LEASES OF MINERALS AS ABSOLUTE SALES—THE PENNSYLVANIA DOCTRINE.

The object of this article is to endeavor to point out what features in instruments transferring rights in minerals in Pennsylvania constitute absolute sales thereof. Such agreements are almost invariably termed "leases", although in fact,

> "A contract regarding coal in place may be a sale absolute, a conditional sale, a lease in the ordinary acceptance of that term, or a mere license to mine and remove the minerals." [1]

It is beyond the scope of this article to consider at length when a given instrument is a conditional sale or a license or a lease, or to discuss, except incidentally, what the true nature of these contracts may be. All that will be attempted is to distinguish between contracts amounting to absolute sales and conveyances of a fee in the minerals, and the transfer of some lesser estate, whether by conditional sale, leasehold, or license to mine.

As will be subsequently pointed out at length, there are several situations where it is essential to determine whether a given instrument of this character constitutes an absolute sale or merely transfers a lesser estate in the mineral. Such problems as the proper distribution of royalties upon the death of the lessor, to whom royalties should be paid on a sale of the lessor's interests, whether lessor or lessee is responsible for taxes, and the determination of title by adverse possession, as well as many other familiar legal questions, turn directly upon whether a given contract in regard to minerals is or is not a complete conveyance of all title and interest therein.

Title to coal properties, more than any other sort of mineral estate, is held under these so-called leases, and the questions involved in these kinds of instruments consequently have been most frequently raised by coal mining companies. For this reason, all of the cases hereafter discussed relate only to problems arising

[1] Elkin, J., in Girard Trust Co. v. Del. & Hud. Co., 246 Pa. 161, 166 (1914).

in connection with the nature of rights to mine coal. Of course any cases dealing with agreements in regard to rights in other minerals will be governed by the same rules.

Before showing the gradual growth of the theory that a lease of the absolute right to mine all the coal constitutes an actual sale thereof, it may be well to give a definition of a mineral lease in the exact language of an eminent judge. In *Sanderson* v. *Scranton,*[2] Mr. Justice Clark said:

"What is termed a mineral lease is frequently found to be an actual sale of a portion of the land; it differs from an ordinary lease in this, that although both convey an interest in land, the latter merely conveys the right to its temporary use and occupation while the former conveys absolutely a portion of the land itself.[2a] It is one of the essential properties of a lease that its duration shall be for a determinate period, shorter than the duration of the estate of the lessor, hence the estate demised is called a 'term' and necessarily implies a reversion. If the entire estate of the lessor is conveyed in a whole or a portion of the land, the conveyance cannot therefore be properly regarded as a demise, but as an assignment."

And in *Hosack* v. *Crill,*[3] Mr. Presiding Justice Rice, who delivered the opinion of the court, said:

"It is now well settled that an instrument which is in its terms a demise of all the coal in, under and upon a tract of land, with the unqualified right to mine and remove the same, is a sale of the coal in place, and this, too, whether the purchase price stipulated for is a lump sum or is a certain price for each ton mined, and is called rent or royalty; and also notwithstanding a term is created within which the coal is to be taken out."

In order properly to comprehend the application of this doctrine, which has reached its climax in Pennsylvania and has not been so completely adopted in other states,[4] it is necessary to examine the decisions by which it was slowly evolved. Such a review is also essential to reach an understanding of the rules governing the interpretation of these contracts, particularly since, as will subsequently be shown, the more recent cases do not appear to be in complete accord with the foregoing doctrines.

[2] 105 Pa. 469, 472 (1884).

[2a] *I. e.,* the underlying mineral.

[3] 18 Pa. Super. Ct. 90 (1901), affirmed *per curiam* 204 Pa. 97 (1902).

[4] Barringer & Adams: The Law of Mines and Mining in the U. S., vol. 1, pp. 36-50; vol. 2, pp. 34-51, and cases cited therein.

The right of a land owner to create an interest by way of lease in the minerals underlying the land was first recognized in Pennsylvania in *Offerman* v. *Starr*.[5] Ten years later Mr. Justice Strong established the foundation of the present Pennsylvania view of the nature of mineral estates in the leading decision of *Caldwell* v. *Fulton*.[6] In this case there was a grant, in consideration of a flat purchase price, of "the full right, title and privilege of taking away stone coal to any extent". Hence there was a conveyance of all of the coal exclusively to the grantee, which was for an unlimited term. The opinion of the court was that the minerals beneath the surface were capable of being severed and made into an estate entirely distinct from the surface, and hence a conveyance of all the coal forever was an assignment of the entire ownership of all the mineral in place.

Shortly after this important decision came *Harlan* v. *Lehigh Coal and Navigation Company*.[7] In this there was a lease for a *term of years* of the right to mine all the coal, exclusive in the lessee, and providing for the payment of fixed minimum and excess royalties *per annum*.[8] It was decided that this instrument was the grant of an interest in the land itself and not a mere license to mine and take away the coal. Whether or not it effected an absolute sale of the mineral was not considered.

Twenty years later, on the authority of the foregoing decisions, Mr. Justice Mercur, in *Scranton* v. *Phillips*,[9] said, by way of *dicta*, that where there was "a lease of all the coal in and under a lot . . . during the period as shall be required . . . to mine and remove said coal", such instrument, though called a lease, was in reality a sale of all the coal with an un-

[5] 2 Pa. 394 (1848).

[6] 31 Pa. 475 (1858).

[7] 35 Pa. 287 (1860).

[8] By a "minimum royalty" is meant a certain fixed price calculated on a basis of a given number of cents per ton for a stated number of tons, which is to be paid *per annum* irrespective of the amount of coal taken out, and which is due even though no mining whatever may have been done. The object of this clause is to compel the mine operator to carry on mining. By "excess royalty" is meant an obligation to pay a certain additional sum *per* ton on all coal mined in excess of a stipulated figure, such figure being considerably in excess of the minimum already referred to.

[9] 94 Pa. 15 (1880).

limited time in which to remove it. Soon after this came the case of *Sanderson* v. *Scranton,*[10] where a lease of all the coal, until it should be mined, with clauses providing for the payment of minimum and excess royalties[11] and allowing distraint and forfeiture for non-payment of royalties or other non-compliance with its terms, was held not to be a lease, but an absolute sale and conveyance which relieved the surface owner from all liability for taxes upon said coal. This decision was followed in *Delaware, Lackawanna and Western Railroad Company* v. *Sanderson,*[12] where the same instrument was in controversy. Mr. Justice Trunkey quoted and approved the *dictum* in *Scranton* v. *Phillips,* already referred to, stating that what the instrument was called was immaterial, and declared that "while the money to be paid is called 'payment', 'price', or 'royalty', . . . the meaning would be the same were the price to be paid called 'rent' ".

Up to this point the Supreme Court had only held such mineral leases to be absolute sales as, though containing in some instances forfeiture and distraint clauses, and provisions for the payment of minimum and excess royalties, nevertheless had exhibited the two characteristics of being grants *of all the coal,* and having *no limitation as to time.*

Within a short time after *Railroad Company* v. *Sanderson,* however, it was held by a short *per curiam* opinion in *Hope's Appeal,*[13] that the presence of a limitation in years in the terms of the conveyance would not in itself be sufficient to cut down a fee simple title conveyed by a lease of all the coal, particularly where the clear intention of the instrument was to effect an actual sale. In this case the lease was for *ninety-nine years, with a fixed annual rental of two thousand dollars,* which, with a curious provision for the payment of excess royalties, was imposed only for the first thirteen years, after which time only a nominal sum was to be paid. The court held it clear, beyond any doubt, that the true purport of the conveyance was to effect a

[10] 105 Pa. 469 (1884).
[11] See *supra,* note 8.
[12] 109 Pa. 583 (1885).
[13] 29 W. N. C. 365 (1885), 1 Sadler (Pa.) 307.

sale, and had no hesitation in deciding accordingly. The doctrine of this case was shortly afterwards applied in *Montooth* v. *Gamble* [14] to a lease of all the coal for *seven years, but at a fixed purchase price, and with no royalties.* The opinion declared that the stipulation for the payment of a fixed purchase price for all the coal clearly showed that the parties intended to effect a sale, especially so as words indicating such an intention were found in the conveyance, and decided that the grantee had an absolute title to the mineral, since he had the power to remove it all. The fact that at the end of seven years all coal unmined was to revert to the grantor did not deprive the grantee of the present right, title, and possession to all of it, and consequently it amounted to a sale.

This doctrine, first enunciated in *Hope's Appeal* and affirmed in *Montooth* v. *Gamble,* that a limitation of the term would not necessarily prevent a conveyance of all the coal under a given tract from constituting a sale thereof, was adopted and the principle firmly settled in the law of this state, in the case of *Kingsley* v. *Hillside Coal and Iron Company.*[15] The instrument in question here was a grant of mining rights in all the coal under the grantor's land to the grantee and his heirs and assigns for one hundred years. The instrument was termed a lease, but was confirmed by a deed, and the real purchase price was a fixed sum, a nominal rental of one dollar *per annum* being added. After citing *Hope's Appeal* and *Montooth* v. *Gamble,* Mr. Justice McCollum, in delivering the opinion of the court, said:

"Where a fair interpretation of the written agreement shows that a sale was intended by the parties and the right to mine and remove all the coal is conferred by it in express terms, or by plain and necessary implication, it will constitute a sale, notwithstanding a term created within which the coal is to be taken out."

This statement of the law governing the construction of such instruments is undoubtedly in force today; but in some of

[14] 123 Pa. 240 (1888).

[15] 144 Pa. 613 (1892). The same instrument involved in this case was similarly construed in Plummer v. Hillside Coal & Iron Co., 160 Pa. 483 (1894), and in Plummer v. Hillside Coal & Iron Co., 104 Fed. 208 (1900), (C. C. A. 3d. Circ.).

the later cases, as will subsequently be shown, the Supreme Court became less ready to construe any given instrument as actually showing the intention to effect a sale. For a period succeeding the above decisions on term leases, however, no such tendency was displayed, and the doctrine set forth above was adopted without question. It may be well, however, to point out at this stage, that in both *Montooth* v. *Gamble* and *Kingsley* v. *Hillside Coal and Iron Company,* the real purchase price was a fixed sum payable at the time of the conveyance, and in *Hope's Appeal* it was to be paid within thirteen years, though the leases were to last for longer terms. There were also no provisions in the contracts in the foregoing cases for minimum or excess royalties in the present sense of the word, and it is impossible to determine whether or not the presence of such clauses would have impelled the court at that time to decide that these provisions negatived any intent of the parties to these instruments to effect an absolute sale.

At this same period another very important decision was rendered in the case of *Lillibridge* v. *Lackawanna Coal Company,*[16] where the Supreme Court held, first, that a conveyance of the exclusive right to mine all *merchantable coal,* thus definitely limiting the amount conveyed, but which contained no term of years, amounted to a sale of all the coal and not a lease; second, that in as much as a sale was intended, the vendee had the right to use without payment the mined out passageways in the coal area conveyed for the transportation of coal mined by him in adjacent properties. This second statement was questioned in *Webber* v. *Vogel,*[17] but was reiterated and affirmed in a later case between the same parties.[18]

The doctrine that royalties are purchase money was first intimated in *Hope's Appeal,*[19] and was adopted without discussion in *Fairchild* v. *Fairchild.*[20] Here there was a lease of all the

[16] 143 Pa. 293 (1891).
[17] 159 Pa. 235 (1893).
[18] Weber v. Vogel, 189 Pa. 156 (1899).
[19] *Supra,* note 13.
[20] 6 Sadler 231 (Pa. 1887).

coal with the right to mine until exhaustion. There were, of course, provisions for fixed minimum and excess royalties and there was also a forfeiture clause for non-payment. On the authority of the foregoing cases the court, without extended discussion, decided that the instrument was a sale, not a lease, and held accordingly that a husband had no right to receive royalties as tenant by courtesy.

The leading case upon this point, however, is *Lazarus's Estate.*[21] There the lease, while transferring all the coal, was for a term of ninety-nine years, with provisions for minimum and excess royalties, and containing forfeiture and distraint clauses. Mr. Justice Sterrett delivered the opinion of the court, and held that the lease was similar to the one in *Hope's Appeal,* except that in the latter a lump sum was to be paid within a given time, while in the instant case payment was to be made as provided in the royalty clauses. On this point the Justice said:

"It is obviously immaterial that in *Hope's Appeal* the consideration was payable *in solido,* while here the consideration, beyond the stipulated sum payable in any event,[21a] is regulated according to the rate per ton for the coal to be mined; for that is simply a difference in the mode of payment of such consideration."

The instrument was then held to be a sale, the opinion declaring:

"Nor is it material that no coal has been or may be mined within the term specified. The grantee has the absolute and exclusive right under the conveyance to mine all the available coal contained in the tract described, and it rests with him alone whether or not there shall be a reversion. If he should exercise his right within the term, the coal will by severance have become absolutely his, and his grantor will have received its equivalent in cash as in the case of an ordinary sale; if not, his inaction will simply amount to a voluntary forfeiture of such rights."

These decisions, holding that an instrument conveying all the coal could be an absolute sale thereof, even though made expressly for a term of years and although prescribing that payment be made only on a royalty basis, were adopted, and possibly extended in *Timlin* v. *Brown.*[22] Here there was a lease of all

[21] 145 Pa. 1 (1892).
[21a] *I. e.,* the minimum royalty.
[22] 158 Pa. 606 (1893).

the coal for *ten years* with fixed minimum and excess royalty provisions, and a forfeiture clause. Without any discussion, the court unanimously held that the agreement constituted a sale of all the coal, and declared that the fixed minimum royalty was to be deemed, unless otherwise provided by the instrument, as constituting the minimum purchase price, which was to be paid in any event. The excess royalty clause was to be regarded as a provision to protect the lessor in case more than the amount of coal estimated by the parties was found, and therefore constituted the maximum price of the mineral estate.

Any extended discussion of the many cases dealing with royalties in general and the theory of fixed minimum royalties is out of place in this connection. It is sufficient to say here that the statement that the latter is the minimum purchase price has not, apparently, been consistently carried out by the later decisions; and under some leases, a few of which will hereafter be considered, these payments have been held to be little more than ordinary rent.[23]

The theory that, where such an intention appears, a lease of the exclusive right to mine all the coal constitutes a sale, for the reasons so well stated in *Lazarus's Estate,* was adopted and carried out without serious question or consideration through a long line of subsequent cases down to 1901.[24] Early in that year the decision in *Hosack* v. *Crill,*[25] from which Mr. Justice Rice's excellent statement of the law up to that time has already been quoted, seemed to uphold and sustain in full force and vigor the rather loose doctrine of the preceding cases holding that almost any sort of conveyance of an exclusive right to mine all the coal in a given tract constituted a sale, irrespective of the fact that the conveyance might be limited as to time, or that there were abundant possibilities of reversion arising out of provisions

[23] Lehigh & Wilkes-Barre Coal Co. v. Wright, 177 Pa. 387 (1896), and Woodruff v. Gunton (No. 2) 222 Pa. 384 (1909).

[24] See Webber v. Vogel, *supra, note* 17; Plummer v. Hillside Coal & Iron Co, *supra,* note 15; Lehigh & Wilkes-Barre Coal Co. v. Wright, *supra,* note 23; Delaware & Hudson Canal Co. v. Hughes, 183 Pa. 66 (1897), and Webber v. Vogel, *supra,* note 18.

[25] *Supra,* note 3.

such as distraint for non-payment of royalties, or forfeiture for failure to comply with other essential terms of such instruments.

This tendency of the Supreme Court to construe practically every instrument of this character, as long as it conveyed an exclusive right to mine all the coal, as an absolute sale of the mineral estate was abruptly checked in the summer of 1901 by Mr. Chief Justice Mitchell in the leading case of *Denniston* v. *Haddock*.[27] Here there was a lease of all the coal in a given tract of land for a term of years, with minimum and excess royalty provisions. At the end of the term demised the lessee entered into a new lease and claimed the right to set off over-payments made in the form of minimum royalties on coal actually mined under the old lease for royalties due under the new one. His contention was that the instrument effected a sale and that the former payments of minimum royalties were installments on the purchase money. Mr. Chief Justice Mitchell, in delivering the opinion of the court, said:

"The expression that a conveyance of coal in place, even by a lease for a limited term, is a sale, is inaccurate, as a general principle of law and unfortunate from its tendency to mislead. . . . It would be better to call such an instrument what it certainly was at common law, a lease without impeachment for waste or a conditional sale. . . . The rules applicable to sales are not to be applied indiscriminately to such instruments, but each is to be construed, like any other contract, by its own terms."

In this instrument there was no provision allowing the lessee to mine an excess quantity of coal above the fixed minimum rate free of charge in any year, however much these payments of minimum royalties in past years were in excess of the amount he had actually mined during that period. In the absence of such a provision he was accordingly not permitted to set off an excess of payments over tonnage mined in the past against royalties due under his new lease. On this point the Chief Justice said:

"Appellant . . . claims he had paid for the coal. He had not. He had paid his rent on stipulated terms, but he had paid nothing for the coal in place."

The doctrine to be inferred from this decision is that a limi-

[27] 200 Pa. 426.

tation in point of time as to the estate conveyed, at least where there is also no provision for allowing recoupment in subsequent years for a failure to mine a prescribed minimum tonnage on which payment has already been made, will raise a strong presumption against any intention to effect an absolute sale.

The general principles laid down in *Denniston* v. *Haddock* were adopted and followed in *Coolbaugh* v. *Lehigh and Wilkes-Barre Coal Company.*[28] Here there was a lease of all the coal "to end when all the minable . . . coal shall have been mined and removed." There was no limitation in point of time. There was, however, apparently a restriction on the amount of coal which the lessee could remove in any one year; since the agreement explicitly declared that the lessee should be entitled to mine eighty thousand tons *per annum.* The instrument provided for a fixed minimum royalty, payable quarterly, and stated that deficiencies in the amount of coal mined in any year as against that paid for under the minimum royalty provisions were to be made up within six years thereafter or not at all. There were also the usual provisions for forfeiture and distraint. It was held that the lessor retained an interest in the coal which could be sold under a judgment against him and thereafter the lessee would be obliged to pay the royalties to the purchaser at sheriff's sale. This is clearly inconsistent with any view that royalties are purchase money; in fact the court quoted *Denniston* v. *Haddock* and declared that, as in that case, the fixed minimum royalty was nothing but rent which was converted into purchase money as the coal was mined. Until the mineral was actually mined out, title to the same remained in the lessors, and the unrecouped deficiency after six years belonged to them as rent pure and simple for the occupancy of the premises. Here, as in *Denniston* v. *Haddock,* it seems clear that the inability of the mine owner to recoup himself at any time for past over-payments on coal actually mined, which he had been obliged to make under the provisions of the minimum royalty clause, was persuasive evidence against any intention to effect a sale. Under

[28] 213 Pa. 28 (1905).

such circumstances the similarity between royalties and rents is very strong.

In *Hollenback Coal Company* v. *Lehigh and Wilkes-Barre Coal Company,*[29] there was also a lease of all the coal for an unlimited term, but the lessee was obliged by the terms of the instrument to leave the mines "so far prepared for future workings as that at least one hundred thousand tons of coal could be mined the next succeeding year . . . without robbing." In consideration of the royalties the lessee was expressly allowed to "mine and remove one hundred thousand tons of coal" of a certain size "in each and every year", thus limiting the output of the lessee in the same manner as in the previous case just considered. It was held that the instrument was not a sale of all the coal and therefore sizes of coal smaller than those upon which royalties were stipulated to be paid should be deemed the property of the lessor and could not be removed and sold by the lessee. The right conveyed was regarded as being a mere license to mine under certain conditions named.

From these last two decisions it is evident that the lack of any limitation in time in such conveyances of all the coal, standing alone, did not necessarily constitute the transactions sales thereof in the eyes of the court. The doctrine deducible from them is that a limitation in output *per annum,* like a limitation in time, is inconsistent with an intention to effect a sale transferring ownership in the coal, and hence raises a presumption that such an absolute assignment was not intended.

Mr. Justice Brown, who delivered the opinion of the court in *Hollenback* v. *Coal Company,* said:

> "A contract regarding coal in place may be a sale absolute, a conditional sale, or a lease. What *Denniston* v. *Haddock* and the cases which have followed it did was to check the tendency to the indiscriminate lumping of such contracts together and to recall in regard to them the true principles of construction applicable alike to all contracts."

A fixed limitation in output obviously makes royalties appear

[29] 219 Pa. 124 (1907).

far more analogous to rent than would be the case in the absence of such a restriction.

The three decisions just discussed evidently hold that a limitation either in time of the tenure or in quantity of the output will raise a very strong presumption against an intention to effect an absolute sale. But in *Gallagher* v. *Hicks*[30] neither of these grounds were present and it is somewhat difficult to see how this decision can be reconciled with either the prior or the subsequent cases. This case involved the construction of a written instrument leasing all the coal for a royalty of six cents per ton, with an additional proviso that fifty dollars per month was to be paid in any event and to be considered as advance payment for coal afterwards mined during that year in case the payment was over and above the royalty earned. The lessee had power, however, to surrender the lease at any time upon payment of all royalties due; and the lessor could terminate the relationship at any time by giving three months' notice. The court, quoting *Coolbaugh* v. *Coal Company,* held that the lessor

"still had an interest in the coal as land, title to portions of which, and in the end to all of which, he had agreed should pass from him and become vested in the lessee . . . as from time to time it acquired the legal title to the coal by mining and removing it. But until that legal title was so taken away from him, it remained in him as in the case of any vendor of real estate."

The agreement was accordingly held not to effect an absolute sale, and the interest of the lessor, which was sold under a judgment, carried with it to the purchaser at sheriff's sale the right to receive payment of all subsequent royalties payable under the terms of the instrument.

The only rule of construction which is possible to draw from this decision by which it may be reconciled with the earlier and later cases is that the clause permitting either party to terminate his relationship at any time after complying with certain conditions is irreconcilable with any theory of an intention to effect a sale. In a sense such provisions, are, of course, a limitation on the term just as effectively as though the instrument were made for a

[30] 216 Pa. 243 (1907).

stated period. As a practical fact, however, these stipulations allowing a termination of the relationship under certain conditions are very similar to the power given by the ordinary forfeiture and distraint clauses in many instruments which undoubtedly constitute absolute sales.

As a result of *Denniston* v. *Haddock* and the subsequent cases just considered, it has been said by an eminent commentator: [31]

"The cases referred to may now be considered authority only for what they actually decide, and conveyances of minerals for a limited term should be classified as leases without impeachment for waste."

The tremendous consequences of these decisions upon the disposition and nature of royalties are obvious at once. The doctrine of *Lazarus's Estate* and the other early cases, that they constitute purchase money, cannot now be deemed to apply in every instance. The true rule seems to be that royalties are purchase money of real estate and pass accordingly only where the instrument providing for the payment thereof has first been construed and held to be a sale and conveyance of the coal. Where such an instrument is held not to effect an absolute conveyance, then the disposition of royalties must be made in accordance with the principles of law governing the distribution of proceeds under whatever nature of estate, whether lease-hold or license, the instrument is deemed to have created.

The case of *Gallagher* v. *Hicks* [31a] seems to mark the limit to which the Supreme Court has gone in construing a coal lease for an indefinite term not to effect an absolute sale. In its next decision, *Lazarus* v. *Lehigh and Wilkes-Barre Coal Company,* [32] the Supreme Court held itself bound by the earlier decision on the same instrument formerly rendered in *Lazarus's Estate,* and affirmed the statement that where there was the right to mine all the coal, "although in the form of a lease for ninety years, it was

[31] Barringer and Adams: The Law of Mines and Mining in the U. S., vol. 2, p. 36.

[31a] *Supra,* note 30.

[32] 224 Pa. 415 (1908).

a grant of an interest in the land itself; not a mere license to take the coal, but a sale of it, conditioned on its being removed within the time specified." This apparent inclination to revert to the looser doctrine of construction preceding *Denniston* v. *Haddock* may or may not be explained by the fact that the court was already committed to such an interpretation of this particular agreement. In any event, the circumstances of the case weaken its real effect. In *McFadden's Estate*[33] the court shows, in *dicta,* a tendency to revert to the broader generalization characteristic of the decisions prior to *Denniston* v. *Haddock.* The terms of the instrument construed are not given in the opinion, but the court, *per* Mr. Justice Elkin, said:

> "Nor is it open to doubt, under the settled rule of our cases, that a lease to mine all the coal underlying a tract of land described in the conveyance, upon the payment of certain specified royalties, amounts to and is the equivalent of the sale of the coal in place. The right to mine the coal to exhaustion is the equivalent of a grant of all the coal, and the payment for the coal mined at a certain rate per ton is the consideration price paid. If there was nothing else in the case there would be only one answer to the question here raised and that answer is that the royalties represent the purchase price and should be treated as principal."

Here the court followed the principle of determining the nature of royalties which has been already given, namely, first to construe the instrument and decide whether or not it is a sale, and then to decide whether such payments are principal or income as the case may be.

A recent decision seems to go even further against the doctrine of stringent classification running through the cases from *Denniston* v. *Haddock* to *Hollenback* v. *Coal Company.* It would seem under the rules contained in those decisions that a conveyance of all the coal which by specific terms is subsequently limited to cover only all of such as will conform to certain conditions of a varying character, could not be construed as a sale of all the mineral but should rather be regarded as a mere license to take such coal as conformed to the standard prescribed. But in *Millard* v. *Delaware, Lackawanna, and Western Railroad*

[33] 224 Pa. 443 (1909).

Company,[34] the Supreme Court held that such an instrument was a sale of all the coal, severing the mineral estate from the surface, and imposing liability for taxes thereon upon the lessee. This ruling is, of course, in accord with the principles stated in *Lillibridge* v. *Lackawanna Coal Company,*[35] where substantially the same conclusion was reached. In the Millard case the court said:

"Without referring specifically to the terms of the lease, we think its language brings it within our cases which hold that it is a sale of coal in place and operates as a severance of the coal from the surface. . . . There is no substantial difference between the lease in the present case and those in *Delaware, Lackawanna, and Western Railroad Company* v. *Sanderson,*[35a] and kindred cases."

This decision seems to establish, though only by way of *dicta,* the doctrine that a limitation in the quality of the coal conveyed is not sufficient to raise even a presumption against the intention to effect an absolute sale, although, as has already been pointed out, *Denniston* v. *Haddock* and the succeeding cases appear to hold that a limitation either in time or in quantity of output will raise an inference against the intention to effect an absolute conveyance.

Still another very recent decision may indicate some tendency of the Supreme Court today to revert to the former and looser classification of these so-called leases. In *Lazarus* v. *Lehigh and Wilkes-Barre Coal Company,*[36] the lease, which was for a term of years, with a fixed minimum sum payable in any event, and which had been considered before in *Lazarus's Estate,*[36a] and again in *Lazarus* v. *Coal Company,*[36b] was once more before the Supreme Court and in *dictum* again held to constitute a sale of all the coal. The force of this statement is, of course, greatly

[34] 240 Pa. 234 (1913).
[35] *Supra,* note 16.
[35a] *Supra,* note 12.
[36] 246 Pa. 178 (1914).
[36a] *Supra,* note 21.
[36b] *Supra,* note 32.

weakened by the fact that the court was irrevocably committed on this agreement.

Whether or not the cases subsequent to *Hollenback* v. *Coal Company,* including *McFadden's Estate, Lazarus* v. *Coal Company,* and *Millard* v. *Railroad Company,* show a tendency on the part of the Supreme Court to revert to the line of earlier decisions, such as *Sanderson* v. *Railroad Company,* and to be more liberal in construing so-called leases of coal as effecting absolute sales of the mineral estate, is a matter of personal opinion. It is the writer's belief that the late cases do exhibit an inclination toward this looser classification, rather than the reverse, and that the only possible indication of a contrary trend toward stricter interpretation is the language of Mr. Justice Elkin in *Girard Trust Company* v. *Delaware and Hudson Company,*[37] which has once before been quoted, and where, citing *Denniston* v. *Haddock, Gallagher* v. *Hicks,* and *Hollenback* v. *Coal Company,* he declared, by way of *dictum*:

"A contract regarding coal in place may be a sale absolute, a conditional sale, a lease in the ordinary acceptance of that term, or a mere license to mine and remove the minerals."

Of course, the correctness of this statement of Mr. Justice Elkin's is beyond contradiction, but as a matter of fact it is not evident from the case whether the Justice meant to imply that a lease would be deemed a sale unless clearly shown to the contrary—the early rule—or *vice versa,* although his citation of the cases favoring strict interpretation naturally shows an inclination toward the stricter doctrine.

The Superior Court has always manifested a tendency to favor the looser interpretation of these agreements and has never formally approved and adopted the doctrine of *Denniston* v. *Haddock, Coolbaugh* v. *Coal Company* and *Gallagher* v. *Hicks.* The broad principles of interpretation adopted by this tribunal have already been given in Mr. Justice Rice's statements in *Hosack* v. *Crill.*[38] In *Turner* v. *Lehigh Valley Coal Company,*[39]

[37] 246 Pa. 161, 166 (1914).
[38] *Supra,* note 3.
[39] 34 Pa. Super. Ct. 101 (1907).

while recognizing the force of the doctrine of *Coolbaugh* v. *Coal Company,* and *Gallagher* v. *Hicks,* the Superior Court said that a lease of all the coal to be mined until exhaustion, with a minimum royalty provision and excess royalties to be paid on coal mined over a certain amount, constituted a sale creating an estate in fee, subject to forfeiture only for breach of conditions subsequent. For their authority they referred back to the earlier cases, particularly *Sanderson* v. *Scranton,*[39a] affirming the definitions of leases and sales given therein by the court. This was by way of *dictum,* but clearly shows an inclination to retain the former looser classification of the Supreme Court. And in *Arnold* v. *Cramer,*[40] it was held:

"The technical words 'grant, bargain and sell' or their equivalent are not necessary to pass the title to coal in place if from the language of the whole instrument the intention to sell is apparent."

After citing many of the cases preceding *Denniston* v. *Haddock* the Superior Court here declared that a lease of all the coal for a term of ninety-nine years, and thereafter from year to year, in consideration of royalty on all coal above a certain grade mined therein, without any fixed minimum royalty or forfeiture clause, and providing that the lease was to last until the coal was exhausted, was intended by the parties to be a sale; and no abandonment short of the statutory period would affect title thereto unless some estoppel were shown.

As a matter of fact this decision seems entirely consistent with *Denniston* v. *Haddock* and the subsequent cases; for the instrument was without restriction either as to time or as to the quantity of coal to be mined, and in the absence of a forfeiture clause it is apparent that no estate was left in the lessor except a reversion of the mined out area—which is clearly not an estate in the mineral itself.

The results which may attend the improper drafting or incorrect interpretation of instruments of this character are obviously of tremendous importance. Thus, as shown in cases

[39a] *Supra,* note 10.

[40] 41 Pa. Super. Ct. 8 (1909).

like *Lazarus's Estate* [41] and *McFadden's Estate* [42] the question of the distribution of royalties in settling decedents' estates turns directly upon whether or not they are to be regarded as purchase money and hence principal, or as rent and, therefore, income; and this in turn depends entirely upon whether an absolute sale has been made or a lesser estate created. So also in cases like *Coolbaugh* v. *Coal Company* [43] and *Gallagher* v. *Hicks*,[44] the effect of sales under judgment of the lessor's interest upon the purchaser's right to receive such payments is a matter of great business importance. Many millions of dollars are annually paid out in the form of royalties on coal leases, and it is to be regretted that the distribution of such enormous sums of money should be compelled to rest upon the proper determination of such close matters of interpretation as have been set forth. It is further apparent that such large questions as the acquisition of title by adverse possession to these immensely valuable mineral estates turn upon the same consideration. This is well illustrated by cases like *Delaware and Hudson Company* v. *Hughes* [45] and *Plummer* v. *Hillside Coal and Iron Company*.[46] Similarly the determination of liabilities for taxes on these great underlying mineral deposits hinges, as illustrated in *Sanderson* v. *Scranton*,[47] and *Millard* v. *Railroad Company*,[48] directly upon whether or not a court will ultimately construe the agreement between the parties to be one effecting a sale or only transferring some lesser interest.

Moreover, the rights of the parties to large quantities of the mineral itself may also depend upon the nature of the transaction. Thus as shown in *Hollenback* v. *Coal Company*,[49] where there is not a sale of coal, and royalties are paid only on certain

[41] 145 Pa. 1; *supra*, note 21.
[42] 224 Pa. 443; *supra*, note 33.
[43] 213 Pa. 28; *supra*, note 28.
[44] 216 Pa. 243; *supra*, note 30.
[45] 183 Pa. 66; *supra*, note 24.
[46] 144 Pa. 613; *supra*, note 15.
[47] 105 Pa. 469; *supra*, note 10.
[48] 240 Pa. 234; *supra*, note 34.
[49] 219 Pa. 124; *supra*, note 29.

sizes, as is common in the anthracite fields, the smaller sizes are obviously the property of the lessor-owner, not the lessee; though the contrary is the case if the instrument is regarded as passing title to all the coal, as shown by *dicta* in *Girard Trust Company* v. *Delaware and Hudson Coal Company.*[50] Again, as in *Lillibridge* v. *Lackawanna Coal Company,*[51] and *Weber* v. *Vogel,*[52] the right to use, free of cost, the mined out passageways for transporting coal mined on other premises of the mine owner turns directly upon whether or not a sale and conveyance has been accomplished by the parties.

There are, of course, numerous other legal features growing out of the relationships of the parties which are vitally affected by the nature of the agreement between them, but enough has been said to show the importance of the foregoing decisions on the substantive law of the State.

A general summary of the decisions as a whole results in the conclusion that in the cases preceding *Denniston* v. *Haddock* the attitude of the Supreme Court was to presume that a lease of all the mineral exclusively to the lessee was intended by the parties to effect an absolute sale thereof. Certainly from the decisions it seems that during that early period some strong evidence to the contrary would have been required to overcome this attitude of the court. In *Denniston* v. *Haddock,* however, and the subsequent cases down to *Hollenback* v. *Coal Company,* the inclination of the Supreme Court clearly swung in the other direction, and, during the interval in which those decisions were rendered, their tendency was to view such instruments as leases or licenses unless there was strong evidence of a contrary intention. Since *Hollenback* v. *Coal Company,* however, the attitude of the Supreme Court seems to have reverted to a limited degree back toward the looser classification prevailing prior to *Denniston* v. *Haddock,* and at the present date this tribunal appears willing to construe such agreements as sales upon less

[50] 246 Pa. 161; *supra,* note 37.
[51] 143 Pa. 293; *supra,* note 16.
[52] 189 Pa. 156; *supra,* note 18.

conclusive evidence of such an intention than was required during the interval between *Denniston* v. *Haddock* and *Hollenback* v. *Coal Company,* to which reference has just been made.

It is important to bear in mind, however, that none of the foregoing decisions have attempted to deny the possibility of creating a separate estate in minerals. All that *Denniston* v. *Haddock* and the subsequent decisions did was to require more definite evidence of the landowner's intention to effect a severance of the mineral estate than had been demanded by the court in the previous cases. Once satisfied that the instrument showed an intention to create a separate estate, the court then rigidly applied the doctrine of *Caldwell* v. *Fulton,*[53] and declared the agreement to be a sale. The principle of this case has always been followed without question or controversy once a given instrument has been construed to fall within its application.

In its usual form today a coal lease turns over to the lessee the mineral estate for a term of years, seldom longer than twenty, in consideration of the payment of royalties of so much per ton *per annum* on a given number of tons, called the minimum royalty, and of a larger sum per ton on all coal mined in excess of a certain figure above the stated minimum, called the excess royalty. These agreements also contain clauses allowing distraint for failure to pay royalties or taxes when due, and forfeiture for non-compliance with certain other terms stated therein. Such provisions are present in practically every lease executed at the present time, but from the nature of the case and the necessarily varying conditions of the parties to every such instrument, it is obvious that seldom if ever are any two of them exactly alike. The different situations of the parties in every case will require the presence or absence of many other provisions in agreements of this sort which, while too numerous to discuss in this article, may or may not have a vital bearing upon determining whether or not the contract was intended to effect an absolute sale. Hence Mr. Chief Justice Mitchell's statement that each one of these instruments must be construed according to its own terms is evidently entirely correct.

[53] *Supra,* note 6.

While the generalizations are extremely difficult to form, it is submitted that the following rules of interpretation may be laid down, under which all the decisions can be reconciled, and the nature of the average lease today be fairly accurately ascertained:

(1) Where the instrument makes no limitations either as to the term of the lessee's estate, or as to the quantity or quality of coal to be mined within any given time, such an agreement is an absolute sale of the coal in place.

(2) A limitation in point of time raises a strong presumption, though not conclusive, that the parties did not intend to make an absolute assignment. The shorter the term given to the lessee the stronger, of course, becomes the presumption. But the lack of a limitation in time, standing alone, will not in itself be sufficient to make the agreement one of sale.

(3) A limitation of any kind on the quantity of mineral which the lessee may mine, not including stipulations meant to insure careful mining, also raises a presumption against an intent to effect a sale, and such a proviso is a very important, though not necessarily a controlling factor, in construing the agreement.

(4) A limitation in the quality of the coal to be taken by the lessee, such as only "merchantable coal," or only such coal as will conform to certain trade conditions, creates no presumption whatever either for or against an intention to effect a sale.

(5) The usual clauses providing for distraint in case of nonpayment of royalties, taxes, *etc.*, and allowing forfeiture for noncompliance with other stipulations in the instrument, which are almost invariably found in all leases, create no presumption in either direction.

(6) Provisions that the purchase price be paid in fixed definite sums within a time shorter than the life of the lessee's estate are strong evidence of an intention to effect a sale. Such stipulations, however, are but seldom found in a modern instrument.

(7) The terms of the provisions for the payment of royalties, especially the minimum royalty clause, are often one of the most important features from which the intention of the parties

can be gathered. At first sight this may appear illogical, since it is undoubtedly correct to say that whether or not royalties are purchase money or rent depends upon whether or not there has been a sale, and hence it might be said that the nature of an instrument cannot be determined by using this same royalty clause as a factor in construing its effect. Such a conclusion, however, is not sound for the reason that in interpreting a given agreement *all* its clauses, including the royalty provisions, must be examined, and the intention of the parties accordingly ascertained from the entire contract, and not merely from some, not all, of its stipulations. Therefore, since the minimum royalty clause is an integral part of the contract, it must be examined, like any other provision, to ascertain the intention of the whole instrument; and once this intention has been decided, then the royalties are to be termed purchase money or rent in accordance with the final interpretation placed upon the entire contract.

Now if the minimum royalty is to be regarded as purchase money for a sale of the mineral, it follows that the mine owner should be allowed to mine at any time without payment, whatever number of tons of mineral he has paid for in the past under the fixed minimum royalty obligation, and which he has not in fact actually mined. Such a provision stipulating, either expressly or impliedly that the mine owner is only to be obliged to pay for all coal actually taken, and allowing him at any time to mine free from royalty charges whatever tonnage he may have paid for in the way of minimum royalty, but not yet actually mined, would constitute perhaps the strongest possible evidence of the intention of the parties to effect an absolute sale of the mineral.

Where, however, there is no such clause, the mine owner is not allowed to make up in any way for minimum royalties paid in the past in excess of the amount of mineral mined; or where, under the terms of the instrument, his time to recoup himself for such over payments on tonnage taken is limited, then, and in each instance, there is clearly a presumption, and a strong one, that a sale of all the mineral estate is not intended, but the royalty payments are regarded by the parties as in the nature of

rent for the premises instead of installments on the purchase price of the coal.[54]

Other clauses of doubtful presumptive value on the intent to effect a sale, though usually found in instruments of the character under consideration, are rights in the mined-out passageways or by whom taxes on the mineral estate shall be paid, and, in the anthracite field, the disposition and ownership of "broken-down" or very small sized coal. Where there has been a sale it has already been shown that the mine owner has a right to use the mined-out gangways for his own purposes, free of cost; and similarly, sizes of coal less than those upon which royalty is to be paid are the mine operator's property, in the absence of provisions to the contrary, where an absolute sale has been effected; while obviously the landowner should not pay taxes in the event of a complete assignment. Whether or not, therefore, clauses in a given instrument taking away such rights in gangways and ownership in small sized coal and obligating the lessor to pay taxes on the mineral are evidence of an intention not to effect a sale is a matter upon which there may be some question. In the writer's opinion, however, provisions upon any of these details are of little or no interpretative value in either direction, and are often found in either form in agreements which are unquestionably absolute sales.

In conclusion it may be well to say that the use of such terms as "lease," "lessor," and "lessee," has been continued from a time when the business practice was to lease all the land above the coal, together with the underlying mineral. This is no longer the case, and it is perfectly practicable today for the mine operator to lease and so acquire by one instrument whatever rights in the surface he may desire for erecting his breaker, mine tracks, hoisting houses, *etc.*, and to obtain his mineral estate under a separate agreement entirely. The absence of such a practice and the often unwarranted use of such words as "lease," "lessor," and "lessee," seems due to the inertia or timidity of the

[54] Denniston v. Haddock, 200 Pa. 426, *supra*, note 27; Coolbaugh v. Lehigh and Wilkes-Barre Coal Co., 213 Pa. 28, *supra*, note 28.

members of the bar in refusing to depart from the ancient forms used in drawing these instruments. It is the fault of the legal profession that such a confused and indefinite state of law exists in this field and it is from them that the remedy must come.

There can be no question of the injustice of imperilling the tremendous interests of parties to such instruments by failing to state definitely and accurately their intention in making their agreement. If, as has already been suggested, all subsequent contracts of this character are made by providing for the interests of the parties in the surface property in one instrument and their rights to the mineral estate in another, and if in the latter contract a clause be inserted stating, not what the instrument shall be called, for that is immaterial, but what the real intention of the contracting parties actually is, then the present doubt as to the true nature of many of these agreements will become a thing of the past.

Meanwhile, the old ambiguous instruments are continually being renewed and until the time comes when they are all replaced by contracts of no doubtful import, it is hoped that the rules for the proper interpretation of such agreements, laid down in the preceding paragraphs, may be of some benefit to the members of the profession at large.

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