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Coal Mining Rights and Privileges in West Virginia

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The purpose of this article is to collect, organize and discuss all the West Virginia cases dealing with mining rights and privileges in connection with the ownership and production of coal. The words "rights and privileges" while possibly inaccurate as a matter of legal terminology, have become so fixed in usage as to preclude the substitution of other words.

One is struck with the fact that, with the exception of comparatively minor statutory regulations, the body of the law upon this subject is contained in the cases; and that, in a state where coal mining has long been a major industry, these cases are few in number. As will be hereinafter shown, many questions remain undecided, some of which have a social impact not limited to the litigating parties.

The problems in this field nearly always arise out of a contest between the owner of the coal, or his lessee, and the owner of the overlying strata; although there are a few cases in which the owner of the underlying strata asserts claims. The mining of coal involves several operations more or less distinct in themselves yet all part of the entire plan of production: (a) the exploratory stage, i.e., by core-drilling or other means of obtaining samples for testing thickness, quality, chemical analysis, and the like in order to predict the economic feasibility of the proposed operation; (b) the use of the surface for the construction of tipples, tramways, railroads or highways, loading facilities, washing and sizing equipment, belt-haulage systems, and such other devices as are developed from time to time in the progressive mechanization of the industry; (c) the taking of trees, stone or other components of the surface for mine props, timbering and construction; (d) the use of the surface for offices, supply houses, shops, miners' houses, stores, and other...
structures; (e) the use of the surface for the purpose of depositing "gob" and other waste materials; (f) the overflowing of part of the surface with mine water, either draining naturally or pumped thereon.

One group of cases deals with problems arising out of this scheme of production, all of which may be possible without involving questions of a quite different nature. Another group of cases concerns the rights and duties of the parties when the removal of the coal results in the subsidence of the overlying strata, thereby causing damage to it or to something on it. A third group involves the right to use the passageways remaining after removal of the coal.

It is quite plain that all these conflicting rights can be settled by the contracting parties if they have the opportunity and foresight to do so. In view of the Continental Coal Company case, hereinafter discussed, it would seem to be settled that there is no public policy, either judicially declared or legislatively enacted, against the owner's consent to the waste or destruction of a vein of coal; certainly there is none against damage to the surface or other overlying strata. A typical set of mining rights is quoted in the opinion in Sycamore Coal Co. v. Adkins. Following the granting clause and description of the property, it is provided:

"... together with the full and complete rights and privileges of every kind for mining, manufacturing and transporting such minerals and other substances on, through, and over the said premises, and in particular the right of exploring for, extracting, sorting, handling and defining the said minerals and other substances; and also with full rights of way to, from and over said premises by the construction and use of roads, tramways, railroads or otherwise for the purpose of exploring, extracting, storing, hauling, manufacturing, refining, shipping or transporting all of said minerals or any other substances, whether contained on said premises or elsewhere and for any other purpose whatever, and with the full right to take and use all water and stone on said lands, and with the full right

4 Geologists insist that the correct terminology is "seam". However, usage of the terms interchangeably has become inveterate and is sanctioned by Webster's New International Dictionary: "Seam. A thin layer or stratum. Of coal or other valuable mineral, a bed, not necessarily thin." "Vein. d. A bed; as a vein of coal."
5 101 W. Va. 211, 133 S. E. 330 (1926).
to take and use all timber, except merchantable timber over eighteen inches in diameter . . . required for any of the above purposes."

In addition, it is common to provide that all such operations shall be conducted without liability for damage to the overlying surface, or to anything therein or thereon, or to the springs and watercourses thereof and, in the more modern deeds, a grant of express stripping rights.

In the absence of such provisions, the court must determine the claims of the parties. The familiar approach is by way of the proposition that certain rights and privileges need not be expressly granted or reserved with the coal but attach thereto as an incident of ownership.

1. MINING RIGHTS AND PRIVILEGES INCIDENT TO OWNERSHIP OF COAL

The ownership of coal carries with it certain privileges, as an attribute or incident of ownership, without the necessity of an express grant or exception thereof. This principle is most clearly enunciated in Squires v. Lafferty, in which O, the owner in fee of 137 acres of land, conveyed 31 acres thereof by deed of "the surface" to X and excepted and reserved "the privilege and right of mining all minerals under said surface." X conveyed 27 acres of the land to the plaintiff. O then conveyed to the defendant's predecessors in title the surface of an adjoining tract (part of the original 137 acres). Later O conveyed to plaintiff coal company all the minerals underlying both tracts. The owner of the coal desired to core-drill for testing purposes and, in order to do so, it was necessary to pass over a road on defendant's land with its equipment. The defendant refused permission to do so and threatened plaintiff's employees with violence. There was no other convenient way of access and no evidence of any injury to defendant's land. It was held that the defendant may be enjoined from obstructing the plaintiff, that, as an incident to ownership of the coal, the owner possesses "the right to use the surface in such manner and with such means as would be fairly necessary to the enjoyment of the mineral estate" and that 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." The court relied in part upon

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6 95 W. Va. 307, 121 S. E. 90 (1924).
7 Id. at 309, 121 S. E. at 91.
the analogous case of *Porter v. Mack Manufacturing Co.*,\(^8\) which recognized and enforced the right of the owner of fire-clay to use the overlying surface for the purpose of removing the same by means of tramways. In that case, there was the express reservation of "the right to mine and remove the same" but it was said that such right, if not express, would be implied and that the owner of the surface is entitled to subjacent support.

In *Armstrong v. Pinnacle Coal & Coke Co.*,\(^9\) one question raised was whether the lessee of coal has the right to erect poles for the transmission of electric power upon overlying surface owned by another. Neither the terms of the severance deed nor those of the lease are reported. The court said that the evidence did not disclose a right in the lessee to locate its poles on the plaintiff's lands. Apparently, the lessee did not claim such rights as incident to the ownership of the coal but contended 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 and 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. The rule of the *Squires* case makes the decision of this question depend upon whether such poles would be "fairly necessary to the enjoyment of the mineral estate"—a question of fact in each case.

**Erecting of Structures and Other Uses of the Surface.** It may be said, generally, that any rights and privileges reserved and excepted, or granted, must be exercised reasonably and with due regard for the interests of the party upon whom the burden is imposed. Thus, in *McKell v. Collins Colliery Co.*,\(^10\) the lessor in a coal mining lease expressly reserved an easement over and through the leased premises for any railroads or wagon roads that might be required for the further development of any of the property of the lessor; and the lease further provided that the lessee should locate its improvements on the surface so as to permit convenient entry over the same to the tracks of any railway company to which the lessor might grant an easement. After the

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\(^8\) 65 W. Va. 636, 64 S. E. 853 (1909).

\(^9\) 101 W. Va. 15, 131 S. E. 865 (1926).

\(^10\) 46 W. Va. 625, 33 S. E. 765 (1897).
lessee had erected buildings and other improvements, the lessor gave notice of the location of a proposed route which would interfere with the lessee's operations. It was held that the lessor, while entitled to locate the reserved easement, cannot select an unreasonable place which would cause unnecessary injury to the lessee.

The principle of the Squires case extends to the case of a lease of coal. But, if the lessor excepts and reserves from the operation of the lease "surface right" of part of the land for burial and cemetery purposes, the lessee has no right to use any part thereof even though the lessor has not yet devoted the land to such purposes.

Ordinarily, if the location of an easement is not definitely described and the grantee is given the right to locate it, such location cannot be changed without the consent of the owner of the servient estate. However, as between the lessor and lessee of a coal lease, if the lessee, having located a water pipe line and finding it necessary to relocate the same in order to perform the covenants of the lease, makes such new location at great expense and maintains it for a period of two years or more with no objection by the lessor, the lessee may enjoin interference therewith and the prosecution of suits for damages arising therefrom.

It is common to provide in coal leases that the lessee shall have the right to cut and use timber on the leased land when necessary in connection with mining operations. In some instances, the size of such timber is specified, e.g., in Raleigh Coal & Coke Co. v. Mankin, as not over twenty inches in diameter, one foot from the ground. It was held that such size is determinable as of the dates when such cutting and use becomes necessary in the process of mining. The lease vests no title to the timber in the lessee but a mere right to cut and use the same when necessary.

The "necessity" of use of such timber is not unlimited, under a lease permitting the lessee to use "so much of the timber on said lands as may be required for mining said minerals and removing them from said land." Such right is an irrevocable license, coupled with an interest, said the court, in Sun Lumber Co. v. Nelson Fuel

12 Ibid.
13 Mary Helen Coal Co. v. Hatfield. 75 W. Va. 148, 83 S. E. 292 (1914).
14 83 W. Va. 54, 97 S. E. 299 (1918).
Co., but the use thereof must be confined to that having a direct connection with the mining operations and does not confer the right to use the timber for the purpose of building miners' houses, store houses, churches, schools, and houses of entertainment for the prospective employees of the lessee. In this case, after the making of the lease, the lessor conveyed to third persons all the timber twelve inches or more in diameter, to be cut and removed within a stipulated time. It was held that this includes only timber of that dimension when the deed was delivered.

In a case in which a deed conveys minerals, with full mining rights and the full right to take and use all timber for mining purposes, excepting merchantable timber over eighteen inches in diameter found on so much of the premises as lies within a designated area, the right of the grantee so to take and use all timber under such size was enforced by injunction granted to the lessee of such rights.

Sometimes the parties to a coal lease fail to state clearly their rights with reference to improvements placed upon the premises by the lessee. In Pocahontas Coal & Coke Co. v. By-Products Pocahontas Co., the lease provided that, in the event of termination of the lease otherwise than by forfeiture, the lessee might remove the improvements, no provision being made in the event of termination by forfeiture. It was held, as a matter of interpretation, that by necessary implication, there was no right of removal in the event of forfeiture. The court said, by way of dictum, that, had there been no provision whatsoever, the presumption is that, in a long-term lease, improvements are intended to be permanent. The court also stated the principles determining when machinery and equipment become irremovable fixtures.

Interpretation of Express Mining Rights. The grant of the "privilege" to remove coal is a grant of the coal itself in place rather than the grant of a right to remove such coal in common with the grantor. But, by apt language, the right to remove such coal may be limited to doing so by openings upon a specified tract.

15 88 W. Va. 61, 106 S. E. 41 (1921).
17 112 W. Va. 590, 164 S. E. 504 (1932).
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After making an executory contract to purchase coal, the vendee can not make unreasonable demands for mining rights, especially when he had prior knowledge of the character of such rights owned by the vendor and which are reasonably adequate.\textsuperscript{19}

In Armstrong v. Pinnacle Coal & Coke Co., the lessee of the coal and the owner of a part of the surface both traced title to a partition deed which provided that "subterranean and surface rights of way to the Kanawha River to get a perfect drainage of coal banks shall attach and is hereby granted forever. . . . but drainage ways shall be constructed as to be reasonable and to do no more injury to land than can be reasonably avoided. . . . with the least possible detriment to others." The lessee found it necessary to change the location of a drainage way so that mine water flowed onto the surface owner's land and damaged a water well. It was held that, while the lessee had the right to relocate the drainage channel, it had not done so with due regard to the rights of the surface owner as provided in the partition deed and, for failure so to do, was liable for damages.

The owner of coal, draining mine water therefrom over adjacent lands under oral permission from the life tenant thereof, can not acquire a prescriptive easement so to do; but the remainderman, although in actual possession with the consent of the life tenant, is but a tenant at sufferance. He can recover for permanent, but not for temporary, damages to his reversionary interest in the land caused by such drainage.\textsuperscript{20}

The law as to stripping rights is undoubtedly inconclusive. It seems plain that, when such rights have been expressly excepted from a grant of the surface, the landowner cannot prevent the mining of the coal in that manner, at least "in the absence of statutory inhibition, fraud or other vitiating circumstances."\textsuperscript{21} The court will take judicial notice of the strip mining law but, in the absence of an allegation of noncompliance therewith, such noncompliance cannot be relied upon as a ground for enjoining stripping operations. The question thus remains open as to whether the owner of the surface may prevent stripping upon the ground of noncompliance with the statute.

\textsuperscript{20} Swick v. West Virginia Coal & Coke Co., 122 W. Va. 151, 7 S. E.2d 697 (1940).
In *West Virginia-Pittsburgh Coal Co. v. Strong*,\(^{22}\) the deed in 1904 severing the coal from the surface contained the following comprehensive mining rights:

"Together with the right to enter upon and under said land with employees, animals and machinery at convenient point and points, and to mine, dig, excavate and remove all said coal and the coal from other land and lands and to make and maintain on said land all necessary and convenient structures, roads, ways, and tramways, railroads, switches, excavations, air-shafts, drains and openings, for such mining, removal and conveying of all coal aforesaid, with the exclusive use of all such rights of way and privileges aforesaid, including right to deposit mine refuse on said land and waiving all claims for injury or damage done by such mining and removal of coal aforesaid and use of such privileges.

"All of the surface of the said land occupied or used by [the grantees] or their assigns, above the level of the Pittsburgh \#8 vein of coal, for their operations herein shall be paid for before the same shall be so used, or occupied, at the rate of One Hundred Dollars per acre, and said party of the first part, his heirs or assigns shall execute and deliver a deed therefor, in fee simple, free from liens and incumbrances, when said surface shall be taken and paid for."

In a declaratory judgment proceeding, the owner of the coal sought a declaration of its rights and specific performance of the covenant to convey the surface. After stating that the bill of complaint was demurrable by reason of combining such prayers for relief, the court held that the above-quoted mining rights did not confer upon the owner of the coal the right to strip the surface. It was further stated that "the mining rights are expressly granted and do not rest upon necessary implication as in a case where the coal is granted without express grant of mining rights, the express terms of the grant of the rights serving to restrict the rights conferred thereto."\(^{23}\) No authority was cited in support of this proposition which, in effect, states that mining rights expressly set forth are in derogation, rather than by way of enlargement, of mining rights incident to the ownership of coal. It is submitted that this has not been the common understanding of the profession but rather that the grantee of the coal, by accepting a deed with specifically enumerated mining rights does not intend to waive any

\(^{22}\) 129 W. Va. 832, 42 S. E.2d 46 (1947).

\(^{23}\) Id. at 835, 42 S. E.2d. at 49.
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other rights not so enumerated and to which he would be otherwise entitled as incident to his ownership, under the doctrine of the *Squires* case. For example, suppose that the mining rights provide that the grantee of the coal might erect a tipple. Would he thereby be precluded from erecting any other structure on the land, such as a supply house or a blacksmith shop? Or suppose that there is granted the right to construct a railroad over the surface. Would the grantee of the coal be denied the right also to construct a road for the use of trucks and automobiles, if such were fairly necessary to the enjoyment of the mineral estate?

The court went on to hold that the quoted mining rights conferred only the privilege of removing the coal "by the usual method at that time known and accepted as common practice in Brooke County. We do not believe that this included the practice known as strip mining." This conclusion was further fortified by the quoted provision for purchase of the surface "occupied or used."

One is inclined to agree with the decision as a matter of interpretation of the intention of the parties; but the case leaves undecided these questions: (1) do such mining rights confer the privilege to strip if the coal owner can satisfactorily prove that such was a known and accepted practice at the time of the execution of the severance deed; (2) if the terrain overlying the coal is of such character that all, or the major portion thereof, cannot be practically mined otherwise than by the strip method, does the coal owner have the right to use that method upon the ground that it is "fairly necessary to the enjoyment of the mineral estate"? Upon this latter point, the dissenting opinion of Judge Fox states:

"... The majority opinion, in effect, denies what the 1904 deed expressly granted, namely, the right to remove all the coal then conveyed; for if the coal can be removed only as alleged in the bill, by the single method, strip mining, now sought to be employed, the right of the plaintiff to remove its coal is absolutely destroyed. I can see neither moral nor legal justification for that inescapable result, but that aspect of the case does not appear to have been considered by those who concur in the majority opinion, or, if considered, was not deemed of sufficient importance to merit discussion."25

24 *Id.* at 836, 42 S. E.2d at 49.
25 *Id.* at 850, 42 S. E.2d at 56.
Irrespective of the rights which may be granted by the owner of the surface, the statute regulates strip mining by requiring the operator to give bond and imposing upon him the duty to regrade the strata removed and otherwise to perform specified operations upon the land in a manner approved by the department of mines and the agricultural experiment station of West Virginia University, except as to lands not adapted to agricultural or grazing purposes. Upon noncompliance with the requirements of the law, the bond is forfeited and the attorney general is directed to collect the penalty. The proceeds of such collections are credited to the department of mines and are expendable for enforcement and administration of the law for the reclamation of the stripped lands.

It will be noted that the owner does not receive the proceeds of the forfeited bond and, unless benefited by the reclamation work of the department of mines, has virtually no protection. It is therefore necessary, in the granting or leasing of stripping rights, to make express provision as to the character and extent of soil replacement and to secure performance thereof by lien, bond or otherwise.

Removal of Adjacent or Neighboring Coal. In the early case of Findley v. Armstrong, an executory contract for the sale of land reserving all coal and "all the necessary and desired privileges" was held not to permit the vendor to insert in the deed a reservation of the right "to remove on and through this tract of land the coals of coterminous tracts of land owner by the vendor." Judge Green reasoned that if such insertions in the deed were permitted "they would render utterly null and void the entire contract, as it would render it utterly vague and uncertain in its meaning. Under such an interpretation of it the vendee could have no possible conception of what use he could have of the surface. . . . If this had been expressed on the face of the contract, it would have destroyed it utterly as a contract; for one of the contracting parties under this so-called contract would have had just such rights and only such rights as the other contracting party might choose to permit him to enjoy." It was also held that parol evidence was inadmissible

21 23 W. Va. 113 (1883).
22 Id. at 124-5.
to show that, when the contract was made, the vendee knew that the vendor owned coterminous coal which would be greatly lessened in value unless removable through the tract purchased.

The result reached in this case is probably sound, as a matter of interpretation of the contract but surely the language of Judge Green goes too far. It cannot be successfully contended that the parties cannot agree that the vendor of land may expressly reserve such rights. It has been done in numberless instances and in no other West Virginia case has it been said that such a provision "utterly destroys" the "so-called contract". Moreover, the objection of the court being based upon possible over-extensive use of the surface, the case does not decide what would have been the result had the proposed reservation omitted the word "on" and used the word "through" alone, i.e., had the proposed reservation been limited to underground haulage of coterminous coal—a right which later cases expressly hold can be created by deed or contract.

If the vendor of the coal is able to convey the right to remove coal from coterminous tracts, the vendee cannot demand the additional right to remove other coal thereafter acquired by him. 29

Where a deed conveying minerals expressly grants the "full and complete rights and privileges of every kind for mining, manufacturing and transporting" the same, "with full rights of way to, from and over said premises by construction of roads, tramways, railroads or otherwise" for the purpose of extracting such minerals "whether contained in the said premises or elsewhere, and for any other purpose whatsoever, with the full right to take and use all timber except walnut, poplar and oak over twelve inches in diameter required for any purposes," it was held that such easement is appurtenant to the minerals and not in gross. The grantee, therefore, has the right to construct a tramroad across the surface for the purpose of hauling timber to be manufactured into lumber to be used for the purpose of mining the minerals granted, as well as the minerals produced by the grantee from other lands in connection with the minerals granted. And the main business of the grantee being the mining of coal, he has the right to haul excess timber, not needed in the mining operations. 30

29 Armstrong v. Maryland Coal Co., supra n. 19.
30 Jones v. Island Creek Coal Co., 79 W. Va. 532, 91 S. E. 391 (1917).
It was also pointed out that it is not necessary that the dominant and servient estates be contiguous or that the easement granted shall terminate on the dominant estate. However, the quoted phrase "and for any other purposes whatsoever" was confined by the court "to such purposes as are reasonably necessary to the production of the coal from such lands as may be owned and intended to be operated" by the grantee in conjunction with the tract granted.

Does the owner of a vein of coal also own the space left after removal of the coal? In Robinson v. Wheeling Steel & Iron Co., the defendant owned all the minerals and other strata from the center of the earth to a stratum of cement rock. The plaintiff owned the remaining strata up to and including the surface. The Wheeling vein of coal was located about 30 feet under the cement rock and the defendant, having mined the coal therefrom, was using the passageways therein for the transportation of coal from adjoining lands. The plaintiff sought an injunction to restrain such use, alleging that it was a continuing menace to the stability of the overlying surface and of a vein of coal owned by him. On demurrer, the injunction was denied, the court holding that the owner of the coal may use the passageways therein for the transportation of minerals from adjoining lands. The court quoted with approval a statement of the English rule that "after the minerals are taken out [the owner] is entitled to the entire and exclusive user of such space for all purposes."

In an illuminating discussion of the Robinson case, Professor Simonton, while agreeing with the result reached and conceding that the decision was in accord with the great weight of authority, took the position that, in principle, the grantor of a vein of coal does not intend to convey the containing space and that in analogous situations a contrary result is reached. Referring to cases of conveyances of timber, clay, rock and the like, it was said:

"... Certainly in these cases there is a fee simple interest in the trees, clay, rock or coal with the incidental privileges in

31 Id. at 538, 91 S. E. at 394.
32 Id. at 539, 91 S. E. at 394.
the containing space essential to enable the owner to enjoy his property. In these cases it is probable no mineral owner ever contended he must necessarily own the space in fee merely because the grant did not expressly provide to the contrary. Why should there be such a difference merely because the mineral happens to be far beneath the surface, or in the case of a vein of coal near the surface, merely because it happens to have such a roof that it can best be mined by tunnels instead of by stripping?"  

The rule is otherwise in Virginia. *Clayborn v. Camilla Red Ash Coal Co.* flatly held that the grantee of the coal has no right to use the space left after removal of the coal for the transportation of coal from adjacent tracts. It was conceded that  

"... the prevailing, if not wholly unbroken, current of authority, supports the general proposition that a grantee of coal in place is the owner, not of an incorporeal right to mine and remove, but of a corporeal freehold estate in the coal, including the shell or containing chamber, and that as such owner he has the absolute right, until all of the coal has been exhausted, to use the passages opened for its removal for any and all purposes whatsoever, including in particular the transportation of coal from adjacent lands, so long as he operates and uses the passages with due regard to the rights of the surface owner."  

On the other hand, as pointed out by the court, the authorities agree that, when the coal has been exhausted, the right terminates. Since, in the case of ownership in fee, there is no time limit within which the owner of the coal is required to remove it, the question arises whether he can drive headings into his own coal and thence into neighboring tracts, and postpone the removal of the residue of his coal while operating in such neighboring tracts.  

Generally, the cases hold that the right to use the tunnels continues only so long as the coal conveyed is in good faith being operated. However, it was suggested, in a dictum in *Armstrong v. Maryland Coal Co.*, that the owner of the coal could avoid this result by leaving some of the coal unmined until the coal from the  

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28 Id. at 388, 105 S. E. at 118, 15 A. L. R. at 949.
29 Note, 15 A. L. R. 957 (1921).
adjoining tracts had been removed. Further distinctions are sought to be made upon the basis of whether the transportation system rests upon the coal itself or upon the rock bed remaining after removal of the coal.

It is submitted that such legalistic quibbles are worthless as decisive factors in the determination of the result to be reached. The ultimate question is whether the owner of the strata other than that consisting of the coal vein is being subjected to harm for which the law should afford a remedy, either by way of injunction or by way of an action for damages. In attempting to arrive at a conclusion, the courts have apparently thought it necessary to reason syllogistically, thus: 1. Major premise: The owner of the containing space has the exclusive right to use and occupy it; 2. Minor premise: The owner of the coal owns (does not own) the containing space; 3. Conclusion: Therefore, he has (has not) the exclusive right to use and occupy it. It is submitted that this is not a sound approach to the solution of the problem.

In the normal large coal field, the vein extends horizontally roughly parallel with the surface, taking into account dips, faults, and the like. Thus, when the owner of the coal drives tunnels into it, even assuming that he removes the top and bottom coal completely, there remains a four-walled chamber, the two sides of which are composed of coal indubitably owned by the owner of the coal and the ceiling and floor of which (it may be conceded for the purpose of argument) are “owned” by the owner of the rock strata, upon the theory that having conveyed nothing but coal, he retained all else. Since each of the contending parties owns two of the four chamber walls, how can a court rationally determine that either “owns” the space contained within them, to the exclusion of the other?

One can be said to “own” space only in the realistic sense and to the extent that a court will recognize and protect a right to exclude all others from it. If the coal owner is to be excluded, it is not because a court has irrationally preferred the position of the owner of the top and bottom of the four-walled chamber by use of the solvent-words, “ownership of the containing space”, but because it recognizes that continued use of the chamber will or

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41 This theory was examined and rejected in the Clayborn case.
42 The Clayborn case criticized this distinction.
may result in harm for which a remedy should be provided. Since
the parties have not expressed their intentions, it is utterly un-
realistic to decide the case by rules of thumb. When the owner
of the fee conveys the coal and nothing else and waives no rights
to protection of the other strata, he nevertheless impliedly consents
to subject it to such damages (other than the removal of support)
as are necessarily incident to the removal of that particular coal;
but he does not consent that it may be damaged by operations
connected with the removal of other coal. By discarding the con-
cept of ownership of space, the courts could eliminate the idea of
the technical invasion of a property right by the "trespass" which
involves no real harm—and concern themselves with the ultimate
issue, is the surface being, or in imminent danger of being, sub-
jected to actual damage? If so, the court should protect the owner
by injunction unless the harm is so inconsequential in comparison
with the loss which would be inflicted upon the coal owner as to call
for the application of the balance of convenience doctrine. In
such case, the surface owner can be adequately compensated in an
action at law.

It must be observed that the "right to use" the pass-
egeways is not necessarily the equivalent of ownership thereof;
and it is an undecided question as to what conclusion would have
been reached in the Robinson case if the plaintiff had alleged
actual, present and continuing damage to his overlying strata. The
right of subjacent support might be involved, but not necessarily
so, since the damage might consist of vibrations, noise, etc., without
subsidence, rendering the use or occupancy of the surface less en-
joyable or valuable. The nature and extent of the mining rights
appurtenant to the coal are not reported. If the right to remove
adjoining coal was not expressly granted, then the case appears to
be rather strong authority that an express grant thereof is not
necessary. However, this authority is weakened by the fact that the
owner of the coal was also the owner of other strata above and
below it.

On principles of equitable estoppel, the use of a trestle and
tramroad constructed over the surface by the owner of the under-
lying coal for the purpose of transporting coal mined on an ad-

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43 This concept resulted in the award of an injunction in the Clayborn
case, although no actual damage was shown.
joining tract will not be enjoined where the surface owner stands by and permits such construction and use without objection. It was intimated but not decided that the balance of convenience doctrine might apply, even in the absence of an estoppel.

This doctrine was, however, applied in Chafin v. Gay Coal & Coke Co., in which the plaintiff owned a small tract of surface which was subject to an easement for the removal of the underlying coal leased by the defendant. The latter, while still continuing to mine the leased coal as fast as possible, leased an adjoining tract and operated it at the same time. The haulageway did not cross plaintiff's land but it was contended that the use of the buildings thereon and the supply track constituted an additional burden which should be enjoined. Upon the ground that such additional burden, if any, was inconsequential, the action of the trial chancellor in denying an injunction was affirmed, saving to the plaintiff the right to sue at law for such damages. The court recognized the rule that the owner of an easement cannot materially increase the burden on the servient estate hence it becomes a question of fact in each case. The most important feature of the case was that the leased coal was being mined as expeditiously as it would have been had there been no operation on the adjoining tract. Thus the case inferentially decides that the holder of an easement cannot stop or slow down the mining of the coal to which it is appurtenant, thereby prolonging its duration, and at the same time use the easement in connection with operations upon other lands. Furthermore, since the right of the owner of the servient estate to sue at law is saved to him, the case must be viewed as an authority for the proposition that, in the absence of an express grant, the owner or lessee of coal is guilty of a legal wrong if he uses the surface easement appurtenant thereto to any extent for the purpose of mining and removing coal from other lands.

45 For a discussion of West Virginia materials including mining law applications of this doctrine, cf. Note, 45 W. Va. L. Q. 155 (1930). In Green v. Wheeling Independent Coal Co., 109 W. Va. 446, 155 S. E. 315 (1930), the question of the right to use a surface entry for the removal of coal from another tract was raised but not decided because of nonjoinder of necessary parties.
46 See Beard v. Coal River Colleries, 103 W. Va. 240, 247, 137 S. E. 7, 10 (1927).
48 Id. at 458, 156 S. E. at 49. Generally, as to the right to use the surface in mining from another tract, see Note, 48 A. L. R. 1406 (1927).
After the decision in this case, the plaintiff sued at law to recover damages and it was held that, in the absence of proof of actual damage, recovery is limited to nominal damages and that evidence of a local custom to pay from one cent to two cents per ton for the use of "front" lands for bringing out coal from "back" lands is inadmissible because it relates to an unrestricted easement rather than, as here, to a slight additional burden upon an easement already secured and located.40

It would seem, therefore, comparing this case with the Robinson case, that a distinction is to be made between (a) the right of the owner of the coal to use the passageways in the coal itself for the removal of adjoining coal and (b) the right to use the surface for such purposes. In the former situation, the right being incident to the ownership (query) of the space, there is no easement, i.e., right in the land of another, and the overlying strata is not a servient estate. In the later, there is a true easement, the burden of which upon the servient estate cannot be materially increased. The conclusion seems to follow that, in order to escape liability at law for trespass, the right to use the surface for the purpose of removing adjacent or neighboring coal is one which must be expressly granted, even though such use does not materially prolong or increase the burden upon the servient estate. In such cases, equity will not intervene.

Frequently, in connection with an express grant of the right to remove coal, it is provided that, if the grantee of the coal constructs tramways, tipples or other improvements, he shall pay to the grantor an agreed sum per acre, "for each acre so used and occupied". Such language has been held not to violate the rule against perpetuities, since there is no postponement of the vesting of an estate in the land.50

But, where the deed provides that the owner of the coal shall pay a specified sum for each acre of land so used or occupied and that the surface owner will execute a deed therefor in fee simple when such surface is taken and paid for, the rule against perpetuities is violated.51


The most recent expression of the court is in a dictum in Jeffrey v. Spencer-Boone Land Co.,\(^6\) in which there was an express grant of the right to remove other coal. It was said,

"... The grant of the coal carried with it the rights and privileges necessary for its mining and removal. The rights granted added nothing in that particular. The main purpose accomplished was the creation of the right of hauling coal from adjoining property.\(^63\)

It will be noted that by this statement no distinction is made between haulage underground and above ground—a distinction which, as heretofore stated, is of great importance. It is possible, however, that the right of underground haulage will be of no value if the terminus of the way is an opening upon the surface as to which such right has not been granted.\(^64\)

There remain to be mentioned two other analogous cases. In Robinson v. South Penn Oil Co.,\(^55\) in which a conveyance of surface excepted the oil, with the right to drain salt water over the land, it was held that such right was valid and binding as against the lessee of a subsequent purchaser of the land, who could not recover damages for injuries to sheep pastured thereon. In King v. South Penn Oil Co.,\(^56\) the lessee of oil and gas was, under the facts of the case, permitted to store oil on that part of the tract from which it had not been removed.

2. Railroad Sidings

A railroad company may be compelled by mandamus to construct and operate upon its right of way a side track and switch in order that reasonable provision may be made by it for the transportation of coal and coke for shipment, as required by statute; and the extent thereof depends upon the facts and circumstances of each case.\(^67\) But a railroad company cannot be required to reconstruct and operate a side track, temporarily constructed and

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\(^{52}\) 112 W. Va. 360, 164 S. E. 292 (1932).

\(^{53}\) Id. at 363, 164 S. E. at 293.

\(^{54}\) Unless the coal mined from adjacent tracts can be brought to a pit mouth or shaft opening which the operator owns, leases or otherwise has been granted the use of, he cannot market the adjacent coal without trespassing upon the surface.

\(^{55}\) 112 W. Va. 114, 163 S. E. 857 (1932).

\(^{56}\) 110 W. Va. 107, 157 S. E. 82 (1931).

\(^{67}\) State ex rel. Mt. Hope Coal Co. v. White Oak Ry., 65 W. Va. 15, 64 S. E. 650 (1908).
operated on land adjoining its right of way, under a verbal and gratuitous permission of the owner of the land, when the privilege is granted to terminate at the will of the landowner.\(^{68}\)

3. **Subjacent Support**

When coal is severed in ownership from the overlying strata, either by grant of the surface and exception of the coal or by grant of the coal and exception of the surface, the "natural right" to have the overlying strata supported "in its natural state" is not surrendered unless by express language evincing such intention.\(^{69}\) The troublesome question is to determine what language is apt and sufficient for the purpose.\(^{69}\)

The point first arose in West Virginia in the case of *Griffin v. Fairmont Coal Co.*\(^{61}\) The plaintiff, owning the entire land from the center of the earth upward, conveyed "all" the coal underlying 68 acres thereof to the defendant "together with the right to enter upon and under said land and to mine, excavate and remove all of said coal."\(^{62}\) Removal of the coal caused subsidence of the overlying strata, rendering the land useless for grazing and agricultural purposes. In an action to recover damages, a recovery was denied, the court holding that (a) there was no implied reservation of subjacent support; (b) the doctrine of *sic utere tuo ut alienum non laedas* did not apply; and (c) the word "all" is unambiguous, and, therefore, as a matter of interpretation, the plaintiff had expressly waived the right of subjacent support.

The same result was reached twenty-eight years later in a case\(^{63}\) in which the surface was conveyed, excepting the coal and the right to mine and ship all the coal, the court saying that the holding in the *Griffin* case has become a rule of property in this state. Judge Hatcher said:

"It is not conceivable that one who was purchasing or reserving surface would deliberately covenant that *all the coal* ."\(^{64}\)

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\(^{61}\) 59 W. Va. 480, 53 S. E. 24 (1905).

\(^{62}\) Italics supplied.


\(^{64}\) 89 W. Va. L. Q. 358 (1933).
should be removed, if he were expecting the surface to be undisturbed. It is just as unreasonable that one buying or reserving coal would pay for or purport to reserve all the coal, and go through the farce of writing into the deed the right to remove all the coal, if he were contracting to leave the surface inviolate. Both grantor and grantee would well know that all the coal could not be removed, if the surface were to be kept intact."

The doctrine of the Griffin case is, however, confined to cases in which the word “all” modifies the word “coal“. Thus, in Hall v. Harvey Coal & Coke Co.,65 it was held that “a conveyance of coal and all minerals, with the right of mining and removing said coal and all minerals” does not extinguish the right of subjacent support, expressly distinguishing the Griffin case.

Where there has been no waiver of support, the landowner may recover damages for the killing of his horse which fell into an opening caused by subsidence of the surface.66

In Drummond v. White Oak Fuel Co.67 the severance deed granted “all the surface land and only the surface”. The coal was 515 feet below the surface and, after the coal pillars had been removed, the plaintiff’s water well was drilled in at a depth of 107 feet below the surface. There was no subsidence or breaking of the surface but the mining operations resulted in a diversion of percolating waters which supplied the well. The court held that the rule of absolute support has no application where percolating waters supplying a surface spring or well are diverted by mining operations conducted in the usual way, unless the diversion occurs in connection with a subsidence or fissure of the surface; if the surface is supported the diversion is damnnum absque injuria. It is believed that this decision should be limited to its facts and that it may be supported upon the ground that, since the plaintiff owned only the “surface”, i.e., the superficial part of the land, he could not be heard to complain of injury to the strata lying 107 feet below it, which he did not own. It would seem further that this situation should be distinguished from one in which A, owning the entire land from the center of the earth upward, conveys to B the coal only, without waiver of subjacent support. It is arguable

64 Id. at 312, 167 S. E. at 738.
65 89 W. Va. 55, 108 S. E. 491 (1921).
67 104 W. Va. 368, 140 S. E. 57 (1927).
in such a case that A would be entitled to support of all the overlying 515 feet of strata, including that containing the percolating waters. But there are expressions to the contrary by the court upon the theory that so to hold would deprive the owner of the coal of the use of it. It is entirely possible that percolating waters may be diverted by ordinary mining operations without any subsidence of overlying strata and, in cases where the coal pillars have been removed, it may be impossible to prove the fact of subsidence if there is no visible evidence thereof on the surface. In either case, the landowner is remediless.

The question of support as between upper and lower veins of coal has arisen in two cases. In Goodykoontz v. White Star Mining Co., a lease embraced two veins of coal. The operator began mining in the upper vein but ceased operations and began mining in the lower vein and pulling coal pillars, which resulted in the seepage of water into the upper vein and an alleged loss of one million of the two million tons remaining therein. It was held that such threatened waste resulting from the negligence of the lessee may be enjoined, and an accounting had for waste already committed. The holding was supported on two grounds, (a) an implied covenant by the lessee to protect the lessor's reversionary interest and (b) the right of subjacent support in the absence of waiver thereof. Since there is nothing to show that the lessor owned the surface or any strata other than the two veins of coal, the case seems to establish the doctrine of subjacent support, as between the upper and lower veins of coal, where there is a lessor-lessee relationship. While Syllabus 2 qualifies the right to injunction by the phrase "which may result from such negligence of the lessee"); it would seem that such operations should be held to be ipso facto negligent. This point is of great importance concerning the questions of whether the plaintiff would have to assume the burden of proof as to negligence, whether the rule of res ipsa loquitur would apply, and whether the defendant might justify his conduct by proof of mining in a non-negligent manner. The tenor of the opinion, and of points 3 and 4 of the syllabi, indicates

68 Id. at 376, 140 S. E. at 60.
69 Notes, 55 A. L. R. 1427 (1928), 109 id. 405 (1937). For a discussion of liability for the removal of support as affected by conditions created by a predecessor in title, see Note, 139 id. 1267 (1942).
70 94 W. Va. 654, 119 S. E. 862 (1923).
that the liability of the lessee for damage to the upper vein is absolute, that proof of negligence is not necessary, and that proof of due care is no defense. The public interest in the conservation of natural resources which are being rapidly diminished is a further reason for so holding.

On the other hand, the destruction of the overlying vein cannot be prevented if the owner of the lower vein has acquired the legal right to do so. In Continental Coal Co. v. Connellsville By-Product Coal Co.,11 O, the owner, conveyed the lower Pittsburgh vein to A, which leased it to D. The deed contained an express waiver of subjacent support for all overlying strata. Thereafter, O conveyed the upper Sewickley vein to P, which took with constructive, if not actual, notice of D's prior rights. P began operations in the Sewickley vein and later D began operations in the Pittsburgh vein, which resulted in subsidence and interference with and damage to P's operations. The court held that D could not be enjoined; that O, having waived the right of support of the upper vein, P as his grantee was in no better position. The only qualification or limitation imposed is that the prior grantee mine the lower vein in accordance with the usual and accepted mining methods which are proper, economic and approved. Nor is it permissible to prove that the owner of the lower vein could have altered its mining methods so as to permit removal of the upper vein simultaneously. On first impression, the result reached seems harsh and against the public interest but on further reflection the reasoning of the court is unassailable. The owner of the lower vein has bought and paid for the right to let down the upper vein. All that remains to the owner is the mere chance to extract it before it is destroyed. He can convey no greater rights to his grantee, who, in effect, buys the chance. The distorting feature of the case arises from the fact that the grantee is actually operating in the upper vein; but this could not enlarge his rights. If, as owner, he leaves the vein untouched, his legal position is the same.

4. Summary

It is apparent that the extent and character of mining rights

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11 104 W. Va. 44, 138 S. E. 787 (1927); cf. Note, 34 W. Va. L. Q. 212 (1928) (contending that the result reached was erroneous; that the interests of the state in the conservation of natural resources should be considered; and that legislation compelling mining so as to preserve the upper vein would be a constitutional exercise of the police power).
and privileges in a given case depend almost entirely upon its particular facts. If, by unambiguous language any specified right is granted or withheld, there is no public policy which defeats its enforcement, even though the public interest may seem to be adversely affected. Concepts vary as to what is in furtherance of the interests of the state as a whole. On the one hand, the idea of the conservation of natural resources is at odds with the right of the owner of a coal vein to consent to its destruction, as in the Continental case. On the other hand, decisions such as those in the Robinson case and in the Chafin cases indicate a view that full development and utilization of coal fields is to be encouraged.

If specific rights have been granted, it is an open question whether all other rights are thereby excluded. The statement in the West Virginia-Pittsburgh case does not necessarily exclude rights of a character similar to those expressly granted.

In the absence of specific language, the rights are such as are reasonably necessary to the mining of the coal in a practicable manner. Stripping rights will not be included, however, even though the coal is not recoverable by other methods, unless stripping was, at the time of the severance deed, a known and accepted mining practice in that field. Over-extensive use of the surface beyond the bare necessities of production and marketing will apparently not be recognized. Whether, in a given case, this would include the right to maintain a gob-pile has not been decided.\textsuperscript{72}

The right to remove adjacent or neighboring coal, either underground or over the surface, is apparently viewed with liberality; but the court is probably prepared to protect the landowner if actual damage, to which he has not consented, is present or imminent.

The doctrine of express waiver of subjacent support by use of the magic word "all" is firmly established as a rule of property. With this exception, the West Virginia cases are in harmony with the general current of authorities.

\textsuperscript{72} The liability of a coal operator for damages arising out of the maintenance of a gob-pile, adjudicated in Rinehart v. Stanley Coal Co., 112 W. Va. 82, 163 S. E. 766 (1932); cf. Note, 40 W. Va. L. Q. 371 (1934); and the right of the public to enjoin the maintenance of a gob-pile as a public nuisance, adjudicated in Board of Commissioners v. Elm Grove Mining Co., 122 W. Va. 442, 9 S. E. 2d. 813 (1940), are not within the scope of this article.
Supplementary Note

The most recent decision involving strip mining is that of Stone vs. Gilbert, 56 S. E. 2d 201 (1949), in which the Court held that:

"Where the owner of approximately two hundred sixty acres of land executes a lease to the owner of twelve acres of coal underlying a part of the larger acreage which expressly gives to the coal owner the right to enter in, upon and over the surface of the strata overlying the coal owner's coal for the purpose of removing all of said coal by strip mining operations and provides that the coal owner shall have 'such additional surface as may be necessary or convenient for such strip mining operations, and, in general, to do any and all acts which are necessary or convenient for the removal of all of said coal', and, further, gives to the coal owner the free and uninterrupted right of way into, upon, over and under said land at such points and in such manner as may be necessary and proper for the purpose of mining such coal, 'without any liability whatsoever from damage that may arise from the removal of any or all of said coal, or the surface or sub-surface or other strata overlying the same, or such additional parts of said surface as may be necessary or convenient in connection therewith', the instrument creates such an interest in the surface of the land on the part of the owner of the coal that he is vested with the right to take and remove from the premises leased such part or quantity of the surface materials as may be reasonable and suitable for and necessary in the construction of a road or ramp leading to the coal owner's tipple outside the leased premises where it appears that the road or ramp and tipple are necessary for the mining and marketing of the coal."

In a concurring opinion, Judge Fox took the position that while the above quoted mining rights were very broad, they should not be so construed as to include the right to take the surface of the leased premises and use the same in creating a fill or road on the premises of another; but that such rights should be limited to the use of such surface materials on the leased premises.