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RIGHTS IN SOIL AND MINERALS UNDER WATER.

This article deals with the ownership of the soil underlying public bodies of water, and with rights in minerals thereunder. It is not the purpose of the article to discuss abstract theories of right, but rather to review the decisions of the courts, pertinent to the subject, which have already been made. In many states there are no such decisions. Some states have no minerals, some have no lakes or rivers, some that have minerals and lakes and rivers have not their minerals in proximity to bodies of water.

As on other subjects, the law on this subject starts with the common law of England. The decisions there are not numerous. England has minerals, but few lakes or large rivers. Her minerals in some instances underlie the bed of the ocean, but not the bed of lakes or streams. Scotland and Ireland have lakes and some minerals, but not in many cases are minerals found in the region of lakes or streams. In fact there is perhaps no case which squarely determines the right of a riparian owner to minerals underlying fresh water lakes or non-tidal streams in the British Isles.

It is profitable before considering decisions bearing directly on the subject of rights in minerals underlying lakes and streams to first consider the more general question of title to the soil which constitutes the bed of such waters.

In the early stages of the English common law, rights in water beds were unimportant, and not often the subject of litigation. Early decisions and the early commentaries are almost silent on the subject. But from what data we have we may gather that in early times the King acted on the theory that both the land and the water were his. He recognized no public right in the sense that his subjects had any interest to be subserved. No distinction was recognized between ownership in private or proprietary capacity and ownership in a sovereign or governmental capacity. The King conceived that he could grant anything that he owned. He granted exclusive fishery rights and he probably in some cases granted the water beds. Land under water which any one cared to use passed

into private use and probably private ownership. By and by the rights of fishing and of navigation became so important, and public sentiment in favor of the free exercise of those rights became so strong, that it became a rule of law that no exclusive rights could be granted in public waters. Public waters were those which partook of the nature of the sea, that is, water in which the tide ebbed and flowed. In time it became recognized that the Crown held all public waters and the water beds in a representative capacity for the benefit of all its subjects—a prerogative that could not be abrogated. There was no thought then that the Crown could not part with private ownership in the soil under the public waters of the kingdom. The idea was that into whatever hands the title passed, the people had a public interest and a right to use for certain public purposes, and this right a grant could in no manner prejudice or take away.¹

In the course of time the Crown surrendered its prerogative right to Parliament, and grants of water rights came to be made by that body or under its authority.² But the law remained otherwise the same. The law of England now is that the title to the soil under all public or tidal waters, including tidal rivers, is in the Crown ;³ that the title is held subject to the public right of navigation and fishery ; that it may be granted but the grantee “can never do anything to interfere with the navigation ; and if a grant were made for the purpose of enabling the grantee to do that which would interfere with navigation, that would be a void grant, because it would be a grant which the Crown could not make, having regard to the fact that it held the land for the benefit of the public, that is, subject to the public right of navigation.”⁴ As well stated in *People v. New York & S. I. F. Co.*,⁵ “The King by virtue of his proprietary interest, could grant the soil, so that it should become private property, but his grant was subject to the para-

1. 1 Farnham, *Waters and Water Rights*, § 36; *Commonwealth v. Alger*, (1851) 7 Cush. (Mass.) 53, 65; Hale, *De Jure Maris*, Pt. 1, Chs. 4-6.

2. 1 Farnham, *Waters & Water Rights*, § 41.

3. *The Royal Fishery of the Banne*, (1674) *Davis's Reps.* 55, 56; *Bulstrode v. Hall*, (1659) 1 Sid. 148; *Lord Adv. v. Hamilton*, (1852) 1 Macq. (Scot.) 46; *King v. Smith*, (1780) 2 Doug. 441; *Malcomson v. O'Dea*, (1862-63) 10 H. L. Cas. 593; *Moore Hist. & L. of Foreshore and Seashore*, 248.

4. *Atty. Gen. v. Tomline*, (1880) L. R. 14 Ch. Div. 58; 1 Farnham, *Waters & Water Rights*, Sec. 36.

5. (1877) 68 N. Y. 71, 76.

mount right of public use of navigable waters, which he could neither destroy nor abridge."⁶

As to inland lakes and rivers above the ebb and flow of the tide, it is settled by the common law of England that the underlying soil belongs to the riparian proprietor.⁷ Yet if the stream is navigable this ownership is subject to the public right of navigation. In *Blount v. Layard*,⁸ Bowen, J., in speaking of the River Thames, says: "We are dealing with the Thames, which is not a tidal river at the place in question. But, on the other hand, it is a navigable river, that is, all the Queen's subjects have the right of passing and repassing on it, and it is what is called in the old books a 'King stream,' by which is meant, not that the soil must belong to the King, but that it is a highway, and that the King is the natural guardian and conservator of the commodious and convenient passage of the river by his subjects."

In the United States we start with a somewhat anomalous situation. When the thirteen original states established their independence, each state became the owner of the unappropriated land within its borders, and continued to own it, subject only to surrender since made to the Federal government. The right of the United States to public lands originated in voluntary surrender made by several of the states of their waste and unappropriated lands to the United States under a resolution of the Congress of the Federation of September 6, 1780, recommending such surrender and cession to aid in paying the public debt incurred by the Revolution, the object being to convert the land into money for the payment of the debt. Where foreign governments ceded territory to the United States, the unappropriated land therein passed to the United States, and new states formed therefrom never had title thereto. It was early held that when cession was made by the states to the United States, the navigable waters and the soil under them were not ceded to the United States, nor were they granted to the United States by the adoption of the United States constitution, but they were reserved to the states respectively. And it was also early held that new states formed

6. See also *Hardin v. Jordan*, (1890) 140 U. S. 371, 11 S. C. R. 808.

7. *Hale, De Jure Maris*, Pt. 1, Ch. 1; *Hindson v. Ashby*, (1896) L. R. 1 Ch. Div. 78; *Orr Ewing v. Colquhoun*, (1877) L. R. 2 App. Cas. 839; *Scott v. Napier*, (1869) 7 Ct. of Sess. Cas. 35; *Bristow v. Cormican*, (1878) L. R. 3 App. Cas. 641.

8. (1891) 2 Ch. 681 (note), 65 L. T. 175.

after the constitution was adopted, have the same right in the soil underlying public waters within their borders as the original states.⁹

At the outset, then, the people of each state held the absolute right to all their navigable waters and the soil under them;¹⁰ and when the United States government issues its patent to public land bordering upon public water, the land under the water does not pass to the riparian proprietor by force of the grant, because the United States does not own it; but if the riparian proprietor acquires the underlying soil at all it is by the gratuitous favor of the state which does own it, but which is no party to the patent or grant.¹¹ Accordingly the question of the respective rights of the public and of the riparian proprietor in the soil under public water within a state is a question, not of Federal but of state cognizance.¹² It was said in the case just cited that it is for the several states themselves to determine this question, and, "If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections." Very few states have determined this question by legislative action. In most cases the courts have been obliged to determine the respective rights of the state and of the riparian owner without legislative guidance.

In this country, as in England, waters are classified as navigable and non-navigable, but the ebb and flow of the tide has not always been accepted as the test of navigability in the United States. There are many great navigable rivers into which the tide never flows. At an early day Chief Justice Taney, speaking of this matter, said, "If a distinction is made on that account, it is merely arbitrary, without any foundation in reason, and, indeed, would seem to be inconsistent with it;"¹³ yet this test has been in a good many cases adopted.¹⁴ In some states the distinction has been repudiated

9. *Pollard's Lessee v. Hagan*, (1845) 3 How. 212; *Mumford v. Wardell*, (1867) 6 Wall, 423, 436; *St. Anthony Falls Water Power Co. v. Water Comm'rs*, (1897) 168 U. S. 349, 658-9, 18 S. C. R. 157.

10. *Mumford v. Wardell*, *supra*.

11. *Barney v. Keokuk*, (1876) 94 U. S. (4 Otto) 324; *Hardin v. Shedd*, (1902) 190 U. S. 508, 519, 23 S. C. R. 685.

12. *Barney v. Keokuk*, *supra*.

13. *The Propeller Genesee Chief v. Fitzhugh*, (1850) 12 How. 443, 454.

14. *Cobb v. Davenport*, (1867) 32 N. J. L. 369; *Fulton L. H. & P. Co. v. State of New York*, (1910) 200 N. Y. 400. See Ill. Cent. R. R. Co. v. Illinois, (1892) 146 U. S. 387, 435, 13 S. C. R. 110.

and it is held that "waters which are navigable in fact are navigable in law."¹⁵ There is no uniform test to determine what waters are navigable in fact.

In *Hodges v. Williams*,¹⁶ it was held that the test of navigability is whether or not the water is navigable for sea-going vessels. Elsewhere it is held that in order to be classed as a navigable river the stream must be capable of practical general uses and must afford a channel for useful commerce.¹⁷ In other states the term navigability has been broadly used to include waters not navigable in the ordinary sense of that term, and to embrace all waters public in their nature. Under this rule, though a body of water is not adapted to use for commercial navigation, still if it is suitable for such public purposes as boating for pleasure, fishing, fowling, bathing, skating, it is held to be public or navigable water.¹⁸

As to the title to water beds, there is much lack of uniformity of rule. Generally it is held that title to the beds of all non-navigable ponds and streams is in the riparian proprietor;¹⁹ though on this point decision is not unanimous.²⁰

When it comes to the soil underlying public or navigable fresh waters, the confusion is great. As to the Great Lakes and other large lakes, like Lake Champlain, it is agreed that the title to the underlying soil is in the state.²¹ Between great lakes and mere ponds there is a point in diminishing size below which title may be conceded to be in the individual. There is another point above which all agree that the title must be in the state. Between the two are the many bodies of water which are the subject of controversy.

Some courts hold that the riparian owners own the soil under navigable fresh waters.²² The theory of these cases

15. *Schulte v. Warren*, (1908) 218 Ill. 108, 118, 75 N. E. 783; 13 L. R. A. (N. S.) 745.

16. (1886) 95 N. C. 331.

17. *Schulte v. Warren*, *supra*.

18. *Lamprey v. State*, (1893) 52 Minn. 181, 199, 200, 53 N. W. 1139, 38 Am. St. R. 541, 18 L. R. A. 670; *Grand Rapids v. Powers*, (1891) 89 Mich. 94, 50 N. W. 661, 14 L. R. A. 498.

19. *Rhodes v. Cissel*, (1907) 82 Ark. 367, 101 S. W. 758; *Foss v. Johnstone*, (1910) 158 Cal. 119, 110 Pac. 294.

20. See *Noyes v. Collins*, (1894) 92 Ia. 566, 61 N. W. 250, 26 L. R. A. 609.

21. 1 *Farnham, Waters & Water Rights*, § 58; Ill. Cent. Ry. Co. v. Illinois, *supra*; *People v. Silberwood*, (1895) 110 Mich. 103, 67 N. W. 1087, 32 L. R. A. 694.

22. *Donovan-Hopka-Ninneman Co. v. Hope Lbr. Mfg. Co.*, (1912) 194 Fed. (Idaho) 643; *Johnson v. Johnson*, (1910) 14 Ida. 561, 95 Pac. 499, 24 L. R. A. (N. S.) 1240; *Berry v. Snider*, (1867) 66 Ky. 266; *Grand*

generally is that the rule of the English common law as to ownership of soil under fresh water lakes and streams should be applied in the United States.

Some decisions, repudiating the common law rule as inapplicable in the United States, hold that the soil underlying navigable fresh water belongs to the state in a proprietary capacity.²³

Some courts hold that the title to the soil underlying all public or navigable waters belongs to the state in its sovereign capacity in trust for the people.²⁴

Some hold that the soil underlying navigable rivers belong to the state;²⁵ while that underlying navigable lakes belongs to the riparian owner.²⁶

Some hold that soil underlying navigable lakes belongs to the state, and the beds of navigable rivers to the riparian owner.²⁷

Some decisions hold that the soil under water susceptible of public use is owned by the riparian proprietor, but that such ownership is subject to the public use.²⁸

It is a rule generally recognized that mineral under the earth belongs to the owner of the surface. In the case of non-navigable bodies of water, it is generally conceded that, since the bed of the water belongs to the riparian proprietors, minerals underlying the water bed belong to them also. In the jurisdictions where the riparian owner upon a public lake or

Rapids Ice & Coal Co. v. South Grand Rapids Ice & Coal Co., (1894) 102 Mich. 227, 60 N. W. 681, 25 L. R. A. 815; Steamboat Magnolia v. Marshall, (1860) 39 Miss. 109; Fulton L. H. & P. Co. v. State of N. Y., supra.

23. Chapman v. Kimball, (1831) 9 Conn. 38; Hammond v. Shepard, (1900) 186 Ill. 235, 57 N. E. 867, 78 Am. St. Rep. 274; Carr v. Moore, (1903) 119 Ia. 152, 93 N. W. 52, 97 Am. St. Rep. 292; Pacific Elevator Co. v. Portland, (1913) 65 Ore. 349, 133 Pac. 72; Conneaut Lake Ice Co. v. Quegley, (1909) 225 Pa. 605, 74 Atl. 648; Reelfoot Lake Case, (1913) 127 Tenn. 575, 580, 158 S. W. 746; New Whatcom v. Fairhaven Land Co., (1901) 24 Wash. 493, 501 (by constitution) 64 Pac. 735, 54 L. R. A. 190. 24. Lamprey v. State, supra; Florida v. Black River Phosphate Co., (1893) 32 Fla. 82, 13 So. 640; Wilton v. Van Hessen, (1911) 249 Ill. 182, 94 N. E. 134; Roberts v. Baumgarten, (1888) 110 N. Y. 380, 18 N. E. 96; Flisrand v. Madson, (1915) 35 S. D. 457.

25. Paul v. Hazleton, (1874) 37 N. J. L. 106 (tidal).

26. Cobb v. Davenport, (1867) 32 N. J. L. 369.

27. Fuller v. Shedd, (1896) 161 Ill. 462, 483, 44 N. E. 286; Bradley v. Rice, (1836) 13 Me. 198, 201; State v. Gilmanton, (1838) 9 N. H. 461; Kanouse v. Slockblower, (1891) 48 N. J. Eq., 42, 21 Atl. 197; Fletcher v. Phelps, (1856) 28 Vt. 257; Willow River Club v. Wade, (1899) 100 Wis. 86, 97, 76 N. W. 273, 42 L. R. A. 305.

28. Fulton L. H. & P. Co., v. N. Y., supra; Willow River Club v. Wade, supra.

stream takes to the center thereof, it will doubtless be conceded that he owns any minerals that underlie the soil. In the jurisdictions where the state is held to own the bed of public waters in a proprietary capacity, there will probably be little doubt that the state owns any minerals that may be found under the bed of the water. In the jurisdictions where the state is held to be the owner of the water bed in its sovereign capacity, little more can be done than to give the substance of the few decisions that we have.

Something depends on what is meant by holding title in a sovereign capacity. The authorities are not in harmony as to what this term signifies. In England, as above stated, the soil underlying tidal rivers is held by the Crown in a sovereign capacity in the sense that it holds, not as a beneficiary, but as a trustee, subject to the paramount right of public use. But this ownership in a sovereign capacity is not there thought to be inconsistent with a holding of title in a proprietary capacity, in the sense that the property may be sold and become the private property of another, impressed with the same trust for public use.²⁹ Some American decisions take the same view.

In *Ill. Cent. R. R. Co. v. Illinois*,³⁰ Justice Field said: "The State holds the title to the lands under the navigable waters * * * in trust for the people of the State, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. * * * The control of the State for the purposes of the trust can never be lost except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining," but that these lands "belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof where that can be done without substantial impairment of the interest of the public in the waters".

In *People v. Kirk*,³¹ it was held that the state could by statute give the right to construct a drive along Lake Michigan and fill in the bed of the lake for that purpose, so long as it

29. See *People v. N. Y. & S. I. F. Co.*, (1877) 68 N. Y. 71.

30. (1892) 146 U. S. 387, 13 S. C. R. 110.

31. (1896) 162 Ill. 138, 45 N. E. 830, 53 Am. St. Rep. 277.

does not substantially interfere with the right of navigation and fishing, and that such action was not a violation of the trust by which the state held the lake bed. It was said that if necessary for the best interests of the people, a portion of the bed of the lake not useful for fishery or navigation might be reclaimed and devoted to park purposes.³²

In *State ex rel., Ellis v. Gerbing*,³³ it was said that "the title to lands under navigable waters * * * is held by the State * * * for navigation and other useful purposes afforded by the waters over such lands," * * * that, "the trust with which these lands are held by the State is governmental, and cannot be wholly alienated," that, "submerged lands, * * * may be disposed of by legislative authority, if such disposition does not impair the rights of the whole people to the use thereof for any purpose expressed or implied by law," that the use of the land under navigable waters may be granted for the purpose of aiding navigation or commerce, or encouraging new industries, and the development of natural or artificial resources, in the interest of all the people, and that "the State may grant reasonable and limited privileges for planting and propagating oysters or shell fish on land covered by waters of navigable streams; but such privileges should not unreasonably impair the rights of the whole people of the State in the use of the waters or the lands thereunder for the purposes implied by law."

In *Mowry v. City of Providence*,³⁴ the court said: "In the case of *Clark v. The City of Providence*,³⁵ * * * this court held * * * that the State or the General Assembly as the organ of the State, is the representative of the public or people as to the public right, and as such has the power to release the right, the General Assembly having in the matter the authority, not simply of the English crown, but of both crown and parliament, except so far as it has been limited by the Constitution of the State or the Constitution and Laws of the United States."

In *Pac. Elev. Co. v. Portland*,³⁶ it was held that a state may

32. See also *Ill. Cent. R. R. Co. v. Chicago*, (1898) 173 Ill. 471, 50 N. E. 1104; same case, (1900) 176 U. S. 646, 20 S. C. R. 509; *Bliss v. Ward*, (1902) 198 Ill. 104, 64 N. E. 705.

33. (1908) 56 Fla. 603, 47 So. 353, 22 L. R. A. (N. S.) 337.

34. (1890) 16 R. I. 422, 16 Atl. 511.

35. (1890) 16 R. I. 337, 15 Atl. 763.

36. (1913) 65 Ore. 349.

grant title to tide lands held by it in its sovereign capacity into private ownership, subject to the paramount public right of navigation and such reasonable regulations as the state may prescribe. It was said that lands totally or partially submerged are made the subject of grant by the sovereign, in order that they may be reclaimed for useful purposes.³⁷ The court further said, citing *Hinman v. Warren*,³⁸ "As the State became the owner of the tide lands, it had the power * * * to sell the same. It has, however, no authority to dispose of its tide lands in such a manner as may interfere with the free and untrammelled navigation of its rivers, bays, inlets, and the like. The grantees of the state took the land subject to every easement growing out of the right of navigation inherent in the public."

In *Oakland v. Oakland Water Front Co.*,³⁹ where the same view as to the nature of the state's title prevails, it was held that the state might grant the soil under the bed of the bay of San Francisco for the purpose of reclamation, where it was capable of reclamation without detriment to any public right.

In *Saunders v. N. Y. C. & H. R. R. Co.*,⁴⁰ it was said that, "while the State holds the title to lands under navigable waters in a certain sense as trustee for the public, it is competent for the supreme legislative power to authorize and regulate grants of the same for public or such other purposes as it might determine to be for the best interests of the state."

One commentator has said: "The trust theory cannot, on principle, be carried to such an extent as to prevent the state from granting the title of the soil under its waters to private individuals and permitting such use of it as is possible, consistent with the public rights".⁴¹

In Wisconsin, where the doctrine of ownership by the state in its sovereign capacity prevails, the right to grant the

37. Citing *Taylor Sands Fishing Co. v. State Land Board*, (1910) 56 Ore. 157, 161, 108 Pac. 126; *Fowler v. Wood*, (1906) 73 Kan. 511, 549.

38. (1877) 6 Ore. 408.

39. (1897) 118 Cal. 160, 50 Pac. 277.

40. (1895) 144 N. Y. 75, 38 N. E. 992, 26 L. R. A. 378. See also *People v. Steeplechase Park Co.*, (1916) 113 N. E. (N. Y. Ct. of App.) 521.

41. 1 *Farnham, Waters and Water Rights*, § 36a, citing *Weber v. Harbor Comm'rs*, (1873) 18 Wall. (85 U. S.) 57; *Barney v. Keokuk*, (1876) 94 U. S. 324; *Hoboken v. Penn. R. R. Co.*, (1887) 124 U. S. 656, 688, 690, 691, 8 S. C. R. 643; *Shively v. Bowlby*, (1893) 152 U. S. 1, 25, 14 S. C. R. 548; *Gough v. Bell*, (1847) 21 N. J. L. 156, 165; same case, (1850) 22 N. J. L. 441. Further, as to grants by the state, see *Martin v. Waddell*, (1842) 16 Pet. 367; *Pollard, Lessee v. Hagan*, (1845) 3 How. 212; *Jones v. Oemler*, (1899) 110 Ga. 202, 35 S. E. 575; *Hatfield v. Grimstead*, (1846)

bed of public waters is much circumscribed. In *McLennan v. Prentice*,⁴² the court said: "The state has no proprietary interest in them, and cannot abdicate its trust in relation to them, and, while it may make a grant of them for public purposes, it may not make an irrevocable one, and any attempted grant of the land would be held, if not absolutely void on its face, as subject to revocation." In another case, however, it was said: "Submerged lands of * * * lakes within the boundaries of this state belong to the state in trust for public use, substantially the same as submerged lands under navigable waters by the rules of the common law."⁴³

In Minnesota, where it is held that the title is in the state in its sovereign capacity; the doctrine that the state has any title which it may convey is repudiated. In *Bradshaw v. Duluth Imperial Mill Co.*,⁴⁴ it is said: "The old common law doctrine * * * that the crown has a *jus privatum*, or right of private property, in navigable waters and their shores, which it could alienate to a subject, has no place in the jurisprudence of this state. It is the settled law with us that the rights of the state in navigable waters and their beds are sovereign, and not proprietary, and are held in trust for the public as a highway, and are incapable of alienation."⁴⁵

In other cases in Minnesota it has been held, in substance, that, while the riparian owner does not own the bed of navigable waters, yet he may wharf off beyond low water mark and occupy the bed of the water subject only to the regulations of the state;⁴⁶ that his private right of use is not limited to purposes connected with navigation, but may extend to any purpose not inconsistent with the public right;⁴⁷ that he has the exclusive right, absolute, as respects every

29 N. C. 139; *Shepard's Point Land Co. v. Atlantic Hotel*, (1903) 132 N. C. 517, 44 S. E. 39, 61 L. R. A. 937; *Eisenbach v. Hatfield*, (1891) 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632; *New Whatcom v. Fairhaven Land Co.*, (1901) 24 Wash. 493, 64 Pac. 735, 54 L. R. A. 190.

42. (1893) 85 Wis. 427, 444-5, 55 N. W. 764.

43. *Village of Pewaukee v. Savoy*, (1899) 103 Wis. 271, 79 N. W. 436, 50 L. R. A. 86.

44. (1892) 52 Minn. 59, 65, 53 N. W. 1066.

45. See, also, *Lamprey v. State*, (1892) 52 Minn. 181, 53 N. W. 1139, 38 Am. St. R. 541, 18 L. R. A. 670. This is followed in *Flisrand v. Madson*, 35 S. D. 457, 470. See, also, *State v. Cleveland, etc., R. Co.*, (1916 Ohio) 113 N. E. 677.

46. *Brisbine v. St. P. & S. C. R. Co.*, (1876) 23 Minn. 114, 130.

47. *Hanford v. St. P. & D. R. Co.*, (1889) 43 Minn. 104, 111, 42 N. W. 596, 44 N. W. 1114, 7 L. R. A. 722.

one but the state, and limited only by the public interests of the state, for purposes connected with public uses—to improve, reclaim and occupy the surface of the submerged land, out to the point of navigability, for any private purpose, as he might do if it were his separate estate,⁴⁸ and that the rights which thus belong to him as riparian owner are valuable property rights of which he cannot be divested without consent, except by due process of law, and, if for public purposes, upon compensation.⁴⁹

The cases which directly pass upon the rights of parties to mineral under public waters are few.

In the year 1858 the question arose in England as to the rights of the Queen and the Prince of Wales, as Duke of Cornwall, to the mines and minerals under the shore and sea adjoining the coasts of Cornwall. "The decision of the arbitrator was that all the mines and minerals lying under the seashore between high and low water marks, and under the estuaries, tidal rivers and other places beyond low water mark, which were within the county, belonged to the Prince as part of the soil and territorial possessions of the Duchy of Cornwall; but that the right to all mines and minerals beyond low water mark, under the tide waters adjacent to, but not part of, the county was vested in the Queen."⁵⁰

In *Lord Advocate v. Wemyss*,⁵¹ by way of dictum, Lord Watson said: "Whether the Crown could make an effectual grant of that solum or of any part of it to a subject appears to me to be a question not unattended with doubt; but I do not think that the Crown could, without the sanction of the legislature, lawfully convey any right or interest in it which, if exercised by the grantee, might by possibility disturb the solum or in any way interfere with the uses of navigation, or with any right in the public. The mineral strata below the bed of the sea, in so far as they are capable of being worked without causing disturbance, appear to me to stand in a different position. To that extent, I know of no principle of Scottish law which could prevent the crown from communicating the right of working to a subject, in the character either of tenant or proprietor. If that be so, it would follow that submarine

48. *Id.* 118.

49. *Brisbane v. St. P. & S. C. R. Co.*, *supra*.

50. *Gould, Waters* (3rd ed.) § 10.

51. (1900) A. C. 48, 66.

materials, if expressly included, might, to the extent which I have indicated, be competently made parts and pertinents of a baronial or other Crown grant of adjacent lands."

In *Steele v. Sanchez*,⁵² it was held that the Des Moines River at Ottumwa was formerly a navigable stream, and that the proprietary title to the bed of the river was in the public, that the title of the riparian owner extended only to high water mark, that he has certain rights below that point, but they are not the subject of transfer independent of the land to which they are appurtenant, and that the riparian owner has no such right in stone under the river bed as to authorize him to sell the same, and that he could not recover for stone quarried therefrom, the right to take which he undertook to sell.

In *Brandt v. McKeever*,⁵³ the court recognized the right of the state to grant the right to the minerals underlying the bed of the Monongahela River.

In *Taylor v. Commonwealth*,⁵⁴ it was held that the navigable waters below low water mark and the soil under them, within the territorial limits of the state, are the property of the state, to be controlled by the state in its discretion, for the benefit of the people of the state, and that an act of the Virginia legislature which so declared was but a declaration sanctioned and supported by the common law. It was said, that the right of the riparian owner is the right of access and of wharfage, the right to accretions, and the right to make reasonable use of the water; that these rights of the commonwealth and of the riparian owner must be exercised, if possible, so that the one shall not unreasonably disturb or impair the enjoyment of the other, but that a riparian owner of land upon the navigable portion of York River, who is not disturbed in the enjoyment of the stream, cannot complain of the fact that the state leases to a citizen a portion of the bed of a navigable stream for the purpose of sinking an artesian well, and using the water therefrom; that the commonwealth holds the soil underneath such navigable waters as trustee for the benefit of all her citizens, and whatever the soil contains belongs to the state, and it alone has the right to develop these hidden sources of wealth for the common benefit of all of its citizens;

52. (1887) 72 Ia. 65.

53. (1851) 18 Pa. 70.

54. (1904) 102 Va. 759, 47 S. E. 875, 102 Am. St. Rep. 865.

that it is not only her right, but her duty as such trustee, to render this property productive.

In *Florida v. Black River Phosphate Co.*,⁵⁵ where the doctrine of ownership by the state in its sovereign capacity prevails, it was held that the riparian owner had no right to take phosphate from the bed of a navigable river under any circumstances, except by consent of the state duly given by the law-making power, and upon such terms and conditions as it may prescribe.

In *State ex rel. Atty. Gen. v. Southern Sand & Material Co.*,⁵⁶ it was held that the state held the title to the beds of its navigable streams as a trustee for its citizens, and that the sale of sand and gravel therefrom was but a method of utilizing the common property of the state for the benefit of its citizens, and it was further held that the state might recover for sand taken from the bed of the Arkansas River for commercial purposes a price or royalty fixed by statute.

In *State v. Akers*,⁵⁷ a similar case, it was held that the state owns the sand under the Arkansas and Kansas Rivers, in trust for all the people; that any citizen may take what he needs for his own use, but the state may impose a royalty upon those taking it for commercial purposes.

In *State v. Pacific Guano Co.*,⁵⁸ it was held that the state, and not the riparian owners, owned phosphate rock underlying certain navigable streams of the state, and that the state might enjoin the removal thereof by the riparian owners, and might recover the value of that already taken by them.

In *Bradley v. S. C. & P. River Min. Co.*,⁵⁹ the United States Circuit Court recognized as valid a statute granting to certain named persons the right to dig and mine in the beds of the navigable waters of the state of South Carolina for phosphate rocks and phosphate deposits.

State v. Korrer,⁶⁰ involves some of the rights of the state and of riparian owners in the matter of the mining of iron ore which lies beneath the bed of Longyear Lake, a public body of water. The court held that the title to the soil under the

55. (1893) 32 Fla. 82, 114, 13 So. 640, 21 L. R. A. 189.

56. (1914) 113 Ark. 149, 167 S. W. 854.

57. (1914) 92 Kan. 169, 140 Pac. 637.

58. (1884) 22 S. C. 50.

59. (1877) 1 Hughes (U. S. C. C.) 72, Fed. Cas. No. 1787. See also *Coosaw Mining Co. v. South Carolina*, (1891) 144 U. S. 550.

60. (1914) 127 Minn. 60, 148 N. W. 617, L. R. A. 1916 C., 139.

waters below low water mark is held by the state, but in its sovereign governmental capacity; that the state has the right to conserve the integrity of its public lakes and rivers, and that the riparian owner has no right, against the protest of the state, to destroy the bed of a public lake for the private purpose of taking ore therefrom, and that the fact that the portions of the lake in controversy are, during low water, not capable of any substantial beneficial use, does not prevent the state from objecting to its diversion to a private use foreign to the public uses of the water and the soil under it. The right of the state to itself take ore from the lake bed, the power of the state to give to the riparian owner or anyone else the right to do so, the right of the riparian owner to take ore from the lake bed if it could be done without disturbing the waters or the public use thereof, and the ownership of the ore in fact taken out, were questions the court did not decide.

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