

December 1963

Mines and Minerals--Surface Transmission of Electricity under Implied Mining Rights

Charles David McMunn
West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>

 Part of the [Energy and Utilities Law Commons](#), [Oil, Gas, and Mineral Law Commons](#), and the [Property Law and Real Estate Commons](#)

Recommended Citation

Charles D. McMunn, *Mines and Minerals--Surface Transmission of Electricity under Implied Mining Rights*, 66 W. Va. L. Rev. (1963).

Available at: <https://researchrepository.wvu.edu/wvlr/vol66/iss1/5>

This Student Note is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

West Virginia Law Review

Published by the College of Law of West Virginia University. Official
publication of The West Virginia Bar Association.

STUDENT BOARD OF EDITORS

Robert Edward Haden, *Editor in Chief*
Robert William Burk, Jr., *Associate Editor*
Thomas Edward McHugh, *Associate Editor*
Sterl Franklin Shinaberry, *Associate Editor*
Stephen Grant Young, *Associate Editor*

Fred Adkins
Richard Marion Alker
Victor Alfred Barone
Earl Moss Curry, Jr.
Ralph Charles Dusic, Jr.
Frank Thomas Graff, Jr.
Eugene Triplett Hague, Jr.
Charles Ellsworth Heilmann
George Charles Hughes, III

Charles Marion Love, III
Lee Ames Luce
John Ralph Lukens
Thomas Franklin McCoy
Charles David McMunn
Lewis Charles Pellegrin
William Walter Smith
Ward Day Stone, Jr.
Boyd Lee Warner, II

Willard D. Lorensen, *Faculty Editor in Charge*
Agnes A. Furman, *Business Manager*

STUDENT NOTE

Mines and Minerals—Surface Transmission of Electricity Under Implied Mining Rights

The modern techniques of drift or deep coal mining demand an abundant supply of electrical power. Safe, economical and efficient transmission of this power throughout the mining operation has raised a legal issue between the owner of the coal and the surface owner. The issue arising is whether the owner of the coal possesses, as incident to that ownership, the implied right to use the surface for the erection of utility poles which carry the transmission lines.

The electrical system for each mine is unique and therefore a rule of thumb comparison of the cost of surface transmission to that of transmission through the mine entries is not possible.

Speaking generally, however, it is economically more advantageous to carry these transmission lines over the surface.¹ From a technical viewpoint, surface transmission is more satisfactory and this includes the ability to use a higher voltage with a reduced amount of loss. Safety and maintenance features add to the desirability of surface transmission.²

The coal owner's right to use the surface was established in the noted case of *Squires v. Lafferty*³ wherein the court stated that the owner of the coal possesses as incident to that ownership ". . . the right to use the 'surface' of the land in such a manner and with such means as would be fairly necessary for the enjoyment of the mineral estate." "This rule is based upon the principle that when a thing is granted all the means to obtain it and all the fruits and effects of it are also granted."⁴ The mere inconvenience of the owner of the servient estate is not sufficient to preclude the exercise of these rights. "That which is really appropriate, useful and convenient is necessary and proper, notwithstanding something different might be made to subserve the same purpose."⁵ Damage caused in the proper exercise of these rights is *damnum absque injuria* to the owner of the surface.⁶

¹ As a specific example, the electrical engineer employed by one of the larger mining companies, when considering a particular mine, advanced that it would cost roughly four to five times as much to run the transmission lines through the mine rather than over the surface.

² Interviews with Charles T. Holland, Dean of the School of Mines and Professor of Mining Engineering, West Virginia University, in Morgantown, W. Va., Oct. 9, 1963; Joseph Dwight McClung, Associate Professor of Mining Engineering, West Virginia University, in Morgantown, W. Va., Oct. 9, 1963; Edwin Channing Jones, Professor and Chairman of the Department of Electrical Engineering, West Virginia University, in Morgantown, W. Va., Oct. 14, 1963.

³ 95 W. Va. 307, 309, 121 S.E. 90, 91 (1924), citing *Porter v. Mack Mfg. Co.*, 65 W. Va. 636, 64 S.E. 853 (1909). The West Virginia law appears to be in a state of some conflict with respect to whether the court or the jury shall have the duty to finally determine the fairly necessary use of the surface as guaranteed by the *Squires* case. That this is a question of law for the court is advanced in *Adkins v. United Fuel Gas Co.*, 134 W. Va. 719, 724, 61 S.E.2d 633, 636 (1950). No authority is cited in support of this proposition. *Contra*, *Armstrong v. Maryland Coal Co.*, 67 W. Va. 589, 608, 69 S.E. 195, 205 (1910), citing 1 BARRINGER & ADAMS, MINES & MINING IN THE UNITED STATES 577 (1900); DONLEY, COAL, OIL & GAS IN WEST VIRGINIA & VIRGINIA § 141a (1951).

⁴ *Squires v. Lafferty*, 95 W. Va. 307, 309, 121 S.E. 90, 91 (1924); *Cole v. Ross Coal Co.*, 150 F. Supp. 808 (S.D. W. Va.), *aff'd*, 249 F.2d 600 (4th Cir. 1957); 36 AM. JUR. *Mines & Minerals* § 177 (1941); DONLEY, *op. cit. supra* note 3; 14 BAYLOR L. REV. 241 (1962).

⁵ *Preston County Coke Co. v. Elkins Coal & Coke Co.*, 82 W. Va. 590, 596, 96 S.E. 973, 975 (1918).

⁶ *Adkins v. United Fuel Gas Co.*, *supra* note 3, at 725.

The West Virginia court has said that a road used in hauling core drilling machinery,⁷ the construction and use of a tramway in fire-clay mining,⁸ and the use of approximately one acre of land in oil and gas production,⁹ are proper uses of the surface under implied mining rights. Beyond this, the court has been silent on the issue of what particular acts constitute the fairly necessary use of the surface under the doctrine of the *Squires* case.

Having established that the mineral owner possesses the implied right to use the surface, the question is presented as to the effect of an express grant of mining rights when combined with those raised by implication. The case of *West Virginia-Pittsburgh Coal Co. v. Strong*,¹⁰ indicates that an express grant of mining rights limits those raised by implication. Professor Donley comments on that portion of the *Strong* case by submitting that this is not the common understanding of the profession nor does the grantee intend to waive these implied rights when accepting a deed containing specifically enumerated rights.¹¹ Six years after this criticism of the *Strong* case, it was announced in the case of *Cole v. Ross Coal Co.*, that ". . . expressed mining rights are in addition to, and not in substitution for, the implied mining rights which the law gives an owner of coal. This is not a case for the application of the maxim *expressio unius est exclusio alterius* . . ."¹² While the statement in the *Strong* case still exists to be argued, the later pronouncement of the *Cole* case seems to have the support of more authority.¹³

The *Strong* case is cited more often for the rule that the owner of the mineral estate does not possess, as incident to his ownership, the right to mine coal by what is commonly termed surface or strip mining unless mining by such a method was known and accepted as common practice in the area at the time of the severance.¹⁴ This view has been followed in the cases of *Oresta v.*

⁷ *Squires v. Lafferty*, *supra* note 4.

⁸ *Porter v. Mack Mfg. Co.*, *supra* note 3; see DONLEY, *op. cit. supra* note 3.

⁹ *Adkins v. United Fuel Gas Co.*, *supra* note 3; *King v. South Penn Oil Co.*, 110 W. Va. 107, 157 S.E. 82 (1931).

¹⁰ 129 W. Va. 832, 836, 42 S.E.2d 46, 49 (1947).

¹¹ DONLEY, *op. cit. supra* note 3, § 144.

¹² 150 F. Supp. 808, 816 (S.D. W.Va.), *aff'd*, 249 F.2d 600 (4th Cir. 1957); See also, 58 C.J.S. *Mines & Minerals* § 150(B) (1948), citing *Jilek v. Chicago, Wilmington & Franklin Coal Co.*, 382 Ill. 241, 47 N.E.2d 96 (1943).

¹³ See nn. Nos. 11 & 12; 36 AM. JUR., *op. cit. supra* note 4.

¹⁴ *Cole v. Ross Coal Co.*, *supra* note 4; DONLEY, *op. cit. supra* note 3, §§ 144, 151.

Romano Bros.,¹⁵ and *United States v. Polino*.¹⁶ The court followed the same rule and reached the same result in the case of *Brown v. Crozer Coal & Land Co.*,¹⁷ where the mining method was the use of an auger rather than strip mining. The rule established by these cases has been advanced as the law applicable to the use of new techniques such as the erection of utility poles for the carriage of transmission lines. Two distinctions may be drawn to show that such an application should not be made.

The first turns upon the meaning of the phrase "fairly necessary use of the surface." This distinction was originally adopted in the *Strong* case¹⁸ and has been further sanctioned in the cases of *Cole v. Ross Coal Co.*,¹⁹ and *United States v. Polino*,²⁰ to the end that the implied right of the coal owner to *use* so much of the surface as is fairly necessary does not include the right to *destroy* the surface as is done in the process of strip mining. "It is beyond all reason to conclude that the parties to the deed . . . at the time of the execution of such deed, had in contemplation the possible complete destruction and removal of the entire surface of said lands, together with everything growing thereon."²¹ Logically it should follow that the erection of utility poles and substations²² which are directly connected with such an operation, involves the *use* of the surface and not its destruction and removal and thus a completely different situation from that raised in the cited cases appears to be presented.

The second distinction turns upon the phrase "by the usual method" and has the same origin and history as that of the first.²³ By looking to the circumstances existing at the time of the execution of the severance deed,²⁴ the court has refused to recognize

¹⁵ 137 W. Va. 633, 73 S.E.2d 622 (1952).

¹⁶ 131 F. Supp. 772 (N.D. W. Va. 1955); 58 W. VA. L. REV. 174 (1955); 13 WASH. & LEE L. REV. 76 (1956).

¹⁷ 144 W. Va. 296, 107 S.E.2d 777 (1959); 62 W. VA. L. REV. 194 (1959).

¹⁸ 129 W. Va. 832, 843, 42 S.E.2d 46, 52 (1947); 58 C.J.S., *op. cit. supra* note 12, § 159; 19 WASH. & LEE L. REV. 276 (1963).

¹⁹ 150 F. Supp. 808, 815 (S.D. W.Va.), *aff'd*, 249 F.2d 600 (4th Cir. 1957).

²⁰ 131 F. Supp. 772, 776 (N.D. W. Va. 1955).

²¹ *United States v. Polino*, 131 F. Supp. 772, 776 (N.D. W. Va. 1955).

²² W. VA. CODE ch. 22, art. 2, § 39 (Michie 1961); as to the use of the surface with respect to "structures" in general, see DONLEY *op. cit. supra* note 3, § 142.

²³ See notes 18, 19 & 20 *supra*; as applied to auger mining see *Brown v. Crozer Coal & Land Co.*, 144 W. Va. 296, 107 S.E.2d 777 (1959).

²⁴ *White v. Bailey*, 65 W. Va. 573, 64 S.E. 1019 (1909); See generally, 13 WASH. & LEE L. REV. 76 (1956).

the implication of the right to auger or to strip on the theory that the right retained is the right to mine coal by the usual *method* known and accepted as common practice at the time and in the area of the severance deed. Divergent mining *methods* should not here be confused with advancements of technique *within a particular mining method*. By deep mine operations, ". . . the surface even when broken or caused to subside, is damaged, rather than destroyed."²⁵ However, by strip mine operations, ". . . the vein of coal is exposed by the removal of the earth and growth above it."²⁶

If subsidence is not destruction, certainly the erection of utility poles should not be considered destruction. The erection of such poles does not present the element of subjecting the surface to possible destruction by the adoption of new and different mining methods but rather is an advancement of technique within the method utilized at the time of the severance, *i.e.* drift or deep mining. The variance in mining methods causing the appearance and usefulness of the surface to be so altered, can be understood as sufficient reason to require the parties to bargain and pay for the right to auger or to strip unless the same was a known and accepted practice in the area at the time of the severance.

The "usual method" test has been applied in cases involving the destruction of the surface by new mining methods such as auger and strip mining. This test has never been applied in the case of new techniques within a single mining method. The use of developments within the art of mining by a particular method should not fall within the rule applied to those cases wherein different mining methods exist when the only mining method under consideration is in fact the method employed at the time of the severance.

The mineral owner's use of utility poles and transmission lines has been the subject of only one decision by the Supreme Court of Appeals of West Virginia.²⁷ Professor Donley casts doubt upon the significance of the holding by stating that,

"neither the terms of the severance deed, nor those of the lease are reported. . . . Apparently, the lessee did not claim such rights as incident to the ownership of the coal, but contended

²⁵ United States v. Polino, *supra* note 21.

²⁶ *Ibid.*

²⁷ *Armstrong v. Pinnacle Coal & Coke Co.*, 101 W. Va. 15, 131 S.E. 712 (1926).

that the poles were erected on a road. It was held that such use of a road, without permission from any official body, imposes a new additional burden on the abutting owner. Under the reported facts, this case cannot be considered as authority for the proposition that the owner of coal has no right whatsoever to erect power poles as incidental to his ownership."²⁸

A final decision as to whether a mineral owner possesses this right as incident to his ownership has not been rendered in West Virginia.

The West Virginia court has said that "the owner is not limited to such appliances as existed at the time of the grant; he may freely employ the means of invention; he may erect all adequate modern machinery for mining and draining."²⁹ The Virginia court has taken the same position in recognizing that the mineral owner ". . . may keep pace with the progress of society and of modern invention."³⁰

Upon the strength of these principles, West Virginia should support the mineral owner's implied right to erect utility poles by adjudging such to be fairly necessary to the enjoyment of the mineral estate under the doctrine of the *Squires* case.³¹ This end will be more easily attained if the law applicable to different mining methods is not allowed to cloud the issue presented. Those few jurisdictions which have decided the issue take cognizance of the implied right to erect poles for the support of transmission lines.³²

Charles David McMunn

²⁸ DONLEY, *op. cit. supra* note 3.

²⁹ *Armstrong v. Maryland Coal Co.*, *supra* note 3, citing 1 BARRINGER & ADAMS, *op. cit. supra* note 3, at 576, 577; see *Williams v. Gibson*, 84 Ala. 328, 4 So. 350 (1888) cited in *Adkins v. United Fuel Gas Co.*, *supra* note 3; as applied to the grant or reservation of a right of way, see *Davis v. Jefferson County Tel. Co.*, 82 W. Va. 357, 95 S.E. 1042 (1918).

³⁰ *Oakwood Smokeless Coal Corp. v. Meadows*, 184 Va. 168, 34 S.E.2d 392 (1945); *Yukon Pocahontas Coal Co. v. Ratliff*, 181 Va. 195, 24 S.E.2d 559 (1943), citing *Williams v. Gibson*, 84 Ala. 328, 4 So. 350 (1888); 58 C.J.S., *op. cit. supra* note 12, § 159, citing the two Virginia cases: "the incidental rights of the mineral owner are to be gauged by the necessities of the particular case and therefore vary with changed conditions and circumstances . . ."

³¹ See DONLEY, *op. cit. supra* note 3.

³² *Creasey v. Pyramid Coal Corp.*, 116 Ind. App. 124, 61 N.E.2d 477 (1945); *Trivette v. Consolidation Coal Co.*, 296 Ky. 529, 177 S.W.2d 868 (1944); *Flannery v. Utilities Elkhorn Coal Co.*, 282 Ky. 355, 138 S.W.2d 988 (1940); *Wells v. North East Coal Co.*, 255 Ky. 63, 72 S.W.2d 745 (1934).