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THE RIGHT OF A STATE TO RESTRAIN THE EXPORTATION OF ITS NATURAL RESOURCES

By THOMAS PORTER HARDMAN*

IN a rather recent decision of the United States Supreme Court in which the problem presented in this article was indirectly involved, it was laid down as a ratio decidendi that "in matters of ... interstate commerce there are no state lines" and "the welfare" of the several states "transcends that of any state." Accordingly the court declared that each state must permit "a division of its resources, natural and created, with every other state." "This," said the court, "was the purpose, as it is the result, of the interstate commerce clause of the Constitution."2 There are, however, two comparatively recent and apparently contrary decisions by the United States Supreme Court, in the first3 of which it was held that a state may constitutionally prohibit the piping out of the state's fresh water supplies, and in the second,4 that a state may prohibit the transportation out of the state of wild animals killed within the state. The question, therefore, arises—the question for discussion in this article—

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2Ibid., 225.
when, or how far, if at all, may a state restrain the exportation of its natural resources?

This problem, of paramount importance to the people of all gas-producing states, and particularly to the people of West Virginia, has been recently raised by an act of the West Virginia legislature which provides in effect that all public service companies transporting natural gas out of the state must first serve adequately all intrastate applicants. It is admitted that, because of the natural limitation upon the amount of gas, there is not sufficient gas to serve adequately all the companies' intrastate and extra-state consumers and the question, therefore, is: Who is entitled to the available service? Are intrastate applicants entitled to adequate service before the companies' extra-state consumers receive any service whatever, or are both intrastate and extra-state consumers entitled to equal service, viz., each to equally inadequate service? If, in accordance with the first-mentioned decision of the United States Supreme Court, it is universally true that "in matters of . . . interstate commerce there are no state lines" and that each state must permit "a division of its resources, natural and created, with every other state," it would seem to follow that the above-mentioned statute is unconstitutional and that extra-state consumers are entitled to equal service with intrastate consumers. The constitutionality of this statute—generally known as the Steptoe Law—has been recently raised by two cases—Pennsylvania v. West Virginia and Ohio v. West Virginia—in which the Supreme Court of the United States has temporarily enjoined the State of West Virginia from enforcing the statute. The West Virginia Public Service Commission, however, has recently ruled that it is not an unconstitutional interference with the freedom of commerce for a state, in the absence of Congressional action, to require public service companies, transporting natural gas out of the state, to serve adequately all intrastate applicants although the effect of the requirement is to restrain or prohibit the exportation of natural gas. Question, then: Is the ruling of the Commission sound? In other words, in the absence of federal action does such state action, whether by

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6 Acts of West Virginia, 1919, c. 71.
7 Unreported as yet.
8 Unreported as yet.
statute or by regulation of a public service commission, unconstitutionally interfere with the freedom of commerce?

With reference to such a question one of the leading text books⁹ lays it down 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 Brewer¹⁰ that 'the moment you find any act of the legislature, or any 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.'"

If this statement of the limitation upon the power of the states is accurate it would clearly follow that the above-mentioned statute is unconstitutional, for it is well settled that natural gas is a "lawful article of commerce,"¹¹ and it is therefore quite clear that the statute in question "prevents the free exchange of lawful articles of commerce between the states." But in the absence of federal action is every state action that "prevents the free exchange of lawful articles of commerce between states" an unconstitutional interference with the freedom of commerce? Upon this point Mr. Chief Justice White has rather recently laid it down¹² that the following propositions are "so conclusively established" by the decisions of the United States Supreme court that they are beyond controversy:

"(1) A state may not exert its concededly lawful powers in such a manner as to impose a direct burden on interstate commerce . . . . . .

"(2) Even though a power exerted by a state when inherently considered, may not in and of itself abstractly impose a direct burden on interstate commerce, nevertheless such exertion of authority will be a direct burden on such commerce if the power as exercised operates a discrimination against that commerce, or, what is equivalent thereto, discriminates against the right to carry it on."¹³

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¹⁰In Ex parte Kieffer, 40 Fed. 399, 402 (1889).
¹¹Haskell v. Kansas Natural Gas Co., 224 U. S. 217, 220 (1912)—"a legitimate subject of interstate commerce."
¹³Citing: "Darnell v. Memphis, 208 U. S. 113; Am. Steel & Wire Co. v. Speed, 192 U. S. 500 and authorities there cited."
If, again, we accept this exposition of the limitation upon the power of the states in respect to interstate commerce it would clearly follow that the statute in question "imposes a direct burden on interstate commerce," for since there is admittedly insufficient gas to serve adequately both intrastate and extra-state consumers and since the enforcement of the statute would therefore give adequate service to intrastate consumers and inadequate service, or perhaps no service, to extra-state consumers, it therefore follows that "the power [of the state] as exercised operates a discrimination against . . . [interstate] commerce, or, what is equivalent thereto, discriminates against the right to carry it on," and accordingly is an unconstitutional regulation of interstate commerce.

But may the above-mentioned statements as to the limitation upon the power of the states be accepted without qualification? Must a state, by virtue of the interstate commerce clause, necessarily permit "a division of its resources, natural and created, with every other state?" If so, it is submitted that it is necessary to overrule the above-mentioned decisions of the United States Supreme Court, in the first of which it was held that a state may constitutionally prohibit the piping out of the state of the fresh waters of the state, and in the second that a state may constitutionally prohibit the transportation out of the state of wild animals killed within the state, for in each of those cases the United States Supreme Court categorically refused to compel a state to permit "a division of its [natural] resources . . with . . [another] state," in each or in one of them at least—the Fresh Water case—the state statute "prevents the free exchange of lawful articles of commerce between the states," and in each the power . . . [of the state] as exercised operates a discrimination against interstate commerce or what is equivalent thereto, discriminates against the right to carry it on." Yet both cases were cited as authorities in the very case in which it was declared that it "was the purpose, as it is the result, of the interstate commerce clause" that a state must permit "a division of its resources, natural and created, with every other state." Therefore, unless there is some qualification to the above-mentioned doctrine that a state must permit a division of its natural re-

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1Note 3.
2Note 4.
sources with every other state—this doctrine having been enunciated in a natural gas case with reference to the interstate division of the natural-gas resources of a state—it would seem to follow that the Natural Gas case cannot consistently stand with either the Fresh Water case or the Wild Animal case. The Supreme Court, however, attempted in the Natural Gas case to distinguish the Fresh Water case, and an examination of the cases is therefore necessary. In the Natural Gas case the Supreme Court held, Justices Holmes, Hughes and Lurton dissenting, that a state statute which, though prohibitive in form, in purpose and effect reserved the natural gas of the state for the sole use of the inhabitants of the state was an unconstitutional regulation of interstate commerce, the court attempting to distinguish the Fresh Water case on rather indefinite grounds. It is sometimes said, however, that the Fresh Water case is distinguishable on the ground that the state has a property right in the fresh water flowing upon the surface of the land within the state whereas it has no such property right in the natural gas imbedded beneath the surface. It is submitted, however, that for reasons herein-after mentioned, the alleged distinction is purely artificial or non-existent; indeed, the court itself in its opinion in the Fresh Water case distinctly repudiated the theory that the right of a state to prohibit such interstate transportation rested on the state's alleged property rights in such waters, the court saying, per Mr. Justice Holmes, that the right of the state to prohibit the piping of fresh water out of the state "is independent of the more or less attenuated residuum of title that the state may be said to possess." The court, thereupon, upheld the statute on what it called "a broader ground," viz., "the principle of public interest and the police power" and the right of "the state as quasi-sovereign and representative of the interests of the public . . . to protect" its "natural advantages." Said the court:

"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 . . . This public interest is omnipresent wherever there is a state and grows more pressing as population grows. It is fundamental . . .

17See, e. g., 25 Harv. L. Rev. 90.
18Hudson County Water Co. v. McCarter, supra, note 3, p. 355.
19Ibid., 355, 356.
20Ibid., 356, 357.
"We are of the opinion, further, that the constitutional power of the state to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. . . ."

The ground of this decision would seem to be indisputable, and it is submitted that upon just such reasoning as the above it is possible and proper to hold that a state may constitutionally compel interstate public utilities, at least so far as they are depleting the state's natural resources, to serve adequately all intrastate applicants however far the requirement may in effect restrain or prohibit the exportation of the resources of the state.

In the Natural Gas case, however, the United States Supreme Court stated with reference to the interstate transportation of natural gas, that "the action of Congress is a declaration of freedom from state interference with the transportation of articles of legitimate interstate commerce," intimating thereby that the interstate transportation and distribution of natural gas by pipeline is a subject national in character which "requires a general system or uniformity of regulation" so that in the absence of Congressional action the states may not regulate the same in any way. In answer to this intimation, however, it may be said that such intimation does not seem to be warranted by the facts, for the distribution of natural gas, a commodity which is found only in a comparatively few states, differs not only in different states but also in different parts of the same state both as to the initial stages of production and particularly as to the only practical way in which natural gas, when produced, may be profitably and properly distributed or transported to consumers, intrastate or extrastate. Thus the interstate transportation of natural gas from Oklahoma to Kansas may differ materially from the transportation of natural gas from Indiana to Illinois, or from West Virginia to Pennsylvania, and in fact under certain circumstances the transportation of natural gas from West Virginia to Pennsylvania may differ materially from transportation of gas from (another part of) West Virginia to Ohio, etc. In one case the natural pressure of the gas may be just sufficient to force the proper amount of gas through the pipes into the other state, whereas in another case artificial pressure is necessary, and in still another case the natural pressure is so great that if it were not artificially reduced it would endanger the lives of people
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along the line. Again in one case because of the natural limitation upon the amount of gas there is not sufficient gas to serve adequately all present intrastate consumers if no gas at all is transported out of the state, whereas in another case there is more than enough to serve all present consumers both intrastate and extra-state. In these respects, then, not to mention others, may it be accurately said that the interstate transportation or distribution of natural gas is a "subject susceptible only of uniform regulation" so that the inaction of Congress in respect thereto is equivalent to a declaration of Congress that commerce therein shall be free? On the contrary it would seem that from the widely differing elements so intimately interwoven with the production and interstate distribution of natural gas in different states or even in different parts of the same state, the distribution of natural gas, including interstate transportation by pipe line, is a subject not "susceptible of uniform regulation" but requiring for proper distribution different regulations for different localities in order to meet adequately the widely different local needs and conditions.

In regard to the general problem involved in this article the United States Supreme Court per Mr. Justice Hughes has recently expressed itself as follows:21

"It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive. In other matters admitting of diversity of treatment according to special requirements of local conditions the states may act within their respective jurisdictions until Congress sees fit to act. . . The principle which determines this classification underlies the doctrine that the states cannot under any guise impose direct burdens upon interstate commerce. . .

"But within these limitations there necessarily remains to the states until Congress acts a wide range for the permissible exercise of power appropriate to their territorial jurisdictions although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention."

But is it "possible to derive from the constitutional grant an

intention that" the distribution, including transportation, of natural gas "should go uncontrolled pending Federal interven-
tion"? The states have always regulated the distribution of natural gas by public utilities by requiring, inter alia, adequate intrastate service. It would seem, therefore, to be indisputable that the distribution of natural gas by public utilities belongs among those "subjects [referred to by the Supreme Court22] which, . . . with the acquiescence of Congress, have been con-trolled by state legislation from the foundation of the Govern-
ment [or from their earliest existence] because of the necessity that they should not remain unregulated and that their regulation should be adapted to varying local exigencies; hence, the ab-sence of regulation by Congress in such matters has not imported that there should be no restriction but rather that the states should continue to supply the needed rules until Congress should decide to supersede them." Thus, "restrictive measures within the police power of the state enacted exclusively with respect to in-
ternal business, as distinguished from interstate traffic, may in their reflex or indirect influence diminish the latter and reduce the volume of articles transported into or out of the state."

The last statement of the Supreme Court, dictum though it is, is practically an express approval of the proposition contended for in this article, for a state regulation requiring adequate intra-
state service from the natural resources of the state is clearly a "measure . . . enacted exclusively with respect to internal business as distinguished from interstate traffic" and, except in the unsettled case where interstate transportation is affected, it is well-established law that such a regulation is within the states' police power. The only question, then, is in cases where inter-
state commerce is affected, and a basic question there is whether such transportation of gas is a "subject national in character and, therefore, susceptible only of uniform regulation."

In regard to this point the Court of Appeals of New York has very recently held23 that the distribution and sale in New York of natural gas piped from Pennsylvania is a subject "local" not "national" in character and that, therefore, until Congress sees fit to act, the State of New York can constitutionally regulate the rate to be charged in New York for gas thus piped from Pennsylvania.

22Ibid., 402, 410.
To much the same effect the following proposition has been laid down by the Supreme Court of Indiana, and quoted with approval by the Supreme Court of the United States:

"Upon this point we affirm that natural gas is characteristically and peculiarly a local product, that its production is confined to a limited territory, that because of its local characteristics and peculiarities it is a proper subject for state legislation, and cannot, so far as regards local protection, be made the subject of general legislation by Congress; or at all events that it does 'not require a uniform system as between the states' for its regulation."

Moreover, that such distribution of natural gas does not "require a general system or uniformity of regulation" is supported, inferentially at least, by a very recent decision of the United States Supreme Court. In that case an interstate public utility was transporting natural gas from state X to state Y and was supplying the gas thus transported to local distributing companies in state Y. The interstate utility furnished the gas to the local distributing companies under an agreement that the local companies should pay the interstate company two-thirds of the gross receipts paid by the customers to the local companies. State Y by fixing rates to be charged by the local companies attempted to regulate the distribution of gas by the local distributing companies. The regulation therefore indirectly regulated the rate received by the interstate utility for the interstate transportation of gas. The lower court held, in accord with the above-mentioned intimation by the Supreme Court in the Natural Gas case, that transportation of natural gas and its disposition and sale through distributing companies was "interstate commerce of a national character," but the United States Supreme Court in reversing the holding, decided that, though the interstate transportation of natural gas is undoubtedly interstate commerce, the

27Landon v. Public Utilities Commission of Kansas, 242 Fed. 658 (1917). Said the court, quoting with approval from Haskell v. Cowham, 187 Fed. 402, 408 (1911): "Interstate commerce in natural gas, including therein its transportation among the states by pipe line, is a subject national in its character and susceptible of regulation by uniform rules. The silence or inaction of Congress relative to such a subject is a conclusive indication that it intends that interstate commerce therein shall be free."
states may nevertheless thus regulate the distribution thereof. The case, therefore, strongly supports the proposition herein contended for that the distribution of natural gas belongs to that class of "matters admitting of diversity of treatment according to the special requirements of local conditions," in regard to which it is settled law that "the states may act within their respective jurisdictions until Congress sees fit to act," although interstate commerce may incidentally or indirectly be affected even to the extent of "reducing the volume of articles transported into or out of the state."

If this conclusion seems to violate the principle of "freedom of interstate commerce" even more so does the decision of the United States Supreme Court in the above-mentioned Fresh Water case, in which the court held that a state can constitutionally prohibit the piping of fresh water out of the state; and even more so does the decision of the same court in the other of the two cases, above referred to, in which the court held that a state has the right to prohibit the transportation out of the state of any wild animals killed within the state. It is true that the Wild Animal case like the Fresh Water case is generally distinguished and sustained on the ground that the state has an alleged property right in wild animals and in streams, but it is submitted that this case like the Fresh Water case cannot be sustained on that ground, for neither running water nor a wild animal, until reduced to possession, is susceptible of actual ownership. The state as sovereign or quasi-sovereign has, of course, sovereign or quasi-sovereign jurisdiction or control over wild animals that roam at large within the state so long as they are within the state, and such animals, until reduced to possession, are not the property of private persons, but it by no means follows that the state has a property right in such animals unless, of course, it has reduced them to possession; for, if the state is owner, it would follow that the state could prosecute for larceny one who without right

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28Simpson et al. v. Shepard, supra, note 21, p. 399.
29Ibid., 400.
30Ibid., 411.
31Supra, note 3.
32Supra, note 4.
33See, e.g., 2 Willoughby, CONSTITUTIONAL LAW, §316; 25 Harv. L. Rev. 90; Freund, POLICE POWER, §§419, 422.
34See Wiel, "Running Water," 22 Harv. L. Rev. 190. As to wild animals see Williams, PERSONAL PROPERTY, 17 ed., 49; 2 Justinian, INSTITUTES, Tit. 1, s. 12.
takess wild animals with intent to appropriate the same to his own use, but it is well settled that such taking is not larceny for the reason that there is no property in wild animals until they are reduced to possession. Similarly it is submitted that the Fresh Water case cannot be distinguished on the ground sometimes advanced, viz., that a state has a property right in fresh water streams within the state, for it seems to be the better view that, like wild animals, running water in fresh water streams is the property of no one, being, like wild animals, in the very nature of things, not susceptible of actual ownership, though of course the state, not as a proprietor but as sovereign or quasi-sovereign, has sovereign or quasi-sovereign jurisdiction or control over such things as wild animals, running water and natural gas not yet reduced to possession, so long as they are within the state's territorial limits. Thus, it is generally established law that a state, though it has no property rights in natural gas within its territorial limits and not yet reduced to possession, nevertheless has the right to conserve the natural gas of the state by preventing the owners of the wells from permitting the natural gas to escape therefrom and go to waste, such state action being, of course, sustained under the state's police power. That is to say, a state's rights in regard to things within its jurisdiction may be either (1) governmental or (2) proprietary, and it is a fundamental mistake to confuse the two sorts of state rights.

Furthermore, while the analogy between wild animals, running water and natural gas is not in all respects complete, it is admittedly close, and, as regards actual ownership prior to reducing to possession, according to what is believed to be the correct view, including the view of the United States Supreme Court, natural gas (like wild animals and running water) is not strictly the property of any one until it is reduced to possession. If then no

25See the article on Larceny by Joseph Henry Beale, Jr., in 25 Cyc. 17, where it is stated that "since larceny connotes the taking of property of another, there could be no larceny at common law of animals ferae naturae unless they were reclaimed, confined or dead, since otherwise they were not property," and see the authorities therein cited.


27Ohio Oil Co. v. Indiana (No. 1), 177 U. S. 190, 20 Sup. Ct. 576 (1900).

28Ohio Oil Co. v. Indiana (No. 1). supra, note 37; Waterford Oil and Gas Co. v. Shipman, 233 Ill. 9, 84 N. E. 53 (1905). Contra, the Kansas and West Virginia cases; see e. g., Mound, etc., Gas Co. v. Goodspeed Gas & Oil Co., 83 Kan. 136, 109 Pac. 1002 (1910); Preston et al. v. White et al., 57 W. Va. 278, 50 S. E. 236 (1905). See Adams, "The Right of a Landowner to Oil and Gas in His Land," 63 U. PA. L. REV. 471.
one, not even the state, has any proprietary rights in wild animals and running water within the state (i.e., so long as they are not reduced to possession) just as no one, not even the state, has any proprietary rights in natural gas while still imbedded beneath the surface of the state, may the state in the exercise of its governmental rights prohibit the transportation out of the state of wild animals, running water or natural gas, reduced to possession within the state? In result, the United States Supreme Court has apparently answered the question in the affirmative as to wild animals and running water, but in the negative as to natural gas. It is submitted, however, that, while the actual conclusions reached in the Wild Animal case, the Fresh Water case and the National Gas case, may, under the special facts of the cases, be sustained, the three sorts of cases are, in this particular respect, indistinguishable, and that, in order to be consistent, all three cases should be sustained on the same ground, viz., that the state, in the exercise of its governmental as distinguished from its proprietary rights, may, under the "principle of public interest" or the police power, reserve its "natural advantages" for its own inhabitants, to the extent that such reservation is necessary to protect or promote the public health, safety, comfort, convenience and general welfare of its inhabitants. This ground, moreover, is the final ground upon which the Supreme Court placed its decision in the Wild Animal case, the court saying:

"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 inter-state commerce may be remotely and indirectly affected. . . . Indeed the source of the police power as to game . . . flows from the duty of the state to preserve for its people a valuable food supply."

Moreover this governmental right of the state, as distinguished from the state's proprietary rights, is, as already pointed out, also the ground upon which the court really placed its decision.

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40Hudson County Water Co. v. McCarter, supra, note 3.
in the Fresh Water case. It would seem, however, that a state could not, under its governmental powers, justify, as against the commerce clause of the Constitution, such a reservation of its natural advantages, e. g., running waters or wild animals, except so far as such reservation is necessary to serve adequately the needs, present and prospective, of its inhabitants, and it is upon this ground that the actual conclusion in the Natural Gas case seems clearly correct, for it affirmatively appeared in that case that the piping out of the state of the gas in question would leave a sufficient intrastate supply to serve adequately all intrastate applicants. Hence, the conclusion in that case seems sound enough; hence, also, the conclusions in the Fresh Water case and in the Wild Animal case⁴³ seem justifiable for the reason that it is fairly inferable from the facts of these cases that game birds such as quail killed in Connecticut after 1895 would not be sufficient to serve adequately the needs, present and prospective, of the small but populous state of Connecticut,⁴⁴ also that the running water in the little Passaic river, New Jersey, would not be, after 1908, sufficient to serve adequately the needs, present and prospective, of the populous districts of New Jersey and also of a considerable part of the City of New York. Hence, in such cases the state in the exercise of its governmental rights may, as Mr. Justice Holmes observed in the Fresh Water case, reserve its "natural advantages," including, it would seem, natural gas, for the people of the state, that is to say, may reserve such "natural advantages" to the extent that the "public interest" actually requires such reservation in order to serve adequately the needs of the people of the state. Quaere, however, whether a sparsely settled state with fresh water supplies admittedly in excess of the needs, present and prospective, of its people, could, as against the commerce clause of the Constitution, prohibit the transportation out of the state of the unneeded excess. Quaere, also (if such a condition is conceivable) whether a sparsely settled state with wild animals, e. g., fish, admittedly in excess of the needs, present and prospective, of its people, could constitutionally prohibit the transportation out of the state of such unneeded excess. As

⁴⁴In the very recent wild animal case of Carey v. South Dakota, referred to in note 4, supra, it is also fairly inferable from the facts that wild ducks killed in South Dakota at the present time would not be sufficient to serve adequately the needs, present and prospective, of the people of that state.
against the commerce clause of the Constitution it is difficult to see how such a prohibition could be upheld under any of a state's governmental powers. Moreover, there are at least two wild animal cases\(^5\) squarely contra to the above-mentioned Wild Animal case and as they arose in the western states while those states were still sparsely settled and while there were possibly at that time more prairie chickens in Kansas and fish in Idaho than were then necessary to meet the needs of the people of those states, it is perhaps possible that those two cases may be distinguished from the above-considered Wild Animal case which arose in a densely populated state where wild animals of the sort in question (game birds such as quail) could not have been so plentiful and probably were not sufficient to meet the actual intrastate needs. It must be admitted, however, that the cases are not clear upon this point and that the possibility of the above-mentioned distinction between the cases is based solely upon probabilities. Upon principle, however, it would seem that if the point should ever specifically arise, it would, perhaps, be necessary to come to the same conclusion in regard to wild animals and running water as that arrived at by the Supreme Court in regard to natural gas, \textit{viz.}, (and the following is believed to be the principle that should be derived from the Natural Gas case\(^6\)) that states cannot prohibit the transportation out of the state of such natural advantages (natural gas, running water or wild animals) as are not necessary to serve adequately the needs of the people of the state. It is quite true that the case does not specifically purport to establish any such principle but apparently purports to lay down the doctrine that a state cannot prevent the transportation out of the state of legitimate articles of commerce. But the same court's conclusions in the Fresh Water case and perhaps in the Wild Animal case seem inconsistent with the last-mentioned doctrine; and it is believed that the three cases can be reconciled only by extracting from the decisions the above-mentioned principle. Moreover, it is submitted that the Fresh Water case and the Wild Animal case (by the Supreme Court) as well as the Natural Gas case, all tend to sustain, in conclusion and upon proper construction, the proposition herein contended for, \textit{viz.}, that a state, as quasi-sovereign and representative of the public interest, can,

\(^5\)State v. Saunders, 19 Kan. 127 (1877) ; Territory v. Evans, 2 Idaho 634, 23 Pac. 116 (1890).

without contravening the commerce clause of the Constitution, reserve its natural resources for its own inhabitants to the extent at least that such reservation is necessary to enable public utilities to serve adequately all intrastate applicants: and this even though such reservation totally prevents any exportation of the natural resources of the state.

This conclusion, it is submitted, does no violence to the well-established "doctrine that the states cannot under any guise impose direct burdens upon interstate commerce," for it is an equally well-established doctrine that a state, within the limits of its police power, can constitutionally regulate purely intrastate transactions even though the effect of such regulation "indirectly affects interstate commerce" and "reduces the volume of articles transported into or out of the state." Certainly, then, if, as was held in the Wild Animal case, it is within the limits of the police power of a state to preserve for its people an adequate natural food supply, e. g., game, it is equally and it would seem indisputably within the police power of a state to preserve for its people an adequate natural fuel supply, e. g., natural gas. And, if, as was held in the Fresh Water case, it is within the governmental power of a state, even as against the interstate commerce clause, to preserve for its people an adequate natural water supply, it is equally within the power of a state to preserve for its people an adequate natural fuel supply, for, as was observed by the United States Supreme Court in a very recent case, "heat is as indispensable to the health and comfort of the people as is light or water." Moreover, as was observed by the same court in regard to fresh-water streams within the state, "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;" so, in regard to a state's natural gas supplies, "few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a state to maintain" for its people such a supply of fuel as is necessary to meet the actual pressing needs of its people, for to quote again the language of the Supreme Court, "heat is as indispen-

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*Simpson et al. v. Shephard, supra, note 21, at p. 400.
*Ibid., 410, 411.
*Hudson County Water Co. v. McCarter, supra, note 3, p. 356.
sable to the health and comfort of the people as is light or water.'" If it be alleged that it is not indispensable for the people to have heat derived from natural gas as they may use coal or wood even if the coal or wood has to be shipped from a distance or perhaps from another state, equally so may it be said in regard to the Wild Game case that it is not indispensable for the people to have game for food as they may eat vegetables, or in regard to the Fresh Water case that it is perhaps not absolutely indispensable for the people of New Jersey to have the running water in the little Passaic river as it is possible to pump water from elsewhere. But the correct answer is that the police power of a state is very comprehensive and extends not only to the indispensable such as public health, public order and safety, but also to the more advanced demands of civilization such as public comfort, convenience and general welfare. Thus, the Supreme Court of the United States has squarely held that "the power of a state by appropriate legislation to provide for the public convenience stands upon the same ground precisely as its power by appropriate legislation to protect the public health, the public morals or the public safety." For example, a state in behalf of the public convenience, i.e., under its police power, may constitutionally require an interstate train to stop if such requirement is necessary in order to serve adequately intrastate needs, a case, by the way, which strongly supports the proposition herein contended for, as the doctrine of that case seems to be that (as a general rule at least, and the case points out no exceptions) a state may constitutionally require adequate intrastate service from an interstate public utility even though the requirement indirectly affects interstate commerce. It being admitted, then, that a state may, within the limits of its police power, thus regulate purely intrastate transactions, it is submitted that within this well-established principle a state may constitutionally compel any interstate public utility, transporting out of a state any natural resources of the state, to serve adequately all intrastate applicants, although the effect of such regulation is to restrain or totally prevent any exportation of the natural resources in question.

The importance of the problem involved in this article is considerably increased by virtue of the probability that coal com-

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82See FREUND, op. cit., §398.
84Ibid.
panies, like gas companies, will, under proper circumstances, soon be held to be public service companies with the usual obligations of public service companies engaged in the supply of commodities.\(^{54}\) In fact it seems that many coal companies already possess all the usually-recognized requirements of public service companies: (1) they have a practical monopoly of the production and sale of a commodity which is essential to the welfare of the community so that the people must directly or indirectly resort to them for that commodity, and (2) they (or many of them) hold themselves out as ready to supply all with that commodity.\(^{55}\) And when these two elements co-exist, viz., a business public in nature and a public profession, the United States Supreme Court has held that the utility possessing them is a public utility.\(^{56}\) It would seem, therefore, that only judicial sanction is necessary to establish many coal companies as public service companies. Nor is judicial sanction entirely lacking. In fact the United States Supreme Court has recently gone very far towards holding that coal companies, under proper circumstances, may be public service companies with the corresponding obligations of such companies, the court having held\(^ {57}\) that a city might levy a tax for the purpose of establishing and maintaining a public yard for the sale at cost of coal and other fuel, this on the ground that it was taxation for a "public purpose." Said the court:\(^ {58}\)

"The authority to furnish light and water by means of

\(^{54}\)Cf. German Alliance Insurance Co. v. Kansas, 233 U. S. 389, 411, 34 Sup. Ct. 612 (1914), where the United States Supreme Court, after reviewing the decisions, said: "They [the cases] demonstrate that a business, by circumstances and its nature, may rise from private to be of public concern and be subject, in consequence, to governmental regulation . . . . "The underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation." Is the business of insurance within the principle? [Or for present purposes \(f\) it may be added, is the coal business within the principle?] It would be a bold thing to say that the principle is fixed, inelastic, in the precedents of the past and cannot be applied though modern economic conditions may make necessary or beneficial its application . . . . We proceed then to consider whether the business of insurance is within the principle.

The court held that fire insurance business, because of modern economic conditions, had come within the principle.

\(^{55}\)As to when "a business, by circumstances and its nature, may rise from private to be of public concern," i. e., a public utility, see German Alliance Ins. Co. v. Kansas, supra, note 54, and authorities therein cited.

\(^{56}\)See e. g., Munn v. Illinois, 94 U. S. 113 (1876), and German Alliance Ins. Co. v. Kansas, supra, note 54.

\(^{57}\)Jones et al. v. City of Portland, supra, note 49.

\(^{58}\)Ibid., p. 224.
municipally owned plants has long been sanctioned as the accomplishment of a public purpose justifying taxation with a view to making provision for their establishment and operation. The right of a municipality to promote the health, comfort and convenience of its inhabitants by the establishment of a plant for the distribution of natural gas for heating purposes was sustained, and we think properly so, in State of Ohio v. Toledo, 48 Ohio St. 112. We see no reason why the state may not, if it sees fit to do so, authorize a municipality to furnish heat by such means as are necessary and such systems as are proper for its distribution. Heat is as indispensable to the health and comfort of the people as is light or water."

In other words, the Supreme Court, taking an admittedly advanced step, practically put the sale of coal in the same category as the sale of natural gas. It remains to be seen, however, just how far the law of public service will be applied to coal companies, but if such companies are, under proper circumstances, held to be public service companies with the corresponding obligations of such companies, the same question would, of course, arise in regard to the exportation of coal that has arisen in regard to the exportation of natural gas, and the answer would, of course, be the same in both cases. So perhaps in regard to the sale of other natural resources such as oil, for it is perhaps not improbable that oil companies, selling oil, will some day be held to be public utilities with the corresponding obligations of such utilities. And, because of the more or less recently developed monopolistic nature of other businesses and the gradual crystallization of public opinion in regard to such businesses it is not improbable that still other businesses may be brought within the pale of public utilities and so brought within the purview of this article.

By confining the purview of this article to the exportation of natural resources by public utilities it is not to be understood, of course, that a state may not, to some extent at least and under proper circumstances, restrain the exportation of its natural resources by other instrumentalities than public utilities, for, among other cases, the above-mentioned Wild Animal case is an authority to the contrary. Nor is any intimation intended to be made that a different rule would necessarily apply to the expor-

As an example of the opposite view on this point see, contra, Opinion of the Justices, 182 Mass. 605, 66 N. E. 25 (1903).
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tation of the resources of a state which are not natural resources but resources created within the state. It is simply to be understood that those aspects of the question are beyond the scope of this article.

In conclusion, however, it should perhaps be mentioned that there is one rather recent decision by the United States Supreme Court which, apparently (but it is believed only apparently) throws some doubt upon the proposition herein contended for. In that case the United States Supreme Court held that a state could not, without violating the commerce clause of the Constitution, compel a street railway operating between a city of that state and another state to operate sufficient cars to serve adequately the city of that state when the practical effect of the regulation was to increase greatly the number of cars operated across the state line. This case, however, seems to be explainable on the ground that, in the only practical way in which such an interstate operation of street cars can be conducted (and interstate commerce is a "practical conception," and must be dealt with in a practical way), such a state regulation would regulate beyond the state line in just the same way that it would regulate up to the state line, and being, therefore, a regulation of extra-state commerce as well as intrastate commerce is clearly a regulation of interstate commerce and hence unconstitutional. It would seem, therefore, that the general rule that a state may require adequate intrastate service although interstate commerce is indirectly affected has at least one exception, or apparent exception, and there may be others, where, as in the Street Car case, there is no question as to restraining the exportation of such of the state's natural resources as are necessary in order to serve adequately all intrastate applicants. For example, suppose that the X Company is transporting natural gas from West Virginia to Pennsylvania and that there is not sufficient gas to serve adequately all the X Company's consumers in both West Virginia and Pennsylvania, there being only sufficient gas to serve adequately either the West Virginia consumers of the Pennsylvania consumers. Suppose further that under such circumstances a


See the writer in 25 W. Vu. L. Q. 222, 230.
Pennsylvania regulation attempted to compel the X Company to serve adequately all Pennsylvania consumers. It would seem clear that such a regulation, unlike the West Virginia regulation, would not operate exclusively upon commerce within the state but would operate directly upon commerce without the state, for its necessary effect, like the effect of the regulation in the Street Car case, would be to force across a state line legitimate articles of commerce, and it is of course well settled that any state regulation which necessarily operates as a regulation of transportation without the state as well as within is a contravention of the commerce clause of the Constitution. It would seem clear, therefore, that such a regulation should be held to be unconstitutional, but to hold so in no way militates against the proposition herein maintained, viz., that in the absence of federal action a state may constitutionally 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 intrastate applicants.