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LEGISLATIVE REGULATION OF NATURAL GAS SUPPLY IN WEST VIRGINIA†

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THE object of the proposed legislation is to obtain for the people of West Virginia an adequate supply of the natural gas produced within their own State, and to relieve them from a serious and progressively increasing injury through the discrimination practiced by the natural gas companies in favor of consumers in other States.

The substance of the proposed enactment is that the public utilities of this State engaged in the natural gas business shall serve adequately the public of this State. In opposition thereto it is urged that these companies also supply gas to consumers in neighboring States, who will suffer restriction or deprivation of ser-

†The above article is a reprint, as a matter of timely interest, of a memorandum written by Messrs. Steptoe and Hoffheimer, in April, 1917, in support of a letter at that time sent to Governor John J. Cornwell, asking that the call of the extra session of the West Virginia Legislature, then in contemplation, might include legislation to remedy the conditions set forth in the memorandum. Slight changes have been made by way of omission, rearrangement, and insertion of later statistics as to gas production, but no material alteration has been made in the memorandum as originally published. The bill proposed by the authors at that time is printed as an appendix to this article

An able discussion of the same problem will be found in Mr. Fred O. Blue's paper read before the West Virginia Bar Association in July, 1917, and printed on pages 34-47 of the 1917 year book of the Association. These two discussions furnish the best printed treatment of this important subject.—Ed.

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vice by augmented service to West Virginia consumers; and hence it is further contended that the proposed legislation would be an unconstitutional interference with interstate commerce, and otherwise violate constitutional guaranties.

We do not admit that service in other States will necessarily be interfered with by adequate service in West Virginia; this depends on whether the supply of gas is adequate for both domestic and foreign consumers. It is to be conceded, however, that if and when the gas supply becomes inadequate for the proper service of all consumers, domestic as well as foreign, the consequence of this legislation will be to afford the consumers in this State a preference in service; and it is believed that the public of this State are morally and legally entitled to such preference. We shall endeavor to show that the object of the proposed legislation, and the means by which it is to be effected, are constitutional and essential to the welfare of this State.

GAS SHORTAGE AND NEED OF A REMEDY

For a number of years past natural gas has been the general and almost exclusive fuel for both domestic and industrial purposes in the greater part of Northern West Virginia, and its use has gradually extended to many other parts of the State. Dwellings, hotels, business houses, factories and public institutions have been and are equipped solely for the utilization of gas as fuel, except for illuminating purposes. Industries have been attracted to the State by the abundance of gas and its relative cheapness. By this growth of industry, population has increased and the general prosperity of the people of the State promoted. The daily life and business of the community have been modified and their adjustments made with reference to the continued use of gas as fuel. A change of fuel would be attended with great loss and inconvenience; and almost equal injury has resulted from the unreliable and interrupted supply of gas during the past two years.

Notwithstanding the abundance of gas within this State and its annually increasing production, the consumers in the State, both domestic and industrial, have, during the last two years, periodically and increasingly, had their factories shut down, with attendant disorganization of business and non-employment of workmen; schools have been closed because of lack of heat, and homes, hotels, business buildings and hospitals have been rendered uncomfortable, and almost untenantable for lack of sufficient gas.

These conditions have been confined to no single locality, but have been general throughout a large section of West Virginia. If they have been felt more acutely in one part of the State than another, it has been because of the difference in the duration and state of development of the gas production in that territory. But the very fact that the difference is merely one of time, demonstrates that the fate of the communities which have suffered first will gradually and inevitably extend to every part of the State, the people or industries of which are dependent on gas for fuel. If the parts which have not yet suffered are to escape the experience of those which have suffered, the remedy must be provided for in the present.

Not for the purpose of complaining of a merely local injury, but in order to illustrate what may well occur, and will occur, in any community in which gas is used for industrial purposes, we may state that the loss to factories in Clarksburg alone during the winter of 1916-1917 is estimated at $1,000,000. Existing factories, which otherwise would have enlarged their plants, have either abandoned the project or have built new plants elsewhere. The enlargement of one factory, at an estimated cost of $1,500,000, which would have added approximately 800 skilled laborers to Clarksburg, has been abandoned. Several industries are already contemplating the removal of their plants to other points. A continuance of the conditions which prevailed during the winter of 1916-1917 will undoubtedly cause other removals. This experience of Clarksburg is common to other parts of Northern West Virginia, and what is there occurring affords ample warning of the consequences to the rest of the State, unless the danger is avoided by the application of a prompt and effectual remedy, before it is too late.

CAUSE OF THE GAS SHORTAGE

The primary cause of the conditions above pointed out is to be found in *a virtual monopoly* which has sprung up in a commodity which is of the very substance of this State, at the hands of a few large corporations, creatures of this State, which have acquired their power by means of special privileges accorded by the laws of this State, and have subordinated the performance of their duty to serve the public of this State to the greater gain resulting from the supply of gas to consumers elsewhere.

Eight large gas companies, the Hope Natural Gas Company,

The Pittsburg & West Virginia Gas Company, The Reserve Gas Company, The United Fuel Gas Company, The Carnegie Natural Gas Company, The Manufacturers Light & Heat Company, The West Virginia Central Gas Company and The Columbia Gas & Electric Company, hold a virtual monopoly of the gas business in this State, controlling not only the market, but the gas territory, production and supply. In the absence of figures for the year 1916, those for 1915 show that out of a total production in this State of 244,004,159,000 cubic feet, these eight companies produced 152,823,811,000 and purchased 59,015,964,000 feet, making an aggregate supply of 211,839,715,000 feet, or about *eighty-seven per cent. of the total production of the State.* Figures for preceding years show practically the same proportion, and we are informed that the statistics for 1916 will disclose a control by these companies of a still greater percentage of the total production.

The gas not controlled by the eight companies above mentioned, either by production or by purchase, is to be ascribed to smaller companies, for the most part engaged in attempting to supply particular communities in the State, but unable to do so because of the inadequacy of their own gas and the refusal of the eight large companies to sell gas to make up the deficit. Among these smaller companies to which the eight large companies refuse to furnish gas, either wholly or in adequate volume, are some actually controlled by them by stock ownership and official management. An example is the Clarksburg Light & Heat Company, fifty-one per cent. of the stock of which is owned by the Standard Oil Company of New Jersey, which also owns the Hope Natural Gas Company and the Reserve Gas Company.

The monopoly possessed by these companies is presented in a double aspect, *a monopoly of supply and a monoply of market.* And these depend on their holding, by either outright ownership or by lease, of a great majority of the known gas producing areas of the State, a fact so notorious as to require no further mention; and on their ownership of the great pipe-line systems and pump stations necessary for the transportation of gas to consumers situate at a distance from the field of production. These pipe-lines and stations are themselves in fact a monopoly, resulting from the command of the large amounts of capital, not available to everyone, necessary to erect them, and the holding of the large areas of gas territory, withdrawn from acquisition by others, necessary to feed them.

The supply is monopolized by these companies. Aside from their own holdings of gas territory, their ownership of pipe-lines and pump stations constitutes them, except under special circumstances, the only purchasers from, or market of, the independent producer of gas. Regardless of the law which, in the same breath by which it confers on them the power of eminent domain, makes them common carriers,[1] they, as was the case in *United States* v. *Ohio Oil Co.*,[2] refuse to transport for other producers gas which might serve the public in this State. The independent producer must either stand by and see his gas withdrawn through adjoining operations, or must sell it to one of these companies.

The monopoly thus held by these eight large companies is described by a short passage from *United States* v. *Ohio Oil Co.*,[3] the language there used in relation to oil equally applicable to gas:

> "Availing itself of its monopoly of the means of transportation the Standard Oil Company refused, through its subordinates, to carry any oil unless the same was sold to it or to them, and through them to it, on terms more or less dictated by itself. In this way it made itself master of the fields without the necessity of owning them, and carried across half the continent a great subject of international commerce coming from many owners, but, by the duress of which the Standard Oil Company was master, carrying it all as its own."

And the resulting evil is akin to that referred to by the Hepburn Act of June 29, 1906,[4] rendering it illegal for interstate carriers to transport commodities owned by them or in which they were interested.[5]

The market is monopolized by these companies. This occurs not only by their original ownership or enforced acquisition of the bulk of the gas produced, but also by their ownership of the pipe-lines and pump stations, which are the only means of transporting the gas to distant points of consumption. For by these means they are enabled to convey their gas near or far, to the destination of their choice, within the range of their lines. And that destination by the strongest motives of self-interest, coupled with opportunity,

[1] W. VA. CODE, c. 52, § 24.
[2] 234 U. S. 548 (1914).
[3] 234 U. S. 548, 559 (1914).
[4] 38 U. S. STAT. AT L., 584.
[5] See United States v. Delaware & H. R. Co., 213 U. S. 366 (1909); Delaware, L. & W. Co. v. United States, 231 U. S. 363 (1913).

is the place where competition and public regulation are the least, and the willingness of the public to pay for gas is the greatest.

DISCRIMINATION AGAINST WEST VIRGINIA

The result of all this is obvious. In a foreign State, Ohio, or Pennsylvania, with a local gas production approaching exhaustion or inadequate for the public needs, with the place of consumption far removed from the initial source of production, and with the influential possibilities of the cost of transportation, as a factor in rate-making, a much higher scale of rates is charged, and apparently paid with willingness by consumers, for West Virginia gas. How far these rates are fixed or controlled in those States by administrative bodies corresponding to our Public Service Commission, we need not stop to inquire. But in those States it is apparent that rates are regulated or tolerated in the local interest, so that they remain at a point sufficiently high to attract to them the gas of West Virginia, regardless of the necessities of this State. The strongest temptation has therefore been offered to these companies, and, as it appears, has been easily yielded to, to divert to those foreign States as large a volume of West Virginia gas as possible, and to contract away an inordinate proportion thereof, in neglect of West Virginia, her people and her laws.

The truth of what we have said is made manifest by the statistics already referred to, in respect to these eight gas companies, when read together with the figures following.

In 1916, the total amount of natural gas produced in this State was 278,805,089,000 cubic feet, of which 188,169,235,000 feet were marketed out of the State and the amount of 94,131,203,000 feet consumed in the State.[6] The amount used in the State includes the consumption for drilling and power in development of gas territory, which statistics show to have been about 8.5% of the total production in 1915 (approximately 20,000,000,000 feet), and also includes the consumption of carbon companies and independent companies and producers. The pertinent matter here is to observe the proportion of the total supply controlled by the eight companies operating pipe-lines, by production and purchase, and the proportion of their supply which is served to domestic and

[6]See recent report of Statistician of Public Service Commission. Production for 1917 was 305,264,926,000 of which 101,245,465,000 was consumed in the state according to report submitted to the Public Service Commission April 24, 1918 and compiled from reports of the different utilities.—Ed.

industrial consumers in this State. Statistics covering these features for the year 1915 and prior years were furnished to the Senate at the last session of the Legislature,[7] from which we have the following:

Name	Total Supply (Cubic Feet)	Domestic and Industrial Consumers in W. Va. (Cubic Feet)
Hope Natural Gas Co.	67,269,224,000	12,000,692,000
Phg. & W. Va. Gas Co.	37,356,275,000	2,119,972,000
Reserve Gas Co.	24,395,435,000	838,894,000
United Fuel Gas Co.	27,880,327,000	15,959,871,000
Carnegie Natl. Gas Co.	15,122,807,000	9,023,000
Manufacturers L. & H. Co.	19,004,955,000	6,226,862,000
W. Va. Natural Gas Co. (W. Va. Central Gas Co.)	6,734,124,000	3,814,575,000
Columbia Gas & Elec. Co.	14,076,568,000	66,062,000
Total	211,839,715,000	31,035,951,000

The above figures indicate that for the year 1915 the *West Virginia consumers received about 14.8 per cent. of the gas supply* in this State of the eight companies named, and that these eight companies controlled about 212,000,000,000 feet out of the total production of 244,000,000,000 feet in the State in 1915. And the proportion of the out-of-state sales in 1916 has greatly increased.

Statistics for the year 1916, as furnished by the Public Service Commission, do not disclose further than the total production and the proportions consumed within the State and marketed out of the State; but it is stated that the marketing out of the State is practically confined to the above-named eight public service corporations, and the figures given show an increase in the amount marketed abroad from 154,000,000,000 in 1915 to 188,000,000,000 in 1916, while in West Virginia, notwithstanding the conditions above referred to, the increase of consumption was from 89,000,000,000 feet in 1915 to 94,000,000,000 in 1916.

THE REMEDY FOR THE INADEQUATE SUPPLY IN WEST VIRGINIA

The remedy for this condition is to be found in no mere adjustment of rates in this State. Leaving out of view the debatable question of Congressional jurisdiction, not yet asserted, there exists

[7]See SENATE JOURNAL for February 17, 1917, pp. 8 *et seq.*

among these States no common regulatory authority. The Public Service Commission of this State can do no more in the realm of rate-making than to fix rates limited by the boundaries of this State. But assume that it exercises its power in this regard by raising rates, with a view of preventing the export from this State of gas required for the public use at home. This would be but an invitation to the corresponding authorities or the consumers in the adjoining States to meet the increase with a counter-increase, leaving the situation quite as bad as before, with profit to no one, except the gas companies.

The remedy, therefore, must be found in direct compulsion of an adequate supply to the people of this State, if such compulsion is constitutionally possible.

THE STATUS OF THE GAS COMPANIES

Is it within the power of the State to protect its inhabitants, and to remedy this evil? We can best answer this inquiry by a brief survey of the rights which these companies have acquired at its hands, and of the concomitant duties which they assumed as conditions of the granted rights.

They have been granted charters or authorized to do business by the State for the avowed purpose of serving the public of this State. They exercise the right of eminent domain for the construction of their pipe-lines, and telephone and telegraph lines, a right which they could enjoy only on the terms and for the purpose of serving the public of this State. In every petition for condemnation, they aver their service to that public and their readiness and willingness to supply gas to all who apply therefor. They have received franchises from counties and municipalities for the construction and maintenance of their pipe-lines and telegraph and telephone lines. The gas-producing sections are a net-work of these lines. Nearly every public road has such a line under, along or across it; and we know of no instance, though such there may be, in which compensation was ever paid for such a franchise; in almost every instance the grant has been a mere gratuity. Without these rights and privileges these companies could have had no existence. That they would have received them, except upon the terms of affording adequate service to the public of this State or in contemplation of the subordination of that service to that of the people of other States, is unthinkable.

The duties assumed and undertaken by these corporations are

well stated by our own Supreme Court, in the recent case of *Carnegie Natural Gas Co.* v. *Swiger*,[8] as follows:

> "We observe that the Legislature, by general law, has conferred upon pipe-line companies, organized for transporting oil and natural gas, the right of eminent domain, and has thereby necessarily imposed upon them, as public service corporations, the right and duty of performing a public service. That right and duty is fixed as firmly as if written into the statute. * * * Pipe-line companies organized for transporting gas must serve the public with gas, under reasonable and proper regulations, along the entire line traversed, and for reasonable rates fixed by themselves, or by statute, or by contracts or ordinances of municipalities. * * * The rights of the people are thus protected in nearly every case where the public is served by public service corporations, furnishing water, gas, electricity, or transportation."[9]

In *Gibbs* v. *Consolidated Gas Co.*,[10] quoted in *Charleston Nat. Gas Co.* v. *Lowe*,[11] *People* v. *Chicago Gas Trust Co.*,[12] and in many other cases, it was said:

> "These gas companies entered the streets of Baltimore, under their charters, in the exercise of the equivalent of the power of eminent domain, and are to be held as assuming an obligation to fulfill the public purposes to subserve which they are incorporated."

It thus appears that the right of eminent domain is delimited by, and coincides with, the public use which it is intended to aid. And that public use is shortly expressed in *Hydro-Electric Co.* v. *Liston*,[13] where, holding that a foreign corporation, authorized to do business in this State, may enjoy the right of eminent domain, it is said:

> "This gives the right of eminent domain, to be exercised, however, *for the public use of the citizens of West Virginia.*"

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[8]72 W. Va. 557, 571, 79 S. E. 3, 9 (1913).

[9]Charleston Gas Co. *v.* Lowe, 52 W. Va. 662, 44 S. E. 410 (1901); Hydro-Electric Co. *v.* Liston, 70 W. Va. 83, 73 S. E. 86 (1911); Calor Oil & Gas Co. *v.* Franzell, 128 Ky. 715, 109 S. W. 328 (1908); Olmstead *v.* Morris Aqueduct, 47 N. J. L. 311 (1885); Gibbs *v.* Consolidated Gas Co., 130 U. S. 396 (1889); Munn *v.* Illinois, 94 U. S. 113, 133 (1876).

[10]130 U. S. 396 (1889).

[11]52 W. Va. 662, 44 S. E. 410 (1901).

[12]130 Ill. 393, 22 N. E. 803 (1889).

[13]70 W. Va. 83, 91, 73 S. E. 86, 90 (1911).

In Lewis on Eminent Domain,[14] it is said:

> "The public use for which property may be taken is a public use within the State from which the power is derived. It seems to be an admitted fact generally, that the power inheres in a State *for domestic uses only, to be exercised for the benefit of its own people,* and cannot be extended merely to promote the public uses of a foreign state."[15]

The duty of serving the public of this State being plain, it logically follows that upon no pretext can these companies renounce that duty. In the leading case of *Gibbs* v. *Consolidated Gas Co.*,[16] Mr. Chief Justice Fuller said:

> "It is also too well settled to admit of doubt that a corporation cannot disable itself by contract from performing the public duties which it has undertaken, and by agreement compels itself to make public accommodation or convenience subservient to its private interests.
>
> " 'Where,' says Mr. Justice Miller, delivering the opinion of the Court in *Thomas* v. *Railroad Co.,* 101 U. S., 71, 83, 'a corporation, like a railroad company, has granted to it a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes without the consent of the State to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State and is void as against public policy.'
>
> "These gas companies entered the streets of Baltimore, under their charters, in the exercise of the equivalent of the power of eminent domain, and *are to be held as having assumed an obligation to fulfill the public purposes to subserve which they are incorporated.*"

In *Attorney-General* v. *Haverhill Gas L. Co.*,[17] it was said of the gas company:

> "The respondent is a corporation, organized to exercise a public franchise of importance to the community in which it

[14]LEWIS, EMINENT DOMAIN, 3d ed., §310.

[15]See also Grover, etc. Land Co. *v.* Lovella, etc. Irr. Co., 21 Wyo. 204, 131 Pac. 43, elaborately discussing this point; and 1 NICHOLS, EMINENT DOMAIN, §29.

[16]130 U. S. 396 (1889).

[17]215 Mass. 394, 101 N. E. 1061 (1913).

> conducts its business. It is its duty to exercise this franchise for the benefit of the public, with a reasonable regard for the rights of individuals who desire to be served, and without discrimination between them. It cannot relieve itself from this duty so long as it retains its charter. It enjoys public rights in the streets, which are derived from the commonwealth, through action of the board of aldermen under authority of the Legislature. It is a *quasi* public corporation, and as such it owes duties to the public. * * * Without legislative authority it cannot sell its property and franchise to another party, in such a way as to take away its power to perform its public duties."

The principle laid down by the foregoing authorities is decisive of the present case. Instead of disposing of their plants, as has been often attempted, the gas companies here involved, disable themselves from the performance of their duty of serving the people of this State by disposing elsewhere of the very subject matter of the service. The disability equally exists, and would be no greater if they sold their pipe-lines.

THE POWER OF THE STATE

If it be granted that these gas companies owe to the people of this State the duty of providing them with an adequate supply of gas, then the right of the State to declare the existence, and to compel performance, of that duty must logically follow. That right, and its due expression, may well be said to rest in the implied condition which accompanies the grant of the corporate privileges, and subject to which they were accepted by these companies.[18]

In *Missouri P. R. Co.* v. *Kansas, supra,* in upholding the validity of an order of a State Railroad Commission requiring an interstate railroad to operate an additional train within the State, it was said, quoting in part from *Atlantic Coast Line R. Co.* v. *North Carolina Corp. Com.*:[19]

> "In that case the order to operate a train for the purpose of making a local connection necessary for the public convenience was upheld, despite the fact that it was conceded that that the return from the operation of such train would not

[18]Farmers Loan & T. Co. *v.* Galesburg, 133 U. S. 156 (1890); New Orleans Waterworks Co. *v.* Louisiana, 185 U. S. 336 (1902); Missouri P. R. Co. *v.* Kansas, 216 U. S. 262 (1910); Gibbs *v.* Consolidated Gas Co., 130 U. S. 396, 410 (1889).

[19]206 U. S. 1 (1907).

be remunerative. Speaking of the distinction between the two, it was said (p.26): 'This is so (the distinction) because, as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although by doing so, as an incident, some pecuniary loss from rendering such service may result.'

* * * * * * * *

"But where a duty which a corporation is obliged to render is a necessary consequence of the acceptance and continued enjoyment of its corporate rights, those rights not having been surrendered by the corporation, other considerations are, in the nature of things, paramount, since it cannot be said that an order compelling the performance of such a duty at a pecuniary loss is unreasonable. To conclude to the contrary would be but to declare that a corporate charter was purely unilateral; that is, was binding in favor of the corporation as to all rights conferred upon it, and was devoid of obligation as to duties imposed, even although such duties were the absolute correlative of the rights conferred."

Apart from any implication of conditions annexed to the grant, the right of the State to compel its creatures to perform the public duties for which they were created, is grounded in the police power.[20]

Of the police power it has been said,[21] it is:

"One of the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government."

And as said in *Chicago & A. R. Co.* v. *Tranbarger*:[22]

"This power can neither be abdicated nor bargained away, and is inalienable even by express grant; and * * * all contract and property rights are held subject to its fair exercise. *Atlantic Coast Line R. Co.* v. *Goldsboro,* 232 U. S., 548, 558, and cases cited."

The public welfare to which the protection of the power extends,

[20]United Fuel Gas Co. *v.* Public Service Commission, 73 W. Va. 571, 80 S. E. 931 (1914); Munn *v.* Illinois, 94 U. S. 113 (1876); New Orleans Gas L. Co. *v.* Louisiana Light, etc. Co., 115 U. S. 650 (1885); Stone *v.* Farmers L. & T. Co., 116 U. S. 307 (1886); Reagan *v.* Farmers L. & T. Co., 154 U. S. 362 (1894); Prentis *v.* Atlantic Coast Line Co., 211 U. S. 210 (1908).

[21]District of Columbia *v.* Brooke, 214 U. S. 138, 149 (1909); Eubank *v.* Richmond, 226 U. S. 137, 142 (1912); Sligh *v.* Kirkwood, 237 U. S. 52, 59 (1915); Hall *v.* Geiger-Jones Co., U. S. Adv. Ops. 1916, pp. 217, 220.

[22]238 U. S. 66, 77 (1915).

embraces not only public health, morals and safety, but also the public convenience and the general prosperity.[23]

In *Sligh* v. *Kirkwood,*[24] it was said:

> "It is not subject to definite limitations, but is co-extensive with the necessities of the case and the safeguards of public interest. *Camfield* v. *United States,* 167 U. S., 518, 524. It embraces regulations designed to promote public convenience or *the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health. Chicago, B. & Q. R. Co.* v. *Illinois,* 200 U. S., 561, 592. In one of the latest utterances of this Court upon the subject, it was said: 'Whether it is a valid exercise of the police power is the question in the case, and that power we have defined, as far as it is capable of being defined by general words, a number of times. It is not susceptible of circumstantial precision. It extends, we have said, not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or the general prosperity.' * * * And further: 'It is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government,' *Eubank* v. *Richmond,* 226 U. S. 137."

The scope of this power, and its flexibility in meeting and dealing with modern conditions, are illustrated in *German Alliance Insurance Co.* v. *Lewis,*[25] where state regulation of fire insurance rates was upheld, and again *Hall* v. *Geiger-Jones, Caldwell* v. *Sioux Falls Stocky. Co.,* and *Merrick* v. *Halsey,*[26] upholding the "Blue Sky Laws." In *Merrick* v. *Halsey,* Mr. Justice McKenna said:

> "Every new regulation of business or conduct meets challenge, and, of course, must sustain itself against challenge and the limitations that the Constitution imposes. But it is to be borne in mind that the policy of a state and its expression in laws must vary with circumstances. And this capacity for growth, and adaptation we said, through Mr. Justice Matthews, in *Hurtado* v. *California,* 110 U. S., 516, 530, is the 'peculiar boast and excellence of the common law.' It may be that constitutional law must have a more fixed quality than customary law, or, as was said by Mr. Justice Brewer, in *Muller* v.

[23]Chicago B. & Q. R. Co. *v.* Illinois, 200 U. S. 561, 592 (1906); Eubank *v.* Richmond, 226 U. S. 137, 142 (1912); Sligh *v.* Kirkwood, 237 U. S. 52, 59 (1915); Chicago & A. R. Co. *v.* Tranbarger, 238 U. S. 66, 77 (1915).

[24]237 U. S. 52 (1915).

[25]233 U. S. 389 (1914).

[26]U. S. Adv. Ops., 1916, pp. 217-231.

> *Oregon,* 208 U. S., 412, 420, that 'it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action.' This, however, does not mean that the form is so rigid as to make government inadequate to the changing conditions of life, preventing its exertion, except by amendments to the organic law."

It was said by Mr. Justice Holmes in *Noble State Bank* v. *Haskell*:[27]

> "It may be said in a general way that the police power extends to all the great public needs. *Camfield* v. *United States,* 167 U. S., 518. It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

The application of the police power to promotion of the public morality, as in the regulation or prohibition of the manufacture or sale of intoxicating liquors,[28] the protection of the public health, as in the prevention of the adulteration of food,[29] or the limitation of the hours of labor,[30] are commonplace.

Measures to safeguard the business prosperity of the state are exampled by the prohibition of monopolies and combinations in restraint of trade;[31] of unfair competition;[32] and even of the sale or shipment of products detrimental to the business reputation of an important industry of a State.[33]

In *Sligh* v. *Kirkwood,*[34] Mr. Justice Day says:

> "We may take judicial notice of the fact that the raising of citrus fruits is one of the great industries of the State of Florida. It was competent for the Legislature to find that it was essential for the success of that industry that its reputation be preserved in other states wherein such fruits find their most extensive market. The shipment of fruits so im-

[27]219 U. S. 104, 111 (1911).

[28]Mugler *v.* Kansas, 123 U. S. 623 (1887); Kidd *v.* Pearson, 128 U. S. 1 (1888); Crowley *v.* Christensen, 137 U. S. 86 (1890).

[29]Plumley *v.* Massachusetts, 155 U. S. 461 (1894); Capital City Dairy Co. *v.* Ohio, 183 U. S. 238 (1902); Price *v.* Illinois, 238 U. S. 446 (1915).

[30]Muller *v.* Oregon, 208 U. S. 412 (1908); Miller *v.* Wilson, 236 U. S. 373 (1915); Holden *v.* Hardy, 169 U. S. 366 (1898).

[31]Waters-Pierce Oil Co. *v.* Texas, 212 U. S. 86 (1909); Grenada Lumber Co. *v.* Mississippi, 217 U. S. 433 (1910); Standard Oil Co. *v.* Missouri, 224 U. S. 270 (1912); International Harvester Co. *v.* Kentucky, 234 U. S. 199 (1914).

[32]Central Lumber Co. *v.* South Dakota, 226 U. S. 157 (1912).

[33]Sligh *v.* Kirkwood, 237 U. S. 52 (1915).

[34]237 U. S. 52 (1915).

> mature as to be unfit for consumption, and consequently injurious to the health of the purchaser, would not be otherwise than a serious injury to the local trade, and would certainly affect the successful conduct of such business within the State. The protection of the State's reputation in foreign markets, with the consequent beneficial effect upon a great home industry, may have been within the legislative intent, and it certainly could not be said that this legislation has no reasonable relation to the accomplishment of that purpose."

If it be true that in any instance the State may legislate in the interest of the health and general business prosperity of its inhabitants, it must follow that health may be preserved against injury by cold as well as by disease or adulteration of food, and that the industry of the State may be protected as well from destruction by deprivation of necessary fuel as from mere injury by practices hurtful to its trade or reputation. Upon this ground, aside from any peculiar relations or obligations affecting public service corporations, it is plain that the State may legislate in defense of its people and its industries in prevention of a real and present danger, arising from deprivation of gas.

INTERSTATE COMMERCE AS AFFECTED BY THE REMEDY

It is urged against the proposed legislation that it amounts to an unconstitutional regulation of interstate commerce, for the reason that if an adequate amount of gas is furnished to this State, the volume of gas transported to foreign States will be diminished. And this objection is argued as if the gas companies held no peculiar relation to this State and were bound by no peculiar obligations to it, and as if the gas affected was a mere ordinary subject of barter and sale, like other commodities. The contention would be the same in principle, and not more startling in form, if the Consolidated Gas Company of New York City, engaged in the supplying of artificial gas to the whole metropolitan territory, should assert the right to abandon its obligations to the citizens of New York, upon the plea that it was entitled to enter into interstate commerce by selling its gas to New Jersey or Philadelphia. Indeed the proposition, when based on the claim of freedom of interstate commerce would equally support a contention that these companies have the right to export from West Virginia to other States the entire stock of gas at their command.

It must be observed that the question here is, not whether a

State may prohibit or restrict the transportation of natural gas from its territory into another State, but *whether the State may require companies—owing to its people the obligation of adequate service—to perform that service,* even though the performance may involve the intrastate consumption of gas which otherwise might be transported to another State.

If these gas companies owe a duty to the people of this State, the performance of that duty cannot be evaded merely because they prefer to enter into interstate commerce rather than to perform it. In *Hudson County Water Co.* v. *McCarter,*[35] in upholding the validity of a New Jersey statute prohibiting the transportation of water from any fresh water stream in the State to a place out of the State, Mr. Justice Holmes said:

> "A man cannot acquire a right to property by his desire to use it in interstate commerce. Neither can he enlarge his otherwise limited and qualified right to the same end."

The same principle is asserted in somewhat different form by three judges sitting in the District Court of the United States for the Northern District of West Virginia, in *Manufacturers Light & H. Co.* v. *Ott.*[36] Although the question before the Court was primarily one of rates, its language is equally applicable to the question of adequacy of service, since the regulatory authority of the State in respect to rates and service rest upon the same basis, the police power. Judge Woods, delivering the opinion of the Court, said:

> "The testimony is undisputed that the main source of natural gas supply is in West Virginia, and that the cost of supplying gas to consumers in that State is necessarily much less than in the other states. It seems obvious that West Virginia corporations supplying gas to the citizens of that State from wells in the State cannot say the rates fixed to consumers in West Virginia are confiscatory, because at the same rates the companies would lose money on business which they had chosen to conduct in other states in association with corporations of those states. Even if it be conceded that interstate commerce is involved, the principle must be regarded as settled beyond dispute."

[35]209 U. S. 349 (1908).
[36]215 Fed. 940, 951 (1914).

And on p. 952, it was further said:

> "The fact that the Manufacturers Light and Heat Co. may have improvidently accepted franchises from municipalities in Ohio and Pennsylvania requiring gas to be furnished at the same rates charged in West Virginia, and that reductions at these points would require gas to be furnished there at less than cost, may be worthy of consideration by the Commission in prescribing the rates in West Virginia.
>
> "But it cannot be controlling, for to hold it so would be to enable the gas companies to *contract away the police power of the State of West Virginia* to require reasonable rates to its own citizens."

And see *State* v. *Flannelly,* 96 Kan. 372, 152 Pac. 22.

It must be noted that, apart from the particular character of the public service corporations affected, the very commodity involved distinguishes the present instance from the other cases to be found in the books. Natural gas is a substance of peculiar character, governed by exceptional rules of law.[37] The sources of supply are limited; the supply itself is exhaustible;[38] and consumption involves the very corpus of gas territory.[39] For this reason natural gas differs essentially from other commodities, and even from those dealt in by ordinary public utilities supplying water, artificial gas or electricity. The waters of a water company are continually replenished from seemingly undiminished natural reservoirs; an artificial gas company can always manufacture new gas; an electric company can generate new power indefinitely. And in the instance of a public utility supplying services, as distinguished from a commodity, such as a railroad or a telephone line, the rendition of the service operates in no degree to diminish the volume of future service. Such instrumentalities may wear out, but they can be duplicated from an abundance of materials.

Given, then, a commodity of peculiar attributes, local in its origin, exhaustible, and, in fact, approaching the point of exhaustion, so that on the one hand it has become a public necessity at home and is, or may be, insufficient both to supply that necessity and to furnish it to consumers abroad, a distinction clearly exists

[37]Brown *v.* Spilman, 155 U. S. 665, 669, 670 (1895); Ohio Oil Co. *v.* Indiana, 177 U. S. 190 (1900); Westmoreland & C. Nat. Gas Co. *v.* DeWitt, 130 Pa. 235, 18 Atl. 724 (1889).

[38]State *v.* Indianapolis Gas Co., 163 Ind. 48, 71 N. E. 139 (1904).

[39]Wilson *v.* Youst, 43 W. Va. 826, 28 S. E. 781 (1897); Rymer *v.* South Penn Oil Co., 54 W. Va. 530, 46 S. E. 559 (1904).

between natural gas and the other articles in respect of which it has been held that interstate commerce could not be directly restricted. In the hands of corporations owing public duties, in the performance of which the public has an interest, *the gas itself is in a just sense to be regarded as affected by a public interest.*

In *German Alliance Ins. Co.* v. *Lewis,*[40] it was held that even the making of personal contracts, such as contracts of fire insurance, might be affected by the public interest. Mr. Justice McKenna there said in reply to the suggestion that only tangible property could be so affected:

> "The distinction is artificial. It is, indeed, but the assertion that the cited examples embrace all cases of public interest. The complainant explicitly so contends, urging that the test it applies excludes the idea that there can be a public interest which gives the power of regulation as distinct from a public use, which, necessarily, it is contended, can only apply to property, not to personal contracts. The distinction, we think, has no basis in principle (*Noble State Bank* v. *Haskell,* 219 U. S., 104), nor has the other contention that the service which cannot be demanded cannot be regulated."

In the recent *Eight Hour Law Case,*[41] decided March 19, 1917, by the United States Supreme Court, it was held that the personal services of the employees of interstate railroads were affected with a public interest.

Assuming then that a gas company, or the commodity in which it deals, is affected by the public interest, precedents are not wanting to show that the principles relating to interstate commerce in ordinary goods and chattels are inapplicable. In *Geer* v. *Connecticut,*[42] and *New York* v. *Hesterberg,*[43] it was held that a State could prohibit the exportation of game killed within its boundaries, and also prohibit the sale therein of game imported from another State. While in these instances the public interest attained the dignity of public ownership, the cases establish that generalizations from authorities referring to ordinary subjects of interstate commerce are inapplicable to a commodity affected with a public interest; and that interstate commerce in a commodity so affected may be restricted, or even prohibited, though such commerce in ordinary merchandise could not be.

[40]233 U. S. 389 (1914).
[41]Wilson *v.* New, 243 U .S. 332 (1917).
[42]161 U. S. 519 (1896).
[43]211 U. S. 31 (1908).

The same conclusion must be derived from *Hudson County Water Co.* v. *McCarter*,[44] which is more directly in point; for there the validity of a New Jersey statute, which prohibited the transportation of water from its fresh water streams to other states was sustained, "independent of the more or less attentuated residuum of title that the state may be said to possess" (page 355), the ground of decision being "the public interest" (pages 355, 356, 357) in the protection of the watercourses of the State. Mr. Justice Holmes said:

> "A man cannot acquire a right to property by his desire to use it in commerce among the states. Neither can he enlarge his otherwise limited and qualified right to the same end."

We do not go so far as to say that the whole quantity of gas existing in a State at any time may be justly regarded as affected by the public interest, so that exportation may be restrained; for if there is an abundance of gas wherewith to serve all present requirements, the public cannot be said to have an interest in any particular part of it. But if the whole quantity of gas is so far reduced that all who at the time desire to consume it cannot be served, and the very gas which is being produced by corporations, themselves affected by the public interest, is immediately necessary for consumption by the people of the State, that very gas may in a correct sense be deemed to be affected with the public interest of the State, and to fall within an exceptional rule.

These considerations would, we believe, sufficiently distinguish the case of *West* v. *Kansas Nat. Gas Co.*,[45] even if the legislation which we now propose directly acted on interstate commerce. There the whole volume of gas produced in Oklahoma was more than sufficient to serve the then gas consuming public of that State, and only the surplus, required by no present necessity in the State, was being transported out of it. Still further, the companies and individuals attacking the validity of the statute there involved were, as more fully appears in the report of the case below,[46] not engaged, and apparently not obligated to engage, in the public supply of gas in Oklahoma. Therefore, neither they, by their business, nor their product, by any existing need, could be said to be affected by a public use. Even in that case, moreover, there was

[44]209 U. S. 349 (1908).
[45]221 U. S. 229 (1911).
[46]Kansas Nat. Gas Co. *v.* Haskell, 172 Fed. 545 (1909).

dissent from the judgment of the Court by Justices Holmes, Lurton and Hughes, a very respectable minority. We shall refer to this decision again, in relation to the commerce clause of the Federal Constitution.

It is no answer to what has been said, that if a State can compel an adequate supply of gas to its citizens and thereby prevent its exportation to a foreign state, another state may impose a similar restriction on the interstate shipment of corn, wheat, lumber or other commodities. Until those commodities, or their production or distribution, shall become affected with a public interest in the sense that the gas business is so affected, no such case will occur. It will be time enough to discuss it when it shall arise. This is the attitude of the Supreme Court of the United States toward such moot questions, when sought to be injected into a controversy before that court. In *Tanner* v. *Little*,[47] in sustaining the validity of a statute imposing a heavy license tax on merchants using trading stamps or redeemable coupons, Mr. Justice McKenna said:

> "Nor is there support of the system or obstruction to the statute in declamation against sumptuary laws, nor in the assertion that there is evil lesson in the statute, nor in the prophecies which are ventured of more serious intermeddling with the conduct of business. Neither the declamation, the assertion, nor the prophecies can influence a present judgment. As to what extent legislation should interfere in affairs political philosophers have disputed and always will dispute. It is not in our province to engage on either side, nor to pronounce anticipatory judgments. We must wait for the instance. Our present duty is to pass upon the statute before us, and if it has been enacted upon a belief of evils that is not arbitrary we cannot measure their extent against the estimate of the legislature."

In *Noble State Bank* v. *Haskell*,[48] where a law requiring banks to maintain a guaranty fund for the protection of depositors was held valid, Mr. Justice Holmes said:

> "It is asked whether the State could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arise."

[47]240 U. S. 369, 385 (1915).

[48]219 U. S. 104 (1911). And see also German Alliance Ins. Co. *v.* Lewis, 233 U. S. 389, 415 (1914).

EFFECT ON INTERSTATE COMMERCE INDIRECT AND INCIDENTAL

If by the proposed legislation interstate commerce is affected, this effect is indirect and incidental, and would not operate to invalidate the law. The direct purpose of the law is to compel the performance of a public duty to the people of this State by those who are obligated to perform it, and by a legitimate exercise of the police power to protect those people from the injury to person and property consequent on the failure to perform the public duty. Conceivably, interstate commerce might not be affected at all, and this would be the case if, as may be true, the gas companies hold in reserve a sufficient gas territory to supply the deficit without subtracting from the quantity of gas transported to other States. But even if the quantity of gas entering into interstate commerce should be diminished as a consequence of the exercise by the State of its regulatory powers, the authorities well establish that the commerce clause of the Federal Constitution would not stand in the way. To argue to the contrary, would be to contend that the State would stand powerless to relieve its citizens from the most flagrant discrimination, or even against *a total deprivation of gas,* at the hands of its public service corporations, which, for gain, preferred to serve consumers in foreign States.

The validity of state legislation incidentally or indirectly affecting interstate commerce has been upheld by repeated adjudications. The principle is clearly stated by Mr. Justice Hughes in the *Minnesota Rate Cases,*[49] where after saying that the states cannot directly tax interstate commerce or prohibit interstate trade in legitimate articles of commerce, he says:

> "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 jurisdiction 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. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the government, because of the necessity that they should not remain unregulated, and that their regulation should be adapted to varying local exigencies;

[49]Simpson *v.* Shepard, 230 U. S. 352 (1913).

hence, the absence 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. Further, it is competent for a state to govern its internal commerce, to provide local improvements, *to create and regulate local facilities,* to adopt protective measures of a reasonable character in the interest of the health, safety, morals, and welfare of its people, although interstate commerce may incidentally or indirectly be involved. Our system of government is a practical adjustment by which the national authority as conferred by the Constitution is maintained in its full scope without necessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which *the state appropriately deals in making reasonable provision for local needs,* it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible."

And again on page 410, we have the exact principle for which we contend, stated as follows:

"In the intimacy of commercial relations, much that is done in the superintendence of local matters may have an indirect bearing upon interstate commerce. *The development of local resources and the extension of local facilities may have a very important effect upon communities less favored,* and to an appreciable degree alter the course of trade. The freedom of local trade may stimulate interstate commerce, while restrictive measures within the police power of the state, enacted exclusively with respect to internal 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.* It was an objection of this sort that was urged and overruled in *Kidd* v. *Pearson,* 128 U. S., 1, to the law of Iowa prohibiting the manufacture and sale of liquor within the state, save for limited purposes. See also *Geer* v. *Connecticut,* 161 U. S., 519, 534; *Austin* v. *Tennessee,* 179 U.

S., 343; *Capital City Dairy Co.* v. *Ohio*, 183 U. S., 238, 245; *Missouri P. R. Co.* v. *Kansas*, 216 U. S. 261."

The principle that interstate commerce may constitutionally be affected indirectly or incidentally by the State in the exercise of its police power has been asserted in many cases, wherein the inevitable result of the regulation within the State has been to subtract from the quantity of a commodity entering into interstate commerce. Examples are readily afforded by the instance of the prohibition of the manufacture and sale of intoxicating liquors;[50] the prevention of the sale of oleomargarine, colored so as to imitate butter;[51] the shipment of game out of the state, or the sale of imported game within the state;[52] the transportation of water out of the state;[53] and the shipment of immature citrus fruit from a state largely engaged in the production of citrus fruit.[54] And it has been held that a general restriction of pipe-line pressure, which in practical result would prevent transportation of gas out of a State, was valid.[55]

The police power of the State embraces to this extent of indirect or incidental interference, not merely commodities which are the subject of interstate commerce, but also the very instrumentalities of that commerce.[56]

Though interstate commerce be incidentally or indirectly affected, the police power of the State includes the authority to compel a reasonably adequate service to the communities within it at the hands of a public service corporation, though it is engaged in interstate commerce; and *up to the point where reasonably adequate local facilities are afforded by a public service corporation, the State may exercise a free hand. Until that point is passed, inter-*

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[50]Kidd *v.* Pearson, 128 U. S. 1. (1888).

[51]Plumley *v.* Massachusetts, 155 U. S. 461 (1894); Capital City Dairy Co. *v.* Ohio, 183 U. S. 238 (1902).

[52]Geer *v.* Connecticut, 161 U. S. 519 (1896); New York *v.* Hesterberg, 211 U. S. 31 (1908).

[53]Hudson County Water Co. *v.* McCarter, 209 U. S. 349 (1908).

[54]Sligh *v.* Kirkwood, 237 U. S. 52 (1915).

[55]Jamieson *v.* Indiana Natural Gas & O. Co., 128 Ind. 555, 28 N. E. 76 (1891).

[56]Smith *v.* Alabama, 124 U. S. 465 (1888); Nashville C. & St. L. R. Co. *v.* Alabama, 128 U. S. 96 (1888); New York N. H. & H. R. Co. *v.* New York, 165 U. S. 628 (1897); Erb *v.* Morasch, 177 U. S. 584 (1900); Southern R. Co. *v.* King, 217 U. S. 524 (1910); Chicago R. I. & P. R. Co. *v.* Arkansas, 219 U. S. 453 (1911); Atlantic Coast Line R. Co. *v.* Georgia, 234 U. S. 280 (1914); St. Louis I. M. & S. R. Co. *v.* Arkansas, 240 U. S. 518 (1916).

state commerce is not unconstitutionally infringed.[57] The cases last cited afford examples of the exercise of this power in respect to both passenger and freight facilities by interstate carriers. They relate in the main to the stoppage of passenger trains at local stations; the inauguration of additional train service; the alteration of narrow gauge track to standard gauge; track connections, and the interchange of cars and traffic. In all of them it is held that the requirement of reasonably adequate local facilities no more than indirectly or incidentally affects interstate commerce. Their substance is negatively stated in *Mobile J. & K. C. R. Co.* v. *Mississippi,*[58] wherein it was said:

> "It is enough to add to that which we have said, that the decree of the supreme court does not work an interference with, or cast a direct burden upon, interstate commerce. The case of the *Illinois C. R. Co.* v. *Illinois,* 163 U. S., 142; *Cleveland C. C. & St. L. R. Co.,* v. *Illinois,* 177 U. S., 514, and *Mississippi R. Commission* v. *Illinois C. R. Co.,* 203 U. S., 335, cited by the companies to sustain their contentions, are not apposite. In those cases there was an interference with interstate trains for local purposes, *though local needs had been adequately supplied.*"

The same proposition is affirmatively laid down in *Chicago, B. & Q. R. Co.* v. *Railroad Commission,*[59] as follows:

> "In reviewing the decision we may start with certain principles as established: (1) *It is competent for a state to require adequate local facilities,* even to the stoppage of interstate trains or the rearrangement of their schedules. (2) *Such facilities existing—that is, the local conditions being adequately met*—the obligation of the railroad is performed, and the stoppage of interstate trains becomes an improper and illegal interference with interstate commerce." * * *

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[57]Gladson *v.* Minnesota, 166 U. S. 427 (1897); Lake Shore & M. S. R. Co. *v.* Ohio, 173 U. S. 285 (1899); Wisconsin M. & P. R. Co. *v.* Jacobson, 179 U. S. 287 (1900); Atlantic Coast Line R. Co. *v.* North Carolina Corp. Com., 206 U. S. 1 (1907); Mobile J. & K. C. R. Co. *v.* Mississippi, 210 U. S. 187 (1908); Missouri P. R. Co. *v.* Kansas, 216 U. S. 262 (1910); Washington *v.* Fairchild, 224 U. S. 510 (1912); Grand Trunk R. Co. *v.* Michigan Railroad Commission, 231 U. S. 457 (1913); Chicago M. & St. P. R. Co. *v.* Iowa, 233 U. S. 334 (1914); Michigan C. R. Co. *v.* Michigan Railroad Commission, 236 U. S. 615 (1915); Chicago B. & Q. R. Co. *v.* Railroad Commission, 237 U. S. 220 (1915); Illinois Central R. Co. *v.* Mulberry Hill Coal Co., 238 U. S. 275 (1915); Seaboard Air Line R. Co. *v.* Railroad Commission, 240 U. S. 324 (1916).

[58]210 U. S. 187 (1908).

[59]237 U. S. 220, 226 (1915).

In *Lake Shore & M. S. R. Co.* v. *Ohio*,[60] the court sustained the validity of a state statute requiring railroad companies to cause three regular passenger trains each way, daily, except Sunday, to stop at a station, city or village containing over three thousand inhabitants, and Mr. Justice Harlan used language directly applicable to the case at bar. He said:

> "Certainly, the State of Ohio did not endow the plaintiff in error with the rights of a corporation for the purpose simply of subserving the convenience of passengers traveling through the State between points outside of its territory. 'The question is no longer an open one,' this court said in *Cherokee Nation* v. *Southern Kansas Railway Co.*, 135 U. S., 641, 657, 'as to whether a railroad is a public highway, established primarily for the convenience of the people, and to subserve public ends, and therefore subject to governmental control and regulation. It is because it is a public highway and subject to such control that the corporation by which it is constructed and by which it is to be maintained may be permitted, under legislative sanction, to appropriate property for the purpose of a right of way, upon making just compensation to the owner, in the mode prescribed by law.' In the construction and maintenance of such a highway under public sanction the corporation really performs a function of the state. *Smith* v. *Ames*, 169 U. S., 466, 544. The plaintiff in error accepted its charter subject necessarily to the condition that it would conform to such reasonable regulations as the State might from time to time establish, that were not in violation of the supreme law of the land. In the absence of legislation by Congress, it would be going very far to hold that such an enactment as the one before us was in itself a regulation of interstate commerce. It was for the state to take into consideration all the circumstances affecting passenger travel within its limits, and, as far as practicable, make such regulations as were just to all who might pass over the road in question. * * *
>
> "It was not compelled to look only to the convenience of those who desired to pass through the state without stopping. Any other view of the relations between the state and the corporation created by it would mean that the directors of the corporation could manage its affairs solely with reference to the interests of stockholders, and without taking into consideration the interests of the general public. It would mean, not only that such directors were the exclusive judges of the manner in which the corporation should discharge the duties imposed upon it in the interest of the public, but that the corporation could so regulate the running of its interstate trains

[60] 173 U. S. 285 (1899).

> as to *build up cities and towns at the ends of its line or at favored points, and by that means destroy or retard the growth and prosperity of those at intervening points.*"

In *Wisconsin, M. & P. R. Co.* v. *Jacobson*,[61] the power of the State to require track connections and facilities for the interchange of cars and traffic at railroad intersections was sustained, the evil sought to be redressed by the statute consisting of practises by which shipments were diverted from one destination to another, because the haul in the one direction was more profitable to the railroad company than in the other. Mr. Justice Peckham said:

> "The question is whether this company in its effort to compel owners of this class of cattle to transport them over its road to Minneapolis, which is a less favorable market, can rightfully refuse to make track connections with another company, by which the owners of the cattle can reach the more favorable market of Sioux City at such a cost as will render the transportation profitable. * * * Can it refuse to obey the commands of the legislature in such case upon the sole ground that it may thereby somewhat lessen the earnings of its road? Or can it refuse to make such connections because, if they were made, wood could be brought from the forests of northern Minnesota to all towns along its line west of Hanley Falls, and there sold for a less price than can now be done, when without such connection being made the demand for the wood along the line of the road of the plaintiff in error is nevertheless constantly decreasing, owing to its quality and price? We think these questions should receive a negative answer. The interests of the public should not be thus wholly, and it seems to us unjustifiably, ignored."

In like manner if the gas companies of this State, deriving their powers from it, may at will, under the guise of the freedom of interstate commerce, carry their gas to points without the State for greater gain, in disregard of the necessities of the people within the State, the inadmissible result would be that the powers derived from this State may be made the instrument of the destruction of the industry and prosperity of the people of this State, while upbuilding the business of foreign States to which they owe no obligation.

The case of *West* v. *Kansas Nat. Gas Co.*,[62] already referred to, is not inconsistent with the above views, and does not militate

[61] 179 U. S. 287 (1900).
[62] 221 U. S. 229 (1911).

against the proposed legislation. In that case, as already noted, neither the corporations and individuals who were plaintiffs, nor their gas, could be said to be affected with a public use; since the persons themselves were not engaged in the business of public gas supply in Oklahoma, and their gas was required by no present necessity in that State. Accordingly, the Oklahoma statute was not in substance, or even ostensibly, enacted in regulation of a public utility, so as to render merely indirect or incidental any decrease in the volume of gas transported out of the State. On the contrary the principal and direct design of the statute was to prevent exportation of gas. This was the more manifest from the discrimination in respect to the use of highways and the right of eminent domain, made between persons engaged in transporting gas within the State and those transporting it to other States. This is pointed out in *Haskell* v. *Kansas Nat. Gas Co.*,[63] a second appeal of the *West Case*. As already noted, also, three Justices dissented from the decision in the *West Case*.

CONSTITUTIONAL PROVISIONS OTHER THAN THE COMMERCE CLAUSE

The constitutionality of the State's exercise of power in the manner contemplated is not successfully impugned by the circumstances that these gas companies have expended money in the construction of pipe lines and pump stations, and that for the supply of gas in foreign States they have made contracts with consumers there. If it be true that the State may validly compel the rendition of adequate service to its people by public service corporations operating within its borders, the State's authority cannot be defeated by expenditures in aid of evasion of that service, or contracts having that result.

The premise that these pipe lines and pump stations were constructed and are used as facilities for the service of consumers in foreign States is fallacious. These instrumentalities were built and are employed for the transportation of an available volume of gas at present consumed in part within this State and in a greater part outside of the State. So long as these lines and stations are employed for the transportation of this quantity of gas, their owners are entitled to a fair return upon the reasonable value of their

[63]224 U. S. 217, 221 (1912).

property so employed for the public convenience.[64] And the right to such fair return is as clear if an increased quantity, or even the whole, of the gas were consumed within this State, as if apportioned to the advantage of other States, as now. The consumption in this State of an augmented amount of gas would of course, result in an enlarged aggregate of the rates paid by the consumers in this State. And it may well be that as a consequence of increased devotion of lines and stations to the service of the West Virginia consumers, or an improbable influence on operating costs, an upward adjustment of rates in this State would be proper. But this, after all, is but a matter of rates. If fairly compensated here, the gas companies are not entitled to refuse to the people of this State an adequate service merely because a greater remuneration can be obtained in some other State.

It is true that in the case of some of these companies, a contraction of the volume of gas conveyed to other States might result in the impairment and ultimate destruction of the usefulness of transportation or distributing facilities serving only those States, so far as West Virginia gas was concerned. But the injury to the owners of these facilities is more apparent than real, when it is borne in mind that the tendency of the gas supply to exhaustion, and the obligation to render adequate service to West Virginia consumers, was as well known on the first day of their career as on the last; and that they had the right and opportunity to anticipate in charges against their foreign consumers the depreciation by way of obsolescence resulting from prospective diminished usefulness of these facilities.[65] Whether or not these companies have disinterestedly refrained from exercising this right to compensate themselves, we will not stop to inquire; but we perceive no reason for assuming the case to be in their favor on this point.

Whatever may be the result in reference to property devoted to the service of consumers in other States or to contracts made with

[64]Coal & Coke R. Co. *v.* Conley, 67 W. Va. 129, 67 S. E. 613 (1910); San Diego L. & T. Co. *v.* National City, 174 U. S. 739 (1899); Cotting *v.* Goddard, 183 U. S. 79 (1901); San Diego L. & T. Co. *v.* Jasper, 189 U. S. 439 (1903); Stanislaus Co. *v.* San Joaquin & K. R. C. & I. Co., 192 U. S. 201 (1904); Knoxville *v.* Knoxville Water Co., 212 U. S. 1 (1909); Willcox *v.* Consolidated Gas Co., 212 U. S. 19 (1909); Railroad Commission *v.* Cumberland T. & T. Co., 212 U. S. 414 (1909); Lincoln Gas & El. Co. *v.* Lincoln, 223 U. S. 349 (1912); Simpson *v.* Shepard, 230 U. S. 352 (1913).

[65]Knoxville *v.* Knoxville Water Co., 212 U. S. 1, 11 (1909); Railroad Commission *v.* Cumberland Tel. & Teleg. Co., 212 U. S. 414, 424 (1909); Simpson *v.* Shepard, 230 U. S. 352, 458 (1913); Kansas City S. R. Co. *v.* United States, 231 U. S. 423, 446 (1913).

them, the constitutional power of this State, nevertheless, remains clear and certain. The expenditures for that property and those contracts were made subject to the police power of the State, and find no protection in the constitutional provisions against the impairment of the obligation of a contract or the deprivation of property without due process of law, or any other guaranty of the State or Federal Constitution. In *Chicago, B. & Q. R. Co.* v. *McGuire,*[66] referring to the right to make contracts, Mr. Justice Hughes said:

> "It is subject, also, in the field of State action, to the essential authority of government to maintain peace and security, and to enact laws for the promotion of the health, safety, morals, and welfare of those subject to its jurisdiction. This limitation has had abundant illustration in a variety of circumstances."

In *Rast* v. *Van Deman,*[67] Mr. Justice McKenna said:

> "Besides, as the business is subject to regulation, the contracts made in its conduct are subject to such regulation. *Louisville & N. R. R. Co.* v. *Mottley,* 219 U. S., 467, and *New York C. & H. R. R. Co.* v. *Gray,* 239 U. S., 583."

In *Chicago & A. R. Co.* v. *Tranbarger,*[68] it was said:

> "But a more satisfactory answer to the argument under the contract clause, and one which at the same time refutes the contention of plaintiff in error under the due process clause, is that the statute in question was passed under the police power of the State for the general benefit of the community at large and for the purpose of preventing unnecessary and widespread injury to property.
>
> "It is established by repeated decisions of this Court that neither of these provisions of the Federal Constitution has the effect of overriding the power of the State to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community; that this power can neither be abdicated nor bargained away, and that all contract and property rights are held subject to its fair exercise. *Atlantic Coast Line R. Co.* v. *Goldsboro,* 232 U. S., 548, 558, and cases cited. And it is also settled that the police power

[66]219 U. S. 549, 568 (1911).

[67]240 U. S. 342, 363 (1916). And see in this connection Portland R. L. & P. Co. *v.* Railroad Commission, 229 U. S. 397 (1913); United Fuel Gas Co. *v.* Public Service Commission, 73 W. Va. 571, 80 S. E. 931 (1914).

[68]238 U. S. 67 (1915).

> embraces regulations designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of the public health, morals, or safety. *Lake Shore & M. S. R. Co.* v. *Ohio,* 173 U. S., 285, 292; *Chicago, B. & Q. R. Co.* v. *Illinois,* 200 U. S., 561, 592; *Bacon* v. *Walker,* 204 U. S., 311, 317."

These principles are concretely illustrated by two cases, standing at the termini of a long period of years, wherein it was vainly urged against the exercise of the police power that property values were thereby depreciated or destroyed. In *Mugler* v. *Kansas,*[69] it was argued against the Kansas prohibition law that brewery buildings and machinery would be materially diminished in value if not permitted to be used for the manufacture of beer. Mr. Justice Harlan said, in rejecting this contention:

> "It is true that when the defendants in these cases purchased or erected their breweries, the laws of the State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. Indeed, as was said in *Stone* v. *Mississippi,* 101 U. S., 814, the supervision of the public health and the public morals is a governmental power, 'continuing in its nature,' and 'to be dealt with as the special exigencies of the moment may require;' and that, 'for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.' So in *Boston Beer Co.* v. *Massachusetts,* 97 U. S., 32: 'If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the Legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer.' "

In *Hadacheck* v. *Sebastion,*[70] a municipal ordinance prohibited brick making within a designated area. It was held that the owner of a tract of land within the prohibited district was not deprived of his property without due process of law, or denied the equal protection of the law, though the land contained valuable deposits of clay suitable for brick making, which could not profit-

[69] 123 U. S. 623 (1887).

[70] 239 U. S. 394 (1915). See also Jamieson *v.* Indiana Natural Gas & O. Co., 128 Ind. 555, 28 N. E. 76 (1891); Northwestern Fertilizing Co. *v.* Hyde Park, 97 U. S. 659 (1878); New Orleans Gas L. Co. *v.* Louisiana L., etc. Co., 115 U. S. 650 (1885); Reinman *v.* Little Rock, 237 U. S. 171 (1915); and Northwestern Laundry Co. *v.* Des Moines, 239 U. S. 486 (1916).

ably be removed and manufactured into brick elsewhere, and was far more valuable for brick making than for any other purpose, and had been acquired by him before it had been annexed to the municipality, and long used by him as a brickyard. It was said by the Court:

> "It is to be remembered that we are dealing with one of the most essential powers of government—one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. *Chicago & A. R. Co.* v. *Tranbargar,* 238 U. S., 67, 78. To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way, they must yield to the good of the community."

In *Hudson County Water Co.* v. *McCarter,*[71] a statute of New Jersey prohibiting the diversion of the water from fresh water streams of the State to other States was upheld as against the owner of water mains laid for the purpose of carrying water from New Jersey to New York. As against the argument that the statute impaired the obligation of contracts, took property without due process of law, denied the equal protection of the laws and interfered with interstate commerce, it was said in part by Mr. Justice Holmes:

> "The defense under the 14th Amendment is disposed of by what we have said. That under article 1, sec. 10, needs but a few words more. One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject-matter. *Knoxville Water Co.* v. *Knoxville,* 189 U. S. 434, 438; *Manigault* v. *Springs,* 199 U. S., 473, 480. * * *
>
> "The other defenses also may receive short answers. A man cannot acquire a right to property by his desire to use it in commerce among the states. Neither can he enlarge his otherwise limited and qualified right to the same end."

Other cases, by express adjudication and concrete illustration, show that the requirement from a public service corporation of adequate service to the public violates no constitutional provision,

[71] 209 U. S. 349 (1908).

even though the rendition of such service is attended with pecuniary loss.[72]

DOUBTS AS TO CONSTITUTIONALITY

It may be readily conceded that the legislative and executive departments of the Government are, equally with the judicial department, bound by the Federal and State Constitutions, and that those charged with the enactment or administration of laws are bound to refrain from unconstitutional acts. But it is equally true that a doubt as to constitutionality, however reasonable that doubt may appear to the individual who entertains it, is no adequate ground for the refusal to enact a law, where the end to be attained is the public welfare, and the means proposed are reasonably calculated to attain that end.

With the progress of civilization social and economic relations become increasingly complex. New evils constantly arise and call for new remedies. The attempt to discover and apply remedies equal to the purpose compel, as they have in the past compelled, a gradual approach, step by step, toward the boundary line between constitutionality and unconstitutionality—a line marked only by the recurring successes and failures of legislation when subjected to judicial examination. As said by Mr. Justice Holmes in *Noble State Bank* v. *Haskell*:[73]

> "With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides."

A reference to cases wherein the Supreme Court of the United States has divided in opinion by a vote of five to four, as in the *Legal Tender Cases*,[74] the *Income Tax Case*,[75] and the *Eight Hour Law Case*,[76] decided March 19, 1917, indicates the uncertainty of the line which in any instance divides the constitutional from the unconstitutional, and shows how little weight ought to be accorded to an individual doubt, however reasonable it may seem. In the

[72]Wisconsin M. & P. R. Co. *v.* Jacobson, 179 U. S. 287 (1900); Atlantic Coast Line R. Co. *v.* North Carolina Corp. Com., 206 U. S. 1 (1907); Missouri P. R. Co. *v.* Kansas, 216 U. S. 262 (1910), hereinbefore quoted; Washington *v.* Fairchild, 224 U. S. 510 (1912).

[73]219 U. S. 104, 113 (1911). See also Hudson County Water Co. *v.* McCarter, 209 U. S. 349, 355 (1908).

[74]Knox *v.* Lee, 12 Wall. 457 (1870).

[75]Pollock *v.* Farmers L. & T. Co., 157 U. S. 429, 158 U. S. 601 (1895).

[76]Wilson *v.* New, 243 U. S. 332 (1917).

Legal Tender Cases, indeed, Chief Justice Chase, in his judicial capacity, held unconstitutional an act in which he had concurred as Secretary of the Treasury. While in *Clark Distilling Co.* v. *Western Maryland R. Co.,*[77] in upholding the Webb-Kenyon Act, the Supreme Court remarked that it was not unmindful that opinions adverse to the power of Congress to enact it were formed and expressed in other departments of the Government, referring to an opinion of the Attorney General of the United States and to a veto message of President Taft.

If the resolution of every doubt as to constitutionality must be awaited before a remedial measure can be enacted, all legislative progress in aid of public welfare would be at an end. The case of *German Alliance Ins. Co.* v. *Lewis,*[78] is an instructive illustration of a successful advance into the untried field of regulation of fire insurance rates, even against the gravest doubts. The *Eight Hour Law Case,*[79] sustaining the Adamson Act, affords another instance of the necessary forward march of legislation in order to meet a great public emergency.

THE NECESSITY FOR DIRECT AND IMMEDIATE LEGISLATION

It has been suggested that a remedy for the present evil may be found in the jurisdiction of the Public Service Commission to prevent unjust discrimination and unfair practices. Our reply is, that the people of this State, if entitled to any remedy, are entitled to one that is swift and sure, and that can alone be provided by the Legislature. Assuming that the Commission already possesses the necessary jurisdiction, its function can only be to inquire into facts already known, and to reach conclusions of law which can be no more effectually settled by the Commission's determination than by legislative enactment.

If the courts are to be invoked, a remedy provided by direct action of the Legislature will, in the courts, be surrounded with a presumption in favor of validity, which no action of the Commission can possess.[80]

The injury suffered is immediate, great and progressively in-

[77]242 U. S. 311 (1917).

[78]233 U. S. 389 (1914).

[79]Wilson *v.* New, 243 U. S. 332 (1917).

[80]See Rast *v.* Van Deman, 240 U. S. 342, 357 (1916); Armour *v.* North Dakota, 240 U. S. 510, 517 (1916); St. Louis, I. M. & S. R. Co. *v.* Arkansas, 240 U. S. 518, 521 (1916); Price *v.* Illinois, 238 U. S. 446, 452 (1915).

creasing. In the very time required for the formulation and enforcement of an appropriate remedy the State is made to suffer in the crippling and discouragement of its people and industry. To relegate this question to the Commission, even though it be assumed to possess the necessary jurisdiction, is but to extend the period of injury.

Assuming the Commission's jurisdiction to exist, and that it is exercised in a way adverse to the gas companies affected, it is too much to suppose that they will accede to the Commission's determination without further contest in the courts. This merely means the prolongation of a controversy, which will inevitably reach the courts, whether based on a finding of the Commission or upon legislative enactment.

It is to be remarked further that the jurisdiction of the Public Service Commission does not in any event extend to the prevention of injury during the time consumed by its inquiry and in proceedings necessary to enforce its determination. It is a distinctive feature of the proposed legislation that it supplies this serious gap in the Public Service Commission Act, which contains no provision for the preservation of the *status quo* pending procedure before the Commission and in execution of its orders.

But does the jurisdiction of the Commission exist? No one can with certainty answer this inquiry. It must be borne in mind that the situation is an anomalous one, requiring a remedy new in its method of operation and its details, though falling within settled principles of law. Application to the Commission would inevitably result in a contest as to the jurisdiction and remedial procedure of the Commission. A determination by the Commission in favor of its own jurisdiction and procedure would be but a prelude to a further contest in the courts as to them, as well as upon the merits of the controversy. In case it should be judicially determined that the Commission is without jurisdiction, the people and the Legislature would find themselves in a situation similar to that which they now occupy—the people without a remedy, and the Legislature called upon to provide one. The only alteration of circumstance would arise from the fact that, during the period of fruitless contest, the gas supply of the State would tend more nearly to the point of exhaustion, leaving it then questionable whether any remedy would be worth the having. What the Legislature could do then by way of affording a remedy, it can as well do now.

A final observation may be made, which is but a repetition of

what has been already said—that the need of a remedy is urgent and a remedy granted after delay will defeat itself. The people and industries of this State, having passed through two winters of great injury and loss, are called upon now to forecast and prepare for the next winter. In the case of those whose domestic and business arrangements require their continued residence in West Virginia, in the absence of a legislative remedy, inconvenient and expensive arrangements for the substitution of other fuel will be necessary. In the instance of those industries to which an adequate gas supply is of the first importance, it may be anticipated that, in the absence of a tangible prospect of effective relief, a remedy will be found in removal to other states where the circumstances are more favorable.

APPENDIX

An Act to inhibit persons engaged in the business of furnishing natural gas to the public, or any part of the public, of this state, from transporting natural gas out of this state, unless and until such public, or part of the public, is adequately protected and served; to enable any such person so serving natural gas to said public, or part of the public, of this state, to obtain a deficiency in his supply of natural gas by purchase from any like person or persons having a supply thereof in excess of the requirements of their consumers in this state; to provide remedies for the enforcement of this act, and punishment and penalties for violations thereof; and to repeal all acts or parts of acts inconsistent therewith.

Be It Enacted By the Legislature of West Virginia:

SEC. 1. That no person engaged in or carrying on the business of furnishing natural gas for public use within this state, or for the use of the public or any part of the public, whether for domestic, industrial or other consumption, within this state, shall hereafter transport out of this state, or from one place to another within this state, any natural gas intended to be consumed or for the purpose of consumption in any other state or territory of the United States, or in the District of Columbia, or in any foreign country, unless and until such person so engaged in or carrying on said business shall, at the time of such transportation, have withheld from such transportation and at such time shall furnish for public use within the territory in this state, and for the use of the

public and every part of the public within the territory in this state in or from which such gas is produced, or through which said gas is transported, or which is served by such person, a supply of natural gas adequate for the purposes, whether domestic, industrial or otherwise, for which natural gas is consumed or desired to be consumed by the public, or any part of the public, within said territory in this state, and for which said consumer or consumers therein are ready and willing to make payment at lawful rates.

SEC. 2. That in case any person engaged in or carrying on the business of furnishing natural gas for public use within this state, or for the use of the public, or any part of the public, within this state, shall have a production or supply of natural gas which is, or probably will be, insufficient to furnish for such use (for the purposes, whether domestic, industrial or otherwise, for which natural gas is consumed by the public, or any part of the public) within the territory in this state served by such person, then and in that event the Public Service Commission shall have authority, and the same is hereby conferred on it, upon the application of any such person or any of the consumers thereof consuming natural gas within this state, to order, after due notice and hearing, any other person engaged in or carrying on a like business and producing or furnishing natural gas for public use in said territory, or transporting the same through said territory, to furnish to such person having such insufficient production or supply, natural gas for the purpose of supplying such deficiency, at and during such times, upon and at such just and reasonable terms, conditions and rates, and in such amounts, as said Commission shall prescribe; provided, however, that no person shall, by virtue of this section, be ordered to furnish natural gas to any other person engaged in or carrying on the business of furnishing natural gas for public use, except to the extent that the person so ordered to furnish natural gas shall, at the time of such furnishing, have a production or supply of natural gas in excess of the quantity requisite and necessary to adequately supply the consumers within this state of the person so ordered to furnish gas.

SEC. 3. That in case of the violation of any provision of this act any person aggrieved or affected thereby may complain thereof to the Public Service Commission in like manner, and thereupon such procedure shall be had as is provided in respect to other complaints to or before said Commission, and all such proceedings and remedies may be taken or had for the enforcement or review of the

order or orders of said Commission, and for the punishment of the violation of such order or orders, as are provided by law in respect to other orders of said Commission. In case of the violation of any provision of this act, the Public Service Commission, or any person aggrieved or affected by such violation, in his own name, may apply to any court of competent jurisdiction by a bill for injunction, petition for writ of mandamus or other appropriate action, suit or proceeding, to compel obedience to and compliance with this act, or to prevent the violation of this act, or any provision thereof, pending the proceedings before said Commission, and thereafter until final determination of any action, suit or proceeding for the enforcement or review of the final order of said Commission; and such court shall have jurisdiction to grant the appropriate order, judgment or decree in the premises.

SEC. 4. That every person who shall violate any of the provisions of this act, or who procures, aids or abets any violation of any of the provisions of this act, shall be guilty of a misdemeanor and thereupon shall be fined not more than one thousand dollars, or be confined in jail not more than one year, or both, in the discretion of the court. When any person is convicted of a violation of this act and it is alleged in the indictment on which he is convicted, or by the jury found, that he has been before convicted of a violation of any of the provisions hereof committed prior to the violation for which conviction upon said trial was found, then he shall be fined not less than two hundred dollars nor more than one thousand dollars, or be confined in jail not less than thirty days nor more than one year, or both. When any person is convicted of a violation of this act and it is alleged in the indictment on which he is convicted, or is admitted, or by the jury found, that he has been twice or oftener before convicted of a violation of any of the provisions hereof committed prior to the violation for which conviction upon said trial was found, then he shall be fined not less than five hundred dollars nor more than five thousand dollars, and shall in addition thereto be confined in the county jail not less than three months nor more than one year.

SEC. 5. That if any person subject to the provisions of this act shall fail or refuse to comply with any requirement of the Commission hereunder, such person shall be subject to a fine of not less than one hundred dollars nor more than five hundred dollars for each offense; and such person, or the officers of the corporation where such person is a corporation, may be indicted for their fail-

ure to comply with any requirement of the Commission under the provisions of this act, and upon conviction thereof, may be fined not to exceed five hundred dollars, and, in the discretion of the court, confined in jail not to exceed thirty days. Every day during which any person, or any officer, agent or employee of such person, shall fail to observe and comply with any order or direction of the Commission, or to perform any duty enjoined by this act, shall constitute a separate and distinct violation of such order or direction of this act, as the case may be.

SEC. 6. That any person claiming to be damaged by any violation of this act may bring suit in his own behalf for the recovery of the damages from the person or persons so violating the same in any circuit court having jurisdiction. In any such action the court may compel the attendance of the person or persons against whom said action is brought, or any officer, director, agent or empleyee of such person or persons, as a witness, and also require the production of all books, papers and documents which may be useful as evidence, and in the trial thereof such witness may be compelled to testify, but any such witness shall not be prosecuted for any offense concerning which he is compelled hereunder to testify.

SEC. 7. That the word "person" within the meaning of this act shall be construed to mean, and to include, persons, firms and corporations.

SEC. 8. That the sections, provisions and clauses of this act shall be deemed separable each from the other, and also in respect to the persons, firms, corporations and consumers mentioned therein or affected thereby, and if any separable part of this act be, or be held to be, unconstitutional or for any reason invalid or unenforceable, the remaining parts thereof shall be and remain in full force and effect.

SEC. 9. That all acts and parts of acts in conflict with this act are hereby repealed.