CHAPTER XIII

SOME SPECIAL PROBLEMS

Mineral Lands

After all, is taxation upon land values the final answer to all the relations between the State and the property under its jurisdiction, or the State and its citizens? We think not, for the following reasons:

All land is not of the same nature. We have pointed out the value of our deposits of coal, iron, oil, gas, etc. These are alike in not being replenishable. When once brought to the surface they are forever separated as substances of value from the land of which they formed a part. While we have followed the usual course of treating them as subject to taxation, we must now, to avoid ultimate error, indicate their true nature. They are part of the great natural wealth of mankind, and, like all other landed values, owe their desirability to the existence of a civilized society. To the savage they mean little or nothing. To civilization they are vital. Society has a first right to benefit from them.

A tax levied upon such natural deposits evidently cannot be fixed or measured by the same rule as a tax upon land not containing them. Such deposits are diminishing assets, for mines and the like gradually become exhausted. The return from this source is not constantly renewable as are the usual surface values. The proper tax charge upon them, when appropriate, is a royalty for the privilege of their extraction. In some cases, as in Minnesota, they are so treated. Inasmuch as their removal permanently diminishes the value of the land from which they are taken a large portion of the product should go to common use ere it be lost to the community forever.

Taking such natural wealth would deprive no owner of anything of his creation. Again, as he has after all no individual monopoly of mineral resources, save in certain limited instances to be considered later, it will be impossible for him to charge against the community the amounts he may so pay as royalty. The Ricardian law of rent—the competition between lands of varying advantages—will operate to hold down his ultimate charge to the public. A heavy royalty charge on rich ore land will only take away some of its advantages over less favorably situated bodies of ore or other material, which, seeking a market, will be a brake upon high prices. Meanwhile, undeveloped lands of known richness can be dealt with through taxation, and for a long time we shall similarly deal with developed lands. Even if we term the charge a tax the nature will be that of a royalty.

Special problems may arise to be disposed of where met. For instance, too great a tax on undeveloped oil and gas lands may force a development and expansion in product for which the existing market may not be prepared. The same consideration may apply to forest lands, to be hereafter discussed. These may only offer real problems as long as we regard such natural wealth as the proper subject for private ownership.

The subject requires further examination. Because all metals and minerals are subsoil deposits, it does not follow that they are of the same nature or that they should receive identical treatment. Proceeding further with our analysis, these deposits may be divided into metals—as copper, silver, iron, etc.—and substances of a movable or wandering nature, as oil and gas. The metals, after being mined and refined, offer no problems other than those pre-

sented by any other human production. The situation as to oil and gas is somewhat different.

It is an old idea with us that the title-owner of a surface area of the earth owns down to the center of the earth and up to the heavens. This is purely an assumption based on conditions that no longer exist. In these days of the airplane and radio we deny any ownership of the air or space above the earth's surface beyond its utilizable limits for structures resting upon the earth. Below the surface we often reject the popular idea, since today the owner of the apex of a mining vein is allowed to follow it laterally, even under ground the surface of which is owned by his neighbor. The old idea yields to the public convenience afforded by the adoption of a different assumption.

Usually, the owner of the surface land has been permitted to extract oil and natural gas down to the depths of between one and two miles, (that is to say, as far as he could reach) and to waste them as he pleased. The man who drills a well expects to draw oil and gas from beneath his neighbor's lands for indefinite distances as well as from within his own boundaries. These deposits extend over wide areas not bounded by any exact surface lines. The surface owner takes to himself wealth to which no man has a proven title. Is this conduct justified by the peculiar circumstances attendant upon pools of oil or gatherings of gas? Examination convinces us otherwise.

The idea of individual ownership between surface lines prolonged downward to the center of the earth and upward as high as the heavens, becomes an impossible theory, which for the public benefit must be modified with respect to oil and gas, and as has been done in California with regard to underground waters, and denied universally in the treatment

of the radio and airplane in the field above the surface. Some appreciation of this fact is shown by the organization of owners of oil lands who, to prevent waste and duplication of effort, have been driven to treat this form of subsoil ownership as something to be held in common, and pro-rate production according to the surface ownership. These owners, however, ignore the superior rights of the public. Already, nevertheless, the State steps in to control the production of oil and wastage of gas, by virtue of its elastic "police power."* This, however, can only be exercised in the interest of the public. Its mere exercise is the assertion of a public right superior to any private interest. This allows no recompense to the private owner.

But the existence of oil and gas in great quantities in isolated places under ground finds a certain analogy in surface conditions as to water—an analogy which may be followed to the public advantage.

Upon the surface of the ground we find great areas where water collects and where private ownership of the land under water is forbidden in the public's interest. From such areas come the water supplies necessary for our great cities. In our present civilization, heat and power are essential—only sec-

* The recent California case of People ex rel. vs. Associated Oil Co. et al. (U. S. Daily, Dec. 20 and 22, 1930) treats control of oil and gas as within the police power of the state. It further declares that "such substances, because of their pecularity in the natural state [described as "fluctuating, uncertain, fugitive nature"] partake more of the nature of common property, title to which becomes absolute when they are captured and reduced to possessions. Because of their peculiar nature the public has a definite interest in their preservation from waste and destruction. This is true because of their character as natural resources and also because the public interest has attached by virtue of positive statutory law or by court judgment independent of statute." The statute under examination declared that the people of the State of California are hereby declared to have a primary and supreme interest "in such deposits."

ondary to water and food—and under the ground instead of over it, as with water, we find great stores of both in oil and gas. To utilize these stores once brought to the surface, we require great piping systems extending hundreds, even thousands, of miles. Again, an analogy is found in our water supplies, for the service of which great cities expend sometimes hundreds of millions of dollars.

Once more we encounter the test of which we have spoken. Any business requiring the exercise of the governmental function of eminent domain—the condemnation of private property for public purposes or the exclusive use of public property—is naturally public business; any which may be carried on without such exclusive franchise is private, and not to be interfered with by the State. (This is not denying the right of the State to carry on certain operations of a large public nature, such as schools, post-offices, etc., but marks a limit which should not be invaded by private interests; otherwise government abdicates its proper functions.) Therefore the transportation and subsequent distribution of oil and gas, as far as carried through pipelines, becomes a public matter, as in the case of water, and ceases to be a matter of taxation, while their extraction may also be a public affair.

We do not say that the State may not, at its option, permit private persons and corporations to bring the State's own property in oil or gas to the surface and establish refineries. This is a subordinate consideration. So may they be permitted to retail it. But oil and gas and their ordinary transportation and distribution by way of pipelines involve public considerations.

The distinction between such substances as oil and gas, on the one hand, and other products of the sub-

soil, such as copper, silver, tin, iron, etc., will not be lost sight of. The former often require the power of eminent domain for their distribution; the latter do not. The first we would incline to make subject to royalties; the pipelines to public ownership and distribution. Taxation can only temporarily alleviate the situation.

We do not pretend that we have suggested the final answer to the problem. Our suggestions are tentative. The answer may or may not come through State ownership and management of these particular natural opportunities, or State ownership and private operation, or otherwise. We are not unmindful of the report made by Justice Sankey of the British Coal Industry Commission in 1919, which has an application to other substances than coal. He said:

"I. I recommend that Parliament be invited immediately to pass legislation acquiring the coal royalties for the State and paying fair and just compensation to the owners."

"II. I recommend on the evidence before me that the principle of State ownership of the coal mines be accepted."

In these recommendations the majority of the Commission joined, though three did "not agree that any compensation whatever should be paid to the present mineral owners for the mineral rights to be acquired by the State." They, however, did not object to the "grant of compassionate allowances" to small royalty owners deprived of the means of livelihood.

Again, we may learn something from the rules of the civil law as administered by Spain in Mexico. Under these, the ownership of subsoil wealth was vested in the Crown and afterward in the Republic of Mexico. This condition was departed from during the Diaz regime, but restored under the Constitution of 1917. This provides in its Article 27 that

"In the nation is vested direct ownership of all minerals or substances [in the subsoil], solid mineral fuels, petroleum, and all hydro-carbons—solid liquid, and gaseous. * * *

"The ownership is inalienable, * * * Concession shall be granted to private parties or * * * corporations organized under the laws of Mexico, only on condition that said resources be regularly developed, and on the further condition that the legal provisions be observed."*

Ownership of the subsoil substances is therefore denied to surface owners, though the subsoil is open to private exploitation on terms fixed by the State.

We may again remember that the "police powers" of the State have been greatly extended in recent years, and this term the courts have carefully abstained from definitely defining. Applications of this power are furnished through recent attempts in California and elsewhere to check the waste of natural gas and control the production of oil. These we have shown are sustained by the courts. Each of these attempts is a denial of complete ownership, as against the public, of subsoil products in the hands of surface owners. The final determination of this question is left to the future.

Forest Lands

The last hundred years have witnessed the destruction under private ownership of the larger portion of our natural timber wealth, with no adequate attempt at reforestation. The mischief has been done. How shall it be repaired? The present owners naturally object to the payment of any considerable tax upon the land, in view of the fact that for a long course of years it will not again be productive enough to pay any but the slightest tax. To remedy this situation there has been suggested, and to some extent put into operation, a small present tax, with a special

*Gruening's **Mexico And Its Heritage**, p. 101.

tax on the product when cut. How workable this may be can only be shown after many years. It seems not very feasible, though some large corporations think they can operate under it before stockholders become too impatient. After all, forests are nothing but crops, though the maturity be long deferred, a period so long that private owners cannot be expected to wait for a return.

The director of the Forest Taxation Inquiry, Professor F. R. Fairchild, (Circular, Forest Service, Department of Agriculture, April 5, 1928) recognizes the futility of attempts to treat the forest situation through taxation, for he says: "It is evident that under present circumstances a perfect system of forest taxation is unattainable. Any system devised upon the basis of the foregoing principles"—such as we have indicated—"must be in the nature of a compromise between conflicting considerations, a weighing of advantages and disadvantages."

Meanwhile, the general government and many State governments are proceeding rapidly to acquire large cut-over regions, and turning them into forestry parks. The solution seems to be in this direction. In taking it, we will be but following the lead of Europe, particularly Germany, where many towns and villages derive much of their revenues from their own forest holdings.

Transportation, Power and Light, and Like Monopolies

Some feel that the taxation of land values and nothing else in these cases will afford a solution. To this we absolutely dissent. Any tax on pure monopoly, such as public utilities, either on land or on both land and improvements, is usually shifted. Ability to shift in other cases we discuss elsewhere. The courts or utilities commissions allow a fair return on pru-

dent investment or reproduction cost and outlay of all needed kinds, and their charges take the element of taxation into account. If we call the tax on monopolies a franchise tax, the situation is in nowise altered. The tax is carried into the cost of the thing produced by the monopoly and is paid by the consumer, else it does not receive the return allowed it by the courts or utilities commissions. Hence it is well nigh useless to tax monopolies of this nature. Only when the monopoly yields less than the allowed return can the tax rest upon its owner. For this reason, and others which we have outlined herein, the public should own these monopolies.

Special considerations apply to patents, of which, as affected by taxation, we shall speak later.

Monopoly and Privilege

These words are often used almost interchangeably, and yet they offer essential differences. Monopoly implies complete control of a particular subject within its sphere of operation. A privilege is a favor which may be conferred on few or many. If on a few only, the conditions surrounding it may, however, create what is by the exclusion of others almost tantamount to a monopoly.

While one often speaks of land monopoly, the words usually signify only the privilege of land ownership. In its customary aspects this offers no monopoly, because the owners of similar privileges are so numerous as to prevent real union among them. The privilege may be valuable, but it is not exclusive as in the case of a monopoly. Therefore, there is constant rivalry and competition. So long as such a condition exists, the Ricardian law of rent comes into play through competition of land of lesser value with land of superior advantages. Thus taxation tends to

keep down the value of the privilege and taxes on land values can not be shifted unless the entire rental value be taken, when competition for land will cease.

In exceptional cases a privilege within circumscribed areas of a limited class of subjects may result in a kind of monopoly. Thus, where cotton-mill owners control all the land on which their operatives live and do business, they may enjoy a limited monopoly. This is, however, restricted by the fact that if their terms become too onerous their workmen may leave.

A more important illustration is afforded by the ownership of great bodies of iron ore. Three large companies are believed to control the most valuable beds of iron ore our land possesses. Nevertheless, they are in a certain degree in competition with each other and with other corporations and private owners, as well as to some extent foreign owners of iron beds. Their monopoly is an imperfect one, though their privilege is undoubted. The unity is not so perfect as to prevent competition, and therefore the Ricardian law of rent continues effective. If all such beds in the world, or even in this country, were under one management, there would be real monopoly.

We are not unmindful of the European cartels which are aimed to create absolute monopolies, or of the attempted union of all copper producers. Their success in the long run is yet to be proven. If successful for a time, the reaction may carry disastrous consequences to them.

The fact that there is always a possibility of an absolute—or practically absolute—monopoly of mineral beds may ultimately lead nations to incline to a broad application of the view of Justice Sankey and his associates as to coal, or to the practice of Mexico, but this is not a question of today.

But other monopolies exist where the shifting of taxes is possible. First, consider the situation of a basic patent. All persons operating in a given field may be forced to use it if they are to continue in business. The patent owner may charge what he will. Any tax upon business using such patent will be shifted to the consumer. The United States Shoe Machinery Company, for instance, through its patents brings about an unnecessarily high cost for shoes. Where the patent is not basic, shifting may not be so easy because of competition. The patent will then partake more of the nature of a privilege.

Where real monopoly exists, private ownership creates many evils, and another method than taxation must be sought.