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ever its form, has as its essential characteristic the quality of
generality; it is basically a generalization or an aggregate of
generalizations, and each generalization serves, in theory at least,
after the manner of a major premise in a syllogism; whereas the
syllabus just set out does not contain anything in the nature of a
principle or other major-premise element. It contains rather a
minor premise (fact situation) and a conclusion, and the major
premises (applicable generalizations—chiefly the family purpose
doctrine) appear only in the opinion. Ex facto—et ex opinione—

dex ortitur.

THOMAS P. HARDMAN.

ON LEASING GAS FROM COAL SEAMS

It has often been said that there is a considerable mass of
undeveloped law in the field of coal mining. Certainly this is true
as to legal phases of horizontal stratification of land ownership; the
very readiness of courts to interpret mineral deeds as establish-
ing subjacent fees leads to new regions of theoretical exploration.
When those overlap, or when their boundaries are left up in the
air, the lawyer has the difficult and delicate task of adjusting
property titles by using the traditional doctrines of the past. And
without going so far as to attribute to older common law precedents
a value that does not belong to them, the relative rights of com-

Changing Law of Competition in Public Service — Another Word (1923) 34
W. Va. L. Q. 133; Hardman, Public Utilities. I. The Quest for a Concept —
Another Word (1934) 40 W. Va. L. Q. 230.

6 See note 3, supra.

7 Cf. MORGAN AND MAGUIRE, CASES ON EVIDENCE (1934) 1001: “Under the
common law system the court theoretically knows the law. It has at its
command a major premise from which the correct conclusion, to be expressed in
a judgment, inevitably follows as soon as the minor premise is ascertained.”

To be sure, the judicial process involves more than the use of logic and the
applicable major premise or premises, if any, for, as Holmes has put it: “The
felt necessities of the time, the prevalent moral and political theories, intuitions
of public policy, avowed or unconscious, even the prejudices which judges share
with their fellow-men, have had a good deal more to do than the syllogism in
determining the rules by which men should be governed.” HOLMES, THE COM-
MON LAW (1881) 1. See also Holmes, J., in Lochner v. New York, 198 U. S. 46,
76, 25 S. Ct. 589, 49 L. Ed. 937 (1906).

1 Note, Horizontal Divisions of Land (1862) 1 Am. L. Reg. (N. S.) 577.
2 In Hansen v. Hall, 167 Mich. 7, 132 N. W. 457 (1913), it was held there
could be a fee simple in “undiscovered minerals”. See Comment (1911) 10
Mich. L. Rev. 143.

3 Sir EDWARD COKE, in 4 INST. 109 (1644) felicitously phrased the common
law technique: “Let us now peruse our ancient books, for out of the old
fields must come the new corn.”

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tering owners or lessees can usually be worked out reasonably so as to ensure proper exploitation. Occurrence of marketable gas in coal seams offers no exception to test that rule.

The abundant presence of gas in various coal strata is a matter of common knowledge, but the intrinsic worth of these deposits seldom gets attention. A coal operator ordinarily keeps in mind only the expense of costly ventilating methods, since mine safety may entail elaborate arrangements to cope with vast quantities of gas. Irrespective of possible profits from separate recovery, the reservoir of gaseous coal will normally be left untouched until actual mining starts; and then the issue is solved simply by blowing it all off into the air. Thus, minute and accurate researches have been undertaken on such everyday problems as outbursts or explosions and their control, though the realistic side of commercial utilization generally remains neglected. No doubt the reason lies in the fact that industrial science has been concerned primarily with the question of origin of the fire-damp; naturally the cause is more fascinating than the effect. The expert who is enamored of the subject can freely speculate as to whether (deep buried in the past) the gas was occluded in the particular seam, under pressure in interstices or existing in solution or sorption in the coal, or whether the real source is migration from some nearby reservoir sand, beyond the confines of that seam, or whether mine gases actually are produced in the same manner and from the same type of material as natural gas. Whatever he finally decides, he

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4 Lawall and Morris, Occurrence and Flow of Gas in Pocahontas No. 4 Coal Bed in Southern West Virginia (1934) 108 TRANS. A. I. M. E. 11, 12-13: "Two mines working this bed liberate daily approximately 13 million cubic feet of inflammable gas. If this gas could be conserved its value, based on a price of 10 c. per 1000 cu. ft., would amount to $1300 per day. Data were gathered on six mines that liberate approximately 23 million cubic feet of inflammable gas every 24 hr. during normal production of coal. The probable value of so much gas passing out of the mine with the ventilating current would be $5300 per day."

5 Parr and Barker, Occcluded Gases in Coal (1909) UNIV. OF ILL. BULLETIN No. 39, 1-28; Graham, Permeability of Coal to Air or Gas and the Solubilities of Different Gases in Coal (1916-1919) 52 TRANS. INST. MIN. ENGRS. 338.

6 Burke and Parry, Flow of Gas through Coal (1935) 110 TRANS. A. I. M. E. 418, 427-429. But cf. Discussion, 432: "After several outbursts induced by heavy blasting, when the coal was cleared it was found that the adjoining coal was still dangerous to work and further outbursts were induced, indicating that the coal had retained its gas although crushed to an amorphous mass of small slickensided scales."

7 Price and Headlee, Physical and Chemical Properties of Natural Gas in West Virginia (1937) 9 W. VA. GEOLOGICAL SURVEY 54: "The fact that these
ought not to fall into the error of believing that any one theory explains the whole story. In any event, apart from the geology and chemistry involved systematic drilling in advance of the mining operation might serve as a safety measure; for if science be encouraged with the purpose of improving the condition of humanity, here perhaps is ample opportunity for experimentation. More practically, however, gas extraction must depend on the marketability of the product recovered. Assuming there is adequate demand locally, development should then be based principally on the factors of content, flow, pressure, duration and expense, always provided the operator has adequate acreage for his own protection.

The present discussion has been called forth by the successful production of marketable gas from coal seams in the northern part of the state. Within recent decades, numerous wells have been brought in at low cost, yielding considerable volumes of gas with adequate B.T.U. analysis. It is interesting, for example, that the Wetzel County field has been developed wholly without reference to future mining operations, several different companies drilling into this unopened coal. In short, a satisfactory gas horizon has been discovered there in the Pittsburgh seam. Hence, legal aspects of such an occurrence of valuable gas within a coal reservoir are worthy of careful note, even though their solution is not yet clear.

coil gases contain considerable quantities of ethane and higher indicates the supposition that mine gas contains methane as the only saturated hydrocarbon may not be a correct one, and that mine gases possibly are produced in the same manner and from the same type of source material as natural gas, the coal merely playing the role of a reservoir trap, just as the various sands do.” In other words, it may be that the coal-gas is just the “offspring” of the operator’s coal.


10 Price and Headlee, supra n. 8, at 52-54: “Several wells near Hundred, Wetzel County, are producing considerable volumes of gas (as much as 380 M. C. F.) from Pittsburgh Coal at an approximate depth of 750 feet. . . . Sample No. 18 was collected 3 1/2 miles north of Morgantown, and the log of the well indicates the gas may be coming from the Brush Creek and/or Upper Kittanning Coal at a depth of 244 and 420 feet respectively. . . . Well No. 19 is producing gas from the Freeport Coal at a depth of 654 feet and is also making salt water.” It is interesting that one old well, next to the office of the Wetzel County Gas Company, has been yielding gas for many decades.

11 At least five different gas companies have producing wells in the coal, with an usual flow of about 70,000 cu. ft., rock pressure around 40 and satisfactory B. T. U. content. With a total cost of $1500 to $2000 per well, its average duration extends a dozen years or so, until water encroaches. Frequently, one finds a long-lived producer that seems almost inexhaustible. It might be noted that one large company drilled successfully in Grant District, Wetzel County, a few months ago, the new well flowing 92,700 cu. ft., rock pressure 102, at 908 feet.
The various methods of leasing might first be considered. One type of lease covers only to the depths of the coal seam, with or without a small addition from underlying strata;\(^\text{12}\) under its terms, the lessor normally receives a gas-well rental of one hundred dollars per annum. While shallow drilling is relatively inexpensive, still the volume of gas hardly justifies higher rental. If deeper leasing to another company then occurs, it is regularly understood that the latter will properly protect existing gas rights in the seam.\(^\text{18}\) Where there is a disposition to be content with small and reasonably certain winnings, rather than to go on doubling the stake, the coal-gas lease is fair all around. A second lease form sets forth the one-eighth gas-royalty provision,\(^\text{14}\) leaving it to the operator to choose the producing strata. Such an arrangement thus permits immediate coal drilling, with later testing of the other horizons not too far-distant. If eventually deep-well development becomes feasible, the lessee’s rights are obviously secure. Meantime, the lessor is continuously safeguarded by the implied condition against drainage,\(^\text{15}\) presumably in any single horizon. Finally, a third sort is the ordinary oil and gas lease of indefinite depth (like the second kind), but with a gas-well rental of three hundred dollars or so. Again the operator has complete choice as to the product, and may even sublet for coal drilling; under similar leases elsewhere, the original company has sometimes sublet for Oriskany production. With all these available methods, leasing may require wary and dextrous treatment, if there is an outstanding fee or royalty inter-

\(^\text{12}\) There are perhaps three common variants of this type of lease. In one, the lessee is limited expressly to the Pittsburgh seam; in another, drilling is permitted to 60 feet or so below that coal; and in the last, the lease extends downward so as to take in the Hurry-up and Cow-run sands, a couple of hundred feet deeper. It is simply a question of the bargaining between the parties, as to how much the lessee gets.

\(^\text{13}\) Of course, the landowner retains by operation of law a way of necessity to the deeper gas-sands, and can assign this over with his lease to another company. Chartiers Block Coal Co. v. Mellon, 152 Pa. 386, 25 Atl. 597, 18 L. E. A. 702 (1893). The second lessee will naturally run into the coal-gas in the process of going down, but must carefully preserve it intact (more or less) for the upper operator. Any wasting of the coal-gas would otherwise be actionable. Sometimes these phases are spelled out in the various leases.

\(^\text{14}\) The ordinary form reads: “If any well on said premises shall produce gas in paying quantities, and such gas is used off the premises or marketed by Lessee, then lessor shall be paid, as royalty, one eighth (1/8) of the value, at the mouth of the well, of so much of such gas as is used off the premises and one-eighth of the net proceeds from the sale of so much of such gas as is so marketed by Lessee.” The one-eighth gas-royalty practice is not so common in West Virginia as elsewhere, although it is met with frequently in some of our newer gas fields.

est in the minerals. The significant legal fact is the frequent practice of limiting the gas strata conveyed, so that two or more operators may simultaneously enjoy different leaseholds in the same tract. Though this is a familiar thing in coal deeds and also commonly occurs when there are separate strata of solid and fugacious minerals, it would seem an unusual device as to gas.

The simple problem, as noted, involves merely the leasing of coal-gas by a landowner who has unqualified legal title, a fee simple absolute, in the old language, from the sky to the earth's centre. Under West Virginia law, his property goes far beyond the exclusive right to capture fugacious minerals and reduce them to possession; the ownership in the present instance extends directly to the gas itself. With complete dominion over anything in the coal, the lessor can of course arrange for development in any fashion he wishes. But suppose someone else has the fee in the gas-producing seam: as between the farmer and that coal owner, who has title to the gas contained within the strata? Or—a different question—which of the two may legally lease such coal-gas? The issues are hardly susceptible of ready answer without further data. In other words, there are too many vital subsidiary facts for an absolute rule of property to be predicated with certainty. Many of these variables must here be considered in brief detail.

1. Priority in title. Where there has been conveyance of coal subject to an outstanding oil and gas lease, it would appear that the latter has prior claim to the gas, wherever

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18 Continental Coal Co. v. Connelsville By-Products Co., 104 W. Va. 44, 138 S. E. 737 (1927); Note (1928) 34 W. Va. L. Q. 212.
18 Unusual problems may easily arise where various gas horizons have been leased to different parties: e. g., there might easily be five separate estates,—surface, coal, coal-gas, ordinary-depth gas sands, and the Oriskany. The situation could then be complicated further through splitting up the coal ownership by selling the seams separately. Into that background the usual ingredient of tenancy in common would probably enter, and serve to introduce possibilities of common law waste. And perhaps the Land Bank Amendment of 1934 (W. Va. Consl. art. 13, § 6) might help along by forfeiting fractional mineral interests or royalty shares to the state, — with or without the added factor of the Black Band case [State v. Black Band Consol. Coal Co., 113 W. Va. 872, 169 S. E. 614 (1933)]. Suppose the life-tenant widow of one of the heirs of the surface owner claimed part of a gas-well rental from one horizon, or the right to join in a new lease of another. The possibilities are such as to make ordinarily abstruse questions in the law of future interests seem like elementary arithmetic.
found. The coal granted would reasonably be burdened with the existing profit a prendre. It thus becomes essential to ascertain that the coal deed came first, if the specific problem as to coal-gas title is to be presented.

2. Terms of coal instrument. With clear precise language conveying the exact "coal" and with a complete absence of qualifying or additional privileges, one can have the picture in sharp focus. But when the deed goes on to enumerate the mining rights, these may imply the exclusion of any gas ownership: "coal" will by construction be limited simply to the solid substance. Again, the matter can be hopelessly confused by utilizing the slippery word "minerals". For a generation or so, West Virginia courts have held that that term is not capable of a definition of universal application but should be construed according to the intent of the parties to be gathered from the language of the instrument, the relative position of the parties and the nature of the transaction. Accordingly, this discussion presumes that any possible reference to "minerals" does not finally settle the issue as to the coal gas; otherwise, there would immediately be an end to one of the claims.

20 It is the theory of the present discussion that a prior outstanding lease of the undiscovered fugacious minerals extends to any and all strata that may yield production. That would not only be the ordinary construction placed on it by the original parties, but it represents the line the courts usually take. Moreover, such an approach best accords with the practical aspects of oil and gas development.

21 Horsecreek Land & Mining Co. v. Midkiff, 81 W. Va. 616, 95 S. E. 26 (1918); cf., Norman v. Lewis, 100 W. Va. 429, 130 S. E. 913 (1926).

22 Salt v. A. Hochstetter Oil Co., 63 W. Va. 317, 323-324, 61 S. E. 307 (1908), per Poffenbarger, J.: "The meaning of the term 'minerals,' in the law of conveyancing, has received very great attention by the English courts, and MacSwinney on Mines, p. 12, predicates, upon a thorough review and analysis of the English decisions, the following conclusion: 'Prima facie, the word mineral must be taken to have a more extensive meaning than its etymology would seem to justify. It has, in fact, been laid down that mineral will, prima facie, include every substance which can be got from underneath the surface of the earth for the purpose of profit. And this is apparently the strict scientific meaning of the word. Mineral will, therefore, prima facie, include not merely such articles as coal and ironstone and freestone, but fire clay and china clay or porcelain clay, and also every kind of stone, flint, marble, slate, brick earth, chalk, gravel, and sand: provided only that these articles are under the surface, and do not lie loosely upon it.' A vast array of authority cited by him, which need not be analyzed here, sustains this conclusion and shows that the word minerals found in a deed, lease or other contract, unqualified and unrestricted by any other clause in the instrument or by circumstances within the knowledge of the parties which may reasonably be deemed to have determined their intention, is given this broad meaning and effect. He says, however, that in all cases the prima facie meaning of the word will yield to the intention of the parties, when, from the language of the instrument in question, such intention is made reasonably clear, or the particular circumstances under which an instrument of severance takes place shows an intention to restrict its meaning, and, in doubtful cases, its meaning will be restricted to that given it
by the custom of the country in which the contract is to operate. Id. 15, 17. As
to whether oil or gas are minerals, these decisions are silent, presumably for
the reason that no litigation involving these substances seems to have arisen
in the courts of that country: but, in view of the holdings, and the expressions
of opinion, found in the English decisions, defining the meaning of the term,
and extending it to every substance or material that can be profitably taken
and used from beneath the surface, no doubt can be entertained as to what the
conclusion would have been, had such question been presented, and the principles
declared point unerringly to the view that both these substances would be
regarded as minerals in the law of contracts. That such is the \textit{prima facie}
meaning thereof, in general law, is universally declared by the courts of this
country. This is so well understood that no authority for it need be cited.\textsuperscript{23}
See also Dingess \textit{v.} Huntington Development & Gas Co., 271 Fed. 864 (C. C.
\textsuperscript{22} Haner \textit{v.} MacCorlde, 109 W. Va. 762, 158 S. E. 500 (1930) (former owner
cannot maintain an action to try title); and Houck-Reidler Bros. Coal Co.
v. Upper Elk Corp., 115 W. Va. 246, 174 S. E. 894 (1934) (nor recover for
violation of the five-foot boundary rule).

\textsuperscript{24} When the sheriff buys in for the state at the annual December tax sale
[under W. VA. REV. CODE (1931) c. 11, art. 10] in theory ownership goes over.
Actually in ordinary practice, the delinquent taxpayer continues to enjoy
beneficial title to the property; and his equity of redemption is far more than
a mere right. Until the second sale through the circuit court proceeding has
finally been concluded, there has been no real foreclosure of the delinquent’s
interest. Unquestionably, the foregoing characterizes the present position as
to many coal lands in this jurisdiction; it is doubtful whether on these facts
either a delinquent coal owner or the state, or both, could give a valid coal-
gas lease. With the termination of moratory measures and impending resumption
of school land sales, the new Public Land Corporation of West Virginia,
(created in c. 37, art. 2A, by the 1933 statute), will acquire the absolute fee
in properties that do not bring the amount of the tax delinquency. It is thus not
impossible that when that corporation owns gas-producing coal, claim may be
made by the Attorney-General’s office for all gas-leasing rights and future
rents and royalties. Perhaps this is a reason why the issue as to ownership of
the coal-gas ought to be settled, one way or the other.

\textsuperscript{25} Granted the instrument in lease-form is a true lease and not a sale
[Comment (1934) 40 W. Va. L. Q. 392], the operator thereunder has presum-
able the right to remove minable or merchantable coal, on a royalty basis.
In advance of actual development, it is hard to see how he could assert any
legal claim whatsoever to gas-leasing privileges. Exploitation of the gas is
certainly not within the fair intendment of the \textit{profit a prendre} he bought; it
would be most unreasonable for him to postpone mining simply in order to
extract another mineral. On the other hand, as the coal is opened up, there
might be an argument in favor of getting out the gas by way of safety
measure, with drilling just ahead of the workings. In any event, if the coal
oil and gas lessee to locate its source in a gas sand subject to his lease. Perhaps an exceptional case may occur in which, through no fault of his own, the drilling to that gas sand permitted its flow to escape up into undeveloped coal. With adequate proof from mining, geological and chemical experts, the operator might then lay claim to "his" gas that had gotten into another's coal. Early West Virginia law, that likened fugacious minerals to feræ naturæ and percolating waters, would have been against him. Today, with the fee ownership of gas definitely settled, the result would not be quite so sure.20

5. Progress of coal development. If coal operations are under way, it is scarcely likely the oil and gas lessee would be permitted by our courts to drill new or additional wells into the seam, in any region near the workings. Mine safety must rightly here be paramount.27 Far in advance of the mining, however, the same consideration might not exist. A fortiori, an undeveloped coal field should offer no practical obstacles in the way of independent exploitation by strangers to the coal title.

6. Type of gas development. Ordinarily, the coal-gas lessee will be interested, for his own protection, in getting the gas out with reasonable diligence. Thus his operations could directly benefit the coal owner by cutting down the dangerous ventilating hazards; and perhaps the law ought to recognize this factor. On the other hand, where the gas lessee continuously postpones development by paying delay rentals, the same favorable presumption would not arise. Again, take the more extreme instance in which the gas operator decides to utilize the coal well for cheap storage underground of gas transported

operator does so market this coal-gas in connection with reasonable mining development, an accounting would probably be denied [Wood County Petroleum Co. v. West Virginia Transportation Co., 28 W. Va. 210, 57 Am. Rep. 659 (1886)].

20 In Pennsylvania, under the "qualified ownership" theory, the oil and gas lessee would be under a disability of keeping his property at home [Westmoreland & Cambria Nat. Gas Co. v. DeWitt, 130 Pa. 235, 24 Atl. 724 (1889)]; otherwise he might lose it. But West Virginia is an "absolute ownership" jurisdiction, so the question of "escaped" gas offers interesting facets. Assuming always the gas lessee has in no sense been at fault, his mineral has in one fashion or another gotten into another's land. Where one's hat blows onto another's premises, or when a house torn from its moorings by tornado or flood effects a landing on a vacant tract, or even if a bee-farmer's swarm depart over to nearby trees [Goff v. Kilts, 15 Wend. 560 (N. Y. 1836)], the law seems to be with the original property owner. Pursuing one's gas along the surface is also legitimate [Burton v. Miller, 169 Ark. 740, 276 S. W. 990 (1925). Contra: Duvall v. White, 46 Cal. App. 305, 180 Pac. 324 (1920); Comment (1920) 8 CALIF. L. REV. 445]. Yet as to the validity of a search for one's gas after it becomes a sort of film over the myriad of coal surfaces that exist as joints and interstices in the coal, quaere.

from wells some distance away. One might infer the equities would here be with the coal owner.

All such variables must be cleared up before ownership of coal-gas can be surveyed. The enquiry should narrowly concern gas of unknown source, contained in unopened coal that is unqualifiedly owned in fee absolute apart from the surface, with prior separate title in the seam. So far as is known, the specific question has not been litigated before appellate courts. Nevertheless, it is elementary learning that the later oil and gas lessee can stand no higher than his lessor, nor take any estate in the coal-gas which the former did not own as of the date the lease was executed. The conflict in claims must lie between (on the one side) the original owner of all and (on the other) the grantee who takes when title to the coal is severed,—either for the reason the latter has been sold outright or because the grantor has conveyed the "surface", expressly excepting in his own favor the underlying seams. To repeat, the two parties involved are therefore the one who has fee simple in the coal and the other who retained or acquired the rest of the property from sky to earth's centre; and the earliest instrument of severance will be construed in the light of the facts at that time. In strict legal theory, the subsequent coal-gas lessee should be dismissed from consideration.

Under these conditions, a very strong case can be urged by the coal owner. To begin with, title to the seam normally includes everything contained in it, such as sulphur, iron ore, rock, and even diamonds and precious metals. An English court thus characterized the rule where coal was excepted:

"If a freeholder grants lands excepting mines... he grants out his estate in parallel layers, and the grantee only gets the parallel layer granted to him and does not get any underlying mineral layer or stratum. That underlying stratum remains in the grantor. The freeholder retains the mineral stratum as part of his ownership; and whether he takes the minerals or subsoil out of the stratum, the stratum still belongs to him as part of the vertical section of the land."

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30 Eardley v. Granville, 3 Ch. D. 826, 834 (1876), per Jessel, M. R.
It has also been observed, in a much-cited American decision, that "one person may own the surface or soil, and another the minerals and mines and metals; and there may be different owners for different strata under the earth." Just as the operator gets the worthless slate and mine refuse which are cast on the gob pile, so he might at least enjoy the right to reduce coal-gas to possession when it is liberated in mining development. It would be absurd to regard the surface owner as retaining title to a hydrocarbon constituent of the coal, right up to the very moment it is lost into thin air.

A second contention, (closely resembling the first), would be based on the ownership of the "containing chamber." Without reference to the gas as a part of the seam and disregarding the previous analogy to diamonds or metals discovered within it, the coal proprietor has bought the entire stratum as well as the space it occupies. Any land within that space, regardless of its connection with the coal, belongs to the mine company: between certain depths the fee to everything is held separately. The leading Pennsylvania case clearly so holds:

"... Under all the decisions, the coal in place was absolutely owned in fee simple by the defendant. In a state of nature, the coal necessarily occupied space. How could the defendant own the coal absolutely and in fee simple, and not own the space it occupied? Or how is it possible to conceive of such a thing as the ownership of the space independently of the coal? If the coal in place is a part of the very substance of the soil, more corporeal than the surface, how can the law regard the space which the substance occupies, as other than the substance itself? Of course such an idea is incapable of practical application, except upon the theory that the coal is not a corporeal substance to be sold and delivered, but that only an incorporeal right to remove it passes to the grantee under a conveyance. And such is the real nature of the appellant's argument. It could not be otherwise. Certainly, if such were the nature of the defendant's right, the argument and the authorities cited in support of it would be applicable and of controlling force; but it is a sufficient reply to all of them to say that all the decisions are directly the other way, and that they all establish that a conveyance of the coal in

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31 Murray v. Allred, 100 Tenn. 100, 102, 43 S. W. 355, 39 L. R. A. 249 (1897).
fee carries everything with it, just as fully and completely as a conveyance of the soil above. . . . If, then, the coal in place is a pure corporeal hereditament, the title in fee-simple to which passes to a purchaser by apt conveyance, there would be no more propriety in claiming a title in the grantor to the space it occupies, than there would be in claiming a similar right in a vendor of the surface to the space developed by the vendee in digging the cellar and foundations of a house. We are altogether unwilling to adopt any such view of the rights of the parties in either of such cases."

Since, then, "the minerals in place were severed by the conveyance from the residue of the soil, and the original land as effectively divided into two tracts as if the division had been made by superficial lines, or had been severed vertically by horizontal planes," the entire cubic content of the vein must be treated alike. An Ohio judge has added:

"It is therefore illogical and inconsistent, and would be impractical and unjust to hold that, as fast as the mineral is taken out, the remaining space should revert to the owner of the upper strata. Such a narrow and technical interpretation of the grant would result in embarrassments to the mining industry which would be intolerable."

These statements of the "space" doctrine, with compactness of expression yet without defects of legal fancy, have twice been approved by dicta in this jurisdiction, and represent the great weight of authority. To be sure, the legal issue before all those courts had to do with use of tunnels through the coal strata; yet the rule as to title was settled without qualification. One may stand on firm case-law footing in arguing that the property in the space carries with it every bit of realty found therein.

But the coal owner's position might be supported further by more general doctrines. The old common law fundamentals that the deed is construed against the grantor, and that the grantor must not derogate from his grant, have statutory backing here. Where

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35 Moore v. Indian Camp Coal Co., 75 Ohio St. 483, 500-501, 80 N. E. 6 (1907).
37 W. Va. Rev. Code (1931) c. 36, art. 1, § 11: "When any real property is conveyed or devised to any person, and no words of limitation are used in the conveyance or devise, such conveyance or devise shall be construed to pass the fee simple, or the whole estate or interest, legal or equitable, which the testator
the operator has purchased in fee, every presumption should then be in his favor; the implication would follow that the coal-gas was to pass with the coal, if there were really any doubt about it. Moreover, it is conceivable that drilling might seriously interfere with normal removal of the seam. Certainly the present code sections requiring blocks to be left in place, where the casing is drilled through to subjacent sands, already burden the industry. If even greater deference must now be shown the landowner, by permitting him to have preferred use of the coal for gas purposes, the operator may begin to wonder what sort of a fee he actually did buy. At all events, he might be able to enjoin any serious damage to his workings through the shooting of wells, and to insist in an extreme case that gas development be reasonably limited in time. The essential fact remains that the prior owner of the solid mineral ought not to have its exploitation materially hindered by another’s extraction of gas from that mineral. And, finally, should there be the usual appeal to the “equities” of the situation, the operator has a complete answer. The carrying charges for coal reserves, from interest and taxes, would amply justify the relatively small revenues possibly available through his leasing the coal-gas.

In complete contrast, the claim of the landowner has a wholly different starting point. It will be noted that simply the “coal” was granted or excepted: that very circumstance in and of itself must indicate that the surface owner was to have the right to lease for oil and gas. This is surely the common understanding of lawyers and laymen everywhere, that severance merely of the seam does not preclude a future development of the fugacious minerals. And what else does the exploitation of oil and gas connote, if not the drilling and recovery from any producing horizon? Were the fee owner of the coal out of the picture, there should be little doubt that the ordinary oil and gas lessee could drill there and take the coal-gas, or that he might go on deeper, and then come back and get it later on. Analogously, had there first been an outright conveyance of the oil and gas (in whole or in part) to such a purchaser, the latter would have insisted, and justifiably so, that

or grantor had power to dispose of, in such real property, unless a contrary intention shall appear in the conveyance or will.” This provision has remained substantially unchanged since 1849. Of course, however, it does not apply to exceptions, but only to grants of the coal in fee.

38 W. VA. REV. CODE (1931) c. 22, art. 4, §§ 11, 12.

39 NATIONAL RESOURCES BOARD, REPORT ON NATIONAL PLANNING, Part IV, Mineral Policy, Section II. Domestic Field, ix Taxation, pp. 426-428. This is one of the best discussions in print, of the burdensome and often unfair nature of these charges against coal reserves.
these were severed in his favor not only from the land but from any other subjacent minerals as well: each and every gas deposit would accordingly be claimed. In other words, the present problem could hardly have been before the parties when the separate coal title was created;\(^{40}\) naturally it must have been in their minds that all gas leasing rights continued annexed to the surface. "Coal", as a word of art, denoted the solid merchantable coal and not its temporary contents, if the uniform practice of conveyancers has any significance whatsoever.\(^{41}\) It is all very well to reason logically, from the Pennsylvania "space" doctrine, for example, but gas leases in West Virginia have always in the past been phrased without restriction, unless expressly provided otherwise. Perhaps the technique of Portia in The Merchant of Venice would be apposite here.

After all, one still has in this jurisdiction that fee simple absolute in gas, quite as dignified in legal valence as the similar ownership of coal. While a few occasional incursions have been made,\(^{42}\) the general frontier as to our common law theory of gas property stays much the same. In substance, it might be argued, a coal fee should not include a gas fee any more than a sale of one separate tract of surface would carry along with it another. If it is conceded (as one must) that gas sands close to the coal are obviously excluded, then the whole difficulty would be simply the environment of the coal-gas. Yet a sale of black sheep does not carry with it the white sheep in the same pasture, nor the conveyance of a fixture the land it occupies. The test would be the severability of the thing owned; and that (it may be) has now been amply satisfied by the drilling in the Pittsburgh seam. So a sense of proportion might require one in the future to distinguish sharply between coal grants and later gas leases. Moreover, the practical arguments are quite as convincing on the surface owner's side as for the

\(^{40}\) Note the analogous doctrine that oil and gas may not be included in grants or reservations of minerals,—when from the language of the instrument, or from the facts and circumstances surrounding the parties at the time of its execution, it becomes apparent that they did not have oil and gas in mind: McKinney's Heirs v. Central Kentucky Natural Gas Co., 134 Ky. 239, 120 S. W. 314 (1909); Detlor v. Holland, 57 Ohio St. 492, 49 N. E. 690 (1898); and West Virginia authorities already cited, supra, n. 22. Cf. Hardman, A Problem in Interpretation (1936) 42 W. Va. L. Q. 110.

\(^{41}\) This would almost certainly be true if the grantee had himself prepared the deed conveying the coal, so that its construction could not ordinarily be in his favor: Bettman v. Harness, 42 W. Va. 433, 26 S. E. 271 (1896); Steelsmith v. Gartlan, 45 W. Va. 27, 29 S. E. 978 (1896).

\(^{42}\) For example, Hall v. Vernon, 47 W. Va. 296, 34 S. E. 764, 49 L. R. A. 464 (1899).
coal owner. Obviously the latter will seldom have equipment and skill for drilling, nor access to pipe-lines and marketing experience. If the coal-gas is to be produced by a gas operator, the landowner can lease equally well. And in the past it has been the ardent desire of the mining company to get rid of the gas: it was in an even more unwelcome category than "red dog" from the gob pile. Certainly there has been no pioneering in attempting to market it.

These then are the respective claims that can be advanced regarding the location of title to marketable gas. While each position may fairly be criticized—the coal operator's for an overstressing of property concepts and the surface owner's for its failure to appreciate thoroughly the problems of the mining industry—the ultimate legal solution probably lies somewhere between such extremes. One should hardly stand in small awe of principle, precedent and doctrine, but the trouble is they are here in equipoise; and the lack of direct authority on the point leaves the problem wide-open. And legal imagination must be thoroughly subjugated for the task of deciding the inherently elusive issues. By and large, it may be said, there are three possible courses the courts may follow. One way, and perhaps the easiest one, would be to avoid answering the question with any degree of definiteness or generality, but to determine every individual case on its own peculiar facts. That practice has proven satisfactory in other phases of mineral law: thus in construing the very term "minerals", in marking out gob pile liability and in discovering implied waivers of subjacent support to cite some illustrations. The inclusion or exclusion of "coal-gas" into the ownership of "coal" might therefore depend on the background of the litigation. Yet certainty in land titles surely demands an accepted meaning for coal, and timorous shrinking from precise decision could seriously unsettle mining rights.

Another solution would involve classifying legal incidents of coal-gas into a few general categories—like the judicial treatment

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44 Board of Comm'rs of Ohio County v. Elm Grove Mining Co., 9 S. E. (2d) 813 (W. Va. 1940).
of casing-head gas. Then the legal result might be predicated on the basis of the class into which an enquiry fell. For example, in the category of safety measures the coal operator would always have an absolute right of disposal (by sale or otherwise) for the entire volume of marketable gas in or near the mine: he could do as he wished with it. Instead of waiting for the flow to bleed off from gassy mines (as in the past), however, the law might appropriately encourage him to experiment with its development and exploitation.

Next, in the category of ordinary leasing, where there were oil or gas sands below the seam, the landowner would control fugacious minerals wherever located. His oil and gas lessee might not only drill through the coal down to the nearest "pay", but recover as well the coal-gas itself considerably in advance of the working. Otherwise, difficulties could readily arise where different gas lessees represented respectively landowner and coal owner, and with useless expenditure in excess drilling. Clearly one company ought to handle the whole matter, and definitely so in the case where the coal gas were to become a more or less subordinate phase of the leasehold undertaking. Still such a category would assume as a prerequisite the existence of other producing horizons, so that it might fairly be held that gas leasing was reasonably within the contemplation of the parties when the coal fee was severed. Here, in contrast, the law should encourage coal-gas operation by the landowner; and incidentally, some of these hydrocarbons could easily have originated in the lower sands. Lastly, in the category of gaseous seams outside producing oil and gas regions, the coal owner would receive the complete beneficial enjoyment of his stratum. There the rule might theoretically ac-

46 Locke v. Russell, 75 W. Va. 602, 84 S. E. 948 (1915); and Prichard v. Freeland Gas Co., 75 W. Va. 450, 84 S. E. 945, L. R. A. 1915D 1186 (1914), 80 W. Va. 787, 93 S. E. 871 (1917). Thus, into one category would fall the issues involved in the claim of the lessor to the one-eighth oil royalty, on casing-head gasoline produced by the gas pumped out from an oil sand. The Locke decision did not definitely settle the question, though it held the lessee entitled to utilize the casing-head gas (that would otherwise be wasted), — and approved the lessee's tender of a share of the gasoline produced. Again, there might be the second category of suits where the lessor sues for gas-well rentals, simply because of the production of gas from an oil well. The Prichard case permitted recovery, not on any casing-head gasoline theory, but because of some evidence that the gas production came from a gas-sand penetrated by the oil well. Finally, a last category could take in all litigation over the right of the lessee to use the casing-head gas to drill and operate other wells on the premises. If the lease contains the usual provision regarding the operator's use of "gas" on the premises, Midsouth Oil Co. v. Cochran, 225 Ky. 676, 9 S. W. (2d) 1004 (1928), decides that the lessor may not recover any compensation for such use by the other.
cord with the presumed intent of the grant, since conceivably at that time no one had thought of the chances of marketing fire-damp. The chief advantage of this second possible course is its approximation to existing practices, to the extent that they have been established either in principles of mine safety or by investment in gas leasing of the Pittsburgh coal. It is accordingly the wisest solution.

But it may be suggested that such a series of categories overcomplicates mining law, because simple rules easily administered best suit all parties concerned in that industry. If the argument be sound, then the third possible course can only become a final determining of the broad proposition as to which of the two owners has absolute title in every case to the marketable gas within the coal seam. Here one might resort to the lay method of calling a spade a spade: there should be a precise definition of the term coal, of universal application. If one could only employ the "single plain meaning" doctrine, the task would practically be over right at the start; no well-furnished law library would be necessary and the dictionary alone would suffice. "Coal" could merely denote coal, and nothing else, so the surface owner would have the gas and that would end it. While the word-definition approach has at least the merit of simplicity, no member of the profession could ever recommend its use here in the light of countless decisions holding to the contrary. Granted therefore the term calls for more careful study, taking into account its mining, geological and chemical attributes, the traditional legal enquiry is the intent of the parties. Unfortunately in this regard, marketing of coal-gas has been so relatively recent a development that any notions about the intended scope of the severance (usually decades back) would have to be sheerest guesswork. The surface-owner would retroactively claim of course that he had thought all the time the valuable coal-gas was his, while the operator on the other hand might appear considerably shocked upon realizing the implied limitation on mining rights. Yet the real truth is that there never was a meeting of the minds on that score, whether the coal fee was created by grant or by exception. It would almost be beyond belief that the operator

47 The "single plain meaning" theory is best stated in Goode v. Riley, 155 Mass. 585, 586, 28 N. E. 228 (1891), per Holmes, J.: "It would open too great risks if evidence were admissible to show that when they said five hundred feet they agreed it should mean one hundred inches, or that Bunker Hill Monument should signify the Old South Church."

48 Illustrative instances of the West Virginia application of the "single plain meaning" doctrine are Griffin v. Coal Co., 59 W. Va. 480, 495, 53 S. E. 24 (1905), and Bee v. Huntington, 114 W. Va. 40, 45-46, 171 S. E. 539 (1933).
consented to leave the gas title in the surface owner until the last pillar was robbed.

So the issue really resolves itself down to a question of policy, in the ultimate choice between the competing common law analogies that are so evenly balanced. As our latent resources are made available through the utilization of these gas deposits, considerations of mine safety, marketing facilities and industrial investment will each play a part in disposing of the problem. In all fairness then, who has the legal right to lease the coal-gas? Until its origin can be cleared up a bit more by the scientists, any absolute title in either party seems thoroughly unwise. Nevertheless, if the second possible course of establishing separate categories be rejected, and if it is the narrow choice between surface proprietor and coal operator in fixing a uniform rule to govern in every instance, no matter how the issue arises, the writer is of opinion that sound policy should favor the owner of the coal. The common law tradition of moderation and avoidance of extremes would amply safeguard existing gas developments under other lessors.49

It is a commonplace that often when legal doctrine is stagnant, the mechanical arts go on improving and advance far beyond existing technical rules. Leasing of gas in the seam presents such an instance. It has now become the task of the common law to guide this current of innovation into safe channels.50

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49 Perhaps on any theory existing leases are already absolutely valid by virtue of the Statute of Limitations [Lockwood v. Carter Oil Co., 73 W. Va. 175, 80 S. E. 314, 52 L. R. A. (n. s.) 765 (1914)], or through prescription [Dowglass v. Kendal, 256 K. B. 1609]. Doctrines of estoppel and laches would also carefully hedge around extensive investments with legal or equitable protection.

50 It should be noted that the term coal gas is commonly used in industrial practice to indicate the method of preparation or manufacture,—as, for example, when coal gas is compared with natural gas or water gas. Throughout the present Editorial Note, however, the expression coal-gas is intended to refer only to gas occurring within unmined coal seams.