Volume 49
Issue 2 *Issues 2, 3 & 4*

Article 11

February 1943

Minable and Merchantable Coal

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er the court will, when faced with the problem of whether the plaintiff can garnishee himself as to a debt owing to or property of a defendant in a situation in which the court has personal jurisdiction over the defendant, literally follow the language of the decision and hold that this can not be done, or whether it will distinguish that case and limit the holding of the instant case to the scope of the syllabus, only time can tell.[19]

D. C. H.

"MINABLE" AND "MERCHANTABLE" COAL

The recent case of *Tressler Coal Mining Co. v. Klefeld*,[1] has revived a question to which, although potentially present in many coal leases relatively little judicial attention has been directed. By way of dicta the court discussed the meanings of the terms "minable" and "merchantable" coal and cited the few available authorities but undertook no discussion of the subject. Briefly, the court said that "minable and merchantable coal is coal so situate that it may be profitably mined and of such quality as to be salable."

Is there any difference between the terms minable and merchantable, and, if so, what is it? The fact that each term, on the surface at least, lies within the connotation of the other does not alleviate the necessity of independent consideration of each within its own sphere. In *Atwater v. Fall River Pocahontas Collieries Co.*,[2] the court rejected as "narrow and arbitrary" the proposition that minable coal is any coal that can be mined, regardless of costs, and adopted the view of the Kentucky court which declared minable coal to be that which "could be profitably mined by judicious methods".[3] The adoption was qualified, however, by assertion that "the words must be defined in view of the wording of the leases." In *Ellis v. Cricket Coal Co.*,[4] the Iowa court presents a more comprehensive analysis of the terms in question:

[19] See Hardman, *"The Law" - In West Virginia* (1941) 47 W. VA. L. Q. 23; *"The Syllabus Is the Law", id.* at page 141; *"The Syllabus Is the Law"- Another Word, id.* at page 209; *"The Syllabus Is the Law" - Another Word by Fox, J.* (1942) 48 W. VA. L. Q. 55.

[20] See, in addition to the cases herein cited, Notes (1924) 31 A. L. R. 711 and (1929) 61 A. L. R. 1458.

[1] 24 S. E. (2d) 98 (W. Va. 1943).
[2] 119 W. Va. 549, 195 S. E. 99 (1937).
[3] Auxier Coal Co. v. Big Sandy Coal Co., 194 Ky. 14, 238 S. W. 189 (1922).
[4] 166 Iowa 656, 661, 148 N. W. 887 (1914).

> "Thus as bearing on the minable character of coal, its accessibility. the condition of the earth over it, the interference by water, whether free from or mixed with other substances, must be taken into account and where removal as an article of commerce is contemplated, the cost of mining and bringing the coal to the surface is a controlling consideration."

The lease involved in the case of *Big Vein Pocahontas Co. v. Browning*,[5] employed the term "available" (which would seem synonymous with minable), and the court said that it included all coal recoverable as a practical and reasonable mining proposition, considering actual conditions, costs and all surrounding circumstances." Another analogous term occasionally employed is "workable." An English writer has said in this connection, "'unworkable' does not mean physically unworkable, but 'unworkable without serious loss over a considerable period of time.'"[6]

Relative to timber it has been said that "The term 'merchantable' is not one that the law can define; and the sense in which it was used must be left to the determination of the jury"[7], nevertheless, there are several judicial definitions of "merchantable" as regards coal. *The Big Vein Pocahontas Company* case declared merchantable to mean "not coal which under all conditions can be handled at a profit, but coal which is ordinarily used. for sale, and can be usually sold at a profit."

Mere casual observation is sufficient to indicate a degree of interdependence between the two terms minable and merchantable, but it is the contention of the writer that the relationship goes beyond interdependence and at least approaches, if not equals, synonymity. The single factor which ultimately controls every act of the coal operator is profit; thus it is the element of profit which acts as the binding agent between minable and merchantable. Coal is not minable if the cost of its mining exceeds the price it will bring on the market, nor is it merchantable if its quality is such that it cannot fetch a price sufficient to offset its cost of production. The court in the *Ellis* case forcibly emphasized profit as the controlling factor:

> ". . . in making use of the expression 'merchantable and minable,' the parties evidently intended that the coal

[5] 137 Va. 34, 120 S. E. 247 (1923).
[6] MacSwinney, Mines (4th ed. 1912) 252.
[7] Pardee v. C. Crane & Co., 74 W. Va. 359, 367, 82 S. E. 340, 343 (1914); Ragland & Co. v. Butler, 18 Gratt. 323, 336 (Va. 1868).

to be paid for should be salable on the market, and that it be such as could be mined at a cost such as that defendant could put it on the market at some profit to itself."

And further along in the opinion,

"A mine may not be minable because of the condition of the coal, its distance from transportation, the character of the mine, and other circumstances, *but these facts are merely explanatory of the real reason* (*i. e., that the mining cannot be done at a profit*), and, by the use of this expression, the parties surely intend that liability for minumum royalty should not attach, unless the coal was salable and could be mined at a reasonable profit."[8]

It is to be noted that the courts frequently consider the terms together rather than distinguish between them individually, as in *Flavelle v. Red Jacket Coal & Coke Co.*[9] In that case the lease required the lessee to mine "all available, workable, and merchantable coal." The court said that if the difference between the cost of mining and the profits to be derived therefrom was "such as to deter an ordinarily prudent and practical operator from mining it, such coal (was) not within the meaning of such descriptive terms." In *Martins Fork Coal Co. v. Harlan Wallins Coal Co.*,[10] in discussing the term merchantable the court said that "it certainly includes the idea of workability. It cannot be merchantable if it is not workable. It would seem also to include the idea of being mined and sold at a profit" under ordinary or average conditions.[11]

No case has been found in which any attempt has been made to establish a reasonable differentiation between the terms minable and merchantable. An analysis of those cases which construe the terms independently of one another generally reveals a single definition expressed by two sets of words, *i. e.*, the same thing said

[8] At pages 661-662. Italics supplied.
[9] 82 W. Va. 295, syl. 4, 96 S. E. 600 (1918).
[10] 14 F. Supp. 902 (D. C. E. D. Ky. 1934).
[11] In the case of Hughes v. National Fuel Co., 121 W. Va. 392, 3 S. E. (2d) 621 (1929), counsel for both parties argued extensively in the trial court and in their briefs to the supreme court the issue of whether minable coal meant all coal which could be removed and usually sold at a profit, but not necessarily a profit under all conditions (contended for by the lessor and sustained by the trial court), or whether it meant that coal which could be profitably mined by judicious methods (contention of the lessee). See 121 H-J SUP. CT. RECORDS AND BRIEFS). Judgment for the lessor in the lower court was reversed on a different point and the supreme court made no mention of this assignment of error. The writer makes no attempt in this note to discuss this issue.

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two different ways.[12] No decision has hinted that the presence of both terms might supplement the force and effect of one of them standing alone. Thus a covenant to remove all "minable and merchantable" coal would have no greater legal signifiance than a covenant merely to remove all "minable" coal, or all "merchantable" coal. The operator expects to remove, and should be bound to remove under leases providing for a tonnage royalty, all coal minable at a profit (to avoid incidental argument, say profit under "normal conditions"), and use of the term minable or merchantable, or both, is but a means whereby the goal of fair and reasonable production may be better secured. Both terms qualify the operator's expected profit but can it be said that the influence of one is greater than that of the other? It is believed not.

G. S. B.

SEPARATE RECOVERY IN STOCKHOLDER'S DERIVATIVE SUIT

The nature of the stockholder's derivative suit has already been discussed at length in an earlier issue of the *Law Quarterly*.[1] The problem now arises as to whether there can properly be a separate or partial recovery in the derivative suit, and on this controversial issue the authorities are divided. On the one side, the courts are persuasive in their argument that to permit separate recovery is to defeat the rights of creditors of the corporation and to disregard the fiction of corporate entity.[2] "Otherwise than in name the action is by the corporation, and if relief be obtained it belongs, not to the stockholder bringing the action but to the corporation."[3] However, on the other side, the proponents of a separate recovery claim that there are instances where substantially all other stockholders are defendants in *pari delicto* with the wrongdoers, and it would be unjust to grant a judgment for the benefit of the corporation. And similarly where the wrongdoers are still in control, circuity of action and multiplied litiga-

[12] For example, Tressler Coal Min. Co. v. Klefeld, 24 S. E. (2d) 98, 101 (W. Va. 1943).

[1] Note (1938) 44 W. VA. L. Q. 129.

[2] Eshleman v. Keenan, 22 Del. Ch. 82, 187 Atl. 25 (1938); Dawkins v. Mitchell, 149 La. 1038, 90 So. 396 (1922); Harris v. Pearsall, 116 Misc. 366, 190 N. Y. Supp. 61 (1921); STEVENS, CORPORATIONS (1936) 659-660.

[3] 13 FLETCHER, PRIVATE CORPORATIONS (Perm. ed. 1931) § 5953.