.

In the case of Kirk v. State Board of Irrigation⁷² the state of Nebraska went a step further than New Jersey and its power was sustained by the supreme court of the state. The state board of irrigation approved the application of one Kirk for appropriation of the waters of a river of the state for power purposes. But, as authorized by law, the board attached as a condition that "power generated under and by virtue of this permit must not be transmitted or used beyond the confines of the state of Nebraska." Kirk appealed to the courts from the action of the board in attaching the condition. The supreme court of the state, relying upon the case of Geer v. Connecticut,⁷³ held that the condition was not invalid as interfering with interstate commerce.

"The state then has such a proprietary interest in the running water of its streams and in the beneficial use thereof that it may transfer a qualified ownership or right of use thereof. When it grants such ownership or right of use it may impose such limitations and conditions as its public policy demands. Under such circumstances the state may reserve such right of ownership and control of the beneficial use of the running waters of the streams as will enable it to prohibit the transmission or use thereof beyond the confines of the state."⁷⁴

Summary.

This concludes our examination of the cases with reference to the proprietary interest of the state in its natural resources and the power it derives from such interest. The state, we find, has a proprietary interest in game and fish and in water, except percolating water. Although the water itself is common property riparian owners have certain vested rights in watercourses and other water bodies and such rights limit state power. In percolating water and in gas and in oil the state has no proprietary

⁷⁰Ibid, at p. 712.
⁷²(1912) 90 Neb. 627, 134 N. W. 167.
⁷³(1896) 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793.
The proprietary interest of the state gives it a wide range of power. It may regulate or prohibit the taking of the common property. It may discriminate against non-residents. However, it acts as trustee for the benefit of all its people. And its power may be cut down by the treaty making power of the federal government. In relation to interstate and foreign commerce the power of the state is extensive. It may absolutely prohibit the exportation of game and water. It has been held that it may prohibit the transmission beyond the state of water power by attaching such prohibition as a condition to a permit to use water in the state. But it has also been held that the state cannot for the purpose of building up an industry in the state discriminate against interstate commerce in shell-fish.

(To be concluded)