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THE RIGHT OF A STATE TO CONSERVE ITS NATURAL RESOURCES.—

In many gas producing states such as West Virginia the supply of natural gas is becoming so depleted that statutes attempting to conserve it in one way or another are not uncommon. How far a state may constitutionally conserve such resources for the people of the state as against extra-state consumers is a problem dealt with by the writer in two articles referred to in the footnote.¹ How far such resources may be constitutionally conserved by a

¹ "The Right of a State to Restrain the Exportation of its Natural Resources," 26 W. Va. L. QuAR. 1, and 26 id. 224. The writer wishes to take this opportunity to correct two errors (one typographical) in the second of these articles: (a) The first sentence in the second article contains this statement: "a state may by legis-
lative or administrative ‘regulation’ restrain the exportation of its natural re-
sources to the extent, at least, that such restraint is necessary to compel public
utilities to render adequate service therefrom to all interstate consumers." The
italicized word is a typographical error for intrastate. (b) The last paragraph of
the second article contains this statement: "The mere fact that there is a legis-
lative or administrative action enforcing the common-law duty to render adequate
service does not change the situation and make such action a ‘regulation’." The
italicized phrase and the repetition thereof in that paragraph should have been
omitted; for, while the common-law enforcement of a common-law duty is not, as
explained in the article, a "regulation" in the sense in which the word "regulate"
is used in the commerce-clause of the Constitution, still a legislative or adminis-
trative declaration of that common-law duty is a "regulation" in the sense in
which the word "regulation" is used in the commerce-clause, for it prescribes a rule
for the future. The meaning of the word "regulate" in the sense in which it is
used in the commerce-clause is fully explained in the article. The actual conclu-
sion set forth in the statement above quoted and in the paragraph in question is,
however, believed to be correct.
state when interstate commerce is not affected is the problem for our present consideration.

The United States Supreme Court has recently passed upon an interesting phase of this problem. In that case a state statute prohibited the use of natural gas when the heat energy therein contained was not fully and actually utilized for manufacturing or domestic purposes. The defendant company was using natural gas for the purpose of manufacturing therefrom gasoline and carbon black; but the heat energy was not utilized to the greatest practical extent. The Supreme Court held that the statute was constitutional. Three Justices dissented. The Court based its decision on the general ground that the purpose of the statute was to conserve the state's natural resources by preventing waste, and that the state's police power is sufficiently comprehensive to accomplish that purpose.

The principal case is not the first of its type to come before the Supreme Court, the same general problem having been raised in two analogous cases. In the first of those cases the Supreme Court held that a state could constitutionally prevent the owner (or lessee) of land from allowing natural gas to escape into the open air for a longer period than two days after the gas had been struck; and that it was no defense that the gas was allowed to escape for the sole purpose of forcing the oil from the well so that the oil could be utilized. In the second of those cases the Supreme Court held that a state could constitutionally prevent the owner of land from making an excessive use of percolating waters containing carbonic acid gas "for the purpose of extracting... or vending such gas as a commodity otherwise than in connection with the mineral water." The general problem of conservation has also been before several state courts, and, as a rule, has been answered in much the same way as in these cases.

It will be noted that the purpose of the statute in each of these three cases was to prevent an unreasonable, excessive or wasteful

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3 Ohio Oil Co. v. Indiana (No. 1), 177 U. S. 190 (1900); Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61 (1911).
4 Ohio Oil Co. v. Indiana (No. 1), supra.
5 Lindsley v. Natural Carbonic Gas Co., supra.
6 Commonwealth v. Trent, 117 Ky. 34, 77 S. W. 390 (1903); Townsend v. State, 147 Ind. 624, 47 N. E. 13 (1897); Hathorn v. Natural Carbonic Gas Co., 194 N. Y. 320, 87 N. E. 504 (1909); Eccles v. Ditto, 167 Pac. 726 (N. M., 1917); Ex parte Elam, 6 Cal. A. 233, 91 Pac. 811 (1907); People v. New York Carbonic Acid Gas Co., 196 N. Y. 421, 80 N. E. 441 (1903). But see Huber v. Merkel, 117 Wis. 356, 94 N. W. 354 (1903).
use of "migratory" substance which, according to the better view, including the view of the Supreme Court, is not owned by the owner of the surface until the substance is reduced to possession, and as to which, therefore, others than the users have interests similar to those of the users. Such substances are, so to speak, *ferae naturae*, i.e., they do not always remain under the surface of any particular surface owner, and are, therefore, not susceptible of actual ownership until reduced to possession. In regard to such substances it seems clear that a statute directed against the excessive use thereof by a given surface owner is not a deprivation of his property without due process, for, according to the modern conception of due process, it seems that a statutory deprivation of property is not a deprivation of property without due process unless (upon a balancing of the conflicting interests involved) "it can be said that a rational and fair man" would "admit" that such action "would infringe fundamental principles as they have been understood by the traditions of our people and our law." Now, the individual interests, of adjoining landowners with respect to such migratory substances as natural gas are entitled to protection along with the interests of the users in question. Besides there is the social interest, i.e., the interest of society, in the conservation of resources so essential to the general welfare; and there is the public interest in such conservation, i.e., the interest of the state as guardian of social interests or perhaps as a juristic person. Hence, in order to conserve such resources so as to "secure as many of these interests as may be, with as little sacrifice of other interests as may be" (for this is the end of law) it seems clear that, if the above-mentioned theories are correct, it should not be held to be a deprivation of property without due process to prevent a surface owner from making an excessive or wasteful use of these migratory substances which, according to the better view, he himself does not own prior to reduction to possession and as to which, therefore, others than he have interests similar to his own.

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7 The two views are set forth and discussed at considerable length by the writer in 26 W. Va. L. Quar. 1. See the authorities there cited.
8 See the Supreme Court cases cited in notes 2 and 3, supra.
10 See Pound, Outline of a Course on the History and System of the Common Law, 3.
12 Id.
13 Pound, op. cit., 5.
In some states, however, such as West Virginia, it is held that the owner of the surface owns the natural gas thereunder before he has reduced the gas to possession,\textsuperscript{14} i.e., the surface owner has title in fee to the gas in place. Under such a theory (since the surface owner, if he does not waste the gas, may use to the point of depletion such gas as he may extract from under his surface) it might perhaps be contended that a statute preventing the surface owner from making an excessive use of gas which he thus owns in fee is a deprivation of his property without due process. But even if we accept that theory, which, however, we do not, the contention is untenable, because the reasons for sustaining conservation statutes apply to other natural resources than migratory substances as to which others than the surface owners have interests similar to the interests of the surface owners. The same reasons sustain statutes for the conservation of forests.\textsuperscript{15} In regard to the conservation of forests (as well as natural gas) the social interest and the public interest in the conservation of such resources outweigh to a certain extent the individual interest of the surface owner and, therefore, the owner of the surface, though he owns in fee the timber thereon (or the gas thereunder) may be required by the state to conserve such resources so as to “secure as many of these interests as may be, with as little sacrifice of other interests as may be.” In other words, the interests of surface owners to such natural resources, whether considered as rights of ownership or as rights to reduce to possession, are, like all other individual interests, subject to some extent to the conflicting individual interests of others and to paramount public or social interests under the police power.

The only question then is: What is the extent of the police power with respect to the conservation of such resources? Like many other questions, the question what is within the police power must be determined largely with reference to the facts of the particular case. Of course it may be said, as it is commonly said, that it is within the police power of a state to promote the public health, public morals, public safety, public order, public convenience and general welfare.\textsuperscript{16} But, of course, the state, under the police


\textsuperscript{16} See, e. g., Sutherland v. Miller, 79 W. Va. 796, 802, 91 S. E. 393 (1917); Lake Shore & M. R. Co. v. State of Ohio, 173 U. S. 285 (1899); Freund, op. cit., \$\$ 3, 8, 9, 10, 398.
power, can promote these interests only to the extent that upon a balancing of these interests against the conflicting individual interests, these interests so outweigh the individual interests as to justify the pro tanto sacrifice of the individual interests. Any statutory action in excess of that would be a deprivation of property without due process.

An application of these principles to our general problem clearly leads to the conclusion that it is within the police power of a state to conserve its natural resources, such as natural gas, to the extent of preventing an unreasonable, excessive or wasteful use thereof by surface owners or lessees; for, as to such resources, other interests than the interests of the user are so vitally affected that the individual interests of the user should be sacrificed to the extent that all the interests involved may be best subserved by such sacrifice.

Equitable Servitudes Benefiting a Business.—The power of a court of equity to enforce negative restrictions imposed by agreement upon the use of property has long been established. The principles controlling the exercise of this power were originally thought to be those underlying the specific performance of contracts. The current English authorities, however, and to a large extent, the more recent American decisions, regard these agreements as creating equitable property rights in another's property.\(^1\) According to this view, they constitute "a sort of equitable appendix to the common law servitudes" of easements, profits, and covenants running with the land, and are properly called "equitable servitudes."\(^2\) In the recent cases of Withers v. Ward\(^3\) and Cole v. Seamonds,\(^4\) the West Virginia Supreme Court of Appeals adopts the property theory, thus repudiating, in effect, the contract theory enunciated in earlier cases.\(^5\) This jurisdiction of the chancellor seems to have been developed largely because of the failure of the common law to create the rights in another's land made necessary by modern social and economic conditions, and

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\(^2\) 33 HARV. L. REV. 876, 877.
\(^3\) 104 S. E. 96 (W. Va. 1920).
\(^4\) 104 S. E. 747 (W. Va. 1920).
\(^5\) West Virginia Transportation Co. v. Ohio River Pipe Line Co., 22 W. Va. 600, 630-639, 46 Am. Rep. 527 (1883); Robinson v. Edgell, 57 W. Va. 157, 49 S. E. 1027 (1905); Hennen v. Deveney, 71 W. Va. 629, 77 S. E. 142 (1913), appears to proceed upon the property theory.