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"Let the Surface-Buyer Beware"

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"LET THE SURFACE-BUYER BEWARE"

With the mining of every additional ton of coal in Pennsylvania, the problem presented by the unlimited removal thereof becomes more acute. Ordinarily where one person owns the surface of land and another the subjacent land, or the minerals therein, the owner of the surface is entitled to have it remain in its natural condition, without any subsidence caused by the withdrawal of the land or minerals thereunder by the subjacent owner.[1] He is entitled to absolute support of his land, not as an easement or right depending on a supposed grant, but as a proprietary right at common law.[2] The failure of the mineral owner to render this support to the surface will make him liable to the owner thereof, or to the owner of the right to support, regardless of the nature of the interference whether it be negligent, intentional, or otherwise.[3] These rules always have been the law of Pennsylvania and the enforcement of them presents little difficulty. However, there arises the problem of what are the legal results where the owner of the surface has relinquished, in some manner, his right to surface support. The manner of relinquishment, whether it be by contract, waiver, reservation, or otherwise, is not within the scope of this discussion. Sufficient is it, that this absolute right has been relinquished by the owner of the surface. This is the situation as we have it today in most of our mining communities. The original owners of both the surface and minerals have in most cases reserved the right to remove support on a sale of the surface and have often stipulated in these deeds that they shall not be liable even for negligence in the removal of this coal. Out of this situation the Pennsylvania courts have upheld the validity of these deeds and contracts and with few exceptions have given them their unqualified blessing. Thus, a reservation in the grant of surface lands of the right to mine the coal thereunder, without incurring in any event whatever any liability for injury to the surface, prevents recovery, by the holder of the surface, of damages for loss caused by negligent mining.[4]

In *Atherton v. Clearview Coal Co.*[5] this benevolent attitude of the Pennsylvania Supreme Court was most strikingly exhibited. Here the coal company

> "excepted and reserved all minerals and coal with the right to mine and remove by any subterranean process 'without liability under any circumstances whatever' for damages done to the surface of said lot or to the improvements now erected or hereafter to be erected thereon."

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[1]Carlin & Co. v. Chappel, 101 Pa. 348, 47 Am. Rep. 722 (1882); Com. v. Panhandle Mining Co., 315 Pa. 16, 172 A. 106 (1934).

[2]Youghiogheny River Coal Co. v. Allegheny Nat. Bank, 211 Pa. 319, 60 A. 924 (1905); Penman v. Jones, 256 Pa. 416, 100 A. 1043 (1917).

[3]Lowry v. Hay, 2 Walk. 239; Robertson v. Youghiogheny River Coal Co., 172 Pa. 566, 33 A. 706 (1896); Berkey v. Berwind-White Coal Mining Co., 229 Pa. 417, 78 A. 1004 (1911).

[4]Graff Furnace Co. v. Scranton Coal Co., 266 Fed. 798 (1920); Weakland v. Cymbria Coal Co., 262 Pa. 403, 105 A. 558 (1918).

[5]267 Pa. 425, 110 A. 298 (1920).

The plaintiff averred that the defendant coal company while engaged in mining its coal

> "negligently and carelessly used and employed, discharged and fired large quantities of dynamite and other high explosives in blasting, thereby causing concussions which broke, cracked, disturbed and damaged the land and buildings."

The Court, speaking through Mr. Justice Stewart, held that:

> "The only negligence averred, to which the injuries complained of could be referred as the antecedent and proximate cause, was the careless and negligent use, in conducting mining operations, of large quantities of dynamite and other high explosives in blasting . . . . with the plaintiff's cause of action based on negligence thus defined, defendant was not liable for the injuries alleged, but was exempt therefrom under the exception and reservation contained in plaintiff's deed."

Lest this be an insufficient basis for the decision in this case, Mr. Justice Stewart fortified his views by further stating that

> "the reservation did not contravene public policy, especially as it did not involve personal rights protected by the Constitution."

Surely, the Pennsylvania Supreme Court did not mean to inaugurate a policy of "anything goes" in regard to the mining of coal. A survey of some other cases would certainly not lead to such a conclusion if the tenor of some of the statements therein is to be any sort of criterion. Just when, then, should a person be entitled to recover damages if he as owner of the surface has given up his absolute right of subjacent support and has also contracted against liability of the owner of the coal for negligence in the extraction of coal? Mr. Justice Simpson, in a concurring opinion in which he was joined by Mr. Justice Kephart in the *Atherton v. Clearview*[6] case, by way of dicta stated the extent to which a release of liability for negligence should extend. He said:

> "If the statement of claim had averred that the defendant had wilfully or wantonly used an excessive quantity of high explosives in order to obtain the coal, and by reason of such excessive use plaintiff's property was injured, or if it had averred that the quantity of high explosives which defendant used was so excessive that it knew or was bound to know before exploding them that unnecessary injury would be inflicted on plaintiff's property, and sought recovery for such unnecessary injury, the statement would charge an actionable offense, notwithstanding the release."

In these words the intent is shown clearly not to allow a release to absolve the offending party from all responsibility which his acts might bring upon himself. If we consider the nature of a release and place ourselves in the position of the parties to an agreement for such, we see at once that the owner of the surface certainly never intended his home and land to be the plaything for the indiscriminate

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[6] *Ibid.*

use of the miner and coal operator. The average surface owner in a mining community when purchasing his land is in most cases unappreciative of the terms of deeds and contracts which are given to him when the purchase is completed. Years later, perhaps, he is rather unhappily made aware of the effects of the waivers, releases and reservations with which his agreement was studded. In effect, the courts have met this situation by the use of the "caveat emptor" doctrine. In *Madden v. Lehigh Valley Coal Co.*[7] the grantor reserved the right to remove surface support. The court held that avoidance of liability for injury to the surface however caused, by negligence or otherwise, was the very object of the reservation. Therefore, the grantee had no right to support, and could not recover for failure of support, even if that had been caused by negligent mining. Here the owner of the mineral rights protected himself from liability even for negligent mining, merely by such a stipulation in his deed. Hardship in such a situation? The court answered that, thusly:

> "Presumably he got his land cheaper by reason of this disadvantage and whether so or not that was his bargain."

Fortunately this has not been the attitude of all of the judges of the Pennsylvania courts. Even in *Atherton v. Clearview Coal Co.*,[8] the court must have felt a twinge of conscience, for, by way of dicta, the court sought to minimize the extent of its holding by attempting to create a sharp line of distinction between contracting away personal rights and property rights:

> "Were it a contract to exempt from liability for damages where the negligence resulted in loss of life or permanent physical disability of the person, much might be said in support of the contention that it was against public policy. But that question is not before us. We merely remark upon it to show a distinction that might be urged between prospective negligence as the subject of contract for release of damages when it related to property over which the party has exclusive control, even 'jus disponendi', and the right to deal with it according to his own pleasure, save that he may not employ it to the injury of his neighbor, and negligence charged as an invasion or interference with those sacred and inherent personal rights which are declared in our bill of rights to be indefeasible, that is, beyond the right or power of the individual to destroy or alienate."

Particular attention is called to the statement that the land may not be employed to the injury of his neighbor. Evidently the court here wished to state that so long as the surface owner owned the land and right of support, restrictions were placed upon its use. Yet by its decision the court said that just as soon as the surface owner gave up this right of support the subjacent mineral owner could use it in any way he saw fit, even to the extent of blasting away and ruining his upper neighbor's land. Evidently, then, the acts of the owner of land must be tempered and determined by the court's taking cognizance of the ownership of the land at

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[7] 212 Pa. 63 (1905).
[8] *Supra*, note 5.

the particular time. Here the acts certainly ruined the neighbor's land but the court evidently overlooked in its decision what it said by dictum.

However, even with such a humble acknowledgment of certain rights in the owner of the surface, we can see that there should be limitations upon the manner in which coal may be taken out when the surface owner has once given up his right of support. In 1921 the Pennsylvania legislature, realizing the effect this decision would have on subsequent mining practice in Pennsylvania, passed an act known as the "Kohler Act."[9] This statute forbade the mining of anthracite coal in such way as to cause the subsidence of, among other things, any structure used as a human habitation. Certain exceptions, including among them land where the surface is owned by the owner of the underlying coal and is distant more than 150 feet from any improved property belonging to any other person, were specifically made. This statute had as its basis the general right of the state to act through its police power to protect the general health, welfare, and safety of its citizens. This statute was attacked on constitutional grounds in *Mahon v. Pennsylvania Coal Co.*[10] A bill in equity had been brought by the Mahons to prevent the defendant coal company from mining under their property in such way as to remove the support and to cause a subsidence of the surface and of their house. The bill set out a deed executed by the coal company in 1878, under which the plaintiffs claimed. The deed conveyed the surface, but in express terms reserved the right to remove all the coal under the same, and the grantee took the premises with the risk, and waived all claim for damages that might arise from mining the coal.

In upholding the constitutionality of the act, Chief Justice Moschzisker stated: "In order to serve the public welfare, the state under its police power may lawfully impose such restrictions upon private rights as, in the wisdom of the Legislature, may be deemed expedient; for all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."

The fact that the owner of the surface had by his contract waived surface support was held not to be a bar against his coming within the general rule that persons with a special interest may have public nuisances abated at their own suit. It was not necessary, however, to depend upon the owner's special interest, for, under the act he was viewed as moving the court to enforce a general rule of public policy intended for the protection of the whole community rather than acting simply for his own protection. This ruling was a recognition of the fact that a mere waiver of the right of support by the surface owner was not to be construed as a mutual private condemnation of the surface by the reckless and negligent mining of the coal beneath. Virtually it attempted to re-establish a right of surface support where it had been released. Its purpose was to act as a check on unbridled mining of the lower surface. However, this victory was short-lived. On appeal to the United States Supreme Court the decision was reversed and the act was held to be uncon-

[9]Act of May 27, 1921, P. L. 1198.
[10]274 Pa. 489, 118 A. 491 (1922).

stitutional, as a taking of property without due process of law.[11] One of the reasons given for the decision was that "so far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought"—a complete reversion to the doctrine of "caveat emptor". The surface owner now was faced with the fact that his surface was likely to be sunk into a mine, his home destroyed, his land made valueless, and in effect his purchase price turned into a gift to the coal company. This, the Supreme Court said, was the value of his bargain. Mr. Justice Brandeis dissented from the rule of the majority, upheld the constitutionality of the Kohler Act, and declared it to be a lawful exercise of the police power. In expanding this view he stated: "Coal in place is land; and the right of the owner to use his land is not absolute. He may not so use it as to create a public nuisance; and uses, once harmless, may, owing to changed conditions, seriously threaten the public welfare. Whenever they do, the Legislature has power to prohibit such uses without paying compensation; and the power to prohibit extends alike to the manner, the character, and the purpose of the use."

Since this decision by the Supreme Court of the United States, the law on the subject of subjacent support has remained in a static condition. Mr. Justice Brandeis had attempted to break away from the conception of a law which would make no provision for a situation which had not been anticipated. The Pennsylvania Supreme Court had tried to do the same in upholding the Kohler Act, but both were repulsed. Time has not lessened the problem, but rather has increased the magnitude of it.

It cannot seriously be questioned that the owner of the surface in buying his land and giving up his right to recover for negligence in the removal of the coal, either never realized what he was doing or never intended it to be an unlimited destruction of his property. Are we to say that only the grossest of negligence directed at the personal rights of the owner of the surface will give to him a cause of action? This certainly should not be the answer. In many cases the coal companies have themselves acknowledged this to be so. The more enlightened companies, although legally not bound to provide compensation for the loss of homes which have been swallowed up, have voluntarily done so. Homes, schools, and even churches have been repaired and restored. Here we have a tacit admission that justice can only be done by making provision for the luckless owner of a home which has been the victim of a "cave-in". It is rather paradoxical that such an admission should come from the owner of the mineral and right of support and yet will not be acknowledged by the courts of Pennsylvania.

A step toward the elimination of indiscriminate mining was taken by the Pennsylvania legislature in 1933 with the passage of the Highway Mining Act.[12] This act, dealing only with the state highways which are underlaid by coal, made

[11] 260 U. S. 393 (1922).
[12] 1933, P. L. 1409.

provision for the retention of subjacent support to these highways. In 1937[13] the act was amended and a Highway Mining Commission was formed. This commission has judicial powers and has exclusive jurisdiction over the mining of coal within or under the right of way of state highways. In 1940 a check was placed upon the commission when it attempted to waive surface support beneath a highway merely because the removal thereof would not endanger the traveling public. It was held that the scope of the commission's power was limited to determining the required amount of coal which must be left beneath or adjacent to the highway, rather than the amount of coal which could be removed without danger to the traveling public.[14]

In 1941 this act was further amended by the creation of the State Mining Commission.[15] This act extended the Act of 1933, as amended, to all lands, easements and rights of way purchased, condemned or otherwise acquired by the Commonwealth. The commission was given the authority to waive vertical and lateral support therefor under certain conditions, to acquire the right to lateral and vertical support and to assess damages for coal required to be left in place. The principal objection to the Kohler Act, namely the confiscation of private property, has been taken care of in this act by making provision for compensation for minerals left in place or property condemned.

Although the commission has been formed to deal primarily with state lands in relation to highways, the very existence of such is an admission of the acuteness of the problem of subjacent support. Extensive efforts have been made to pass legislation which would give relief to the individual property owner but they have all come to naught.[16] Whether more success will come to these efforts as the damages from subsidences grow greater remains to be seen. A corresponding growth in public indignation might aid in accomplishing this result.

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[13]1937, P. L. 891.

[14]Glen Alden Coal Company's Case, 339 Pa. 149 (1940).

[15]Act of the General Assembly No. 120, approved July 3, 1941.

[16]It is interesting to note that during the past legislative session eight bills dealing directly with the problem of mining and surface support were introduced in the House of Representatives. Some of these bills attempted to nullify clauses for non-liability on the part of the mineral owners to the surface owners while others attempted to give a right of damages to surface owners for subsidences. Bills attempting to do such were given a legislative death by referring them to various committees. In the Senate, two bills were introduced in regard to surface subsidence and were subsequently enacted into laws.