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Mines and Minerals--Implied Right to Strip Mine Coal

B. E. B.
West Virginia University College of Law

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or statute overcome the weak arguments against the doctrine, cy pres, one of the strongest and most favored doctrines in Anglo-American trust law, has never been used by our supreme court. Through historical error, limited legislation and unduly narrow construction of the applicable statute in the Goetz case, no trust has yet been preserved by our highest court by this, one of the most beneficent doctrines in equity jurisdiction. Perhaps it can be said of our court, as of another, that its refusal to allow these trusts "... has lost to the needy of the state innumerable charities because the Virginia court preferred to be consistent rather than right." That state has undergone a reversal in policy with regard to charities but it remains for further legislative action or more liberalized judicial interpretation to bring this aspect of West Virginia trust law into accord with the weight of authority in this country.

E. W. C.

Mines and Minerals—Implied Right to Strip Mine Coal.—The subject of the implied strip mining rights has not received much attention by the courts, due primarily to the fact that wherever the right to strip mine is intended, it is usually expressly stated. The problem arises, however, where there is a reservation or conveyance of coal without spelling out the right to mine the coal by strip mining methods. The question then is whether, under the terms of the reservation or grant, the coal owner may strip mine the coal. The issue is especially important when it is subsequently discovered that all or a substantial part of the coal cannot be removed except by stripping it.

The problem is important because of the destructive nature of the strip mining method. By its use, the surface overlying the coal is either completely removed or destroyed, although it may

22 Any reluctance to accept fully the English view of cy pres is said in a Comment, 49 Yale L.J. 303, 307 (1939), to be due primarily to: (1) the stigma and confusion attached to the ancient king's prerogative cy pres, as distinguished from judicial cy pres; (2) overemphasis placed by the courts upon effectuation of a donor's intent; (3) desire in some states to limit gifts to charitable corporations which are under legislative supervision.

23 Note, 17 Va L. Rev. 302 (1931).

24 See note 2 supra.

1 If the right is expressly spelled out, it will be allowed unless prohibited by statute. Tokas v. Arnold Co., 122 W. Va. 613, 11 S.E.2d 759 (1940). That no West Virginia statute prohibits it, see West Virginia-Pittsburgh Coal Co. v. Strong, 129 W. Va. 832, 42 S.E.2d 46 (1947).
afterwards be replaced. Thus it can be seen that where stripping is being carried on, the surface ground is worthless, either temporarily or permanently. But this is not so as to the usual or normal underground or shaft method of mining. There, only a very small portion of the surface is used, the rest remaining intact and undisturbed, and no part of the surface is destroyed unless by subsidence. As to underground mining, there is no legal problem concerning the surface, where the right of subjacent support has been waived. The coal owner has the right to mine his coal even though the grant or reservation thereof may contain no express mining clause at all. The right to mine the coal is incident to the ownership thereof, and he has the inherent "right to use the surface of the land in such manner and with such means as would be fairly necessary for the enjoyment of the mineral estate", and he may use such machinery and appliances as are ordinarily used in the business of mining, and is not limited to those which were in use at the time of the grant, but may keep pace with the progress of society and modern inventions. This inherent or incidental right is based upon the principle that "when a thing is granted, all the means to obtain it and all the fruits and effects of it are also granted." So, it is an established rule that even without express grant or reservation, the court will imply the right of the coal owner to use so much of the surface in mining the coal as is "reasonably necessary" to the mining. But does this include strip mining?

The cases indicate that whether the right to strip mine shall be implied—and indeed whether any right not expressly granted or reserved shall be implied—depends on the intention of the parties. In order to arrive at that intention, the court will construe the deed of the surface and reservation of minerals (or grant of the minerals) in the same way as other written instruments, and that is according to the intention of the parties. As to the instrument’s meaning, it must be construed as of the date of its execution. In addition to construing the instrument, the court will look at the surrounding circumstances existing when the deed was entered into, the subject matter of the deed, and the situation of the parties, in order to arrive at their intention.

2 Squires v. Lafferty, 95 W. Va. 307, 309, 121 S.E. 90, 91 (1924).
4 See note 2 supra.
8 Gibney v. Fitzsimmons, 45 W. Va. 334, 52 S.E. 189 (1898).
Intention of the parties at the time of the execution of the deed being the controlling factor then, the court has refused to imply the right to strip mine in the West Virginia cases because it has felt, considering all the enumerated factors, that the parties did not intend such right.

The most recent case arising in West Virginia is *United States v. Polino.*

By deed of 1917 defendant conveyed a tract of mountainous land to the United States, knowing that the government intended to use the land for a national forest and game preserve. Defendant reserved the "right to mine and remove minerals" from the land, but provided that the mining should be done strictly in accord with rules and regulations prescribed by the Secretary of Agriculture, among which were the requirements that only so much of the surface be occupied or disturbed as was reasonably necessary, and that provision must be made for support of the surface. Defendant's lessee started to strip mine. The United States sought an interpretation of the reservation in the deed. The court held that defendant (or his lessee) had no right under the reservation to employ strip mining methods. The court said that the severance of the surface from the coal must be construed in the light of the circumstances existing at the time of such severance, and construed as of that time, the court could not find any intent of the parties that stripping be permitted. The court stresses the fact that strip mining was not common in that locality at that time, as having a bearing on the parties' intent. Also stressed is the fact that defendant knew the purpose for which the government was acquiring the land, and that purpose would be completely thwarted if defendant's lessee strip mined the land. Because of these two factors, and because of the regulations of the Secretary of Agriculture, the court felt that the parties apparently did not intend the land to be strip mined, and without a showing of such intent the court refused to imply the right. That case is easy to justify, especially so since the pleadings failed to show that the coal could not be mined except by strip mining it.

*Oresta v. Romano Bros.* was a suit for damages to the surface from strip mining. The deed of the surface reserved the coal "with the right and privilege of full and free ingress or egress in, on, beneath and over said lands for the purpose of mining, excavating, shipping, and removing said coal . . . and all and every privilege

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11 See note 7 supra.
necessary to the full and perfect enjoyment of the rights and privileges herein reserved.” Defendant removed 10,000 tons of coal admittedly which could not have been removed except by strip mining it. The court held that “it is evident from the language of the reservation of the mining rights, that at the date of the deed of severance ... the parties to the deed intended that the coal should be mined and removed by the usual method then known and accepted as common practice ... where the lands in question are located, and that such method, as it then existed, did not include [strip mining].” Here again the court stressed the fact that stripping was not then of common practice in the locality, as tending to show the parties did not intend the right to be reserved.

In Rock House Fork Land Co. v. Raleigh Brick & Tile Co., a deed of 1902 conveyed to plaintiff “all the coal and other minerals ... except oil and gas,” and the “right to enter upon said land and to mine, excavate and remove all the coal ... .” The court held that in construing the word “minerals”, brick clay was not included therein because not minable by ordinary processes of mining; that from the language used, “the parties only intended such minerals as were secured by the ordinary process of mining.” And if they were minable only by other than ordinary processes (stripping), then they would not be within the contemplation of the parties as “minerals”. While not strictly a coal stripping case, the court follows the pattern (or perhaps sets the pattern) of refusing to imply strip mining rights where it can seize on any circumstance evidencing an intent to the contrary.

Perhaps the principal West Virginia case on the subject is West Virginia-Pittsburgh Coal Co. v. Strong, and it deserves considerable attention. By deed of 1904, defendant conveyed coal in place to plaintiff, “together with the right to enter upon and under said land with employees, animals and machinery at convenient points, and to mine, dig, excavate, and remove all said coal ... and to make and maintain on said land all necessary and convenient structures, ways, and openings, for such mining, removal, and conveying of all the coal aforesaid ... .” Provision was also made that plaintiff must pay for such surface occupied or used, at so much per acre, and that defendant was to give a deed in fee simple therefor upon payment. A considerable part of the coal could not be mined

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12 Id. at 641, 73 S.E.2d at 627.
13 83 W. Va. 20, 97 S.E. 684 (1918).
14 Id. at 21, 97 S.E. at 685.
by the usual methods, but only by strip mining, but the court refused to imply the right to strip. As to the provision for payment for use of the surface, the court said that that provision showed that the parties did not contemplate complete destruction of the surface. The court then said that by reading the instrument as a whole "it was the manifest intention of the parties to preserve intact the surface . . . subject to the use of the owner of the coal . . . to 'mine, dig, excavate, and remove all of said coal' by the usual method at that time known and accepted as common in the locality. . . . We do not believe that this included the practice known as strip mining." Here, the court, as in the other cases, stresses the fact that strip mining was not a common or accepted usage in that locality at the date of the deed. Then the court said that if the owner of the surface has a proprietary right to subjacent support, he has at least an equal right to hold intact the thing to be supported, i.e., the surface, "in the absence of a clearly expressed intention to the contrary." Thus the court intimates, if it does not say, that the owner of coal will not be allowed to strip mine it unless that right is expressly given to him. The court then refers to the statute regulating and controlling strip mining operations in West Virginia, and says that statute shows a plain purpose of rigidly controlling strip mining. The court felt that the statute showed that a liberal construction must not be applied by the court, especially in view of the declaration of legislative purpose in passing the act. Thus, despite the fact that a large part of the coal could not be mined except by stripping, the court refused to imply that right. It said that the granting clause gave

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19 It is difficult to see why plaintiff should not be allowed to strip mine the land once defendant had conveyed it to him by deed in fee simple, as provided, but the court apparently thought not.

17 See note 15 supra at 836, 42 S.E.2d at 49.

18 That he has such right, see Cole v. Signal Knob Coal Co., 95 W. Va. 702, 122 S.E. 268 (1924); Drummond v. White Oak Fuel Co., 104 W. Va. 368, 140 S.E. 57 (1927). That such right may be waived, see notes 5 and 6 supra.

19 See note 15 supra at 837, 42 S.E.2d at 50.

20 W. VA. CODE c. 22, art. 2A, §§ 1-9 (Michie 1955).

21 In general the statute provides for the posting of a bond of $500 per acre for every acre intended to be strip mined, before commencing such operations, said bond conditioned that the strip miner will replace the soil, level it off, and reseed and replant it, at the end of the operations.

22 W. VA. CODE c. 22, art. 2A, § 1 (Michie 1955). "In view of the fact that the practice of strip mining may and commonly does cause soil erosion, stream pollution and . . . increases the likelihood of floods, destroys the value of land for agricultural purposes, counteracts efforts for the conservation of soil, water, and other natural resources . . . and in general creates hazards dangerous to life and property; now therefore the legislature declares that its purpose in the enactment of this article is to provide such regulation and control of strip mining as to minimize its injurious effects as much as may be possible."
plaintiff the right only to "use" so much of the surface as was "convenient and necessary", but that the right to use was not the right to destroy.\textsuperscript{23}

In a rather vigorous dissenting opinion\textsuperscript{24} (which may be a fore-shadowing of things to come) Judge Fox felt that a more liberal attitude should be taken by the courts, more in line with modern technical advancements. "Whatever may have been in the minds of the parties to the 1904 deed, in respect to strip mining, it is not in my opinion a safe rule to place obstructions in the way of the business and mechanical developments of the present age."\textsuperscript{25} He noted that strip mining has become more common and more practical than in former years, and that it should be recognized; that by this method of mining coal is made available which might not otherwise be produced. And besides, the statute regulating strip mining has minimized the evils thereof, and that should be considered. He felt that if the coal could not be mined otherwise than by stripping, plaintiff should be allowed to do so; that since the deed granted plaintiff all the coal, the court by denying plaintiff the right to strip mine that coal, denied him what the deed expressly granted to him, and that thus the right of plaintiff to remove all the coal was completely destroyed.

There is much to be said in favor of Judge Fox's views in the light of modern conditions. Perhaps that might pave the way for future decisions along the lines of this dissent. But as far as the reported cases in West Virginia have gone, the law on the subject is definitely inconclusive. It may be seen that although the court in West Virginia has not said that the right to strip mine cannot be implied, yet it has been so strict in construing the grants and reservations, and the circumstances surrounding the execution thereof, as to amount, for all practical purposes, to a declaration that strip mining will not be permitted in any case where it is not expressly provided for. This is especially noticeable in the West Virginia-Pittsburgh case. As to what facts and circumstances might possibly be sufficient for an implication of stripping rights, the court has not said. But having often stressed the fact that at the time of the deed strip mining was not known and accepted as common practice in the locality, the decisions have posed the question whether stripping rights might be implied if at the time of

\textsuperscript{23} The court borrowed this phrase from Barker v. Mintz, 73 Colo. 262, 215 Pac. 594 (1923).

\textsuperscript{24} See note 15 supra at 844-851, 42 S.E.2d at 53-56.

\textsuperscript{25} Id. at 848, 42 S.E.2d at 55.
the deed strip mining was common in the locality. It would seem that the court is at least implying that that circumstance might be sufficient, if the grant or reservation is also sufficiently broad enough not to exclude it. A fortiori it should be implied if, in addition to those circumstances, all or a large part of the coal could not be mined except by strip mining methods. In such a case, would not strip mining be "fairly necessary for the enjoyment of the mineral estate?" The court has not found that fact alone to be sufficient to imply the right to strip mine.

On this element of impossibility of mining except by stripping, should knowledge of the parties, or either of them, of this fact at the time of the deed be material on the question of the parties' intention? On this point the court has made no pronouncement. It would seem, however, that the very justice of the case would require that knowledge of the parties at the time of the execution of the deed should be given serious consideration on the issue of whether the right to strip mine should be implied in the particular case. One commentator has suggested that: (1) If neither A (who conveys the surface and reserves the coal) nor B (grantee of the surface) knows at the time that the coal must be strip mined, then A may not strip mine it. In such case it is better not to imply the right to strip mine, but to require an express reservation, thus placing the burden on the coal owner if this is not done. (2) If both parties know this fact, then A should have the right to strip mine. In such case, B has by his knowledge and by his silence accepted the risk of destruction of the surface. Otherwise, A would be deprived of his coal and the reservation would be a nullity. An even stronger case is made where A conveys the coal to B, reserving the surface. If B could not strip mine it, then A has actually conveyed nothing, and B is deprived of the value of the grant. Where both parties know the fact, then it would seem more just to place the burden on the surface owner. (3) If A knows but B does not know that the coal must be strip mined, A should not be allowed to strip mine it. To deny A the right in such case is only to give full effect to the grant. A having knowledge, he should expressly reserve the right to put B on notice. If he does not, it is his own

28 See note 24 supra.
27 See note 2 supra.
29 It makes no difference whether the coal in place is reserved or granted. The principles are the same regardless of which way the party acquires it.
30 Apparently the West Virginia cases fall here, for in them there is no indication that the parties knew this fact when they entered into the deed.
fault. B should not be penalized. (4) If A does not know, but B does know that the coal must be strip mined, then A should be allowed to strip mine. Here again, by his knowledge and silence, B must assume the risk. To deny the right is to nullify the reservation.

However, as is pointed out above, on these questions one can only surmise as to what the court might do in the future.

It would be well to review briefly here what position the Pennsylvania court has taken on the question of implied strip mining rights. It is to be noted in the following cases that the Pennsylvania court has been considerably more liberal than the West Virginia court in finding a basis for implying strip mining rights.

In Commonwealth v. Fitzmartin, A conveyed the surface, reserving “all the coal . . . in and under the surface,” with the right to mine and remove it “without any liability whatsoever for damages to said lands. . . .” The surface was such that the coal could be mined only by strip methods, although the pleadings do not show whether this fact was known to the parties at the date of the deed or not. Held (by 4-3 decision), that A had the right to strip mine. By reserving all the coal, without any liability for damages to the surface, the grantee impliedly waived any right to surface support, and “unless the words . . . refer to and reserve the right to strip mine the coal, they would be meaningless.”

In Mt. Carmel R.R. v. M. A. Hanna Co., A attempted to strip mine coal under B’s railroad right-of-way. The grant of the right-of-way to B reserved the coal and the right to remove it “in any manner or by any method of mining”, and it was stipulated that B would assume the risk of the “surface of the land . . . breaking or falling in by reason of” the mining. Held, that strip mining was not prohibited under the reservation, even though operation of the railroad would have to cease until a fill in was made. The court also said that it was immaterial that the coal could have been removed by the ordinary underground methods. It is arguable that this case could be considered as an express reservation of stripping privileges.

In Commonwealth v. Fisher, a deed of 1855 conveyed the surface, reserving “as though the present conveyance had not been

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32 Id. at 399, 102 A.2d at 897.
34 364 Pa. 422, 72 A.2d 568 (1950).
made . . . all the coal in or upon said premises”, with the right to mine and remove all the coal “with as little injury or damage [to the grantees] . . . as shall be practicable consistently with the success of the [mining].” The land was unimproved mountainous land held by the state as a game preserve. Part of the coal could not be removed except by strip mining, and although strip mining was not of common practice in the locality at the time of the deed, it was so at the time the coal owner commenced to strip mine. Held, that “there is no rule of law which would preclude [the coal owner], having the right to mine the coal, from using methods for that purpose made possible by modern machinery and inventions.”

It was noted that Pennsylvania has a statute, which is very similar to the West Virginia statute, regulating strip mining. The court felt that in view of that statute, any damage caused to the surface owner would be merely of a temporary nature. The court also pointed out that the wording of the deed amounted to a waiver of surface support.

In Rochez Bros. v. Duricka, coal was reserved with the “right to enter in, upon, and under said lands . . . for the purpose of . . . mining”, and the “right of mining and removing under said described premises” the coal, and without liability for injury to the surface. Held, that though surface support was waived, the language used in the reservation was peculiarly applicable only to shaft or underground mining, and did not refer to strip mining. A material factor here was that the land was rich agricultural land, ideal for farming, and as such it would be rendered unproductive for many years if strip mined, thus the statute would not save it here, as in the Fisher case.

Thus it is seen that Pennsylvania takes a much more liberal view than West Virginia. The Pennsylvania cases apparently go so far as to imply the right to strip mine wherever the language is sufficiently broad to amount to a waiver of subjacent support, provided it does not expressly, or as a matter of interpretation exclude strip mining. West Virginia certainly has not gone that far, nor perhaps should it, for there is a very considerable difference between mere subsidence of the surface, and its destruction. The fact that the coal is not removale except by strip mining is an added reason

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35 Id. at 427, 72 A.2d at 570.
37 See note 20 supra.
38 Compare this decision with Judge Fox’s dissenting opinion in West Virginia-Pittsburgh Coal Co. v. Strong, note 15 supra.
to imply the right in Pennsylvania, but, as is seen, that is not a necessary element.

So, then, there are basically two views on the subject of implied stripping rights: The strict view of West Virginia, and the liberal view of Pennsylvania. As to the few cases outside of the two states, they seem to be more in accord with the West Virginia view. Note in the following cases that the decisions are almost directly in line with what the West Virginia court is implying in its decisions.

In Barker v. Mintz, the coal could not be mined except by stripping, but the court refused to allow the coal owner the right to strip mine.

In Franklin v. Callicoat, at the time of the deed strip mining methods were not known in the locality, and the land was used for agricultural purposes. In spite of the fact that the coal could not be removed except by strip mining, the court would not imply the right to do so.

In MacDonnell v. Capital Co., the court said, “An expressed mineral reservation contained in a deed carries with it, by necessary implication, the right to remove such minerals by the usual or customary methods of mining and thus reduce them to possession, even though the surface ground may be wholly destroyed as a result thereof.” The opinion does not indicate whether the court meant customary at the date of the deed, or customary at the date of mining operations. But in any event, the court is obviously saying that if strip mining is a customary method of mining at the date of the deed, the coal owner may employ that method in removing his coal, whether the court also means the latter interpretation or not.

In Byron v. Utah Copper Co., a copper ore rather than a coal case, the court felt that it could not say, as a matter of law, that mining operations were confined to subterranean mining or operations beneath the surface. However, in this case, at the date of the deed, surface mining was of common practice in the locality, and it was the usual method of mining employed by the mineral owner on property in close proximity to the property in question.

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40 See note 23 supra.

41 But even though not implying the right, the court still allowed the coal owner to strip mine the coal upon payment of damages to the surface owner, since the stripping operations did not considerably injure him anyway. Neither Pennsylvania nor West Virginia has gone this far.


44 53 Utah 151, 178 Pac. 53 (1918).
Might we safely assume that West Virginia would follow the line of decision in these cases if these fact situations arose here? Has not the West Virginia court at least implied as much?

In the final analysis, the real question is which party should more equitably bear the burden of loss or damage, the coal owner or the surface owner? Is it unjust or unreasonable to require that strip mining rights be spelled out? Certainly the inconvenience in doing so would be negligible. There would perhaps be the disadvantage that the fee owner might not be able to sell the surface or get as good a price for it if he reserved the right to strip mine the coal, or that in conveying the coal he might not get as good a price if he did not also grant the right to strip mine. But would not fair dealing and honesty require that the parties disclose their intentions, or possible intentions anyway? This would entail no hardship where severance deeds are now being made, or will later be made. But this does not entirely solve the problem, because of the vast number of severance deeds made in the past and before the present position of the court had been taken. In such cases, and in any exceptional cases where the right is perhaps left out of the deed through error; or where the parties honestly do not think strip mining will be necessary, but it turns out later to be necessary; or where knowledge of that fact and silence on the part of one party might amount to fraud whereby he is unjustly enriched—in such cases perhaps the right to strip mine should be implied. At least the court should give extra careful consideration to the peculiar circumstances involved in such cases. But generally, the court might be entirely justified in laying down such strict rules. In any event, whether the court may be considered too strict or not, at present at least, it seems to be firmly committed to the view that the right to strip mine must be almost expressly spelled out before the court will concede such right to any coal owner against the interests of the surface owner.

B. E. B.