



Volume 89
Issue 3 *The National Coal Issue*

Article 12

April 1987

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Recommended Citation

Paul N. Bowles, Jennifer N. Taylor & J. T. Lane, *An Update of Donley's the Law of Coal, Oil and Gas in West Virginia and Virginia: 1971-1986*, 89 W. Va. L. Rev. (1987).

Available at: <https://researchrepository.wvu.edu/wvlr/vol89/iss3/12>

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AN UPDATE OF DONLEY'S *THE LAW OF COAL, OIL AND GAS IN WEST VIRGINIA AND VIRGINIA: 1971-1986*

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A decade and a half has passed since the late Robert Tucker Donley updated his "Bible" of coal, oil, and gas law in 1971.¹ In the interim, important developments have clarified or changed some of the original principles stated in his treatise, *The Law of Coal, Oil and Gas in West Virginia and Virginia*.²

This update presents an overview of the West Virginia decisions and statutory enactments which have affected the mineral industry from 1971 to 1986. It is intended to be used as a supplement to Judge Donley's work. The following discussion, therefore, is directly correlated to the numbered sections of Donley's original text.

Section 6 - Willful Trespass.

Perhaps the most cogent analysis of mineral trespass principles was in *Pan Coal Co. v. Garland Pocahontas Coal Co.*,³ cited in the original text. In a mineral

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Paul N. Bowles originated the idea for this update and assisted in the preparation of the preliminary draft. Unfortunately, his untimely death occurred prior to its completion. For ten years, Mr. Bowles traveled from Charleston to Morgantown to teach coal, oil, and gas law at West Virginia University College of Law. This course was one of the most popular offered. A tribute to Mr. Bowles for his dedicated service to the College of Law and the legal community in general appears as an introduction to this issue of the Law Review.

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Mr. Lane graciously contributed his time in assisting in the completion of this Update following Mr. Bowles' death.

The authors gratefully acknowledge the assistance of Professor Patrick C. McGinley in the final editing of this Update.

[Although substantially conforming to *A Uniform System of Citation*, this Update does not strictly comply with the standard law review format and citation form. Given the purpose of this Update, such variances are intended to make this work more useful when used with the original treatise and the previous supplementation. -Ed.]

¹ Donley, *Development of the Law of Coal, Oil and Gas from 1951 to 1971*, 74 W. VA. L. REV. 260 (1972).

² R. DONLEY, *THE LAW OF COAL, OIL AND GAS IN WEST VIRGINIA AND VIRGINIA* (1951).

³ *Pan Coal Co. v. Garland Pocahontas Coal Co.*, 97 W. Va. 368, 125 S.E. 226 (1924).

trespass case, a trespass occurs when unauthorized entry is made into a coal seam, or an oil and gas formation and damage results from the taking of the coal, oil, or gas. Once a trespass is established, the measure of damages depends upon whether the trespass is willful or innocent (*i.e.*, whether the trespass was in good faith or in bad faith).

In *Reynolds v. Pardee & Curtin Lumber Co.*,⁴ the West Virginia Supreme Court of Appeals expanded the principle established in *Pan Coal*. In *Reynolds*, the court considered a perplexing verdict in which the jury found two of the defendants guilty of trespass but did not assess damages. The supreme court reversed, holding that the verdict was inconsistent; if a trespass had occurred by the unauthorized mining of the plaintiff's coal, there would necessarily be damage, even though perhaps inconsequential in amount.⁵

The *Reynolds* court found conflicting evidence as to whom had committed the trespass. In remanding the case, the court discussed and reaffirmed the general principles pertaining to trespass and the measure of damages for both willful and innocent trespasses. The court directed that any party shown to have committed the trespass by the unauthorized mining of the plaintiff's coal would be liable for damages.⁶ Whether the trespassing party had had notice of the plaintiff's ownership was held to be "irrelevant to their status as trespassers."⁷

The court further directed that once trespass had been established, the trial court next should consider the measure of damages. The type of notice is a factor pertinent in establishing the nature of a trespass as either willful or innocent, but is not singularly determinative.⁸ In the final analysis, the focus must be on the subjective intent of the trespasser.⁹ Reiterating the principles of *Pan Coal*, the court reaffirmed that if a trespasser acts in good faith believing that he is operating within his legal rights, he is an innocent trespasser. On the other hand, if he acts in bad faith and willfully trespasses, he is a willful trespasser.¹⁰

Finally, the court considered the potential liability of the lessor. In reversing the trial court's directed verdict, the court held that the lessor could have been held liable if it "had knowledge of or acquiesced in its lessees' trespass or failed to adequately warn its lessees about . . . [the plaintiff's] reservation . . ."¹¹ Under such circumstances, the lessor could "be held jointly accountable on a common purpose theory."¹²

⁴ *Reynolds v. Pardee & Curtin Lumber Co.*, 310 S.E.2d 870 (W. Va. 1983).

⁵ *Id.* at 875.

⁶ *Id.* at 876.

⁷ *Id.*

⁸ *Id.* In *Reynolds*, the court found that the defendants had constructive notice of the plaintiff's ownership under the recorded deed, as well as actual notice under the exemption in the lease documents.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 876-77.

¹² *Id.*

Section 7 - Innocent Trespass

The principle of innocent trespass and the measure of damages for such a trespass has been discussed and affirmed in three decisions. In each case, the West Virginia Supreme Court of Appeals considered the subjective intent of the trespasser in determining whether the trespass was willful or innocent. In *Reynolds v. Pardee & Curtin Lumber Co.*,¹³ discussed in the previous section, the court evaluated the liability of three mining companies as well as the lessor, all of whom could have been guilty of trespass. In *Bethlehem Steel Corp. v. Shonk Land Co.*¹⁴ and *Thaxton v. Beard*,¹⁵ the court affirmed the trial courts' factual findings that the trespasses were innocent.

In all three cases, the court reaffirmed the principle that the measure of damages recoverable for an innocent trespass is the market value of the minerals at the mine less the reasonable cost of removal. In *Bethlehem Steel Corp.*, Bethlehem asserted that the cost of removal did not include the ultimate marketing costs. In rejecting this element of damage, the court held that Bethlehem was not entitled to deduct processing costs or overhead expenses.¹⁶

Thaxton v. Beard was complicated by two facts. First, the plaintiff was a cotenant who owned a one-eighth interest in the oil and gas. The court held that "strictly speaking one cotenant cannot be a trespasser against his cotenant."¹⁷ Trespass involves an unauthorized entry on the land of another. A cotenant, by virtue of such ownership, has "authority" to enter his own property. However, he may not take the corpus of the land—the coal, oil, or gas. Such an act, by statute, constitutes waste and is actionable by the cotenant whose interest is taken.¹⁸

Without noting the distinction between waste and trespass, the court treated the case as a trespass and held that once trespass is established, the issue becomes the measure of damage, which in turn, depends on whether the taking was willful (bad faith) or innocent (good faith).¹⁹

A second factor complicating *Thaxton* was that the cost of drilling and production exceeded the value of the minerals which had been taken at the time of the lawsuit. Therefore, the court allowed the plaintiff an election of remedies. He could keep the well or his interest in it, after costs had been recouped, or he could adopt the lease and recover his royalty for all past as well as future production.²⁰

¹³ *Reynolds v. Pardee & Curtin Lumber Co.*, 310 S.E.2d 870 (W. Va. 1983).

¹⁴ *Bethlehem Steel Corp. v. Shonk Land Co.*, 169 W. Va. 310, 288 S.E.2d 139 (1982).

¹⁵ *Thaxton v. Beard*, 157 W. Va. 381, 201 S.E.2d 298 (1973).

¹⁶ *Bethlehem Steel Corp.*, 169 W. Va. at 324, 288 S.E.2d at 147.

¹⁷ *Thaxton*, 157 W. Va. at 389, 201 S.E.2d at 303.

¹⁸ W. VA. CODE §§ 37-7-1 to -5 (1985). In *Thaxton*, the court did not discuss this statute, nor did it consider treble damages provided for in W. VA. CODE § 37-7-4 (1985), which applies to malicious waste, presumably because the waste was innocent.

¹⁹ *Thaxton*, 157 W. Va. at 388, 201 S.E.2d at 302.

²⁰ *Id.*, 201 S.E.2d at 302-03.

This election of remedies presented further difficulties in that the lease provided for the right to unitize, and the lessee in fact had combined the plaintiff's tract with other tracts to create a unit. The court held that if the plaintiff elected to adopt the lease, he must do so with all of its provisions, including the unitization right and the creation of the unit by the lessee.²¹

Section 12 - Waste by Cotenants of Oil and Gas.

In *Thaxton v. Beard*,²² discussed more fully in section 7, the West Virginia Supreme Court of Appeals affirmed prior case holdings relating to the wrongful or unauthorized taking of the corpus of a mineral estate by a cotenant. The court again recognized that a cotenant who commits waste cannot be a trespasser.

The *Thaxton* court determined that development of the mineral estate was in good faith, but that waste had occurred by the taking of the oil and gas in which the cotenant owned an interest. The court found that since the taking was in good faith, the measure of damages was the same as for an innocent trespass—the value of the minerals in place, that being the value of the oil and gas produced less the cost of production.²³ However, since the cost of drilling and production had exceeded the value of the oil and gas which had been sold, the court allowed an election of remedies as noted in section 7.

In *Thaxton*, the issue of estoppel was raised as a defense. The court held that when a party deals with property in a manner inconsistent with a cotenant's interest, and that cotenant makes no objection, the latter is estopped from denying the validity of the action.²⁴ However, estoppel does not apply when the cotenant is actually ignorant of his own rights.²⁵ In this case, the court held that the plaintiff was mistaken as to his title, and accordingly, there was no estoppel.²⁶

Finally, the court reiterated its previous decisions in holding that the cotenant responsible for the waste was required to account to the cotenant against whom the waste had been committed.²⁷

Section 24 - Partition of Oil and Gas and Land Underlaid with Oil and Gas.

In the original text, Donley summarized the conflicts in the case law which generally held that oil and gas could not be partitioned except by a decree for a sale with subsequent division of the proceeds.²⁸

Historically, partition was available only to cotenants who took their interests voluntarily by descent.²⁹ The common law right to partition eventually was en-

²¹ *Id.*, 201 S.E.2d at 303.

²² *Thaxton v. Beard*, 157 W. Va. 381, 201 S.E.2d 298 (1973).

²³ *Id.* at 388, 201 S.E.2d at 303.

²⁴ *Id.* at 387, 201 S.E.2d at 302.

²⁵ *Id.*, 201 S.E.2d at 302.

²⁶ *Id.* at 388, 201 S.E.2d at 302.

²⁷ *Id.*, 201 S.E.2d at 303; *See, e.g., Smith v. United Fuel Gas Co.*, 113 W. Va. 178, 166 S.E. 533 (1932); *McNeely v. South Penn Oil Co.*, 58 W. Va. 438, 52 S.E. 480 (1905).

²⁸ R. DONLEY, *THE LAW OF COAL, OIL AND GAS IN WEST VIRGINIA AND VIRGINIA* § 24, at 22 (1951).

²⁹ *Consolidated Gas Supply Corp. v. Riley*, 161 W. Va. 782, 785, 247 S.E.2d 712, 714 (1978).

larged by statute so that all cotenants were provided the right to have oil and gas partitioned, or the alternative remedy of having the land sold and the proceeds divided.³⁰ Against this historical background, the West Virginia court held in its early decisions that oil and gas were not susceptible to partition in kind; therefore, the only remedy for cotenants was sale, provided the other statutory requirements were met.³¹ In 1939, the legislature amended the partition statute by adding a phrase which clarified the rights of owners of "minerals, and lessees of mineral rights other than lessees of oil and gas minerals" to have partition in kind.³² In the original text, Donley noted that the 1939 statute "should be construed to require a partition of oil and gas, in kind, where the other essential elements are present."³³

In *Consolidated Gas Supply Corp. v. Riley*,³⁴ the West Virginia Supreme Court of Appeals was presented with its first opportunity to decide a case involving partition of oil and gas properties subsequent to the enactment of the 1939 statute. The court construed the statute as Donley had suggested.

Consolidated Gas was the owner of an 11/20ths undivided interest in the oil and gas and was also the lessee of a full interest in the oil and gas. Consolidated commenced an action seeking partition by sale of the property, rather than a partition in kind. The lower court granted summary judgment in favor of Consolidated Gas on the apparent theory that as a cotenant in the oil and gas, it had an absolute right to partition the property by sale. On this issue, the supreme court reversed.³⁵

After tracing the history and evolution of the right to partition, the court held that under the 1939 statute, cotenants are entitled to partition in kind of oil and gas property.³⁶ When any of the cotenants of oil and gas property seek partition, the court held that all such cotenants first are entitled to a partition in kind.³⁷ Such action depends only upon the factual issue of the feasibility of such partition.³⁸ If such partition is not feasible, the party seeking partition has the burden of demonstrating that the property cannot be conveniently partitioned in kind, that the interests of one or more of the cotenants will be promoted by the sale, and that the interests of the other cotenants will not be prejudiced by the sale.³⁹

³⁰ R. DONLEY, *supra* note 28, § 24, at 22.

³¹ *Id.*

³² W. VA. CODE § 37-4-1 (1985).

³³ R. DONLEY, *supra* note 28, § 24, at 22.

³⁴ *Consolidated Gas Supply Corp. v. Riley*, 161 W. Va. 782, 247 S.E.2d 712 (1978).

³⁵ *Id.* at 792, 247 S.E.2d at 717.

³⁶ *Id.* at 790, 247 S.E.2d at 716.

³⁷ *Id.*, 247 S.E.2d at 716.

³⁸ *Id.*, 247 S.E.2d at 716.

³⁹ *Id.* at 787-88, 247 S.E.2d at 715. In his dissent, Justice Neely postulated that as both the owner of a fractional interest in the oil and gas, and the lessee with exclusive rights to develop the oil and gas, Consolidated Gas was the only entity in a position to bid at any sale of the property.

The *Riley* court further considered the issue of whether the lease covering the property prevented a partition. In doing so, the court revisited its decision in *McMullen v. Blecker*⁴⁰ in which it had held that partition, either in kind or by sale, is not available when there is a subsisting lease. The court rejected *McMullen* stating that:

[It] ignores the fundamental principle that partition is essentially governed by statute in this State. Our statutes governing partition recognize that if partition is obtained it is subject to any existing lease.

. . . .

We do not suggest that there may be no set of facts in a particular case which would preclude partition of a mineral interest where there is a subsisting lease. . . . *McMullen* cannot be read as requiring the denial of partition in every case in which there is a subsisting lease on the mineral interest sought to be partitioned.⁴¹

Based upon these principles, the court reversed the entry of summary judgment and remanded the case for a determination of the feasibility of partition in kind, and if not feasible, for a factual determination of whether the requirements for a sale of the property were met.⁴²

Section 32 - Minerals.

In *West Virginia Department of Highways v. Farmer*,⁴³ the West Virginia Department of Highways instituted condemnation proceedings to obtain sand and gravel from the land on which the Farmers were the surface owners. The Farmers derived their title through a deed reserving to the grantors the "oil, gas and other minerals." Thus, at issue was whether the reservation of "other minerals" included the sand and gravel, or whether the sand and gravel was conveyed with the surface.

The court determined that the deed language was ambiguous because it did not specifically reserve sand and gravel, and because of "the surrounding circumstances and past activities concerning this property,"⁴⁴ which included the fact that from the date of the severance in 1911, sand and gravel had never been sold from the property and the land had been used solely for agricultural purposes.

Neely reasoned that Consolidated Gas, with its exclusive development rights, controlled the market value of the property. *Id.* at 795, 247 S.E.2d at 719 (Neely, J., dissenting). The compelling logic of the dissent indicated the formidable case which Consolidated, as both the owner of a fractional interest in the oil and gas as well as the lessee, would have to present to force a sale of the property under current statutes.

⁴⁰ *McMullen v. Blecker*, 64 W. Va. 88, 60 S.E. 1093 (1908).

⁴¹ *Consolidated Gas Supply Corp.*, 161 W. Va. at 790-91, 247 S.E.2d at 717.

⁴² *Id.* at 792, 247 S.E.2d at 717.

⁴³ *West Virginia Dep't of Highways v. Farmer*, 159 W. Va. 823, 226 S.E.2d 717 (1976).

⁴⁴ *Id.* at 825-26, 226 S.E.2d at 719.

Thus, the court reasoned that "it seems remote that a reference to 'minerals' in a reservation was intended to include sand and gravel."⁴⁵

In resolving this ambiguity as to the meaning of "other minerals," the court considered four rules of construction. First, under the rule of *ejusdem generis*,⁴⁶ the "enumeration of oil and gas makes meaningless the term 'other minerals,' except for minerals which are the same kind, class or nature, that is, petroleum products. A grant or reservation of specifically named minerals conveys and reserves rights only in those minerals."⁴⁷ Second, when an ambiguity exists, a deed should be construed against the grantor and in favor of the grantee.⁴⁸ Third, the court likened the reservation to a restrictive covenant and indicated that such covenants would be strictly construed against the person seeking to enforce them.⁴⁹ Finally, the court noted that the taking of sand and gravel and development of the land for such purposes would destroy the surface.⁵⁰ Although not citing any of the decisions relating to surface mining, the court applied the logic which appears in those cases in holding that the parties, by granting the surface, would not have intended to destroy the estate conveyed without specifically granting such rights.⁵¹

Section 48 - Cotenants.

West Virginia continues to adhere to the general principle that a cotenant may properly lease his own interest in mineral properties, but may not lease the interests of the other cotenants.⁵² The rule of *Thaxton v. Beard*⁵³ provides the excluded cotenant with the option of either rejecting the lease and taking a proportionate share of the oil and gas produced less production costs, or of recog-

⁴⁵ *Id.* at 826, 226 S.E.2d at 719.

⁴⁶ "Under 'ejusdem generis' canon of statutory construction, where general words follow the enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated." BLACK'S LAW DICTIONARY 464 (5th ed. 1979) (citation omitted).

⁴⁷ *Farmer*, 159 W. Va. at 826, 226 S.E.2d at 720.

⁴⁸ *Id.* at 827, 226 S.E.2d at 720.

⁴⁹ *Id.*, 226 S.E.2d at 720.

⁵⁰ *Id.* at 828, 226 S.E.2d at 720-21.

⁵¹ *Id.*, 226 S.E.2d at 720-21.

⁵² R. DONLEY, THE LAW OF COAL, OIL AND GAS IN WEST VIRGINIA AND VIRGINIA § 48, at 58. *But see* Donahue v. Bills, 305 S.E.2d 311 (W. Va. 1983), in which the West Virginia Supreme Court of Appeals held that a reservation of one-half of all minerals, together with "the right to lease, enter on said premises, prospect, and explore and drill for and mine, excavate and remove the same" constituted a right in the grantor to lease *all* of the minerals, on behalf of himself and his grantees, even though he had reserved only a one-half interest in the minerals. The holding of this case is questionable; it appears the court possibly could have misinterpreted the reservation clause thus holding that the grantor had specifically reserved the right to lease all of the minerals.

⁵³ *Thaxton v. Beard*, 157 W. Va. 381, 201 S.E.2d 298 (1973).

nizing the lease and receiving a share of past as well as future royalties under the lease terms.⁵⁴

Section 58 - Application of the Rule Against Perpetuities.

In *Iafolla v. Douglas Pocahontas Coal Corp.*,⁵⁵ the West Virginia Supreme Court of Appeals reviewed a coal lease that provided the lessee with a perpetual option to extend the lease from year to year, but required the coal company lessee to pay an annual minimum rental of \$1,200. Affirming its holding in *Pechenik v. Baltimore & Ohio Railroad Co.*,⁵⁶ the court held that a lease is not void or otherwise unenforceable merely because the lessee alone is given the option to continue the operation.⁵⁷ “[N]or does such lease violate either the rule against perpetuities or the rule of law relating to restraints on alienation.”⁵⁸

In answering the lessor’s claim that the lease contemplated commencement of mining within a reasonable time, the court held that the requirement of payment of minimum rental provided the lessee with the option of either mining the coal or paying the rental. If either of these obligations was satisfied, the lease could continue indefinitely.⁵⁹

Section 69 - The “Thereafter” Clause.

In *McCullough Oil, Inc. v. Rezek*,⁶⁰ the West Virginia Supreme Court of Appeals considered an oil and gas lease providing for a primary term of eighty days and a secondary term for “as long thereafter as operations for oil or gas are being conducted on the premises, or oil or gas is found in paying quantities thereon.”⁶¹ In addition, the lease contained a provision that if production, once obtained, ceased after expiration of the primary term, the “[l]ease shall not terminate, provided Lessee resumes operations within sixty (60) days from such cessation, and this Lease shall remain in force during the prosecution of such operations, and, if production results therefrom, then as long as oil or gas is produced in paying quantities.”⁶² Production was obtained from two wells within the primary term and continued from 1966 to 1972. From 1972 to 1978, production of oil and gas ceased and no payments were made to the lessors. The

⁵⁴ *Id.* at 388, 201 S.E.2d at 302-03.

⁵⁵ *Iafolla v. Douglas Pocahontas Coal Corp.*, 162 W. Va. 489, 250 S.E.2d 128 (1978).

⁵⁶ *Pechenik v. Baltimore & Ohio R.R. Co.*, 157 W. Va. 895, 205 S.E.2d 813 (1974).

⁵⁷ *Iafolla*, 162 W. Va. at 493, 250 S.E.2d at 131 (quoting *Pechenik*, 157 W. Va. 895, 205 S.E.2d 813).

⁵⁸ *Id.* at 493, 250 S.E.2d at 131 (quoting *Pechenik*, 157 W. Va. 895, 205 S.E.2d 813).

⁵⁹ *Iafolla*, 162 W. Va. at 500-01, 250 S.E.2d at 135.

⁶⁰ *McCullough Oil, Inc. v. Rezek*, 346 S.E.2d 788 (W. Va. 1986).

⁶¹ *Id.* at 791.

⁶² *Id.*

court held that this cessation of production without resumption of operations within sixty days caused the lease to terminate.⁶³

In its decision, the court discussed the meaning and purpose of several interrelated lease clauses: the habendum clause, the cessation of production clause, and the notice and demand clause.⁶⁴ The habendum or "term" clause serves the purpose of defining and limiting the duration of the lessee's estate. Such a clause typically includes a "primary" short term, usually expressed in years, at the end of which there must be production. If production occurs, the "thereafter" provision continues the lease for "as long thereafter" as oil or gas is produced in paying quantities, or in some leases, for as long thereafter as oil and gas operations are being conducted. The clause seeks to assure the lessor that there will be production on the leased premises and that the lessor will be paid a royalty.⁶⁵

The "cessation of production" clause, or "savings" clause, modifies the "thereafter" provisions of the habendum clause. Such a clause provides the lessee a "grace" period for a specified time after cessation of production, during which the lessee has a right to resume operations.⁶⁶

The *McCullough* court also addressed notice and demand clauses holding that "[a] notice and demand clause in an oil and gas lease (or other mineral lease) has no effect upon the habendum clause or cessation of production clause of the lease."⁶⁷ According to the court:

Ordinarily a notice and demand clause relates to express and implied contractual obligations (covenants) of the lessee under the lease and relates to forfeiture of the lease for a default, that is, for a breach of these obligations; the notice and demand clause does not relate to termination or expiration of the lease upon the occurrence of the estate-limiting event stated in the habendum clause or cessation

⁶³ *Id.* at 797. In its discussion of the lease provisions, the court did not consider the presumption of abandonment upon twenty-four months of nonproduction created in W. VA. CODE § 36-4-9(a) (1985). This is curious in that the wells were apparently capable of production and no oil or gas had been produced for six years. Furthermore, the court treated the notice and demand provisions as pertaining to the lease, but actually they were included only in the assignment from the lessee to the assignee of the lease. While the holding was consistent with the applicable principles of law, perhaps the decision should have focused upon the fact that no oil or gas was produced upon the leased premises for six years.

⁶⁴ In addition, the court held that

An oil and gas lease is both a conveyance and a contract. It is designed to accomplish the main purpose of the owner of the land and of the lessee (or its assignee) as operator of the oil and gas interests: securing production of oil or gas or both in paying quantities, quickly and for as long as production in paying quantities is obtainable. Analyzed, an oil and gas lease contains traditional conveyancing portions and the usually separate contractual portions.

McCullough Oil, Inc., 346 S.E.2d at 792.

⁶⁵ *Id.* at 793.

⁶⁶ *Id.*

⁶⁷ *Id.* at 795-96.

of production clause. Consequently, a notice and demand clause does not convert a determinable interest under the habendum clause or cessation of production clause into an interest subject to a condition subsequent, specifically, subject to the receipt of notice that the lease is about to expire due to the expected non-production (at the end of the primary term) or the expected lack of resumption of operations (after cessation of production during the secondary term).⁶⁸

Finally, the court noted that the automatic termination provision of the “thereafter” clause was desirable in that it provided certainty as to whether the lease was terminated in the event of nonproduction.⁶⁹

Section 71 - “In Paying Quantities.”

The oil and gas lease phrase “produced in paying quantities,” as originally explained by Donley, has been expanded and clarified.⁷⁰ In *Goodwin v. Wright*,⁷¹ the West Virginia Supreme Court of Appeals held that a lessor cannot remain bound to a lease when it does not pay.⁷² The main objective of a lease is to obtain production that is profitable to both parties, and the lease ends when oil and gas are no longer produced in commercially paying quantities.⁷³ The court noted that “production” was synonymous with “production in paying quantities.”⁷⁴ Thus, even if the requirement of “paying quantity” is not expressed in a lease, it will be implied.

The *Goodwin* court further held that the use of free gas for domestic purposes was a secondary matter and did not satisfy the duty to produce.⁷⁵ Nor did it constitute “production” that would keep the lease in effect beyond the primary term.⁷⁶

Section 76 - Statutory Method of Cancellation for Nonpayment of Delay Rental.

In the original text, Donley observed that West Virginia Code section 36-4-9(a)⁷⁷ did not distinguish between “unless” and “or” type leases.⁷⁸ In *Warner v.*

⁶⁸ *Id.* at 796.

⁶⁹ *Id.* at 797.

⁷⁰ See R. DONLEY, *THE LAW OF COAL, OIL AND GAS IN WEST VIRGINIA AND VIRGINIA* § 71, at 90 (1951).

⁷¹ *Goodwin v. Wright*, 163 W. Va. 264, 255 S.E.2d 924 (1979).

⁷² *Id.* at 268, 255 S.E.2d at 926.

⁷³ *Id.*, 255 S.E.2d at 926.

⁷⁴ *Id.*, 255 S.E.2d at 926.

⁷⁵ *Id.* at 270, 255 S.E.2d at 927.

⁷⁶ *Id.*, 255 S.E.2d at 927.

⁷⁷ W. VA. CODE § 36-4-9a (1985).

⁷⁸ R. DONLEY, *THE LAW OF COAL, OIL AND GAS IN WEST VIRGINIA AND VIRGINIA*, § 76, at 102 (1951).

Haught, Inc.,⁷⁹ the West Virginia Supreme Court of Appeals seized upon the opportunity to differentiate between these two types of leases.

“In an ‘or’ lease, the lessee covenants to do some alternative act, usually to drill a well or pay periodic rentals, [in order] to maintain the lease during its primary term.”⁸⁰ To terminate a lease before the expiration of the primary term some affirmative act is required, such as a surrender of the lease.⁸¹ Since such a termination requires action or entry by the lessor, and often a “judicial determination of the rights of the parties, equitable rules against forfeiture are applicable to a determination of whether the lease should be cancelled.”⁸²

On the other hand, in an “unless” lease, the lessee does not covenant to “drill or pay.” However, if the lessee does neither within the term of the lease, the lease automatically expires.⁸³ More precisely, “‘if’ no well is drilled, the lease terminates ‘unless’ rentals are paid.”⁸⁴ The lessee is not obligated,⁸⁵ and moreover, no affirmative act is required if he desires to terminate the lease before the expiration of the primary term. Failure to drill a well coupled with the failure to pay rentals will cause the lease automatically to expire.⁸⁶ Because of this automatic provision, “equitable rules against forfeiture are *not* applicable to a determination of whether the lease has expired.”⁸⁷

The court then looked to the purposes of section 36-4-9a, and found that the legislature intended to provide a mechanism for cancellation of leases for nonpayment of delay rent.⁸⁸ The court held that in “unless” type leases, cancellation provisions were unnecessary because such leases automatically terminate upon nonpayment of rent.⁸⁹ Therefore, the provisions for cancellation in section 36-4-9a applied only to “or” type leases.⁹⁰ This statute provides an expeditious means for cancellation of “or” type leases without requiring the lessee to seek an equitable forfeiture or declaration of abandonment, both of which were difficult to obtain prior to the enactment of the statute under equitable principles.

In *Warner v. Haught, Inc.*, the lessee had failed to pay delay rentals on time. The lessors promptly sent notices that the leases were cancelled. Upon receipt of the notices, the lessee made the delay rental payments. The court held that the

⁷⁹ *Warner v. Haught, Inc.*, 329 S.E.2d 88 (W. Va. 1985).

⁸⁰ *Id.* at 92.

⁸¹ *Id.*

⁸² *Id.* at 93.

⁸³ *Id.* at 92.

⁸⁴ *Id.*

⁸⁵ *Id.* at 93.

⁸⁶ *Id.* at 92.

⁸⁷ *Id.* at 93 (quoting 3 H. WILLIAMS, OIL & GAS LAW § 606 (1984)) (emphasis added).

⁸⁸ *Id.* at 94-95.

⁸⁹ *Id.*

⁹⁰ *Id.*

lessors had failed to follow the procedures set forth in section 36-4-9a, and further, that even though the payments were late, they were tendered within the time required after demand pursuant to the statute; therefore, a forfeiture was inappropriate.⁹¹

However, the court held that:

[o]il and gas lessees may not subvert the section 36-4-9a provision into a device to constantly defer or avoid timely payment of delay rentals. Accordingly, we hold that under West Virginia Code § 36-4-9a (1985 Replacement Vol.), an oil and gas lessee's repeated failure to pay rentals on time, thereby forcing the lessor to repeatedly seek relief under that section, may permit a finding that the indifference, laches or injurious conduct of the lessee justifies a declaration of equitable forfeiture of the leasehold.⁹²

Section 92 - Influence of Doctrine of Abandonment.

West Virginia Code section 36-4-9a, as enacted in 1943, provided a mechanism to declare oil and gas leases null and void if delay rent was not paid when due. In 1979, this statute was amended by adding a rebuttable presumption that a lessee intends to abandon a lease when there is no production of oil or gas for a period greater than twenty-four months.⁹³

In *Berry Energy Consultants & Managers, Inc. v. Bennett*,⁹⁴ the West Virginia Supreme Court of Appeals considered the effects of West Virginia Code section 36-4-9a in a case in which a lessee drilled a well within the primary term of a lease but was unable to market the gas for a period of about twenty months after the primary term had expired. In the interim, the lessors attempted to cancel the lease, arguing that the lessee had abandoned it.

In considering the issue of abandonment, the court reiterated the principle that abandonment is a matter of intent, determined by the conduct and declarations of the lessee.⁹⁵ Determination of intent was facilitated by the 1979 amendment to section 36-4-9a.⁹⁶

However, in *Berry Energy*, tendered and accepted delay rental payments precluded the assertion of the statutory presumption of intent to abandon.⁹⁷ "Such

⁹¹ *Id.* at 96.

⁹² *Id.*

⁹³ W. VA. CODE § 36-4-9a (1985). The presumption of abandonment upon twenty-four months of nonproduction applies to such periods subsequent to July 1, 1979. However, this rebuttable presumption does not apply to leases for gas storage purposes, (1) when any shut-in royalty, flat well rental, delay rental, or other similar payment is made, (2) when the failure to produce and sell is the direct result of the interference of the owner, or (3) when the delay in excess of twenty-four months results from inability to sell or deliver oil or gas. *Id.*

⁹⁴ *Berry Energy Consultants & Managers, Inc. v. Bennett*, 331 S.E.2d 823 W. Va. 1985).

⁹⁵ *Id.* at 826.

⁹⁶ *Id.*

⁹⁷ *Id.* at 827.

payments contradict the assertion . . . that the lessees abandoned the lease.”⁹⁸

Section 104 - The Implied Covenant to Sell the Minerals.

In *Berry Energy Consultants & Managers, Inc. v. Bennett*,⁹⁹ a lease permitted the payment of delay rentals until gas could be marketed but the gas was not marketed until twenty months after the expiration of the primary term. During that time, the lessor attempted to cancel the lease. The court held that payment of delay rentals did not relieve the lessee of his duty under the implied covenant to market, and remanded the case for a determination of whether the lessee had diligently pursued his obligation to market oil and gas from the leased premises.¹⁰⁰

-Section 111 - Recovery of Damages.

*Bethlehem Steel Corp. v. Shonk Land Co.*¹⁰¹ focused on the right of a coal lessor to recover damages from a defaulting lessee. Noting that a lessee who remains on leased premises without the lessor's consent, and after termination of the lease term, is a trespasser, the West Virginia Supreme Court of Appeals held that, in the absence of statutory remedies for a tenant's willful failure to surrender the leased premises, a lessor is entitled to the reasonable rental value of the property.¹⁰² “For mineral leases reasonable rental value is synonymous with reasonable royalties.”¹⁰³ Thus the lessor would be entitled either to “reasonable royalties on coal mined, or a reasonable minimum royalty, whichever is greater.”¹⁰⁴

Section 116 - Upon Abandonment of the Lease.

West Virginia Code section 36-4-9a,¹⁰⁵ codifies the common law precedents noted in the original text. This code provision establishes the rebuttable presumption that the failure to produce and sell or use oil and gas for a period longer than two years constitutes an intention to abandon any existing oil or gas well.¹⁰⁶ As discussed in section 92, *Berry Energy Consultants & Managers, Inc. v. Bennett*¹⁰⁷ represents a clear interpretation of this statute and relevant common law.

Section 119 - Enforcement of Forfeitures and Relief against Forfeitures.

Bethlehem Steel Corp. v. Shonk Land Co.,¹⁰⁸ involved a combination of both forfeiture and nonrenewal issues. The term of Bethlehem's coal lease ran from

⁹⁸ *Id.* at 828.

⁹⁹ *Berry Energy Consultants & Managers, Inc. v. Bennett*, 331 S.E.2d 823 (W. Va. 1985).

¹⁰⁰ *Id.* at 829.

¹⁰¹ *Bethlehem Steel Corp. v. Shonk Land Co.*, 169 W. Va. 310, 288 S.E.2d 139 (1982).

¹⁰² *Id.* at 327-28, 288 S.E.2d at 149.

¹⁰³ *Id.*, at 328, 288 S.E.2d at 149.

¹⁰⁴ *Id.* at 329, 288 S.E.2d at 149.

¹⁰⁵ W. VA. CODE § 36-4-9a (1985).

¹⁰⁶ *Id.*

¹⁰⁷ *Berry Energy Consultants & Managers, Inc. v. Bennett*, 331 S.E.2d 823 (W. Va. 1985).

¹⁰⁸ *Bethlehem Steel Corp. v. Shonk Land Co.*, 169 W. Va. 310, 288 S.E.2d 139 (1982).

1968 until 1978 with the right of renewal in Bethlehem, provided it was not in default. Bethlehem sent a timely notice of renewal, to which Shonk replied that Bethlehem was in default. The renewal right was rejected and Shonk declared that forfeiture would be deemed to have occurred if the default was not cured within the time period specified in the lease.

In *Bethlehem Steel Corp.*, the distinction between a nonrenewal and a forfeiture was critical. By nonrenewal of the lease, Bethlehem would have the right to remove or sell the processing plant in which it had invested six million dollars three years previously. However, if Bethlehem had forfeited the lease, it would lose its processing plant. Whether by forfeiture or nonrenewal, Bethlehem would lose its lease within a two-month time period.

One of the fundamental concepts in forfeiture cases is that the equitable remedy of forfeiture does not lie when the injured party can be made whole by an award of damages.¹⁰⁹ In *Bethlehem Steel Corp.*, the court held that "Shonk can be made whole by monetary damages and by allowing it [Bethlehem] not to renew the lease."¹¹⁰ Therefore, Bethlehem's default did not justify the wholesale forfeiture of its equipment and personal property.¹¹¹ The court relied extensively on *Easley Coal Co. v. Brush Creek Coal Co.*¹¹² in recognizing that forfeiture is not a favored remedy and would not be granted for every breach of a covenant or condition of a lease.¹¹³ For such a breach to afford the basis for a forfeiture, the broken covenant or condition relied upon for forfeiture must be clearly and definitively expressed in a forfeiture clause.¹¹⁴

In further support of its decision not to allow forfeiture, the court held that a lessor must act and assert his rights to enforce lease provisions. When he fails to do so and either acquiesces or allows the lessee to act to his detriment, the ability to forfeit becomes unconscionable.¹¹⁵

The Shonk lease contained a forfeiture clause which provided that any "default" could be relied upon. The court held that such a "catchall, dragnet forfeiture clause for breach of any contractual covenant is inadequate."¹¹⁶ This decision serves as a warning to practitioners that the specific reason for default which may provide grounds for forfeiture must be clearly set forth in the forfeiture clause of a lease.

The lease in *Bethlehem Steel Corp.* was for a term of ten years, with a right in the lessee to renew the lease for two successive ten-year terms, provided the

¹⁰⁹ See, e.g., *McCartney v. Campbell*, 114 W. Va. 332, 171 S.E. 821 (1933).

¹¹⁰ *Bethlehem Steel Corp.*, 169 W. Va. at 314, 288 S.E.2d at 142 (emphasis in original).

¹¹¹ *Id.* at 313-14, 288 S.E.2d at 142.

¹¹² *Easley Coal Co. v. Brush Creek Coal Co.*, 91 W. Va. 291, 112 S.E. 512 (1922).

¹¹³ *Id.* at 296, 112 S.E.2d at 513.

¹¹⁴ *Bethlehem Steel Corp.*, 169 W. Va. at 315-16, 288 S.E.2d at 143.

¹¹⁵ *Bethlehem Steel Corp.*, 169 W. Va. at 317-18, 288 S.E.2d at 143-44.

¹¹⁶ *Id.* at 316, 288 S.E.2d at 143.

lessee complied with the lease and gave timely notice of renewal. In considering whether the lease could be renewed by Bethlehem, the court ruled that "Bethlehem's conduct justified Shonk's refusal to permit renewal."¹¹⁷ The court did not articulate the exact nature of this conduct, although it appears that the lessee's failure to provide maps, incorrect calculation or nonpayment of royalties, and failure to conduct lawful operations were involved.¹¹⁸

Section 120 - Express Covenant to Mine Minimum Quantity of Coal, or to Pay Minimum Royalties.

In the original text, *Babcock Coal & Coke Co. v. Brackens Creek Coal Land Co.*¹¹⁹ was cited as the modern decision reflecting the principle that an agreement to pay minimum royalties is a contract of hazard, and the lessee assumes the risk of the existence of any mineral to be mined.¹²⁰ The Fourth Circuit specifically adopted this theory in *Orlandi v. Goodell*.¹²¹

In *Orlandi*, the lessee, finding no marketable coal on the leased premises, and relying on the doctrine of mutual mistake, failed to make the required minimum royalty payments provided for in the lease. The lessor brought suit, and on appeal, the Fourth Circuit refused to apply the mutual mistake doctrine and upheld the *Babcock* rule:

Minimum royalty provisions are the very earmarks of contracts of hazard As in *Babcock*, the minimum royalty provisions here are stated in absolute terms No relationship exists between the payment schedule and any given quantity of coal that might be mined [T]here is no requirement that . . . [a certain] amount shall be mined and no stated contingency that payments shall be made only if such a quantity actually is mined.¹²²

The court noted a possible method of easing the harshness of the *Babcock* rule through the use of a cancellation clause.¹²³ If a lease contains a termination clause and the lessee follows its terms to relieve itself of any responsibility, then the minimum royalty obligation may be circumvented.¹²⁴ However, the mere presence of such a clause without an attempt to follow its "contractual escape route" does not entitle the lessee to assert the cancellation clause as a defense for any

¹¹⁷ *Id.* at 319, 288 S.E.2d at 144.

¹¹⁸ *Id.*, 288 S.E.2d at 144.

¹¹⁹ *Babcock Coal & Coke Co. v. Brackens Creek Coal Land Co.*, 128 W. Va. 676, 37 S.E.2d 519 (1946).

¹²⁰ R. DONLEY, *THE LAW OF COAL, OIL AND GAS IN WEST VIRGINIA AND VIRGINIA* § 120 at 149 (1951).

¹²¹ *Orlandi v. Goodell*, 760 F.2d 78 (4th Cir. 1985).

¹²² *Id.* at 81.

¹²³ *Id.* at 82.

¹²⁴ *Id.*

inaction. "Impossibility does not excuse nonperformance where the promisor has indicated an intent to assume the risk. . . ." ¹²⁵

Section 131 - What is Transferred by an Assignment.

As an additional illustration of what may be transferred by an assignment, *Arbaugh v. Raines*¹²⁶ raised the issue of whether a purchaser of shares in an oil or gas well also acquired an interest in the leasehold estate. The West Virginia Supreme Court of Appeals answered with a resounding "no," relying first upon the provisions of West Virginia Code section 36-1-1,¹²⁷ which clearly "dictates the manner in which such transfer or conveyance must be made."¹²⁸ The court then looked to the language of the assignment agreement and found that the intent of the parties was clearly and accurately reflected, and, therefore, not subject to judicial interpretation.¹²⁹ *Arbaugh* affirms the principle that an assignment is limited only to an interest in the well, and does not include the leasehold estate.

Section 142 - Erecting of Structures and Other Uses of the Surface.

The general rule on surface use set forth in the original text was that any rights and privileges existing with ownership of minerals must be exercised reasonably and with due regard for the interest of the party upon whom the burden is imposed.¹³⁰ Recent decisions have recognized the continuing validity of this rule.

In *Buffalo Mining Co. v. Martin*,¹³¹ the surface owners sought to construe the language of an 1890 coal severance deed as barring the mineral owners from constructing an electric power line over their property. Because the severance deed made no mention of such a right, the surface owners claimed that utilizing the surface for this purpose was an unreasonable use of the land not contemplated by the original parties.

The West Virginia Supreme Court of Appeals found that the right of the mineral owner to construct power lines over and across the surface was part of the broad and specific rights for utilization of the surface contained in the deed. Since such broad rights were coupled with a number of specific surface uses, there was the implication of compatible surface uses that were necessary to the underground mining activity.¹³² Thus, because the deed implied the right to use the surface for power lines and since the surface owners did not raise the issues

¹²⁵ *Id.* (citing *Wiggins v. Warrior River Coal Co.*, 696 F.2d 1356 (11th Cir. 1983)).

¹²⁶ *Arbaugh v. Raines*, 155 W. Va. 409, 184 S.E.2d 620 (1971).

¹²⁷ W. VA. CODE § 36-1-1 (1985).

¹²⁸ *Arbaugh*, 155 W. Va. at 413, 184 S.E.2d at 623. W. VA. CODE § 36-1-1 (1985), provides that such transfer or conveyance shall be by deed or will.

¹²⁹ *Arbaugh*, 155 W. Va. at 414, 184 S.E.2d at 624.

¹³⁰ R. DONLEY, *THE LAW OF COAL, OIL AND GAS IN WEST VIRGINIA AND VIRGINIA* § 142 at 189 (1951).

¹³¹ *Buffalo Mining Co. v. Martin*, 165 W. Va. 10, 267 S.E.2d 721 (1980).

¹³² *Id.* at 16, 267 S.E.2d at 725.

of undue burden and reasonable necessity in the original proceeding, the court affirmed the lower tribunal's decision, permitting the construction of the power lines across the surface.¹³³

In a later decision, *Lowe v. Guyan Eagle Coals, Inc.*,¹³⁴ the court reiterated these principles. The court held that the compatibility of a mineral owner's uses of and burdens on a surface owner's estate, together with the intent of the parties, were questions of fact.¹³⁵

Section 143 - Interpretation of Express Mining Rights.

In *Buffalo Mining Co. v. Martin*,¹³⁶ discussed in section 142, the West Virginia Supreme Court of Appeals noted that when enforcement of implied mining rights, as opposed to express rights, is sought, "the test of what is reasonable and necessary becomes more exacting."¹³⁷ The mineral owner in such a case seeks a right not by virtue of an express right contained in the deed, but one found "by necessary implication as a correlative to those rights expressed in the deed."¹³⁸ The factors to consider in determining the existence of such an implied right are whether the right is reasonably necessary for the extraction of the mineral, and whether the right can be exercised without any substantial burden to the surface owner.¹³⁹

The court noted that when "the severance deed contains broad rights for utilization of the surface in connection with underground mining activities and these broad rights are coupled with a number of specific surface uses, courts will be inclined to imply compatible surface uses that are necessary to the underground mining activity."¹⁴⁰ Thus, although the specific right to construct an electric transmission line was not expressly set forth in the severance deed, the court held that it was implied by virtue of the express rights contained in the instrument.¹⁴¹

Section 144 - Stripping Rights.

In *Roberts v. Powell*,¹⁴² the severance deed conveyed to the plaintiffs the surface with a reservation of all coal, oil, gas, and other minerals. In providing for mining rights, the deed reserved:

[a]ll mining rights and privileges; the full right to mine or drill and remove the

¹³³ *Id.* at 18-19, 267 S.E.2d at 725-26. These two factors are part of an "exacting" test propounded by the court, more specifically addressed in § 143 *infra*.

¹³⁴ *Lowe v. Guyan Eagle Coals, Inc.*, 273 S.E.2d 91 (W. Va. 1980).

¹³⁵ *Id.* at 93.

¹³⁶ *Buffalo Mining Co. v. Martin*, 165 W. Va. 10, 267 S.E.2d 721 (1980).

¹³⁷ *Id.* at 18, 267 S.E.2d at 725.

¹³⁸ *Id.*, 267 S.E.2d at 725.

¹³⁹ *Id.*, 267 S.E.2d at 725.

¹⁴⁰ *Id.* at 16, S.E.2d at 725.

¹⁴¹ *Id.* at 18, S.E.2d at 725.

¹⁴² *Roberts v. Powell*, 157 W. Va. 199, 207 S.E.2d 123 (1973).

same and use as much of the surface as may be necessary in connection therewith . . . together with all right-of-way over, through and across said tract of land without liability for damage or injury to said land, timber, appurtenances, or water. Furthermore, all developing of the un conveyed mineral rights shall protect in reason the rights of . . . [plaintiffs] and shall never be construed to permit mining of the surface to obtain the coal or minerals by such means as is commonly known as "stripping" without compensation for the surface destroyed and damage done thereto.¹⁴³

In considering this language, the West Virginia Supreme Court of Appeals held that the owner of the coal was entitled to extract the minerals by surface mining, but was liable for any damages it caused in using such method.¹⁴⁴ The plaintiffs argued that the damage must be ascertained in advance of mining. The court held that the deed did not require such advance agreement and that the coal owner had the right to proceed with mining, subject only to the requirement in the severance deed that he pay damages.¹⁴⁵

On the issue of damages, the court held that punitive damages were inappropriate absent a demonstration that the mining operations were carried on in a wanton or malicious manner.¹⁴⁶ In view of the fact that the coal owner lawfully exercised his mining rights, the damages recoverable were limited to actual damages (*i.e.*, the difference between the fair market value of the land before and the value after the mining).¹⁴⁷

Section 157 - The Free Gas Clause.

In *Goodwin v. Wright*,¹⁴⁸ the West Virginia Supreme Court of Appeals addressed the issue of whether the lessors' receipt of free gas for domestic purposes constituted consideration or production sufficient to keep the lease alive beyond the primary term. Noting a lack of authority in this area, the court relied strongly on an Illinois case¹⁴⁹ in holding that a free gas provision, like a provision for burying lines below the surface plow depth, was a secondary matter and did not constitute consideration or production so as to keep a lease in effect after the basic term.¹⁵⁰

¹⁴³ *Id.* at 203, 207 S.E.2d at 126. The reservation clause in the second deed reserved all coal and minerals underlying the surface "and sufficient rights of way to properly mine all of said coal. The party of the second part shall be paid a reasonable damage for all surface openings and water sinkings that may occur by any mining operations." *Id.*, 207 S.E.2d at 126.

¹⁴⁴ *Id.* at 203-04, 207 S.E.2d at 126.

¹⁴⁵ *Id.* at 204, 207 S.E.2d at 126.

¹⁴⁶ *Id.*, 207 S.E.2d at 127.

¹⁴⁷ *Id.* at 206, 207 S.E.2d at 128.

¹⁴⁸ *Goodwin v. Wright*, 163 W. Va. 264, 255 S.E.2d 924 (1979).

¹⁴⁹ *Metz v. Doss*, 114 Ill. App. 2d 195, 252 N.E.2d 410 (1969).

¹⁵⁰ *Goodwin*, 163 W. Va. at 270, 255 S.E.2d at 927.

Section 158 - The Flat Rental for Gas Wells.

In *McGinnis v. Cayton*,¹⁵¹ an 1893 oil and gas lease was extended by production of oil from a single well. In 1978, a gas well on the same tract which had not produced for more than twenty-five years was deepened, and production of gas was obtained pursuant to the terms of the original lease. The lessee then tendered a flat well rental payment of \$100 per year. The owners of the tract of land, successors to the original owner and lessor, instituted an action seeking to reform the lease or have it declared void. The trial court granted summary judgment for the defendant and the plaintiffs appealed.

With respect to flat well rentals, the majority of the court refused to consider equitable considerations such as mutual mistake, which would have allowed for reformation, because the plaintiffs in the action were not the original parties to the lease, but had purchased their interest with notice of the prior contract.¹⁵² However, the majority held meritorious the claim that there had been a mutual mistake of fact when the lease was executed into in 1893, and remanded the case for a determination on this issue.¹⁵³ In doing so, the supreme court considered the fact that when the lease was entered into, gas was not a valuable resource, and the typical oil and gas lease at that time provided only for a small lump sum payment for gas production.¹⁵⁴ Under these circumstances, the lease would enjoy a presumption of validity but the plaintiff would have the burden of proving both mutual mistake of fact and that the contract did not allocate the risk of changed conditions.¹⁵⁵

The issue of flat well rentals also has been the focus of recent legislation. In 1982, the West Virginia Legislature enacted legislation, now West Virginia Code section 22B-1-8,¹⁵⁶ which declared that the public policy of the state was to prevent production of oil and gas under leases providing for flat well royalty. Thus, to obtain a permit for drilling operations after the effective date of the statute, it is necessary that the oil and gas lease be filed with the permit application. A permit may not be issued when such lease contains a flat well royalty clause. In order to avoid this prohibition, the applicant must file an affidavit certifying that the payment of royalty will be based upon at least one-eighth of the proceeds received for gas produced.

Section 159 - Gas Royalties.

See section 158.

¹⁵¹ *McGinnis v. Cayton*, 312 S.E.2d 765 (W. Va. 1984).

¹⁵² *Id.* at 770.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ W. VA. CODE § 22B-1-8 (1985).

Section 176 - Liability to the Owner of the Surface.

As a general rule, a mineral owner may use the surface overlying his mineral estate for all reasonable and necessary purposes without liability to the surface owner for damages. In *Adkins v. United Fuel Gas Co.*¹⁵⁷ the court affirmed this longstanding principle and recognized the acts and uses typical in oil and gas development. The decision in *Adkins* also is significant for its holding that reasonable and necessary use of the surface is a question of law to be decided by the court and not a question of fact for the jury.¹⁵⁸

Following the principle articulated in *Adkins*, the United States Court of Appeals for the Fourth Circuit, in *Justice v. Penzoil Co.*,¹⁵⁹ held that the court, not the jury, must conclude whether a given use of property by a mineral developer is reasonable and necessary.¹⁶⁰ In defining the parameters of the issues to be decided by a jury and those by the court, the Fourth Circuit held that the jury should act as fact finder on subsidiary questions regarding disputed issues of the nature and extent of the damage, if any, caused by the operator to the surface of the land.¹⁶¹ The ultimate question of law regarding whether the use was unreasonable or unnecessary would be decided by the court as a matter of law.¹⁶²

The West Virginia Supreme Court of Appeals, in *Buffalo Mining Co. v. Martin*,¹⁶³ held that a severance deed containing broad mining rights would include the right to construct an electric power line, although such a right was not expressly stated.¹⁶⁴ The court stated that when "broad rights for utilization of the surface in connection with underground mining activities. . . are coupled with a number of specific surface uses, courts will be inclined to imply compatible surface uses that are necessary to the underground mining activity."¹⁶⁵ The court indicated that in cases seeking judicial recognition of implied rights as opposed to express rights, a balancing test must be employed in which "it must be demonstrated not only that the right is reasonably necessary for the extraction of the mineral, but also that the right can be exercised without any substantial burden to the surface owner."¹⁶⁶ Thus, the "reasonable use" test of *Adkins* was employed by the court to allow surface use by the mineral owner.

However, eight months after *Buffalo Mining Co.*, in *Lowe v. Guyan Eagle Coals, Inc.*,¹⁶⁷ the West Virginia court, without considering *Adkins*, found that the

¹⁵⁷ *Adkins v. United Fuel Gas Co.*, 134 W. Va. 719, 61 S.E.2d 633 (1950).

¹⁵⁸ *Id.* at 724, 61 S.E.2d at 636.

¹⁵⁹ *Justice v. Penzoil*, 598 F.2d 1339 (4th Cir.), cert. denied, 444 U.S. 867 (1979).

¹⁶⁰ *Id.* at 1343.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Buffalo Mining Co. v. Martin*, 165 W. Va. 10, 267 S.E.2d 721 (1980).

¹⁶⁴ *Id.* at 17-18, 267 S.E.2d at 725.

¹⁶⁵ *Id.* at 16, 267 S.E.2d at 725.

¹⁶⁶ *Id.* at 18, 267 S.E.2d at 725-26.

¹⁶⁷ *Lowe v. Guyan Eagle Coals, Inc.*, 273 S.E.2d 91 (W. Va. 1980).

unreasonableness of a coal operator's use of a subservient surface estate was a question of fact for the jury.¹⁶⁸ Moreover, instead of applying the "reasonable use" test, the court focused on whether the use of the surface constituted a burden greater than that which was contemplated by the parties to the original coal severance deed.¹⁶⁹

While the decision in *Buffalo Mining Co.* follows the "reasonable use" standard of *Adkins* and *Justice*, the *Lowe* decision appears to be in conflict with prior decisions. The cases perhaps may be distinguished by the contexts in which they arose; *Lowe* dealing with permissible use of the surface decades after a coal severance deed, and *Buffalo Mining Co.* considering permissible use of the surface estate by an oil and gas lessee. The difference also may be in the interpretation of the express and implied warranties. The question arises as to whether the *Adkins* reasonable use/question of law test or the *Lowe* authorized use/question of fact standard is to be applied by the West Virginia court in the future, especially since the court recognized both theories within an eight month period.¹⁷⁰

The liability of a mineral owner to a surface owner also has been the focus of recent legislation. In 1983, West Virginia enacted the Oil and Gas Production Damage Compensation Act.¹⁷¹ Under West Virginia Code section 22B-2-3 of this Act, a surface owner may recover for damage to his land by oil and gas operations. Such compensation may include: (1) lost income or expenses which result from the inability of the landowner to use that portion of his land taken for drilling; (2) the market value of crops destroyed or damaged; (3) any damage to water supply; (4) the cost of repair of personal property; and (5) the diminution in value, if any, of the surface land and other property after completion of the operations according to the actual use made by the surface owner prior to the drilling.¹⁷²

The surface owner has a period of two years following the notice of the commencement of reclamation to make a claim under the Act.¹⁷³ If the parties are unable to reach an agreed settlement, the surface owner may either institute an action in the circuit court of the county in which the well is located or elect to have the issue determined by binding arbitration, the procedures for which are set forth in the Act.¹⁷⁴ The Act specifically preserves the common law cause of action for damages for unreasonable or unnecessary use of the land.¹⁷⁵

¹⁶⁸ *Id.* at 93.

¹⁶⁹ *Id.*

¹⁷⁰ While the *Lowe* approach does seem compelling, it is illogical in light of the many antiquated leases still in effect. It is doubtful that the authorized uses of these leases could have contemplated the advanced, yet reasonable, technology of the current era.

¹⁷¹ W. VA. CODE §§ 22B-2-1 to -9 (1985).

¹⁷² *Id.* at § 22B-2-3.

¹⁷³ *Id.* at § 22B-2-5.

¹⁷⁴ *Id.* at § 22B-2-7.

¹⁷⁵ *Id.* at § 22B-2-4.

In other recent legislation, West Virginia Code section 22-8-7(b)(4), which is included in what is commonly known as the "deep well" statute,¹⁷⁶ also protects the interest of surface owners. The legislature has defined a deep well as one which extends to six thousand feet in depth or to the top of the uppermost member of the Onondaga Group.¹⁷⁷ Prior to drilling such a well, an operator must obtain consent from the surface owner, even if he is operating under a valid lease from the mineral owner.¹⁷⁸

In addition to the statutes affecting production of oil and gas, West Virginia has enacted legislation controlling the surface impact of underground and surface mining. In compliance with the mandates of the Federal Surface Mining Control and Reclamation Act of 1977,¹⁷⁹ West Virginia has enacted its own reclamation act which parallels the federal act.¹⁸⁰ While primarily addressing surface or strip mining reclamation, section 22A-3-14,¹⁸¹ provides relief to surface owners for damage caused by underground mining. Section 22A-3-14(b)(1) requires operators to "[a]dopt measures consistent with known technology in order to prevent subsidence causing material damage to the extent technologically and economically feasible. . . ."¹⁸² This language is qualified, however, by the last sentence: "Provided, [t]hat this subsection does not prohibit the standard method of room and pillar mining."¹⁸³

Section 177 - Liability for Injuries to Persons.

In *Mullens v. Beatrice Pocahontas Co.*,¹⁸⁴ community residents sued a coal mining and processing company, seeking damages and injunctive relief from coal dust emitted from the defendant's plant. In applying Virginia law, the Fourth Circuit found that even though the severance deeds did not mention dust emission, the coal operator could not be held liable for dust "reasonably necessary for the preparation of coal in the ordinary way."¹⁸⁵ However, in considering the fact that

¹⁷⁶ W. VA. CODE § 22-8-7 (1985).

¹⁷⁷ W. VA. CODE § 22-8-2(a)(12) (1985).

¹⁷⁸ W. VA. CODE § 22-8-7(b)(4).

¹⁷⁹ 30 U.S.C. §§ 1201 to -1328 (1982 & Supp. III 1985).

¹⁸⁰ W. VA. CODE §§ 22A-3-1 to -40 (1985).

¹⁸¹ *Id.* at § 22A-3-14.

¹⁸² *Id.* at § 22A-3-14(b)(1).

¹⁸³ *Id.* West Virginia has yet to interpret this portion of the statute. However, Illinois, in *Melvin v. Old Ben Coal Co.*, 612 F. Supp. 1204 (D.C. Ill. 1985), addressed the issue, and held that while the identical Illinois statute allows subsidence under certain terms, it does not serve to exempt longwall mine operators from all provisions. *Id.* at 1205. "To hold otherwise would grant longwall mine operators a license to unilaterally ignore federal and state law regarding coal mining." *Id.* The *Melvin* court further held that the new Act superseded any prior waiver of surface damage compensation, finding that continued recognition of express waivers would render the new legislation virtually meaningless. *Id.* at 1206.

¹⁸⁴ *Mullens v. Beatrice Pocahontas Co.*, 432 F.2d 314 (4th Cir. 1970).

¹⁸⁵ *Id.* at 319.

both prior surface and mineral owners never contemplated that the emission of excessive or needless dust would seriously impair the rights of the surface owners, the court found that "the surface cannot be burdened by dust that is not the product of ordinary operations or by dust which the coal operator can reasonably control."¹⁸⁶ Moreover, the operator is liable for damages caused by the excess dust, even though the deeds waived any damage from air pollution and dust.¹⁸⁷ The court remanded the case to the lower tribunal, finding that issues such as the amount of dust, its effect on the health and property of the residents, and whether it was reasonably necessary or controllable were questions of fact for the jury.¹⁸⁸

Section 178 - Liability for Injuries to Property.

The issue of liability under Virginia law for damage caused by coal dust emissions was addressed in *Mullens v. Beatrice Pocahontas Co.*,¹⁸⁹ discussed in the previous section. This case expanded the general rule that an operator is liable for such damages if the dust is excessive, unreasonable, and within his means of control.

In another case involving liability for property damage, *Johnson v. Junior Pocahontas Coal Co.*,¹⁹⁰ the court distinguished between an independent contractor and a coal lessee. The contractor, who had damaged adjacent property in the process of strip mining, claimed insulation from liability through the exculpatory clause in the severance deeds. The West Virginia Supreme Court of Appeals refused to extend such immunity to the independent contractor, holding that he had only a contractual interest in the land. Such an interest is sufficient to establish an estate or privity interest in the property; therefore, the exculpatory clause in the deeds would not shield him from liability for willful, wanton, and negligent conduct.¹⁹¹

Section 179 - Abatement of Operations as a Nuisance.

See section 177.

Section 181 - Statutory Duties of Oil and Gas Well Operator or Owner.

Subsequent to the last update, West Virginia revised its Oil and Gas Conservation Act, chapter 22, article 8, of the West Virginia Code.¹⁹² This Act attempts to regulate the oil and gas industry to foster, encourage, and promote exploration and conservation of the minerals on the one hand, and yet prohibit

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 320.

¹⁸⁹ *Mullens v. Beatrice Pocahontas Co.*, 432 F.2d 314 (4th Cir. 1970).

¹⁹⁰ *Johnson v. Junior Pocahontas Coal Co.*, 160 W. Va. 261, 234 S.E.2d 309 (1977).

¹⁹¹ *Id.* at 272-73, 234 S.E.2d at 315.

¹⁹² W. VA. CODE §§ 22-8-1 to -16 (1985).

waste and exploitation of them on the other. Furthermore, it seeks to protect the interests of operators, royalty owners, and surface owners. Section 22-8-7 specifically outlines the steps and procedures that all of the parties involved must follow, including the initial application to drill a well, the size of the well, and notice to the surface owner.¹⁹³

The West Virginia Supreme Court of Appeals interpreted the early version of the Act in *Devon Corp. v. Miller*.¹⁹⁴ In this case, the constitutionality of West Virginia Code section 22-4A-7(b)¹⁹⁵ and Rule 3.04 of the Operational Rules of the West Virginia Oil and Gas Conservation Commission were addressed. The statute and the rules required the operator, under certain circumstances, to obtain the consent and an easement for a deep well location from the surface owner prior to drilling. In *Devon*, the operator had acquired a one-half interest in a tract prior to the enactment of the statute and a one-half interest afterwards, and was denied a drilling permit because he had not obtained the surface owner's consent.

Dismissing the operator's claim that the statute unconstitutionally impaired a previously existing contract not requiring such consent, the court held that although the operator did acquire a one-half property interest in the minerals prior to the enactment of the statute, drilling rights were not fully acquired or vested until the purchase of the remaining interest, which were completed after the effective statutory date. Thus, no constitutional violation was found and the operator was bound to comply with the consent provision.¹⁹⁶

Section 182 - Statutory Duties of Coal Operator or Owner.

Chapter 22A, article 3 of the West Virginia Code, the West Virginia Surface Coal Mining and Reclamation Act, was enacted to protect the rights of all parties involved in mining. It focuses on environmental and economic issues as well as public welfare and safety.¹⁹⁷

At first, because the West Virginia Supreme Court of Appeals interpreted this Act as applying only to operators, coal owners, and surface owners, it refused to extend the Act's scope to protect the rights of adjacent landowners. In *McGrady v. Callaghan*,¹⁹⁸ landowners protested the issuance of a surface mining permit to an adjacent landowner, claiming that the failure to notify them of the impending permit violated the due process clause of the Constitution by depriving them of property rights without a proper hearing. The court held that since the mining permit did not give the operator any right to take or directly affect any property

¹⁹³ W. VA. CODE § 22-8-7 (1985).

¹⁹⁴ *Devon Corp. v. Miller*, 280 S.E.2d 108 (W. Va. 1981), *cert. denied*, 455 U.S. 993 (1982).

¹⁹⁵ Now encompassed within W. VA. CODE § 22-8-7(b)(4) (1985).

¹⁹⁶ *Id.* at 114.

¹⁹⁷ W. VA. CODE §§ 22A-3-1 to -40 (1985) (previously codified at W. VA. CODE §§ 20-6-1 to -42 (1980)).

¹⁹⁸ *McGrady v. Callaghan*, 161 W. Va. 180, 244 S.E.2d 793 (1978).

other than his own, there was no taking of the adjoining landowner's property so as to require a due process hearing.¹⁹⁹

Since the *McGrady* decision, the West Virginia Legislature has revised the statute, which now must be as stringent as the federal provision. West Virginia Code sections 22A-3-18 through 22A-3-20 specifically provide for public notice of mine permits and recognize the rights of *all* persons affected by the mining.

In *Zirkle v. Faerber*,²⁰⁰ the West Virginia Supreme Court of Appeals held that an adjacent landowner has the right to review a *complete* permit application before permission to mine may be issued by the state.²⁰¹ The court further held that when "the operator's advertisement [of intent to mine] is published before the application of a surface-mining permit is actually complete, the . . . advertisement must be republished upon the submission of the complete application, and concerned parties must be permitted to comment as envisaged by W. Va. Code 22A-3-20(b) [1985]."²⁰² Under the statute, any person adversely affected may file written objections and request an informal conference.²⁰³

CONCLUSION

The organization, analysis, and scholarly approach of Judge Donley in his original book and his subsequent update provide the most comprehensive overview of the law of coal, oil, and gas in West Virginia and Virginia currently existing. The writers of this update have attempted to follow the same approach and provide a useful evaluation of developments in the energy industry through 1986.

¹⁹⁹ *Id.* at 185, 244 S.E.2d at 796.

²⁰⁰ *Zirkle v. Faerber*, 350 S.E.2d 3 (W. Va. 1986).

²⁰¹ *Id.* at 6.

²⁰² *Id.* The court specifically stated that republication and comment is *not* required whenever a permit is revised but only when publication is before the permit application is complete. *Id.*

²⁰³ W. VA. CODE § 22A-3-20(b) (1985).

