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Mines and Minerals--Leases--Covenant to Pay Minimum Annual Royalty for Term

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of negligence retains its original force until overcome by proof of affirmative acts of due care of the defendant." In later cases, the general effect has perhaps been to create a true rebuttable presumption of law, throwing upon the defendant the duty of going forward with the evidence. *Veith v. Salt Co.*, 51 W. Va. 96, 41 S. E. 187 (1902); *Jacobs v. Baltimore & Ohio R. R.*, 68 W. Va. 618, 70 S. E. 369 (1911); *Edmonds v. Monongahela Traction Co.*, 78 W. Va. 714, 90 S. E. 230 (1916); *Hodge v. Sycamore Coal Co.*, 82 W. Va. 106, 95 S. E. 808 (1918); cf. *Jones v. Riverside Bridge Co.*, 70 W. Va. 374, 73 S. E. 942 (1912). But cf. *Diotollavi v. United Pocahontas Coal Co.*, 95 W. Va. 692, 122 S. E. 161 (1924). The instant case and the *Webb* case, together with the modification of the *Parr* and *Blevins* cases, indicate a definite attempt to settle this question as to the treatment of *res ipsa loquitur*, as being, not a genuine presumption, but a permissible inference. C. T.

MINES AND MINERALS—LEASES—COVENANT TO PAY MINIMUM ANNUAL ROYALTY FOR TERM.—Plaintiff sued for cancellation of a coal-mining lease and for relief from payment of further minimum royalties under the lease to the date of expiration thereof, claiming that the coal had been exhausted. The lease was for thirty years, twenty-five of which had passed, contained a promise to pay a minimum three thousand dollars per year subject to increases contingent on production and was of all coal in the Sewell seam under a designated tract. The trial court sustained a demurrer to the bill of complaint. *Held*, that, despite the general right to rescind for mutual mistake of fact, relief could not be granted since the promise to pay was unqualified and the lessee assumed the risk. Rulings affirmed. *Babcock Coal & Coke Co. v. Brackens Creek Coal Land Co.*, 37 S. E. (2d) 519, 163 A. L. R. 871 (W. Va. 1946).

Plaintiff contended that the minimum royalty provision was incidental to the primary obligation set forth in the lease, diligently and in a workmanlike manner to mine the Sewell seam of coal, and that its obligation ceased when such coal had been so far exhausted that there was no longer workable coal in the property, and further asserted mutual mistake of fact. Defendant sought a construction that a lease for a term at a minimum annual royalty by express stipulation to be treated as rent reserved upon contract constitutes an absolute undertaking of the lessee to pay the minimum rental during the entire term from which lessee may not be relieved because of unfavorable mining conditions or exhaustion of coal absent expression of a contrary intention.

The authorities are not in accord as to application to mining leases of the general rule permitting rescission for mutual mistake of fact. Note

(1946) 163 A. L. R. 878. Of course, express provisions in the lease govern and obviate any controversy. 5 WILLISTON, CONTRACTS (Rev. ed. 1937) §1567. Absent such provisions, one view goes on the theory of a sale of the minerals in place, with the royalties deemed instalment payments for the property and denies relief on the ground either that the misfeasance alleged did not induce the lease or that the lessee assumed the risk. Madeira, *Leases of Minerals as Absolute Sales—The Pennsylvania Doctrine* (1915) 64 U. OF PA. L. REV. 42; *Bankers Pocahontas Coal Co. v. Central Pocahontas Coal Co.*, 113 W. Va. 1, 166 S. E. 491 (1932) (burden on lessor to establish right to relief); *Minor v. Pursglove Coal Mining Co.*, 111 W. Va. 28, 161 S. E. 425 (1931) (instrument held lease with elements of sale). Note (1946) 163 A. L. R. 881. The instant case reasons that ordinarily in a lease for coal mining purposes no warranty that the tract contains a definite quality or quantity of coal is implied. It recognizes two common classes of coal leases—those containing a minimum royalty clause as here, and those undertaking to mine a given tonnage of coal over the term of the lease, with termination of the covenant to pay when the coal is exhausted, appropriate in the latter but not in the former situation. The federal rule, developed in the pre-Erie era, that, when a minimum royalty provision is expressed, it is enforceable though the mine contain few if any minerals or though unusual conditions prevent the carrying on of mining operations seems in accord with or even in advance of the West Virginia doctrine. *Rocky Mountain Fuel Co. v. Albion Realty & Securities Co.*, 70 F. (2d) 212 (C. C. A. 10th, 1934); *Moxhan v. Sherwood Co.*, 267 Fed. 781 (C. C. A. 4th, 1920); see *Ridgely v. Conewage Iron Co.*, 53 Fed. 988 (C. C. E. D. Pa. 1893); cf. *Stonega Coke & Coal Co. v. Price*, 116 F. (2d) 618 (C. C. A. 4th, 1940); *Price v. Stonega Coke & Coal Co.*, 26 F. Supp. 172 (S. D. W. Va. 1938). Among the states, there is little uniformity. Many cases are distinguishable on the facts, since leases are seldom identically worded. Cf. *Corona Coal & Coke Co. v. Dickinson*, 261 Pa. 589, 104 Atl. 741 (1918); *Virginia Iron Co. v. Graham*, 124 Va. 692, 98 S. E. 659 (1919); Note (1946) 163 A. L. R. 881. But it would appear that the only set of facts which will not entitle the lessee to be relieved from his contract in any event are those such as in the principal case. Except where there is an unambiguous lease with an unqualified promise to pay a given amount over a definite period of time, *Lawson v. Williamson Coal & Coke Co.*, 61 W. Va. 669, 57 S. E. 258 (1907); *Timlin v. Brown*, 158 Pa. 696, 28 Atl. 236 (1893); see *Gorman v. Lusk*, 270 Ky. 350, 109 S. W. (2d) 625 (1937); 5 WILLISTON, CONTRACTS §1567; 1 BARRINGER, LAW OF MINES & MINING (1905) §89, the lessee may make out a case for re-

lief from the lease; and the majority doctrine permits it even under such leases. *Lilly v. National Sewer Pipe Co.*, 196 Iowa 1320, 195 N. W. 746 (1923); *Fritzler v. Robinson*, 70 Iowa 500, 31 N. W. 61 (1886); *Boyer v. Fulner*, 176 Pa. 282, 35 Atl. 235 (1896) (distinguishing *Timlin v. Brown*, *supra*). For a collection of cases, see 40 C. J. (1926) 1035. While the decision may work a hardship on the lessor, it is in line with the prior state of West Virginia authorities which it does not purport to extend to other types of leases.

J. H.

NEGLIGENCE—LAST CLEAR CHANCE—APPLICATION OF DOCTRINE WHERE PLAINTIFF INATTENTIVE AND DEFENDANT SEES PLAINTIFF AND HAD OPPORTUNITY TO REALIZE DANGER.—Decedent was killed by defendant's car at a point on defendant's tracks not a public crossing. Decedent was oblivious to the approach of the car, but was discovered by defendant's conductor before the accident, the evidence being conflicting as to whether the conductor could have avoided the accident by the use of due care after discovery of decedent's dangerous position. Verdict was given for defendant, but a new trial was granted because of refusal to give the instruction that if defendant knew or in the exercise of reasonable care should have realized decedent's danger and that he was oblivious thereto in time that defendant could have prevented injury to decedent, then decedent's negligence will not relieve defendant from liability. On appeal by plaintiff, *held*, that defendant's duty to use reasonable care to avert injury arises only after actual discovery and realization of decedent's position of peril. *Hall v. Monongahela West Penn Public Service Co.*, 37 S. E. (2d) 471 (W. Va. 1946).

If under these circumstances defendant realizes plaintiff's position of imminent peril and his apparent obliviousness to the approaching danger, and is then negligent, the majority of courts hold that plaintiff may recover. *Girdner v. Union Oil Co. of California*, 216 Cal. 197, 13 P. (2d) 915 (1932); *Pilmer v. Boise Traction Co.*, 14 Idaho 327, 94 Pac. 432 (1908); *Oklahoma R. R. v. Overton*, 158 Okla. 96, 12 P. (2d) 537 (1932). But as to what it is necessary for defendant to have discovered the authorities are in conflict. Some courts using the reasoning of the instant case hold that defendant must actually realize plaintiff's danger and that he was oblivious thereto, *Young v. Woodward Iron Co.*, 113 Ala. 330, 113 So. 223 (1927); *Pamarese v. Union Ry. of N. Y.*, 261 N. Y. 233, 185 N. E. 84 (1933), but the greater number apply an objective standard and require only that defendant have knowledge of the facts