

February 1960

Mines and Minerals--Mining Rights Determined by Construction of Deed--Common Mining Practice at Time and Place of Execution of the Deed

L. O. H.

West Virginia University College of Law

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



Part of the [Oil, Gas, and Mineral Law Commons](#)

Recommended Citation

L. O. H., *Mines and Minerals--Mining Rights Determined by Construction of Deed--Common Mining Practice at Time and Place of Execution of the Deed*, 62 W. Va. L. Rev. (1960).

Available at: <https://researchrepository.wvu.edu/wvlr/vol62/iss2/11>

This Case Comment 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.

committed a breach of contract. Risk of such hinderance as has occurred was assumed by A. If B's purpose in making other purchases was to corner the market or otherwise hinder performance in ways or for purposes not within the risk assumed he would have committed a breach."

As large and as complicated as our system of government agencies is today, it would be difficult to imagine that a contract with one agency should alter contractual liabilities on other projects of all such agencies within a specified area. Such activity by other agencies ought to be a risk that is assumed as is normal competition on the commercial market. If there is an assumption of such a risk, then the act creating the competition for the labor supply is not a breach.

The majority of the court in the principal case, however, does not consider the act of the government in raising prevailing wages in the area as the breach for which it would grant a right to compensation for extra costs. The majority feels that it was the obligation of the government agency to disclose any material information at the time of making the contract relating to the cost of performance and that failure to inform the contractor of an impending future contract was a breach of the implied condition.

As mentioned by the dissenting opinion, the majority of the court in the principal case has cited no cases, and this writer can find none, that hold one party to a contract must disclose information to a prospective bidder relating to another and different contract which might cause competition in the labor market.

As the dissenting opinion states, it is not a breach when one creates a competitive situation and it does not seem that it could be a breach for merely failing to disclose that which one is allowed to do by law.

M. J. F.

MINES & MINERALS—MINING RIGHTS DETERMINED BY CONSTRUCTION OF DEED—COMMON MINING PRACTICE AT TIME AND PLACE OF EXECUTION OF THE DEED.—In an action for damages, *P* alleged that *D*'s auger mining was unauthorized by deeds under which *D* was conducting mining operations on *P*'s land. One of the deeds to the minerals under which *D* claimed *granted* the right to remove the minerals in the most approved method, and another deed under which *D* claimed *reserved* all minerals, together with all necessary and useful rights for the proper mining thereof. *Held*, that the lan-

guage of the deeds should be interpreted as of the time when, and the place where, they were made. Since these deeds were made between 1904 and 1907, and auger mining was not accepted as a common practice, in the county where the land was situated, until almost fifty years thereafter, *D* had no right by these deeds to engage in auger mining upon such land. *Brown v. Crozer Coal Co.*, 107 S.E.2d 777 (W. Va. 1959).

The principal case follows the earlier case of *West Virginia-Pittsburgh Coal Co. v. Strong*, 129 W. Va. 832, 42 S.E.2d 46 (1947), where the court held that similar deeds did not grant the right to strip mine when such was not common practice in the locale at the time of the grant. The court in the principal case drew an analogy between strip and auger mining, and applied the same rule laid down by the earlier case. Both these decisions have left some questions in the field of strip and auger mining unanswered. Indeed, as pointed out in *DONLEY, COAL OIL & GAS IN WEST VIRGINIA AND VIRGINIA*, § 144 (1951), the law of strip mining in West Virginia is still in the process of development. Judge Donley indicates that the result reached in *West Virginia-Pittsburgh Coal Co. v. Strong, supra*, while it may be correct upon its facts, still it failed to consider the principle that a deed is to be construed most strongly against the grantor. However, this comment deals more with the reasoning behind, and the practical aspects of, these two cases, and with the possibility that as a practical result these holdings could perhaps give rise to results *contra* to the judicial intent of the court.

As aforementioned, the West Virginia court in the principal case followed the holding in the *Strong* case. The *Strong* case is the judicial basis for *Oresta v. Romano Bros.*, 137 W. Va. 633, 73 S.E.2d 622 (1952), which arrived at a similar holding, and upon which the court in the principal case also relied. In the *Strong* case the only authority cited by the court for the principles which it enunciated was *Rock House Fork Land Co. v. Raleigh Brick and Tile Co.*, 83 W. Va. 20, 97 S.E. 684 (1918), which held that the intention of the parties to the extent of the minerals grant is to be determined by the language of the mining rights and such grant limited to such minerals as are ordinarily produced by the exercise of such mining rights granted by the deed. Since the deed in that case granted the minerals, it was necessary for the court to determine whether or not clay on the surface was a "mineral" under such a grant. The court said that minerals in that instance would be those ordinarily obtainable by tunneling and shafting and therefore clay was not

granted. The court went further and conceded that as far as minerals went, manganese and other ores are found upon the surface and are often secured without quarrying or mining, and that it could not be properly contended that such ores when so found are not minerals, but when secured by the process of tunneling or similar processes are minerals. By implication, the court seemed to say that such minerals would have been granted even if they were to be mined on the surface.

In the *Strong* case the court said that certainly if the owner of the surface had a proprietary right to subjacent support, then he likewise had an equal right to keep intact that which is to be supported, *viz* the surface. The court added that, as a matter of course, there could be no right to the preservation of something that another person has a superior right to destroy.

In the grant in the *Strong* case "all" the coal was granted along with the right to mine and remove "all" the coal. Such a grant would constitute a waiver of subjacent support under the rule of *Griffin v. Fairmont Coal Co.*, 59 W. Va. 480, 53 S.E. 24 (1905). This was a case in which the grantor sold "all" the coal together with the right to enter and remove "all" the coal. The court acknowledged that when the owner grants or leases the coal or minerals underlying the surface of his land, he has the right of subjacent support unless he has expressly or impliedly waived such right. But, the court held that the use of the word "all", in modifying the word "coal" in both the mining and the granting clauses, was a sufficient implication that the grantor had waived his right to subjacent support. Although the more modern cases of *Erwin v. Bethlehem Steel Corp.*, 134 W. Va. 400, 62 S.E.2d 337 (1950); *Winnings v. Wilpen Coal Co.*, 134 W. Va. 387, 59 S.E.2d 655 (1950); *Hall v. Harvey Coal & Coke Co.*, 89 W. Va. 55, 108 S.E. 491 (1921), have expressly refused to extend the rule of *Griffin v. Fairmont Coal Co.*, *supra*, it has become a rule of property in this state. *Simmers v. Star Coal & Coke Co.*, 113 W. Va. 309, 167 S.E. 737 (1933). Had the principles in the *Griffin* case been applied, the *Strong* case would seem to contradict itself, there would be no right of preservation of the overburden or surface, but it could not be destroyed by strip mining. The *Strong* case, therefore, presents the question of whether the lessee or grantee of the coal rights in such a case might be allowed to enter and remove the coal so that the surface might subside due to lack of subjacent support, where the grantee would be prohibited from strip mining. It is obvious that where the surface sinks because

of lack of proper subjacent support, the land may be as useless as if the overburden had been removed. If, in such a case, the grantee of the coal rights were allowed to remove the subjacent support, but not allowed to strip mine, the owner of the surface would lose the statutory protection given him where there is strip mining done on his land. The West Virginia Code provides that any person strip mining land must give a penalty bond of \$500 per acre, and if he fails to regrade and replant the area, the bond is forfeited. The landowner may get the benefit of these bonds to recondition his land after any default of the strip miner. W. VA. CODE, ch. 22, art. 2A, §§ 3-5 (Michie Supp. 1959). It is interesting to note that the court in the principal case drew an analogy between strip and auger mining, and made reference to the fact that a similar bond was required for auger mining, the statute was amended by Chapter 99, Acts of the Legislature, 1959, so that its provisions apply only to surface mining. Deep mining and auger mining are now specifically excluded.

Judge Fox, who dissented in the *Strong* case, felt that the majority of the court were denying the grantee the right to all the coal, which right had in fact been expressly granted to the grantee. An instrument must be construed by the apparent intention of the parties when the contract was formed. *Babcock Coal & Coke Co. v. Brackens Creek Coal Land Co.*, 128 W. Va. 676, 37 S.E.2d 519 (1946). If a party, as in the principal case, grants "all minerals" along with the right to use all land necessary for the removal of all minerals, it is felt that the parties intended for the surface to be destroyed if necessary, especially where the minerals lay in rather rough country. The decision in the principal case that a deed is to be construed as of the time when it was made in the county where the land lies may inhibit the use of newer mechanical means in mining, because such developments were not conceived or foreseen years beforehand when the deed of severance was made. Auger mining is a new method of mining, corresponding to the act of a man drilling a hole in a tree, with a small part of the tree cut away to give the drill support. It is the author's opinion that auger mining and strip mining are not analogous.

The Pennsylvania court has considered this problem, particularly in regard to strip mining, on various occasions. The more recent cases indicate that the Pennsylvania Supreme Court has undertaken to consider each case individually, looking to the sur-

rounding circumstances to determine whether stripping should be allowed. In *Mount Carmel R. Co. v. M. A. Hanna Co.*, 371 Pa. 232, 89 A.2d 508 (1952), where there was a grant in 1891 with a right to mine the coal by any method, it was held that the grantee had the right to strip mine even though such method was not in common usage at that time. A year later the same court said in *Rochez Bros., Inc. v. Durica*, 374 Pa. 262, 97 A.2d 825 (1953), that language which was particularly applicable to underground mining did not include the right to strip mine. The apparent conflict in these two cases was resolved in *Commonwealth v. Fitzmartin*, 376 Pa. 390, 102 A.2d 893 (1954). This case reviewed a number of Pennsylvania decisions on the right of a grantee to strip mine under a deed of severance made at a time when such was not the common practice. The court said that the subject matter had to be considered along with other surrounding circumstances. The *Durica* case was distinguished on the ground that the land in question there was rich agricultural and farm land, while the land in *Mount Carmel R. Co. v. M. A. Hanna Co.*, *supra*, and in the case then under consideration lay in rough terrain. The Pennsylvania court felt that the cases were perfectly reconcilable on that basis.

It is the author's opinion that some sort of subjective standard, as used above, should be applied in West Virginia, especially in cases where strip or auger mining would be the only feasible and economical method of removing the coal. Such a standard would not be a panacea, but it might come closer to effectuating the original intent of the parties.

L. O. H.

PROPERTY—TENANCY BY ENTIRETIES CREATION THROUGH SIMULTANEOUS CONVEYANCES INVOLVING TENANTS IN COMMON.—*P*, holder of inchoate dower right in spouse's undivided interest in land as a tenant in common with his mother, joined with spouse, *D*₁ in conveyance of this interest to his mother, *D*₂, which conveyance vested her as sole owner of the fee in the entire tract. In the second part of this transaction, *D*₂ conveyed a portion of the tract to *P* and *D*₁. *P* divorced and remarried, brought this suit for partition; she sued as a tenant in common. The trial court held that, although *D*₁ intended to create a tenancy by the entireties as between himself and *P*, such instrument did not create that estate, and that the *P* was not a tenant in common subsequent to her divorce, and *P* had no