April 1972

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DEVELOPMENT OF THE LAW OF COAL,
OIL AND GAS FROM 1951 TO 1971

ROBERT TUCKER DONLEY*

It is now twenty years since the publication of the writer's book *The Law of Coal, Oil and Gas in West Virginia and Virginia.* The passage of a fifth of a century seems to furnish an appropriate occasion for bringing up to date the law of the Virginias upon this subject; to re-examine previous statements, conclusions and predictions; and to review important new departures from previous doctrines.

Although the West Virginia and Virginia cases decided prior to 1951 are of such abundance as to require a volume for their examination, comparatively few have been decided since that time; and of these only a handful deal with principles not previously considered.

For convenience of reference, the text of this article will conform as nearly as possible to the previous work by numbered sections.

Section 7. Innocent Trespass.

*Condry v. Pope* again affirmed the principle that an innocent trespass occasioned by a mistake as to the location of a boundary line rendered the trespasser liable for the value of oil and gas extracted, after severance, less the reasonable cost of production. Mere lapse of time in asserting the right to recover in an accounting is not barred by laches where the statute of limitations has not run against the legal right.

Section 27. Conveyance of Interests in Minerals in Place.

In *Avery v. Moore,* four heirs each owned an undivided one-fifth interest in a tract of land, and two other heirs each owned an

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2 152 W. Va. 714, 166 S.E.2d 167 (1969). Mullins v. Clinchfield Coal Corp., 227 F.2d 881 (4th Cir. 1955), held that where removal or displacement of coal was done by the surface owner innocently and in good faith, he was liable only for the value of the coal in place, irrespective of whether his act was deemed a trespass. The trial court may, in its discretion, deny interest from the date of displacement. Here, the measure of damages was held to be the royalty value of 25¢ per ton, which the court said was its value in place.

undivided 1/10 interest therein. These parties made a voluntary partition into five lots. The deed of partition provided for and contained a reservation of the coal and mining rights, and also recited that

The lands are now under lease [for oil and gas], . . . and in the event of development under said lease all parties to this grant shall share in the royalty produced from any portion of said land, according to their respective rights as they existed prior to this partition. . . . And provided further, that upon the termination of the lease now in force upon said lands, each party to whom grants are herein made shall have the right to lease all the oil and gas in the tract herein conveyed to him or her, and retain all rentals and bonuses paid upon such lease so made, until the same is developed; and when it is developed, all parties . . . shall share in the royalty produced from any of said five tracts of land, according to their respective rights as they existed prior to this conveyance.4

A tract of 50 acres (one of the five lots partitioned) was conveyed to one of the heirs by the partition deed. He died intestate and the title descended to the plaintiff. Thereafter, the plaintiff and her husband conveyed to the defendant said tract, and the deed provided that “[a]lthough the oil and gas are not hereby reserved, this conveyance is subject to a provision, in the said partition deed, with reference to leasing and developing.”5

It was held that the effect of the deed was to vest title in the defendant to the 50-acre tract, including the oil and gas in place, with the right to lease it and receive bonus and delay rentals. This right was subject, however, to the rights of the owners of the other four tracts to participate in the royalties resulting from any production upon the 50-acre tract.

The court also held that the defendant did not acquire any title to the oil and gas or any right to the royalties derived therefrom under the remaining four tracts involved in the partition, since the deed to the defendant “related to and embraced only the oil and gas within and under the fifty acre tract of land and her (plaintiff’s) share of any royalty derived from the development of the oil and gas

4 Id. at 139, 144 S.E.2d at 436-37.
5 Id. at 140, 144 S.E.2d at 437.
within and under that tract of land and did not embrace or relate in any manner to any interest in the oil and gas royalties derived from and oil and gas within and under all or any of the other four tracts of land involved in the partition."

The court also reiterated the principle that under the West Virginia Code when no limitation is contained in a deed, it passes the entire interest which the grantor had power to dispose of in such real estate.

In *Kelly v. Rainelle Coal Co.*, the owner of a seam of coal executed an instrument in which it "hereby granted and leased...the privilege of mining and marketing" any remaining coal in the Sewell seam. The grantee agreed to pay 10 cents per ton royalty and agreed that he "will not mine any coal except in the locations selected by the [grantor]." and the grantor was given "full authority to stop any work of the [grantee] that may endanger any of its mine workings."

The court held that "[t]he conditions under the license was to be exercised prevented the rights given from becoming a *profit a prendre* or a license coupled with an interest, since [the grantor] could designate the places where mining was to be done or entirely prevent such operations. . . . Therefore, if it is a bare license, it is revocable at the pleasure of...the licensor."

After some extended discussion, it was said that "[t]he usual and necessary provisions of exclusiveness, definite time of existence, and the granting of a right or estate in the coal being absent in the contract, the conclusion is inevitable that the contract created no lease. . . ."

Judge Given, dissenting, said: "It seems clear to me that the instrument is a mining lease." The restrictive features "did not reduce the substance of the grant; it merely limited operations there-

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6 *Id.* at 141-42, 144 S.E.2d at 438.
8 135 W. Va. 594, 64 S.E.2d 606 (1951).
9 *Id.* at 596, 64 S.E.2d at 610.
10 *Id.* at 596-97, 64 S.E.2d at 610.
11 *Id.* at 597, 64 S.E.2d at 610.
12 *Id.* at 605-06, 64 S.E.2d at 614.
13 *Id.* at 607, 64 S.E.2d at 615.
14 *Id.* at 608, 64 S.E.2d at 616.
under." He also argued that it was a license coupled with an interest and was therefore irrevocable.

In Bennett v. Smith, it was held that

[a] deed which grants a tract of land, described by metes and bounds, which contains no exception or reservation of the coal underlying the land conveyed, but which refers, 'by way of further description', to a prior deed in which the same land is identically described by metes and bounds and in which the coal is expressly excepted and reserved, does not, by such reference, incorporate in such deed the exception and the reservation of the coal contained in the prior deed, and does not except or reserve the coal from its operation but passes the title of the grantor to such coal to the grantees in such deed.

The facts were that the grantor's title was derived through a voluntary partition and the execution of mutual deeds, which excepted and reserved all the coal, oil and gas. The grantor, owning an undivided one-third interest in those minerals, conveyed his allotted tract without reserving it, to a grantee, who in turn made a similar conveyance to the plaintiff.

In Bostic v. Bostic, a husband conveyed a tract of land to his wife for life, with remainder in fee to his son, but reserved to himself the right to mine and sell coal and other minerals underlying the land. The court held that this was a mere personal privilege to mine coal which ceased upon the grantor's death. The deed was construed most strongly against the grantor. It was also noted that the land was unproductive and mountainous, and had no value except for the coal. Also, the deed did not reserve the coal to the grantor and his heirs.

The court distinguished Hale v. Grow, where there was a reservation of the right to take all the coal, which was absent in

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15 Id. at 610, 64 S.E.2d at 616.
16 It is submitted that the dissent states the preferable view. In Consolidation Coal Co. v. Mineral Coal Co., 147 W. Va. 130, 126 S.E.2d 194 (1962), the court held that no particular form of words was necessary to create a lease of minerals. Also, where there is a general description of the leased lands, the lease is not void for uncertainty if its boundaries can be ascertained by the aid of extrinsic evidence.
17 136 W. Va. 903, 69 S.E.2d 42 (1952) (syllabus point 1).
Bostic. The court also relied upon and approved *United States Coal and Oil Co. v. Harrison* involving a reservation of the right to sell and remove timber, which was held to be a mere license.

A decision by a federal district court relied principally upon the Bostic case in holding that merely calling an instrument a coal lease does not make it such. Here, it was merely a license, and not an interest in the land such as to entitle the licensee to compensation for taking in eminent domain proceedings. The instrument purported to "lease" certain land for a term of five years for coal mining purposes, with the right to use the surface as reasonably necessary for mining, transporting and marketing coal. It provided for the payment of royalties and the lessor's remedy of distress for the recovery thereof. It is submitted that this decision is of doubtful validity.

Section 34. Adverse Possession of Subsurface Minerals.

The Virginia cases have uniformly upheld the principle that after the severance of title to the surface from the title to the underlying coal, the owner of the surface cannot acquire title to such coal by adverse possession in the absence of "actual commercial mining of the coal." Adverse possession must be actual, open, notorious and hostile. Sporadic mining for domestic use is not sufficient.

Section 38. The Lessee's Estate as Vested or Contingent.

An interesting application of the doctrine that an oil and gas lessee acquires a vested estate upon the discovery of the minerals is found in *Shearer v. Allegheny Land and Mineral Co.* In that case the plaintiff on March 6, 1959, executed an oil and gas lease

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20 71 W. Va. 217, 76 S.E. 346 (1912).
to the defendant on her tract of 75 acres, but she owned the oil and gas under only 34 acres of it. The 75-acre tract was part of a larger tract of 246 acres, which had been leased by the predecessor in title of the plaintiff for oil and gas purposes to Hope Natural Gas Company in 1903. This lease was still in effect and had been duly recorded. The lease provided for a flat gas well rental of $300.00 annually.

The second lease (March 6, 1959), was on a 1/8th royalty basis. The defendant (Allegheny) had the title examined and was assured that the 75 acres were not included in the original 246-acre tract, and thereupon commenced to drill a well. Hope notified the defendant to cease, and then Hope verbally agreed to assign to the defendant its leasehold rights to the 34-acre tract upon which the well was being drilled. This was followed by a written assignment to the effect. Three days later the well was completed as a producer. The plaintiff was then notified that she would receive only the $300 payable annually under the first lease instead of the 1/8th royalty under the second lease.

The court held that since the original lease (1903) to Hope was valid and still in force the plaintiff had no power to make the second lease to defendant, and it was therefore invalid. Since there was no basis for recovery under it, the defendant was liable only for the $300 annual rental. The execution of the second lease (there being a prior valid lease in existence) did not create the relationship of landlord and tenant. No estate vested until the discovery of oil or gas. Therefore, the defendant was not estopped to deny the plaintiff's title. Moreover, the defendant had never attempted to do so, and had always recognized the plaintiff's title to the surface and oil and gas.

Judges Haymond and Berry dissented upon the ground that the defendant did not surrender the second lease and therefore was operating under it. The majority decision seems to be sound.26

The old cases were approved in Arbaugh v. Raines,27 which again stated that the lessee's interest is "inchoate and contingent until discovery of oil or gas, but upon such discovery the right to

26 I. H. Williams & C. Myers, Oil and Gas Law 94 (1971), stating that "[f]ortunately the Court concluded . . . that the landlord tenant relationship did not come into effect . . . ."

27 184 S.E.2d 620 (W. Va. 1971).
produce becomes a vested right." This rule was not embodied in
the syllabus and, it is submitted, was not necessary to the decision
of the case, which involved a contract by the lessee to sell shares
in the net proceeds to be derived from the operation of one well
to be drilled in the future.

Section 44. Who May Lease For Mineral Purposes.

In _Samsell v. State Line Development Co._, lands were acquired
by deed to the State Conservation Commission, predecessor to the
Department of Natural Resources. Under the West Virginia Code
title was vested in The Public Land Corporation, with authority to
lease for the development of oil, gas and minerals. Therefore, it
was held that a coal lease executed by the Director of the Department
of Natural Resources was invalid. Likewise a lease executed by the
Secretary of The Public Land Corporation, without authority or
direction of that corporation and not subsequently ratified by the
corporation, was also invalid. The State was not bound under the
doctrine of estoppel since the State was not acting in a proprietary
capacity. Judges Haymond and Caplan dissented upon the ground
that estoppel should apply because the State received more than
$120,000 in coal royalties and was acting in a proprietary capacity.
The dissent seems to be preferable.

Section 48. Cotenants.

The Virginia Court has again enunciated the principle that
a cotenant of an undivided interest in a tract of coal may enjoin the
other cotenants from mining.

Section 53. Recordation of Leases.

In _Shearer v. United Carbon Co._, it was held that the lessor
of land for oil and gas purposes, the payment of whose royalty was
expressly assumed by a sublessee under the provisions of a sublease,
was a creditor-beneficiary thereunder, and could, in a suit in equity,
recover the royalty from the sublessee.

Judge Given, dissenting, took the position that prior to the
making of the sublease to the defendant, the terms of the assigned

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28 Id. at 623.
29 See text § 133, infra at 269.
33 143 W. Va. 482, 103 S.E.2d 883 (1958).
oil and gas lease were modified by an agreement between the lessor and the lessee, so as to increase the royalty payments, of which fact the sublessee had no knowledge, nor was such modifying agreement recorded. Judge Given contended that the scope of the sublessee's promise to pay the royalties should be limited to the original amount thereof and that the West Virginia recording statute was applicable.34

Judge Riley concurred in the dissent. However, it is submitted that this criticism was not valid. The sublessee should not have relied exclusively upon the public records and should have inquired of his sublessor and the original lessor as to the extent of their respective duties and rights.

Section 61. Construction Against Lessor, or Against Grantor.

A coal mining lease will be most strongly construed against the lessor.35 In Hall v. Hartley,36 deeds conveyed lands subject to all exceptions and reservations in the grantor's chain of title. This was followed, in the last paragraph, by a statement that the grantor "doth hereby assign and transfer unto [the grantee] an undivided one-eighth (1/8th) interest in and to the oil and gas in, on and under the above mentioned . . . three tracts or parcels of land. . . ."37

The court held that there were two granting clauses, repugnant to each other. The first conveyed a fee simple title to all the oil and gas and prevailed over the second, which limited it to a one-eighth interest. The court reiterated the proposition that in case of ambiguity the construction most favorable to the grantee will be adopted and held that where two clauses in a deed are so repugnant to each other that they cannot stand together, effect will be given to the first, and the latter rejected. The court called this the "technical rule."

Section 112. Measure of Damages For Failure To Develop Where No Drainage.

The so-called West Virginia "interest rule" as stated in Grass v. Big Creek Development Co.38 was criticized and limited by the

34 W. VA. CODE ch. 40, art. 1, §8 (Michie 1966).
37 Id. at 330, 119 S.E.2d at 761.
court in *Cotiga Development Co. v. United Fuel Gas Co.* in a very able opinion by Judge Calhoun. *Cotiga* involved liability for damages for the lessee's breach of an express covenant to market the gas as speedily as practicable. The court held that the lessor was entitled to recover the one-eighth royalty on the gas which should have been marketed during the period in question, but also that the lessee had the right to offset and take credit for that sum, dollar for dollar without interest, rather than on a cubic foot basis, in the settlement and payment for royalties for gas next thereafter marketed from the leased premises.

Neither the "interest" nor the Illinois royalty rule (for breach of the implied covenant for full development) achieves exact justice between the parties. The interest rule is impossible to apply with accuracy. The royalty rule overcompensates the lessor if later the lessee drills additional wells and thereby pays the same royalty twice. The compromise between these extremes as enunciated in *Cotiga* seems to be a common sense solution of this vexatious problem. While the court did not expressly overrule the *Grass* case, it is submitted that it has impliedly done so.

**Section 116. Abandonment of a Leasehold Estate.**

The failure of a lessee to operate under a coal lease which provides for diligent operation constitutes an abandonment thereof. If the lease contains an express forfeiture clause which provides for the giving of notice, the institution of a suit to compel a surrender of the lease is sufficient for that purpose.

In *Home Creek Smokeless Coal Co., v. Combs*, there were suits to cancel coal leases for non-payment of minimum royalties and failure to operate diligently. The lessors had received no royalties for periods as long as ten years or more, but had made no protest nor any effort to collect. The lessee had maintained the property at considerable expense and pleaded that it was able and willing to continue mining. The court held that it would not grant cancellation on the theory of abandonment nor for breach
of covenants, express or implied, in the absence of an express forfeiture clause, (citing Horse Creek Coal Land Co. v. Trees). The case was remanded for an accounting for unpaid royalties and the payment or securing of the payment thereof by the lessee before mining operations resumed.

Statutory provisions in Virginia, the purpose of which are to set the title to land at rest when its value has been reduced because of the reservation of non-existent mineral values have been held constitutional.

Section 119. Enforcement of Forfeiture and Relief Against Forfeitures.

In Fredeking v. Grimmert it was held that a forfeiture clause in a lease upon real estate owned by tenants in common is indivisible and such lease cannot be forfeited by the action of fewer than all the owners of the undivided interests. It is submitted that no reason appears for not applying this rule to mineral leases.

Express forfeiture clauses have been enforced for breach of a covenant to mine coal diligently. However, in Keller v. Model Coal Co., it was held that a court of equity would not enforce a forfeiture of a coal lease at the instance of the lessor, in the absence of a forfeiture provision in the lease, unless there was an abandonment by the lessee. However, where such suit also prayed for a discovery and accounting, a court of equity would take jurisdiction for that purpose. A demurrer was sustained as to the forfeiture and overruled as to the discovery.

Judges Haymond and Browning dissented on the ground that the facts alleged in the bill did not show any basis for discovery and accounting.

44 75 W. Va. 559, 84 S.E. 376 (1915).
46 Love v. Lynchburg National Bank and Trust Co., 205 Va. 860, 140 S.E.2d 650 (1965). These sections provide for the removal as a cloud on title of any minerals devised or reserved (1) if such devise or reservation was made by a writing more than 35 years prior to the institution of suit; and (2) the right to explore or mine has not for a like period been exercised; (3) all taxes have been paid by the person holding legal title to the land; and (4) for a like period no deed of bargain and sale of such claim reservation of such mineral rights has been recorded; and (5) for a like period the claim to mine has been abandoned.
48 See text §116, supra at 267.
Section 127. Assignment of the Lessee's Interest.

The distinction between an assignment and a sublease is that by the former the lessee transfers his entire interest in the leased premises, or a part thereof, whereas in the latter he retains some interest in the premises transferred. Termination of the primary lease also terminates the sublease. The right to renew the primary lease cannot be exercised by a sublessee. Consent of the lessor to the assignment of a coal lease by the lessee is not required unless it is so provided in the lease.

Section 133. The Statute of Frauds (and The Statute of Conveyances).

In Arbaugh v. Raines, the defendant leased a tract of 236 acres for oil and gas purposes. Thereafter he sold to the plaintiffs and others “shares” in the working interest in a well which was to be drilled, each purchaser paying $250 for each 1/32nd interest in the net proceeds to be derived from the production. Later, the State Road Commission paid the defendant $10,500 for the release of all rights under the lease within a certain controlled area for access to and from Interstate Route 64. The evidence showed that the release to the State Road Commission in no way interfered with the production from the well. The plaintiffs sought to recover share interests in this sum of money upon the theory that they had an interest “amounting to an interest in land.” The court quite properly denied relief, holding that the only interests owned by the plaintiffs were the rights to participate in the net proceeds of the production of oil or gas from the one well mentioned in the contract. They had no title to the leasehold estate, and such title could be acquired only by deed or will under the Statute of Conveyances. They were not entitled to share in the production of any additional wells which the defendant might thereafter cause to be drilled.

51 Id.
52 Id.
53 Id.
54 184 S.E.2d 620 (W. Va. 1971).
55 W. VA. CODE, ch. 36, art. 1, § 1 (Michie 1966), provides that no term “of any duration under which the whole or any part of the corpus of the estate may be taken, destroyed, or consumed, except for domestic use, shall be created or conveyed unless by deed or will.” (emphasis added).
Section 138. Covenants Running With The Land.

In *United Fuel Gas Co. v. Battle*, it was held that (1) a covenant to furnish free gas runs with the land, and gas so furnished is subject to the business and occupation tax on the basis of the value of the gas at the well, and (2) wholesale sales in this state by a public utility of gas produced in West Virginia are subject to such tax even though comingled with gas produced elsewhere and transported from West Virginia to Kentucky and back again into West Virginia. The court held this did not constitute interstate commerce.

Perhaps the most important oil and gas case decided in the Virginias in the last twenty years was *Davis v. Hardman*. Although this case did not mention *Rawling v. Fisher* (which the writer severely criticized in the textbook), it is submitted that it should be considered to be impliedly overruled by the *Davis* case. A full discussion of the latter will be found in 412 in section 162a.

Section 141. Rights and Privileges Incident to The Ownership of Minerals.

In *Cole v. Ross Coal Co.*, in an excellent opinion by Judge Watkins, the court approved the rule of *Squires v. Lafferty* and also held that the enumeration of specific mining rights does not exclude all others which would be implied. Stated otherwise, implied mining rights are not excluded by the grant or reservation of supplemental rights which would not be implied, in the absence of explicit language preventing such implication.

Section 144. Stripping Rights.

The principles enunciated in *West Virginia-Pittsburgh Coal Co. v. Strong* were followed by the federal district court in *United States v. Polino*, which held that there was no right to strip mine where, in 1917, in the locality, there were no stripping operations.

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59 R. DONLEY supra note 1, at 180.
62 R. DONLEY, supra note 1, at § 141a.
63 129 W. Va. 832, 42 S.E.2d 46 (1947).
Ordinary mining privileges, including a waiver of damages to the surface, contained in the deed severing the coal from the residue of the strata, executed in 1885, intended that the coal should be mined by the usual method then known and accepted as common practice in that county, which did not include strip mining.

The same principles were applied to the case of auger mining where the severance deeds in 1904 and 1905 granted the right to remove all minerals “in the most approved method,” and a deed in 1907 reserved all minerals with “all necessary and useful rights for the proper mining” thereof. The court denied the right to use the auger method, which at the dates of the severance deeds was not a usual, known and accepted common practice in that county.

In State v. Elder there was an action by the State of West Virginia to recover on four performance bonds executed by defendant and surety to insure the proper reclamation of lands following surface mining operations under four separate permits. The defendant failed to comply with the statutory reclamation requirements as to only one of these tracts and a 30-day notice was given. It was held that the State could recover the full penalty of the bond without proof of damages, as liquidated damages, since the cost of reclamation could not be ascertained with any degree of certainty. However, there was no recovery on bonds on the other three tracts notwithstanding permits therefor were attempted to be revoked but as to which the 30-day notice was not given.

Section 146. Removal of Coterminous or Neighboring Coal by Underground Haulageways.

In 1952, the West Virginia Supreme Court of Appeals decided, for the first time definitively, that the owner of a seam of coal (or his lessee) may use the subterranean passageways for the transportation of coal mined from adjacent lands, subject to three qualifications: (1) the coal must not be exhausted; (2) it must not be “abandoned;” and (3) the mining of the coal must be prosecuted with due diligence. The writer has adversely criticized this decision elsewhere

Another case of first impression, decided in the same year, dealt with the space doctrine as applied to the use by the owner of the gas, of the containing space remaining after exhaustion (or original non-existence of all the recoverable gas within a particular stratum). The court held that the owner of such a stratum in which there was no recoverable gas could maintain a suit to cancel and remove as a cloud on title a gas storage agreement made between the owner of the gas (in place) and a third party. As ancillary to such relief the court may also grant an injunction against the continuing trespass and award damages.

Again limitations of space preclude discussion of the writer's adverse criticism of this decision. The thesis there advanced is that the real basis for equitable relief is the unauthorized use of a well for purposes of injecting the gas.

Section 147. Removal of Coterminous or Neighboring Coal Over the Surface.

Several cases in Virginia have dealt with this problem. It is necessary to state the facts in detail in order to understand the scope of the decisions, which will be set forth in chronological order.

In William S. Stokes, Jr., Inc. v. Matney, a deed conveyed coal and "the right to remove over, upon and under said land . . . the said coal . . . from on and under adjacent, coterminous, neighboring and any other lands; and the right . . . to use . . . the surface . . . to make and erect . . . roads, tramroads . . . for the mining, manufacturing and removing of said coal . . . from, on or under said tract of land, and from, on or under adjacent, coterminous, neighboring and any other lands." The deed also provided that these rights would be appurtenant to any and all coal in and under the described tract, and in and under any other land then owned or thereafter acquired by the grantee, its successors or assigns.

This grantee leased the tract of coal to the defendant, who claimed the right to haul coal over the plaintiff's surface from

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71 Donley, supra note 66.
72 194 Va. 339, 73 S.E.2d 269 (1952), distinguished in the Lester case, infra note 76.
73 Id. at 343, 73 S.E.2d at 271.
other tracts owned by the defendant, but title to which had not been acquired through the lessor. It was held that the defendant could not do so. As to coal never owned by the grantee, it was not a successor or assign within the meaning of the severance deed.

In O'Quinn v. Looney,⁷⁴ there was a joint coal lease by three lessors of their individual tracts containing respectively 71 acres, 70.9 acres and 418.8 acres. The lease provided for a haulage royalty of 1¢ per ton for the use of the leased premises for the removal of other coal subsequently owned or acquired by the lessee, but no provision was made for the distribution thereof among the joint lessors. The parties had acquiesced in the practice of payment of the royalties to the owner of the 418.8-acre tract, who paid to the other two owners the amount he thought they "ought to have."

Since there had been no division of the haulage royalties in proportion to the acreages owned by the respective lessors, the cause was referred to a commissioner who determined that the owner of any tract (there having been later conveyances out of the 418.8-acre tract) over whose lands the haulage rights are hereafter exercised should be paid a part of the haulage royalties in proportion to the amount of burden imposed on his land.

In another case it was held that in the absence of the right granted by the lessor to haul "outside" coal over the leased land, the lessee was liable as a trespasser for the fair value of that use.⁷⁵

In Ross Coal Co. v. Cole,⁷⁶ (affirming Cole v. Ross Coal Co.⁷⁷) the court said that the implied right to operate a tipple on the surface overlying coal does not extend such right to the removal of coal from adjacent lands because this would materially increase the burden upon the servient estate (citing Chafin v. Gay Coal & Coke Co.⁷⁸). It was also held that limitations upon enumerated rights of the owner of deep seams of coal to the use of the surface were also applicable to any implied rights which the owner had in addition to those enumerated.

⁷⁴ 194 Va. 548, 74 S.E.2d 157 (1953).
⁷⁵ Clyborne v. McNeil, 201 Va. 765, 113 S.E.2d 672 (1960). Here the lease conferred such right by requiring the payment of 2½¢ per ton for the outside coal hauled through or over the leased tract.
⁷⁶ 249 F.2d 600 (4th Cir. 1957).
The Matney case was distinguished in Lester Coal Corporation v. Lester, in which the language extended the easement privilege to the grantee "it's successors or assigns by purchase, lease or otherwise." Here the successor in title of the grantee leased the coal, and the lessee was held to be permitted to use the surface for transporting coal from other tracts also leased by it, but not owned by the lessor.

In Keen v. Paragon Jewel Coal Co., the plaintiff sued to recover damages for the use of his land over which the defendant had been hauling coal mined from adjacent lands. The lands were the result of a partition occurring in 1895. The plaintiff was the owner of a tract of 50 acres out of one of the partitioned tracts which contained 484 acres. The defendant was lessee of the coal under adjacent tracts which were derived from another of the partitioned tracts, i.e., a common source of title originating in the partition decree. The properties were in mountainous country so that there was no means of ingress or egress to the public highway from the defendant's leased tracts except by using a road over plaintiff's tract.

It was held that the defendant had a way of necessity over plaintiff's land for hauling the coal produced under defendant's lease. The fact that there was no necessity for the removal of coal in 1895 was immaterial, "the scope of the way may increase to meet the increased necessities of the property." The court cited with approval Crotty v. New River & Pocahontas Consolidated Coal Co.

It was also held that plaintiff was not a purchaser for value without notice, since an inspection of the land would have revealed the landlocked situation. The defendant, as lessee, had the same rights as its lessors.

Section 150. Right of Subjacent Support and Waiver Thereof.

Only one new case has been found dealing with subjacent support, but it is notable as possibly predicting a modification of the Griffin case. In Stamp v. Windsor Power House Coal Co., it was held that the grantee of the Pittsburgh seam of coal with an

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81 Id. at 96, 122 S.E.2d at 903 (emphasis supplied).
82 203 Va. 175, 122 S.E.2d 543 (1961).
express waiver of subjacent support was not liable for damages to the overlying surface or surface structures resulting from the mining (subsidence), even though grossly negligent in such activities. The court reaffirmed that the rule of the *Griffin* case had become a rule of property in West Virginia.

The court also refused to distinguish between ordinary negligence and gross negligence, but said: "This Court, as presently constituted, does not necessarily approve of the holding in the *Griffin* case that a surface owner could not recover for a wilful or wanton act of those who were producing coal which they owned beneath the surface of the plaintiff's land."

**Section 155. The Lessee's Right to Remove Trade Fixtures.**

In *Mullins v. Sturgill*, it was held that mine rails, ties and mining cars were not trade fixtures and could be removed by the owner (an operating contractor with a sublessee) more than 90 days after the termination of the original lease, notwithstanding an express provision therein that the lessees should have 90 days in which "to remove all of their equipment, mining machinery and other such articles or merchandise as they may desire to move after the termination, expiration or cancellation of this lease." The decision was really based on the ground that by conduct in recognizing the tenancy as subsisting, the lessor had waived the right to declare a forfeiture, thereby leaving the lease in effect until September 29, 1949. The refusal to permit removal occurred the following month, i.e., within that 90-day period.

**Section 157. The Free Gas Clause.**

See Section 138.

**Section 162a. Transfer of Royalty Interests as a Transfer of Title to Oil in Place.**

In *Davis v. Hardman*, heretofore briefly referred to as perhaps the most important oil and gas case decided in the Virginias

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86 Id. at 150.
87 191 Va. 653, 66 S.E.2d 483 (1951).
88 Id. at 658, 66 S.E.2d at 486.
90 Supra note 57.
in the last twenty years, the facts were so involved that they may be more readily understood from the following chart-analysis.

T, owner in fee of 44 acres devised it to: A, B, C and D, his four sons, in equal shares.

(1) A conveyed his 1/4 interest to B, without reservations.

(2) C conveyed his 1/4 interest to B, reserving "for the benefit of [C], his heirs and assigns his proportionate share of 1/4 of the rest and residue of the oil and gas royalty, when produced, in and under said land, but [B], his heirs and assigns to have the right to lease said land for oil and gas purposes and to receive the bonuses and carrying rentals."91

(3) D conveyed to B his 1/4 interest, with same reservation as in (2)

Result: B owns 2/4 outright, without reservation of oil and gas.

B owns 2/4 subject to reservation of oil and gas, but B has the executive right to lease C's and D's retained oil and gas.

B later conveyed the entire tract to X, but excepted and reserved for the benefit of C and D each, "his equal 1/4 of the oil and gas royalty in and under said land, when produced, being 1/4 of the usual 1/8 royalty," and also excepted and reserved to B himself the remaining 1/2 of the oil and gas royalty, when produced, but granted to X, his heirs and assigns, the right to lease said land for oil and gas purposes and to receive the 'carrying rental.'92

Later, C became the owner of the reservation in favor of D. Thus, B and C each owned 1/2 of the oil and gas royalty.

Then, B died

To

M

Then, C died

To

F

(1) M and F executed an oil and gas lease to L, lessee, covering the entire 44 acres.

In the meantime, before B's death he had conveyed the 44 acres to X, as previously stated, and by several later conveyances, title became vested in Y, subject to the reservations of royalty.

91 148 W. Va. at 84, 133 S.E.2d at 78 (emphasis supplied).
92 Id. at 84-85, 133 S.E.2d at 78-79.
(2) Y then leased for oil and gas to H, lessee.

So, the question was, which lease was valid? No. 1 or No. 2 above?

The court, in an excellent opinion by Judge Calhoun, held that No. 2 was the valid lease because the entire executive right had been granted by B to X, and now was vested in X's successor in title, Y, and ordered cancellation of No. 1 as a cloud on title.

The court further held that Toothman v. Courtney was a mere rule of construction which would not be applied to control other expressions of intention to the contrary.

Thus, the title to the oil and gas, in place, was vested in Y, but M and F had non-participating royalty interests. (Y got delay (carrying) rentals, along with the executive right).

It was pointed out in an excellent student note by Thomas Franklin McCoy, that the Davis case must be regarded as recognizing the validity of the "executive right", (although not by name) both as to the non-participating royalty interest and as to the non-participating mineral interest. In effect, the Davis case overturned the unfortunate decision in Rawling v. Fisher, although the latter case is not cited or discussed. Limitations of space do not permit a repetition here of the ramifications of the Davis case, and the reader is referred to Mr. McCoy's discussion.

In Rastle v. Gamsjager, there was a devise of the "oil and gas that may be produced" to four children, and to the survivors of said four children. The court held that this was a devise of oil and gas in place, and not of a non-participating royalty interest. The Davis case was distinguished partly upon the ground that in the Davis case a deed was involved, and was thus construed most strongly against the grantor, whereas in Rastle it was a will, and there was a strong presumption against intestacy.

93 62 W. Va. 167, 58 S.E. 915 (1907). As stated in § 162a of the text, this doctrine is "that a grant, or an exception and reservation, of all the oil rental, or all the royalties to be derived from the land, unlimited in time, is, in legal effect a grant, or an exception and reservation, of title to the mineral, in place."

94 Mineral Interests supra note 89.

95 101 W. Va. 253, 132 S.E. 489 (1926), severely criticized by this writer in the text, §138, at 180.

96 151 W. Va. 499, 153 S.E.2d 403 (1967); 26 O. & G. Rev. 393.
In commenting upon this case, Williams and Myers97 said:
It is to be hoped that this does not represent a revival
of the Coke dictum.98 The result of the case is readily
explicable, without reliance on the Coke dictum, Tooth-
man99 or Paxton,100 in that the instrument construed was
a will and the constructional preference against intestacy
favored the mineral construction (no partial intestacy)
over the royalty construction (which would have meant
partial intestacy).

Section 169. Transportation of Oil and Gas By Public Utilities.

_Eureka Pipe Line Co. v. Public Service Commission_101 held that
the Public Service Commission of West Virginia had no jurisdiction,
power or authority to regulate the production and marketing of oil
by an operator that was not a public utility, and therefore had no
power to approve a proposed tariff of a pipe line public utility
engaged in the transportation of oil, the object of which tariff was
to regulate over-production of oil.

Section 178. Liability For Injuries to Property.

The cases dealing with various phases of this question will be
discussed in chronological order.

In _Oresta v. Romano Brothers, Inc._,102 the court found that
the defendant negligently piled the overburden resulting from strip
mining so that it slipped, washed down and was cast upon the land
of the plaintiff, and created a private nuisance. It was held that it
was no defense that the deed severing the coal from the residue of
the strata contained ordinary mining privileges, including a waiver
of damages to the surface. Such deed, executed in 1885, intended
that the coal should be mined by the usual method then known and
accepted as common practice in that county, which did not then
include strip mining.

The court also held that damages of the character here involved
were temporary, not permanent, and that evidence of the market

98 "If a man seized of lands in fee by his deed granteth to another the
profit of those lands, the whole land itselfe doth passe; for what is the land
but the profits thereof . . . ." _2 Coke UPON LITTLETON_ [146 b] (1812).
value of the property immediately before and immediately after it was injured was inadmissible.\textsuperscript{103}

\textit{Koch v. Eastern Gas & Fuel Associates}\textsuperscript{104} was an action to recover for negligent maintenance of a gob pile, fumes from which damaged the plaintiff's property (one-half mile distant), shrubbery, trees and vegetation.

It was held that the defendant's plea of assumption of risk was valid insofar as it barred recovery for damages occurring prior to the time that plaintiffs moved into their property, but could not bar recovery for damages subsequent to that date and after the defendant had been notified, or by the exercise of reasonable care should have known of the injurious effects of the fumes.

The defendant also pleaded a prescriptive right to maintain the gob pile, alleging that for more than 10 years preceding this action, it had been in existence with the full knowledge and assent of the plaintiffs. It was held that this plea alleged only a permissive use and as such did not vest any prescriptive rights in the defendant.

In \textit{C. & W. Coal Corp. v. Salyer},\textsuperscript{105} the Virginia court held that where a stratum of coal in mined areas slanted toward plaintiff's land, and water encountered in seams of coal flowed in that direction but there was no showing that any underground streams that were cut during mining operations were confined to a well-defined channel and the mining company could not reasonably tell from surface indications that there was a stream flowing from the area of its operations in a well-defined channel to the plaintiff's property, the mining company was not liable for the destruction of a spring which stopped flowing on the plaintiff's property shortly after a severe dynamite blast was set off by the company.

This was a strip mining operation on property adjoining plaintiff's land. The plaintiff alleged negligence but offered no proof thereof. The decision was based principally upon \textit{Clinchfield Coal Corp. v. Compton},\textsuperscript{106} and there was no discussion of the question of absolute liability for blasting.\textsuperscript{107}

\textsuperscript{103} Id. at 647-52, 73 S.E.2d at 630-33.
\textsuperscript{104} 142 W. Va. 386, 95 S.E.2d 822 (1956). See Donley \textit{supra}, note 69 at 255. \textit{See also} Harless v. Workman, 145 W. Va. 266, 114 S.E.2d 548 (1960) for a discussion of the distinction between nuisance and negligence as a basis for liability in operating a coal tipple and crusher. This is an instructive and well-considered opinion by Judge Calhoun.

\textsuperscript{105} 200 Va. 18, 104 S.E.2d 50 (1958).
\textsuperscript{106} 148 Va. 437, 139 S.E. 308 (1927); \textit{Annot.}, 55 A.L.R. 1376 (1927). \textit{See also} \textit{Annot.}, 109 A.L.R. 415 (1937); \textit{Annot.}, 29 A.L.R.2d 1373 (1933).
In Chesapeake & Ohio Ry. Co. v. Bailey Production Corp.,\textsuperscript{108} stripping operations resulted in a landslide damaging plaintiff's railroad. The existence of liability and the amount of damages were agreed upon. The only issue was whether an independent contractor who agreed to do the stripping for the owner of the coal was liable to indemnify the latter.

It was held that such liability existed (and the court found as a fact that the actions of the stripper caused the damage). The contract expressly provided for indemnification, and included liability for costs and reasonable attorney's fees incurred by the indemnitee, notwithstanding the termination of the "working part" of the agreement and the release of the stripping bond by the State of West Virginia.

In McCoy v. Cohen,\textsuperscript{109} the court held that the plaintiffs, whose water wells were damaged as the result of the lawful drilling for gas by defendant, could not recover in the absence of proof of negligence upon the part of the driller, and proof that any of the substances which polluted the wells were used in or came from or were produced by the drilling operations.

In Severt v. Beckley Coals, Inc.,\textsuperscript{110} the plaintiffs, husband and wife, had constructed a home prior to 1965. Sometime thereafter the defendant constructed and operated a mine within 120 feet of plaintiffs' home, and installed an exhaust fan, crusher, belt carrier and trucks to transport the coal. This operation deposited coal dust on both the exterior and interior of plaintiffs' property and the furniture in the house, destroyed paint and vegetation, and disturbed sleep and rest. The evidence failed to establish negligence on the part of the defendant. Plaintiffs sought to recover damages to person and to property and also sought an injunction to restrain further operations of the defendant.

The court held that an injunction should be refused. The plaintiffs had an adequate remedy at law. Recovery on the jury's verdict was upheld. The measure of damages to plaintiffs' land was the difference in market value immediately before and immediately after the injury, which was permanent. One such recovery was a license to continue the nuisance, and there could be no second recovery for its continuance. The determination of whether the

\textsuperscript{109} 149 W. Va. 197, 140 S.E.2d 427 (1965) (three consolidated cases).
\textsuperscript{110} 153 W. Va. 600, 170 S.E.2d 577 (1969).
damage is temporary or permanent depends upon the character of the nuisance and not upon the quantity of damage.

**Section 184. The Five Foot Zone.**

In *Atkinson v. Jennings,*" it was held that in an action to recover the statutory penalties for wrongful penetration of the five foot zone, the burden is upon the plaintiff to establish his boundary line by a preponderance of the evidence.

**CONCLUSION**

Of the many cases hereinbefore discussed, four stand out in novelty and importance:

The *Shearer*" case established the principle that the existence of a valid oil and gas lease does not prevent the lessee under a second (and therefore invalid) lease from acquiring an interest under the first lease, the doctrine of attornment having no application.

The *Cotiga*" case, it is believed, has the effect of overruling the "interest rule" of the *Grass*" case as to the measure of damages for breach of express or implied covenants for development and/or marketing.

The *Davis*" case is the most significant one, in limiting the use of the word "royalty," being the doctrine of *Toothman v. Courtney*" and the line of cases following it. Also, in recognizing the validity of the "executive right" (although not denominating it as such) the court upheld the validity of a pure nonparticipating royalty, and thus impliedly overruled the execrable decision in *Rawling v. Fisher,*" which this writer severely criticized in the textbook.""

Finally, in *Cole v. Ross Coal Co.,"* Judge Watkins approved the writer's contention" that the enumeration of specific mining rights does not exclude others which exist as an incident of ownership, and declined to follow statements to the contrary contained in *West Virginia — Pittsburgh Coal Co. v. Strong.*"