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THE POWER OF A STATE TO CONTROL THE EXPORT OF HYDRO-ELECTRIC ENERGY

JAMES W. SIMONTON\(^2\)

Introduction

During recent years various states have passed more or less comprehensive water power acts\(^1\) designed to provide for the disposal and development of the potential water power of streams, and to regulate and control the same after development. In some of these acts the state expressly declares itself to have full control of all the potential water power within the state for the benefit of its people,\(^2\) and in other acts where the language is not so specific, it has been assumed that, like wild animals and the water flowing in the streams, here is something which is the private property of no one, and therefore may be disposed of by the state for the benefit of the people.\(^2\) In some acts provisions are found by which the state seeks to restrict the export of electric energy derived from hydro-electric developments licensed under the acts. It is probable that such provisions are void, as violating the commerce clause of the Federal Constitution. A discussion of this question follows.

Wherever there is a stream of water with sufficient fall, the force of the flow of the current can be converted into electrical energy which may be transported to distant points and there marketed. Usually the locations where there are considerable quanti-

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\(^1\) Statutes exist in Arkansas, California, Maine, Pennsylvania, Virginia, West Virginia and Wisconsin.

\(^2\) All water power in this State suitable for the purpose of producing power for all lawful purposes, is and the same is hereby declared to be inherent in, and a part of the public domain, and shall vest in and be for the use of the State of Arkansas, and the people thereof, for its and their use and benefit.’’ Ark. Dig. Stat. (Supp. 1927), § 10456b.

‘‘In order to conserve and utilize the otherwise wasted energy from the water powers in this State, it is hereby declared to be the policy of the State to control the waters of the State and to encourage the utilization of the power resources in this State to the greatest practicable extent.’’ Va. Code Ann. (Michie, 1930) § 3581(1).

‘‘The water power belongs to the State; and the permit provided for in the act is simply authority to construct dams for the development of hydraulic or hydro-electric power for sale to the public with necessary transmission lines and auxiliary plants.’’ Royal Glenn Land & Lumber Co. v. Public Service Commission, 91 W. Va. 446, 449, 113 S. E. 749 (1922).
ties of such potential power available are in regions remote from the places where there are large and desirable markets for electrical energy. Formerly such potential water power was of little value because of the difficulty in transmitting the energy produced to places where there was a demand for it. Improvements in methods of transmission of electric current have overcome this difficulty, and, as a result, problems of hydro-electrical development have attained a prominence which threatens to make them an important national political issue.

The land along the streams is usually privately owned, and where the so-called common law as to riparian rights prevails, the riparian owners have certain natural rights in the flowing streams which are of vital importance to projects of hydro-electrical development. Among other privileges the riparian owner has a limited privilege of taking water from the stream and also a right that the upper riparian owners do not take or permit anyone else to take more than a reasonable amount of water from the stream. If this latter right be enforced the result is that the great bulk of the water passes down the stream and eventually reaches the sea. Subject to this limited but paramount right of riparian owners to take water, the state has power to control the taking of water from streams within its borders. Under this power the state may prohibit the taking of water not only by those outside the state but also by those within its borders; and it may permit the taking of water by communities within its borders subject to the rights of riparian owners below the point of removal, and to some degree subject also to the public right of navigation. The water in the stream, therefore, is not owned, but the state in its sovereign capacity has a considerable power of control over its removal therefrom.

The force of the flow of the current of a stream at any point depends on the slope of the land through which it passes. Ordin-

*For an excellent discussion of the origin and development of the law as to riparian rights see Well, Comparative Development of the Law of Water Courses (1918) 6 Cal. L. Rev. 245, 342.
*Gould, Waters (3d ed. 1900) §§ 204-209.
*Hudson County Water Co. v. McCarter, 209 U. S. 249, 28 S. Ct. 529 (1907). See also the opinion of the state court, 70 N. J. Eq. 695, 65 Atl. 489 (1908).
*This right of lower riparian owners to have the flow substantially undiminished is a property right and of course if a city desires water such property rights may be taken by eminent domain if authorized by statute.
arily the natural characteristics of the land, including the advantages due to its slope, belong to the owner of the land. While the state in its sovereign capacity has a considerable power of control over the taking of water from the stream, it does not follow that it has a like power of control over the privilege of utilization of the force of the flow of the water in the stream, for the slope of land which produces the power is a natural characteristic of the land itself and presumably belongs to the land owner. It is not the purpose here to discuss this very interesting question. In order to avoid a decision of this question the discussion below will be based first, on the assumption that the state does have the power of control of the utilization of the force of the flow of the current of its streams for the benefit of its people, and second, on the assumption that the privilege of utilization of the force of the current is a natural right which is a part of the riparian land and that the state's power of control is limited to its power over navigation, fish and the health, safety and welfare of its people.

I. Assuming the Privilege of Use of the Flow of Streams is not the Private Property of the Riparian Owner

There seems to have grown up a general belief that the state has full power of control over the development of all potential water power resources within its borders, and as stated above, some states have expressly asserted such power of control in statutes. While the validity of none of these acts has been tested in the courts, there is a serious question as to whether they do not violate the Federal Constitution. One phase of the question only will be discussed below, namely, to what extent may a state for the benefit of its citizens control the export of electric current produced from its hydro-electric plants.

Three states which have by statute asserted control over the export of electric current are Maine, Wisconsin and West

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9 That the right to the flow of the stream belongs to the riparian owner and is property, see Gould, op. cit. supra n. 5, § 204; Farnham, Waters (1904) § 471.
10 Under the decisions at present it seems the right of the riparian owner to use the flow of the stream for power is settled, but there is a general belief on the part of the public, and even of many lawyers that here is a resource which belongs to the public. As a matter of fact riparian owners along streams suitable for large power developments have never made any considerable use of their alleged right. Perhaps the force of public opinion that this unutilized resource ought to belong to the public may have weight in changing the law in view of the fact riparian owners do not utilize.
Virginia. Ever since 1909 Maine has had a statute which expressly prohibits owners of hydro-electric plants exporting any current produced therefrom. An elaborate act passed in 1929 which was designed to permit the export of surplus hydro-electric current was submitted to a referendum and defeated by a substantial majority. In both Wisconsin and West Virginia there are provisions giving a preference to customers within the state as to electric energy produced by hydro-electric plants, leaving for export what is not required by such customers, but there are no special provisions requiring extensions of transmission lines within the state so as to supply the wants of the inhabitants of an ever increasing territory within the state. Electric energy is a commodity subject to the commerce clause of the Federal Constitution, so the question is whether the state may control the

this energy. Moreover new legislative policies and purposes may be asserted under which the privileges of the riparian owner may eventually be restricted. For example, in the Wisconsin statute the enjoyment of scenic beauty is expressly declared to be a public right and the denial of a permit for a dam is authorized when found to be contrary to such public interest. Wis. Stat. (1929) § 31.06(3). Whether this is now enforceable may be open to question yet certainly such an interest is as easily sustained as statutes prohibiting unsightly billboards.

12 Me. Laws 1929, c. 280.

Upon complaint by any party affected, setting forth that any grantee of a permit to develop hydraulic power and generate hydro-electric energy for sale or service to the public is not furnishing citizens of this state with adequate service at reasonable rates in consequence of sales of such energy outside of the state, the commission shall have power to declare any or all contracts entered into by said grantee for such sales null and void in so far as they interfere with such service or rate. Such declaration shall be made only after a hearing and investigation and a recorded finding that convenience and necessity require the sale of a specified part or all of such energy within this state. Wis. Stat. (1929) § 31.27. The applicant for a permit under the act by 31.006(1) must agree to this power of the commission.

14 "Under all licenses, excepting those of railroad corporations licensed solely for their own use, the reasonable needs for electric power and energy on the part of the State and consumers in this State who can reasonably be served by the licensee shall have preference as compared with the needs of others, and the commission shall have power to enforce this provision by appropriate orders." W. Va. Rev. Code (1931) c. 31, art. 9, § 6(f). The West Virginia Water Power Act of 1929 has recently been held void as violating the State Constitution in Hodges v. Public Service Commission, 110 W. Va. 649, 159 S. E. 834 (1931). The last section repealed the Water Power Act of 1915 and since the Act of 1929 was held entirely void presumably the Act of 1915 is now in force. The Act of 1915 went further than a mere preference. By the Act of 1915 the Public Service Commission was fully empowered to control the export of hydro-electric energy even to the extent of forbidding export. See W. Va. Acts of 1915, c. 17, § 15.

It may be possible under the laws relating to utilities in general to compel extension of transmission lines.

export of such energy produced from water power within the state.

If we assume the force of the flow of the current in the streams within a state is the property of no one, and therefore is within the control of the state for the benefit of its people, then it would seem that the state may regulate the development of hydro-electric plants and as a condition to permission to make a hydro-electric development may prohibit or control the export of any of the electric energy derived therefrom. If so, the Maine act is valid for it is plainly designed to preserve all the hydro-electric energy for the use of the people of that state. It would seem to follow that if Maine may prohibit such export, then West Virginia and Wisconsin may impose a lesser condition on such hydro-electric development, namely, that only that hydro-electric energy not required by customers within the state be available for export, or to put it another way, that customers within the state have a preference as to the use of such current. The above conclusions are supported by the decisions of the Supreme Court as to the state’s power over wild animals and its power of control of the taking of water from the streams within the state.

In Geer v. Connecticut16 a statute permitting the taking of game birds within Connecticut and their sale within the state only, but prohibiting export was sustained, such game birds being considered not to be a commodity within the protection of the commerce clause. The theory of this decision is that wild animals are the property of no one and are therefore under the control of the state for the benefit of its citizens and therefore the state may reserve all such animals for the use of its people. Furthermore, water flowing in streams is not private property, so as to such water it has been held the state may prohibit exportation beyond the boundaries,17 and may even fix the terms and conditions upon which municipalities within the state may take water from the streams.18 True, in Foster-Fountain Packing Company v. Haydel19 a Louisiana statute requiring all shrimps caught in

[Notes]

17 Hudson County Water Co. v. McCarter, supra n. 6.
18 Trenton v. New Jersey, supra n. 7.
19 278 U. S. 1, 49 S. Ct. 1 (1928).
Louisiana waters to be hulled and canned within the state, but
permitting free export of the meat after it was canned was held
void as a restraint on interstate commerce but this was on the
ground that the design of the state statute was to permit and en-
courage the taking of shrimps and their export in interstate com-
merce and not to preserve them for the use of the people of the
state. The Act of Maine of 1909 is designed to preserve hydro-
electric current for the use of the people of the state and does
not permit exportation. Under the Acts of West Virginia and
Wisconsin the corporation which erects the plant must get a li-
cense from the state to do so and one of the conditions imposed
upon the exercise of the privilege is that preference shall be given
to consumers within the state as to the use of the electric energy
produced. If the state can entirely prohibit the export of hydro-
electric current then it may grant the privilege of hydro-electric
development to a corporation on condition that it agrees to such
preference. While water power acts such as those of West Vir-
ginia and Wisconsin are intended to encourage the development
of hydro-electric power, they do not fall within the doctrine of
Foster-Fountain Packing Company v. Haydel because they do
provide that intrastate customers are to have the use of the en-
ergy if they so desire and if they should utilize all of the pro-
duction of any hydro-electric plant none would be available for
export. Therefore, it is submitted that if the force of the flow
of the current of water in streams within the state is not private
property, then like wild animals and water within the stream,
this resource is within the control of the state for public benefit,
and that the state may constitutionally prohibit the export of
hydro-electric current produced from such streams. It may also
impose any lesser condition on the grant of the privilege of de-
velopment such as the requirement that the consumers of the state
have a preference, or that the licensee pay a special fee or tax on
all such current exported.  

II. Assuming the Privilege of Use of the Flow of Streams is
Private Property

Assuming that the privilege of utilization of the force of the
flow of the current of a stream for the production of power is a

2 Under the Maine Act of 1929 a special charge of four percent of
the proceeds was imposed upon all current exported. See Me. Laws
1929, c. 280, § 4. This act was to take effect only if approved at a
referendum of the people. It was defeated.
natural right attached to the riparian land, and therefore the private property of the owner or owners of such land, may the state prohibit a riparian owner from erecting dams and hydro-electric plants except on condition that the electric current produced be utilized within the state; or may a state impose a condition upon its consent to the erection of such a plant, such as a requirement that the wants of domestic consumers be supplied first, and only the surplus be subject to export; or a condition such as a requirement that a special tax be paid upon all of the current from such plant which is exported? Clearly the state has certain regulatory powers over the erection and operation of such plants under its police powers, and under its power of control over fish and navigation, but assuming there is no objection to a proposed plant upon any such grounds, may the state nevertheless permit the erection of a proposed hydro-electric plant only upon some condition such as suggested above?

The private owner of riparian land suitable for hydro-electric development not having the privilege of the power of eminent domain, could not market his product in other states unless an existing utility had transmission lines crossing his land which lines extended into other states, or unless his land either adjoined, or extended into another state. But he might have access to some such facility for selling his product as a commodity to enter into interstate commerce. It has been held that electric energy is a commodity or product which may be under the protection of the commerce clause, and certainly no distinction can be made between that derived from the use of fuels such as coal or gas, and that produced from water power. If the privilege of using the power of the stream belongs to the landowner then all he does is to convert the energy of the current into another form of energy. This new form of energy is marketable in interstate commerce, and is as much under the protection of the commerce clause of the Federal Constitution as is oil or gas or any other natural product of the soil, and also, it would seem, as is any agricultural product.

The interpretation of the commerce clause as applicable to the situation under discussion must be determined from the de-

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22 It is also possible that a public utility might exercise the power of eminent domain in order to acquire a transmission line which would reach the riparian owner’s land and over which the electric energy could pass.

23 Public Utilities Commission v. Attleboro, etc., Co., supra n. 16; Coal & Coke Co. v. Public Service Commission, 84 W. Va. 662, 670, 100 S. E. 557 (1919).
cisions of the Supreme Court of the United States, and while cases involving the validity of state statutes designed to keep certain products of other states out of the particular state are numerous, decisions involving state statutes designed to keep within the state some product of the state, or to restrict in some manner the export of such product are not common. No attempt will be made to collect and discuss exhaustively all of such cases but those which seem pertinent will be noted.

A state statute requiring purchasers of wheat within the state of North Dakota to separate the dockage and to return it to the seller unless such dockage be valued and paid for, was held void as an unwarranted burden on interstate commerce, though the statute in question applied to wheat purchased both for sale within the state and for shipment in interstate commerce, and though no interstate shipment had begun or was necessarily within the intention of the purchaser.\(^2\) Cases furnishing still closer analogies are those which involve state statutes designed either to prevent the export of natural gas produced with the state, or else designed to give to consumers of natural gas within the state the preference as to its use and permitting export only of the surplus over and above that required to supply such consumers. In West, Attorney General of Oklahoma v. Kansas Natural Gas Company,\(^3\) there was involved an Oklahoma statute designed to prevent the export of any natural gas produced within the state. This act the majority of the court held void as an unwarranted burden upon interstate commerce, though three justices dissented without filing opinions or in any manner indicating their reasons. In Pennsylvania v. West Virginia,\(^4\) there was involved a statute providing in effect that the wants of intrastate consumers of natural gas produced within the state should be adequately supplied with this product, leaving available for export the surplus over and above what such consumers might require. The court following the Oklahoma case held this statute also void as imposing an improper burden upon interstate commerce.\(^5\) Again three justices


\(^{3}\) 221 U. S. 229, 31 S. Ct. 564 (1910).

\(^{4}\) 262 U. S. 553, 43 S. Ct. 658 (1923).

\(^{5}\) It has been urged by Professor T. P. Hardman that this act should be upheld on the ground that it is the common law duty of a utility to render adequate service and that this statute merely requires utilities in the state to supply to their customers an adequate amount of gas and therefore there is no unlawful restriction on interstate commerce. See The Right of a State to Restrain the Exportation of Its Natural Resources (1920) 26 W. VA. L., Q. 224.
dissented, all of them filing opinions, but only two of these dissenting justices indicated disagreement with the majority interpretation of the commerce clause of the Constitution. The reasoning of the majority of the court in both of these cases is that the right of the landowner to take natural gas from his land is a private property right, and after he reduces the gas to possession it becomes a saleable commodity, and as such is entitled to be sold in the national markets, that is, it becomes a commodity subject to enter into interstate commerce. This seems to mean that the owner of such gas is, under the commerce clause, entitled to a national market for his product, and that one who desires to purchase and export such gas is guaranteed the privilege of so doing. The state cannot place an unreasonable restriction on such privilege. In the Oklahoma case the majority opinion states:

"It (the statute) does not alone regulate the right of the reduction to possession of 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 . . . . 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 and interstate commerce. The statute of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prohibit it from being a subject of interstate commerce, . . . . In such commerce, instead of the States, a new power appears and a new welfare, which transcends that of any state. But rather let us say it is constituted of the welfare of all of the states and that of each state is made the greater by a division of its resources, natural and created, with every other State, and those of every other State with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States."

This language certainly indicates that where one produces a commodity within a state, he is entitled under the commerce

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The text is a continuation of the work by Simonton on the Power of a State to Control the Export of Hydro-Electric Energy.
clause to the benefit of selling it in interstate commerce if he chooses, or in other words, that the state cannot take from him his right to offer it in the national markets, and cannot require that he sell it within the state to such intrastate purchasers as he may be able to find. It may be noted this also may be said to be the effect of the decisions on the North Dakota statute as to wheat. The right of the wheat grower to sell in the national market is protected by the commerce clause. Mr. Justice Holmes in his dissenting opinion in the West Virginia case, with which Mr. Justice Brandeis concurred, takes the ground that "the products of a state until they are actually started to a point outside it may be regulated by the State notwithstanding the commerce clause". He also stated that he thought the decision in the Oklahoma case wrong, "implying that Pennsylvania might not keep its coal, or the northwest its timber, etc. But I confess I do not see what is to hinder . . . . that 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 the property within its boundaries that otherwise would have passed outside." Here is a clear conflict as to policy in the interpretation of the commerce clause. Mr. Justice Holmes would restrict its application to cases where the product has actually started upon its interstate journey, while the majority of the court seem committed to extending protection to all privately owned property within the state which may become a proper subject of commerce between the states. Certainly as a matter of national policy state restrictions upon free exchange of commodities seems undesirable, and perhaps the commerce clause as applied by the majority is the best method of

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20 This generalization expresses the opinion of the writer as to the meaning of the majority of the court. If this is correct then a distinction can be clearly made between cases where a person has private property he desires to sell in interstate markets and cases involving wild animals or water in a stream which is not privately owned for as to these things the state may control the disposition as it pleases.

21 282 U. S. 533, 600, 602-603, 48 S. Ct. 658, 666, 667. Holmes denies that any "speculative view" of title has anything to do with the matter but seemingly insists a state may give a preference to its inhabitants as to any of its natural products or natural advantages in so far as the commerce clause is concerned. It seems that aside from his own language in this case and in Hudson Water Co. v. McCarter, supra n. 6, there is nothing in the decisions of the Supreme Court to sustain this notion, but that the majority of that court have made a distinction based on the difference between things privately owned and things not privately owned,
preventing undesirable state restrictive laws. Coming now to our inquiry as to whether a state can prohibit the export of hydro-electric energy produced within the state we may say if the majority opinion in the above cases represents the law, then such a restriction of the export of hydro-electric current produced within the state is also void. Furthermore, if West Virginia cannot legally provide that her own citizens are to be adequately supplied with such natural gas produced within the state as they may require, then it follows that neither West Virginia nor Wisconsin can lawfully require that a hydro-electric utility within the state supply adequately the customers within the state and export only such surplus as may remain. Under the above decisions as to natural gas this would be an unwarranted restriction on interstate commerce, unless there is some distinction between natural gas and hydro-electric energy. It is submitted that if the riparian owner owns the privilege of utilizing the energy of the current then he may convert such energy into marketable form and when so converted he is entitled to sell that energy in interstate commerce.

As a matter of national policy state restrictions upon the free exchange of commodities seem undesirable. If the right of the citizen to sell in national markets is not protected then the state may lessen or even destroy the value of his property by limiting him to such purchasers as he may be able to find within the state.\textsuperscript{31} It is submitted that the use of the commerce clause is a good and efficient method to accomplish this result. Perhaps it is the best and simplest method. But if only a good and efficient method it is justifiable.

It seems clear from the above lines of cases that the distinction between wild animals and flowing water on the one hand, and wheat, natural gas and hydro-electric energy on the other turns upon the fact that the latter are privately owned while the former are not. The commerce clause applies to the privately owned commodities.

It has been argued that while a state cannot forbid the ex-

\textsuperscript{31}It is to be noted that if Oklahoma could have prohibited the export of natural gas the market of private owners would have been so limited that this commodity for very many years would have been almost worthless. Experience since the decision of West v. Kansas Natural Gas Co., \textit{supra} n. 25, has been such as to show that that statute, if sustained, would have made gas almost worthless and would have greatly increased the waste of this valuable commodity.
port of natural gas under the commerce clause, it may deny to corporations wishing to engage in such export business the use of the power of eminent domain in order to secure rights of way for pipe lines which are essential to the exportation of such natural gas. Clearly the same argument can be made as to hydro-electric current for transmission lines are essential to marketing this energy. In West v. Kansas Natural Gas Company the point arose and was decided. It was urged the state might deny its power of eminent domain and thus prevent the export of natural gas. True there were existing pipe lines through which gas was being exported and since the effect of the statute, if valid, would be to destroy these, a difficulty existed. But the Supreme Court held that since natural gas was a legitimate article which could be placed in interstate commerce "no state by the exercise of, or by the refusal to exercise, any or all of its powers, may substantially discriminate against or directly regulate interstate commerce or the right to carry it on." It followed that the right of eminent domain being freely given to intrastate utilities transporting natural gas, could not be denied to interstate utilities when it prevented or unduly restricted interstate commerce in that commodity. This would clearly be a discrimination. At the time the restrictive statutes as to hydro-electric current were enacted in West Virginia, Maine and Wisconsin there probably were utilities with transmission lines in some or all of these states over which electric energy produced in steam plants was being exported. But whether there were or were not such existing transmission lines does not seem material, for if we once admit that hydro-electric current is a product which the owner is entitled to sell in interstate commerce and is under the protection of the commerce clause then a denial of the right of eminent domain, in order to prevent the construction of interstate transmission lines would be a discrimination, provided the state in question was freely giving such power to intrastate utilities.

In conclusion, it is submitted that if the privilege of using the flow of the current of streams is the private property of the riparian owners, then the state's power of control of the export of electric energy produced from such source is limited by the

**n Supra n. 25.**

**221 U. S. 239, 261, 31 S. Ct. 564, 573, quoting from Haskell v. Cowhan, 187 Fed. 403, 407 (C. C. A. 8th 1911).**
commodity clause of the Federal Constitution. In spite of a general belief in states which have potential water power, that this is a resource which the state may dispose of for the benefit of its people, it is improbable that this will become the settled law in the face of the long history of opinion to the contrary. If this proves true then those states which seek to have this resource developed and the product devoted to intrastate uses are doomed to failure.