1927

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

Dwight Williams

THE POWER OF THE STATE TO CONTROL THE USE OF ITS NATURAL RESOURCES†

By DWIGHT WILLIAMS*

THE EXTENT OF THE POWER OF THE STATE TO CONTROL INDEPENDENT OF ITS PROPRIETARY INTEREST

HITHERTO we have considered the power of the state over its natural resources only as that power is derived from its proprietary capacity. In a broad sense the police power of the state includes the power the state thus exercises as a trustee. In the present installment we are to examine the extent of the police power of the state in the narrower sense over natural resources, that is, independent of its character as trustee.

1. AS AGAINST PRIVATE RIGHTS.

The power of the state over wild animals both as against the claims of individuals and as against the charge of regulating interstate commerce which was upheld in the case of *Geer v. Connecticut*[75] by reason of its proprietary interest can also be based on the general police power of the state. The United States Supreme Court in the last paragraph of its opinion in the *Geer Case* said:

"Aside from the authority of the state, derived from the common ownership of game and the trust for the benefit of its people which the state exercises in relation thereto, there is another view of the power of the state in regard to the property in game, which is equally conclusive. The right to preserve game flows from the undoubted existence in the state of a police power to that end, which may be none the less efficiently called into play, because by doing so interstate commerce may be remotely and indirectly affected."

But there are enactments in connection with the regulation of the taking of wild animals which cannot be derived from the proprietary interest of the state and to be sustained must be based on the police power. A game law of New York provided that,

---

*Professor of Business Law, Kansas State Agricultural College, Manhattan, Kansas.

†For the first installment of this article, see 11 MINNESOTA LAW REVIEW 129-49.

[75](1896) 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793.

"whenever in this act the possession of fish or game, or the flesh of any animal, bird or fish is prohibited, reference is had equally to such fish, game or flesh coming from without the state as to that taken within the state."

Obviously the state can have no proprietary interest in game and fish reduced to possession outside the state and brought in. The validity of the provision of the New York law was upheld as a proper exercise of the police power by the United States Supreme Court in the case of *New York ex rel. Silz v. Hesterberg.*[76]

Silz was convicted of violating the statute by having in his possession in the state in the closed season two birds both lawfully taken and killed in Europe. He sought release by a petition for a writ of habeas corpus. The United States Supreme Court said:[77]

"It has been provided that the possession of certain kinds of game during the closed season shall be prohibited, owing to the possibility that dealers in game may sell birds of the domestic kind under the claim that they were taken in another state or country. The object of such laws is not to affect the legality of the taking of game in other states, but to protect the local game in the interest of the food supply of the people of the state. We cannot say that such purpose, frequently recognized and acted upon, is an abuse of the police power of the state, and as such to be declared void because contrary to the fourteenth amendment of the constitution."[78]

As the power of the state over wild animals has been based on the police power independently of the trusteeship of the state, the same has been done with reference to its power over water. The United States Supreme Court in the case of *Hudson County Water Co. v. McCarter,*[79] in an opinion written by Justice Holmes said:[80]

"But we prefer to put the authority, which cannot be denied to the state, upon a broader ground than that which was empha-

[76](1908) 211 U. S. 31, 29 Sup. Ct. 10, 53 L. Ed. 75.

[77]New York ex rel. Silz v. Hesterberg, (1908) 211 U. S. 31, 40, 29 Sup. Ct. 10, 53 L. Ed. 75.

[78]The case affirmed the judgment of the court of appeals of New York in People, ex rel. Hill v. Hesterberg, (1906) 184 N. Y. 126, 76 N. E. 1032, 3 L. R. A. (N.S.) 163. State courts had previously upheld such laws. Ex parte Maier, (1894) 103 Cal. 476, 37 Pac. 402; Magner v. Illinois, (1881) 97 Ill. 320; Phelps v. Racey, (1875) 60 N. Y. 10, 19 Am. Rep. 140. To the contrary, however, is the case of In re Davenport, C. C. D. Wash. (1900) 102 Fed. 540.

[79](1908) 209 U. S. 349, 28 Sup. Ct. 529, 52 L. Ed. 828, 14 Ann. Cas. 560.

[80]Hudson County Water Co. v. McCarter, (1908) 209 U. S. 349, 355, 28 Sup. Ct. 529, 52 L. Ed. 828, 14 Ann. Cas. 560.

sized below, since, in our opinion, it is independent of the more or less attenuated residuum of title that the state may be said to possess."

This broader ground was expounded in the following language:[81]

"It appears to us that few public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a state, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots. Whether it be said that such an interest justifies the cutting down by statute, without compensation, in the exercise of the police power, of what otherwise would be private rights of property, or that apart from statute those rights do not go to the height of what the defendant seeks to do, the result is the same."

We have already noted that the property rights in subterranean waters are on a different basis from those in waters above ground in that the owner of the soil is according to the earlier common law rule the absolute owner of the percolating water and may do as he pleases with it. This rule, however, we found has been considerably modified in many jurisdictions in this country. The attitude of any court toward attempts on the part of the state to regulate the use of percolating waters depends on the rules at common law in its jurisdiction governing the rights in such waters.

The case of *Huber v. Merkel*,[82] decided by the supreme court of Wisconsin, is perhaps the most extreme application of the so-called English rule in this country. The legislature of the state provided that the owners of artesian wells "shall use due care and diligence to prevent any loss or waste or unreasonable use of any water therein contained or flowing from the same, as would deprive or necessarily diminish the flow of water in any artesian well, to the injury of the owner of any other well in the same vicinity or neighborhood" and provided further that the owner violating such duty should be liable in damages. The defendant in the case was found to have maliciously allowed his

[81] Ibid. at p. 356.
[82] (1903) 117 Wis. 355, 94 N. W. 354, 62 L. R. A. 589.

artesian wells to flow to their full capacity with the result that plaintiff could not use his artesian well except by pumping the water from it. Yet the court held that the defendant was within his rights and that the statute was unconstitutional. "So it seems inevitable," the court said,[83] "that, in this state at least, the right of a landowner to sink wells and to gather and use percolating waters as he will, even though the flow in his neighbor's well be diminished, is a property right." And it concluded that[84] "the law in question cannot be held to be within the police power, and that it in effect takes private property for private use and without compensation."[85]

The case of *Hathorn v. Natural Carbonic Gas Co.*,[86] illustrates, on the other hand, the attitude taken by a court that has modified the strict English rule by limiting the rights of the owner of the soil and recognizing correlative rights in the percolating water.[87] A statute of New York was upheld in this case insofar as it prohibited the owner of the surface from pumping on his own land certain mineral waters, or from taking such waters by any artificial contrivance, when the object of so doing was to extract and collect carbonic acid gas for the purpose of marketing the same and when the result was to diminish the flow to other owners drawing from the same source of supply.[88]

The statute was upheld by the United States Supreme Court in the case of *Lindsley v. Natural Carbonic Gas Co.*,[89] upon the authority of *Ohio Oil Co. v. Indiana*,[90] which sustained the Indiana statute against the waste of gas. In the *Lindsley Case* the court said:

"The mineral waters and carbonic acid gas exist in a commingled state in the underlying rock, and neither can be drawn out

[83]Huber v. Merkel, (1903) 117 Wis. 355, 366, 94 N. W. 354, 62 L. R. A. 589.

[84]Ibid., at p. 373.

[85]In direct conflict with the case of Barclay v. Abraham, (1903) 121 Ia. 619, 96 N. W. 1080, 64 L. R. A. 255, and Stillwater Water Co. v Farmer, (1903) 89 Minn. 58, 93 N. W. 907, 60 L. R. A. 875, in both of which injunctions were issued to prevent waste of the water without a statute.

[86](1909) 194 N. Y. 326, 87 N. E. 504, 23 L. R. A. (N.S.) 436.

[87]Forbell v. City of New York, (1900) 164 N. Y. 522, 58 N. E. 644, 51 L. R. A. 695.

[88]One member of the court dissented on the ground that the case should be dealt with as a case of the taking of gas rather than one of the taking of water.

[89](1911) 220 U. S. 61, 31 Sup. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C 160.

[90](1900) 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729.

without the other. They are of value in their commingled form and also when separated, but the greater demand is for the gas alone. Influenced by this demand, some surface owners, having wells bored or drilled into the rock, engage in extensive pumping operations for the purpose of collecting gas and vending it as a separate commodity. Usually where this is done an undue proportion of the commingled waters and gas is taken from the common supply and a large, if not the larger, portion of the waters from which the gas is collected is permitted to run to waste. Thus these pumping operations generally result in an unreasonable and wasteful depletion of the common supply and in a corresponding injury to others equally entitled to resort to it. It is to correct this evil that the statute was adopted, and the remedy which it applies is an enforced discontinuance of the excessive and wasteful features of pumping. It does not take from any surface owner the right to tap the underlying rock and to draw from the common supply, but, consistently with the continued existence of that right, so regulates its exercise as reasonably to conserve the interests of all who possess it."

In the absence of statute, since every owner of the soil either has a qualified ownership of the oil and gas under his land or has the right to reduce them to possession, he may reduce to possession as rapidly as possible and for that purpose he may use extraordinary methods to do so. No one has the right to complain for no one is deprived of a property right by the efficiency of another in obtaining possession of the gas. Therefore the owner of a gas well may enlarge his well by the explosion of nitroglycerin to increase the flow.[91] Likewise each owner has the right to use pumps to obtain possession of oil underneath his property.[92] But an act of the legislature making it unlawful to pump or to increase otherwise the natural flow from a gas well has been sustained as within the police power of the state because it was designed to protect private property by "preventing it from being taken by one of the common owners without regard to the enjoyment of the others."[93]

The chief and most successful exercise of the police power of the state in connection with oil and gas has been in the

[91]People's Gas Co. v. Tyner, (1892) 131 Ind. 277, 31 N. E. 59, 16 L. R. A. 443.

[92]Kelley v. Ohio Oil Co., (1897) 57 Oh. St. 317, 49 N. E. 399, 30 L. R. A. 765; Higgins Oil and Fuel Co., (1919) 145 La. 234, 82 So. 206, 5 A. L. R. 411.

[93]Manufacturers Gas and Oil Co. v. Indiana Natural Gas and Oil Co., (1900) 155 Ind. 461, 57 N. E. 912, 50 L. R. A. 768. One of the facts in the case was that the increased flow would permit salt water to enter the gas reservoir and destroy it.

prevention of waste. Whether independently of statute a right exists in the owner of the soil to prevent sheer waste the courts are not agreed. The supreme court of Pennsylvania,[94] although admitting that the public has a sufficient interest in the preservation of gas and oil from waste to justify legislation on the subject, held that at common law the owner of land from under whose land gas is drained and allowed to escape into the open air and go to waste through a well on the land of a neighboring owner has no legal remedy. The owner of the surface owns all that is beneath and has the right to do as he pleases with his own property; he can sell it or destroy it. The court of appeals of Kentucky[95] has, however, held that an injunction will be issued in such a case. The analogy of subterranean water was pointed out and owners of the same gas reservoir, although having the right to bore for gas, are limited to a reasonable exercise of that right.

The leading case on the power of the state to prohibit the waste of gas and oil is *Ohio Oil Co. v. Indiana,*[96] decided by the United States Supreme Court in 1900. The legislature of Indiana by statute made it unlawful "to allow or permit the flow of gas or oil from any such well [i.e. natural gas or oil well] to escape into the open air, without being confined within such well or proper pipes or other safe receptacle, for a longer period than two (2) days next after gas or oil shall have been struck in such well." The Ohio Oil Co. drilled some wells in the state for the purpose of producing oil. Oil was found and produced but some natural gas also came to the surface from the same wells. The company was engaged only in producing oil and had no facilities for taking care of the gas and therefore let it escape into the open air. It was contended that the oil could not be profitably produced by the company from the wells without allowing the gas to escape and that the gas served the useful purpose of forcing up the oil. The state, through its attorney general, sought to enjoin the company from allowing the gas to escape and an injunction was granted in the state court. The supreme court of Indiana[97] in upholding the validity of the statute emphasized the absence of title in any individual in gas until it was reduced to possession

[94]Hague v. Wheeler, (1893) 157 Pa. 324, 27 Atl. 714, 22 L. R. A. 141.
[95]Louisville Gas Co. v. Kentucky Heating Co., (1903) 117 Ky. 71, 77 S. W. 368, 70 L. R. A. 558.
[96](1899) 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729.
[97](1898) 150 Ind. 21, 50 N. E. 1125, 47 L. R. A. 627.

and apparently considered that property in gas was to be put on the same basis as property in wild animals.

When the case came before the United States Supreme Court it had to decide whether the statute took property in violation of the due process clause. The reply of Justice White, who wrote the opinion of the court, to the contention that the statute was invalid because it deprived the owners of the land of their property in the gas itself was that if the statute was invalid for that reason then every surface owner could drain without any limitation whatever all gas extending under the land of others which could be brought to his well. And such a result, he claimed, meant that no one had property in the gas itself, for another had the right to take it. What each surface owner has, the court concluded, is the right to reduce to possession and the purpose of the statute was to protect that right.

"It follows from the essence of their right and from the situation of the things, as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right, to the detriment of the others, or by waste by one or more, to the annihilation of the rights of the remainder. . . . Viewed, then, as a statute to protect or to prevent the waste of the common property of the surface owners, the law of the State of Indiana which is here attacked because it is asserted that it devested private property without due compensation, in substance, is a statute protecting private property and preventing it from being taken by one of the common owners without regard to the enjoyment of the others."[98]

The statute involved in the *Ohio Oil Company Case* prohibited the escape of oil or gas without utilization. It did not restrict the way in which they were to be utilized. The case of *Walls v. Midland Carbon Co.*,[99] decided by the United States Supreme Court in 1920 dealt with a statute of Wyoming which went further. The Midland Carbon Company did not permit natural gas to escape but utilized it in a way which the statute declared to be "wasteful and extravagant."

The statute of Wyoming provided that:

"The use, consumption, or burning of natural gas taken or drawn from any natural gas well or wells, or borings from

[98]Ohio Oil Co. v. Indiana, (1899) 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729.

[99](1920) 254 U. S. 300, 41 Sup. Ct. 118, 65 L. Ed. 276.

which natural gas is produced for the products where such natural gas is burned, consumed or otherwise wasted without the heat therein contained being fully and actually applied and utilized for other manufacturing purposes or domestic purposes is hereby declared to be a wasteful and extravagant use of natural gas and shall be unlawful when such gas well or source of supply is located within ten miles of any incorporated town or industrial plant."[100]

Another provision of the act is directed specifically against the use of natural gas for the purpose of producing carbon without full utilization of the heat.

The Midland Carbon Company sought in the federal courts to restrain the attorney general of the state and others from enforcing the statute on the ground that it went, in violation of the federal constitution, beyond the police power of the state. The company had built at great cost, before the enactment of the statute, a factory equipped only for the production of carbon black. This product is used in the manufacture of printing ink and for a number of other purposes. It was apparently admitted that the market price of the carbon black and gasoline—the latter being extracted from the gas before it was burned to produce carbon black—from a given amount of gas was higher than the market price of the gas or its products in any other form. On the other hand, only 1¾ pounds of carbon black and $\frac{2}{10}$ of a gallon of gasoline were obtained from the consumption of 1,000 cubic feet of natural gas and the state officers claimed that there were from 33 to 40 pounds of carbon black in that amount of gas and that the process of extracting was therefore less than 5% efficient. But there was apparently no known method of securing a more efficient production. The company produced about 13,000 pounds of carbon black and 1,600 gallons of gasoline daily. The state officers claimed that it was using about 10,000,000 cubic feet of gas per day, that all the wells in the entire region would be completely depleted in three years, and that by the enforcement of the statute the two nearby towns would have a supply of gas for all domestic and industrial purposes for thirty years.

On this state of facts, shown by affidavits, the Supreme Court reversed the decree of the United States district court granting

[100]A statute of Indiana declaring that "the use of natural gas for illuminating purposes, in what are known as flambeau lights, is a wasteful and extravagant use thereof," and prohibiting such use was held constitutional in Townsend v. State, (1897) 147 Ind. 624, 47 N. E. 19, 37 L. R. A. 294.

an interlocutory injunction. The court held, in an opinion written by Justice McKenna, that the case was within the principle of *Ohio Oil Co. v. Indiana*.[101] Three members of the court—one of them being Chief Justice White who wrote the opinion in the *Ohio Oil Co. Case*—dissented without opinion. The common principle found in the case of *Ohio Oil Co. v. Indiana* and *Lindsley v. Natural Carbonic Gas Co.*[102] and which controlled in the *Walls Case* was, the court said, that[103] "the power is exerted to prohibit an extravagent or wasteful or disproportionate use of the natural gas of the state."

It is clear, however, that the court in the *Walls Case* has considerably enlarged the power the state possessed over oil and gas under the *Ohio Oil Co. Case*. In contrast with the earlier case, there was no escape of gas unutilized. In fact from the point of view of obtaining the highest market price to the owners of the gas it was utilized to the greatest advantage. But in such utilization heat was generated which was not and could not be used. This the legislature declared to be wasteful and made unlawful when within ten miles of any incorporated town or industrial plant. The reason why it was declared wasteful and unlawful was evidently that in the towns and industrial plants it could be made use of to greater advantage *from the point of view of the public* than in the manufacture of carbon black. The statute can be justified only as a measure for the conservation, for the sake of the public, of the resources of the state. It cannot be justified on the narrow ground of the *Ohio Oil Co. Case* as a measure for the protection, for the sake of the collective owners of a common gas field, of the private property right to reduce to possession. In fact the court paid no attention to the question whether the gas field was owned by several or whether the entire field was owned by one. It paid no attention because evidently it made no difference. The statute according to the decision was to stand not as a means of protecting one surface owner against another but as a measure of conservation of the natural resources of the state. The question, said the court, is[104] "whether the legislation is a legal conservation of the natural resources of the state, or an

---

[101] (1900) 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729.

[102] (1911) 220 U. S. 61, 31 Sup. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C 160.

[103] (1920) 254 U. S. 300, 323, 41 Sup. Ct. 118, 65 L. Ed. 276.

[104] (1920) 254 U. S. 300, 314, 41 Sup. Ct. 118, 65 L. Ed. 276.

arbitrary interference with private rights." The court further said:[105]

"Of the range of the utility of carbon black there can be no controversy and to this fact the companies give an especial emphasis in their averments, supplementary affidavits, and argument. The fact, however, is but of incidental importance. The determining consideration is the power of the state over, and its regulation of, a property in which others besides the companies may have rights and in which the state has an interest to adjust and preserve, natural gas being one of the resources of the state."

And again the court said:[106]

"And there is great disproportion between the gas and the product, and necessarily there was presented to the judgment and policy of the state a comparison of utilities involved, as well, the preservation of the natural resources of the state, and the equal participation in them by the people of the state. And the duration of this utility was for the consideration of the state, and we do not think the state was required by the constitution of the United States to stand idly by while these resources were disproportionately used, or used in such a way that tended to their depletion, having no power of interference."

The ten-mile limit was held not to be an unconstitutional discrimination and there is no reason to think from the opinion that the legislature could not have dispensed entirely with such a limit.

Other states with natural gas fields are attempting to conserve this natural resource against its manufacture into carbon black. A case came into the federal district court in Louisiana last year in which the action of the commissioner of the department of conservation in refusing to issue a permit to build carbon black plants was attacked.[107]

Another case, *Gas Products Co. v. Rankin*,[108] decided subsequently to the *Walls Case*, came up in Montana. This case, also involving a statutory prohibition of the manufacture of carbon black, is interesting both for the reason that the court, by a vote of three to two, came to the opposite conclusion from that reached in the *Walls Case* and also for the reason that it illustrates the fact that the legislative power of the state in relation to its natural resources, as in other respects, is limited not only by the provi-

[105](1920) 254 U. S. 300, 319, 41 Sup. Ct. 118, 65 L. Ed. 276.
[106](1920) 254 U. S. 300, 324, 41 Sup. Ct., 118, 65 L. Ed. 276.
[107]Harkness v. Trion, (1925) 11 F. (2nd) 386. And see Quinton Relief Oil & Gas Co. v. Corporation Commission of Oklahoma, (1924) 101 Okla. 164. 224 Pac. 156.
[108](1922) 63 Mont. 372, 207 Pac. 993, 24 A. L. R. 294.

sions of the federal constitution but by those of the state constitution as well.

The Montana statute attacked was the same as that of Wyoming involved in the *Walls Case* except that in the former there was no ten-mile limit. There was no substantial difference in the character of the facts in the two cases. The omission of the ten-mile limit would in the opinion of the Montana court apparently not distinguish the cases. The two grounds for disagreement with the *Walls Case* were (1) a rule of property in Montana as to natural gas different from that announced by the United States Supreme Court and (2) an interpretation of the constitutional guaranty of due process in the state constitution different from the interpretation of the same guaranty in the federal constitution. The first ground, it is submitted is entirely inadequate. The United States Supreme Court sustained the statute not by a denial of a property right in gas but by holding that it was subject to the police power of the state to the extent of the statute. Whether that property right be called a right to reduce to possession as held by the United States Supreme Court or a qualified property in the gas itself as held by the Montana court makes no difference. In either case there is property which is within the protection of the due process clauses. The real difference between the two courts is a difference in the interpretation of due process and behind that interpretation is the question of policy—whether the power of the state to control the waste of its natural resources should be extended beyond the bounds set in the case of *Ohio Oil Co. v. Indiana,*[109] that is beyond what is necessary to protect the surface owners of a common field of gas.

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

We have seen that what power the state has over wild animals and water may be based, even in relation to interstate commerce, on its proprietary interest independent of the ordinary exercise of the police power.[110]

---

[109] (1900) 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729.

[110] The case of Sils v. Hesterberg, (1908) 211 U. S. 31, 29 Sup. Ct. 10, 53 L. Ed. 75, was not, of course, based on such interest but it involved control over wild animals brought in from other states and was therefore not concerned with control over the exportation from the state of its own resources.

In relation to natural gas and oil,[111] on the other hand, the state has no proprietary interest and what control it has with reference to them it has by reason of its ordinary police power.

One of the fundamental purposes of the police power is to provide for the public safety. A statute of Indiana forbade the transportation of gas through pipes at a pressure exceeding 300 pounds per square inch and forbade transportation except by the natural pressure of the gas flowing from the well. The act was attacked as being an unconstitutional interference with interstate commerce in the cases of *Jamieson v. Indiana Natural Gas and Oil Co.*[112] and *Benedict v. Columbus Construction Co.*[113] It was contended that the real purpose of the statute was to prohibit the exportation of the gas beyond the state borders. It was apparently admitted that with pressure limited to 300 pounds at the well and no artificial pressure in any way permitted, gas could not be transported in pipes beyond a distance of about sixty miles.

So far as it prohibited a pressure in the pipes in excess of 300 pounds it was held in the Indiana case to be a valid police regulation, although it indirectly interfered with interstate commerce. The court said that natural gas is a dangerous product, in a high degree inflammable and explosive, and that the effect upon interstate commerce was only incidental. But the chancellor, in the New Jersey case, held that the statute in so far as it prohibited the use of artificial pressure up to 300 pounds whether at the well or at any point in the transportation pipes was an unreasonable police measure and was aimed at the prevention of transportation of the gas to other states and therefore in violation of the commerce clause of the federal constitution. The court said[114] that although the—

"pipes may be of equal strength along their entire line, and although friction lessens the pressure at the rate of from five to eight pounds per mile, the statute forbids the doing of anything to counteract the effect of the friction and maintain the pressure which the legislature admits is safe and reasonable."[115]

---

[111]The cases which we shall note deal with gas but the principles doubtless apply to oil also.

[112](1891) 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652.

[113](1891) 49 N. J. Eq. 23, 23 Atl. 485.

[114]Benedict v. Columbus Construction Co., (1891) 49 N. J. Eq. 23, 37, 23 Atl. 485.

[115]An entire Kansas statute containing among other things provisions substantially similar to the Indiana statute was declared unconstitutional because the general purpose of the statute was to prevent interstate commerce in natural gas. Haskell v. Kansas Natural Gas Co., (1912) 224

The two leading cases on the question of the power of the state in relation to interstate commerce in natural gas are *West v. Kansas Natural Gas Co.*,[116] and *Pennsylvania v. West Virginia*.[117]

The first case arose out of an attempt by the legislature of Oklahoma to prevent the exportation of natural gas from the state. The state prohibited its transportation by pipe lines except by companies incorporated in accordance with the provisions of the statute; foreign corporations were forbidden to conduct the business; no corporation organized in the state for the purpose of transporting gas within the state was to be granted a charter, or right of eminent domain, or right to use highways, except it expressly stipulate in its charter that it shall transport only within the state and shall not deliver to any one engaged in transporting beyond the state; pipe lines for natural gas were declared to be an additional burden upon highways, streets, etc., and the right of eminent domain restricted to those complying with the purpose of the act.

The case came to the United States Supreme Court on an appeal in which the complainants sought to enjoin the attorney general of the state from enforcing the statute. It was admitted that the whole purpose of the act was to prevent natural gas from leaving the state. On behalf of the state it was contended, however, that the "ruling principle" of the law was conservation and that the effect upon interstate commerce must be regarded as incidental; that the state was exerting its powers to prevent the depletion of one of its natural resources. The supreme court of Indiana had declared unconstitutional a statute which attempted to do much more directly what the Oklahoma statute sought to accomplish.[118] The Supreme Court of the United States likewise declared invalid the Oklahoma law.[119] The court looked to the ultimate purpose of the act—the prohibition of interstate commerce. The private property right in gas and the absence of public ownership was reiterated. The point of view of the

---

U. S. 217, 32 Sup. Ct. 442, 56 L. Ed. 738. This was the statute involved in the case of West v. Kansas Natural Gas Co., which we consider below.

[116](1911) 211 U. S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716, 35 L. R. A. (N.S.) 1193.

[117](1923) 262 U. S. 553, 43 Sup. Ct. 658, 67 L. Ed. 1117, 32 A. L. R. 300.

[118]State, ex rel. Corwin v. Indiana and Ohio Oil, Gas and Mining Co., (1889) 120 Ind. 575, 22 N. E. 778, 6 L. R. A. 579.

[119]Justices Holmes, Lurton, and Hughes dissented.

court is well expressed in the following words from the opinion of the court written by Justice McKenna:[120]

"It [the Oklahoma statute] does not alone regulate the right of the reduction to possession of the gas, but when the right is exercised, when the gas becomes property, takes from it the attributes of property, the right to dispose of it; indeed, selects its market to reserve it for future purchasers and use within the state on the ground that the welfare of the state will thereby be subserved. The results of the contention repel its acceptance. Gas, when reduced to possession, is a commodity; it belongs to the owner of the land, and, when reduced to possession, is his individual property, subject to sale by him, and may be a subject of intrastate commerce and interstate commerce. The statute of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. In other words, the purpose of its conservation is in a sense commercial—the business welfare of the state, as coal might be, or timber. Both of these products may be limited in amount, and the same consideration of public welfare which would confine gas to the use of the inhabitants of a state would confine them to the inhabitants of the state. If the states have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. And why may not the products of the field be brought within the principle?"[121]

The Oklahoma statute was passed in 1907 and the Supreme Court of the United States declared it invalid four years later. In 1919 the legislature of West Virginia enacted a statute that did not go nearly as far. The act sought not to prohibit the use of the natural gas of the state in other states but sought to give its own inhabitants the preferred right to purchase the gas before it left the state. The result of the enforcement of such a statute, however, would be to decrease the amount of gas which otherwise

[120]West v. Kansas Natural Gas Co., (1911) 221 U. S. 229, 254, 31 Sup. Ct. 564, 55 L. Ed. 716, 35 L. R. A. (N.S.) 1193.

[121]The entire statute, including those provisions designed to grant the right of eminent domain and the use of the highways for pipe lines to those transporting gas within the state and to deny such privileges to those transporting gas out of the state, was declared invalid because of the general character and purpose of the law to discriminate against interstate commerce. And see also Haskell v. Kansas Natural Gas Co., (1912) 224 U. S. 217, 32 Sup. Ct. 442, 56 L. Ed. 738.

In case a state does not discriminate against interstate commerce, but by mere inaction does not grant the right of eminent domain or the use of its highways to gas pipe lines, the law is not settled as to the rights of those engaged in interstate commerce. See, in addition to the West and Haskell cases in the United States Supreme Court, Haskell v. Cowham, (8th Cir. 1911) 187 Fed. 403, 109 C. C. A. 235; and Consumer's Gas Trust Co. v. Harless, (1892) 131 Ind. 446, 29 N. E. 1062, 15 L. R. A. 505, and a note in 35 L. R. A. (N.S.) 1195.

would be transported from West Virginia to Pennsylvania and Ohio. The result was that these two states brought original suits in the United States supreme court to enjoin the state of West Virginia from enforcing the act.[122]

On behalf of West Virginia it was contended that the statute only required that each public service gas company furnish reasonably adequate service within reasonable territorial limits and that the effect on interstate commerce was only indirect and incidental. The court in an opinion by Justice VanDevanter declared[123] the issue to be—

"whether a state wherein natural gas is produced and is a recognized subject of commercial dealings may require that in its sale and disposal consumers in that state shall be accorded a preferred right of purchase over consumers in other states,—when the requirement necessarily will operate to withdraw a large volume of the gas from an established interstate current whereby it is supplied in other states to consumers there. Of course, in the last analysis, the question is whether the enforced withdrawal for the benefit of local consumers is such an interference with interstate commerce as is forbidden to a state by the constitution."

The West Virginia law was declared unconstitutional because its necessary operation was to obstruct and burden interstate commerce in a lawful article of commerce. In regard to the argument of conservation the court said:[124]

"Another consideration advanced to the same end is that the gas is a natural product of the state and has become a necessity therein, that the supply is waning and no longer sufficient to satisfy local needs and be used abroad, and that the act is therefore a legitimate measure of conservation in the interest of the people of the state. If the situation be as stated, it affords no grounds for the assumption by the state of power to regulate interstate commerce, which is what the act attempts to do. That power is lodged elsewhere."

Justice Holmes dissented and in an opinion[125] which Justice Brandeis said seemed to him unanswered stated his reasons. In his opinion, "the constitution does not prohibit a state from securing a reasonable preference for its own inhabitants in the enjoyment of its products even when the effect of its law is to keep property within its boundaries that otherwise would have passed

[122]Pennsylvania v. West Virginia, (1923) 262 U. S. 553, 43 Sup. Ct. 658, 32 A. L. R. 300.
[123]Ibid., at p. 595.
[124]Ibid., at p. 598.
[125]Ibid., at p. 600.

outside." He went even so far as to say in regard to the argument that if one state could prevent the exportation of gas others could keep their coal and timber:

"I confess I do not see what is to hinder. Certainly if the owners of the mines or the forests saw fit not to export their products the constitution would not make them do it. I see nothing in that instrument that would produce a different result if the state gave the owners motives for their conduct, as by offering a bonus."

Moreover he said that the state sought to reach natural gas before it had begun to move in commerce of any kind.

Legally the decisions in the Oklahoma and West Virginia cases can be distinguished from the *Geer* and *New Jersey Water Cases* because of the difference in the property rights in wild animals and water on the one hand and gas on the other. However, in both the *Geer* and *New Jersey Water Cases* the court stated that the same result would be arrived at through the exercise of the police power independent of the proprietary interest of the state. The majority of the court feels that the principle of those cases should not be extended to the gas cases. It evidently fears encroachment upon interstate commerce by the states were it to hold otherwise. "Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals." Therefore the court has refused to classify gas in its relation to interstate commerce with game and water but to regard the latter as constituting a special class. The commercial importance of gas and oil is undoubtedly a factor in distinguishing it in the mind of the court from game and water. In contrast with them, this is ultimately their only importance and where an article derives its importance as an article of commerce the supreme court is very jealous of any attempt on the part of any state to use its power because the article happens to be in the state to secure advantages in it at the expense of other states.

SUMMARY

We summarize here the result of our study of the cases on the power of the state independent of its proprietary interest. As against alleged private rights as well as against the charge of interfering with interstate commerce the United States Supreme Court has said that the power which we found in our first installment is usually based on the proprietary interest of

the state may be based on the police power independent of that interest. However, regulations concerning game brought in from other states must be based on the police power alone. The bulk of this installment deals, however, with those resources—percolating water, gas, and oil—in which the courts have held that the state has no proprietary interest. As against private rights we find that the great power of the state with reference to these resources is the prevention of waste. The United States Supreme Court has broadened the basis of this power to include the protection of the public interest in the natural resources as well as the protection of the property interest of the several owners of the resources themselves. In relation to interstate commerce the state has up to the present not been able to make its control effective. In fact we may safely say that its power over gas and oil is no greater in relation to interstate commerce than its power over resources in the state which have a fixed situs, such as coal and iron ore.

Conclusion

Looking to the future what tendencies may we discern in the decisions of the courts in relation to the power of the state to control its natural resources which have no fixed situs?

The state has extensive powers where it has a proprietary interest. But the subjects in which it has a proprietary interest are very limited. They include game and fish and water and there seems to be no disposition whatever on the part of the courts to extend the proprietary interest of the state to other subjects. In understanding the present limits of that interest the historical reason based on the physical nature of the things themselves is undoubtedly the most important. The courts found difficulty in assigning ownership to any one, except the public, in such "fugitive" things as game, fish, and water, and even in oil and gas. They were on one person's land now and on another's a moment later. They also felt that percolating water and gas and oil being underground were more closely identified with the soil than game and they therefore denied public ownership in them. However, we believe that in addition to the physical nature of the thing its commercial importance is also a factor in determining whether the state is to have a proprietary interest in it and especially the extent of the state's power based upon such interest. This factor is not mentioned by the courts in their opinions and

is sometimes obscured by other factors but we think it has had and will have considerable influence in shaping the law. It is apparently where the prevailing view is that a thing, such as game and to a limited extent water, should be reserved chiefly for other than commercial uses that the courts have been most ready to recognize to the fullest extent a proprietary interest in the state. It is to be noted too that as a rule the proprietary interest of the state has been confined to those things which have not been, comparatively, of great commercial importance. Certain fisheries—such as oysters—are, it is true, of great commercial importance. But has not their commercial importance had something to do with the recognition to some extent of private rights in connection with them? Private ownership, for example, may be had in shell fish without reduction to possession and the right to fish, as a property right independent of ownership in the fish themselves, may also be acquired.[126] The commercial importance of gas and oil may not have been the chief reason for denying to the state a proprietary interest in them but we think it may have been one reason for distinguishing them from animals ferae naturae in that respect.[127] Again it may have had a part in the decision in the cases[128] which have denied to the state the power to prevent the shipment of oysters and shrimps—things in which the state admittedly has a proprietary interest—for canning and packing outside of the state. And if other courts besides that of Nebraska[129] pass upon the question of the power of the state to attach a condition to a permit to use water for generating power that the power produced shall not be transmitted beyond the state borders, it will be one influence tending to lead them to an opposite conclusion.

Apart from the effect the commercial importance of shellfish and water power may have upon the power of the state to control interstate commerce in them, the cases in reference to them have another common feature. The state in these cases sought, by means of its undoubted power over those things in which it has a proprietary interest, to attach conditions to their use which interfered with interstate commerce. Shellfish could

[126]Fish and Fisheries, secs. 4 and 6, 11 R. C. L. pp. 1017, 1021.

[127]See p. 248, supra.

[128]State v. Ferrandau, (1912) 130 La. 1035, 58 So. 870, Ann. Cas. 1913D 1170; Elmer v. Wallace, (D.C. Ala., 1921) 275 Fed. 86.

[129]Kirk v. State Board of Irrigation, (1912) 90 Neb. 627, 134 N. W. 167.

be exported but not for canning and packing. Water could be used but the power generated could not leave the state. If the state could entirely prohibit the exportation of shellfish why might it not prohibit their exportation for canning and packing? If the state could prohibit the use or exportation of water why might it not prohibit the exportation of power generated from that water?

The Louisiana case and the case in the federal district court—the shellfish cases—emphasize two facts: (1) that the state had recognized the fish as an article of interstate commerce and then presumed to regulate that commerce; (2) that the purpose was not conservation but the building up of a collateral industry. The Nebraska case held the limitation on the use of the water valid. The prohibition on the transmission of the water power outside of the state was absolute. But such prohibition did not have for its purpose the conservation of the water itself. And the state has no proprietary interest in the water power. It has no more proprietary interest in the water power than it has in goods manufactured by the aid of that power. No one perhaps would contend that the state could exercise its power over the use of water to the extent of prohibiting the exportation of such goods. Yet, if the state can permit the use of the water with a condition or deny its use, why not? Of course other factors besides the use of the water enter into the manufacture of the goods but other factors besides the water are also needed to generate the power.

The general question in these cases is: Can the state discriminate against interstate commerce by using its power to protect and conserve for its own inhabitants things in which it has a proprietary interest as a means merely to secure advantages in collateral things in which it has no proprietary interest? The Supreme Court of the United States has not answered that question. If it answers the question in the negative we may expect it to use the analogy of those cases where it looks to the purpose of the legislature to determine its power. In *Hammer v. Dagenhart*,[130] for example, it denied to Congress the power to regulate commerce when the purpose was to use the regulation as a means of discouraging the use of child labor in manufacturing. And the court has denied to the state the use of its power to exclude foreign corporations when the purpose is to interfere with interstate commerce.[131]

[130](1918) 247 U. S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101.

In relation to those things in which it has no proprietary interest we have already noted the great power of the state is the prevention of waste and we have also noted with reference to interstate commerce in such things that little latitude is apparently left the state after the decision in the case of *Pennsylvania v. West Virginia.*[132] A sentence in the dissenting opinion of Justice Holmes in that case suggests, however, a question that will perhaps sooner or later come up to the supreme court for decision. These are the words of Justice Holmes:[133]

"The right of the state so to regulate the use of natural gas as to prevent waste was sustained as against the fourteenth amendment in *Walls v. Midland Carbon Co.*, . . . and I do not suppose that the plaintiffs would have fared any better had they invoked the commerce clause."

Suppose that a company such as the Midland Carbon Co., in order to avoid the prohibitions of the Wyoming statute transports gas across the line into Montana where such prohibitions have been declared invalid by the state court and from the gas so transported manufactures carbon black. Would it thereby under the decision in *Pennsylvania v. West Virginia* avoid the penalties of the Wyoming statute, sustained in the *Walls Case*, which prohibits the use, sale, or other distribution of natural gas for the purpose of manufacturing carbon without the heat being fully utilized? The Wyoming statute does not attempt to discriminate in favor of the inhabitants of the state but is designed to operate on intrastate and interstate commerce alike. On the other hand the purpose of the West Virginia statute declared invalid in *Pennsylvania v. West Virginia* was to secure a preference to the inhabitants of the state.

The United States Supreme Court[134] has sustained a statute of Florida which forbade the sale or shipment of any citrus fruits which were immature or otherwise unfit for consumption. The court took judicial notice that the raising of citrus fruits was one of the great industries of Florida and declared that it was competent for the state through its police power to protect the success of that industry by preserving its reputation where the

[131]Western Union Telegraph Co. v. Kansas, (1910) 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355.

[132]Pennsylvania v. West Virginia, (1923) 262 U. S. 553, 43 Sup. Ct. 658, 67 L. Ed. 1117, 32 A. L. R. 300.

[133]Ibid., at p. 601.

[134]Sligh v. Kirkwood, (1915) 237 U. S. 52, 35 Sup. Ct. 501, 59 L. Ed. 835.

fruits were sold. The statute applied to both intrastate and interstate commerce but did not discriminate against the latter. The court said:[135]

"Nor does it make any difference that such regulations incidentally affect interstate commerce, when the object of the regulation is not to that end, but is a legitimate attempt to protect the people of the state. . . . So it may be taken as established that the mere fact that interstate commerce is indirectly affected will not prevent the state from exercising its police power, at least until Congress, in the exercise of its supreme authority, regulates the subject. Furthermore, this regulation cannot be declared invalid if within the range of the police power, unless it can be said that it has no reasonable relation to a legitimate purpose to be accomplished in its enactment; and whether such regulation is necessary in the public interest is primarily within the determination of the legislature, assuming the matter to be a proper subject of state regulation."

Does not the principle of *Sligh v. Kirkwood*[136] make the power of the state over the utilization of gas sustained in the *Walls Case* applicable even where the gas is destined for interstate commerce? That the prohibition of the Florida statute is based on the condition of the article while that of the Wyoming statute is based on the purpose for which it is to be used would seem to be immaterial. Each state is attempting to protect a local interest—in the one case against damage to the reputation of an industry, in the other against the waste of a natural resource. In each case we have a "legitimate attempt to protect the people of the state," and by regulations that only "incidentally affect interstate commerce."

[135]Ibid., at p. 60.
[136](1915) 237 U. S. 52, 35 Sup. Ct. 501, 59 L. Ed. 835.