

ARE COURTS THE BULWARK OF PRIVILEGE?

(For the Review.)

By FREDERICK CYRUS LEUBUSCHER.

The Court of Appeals of the State of New York has just decided the case of *People vs. N. Y. Carbonic Acid Gas Co.* (196 N. Y. 421), reversing the judgment of the lower courts which restrained this Company from so using its mineral springs at Saratoga as to exhaust the natural supply. I will not discuss the technicalities that lead the Court of Appeals to reverse the judgment, but desire merely to call attention to a portion of the opinion of Chief Judge Cullen, which is of grave moment to all the people of the Empire State. This reads as follows:

"It is urged that the public have such an interest in the mineral waters of Saratoga, because of their great curative and health giving properties, that the legislature may interpose for their protection under the right of the state in the exercise of its police power 'to protect and develop its natural resources,' even though the waters themselves are the property of private persons. I deny that the police power vests in the legislature any such right. 'The police power of the government, as understood in the constitutional law of the United States, is simply the power of the government to establish provisions for the enforcement of the common as well as civil law maxim, *sic utere tuo, ut alienum non laedas* (Tiedeman's limitations of Police Power, p. 4), that is to say, one cannot use his own property so as to injure the rights of others, nor can he use it in such a manner as to offend against public morality, health or peace and good order. In the exercise of this power, doubtless, the legislature may not only prohibit acts of commission on the part of the owner, but acts of omission, provided the result of such omission is to evade the rights of others or those of the public. But under that power the legislature cannot require an owner to use his property for the advantage and benefit of others or of the public, or even for his own benefit, nor restrain him from devoting it to such purpose as he sees fit, or even from wasting it, provided such use does not conflict with the rights of others or the public. (Matter of Ryers, 72 N. Y. 1.) *A man owing a coal mine may mine the coal and waste it, regardless of the interest of the present generation or of succeeding ones.* It is not that such conduct would not be an evil, but because the people who framed our system of government, taught by experience, deemed it wiser to trust the use of property to the dictates of the intelligent self-interest of the owner, rather than to subject it to governmental interference."

I venture to disagree with the learned judge, not only because the doctrine he enunciates bolsters up every special privilege, but because it is subversive of a long line of precedents,—usually so dear to the heart and mind of the average judge. From Justinian, through Blackstone and Kent, it has ever been held that "for the commonwealth a man shall suffer damage as for the saving of a city or town." Thus, in the case of a general conflagration, the authorities may blow

up and otherwise destroy buildings for the purpose of preventing the spread of the flames. This may be considered, however, only an extreme application of the "police power" of the government. I would go further and claim that whenever the private exploitation of a natural opportunity of resource interferes with the well-being of the public, the government representing the public can and should step in to prevent such use.

I am specially concerned with one sentence in the opinion of the Chief Judge, viz: "A man owning a coal mine may mine the coal and waste it, regardless of the interest of the present generation or of succeeding ones." The *reductio ad absurdum* of this doctrine is, that if one man could acquire control of all the coal deposits of the world, he might arbitrarily, for selfish or whimsical reasons, shut down all the mines for a year. Can it be seriously contended that for the consequent poverty, suffering, misery and death, the people have no remedy? Only a few years ago, during the strike in the anthracite coal fields, the dictum of the learned judge had a practical application; and the statement of Mr. Baer, that God in his wisdom had intrusted these coal fields to him and his associates, to do with them as they saw fit, was ridiculed from ocean to ocean.

All civilized governments exercise the right of eminent domain,—the constitutional right of taking any and all privately owned lands for public purposes,—thus drawing a sharply defined line between real estate and personal property. Unmindful of this fundamental distinction, Judge Cullen falls into the common economic error of classifying natural opportunities and resources with wealth and capital. Coal deposits are, economically considered, land, and wealth is produced by the application of labor to land. A man has the right to do whatever he will with the product of his labor or with the wealth that he acquired from exchanging that product with the product of others; and no government should interfere with the exercise of that right, however arbitrarily he may use his wealth. Land, however, including coal deposits, is not and never has been, a product of labor. It was given by God or nature to all men for their use and enjoyment, for man by the very nature of his being is a land animal. If a man therefore so uses any portion of this globe as to interfere with the equal rights of his fellowmen, a government can and should step in to restrain him.

In writing of the police power of a government Chief Justice Shaw said in *Commonwealth v. Alger* (7th Cushing 53)—"It is easier to perceive and realize the existence of this power than to mark its boundaries or prescribe limits to its exercise." The numerous conflicting decisions of federal and state courts on this question of police power, show this to be true. I contend, however, that if our courts, whenever this question comes before them, would constantly bear in mind the economic distinction between land and wealth, much less confusion would result.

The Court of Appeals will, before many years, when opportunity offers, take occasion to disavow as *obiter* the opinion of Chief Judge Cullen that "A man owning a coal mine may mine the coal or waste it, regardless of the interest of the present generation or of succeeding ones." This august court will also,

I firmly believe, some day point out the distinction between land and natural opportunities on the one hand, and wealth and capital on the other, and will no longer hold, with reference to natural resources, that "the people who framed our system of government, taught by experience, deemed it wiser to trust the use of property to the dictates of the intelligent self-interest of the owner rather than to subject it to governmental interference."

It was, of course, not within the power of the judicial branch of the government to recommend to the legislative branch a solution of this problem, even though the chief judge intimates in this opinion that unrestricted private ownership of natural resources and opportunities is an "evil." I am not hampered by judicial robes, and can exercise the right of the humblest citizen to advise the representatives of the people. I suggest therefore that the dispute as to the use of coal lands and other natural resources and opportunities would be solved automatically under an extension of the taxing power of the government. Take the coal deposits for instance. Probably not more than one per cent. of the coal-bearing lands of the United States is being mined. Were these lands taxed to their full rental value, the owners would either be obliged to work them or to abandon them for others to work. The result would be not only an enormous revenue which would allow a repeal of the taxes on industry, but, by competition, the price of coal would be greatly lowered. A similar tax on all land to the full rental value thereof would result in: 1st. The settlement of disputes between the public and private individuals as to their respective rights. 2nd. The relief of both labor and capital from the burdens of taxation. 3rd. The consequent increase of production. 4th. The increase of the purchasing power of both labor and capital. 5th. The diminution of poverty, and of crime, its sister, lessening the necessity for so many policemen, courts, almshouses and jails. 6th. The consequent simplification of government.

AUTHOR'S NOTE.

This important case can be considered from another standpoint, one of perhaps more immediate public interest. The doctrine promulgated by the chief judge makes the fight for the conservation of our natural resources so ably begun and continued by Gifford Pinchot, all the more opportune. Were it not for Mr. Pinchot and his supporters, the water rights, coal-bearing and other lands, still remaining in the possession of the Federal government, would, ere this, have come under private control, to be held out of use or wasted "regardless of the interest of the present generation or of succeeding ones." Mr. Pinchot has truly said that the final closing to settlement and development of the public lands by their passing into private ownership, marks the end of the epoch of comparative freedom for the masses. It would not only mark the end of the freedom that is still left to us, but it would plunge the poor into still deeper poverty. Mr. Pinchot is entitled to the support of all lovers of freedom and of man. His hands should be upheld, whether he believes in the Single Tax philosophy or not, for ere long he will realize that the way to get freedom for every American—not comparative freedom, but freedom—is by compelling all owners of land to pay into the public treasury that value which they themselves did not produce. Until he has realized this, I think it is the duty of all Single Taxers to applaud and to second his efforts. For the decisions of our Court of Appeals are highly thought of by the courts of sister states, and are followed by most of them; and the Pinchot agitation will offset the tendency toward the general adoption of Judge Cullen's doctrine throughout the United States.