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THE RIGHT OF A STATE TO RESTR AN THE EXPORTATION OF NATURAL RESOURCES—ANOTHER THEORY

By THOMAS PORTER HARDMAN*

In the November number of this volume the writer attempted to show that, in the absence of Congressional action, a state may by legislative or administrative "regulation" restrain the exportation of its natural resources to the extent, at least, that such restraint is necessary to compel public utilities to render adequate service therefrom to all interstate consumers. In the present article an attempt will be made to show, inter alia, how the same conclusion may be constitutionally reached by a totally different process, viz., by judicially enforcing the common-law duty of public utilities to render adequate service to all applicants, that is to say, of course, to render adequate service to all within the limits of the utilities' profession unless there is a valid excuse for refusing to do so. Accordingly, the first proposition to be contended for in this article is this: that a state-court decision enforcing a common-law duty with respect to commerce is not a "regulation" of commerce in the sense in which the word "regulate" is used in the Constitution, and, hence, a state-court decision enforcing the common-law duty of public utilities to serve all adequately, not being a "regulation" at all, cannot, of course, be an unconstitutional regulation of interstate commerce; and that, therefore, such decision, though totally preventing the exportation of intrastate resources, has nothing to do with the power of Congress to regulate interstate commerce and is accordingly constitutional.

It would seem to be indisputable that state action, in order to be an unconstitutional interference with interstate commerce, must itself be a "regulation" of interstate commerce, for the

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1As the United States Supreme Court said in Philadelphia & Reading R. R. Co. v. Pennsylvania, 15 Wall. 284, 293, 21 L. Ed. 164 (1872): "It is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution." "When, therefore, [as the Supreme Court said in a recent case] an order made under state authority to stop an interstate train is assailed because of its repugnancy to the interstate commerce clause, the question [is] whether such order is void as a direct regulation of such commerce." Atlantic Coast Line R. R. Co. v. Wharton et al., Railroad Commissioners, 297 U. S. 328, 234, 25 Sup. Ct. 121 (1907). Set, also, to the same general effect, Preventic and Egan, THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION, 187.
reason why such state action is unconstitutional is that the power granted by the Constitution to Congress to "regulate" interstate commerce operates as an implied prohibition upon the states—an implied prohibition to do what? Necessarily an implied prohibition to "regulate" the same thing as that which the Constitution empowered Congress to "regulate," for the power granted to Congress to "regulate commerce," so far as it operates as an implied prohibition upon the states, is, *in rerum natura*, an implied prohibition upon the states to act in conflict with the power of Congress, *viz.*, to "regulate" interstate commerce. Thus the question is squarely raised: What is a regulation of commerce in the sense in which the word "regulate" is used in the Constitution? Is a court decision enforcing a common-law duty with respect to commerce a regulation of commerce in the constitutional sense?

In a comparatively recent Supreme Court decision,² which is quite in point, it was contended by counsel, in regard to the existence of state common-law control over interstate commerce, that as "there was no Federal statute law at the time applicable to the case and as the matter is interstate commerce . . . . there is no controlling law, and the question . . . . . . is left entirely to the judgment . . . . . [of the public utility]." But Mr. Justice Brewer, speaking for the court, answered the contention as follows:³

"This court has often, held that . . . . . . interstate commerce . . . . . cannot be *regulated* by the States . . . . . . "

"There is no body of Federal common law separate and distinct from the common law existing in the several States . . . . . . But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of Congress.

"What is the common law? . . . . . .

"Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the

common law, as so defined, and are subject to no rule except that to be found in the statutes of Congress? We are clearly of opinion that this cannot be so, and that the principles of the common law are operative upon all interstate commercial transactions except so far as they are modified by Congressional enactment."

Here, then, is a direct decision by the United States Supreme Court in a comparatively recent case, to the effect that, though, "interstate commerce . . . . . . . cannot be regulated by the States," it can be constitutionally controlled by the common law of the States, except so far as the common law is modified by Congressional enactment. In other words, the common-law control of the states over interstate commerce is not, in the view of the United States Supreme Court, a regulation of commerce in the sense in which the word "regulate" is used in the Constitution. Moreover, as will be explained hereafter, this conception of the nature of a "regulation" is not only in strict accord with the common legal acceptation of the meaning of the word, but is also a conception calculated to remedy all the evils which the framers of the Constitution intended the interstate commerce clause to remedy.

First, then, what is the common legal acceptation of the meaning of the word "regulate"? In the leading case on interstate commerce the great expounder of the Constitution defined the "power to regulate commerce" as used in the Constitution as the power "to prescribe the rule by which commerce is to be governed." To regulate then is to prescribe rules (regulæ), that is to say, to lay down beforehand the rules which are to govern the person or thing in question. Now, is it the province of a common-law court to lay down beforehand the rules which are to govern in the future, to prescribe rules, i. e., to "regulate"? Clearly not. It is the province of a court to decide what is the law in a case actually before the court. It is the province of legislative or administrative bodies to prescribe, to lay down beforehand, the regulations or laws to be hereafter applied. As the court said in a comparatively recent case:

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4Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 196, 6 L. Ed. 23 (1824).  
5See 2 Wyman, Public Service Corporations, §§ 1402, 1403, 1404.  
6See 2 Wyman, op. cit., § 1402, and authorities therein cited.  
7In re Leasing of State Lands, 18 Colo. 359, 32 Pac. 988 (1893). See, also, Beets v. Commissioners of the Land Office, 27 Okl. 64, 110 Pac. 768 (1910).
"The word 'regulation', as used in the Constitution, has a well-defined meaning . . . . In Gibbons v. Ogden, 9 Wheat. 186, the Supreme Court of the United States had occasion to interpret that clause of the national Constitution which reads: 'Congress shall have power to regulate commerce, etc.; and the court held that the word 'regulate', as used in that connection, means to prescribe the rule by which commerce is to be governed. So we think the [state constitutional] provision, 'under such regulations as may be prescribed by law,' means such reasonable rules as may be prescribed from time to time by the legislative department of the government.'

Hence, to regulate—to make regulations—is a legislative or administrative function and not a judicial function. For example, it is settled law that a common-law court cannot fix the rates to be charged by public utilities, for the reason that to fix rates is to prescribe rules to be hereafter applied (viz., to regulate) which is not a judicial function but a legislative or administrative function. It is, of course, a judicial function to decide in a case actually before the court whether a given rate, i.e., rate regulation, is valid, but the court, upon holding a rate regulation invalid, cannot prescribe the rates, i.e., the rate regulations, to be hereafter applied. Accordingly, it is settled law that a state cannot prescribe interstate rates of public utilities, i.e., cannot by legislative or administrative action regulate interstate rates, for the reason that such action (a regulation) is an unconstitutional regulation of interstate commerce. Yet, in the absence of Congressional action, the Supreme Court of the United States holds that a state, by judicially enforcing the common-law duty of a public utility not to discriminate in rates, including interstate rates, can, by common law, control the interstate rates of public utilities, except so far as the common law is modified

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9To the effect that the interstate commerce clause restrains legislative or administrative action by a state, and not judicial enforcement of common-law duties, see Frederics and Egan, op. cit., 159, where it is said that "the gist of the limitation upon the power of the states in respect to interstate and foreign commerce may be found in the statement of Mr. Justice Brewer that 'the moment you find an act of the legislature, or an ordinance of a city, which prevents the free exchange of lawful articles of commerce between the states, you find an act or ordinance which contravenes the commerce clause of the United States Constitution.'" The inter-quotation is from Ex parte Kieffer, 40 Fed. 339, 402 (1889).
10See Steenerson v. Great Northern Railway Co., 69 Minn. 353, 72 N. W. 713 (1897).
by Congressional enactment. Why this distinction? It is submitted that the reason is that a court decision enforcing a common-law duty in respect to commerce is not a "regulation" of commerce, and, hence, cannot be an unconstitutional regulation of interstate commerce. Now, if, as the Supreme Court holds, a state court can constitutionally control interstate commerce by judicially enforcing the common-law duty of public utilities not to discriminate in rates, including interstate rates, it is submitted that for precisely the same reason a state can constitutionally control interstate commerce by judicially enforcing the common-law duty of public utilities to serve all adequately; for the Supreme Court said in regard to the discrimination in interstate rates by an interstate public utility:

"We are clearly of opinion . . . . . that the principles of the common law are operative upon all interstate commercial transactions except so far as they are modified by congressional enactment."

In the Supreme Court decision just quoted from an interstate public utility charged A and B different interstate rates for the same interstate services. There was no Congressional enactment applicable; and the question was whether a state by common-law court action could compel the interstate public utility to comply in interstate services with the common-law duty of public utilities not to discriminate (in rates). The United States Supreme Court held, as has been intimated, that (in the absence of Congressional action) the state could thus compel an interstate public utility to comply with its common-law duty even though it constituted a direct state control over interstate commerce. Now, the common-law duty of a public utility involved in that case—viz., the duty not to discriminate—is precisely the same sort of duty as the common-law duty of public utilities to render adequate service—in fact the duties are so closely related that it is often quite difficult to determine whether a given breach of duty of a public utility involves the one duty or the other. It would seem clear, therefore, that what the Supreme Court said with reference to state common-law control over interstate public utilities in regard to the duty not to discriminate is equally applica-

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14 Western Union Telegraph Co. v. Call Publishing Co., supra, note 2.
15 Western Union Telegraph Co. v. Call Publishing Co., supra, note 2 at p. 102.
ble to state common-law control over interstate public utilities in regard to the correlative duty to render adequate service.

The distinction between common-law court control over interstate commerce (which is constitutionally permissible) and legislative or administrative regulations thereof (which are prohibited) may be well illustrated by comparing the last-mentioned Supreme Court case with another decision by the same court in which it was held that state legislative action directed against a certain sort of discrimination in interstate rates was unconstitutional. The discrimination there in question took the form of charging less for a long interstate haul than for a short haul included therein. This form of discrimination, i.e., discrimination between localities rather than between persons, was not, it seems, prohibited by the common law. Such state legislative action with respect to such discrimination in interstate rates is, therefore, a regulation of interstate commerce, though substantially the same sort of control by a state court enforcing the common-law duty not to discriminate in interstate rates (so far as that common-law duty extends) is not an unconstitutional regulation of interstate commerce. Such common-law court action, then, is not included in the ordinary legal conception of what constitutes a regulation. Quaere, then: Is such court action in the category of evils which the framers of the Constitution intended to remedy by inserting the interstate commerce clause? What was the purpose of the interstate commerce clause? The Supreme Court of the United States has well stated the undisputed answer:

"It is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the states was to insure uniformity of regulation against conflicting and discriminating state legislation."

"Against conflicting and discriminating state legislation", yes, but not, it will be noted, against state court decisions enforcing common-law duties. It was against the arbitrary and discriminatory regulations by state legislative bodies, not against

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19See BEALE AND WYMAN, RAILROAD RATE REGULATION, 2 ed., § 700.
20County of Mobile v. Kimball, 102 U. S. 691, 697, 26 L. Ed. 238 (1880).
the reasonable and non-discriminatory common-law court decisions that the interstate commerce clause was directed. It should be noted parenthetically, however, that the term "state legislation", as used by the court undoubtedly includes delegated legislation and certain quasi-legislative or administrative regulations by municipal corporations and public service commissions. And for this there was a reason, for the common law was and is substantially uniform throughout the states, so that it clearly was not the purpose of the commerce clause to prevent state courts from enforcing common law duties except, of course, where the common law has been modified by Congressional enactment. Since, then, it is not within the purpose of the commerce clause to prevent state courts from enforcing existing common-law duties there is clearly no reason for extending the common acceptation of the term regulation so as to include a common-law court decision. Accordingly, it is submitted that a state-court decision enforcing the common-law duty of a public utility to render adequate service is not a regulation of commerce and, therefore, is not unconstitutional although its necessary effect is totally to prevent the exportation of intrastate resources.

Perhaps it should be pointed out parenthetically that Congress, under the power granted to it to regulate interstate commerce, can undoubtedly, by legislation or by administrative regulation of its agencies, modify the above-mentioned common-law powers of the states with respect to interstate-commerce transactions, but Congress has not as yet attempted to regulate the interstate transportation of many legitimate articles of interstate commerce, e. g., natural gas.

Also, in answer to any alarmist argument as to how far the doctrine herein contended for may be carried, for example, whether it would extend to the exportation of timber or ore or grain, it may be said that the business of supplying such commodities is not, under the present law, a public service, and, hence, the proposition herein maintained has only a limited application and would only restrain the exportation of purely intrastate resources by public utilities, and that only so far as necessary to compel the public utility to serve adequately all intrastate applicants. How far further state restraint may be constitutionally permissible is a totally different question, involving the
extent of the police power of the state, and is, therefore, beyond
the province of this article.

It must be admitted, however, that, while there are apparently
no cases precisely in point, there are a few cases19 which by analogy tend to support a view opposed to
the one herein presented. In these cases, in which there
were, however, no interstate complications, it was held
in effect that, where through no fault of a natural gas
company there is insufficient gas to supply all adequately, the
natural gas company has, because of that fact, no excuse for refus-
ing to divide the inadequate supply among all consumers, and
that the gas company must even serve new applicants, thus ren-
dering the inadequate supply more inadequate. The rule as to
dividing insufficient water supplies in irrigation cases is, however,
directly contra.20 Moreover, the last-mentioned natural-gas cases
are, by the best textbook authority, considered unsound.21 And
upon principle there seems to be no justification whatever for
the cases which hold that a natural gas company must supply
new applicants when there is not sufficient gas available to serve
adequately present consumers. Such additional service means in-
adequate service to all, which is inconsistent with the common-law
duty of the public utility to render adequate service unless it has
a valid excuse for refusing to do so, and is also in conflict with a
sound principle of economics and public policy to the effect that
the public good is best subserved by serving the public in such a
way that the public as a whole receives proper service even though
certain individual members of the public receive no service of the
sort in question. Hence, new applicants should either get fuel
elsewhere or use fuel of another sort, and the utility has, upon
principle, a good excuse for refusing to serve new applicants, at
any rate when further service means unreasonably inadequate
service to the consumers as a whole. The ill-considered cases to
the contrary do not discriminate very nicely upon this point,

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19See State v. Wood v. Consumers Gas Trust Co., 157 Ind. 345, 61 N. E. 874
(1901); Indiana Natural Gas & Oil Co. v. State ex rel. Armstrong, 162 Ind. 690,
71 N. E. 133 (1904); Public Service Commission, Second District v. Iroquois


21See 1 WYMAN, op. cit., § 633, where it is said: "The rule for natural gas It
will be noticed is opposed to the rule for the disposition of the irrigation cases
discussed in the last paragraph. Logical though it may be, it [the rule for nat-
ural gas] seems the writer to be lacking in appreciation of the situation as a
whole. A rule which may result in satisfactory service to none, not even to the
applicant in question, is hardly consistent with public service for all. Certainly
where the supply now available is not sufficient to meet the proper demands of
present customers, it would seem that later applicants could not demand the reduc-
tion of the taking of older customers."
and in the main seem to hold simply that the utility has no excuse for refusing new applicants merely because serving new applicants would mean inadequate service to all. However that may be, where the inadequacy of service is so small as not to be unreasonable, it is submitted that where further service means unreasonably inadequate service the utility has a valid excuse for refusing to serve new applicants. But be that as it may, the above-mentioned cases are not precedents in point, for in those cases the respective rights of interstate and extra-state consumers to the natural resources of the state were in no way considered. Hence this problem must be decided upon principle alone.

Is there, then, upon principle any valid reason why the common-law duty herein considered should not be enforced under the facts in question? Conceivably it may be contended that if by judicial decree enforcing a common-law duty, one state, e.g., West Virginia, can constitutionally compel an interstate public utility, exporting intrastate resources, to render adequate service to all intrastate applicants, although the necessary effect of such decree is to prevent exportation of such resources, then, by parity of reasoning, the adjoining states, e.g., Pennsylvania and Ohio, can by similar judicial decree constitutionally compel the same public utility to render adequate service within those states—which is admittedly an impossibility, for, through no fault of the utilities, there is admittedly insufficient service to serve adequately all the utilities' present consumers in both West Virginia and the adjoining states. This argument, it must be admitted, is to a certain extent irrefutable, for it is indisputable that such an interstate utility must to a certain extent serve adequately all consumers in both West Virginia and adjoining states. But to what extent? A public utility is, of course, bound to serve all adequately only if it has no valid excuse for refusing to do so. Quaere, then: Has such interstate public utility a valid excuse for refusing to render adequate service to any part of its public? Now, a public utility is "a business affected with a public interest" and its paramount duty is to render proper service to the public as a whole, even though serving properly the public as a whole means improper service, or no service, to particular individuals, for in matters affecting the public the rights of the public are of course paramount to the rights of individuals. For example, if a passenger train (though the only train for the day) is.
so full that another passenger cannot be taken on without rendering the service to the other passengers unreasonably inadequate, then, if, through no fault of the carrier, there are no additional passenger facilities available, it would seem to be not only the right but the duty of the carrier to refuse to take on other passengers although a few more might be jammed into the car by requiring everybody to stand. So, if under similar circumstances the carrier had by chance let so many into the car that those sitting were compelled to stand in order to make room, thus rendering the service to all unreasonably inadequate, it would seem to be not only the right but the duty of the carrier to put off some of those already on so that those carried might be carried reasonably. If, therefore, the public of such public utility will, on the whole, be given unreasonably inadequate service unless the utility refuses to serve a separable part of that public the better view is, it would seem, that, in the absence of mandatory charter or statutory provisions, the utility has (upon giving reasonable notice where circumstances so require) a valid excuse for refusing to serve that separable part of its public. Hence, since the utility has a right to refuse to serve some separable part of its public, it would seem that it also has a duty to refuse to serve some separable part of its public when service to such separable part means unreasonably inadequate service to the public as a whole; for, if the utility has a right to refuse such service and the public served will receive reasonably adequate service only if there is such refusal, then, since there is a common-law duty imposed on the utility to render adequate service to all unless it has a valid excuse for refusing to do so, it would seem to follow that a court may lawfully decree that the utility must render adequate service where it can do so by doing what it has a right to do for then it would seem that it has no valid excuse for refusing to render such adequate service. Now the facts are that service to all consumers in both West Virginia and adjoining states means during the winter months, viz., when the service is really needed, unreasonably inadequate service in the generality of cases and, therefore, unreasonably inadequate service to the consumers as a whole. The gas service received is like the passenger service where on a

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22 See, e.g., East Ohio Gas Co. v. City of Akron, 81 Oh. St. 33; 90 N. E. 40 (1909); Sherwood v. Atlantic & D. Ry. Co., 94 Va. 291, 26 S. E. 945 (1897). There is, however, an irreconcilable conflict of authority on this point, and the cases are pretty evenly divided. See the point discussed and the cases pro and con cited in WYMAN, PUBLIC SERVICE CORPORATIONS, §§ 305, 306.
long journey all are compelled to stand, even those who were sitting, in order to let everyone ride. It is even a stronger case than that; it is like the passenger service where sometimes all can ride if all stand, sometimes (but not when service is seriously needed) all can ride sitting, and sometimes (viz., when service is seriously needed) all must ride standing, and at the same time, as it were, supply in part their own private cars in which to ride, for, during a good part of the year and when the gas service is most needed, it is necessary for gas consumers to supply in large part their own private means of heating and lighting. Accordingly, it is clear that the public as a whole, i.e., the public served, will have unreasonably inadequate service if the whole public is served. Hence it is clear that the public served, i.e., the public as a whole, will be best served by serving only a part of that public, for there is little business and less pleasure in having one’s house only half-warmed by gas fires so that it is necessary to use two different systems of heating in order to have one’s house adequately heated. It would seem clear that such service is unreasonably inadequate service and that a remedy should somehow be found, for certainly the common law is not so inadequate and inflexible as to be incapable of furnishing a remedy for such an injustice.

Quaere, then: Since some part of the utility’s public should upon principle be refused adequate service, what part of that public is it most just to refuse to serve adequately? Do intrastate consumers and extra-state consumers have precisely equal rights to the natural resources of a given state? The question answers itself. Clearly Pennsylvanians have a certain claim upon Pennsylvania, including the natural resources of Pennsylvania, which is not held by people in the adjoining states, for while the federal Constitution obliterates certain state-rights, it admittedly did not oblate them all, and certainly did not wholly take away the peculiar rights of the inhabitants of a state to the state itself. In fact the Constitution itself provides22 that: “The powers not delegated to the United States by the Constitution, nor prohibited to it by the states, are reserved to the states, respectively, or to the people.” The Constitution imposes no express prohibition upon the states with respect to their natural re-

22Constitution of the United States, 10th Amendment.
sources, and it would seem that the only power granted by the Constitution that could possibly affect this question is the power delegated to Congress to "regulate" interstate commerce. Now, so far as that delegation of power to the United States is an implied prohibition upon the states it is of course, an implied prohibition upon the states to "regulate" the same commerce, but, as we have seen, a state-court decision enforcing a common-law duty is not a "regulation" in the constitutional sense, and, therefore, the rights here being considered are in the language of the Constitution "reserved to the states, respectively, or to the people" of those states. Hence, as the case is in this respect not covered by the Constitution the situation, it would seem, is substantially the same as if West Virginia bordered on Canada and, there being insufficient gas to supply adequately all West Virginia consumers and Canadian consumers, the question was: Who, if any, have preferential claims upon West Virginia's natural resources, West Virginians or Canadians? From the inherent attributes of a sovereign state (and a state of the United States is a sovereign except so far as certain attributes of sovereignty have been surrendered by the federal Constitution, and, as we have seen, the federal Constitution does not, in this respect, affect the question)—from the inherent attributes of a sovereign state, then, it follows that the people of a given state have in respect to the territory (or natural resources) of that state some peculiar rights not held by people outside the state. Thus, the United States Supreme Court has held in effect that intrastate consumers have a preferential right to running waters within the state, and to wild game killed within the state, these cases holding that a state may prohibit the exportation of running water and wild animals reduced to possession within the state. Now, why haven't intrastate consumers a corresponding preferential right to the natural gas within the state? Natural gas stands upon precisely the same sort of footing as running water and wild game, for all three are natural resources, and, according to the better view, no one, not even the state, has any property in running water, wild animals or nat-

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24See note 1, supra.
ural gas until reduced to possession. Perhaps it may be said that the United States Supreme Court has held in *West v. Kansas Natural Gas Company*, that intrastate consumers have no such preferential right to the natural gas within the state; but, as was pointed out in the writer's previous article on this question, that case is quite consistent with the view that there is such preferential right, for in that case it affirmatively appeared that there was sufficient natural gas for both intrastate and extra-state consumers. That case, therefore, does not deny to intrastate consumers a preferential right to an adequate supply of the state's natural resources, but, as it cites as authorities the two last-mentioned cases, it impliedly sanctions the proposition just advanced, *viz.*, that a state does, to a certain extent, have a preferential claim upon its natural resources; and that extent, it is submitted, goes at least as far as is necessary to compel public utilities, transporting out of the state the state's purely intrastate resources, to render adequate service therefrom to all intrastate consumers.

This preferential state right is, then, it is submitted, a valid reason why intrastate consumers should receive reasonably adequate service from such intrastate resources before extra-state consumers are served; in other words, because of this peculiar, preferential right of the people of a state to the state itself, including the inherent resources of the state, an interstate public utility, transporting natural resources from the state, is under a common-law duty, constitutionally enforceable by judicial decree, to serve adequately all consumers within the state (if there is sufficient service to do so), and that this is so although there is a contemporaneous common-law decree in an adjoining state attempting to compel the same utility to render adequate service in such other state. The utility cannot of course comply with both state-court decrees, but, for the above-mentioned reasons, it has a valid excuse for refusing to obey the one decree and no legal excuse for refusing to obey the other.

In conclusion it should be observed that the mere fact that there is state legislative or administrative action, enforcing the common-law duty to render adequate service, does not change the situation and make such action a "regulation". That this is so is well illustrated by a series of United States Supreme Court cases.

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27 See this point discussed and the authorities referred to in 26 W. Va. L. Q. 1, 10 et seq.
221 U. S. 228, 31 Sup. Ct. 564 (1911).
which hold that a state may by legislative or administrative action compel interstate carriers to stop interstate trains when it is necessary to stop such trains in order to comply with the common-law duty to render adequate intrastate service. In other words, when the legislative or administrative order is merely *declaratory of the common-law duty* to render adequate service, such order is constitutional, not being in reality a regulation but a mere legislative or administrative declaration of the common law. But the same court holds that such legislative or administrative action, requiring interstate trains to stop, is unconstitutional when, without stopping such trains, the carrier is already rendering adequate intrastate service. In other words, when such legislative or administrative order goes beyond the common-law duty to render adequate (intrastate) service, such state action, being strictly a legislative or administrative order and not merely a declaration of the common law, is a "regulation" of interstate commerce, and, therefore, unconstitutional. Moreover, the situation in these Supreme Court cases is substantially on all fours with the situation in regard to the exportation of natural resources by public utilities. Hence, since a state, by enforcing the common-law duty of a public utility to render adequate service, can compel the utility to stop interstate trains in order to render such service, so a state, by enforcing the same common-law duty, can compel a public utility, exporting natural resources, to stop such exportation to the extent that such stoppage is necessary in order to enforce the common-law duty of the utility to serve adequately all intrastate applicants.

Cf., Cleveland C. C. St. L. R. R. Co. v. Illinois, 177 U. S. 514, 20 Sup. Ct. 722 (1900). See also the cases cited in the following note.