Rights of Fee Simple Owner of Subjacent Mineral Stratum in the Containing Space

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Rights of Fee Simple Owner of Subjacent Mineral Stratum in the Containing Space.—In a recent case\(^1\) in equity the bill alleged that the defendant owned "all the coal, limestone rock, ores, and minerals between the center of the earth and the stratum of cement rock 9 feet or less in thickness, located about 30 feet above the Wheeling vein of coal underlying the surface" of the complainant's land, and that the defendant was, without the consent of the complainant, transporting coal from adjoining lands through passageways formed by mining said underlying coal. An injunction was requested. A demurrer to the bill was sustained, and the trial court certified its ruling to the Court of Appeals, where the ruling was affirmed. No brief was filed by the complainant. The court in a brief opinion and without extended discussion followed the great weight of authority,\(^2\) which is to the effect, that on a grant or reservation in fee simple of a stratum of mineral, such as a vein of coal, thus severing the ownership of such mineral from that of the rest of the land, the owner of such mineral may make use of the spaces produced by mining, for the purpose of transporting through such chambers coal mined on other lands. This logically follows from the conclusion reached in these cases that where there is a grant or reservation of subsurface minerals in fee, the parties intend a grant or reservation, not only of the minerals in fee, but also of the space containing such minerals; hence since the owner of the mineral vein owns the space in fee simple, he may use it for the purpose of transporting minerals from other lands.

About five years ago the Supreme Court of Virginia\(^3\) ventured to disagree with the then unbroken line of decisions on the question, and took the view that the owner of the minerals had no right to use said space for purposes other than those properly connected with the mining of said minerals. In an article published in the West Virginia Law Quarterly,\(^4\) the authors contended that the result reached by the Virginia court was, on principle, preferable to that of the majority rule; that where the grant or reserv-

\(^2\) See collection of cases in 27 W. Va. L. Quar. 334, n. 7.
vation of minerals is silent on this point, the intent of the parties is that title to the minerals only is granted or reserved, together with such privileges to use the space containing such minerals as may be necessary for the purpose of mining the minerals, whenever the owner chooses to mine the same; that the privileges of using the space therefore are thus limited and terminate as soon as all the minerals have been removed.

If A, a landowner, grants a specific vein of coal to B in fee, he probably never dreams that he is granting B a fee simple estate in the containing space, which estate presumably will endure forever or until retransferred or terminated by some method recognized by law, unless one assumes that A knows the law and consequently is fully aware of the legal effect of his conveyance. The mineral is valuable only because it can be mined and sold, and certainly A could by appropriate language, even in jurisdictions which follow the majority rule, convey the mineral in fee together with the privilege of using the containing space only for the purpose of removing such mineral.\(^5\) In other words there is nothing strange in the conception of fee simple ownership of mineral in place, without the fee simple ownership of the containing space, nor does there seem to be any good reason why such an estate cannot be created by express language. It is submitted that the average reasonable man, not learned in law, when he makes such a grant as is supposed, thinks he is granting the minerals only, and would be greatly surprised if he were informed that he was creating an estate in fee in the space, which would continue after all the minerals had been removed. The law ought not to run counter to the reasonable suppositions of ordinary men who are not learned in law, unless there is some good policy which makes such a departure desirable. It is submitted then that if ordinary reasonable men would in such case suppose the grant carried only the minerals with the privilege of mining them, and not a perpetual estate in fee in the space containing the minerals, (which space the owner presumably would be privileged to use for any pur-

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pose not inconsistent with the rights of the adjoining property owners, even after all the minerals had been removed) this supposition ought to be respected unless there are sound reasons of policy opposed to it. Are there such considerations of policy?

The first English cases which involved the right of the coal owner to transport coal from adjoining lands through spaces made by mining, merely assumed title to the space passed for the reason that the grant or reservation of the coal was absolute, hence it was concluded the parties must necessarily have intended this result. Was this conclusion based on any reasonable policy or was it merely the effect of technical notions as to estates in fee simple? If it really was based on policy, evidently such considerations were not sufficiently strong to apply in the case of copyhold lands for in the case of copyholds the English court came to the opposite conclusion. It seems evident that our courts merely followed the English decisions and that our decisions were very largely the result of the doctrine of stare decisis.

It has been suggested that the majority rule is based on public policy—that there is a public interest in the encouragement of the coal industry and that this rule is justified because it tends to encourage the mining of coal. Perhaps there may be some force in this economic argument, though it is doubtful. It is improbable that one mine in a hundred in this country would be adversely affected were the rule otherwise, and such a small minority probably would not affect the retail price of coal at all. The majority rule may indeed aid the hard working coal speculator at times, by enabling him to secure control of the mineral at a strategic point, which he may dispose of at a fat profit, after securing his advantage from some less learned landowner. He may pass along a part of his profit to the public but one can not help but have doubts. Certainly there can be no object in encouraging the coal industry unless beneficial to the public, particularly at the expense of the landowner. Besides why did not the English courts apply the same rule to copyholds, and why do not our

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7 For the technical basis of the distinction as to copyhold lands together with authority see 27 W. VA. L. QUAR. 394-6.
8 See dissent of Prentis J., in Clayborn Case supra at p. 402.
courts permit the coal operator to transport coal from adjoining lands across the surface? The policy here would be just as strong, and in the latter case far more effective. Often there would be little or no actual damage to the landowner. It is to be doubted whether even a coal operator's statistician could make a convincing demonstration of any benefit to the public resulting from the workings of the majority rule.

It has also been suggested that to hold that a grant or reservation of mineral in fee simple gives a fee simple estate in the minerals with only incidental privileges of using the containing space for the purpose of mining such minerals, would create a new sort of estate unknown to the common law;\(^9\) that there is a sound policy against this, and then the much discussed and much abused case of *Hill v. Tupper*\(^{11}\) is apt to be cited as authority. The writer has never been able to see how that doctrine, however it may be stated, or that case, whatever it may hold, can possibly have any application to the question under discussion here. The question is merely what shall the law assume the parties mean by a grant or reservation of a mineral vein in fee simple without any language bearing on the ownership of the containing space? It most certainly is not a question as to whether or not the parties will be permitted to create an estate in fee in mineral without also passing fee simple title to the space. No court has ever suggested this may not be accomplished by express language, and as a matter of fact not only is there authority that such an estate may be created in a mineral vein,\(^{12}\) but there are examples of such estates to be found in common law decisions. For example such is the estate created

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\(^9\) The writer believes there was no merit in the suggestion even fifty years ago, and at present the difficulty with the soft coal industry is overdevelopment. Such statements are afterthoughts suggested to justify decisions already made, and such statements are apt to be without substantial foundation. Besides why should the public interest be so strong as to justify what is otherwise an unjust legal trap for the landowner? Why should not the coal operator and the public pay for the coal they get?

\(^{10}\) This is asserted in a note in 31 *Yale L. J.* 747, 753. It has been said that Hill v. Tupper holds that a new species of incorporeal hereditament cannot be created. It is doubtful whether the doctrine of that case has any value whatever in this country where recording acts are quite generally in force. But even so, the estate in the case under consideration is a fee simple estate and not an incorporeal hereditament. It may well be true that a new type of fee estate cannot be created, for example, one that will descend to male and female heiress alternately Johnson v. Whiton, 159 Mass. 424 (1893), but that doctrine obviously has no application here. The conception of ownership of property which is occupying space owned by another is so very common today it could only lead to confusion were the courts to deny such possibility.

\(^{11}\) 2 *Hurl. & C.* 121 (1868).

\(^{12}\) See cases cited in n. 5 *supra*. 

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where standing timber is conveyed in fee simple either by grant or by reservation;\textsuperscript{13} or in case of a grant or reservation of a clay, rock or coal stratum on the surface of the land; or presumably in case of a conveyance of a vein of coal near the surface where the practical manner of mining it is by stripping. Certainly in these cases there is a fee simple interest in the trees, clay, rock or coal with the incidental privileges in the containing space essential to enable the owner to enjoy his property. In these cases it is probable no mineral owner ever contended he must necessarily own the space in fee merely because the grant did not expressly provide the contrary. Why should there be such a difference merely because the mineral happens to be far beneath the surface, or in the case of a vein of coal near the surface, merely because it happens to have such a roof that it can best be mined by tunnels instead of by stripping?

While it is improbable that the majority rule results in any benefit whatever to the public, though it does furnish a trap into which the unsuspecting landowner is apt to fall, to the profit of the coal operator, yet it will probably persist, not because it is a good rule or is based on sound policy, but because there will probably be no strong demand for a change. So far the rule has been applied only where the spaces produced by mining have been used only for the transportation of coal from adjoining lands. Should a railroad company some day buy an old mine and lay tracks through it thus making a tunnel, the courts would probably refuse to carry the logic of the theory on which the majority rule is based to the extent of allowing the railroad to use the space without further compensation, and would probably find some means to compel payment for the privilege.

In the principal case it is only fair to point out that according to the allegations of the bill the defendant owned practically everything from the center of the earth up to a certain point about 80 feet above the Wheeling vein of coal, and the complainant owned the surface and the strata down that far. In such case one might well make a distinction, and reasonably presume that the parties responsible for the severance in ownership, might well have

\textsuperscript{13} Tiffany, Real Property, 2nd. ed. 882-3.
intended to give to defendant all the space as well as all the minerals from the stated level downward. Consequently the result reached might be reached even under the other view suggested above.

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