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Private Mining Law in the 1980's: The Last Ten Years and Beyond

Cyril A. Fox jr.
University of Pittsburgh School of Law

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PRIVATE MINING LAW IN THE 1980's: THE LAST TEN YEARS AND BEYOND*

Cyril A. Fox, Jr.**

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** Professor of Law, University of Pittsburgh School of Law, of Counsel, Rose, Schmidt, Hasley & DiSalle, Pittsburgh, Pennsylvania. A.B., 1958, The College of Wooster; J.D. 1965, University of Pittsburgh School of Law. The author would like to thank Marie Muller for her assistance in the preparation of this article.

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I. Introduction

This article surveys some of the trends in private mining law during the 1980's—the period from 1980 through 1989. It focuses on legal disputes between private parties. The field of battle is occupied by many different interests: lessors and lessees, buyers and sellers of mineral interests, surface owners and mineral owners, and owners of one mineral and owners of another beneath the same surface tract. Some of these disputes, resolved during the 80's, centered on the interpretation of agreements—deeds, leases, and contracts—made decades earlier. Other disputes involved new agreements, new materials, new markets, and new development methods. Many of the cases during the 80's are noteworthy only because they demonstrate some courts' continued application of traditional and well recognized methods of analysis. Other cases, however, provide insights into new analyses.

While this article is primarily aimed at developments in the hard minerals area, it is important to keep in mind that the problems which confront hard mineral developers are similar to those which confront oil and gas producers as well. Thus, the excellent discussion of changes in private law affecting oil and gas development during the Twentieth Century by Professor Ernest E. Smith is highly pertinent to the issues addressed in this article. Professor Smith's description of the changing nature of the oil and gas producer's rights in the surface estates illustrates that the problems of all mineral developers, regardless of how densely compacted the molecules of their product, are very closely related.

The 1970's may be remembered as the decade of federal environmental legislation. The Clean Water Act, the Clean Air Act, the Toxic Substances Control Act, Coastal Zone Management Act, 1

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2. Id. §§ 16.03 - 16.07.

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the Safe Drinking Water Act, the Solid Waste Disposal Act and the Resource Conservation and Recovery Act, among others, took shape during that period. For the coal industry, this flurry of activity culminated in the Surface Mining Control and Reclamation Act of 1977 (SMCRA). During the 1980's, much of industry's energies were expended battling, within the public arena, the proper interpretation and implementation of these statutes.

At the same time, private disputes were fought within the court system and being resolved in piecemeal fashion, as they usually are. It is fairly easy to see the potential impact of federal environmental legislation and regulatory agency interpretations in this area. Constitutional requirements of due process mandate the availability of a forum in which these actions may be tested. It is more difficult to recognize the effect of individual disputes on the reshaping of legal rules. In certain areas changes have been occurring through the litigation process which may be every bit as significant to the industry's long term health as SMCRA. Yet, the places and ways in which these changes occur make them far less visible.

Most private mineral law litigation during the 80's was no different than that of earlier times. Courts typically grappled with the following issues: Was a particular mineral conveyed as part of the mineral estate? Has the mineral estate ended? Does the mineral estate hold the right to engage in particular ancillary activities? Sometimes courts used traditional approaches in resolving these issues. Where, however, the mineral estate was created a long time earlier and where no recent mineral development had occurred, legislatures

9. For a general review of federal environmental legislation impacting on mining activities, see Manthey, Mining, the Environment, and Government (1883-1983): Environmental Constraints on Open Pit Mining, 4 E. Min. L. Inst. ch. 3 (1983).
11. For a review of the first 10 years of federal activity under SMCRA, see Macleod, Means & Chetlin, State Primacy under the Surface Mining Act: The First Decade, 9 E. Min. L. Inst. ch. 5 (1988).
13. See infra notes 36-38 and accompanying text.
and courts began examining these problems differently. The balance between mineral development and surface use is being revised in myriad ways. Some are slight and subtle; others, significant and startling. Quite often statutes adopted to protect public interests have played an important role in the revision of private rights. There are suggestions in the cases that these statutes may play an even greater role in the future.

II. OWNERSHIP, CONVEYANCING, AND TITLE—BASIC PROPERTY MATTERS

A. Ownership

Basic conveyancing principles have not been significantly affected by the other changes taking shape in the 1980's. The method of creating a mineral estate or other interest, the type of interest created, and the techniques for interpreting conveyancing language remain largely unaffected by other trends. Courts still look to the grantor's intent to decide what type of interest was created.

The question of what substances constitute "minerals"17 in a severance was an issue presented by several cases. The questions of the right to mine barite,18 limestone,19 sand and gravel,20 and even the right to remove and sell subsoil in a limestone lease21 were litigated. The decisions are generally consistent in holding that, unless the deed or lease expressly states otherwise, substances which might

14. See infra note 168 and accompanying text.
15. See infra notes 195-98 and accompanying text.
17. See generally, Carpenter, Oil and Gas in Grants and Reservations of "Minerals": When Is a Mineral Not a "Mineral?" 5 E. MIN. L. INST. ch. 10 (1984). Recognizing the inevitability of conceptual overlap, the author makes a useful distinction between "consensus minerals," which usually pass under a severance, and "surface substances," which may not pass even though they have some or all of the characteristics of "minerals," including value apart from the land.
20. West v. Godair, 538 So. 2d 322 (La. Ct. App. 1989) writ granted, rev'd 542 So. 2d 1386 (La. 1989), reh'g denied 546 So. 2d 1205 (La. 1989) (language of instrument was ambiguous; grantors' extrinsic evidence insufficient to show intent to reserve sand, gravel, and topsoil).
fit some technical definition of the term were not intended to pass
with a conveyance of "minerals" if the means for removal of them
will be inconsistent with continued enjoyment of the surface estate.22
Most courts today are not willing to presume that the surface owner
intended to authorize mineral development activities which would
substantially diminish the surface land's utility. That intent must be
expressed in the severance document or necessarily implied from
general knowledge of mineral development in the area.23

The Supreme Court of Texas held to the contrary. In Moser v.
U.S. Steel Co.,24 that court reversed a line of cases applying the
more common reasoning25 and concluded that all substances having
value, whether or not known at the time of severance, are included
in the generic terms "minerals" or "other minerals."
26 Recognizing
that it was announcing an unanticipated change in Texas law, the
court determined that its holding should only apply prospectively.27
Further, it preserved prior decisions which had held, as a matter of
law, that certain substances such as limestone, sand and gravel, and
"near surface lignite, iron and coal" were not "minerals."
28

The court found that the surface enjoyment test had not proven
useful in determining the intent of parties to a severance of "min-
erals" and surface. Instead, the Texas court concluded that the in-
quiry should focus on the "general intent" of the parties without
regard to the technical or scientific meaning of the term "min-
erals."29 Essentially, this test places the burden on the surface owner
to limit the extent of a severance by express language in the con-
vveying instrument.

383 (1976).
23. See infra notes 152-59 and accompanying text.
24. 676 S.W.2d 99 (Tex. 1984).
25. E.g., Reed v. Wylie, 597 S.W.2d 743 (Tex. 1980) (Reed II); Acker v. Guinn, 464 S.W.2d
348 (Tex. 1971).
26. 676 S.W.2d at 103.
27. Id.
28. Id.
29. The court relied upon the theory of "general intent" as set forth in Kuntz, The Law Relating
to Oil and Gas in Wyoming, 3 Wyo. L.J. 107 (1949); see also 1 E. KUNTZ, THE LAW OF OIL & GAS
The *Moser* holding does, however, provide the surface owner with some protection against permanent loss of surface use from mineral development. Where the substance is one specifically mentioned in the severance, the mineral estate is only liable for damage to the surface estate caused by its negligence in conducting its removal operations. Where the right to develop exists for a generically described "mineral" or "other mineral," the surface owner is entitled to compensation for surface damage even if the injury does not result from the operator's negligence.\textsuperscript{30}

Courts in Pennsylvania and Alabama addressed the issue of which party retained ownership of coalbed methane gas after severance of coal or gas rights from surface ownership. The Supreme Court of Pennsylvania decided, by a divided vote, that coalbed gas was owned by the coal estate because: (1) ownership of the coal seam carried with it all other substances located therein as a matter of law, absent a contrary intent in the severance instrument, and (2) when this coal estate had been severed from the surface, coalbed gas was a detriment, not a benefit, to its owner so that, as a factual issue, the surface owner would not have intended to retain ownership.\textsuperscript{31} In so holding, the court reversed two lower court decisions, which had held in favor of the gas lessee on the ownership question because the coal owner would not have intended to acquire ownership of this gas precisely because the gas was so dangerous. The lower courts, while recognizing the gas lessee as owner of the coalbed gas, severely restricted the methods which that lessee could use to recover the gas. Applying nuisance principles, these courts prohibited the use of enhanced gas production methods which would interfere with the coal owner's ability to mine the coal or which would threaten the coal miners' safety.\textsuperscript{32}

A federal district court in Alabama, in an unreported opinion, found, as a matter of fact, that a reservation of oil and gas rights

\textsuperscript{30} 676 S.W.2d at 103.


in a coal severance did not include the right to produce methane gas from the coal seam.\textsuperscript{33} The coal severance contained specific requirements for wells which might be drilled "through the coal seam." Therefore, the parties to the severance had not intended to allow gas wells to produce from the coal seam.

There were enough cases deciding issues of basic property law to make up a substantial part of any first year property casebook. One ever-present and reoccurring title problem involves the effect of a previous owner's exception or reservation of mineral rights.\textsuperscript{34} During this period, cases generally were decided in the grantor's

\begin{itemize}
\item Rayburn v. USX Corp., (N.D. Ala. 1987), (available April 1, 1990, on LEXIS, Genfed. library, Dist file). \textit{aff'd without opinion}, 844 F.2d 796 (11th Cir. 1988).
\item Technically, an "exception" is the retention of some thing or some right which existed in the grantor before the conveyance, while a "reservation" is the creation of a new legal right—one which did not exist while the grantor held the estate—passing to the grantor from the grantee. Therefore, also technically, a grantor "excepts" an interest in minerals when conveying the remainder of its estate to a third party as the minerals were in existence before the conveyance. Whitaker v. Brown, 46 Pa. 197 (Pa. 1864). The same grantor may "reserve" an easement over the estate conveyed in favor of other land of that grantor as the easement had no physical or legal existence prior to the conveyance. Moffitt v. Lylte, 165 Pa. 173 (Pa. 1895).
\item Drafters of many deeds, and many lawyers and judges, are unaware of this technical distinction. If the drafter did not avoid the problem by "excepting and reserving" everything the grantor wanted, courts today tend to ignore the actual words used and focus upon the grantor's intent to retain some interest or right in the property transferred. See Goin v. Eater, 107 Ill. App. 3d 887, 438 N.E.2d 234 (1982), in which the court was aware of the technical distinction and found it useful, but still decided the issue on the basis of the grantor's intent as determined from all the words in the deed. See also Burnett v. Perkins, 523 So. 2d 106 (Ala. 1988) where the court ignored the technical distinction altogether; Morgan v. Roberts, 434 So. 2d 738 (Ala. 1983); Shawville Coal Co. v. Menard, 280 Pa. Super. 610, 421 A.2d 1099 (1980) (slight difference in language of reservation and exception clause and granting clause resulted in joint ownership of minerals and mining rights).
\item In O'Brien v. Village Land Co., 780 P.2d 1 (Colo. Ct. App. 1989) (cert. granted Sept. 11, 1989), the deed into the Village contained a reservation of one-half of "all oil, gas and other minerals" in favor of its grantor. The deed from the Village to plaintiff's decedent contained both a reservation of one-half of "all oil, gas and other minerals" and an exception for "all other items and agreements of record." The trial court found the deed was unambiguous and conveyed the Village's one-half mineral interest to its grantee. The appellate court agreed that the deed was unambiguous and, relying on the technical distinction between reservations and exceptions, held that the deed conveyed one-quarter of the minerals to the Village's grantee so that the Village's grantor owned one-half the minerals, the Village owned one-quarter, and the plaintiff's decedent owned one-quarter. Texas uses yet another approach, depending on whether the reservation is of the land "described" in the deed or of the land "conveyed" by the deed. If of the land "described," the entire one-half originally conveyed to the Village would have remained with it under its reservation; if of the land "conveyed," the Village would have retained only one-quarter of the minerals. Averyt v. Grande, 717 S.W.2d 891 (Tex. 1986). Fragmentation of ownership because of these tenuous and tendentious distinctions is exactly the situation which the Duhig rule is designed to avoid. See infra note 36.
\end{itemize}
favor, using long-settled rules of construction. Where the grantor purports to retain an interest which had been severed from the estate sometime before the conveyance in question, courts generally find that the reservation is ineffective to vest any interest in the grantor.

Some cases are almost refreshing for their continued adherence to these well-established principles. For example, in International Salt Co. v. Geostow, the Second Circuit considered the question of ownership of the strata being mined. That court concluded that the owner of the mineral estate (salt) continued to own the space from which the mineral had been extracted so long as mining operations continued. This ruling is consistent with the position taken by most eastern mining states, although many of these states put this issue to rest long ago.

B. Divided Ownership and the Law of Waste

Mineral cases are always fruitful sources of title problems which involve future interests and concurrent ownership. During the 80's, the states of Florida and Tennessee both addressed the application of the Rule Against Perpetuities to reserved perpetual royalty interests following severance of the surface and mineral estate. Each

35. Howell Petroleum Corp. v. Holliman, 504 So. 2d 277 (Ala. 1987); Turner v. Lassiter, 484 So. 2d 378 (Ala. 1986) (Both of these cases illustrate that failure to include an exception or reservation in a granting clause is not fatal to retention of minerals where intent is adequately expressed elsewhere in the deed.)

36. E.g., Hill v. Gilliam, 284 Ark. 383, 682 S.W.2d 737 (1985) and Peterson v. Simpson, 286 Ark. 177, 690 S.W.2d 720 (1985). These cases invoked the rule of Duhig v. Peavy-Moore Lumber Co., 135 Tex. 503, 144 S.W.2d 878 (1940) in interpreting conveyances excepting fractional mineral interests of the same size as previously severed to find that the grantee took all of the grantor's interest in the minerals. A similar result was reached without reference to the Duhig rule in Cole v. Minor, 518 So. 2d 61 (Ala. 1987).

37. 878 F.2d 570 (2d Cir. 1989).


39. "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." J. C. GRAY, THE RULE AGAINST PERPETUITIES § 201 (4th ed. 1942). For a modern statement of the Rule and means for alleviating its common law force, see RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS §§ 1.1 - 2.2 (1983).

court found that the reservation had created a presently vested interest in real property in the grantor which did not violate the infamous Rule, despite the fact that minerals might never be produced.

The ability to divide the ownership of an estate (either over time between present and future owners, or concurrently, among several owners) will always tease mineral developers with the following questions: From whom must one get permission to develop? Where are they? How long can that permission last?

Central to divided ownership problems is the law of waste. The law of waste is designed to assure each owner of a portion of the fee the ability to enjoy its own share of the property and no more.\(^\text{41}\) Thus, where a life tenant begins mineral development without the consent of all the future interest holders, the rights of those future interest holders have been unlawfully diminished. This may also be true when one of several cotenants extracts minerals without the joiner of its cotenants. In each of these scenarios, the developer seeks to appropriate to itself something of value which belongs to another.

1. Life Estates and Future Interests

Where an estate is divided between present and future interests, usually between a life tenant and remaindermen, the future interest holder is entitled to receive the estate undiminished by the life tenant’s actions with the exception of reasonable wear and tear.\(^\text{42}\) The life tenant’s ability to develop the minerals is determined by the intent of the creator of the divided ownership. Only where the creator intended to allow the life tenant to enjoy the minerals, thereby diminishing the value of the remainder for the future interest holder, may the life tenant develop or lease the minerals, or receive income from their development.\(^\text{43}\)

Most jurisdictions employ the “open mines doctrine” as a guide to determining the creator’s intent when it has not otherwise been expressed. Under this doctrine, a life tenant may exploit the minerals

\(^{41}\) 5 Am. L. of Prop. § 20.1 (Casner ed. 1952).
\(^{42}\) 1 Id. § 2.16e.
\(^{43}\) 5 Id. § 20.6.
or share in the proceeds of development only if that development had begun before the life estate took effect.\textsuperscript{44} Otherwise, mineral development by the life tenant is actionable as waste. Even where the life tenant is authorized to develop the minerals, there will be a question as to whether the life tenant can grant development permission which will last longer than the life estate.

The "open mines doctrine" is only a rule of construction, a means of determining the grantor's intent where that intent is not otherwise expressed. During the 80's, a Pennsylvania court found it inappropriate to invoke this doctrine where the grantors had clearly indicated their intent to retain the right to exploit the minerals and to benefit from that exploitation.\textsuperscript{45} The grantors, husband and wife, had conveyed the fee to their children, "excepting and reserving" a life estate in the property and, inter alia, "the gas rentals and/or royalties" to themselves. The wife leased the gas rights after her husband's death. At her death, the remaindermen brought an action against her estate and the gas lessee for trespass and conversion; the lessee brought an action to enjoin the remaindermen from interfering with its operation of the wells. While the grantors had clearly expressed their intent to permit the life tenants (themselves) to lease the minerals, the court could not determine from the deed, as a matter of law, whether they had intended to allow the life tenants to bind the remaindermen by any leases. Therefore, the case was remanded for a determination of that question.

Three years later, a Texas court did find it necessary to apply the "open mines doctrine."\textsuperscript{46} Testator had executed several mineral leases on his ranch during his lifetime. His will created a trust of the ranch and other property for the benefit of his son. The trustee was given the power to execute mineral leases. The trust was to terminate when the son reached the age of 35. If, at that time, the son had a child "born in lawful wedlock," the entire trust corpus was to be distributed to the son. If, as turned out to be the case, the son did not have a child when the trust ended, he was to receive

\textsuperscript{44} Id.


\textsuperscript{46} McGill v. Johnson, 775 S.W.2d 826 (Tex. Ct. App. 1989).
all personal property in the trust and only a life estate in the ranch. The remainder was given to the testator’s two sisters or their issue. Both sisters died before the son reached the age of 35. Only one of the two was survived by issue.

When the trust ended, the trustee distributed all royalties, rentals, and bonuses which it had received from mineral leases to the son, along with the fee in one-half of the ranch and a life estate in the other one-half. The issue of the testator’s sister challenged this distribution. The court held that the sister who had died without issue held only a contingent remainder in her one-half of the property. When that remainder failed to vest in her or in her issue, it passed to the son, along with a life estate in the other one-half. In applying the “open mines doctrine,” the court concluded that the testator had intended to give the life tenant-son the benefit of his mineral leases, and of those made by the trustee. Wells under leases predating the testator’s death were “open mines;” leases by the trustee were intended for the son’s benefit to the extent of his interest in the property. The trustee had not committed waste by distributing all lease income to the son when the trust ended.

Another important case was decided by the Kentucky court in 1989.47 The grantor, under an 1897 deed, had conveyed the fee in certain real estate to his wife for life, subject to a life estate in himself, and “at the death of [the wife] . . . to descend to the heirs of her body belonging to the said Grantor . . . .”48 Grantor and his wife then sold the minerals by deed. The wife survived her husband and four of their seven children. She died in 1936. Her surviving children or their representatives leased the coal on the property and the lessee began mining in the early 1980’s. The successor to the 1903 mineral grantee sought to prevent mining but, for reasons not in the opinion, an injunction was denied. The suit continued in order to determine who was entitled to the royalties. The trial court had held that the wife had received only a life estate and that her children had received only contingent remainders until her death. The appellate court reversed, holding that the children’s remainders vested

48. Id. at 459.
as they were born. Because the three children who pre-deceased their mother left no other heirs, she had inherited their interests at their respective deaths. As a result, the wife owned three-sevenths of the fee, including the minerals, when she died. The 1903 mineral deed severed the minerals and surface estates, passing her three-sevenths interest to the 1903 grantee. That grantee’s successor now holds the three-sevenths interest as a cotenant with the four children who survived their mother. The court did not indicate how this will affect the underlying disputes over the validity of the later lease or the right to royalties from the mining operation.

2. Cotenants

Concurrent ownership of minerals presents problems similar to those of present and future interests. May a cotenant who has not joined in a mineral lease prevent the lessee from mining? The answer to this question depends upon the jurisdiction in which the minerals are located. Virginia continues to treat mining which has been authorized by fewer than all cotenants as waste, and any cotenant may enjoin mining by the other cotenants or their lessees. However, the rule is different in many other states.

For example, in Pennsylvania, a lease of surface mining rights executed by fewer than all of the surface cotenants was discharged upon sale of the surface estate at a partition sale instituted by the lessor-cotenants. In a later decision in the same litigation, the court held that the lessor-cotenants’ failure to acquire the property at the partition sale was not a breach of their covenant of quiet enjoyment in the lease.

51. See generally, Annot., 5 A.L.R.2d 1368 (1949); Annot., 91 A.L.R. 205 (1934); Annot., 40 A.L.R. 2d 1400 (1926).
53. Lichtenfels v. Bridgeview Coal Co., 366 Pa. Super. 304, 531 A.2d 22 (1987). The lessee had requested the lessor-cotenants to institute the partition proceeding in the expectation that they would be the successful purchasers, thus eliminating the interest of one cotenant who had held out for a higher rental.

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The importance of a cotenant’s theory for requesting injunctive relief is illustrated by the West Virginia Supreme Court of Appeal’s decision in *Eagle Gas Co. v. Doran & Associates, Inc.* West Virginia is one of the minority of jurisdictions which allow one cotenant to enjoin mineral production by another cotenant as waste. In *Eagle*, plaintiff and defendant held separate leases from different cotenants of the fee. Plaintiff sought to enjoin defendant from trespassing against its leasehold. The court upheld the refusal of an injunction and limited plaintiff to an accounting. Relying upon an earlier decision which did not involve injunctive relief, the court said: "It is conceptually impossible for tenants-in-common, with a mutual right to possession of the whole, to trespass against one another." It is not clear that this case signals a change in West Virginia law, however. There are numerous points of distinction between this case and those West Virginia cases allowing one cotenant to enjoin mineral production by another cotenant. This dispute was between two lessees not between fee owners. Plaintiff’s lease had never been delivered to it by its lessors, although plaintiff had regularly paid delay rentals to an agent of the lessors. Defendant was not chargeable with notice of plaintiff’s unrecorded lease because plaintiff had denied having a lease when asked by one of defendant’s lessors. Most significantly, plaintiff sued to enjoin a trespass, not waste. Had plaintiff’s request for injunction been predicated on a theory of waste, the decision could have been different.

C. Trespassers—Innocent and Wilful

The early 1980’s was not a particularly good period for three operators who mined minerals, owned by others, without their permission. Determining who owns the minerals in a tract of land can

be a tricky business.\textsuperscript{60} However, as the cases from this period indicate, the penalty for failing to obtain permission from the correct owner can be high.

When awarding damages, most courts distinguish between "innocent" trespassers, who mine another's minerals by mistake, and intentional trespassers, who knowingly or recklessly mine without permission.\textsuperscript{61} Where the trespass was intentional, most courts employ a rule of damages designed to deny the trespasser any profit whatsoever from its wrongful act. The precise calculation of this profit element differs from jurisdiction to jurisdiction. The distinction appears to lie in a court's determination of which acts were wrongful. The wilful trespasser is required to bear the cost of its wrongful acts, but is entitled to a credit for the cost of acts which were not wrongful.

In \textit{Dethloff v. Zeigler Coal Co.},\textsuperscript{62} an Illinois mine operator was ultimately assessed compensatory damages of $3,600,000 for its intentional trespass. After defendant's lease had expired, plaintiffs indicated an interest in negotiating a new lease. Defendant, contending that the old lease was still in effect, mined and tendered royalties based upon the expired lease. The supreme court upheld the trial court's refusal to submit the issue of defendant's status as an innocent or intentional trespasser to the jury. In so doing, the appellate court held that status is a question of law and not of fact.

That court further ruled that the measure of damages in Illinois is the value of the coal at the mine mouth less the cost of transporting it there. An intentional trespasser is not entitled to offset the cost of mining or processing the coal for sale. However, if the defendant had been an "innocent trespasser," it would have been entitled to deduct its mining costs as well as the transportation costs from the coal's value when sold. The court also affirmed the trial court's refusal to award punitive damages. By denying an intentional


\textsuperscript{61} See generally Annot., 21 A.L.R.2d 380 (1952).

trespasser any benefit from its wrongful act, the measure of damages itself is punitive.\textsuperscript{63}

In \textit{Reynolds v. Pardee & Curtin Lumber Co.},\textsuperscript{64} the West Virginia Supreme Court of Appeals discussed the distinction between willful and innocent trespassers and held that the damages available from each are equal to the mineral’s value at the mine mouth. The difference lies in who must bear the cost of mining and transporting the mineral, the trespasser or the mineral owner. An intentional trespasser is liable for the value at the mine mouth without deduction for the costs of either mining or moving the mineral there. On the other hand, an innocent trespasser’s liability is measured by the value of the mineral in place. This may be determined by the value at the mine mouth, less the cost of mining and moving the mineral there.\textsuperscript{65} The innocent trespasser does not profit from its wrong, but it is not penalized by the loss of its out of pocket expanses; the willful trespasser loses both its profit and its operating expenses.\textsuperscript{66}

The West Virginia court also indicated that the trespasser’s lessor could be jointly liable with it for the trespass. The court stated that, if the lessor “had knowledge of or acquiesced in its lessee’s trespass or failed to adequately warn its lessee about [plaintiff’s interest], it can be held jointly accountable for the trespass on a common purpose theory.”\textsuperscript{67}

The West Virginia damage rule differs from that of Illinois by denying the wilful trespasser recovery for the cost of moving the coal to the mine mouth. While neither case notes this difference, it would appear that Illinois views the trespass as ending once the coal has been severed from the seam. West Virginia treats the wrong as continuing until the coal reaches the point of shipment from the mine.

\textsuperscript{63} 82 Ill. 2d at 413, 412 N.E.2d at 536.
\textsuperscript{64} 310 S.E.2d 870 (W. Va. 1983).
\textsuperscript{66} The court also upheld the denial of punitive damages. 310 S.E.2d at 876.
\textsuperscript{67} Id.
A Pennsylvania court adopted a very different measure of damages for a wilful surface mining trespasser in *Smith v. Benjamin Coal Co.*68 Despite plaintiff's objections, defendant mined under a lease from a third party which did not include plaintiff's property. Knowing of plaintiff's ownership claim, defendant did not search its lessor's title nor make a survey of the area to be mined. Plaintiff brought this action in equity to enjoin further mining and to recover damages for coal mined.

The appellate court reversed an award based upon the value of the coal in place as determined by the royalty rate for similar coal. According to the court, this measure would not justly compensate plaintiff for her loss. Instead, she was entitled to damages based upon three factors: (1) the value of the coal in place; (2) detention damages for delay in payment; and (3) an amount, "reasonable in all the circumstances," sufficient to compensate plaintiff for defendant's taking of her incidents of ownership in the coal. Plaintiff's incidents of ownership included rights to determine when to develop and sell the coal, with whom to deal, at what rate, and under what specific terms. The court held that the third element of damages is to be proven with the "best available evidence," including the amount of profit which defendant made in mining and selling the coal.69 Defendant need not disgorge all of its profits from the wrongful mining. The amount of profit is a factor to be considered in determining the amount of plaintiff's "just compensation."

The Pennsylvania court's damages formula is far less precise than that applied elsewhere. This formula allows recovery of more than the royalty, but it gives little guidance as to how much more should be recovered. It also allows the trespasser to benefit from its wrongful act. The trespasser's profit is only a "factor" in determining damages. Thus, a wilful trespasser presumably could retain some or all of its mining costs and its profit. Conversely, the Illinois and West Virginia decisions state the traditional measure of damages—the difference between the mineral's value at the mine mouth and

68. 279 Pa. Super. 82, 420 A.2d 754 (1980).
69. Id. at 89, 420 A.2d at 758.
the cost of mining it. This formula denies the trespasser any profit from its unlawful mining activity although the acts which constitute that activity may not be uniform.

The Pennsylvania court may have focused its opinion on "just compensation" because the proceeding was in equity rather than one for damages. The court did not examine intentional trespasser cases from other jurisdictions. In 1913, the Pennsylvania Supreme Court had refused to award more than value in place for an intentional deep mining trespass. However, the court in Benjamin distinguished that case as limited to deep mines. Although the validity of this distinction may be open to question, the court's awarding of more than royalties for a wilful trespass should not be questioned. Otherwise, the trespasser has little incentive to negotiate with the mineral owner: it may mine without permission and, after litigation, pay no more that the going royalty rate plus interest for its use of the money in the interim.

III. ACQUISITION OF INTERESTS—BUSINESS AND MORALITY

A new standard of morality or commercial ethics is being reflected in cases concerning buyers and sellers of mineral properties. Courts are examining the fairness of business transactions in new ways. A party who negotiates an advantageous contract will be permitted to retain the benefits of its efforts if it has treated the other party fairly and in good faith both during the negotiation and performance of the contract. However, a party in a superior negotiating position, through superior knowledge or access to knowledge concerning the quality and quantity of minerals or concerning access to facilities necessary for the property's development, is being held to a higher standard in its treatment of the opposing party. A party in a superior negotiating position may no longer rely on the protection of the traditional doctrine of Caveat Emptor. In determining

70. Supra note 61.
71. In Trustees of Kingston v. Lehigh Valley Coal Co., 241 Pa. 469, 88 A. 763 (1913), the court indicated that the value of the coal in place, as measured by its value per acre, if any, or its royalty value if no acreage value were available, should be the measure of recovery regardless of the nature of the trespass.
the fairness and validity of underlying transactions, courts are beginning to review the ways in which the stronger party uses its strength.

Perhaps the most notorious of these cases during the 80's involved the dispute between Pennzoil and Texaco over Pennzoil's frustrated efforts to acquire Getty Oil Co. After Texaco acquired Getty, Pennzoil recovered a jury verdict against Texaco for approximately $10.6 billion resulting from Texaco's tortious interference with an advantageous business relationship, even though that relationship never became final. Not all of the decisions, addressing this issue during that decade, brought such a high recovery, but many reflect the growing judicial requirement that one must deal fairly with others and not take undue advantage of special knowledge or market power.

This new morality is illustrated by Zimpel v. Trawick. In Zimpel, defendant purchased 15 mineral acres in Oklahoma from an elderly woman living in Arkansas at a purchase price of $2,000 an acre. He then sold that property, just three weeks later, for $3,300 an acre. At the time of the original purchase, defendant knew that a potentially productive well had been drilled on neighboring land. Information about the well was being closely guarded by its operators; however, defendant had learned of test results from his partner's father-in-law, who knew some people operating the drilling rig. Defendant discussed purchase of acreage with the elderly owner's brother, who also lived in Arkansas and also owned mineral acreage in the vicinity, and with the owner herself on several occasions. During these negotiations, defendant never revealed any information about the new well and, in fact, indicated to both the seller and her brother that the Oklahoma oil and gas business was in poor condition.

73. Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768 (Tex. Civ. App. 1987), writ ref'd n.r.e. (affirming judgment as to actual damages and ordering remittitur to reduce punitive damages from $3,000,000,000 to $1,000,000,000); 748 S.W.2d 631 (Tex. Civ. App. 1988) (accepting parties' settlement agreement and dismissing action). A list of the other citations to this dispute would be almost as long as this article. An interesting description of the litigation can be found in Baron & Baron, The Pennzoil-Texaco Dispute: An Independent Analysis, 38 BAYLOR L. REV. 253 (1986).

When the ailing woman agreed to sell, the defendant immediately drove 300 miles to her home in order to close the deal. The parties met on her front porch. She was attached to an oxygen tank, and she talked at length of her desire to die debt free. Shortly after the sale, she did die and her personal representative brought this action in fraud. The court awarded $19,500 in compensatory damages, measured by the difference between the purchase price and the acreage's fair market value as determined by its resale price, and $20,000 in punitive damages. As to the punitive damages, the court said that "[d]efendant's conduct in this case was nothing short of outrageous."\(^{75}\)

The significance of this case lies in the court's conclusion that, because the parties were not on equal footing, the defendant had a duty to disclose secret information to her or be found guilty of misrepresenting the property's value.\(^{76}\) The court's sympathies for the seller are obvious and one probably should not read too much into the case. However, this case is noteworthy because much earlier the Arkansas Supreme Court had denied relief to equally uneducated sellers in an action against an equally informed and knowledgeable buyer.\(^{77}\)

On the other hand, a Michigan court refused to impose a duty to disclose knowledge of the value of mineral land on a prospective lessee in *Zaschak v. Traverse Corp.*\(^{78}\) The facts are not at all clear from the court's opinion. Plaintiff sold the mineral rights under his land to the defendant. During the negotiations, plaintiff asked one of defendant's land agents about exploratory oil and gas activity in the vicinity. The agent, who possessed a graduate degree in geology

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75. *Id.* at 1512-13.
76. The opinion stated: The court is firmly convinced that the evidence abundantly shows that . . . [defendants], through the use of superior knowledge not reasonably within the reach of . . . [the seller], and through the failure to disclose facts they had knowledge and a duty to disclose, fraudulently caused her to convey her mineral interest to the defendants for substantially less than fair market value. *Id.* at 1511. Cf. Barnhill & Enns, *Choosing Between an Honest Bargain and No Bargain: Information Disclosure to Potential Lessors*, 2 E. Min. L. Inst. ch. 1 (1981) and authorities therein cited.
and, according to the court, "undoubtedly had information regarding oil and gas exploration in the area of plaintiffs' land . . .,"79 stated that he was unaware of any exploration activity, while in fact, activity of that type was taking place in the area at that time. Although the lessee paid plaintiff a current fair price for his minerals, the minerals either later became or were later determined to be worth substantially more than the purchase price. The court sustained summary judgment for the defendants based on plaintiff's failure to plead sufficient facts to support an action of fraud. Indicating that evidence of fraud would first require a duty of disclosure, the court said: "Michigan courts have not yet recognized a duty on the part of a vendee to disclose facts relevant to the value of real estate in question even when specifically asked. We decline to promulgate such a duty on the facts of this case."80

One should not take too much comfort from Zaschak. First, the case decided only that the facts as pleaded did not state a cause of action. The opinion failed to indicate what those facts were. Second, the opinion does not indicate the degree of knowledge which could be imputed to the plaintiff, nor does it indicate the parties' relative bargaining power. The court admitted that the defendant's agent "could have concealed material facts from plaintiff,"81 not that he did, in fact, do so. Finally, there were two other defendants which settled with the plaintiff, perhaps because they recognized the possibility of recovery with adequate pleadings.

Canada had its own Pennzoil case during this era, International Corona Resources Ltd. v. LAC Minerals Ltd.82 The Supreme Court of Canada affirmed the imposition of a constructive trust on certain gold mining lands and a mine owned by LAC Minerals Ltd. (LAC). The properties at issue had been acquired after International Corona Resources Ltd. (Corona) had initiated discussions with LAC which

79. Id. at 129, 333 N.W.2d at 192.
80. Id. at 128, 333 N.W.2d at 192.
81. Id. at 128, 333 N.W.2d at 191.
Corona hoped would lead to some kind of joint development arrangement of its mineral lands. Corona was a small company without access to the large amounts of capital necessary for development of the property. LAC was a large mining concern. Corona revealed various items of information related to the potential development value of its lands and of neighboring lands. At no time did Corona formally declare that this information was being disclosed in confidence. Based on the information from Corona, LAC acquired land adjoining Corona’s and opened its own mine.

The trial court had imposed the constructive trust because it found that LAC owed Corona a fiduciary duty not to profit at Corona’s expense from the information disclosed. Although a majority of the Supreme Court of Canada found that there was no fiduciary relationship between the two companies, the court unanimously upheld the constructive trust on the different ground of breach of confidence. To show an actionable breach of confidence, according to the court, one must show: (1) that confidential information was disclosed, (2) that it was disclosed under circumstances which give rise to a duty of confidentiality, and (3) that the information was misused by the party to whom it was disclosed.

A duty of confidence was found even though Corona, in an effort to attract investors, had made some of the information public before to its discussions with LAC. Corona never expressly told LAC’s representatives that non-public information was being disclosed in confidence. Nonetheless, the court concluded that LAC had a duty not to use the information to Corona’s detriment because a “reasonable person” would have realized that the information was being disclosed in confidence. This standard appears to turn the issue of confidentiality into a question of fact and to permit inference of the duty even in the absence of any effort by the disclosing party to protect the confidential nature of its information.

Zimpel and Corona both involve parties with unequal bargaining power. One was the archetypical, terminally ill, little old lady; the other a going business concern with a substantial professional staff. Yet each court believed that the particular plaintiff had been dealt with unfairly by its respective defendant. Neither court hesitated to provide substantial relief for the weaker, injured party. Zimpel may
be nothing more than a case of garden variety fraud,\textsuperscript{83} but \textit{Corona} imposed liability where, arguably, none had existed before. At least it appears to be the first case to employ the "reasonable person" test to create a duty of confidentiality. Taken together, these cases illustrate a trend in which courts will hold parties with superior knowledge, bargaining power, or access to information to a higher duty to prevent that party from benefitting from its advantageous position at the other party's expense.\textsuperscript{84}

The difference between "unfair advantage" and actual fraud is often only a matter of degree or of characterization. Where fraud or misrepresentation is present in the transaction, courts are generally willing to award substantial damages to the injured party.\textsuperscript{85} The adoption of the federal Racketeering Influence & Corrupt Organizations Act\textsuperscript{86} (RICO), with its provisions for treble damages, makes successful fraud claims very expensive for the defendants. The Supreme Court has indicated that RICO is to be liberally applied in civil fraud cases.\textsuperscript{87} Thus, a party to negotiations or an agreement who has superior information or other bargaining power should take particular care to deal fairly, both in fact and in appearance, with the weaker party.

Where the parties stand on a more equal footing and are able to negotiate freely, courts during the 80's continued to hold them

\textsuperscript{83} See also Arkel Land Co. v. Cagle, 445 So. 2d 858 (Ala. 1983) (lessor with only fifth grade education was advised by land agent that he need not retain an attorney; attorney who drafted lease found to be agent of lessee, not lessor, made material misrepresentation as to the property covered by the lease); Johnson v. Brewer, 427 So. 2d 118 (Miss. 1983) (lessee's agent made material misrepresentation to 80 year old lessor as to reason for top lease and paid "grossly inadequate" consideration). Note that each of these lessors admitted that they had not read the leases which they signed, but neither defendant was relieved of liability for its fraud.

\textsuperscript{84} See also Fox, \textit{Rights of a Lessor in Payments Received by a Producer from "Buydouns" or "Buyouts" of Long-term Contracts}, 10 E. Min. L. Inst. ch. 1 (1989). (Discussing the suggestion of a higher standard owed by a mineral lessee to its lessor under certain circumstances).


to their agreements even when those agreements turned out to be disadvantageous. For example, in *Esplanade Oil & Gas, Inc. v. Templeton Energy Income Corp.* 88 the buyer of certain oil producing properties refused to close when the price of oil dropped from $28.30 to $20.30 per barrel. The parties had entered into a letter agreement contemplating negotiation of a "mutually definitive purchase agreement" which was never executed. The letter agreement provided that the buyer's duty to close was subject to a condition that "[t]here shall be no adverse material change to the [p]roperties . . . prior to [c]losing." The Fifth Circuit held that this language referred to material changes in the seller's title, not to changes in the wells' value. The court also found that the parties' failure to execute the purchase agreement or to satisfy certain other conditions in the letter agreement did not cause the buyer's refusal to perform. Therefore, the buyer was liable in damages for failure to perform its contract.

Several other decisions stressed the equal bargaining power of the parties in holding them to their agreements. An integration clause in a contract of assignment was held to negate the existence of an implied duty to mine, even though part of the consideration for the assignment was a profit participation from development. 89 Similarly, an integration clause in a mineral lease operated to bar evidence of oral representations as to coal quality or the depth of overburden made during preliminary negotiations. 90 A provision in an agreement of sale for coal properties and equipment that the buyer would accept the properties "as is" barred recovery for treatment costs of an acid mine discharge discovered after the sale. 91 The facts indicated

88. 889 F.2d 621 (5th Cir. 1989).
that neither party knew about discharge at the time of contracting. The court indicated that, where the parties to the contract are "seasoned businessmen," it would not grant relief which might otherwise be available to the "inexperienced consumer." 92

Taken together, these cases indicate an increased judicial willingness to consider, as a threshold matter, the relative bargaining strength of the parties to any agreement. Where their strength is sufficiently disproportionate, a court will examine the fairness of the weaker party's treatment by the stronger party. If that treatment does not meet the court's standard of fairness, relief will be available. Where the court is satisfied that the parties' relative bargaining strengths, although not necessarily equal, were not too disproportionate, the parties will be held to their bargain.

IV. OWNERSHIP—HOW LONG CAN IT LAST?

One interesting aspect of mineral law is the ability to separate ownership of mineral rights from the remainder of the estate, usually erroneously called the "surface estate." Unless limited by specific language in the severance instrument, a mineral estate will last as long as it contains recoverable minerals. 93 Once the minerals have been exhausted, the mineral owner's rights and duties end unless the parties have agreed otherwise. 94 Furthermore, the mineral estate, at least where it is a leasehold rather than a freehold, may be lost by abandonment. 95

This separation of ownership creates a tension between the surface and mineral estate owners which seems to have become particularly frustrating to surface owners during the past ten years. Lack

92. Id. at 328, 558 A.2d at 564.
93. See cases cited, supra notes 37-38.
of ownership means that the surface owner lacks control over when the minerals will be developed, how they will be developed, and how greatly their development will interfere with activities on the surface estate.

In the eastern states, mineral interests were often severed from surface interests during the Nineteenth Century. Thus, many of these interests are now more than 100 years old. Even interests severed around the time of World War II are now fifty years old. A majority of the cases discussed in this article involve severances which predate World War II. Despite considerable changes in surface use since these severances occurred, the minerals frequently remain unmined.

There are many reasons why the minerals may not have been mined. Some minerals go unmined as a result of the division of ownership which seems inevitable when property interests pass from generation to generation. Others go unmined when their corporate owners quietly go out of business without formal dissolution or bankruptcy proceedings. In still other cases, the minerals are being held as reserves, either against present commitments for future production or strictly as inventory for production or sale when market conditions warrant it. Finally, some mineral deposits cannot be economically developed under present market conditions or with current technology, but may be developed with changed conditions. Often non-production of a particular mineral property is due to a combination of these reasons.

The more difficult it becomes to locate the owner of a severed mineral interest, the less likely it is that someone with an interest in the surface will try to do so. Indeed, a court may even excuse failure to search for the mineral owner because of the expense and difficulty of doing so. The Fifth Circuit recently held that a severed mineral interest was discharged by a mortgage foreclosure sale of the surface estate even though the mortgagee made no attempt, other than general advertisement of the sale, to notify the mineral lessee of the foreclosure. The court ruled that due process did not require

96. See Beck, Obtaining "Good" Title from the Inactive or Terminated Corporation, 2 E. Min. L. Inst. ch. 19 (1981).
97. Davis Oil Co. v. Mills, 873 F.2d 774 (5th Cir. 1989), cert. denied, 110 S. Ct. 331 (1989).
actual notice to the mineral interest because of the complexity of searching mineral titles.\textsuperscript{98} Surface development proceeds without regard for the unknown or inactive mineral owner. Later, when it becomes economically or technologically feasible to develop the minerals, conflicts arise between the surface owner and mineral owner.

A typical scenario goes as follows. The severance of the two estates occurred decades ago. Memories of that transfer have dimmed. Title searchers concerned with the surface estate title fail to look for severances. Instead, they limit their abstracts, opinions, and insurance polices to title to the surface estate alone. When the mineral interest becomes valuable enough to merit development, new operators approach the surface owner for leases or deeds. At that time, the surface owner tries to establish title to the minerals despite the ancient severance. The 1980’s did not demonstrate any weakening in the traditional principles for determining who owns the minerals beneath a particular tract of land. That era did, however, see new limitations on how long separate ownership, once established, may continue without development.

A. Termination for Non-Development or Improper Development

In several cases lessors or surface owners attempted to terminate mineral leases either because the minerals had not been developed for some time or because the mineral operator had breached some affirmative obligation in its lease. As a general proposition, courts were not sympathetic to a lessor-plaintiff who tried to terminate the lease by forfeiture.

The Ohio Supreme Court recognized that a mineral lessee had breached its implied duty to mine by failing to develop the property

\textsuperscript{98} In \textit{Davis}, the court stated:
Given the complexity of land title records in some jurisdictions, the “reasonableness” constraint of Mullane [v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)] must limit the broad language of Mennonite [Board of Missions v. Adams, 462 U.S. 791 (1983)]. See [Tulsa Professional Collection Services v.] Pope, [485 U.S. 478 (1985),] 108 S.Ct. at 1344. Accordingly, the reasonableness of constructive notice in a particular case may turn on the nature of the property interest at stake and the relative ease or difficulty of identifying such interest holders from the land records and also on the existence of alternative means of insuring the receipt of notice.

873 F.2d at 790.
for seventeen years. Nevertheless, the court denied the lessor’s requested forfeiture. Forfeiture for failure to mine would be allowed “when necessary to do justice to the parties.” The lessor had the burden of proving that damages would not be an adequate remedy. As the lessor had introduced no evidence of damages sustained from the breach, justice did not require a forfeiture here.

The Supreme Court of Pennsylvania, in a similar case, held that no duty to mine would be implied in a lease providing for an annual minimum advance royalties to the lessor. In Pennsylvania, “minimum annual royalties are in the nature of liquidated damages for the lessee’s failure to mine.” The lessor could not terminate the lease for lessee’s failure to mine while these royalties were being paid.

In West Virginia, a lessor unsuccessfully sought to obtain a forfeiture of a coal mining lease for the lessee’s breach of various express covenants as provided in the lease. The trial court had awarded the lessor $10,000,000 in damages for various breaches and had decreed the lease forfeited. On appeal, the West Virginia Supreme Court affirmed the award of damages but reversed as to the forfeiture. Forfeiture would have given the lessor its damages plus improvements made by the lessee worth over $6,000,000. The court found that the lessor had been adequately compensated in damages for its losses from the breaches. Therefore, it would be inequitable to allow a forfeiture as well. Additionally, the court found forfeiture

100. Id. at 135, 443 N.E.2d at 508.
103. The court agreed with the lower court that the lease term had expired, but not because of non-development. 513 Pa. at 203, 519 A.2d at 390-91.
to be unavailable because the forfeiture provision in the lease did not specify which defaults could result in this severe remedy. Finally, the court ruled, the lessor had waived its right to forfeiture by not acting sooner.

A lessee was relieved of forfeiture by a Pennsylvania court where he failed to begin mining within the period required by the lease.\(^{105}\) The lease provided for automatic termination if mining did not begin within one year after its execution. The state regulatory agency had not issued a mining permit at the end of that one year period. The lessee had acted promptly and in good faith to obtain the permit. Because the delay was due solely to the government agency and because the lessee had at all times acted in good faith, the court refused to enforce the termination provision.

A successor to a lessee, who, under the provisions of the lease, was permitted to terminate a lease, was also required to refund a portion of the advance royalties paid when the lease was executed.\(^{106}\) The lease permitted the lessor to terminate for non-production under certain circumstances. It also required the lessor to refund part of the advance royalty payment upon termination. The lessor sold the property to plaintiff who invoked the termination clause but refused to repay any royalties. The Illinois court held that both the provision’s authority as to termination and the promise to refund royalties were covenants running with the lessor’s estate. Therefore, the lessor’s successor was entitled to the benefit of the termination provision and was bound by the refund requirement.\(^{107}\)

These cases indicate that courts will allow premature termination of a mineral lease only in unusual circumstances. The lessor must act timely in order to assert forfeiture, allege an actual default permitting termination,\(^{108}\) and be prepared to demonstrate that damages

\(^{107}\) For cases holding that deed covenants regarding minerals did not run to successors of the promisee, see Union Expl. Partners, Ltd. v. Amsouth Bank, 718 F. Supp. 552 (S.D. Miss. 1989) (promise to pay grantee one-half of royalties from mineral production) and Bisbee v. Spacht, 125 A.D.2d 982, 510 N.Y.S. 2d 378 (1986) (mortgagee's promise to convey one-half of mineral rights to mortgagee on satisfaction of mortgage).
\(^{108}\) Dunn v. United Sierra Corp., 612 S.W.2d 470 (Tenn. Ct. App. 1980) (lessee not in default for failure to pay royalties where payment made in good faith but amount due was in dispute.).
will not be adequate compensation for the lessee’s defaults. While courts have differed in allocating the burden of proof on the inadequacy of damages,\textsuperscript{109} as a general principle, damages are to be preferred to forfeiture. The lessee’s good faith efforts to meet lease conditions can be sufficient to prevent termination where the default was due to governmental conduct beyond the lessee’s control.

B. Adverse Possession of Minerals

Adverse possession is a common theory under which surface owners assert ownership of severed mineral interests. Unfortunately these claims are rarely successful. To acquire title to a severed mineral estate by adverse possession at common law, one must actually open a mine or well into the minerals and then operate it openly, continuously, hostily, and exclusively for the period allowed by the statute of limitations for actions to recover possession of land.\textsuperscript{110} Thus, where an estate in one-half the minerals had been severed by an unrecorded deed, one who acquired title to the surface by adverse possession also acquired title to the one-half of the minerals not severed. However, the adverse possessor did not acquire title to the severed one-half.\textsuperscript{111} Because the adverse possessor had never attempted to develop the minerals, the grantee’s interest under the unrecorded deed was never divested.

An interesting twist on the adverse possession theme appears in a Tennessee case where the mineral lessee occupied a portion of the surface for non-mining purposes and paid taxes on it for longer than the statutory period.\textsuperscript{112} The court held that the lessee had acquired title to this land by adverse possession. Thus, while mineral owners need not fear loss of their estates by adverse possession until

\textsuperscript{109} Artinez, \textit{supra} note 98, at 1051-56.


\textsuperscript{111} Boshwell v. Keith, 418 So. 2d 89 (Ala. 1982) (one-half of minerals severed by deed in 1937; title to surface and unsevered portion of minerals acquired by adverse possession in 1953.).

\textsuperscript{112} Hughes v. Cowan Stone Co., 766 S.W.2d 188 (Tenn. Ct. App. 1988).
the adverse possessor actively exploits the minerals, surface owners may not sit idly while the mineral estate exercises rights in the surface not granted it in the severance.

C. Dormant Mineral Statutes

The common law rules with regard to the termination of a severed mineral estate by forfeiture and adverse possession, as well as the state recording statutes' protection of duly recorded property interests, operate to protect the mineral owner at the expense of the surface owner.\(^{113}\) These same protections can make it as risky to develop the mineral estate without consolidating ownership as to develop the surface without regard to the mineral estate.\(^ {114}\)

As a response to the recording statutes' efficiency and the impediments to surface development from dormant mineral interests, several states have adopted statutes tailored specifically to limiting and eliminating dormant mineral interests. These statutes take one of three basic forms: "use it or lose it," "root of title," and "catch all." All three forms impose a burden on severed mineral owners to take affirmative action to preserve their interest and to continue to take action, at least periodically, in the future. Each will be discussed in turn.

The first statutory approach in limiting dormant mineral interests is the "use it or lose it" statute. These statutes require the mineral owner to develop or make some other "use" of the minerals. Permissible alternative "uses" are often defined in the statute as paying taxes in the mineral estate, paying rentals or royalties, or periodically recording in the land title records a statement that the owner intends to preserve its claim.\(^ {115}\) Failure to preserve the interest results in its

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115. The leading example of this form is the Indiana Dormant Mineral Mine Act, Ind. Code Ann. §§ 32-5-11-1 to -8 (Burns 1979). The statutory scheme is analyzed and discussed at length in Polston, Legislation, Existing and Proposed, Concerning Marketability of Mineral Titles, 7 LAND & WATER L. Rev. 73 (1974).
loss. The interest either vests in the surface owner,\(^{116}\) the owner of the interest from which it was created,\(^{117}\) or the state.\(^{118}\)

During the late 1970’s and early 1980’s, some of these statutes were held to run afoul of constitutional protections of private property\(^{119}\) while others were found to meet these same requirements.\(^{120}\) However, federal constitutional issues were resolved favorably to the “use it or lose it” type of statute in *Texaco, Inc. v. Short.*\(^{121}\) Since that decision, a number of states have adopted similarly constructed statutes.\(^{122}\) An Indiana court has held that the act of leasing a severed mineral interest is not a sufficient “use” within such a statute.\(^{123}\) Failure to make any statutorily defined “use” in Indiana may result in automatic lapse of the mineral interest without any action by the surface owner.\(^{124}\)

The second statutory approach used by some states to rectify dormant mineral interests subjects severed mineral interests to the state’s marketable title statute.\(^{125}\) To oversimplify, an owner’s title is established by a chain of record title from the present back to an instrument known as the “root of title,” recorded before a given date. Only claims reflected in the “root,” or appearing of current


\(^{117}\) E.g., Ind. Code Ann. § 32-5-11-1 (Burns 1979).


\(^{124}\) McCoy, 623 F. Supp. 1300. See also Polston, Recent Developments in Oil and Gas Law, 6 E. Min. L. Inst. ch. 19, § 19.04(4) (1985).

owner’s record chain of title since the “root” remain valid. Claims predating the “root” may be preserved by “use” or by re-recording within the statutory period. Otherwise, they are lost. Even a fraudulent deed may become a valid “root of title” and cut off claims. Where the surface owner’s “root” indicates an outstanding mineral interest, the mineral interest is preserved, at least until that instrument no longer serves as the root of title to the surface.

Statutes in the third or “catch all” category apply a variety of approaches to terminate dormant mineral interests. A Georgia statute gives the surface owner “a presumption” of title in the mineral interest by “adverse possession” where the minerals have not been worked and taxes on the interest have not been paid for a period of seven years after the severance and seven years prior to the surface owner’s filing a claim of title. Although the Georgia Supreme Court held that the statute could not apply retroactively to interests created before its adoption, that court later indicated that any prior mineral interest will be lost if the seven year periods have run after the statute was adopted. A mineral owner was permitted to preserve its estate by paying only part of its real estate tax liability three days before the surface owner filed his claim. The Eleventh Circuit recognized that “adverse possession” was a misnomer but not fatal to the statute’s constitutionality; the statute was valid as a mineral lapse act under Short.

Virginia is the only state which has held its mineral lapse statute to be unconstitutional after Short was handed down. The Virginia

statute creates a presumption that no recoverable minerals exist under a surface tract if mineral development has not taken place for thirty-five years. The presumption, however, only applied in counties of certain population sizes west of the Blue Ridge Mountains and not in other counties west of those mountains. The Virginia Supreme Court held that the statute was unconstitutional because a county's population has no rational relationship to the presence or absence of minerals under the surface. To that extent, the statute bore no reasonable relationship to its intended purpose and was arbitrary.

Generally, the 80's were a favorable period for mineral lapse statutes, whatever form they took. Legislatures and courts were sympathetic to surface owners whose plans were impeded by long unused mineral interests. These statutes make it much easier for the surface owner to eliminate outstanding title claims, develop the surface without regard to mineral claims, or develop the minerals when the existing owner is unwilling to do so. The rather wide-spread adoption of these statutes reflects the increasing tension between surface and mineral interests which became a hallmark of the 80's.

V. MINING RIGHTS—SURFACE USE AND SURFACE DAMAGES

Mineral ownership has no value unless one can remove the mineral from the earth, process it, sell it, or consume it. For this reason, the mineral estate has a right, easement, or servitude for use of the surface estate in order to remove the minerals. Analogous to the law of easements and servitudes, the mineral estate is referred to as the "dominant estate" and the surface estate as the "servient estate." The mineral estate has been permitted to diminish the value of the surface, or to interfere with its use by the surface owner, so long as those actions are reasonably necessary to recover the minerals. Even where the severance expressly creates certain surface rights

134. VA. CODE § 55.164 (1950).
in the mineral estate, additional rights will be implied if they are "reasonably necessary for exploration and development."\textsuperscript{136}

Several themes appear in the 80's litigation over mining rights. The passage of time, changes in mining technology, increased judicial sensitivity to the environmental effects of mineral development, the adoption of federal and state environmental statutes, and increasing judicial sympathies for surface owners' ability to make productive use of their land have influenced court determinations concerning the extent of private mining rights granted years ago. These influences have generally, although not always, served to limit both the mineral estate's express and implied rights to affect the surface estate adversely.

The time element often plays an important role in these disputes. The original severance may have occurred decades, or as much as a century, earlier. Mining methods have changed; surface activities have changed. What may have seemed reasonable to a surface owner when John C.C. Mayo was buying coal lands under his "broad form deeds" in the hills of Nineteenth Century Kentucky may no longer be acceptable to the developer of a shopping center,\textsuperscript{137} residential subdivision,\textsuperscript{138} or automobile assembly plant. Even farming in the 80's has changed, often requiring substantial capital investment in buildings, equipment, drainage facilities, and water supply. These conflicting expectations between mining interests and surface use interests have fueled new judicial approaches to old mining rights problems.

Mining rights litigation in the 80's began in West Virginia with some very traditional problems of deed interpretation.\textsuperscript{139} By the end of this period, the same court was making some disturbing sugges-


\textsuperscript{137} See Eastwood Lands, Inc. v. U.S. Steel Corp., 417 So. 2d 164 (Ala. 1982) (shopping center developer not entitled to enjoin mining which might cause damage to surface because of waiver of support in severance deed; waiver not against public policy.).

\textsuperscript{138} Island Creek Coal Co. v. Rodgers, 644 S.W.2d 339 (Ky. Ct. App. 1983) (duty to support surface in natural state determined as of time coal removed, not as of severance of coal and surface).

\textsuperscript{139} See infra notes 143-147 and accompanying text.
tions about the effect of federal and state environmental legislation on private rights and on liability waivers in earlier severances. Similar sentiments have been expressed by other courts. During this era, the last two eastern coal mining states adopted limitations on the extent to which severances authorized surface mining by the mineral estate. However, they did so on very different bases and with very different consequences.

It is too early to say with certainty that the trend toward limiting the scope of express and implied mining rights will continue. The pace of change in the common law is often very slow. However, the seeds have been planted by the judicial opinions written by courts of influential mining states. These opinions cannot be ignored by the mineral practitioner. The following cases are illustrative of present judicial tendencies.

A. Mining Rights and Changing Technology

1. In General

In 1980, the West Virginia Supreme Court of Appeals addressed the present effect of mining rights which had been reserved in an 1890 severance. These reserved mining rights expressly included the right to use the surface for "telephone and telegraph lines" and "all proper and reasonable rights and privileges for ventilating and draining the mines." The question arose as to whether the deed also impliedly permitted an electric transmission line on the surface to power mine ventilation equipment? A divided court held that the scope of implied mining rights, in contrast to express rights, should be determined by balancing the necessity for the claimed right against the burdens it imposes on the surface. The right should be allowed where it is reasonably necessary for mining and where its exercise will not impose a substantial burden on the surface. A dissenting

140. See infra notes 201-214 and accompanying text.
141. See infra notes 190-199 and accompanying text.
142. See infra notes 167-173 and accompanying text.
144. Id. at 18, 267 S.E.2d at 725.
opinion argued that this balancing test eliminated West Virginia’s traditional “intention of the parties” test of implied rights and allowed the court to make contracts for the parties.\textsuperscript{145}

A second 1980 decision by the West Virginia court involved a 1902 mineral severance where the grantor had expressly reserved the right to transport coal, workers, and equipment over the land to operations on neighboring lands.\textsuperscript{146} At issue was the right to use an old haul road serving an abandoned deep mine to transport personnel and equipment to an adjoining surface mine. The court held that the scope of an express easement, unlike an implied one, is determined by the parties’ intent at its creation; and their intent is a question of fact, not of law. An express easement may not impose a greater or different burden on the servient estate than the parties had intended. Surface uses and mining technology at the time of severance were relevant factors to be considered in determining the easement’s intended scope.\textsuperscript{147} The case was remanded for a factual determination of whether 1980 hauling technology is so substantially different from 1902 technology as to “overburden” the surface estate.

The scope of “reasonable necessity” does not remain constant. Changes in technology (electric ventilating fans) and in regulation (SMCRA) affect that term. The Eleventh Circuit has held that an express right to use the surface for preparation and transportation of minerals “from said land or other lands” was broad enough to permit the mineral estate to create a nine acre sedimentation pond for its coal cleaning plant on the surface estate.\textsuperscript{148} The court failed to discuss the question, but one wonders whether the sedimentation pond was required under the operator’s surface mining permit. The result suggests, at least, that facilities required to satisfy new mining regulations are within the mineral estate’s surface use rights.

\textsuperscript{145} Id. at 21, 267 S.E.2d at 727.
\textsuperscript{147} Id. at 268, 273 S.E.2d at 93. See also Reimer v. Gulf Oil Co., 281 Ark. 377, 664 S.W.2d 456 (1984) (oil and gas lessee had express easement over surface to well on other land and would be liable for unreasonable use of easement only.).
\textsuperscript{148} Pittsburg & Midway Coal Mining v. Shepherd, 888 F.2d 1533 (11th Cir. 1989).
Conflict does not exist only between the surface and mineral estates. An Indiana court recognized an implied easement through coal estates severed between 1899 and 1905 to explore lower strata for oil and gas.\textsuperscript{149} The easement extended 300 feet in diameter from the well bore because of federal law\textsuperscript{150} requiring pillars of that size to protect active oil and gas wells drilled through coal seams.\textsuperscript{151} The court’s use of a statute, which was enacted long after the severance, in order to define the easement offers further evidence of how new governmental regulations can affect “reasonable necessity.”

These cases are illustrative of the most important private law issues confronting the mining industry today: What rights should be implied from a severance of minerals from the surface estate? What is the scope of rights expressly created in the severance instrument? Both of these questions must be answered in the context of changing mining technology and changing demands for surface use by both the mineral and surface owners. It is unlikely that the parties to the 1890 severance could have foreseen the need for giant electric motors and fans with attendant electrification facilities to ventilate an 1890 mine. Nor does it seem likely that the 1902 grantor would have anticipated the use of his land 70 years later for surface mining on a neighbor’s land, an activity probably unknown at the time of the severance.

At the same time, the mineral estate can not be confined to mining technology existing at the time of severance, even though the impact of new technology on the surface may be greater than the parties could have contemplated. Courts should not be Luddites.\textsuperscript{152} Even in 1890 and 1902, the fact of technological changes should have been foreseeable, whether or not specific changes could have been foreseen.

Nor should the scope of its mining rights be limited strictly to those “reasonably necessary” to mine at the time of the severance.

\textsuperscript{150} Federal Mine Safety and Health Act, 30 U.S.C. §§ 863, 877(h) (1982).
\textsuperscript{151} Richardson, 422 N.E.2d at 713.
If mine operators, at the time of severance, were permitted to discharge untreated acid mine drainage directly into surface streams, but are now required to treat water discharges to prevent pollution, use of the surface for a settling pond may be "reasonably necessary" for mining operations. No federal legislation defined the minimum size of coal pillars required to protect active gas wells in 1899. Yet, if the size of an implied easement for drilling through a coal seam were less than 300 feet in 1981, the well could not be sunk. The oil and gas owner could not develop its property just as certainly as if no separate oil and gas rights existed.

The mine operator, who is successful in these actions, can occupy part of the surface estate at no additional cost while the surface owner is denied some current use of its estate. This seeming unfairness has led several states to adopt legislation expressly requiring the payment of damages to the surface estate owner for land used by the mineral estate.

The common law has a remarkable facility for adapting to meet new societal needs. The West Virginia court's attempt at determining the scope of mining rights by comparing the burden of an express easement at the time of its creation to the burden at the time of its exercise, or to balance inconveniences in the case of an implied easement, are steps in the right direction. Unfortunately, these steps fall far short of meeting current needs of either the mining industry or the surface owner. Under either test, it is necessary to ask a court to determine the scope of that right. Neither decision encourages the parties to settle their disagreements privately.

In determining the parties' intent where the original severance is silent, courts must resort to the theory of "general intent" in order to conclude that the new right was conferred on the mineral estate. Essentially, this "general intent" approach assumes that the mineral estate was intended to have all rights necessary or appropriate for mineral development unless its rights are specifically restricted in the

155. See infra, notes 208-219 and accompanying text.
severance document. This theory implies that, at the time of severance, the surface owner anticipated specific technological and economic changes far into the future and bargained for them in setting the consideration to be paid for the severance. This is an unrealistic burden to place upon both the parties, now long dead, and the language, from times when modern mining methods and needs were unknown.

The American Law Institute is engaged in a reformulation of the law of easements and other servitudes. Tentative Draft No. 1 of the Restatement (Third) of Property, Servitudes, dealing with the creation of servitudes, was approved at the Institute’s annual meeting in May, 1989. The Restatement will attempt to formulate a “unified field theory” of servitudes—easements, profits, covenants, equitable servitudes, and other rights incident to the ownership or use of land.

According to the Restatement an easement by necessity arises whenever a severance of a single estate into two or more fails to create express rights in one parcel which are necessary for use and enjoyment of the other. Implied mining rights are within this provision. The commentary states, in part:

To support implication of a servitude under this section, the rights claimed must be necessary to the reasonable enjoyment of the property. ‘Necessary’ rights are not limited to those essential to enjoyment of the property, but include those which are reasonably required to make effective use of the property. If the property cannot otherwise be used without disproportionate effort or expense, the rights are necessary within the meaning of this section. Reasonable enjoyment of the property means use of all the normally usable parts of the property for uses that would normally be made of that type of property.

The Restatement recognizes that the law should not freeze property rights at the time of severance: “What is necessary depends on the nature and location of the property and may change over time. . . .” The parties may agree that there shall be no servitude

156. Kuntz, supra note 29.
157. RESTATEMENT (THIRD) OF PROPERTY, SERVITUDES, § 2.15, comments a, b, illustrations 5-7 (Tent. Draft No. 1, 1989).
158. Id. at comment d.
159. Id.
by necessity, but only by "language or circumstances of the conveyance [which] clearly indicate that the parties intended to deprive the property of that right." An unarticulated intent should not deprive a property owner of rights reasonably necessary for enjoyment of that property.

Central to the availability of the right is its "reasonable necessity" to the enjoyment of the severed estate. Unlike the West Virginia court, the Restatement does not suggest balancing the necessity of the right with its impact on the servient estate. Instead, it looks to the right's necessity for enjoyment of the severed estate.

This provision is limited to rights implied from a severance because of "necessity." However, the same approach can be used in interpreting express mining rights which are ambiguous or which, because of changes in mining conditions or regulation, have become ambiguous. The Institute has not yet considered the scope of express servitudes. Mineral practitioners should be aware of these efforts and should follow them closely.

2. Surface Mining

The mineral estate's rights as the dominant estate have never been unlimited. At some point the mineral estate's activities affect the surface estate so adversely that the surface estate becomes worthless. Courts in most eastern coal mining states are reluctant to find that the surface owner intended to allow the mineral estate to destroy the surface estate completely. Surface mining so substantially burdens the surface estate that the right to engage in it should not rest

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161. The Restatement discusses this point:
Because of the strong public policy favoring avoidance of the costs incurred on account of unusable property, and the strong likelihood that the parties . . . did not intend to deprive it of its utility, servitudes by necessity will be implied unless it is clear that the parties intend[ed] to deprive the property of rights necessary to its enjoyment. Thus servitudes necessary to enjoyment of the property will be implied unless it affirmatively appears that the parties did intend that result. Mere proof that they failed to consider access rights, or incorrectly believed other means to be available, is not sufficient to justify exclusion of the implied servitudes for rights necessary to its enjoyment. (emphasis added).

upon implication. There must be some positive evidence of that intent.\(^{163}\) The evidence may be found in the language of the severance,\(^{164}\) or it may be implied from facts which should have been known to both parties when the severance occurred (e.g., mining practices in the area).\(^{165}\)

In most states, this limitation on the mineral estate developed as a matter of common law, as a rule of construction of severance instruments. However, the state legislatures of Tennessee and Kentucky both sought to impose this limitation on their courts by statute. Both statutes were challenged on constitutional as well as other grounds. The Tennessee statute,\(^{166}\) which allowed surface mining only if the severance contained express language to that effect or if surface mining had been a common activity at the time of the severance, applied only to surface mining of coal. The Tennessee Supreme Court, in a case involving 50 and 60 year old severances, found that the statute simply codified an accepted rule of construction.\(^{167}\) Thus, the statute did not violate the mineral estate’s constitutional contracts, due process, or equal protection rights. This approach also enabled the court to avoid the question of legislative invasion of a judicial function, the central issue in the Kentucky case. Moreover, as a common law rule of construction, the Tennessee statute should not be limited to surface mining of coal.

The Kentucky Supreme Court held its statute, which contained almost identical language to that of Tennessee, to be an unconstitutional invasion of judicial power by the legislature insofar as it directed the interpretation of existing instruments.\(^{168}\) The court did allow the surface owner to recover damages for the injury to the


\(^{168}\) Akers v. Baldwin, 736 S.W.2d 294 (Ky. 1987).
surface. Damages are to be measured by the difference in the estate's value before and after mining operations. Reclamation activities actually conducted by the mine operator are to be considered in determining the land's post-mining value. As a result, Kentucky is the only major eastern coal producing state with a common law basis for permitting surface mining under deeds executed when that method was not well known.169

The voting citizens of Kentucky were unhappy with the court's decision. In 1988, they amended the Kentucky Constitution by adding to it the precise language held unconstitutional by the court.170 The federal constitutionality of this amendment is presently being litigated.171 The amendment limits mining methods to those known in the community at the time of severance. If literally interpreted and federally constitutional, it could prevent the use of continuous mining machines, conveyor belts, and other common technological advances in the mining of coal severed before these methods were known. It is difficult to believe that the Kentucky voters intended to require coal miners to work only with picks and shovels and to remove the coal from the mines with mule drawn wagons. The Kentucky court did give increased protection to owners whose land is subject to surface mining under old deeds by making damages available as a matter of law.172

169. But see United States v. Stearns Coal & Lumber Co., 816 F.2d 179 (6th Cir. Ky. 1987) (Mineral owner which had conveyed surface to federal government in 1937 for national forest and reserved minerals had not reserved right to conduct surface mining operations under Kentucky law; court's reasoning was rejected by Kentucky Supreme Court in Akers, 736 S.W.2d 294, discussed in supra note 168 and accompanying text.

170. KY. CONST. § 19(2) (added November 11, 1988):
(2) In any instrument heretofore or hereafter executed purporting to sever the surface and mineral estates or to grant a mineral estate or to grant a right to extract minerals, which fails to state or describe in express and specific terms the method of coal extraction to be employed, or where said instrument contains language subordinating the surface estate to the mineral estate, it shall be held, in the absence of clear and convincing evidence to the contrary, that the intention of the parties to the instrument was that the coal be extracted only by the method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed, and that the mineral estate be dominant to the surface estate for the purposes of coal extraction by only the method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed.


172. The court made an exception for deeds executed between 1956, the date of its earlier decision.
The 80's saw further limitations on the mineral estate’s right to engage in surface mining activities, particularly under ancient severances. While Tennessee announced its approval of a rule of construction limiting implied mining rights, the decision is more important than it may, at first, seem. That state later repealed the statute which prompted the litigation. By declaring that the statute merely codified an existing rule of construction, the rule of the case remains in force. Repeal of the statute does not repeal the common law principle which that statute stated.

In Kentucky, the rule was moved, by action of the electorate, from a statute to a constitutional principle. Should the amendment withstand the federal constitutional challenges, it may more severely restrict mining rights than judicially imposed constructional rules, which can change with time as needed. Even if the amendment does not pass federal constitutional muster, the Kentucky court has increased the cost of exercising surface mining rights by making the mineral estate strictly liable for damage to the surface estate from that activity. Similarly, by holding that all substances of value pass to the mineral estate under severances of “minerals” or “all minerals,” subject to a duty to compensate for damage to the surface from mining, Texas resolved this ownership question at a cost to the mineral estate.173

3. The Duty of Support and Longwall Mining Rights

Each estate, including each mineral estate, owes a duty of support to all estates lying above it, including the surface estate.174 This duty may exist as a servitude appurtenant to the surface or, as in Pennsylvania, this duty may exist as a distinct estate in land.175 It

allowing surface mining under these deeds, and 1987, the date of the present decision. Akers, 736 S.W.2d at 307.
may be waived by a surface owner, either in the mineral severance or by a subsequent agreement.\textsuperscript{176}

Where not waived, the mineral estate has an "absolute" duty to support the surface in its natural or unimproved state.\textsuperscript{177} A Kentucky court held that the extent of this duty should be determined when the coal is removed, not at the time of the severance.\textsuperscript{178} The coal had been severed in 1905 and mining had continued until 1971. The underground mine operator argued that its duty of support should be fixed according to the reasonable uses to which the surface might be put in 1905. Modern subdivision practices were unknown. Subsistence farming required plots of 50 acres or more. That was the "natural state" which the operator had to support. The court, however, defined "natural state" as the condition of the surface, including reasonable and foreseeable improvements thereon, \textit{at the time the coal is severed, not from the fee, but from the earth}.\textsuperscript{179}

At the time of mining in 1948, surface use for a residential subdivision was foreseeable. Therefore, the operator had to provide support for that use, not for a 1905 subsistence farm.

The case was one of first impression. It indicates that the issue of changing technology cuts both ways. If the mineral estate is permitted to use more modern technology than existed at the time of severance, the surface estate's right to enjoy similar technological advances should likewise be recognized.

The right of the mineral estate to engage in longwall mining operations has been under attack on many fronts. This method of mining allows for greater recovery of coal at less cost than the more traditional room and pillar mining method. It also results in faster subsidence of overlying strata often with, at least temporary, surface impacts.\textsuperscript{180} It has been suggested that, by reasoning similar to that

\textsuperscript{176} E.g., Eastwood Lands, Inc. v. U.S. Steel Corp., 417 So.2d 164 (Ala. 1982) (reservation of minerals and right to mine without leaving support for surface barred action injury to shopping center buildings as result of mining.).

\textsuperscript{177} RESTATEMENT (SECOND) OF TORTS § 820 (1977).

\textsuperscript{178} Island Creek Coal Co. v. Rodgers, 644 S.W.2d 339 (Ky. Ct. App. 1982).

\textsuperscript{179} Id. at 344.

\textsuperscript{180} See EASTERN MINERAL LAW FOUNDATION, SPECIAL INSTITUTE ON SUBSIDENCE (1989), for a thorough discussion of longwall mining and subsidence effects.
which limits surface mining rights, longwall mining could be restricted to those severance instruments which expressly authorize it or which were made after it became a recognized mining method.\textsuperscript{181}

A number of decisions at the end of the 80's rejected this argument, holding that longwall mining was permitted under various older severance instruments.\textsuperscript{182} Unfortunately, most of these decisions are unpublished. Only one of these opinions is from the highest court of any state. The well researched opinion of Judge Simmons in \textit{Culp v. Consol Pennsylvania Coal Co.}\textsuperscript{183} deserves to be read carefully by anyone interested in this question. Judge Simmons found that the impact of longwall mining on the surface is not comparable to that of surface mining. Longwall mining is "an accepted method of underground mining which was contemplated by both federal and state mining regulations." Further, he found that it is not a "novel process," as many have supposed. Quoting from various state and other mining publications, he found that longwall mining was known in the United States as early as 1874. For these reasons, he concluded it did not have to be set forth in the severance instrument.

In \textit{Large v. Clinchfield Coal Co.},\textsuperscript{184} a divided Virginia Supreme Court refused to enjoin longwall mining under plaintiffs' property because plaintiffs could not show any irreparable injury. Plaintiffs' support right had not been waived in the 1887 mineral severance. Conceding that plaintiffs' right to support was "absolute," the majority concluded that this alone would not justify equitable relief; injunctive relief requires some irreparable injury. Withdrawal of support, even surface subsidence, which does not "injure" the superior estate, does not give rise to a cause of action. The "absolute" nature of the support right means only that liability for injury from with-

\textsuperscript{181} For a summary of the arguments for and against this position, see McGinley, \textit{Does the Right to Mine Coal under a Lease or Deed Include the Right to Extract by Longwall Mining Methods?} 5 E. Min. L. Inst. ch. 5 (1984).


\textsuperscript{183} \textit{Culp}, No. 87-1688 (W.D. Pa. May 4, 1989).

\textsuperscript{184} 387 S.E.2d 783 (Va. 1990).
drawal of support is absolute, not that support must be provided where its withdrawal works no injury.

The surface estate at issue was unimproved and uninhabited timberland. Longwall mining would result in swales three feet deep, 600 feet wide, and 3,000 to 5,000 feet long over the surface. There would be no surface cracking and a surface stream would not be affected by subsidence from the mining. Although the dissenters found this to be sufficient injury to surface owners to justify an injunction, the majority held that an injunction was not warranted. The majority opinion should not be read as suggesting that a surface owner may never be able to enjoin longwall mining beneath its property; however, in order to do so, the owner must prove "irreparable injury" to the surface beyond the mere loss of subjacent support itself. Presumably, the result would have been different had the plaintiffs been able to show that the subsidence would have diminished the value of the surface or would otherwise have interfered with its use.

The majority rejected the plaintiffs' assertion that this action was comparable to one brought to enjoin a continuing trespass, for which no physical damage need be proven. In this case, the defendant had the right to mine the coal in question. Therefore, defendant's conduct was not a trespass.

The two dissenting justices found "irreparable injury" from the withdrawal of support and its impact on the surface. To them, "the destruction of an absolute property right, is, in itself, an injury subject to injunctive relief."

A federal district court in Virginia held that a mine operator was not liable for damage to the surface from vibrations, subsidence, and escaping methane gas as result of longwall operations. Plaintiffs' predecessor in title had waived its right to subjacent support and to damages from mining. Despite the fact that the parties to

185. Id. at 786.
187. Large, 387 S.E.2d at 787.
the waiver had not contemplated longwall mining, the waiver was held to be valid because they had contemplated damage to the surface from mining.

**B. Statutory Influences**

Mineral lapse statutes are a form of direct legislative intervention in the allocation of private rights. They reflect value choices made by the elected community representatives regarding relative development priorities. These statutes can foster mineral development as easily as they can hinder it. Indeed, one suspects that only the most sophisticated surface owners rely on the availability of these statutes to clear title. Probably most actions are brought at the suggestion of third parties desiring to develop the minerals who can not do so while they remain in their present ownership state.

Other statutes have been found to have a bearing on the development of mineral lands in rather unusual or unexpected ways. The federal and state surface mining acts were enacted to achieve public goals, primarily environmental protection. Yet they are beginning to play an important role in the private rights of surface and mineral estate owners. Surface owners and courts are discovering new theories on which to reestablish rights seemingly waived in earlier severances. Several states have enacted statutes requiring the mineral estate to pay damages for use of or interference with the surface. Where these statutes also authorize the mineral estate to use the surface without hinderance by the surface owner, in exchange for damage payments, they provide benefits to both parties.

1. Environmental Protection Statutes

Pennsylvania’s bituminous coal mine subsidence statute prohibits underground mining of bituminous coal in a manner which will cause subsidence of the surface. It also requires protection for

certain designated structures and surface features. An operator whose activities have damaged a protected structure or feature must either repair it or compensate the owner for the resulting damage. This liability exists even though the surface owner’s right to support had been waived earlier when the surface and coal estates were severed. The operator’s liability is statutorily based, rather than being based upon the common law right of support. It is absolute liability, which is measured by the cost to repair the damaged structure, not by the diminution in value of the property. The operator is liable for all damages legally caused by its failure to provide the statutorily required support or notice of mining. The statute does not protect separately owned strata between an active mine and the surface.

An Illinois federal district court held that that state’s surface mining act invalidated an earlier damage waiver by a surface owner from deep mining activities to the extent that restoration or compensation was required by the act. However, the compensation provisions of that act apply only to damage actually resulting from subsidence; they do not require compensation for costs incurred by a surface owner to avoid subsidence damage.

In Rose v. Oneida Coal Co., the West Virginia Supreme Court of Appeals refused to award damages for injury to plaintiffs’ surface from subsidence because of a waiver in the severance instrument. However, the court suggested that the state’s surface mining act may

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192. Id. § 1406.6.
196. Albright v. Municipal Authority, 348 Pa. Super. 505, 502 A.2d 658 (1985) (water escaped from public reservoir, a protected structure, and damages plaintiff’s properties; act imposes absolute duty on mine operator to prevent subsidence under protected structures; operator liable for all damages legally caused by its failure to provide support, not just for damage to protected structure.).
have created private rights not covered by the earlier waiver. Its affirmation of summary judgment for defendant was expressly without prejudice to plaintiffs’ right to bring a later action under that theory.202 The court observed: “Although we believe that [the West Virginia surface mining act] has changed many of the old common law rules concerning the rights and remedies of surface owners vis a vis mineral owners, the dimensions of those changes are as yet uncertain.”203

In a later case, that same court held a waiver of support and damages in a 1907 severance was insufficient to waive the state surface mining act’s prohibition against mining within 300 feet of an occupied dwelling.204 The act contemplates a knowing and specific consent to mining within 300 feet of an occupied dwelling. The court did not believe that a damage waiver executed when this consent requirement did not exist could be extended to meet the statutory mandate because the statute could not have been within the contemplation of the parties to the 1907 severance. A new consent from the present owner is required to permit mining within 300 feet of plaintiffs’ homes.

In these cases, courts are finding private duties in public statutes. Their action is not without precedent. The Restatement (Second) of Torts recognizes that private causes of action may be based upon public or statutory duties in appropriate cases.205 The Restatement indicates when and how courts may look to legislation or administrative regulation to determine a standard of conduct for the “reasonable person.”206 Violation of that standard may be negligence per se or the standard may only be evidence of negligence.207

Courts may be going beyond the Restatement in these cases. Waivers in early severances often include both the common law duty

202. Id. at 816.
203. Id. For a cryptic statement that Pennsylvania’s subsidence act was intended to modify the common law of support in a manner adverse to the owner of an underlying coal seam, see George, 102 Pa. Commw. 87, 89 n.5, 517 A.2d 578, 580 n.5.
206. Id. § 285.
207. Id. § 288B.
of subjacent support and liability for negligent conduct. Essentially, these courts are limiting severance waivers to common law liability as it existed at the time of severance. This treatment favors the present surface owner who is given the benefit of new statutory duties despite an earlier waiver of a similar common law liability. It is, however, inconsistent with those decisions which refuse to limit mining technology or surface use to conditions existing at the time of severance.

2. Surface Damages Statutes

A number of mineral producing states have enacted statutes imposing liability on a mineral developer for use of or injury to the surface estate.\(^\text{208}\) Although its act is limited to oil and gas operations,\(^\text{209}\) the Oklahoma experience is instructive.

Oklahoma passed its surface damages act in 1982. The act's constitutionality was established in *Davis Oil Co. v. Cloud*.\(^\text{210}\) The *Davis* majority held that the statute does no more than modify a permissible defense to an action brought by the surface owner for damages, a matter within the competence of the legislature and not proscribed by the state or federal constitution's contracts or due

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\(^\text{209}\) Alpine Constr. Corp. v. Fenton, 764 P.2d 1340 (Okla. 1988) (legislature limited benefit of act to oil and gas operations; coal operator's reclamation duties surface mining act and waiver of damages from mining in severance preclude surface owner's right to injunction.).

\(^\text{210}\) 766 P.2d 1347 (Okla. 1986 [sic]). (The original decision of court was written in 1986 but not released for publication until January of 1989, following denial of a request for rehearing. The 1986 opinion was written by Justice Lavender for a unanimous court, one justice noting a dissent as to the retroactive effect of the statute. The decision as finally published continues Justice Lavender's opinion unchanged as the majority opinion. However, four of the nine members of the court dissent as to the retroactive effect of the statute in an opinion by Justice Summers).
process clauses. However, the dissent opined that requiring the mineral estate to compensate for actions which are not negligent or wilful was a retroactive modification of vested rights.

As with other state statutes, the Oklahoma act replaces common law liability for negligence or nuisance with a strict liability standard.211 The act expands the nature of damages from production activities beyond the “unreasonable and unnecessary” standard of the common law.212 Operators must negotiate damage payments with the surface owner before beginning operations. However, these requirements are imposed only upon an “operator” as defined in the statute.213 Unlike the statutes of other states, a lessee with the right to enter and explore for hydrocarbons is not an “operator” during exploratory activities. The availability of statutory damages bars a surface owner’s action for common law nuisance, even where the lessee enters without attempting to comply with the act.214

The National Conference of Commissioners on Uniform State Laws has been developing what is now entitled “The Model Surface Use and Damages Act.” This Act would grant a severed mineral interest the right to use the surface for limited purposes and would require the mineral developer to pay damages to the surface owner. Damages are defined in a manner similar to rent for portions of the surface actually occupied by the developer or made unavailable to the surface owner during development activities. Additional damages, similar to consequential damages, exist for actual injury to the surface or designated surface features.

The Model Act could potentially bring about significant changes in the law of many eastern states. For example, Pennsylvania law does not allow a mineral owner to engage in surface mining unless the severance document contains “some positive indications that the parties . . . agreed to authorize” this method of mining.215 On the other hand, the Kentucky Supreme Court allows surface mining with

no evidence of the parties' intent\textsuperscript{216} even though a similar deed in Pennsylvania would not permit surface mining. Kentucky requires the mineral estate to compensate the surface estate for damages from mining. Thus, the Model Act can be read as opting for the Kentucky solution for all states.

The respective rights of owners of severed minerals and surface estates traditionally have been governed by the apparent intent of the parties to the original severance instrument. Their intent has been determined from the language in that instrument and admissible extrinsic evidence. At present there is no uniform rule for determining what specific language constitutes a waiver of surface support or of liability for injury to or destruction of the surface estate.\textsuperscript{217} Surface damages acts, including the draft Model Act, seek to substitute a legislative judgment as to the allocation of loss from mineral development for the parties' intended allocation of that loss.

These efforts may reflect a dissatisfaction with the traditional way of allocating losses by contract. At the very least, they reflect a dissatisfaction with the consequences of ancient severances when liability was measured by different, far less intensive surface activities.

VI. Conclusion

There are some lessons to be learned from these cases of the 1980's. Courts have not deviated from tradition when interpreting the language of conveyances. Within limits, courts still will protect expectations which the parties indicate they intend to have protected. However, there is a demand for a higher standard of fair dealing when the parties are not equally knowledgeable of relevant facts or do not possess equal bargaining power.

Courts and legislatures are becoming increasingly impatient when rights created long ago remain unused or, when asserted, conflict

\textsuperscript{216} Akers v. Baldwin, \textit{supra} n. 168.

with the interests or needs of current owners. Whether in the form of dormant mineral statutes or new sources of surface owner rights, the tendency is to favor the present developer over the dormant one and the surface owner over the mineral owner. This is not always the case, of course, but it is so more often than ever in the past.

Some trends suggested in this article will undoubtedly influence the development of private mineral law in the 1990’s. Others may prove to be only excursions and alarums.218 Because changes in the common law of private relationships occur case by case, they become noticeable only after several similar decisions. It is easy not to recognize them as changes while they are developing. However, it is important to be aware of the possibility of change rather than wait until a change has become part of the common law and is, itself, entrenched as precedent.

218. Those rapid and noisy, temporary movements of large numbers of people in the background of Elizabethan dramas. They exist more for momentary effect than as important parts of the plot. E.g., RICHARD III, act V, scene iv; HENRY V, act IV, scene iv.