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Mines and Minerals--Merger of Coal Lease in Reversion to Minerals–House as Trade Fixtures under Coal Lease

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due to the consideration given for the license and the contemplated expenditures made in reliance thereon.[7] It is of greater dignity than a bare license and is regarded as an equitable easement.[8]

The court in the principal case properly held that there was a bare license to erect the sign and not a equitable easement, for otherwise the licensee would be getting something for nothing, as there is no showing that the rent was consideration for the contract to give the license. The question as to whether it is a bare license or an equitable easement is largely one of policy and is not based solely on logic.[9] There is no fraud in allowing one to make expenditures which the licensor has the right to assume are made in contemplation of the instability of the license.[10] To make the permission irrevocable there must be both a clear intent to create a permanent incorporeal interest and due formality.[11] There seems to be no injustice in placing the loss on a licensee who is careless enough to expend his money without getting an irrevocable legal right.[12]

W. J. C.

MINES AND MINERALS — MERGER OF COAL LEASE IN REVERSION TO MINERALS — HOUSES AS TRADE FIXTURES UNDER COAL LEASE. — *L*, owner of land and minerals, leased to *T* the underlying coal. *L's* title to the surface passed to *A* and *L's* ownership of the reversion in the coal passed to *B*. *T* meantime in the exercise of his mining rights, and in the use of his way of necessity, erected a large number of miner's houses. Later *T* became insolvent and ceased mining operations. The miner's houses were vacated and fell into serious disrepair. *B*, as mineral reversioner bought in *T's* outstanding mineral lease at a subsequent bankruptcy sale. Sometime later *A*, as surface owner, took possession of the houses, the way of necessity not being then in use, made extensive improvements and rented the houses to new occupants. *B* filed a bill for an accounting of the rentals. *Held*, that he as owner of the coal was not entitled to any share. *Millard v. Stepp.*[1]

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[7] Carpenter v. Stapleton, 169 Va. 22, 192 S. E. 792 (1937); Sanford v. First City Co., 118 W. Va. 713, 192 S. E. 337 (1937).

[8] Carpenter v. Stapleton, Brown v. Western Maryland Ry., both *supra* n. 5.

[9] Pifer v. Brown, 43 W. Va. 412, 27 S. E. 399 (1897); CLARK, *op. cit. supra* n. 2, at 19.

[10] Note (1900) 49 L. R. A. 526.

[11] The mere fact a deed is used does not in and of itself create an easement. Lehigh & N. E. R. R. v. Bangor & P. Ry., 228 Pa. 350, 77 Atl. 552 (1910).

[12] Pifer v. Brown, 43 W. Va. 412, 27 S. E. 399 (1897).

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[1] 5 S. E. (2d) 815 (W. Va. 1939).

Immediately upon the sale of any estate in the minerals, whether for a term of years or in fee, the subsurface operator becomes entitled to a way of necessity, — to the use of the surface — in exploiting the coal.[2] These mining rights are usually regulated by agreement between the parties. In accordance with such an agreement *T* erected the houses. It is well to note that these houses were not really trade fixtures in the normal sense of the term because there was no landlord tenant relation but only the exercise of an easement by way of necessity.[3] An operator, however, may make any use he wants to of his improvements[4] so long as he does not seriously injure the surface by removal.[5] The West Virginia precedents as to the removal of trade fixtures cannot apply where the fee in the coal is outstanding.[6] In theory the buildings may be put up, used and taken away as long as the way of necessity exists. If the coal veins are completely worked out obviously the houses cannot be left on the land indefinitely. In any event it would seem that the mineral owner keeps title to the buildings until he chooses voluntarily to waive this right in favor of the surface owner.

In the present case *B* as mineral reversioner bought out *T's* term in the coal. When the owner of the reversion in fee bought in the term for years, at common law, irrespective of intent of the parties there was immediately a merger by which the term was drowned in the reversion.[7] The common law doctrine of merger is a fixed rule of property law and has nothing to do with intent.[8] In recent decades equity principles have made certain inroads on the doctrine of merger, so that today as regards merger of equit-

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[2] McGraw v. Lakin, 67 W. Va. 385, 68 S. E. 27 (1910); Armstrong v. Maryland Coal Co., 67 W. Va. 589, 69 S. E. 195 (1910); Squires v. Lafferty, 95 W. Va. 307, 121 S. E. 90 (1924); Scott v. Moore, 98 Va. 668, 37 S. E. 342 (1900).

[3] Shaleen v. Central Coal & Coke Co., 127 Ark. 397, 192 S. W. 225 (1917).

[4] Lessee under coal lease could build houses for future use of its employees and pending such use, lease the buildings to another company without accounting to the lessors for the rents. Stonegap Colliery Co. v. Kelly & Vicars, 115 Va. 390, 79 S. E. 341 (1913).

[5] (1926) 40 C. J. 1016, § 621(2); Couch v. Welsh, 24 Utah 36, 66 Pac. 600 (1901).

[6] The case of Gartland v. Hickman, 56 W. Va. 75, 49 S. E. 14, 67 L. R. A. 694 (1904), which says that trade fixtures put on land under an oil and gas lease must be removed before the term expires or within a reasonable time thereafter, however, will not apply in this case since the fee in the coal is outstanding and the way of necessity is still in existence.

[7] Notes (1915) 9 R. C. L. 808, § 64; (1920) 19 C. J. 945, § 156; Kerns v. Carr, 82 W. Va. 78, 95 S. E. 606 (1918); Turk v. Skiles, 45 W. Va. 82, 30 S. E. 234 (1898).

[8] Larmon v. Larmon, 173 Ky. 477, 191 S. W. 110 (1917); Forthman v. Deters, 206 Ill. 159, 69 N. E. 97, 99 Am. St. Rep. 145 and note (1903).

able interests, the smaller is not necessarily drowned in the greater. In short equity looks to the actual or presumed intent of the parties.[9] For instance, there is no merger of an equitable life estate and a legal contingent remainder.[10] Again, where the legal ownership of land and the absolute ownership of an encumbrance or charge become vested in the same person, there is no merger in equity.[11] Since, however, no equitable interests were involved both the trial court and the appellate court were sound in holding that, following the bankruptcy sale, *T's* lease was lost in *B's* fee. It would thus seem that all of the incidents of *T's* way of necessity, which had been defined in terms of mineral rights, were absorbed into *B's* common law way of necessity, as mineral owner. Naturally the disappearance of *T's* privilege to use the surface in no way precludes *B's* ownership of the houses since *B* purchased at the bankruptcy sale all the leasehold property including, one would think, the right of severance. At least *B's* way of necessity as regards the use and removal of the old houses or the erection, use and removal of new ones, should be no less than *T's* former easement by way of necessity, so long as there is minable coal and reasonable prospect of future development.

Assuming that these houses were removable fixtures arising out of use of a way of necessity and assuming further that *B* succeeded to the rights under the original mineral lease, either by the bankruptcy assignment or by *B's* own common law way of necessity, these assumptions do not dispose of the issues in this case. In the present suit for an accounting in equity the trial chancellor must decide this quasi-contractual claim on its intrinsic merits, having regard to all the facts in the case. The evidence here indicated that most of the houses had been unoccupied for years, and that the mineral owners were completely indifferent to their injury or destruction. From all appearances *B* was willing to have these buildings continue to deteriorate until they became worthless.[12] Furthermore the surface owner, *A*, entered into possession to prevent further ruin of the houses and expended a great deal of time and considerable money in repair and renovation. In these circumstances no

[9] 2 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) §§ 786-788.

[10] Higgins v. Washburn, 11 Cal. App. 735, 106 Pac. 415 (1910); Scott v. Fairlie, 81 Fla. 438, 89 So. 128 (1921).

[11] Agnew v. Charlotte, *etc.* R. R., 24 S. C. 18 (1884); Wiedemann v. Crawford, 158 Ky. 657, 166 S. E. 185 (1914).

[12] These facts appear in the record, though they are not mentioned in the opinion.

doubt it seemed thoroughly inequitable to the trial chancellor that *B* should now claim a right in the rents.

The appellate court here wisely refrained from determining the extent of *B's* surface rights, including the use of the houses in question, if and when further development of the coal takes place.

J. L. G. Jr.

WORKMEN'S COMPENSATION — DEATH BENEFIT AWARDS TO PARTIAL AND TOTAL DEPENDENTS. — *X* was fatally injured while at work for the *Y* company, a subscriber to the workmen's compensation fund. *X's* widow, separated from him for several years, was not dependent. The commissioner awarded benefits to *X's* dependent child but denied benefits to *X's* partially dependent mother. The appeal board reversed the commissioner's order denying benefits to *X's* partially dependent mother. *Held,*[1] two judges dissenting, that it is within the sound discretion of the commissioner to make an award to a partially dependent mother, though there is also an award to a dependent child. *Hudson v. State Compensation Commissioner.*[2]

The Workmen's Compensation Act provides, "If the deceased employee be an adult and there be no dependent widow, widower or child under sixteen years of age, or wholly dependent person, but there are partly dependent persons at the time of death, the payment shall be . . ."[3] A succeeding section reads, "The benefits, in case of death, shall be paid to such one or more dependents of the decedent . . . as may be determined by the commissioner. . . . Payment to a dependent subsequent in right may be made if the commissioner deems proper. . . ."[4]

The latter provision modifies the meaning of the prior provision and gives the commissioner a discretion in awarding death benefits, because, by the generally accepted rule of construction, if different parts or sections of the same statute are found to be in irreconcilable conflict, the last in order of position or arrangement will prevail.[5] This view finds support in a California case[6] giving

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1 It is noted that the compensation commissioner appealed from the ruling of the appeal board.

2 5 S. E. (2d) 108 (W. Va. 1939).

3 W. VA. CODE (Michie, 1937) c. 23, art. 4, § 10 (f).

4 W. VA. CODE (Michie, 1937) c. 23, art. 4, § 11.

5 Board of Education v. Tyler County Court, 77 W. Va. 523, 87 S. E. 870 (1916); Speidel Grocery Co. v. Warder, 56 W. Va. 602, 49 S. E. 534 (1904); Harvey Coal & Coke Co. v. Tax Com'r, 59 W. Va. 605, 53 S. E. 928 (1905); BLACK, CONSTRUCTION & INTERPRETATION OF LAWS (2d ed. 1911) 102.