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THE POLICE POWER AND THE THIRD ESTATE

By

Charles L. Casper*

It is well recognized in Pennsylvania that there may be three estates in land, namely, mineral, surface and right of support, so that one person may own the coal, another the surface and the third party the right of support.¹ In the absence of express waiver or the use of words from which the intention to waive clearly appears, the grantee of minerals takes the estate subject to the burden of surface support.² Where there is a separation of the minerals from the surface, the owner of the mineral estate owes a servitude of sufficient support to the superincumbent estate.³ This servitude of support is an estate in land, sometimes referred to as "the third estate".⁴

While it is true that a servitude of support of the surface may be owed by the owner of the mineral estate to the owner of the surface, it is equally true that the owner of the fee in the entire estate may grant the surface and release his right to surface support, or he may convey the surface and reserve the minerals with the right to mine and remove them without liability for any damage done to the surface. In such cases the owner of the minerals has the right to mine all the coal even though it results in the surface falling in.⁵ It has thus become common practice in the anthracite coal regions for much of the surface to be owned without any right of surface support, principally because most tracts of land were owned by coal companies who would only convey the surface with a reservation of minerals and the right to mine the same without any liability for damage done to the surface by reason thereof. This legal situation has permitted the owners of mineral rights to cave in large areas of surface on which have been erected valuable improvements.

To remedy this situation, in 1921 the Pennsylvania General Assembly passed the Kohler Act.⁶ This statute made it unlawful for any owner or other person in charge of any anthracite coal mine or mining operation so to mine anthracite coal as to cause the caving in, collapse or subsidence of (a) any public building

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² Penman v. Jones, 256 Pa. 416; 100 A. 1043 (1917).
⁵ Graff Furnace Co. v. Scranton Coal Co., 244 Pa. 592, 91 A. 508 (1914).
⁶ Act of May 27, 1921, P.L. 1198, 52 P.S. section 661 et seq.
or any structure customarily used by the public as a place of resort, assemblage, or amusement, including, but not being limited to, churches, schools, hospitals, theatres, hotels and railroad stations; (b) any street, road, bridge, or other public passageway, dedicated to public use or habitually used by the public; (c) any track, roadbed, right-of-way, pipe, conduit, wire, or other facility, used in the service of the public by any municipal corporation or public service company as defined by the Public Service Company Law; (d) any dwelling or other structure used as a human habitation, or any factory, store, or other industrial or mercantile establishment in which human labor is employed; (e) any cemetery or public burial ground. The statute placed duties on municipal officers to prevent mining in violation of the Act, and conferred power on courts of common pleas to award injunctions to restrain violations of the Act.

The conditions which impelled the legislature to pass the Act are set forth in the preamble as follows: "Whereas, the anthracite coal industry in this Commonwealth has been and is being carried on in populous communities in such a manner as to remove the entire support of the surface of the soil to such an extent as to result in wrecked and dangerous streets and highways, collapsed public buildings, churches, schools, factories, streets, and private dwellings, broken gas, water and sewer systems, the loss of human life, and in general so as to threaten and seriously endanger the lives and safety of large numbers of the people of the Commonwealth. . . ." When the governor signed the bill, he stated that "lives have been lost, homes, churches and schools destroyed, and an ever-present peril has threatened the morale of the entire community"; and he added that "for a generation, the appeal... to save the situation has been heard at the capitol."

Pursuant to the provisions of this statute, one Harold J. Mahon and his wife, owners of premises in the City of Pittston, which they occupied as a residence, brought a bill in equity in the Court of Common Pleas of Luzerne County to restrain the Pennsylvania Coal Company from mining any coal under their property, alleging that the removal of such coal would cause the caving in, collapse or subsidence of their dwelling house, contrary to the provisions of the Kohler Act. The Court found that if not restrained, such mining would cause the caving in, collapse and subsidence of the surface, together with the dwelling, which would cause injury to the plaintiffs, but refused the injunction on the ground that the defendant as the owner of the coal had an absolute right to remove it, free from all liability thereby inflicted, and that no interest was involved except the private injury to the plaintiffs. Plaintiffs appealed to the Supreme Court of Pennsylvania, and numerous parties intervened, including the Attorney General of Pennsylvania and the City Solicitor of the City of Scranton. The court did not confine itself to a consideration of the narrow issue of the facts involved, but considered the constitutionality of the Kohler Act itself as a reasonable and

valid exercise of the police power. The majority of the court speaking through Chief Justice Moschzisker reversed the Court of Common Pleas of Luzerne County and held that the act was a constitutional exercise of the police power. The Chief Justice pointed out that although the court had previously held that where a defendant possessed a contractual right to let down the surface it would not be restrained from mining under a school building to the injury thereof, because the doing of a lawful act in a lawful manner cannot constitute a public nuisance, yet in passing the Kohler Act the legislature, in effect, had declared this type of mining to be a public nuisance since circumstances may so change as to clothe with a public interest what at other times would be only a matter of private concern. The Court further stated that on the facts which gave rise to the statute the questions involved were for legislative decision, and that the statute was a valid exercise of the police power.

Mr. Justice Kephart dissented from the opinion of the Court. In the course of his dissent, he stated that plaintiffs, together with many others who purchased similar surface lots in the anthracite region, paid much less for the property because they were willing to acquire it without the right of support, and indicated that they could have stipulated for such support. But what Mr. Justice Kephart either did not know or failed to point out was that much of this land was purchased from coal companies which were unwilling to sell the same except without a stipulation for support, which made it a practical impossibility to obtain such stipulation. He further indicated that the statute required a mining company to leave one-fourth to one-third of the coal in place. A careful reading of the statute shows no such requirement. What it does do is to require the coal to be mined in such a manner as not to cause the surface to subside. It is possible with proper mining methods to remove nearly all of the coal by proper use of supports and props. A mining company should be governed by the maxim sic utere tuo et aliquem non laedas, even though there be no right to surface support in the superincumbent owner.

Mr. Justice Kephart summarizes his objections to the Kohler Act under six main arguments:

1. The Act is unnecessary to protect life, because notice could be given which would protect those who voluntarily go where it is not safe to be.

   It is submitted that this is most impracticable, because if this suggestion were followed, it would make ghost towns out of many flourishing communities.

2. The Act is part of a scheme to force coal companies to support the surface of owners who have for value released the right of support or have purchased land for a less price by reason of not acquiring this right with their purchase.

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This reason ignores the facts of economic life in the coal regions which makes it practically impossible to sell the subsurface and reserve the third estate, or to buy surface with it.

3. There is no good reason why fair compensation should not be provided to the coal companies.

But it is to be noted that nothing is taken from the coal companies except a questionable right to use their property to the injury of another.

4. If the law were in good faith intended to protect lives and safety from cave-ins caused by mining, it would protect all such cave-ins and not only those in the anthracite regions.

The majority opinion shows that reasonable classification is permissible in legislation.

5. Prior legislation provided adequate protection for all surface owners except such as had released their protection, and it was for the benefit of this class that the Kohler Act was passed.

This is obviously true, because that class was the only class needing that protection.

6. The Kohler Act confiscates the coal for the benefit of the surface owner.

This is not so; it only prevents improper use of the coal.

The defendants appealed from the decision of the Supreme Court of Pennsylvania to the Supreme Court of the United States. That court reversed the prior decision, and held the Kohler Act to be unconstitutional as taking property without due process of law. Mr. Justice Holmes delivered the opinion of the Court, and said that since this action was brought concerning a single private house it did not constitute a public nuisance. He further stated that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking, which will require the exercise of the right of eminent domain and compensation to the property owner. He pointed out that the question at bottom is upon whom the loss should fall, and stated that since persons and communities had seen fit to take the risk of acquiring only the surface, the fact that their risk has become a danger does not warrant giving them greater rights than they bought.

This opinion of Mr. Justice Holmes is difficult to understand in the light of his judicial philosophy that while it is true that the police power must end somewhere, where there is no mathematical or logical way of fixing the line precisely, the decision of the legislature must be accepted unless it can be said that it is very wide of any reasonable mark. In fact, Mr. Justice Brandeis in his earnest

and persuasive dissent followed the true Holmesian philosophy. He stated that the Supreme Court had repeatedly recognized the propriety of deferring to tribunals on the spot, that both the legislature and the Supreme Court of Pennsylvania, with greater knowledge of the danger, had declared the necessity for the legislation, and that the coal companies had failed to adduce any evidence from which it appeared that to restrict mining operations was an unreasonable exercise of the police power. He demolished the argument that the restrictions of the statute required the application of eminent domain, because every restriction on the use of property imposed in the exercise of the police power deprives the owner of some right in the property without making compensation. Mr. Justice Brandeis pointed out that coal in place is land, and the right of the owner of land to use it is not absolute. He may not use it to create a public nuisance and thus threaten the public welfare.

In 1926 the validity of a zoning ordinance of the Village of Euclid, Ohio, came before the Supreme Court of the United States in the case of Village of Euclid v. Ambler Realty Company. The ordinance in question restricted the use of land in certain sections of the municipality to residential buildings only. The court held the ordinance to be a constitutional exercise of the police power. The court, speaking through Mr. Justice Sutherland, stated that regulations which, applied to existing conditions, are so apparently wise, would have been rejected as arbitrary and oppressive a century or half a century ago, and that the scope of the application of constitutional guaranties must expand or contract to meet new and different conditions. He further stated that in resolving doubts as to whether a zoning ordinance is a constitutional exercise of the police power, the common law maxim sic utere tuo ut alienum non laedas, which is the foundation of the law of nuisance, should be applied.

Of course, the governmental power to interfere by zoning regulations with the general rights of the landowner by restricting the character of his use is not unlimited, and such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals or general welfare. But where the question is fairly close whether the zoning of a particular section is an unreasonable or arbitrary classification, the court will not substitute its judgment for that of the legislative body. Since the constitutionality of zoning ordinances is founded on the common law doctrine of nuisance, and the right of an owner to do as he wishes with his land is limited by the prevention of a use that injures a neighbor's property, there should be no constitutional prohibition against prohibiting a harmful use of the subsurface as well as the surface. The mining of coal under a public highway in such a manner as to disturb the surface is a nuis-

Under a proper zoning law, if the principles of the law of nuisance are to be applied, zoning could be applied to the third estate in land and an improper use thereof could be prevented.

More than a quarter of a century has passed since the decision in the *Mahon* case. As a consequence of that decision, much property damage and personal injury has been caused in the mining regions of Pennsylvania by improper use of the third estate.

Since the decision in the *Mahon* case, the Supreme Court has greatly extended the area in which the police power may operate constitutionally. In *Nebbia v. New York*, the Court sustained the constitutionality of the New York Milk Control Law, and in so doing discussed generally the police power. Mr. Justice Roberts, who delivered the majority opinion, pointed out that the Court has repeatedly sustained curtailment of enjoyment of private property in the public interest, and called particular attention to cases sustaining building and zoning codes, and stated that the Constitution does not secure to any one liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. The opinion clearly enunciates that so far as due process is concerned, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation. When such policy is declared by the legislature, the courts are without authority to over-ride it. The language of the *Nebbia* case is a far cry from the principles announced by Mr. Justice Holmes in the *Mahon* case. The court has wisely expanded its conception of the police power to meet the economic conditions of a changing world. It is therefore probable that if legislation similar to the Kohler Act were enacted today as part of a comprehensive zoning plan, it might be held to be constitutional. As Mr. Justice Holmes himself said:

"The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories; intuitions of public policy, avowed or unconscious even the prejudices which judges share with their fellow-men have had a great deal more to do than the syllogism in determining the rules by which men should be governed."

18 *HOLMES, THE COMMON LAW*. 

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