

November 1953

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Recommended Citation

Robert T. Donley, *Use of the Containing Space After the Removal of Subsurface Minerals*, 55 W. Va. L. Rev. (1953).

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USE OF THE CONTAINING SPACE AFTER THE REMOVAL OF SUBSURFACE MINERALS

ROBERT T. DONLEY*

TWO recent West Virginia cases—one expressly¹ and the other inferentially²—again bring to prominence the much-debated question of who has the “ownership” of the space remaining after the removal of subsurface minerals where there has been a severance in title of them from the other strata. It may be remarked, at the outset, that the results reached by the courts are the same whether the title of the mineral owner be granted to him or whether it be excepted by him from a grant of the land.

The discussion which will follow is not in the spirit of adverse criticism of the very able opinions in these cases, nor of the cogent dissent in the *Fisher* case. Rather, it is offered with the hope that further analysis will throw additional light upon the problems involved and suggest some limitations and qualifications of the space doctrine which may not be readily apparent from a casual reading of the opinions.

THE COAL CASE

A simple case may be stated thus: *O*, the owner in fee of a tract of land from the center of the earth to the heavens, conveys to *G*, grantee, all the underlying coal. (The deed usually provides that *G* is also granted such mining privileges as are reasonably necessary for the mining, removal and marketing of the coal, although such a grant is unnecessary and will be implied.)³ After *G* has removed part of his coal, leaving supporting ribs and pillars of recoverable coal, he desires to use the passageways for the transportation of coal from other lands owned or leased by him. Whereupon, *O* claims a continuing trespass and either seeks damages in an action at law or an injunction and accounting in a suit in equity.

The West Virginia Supreme Court of Appeals has now decided, for the first time, that in the case stated the owner of the coal (or his lessee) may use the subterranean passageways for the transportation of coal mined from adjacent lands, subject to three qualifica-

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¹ *Fisher v. West Virginia Coal & Transportation Co.*, 73 S.E.2d 633 (W. Va. 1952). Given, J. dissented, preferring the Virginia view: *Clayborn v. Camilla Red Ash Coal Co.*, 128 Va. 383, 105 S.E. 117 (1920).

² *Tate v. United Fuel Gas Co.*, 71 S.E.2d 65 (1952).

³ *Squires v. Lafferty*, 95 W. Va. 307, 121 S.E. 90 (1924).

tions or limitations: (1) the coal must not be exhausted; (2) it must not be "abandoned"; and (3) the mining of the granted coal must be prosecuted with due diligence.⁴

This decision was reached upon the ground that two prior West Virginia cases had "committed" the court to the doctrine enunciated in two Pennsylvania cases: *Lillibridge v. Lackawanna Coal Co.*,⁵ and *Webber v. Vogel*.⁶ It therefore becomes necessary to examine all four cases with a view to discussing (a) whether the West Virginia court was irrevocably so committed and (b) the exact limitations and qualifications of the so-called Pennsylvania doctrine.

The first of the two West Virginia cases cited as committing the court is *Armstrong v. Maryland Coal Co.*⁷ It was not necessary to the decision of that case either to adopt or to reject the Pennsylvania view, for the reason that under the facts the vendor's deeds all contained a grant of the privilege to transport coterminous coal. Any views expressed, it is submitted, must be regarded as dicta. However, even if regarded as a binding precedent, it was said in the *Armstrong* case:

"In *Webber v. Vogel*, it was thought that the language of the *Lillibridge* case might imply that the right of way would continue even after the exhaustion of all of the coal. This notion was disapproved and the right to haul coal from adjoining lands limited to the time when the coal in the land so traversed should be removed. But, as is suggested in argument, this limitation could easily be provided against by leaving some of the coal unmined until the coal from adjoining tracts could be removed, and that if need be a few pillars could be left for subjacent support, *which would answer all the requirements.*"⁸

The second West Virginia case cited as committing the court to the Pennsylvania doctrine is *Robinson v. Wheeling Steel & Iron Co.*⁹ This case is not strictly in point for the reason that the owner of the coal also owned all the strata below and part of the strata above the coal to a layer near the surface. It was stated in the opinion that the owner of the coal could use the passageways with this important limitation: "in such manner as will not unreasonably interfere with the enjoyment by the plaintiff of his interest in

⁴ *Fisher v. West Virginia Coal & Transportation Co.*, 73 S.E.2d 633 (W. Va. 1952).

⁵ 143 Pa. 293, 22 Atl. 1035, 13 L.R.A. 627 (1891).

⁶ 189 Pa. 156, 42 Atl. 4 (1899).

⁷ 67 W. Va. 589, 60 S.E. 195 (1910).

⁸ Italics supplied.

⁹ 99 W. Va. 435, 129 S.E. 311 (1925).

the land." However, this limitation is not carried into the syllabus. Moreover, the bill of complaint alleged that the coal had been completely exhausted. Notwithstanding this fact, the court interpreted the *Lillibridge* and *Webber* cases as holding that the owner of the coal could use the passageways *until* exhaustion of the coal, and cited an Illinois case¹⁰ for the proposition that the owner of the coal could use the containing space in any way that he sees fit. It also mentioned the English view that the owner of the coal has the property and exclusive right to possession in the whole space and is entitled to use the same for all purposes.

From these conflicting statements in the two West Virginia cases,¹¹ it will be observed that there is agreement upon the element of *exhaustion* of the coal as the fact which terminates the right to use the containing space for the transportation of coal from other tracts. They do not, it is submitted, purport to enunciate—much less “commit” the court to— (1) the alternative fact of abandonment, and (2) the additional fact of nonprosecution of operations with due diligence.

The next inquiry, then, is whether the Pennsylvania cases, properly interpreted, require the absence of the two facts last above mentioned. While the *Lillibridge*¹² case is regarded as the fountainhead of the majority rule in the United States, and has been cited in virtually every subsequent case¹³ dealing with the point, it has been a source of amazement to the writer that it has been so cited both in later Pennsylvania cases and elsewhere, uncritically and without apparent realization of the peculiar facts involved in it. These facts are:

(1) The granting clause in the deed conveying the coal was limited to “all merchantable coal” in the tract. Therefore, it is at least arguable that the grantee did not become vested with title to *all* the coal, but with only part of it. In West Virginia, “merchantable” coal means coal so situate that it may be profitably mined and of such quality as to be salable.¹⁴

(2) The habendum clause (in the *Lillibridge* case) provided that the grantee was “to have and to hold the coal in and under said land unto the [grantee] its successors and assigns, *until the*

¹⁰ *Attebery v. Blair*, 244 Ill. 363, 91 N.E. 475 (1910).

¹¹ Notes 7 and 9 *supra*.

¹² Note 5 *supra*.

¹³ See Annotation, 15 A.L.R. 957.

¹⁴ *Tressler Coal Mining Co. v. Klefeld*, 125 W. Va. 301, 24 S.E.2d 98, 49 W. Va. L.Q. 173 (1943).

exhaustion thereof¹⁵ under the terms of this indenture." Therefore, the grantee became vested not with a fee simple title to the coal but only with a determinable fee. The estate ended upon the happening of the specified event, *viz.*, the exhaustion of the coal.¹⁶

It must be conceded that the Pennsylvania court did not base its decision upon the two limitations—one of quality of the subject-matter and one of duration of the estate—above discussed. However, it did point out that the plaintiff's Bill of Complaint contained no allegation that all the coal had been removed and no allegation that the tunnel was being maintained on the rock bed beneath the coal.

The *Webber* case¹⁷ recognized the doctrine of the *Lillibridge* case as establishing "a settled rule of property", but stated that it was not to be extended beyond what was plainly decided therein. It may also be remarked that the *Webber* case has likewise been uncritically cited without reference to the limitations and qualifications set forth in it, which appear from the following quotation:

"While there exists by the deed to the grantee an estate in fee simple of the severed coal, and his right to the space mined out will not be distinguished from that in which the coal remains unmined, that estate, except in very rare cases, has no badge of perpetuity. *In nearly every case the instrument itself discloses the intention of the parties that the coal shall be mined; that is, that the subject of the grant shall soon be exhausted or consumed.* It is severed from the under and overlying land for the purpose of turning it into money. It would not only be a perversion of the intention to merely use such an estate to reach other coal, but such use would be a continual menace to the stability of the surface. No owner of the upper land could tell when his estate would cease to be disturbed by workings underneath. It was intended to go no further in the case cited [*Lillibridge*] than to hold that, while the purchaser of the coal was in good faith mining out his coal, his right to the use of the space made vacant by his workings as they progressed could not be successfully obstructed by the owner of the surface; and not that by the purchase of the coal he obtained an undisputed and perpetual right of way under another's land. The owner of the land above and below has a right to the reversion of the space occupied by the coal *within a time contemplated by the parties when they sever that peculiar part of the land from its horizontal adjoiners.*"¹⁸

¹⁵ Italics supplied.

¹⁶ Cf. *United Fuel Gas Co. v. Hill*, 112 W. Va. 10, 163 S.E. 613 (1932).

¹⁷ Note 6 *supra*.

¹⁸ Italics supplied.

It thus appears that, as disclosed by the italicized words above, the purported limitation of the *Lillibridge* doctrine was upon the theory that *as disclosed by the deed of conveyance*, the parties *intend a grant for a limited time only*. So, the doctrine that the space reverts to the grantor of the coal is really based upon "the contemplation of the parties." As previously pointed out, this was true in the *Lillibridge* case because the grantee there acquired only a determinable fee. But it is submitted that there is no justification for inventing a fictional doctrine of a grant for a limited time where the deed conveys the coal in fee simple without limitation as to quantity or quality of the coal, or of duration of the estate. It is common knowledge that coal fields are acquired in large blocks with a view to development many years in the future. It is believed that no court ever held or suggested that, in the absence of appropriate stipulation in the deed, the grantee of a fee simple estate owes any implied duty of development to the grantor, nor that the right to the use of the containing space is limited in time measured from the date of the deed. If the owner is under no duty of development, *i.e.*, if he can rightfully postpone the beginning of operations, why, after such beginning, is he under a duty to proceed with reasonable diligence? No rational answer can be given to this question.

The confusion in the Pennsylvania doctrine thus introduced by the *Webber* case made it necessary for the court to attempt a clarification in *Westerman v. Pennsylvania Salt Mfg. Co.*¹⁹ There, referring to the *Lillibridge* case, it was said that the court "held that the owner of the coal also owned the chamber or space enclosing it, and, so long as such ownership continued, could use such space for the transportation of other coal."

"We do not understand the language of the opinion in *Webber v. Vogel*, *supra*, to limit such right of transportation to the precise time that coal is being mined on the tract in question. Of course, defendant's right in the plaintiff's farm will terminate as soon as the minable coal therein has been removed . . . the coal in the ribs was not forfeited because left for a time to support the surface . . . Neither the coal nor the space reverts to plaintiff because of such temporary suspension of mining. *The deed gives defendant the coal, without any restriction as to the time when it shall be mined; so there is nothing upon which to base any claim of reversion. . .*²⁰ Defendant has no perpetual right of way through plaintiff's

¹⁹ 260 Pa. 140, 103 Atl. 539, 15 A.L.R. 843 (1918).

²⁰ Italics supplied.

land; its right will cease when the coal therein is exhausted or abandoned."

What is meant by "temporary suspension of mining"? It is submitted that this expression refers to non-exhaustion of the coal rather than to intermittent operation. In other words, until the coal is exhausted, the owner may mine whenever he pleases, and from time to time, over an *unlimited* period and all intervals between operations until all the recoverable coal is gone are mere temporary suspensions. This is necessarily the case because any other view would have to be based upon an implied duty of development for which there is no justifiable legal foundation. Thus, it is unsound to convert the *privilege* of suspension of operations—in the sense stated—into a *duty* to prosecute mining with reasonable diligence.

What is meant by "abandoned"? Since it is conceded everywhere that the owner in fee of coal acquires a corporeal hereditament, it must likewise be conceded that he cannot lose title to it under the doctrine of abandonment. Title to personal property and to incorporeal rights may, indeed, be so lost.²¹ But under the theory of the Pennsylvania cases, the use of the tunnels is not the exercise of an incorporeal right, such as an easement, in the property of another. The owner of the coal owns the space enclosing it so long as his ownership of the coal continues, says the *Westerman* case.²² In this view, then, the word "abandoned" must be interpreted as merely synonymous with "exhausted". It cannot properly mean abandonment in the sense of loss of title by nonuser, because title to corporeal property cannot be divested in such a way.

To summarize, it is the writer's contention that the Pennsylvania cases, in the light of the facts therein involved and closely limited by the language of the opinions, and as finally interpreted in the *Westerman* case, established the doctrine in that jurisdiction that, in the absence of anything in the deed expressly or by necessary implication to the contrary, the grantee of the coal, in fee simple, has the absolute privilege to use the passageways therein for the transportation of other coal until the exhaustion of the granted coal. The privilege is not lost by "abandonment" except as that term means permanent abandonment—not of the coal—but abandonment of *operations by reason of exhaustion of the recover-*

²¹ For example, a leasehold estate may be ended by abandonment; *Blue-stone Coal Co. v. Bell*, 38 W. Va. 297, 18 S.E. 493 (1893); *Parish Fork Oil Co. v. Bridgewater*, 51 W. Va. 583, 42 S.E. 655 (1902).

²² Note 19 *supra*.

able coal. Nor is it lost by any failure to continue mining with due diligence.

It is submitted, therefore, with all deference, that the *Fisher* case should not have gone further in stating the Pennsylvania rule thus: "so long as the coal . . . is neither exhausted nor abandoned, and mining is being prosecuted with due diligence . . . the owner of such coal, may use the subterranean passageways for the transportation of coal mined from adjacent lands. . . ." In a word, the factors of "abandonment" and of failure to prosecute operations with diligence should have been omitted. If this had been done we would have a principle of law which—irrespective of its theoretical soundness—would be relatively simple to apply. Whether or not a seam of coal is exhausted can be proved with reasonable facility and certainty. Not so of "abandonment"—which even if legally possible, involves a matter of intention—nor of "due diligence", where the test may be either subjective or objective, as demonstrated by the confusing decisions in oil and gas lease cases.²³

DISCUSSION OF THE SPACE-OWNERSHIP THEORY

If, under the doctrine discussed, the owner of the coal loses his privilege to use the passageways upon exhaustion of the recoverable coal, who has the right to complain if such use unlawfully continues? The cases have involved claims made by the owner of the *overlying* strata, including the "surface"²⁴ who also owned the *underlying* strata, usually upon the ground that the continued use of the passageways was either actually damaging the surface or constituting a "continual menace" to its stability. A brief analysis will show that such division of ownership of the strata is not necessarily the case.

Suppose that *O*, the owner in fee simple of a tract of land from the center of the earth to the heavens, makes the following conveyances:

(1) *O* conveys to *A* "all the strata overlying the Pittsburgh seam of coal". Then,

(2) *O* conveys to *B* "all the strata underlying the Pittsburgh seam of coal". Then,

(3) *O* conveys to *C* "all the Pittsburgh seam of coal."

If *C* exhausts the coal, who "owns" the space formerly occupied by it? There could not, it is submitted, be a "reverter"

²³ See discussion in DONLEY, LAW OF COAL, OIL AND GAS IN WEST VIRGINIA AND VIRGINIA § 108 (1951).

²⁴ *Id.* at § 30.

either to *A* or *B* because neither at any time became vested with any interest in the coal or in the space occupied by it. The statement in *Webber v. Vogel*²⁵ that "the owner of the land above and below has a right to the reversion of the space occupied by the coal", was based upon a different situation, where *O*, the owner in fee, conveyed only the coal to *C*, retaining title to the strata above and below. The theory advanced by Professor Simonton was that *C* received no title to the containing space because he acquired nothing but the coal.²⁶ But in the case previously supposed, following the same line of reasoning, neither *A* nor *B* received title to the containing space because they acquired, respectively, nothing but the overlying and underlying strata. If this be true, and if *C* as owner of the coal, loses the space upon exhaustion of the coal, then it would seem that the "ownership" of the space would "revert" to *O*—who has no other interest in the entire tract, and as appurtenant to nothing. The result thus reached would be analogous to the Pennsylvania doctrine of the "third estate", which the writer has elsewhere sought to show is unsound.²⁷ If, in the case supposed, the court rejects the claims of *O* and of *C*, will it then choose between *A* and *B*, or will it decide that, as respective owners of the overlying and underlying strata, they are cotenants of the containing space? How shall any damages arising from wrongful user be apportioned? If *B* is willing to permit *C* to continue to use the tunnels, but *A* is not, whose decision shall govern?

The absurdities and inconsistencies suggested are sufficient to make one wish that the whole doctrine had been originally rejected and that the American courts had adopted the simple, workable rule that the owner of coal owns the space remaining after its exhaustion, in accordance with the English view. The writer has not found a case in which the surface owner has been subjected to any substantial damage by the continued use of the subterranean passageways. Some courts have held that the measure of damages for a continuing trespass is the worth of the use of the property and have allowed recovery of the customary "haulage royalty" or "way leave."²⁸ The West Virginia court has cited with approval a Pennsylvania case²⁹ holding that the measure of damages is nominal, in the absence of proof of actual harm.³⁰

²⁵ Note 6 *supra*.

²⁶ Note, 32 W. VA. L.Q. 242 (1926).

²⁷ DONLEY, *op. cit. supra* note 23, at § 29.

²⁸ Quality Excelsior Coal Co. v. Reeves, 206 Ark. 713, 177 S.W.2d 728 (1944).

²⁹ Springer v. J. H. Somers Fuel Co., 196 Pa. 156, 46 Atl. 370 (1900).

³⁰ Chafin v. Gay Coal & Coke Co., 113 W. Va. 823, 169 S.E. 485 (1933).

This seems to be the preferable rule. What legal or moral justification is there for imposing upon the coal operator the additional economic burden of a "way leave" of 2¢ or 3¢ or more per ton in order to put it into the pocket of the surface owner who is not being harmed in any degree by the use of the subterranean passageways, and who, in all probability, was not cognizant of the legal situation until so advised by astute counsel? For the same reasons, the court should refuse to grant an injunction where the harm to the coal operator in stopping his use of the passageways will greatly outweigh the benefit to be derived by the surface owner. This is a case distinctly calling for the application of the "balance of convenience" rule, for which there is ample precedent in West Virginia.³¹

To conclude this phase of the discussion: even if the coal owner may lose the use of the passageways under the doctrine laid down in the *Fisher* case,³² if the court adopts the rules above mentioned (1) limiting recovery at law to nominal damages; and (2) refusing to grant an injunction, it may well be that the coal operator is not, from a practical standpoint, adversely affected by the decision.

CONTAINING SPACE IN OIL AND GAS CASES

In *Tate v. United Fuel Gas Co.*,³³ the owner in fee simple of a tract of land from the center of the earth to the heavens, conveyed it to *A*, expressly excepting and reserving the oil and gas, with the exclusive right to drill for production thereof and the usual incidental rights of way and other privileges. *O* thereafter conveyed an undivided interest in the oil and gas, and he and his cotenants leased the same to *G* for oil and gas purposes by a standard form of lease. On the same date, *O* and his cotenants entered into an agreement with *G*, granting to the latter the exclusive right to use and occupy the Big Lime stratum underlying the tract for the purpose of injecting and storing gas therein and all other rights necessary in the operation of the property for storage purposes, alone or in conjunction with neighboring lands. Thereafter *G* drilled a well from which no oil or gas has been produced, into the Big Lime stratum and used it for pumping gas produced from other lands into said stratum for storage. *A*, alleging that there is no recoverable oil or gas in the Big Lime stratum, sought an injunction to restrain *G*'s use thereof for such purposes, a cancella-

³¹ Note, 45 W. VA. L.Q. 155 (1939).

³² Note 1 *supra*.

³³ Note 2 *supra*.

tion of the gas storage agreement as a cloud on his title, and a decree for the value of the use of the premises. A demurrer to the bill of complaint was overruled and it was held that *A* was vested with title to the Big Lime stratum (since *O*'s deed excepted and reserved the oil and gas and not the limestone) and that a court of equity had jurisdiction to remove cloud on title and to enjoin a continuing trespass; and would proceed to grant complete relief although the alleged damages were a legal demand.³⁴

In making its decision, the court applied the space doctrine of the *Lillibridge*, *Webber* and *Westerman* cases,³⁵ as interpreted by it, "that so long as there remain recoverable minerals which are mined in good faith, the space may be used by the owner of the minerals". It was then concluded that since, under the allegations of the bill, no recoverable minerals existed in the stratum, *O*, as the owner of the gas (if it formerly was present therein) had no right to use for storage purposes the space thus vacated by exhaustion, and consequently could not grant such right to *G*.

It will be noted that the foregoing statement of the Pennsylvania space doctrine differs from that stated in the *Fisher* case, in that (1) abandonment as an alternative to exhaustion is omitted and (2) operation "in good faith" is substituted for "due diligence".³⁶ Disregarding these variations, and assuming that exhaustion of the recoverable minerals is the determining factor, the question arises as to whether the space doctrine applicable to coal and other solid minerals can or should be applied without qualification to those of a vagrant or fugacious nature. To begin with, the owner of gas underlying land does not own it in the absolute and unqualified sense that one owns a solid mineral. He may lose the gas by reason of operations upon adjacent lands. On the other hand, he may acquire his neighbor's gas by operations on his own land. The minute spaces between the grains of a porous stratum may be vacated, (*i.e.*, to the point of nonpractical production) and again refilled, in whole or in part, and this may occur either through natural migration or through the effect of pumping or other intervention by the act of man.

³⁴ The statement of facts is condensed and the problem of interpreting the deed is omitted because it is not necessary to the discussion of the principle involved.

³⁵ Notes 5, 6 and 19 *supra*.

³⁶ This is not merely a quibble as to the meaning of words. One may operate in good faith, *i.e.*, a subjective state of mind, and yet not do so with due diligence, *i.e.*, an objective test measured by what a reasonably prudent operator would have done in the circumstances.

While the West Virginia court has committed itself to the "absolute" ownership theory of oil and gas,³⁷ it is nevertheless true that in substance and effect the "ownership" consists of the exclusive right to explore and reduce them to possession. "Therefore", said the Kentucky court, "the geological formations or strata common to this class of minerals may be exhausted a thousand times and the mineral owner still retain the exclusive right to take all the minerals which find their way into the formation, whether through injection or in any other way."³⁸ Accordingly, it was held that where the owner of land in fee simple conveyed it, excepting and reserving the minerals, his grantee has no right to explore for or to produce them, irrespective of their source. Therefore, such grantee had no right in the stratum which he could lease to a third person for storage purposes; but the grantor could do so and is entitled to receive the rental therefor. The court went on to say that, in this view, it was not necessary to decide "whether the cavity or stratum from which a [fugacious] mineral has been removed becomes the property of the mineral or [of the] surface owner". It is arguable, however, that the court in effect did decide the question for if the owner of the gas has the exclusive right from time to time without limitation to extract it, regardless of its source; and if he likewise has the exclusive right to enter into a gas storage lease and receive the rentals, it would seem that he has substantially all the incidents of ownership of the title to the stratum itself—including the minute spaces between the particles of rock or sand. And, it necessarily follows from the decision that exhaustion of the original supply of gas does not terminate such rights.

Reverting to the *Tate* case,³⁹ the decision embodied in the syllabus is that where the owner in fee conveys the land, excepting and reserving the minerals, the deed operates to pass to the grantee title to the Big Lime stratum from which the minerals have been extracted. This is, of course, a quite sound conclusion. But it does not necessarily follow therefrom that because one is the owner of such stratum he has the exclusive right to the use thereof for gas storage purposes. Such use may be prevented by reason of the fact that the storage space becomes occupied by gas from other lands, as may be demonstrated by the following hypothetical

³⁷ *Boguess v. Milam*, 127 W. Va. 654, 34 S.E.2d 257 (1945).

³⁸ *Central Kentucky Natural Gas Co. v. Smallwood*, 252 S.W.2d 866 (Ky. 1952).

³⁹ Note 2 *supra*.

case: Suppose that after the delivery of the deed in the *Tate* case gas from adjacent lands finds its way into the Big Lime stratum, either from natural vagrancy or by reason of storage pressures from operations conducted on other lands. Surely it is beyond question that the grantor, by virtue of his exception and reservation of the minerals, has the exclusive right to drill into that stratum and produce such gas, to the exclusion of the grantee. The situation would then exist wherein the title to a gas-containing stratum is vested in one person and the "title" to the gas itself in another. No trespass would occur by occupancy of the space for the reason that when the gas is injected through a well located on *other* land, the injecting-owner of the gas loses his title to it, as personal property, and it again becomes part of the real estate and the title to it, as real estate, becomes vested in the owner of the gas under any adjacent tract to which it migrates. It has been so held in Kentucky.⁴⁰ The theory is that gas is a mineral *ferae naturae* and that its injection into the strata at a place where the injector has a right to do so, is no more a trespass upon the neighboring strata than it would be if one were to catch a fox and turn it loose upon his own land, following which the fox wanders onto his neighbor's land.

Hence, it would be neither illogical nor legally impossible if the West Virginia court were to hold that the ownership of the gas-containing stratum may be vested in one person and the exclusive right to extract the gas in another. However, it does not follow that the latter has the additional privilege to use the surface for the purpose of *injecting* such gas, even though it be conceded that he has necessary surface privileges for *removing* it after injection.

Therefore, it is submitted that even if the allegations of the answer in the *Tate* case that there do exist recoverable minerals in the Big Lime strata be hereafter proved, such fact would not establish the right of the defendants to use the surface of the plaintiff's land *for injection purposes*. But, it is further submitted that the defendants cannot be prevented from storing gas in that stratum so long as injection occurs on other lands where the right to do so exists. The *Tate* case does not spell out this distinction but observes that "in considering the overall implication of the questions presented . . . it is a fair assumption that the exception made . . . in the deed . . . was for the purpose of mining and

⁴⁰ *Hammonds v. Central Kentucky Natural Gas Co.*, 255 Ky. 685, 75 S.W.2d 204 (1924). See also *Cornwell v. Central Kentucky Gas. Co.*, 249 S.W.2d 531 (Ky. 1952).

operating the land for the *production* of minerals. Now [the grantors] are seeking to utilize their ownership rights and privileges provided for in that exception for a different purpose, *i.e.*, the *storage* of gas produced elsewhere."⁴¹

It is submitted that this is a valid distinction (if the court had said "injection" instead of "storage") because it may fairly be said that when one buys a tract of land subject to an exception of the oil and gas, he necessarily contemplates that the surface may be burdened with production operations. He consents thereto, either expressly or impliedly, and that consent should not be limited to operations for producing the gas originally trapped in the strata but should extend to that thereafter finding its way into it, whether by natural or by artificial means. He does not consent, however, that his surface should be subjected to the further burden of using it for injection purposes. In reaching this conclusion it is necessary to resort to no more than accepted principles of interpretation of the expressed intent of the parties. The court cited—evidently for purposes of comparison or analogy—*United Fuel Gas Co. v. Morley Oil & Gas Co.*,⁴² which held that where a deed conveys land to a school board and provides that it shall be "exclusively appropriated and used as a site for a school house and school", these words are not merely an expression of the purpose of the conveyance but constitute a restrictive covenant. There is no need to resort to this principle in order to reach the result previously suggested.

To conclude this phase of the discussion: it is submitted that the *Tate* case does not necessarily hold that in all cases the mere use of a subsurface stratum for gas storage purposes constitutes a continuing trespass thereto which a court of equity will enjoin, and which will entitle the owner to an accounting for use and occupancy; nor that it is a trespass of any kind. It is the use of the surface and other overlying strata for *injection* purposes which creates the cause of action and the grounds for equitable relief.

CONCLUSION

A case is authority for no more than it was actually necessary for the court to decide with reference to the particular facts involved.

Therefore, the writer believes that, upon principle, it should be held that:

⁴¹ Italics supplied.

⁴² 102 W. Va. 374, 135 S.E. 399 (1926).

(1) For all practical purposes, the owner of a seam of coal may almost indefinitely continue to use the passageways therein for the transportation of coal produced from other lands, without liability. In this sense, he may be called the owner of the containing space. It is a workable rule if exhaustion of the recoverable coal is made the sole test for terminating such user.

(2) The owner of the gas underlying a tract of land may exhaust it and re-exhaust it, indefinitely, irrespective of the source of the gas or of the manner in which it acquired its situs. He may also pump gas from other lands into a stratum which will contain it, irrespective of whether such stratum has previously been exhausted, so long as the injection process is accomplished through operations on lands as to which such right of injection exists. These rights of injection and of removal may be exercised without liability to the owner of the stratum in which the gas is thus placed.

(3) The owner of the gas underlying a tract of land may not, merely by virtue of his ownership of such gas, use the surface or other overlying strata for the purpose of injecting gas produced from other lands, simply because such use would be an unnecessary and unreasonable imposition of a burden upon the land which was not fairly within the contemplation of the parties to the severance deed.

(4) Because of the fugacious and recurring nature of gas, the space doctrine applicable to solid minerals cannot be applied to it without limitation. One person may own the containing stratum and another own the exclusive right to extract the gas therein contained, irrespective of its source, and from time to time, as replaced.