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THE NATURE OF PROPERTY RIGHTS IN A SEPARATELY OWNED MINERAL VEIN.

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Anciently in England the concept of ownership in land was inseparably connected with that of livery of seisin. Of course there could be no livery of seisin of an unopened mineral substratum. So it seems that at common law an unopened mine could not be conveyed apart from the surface. Apparently only rights to enter and take minerals could be granted[1] and they were held to be incorporeal estates in the land affected.[2] After the Statute of Uses had worked its complete revolution in the modes of conveyancing there was no longer any difficulty in conveying corporeal estates in substrata apart from interests in the surface of lands. So the English courts came to recognize and protect the separate ownership of subterranean strata.[3] It has been universally held in the United States, where it has never been customary to convey fees simple by livery of seisin, that a corporeal fee simple estate in a substratum may exist and may be conveyed by apt words.[4] Indeed the tendency in the United States, led by the Pennsylvania

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[1] See CHALLIS, REAL PROPERTY, 3 ed., 58.

[2] Lord Mountjoy's Case, Godb. 17 (1583).

[3] Rich *v.* Johnson, 2 Str. 1142 (1741); Stoughton *v.* Lea, 1 Taunt. 402 (1808); Harris *v.* Ryding, 5 M. & W. 60 (1839); Humphries *v.* Brogden, 12 Q. B. 739 (1850). See MACSWINNEY, MINES, 62.

[4] See "Horizontal Divisions of Land", 1 AM. L. REG. (N. S.) 577.

It is submitted, however, that in many cases of conveyance of a mineral in place, even where the mineral occurs in a solid stratum or vein the parties do not think of the conveyance as passing the stratum as such, but rather as simply a conveyance of the *corpus* of the mineral. It has even been held that there may be a fee simple conveyance of "undiscovered minerals": Hansen *v.* Hall, 167 Mich. 7, 132 N. W. 457 (1911). See 10 MICH. L. REV. 143.

The prevailing doctrine, as considered in this article, results from what is believed to be too great a readiness to construe grants of minerals in place to amount to a horizontal stratification of the land. Many of the English grants seem to have been of the "mines", in terms; for example: Proud *v.* Bates, 34 L. J. Ch. 406 (1865). American grants, on the other hand, more usually refer to "all the coal"; for example: Genet *v.* Delaware *etc.* Canal Co., 122 N. Y. 505 (1890). It is believed that this difference of terminology is not merely accidental, but indicates a fundamentally different conception in the minds of the parties as to what is being done. It is submitted that the English terminology gives more show of reason for construing the grants as passing an estate in the "containing chamber". Compare the language quoted, *post*, note 24.

court, now is to construe as a grant of a corporeal estate in fee simple any deed the language of which shows an intent to convey all the obtainable minerals in a substratum, even though such instrument is called a lease and uses the terminology of leases of real estate.[5]

Mining operations in a substratum naturally produce chambers or open spaces where the mineral has been removed. The use which may be made of this space by the owner of the mineral vein, where the surface is separately owned, raises a most interesting question. Apparently the right of the owner of the mineral vein to use this space for any operations properly connected with the mining of his minerals in the particular tract has never been questioned. But the right of the owner of the mineral vein to transport through such space minerals mined from beneath adjacent lands has been attacked on several occasions, generally where coal lands have been concerned. The typical case raising the question fairly, and the one intended herein to be discussed for the most part, is one where the grant or reservation of coal is silent as to the right of the owner of the coal to make use of chambers produced by mining and such owner claims the right to transport through such chambers coal mined from beneath adjoining lands.[6] The hitherto unbroken line of authority in such cases has been that the absolute owner in fee of the mineral in place has such

[5] Hope's Appeal, 1 Sadler 307, 3 Atl. 23 (Pa. 1886); Montooth *v.* Gamble, 123 Pa. St. 240, 16 Atl. 594 (1889); Kingsley *v.* Hillside Coal & Iron Co., 144 Pa. St. 613, 23 Atl. 250 (1892); Lillibridge *v.* Lackawanna Coal Co., 143 Pa. St. 293, 22 Atl. 1035 (1891); Hosack *v.* Crill, 18 Pa. Super. Ct. 90 (1901). But of late the Pennsylvania court has displayed an unwillingness to construe such deeds as grants in the absence of language therein seeming to require it: Denniston *v.* Haddock, 200 Pa. St. 426, 50 Atl. 197 (1901); Coolabaugh *v.* Lehigh *etc.* Co., 219 Pa. St. 124, 62 Atl. 94 (1905); Greek *v.* Wylie, 109 Atl. 529 (Pa. 1920). See Percy G. Madeira, Jr., "Leases of Minerals as Absolute Sales—The Pennsylvania Doctrine", 64 U. OF PA. L. REV., 42. See *post*, note 24.

[6] The case chosen for discussion is, then, one presenting a question of what the law will imply or allow rather than of interpretation of deeds. It is intended to exclude from particular consideration such cases as Ramsey *v.* Blair, [1875] 1 A. C. 701; Genet *v.* Delaware *etc.* Canal Co., *supra*; St. Louis Consolidated Coal Co. *v.* Schmisseur, 135 Ill. 371, 25 N. E. 795 (1890); McCracken *v.* Gumbert, 131 Pa. St. 36, 18 Atl. 1068 (1890); Attebery *v.* Blair, 244 Ill. 363, 91 N. E. 475 (1910); Potter *v.* Rend, 201 Pa. St. 318, 50 Atl. 821 (1902); and St. Louis *etc.* Trust Co. *v.* Galloway Coal Co., 193 Fed. 106 (1911), where the words of the grant or reservation of the coal can be construed to include a right to use in this way such subterranean chambers, and, of course, such cases as Rockafellow *v.* Hanover Coal Co., 12 Pa. Co. Ct. 241 (1893), where the grant expressly denied such right, or such cases as Moore *v.* Price, 125 Ia. 353, 101 N. W. 91 (1904), and Beck *v.* Economy Coal Co., 149 Ia. 29, 127 N. W. 1109 (1910), where the grant was construed to exclude such right. Again, the typical case herein to be discussed is one where the grantee of coal is transporting coal mined beneath one tract through haulways underlying a second tract and bringing the same to the surface upon still a third tract, and it is the owner of the second tract who contests the right of the grantee of the coal so to move it. The question, then, is one not complicated by being entangled with a question of surface rights-of-way. Whether rightly or wrongly, courts put cases involving such questions upon a basis entirely different from that upon which they put cases of the type chosen for discussion: Dand *v.* Kingscote, 6 M. & W. 174 (1840); Hooper *v.* Dora Coal Mining

right.[7] In the case of *Clayborn* v. *Camilla Red Ash Coal Co., Inc.*,[8] the Virginia Supreme Court has held *contra.*

The possible existence of such a problem appears to have been thought of by an English court at least as early as 1858 when, in the case of *Powell* v. *Aikin*[9] the court indicated by way of *dictum* that such use of the space produced by mining operations could not be made. The question seems to have first come up for decision in 1860 in the case of *Bowser* v. *McLean,*[10] where the land affected was copyhold. A little later came the case of *Proud* v. *Bates,*[11] raising the question as to freehold lands. The law in England is now settled as to both kinds of estates and is well stated in *Eardley* v. *Granville,*[12] where Jessel, M. R., said:

> ". . . The law seems to stand this way: The estate of a copyholder in an ordinary copyhold (for it is an estate) is an estate in the soil throughout, except as regards for this purpose timber trees and minerals. As regards the trees and minerals, the property remains in the lord. . . The possession is in the copyholder; the property is in the lord. If a stranger cuts down the trees, the copyholder can maintain trespass against the stranger, and the lord can maintain trover for the trees. . . ."
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> ". . . The same rule applies to minerals as to trees. If you once cut down the tree, the lord cannot compel the copy-

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Co., 95 Ala. 235, 10 So. 652 (1892); Leavers *v.* Cleary, 75 Ill. 349 (1874); St. Louis Consolidated Coal Co. *v.* Schmisseur, *supra*· McCloskey *v.* Miller, 72 Pa. St. 151 (1872); Stewart *v.* Northwestern Coal *etc.* Co., 147 Pa. St. 612, 23 Atl. 882 (1892), and Farrar *v.* Pittsburgh *etc.* Coal Co., 28 Pa. Super. Ct. 280 (1905). Nor is it to be confused with the simple question of the right of access through the superincumbent strata of a given tract to a separately owned stratum beneath the same tract. Such right exists but rests upon different considerations from any present in the sort of case chosen for discussion: Mellon *v.* Chartiers Block Coal Co., 152 Pa. St. 286, 25 Atl. 597 (1892). The case to be considered is also one where the passage-way is of a height equal to the thickness of the coal vein, where strata above and below the ocal vein form the floor and roof of the tunnel, respectively, and are separately owned. It is not, then, a case where the owner of the coal has simply tunneled *through* his own property, but a case where he has mined out *all* of the coal for the thickness of the vein and for the length and breadth of the passageway. See note 18, *post,* on this point.

[7] Bowser *v.* McLean, 2 De G., F. & J. 415 (1860); Proud *v.* Bates, *supra;* Hamilton *v.* Graham, L. R. 2 Sc. & Div. App. 166 (1871); Ramsey *v.* Blair, *supra;* Eardley *v.* Granville, 3 Ch. D. 826 (1876); Batten Pooll *v.* Kennedy, 1 Ch. 256 (1907); Lillibridge *u.* Lackawanna Coal Co., *supra;* Webber *v.* Vogel, 159 Pa. St. 235, 28 Atl. 226 (1893); s. c. 189 Pa. St. 156, 42 Atl. 4 (1899); New York *etc.* Coal Co. *v.* Hillside Coal *etc.* Co., 225 Pa. St. 211, 74 Atl. 26 (1909); Westerman *v.* Pennsylvania Salt Mfg. Co., 260 Pa. St. 140, 103 Atl. 539 (1918); Bagley *v.* Republic Iron & Steel Co., 193 Ala. 229, 69 So. 17 (1915); Schobert *v.* Pittsburgh Coal *etc.* Co., 254 Ill. 474, 98 N. E. 945 (1912); Madison *v.* Garfield Coal Co., 114 Ia. 56, 86 N. W. 41 (1901); Wadsworth Coal Co. *v.* Silver Creek Mining *etc.* Co., 40 Ohio St. 559, 567 (1884), (*semble*); Moore *v.* Indian Camp Coal Co., 75 Ohio St. 493, 80 N. E. 6 (1907); Armstrong *v.* Maryland Coal Co., 67 W. Va. 589, 608, 69 S. E. 195, 203 (1910), (*semble*). See also MACSWINNEY, MINES, 67, 104; 27 CYC. 699; 18 R. C. L. 1149, and notes in 13 L. R. A. 627; 40 L. R. A. (N. S.) 826, and ANN. CAS. 1913 B, 1104.

[8] 105 S. E. 117 (Va. 1920).

[9] 4 K. & J. 343 (1858).

[10] *Supra,* note 7.

[11] *Ibid.*

holder to plant another. The latter has a right to the soil in the copyhold where the trees stood, including the stratum of air which is now left vacant by reason of the removal of the tree. So, if the lord takes away the minerals, the copyholder becomes entitled to the possession of the space where the minerals formerly were, and he is entitled to use it at his will and pleasure. If you have a shaft made for working the mines, the copyholder may descend in the shaft, and either walk about in the space below or use it for any other rational purpose. That is the position of the copyholder . . . [the grantee of the lord's mineral rights] has, therefore, no right to trespass on the copyhold for any purpose whatever, because I assume he does not want it for the purpose of working the manorial minerals; for that purpose he has a right to use it; but assuming that he does not want it for that purpose, but only wants it for the purpose of carrying the coal from under Sneyd's estate—that is, foreign coal—he has no right to use it at all. Of course the injunction to be granted will only restrain him from using it for that purpose; it will not affect the other right. . . ."

". . . If a freeholder grants lands excepting mines . . . . he grants out his estate in parallel layers, and the grantee only gets the parallel layer granted to him and does not get any underlying mineral layer or stratum. That underlying stratum remains in the grantor. The freeholder retains the mineral stratum as part of his ownership; and whether or not he takes the minerals or subsoil out of the stratum, the stratum still belongs to him as part of the vertical section of the land. But he says[13] in the case of a copyholder, that is not so, because the copyholder, though he has no property in the stratum in the sense of being entitled to take the minerals, has property and possession in this sense, that the moment the minerals are taken away the space is in his possession, and he only can interfere with it, the lord having no right to do so."

From this it is apparent that in one line of English cases of which *Bowser* v. *McLean*[14] is apparently the first, the question of the right to use the space produced in a mine arose between copyholders and the lords of the manor. In the other line of cases, represented by *Proud* v. *Bates*,[15] the question arose between the owners in fee of the surface and of the subterranean strata. Although in the latter line of cases it is held that the owner may use

[12] *Supra*, note 7.
[13] The Master of the Rolls is here summarizing the law as laid down in Bowser v. McLean, *supra*.
[14] *Supra*, note 7.
[15] *Ibid.*

the spaces to transport coal mined on other lands, and in the former it is held that he may not do so, the two are not inconsistent. Of the English cases only those involving freeholds are actual authority in the United States, and all of these cases seem to be in accord.[16]

Coming now to the American authorities, the first case in point of time[17] as well as the leading case is *Lillibridge* v. *Lackawanna etc. Coal Co.*,[18] decided in 1891. Except for the recent Virginia case *supra,* it has been followed by all the other American courts wherever the question has arisen.[19] It may be fairly said that all the other cases have adopted its analysis so that a consideration of the reasoning of the Pennsylvania court will give a fair understanding of what has been the prevailing American theory. The Pennsylvania court, three of the seven justices dissenting, said:

> ". . . Under all the decisions, the coal in place was absolutely owned in fee simple by the defendant. In a state of nature, the coal necessarily occupied space. How could the defendant own the coal absolutely and in fee simple, and not own the space it occupied? Or how is it possible to conceive of such a thing as the ownership of the space independently of the coal? If the coal in place is a part of the very substance of the soil, more corporeal than the surface, as was said in *Caldwell* v. *Fulton,*[20] how can the law regard the space

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[16] But note the dissenting opinion of Lord Chelmsford in Hamilton *v.* Graham, *supra,* where he said:
"The result of my consideration of the cases has been to lead me to the conclusion that although where mines or minerals are excepted out of a grant or lease they may be regarded as an estate or tenement separate from the surface land, yet the property in them is of a peculiar and limited character; it is rather a right to take away a part of the land for the profitable enjoyment of it than to possess it in its undisturbed natural state. If under an exception of mines or minerals a grantor or lessor has the same property in them as any other absolute owner has in the land belonging to him, the Appellant would have a right to grant wayleaves over the coal and limestone excepted to any person or any number of persons to carry minerals from other mines, which he might find to be a more profitable application of his property than gradually to exhaust it by working out the minerals."
Note also the following *dictum* of the court in Spoor *v.* Green, 9 L. R. Exch. 99, 109 (1874): "The seam of coal, and not the space occupied by the coal, forms the subject-matter of the agreement. . . ."

[17] The cases of Genet *v.* Delaware *etc.* Canal Co., St. Louis Consolidated Coal Co. *v.* Schmisseur, and McCracken *v.* Gumbert, *supra,* were earlier American cases, but, as shown above, are not in point.

[18] *Supra,* note 5. Note that the Virginia court in Clayborn *v.* Camilla Red Ash Coal Co., *supra,* insists that the whole of the langauge for which this case is always cited in this connection is a *dictum,* for the reason that the passage-way in this case was of a height less than the thickness of the coal vein, the grantee of the coal therefore owning both a layer of coal which formed the roof of the passage-way and a layer which formed the floor thereof. However this may be, the case has always been treated as a direct holding in line with the English authorities and has been followed as such.

[19] But note inconsistent language in a case involving a different question: Mellon *v.* Chartiers Block Coal Co.,*supra,* decided by seven justices of whom, curiously enough, five had sat in the Lillibridge Case. See Clayborn *v.* Camille Red Ash Coal Co., *supra,* on this point.

[20] 31 Pa. St. 475 (1858).

which the substance occupies, as other than the substance itself?[21] Of course such an idea is incapable of practical application, except upon the theory that the coal is not a corporeal substance to be sold and delivered, but that only an incorporeal right to remove it passes to the grantee under a conveyance. And such is the real nature of the appellant's argument. It could not be otherwise. Certainly, if such were the nature of the defendant's right, the argument and the authorities cited in support of it would be applicable and of controlling force; but it is a sufficient reply to all of them to say that all the decisions are directly the other way, and that they all establish that a conveyance of the coal in fee carries everything with it, just as fully and completely as a conveyance of the soil above. . . . If, then, the coal in place is a pure corporeal hereditament, the title in fee-simple to which passes to a purchaser by apt conveyance, there would be no more propriety in claiming a title in the grantor to the space it occupies, than there would be in claiming a similar right in a vendor of the surface to the space developed by the vendee in digging the cellar and foundations of a house. We are altogether unwilling to adopt any such view of the rights of the parties in either of such cases".

From this it will be seen that the Pennsylvania court considered that there could be only two theories as to the rights of the owner

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[21] Just what is meant by this language is not quite clear. Apparently the court means to say that law cannot distinguish between space and the matter which occupies it. To philosophy, the concept of space as distinct from the matter which occupies it seems a commonplace. See 1 LOCKE, HUMAN UNDERSTANDING, 297: " . . . we have as clear an idea of space distinct from solidity as we have of solidity distinct from motion"; JOHN DEWEY, LEIBNITZ'S NEW ESSAYS, 134: " . . . space is not necessarily a *plenum* of matter. . . . Space is occupied by matter, but there is no essential relation between them"; see also C. C. EVERETT, FICHTE'S SCIENCE OF KNOWLEDGE, 230; JOSEPH MCCABE, HAECKEL'S RIDDLE OF THE UNIVERSE, 245.

As is well pointed out in a *dictum* of the Pennsylvania court itself in Mellon *v.* Chartiers Block Coal Co., *supra*: "In the earlier days of the common law the attention of buyers and sellers and therefore the attention of the courts was fixed upon the surface. He who owned the surface owned all that grew upon it and all that was buried beneath it. His title extended upwards to the clouds and downwards to the earth's centre. The value of his estate lay, however, in the arable qualities of the surface. . ."

In such a state of affairs the question of the ownership of a *quantum* of space below the surface, as distinguished from the ownership of that portion of the earth's crust which occupied it, never became of importance. But it is submitted that when property rights in space, as distinguished from property rights in the matter which occupies the space, become of importance there is no logical reason for the law's refusing to deal with them. In this connection consider further the language of the Pennsylvania court in the same case:

"The grantee of the coal owns the coal, but nothing else, save the right to take it away. Practically considered, the grant of the coal is the grant of a right to remove it. This right is sometimes limited in point of time; in others it is without limit. In either event it is the grant of an estate determinable upon the removal of the coal. It is, moreover, a grant of an estate which owes a servitude of support to the surface. When the coal is all removed the estate ends, for the plain reason that the subject of it has been carried away. The space it occupied reverts to the grantor by operation of law. It needs no reservation in the deed, because it was never granted. The grantee has the right to use and occupy it while engaged in the removal of the coal, for the reason that such use is essential to the enjoyment of the grant."

Note also the language used in Spoor *v.* Green, *supra.*

of the mineral: (1) that, owning the coal, he owns the space which it occupies, for the reason, either (a) that, to the law, space and the matter which occupies it are the same thing, or (b) that, granting space is not to the law the same thing as the matter which occupies it, the owner of the mineral, by reason of owning it, owns also the space which it occupies; or (2) that he has only an incorporeal right to enter and take the mineral. It considered that the owner of the mineral could not own the *corpus* of the vein and at the same time have only a limited right in the space occupied by the mineral and that any restriction upon the mine-owner's user of the space inconsistent with a fee simple in the space made it something less than a fee simple; made it, in fact, an incorporeal estate.

As a matter of fact a theory different from either of the two which the Pennsylvania court thus considers possible, had already been adopted in England where the question arose between a lord of the manor and his copyholder, as has been shown.[22] It was apparently held in such cases that the lord of the manor owned the coal in fee and had a right to use the space for the purpose of mining such mineral but for no other purpose. Hence the copyholder either owned the entire space occupied by the mineral from the time of the creation of the copyhold, subject to the right of the lord to leave the coal therein until he chose to remove it, and subject to the right of the lord to use the space while removing the mineral, or else the copyholder's estate progressively extended to the space as fast as the coal was removed from it,[23] subject to the lord's right to use it throughout his operations beneath the manor itself. Whatever their basic theory, however, the English courts found no difficulty in holding in such cases that the owner of the

[22] Eardley *v.* Granville, *supra.*

[23] The following words of the Master of the Rolls in the extract heretofore quoted from Eardley *v.* Granville, *supra,* would lend color to this theory of the respective rights of copyholder and lord of the manor: ". . . the copyholder, though he has no property in the stratum in the sense of being entitled to take the minerals, has property and possession in this sense that the moment the minerals are taken away the space is in his possession, and he only can interfere with it, the lord having no right to do so". It is submitted that it would be logically possible to hold that, whatever the rights in the space so long as occupied by the coal where stratum and surface are separately owned in fee, the space, as progressively made vacant by the removal of the coal, passes to the surface owner. Apparently the only decided case in which this solution occurred to the court is Moore *v.* Indian Camp Coal Co., *supra,* in which the court said:

"It is therefore illogical and inconsistent, and would be impracticable and unjust, to hold that, as fast as the mineral is taken out, the remaining space should revert to the owner of the upper strata. Such a narrow and technical interpretation of the grant would result in embarrassment to the mining industry which would be intolerable." The soundness of this is not apparent.

mineral had a fee in the mineral but some lesser interest in the space it occupied.

Conceiving only two possible theories, then, the Pennsylvania court adopted the one that a fee simple in coal in place "carries everything with it just as fully and completely as a conveyance of the soil above". Such a theory presents not only difficulty in cases where coal rights have been passed by so-called leases which have been construed as grants,[24] but also in cases of absolute grants of coal in place. Under the doctrine of the Pennsylvania court it would seem, as stated by Lord Chelmsford in his dissenting opinion in *Hamilton* v. *Graham*,[25] that the mine-owner, while making only a show of carrying on his mining beneath the tract, might let out rights-of-way through the space to owners of minerals beneath adjacent lands. And, as the Virginia court well asks,[26] if the mine-owner owns the space absolutely in fee simple how can any restriction upon the nature of his user be imposed, during the period of such ownership, except such as the law would impose upon a surface fee simple? There is apparently no hint in the English cases that the rights of the grantee of the coal are

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[24] Some of these so-called leases contain an express limitation of all rights thereunder to the time until all the merchantable coal shall become exhausted. Others contain a limitation for a precise number of years. If a so-called lease can pass a fee, in "everything" similar to a fee in surface lands, a fee simple in the coal which the space occupies as well as in the coal itself, such fee has from the beginning and so long as it exists a fixed spatial extent. As said by the New York court in Genet *v.* Delaware *etc.* Canal Co., *supra*: ". . . by the terms of the agreement and in contemplation of the parties, the whole body of the coal, considered as of cubical dimensions and capable of descriptive separation from the earth above and around it, and as it lies in its place, is absolutely and presently conveyed. The thing sold. . . can be identified as land and severed as land from the estate of which it forms a part." Again, in Moore *v.* Indian Camp Coal Co., *supra*, it was said: "It results from the absolute proprietorship over the mineral in place, that the owner thereof has a like interest in the 'containing chamber' until the termination of the estate. . . . The phrase 'containing chamber', as used in the books, is simply a convenient expression for the limits or boundaries of the grant. The grant is an entirety and the estate thereby created is determinable as a whole upon the contingency of the exhaustion of the mine." The latter words, it is true, were used of ownership under an absolute grant. But they are applicable to a so-called lease construed as a grant. Under the doctrine of the Lillibridge Case, then, when the estate of the grantee of the coal ends it ends all at once. And, it is submitted, it can only end by operation of the limitation in the grant. Therefore it is submitted that if leases providing for termination of all rights thereunder upon exhaustion of all the merchantable coal pass fees simple in the coal they must be some peculiar kind of base or terminable fees and open to the objections urged *post*.

The correctness of a solution of the present problem should not be tested by its applicability where the separate rights in the coal were created by one of these so-called leases which the court construes as a grant. It is submitted that it is simply wrong to construe most so-called leases as grants in fee. In Denniston *v.* Haddock, *supra*, the Pennsylvania court itself said: ". . . The expression that a conveyance of coal in place even by a lease for a limited term is a sale, is inaccurate as a general proposition of law and unfortunate from its tendency to mislead. . . . . Whether it would be better to call such an instrument accurately what it certainly was at common law, a lease without impeachment of waste, or to endeavor to reconcile all the decisions by calling it a conditional sale, it is not necessary at present to discuss. . . . the rules applicable to sales are not to be applied indiscriminately to such instruments. . . ."

[25] *Supra*, note 7.

[26] Clayborn *v.* Camilla Red Ash Coal Co., *supra*.

not thus free of qualification or restriction.[27] Yet such unqualified and unrestrained user of the space was obviously never within the intent of the parties. The Pennsylvania court, apparently recognizing this fact, said by way of *dictum* in *Webber* v. *Vogel*,[28] that the right to transport coal from beneath adjacent land, through space in particular land, exists only so long as the particular land is being mined in good faith.[29]

Again, in the same case the Pennsylvania court said that, upon the exhaustion of the coal vein, the owner of the land above and below the coal has a right to the space formerly occupied thereby. It is submitted that this result can only be arrived at under the doctrine of the Lillibridge Case by holding that such owner has by implication (1) some right in the coal vein analogous to a possibility of reverter, or (2) a possibility of reverter, or (3) that there is a limitation in favor of the grantor and his heirs and assigns.[30] Any of these holdings involves difficulties. To hold that there is some interest analogous to a possibility of reverter subsisting in favor of the owner of the residue of the land is open to the objection that it creates by implication an interest in land hitherto unknown to the law and therefore bad.[31] To hold that what the grantor of the coal has is a true possibility of reverter is, of course, to reduce the estate of the grantee of the coal to a mere base or terminable fee. It is questionable whether such an estate can exist in those states where the statutes of *Quia Emptores* is in force.[32]

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[27] See English cases cited, *supra*, note 7.

[28] *Supra*, note 7.

[29] Directly *contra* is the *dictum* of the West Virginia court in Armstrong *v.* Maryland Coal Co., *supra*. It is submitted that the *dictum* of the West Virginia court is correct, under the doctrine of the Lillibridge Case. If the grantee of the coal has a fee simple estate in the whole of the space occupied thereby, or, later, in such space as may have been made vacant by the removal of the coal, such fee simple interest to last until the exhaustion of the coal, how can it be contended that his continuing to have any such interest depends upon his mining the coal in good faith? Suppose there were a grant to A and his heirs until A becomes President of the United States. Could it be contended that A is under any legal or equitable duty to try in good faith to become President as quickly as possible and thus quickly to end his fee? To ask such questions is to demonstrate that, as indicated by the Virginia court in Clayborn *v.* Camilla Red Ash Coal Co., *supra*, this collateral, afterthought restriction of the doctrine is inherently incapable of practical application.

Note that the question of the duty of the grantee of the coal to mine faithfully to keep royalties up to a given minimum per year, or under express or implied covenants to develop diligently, is a different question entirely.

[30] The suggestion of the court in the Webber Case that the grantor of the coal has a "reversion" is obviously untenable.

[31] 1 WASHBURN, REAL PROPERTY, 6 ed., 72.

[32] The late Professor Gray of Harvard considered that the effect of *Quia Emptores*, STAT. WESTM., 111, 18 EDW. 1, c. 1, was to abolish base or terminable fees. GRAY, RULE AGAINST PERPETUITIES, 3 ed., §§ 31-42, Appendix, §§ 774-788.

It is only fair to the Pennsylvania court to say, however, that *Quia Emptores* seems never to have been in force there by reason of the form of the grant by the Crown to William Penn: Ingersoll *v.* Sergeant, 1 Whart. 337 (Pa. 1836); Sheets *v.* Fitzwater, 5 Pa. St. 126 (1847); Pennsylvania RR. Co. *v.* Parke, 42 Pa. St. 31 (1862); Henderson *v.* Hunter, 59 Pa. St. 335 (1868); Siegel *v.* Lauer, 148 Pa. St.

But granting that such an interest in land can still exist, to hold that the grantor here has a possibility of reverter is to give it to him by implication. It is believed no court has heretofore gone so far as to create such an interest in land by implication. Again, if it be held that there is an implied limitation in favor of the grantor, his heirs and assigns, upon the exhaustion of the coal, there is thereby created a future estate which would be within the rule against perpetuities and probably void.[33]

Enough has been said to show the difficulties in which the Pennsylvania court has become entangled in its attempt to qualify the doctrine of the Lillibridge Case, in order to give effect to what it must have recognized to be the intent of the parties in such cases. It is submitted that the difficulty, if not impossibility, of so qualifying the doctrine demonstrates its inherent incorrectness. It is believed that the fundamental error was made in holding that the grant was not only of the coal in place but also of all the space within the limits or boundaries thereof. It is submitted that this was never the intent of the parties.

The question of the rights of a purchaser of timber trees as compared with those of the grantee of a coal vein was noticed in the Lillibridge Case and also by the Virginia court.[34] It is submitted that the Virginia court is correct in insisting that the two cases are logically comparable. If a mine-owner acquires rights in fee in the space from which he has removed the coal, it is arguable that the purchaser of timber trees acquires rights in fee in the irregular columns of air in which such trees stood, exercisable after the same have been removed. But the application of the logic of the situation to rights of way hardly seems the best one by which to show the untenableness of the theory of rights in fee in

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236, 23 Atl. 996 (1892); but *contra*, Wallace *v.* Harmstad, 44 Pa. St. 492 (1863), a case which, Professor Gray says: "In fact. . . . is unintelligible". It appears, then, that a terminable fee in Pennsylvania is quite possible.

[33] GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 317.

Since no life or lives in being would be affected in these cases, the future estate herein contemplated would have to vest within a gross period of 21 years or be void: Philadelphia *v.* Girard's Heirs, 45 Pa. St. 9, 29 (1863). Kimball *v.* Crocker, 53 Me. 263 (1865); Andrews *v.* Lincoln, 95 Me. 541, 50 Atl. 898 (1901).

[34] Clayborn *v.* Camilla Red Ash Coal Co., *supra*. The court said: ". . . . A somewhat similar situation arises when one buys a standing tree. He gets the tree as a part of the real estate, with an easement for support and removal, but he does not acquire any corporeal right in the soil or in the space which the tree occupies. . . . The right to mine is an incorporeal hereditament, an easement expressed in or incident to the grant of the fee, and in the exercise of this easement the grantee has no more right to put an additional burden upon the servient estate than he would have to haul timber from an adjoining tract over a tract upon which he had bought the timber with the right of removal. It is only fair to say that this view is directly challenged and rejected in the Pennsylvania case under consideration."

the resulting space. A more convincing application would, it is submitted, be this: Why might not the purchaser of the giant trees of a redwood forest erect in the column of air previously occupied by one such tree a wireless tower, or some other such erection, and maintain the same there pending his severing the other trees, however long that might be? It will probably not be seriously contended that the purchaser of the trees gets any such right.

So much for the difficulties encountered by the Pennsylvania doctrine. It is believed that these difficulties chiefly inhere in the idea that a fee simple in a substratum is identical in nature with a fee simple in land in general. As Lord Chelmsford well says in *Hamilton* v. *Graham*,[35] "the property in [such strata] is of a peculiar and limited character". It is not meant to say that the estates in such strata are not fees simple.[36] But does it, therefore, necessarily follow that the "natural rights" and incidents inhering in such fees are identical with those attaching to surface fees? To say that such fees of necessity carry "everything" which attaches to surface fees is to follow what Justice Holmes has so aptly described as "the illusion of mathematical certainty in legal reasoning"[37] and to be blinded by terminology. A fee simple is simply the estate of highest dignity which the law will allow in the subject-matter thereof. And it is submitted that, on principle, the law ought to allow an estate of somewhat different quality in a substratum from that which it will allow in surface lands. Surface lands are acquired to be husbanded and enjoyed in approximately their natural state. But mineral substrata are acquired only to be severed, exhausted and carried away. Continuing and exclusive possession against the whole world and of the whole area affected is essential to the purposes of a surface fee simple. Therefore a conveyance of such a fee may well be considered to have passed the right to such possession insofar as such right is not limited by law.[38] But the purchaser of a mineral vein is interested only in

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[35] *Supra*, note 7.

[36] It has been suggested that, while inheritable freeholds, such estates are not fees simple. But the learned author of this suggestion himself admits it finds no support in decided cases: 1 MINOR, REAL PROPERTY, 210.

[37] HOLMES, COLLECTED LEGAL PAPERS, 126.

[38] The court in the Lillibridge Case was particularly inapt, in the portion of the opinion set out in this article, in seeking to draw a parallel between the digging of a cellar by a surface grantee and the removal of the coal by the grantee thereof. There is no parallel in the two situations whatever. The surface vendee has acquired whatever rights his vendor had in this part of the land. Had the vendee purchased the surface of rocky land merely to quarry it out in this manner, the

reducing the same to personalty. Therefore continued and exclusive possession of the space occupied by the mineral is necessary only until this purpose is accomplished. This, together with an incorporeal right to use the vacant space progressively produced, as of the mine-owner's right of access, in any operations beneath the particular tract, is, it is submitted, all the law ought to allow to the fee simple owner of the mineral.

Such an outcome, as the Virginia court well points out, seems in harmony with the intent of the parties in the average case. Where A, owning land in fee simple, grants to B the coal therein in fee simple, it is submitted that it was not the intent of the parties that B should have more than the coal and the right to remove the same whenever he chooses. It is not intended, certainly, that B have any rights to last beyond the time when the coal is exhausted. It is submitted that this intent of the parties can be given effect in a manner consistent with legal principles by holding that B gets a fee simple in the coal, but not in the space it occupies.[39] This theory gives B the rights in the space necessary to give him what it was intended he should have.

This theory upholds the existence of a fee simple in the *corpus* of the coal where the same has been created by a proper grant or reservation and it avoids most if not all of the difficulties encountered by the doctrine of the Lillibridge Case. This theory avoids, for one thing, the difficulty about the terminability of the fee. If the fee simple is conceived of as existing only in the substance of the coal it expires upon the complete severance and reduction of the coal to personalty.[40] If, on the other hand, the fee

parties would be in a relation having some similarity to that of the vendor and vendee of the coal.

[39] The doctrine of the Lillibridge Case is not that the right therein recogcnized exists because of a corporeal estate in the owner of the coal in the strata immediately above and below the coal. The Virginia court seems, in the Clayborn Case, to have understood, however, that the Lillibridge Case "contended. . . . . conveyance of the coal carried with it the stratum above and below the coal." A recent writer notes "some cases going to the extent of saying that an estate in the substratum or shell is also granted", although not specifying the Lillibridge Case: 7 VA. L. REV. 404. Another cites the Lillibridge Case as authority to the effect that the grantee of the coal gets "a corporeal estate in the walls containing the coal": 34 HARV. REV. 677. It is submitted that the Lillibridge Case simply holds that the grantee of the coal also acquires the space it occupies in fee and by reason of that fact may make any use of it he chooses during the time he so owns it. In that view he is entitled to support for a track laid upon the lower stratum just as he is to the natural right of subjacent support of the coal in place. This true interpretation of the doctrine is set out in the concluding sentence of the opinion in Moore *v.* Indian Camp Coal Co., *supra*: ". . . . here the defendants claim, as we have endeavored to make clear, the right to use *their own* property as a way for transporting coal mined on adjacent estates".

[40] In Mellon *v.* Chartiers Block Coal Co., *supra*, the court said: "When the coal is all removed the estate ends for the plain reason that the subject of it has been carried away."

simple is also in a certain definite amount of space, it could only expire by means of an implied limitation in the grant or by means of some sort of implied possibility of reverter.

It remains to notice the practical expediency of the Virginia court's decision. If the rule of the Lillibridge Case has become a settled rule of property the wisdom of changing it now might be questionable, however desirable from the standpoint of legal theory. In *Clayborn* v. *Camilla Red Ash Coal Co.*,[41] the question arose under a grant which antedated the Lillibridge Case. So the court considered that even if there were a settled rule of property to the effect contended for it would not apply to the case before it. It is indicated, however, that the court does not consider the Pennsylvania doctrine a settled rule of law. If it be not, the Virginia court is to be commended for a decision which serves, perhaps, to reopen a matter in which the law is in danger of crystallizing in a form believed to be incorrect. It is submitted that the Virginia court has arrived at the proper concrete result.

[41] *Supra*, note 8.