Washington University Law Review

Volume 1 | Issue 2

January 1916

# Legal Regulations of Miner and Surface Owner

# ST. LOUIS LAW REVIEW

Published Quarterly During the University Year by the Undergraduates of Washington University Law School.



# NOTES

## LEGAL REGULATIONS OF MINER AND SURFACE OWNER

This note deals with the reciprocal rights and duties of the owner of the surface of private land and the owner of mines and mineral rights under the land.

Mines on public land, matters of remedy, and rights and duties which affect others than the surface and subjacent owners, are without the scope of this note.

The ownership of the minerals under the land may be separated either by exception or by grant.[1] In general, the relative rights and duties of the surface and subjacent owner are said to be the same

[1]Marvin v. Brewster Iron Co., 55 N. Y. 538.

whether the right of the mine owner is created by an exception in a deed to the surface, or a grant of minerals, the grantor excepting the surface.[2]

*Subjacent Support*

Upon the separation of the ownership of the surface from the ownership of the minerals thereunder, there is imposed on the owner of the lower stratum, an implied duty to support the surface of the land.[3] This duty is absolute,[4] and does not depend on whether the mining is skillfully done,[5] "but whether by reason of failure to support it, the surface is injured."[6] In a case where the mineral is situated so near the surface that it cannot be mined without destroying the surface, this fact might be a circumstance which would show a waiver; but, if a waiver is not shown, then the mineral cannot be taken.[7]

A person may own the mineral and be unable to get at it.[8] In the case of stone, for instance, which cannot be mined without disturbing the surface of the soil and completely destroying the benefits accruing to the owner of the surface, it is held that the owner may only take out such stone as is exposed, from one cause or another, by the removal of the soil.[9]

Although the courts sometimes phrase the rule: "The owner of the estate in the minerals is entitled to remove only so much of them as he can take without injury to the surface,"[10] it is generally assumed that artificial support may be substituted for the natural support furnished by the mineral.[11]

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[2]Hooper v. Dora Co., 95 Ala. 235; Wardell v. Watson, 93 Mo. 107; Baker v. Pittsburg, etc., R. R. Co., 219 Pa. 398.

[3]Coleman v. Chadwick, 80 Pa. St. 81; Horner v. Watson, 79 Pa. St. 242; Jones v. Wagner, 66 Pa. St. 429; Piedmont Coal Co. v. Kearny, 114 Md. 496; Southwest Mo. R. Co. v. Morning Hour Mining Co., 138 Mo. App. 129; Wilms v. Jess, 94 Ill. 464; Donk Bros. Coal Co. v. Novero, 135 Ill. App. 633; Dugdale v. Robertson, 3 Kay and J. (69 Eng. Reprint) 695. On this general question see notes in 24 Am. St. Rep. 555, 41 L. R. A. (N. S.) 236, 13 L. R. A. 628.

[4]Youghiogheny River Coal Co. v. Allegheny Nat. Bk., 211 Pa. 319, 69 L. R. A. 637.

[5]West Pratt Coal Co. v. Dorman, 161 Ala. 389, 23 L. R. A. (N. S.) 805; Lloyd v. Catlin Coal Co., 210 Ill. 460; Collins v. Gleason Coal Co., 140 Iowa 114, 18 L. R A. (N. S.) 736.

[6]Berkey v. Berwind, 229 Pa. 417.

[7]Bibby v. Bunch, 176 Ala. 585.

[8]Phillips v. Collinsville Granite Co., 123 Ga. 830; Silver Springs, etc., v. Van Ness, 45 Fla. 559.

[9]Phillips v. Collinsville Granite Co., supra.

[10]Per Boyd, C. J., in Piedmont v. Kearny, 114 Md. 496, supra.

[11]Livingston v. Moingona C. Co., 49 Iowa 369; note in 41 L. R. A. (N. S.) at p. 238.

"The word 'surface,' as used in the books, means, not merely the geometrical superficies without thickness, but includes whatever earth, soil, or land lies above and superincumbent on the mine."[12] Therefore, one mine owner has a right to support from the owner of a deeper mine below it.[13]

The subsurface owner is only obliged to support the surface in the state in which it was at the time of the severance of the estates, or in the state for the purpose of putting it into which, the grant was made.[14] The duty does not extend to additional buildings or other burdens. Yet, when the burden on the surface is increased and subsidence occurs, it will be assumed *prima facie* that the subsidence would have occurred if no additional burden had been placed thereon.[15].

In regard to springs on the surface which are diverted as a result of ordinary mining, the rule is that the mine owner is not liable;[16] but if improper removal of surface support causes fissures, or in any other manner causes a loss of water, there is a cause of action.[17]

Of course, the right to support may be bartered away.[18] This may be and usually is done (if at all) in the contract which severs the two estates.[19] The intention to waive the right must appear either expressly or by clear implication.[20] "It must be expressed in terms so plain as to admit of no doubt," is the way one court has phrased it.[21] A provision "releasing and discharging" the mine owner from all liability for damages to the surface is held to be an express waiver.[22] So also is a reservation of "all the coal" with the sole right to mine the same "without thereby incurring in any event

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[12]Per Biddle, J., in Yandes v. Wright, 66 Ind. 319, 32 Am. Rep. 109.
[13]Yandes v. Wright, ubi supra.
[14]Marvin v. Brewster Iron Co., 55 N. Y. 538, supra.
[15]Western Ind. Coal Co. v. Brown, 36 Ind. App. 44; Wilms v. Jess, 94 Ill. 464, supra.
[16]Coleman v. Chadwick, 80 Pa. St. 81, supra.
[17]Piedmont Coal Co. v. Kearny, 114 Md. 496, distinguishing Coleman v. Chadwick, supra; Pringle v. Vesta, 172 Pa. 438; see also Berkey v. Berwind, 220 Pa. 65, 16 L. R. A. (N. S.) 851.
[18]Miles v. Pennsylvania Coal Co., 217 Pa. 449; Madden v. Lehigh Valley Coal Co., 212 Pa. 63; Williams v. Hay, 120 Pa. 485.
[19]Cases in note 18, supra.
[20]Walsh v. Kansas Fuel Co., 91 Kan. 310; Silver Springs O. and G. R. Co. v. Van Ness, 45 Fla. 559; Seitz v. Coal Valley Mining Co., 149 Ill. App. 85; Butterly v. New Hucknell Colliery Co. [1910] A. C. 381, 79 L. J. Ch. N. S. 411.
[21]Catron v. South Butte Mining Co., 181 Fed. 941.
[22]Scranton v. Phillips, 94 Pa. 15; Stilley v. Pittsburgh-Buffalo Co., 234 Pa. 492.

whatever any liability for injury caused or damage done to the surface."[23]

On the other hand, the courts are reluctant to find a waiver by implication. By the weight of American and English authority, a sale of "*all* the coal, together with the right to remove the same," does not imply a waiver of surface support.[24] Nor is a waiver implied by a grant of "all the coal with the right to remove it," together with a provision that in mining the mineral owner "will do as little damage to the surface as possible," or by like terms.[25] These words are held to refer to damage from sinking shafts or other uses of the surface which are permitted.[26] Even in a case where a lease provided that no pillars in a coal mine should be withdrawn within six hundred feet of the shaft, the court refused to find an implied permission to take away surface support at other places.[27] In a lease of the right to mine "all the coal" under a certain tract, which lease was to run for fifteen years "unless the coal in the land is sooner *mined out and exhausted,*" a waiver of surface support was not implied. The clause for termination was held to refer to the exhaustion of all the coal which could be mined without taking away any of the surface support.[28]

An alleged custom of miners to take away the ribs and pillars of coal and allow the surface to fall has been held to be unreasonable and void.[29]

Although the foregoing shows that it is difficult to make out a case of waiver by implication, one was found in a case where the intention appeared that a higher and a lower mine were to be worked

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[23]Graff Furnace Co. v. Scranton Coal Co., 244 Pa. 592.

[24]Piedmont Coal Co. v. Kearny, 114 Md. 496; Robertson v. Coal Co., 172 Pa. St. 566; Burgner v. Humphrey, 41 Ohio St. 340; Harris v. Ryding, 5 M. and W. 60. Griffin v. Fairmount, 59 W. Va. 480, 2 L. R. A. (N. S.) 1115, is contra but it has a strong dissenting opinion. The case note in the L. R. A. criticizes the case and says that it departs from the current of authority.

[25]Williams v. Hay, 120 Pa. 485, supra; Seitz v. Coal Valley Mining Co., 149 Ill. App. 85, supra, here the words were, "do as little damage to the surface as it and they conveniently may." Coleman v. Chadwick, 80 Pa. St. 81, supra, in which case there was a grant of all the coal "and all privileges necessary for the convenient working," etc., and "also all rights and privileges incident or usually appurtenant to the working of said mines."

[26]Williams v. Hay, 120 Pa. 485, supra.

[27]Wilms v. Jess, 94 Ill. 464. The court said the only effect of the provision was to require the conduct of mining so that the coal would remain accessible.

[28]Mickle and Co. v. Douglas, 75 Iowa 78.

[29]Southwest M. R. Co. v. Morning Hour Mining Co., 138 Mo. App. 129; Coleman v. Chadwick, 80 Pa. St. 81; Horner v. Watson, 79 Pa. St. 242.

simultaneously and the manner in which they were intended to be worked always caused a subsidence.[30]

Where it appears that the right of support was waived, the question of negligence in mining is immaterial and the mineral need not be removed carefully or in the usual course of mining.[31]

*Penetration of the Soil*

In a grant or reservation of minerals, the right of the mine owner is implied to penetrate the surface by sinking one or more shafts.[32] And in case of oil rights, it is said that the fact that there are no croppings of oil on the surface will not prevent the owner from digging and tunneling to see if any exists below the surface.[33] The express statement of other rights does not exclude the implication of the right to penetrate the surface;[34] the rule *"Expressio unius est exclusio alterius"* not being considered of sufficient force to overcome the presumption that the right of penetration is granted.

The courts favor this implication and make it even where the mine owner also owns adjoining lands which could be used, although inconveniently.[35] However, the implication may be rebutted. For instance, where part of the surface is reserved for cemetery purposes, there is no implied right to sink shafts through that part.[36]

*Use of the Surface.*

The mine owner also has the implied right to use the surface as far as is reasonably necessary for the profitable and beneficial enjoyment of his property;[37] and this is a question for the jury under the facts and circumstances of each case.[38] In the case of an oil lease, it was held that the right becomes extinct when the purpose is accomplished or the work abandoned.[39] The entrance upon the land and necessary damage to the surface in preparation are only justi-

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[30]Butterly v. New Hucknell Colliery Co. [1910] A. C. 381, supra.

[31]Madden v. Lehigh Valley Coal Co., 212 Pa. 63. But compare Western Indiana Coal Co. v. Brown, 36 Ind. App. 44; Livingston v. Moingona Coal Co., 49 Iowa 369.

[32]Ewing v. Sandoval C. and M. Co., 110 Ill. 290; Baker v. Pittsburgh, etc., R. R. Co., 219 Pa. 398; 27 Cyc. 688; Note in 24 Am. St. Rep. 555.

[33]Dietz v. Mission Transfer Co., 95 Cal. 92.

[34]Williams v. Gibson, 84 Ala. 228; Wardell v. Watson, 93 Mo. 107; Marvin v. Brewster Iron Co., 55 N. Y. 538.

[35]Wardell v. Watson, 93 Mo. 107, supra.

[36]Montgomery v. Economy Fuel Co., 61 W. Va. 620.

[37]Gordon v. Million, 248 Mo. 155; Gordon v. Park, 219 Mo. 600; Turner v. Reynolds, 23 Pa. St. 199; 27 Cyc. 688. For the right to use the surface in general, see note in 48 L. R. A. (N. S.) 883, and note in 24 Am. St. Rep. 555.

[38]Williams v. Gibson, 84 Ala. 228, supra; 27 Cyc. 689.

[39]Watford Oil and Gas Co. v. Shipman, 233 Ill. 9.

fied if for the purpose of mining, and if the purpose is abandoned before any actual exploration is made, it is held that the miner becomes a trespasser *ab initio* and that good faith in making the preparations is no defence.[40]

In regard to this right, in *Marvin v. Brewster Iron Co.*,[41] the court said:

"The owner of the mine may keep pace with the progress of invention and ingenuity so far as necessary to a profitable working of his property in competition with rivals. Hence, he may adopt new and improved methods which are usually availed of in the same business when the use of them is necessary to him.

"He may have only that which is necessary, but may have that in a convenient way."

If buildings are necessary, they may be erected;[42] but the mine owner has the burden of proving that they are necessary.[43] In a grant of the exclusive right to mine for and produce oil and "all rights and privileges necessary for the proper use and enjoyment of the lease," it was held that no right was implied to use the surface to be sublet for residences and gardens, barns, etc., of employees.[44]

The right to build a tramway was implied under a grant of the right "to mine and remove" coals.[45]

Limiting the doctrine, it is held that the mine owner has no right to use the plant erected on the surface of the land for loading and transporting of coal mined on adjacent lands.[46] *A fortiori*, this would be true where there was a provision for the return of the land after the coal was exhausted.[47] The fact that it is "necessary, practical or economical" to so mine makes no difference.[48]

Whether the mine owner is bound to bring up the minerals through a shaft on the same land and not through an adjoining mine is quite a different question. It was held that he was not so bound even where the amount he paid for the mineral rights was based on the amount of coal mined, and taking the coal up through the adjoining shaft mingled it with other coal.[49]

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[40]Coffindaffer v. Hope Nat. Gas Co., — W. Va. —, 52 L. R. A. (N. S.) 473.
[41]155 N. Y. 538.
[42]Wardell v. Watson, 93 Mo. 107, supra.
[43]Bonson v. Jones, 89 Iowa 380.
[44]Fowler v. Delaplain, 79 Ohio St. 279, 21 L. R. A. (N. S.) 100.
[45]Porter v. Mack Mfg. Co., 65 W. Va. 636.
[46]Hooper v. Dora Co., 95 Ala. 235.
[47]Moore v. Price, 125 Iowa 353; McClosky v. Miller, 72 Pa. 151.
[48]Brasfield v. Burnwell Coal Co., 180 Ala. 185.
[49]Pruett v. O'Gara Coal Co., 165 Ill. App. 470.

It has been held that a coal mine owner has no right to use the surface for the conversion of the coal into coke. "His only right is to mine and transport the coal in its first marketable state."[50]

The right to the use of the surface as far as necessary for mining includes the right to dump refuse from the mine below upon the surface.[51] Of course, this right does not justify dumping refuse from mines under adjoining land.[52]

The right to cut timber for use in mining or otherwise is not generally implied. Where it is given for a certain purpose, it may not be used for any other purpose.[53]

*Use of Space From Which the Coal Has Been Removed*

The general rule is that the grantee of coal in place has the right to use the space left by the removal of the coal for the transportation of coal from adjoining mines, while the grantee is still working the first mine.[54]

*Oil and Coal Rights in Conflict*

In regard to the difficult question of the relative rights of the owners of the coal and of the oil and gas under the same land, the decisions offer little satisfaction.[55] In *Chartiers Block Coal Co. v. Mellon*,[56] Chief Justice Paxson says:

"While the right of the surface owner, to reach in some way his underlying strata, is conceded, it involves too many questions affecting the rights of property, and of injury to the underlying strata, to be settled by the judiciary. It is a legislative, rather than a judicial question."

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[50]Williams v. Gibson, 84 Ala. 228, supra.

[51]Dewey v. Great Lakes Coal Co., 236 Pa. 498.

[52]Hooper v. Dora Co., 95 Ala. 235, supra.

[53]Lewis v. Virginia-Carolina Chem. Co., 69 S. C. 364.

[54]Lillibridge v. Lackawanna, 143 Pa. St. 293, 13 L. R. A. 627; Schobert v. Pittsburg Coal and Mining Co., 254 Ill. 474; New York, etc., v. Hillside, etc, 225 Pa. 211; note in 40 L. R. A. (N. S.) 826; note in 24 Am. St. Rep., at p. 557. As to copyhold lands in England, the rule is different. There, the lord of the manor may use the space for removing coal from other lands within the same manor, but not from lands outside the manor; Eardly v. Granville, 3 Ch. D. 826; Bowser v. McLean, 2 De Gex, F., and J. (45 English Reprint) 415.

[55]But see: Rend v. Venture Oil Co., 48 Fed. 248; Chartiers Block Coal Co. v. Mellon, 152 Pa. 286.

[56]152 Pa. 286, supra.