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SOME ASPECTS OF TORT LIABILITY IN
THE MINING OF COAL.*

ROBERT TUCKER DONLEY**

The purpose of this article is to discuss four types of cases involving tort liability in connection with the mining of coal and to examine the question of whether liability in cases of this character should be based upon negligence, or whether the doctrine of absolute liability should apply.

I. THE USE OF EXPLOSIVES

The first type of case involves the question of the liability of a coal operator in the mining of coal, for example, in strip mining, who finds it necessary to set off explosives, and by reason thereof the force of the concussion is transmitted through the strata or through the air, resulting in damage to neighboring property.

The majority of the decisions in this country support the rule of absolute liability in such cases, irrespective of whether or not there is a physical invasion of the plaintiff's property by the casting of rocks, debris and the like onto such property, or on the other hand, the invasion of plaintiff's property occurs by shocks and concussions only.1

The minority view2 is based upon the theory that if the coal operator has no other way by which to extract the coal and uses no more explosive than is reasonably necessary for the task and conducts the blasting in a careful manner, that is to say, with all the precautions which are possible to be taken, then there is no liability.

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2 See Annot., 92 A.L.R. 471 (1934).
There appears to be no authority directly in point in West Virginia. The blasting cases are not, as sometimes supposed, based upon the application of the doctrine of *Rylands v. Fletcher*, for the reason that the blasting is done intentionally; whereas, under the *Rylands v. Fletcher* doctrine the instrumentality causing the damages accidentally escapes. Nor is this a case of "nuisance", as in cases involving the detonation of stored explosives, in which the courts impose an absolute liability, nor is the matter governed by the rule of *res ipsa loquitur*, which is a mere rule of evidence and not a rule of substantive law.

It is submitted that the doctrine of absolute liability should be applied, for it is little comfort to a plaintiff whose property has been brought down about his ears to deny him recovery by answering that while the defendant admits having destroyed the plaintiff's property, he was very careful when he did it. It is socially desirable to require industries engaged in dangerous activities to distribute the loss by providing insurance, rather than to shift it upon the blameless neighbor. The basis of liability is the extraordinary, hazardous nature of the defendant's conduct and a sound public policy demands that the actor assume the risk.

II. STREAM POLLUTION

The second phase of tort liability in connection with the mining of coal concerns injury to property arising from stream pollution.

**Liability for Injuries to Property.** Much confusion and diversity of opinion have arisen concerning the joint or separate liability of coal operators who, acting independently of each other, discharge waste material into a stream, which is carried by the water and deposited on the land of a lower riparian owner. In 1906, the West Virginia court held, in *Day v. Louisville Coal & Coke Co.*, that any one of the operators is liable separately for the entire damage. In 1909, the Virginia court held the opposite, in *Pulaski Anthracite Coal Co. v. Gibboney Sand Bar Co.*, without mentioning the *Day* case. In 1912, in an action in Virginia against several producers

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5 The text of the discussion here is a reprint from DONLEY, LAW OF COAL, OIL & GAS IN W. VA. & VA. § 178 (1951), and is printed here with the consent of the publisher, The Michie Company, Charlottesville, Va.
6 60 W. Va. 27, 53 S.E. 776 (1906).
7 110 Va. 444, 66 S.E. 73 (1909).
of iron pyrites, the trial court in Arminius Chemical Co. v. Ladrum\(^8\) instructed the jury that if it were impossible to determine in what proportions the defendants had contributed to the injuries, then each who had contributed in any degree is responsible for the whole injury. The Supreme Court said that "Whether the rule announced in Pulaski Anthracite Coal Co. v. Gibboney, supra, would control, where it is impossible to determine in what proportion each of several wrongdoers had contributed to the injury complained of, need not be considered in this case, since the instruction given was not objected to by the defendants." Further, in commenting upon the Pulaski case, the court said that the authorities were not in harmony, and cited the Day case as sustaining the contrary view. In 1916, in Carolina, C. E. O. Ry. v. Hill,\(^9\) the Virginia court indicated that the doctrine of the Pulaski case is limited to cases involving stream pollution and that "The doctrine is thoroughly established that where there are several concurrent negligent causes, the effects of which are not separable, though due to independent authors, either of which is sufficient to produce the entire loss, all are jointly or severally liable for the entire loss," citing the Arminius case. The latest decision in Virginia is that of Panther Coal Co. v. Looney,\(^10\) which holds that a coal operator does not have the legal right to pollute a stream, in a material and substantial way, by permitting mine water to drain into it, so as to damage the lands of a lower riparian owner, citing both the Pulaski and Arminius cases. In the meantime, in 1920, in Farley v. Crystal Coal Co.,\(^11\) the West Virginia court overruled the Day case in so far as it authorized the joinder of defendants, and imposed liability upon one of them for the entire damage, citing in support of its decision the Pulaski case, but not mentioning the Arminius case.

The qualification mentioned in the Carolina case that the act of any one of the tort-feasors be sufficient to produce the entire loss would, it is submitted, impose liability upon the basis of probabilities rather than upon the basis of proof which, as a practical matter, it is impossible to obtain. Perhaps in the great majority of instances no one can determine with any degree of certainty how much pollution was contributed by any one operator, and the indication in Virginia is that he is not liable for the injury unless it be shown that his contribution was sufficient to produce the entire loss—an entirely

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\(^{8}\) 118 Va. 7, 73 S.E. 459 (1912).
\(^{9}\) 119 Va. 416, 89 S.E. 902 (1916).
\(^{10}\) 185 Va. 758, 40 S.E. 2d 298 (1946).
\(^{11}\) 85 W. Va. 595, 102 S.E. 285 (1920).
different proposition from whether it did, in fact, produce the entire, or any part of, the loss. It would seem that, in principle, each operator should be liable only for such share of the damage as he contributed. But, as a practical matter, how can the landowner prove that fact with any degree of certainty? Even if it were possible to prove the exact amount of debris deposited in the stream by each operator—for example, if each of four operators deposited the same number of tons in the stream in a given period—it would not inexorably follow that each is liable for one-fourth of the damage, because the amount deposited on the plaintiff's land is not necessarily the amount placed in the stream. As a physical fact, some of the material deposited by the operator farthest up the stream would sink to the bottom or be deposited elsewhere before reaching the plaintiff's land. Unless, then, the courts are prepared to adopt a rule of thumb to the effect that proof of the amount of polluting matter deposited in the stream is, in the absence of evidence to the contrary, sufficient proof of the amount deposited on the plaintiff's land, there would seem to be no way in which the landowner can establish a case, in an action at law which does not rest upon mere speculation and probability. Of course, these considerations would not prevent the granting of an injunction to restrain the operators from depositing the material, by way of the stream, upon the plaintiff's land. And it may be that a court of equity having taken jurisdiction for that purpose, would give complete relief by requiring a discovery of the amount of polluting material placed in the stream by each operator, and—applying the suggested rule of thumb—award damages. Whether this would be an unconstitutional deprivation of the right of trial by jury is a problem beyond the scope of this inquiry. In summary, therefore, it may be said that the cases are in a confusing, if not irreconcilable, state and that the theoretical right of the landowner to recover proportionate damages separately from each contributing operator may well-nigh be unenforceable by reason of insurmountable difficulties of proof.

In the case of *G. L. Webster Co. v. Steelman*, the defendant discharged waste from its canning operations into a stream at a point approximately 2.69 miles from the property of the plaintiff. The waste material was deposited on the property of the plaintiff and in the waters surrounding him, resulting in the production of very offensive odors, and making the property of the plaintiff virtually uninhabitable.

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12 172 Va. 342, 1 S.E.2d 805 (1939).
The plaintiff contended that in the absence of negligence it was not liable for damages, and its acts in discharging waste matter were the exercise, in a lawful manner, of its rights and that any loss occasioned thereby was *damnnum absque injuria*.

The plaintiff’s proceeding was a notice of motion for judgment, which contained no allegation of negligence, and the plaintiff did not attempt to prove negligence upon the part of the defendant, the whole theory of the plaintiff’s case being that the drainage system created a nuisance.

The court said: “Odors which are offensive and disagreeable in such a manner as to render life uncomfortable and damage property rights constitute a nuisance. . . . [Citing authorities.] In the creation of a nuisance, it appears to be generally settled that the question of negligence or reasonable care is immaterial. . . . [Citing authorities.] In Virginia, we follow the general rule that it is not necessary to allege or prove negligence when the acts complained of result from a nuisance committed by another in a private capacity. . . . [Citing authorities.]”

The court, continuing, quoted from Minor, Vol. 1 of the *Law of Real Property* as follows: “It is to be observed that, whatever the rights of the upper proprietor may be with respect to the drainage of surface-water, the authorities seem agreed upon the proposition that he has no right to pollute it while on his land and then allow it to drain, even in natural channels, upon his neighbor’s land, and he is liable for injuries to the latter caused thereby—even, it seems, though he be guilty of no negligence.”

**III. SUPPORT OF OVERLYING STRATA**

The third phase of liability concerns the duty to protect superincumbent seams of coal, and the duty of both the lessor and the lessee to support the overlying strata.13

*Lessee’s Duty to Protect Superincumbent Seams of Coal.*

Where there has been a severance of title to the surface from the title to two seams of coal, the problems of support for the superincumbent seam may be classified as follows:

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13 The material in this section is a reprint from the writer's *Coal Leases*, Title XVI in *American Law of Mining*, now in manuscript form, and is printed here by permission of the publisher, Matthew Bender & Co., New York, N.Y.
Both seams are owned by the same lessor and

(a) The lessor leases both seams to the same lessee by one instrument. In such a case, where the lessee mines in the lower seam and removes supporting pillars in such a way as to cause the seepage of water into the upper seam, resulting in the loss of recoverable coal therefrom, the lessor is entitled to an injunction against further removal of support, and to an accounting for damages sustained. The principle applied is that there is an implied covenant that the lessee will do nothing and leave nothing undone which is reasonably necessary to protect the premises against waste and destruction. The lease could, of course, contain an express waiver of support which would discharge that duty, but it is highly improbable that the lessor would so agree. The duty to support the upper seam continues until all the minable and merchantable coal therein has been removed by the lessee, or by the lessor after the term of the lease has expired.

(b) The lessor leases each seam to different lessees. If the lessee of the lower seam operates in a negligent manner so as to make it impossible to mine the upper seam, the lessee of the latter may recover damages from the lessee of the lower seam. And, although the first lease is of the lower seam, if the lessor does not expressly or by necessary implication waive the right to support of the upper seam, and thereafter leases it to another lessee, the latter may enjoin the lessee of the lower seam from removing it in such a manner as to interfere with operations in the upper seam. This is a sound conclusion because it is incredible that the lessor would consent to the destruction of the upper seam. Or, if he did intend to do so, that intention must be clearly expressed in the lease of the

14 Goodykoontz v. White Star Mining Co., 94 W. Va. 654, 119 S.E. 862 (1923). While there are expressions in this case indicating that the liability of the lessee is based upon negligence, it would seem that mining in the manner stated constitutes negligence per se. Other statements in the case indicate that the liability is an absolute one. It is submitted that this is the correct view. See also, Genet v. Delaware & H. Consol. Co., 186 N.Y. 593, 32 N.E. 1078 (1893), in which the lease covered three seams of coal. The lessee mined in the middle seam in such a negligent manner as to cause subsidence of the overlying seam, making further mining impossible. The lessee was held liable for the minimum royalties plus damages for the loss of the coal which could have been mined but for such destruction.


16 Ibid.


lower seam.\textsuperscript{19} And, the right of the lessee of the upper seam to its support cannot be divested or changed by a subsequent lease of the lower seam, or by modification of the original lease thereof, for the reason that the lessor's right to support passes to the lessee of the upper seam as an incident of the grant of the leasehold estate.\textsuperscript{20}

(2) Each seam is owned by a different party. If the lessor owns the lower seam only and as appurtenant thereto there has been an express waiver of subjacent support of all the overlying strata (including, therefore, all superincumbent coal), the lessee is under no duty to support the latter even though the mining of the lower seam will result in the complete loss and destruction of the upper seam.\textsuperscript{21}

It is apparent that if the seams are owned by different parties it must be determined from the severance deeds whether the owner of the lower seam has secured a release or a waiver of the duty to support the upper seam. If so, he can confer that privilege upon his lessee and he would ordinarily do so either expressly or by implication. In this type of case, the release or waiver is of a "natural right" to subjacent support and has nothing to do with the theory of an implied covenant.

\textit{Duty of Lessor and Lessee to Support Overlying Strata.} There will now be considered the duty of the lessee to the lessor to support all the overlying strata and the liability of the lessor or of the lessee, or both, for failure to provide subjacent support for overlying strata which is owned by a third person.

A. As between lessee and lessor, the problem may be divided into two situations:

(1) The lessor is the owner of the seam of coal only. The duty of the lessor to provide support for the overlying strata must be de-

\textsuperscript{19} \textit{Ibid.} In this case, the lease of the lower seam granted specifically enumerated rights to use and occupy the surface, "being the mining rights, privileges and grants so full and complete as the same are contained in the several Deeds of conveyance from the original owners to the said Lessor." The court held that this provision referred only to the surface rights and was not a release, by reference, of the duty to support the upper seam.

\textsuperscript{20} \textit{Ibid.}

\textsuperscript{21} Continental Coal Co. v. Connellsville By-Products Coal Co., 104 W. Va. 44, 138 S.E. 787 (1927). Although this decision has been destructively criticized in Note, 34 W. Va. L.Q. 212 (1928), it is submitted that it is correct. The subsequent purchaser of the overlying seam takes it with notice of the prior waiver of subjacent support concerning it.
If, as appurtenant to the ownership of the coal, or otherwise, the lessor has secured a release or waiver of the duty to provide subjacent support, it inures to the benefit of the lessee in the absence of a provision in the lease to the contrary. Normally, there would be no such provision in the lease because the lessor would be desirous of effecting a full recovery of the coal and would have no interest in the support of the surface.

(2) The lessor is the owner of both the coal and the overlying strata. In this situation, the lessor may or may not desire to have the surface supported, depending upon its character, location and suitability for useful purposes in the future. In either case, the duty of the lessee to provide support depends entirely upon the terms of the lease. Thus, where the lease contains an express waiver of support, the lessee is under no duty to furnish it, and such waiver is not affected by a provision in the lease giving the lessor permission to inspect the mine and to designate where pillars are to be left. And, where the lease requires the lessee to mine and pay for all the coal in the demised premises and exempts the lessee from liability for damages to the surface unless caused by gross negligence and provides that pillars should be left sufficient to support the roof so that at the expiration of the lease the mine shall be left in as good condition for future mining as any prudent operator would leave the same were he entitled to continue mining for a series of years, it was held that there was a waiver of the right to support. On the other hand, the lessee is under a duty to furnish support in the absence of an express waiver thereof, and the mere fact that the lease demises all the coal and requires the lessee to mine by the most economical

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22 The determination of what constitutes a waiver of subjacent support in the severance deed, or otherwise, is beyond the scope of this article.

23 In Pennsylvania, the right of subjacent support is a "third estate", an interest in real property, and may be owned independently of the surface and of the coal. If so owned, a release or waiver may be obtained from the owner. Chartnetski v. Miner's Mills Coal Mining Co., 270 Pa. 459, 113 Atl. 683 (1921); Smith v. Glen Alden Coal Co., 347 Pa. 290, 32 A.2d 227 (1943).


25 Miles v. Pennsylvania Coal Co., 217 Pa. 449, 66 Atl. 764, 10 Ann. Cas. 871 (1907). The provision refers only to the temporary leaving of pillars during the course of mining the main body of the coal.

26 Miles v. New York, Susquehanna & Western Coal Co., 250 Pa. 147, 95 Atl. 897 (1915). The stipulation for leaving pillars was held to refer to a termination of the lease before the removal of all the coal so that future operations could be conducted; and that a stipulation for careful and skillful mining does not require the lessee to support the surface.
TORT LIABILITY IN MINING OF COAL

method does not constitute a waiver or release of the duty.\(^{27}\) In such a case, the duty is enforceable by a subsequent vendee of the lessor notwithstanding that the vendee's deed recited that the pillars had been removed by the lessee.\(^{28}\)

B. Duty owing to third person owning the overlying strata. In the following discussion the cases involve situations in which there has been a severance in title of the coal from the overlying strata and no waiver or release of the right to support. The lessee of the coal removes the support and the question is whether or not he is liable to the surface owner, whether the lessor is liable, or whether they are jointly liable.

(1) Liability of the lessee. The right to support is a "natural right", the duty to provide support is absolute, and it is not a defense that the mining was conducted with due skill and care and in the most approved manner.\(^{29}\) There can be no doubt, therefore, that the lessee is liable for the failure to leave supporting pillars or artificial substitutes in lieu thereof.

(2) Liability of the lessor. There is a conflict of authority as to whether or not the lessor is liable to the surface owner for damages caused by the removal of support\(^{30}\) by the lessee. In *Campbell v. Louisville Coal Mining Co.*,\(^{31}\) the lease provided that the lessee should mine in a workmanlike manner, and the lessor reserved the right to inspect the mine. The lessor's agents knew that the lessee was removing the natural support and was not substituting artificial supports. The lessor made no efforts to prevent mining in such a manner and accepted royalties resulting therefrom. The court upheld a recovery against the lessor, holding that such mining was


\(^{28}\) *Ibid.*

\(^{29}\) Alabama Clay Products v. Black, 215 Ala. 170, 110 So. 151 (1926). Even though the lessee is under no duty to support the surface, he may be liable for wanton or malicious damage to it. Elkhorne Coal Corp. v. Johnson, 263 S.W.2d 124 (Ky. 1954).


\(^{31}\) 39 Colo. 379, 89 Pac. 767, 10 L.R.A. (n.s.) 822 (1907). It was also held that a statute permitting the surface owner to require the mineral owner to give bond to secure the surface owner against damages, does not discharge the duty of the mineral owner by failure of the surface owner to require such bond.
negligence; that the lessor cannot do indirectly that which the law prohibits him from doing directly. "One cannot knowingly reap the benefit of a wrong and escape the liabilities resulting from such wrong." The principle applied is that "whoever, for his own advantage, authorizes his property to be used by another in such a manner as to unnecessarily endanger and injure the property of others is answerable for the consequences . . . . The case does not fall within the general rule to the effect that the lessor of premises is not liable for the negligence of his lessee, because, ordinarily, the lessor does not retain, and is under no obligation to retain, control over the demised premises." This view has received the approval of the Kentucky court which, on a similar state of facts, held that the lessor is liable if he authorizes or permits the lessee to remove supporting pillars, takes no steps to prevent it, and accepts benefits in the form of royalties. 32

In Alabama Clay Products v. Black, 33 the Alabama court refused to follow the Campbell case in so far as the latter held that the receipt of royalties by the lessor was a basis for the imposition of liability, stating: "the mere receipt of a royalty for the mineral even if the [lesser] knows of the mining operations would not authorize or require him to interfere and control simply because he may have been the owner of the mineral, in the absence of the reservation of the right to do so under the terms of the lease." The court further held that ordinarily the lessee and not the lessor is liable for a subsidence caused by mining operations over which the lessee is in full control. However, if the lessor reserves the right to direct or control the mining operations of the lessee and gives directions as to the taking of coal from the pillars, he is liable to the owner of the surface for the resulting injury. And, it has been held that if the lessor directs the lessee to remove the support, both lessor and lessee are liable; but if the lessee has full control over the manner of mining, he alone is liable. 34 The lessor is liable where the lease contemplates and expressly authorizes the lessee to rob the pillars and leave the surface without support; and this result is unaffected by a provision in the lease that the lessee would secure written releases from the surface owners and would indemnify the lessor against any claims for damages. 35

33 215 Ala. 170, 110 So. 151 (1926).
34 Kistler v. Thompson, 158 Pa. 139, 27 Atl. 874 (1893).
35 Republic Iron & Steel Co. v. Barter, 218 Ala. 369, 118 So. 749 (1928).
The Pennsylvania court has rather strictly limited the liability of the lessor. Irrespective of whether the instrument constitutes a sale or a lease, neither the vendor nor the lessor is responsible in trespass for the negligent mining by the vendee or lessee which results in damage to the surface; and the reservation in the lease by the lessor of the right to inspect the mine does not make him a director of the mining operation, nor constitute an aiding or abetting of the operation of the lessee, nor establish that the removal of the pillars was under the supervision, direction and control of the lessor. The inference to be drawn is that the vendor or lessor would be liable if he did actively direct or participate in the removal of the support. Upon procedural grounds, the court refused to decide whether or not the vendor or lessor could be held liable for negligence in entering into the lease when he knew or should have known that the mine was practically exhausted and that the removal of further coal would cause subsidence and the withdrawal of support.

It is submitted that the Colorado view is the sound one where a true lease, as distinguished from a sale, of the coal is involved. The surface owner has the absolute right to support and the lessor-owner of the coal is under an absolute duty to leave natural support or an adequate substitute for it. If the lessee fails to provide support and he is insolvent or judgment against him is otherwise uncollectible, it is unjust and unreasonable that the surface owner must submit to the damage or destruction of his property without a remedy against the person who owed to him the absolute duty of protection and whose voluntary act in executing the lease made it possible for the loss to occur. If the lessor cannot himself directly remove the support without incurring liability, upon what principle may he do so indirectly through the medium of a legal device called a lease? There is no magic in a name. If the courts desire to impose liability upon the lessor, there is no insurmountable technical difficulty involved and several alternative theories may be advanced. (1) In the absence of a provision in the lease requiring the lessee to support the surface, the court can create a constructive covenant to do so. (2) The lease contains an express covenant by the lessee to provide support. In either case it should be held that the lessor is under a duty to determine from time to time as the mining progresses

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37 Ibid.
whether or not the covenant is being violated, and if so to take such steps as may be necessary in order to prevent it, by injunction\(^3\) or by forfeiture for breach under an express forfeiture clause. (3) If the lease does not expressly or by implication restrict the removal of support, the lessor should be held liable for having thereby authorized the use of his property in such a manner as to injure the property of the surface owner.

It may be contended, in opposition to the foregoing position, that since the vendor of a seam of coal is not liable to the surface owner for the removal of support by the vendee, and that since for many purposes a lease is merely a legal device for effecting a sale of the coal upon an instalment basis, a lessor should incur no greater liability than that incurred by a vendor.\(^3\) The answer to this contention is that in all legal relationships involving a right-duty concept the courts must determine the identity of the party who owes the duty. And, especially in instances where that duty is an absolute one, as in support cases, it is attached to ownership of the supporting strata. Consequently, the holder of the title in fee to it is necessarily identified as the party who owes the duty. If he would escape it he must part with the ownership, with its benefits and its burdens. He should not be permitted to retain the advantages presumably connected with ownership and to escape the liabilities inseparably incident to it, by vesting a lesser estate in another. Therefore, it is submitted, there is a valid, realistic basis for making a distinction between the legal duties of a vendor and those of a lessor.

IV.

It will be observed that in each of the three types of cases which have been previously discussed, namely, liability for blasting, liability for stream pollution, and liability for removal of subjacent support, it has been suggested that the better view is that the rule of absolute liability should be imposed.

\(^3\) As to the circumstances under which some courts will issue an injunction against the withdrawal of support, see VI American Law of Property §23.53 (1954). The extent to which liability may exist by reason of the existence or construction of buildings upon the surface is beyond the scope of this article. See Annot., 32 A.L.R.2d 1309 (1953). Where a lease contemplates the removal of minerals which the lessor does not own, he is liable to the true owner for trespasses committed by the lessee. Annot., 127 A.L.R. 1020 (1940). But not if the lease amounts to a mere quitclaim. Greek Catholic Congregation v. Plummer, 388 Pa. 373, 12 A.2d 435, 127 A.L.R. 1008 (1940).

\(^3\) See note 36 supra.
The fourth, and last, type of case to be discussed concerns the liability imposed upon coal operators in connection with the maintenance of gob piles.

The maintenance of "gob piles" in close proximity to coal tipples is a common practice. These piles consist of rock, slate, sulphur balls, inferior coal and other materials separated from the merchantable portion of the coal. When the piles reach a large size, the pressure of these materials creates heat which often results in spontaneous combustion, producing the emanation of quite noxious fumes of sulphur dioxide and perhaps other gases. In *Rinehart v. Stanley Coal Co.*, the court held that an operator who creates such a gob pile and thereafter deposits on it "bug dust" (fine particles of coal resulting from the operation of cutting machines), knowing that fire would likely result because of its highly combustible nature, is guilty of actionable negligence which renders him liable to a neighboring landowner for damages sustained to crops, fruit trees, fences and dwelling houses by reason of the destructive effect thereon of fumes produced by such combustion. The duty of the operator to remove the bug dust from the interior of the mine, in response to orders from a state mine inspector, does not permit him "to create a private nuisance in the negligent disposal of a potentially dangerous substance."

In the case of *Koch v. Eastern Gas & Fuel Associates*, the plaintiffs instituted an action of trespass on the case to recover damages to their property caused by fumes emanating from a gob pile maintained by the defendant. The cause of action was based upon the allegation of negligence in the operation and maintenance of the gob piles. Disregarding the procedural questions raised as to duplicity in the defendant's pleas, the court held that the plea that the defendant had acquired a prescriptive right to maintain the gob pile was demurrable because it did not allege the elements of adverse and continuous use during the statutory period, *i.e.*, that the plea did not allege when the gob piles became ignited and continued to burn.

The defendant also filed a plea of assumption of risk. The court held that this plea was properly interposed, and that the trial court

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40 112 W. Va. 82, 163 S.E. 766 (1932). Note, 40 W. Va. L.Q. 371 (1934). This paragraph is a reprint from DONLEY, LAW OF COAL, OIL & GAS IN W. VA. & VA. (1951), and is reprinted with the permission of the publishers, The Michie Co., Charlottesville, Va.

41 95 S.E.2d 822 (W. Va. 1956).
erred in sustaining a demurrer to it, but the court went on to say: "Of course, as the allegations of the declaration in the case at bar are to the effect that the alleged wrongdoings on the part of the defendant trust association are progressive and continuing, the plea of assumption of risk cannot be employed to bar damages to the plaintiffs which have accrued since the plaintiffs moved into and on their property, and after the trust association had been notified or by the exercise of reasonable care should have known, of the injurious effects of its gob pile or gob piles."

This confusing statement seems to mean that the plaintiffs could not recover for any damages which their property had suffered prior to their moving into their property, but could recover damages which were sustained thereafter; but it is noted that this right of action was said not to accrue until after the defendant either knew or should have known of the injurious effect of the fumes. No authority was cited in support of this proposition, and it seems to be the theory of the decision that the maintenance of a gob pile which is emanating noxious fumes is not in itself an act of negligence, but becomes so only when damage to another results therefrom.

The court went on to say: "Though the continuing trespasses alleged in the instant declaration may, in fact, constitute a private nuisance, the case was not submitted to this Court on that theory. Whether the alleged continuing trespasses were, in fact, a nuisance, the cause of action did not arise until the injury had actually occurred. 2 Wood on Nuisances, 3rd Ed., Section 719." This citation is not authority for the proposition for which it is cited, for the reason that the text of that section of Wood on Nuisances deals with the acquisition of a prescriptive right to maintain a nuisance, and with reference thereto the author states that such prescriptive right begins to run from the time the actual injury results from the user.

The court insisted upon the distinction that "the case at bar under the averments of the instant declaration was drafted by lawyers skilled in the common law practice of this State, for the purpose of bringing this case within the category of an action of trespass on the case for the purpose of recovering damages for continuing trespasses, resulting in injury or damage, as distinguished from an action to recover temporary damages from a private nuisance."

In the case of Oresta v. Romano Bros., the court held that a

coal stripper was guilty of actionable negligence in depositing waste material in such a manner as to cause it to be cast upon adjoining land, and that this amounted to the maintenance of a nuisance.

It is apparent that negligent acts may result in the creation of a nuisance, but once the nuisance is created, the liability of the defendant is absolute and whether the action is to recover for temporary damages or for permanent damages affects only the measure thereof and not the substantive liability.

It is, therefore, not readily apparent why there was such an insistence upon making the distinction in the Koch case between a cause of action based upon negligence and a cause of action based upon a nuisance when, as demonstrated by the Oresta case, the negligence results in the production of a nuisance, the result is the same.

A recent and excellent treatise\textsuperscript{43} states:

"Many wrongs which are loosely called nuisance depend entirely upon the negligence of the actor. In an important case, Justice Cardozo, when on the New York Court of Appeals, emphasized that such nuisances are properly controlled by ordinary doctrines of the law of negligence notwithstanding the name of nuisance is applied to them. 'Situations there are,' he observed, 'where what was lawful in its origin may be turned into a nuisance by negligence in maintenance. The coal hole, built under a license, may involve a liability for nuisance if there is negligence in covering it. The tumbledown house abutting on a highway is transformed into an unlawful structure if its ruinous condition is a menace to the traveler. In these and like situations, the danger being a continuing one, is often characterized as a nuisance, though dependent upon negligence.'

"But there are many instances of nuisance which do not depend upon negligence for their wrongful character, and it is such nuisance that concerns us here. In this type of nuisance, it is immaterial that the defendant has employed all reasonable precautions to avoid harm to the plaintiff for the plaintiff does not rely upon the existence of a duty imposed by law to exercise care. Consequently the breach of such a duty is not of controlling significance. . . ."

"The Restatement, however, is clearly on sound ground in attributing many nuisances to conduct which is negligent (or reckless) or ultra-hazardous. It is obvious that many activities are carried on with lack of precautions to prevent interference with others so great as to constitute negligence. When this

\textsuperscript{43}I. Harper & James, Torts 66 (1956).
interference substantially restricts others in the lawful use of their land, there is liability for nuisance. In many such cases, the usual continuity of interference is not required. It is enough that the interference is 'substantial,' although, of course, continuity of interference may be an important factor in determining the 'substantiality' thereof. 4

"It may be said, as a general proposition, that the doctrine of voluntary assumption of risk has no application in nuisance cases to relieve from liability. Thus it is no defense to an action for nuisance that the plaintiff 'came to the nuisance' by knowingly acquiring property in the vicinity of the defendant's premises. The maxim volenti non fit injuria, said Sir John Salmond, is capable of no such application and, indeed, it has been held that the same result is proper where the nuisance complained of arose out of negligence. The duty to use due care, it seems, is not abated toward one who has elected to live or reside in the vicinity of the nuisance.

"But while 'coming to the nuisance' is not, in and of itself, a defense, priority in use is one of the factors which is important in determining whether a particular use constitutes a nuisance. Thus, if a person builds or buys a residence in a neighborhood which is predominantly industrial, the fact that he is annoyed by adjoining factories does not give him a cause of action for nuisance. So too, if he builds his home near an airport or a railroad track, these activities do not immediately become nuisances." 45

In the case of Board of Commissioners v. Elm Grove Mining Co., the court upheld the power of municipalities or county courts, under the provisions of the Code, to abate nuisances affecting public health by securing an injunction restraining the addition of combustible substances to a burning gob pile.

In that case a brief was filed by the West Virginia Coal Association, which took the position that such an injunction would "decree from existence the mining of coal in this State." The court, speaking by Judge Maxwell, stated that it did not share that alarm, and went on to say that: "But public health comes first. Even in as useful and important industry as the mining of coal, an incidental consequence, such as here involved, cannot be justified or permitted unqualifiedly, if the health of the public is impaired thereby. Notwithstanding a business be conducted in the regular manner, yet if in the operation thereof, it is shown by facts and circumstances to

44 Id. at 68-69.
45 Id. at 83.
46 122 W. Va. 442, 9 S.E.2d 813 (1940).
constitute a nuisance affecting public health 'no measure of necessity usefulness or public benefit will protect it from the unflinching condemnation of the law.'"

It is interesting to observe also that in the *Koch* case, previously mentioned, the contention was again made on behalf of the West Virginia Coal Association that it is a matter of general knowledge in this state that the mining of coal cannot be successfully carried on without the use of gob piles, and that it is a natural, necessary and unavoidable incident to the ordinary and proper mining of coal, and that it is the very nature of gob piles to catch fire by spontaneous combustion, and that regardless of care and caution they will catch fire and once ignited they cannot be extinguished by any practical means now known.

The accuracy of that contention may be seriously questioned. It is a matter of fact that one of the largest mines now operating in northern West Virginia has eliminated gob piles by bulldozing earth over waste material.

But even if the contention of the Coal Association is sound, as a matter of fact, it is submitted that it should not justify the injury or destruction of neighboring property without liability. If, as previously shown, injury to or destruction of neighboring property is caused by blasting, or the force of concussions, it is difficult to see any valid distinction between that class of cases and those in which injury is caused by the impact of noxious fumes transmitted through the air.

To summarize, then: It is submitted that in all the four types of cases, namely, blasting, stream pollution, removal of subjacent support, and the maintenance of gob piles, courts should impose an absolute liability. The fundamental basis for this belief is that in the middle of the twentieth century we should not be bound by the narrow concept of fault principles, which were developed in the eighteenth and nineteenth centuries, in a much more primitive and nonindustrial society; and that the courts should be prompted by policy considerations emerging from the idea of the inviolability of private property rights, and the notion that expanding industry, now largely in the hands of great corporations having ample resources, should make good the loss caused to innocent bystanders in the roles of nearby property owners.