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STATUTORY REGULATION OF STRIP MINING

“Logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law.”¹ Certainly that observation is equally sound today whether experimental legislative measures or recent judicial doctrines be examined: the seamless web of legal theory is constantly enlarging so as to encompass more and more new fields of business and industrial activities, simply because of these various political, social and economic considerations. Mineral law offers an excellent illustration. Within a few decades, almost every phase in development of underground natural resources has been subjected to attentive treatment by legislatures and courts,—with the result that legal control in one form or another has gradually been substituted for the unrestricted mining of the past.² It can thus be reasonably argued that the statutory regulation of strip mining in West Virginia now merely exemplifies such an inevitable trend, the constitutional validity of which presently rests on scientific ideals of soil conservation.³

Perhaps it would be well to glance briefly at the provisions of this new statute which, after January 1, 1941, will govern all strip mining here. The preamble contains a legislative finding to the effect that (*inter alia*) stripping causes soil erosion, increases flood hazard, pollutes streams and accumulates stagnant pools; in short,

tiff an unnecessary burden of proof, for it will seldom happen in practice that the defendant will controvert the plaintiff's representative character for the purpose of attaining the substantial right and justice of the case, or for any other purpose than to hinder and delay him in the prosecution of his rights.” *Cheatham v. Riddle*, 12 Tex. 112 (1854).

For similar reasons, the expediency of omitting an allegation of capacity from the declaration may be urged. See *Moss v. Campbell's Creek R. R.*, 75 W. Va. 62, 83 S. E. 721 (1914), where a demurrer to the declaration was sustained because capacity was not alleged, and the court indulges in the following observations. “Just as full and fair a trial on the merits of the action was had on the declaration without the averment as would have been had with it. Defendant was entitled to the averment, because it is a traversable one; but if it had been in the declaration, in all probability it never would have been traversed If there had been any doubt as to the appointment and qualification of the plaintiff as administratrix, would not the defendant have raised the issue, even on the declaration as it was? Pity it is, that we have no statute which would enable us to disregard wholly such a matter as is relied on for reversal herein.”

¹ CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1922) 112.

² For example, as to oil and gas, see the background of recent authorities in SUMMERS, *LAW OF OIL AND GAS* (2d ed. 1938).

³ These have been declared to be legislative policy in the 1939 “Soil Conservation Districts Law of West Virginia,” [W. Va. Acts 1939, c. 5; W. VA. CODE (Michie 1939 Supp.) c. 19, art. 21A].

these operations counteract conservation efforts and endanger life and property. Apart from intricacies of legal language, the preamble practically reasons by analogy⁴ from the soil conservation districts law, enacted simultaneously. Thereafter, — with the peculiar art which modern legislation has of communicating its meaning circuitously, — the same section in substance provides that the operator must henceforth replace within a reasonable time the material removed in the process of stripping, so as to do away with the evils already noted. Moreover, an adequate bond has to be furnished (with a minimum penalty of one hundred and fifty dollars per acre), before the necessary strip mining permit can be issued by the chief of the department of mines. In section two of the statute, criminal prosecution of violators is expressly provided for. And the effective date is by section three deferred until 1941 as to the pending operations; (of course all other stripping projects were subject to these regulations, right from the start). To sum up, strip mining now entails a promise to repair the terrain; and to minimize liability, separate incorporation may become requisite in practice for each large-scale operation. Next, the *minimum* prescribed for the statutory bond is subject to the discretion of the state official: it is possible the amount may be increased in an area where agricultural or manufacturing properties are involved. Finally, the reasonable time within which replacement is to occur has been left sufficiently elastic to protect both industry and the public. Presumably, enforcement of the statute will eventually be based in part on experiments in revegetation and reforestation of stripped lands in Illinois,⁵ Indiana⁶ and Ohio.⁷ Meantime the department of mines has worked out the type of bond⁸ to be used in future stripping, and has prescribed the form of per-

⁴ Cf. Pound, *Common Law and Legislation* (1908) 21 HARV. L. REV. 383.

⁵ Croxton, *Revegetation of Illinois Coal Stripped Lands* (1928) 9 ECOLOGY 155.

⁶ Tracy, *Reforesting the Spoil-Banks of a Coal Stripping Pit* (1928) 14 MINING CONGRESS JOURNAL 101.

⁷ See the reference to reforesting of spoil dumps in Cash and Von Bernewitz, *Methods, Costs, and Safety in Stripping and Mining Coal etc.*, BUREAU OF MINES BULLETIN 298 (Gov't Printing Office 1929) 120. The best discussion of the problem of spoil banks in eastern Ohio is contained in Moore and Headington, *Agriculture and Land Use as Affected by Strip Mining*, DEPT. OF RURAL ECONOMICS BULLETIN No. 135 (Ohio State University, 1940).

⁸ The obligation of the bond now approved by the attorney general and by the chief of the department of mines reads as follows:

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH THAT, WHEREAS, the above bound principal, in pursuance of the provisions of Section 1, Chapter 84 of the Acts of the Legislature of West

mit,⁹ so that necessary administrative machinery is properly in order.¹⁰

One will readily concede that strip mining has heretofore always escaped any very burdensome regulation, even despite its

Virginia, 1939 (Section 1, Article 2A, Chapter 22, Michie 1939 Supplement to the West Virginia Code), has obtained, or is about to obtain, from the Chief of the Department of Mines of the State of West Virginia, a permit to conduct the operation of "strip mining," and will carry on the business of mining coal by uncovering from the surface soil therefrom, and the acreage of surface involved in such strip mining will be not more than acres, and is situated in the County of, in the State of West Virginia, at or near

NOW, THEREFORE, if the said principal, in carrying on the business of mining coal by uncovering from the surface soil therefrom, shall, after the excavation thereof and within a reasonable time to be determined by the Department of Mines, or not later than day of, 19....., replace said soil, subsoil or other strata removed from said coal and refill any ditches, trenches or excavation made in stripping said coal, so as to minimize the hazards of floods, pollution of streams and water, accumulation of stagnant water, and the destruction of said soil for agricultural purposes, then this obligation to be void; otherwise to remain in full force and effect.

* * * * *

APPROVED as to sufficiency of form and manner of execution this day of, 19.....

.....
 Attorney General of the State of
 West Virginia

APPROVED, in pursuance of the provisions of Section 1, Chapter 84 of the Acts of the Legislature of West Virginia, 1939 (Section 1, Article 2A, Chapter 22, Michie 1939 Supplement to the West Virginia Code), this the day of, 19.....

.....
 Chief of the Department of Mines

⁹ Similarly, the form of permit is in the following language:

Strip Mining Permit No.

Date

PERMIT

Company

District

County

Address

Permission is hereby granted for the operation of strip mining of acres of coal (land held under lease known as the Tract) in

District, County, as shown on map filed with the Department of Mines.

The permit expires July 1, 1941.

A copy of the Permit shall be kept at the mine.

(Signed).....

Chief of Dept. of Mines

¹⁰ The importance of having adequate administrative machinery is specifically set forth in the dissent of Brandeis, J., to *Pennsylvania v. West Virginia*, 262 U. S. 553, 621-623, 43 S. Ct. 658, 67 L. Ed. 1117 (1923).

long history. Not many realize, incidentally, that the first coal mined in America was that obtained by stripping the overburden (or cover) through the medium of picks, shovels and wheelbarrows; then plows and scrapers, drawn by oxen or horses, were later substituted for hand-shoveling. In these early days, the work of stripping was usually conducted only during the summer, with wagon hauling the task of the winter season.¹¹ From such primitive methods of eighty years ago, open-pit mining of anthracite, bituminous coal and lignite has ultimately become a vast industry, actually more important in some states¹² than ordinary underground operation; indeed, its rapid growth is a most interesting recent development in coal mining. With the inherent advantages of labor-saving equipment, inexpensive construction charges and high salvage on investment, — and without the necessity of timbering or ventilating, — an operator in a stripping field can sometimes offer serious competition today to the underground mine.¹³ It is also claimed that the open pit has been beneficial to the nation, as a factor in the conservation of coal resources.¹⁴ On the other hand, the destruction of so much agricultural land is regarded by many as a high price to pay for this mineral exploitation. For, without regard to the loss through removal of the surface in the initial phase of developing, the waste (or spoil)¹⁵ consequent on machine-shoveling of the overburden is left in great ridges; and there are deep gullies and drainage ditches which forever prevent cultivation. Hence the present statutory regulation seeks only the replacement and leveling off of the material currently removed in local strip operations.¹⁶

Obviously, on its very threshold of enforcement, the new law

¹¹ See Cash and Von Bernewitz, *supra* n. 7, at p. 5

¹² *E. g.*, in Kansas and Missouri. Much recent data is available in Toenges and Anderson, *Some Aspects of Strip Mining in Central and South Central States*, BUREAU OF MINES INFORMATION CIRCULAR, I. C. 6959 (1937).

¹³ Kiessling, Tryon and Mann, *The Economics of Strip Coal Mining*, BUREAU OF MINES ECONOMIC PAPER No. 11 (Gov't Printing Office 1931).

¹⁴ This factor has a three-fold importance. First, coal with poor roof and lying at depths up to sixty feet has been stripped. Second, thin seams that cannot be mined economically by underground methods are successfully recovered by stripping. And, third, poor-quality coal that would otherwise have no market because of cost, is economically stripped and profitably sold at reduced prices.

¹⁵ There is an interesting discussion of mining methods in Stoek, *Steam-shovel Mining of Bituminous Coal* (1917) 57 *TRANSACTIONS A. I. M. E.* 514.

¹⁶ The statute requires the operator to "replace said soil, subsoil or other strata removed from said coal and refill any ditches, trenches or excavation made in stripping said coal." [W. Va. Acts 1939, c. 84; W. VA. CODE (Michie Supp. 1939) c. 22, art. 2A.]

must face the same constitutional obstacles that were successfully urged against the Pennsylvania statutory subjacent support legislation, a decade or so ago.¹⁷ That is to say, — since this regulation of stripping is without precedent,¹⁸ possibly the act may be held to impair the obligation of outstanding coal conveyances,¹⁹ or to violate “substantive” due process by imposing an intolerable burden on ordinary mining where the operator owns both surface and minerals.²⁰ The sharp difference of opinion between Holmes and Brandeis in *Pennsylvania Coal Co. v. Mahon*²¹ should serve to indicate the extent to which the question is wholly one of degree.²² No doubt many reasonable regulatory measures are sustained, whether their police power basis be safeguarding of life and property in mines²³ or conservation of mineral resources.²⁴ Analogously, protection of agriculture against serious hazard has definite authority in its favor.²⁵ And quite aside from such long-established categories, there is a growing social interest in preventing unsight-

¹⁷ The Kohler Act of May 27, 1921, in effect forbade the mining of anthracite so as to cause subsidence of any dwelling, public building, public highway or bridge, or public utility right of way.

¹⁸ Strip mining has heretofore gone without serious regulation almost everywhere. However, there is a Colorado statute in general terms, providing as follows [COLO. STATS. ANN. (1935) c. 110, § 189]:

“When the right to mine is in any case separate from the ownership or right of occupancy to the surface, the owner or rightful occupant of the surface may demand satisfactory security from the miner, and if it be refused may enjoin such miner from working until such security is given. The order for injunction shall fix the amount of the bond.”

This statute was applied to stripping, in *Barker v. Mintz*, 73 Colo. 262, 215 Pac. 534 (1923).

¹⁹ If the coal seam has been sold or leased to the operator by the owner of the surface, without any liability whatsoever for surface damage, the present legislation quite clearly modifies the obligation of the contract between the parties.

²⁰ Normally, in most large-scale operations, the stripper will own both surface and coal (*i. e.*, the entire land) in fee. The statute will thus restrain the owner from utilizing his own property, in the most economical way available for strip-mining. Where the land lies in waste country, restoration of the surface may seem a wholly useless burden on industry.

²¹ 260 U. S. 393, 416, 43 S. Ct. 158, 67 L. Ed. 322 (1922).

²² Holmes described the decision in this language: “It is a matter of degree An interesting case when Brandeis and I differed” SHRIVER, JUSTICE OLIVER WENDELL HOLMES (1936) 168-169.

²³ *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 34 S. Ct. 359, 58 L. Ed. 713 (1914); *Mapel v. John*, 42 W. Va. 30, 24 S. E. 608 (1896).

²⁴ *Walls v. Midland Carbon Co.*, 254 U. S. 300, 41 S. Ct. 118, 65 L. Ed. 276 (1920).

²⁵ *Miller v. Schoene*, 276 U. S. 272, 48 S. Ct. 246, 72 L. Ed. 568 (1928); *Lemon v. Rumsey*, 108 W. Va. 242, 150 S. E. 725 (1929).

ly waste lands that shock sensibilities by their ugly hopelessness.²⁶ In any judicial consideration of all those factors, surely no hypostatic creeds of the past can automatically solve the difficult issue as to constitutionality.²⁷ It must be remembered too that there may easily prove to be a certain reciprocal advantage to the stripping company, — through the achievement of an actual sale value for replaced-surface land, previously worthless.

So all these constitutional considerations seem to emphasize rather than to disturb the important pattern of the new legislation. It is true that strip mining has not heretofore been of such magnitude as to call for local regulation of this nature;²⁸ nor is there any immediate probability of its increase here under present price-fixing methods.²⁹ Yet precise ideals of soil conservation have just been legislatively declared that must undoubtedly, sooner or later, clash with the usual economy of the strip-coal industry. It will accordingly be the task of the courts in the future to reconcile and to adjust the differences between the two, with the same statesmanship that equity judges have continuously shown in seeking a balance of convenience for the regulation of industrial nuisances.³⁰ For the present, it suffices now to mark the progress of the law in undertaking perhaps to modernize an essential phase of mining.

C. C. WILLIAMS, JR.

²⁶ *The Social Interest in the Aesthetic and the Socialization of the Law* (1923) 29 W. VA. L. Q. 195; *The Modern Tendency Toward Protection of the Aesthetic* (1937) 44 W. VA. L. Q. 58.

²⁷ Holmes, *The Path of the Law* (1897) 10 HARV. L. REV. 457, 466: "We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind. No concrete proposition is self-evident, no matter how ready we may be to accept it, not even Mr. Herbert Spencer's Every man has a right to do what he wills, provided he interferes not with a like right on the part of his neighbors."

²⁸ In 1917, Dr. I. C. White, State Geologist, reported there were no strip mines in West Virginia, because of its very hilly character (Stoek, *supra* n. 15, at 526). Six years later, almost 300,000 tons of coal were produced here by the stripping method, — though this total was only three-tenths of a percent of the state production (Cash and Von Bernewitz, *supra* n. 7, at 37). Since that time, stripping has increased or decreased in accordance with the local demand. Various operations are now in progress, — for example, near Shinnston, in Harrison County, and near Arthurdale, in Preston.

²⁹ Strip-coal has often the double handicap of stain and lower B. T. U. analysis; and buyers will therefore demand a cheaper cost for this type. Under the administration of the Guffey Act, prices have been established for all coal produced, whether by underground mining or by stripping. At present, no differential in price exists locally between these two products. Since strip-coal can hardly compete at the same minimum figure, the result must be to discourage open pit methods here. Curiously enough, in other coal regions such a differential has been recognized and established.

³⁰ McClintock, *Discretion to Deny Injunction against Trespass and Nuisance* (1928) 12 MINN. L. REV. 565.