Kentucky Law Journal

Volume 63 | Issue 1 Article 5

1974

Kentucky's Experience with the Broad Form Deed

James K. Caudill
University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Oil, Gas, and Mineral Law Commons, and the Property Law and Real Estate Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Caudill, James K. (1974) "Kentucky's Experience with the Broad Form Deed," *Kentucky Law Journal*: Vol. 63 : Iss. 1 , Article 5.
Available at: https://uknowledge.uky.edu/klj/vol63/iss1/5

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

NOTES

KENTUCKY'S EXPERIENCE WITH THE BROAD FORM DEED

I. Introduction

Kentucky is now the number one coal producing state in America with total production in 1973 of more than 127,000,000 tons.[1] Some of the coal fields in this state have been in operation for more than a century. Almost every kind of mine has existed at one time or another in Kentucky. Unlike most of the other leading mining states, this state has two separate and distinct coal fields, one at each end of the state. Although these regions are extensive and are heavily mined, they are very different geologically. In addition to its vast coal deposits, Kentucky has a number of other minerals in amounts sufficient to induce their extraction. For example, oil, gas, clays, limestone, and iron ore are recovered throughout most of the state,[2] and the hills and plains of this state doubtless contain as yet untapped treasures.[3]

With such extensive mining, quarrying and drilling activity over a long period of time, it is not surprising that an extensive lore of mineral development law has been fashioned in Kentucky. The Court of Appeals has been faced with a rich variety of cases involving the mineral industries in their conflicts with each other, with the public, and with individual landowners affected by their operations. The Court's solutions to some of these problems have been unique in the United States.

---

[1] 1973 Ky. Dept. of Mines and Minerals Annual Report, at 8. This figure represents an increase of more than 7,000,000 tons from the 120,271,247 tons reported in 1972. In 1973 64,145,581 tons were produced by surface methods, whereas 63,361,739 tons were produced by underground techniques. *Id.* In 1973 Kentucky regained the lead among coal producing states by surpassing West Virginia in total production by approximately ten million tons.

[2] 1961 Ky. Dept. of Eco. Dev., Mines and Minerals Div., Rep. on Resources of Ky. at 8 [hereinafter cited as Resources of Ky.].

[3] In 1953 Kentucky coal reserves were carefully studied and catalogued by the Department of Mines and Minerals. Of an estimated 123,327,000,000 short tons originally present, 118,973,000,000 tons were still in the ground; this is more than either of the other two leading bituminous coal producing states—West Virginia and Pennsylvania. Resources of Ky. at 4.

Mining and drilling are by their nature damaging to the land from which minerals are taken; therefore, since that portion of society not engaged in the business of extracting minerals must also receive its support, directly or indirectly, from the land, conflicts with the mineral industries have been frequent and bitter. From this basic premise, it naturally follows that the law of mining has been a constant balancing of the need for a free and reasonably unrestricted mineral industry against the need for the same land to be used for other purposes.

As though to symbolize the conflict inherent in mining, the law long ago recognized mineral rights—the right to mine and drill—as a separate estate in land. Mineral estates are said to be "severed" from the surface estate.[4] Severance may be accomplished either by a lease of the mineral rights while the lessor retains the surface for his own use or by a deed which creates a full mineral estate in every way distinct from the surface estate.[5] A mineral deed operates to create a fee simple in the minerals while the fee simple in the surface continues as before, subject to easements or hereditaments in the mineral owner to use the surface for purposes of mining.[6]

Despite their legal severability these two estates are in fact intermingled and mixed; indeed, the mineral is covered by the earth of the other estate. As a result surface rights are inherent in mineral ownership.[7] For example, coal is worthless unless its owner has access to it. Thus the law considers access as an *inherent* right appurtenant to mineral estates. Moreover, since access to coal can be achieved only through the surface estate, the surface is burdened not only by an easement for access but also by an easement to remove overlying rock strata ("overburden") in order to extract the minerals. This is in essence a right to remove the overlying surface itself. Because the surface owner has no corresponding easement in the mineral estate, the

[4] Duncan v. Mason, 39 S.W.2d 1006 (Ky. 1931).

[5] 1 W. THORNTON, OIL AND GAS § 131 (5th ed. 1932) [hereinafter cited as THORNTON].

[6] Gulf Oil Corp. v. Walton, 317 S.W.2d 260 (Tex. Civ. App. 1958).

[7] Simon v. Langholf, 293 P.2d 302 (Colo. 1956); P & N Inv. Co. v. Florida Ranchettes, Inc., 220 So. 2d 451 (Fla. Ct. App. 1969); Pickens v. Adams, 131 N.E.2d 38 (Ill. 1956); Brooks v. Mull, 78 P.2d 879 (Kan. 1938); McNeese v. Renner, 21 So. 2d 7 (Miss. 1945); Hurley v. Northern Pacific Ry., 455 P.2d 321 (Mont. 1969); Melton v. Sneed, 109 P.2d 509 (Okla. 1940).

mineral is considered the dominant estate while the surface is the servient estate.[8]

The law is well settled, however, that the owner of the minerals has the right to use the surface only to the extent that is *reasonably* necessary or incident to his development, use, and enjoyment of his own property.[9] He must act with due care to protect the surface owner's rights.[10] It is at best a matter of give and take among competing interests. Through an examination of the Kentucky law relative to the rights of surface and mineral owners, one can determine to what extent and in what ways the land is servient to the rights of owners of minerals.

A cursory reading of Kentucky cases reveals an extreme protection of mineral rights with relatively little concern for the surface owner, particularly where coal is concerned. Often, the relative rights of the parties are determined by the Court's construction of the wording of old mineral conveyances called "broad form deeds," which must be examined carefully in every case. The case law of the past twenty years perhaps best illustrates both the bias in Kentucky law in favor of mineral rights and the manner in which the judiciary of this state has helped to perpetuate that bias by its interpretation of the broad form deed.

II. THE NATURE OF MINERAL ESTATES

A. *Ownership Theory*

There are two theories in the United States concerning severed interests in real property, chiefly mineral rights. The ownership theory provides that the mineral is an estate separate from and of equal dignity with the surface.[11] The mineral interest, the actual ownership of the minerals below surface, is in the nature of real property.[12] The owner of the severed interest is not a tenant in common with the surface owner in any

---

[8] Sammons v. Warfield Natural Gas Co., 201 S.W.2d 719, 722 (Ky. 1947); Gulf Oil Corp. v. Walton, 317 S.W.2d 260 (Tex. Civ. App. 1958).

[9] 4 W. SUMMERS, OIL AND GAS § 652 (1962).

[10] THORNTON § 131.

[11] Bilby v. Wire, 77 N.W.2d 882 (N.D. 1956); Lillibridge v. Lackawanna Coal Co., 22 A. 1035 (Pa. 1891); 1 E. KUNTZ, LAW OF OIL AND GAS § 3.2 (1962) [hereinafter cited as KUNTZ].

[12] THORNTON § 131. *See also* Farnsworth v. Barrett, 142 S.W. 1049 (Ky. 1912).

sense.[13] The surface is dominant only to the extent that it is entitled to subadjacent support, protection from polluted water during mining, and certain other easements.[14]

Since the estates are of equal dignity, usually both fees simple, there is no merger when both estates come into the hands of the same owner.[15] If the surface owner, after reacquisition of the mineral which had been previously severed, conveys his land without an explicit reference to the minerals, has he conveyed the minerals? The cases on this point are few and badly split.[16] Some have applied the presumption that a grantor intends to convey all his interest in the land unless the contrary appears.[17] Conversely, other cases have refused to apply this presumption to the case of a severed estate because it is a completely distinct and equal interest not described in a general warranty deed for land in fee simple.[18] Certainly a cautious conveyancer would draft the instrument with care to avoid any question.

B. *Profit Theory*

According to the other theory after the mineral rights have been conveyed, the surface owner continues to enjoy a fee simple absolute, including full ownership of the minerals in the ground. His estate, however, is subject to a *profit a prendre,* an incorporeal hereditament, in the other party to take and remove the minerals.[19] Title to the minerals passes to the lessee, the owner of the mineral rights, only when they have been removed from the earth and reduced to possession.[20] Under this

---

[13] Virginia Coal and Coke Co. v. Kelly, 24 S.E. 1020 (Va. 1896); Harris v. Cobb, 38 S.E. 559 (W. Va. 1901).

[14] Chartiers Oil Co. v. Curtiss, 34 Ohio C.C.R. (n.s.) 106 (5th Cir. Ct. 1911), *aff'd* 106 N.E. 1053 (1913).

[15] KUNTZ § 2.2.

[16] The following cases held that merger had terminated the separate mineral estate: Humphries v. Texas Gulf Sulphur Co., 393 F.2d 69 (5th Cir. 1968); Jones v. McFaddin, 382 S.W.2d 277 (Tex. Civ. App. 1964). For a case that found no merger *see* Ferguson v. Hilborn, 402 P.2d 914 (Okla. 1965).

[17] For a discussion of the rules of construction regarding written instruments, see generally 6 R. POWELL, THE LAW OF REAL PROPERTY ¶ 902 (P. Rohan rev. ed. 1973).

[18] KUNTZ § 3.2.

[19] Callahan v. Martin, 43 P.2d 788 (Cal. 1935); Pickens v. Adams, 131 N.E.2d 38, 43 (Ill. 1956).

[20] Wright v. Carter Oil Cos., 223 P. 835 (Okla. 1923).

theory the minerals are personalty. Since there is only one estate, subject to a lesser interest, merger would extinguish the *profit a prendre* if both interests were acquired by the same owner.[21] Moreover, because the mineral lessee has the exclusive right to remove the mineral, the surface owner holds possession as trustee for the lessee of the mineral until it is recovered.[22] Under the ownership theory the mineral estate is of potentially eternal duration as any other fee simple.[23] Subject to loss by adverse possession, failure to extract the mineral will not affect the ownership or right to exploit the mineral.[24] By contrast, failure to use a *profit a prendre* may result in its loss after passage of a reasonable period of time because the right is limited and little more than a license.[25]

C. *Kentucky Interpretation*

Kentucky favors the ownership theory but both kinds of interests *may* exist, depending upon the type of instrument by which the rights were granted.[26] The language of the conveyance must be chosen with some care if a lease of limited duration is intended. On the other hand, if title to the minerals themselves is to be vested in the lessee, what may have been intended only as a lease will be construed as a deed—a sale of the mineral.[27] For example, where a landowner conveyed all the "mineral right and coal privileges and rights of way, together with the right to search for all undiscovered minerals, with warranty," it was determined that title to the minerals was

---

[21] KUNTZ § 3.2, at 80.

[22] KY. REV. STAT. § 381.430 (1971) [hereinafter cited as KRS].

[23] Scott v. Laws, 215 S.W. 81 (Ky. 1919).

[24] Dominion over mineral must be open and notorious. Surface ownership is not adverse to mineral ownership unless the surface owner actually exercises control over the mineral estate apart from his control over the surface. Pond Creek Coal Co. v. Hatfield, 239 F. 622 (6th Cir. 1917). Payment of mineral taxes by the surface owner is not adverse possession. *Id.* at 623. One who possesses the surface does not possess severed minerals, except as trustee for the mineral owner as provided in KRS § 381.430. Kentucky Block Cannel Coal Co. v. Sewell, 249 F. 840 (6th Cir. 1918); Thornbury v. Virginia Iron Coal & Coke Co., 287 S.W. 698 (Ky. 1925). Finally, the Court of Appeals held that the surface owner must actually mine the coal to be adverse to the mineral owner. Hoskins v. Northern Lee Oil & Gas Co., 240 S.W. 377 (Ky. 1922).

[25] Scott v. Laws, 215 S.W. 81, 82 (Ky. 1919).

[26] *Id.* at 82.

[27] *Id.* at 83.

vested in the grantee. The Court did not consider it determinative that title to the minerals was not expressly conveyed.[28]

The instrument in *Scott v. Laws*[29] was somewhat crudely drafted, but it illustrates the Kentucky interpretation of mineral deeds and leases. In 1859, J. H. Laws owned land adjacent to that of Valentine Gearheart in Floyd County. Gearheart conveyed by deed the mineral rights to Laws. In 1860 Laws and his wife conveyed the mineral rights in Gearheart's land, together with all their own land in fee simple, to the Big Sandy Coal and Mining Co., retaining a mortgage on the land to secure bonds received as payment. J. H. Laws thereafter died and the bonds descended to his sole heir, Harry L. Laws, who eventually foreclosed the mortgage and became the owner of the land. Meanwhile, in 1905, L. Dow Scott had purchased the surface held by Gearheart's heirs and instituted a quiet title suit regarding the minerals. The Big Sandy Coal and Mining Co. had possessed title to the mineral rights for more than forty years without undertaking operations of any kind. Scott, stressing language in the deed which stated that Valentine Gearheart sold "the above described privileges," argued that it conveyed only a license which had terminated by non-use. Moreover, Valentine's wife had released her dower only in "the above described privileges."[30] Certainly if the intent had been to convey the minerals themselves, it was strange that the deed was in terms of privileges, a word more often associated with easements and licenses than with ownership.[31] The Court of Appeals conceded that a mineral license may be lost through nonuse but held that the deed was sufficient to create a full mineral estate.[32] In so holding it emphasized a part of the deed by which the grantor conveyed "the mineral rights and coal privileges and rights of way to and from said minerals and coal privileges . . . unto the said James H. Laws forever, free from me, my heirs and assigns, and will forever warrant and defend the same." This language was found to be sufficient to show the intention of the grantor to convey the exclusive and perpetual

[28] *Id.* at 82.
[29] *Id.* at 81.
[30] *Id.*
[31] 3 POWELL ¶ 405, at 395
[32] Scott v. Laws, 215 S.W. 81, 82 (Ky. 1919).

right to all the minerals, in other words, to convey title to them.[33]

Kentucky had adopted the "broad construction" for mineral deeds and leases in 1910.[34] Under this theory a grant or exception of all minerals includes all inorganic substances which may be profitably taken from the land. To restrict the meaning of the phrase "all minerals," there must be qualifying language evidencing an intent to convey something less than all substances legally cognizable as minerals.[35] Notwithstanding this broad rule of construction, the decision in *Scott v. Laws* seems extreme. It is submitted that the qualifying language was present since only *privileges* and *rights* are mentioned—not *title* to the minerals. Similarly, the conclusion that because the grant of minerals was unlimited the title was passed is a *non sequitur.* A *lease* of all mineral substances could have been intended. The Court apparently assumed that title passed but nowhere did it explain the basis for that assumption. Perhaps since loss through non-use was at issue, the perpetual warranty was given particular significance; one can only wonder. Due to these inadequacies, *Scott v. Laws* may have little value as precedent.

It is possible to avoid the effect of a broad construction of "all minerals" by establishing that the parties intended only to convey those minerals enumerated in the deed. For example, a mineral deed granting "all minerals such as coal, iron, silver, gold, copper, lead, bismuth, antimony, zinc, or any other mineral of any marketable value" has been held not to convey oil and gas.[36] Recognizing that "all minerals" would ordinarily include oil and gas, the Court, nevertheless, held that since the deed had to be interpreted as a whole, the listing of several solid mineral substances indicated that the parties were not contemplating liquid resources.[37]

---

[33] *Id.* at 82. In drafting mineral deeds it should be kept in mind that a conveyance of less than a right to remove all the minerals is more likely to be considered a lease, other factors being equal, than one including the right to remove it all. Williamson v. Williamson, 45 S.W.2d 392 (Ky. 1928).

[34] Kentucky Diamond Mining and Dev. Co. v. Kentucky Transvaal Diamond Co., 132 S.W. 397 (Ky. 1910).

[35] 215 S.W. at 82, *citing* Kentucky Diamond Mining and Dev. Co. v. Kentucky Transvaal Diamond Co., 132 S.W. 397, 398 (Ky. 1910).

[36] McKinney's Heirs v. Central Kentucky Natural Gas Co., 120 S.W. 314 (Ky. 1909).

[37] *Id.* at 316.

In cases involving interpretation of deeds such as those just discussed, it is generally recognized that reservations or exceptions in an instrument are construed in favor of the grantee where there is an ambiguity.[38] This rule is based on the notion that the grantor, the presumed drafter, has the opportunity to provide unequivocal language to avoid any uncertainties.[39]

In Kentucky, as elsewhere, however, not only have deeds involving minerals frequently been drafted by attorneys for the grantee but also in many cases only the grantee, has known what lay beneath the surface. This gulf of experience and expertise between the parties (the grantee, usually an oil, gas, or coal company as opposed to the often unsophisticated ordinary landowner-grantor) has almost always worked to the disadvantage of the grantor. For these reasons it has been suggested that mineral deeds should be treated as contracts of adhesion strictly construed against the drafter—often the grantee.[40] The treatment of insurance policies is analogous. In that instance a large corporation with a sophisticated legal staff bargains with individuals usually unfamiliar with the intricate service the corporation offers. Well established case law interprets insurance policies in favor of the insured, and at least one court, without any reference to insurance contracts, has followed the same reasoning for oil and gas leases.[41]

Much of Kentucky's mineral wealth was sold years ago under sweeping broad form deeds drafted by coal and land companies. By their express terms these instruments made the surface estates almost totally servient to the mineral estates. In recent years a great deal of litigation has arisen regarding broad form deeds, and the resulting decisions have extended

[38] Hosbach v. Head, 284 S.W.2d 684 (Ky. 1955); Eastham v. Church, 219 S.W.2d 406 (Ky. 1949); Hunt v. Hunt, 82 S.W. 998 (Ky. 1904).

[39] *See, e.g.*, Hosbach v. Head, 284 S.W.2d 684 (Ky. 1955). Conditions and restrictions are strictly construed. *Cf.* Chambers v. Thomas, 205 S.W.2d 1000 (Ky. 1947). One reason advanced for strict construction of land use restrictions is that fee simple ownership has always been favored at law. Trustees of Presbytery, U.S.A., Inc. v. Garrard Co. Bd. Educ., 348 S.W.2d 846 (Ky. 1961).

[40] *Cf.* Thompson, *Surface Damages-Claims by Surface Estate Owners Against Mineral Estate Owner*, 14 WYO. L.J. 99 (1960).

[41] Weaver v. National Fidelity Ins. Co., 377 S.W.2d 73, 75 (Ky. 1963). One court has reached the same result with oil and gas leases. Wyckoff v. Brown, 11 P.2d 720 (Kan. 1932).

the rights of mineral holders even *further* than the already drastic language of the deeds. The broad form deed might just as well have been called the long form; Kentucky courthouses contain many yellowing samples with granting clauses more than five typewritten pages in length. Virtually everything is included. An abbreviated example of the all encompassing broad form deed appears in *Case v. Elkhorn Coal Corp.*[42]:

> Conveying all the minerals, etc., . . . and such of the standing timber thereon as may, at the time of the use thereof, be or by the party of the second part [grantee], its successors or assigns, be deemed necessary or convenient for mining purposes, or so deemed necessary or convenient for the exercise and enjoyment of any or all of the property rights and privileges herein bargained, sold, granted or conveyed . . . and the exclusive rights of way for any and all . . . haul roads and other ways, pipe lines, telegraph and telephone lines that may hereafter be located on said land by the parties of the first part, their heirs, representatives, or assigns, or by the party of the second part, its successors or assigns, or by any person or corporation with or without the authority of either of said parties, their, or its heirs, representatives, successors, or assigns; . . . and to use and operate the surface thereof and any and all parts thereof . . . and also the right to build, erect, alter, repair, maintain, and operate upon said land . . . any and all houses, shops, buildings . . . and machinery and mining and any and all equipment, that may by the party of the second part, its successors or assigns, be deemed necessary or convenient for the full and free exercise and enjoyment of any and all the property rights and privileges hereby bargained, granted, sold, or conveyed; . . . and the right to remove all pillars and other lateral and subjacent supports (from the mines) without leaving pillars to support the roof or surface; . . . and the right to erect upon said land, and maintain, use, repair, and operate, and at their pleasure remove therefrom any and all buildings and machinery and mining and any and all equipment, whether specifically enumerated herein or not, that may by the party of the second part, its successors or assigns, be deemed necessary or con-

[42] 276 S.W. 573, 574 (Ky. 1925). For another example of the sweeping nature of the broad form deed, *see* Watson v. Kenlick Coal Co., 489 F.2d 1183, 1185-86 (6th Cir. 1974).

> venient for the exercise or enjoyment of any or all of the property, rights, and privileges herein . . . granted or conveyed, and also free access to, upon, and over said land for the puprose of surveying and prospecting for said property and interests. . . . And it, said party of the second part, its successors, and assigns, to have unlimited time in which to do so, and shall not be limited to commence the exercise or enjoyment of all or any of said property, rights, and privileges at any particular or reasonable time; and when so commenced shall not be deemed to have abandoned nor forfeited the same, nor any part thereof by a, or any cessation thereof, or any part thereof. . . . But there is reserved to the parties of the first part all the timber upon the said land, except that necessary for the purposes hereinbefore mentioned; and there is also reserved the free use of said land for agricultural purposes, so far as such use is consistent with the rights hereby bargained, sold, granted and conveyed; and right to mine and use coal for their own personal household and domestic purposes.[43]

The reservation of the right by the grantor to use his land for all purposes not inconsistent with the rights granted the mineral holder has proved an almost worthless protection. For example, the surface may not be subdivided for residential development without the consent of the owner of the mineral estate. If such subdivision is made, it may not impair access to the minerals; furthermore, the burdens associated with mining do not have to be distributed evenly over the whole tract.[44] It has been held that where the damming of a stream on the land to create a lake would interfere with mining, the mineral holder may recover damages for all interference with his operations caused by the flooding.[45]

Another type of broad form deed, often called the "Mayo form," is named after John C.C. Mayo, a well known Eastern Kentucky land and coal trader at the end of the nineteenth

---

[43] *Id.* at 574.

[44] Kinney-Coastal Oil Co. v. Kieffer, 277 U.S. 488 (1928).

[45] Humble Oil and Refining Co. v. Wood, 292 S.W. 200 (Tex. Civ. App. 1927). In connection with the dominant mineral owner's right to prevent unusual development of the surface which would impair his mining rights, some unusual cases have arisen. It has been held that the surface owner may not impair mining rights by setting aside most of the surface for a cemetery. Eternal Cemetery Corp. v. Tammen, 324 S.W.2d 562 (Tex. Civ. App. 1959).

century.[46] The Mayo form deed grants the right to remove "all minerals now known or hereafter discovered . . . by all means either now known or hereafter discovered."[47] With language such as this, there presumably would be little room left for challenging these deeds other than upon grounds of public policy. But many cases have arisen where the rights of the parties or their successors were uncertain. It is therefore appropriate to analyze the Kentucky law regarding such deeds and their less sweeping "short form" counterparts as they have developed within the larger context of mineral conveyances.

III. RIGHTS AND DUTIES OF THE MINERAL OWNER

A. *Drilling and Mining Rights*

Mineral ownership, as noted above, carries with it the right to use the surface reasonably for purposes of exploiting that mineral. In this regard several common law easements are recognized. Perhaps the most obvious of these is the right to sink shafts and drill through the surface to reach the mineral. This is an implied easement which exists even though the deed is silent.[48] Courts have long recognized that

> a grant of minerals implies the right to win them from the underlying soil. The use of some portion of the surface is necessary for the proper enjoyment of this right. To reach the mineral the miner must pass from the surface downward. To do this he has a way of necessity. He may sink through such land from the surface to the mines in order to reach them.[49]

Although the preceding implied easement is well established, the exact amount of the surface that may be used for drilling or mining without an additional grant by the surface owner is uncertain. In an interesting Mississippi case[50] a drilling company, under contract with the mineral owner, cleared

---

[46] *See*, M. Chapman, Influence of Coal in the Big Sandy Valley, 1945 (thesis in University of Kentucky Library).

[47] Tolliver v. Pittsburgh-Consolidation Coal Co., 290 S.W.2d 471 (Ky. 1956). The Court in Kentland-Elkhorn Coal Co. v. Charles, 514 S.W.2d 659, 663 (Ky. 1974), overruled *Tolliver* to the extent it held "that the mineral owner cannot be held liable to the surface owner for creating a nuisance."

[48] Baker v. Pittsburgh, C. & W.R. Co., 68 A. 1014 (Pa. 1908).

[49] *Id.* at 1115.

[50] Union Producing Co. v. Pittman, 146 So. 2d 553 (Miss. 1962).

timber and graded part of the plaintiff's land preparatory to drilling for oil. The well proved unproductive and was finally plugged as a "dry hole." There was conflicting testimony as to how much land was cleared for the drilling, but the plaintiff claimed that three acres more than necessary had been disturbed. The defendant, claiming that only two and a half acres were cleared, argued that the acreage cleared was not an unreasonable use of land for drilling. The court affirmed a jury finding that the amount of land cleared and graded was unreasonable but reversed the damages as being excessive. The court stated that the amount of land that is unreasonable or excessive must be measured not by the minimum possible land use but by the accepted method of mining or drilling currently in use in the industry.[51] If the amount of land used is not excessive by industry standards, the lessor cannot complain even if the land actually used is completely destroyed. As the Supreme Court of Mississippi put it, "[t]he right to remove minerals by the usual or customary methods of mining exists, even though the surface of the ground may be wholly destroyed as a result thereof."[52]

Implicit in this declaration is the assumption that a mineral extractor operating in conformity with prevailing industry methods and standards is not acting wantonly or wilfully. Ordinarily a wilful act will subject the actor to liability even if he would have been entirely within his rights had he not acted wilfully.[53] In Kentucky a dispute involving this issue is a jury question, and the court should give an instruction that the use of land was not wilful or unreasonable if the use conformed to current industry practices.[54] Moreover, there should be an instruction that the mineral lessor is not under a duty to restore the surface to its former condition after mining.[55]

The liability of mining and drilling interests is not always at an end merely because the surface owner has no legal basis to complain. For example, in drilling for oil, large "slushpits"

---

[51] *Id.* at 555.

[52] *Id.* at 556.

[53] Elkhorn Coal Corp. v. Johnson, 263 S.W.2d 124 (Ky. 1953); Elkhorn Coal Corp. v. Yonts, 262 S.W.2d 384 (Ky. 1953); United Fuel Gas Co. v. Sawyers, 259 S.W.2d 466 (Ky. 1953); General Refractories Co. v. Swetman, 197 S.W.2d 908 (Ky. 1946).

[54] Union Producing Co. v. Pittman, 146 So. 2d 553, 556 (Miss. 1962).

[55] *Id.*

are often bulldozed near the well to trap escaping oil wastes. Although after drilling operations are completed the mineral owner is not under an obligation to fill the slushpit, he may be liable to anyone other than the surface owner who is harmed by it.[56] Furthermore, a mineral owner's failure to plug an oil or gas well or to seal a mine may result in liability for damage not only to adjoining surface owners but also to other mineral owners as well. Often the oil and gas rights are held by one lessee while coal rights are held by another. When this occurs the owner of the lower lying mineral has a right to penetrate the above seam of mineral, but in doing so he must minimize the damage to that property.[57] Additionally, by statute the shaft of abandoned oil and gas wells must be plugged with rock, cement and other enduring materials if the shaft passes through minable coal or other mineral deposits.[58] Though failure to plug an abandoned hole in the manner specified by the statute is negligence per se, a party alleging damage must prove that the damage was the proximate result of the violation of the statute.[59]

An additional area where Kentucky courts have permitted the surface owner to recover for damage to his land occurs when drilling rights for oil and gas are recognized in the lease but the drilling is carried out in a manner other than that contemplated when the deed was executed. In *Wiser Oil Co. v. Conley*[60] a lease executed in 1917 gave the lessee all the customary drilling and exploration rights. In the early 1960's the lessee's successor began using the "waterflooding" method to recover the oil beneath the plaintiff's land. Waterflooding had been used experimentally a few times prior to 1917, but it certainly was not in general use in the oil or gas industries. This method involves the drilling of an unusually large number of shafts into the ground and the pumping of enormous quantities of water into the oil well. Since petroleum is lighter than water,

[56] Central Oil Co. v. Shows, 149 So. 2d 306 (Miss. 1963).

[57] Wiser Oil Co. v. Conley, 346 S.W.2d 718, 722 (Ky. 1960).

[58] KRS § 353.120.

[59] Nisbet v. Van Tuyl, 224 F.2d 66 (7th Cir. 1955). This case was decided according to Kentucky law.

[60] 380 S.W.2d 217 (Ky. 1964). *See also* Wiser Oil Co. v. Conley, 346 S.W.2d 718 (Ky. 1960).

it rises and is pumped out through other shafts. In the *Wiser Oil Co.* case the company drilled eleven water input holes through seams of coal retained by the surface owner. Applicable mine safety regulations required that columns of coal 200 feet square be left undisturbed around each of the proposed wells. As a result, the new wells were distributed over most of the property, making mining of the coal much more difficult as well as damaging the surface heavily.

The oil company relied on *General Refractories Co. v. Swetman*[61] which contained broad dictum favoring mineral estates:

> Numerous authorities could be cited to the effect that, unless the conveyance itself repels the construction, one who owns the mineral rights in a tract of land by implication of law acquires the right to use as much of the surface as may be reasonably necessary for the beneficial and profitable operation of his mines.[62]

The company claimed not only the right to use the surface but also denied liability for the resulting damage to the surface. In *Buchanan v. Watson*[63] a strip mining company was held not liable for surface damages under similar circumstances, but there the mineral deed, one of the broad form variety, contained an express waiver-of-damages provision lacking in the *Wiser* oil and gas lease.[64]

The Court in *Wiser,* adhering to its precedent in *General Refractories,* held that the implied easement in the mineral owner to use the surface allowed waterflooding. It noted, however, that "principles of justice and humanity would require that reasonable compensation be paid the landowner for the devastation wrought."[65] Unfortunately, this moderating statement has *not* been followed by later cases involving the same issue in the context of far more destructive strip mining for coal.[66]

---

[61] 197 S.W.2d 769 (Ky. 1946).

[62] *Id.* at 770.

[63] 290 S.W.2d 40 (Ky. 1956).

[64] Wiser Oil Co. v. Conley, 346 S.W.2d 718, 721 (Ky. 1960).

[65] *Id.*

[66] In Martin v. Kentucky Oak Mining Co., 429 S.W.2d 395 (Ky. 1968), the Court of Appeals adhered to *Buchanan* in a manner inconsistent with the *Wiser* case. The

There is established precedent that a conveyance of coal with the right to "mine" is not limited to the sinking of a shaft but may include other methods, such as stripping, which are found convenient by the mineral grantee.[67] In the last 20 years a line of cases following *Buchanan v. Watson* upheld the right of mineral owners under broad form deeds to remove their minerals regardless of the surface damage.[68] In most of these cases, the deeds contained waiver-of-damages clauses that nullified efforts to recoup some of the landowners' losses. Reading *Buchanan* and the cases following it in light of the *Wiser Oil Co.* decision, the Kentucky rule seems to be that mineral ownership carries with it the right to destroy the surface to get the mineral, whether or not there is a waiver-of-damage provision; if there is no such waiver, the surface holder is entitled to compensation only for damages beyond those contemplated when the deed was signed. In the *Wiser Oil Co.* case some damage would have resulted had the 1917-era methods of drilling been used, and this would be non-compensable. The mineral owner is liable only for that additional damage which results from the newer methods.[69]

B. *Right to Remove Overburden*

Another right of mineral owners is that of removing as much overlying rock as necessary to reach the minerals. In effect this is just a variation of the right to drill and sink shafts since both are methods of access through the surface estate. When mining was accomplished by pits and shafts, the law recognized the right to remove overlying strata almost as a

---

Court stated that the presence of a waiver-of-damage provision was not of decisive importance in *Buchanan*. *See* text accompanying notes 123-25 *infra*.

[67] Buchanan v. Watson, 290 S.W.2d 40 (Ky. 1956); Rudd v. Hayden, 97 S.W.2d 35 (Ky. 1936).

[68] Rudd v. Hayden, 97 S.W.2d 35 (Ky. 1936), may be considered the grandfather of the Kentucky broad form deed rule. Buchanan v. Watson, 290 S.W.2d 40 (Ky. 1956), was the first case directly challenging the right of the mineral owner to strip mine under the old mineral deeds. Following the *Buchanan* precedent are: Blue Diamond Coal Co. v. Neace, 337 S.W.2d 725 (Ky. 1960); Kodak Coal Co. v. Smith *and* Vicco Coal Corp. v. Smith, 338 S.W.2d 699 (Ky. 1960) (consolidated for appeal); Ritchie v. Midland Mining Co., 347 S.W.2d 548 (Ky. 1961); Croley v. Round Mountain Coal Co., 374 S.W.2d 852 (Ky. 1964); Martin v. Kentucky Oak Mining Co., 429 S.W.2d 395 (Ky. 1968).

[69] Wiser Oil Co. v. Conley, 346 S.W.2d 718 (Ky. 1960).

corollary to the right of access. The early cases, however, indicate that only "deep" mining was contemplated. For example, in *Moore v. Indian Camp Coal Co.*[70] the Supreme Court of Ohio limited this right of mineral owners by requiring that they act with "regard at the same time to the right of the surface owner to subjacent support."[71] Subjacent support of the surface is relevant only if underground mining methods are used. Traditional mining methods involved only the removal of a layer of rock or slate above the coal to obtain more headroom and a stronger ceiling and a layer below the coal for drainage and a level, secure floor. The right to remove these encompassing strata was determined to be a natural right incident to ownership of minerals, because in many, perhaps most, instances mining would otherwise be impossible. To restrict the mineral lessee to the strict terms of the conveyance (*i.e.*, to removal of the mineral only) would defeat the intent of all parties and would be manifestly unreasonable.[72]

1. *Problems of Interpretation*

The advent of strip mining raises the question whether a conveyance or lease of minerals with only the right to "mine" and without the elaborate enumeration of privileges contained in the broad form deed gives the mineral owner the right to strip mine. The cases are split; Kentucky has adopted the view[73] that the right to mine includes strip mining unless the term is otherwise limited. Cases in other jurisdictions reach a contrary result. In *Stewart v. Chernicky*,[74] a Pennsylvania case, the defendants strip mined a tract of land on which a 1902 mineral deed granted them all the coal in and under the tract together with the right to remove it without liability for damage to the surface. The owners of the land sued for resulting damage. Although the facts were similar to those in *Buchanan v. Watson*,[75] particularly since an express waiver-of-damages clause was involved,[76] *Stewart v. Chernicky* reached conclu-

[70] 80 N.E. 6 (Ohio 1907).
[71] *Id.* at 7.
[72] *Id.* at 7-8.
[73] Rudd v. Hayden, 97 S.W.2d 35 (Ky. 1936).
[74] 266 A.2d 259 (Pa. 1970).
[75] 290 S.W.2d 40 (Ky. 1956).
[76] 266 A.2d at 263.

sions of law different from *Buchanan* on every point considered. The opinion in *Stewart* by Judge Eagan resembles a point-by-point refutation of *Buchanan.* He began by reiterating that in the construction of deeds the intent of the parties at the time the deed is executed governs and that the literal words of the deed are important only to show that intent.[77] This principle is well established in Kentucky for construction of most deeds,[78] but it appears that an exception has been judicially created for mineral deeds, whose construction has been divorced from the parties' intent.[79]

In *Stewart* the Pennsylvania court noted that strip mining was not completely unknown when the deed was executed in 1902. But the evidence, though conflicting, was that strip mining had not been introduced into that part of the state until about 1938. The deed conveyed title to all coal under the tract, followed by a broad grant of rights and easements:

> [t]ogether with the right of ingress, egress, and regress over and through said lands for the purpose of mining, storing, manufacturing and removing said coal and such other coal as may be now owned or hereafter acquired by the said second parties (grantees), their heirs, successors or assigns; also the right to drain and ventilate said mines by shafts or otherwise and to deposit the wastes from said mines, and to build roads, bridges and structures with the necessary curtilege [*sic*] for said purposes; with a full release of and without liability to the surface, waters or otherwise arising from any of said operations.

---

[77] *Id.*

[78] Kentland Coal & Coke Co. v. Blankenship, 300 S.W.2d 570 (Ky. 1957); Monroe v. Rucker, 220 S.W.2d 391 (Ky. 1949); Baker v. Baker, 230 S.W. 293 (Ky. 1921). In *Baker* the Court of Appeals stated that the intent of the parties, particularly that of the grantor, is to be sought and carried out whenever possible. In recent years the Court of Appeals has hardened its attitude somewhat. In McMahan v. Hunslinger, 375 S.W.2d 820, 822 (Ky. 1964) it declared that courts must "seek the intention of the grantor from the language used, considered in light of such factors as the general scheme of the subdivision. We may not substitute what the grantor may have intended to say for the plain import of what he said." More recently the court has held the "four corners" test applicable to deeds. Phelps v. Sledd, 479 S.W.2d 894 (Ky. 1972). But in view of the Handy v. Standard Oil Co., 468 S.W.2d 302 (Ky. 1971), holding that where the language of a deed was ambiguous or uncertain the court should consider the relative situation of the parties, their objects, and subsequent acts, the law is uncertain.

[79] Martin v. Kentucky Oak Mining Co., 429 S.W.2d 395, 397 (Ky. 1968).

> Together with all and singular the said property, rights, privileges, hereditaments, appurtenances whatsoever thereunto belonging or in any wise appertaining, and the reversion and the remainders thereof, and all the estate, right, title, and interest, property, claim and demand whatsoever of the said party of the first part in law, equity or otherwise howsoever of, in and to the said coal and coal space, mining rights, and release of damages.[80]

In holding that this sweeping grant to the mineral buyer did not include the unconditional right to use strip methods or a valid waiver of damages resulting from such methods, the court relied on two factors. First, the court, taking judicial notice of the devastating effect of strip mining,[81] utilized a well recognized rule for construing ambiguous clauses in deeds. When confronted with a choice of construing an ambiguous clause as fair and reasonable or inequitable and unusual, the courts normally choose that interpretation which the parties most likely intended at the time of the transaction.[82] The court had no difficulty in applying this rule to the case to place the burden upon the mineral owners to prove that the plaintiff's predecessor in title had conveyed the right to forever destroy the land in the process of mining. Some "positive indication" that the parties to the deed meant to authorize practices which might result in such consequences did not materialize. Second, with the exception of free access, egress and regress, the rights listed in the deed were held to be relevant only to underground mining. The most telling example was the right "to drain and ventilate said mines by shafts or otherwise" which would obviously be vital for conventional operations but irrelevant to a strip mine operator. While the first point revealed the probable intention of the grantor, this factor indicated that the grantee

[80] 266 A.2d 259, 263 (Pa. 1970).

[81] *Id.* The deleterious effects of strip mining upon the surface and adjoining lands has been convincingly documented. Among recent studies conducted in Kentucky is one funded through the University of Kentucky. The study was an open report prepared in collaboration with the U.S. Dept. of the Interior, Fish and Wildlife Service and Bureau of Mines; the U.S. Dept. of Agriculture, Forest Service and Soil Conservation Service; The Dept. of the Army, Corps of Engineers; and the Commonwealth of Kentucky, Dept. of Conservation and Dept. of Fish and Wildlife; and the University of Kentucky. C. Collier, REPORT ON THE INFLUENCES OF STRIP MINING ON THE HYDROLOGIC ENVIRONMENT OF PARTS OF BEAVER CREEK BASIN, KENTUCKY (1962).

[82] 266 A.2d at 263.

also was thinking only of underground mining.[83]

The Pennsylvania court[84] distinguished an earlier case that was more in line with the Kentucky cases. That case held that a grant of "all the coal" included the right to strip mine where the parties stipulated that conventional methods were not feasible. Such special circumstances which perhaps made an intent to authorize stripping the more rational and usual construction were not present in *Stewart*. Such contingencies, if they existed, would have been mentioned in the deed. Indeed, if conventional mining were impracticable, the elaborate grant of easements and rights associated with underground mining would probably not have been included.

Since the right to mine was limited to underground methods, it naturally followed that the waiver of damages clause was likewise limited. Its broad language that "full release of and without liability for injury to the surface, waters or otherwise" could not be construed to include waiver of damage for unauthorized mining.[85]

By contrast, the Kentucky Court of Appeals in *Buchanan v. Watson*[86] rested its decision on the proposition that "since the appellant had a right to remove all of the coal in, on, and under the surface of this tract, the particular methods contemplated by the parties (in the absence of language prohibiting other methods) does not preclude him from utilizing the only feasible process of extracting the coal."[87] In other words, the method by which mineral is removed is incidental to the right to remove it.

2. *Extent of the Right*

The extent of the mineral owner's right to remove overburden to recover his property is illustrated by *Wright v. Bethlehem Minerals Co.*[88] There an 1891 deed conveyed all the coal, oil, gas, and all other minerals with the usual easements and rights, including the right to mine by "any manner and by any

[83] *Id.* at 264.
[84] Commonwealth v. Fitzmartin, 102 A.2d 893 (Pa. 1954).
[85] 266 A.2d at 264.
[86] 290 S.W.2d 40 (Ky. 1956).
[87] *Id.* at 42.
[88] 368 S.W.2d 179 (Ky. 1963).

method deemed either convenient or advisable."[89] In view of *Buchanan* and its progeny the grantee's right to strip mine was not in-issue, but the deed contained an express provision to protect the surface in one respect. It provided that:

> [a]nything to the contrary herein notwithstanding, it is not intended by this deed to grant the right to erect any miners' dwellings or tipples on any of said three tracts of land; nor is it intended to grant by this deed the right to use any portion of the surface of said three tracts of land for the purpose of dumping slate thereon.[90]

Despite this exception in the deed, the grantee's successor undertook stripping operations. His equipment was used to excavate a bench in the side of the hill for the purpose of securing a place for the rotary augers, and in the process soil, rocks, and timber were pushed down the mountain, covering much of the land to the depth of several feet. Naturally, the aggrieved owner contended that this was using the surface "for the purpose of dumping slate thereon." He also argued that the excavation of the wide auger bench on the hillside could not be deemed a roadway or tramway, the construction of which had been authorized by the deed. In fact, the auger bench was used as a roadway; trucks were loaded on the bench directly from the augers. However, the essential use of the bench was for placing the augers. It was undisputed that the bench was not justifiable as a tramway or haulroad and involved far more destruction than was contemplated when haulroads were authorized.[91]

Without reaching or deciding the substantive effect of the exception in the deed, the Court of Appeals, nonetheless, affirmed an order permanently enjoining the surface owner from interfering with the mining. The Court stated that conveyances must be construed as a whole consistent with the purpose for which the instrument was executed.[92] Since there was no dispute that the right to remove overburden is incidental to the right to recover the coal, there was no violation of the deed. "According to the context, the word 'incidental' may mean a

---

[89] *Id.* at 180.
[90] *Id.*
[91] *Id.* at 181.
[92] *Id.*

casual chance happening, not of prime importance, or may mean what is subordinate to the main event or act."[93] Apparently the Court thought the reservation was meant to restrict only the conventional piling of slate from underground mines and resolved the ambiguity against the grantor, though without mentioning that constructional rule.

If the *Wright* case, because of the ambiguous nature of the deed there construed, left doubts concerning the mineral owner's right to remove overburden, these should have been erased by the 1960 decision in *Blue Diamond Coal Co. v. Neace.*[94] The deed involved therein conveyed to the mineral grantee the right "to enter upon said lands, use and operate the same and surface thereof . . . in any and every manner that may be deemed necessary or convenient for mining . . . ."[95] Several years before stripping operations were commenced, the coal company had recovered all the minable coal under the land by conventional methods; however, a thin fringe of coal along the outside of the hill was left which could not be mined due to the prohibitive cost in supporting the roof. The company undertook to auger this remnant which required a cut into the hillside to form the platform or bench for machinery. A great amount of timber was destroyed; the rock, dirt and debris thrown down the steep hillside below the cut covered some twenty-five acres of land not being used in any way for mining purposes. At trial, the surface owner produced several expert witnesses who refuted the company's claim that underground mining methods could not be used to recover the remaining mineral.[96]

The Court of Appeals, adhering to its decision in *Buchanan,* held that since the company had a right to strip and auger and had utilized methods customary in the industry at the time, the exercise of that right could not of itself be classified as arbitrary, wanton, or malicious.[97] Earlier cases had al-

---

[93] *Id.*

[94] 337 S.W.2d 725 (Ky. 1960).

[95] *Id.* at 726.

[96] *Id.* at 726-27.

[97] *Id.* at 727. In Kentland-Elkhorn Coal Corp. v. Charles, 514 S.W.2d 659 (Ky. 1974), the Court grafted nuisance principles onto the law of minerals to impose liability on a coal company for "unreasonableness in *the manner of use* of a method of mineral recovery." *Id.* at 662 (emphasis original). Commissioner Cullen, speaking for the

ready established that the mineral owner was not restricted to the minimum amount of land which in the opinion of a jury would be absolutely necessary for mining.[98] Thus the *manner* in which the operation is conducted, rather than the mere presence of the operation, is determinative of the question of wanton conduct.[99]

In the *Blue Diamond* decision the Court of Appeals was faithful to its view expressed in *Elkhorn Coal Corp. v. Johnson.*[100] In that case the coal company had a right under its deed to mine "all the coal" under the surface owner's house without providing for support. This right was exercised despite the surface owner's protests. The trial court gave an instruction that the landowner could recover only if the company acted wantonly, arbitrarily, or maliciously. Nonetheless, the jury returned a verdict in favor of the surface owner for $2,000 damages. In reversing, the Court of Appeals stated that the manner in which the coal was removed from beneath the plaintiff's home without leaving subjacent support had not been malicious. The evidence was that "only light charges of dynamite

---

Court, analyzed the liability of a mineral owner for damage to the surface by distinguishing between "arbitrary, wanton, and malicious" conduct and conduct that is "oppressive." The former refers to the attitude of the actor, whereas the latter bears on attitude plus the effect of the conduct. Since in this case there was a claim for damages based on an *oppressive manner* of mineral recovery, the Court invoked a balancing of interests analysis from the law of nuisance to determine whether or not the conduct in question was unreasonable. In utilizing the law of nuisance to analyze this broad form deed case, the Court overruled two cases, Tolliver v. Pittsburgh-Consolidation Coal Co., 290 S.W.2d 471 (Ky. 1956) and Consolidation Coal Co. v. Mann, 181 S.W.2d 394 (Ky. 1944), which had absolved a mineral owner of liability for creating a nuisance.

In a concurring opinion, Justice Stephenson disagreed with the idea that the law of nuisance should resolve the dispute before the Court. Instead, under the law of mineral rights Justice Stephenson would "impose strict liability for damages to the surface owners' improvements, improved property, and merchantable timber occasioned by the conduct of a mining operation." 514 S.W.2d at 667 (Stephenson, J., concurring).

[98] Buchanan v. Watson, 290 S.W.2d 40 (Ky. 1956); Wells v. North East Coal Co., 72 S.W.2d 745 (Ky. 1934).

[99] Bevander Coal Co. v. Matney, 320 S.W.2d 301 (Ky. 1959); Elkhorn Coal Corp. v. Johnson, 263 S.W.2d 124 (Ky. 1953). In Blue Diamond Coal Co. v. Campbell, 371 S.W.2d 483 (Ky. 1963), the company had cut a haul road in the hillside for no apparent purpose. The Court stated that a jury could decide the question of whether or not the company's action was so contrary to established industry practices that the action would be considered oppressive, wanton, and malicious.

[100] 263 S.W.2d 124 (Ky. 1953).

were used" and that the entries were heavily timbered.[101]

What then does constitute wanton, arbitrary and malicious exercise of mining rights? In *Croley v. Round Mountain Coal Co.*[102] the Court again upheld the right to strip mine under a "Mayo form" deed which granted the right "to use and operate the same and surface thereof . . . in any manner that may be deemed necessary or convenient for mining . . . ."[103] The Court, protecting mineral interests with a broad treatment of the grant of "all coal", a term found in virtually all coal leases, declared:

> [t]he reservation in the instant case not only reserves "all" coal, but also oil, gas, *stone, water,* and "any other minerals in, on or under the land," with the right to "take, enter, mine, cut, and remove any and all minerals in, on and under the land." Obviously *all* coal could not be removed by the deep mining process. Removal of *stone* would normally require substantial destruction of the surface. We think the parties must have intended that the minerals could be removed by any recognized method or process.[104]

The company reached the limit, however, when it used part of the surface for the dumping of waste from other operations on other lands, a process which constituted a wanton act.[105] But since the surface, or most of it, was subject already to substantial destruction from stripping for the underlying coal, the measure of damages was reduced.

3. *Timber Rights*

Several well-recognized servitudes of the mineral estate have been merged in Kentucky into a greatly broadened right

---

[101] *Id.* at 125.

[102] 374 S.W.2d 852 (Ky. 1964).

[103] *Id.* at 853.

[104] *Id.* at 854 (emphasis original).

[105] *Id.* at 854. The damages recoverable in this type of case have been the difference between the value of the land immediately before and after the compensable damage. *See, e.g.*, Nisbet v. Lofton, 277 S.W. 828 (Ky. 1925). For a discussion of damages recoverable in a broad form deed case based upon nuisance principles, *see* Kentland-Elkhorn Coal Co. v. Charles, 514 S.W.2d 659 (Ky. 1974), where the Court stated the established rule that a party can recover only those damages sustained prior to trial for a temporary nuisance. However, in the case of a permanent nuisance, the measure of recovery is the difference in fair market value of the litigant's property.

of the mining interest to remove overburden. For example, the right to use such amounts of timber as may be necessary for proper mining has been long recognized.[106] This has been held to be included in the phrase "the usual rights and privileges of mining" which appears in mineral deeds.[107] Just as the right to remove overburden gives no title to that overburden, the right to use standing timber to the extent necessary for mining implied no title to the trees, at least not until they have been cut by the mineral owner.[108] By the same token, the surface owner could cut down all the standing timber and sell it except for that amount needed for mining.[109] In effect, the miner's claim for reasonable use of timber is much like a lien on all the timber to secure a debt equal to only a part of the timber's value. The mineral owner may intervene to protect the timber for his future mining needs, as where the owner attempts to cut all the trees to prepare the land for agricultural use. The surface owner may have excepted from the deed and retained the permanent use of his land for farming, but the right is servient to the reasonable use of timber for mining.[110] There is a dearth of authority regarding how far the right to use timber extends. It is clear, however, that the mineral owner may not insist upon preservation of timber not presently being utilized for mining solely for the reason that the timber may in the future be usable for mining.[111]

The right to cut timber has become incidental to the removal of overburden in strip mining. Only conventional underground methods require large amounts of timber to support the roof and sides of the tunnels. Moreover, today roof-bolting has largely replaced the use of timber. The recent cases have focused upon the destruction of timber as an incidental effect of

[106] Jasper Land Co. v. Manchester Sawmills, 96 So. 417 (Ala. 1922). The right of the mineral owner to reasonably use standing timber is fast losing importance. At one time enormous amounts of timber were used to support the mine tunnels; however, now roof bolting, using steel bolts, is safer and is used almost exclusively. George K. Martin, Roof Bolting in Kentucky, 1956 (thesis in chemical engineering, University of Kentucky).

[107] 96 So. at 418.

[108] Shackelford Coal Co. v. Knight, 108 So. 247 (Ala. 1926).

[109] Steinman Dev. Co. v. W.M. Ritter Lumber Co., 290 F. 832 (W.D. Va. 1922), *aff'd*, 290 F. 841 (4th Cir. 1923).

[110] Kenmont Coal Co. v. Hall, 40 S.W.2d 301 (Ky. 1931).

[111] *Id.* at 303.

mining rather than the use of timber in mining techniques. In *Kodak Coal Co. v. Smith*[112] the deed conveyed the mineral owner the right to use standing timber not more than twelve inches in diameter. Many years after the deed was executed, the mineral lessees began augering with the usual debris being discarded down the hillside. In the process trees more than twelve inches in diameter were destroyed. Recognizing that such destruction was not "use" of the trees as contemplated in the deed, the Court of Appeals, nevertheless, held that the destruction was incidential to the right of utilizing the surface in the mining process. As an afterthought the Court further stated that removal of large trees in preparing shaft openings or building roadways could hardly be said to violate the terms of the deed.[113]

The difference between removing timber to make room for a shaft opening or roadway and the wholesale destruction of timber in a way which cannot possibly aid mining operations (*i.e.*, by inundating the trees with debris) is one of kind and not of degree. In the first case the removal of trees really is incidental to a reasonable exercise of mining rights. Destruction need not be extensive; such shafts are small in size and generally unobtrusive. In addition, the timber may be sold by the surface owner to further mitigate his damage. In the second case the surface owner's property in the timber is completely destroyed with no compensating ecomomic gain to either party. The destruction is necessary only in the sense that once overburden has been pushed down the mountain, it cannot be controlled or contained. However, this distinction has been lost on the Court, because in *Kodak Coal Co. v. Smith* it declared that preservation of land is a matter for the legislature.[114]

Since, the *Blue Diamond Coal Co. v. Neace* and *Kodak Coal Co. v. Smith* cases were decided, the protection of surface rights has been eroded still further. Probably the most dramatic case decided by the Court of Appeals is *Martin v. Kentucky Oak Mining Co.*[115] Unlike some of the earlier cases, this case was thoroughly briefed and argued. Amicus curiae briefs

[112] 338 S.W.2d 699 (Ky. 1960).
[113] *Id.* at 701.
[114] *Id.* at 700.
[115] 429 S.W.2d 395 (Ky. 1968).

were filed by the Sierra Club, the Kentucky Civil Liberties Union, and by several mining companies not directly involved in the dispute. Public resentment against strip mining had increased in several Eastern Kentucky counties, particularly in Knott County, to the point that armed violence was being avoided on a day-to-day basis. Citizens in Knott County, where much— perhaps most — of the total land is subject to broad form mineral deeds, had banded together in an organization called Appalachian Group to Save the Land and People. By the time the appeal was argued, several armed clashes had already occurred[116] and more trouble was expected. Events seemed to be moving swiftly toward an ominous culmination as the conservation movement in Kentucky made a concerted attack on the broad form mineral deed in general and the *Buchanan, Blue Diamond,* and *Kodak* decisions in particular.

As set out in the majority opinion the arguments presented by the landowners were six-fold. Some of these had been presented and rejected before, but some were being advanced for the first time in Kentucky. The arguments were (1) that the parties to the mineral deeds could not reasonably have intended that the surface should be "destroyed" in the removal of the minerals because there would be no reason to retain surface title if it could be rendered worthless at the pleasure of the mineral holder; (2) it is unfair, unjust, and inequitable to construe the deeds to allow destruction of the surface without compensation to its owner; (3) the parties to the deeds did not contemplate the development of strip and auger mining; (4) the word "mining" in the deeds embraces *only* mining by underground methods and this term should be interpreted in view of mining techniques in use when the deed was executed; (5) the right to "use" the surface does not include the right to "destroy" it; and (6) the mineral owners should be estopped from stripping or auger mining any area upon which they have permitted the surface owner to make improvements without providing notice of their dominant legal rights.[117]

At the outset the Court quickly disposed of the landowners' conservation argument by stating that a decision that broad form deeds do not convey the right to strip mine would

[116] Louisville Courier-Journal, July 19, 1967, at 1, col. 5.
[117] 429 S.W.2d at 397.

not bring a halt to this mining technique. The courts in Pennsylvania and West Virginia, it noted, had reached conclusions favorable to the surface interests but strip mining was even more widespread there than in Kentucky. Thus it declared, "[c]onservation is not in issue. The issue is whether the owners of minerals, who clearly have the right to remove the coal by deep mining processes, must purchase from the landowner the right to use strip or auger processes."[118] Notwithstanding the Court's efforts to brush it aside, conservation was very much in issue. The Attorney General of Kentucky had intervened in the suit on behalf of the landowners to assert the interest of the Commonwealth in preserving its great natural resources.[119]

Similarly, the first five contentions of the landowners were lumped together for treatment. These arguments were based on the proposition that the parties could not have intended to permit destruction of the surface so that it could not be used for residential or agricultural purposes. In rejecting this claim the Court went further than ever in limiting the rights of surface owners when it declared that:

> [w]hether or not the parties actually contemplated or envisioned strip or auger mining is not important—the question is whether they intended that the mineral owner's rights to use the surface would be superior to *any* competing right of the surface owner.[120]

The surface owners next argued that the mineral owners should be estopped from asserting their right to strip mine land on which the surface owner had made improvements. The Court stated that no duty existed on the part of one owning mineral rights to thousands of acres of land to inform owners of parcels of the surface that the latters' rights were subordi-

---

[118] *Id.* at 397. All parties assumed that conservation was an issue in the case. The fact that strip mining was more extensive in Pennsylvania and West Virginia is inconclusive to indicate that a ruling on the broad form deed is immaterial to conservation. Under the Court's broad interpretation of the rights of mineral owners, Kentucky experienced the greatest increase in strip mining among coal producing states. Between 1964 and 1972 strip mine coal production nationwide increased by 118,000,000 tons and went from 31% to 47% of total production. 1973 WORLD ALMANAC AND BOOK OF FACTS 491.

[119] 429 S.W.2d at 397.

[120] *Id.* at 397.

nate by law. Indeed, if there were any basis for estoppel, it would run against the surface owners since they had made their improvements after the *Buchanan* decision, which provided public notice that stripping under the broad form deed subjected the mineral owner to no liability for surface damage *unless* it was inflicted wantonly.[121]

The dissent in *Martin* was essentially two-pronged: (1) the majority was erroneous in concluding that intent to make the surface estate subservient should be determinative rather than that a particular mining method was contemplated by the parties; and (2) the result was not only inconsistent with decisions on the same issues in other important coal producing states[122] but also with prior Kentucky cases.

The *Martin* opinion was perfectly in accord with *Buchanan* and its progeny, but a conflict between *Buchanan* and *Wiser* put the Kentucky law in an anomalous position. Oil and gas interests were being required to make compensation for surface damage incidental to their work while coal mining interests received *carte blanche*.

Of course the presence of an express waiver-of-damages clause in *Buchanan* and the other broad form deed cases distinguish these cases from *Wiser*.[123] But this distinction must be read in view of the statement in *Croley v. Round Mountain Coal Co.*[124] that the existence of a waiver-of-damages clause in the deed was not controlling in the *Buchanan* case since the right to use strip and auger methods existed anyway. The ma-

[121] *Id.* at 398.

[122] The dissenting opinion listed an array of authority contrary to the position adopted in *Buchanan* and adhered to in *Martin.* At least six states have passed on similar issues and none is in accord with the Kentucky decisions. The dissent listed: Franklin v. Callicoat, 119 N.E.2d 688 (Ohio C.P. 1954); East Ohio Gas Co. v. James Bros. Coal Co., 85 N.E.2d 816 (Ohio C.P. 1948); Williams v. Hay, 14 A. 379 (Pa. 1888); Livingston v. Moingona Coal Co., 49 Iowa 369 (1878); Catron v. South Butte Mining Co., 181 F. 941 (9th Cir. 1910); Oresta v. Romano Bros., 73 S.E.2d 622 (W. Va. 1952); West Virginia-Pittsburgh Coal Co. v. Strong, 42 S.E.2d 46 (W. Va. 1947); Rochez Bros., Inc. v. Duricka, 97 A.2d 825 (Pa. 1953); Chesapeake and Ohio Ry. Co. v. Bailey Production Corp., 163 F. Supp. 666 (S.D.W. Va. 1958); Campbell v. Campbell, 199 S.W.2d 931 (Tenn. Ct. App. 1946); United States v. Polino, 131 F. Supp. 772 (N.D. W. Va. 1955); Wilkes-Barre Township School District v. Corgan, 170 A.2d 97 (Pa. 1961); Rocky Mountain Fuel Co. v. Heflin, 366 P.2d 577 (Colo. 1961); Benton v. U.S. Manganese Corp., 313 S.W.2d 839 (Ark. 1958).

[123] Wiser Oil Co. v. Conley, 346 S.W.2d 718 (Ky. 1960).

[124] 374 S.W.2d 852 (Ky. 1964).

jority opinion in *Martin* made no further effort to distinguish *Wiser* and *Buchanan*; the Court was simply determined to adhere to *Buchanan* and the cases following it "whether or not it conflicted with *Wiser*."[125]

Thus, under the present law, the oil and gas industry, one of some importance in Eastern Kentucky, is treated much less favorably than the longer established coal industry. The situation is anomalous, so much so that Judge Hill, in dissent, compared the conflicting cases with "sin and salvation" — two irreconcilables.[126]

4. *Water Rights*

Another frequent source of friction between mineral owners and land owners has been the use of limited water supplies. Since water is necessary for both mining, farming and domestic purposes, conflict has been unavoidable. Regardless of the methods utilized, water which comes in contact with coal mines becomes highly polluted. Therefore, if water is used for mining it cannot be used for most other purposes.

Generally, cases in this area have favored the mineral owner. For example, in *Oakwood Smokeless Coal Corp. v. Meadows*[127] the Supreme Court of Appeals of Virginia held that drainage of coal mines is essential to their productive use. In this case the damage was incidental to the right of the mine operator to construct an air shaft as required by the safety laws. Water percolated from the surface through the air shaft and dripped from the roof of the mine. Eventually the water, now thoroughly polluted and highly acid, flowed out the entrance of the mine and onto an adjoining tract of land. Since the owner of the adjoining land claimed title through the common grantor with the mineral owner and took subject to the superior right of the mineral owner to drain his mine, the damage to the surface owner's land was *injuria absque damnum*.[128] Drainage was never mentioned in the deed, but the court stated that it

---

[125] 429 S.W.2d at 399.

[126] Martin v. Kentucky Oak Mining Co., 429 S.W.2d 395, 402 (Ky. 1968) (Hill, J. dissenting). The dissent stated that any use of land which resulted in major destruction was "unreasonably burdensome, unjustly severe, and harsh" within even the meaning of *Buchanan* and the other broad form deed cases. *Id.* at 403.

[127] 34 S.E.2d 392 (Va. 1945).

[128] *Id.* at 396.

is an inherent right fundamental to all other mining privileges necessary for full enjoyment of the mineral estate.[129]

Preeminent water rights of the mineral estate are not even limited by the right of the surface to be secure from danger. Some danger must be accepted by the landowner as part of the burden mining places upon the surface. For example, where water is pumped into an underground channel in the mine and carried off, the surface owner is not entitled to enjoin the bringing of water under his land. This is so even if he argues that if the pumps cease functioning for any reason, the mine would be flooded with resultant injury to the surface.[130] Such possibilities are too remote to justify injunctive relief for two reasons: (1) this danger would be faced primarily by the mine owner and (2) the whole surface estate is burdened by a servitude for ditches, drains, and tunnels necessary for mining.[131]

When water is impounded by the mining company the danger to the surface suddenly releasing the water is often substantial. In *Stone Coal Co. v. Varney*[132] an abrupt release of water carried tons of rock and mud onto a surface which was being used as a residence and for light farming. The jury awarded $3,000 for permanent damages to the shrubbery, garden and water supply. Since this case did not involve a mineral deed, the dispute was resolved by ordinary trespass principles.

The reasonable use of water for mining has been recognized universally as a natural easement of mineral estates.[133] It has been held that an oil lease carries with it the right to use water from a well located on the land; however, the uses must be for drilling purposes and other reasons relating to removal of the oil.[134] This right is also incidental to secondary drilling operations. If the holder of an oil lease is also authorized to tap gas reservoirs and recover as much gas as necessary to complete

---

[129] *Id.* at 397.

[130] Genet v. Delaware and H. Canal Co., 25 N.E. 922 (N.Y. 1890).

[131] *Id.* at 926.

[132] 336 S.W.2d 41 (Ky. 1960).

[133] Russell v. Texas Co., 238 F.2d 636, 644 (9th Cir. 1956), *cert. denied* 354 U.S. 938 (1957); Mack Oil Co. v. Laurence, 389 P.2d 955, 961-62 (Okla. 1964); Holt v. Southwest Antioch Sand Unit Fifth Enlarged, 292 P.2d 998, 1000 (Okla. 1955); Stradley v. Magnolia Petroleum Co., 155 S.W.2d 649 (Tex. Civ. App. 1941).

[134] Stradley v. Magnolia Petroleum Co., 155 S.W.2d 649, 652 (Tex. Civ. App. 1941).

the oil drilling utilizing the gas as fuel, the driller may make reasonable use of water available on the land for drilling the secondary gas well.

5. *Lateral and Subjacent Support*

Traditionally, the law has imposed a duty approaching strict liability upon mineral owners to provide lateral and subjacent support for the surface.[135] Such support is an inherent right of the surface estate.[136] A significant Kentucky case which explains how far the right to support extends is *Nisbet v. Lofton,*[137] a case which involved an 1899 mineral deed which conveyed "the whole and every part of the coal mining privileges and rights to mine the coal from, in and under, including all the coal in and to a tract of land lying near the city of Providence, Webster County, Kentucky."[138] Part of the coal had already been mined under an earlier lease. Many years later after most of the coal had been mined, the defendant, the mineral owner, permitted the pillars supporting the plaintiff's land to be removed, resulting in considerable general subsidence of his property. The evidence established coal pillars 18 x 50 feet remained as lateral support after the original mining operation under the lease. After these relatively large pillars were reduced, inadequate support pillars approximately 4 x 6 feet in size remained.

The defendant argued that the phrase in the deed "including all the coal" conveyed the right to remove all the coal without regard for damage to the surface which might result; that a requirement that pillars be left behind for support was inconsistent with the right to recover all the coal. The Court of Appeals found it unnecessary to decide whether the language of the deed freed the defendant of the duty to support the land. Noting that "at the time of the execution of this deed the coal had even then been removed from the premises owned by plaintiff, but that in its removal sufficient pillars had been left

[135] North-East Coal Co. v. Hayes, 51 S.W.2d 960 (Ky. 1932); Jones Coal Co. v. Mays, 8 S.W.2d 626 (Ky. 1928); West Kentucky Coal Co. v. Dilback, 294 S.W. 478 (Ky. 1927).

[136] Nisbet v. Lofton, 277 S.W. 828 (Ky. 1925).

[137] 277 S.W. 828 (Ky. 1925).

[138] *Id.* at 829.

to support the surface,"[139] the Court recognized a common law right to subjacent and lateral support of the surface:

> The act of his [defendant's] lessees in removing these supports was a wrongful act which the defendant sanctioned or consented to, at least, he took no steps to prevent it, and of which he has received the benefit, and hence his liability is the same as though he had committed the wrongful acts which resulted in the damage to the plaintiff's property.[140]

Surface estates are also entitled to lateral support, but the courts have not imposed as strict a duty upon the mineral owner in this regard. Generally, adjoining landowners may recover for failure to provide adequate lateral support for their property only if they can show negligence. In *West Kentucky Coal Co. v. Dilback*[141] the plaintiff owned a house on a tract of land adjacent to land mined by the defendant. The plaintiff's land was not subject to any lease or conveyance of mineral rights, and there was no evidence that his land had been wrongfully mined. The adjoining land collapsed from lack of support and fissures appeared, which in turn caused the plaintiff's well to run dry. The Court fixed no liability upon the mineral owner for the destruction of the well, since it could not be shown that defendant had caused any settling of the adjoining land. Had the well been on the land above the mine, the Court indicated that liability would be absolute for the duty to provide subjacent support is absolute as to the surface owner. On the other hand, the duty of lateral support extends to adjacent land but is breached only by negligent acts.[142]

IV. RECENT DEVELOPMENTS

The Kentucky General Assembly recently provided the surface owner with some degree of protection against the ofttimes devastating effects of strip mining by amending the statutory provisions which regulate strip mining. Heretofore these provisions required that maps and plats be delivered to the Department of Mines and Minerals indicating the location

---

[139] *Id.*
[140] *Id.* at 831.
[141] 294 S.W. 478 (Ky. 1927).
[142] *Id.* at 479.

and effect of the strip mining operation on land and streams. In addition, detailed plans for grading, backfilling and other reclamation are required for issuance of a strip mining permit.[143] Recognizing that these measures have proved inadequate to cope with the environmental problems inherent in strip mining, KRS § 350.060 now requires that written consent of the surface owner be obtained before strip mining operations can be conducted. Most significantly, this requirement is even present for land subject to a broad form deed. KRS § 350.060(7) provides:

> Each application shall also be accompanied by a statement of consent to have strip mining conducted upon the area of land described in the application for a permit. The statement of consent shall be signed by each holder of a freehold interest in such land. Each signature shall be notarized. No permit shall be issued if the application therefor is not accompanied by the statement of consent. This statement of consent shall not be required for coal mined under the provisions of KRS Chapter 351 and KRS Chapter 352.[144]

If this highly controversial measure is valid, Kentucky law will comport with the view in other jurisdictions that the broad form deed does not convey the right to use strip mining methods unless explicitly stated in the instrument. This amendment was enacted as a result of strong popular pressure to end what was widely viewed as a serious wrong. Clearly, most of the legislators thought of the amendment as a conservation measure; however, the public regarded the measure as an anti-stripping law which would enable surface owners to resist destruction of their property without compensation.

The new amendment, however, may be constitutionally attacked on several grounds. First, it may be invalid because it operates to impair contract obligations. Second, one can argue that it deprives the mineral owner of a valuable property right without due process of law. Third, because the new provision is limited to surface mining, an equal protection issue arises. The most persuasive of these arguments is that the new amendment impairs contract obligations. The Kentucky Court of Appeals has held that broad form deeds convey to the min-

---

[143] *See* KRS § 350.060 (Supp. 1972).

[144] KY. ACTS ch 373 (1974).

eral owner the right to strip mine without the consent of the surface owner *even though* no such right was expressly granted.[145] Now the legislature has limited the freedom of mineral owners to exploit the surface by exercising rights conveyed to them by their deeds.

In the *Kodak* case the Court of Appeals expressly deferred to the legislature any change regarding the rights of landowners whose land is subject to "broad form" deeds. "The preservation of the land is a matter for the legislature."[146] It is well established that a statute is not unconstitutional merely because it incidentally impairs existing contractual rights or hinders the performance of a contract. Indeed, all business is conducted subject to the retained power of the state to protect public welfare.[147] Moreover, one who buys into an enterprise already regulated by statute purchases subject to further regulation.[148] These cases and many others have established that private contracts must give way before legitimate exercise of the police power.

It is, therefore, clear that the contract clause is not an independent barrier to legislation if that action is a valid exercise of police power. On the other hand, if the recent amendment *is not* a valid exercise of police power, the contract clause is fully applicable and must be examined. The cases cited above have all involved economic regulation and property rights, but the regulation was of a broad, remedial scope. An activity was prohibited or restricted in order to promote some public good. In the present legislation, by contrast, the remedial effect, if any, is obtained by tinkering with the contract rights of the parties *inter se*. Many cases have held that where police power is exercised the incidental impairment of contracts does not necessarily invalidate the exercise. Is the converse also true? Is it permissible to impair the obligation of contracts if the result is furtherance of some public purpose?

---

[145] *See, e.g.,* Kodak Coal Co. v. Smith, 338 S.W.2d 699 (Ky. 1960).

[146] *Id.* at 700.

[147] Home Building and Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934); Chicago and Alton R.R. Co. v. Tranbarger, 238 U.S. 67 (1915); Atlantic Coast Line R. Co. v. City of Goldsboro, 232 U.S. 548 (1914); Stone v. Mississippi 101 U.S. 814 (1880).

[148] Veix v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S. 32 (1940). For a Kentucky case which dealt with the issue of whether or not a statute impaired contract obligations, *see, e.g.* City of Covington v. Sanitation Dist. No. 1 of Campbell and Kenton Counties, 301 S.W.2d 885 (Ky. 1957).

Is it important whether the same end could be reached by direct regulation of the industry? Needless to say, there is little case law to guide us. Such an approach to regulation has rarely been tried. If the converse is true, the contract clause is virtually written out of the Constitution, because some public purpose can nearly always be connected with impairment of the contract. While the Founding Fathers may not have intended the contract clause to interfere with an otherwise valid exercise of police power, they must have intended that the clause have some meaning.

The validity of the new legislation depends in part upon its purpose. It could perhaps be justified as a measure to preserve the peace or to conserve land and water. The new legislation is ineffective as a conservation measure, since it delegates to an individual, a party to the contract which severed the mineral, a veto over the use of land by the other party to the contract. This bestows upon the landowner the right to prevent certain land uses, although the state's highest court has held that the right of the mineral owner to use the surface is paramount. That right had been purchased for valuable consideration. The Court of Appeals has considered and expressly rejected the argument that consideration was inadequate.[149] The new amendment puts the surface owner in a position to be paid again for what he, or his predecessor in title, has already received compensation. This theme was discussed in *Martin* where the Court stated:

> The argument that the landowners would not have undertaken to *sever* the mineral title from the surface title, and retain the latter, instead of simply deeding the whole title to the mineral buyers, if they had not contemplated that the surface would retain its value for agricultural and residential uses, is not fully persuasive. We think the fact that in many instances, as here, the landowner was being paid, for the mineral rights alone, practically the full value of his land, might well indicate that the landowner chose to retain the *bare* title simply for what little value, if any, it might have.
>
> If as appears well may have been the case, the landowners who executed the broad form mineral deeds at the turn of the century were paid prices which substantially or in large

[149] Martin v. Kentucky Oak Mining Co., 429 S.W.2d 395 (Ky. 1968).

> part equaled the full value of the land (at least of the hillside land) we see nothing unfair, unjust or inequitable in construing the deeds in favor of the grantees. Certainly the fact that the surface of the land is worth much more today than it was in 1905 is not a valid reason for saying that the landowners should be paid again.[150]

In view of the above excerpt from *Martin,* the recent amendment on its face appears to be an impairment of contracts, and it can be upheld only if the legislation serves the public interest and is a valid exercise of police power.

When a concerted effort was made in the *Martin* case in 1968 to overturn the Kentucky broad form deed rule, the deleterious effects of the Kentucky decisions on land and water conservation were strongly urged as a basis to reverse the rule.[151] However, a majority of the justices were not persuaded:

> The court is fully aware of the great public concern with the conservation problems attendant upon strip and auger mining, and the urgent necessity to protect the soil and the water courses from destruction and pollution. However, counsel for the landowners, and for those amicus curiae who side with them in arguing that the broad form deed does not permit strip or auger mining, frankly concede that a decision of this court upholding their contention as to the construction of the deed will not stop strip or auger mining. They admit that in Pennsylvania and West Virginia, where the courts have held that the broad form deed does authorize strip or auger mining, that type of mining is even more prevalent than in eastern Kentucky. And of course it is common knowledge that strip mining has been done on a large scale in western Kentucky where the broad form deed was not commonly used.[152]

---

[150] *Id.* at 398 (emphasis original). In Watson v. Kenlick Coal Co., 498 F.2d 1183 (6th Cir. 1974), the Sixth Circuit discussed the Kentucky broad form deed cases. The plaintiff in *Watson* filed suit pursuant to 42 U.S.C. § 1983 (1970) and alleged that the pervasive regulation of strip mining or the broad form deed cases constituted state action. In affirming a dismissal of the suit, the court held that there was neither a deprivation of rights guaranteed by the United States Constitution nor state action present in a suit where the surface owner complained of destruction of his surface rights.

[151] For a discussion of the relative merits of each side in the energy v. conservation dispute, *see* Diamond, *Energy and Environment as Allies,* N.Y. Times, Oct. 20, 1974, § 3, at 14, col. 3. For a recent case discussing the due process aspects of a statute which provided an outright ban of future strip mining in a state forest, *see* Bureau of Mines of Maryland v. George's Creek Coal & Land Co., 321 A.2d 748 (Md. 1974).

[152] Martin v. Kentucky Oak Mining Co., 429 S.W.2d 395, 397 (Ky. 1968).

Since the statute only does what the Court of Appeals refused to do in the *Martin* case and since the Court has already said such an act does not contribute to conservation, one is virtually forced to conclude that the statute is not a valid exercise of the police power but instead is an unconstitutional impairment of the obligation of contracts. The police power is always subject to an important limitation. It may be used so as to invade private rights only if the legislation bears a real and substantial relation to public health, safety, morality, or some other phase of the general welfare.[153] It is apparent that the recent "broad form deed bill" cannot pass muster. Countless private individuals who own interests in surface estates from which the mineral has been severed are now delegated the right to undo whatever conservation purpose the legislation may have by granting their consent, for a consideration, to surface mining on their land. It is plain that the primary purpose and effect of the statute is to change the relative legal rights and economic bargaining positions of many private parties under their contracts rather than to achieve any general public purpose.

The police power is public power. It is not served by legislation which vests private rights in particular persons. A law delegating to one person a veto over land use by another is not part of that public power described by Mr. Justice Holmes in *Noble State Bank v. Haskell.*[154]

> It may be said in a general way that the police power extends to all the great public needs. . . . It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and predominate opinion to be greatly and immediately necessary to the public welfare.[155]

If we were writing on a clean slate the method employed by the recent amendment might be unobjectionable, for the state certainly has the power to prohibit certain types of mining if necessary for the public good. However, there are long standing property rights involved. The Court of Appeals

[153] Louis K. Liggett Co. v. Baldridge, 278 U.S. 105 (1928). *See also* City of Covington v. Sanitation Dist. No. 1 of Campbell and Kenton Counties, 301 S.W.2d 885 (Ky. 1957).

[154] 219 U.S. 104 (1911).

[155] *Id.* at 111.

held—rightly or wrongly— that broad form deeds convey the right to use strip and auger mining methods whether or not the owner of the surface approves. A statute which obviates this right impairs the obligation of the contract between surface and mineral owners. As such, it is unconstitutional unless enacted pursuant to a proper exercise of the police power. Under the circumstances, a grave constitutional question certainly exists. The courts of this Commonwealth will probably be called upon in the near future to face this question.

James K. Caudill