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applying the doctrine of collateral estoppel between cases such as *Eagle* and *Teitelbaum* wherein the criminal defendant is the plaintiff in the subsequent civil action, and cases such as *Interstate* wherein the criminal defendant is the defendant in the subsequent civil action. The courts should embrace within the doctrine of collateral estoppel cases wherein the criminal defendant seeks to recover in a civil action, when he has been previously convicted of a wrong. The main obstacles to be overcome are the technical requirements that mutuality and identity of parties must exist, for behind the phrase of collateral estoppel lies a rule of reason and practical necessity, not to be circumvented by technical rules.[33] The courts should not disregard the fundamental theory inherent in the basic doctrine of collateral estoppel.

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LIMITATION OF ACTIONS FOR FAILURE OF SUBJACENT SUPPORT

Where ownership of the underlying mineral is severed from ownership of the surface,[1] the mineral owner has a duty to maintain enough subjacent support to prevent subsidence of the surface.[2] This duty is absolute,[3] and unless the surface owner waives his right to support,[4] the care or skill with which the mineral owner operates his mine will not affect his responsibility.[5] The right to subjacent support is not a contract right, but rather it arises out of ownership of the sur-

[33]Good Health Dairy Products Corp. v. Emery, 275 N.Y. 14, 18, 9 N.E.2d 1758 (1937).

[1]Banks v. Tennessee Mineral Prods. Corp., 202 N.C. 408, 163 S.E. 108 (1932).

[2]Western Coal & Mining Co. v. Young, 188 Ark. 191, 65 S.W.2d 1074 (1933); Empire Star Mines Co. v. Butler, 62 Cal. App. 2d 466, 145 P.2d 49 (1944); Brooke v. Dellinger, 193 Ga. 66, 17 S.E.2d 178 (1941); Smith v. Glen Alden Coal Co., 347 Pa. 290, 32 A.2d 227 (1943); Clinchfield Coal Corp. v. Compton, 148 Va. 437, 139 S.E. 308 (1927).

[3]Woodward Iron Co. v. Mumpower, 248 Ala. 502, 28 So. 2d 625 (1946); North-East Coal Co. v. Hayes, 244 Ky. 639, 51 S.W.2d 960 (1932).

[4]Mason v. Peabody Coal Co., 320 Ill. App. 350, 51 N.E.2d 285 (1943); Pennsylvania Coal & Coke Corp. v. Duncan-Spangler Coal Co., 333 Pa. 272, 3 A.2d 356 (1939); Continental Coal Co. v. Connellsville By-Prod. Coal Co., 104 W. Va. 44, 138 S.E. 737 (1927).

[5]Paris Purity Coal Co. v. Pendergrass, 193 Ark. 1031, 104 S.W.2d 455 (1937); Peters v. Bellingham Coal Mines, 173 Wash. 123, 21 P.2d 1024 (1933).

face.[6] The suface owner can demand that all of the subjacent mineral be left unmined if it is necessary to support his land.[7]

The absolute duty to maintain sufficient subjacent support is recognized in all jurisdictions.[8] However, it appears that only five jurisdictions have ruled on the question of when the surface owner's cause of action accrues and when the statute of limitations, therefore, begins to run against him.[9] Of these five, a majority of four hold that a cause of action does not accrue and the statute of limitations does not begin to run until the surface has actually been damaged, *i.e.*, until there has been some subsidence of the overlying soil.[10] The states that follow this view, which is the same as the English rule of *Backhouse v. Bonomi*,[11] consider the surface owner's right to the ordinary undisturbed enjoyment of his land to be of primary importance. The mineral owner merely has a right to mine the underlying strata so long as he does not interfere with the surface. When the surface caves in, the surface owner's enjoyment is disturbed, and it is then that his cause of action arises.[12] At least one decision, following the English rule, is based upon the theory that removal of the subjacent support may remain unknown to the surface owner until his land has in fact subsided.[13]

Apparently, Pennsylvania stands alone as the only state that holds a cause of action accrues and the statute of limitations begins to run at the time the underlying support is removed. The Supreme Court of Pennsylvania held in *Noonan v. Pardee*[14] that the subsidence was merely the consequence of the previous act of removing the necessary support, which when removed, violated the duty and gave rise to the

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[6]Carlin & Co. v. Chappel, 101 Pa. 348 (1882).

[7]Evans Fuel Co. v. Leyda, 77 Colo. 356, 236 Pac. 1023 (1925); Whiles v. Grand Junction Mining & Fuel Co., 86 Colo. 418, 282 Pac. 260 (1929).

[8]In Pennsylvania, the right to subjacent support may exist as a separate right in someone other than the surface or the mineral owner. In such a situation, the servitude of support is referred to as a "third estate." Charnetski v. Miner's Mills Coal Mining Co., 270 Pa. 459, 113 Atl. 683 (1921); Smith v. Glen Alden Coal Co., 347 Pa. 290, 32 A.2d (1943).

[9]Alabama, Arkansas, Illinois, Kansas and Pennsylvania. See notes 10 and 14 infra.

[10]West Pratt Coal Co. v. Dorman, 161 Ala. 389, 49 So. 849 (1909); Western Coal & Mining Co. v. Randolph, 191 Ark. 1115, 89 S.W.2d 741 (1936); Wanless v. Peabody Coal Co., 294 Ill. App. 401, 13 N.E.2d 996 (1938); Treece v. Southern Gem Coal Corp., 245 Ill. App. 113 (1923); Walsh v. Kansas Fuel Co., 102 Kan. 5, 169 Pac. 219 (1917); Audo v. Western Coal & Mining Co., 99 Kan. 454, 162 Pac. 344 (1917).

[11]9 H.L. Cas. 503, 11 Eng. Rep. 825 (1861).

[12]15 Harv. L. Rev. 574 (1902).

[13]West Pratt Coal Co. v. Dorman, 161 Ala. 389, 49 So. 849 (1909).

[14]200 Pa. 474, 50 Atl. 255 (1901).

cause of action. The Pennsylvania court, holding that the six-year statute of limitations began to run at the time the underlying mineral was removed, said:

> "It is argued that in some cases the surface owner could not know by the most careful observation whether the mine owner had neglected his duty within six years. We answer, that is only one of the incidents attending the purchase of land over coal mines. It is not improbable that this risk enters largely into the commercial value of all like surface land in that region. But, however this may be, we hold that the miner is not forever answerable for even his own default.... Neither law nor equity demands that any greater burden should be placed upon him than that indicated. Any heavier one would encourage the purchase of surface over coal mines for speculation in future lawsuits."[15]

The *Noonan* doctrine was followed by Pennsylvania's highest court in *Tischler v. Pennsylvania Coal Co.*[16] and *Woods v. Pittsburgh Coal Co.*[17] The more recent case of *City of Carbondale v. Hudson Coal Co.*[18] clearly shows that Pennsylvania continues to stand firmly behind the *Noonan* rule. Nevertheless, it is submitted that the application of this rule places an impossible burden upon the surface owner. In situations where he obviously should be granted relief, he is left with either an insufficient remedy or no remedy at all. The various problems presented by the Pennsylvania doctrine can best be demonstrated by considering the following hypothetical situation. First, assume that there is active mining below the surface and that the surface owner realizes the duty to support his land may be violated. It is likely that notice of an actual violation might not come to his attention through subsidence until after the statute of limitations has run. Must the surface owner assume this risk? It is obvious that he must unless there is some course of action open to him at this time.

One possible course of action may be to seek an injunction to restrain the mine owner from removing the necessary support.[19] Such a remedy is ordinarily given if a multiplicity of suits at law would thereby be avoided. However, in the *Woods* case, the Pennsylvania court refused an injunction because the court felt that a multiplicity of suits

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[15]Id. at 257.

[16]218 Pa. 82, 66 Atl. 988 (1907).

[17]230 Pa. 197, 79 Atl. 499 (1911).

[18]The court, in reference to the Noonan rule, said: "[T]his is a sad and unsound legal principle but is too well and too long established in Pennsylvania law to be open to challenge." 58 Lack. Jur. 233, 237 (1957).

[19]Gatson v. Farber Fire Brick Co., 219 Mo. App. 558, 282 S.W. 179 (1925); Greek Catholic Congregation v. Wilson Coal Co., 329 Pa. 341, 198 Atl. 41 (1938).

might not result from denying injunctive relief.[20] The court said that one action at law might provide an adequate remedy if and when the mine owner breaches his duty. In other words, one lawsuit might be enough to convince the mine owner that he should stop mining that portion of the mineral necessary to support the surface.

If the court decides that, contrary to the Pennsylvania view, the surface owner is entitled to a restraining injunction, another question arises. How much mineral must be left unmined to maintain sufficient subjacent support? The answer to this question requires a finding based upon expert testimony.[21] In all due respect to the mining engineering profession, it is submitted that a decision of this nature would contain an element of conjecture.[22] It is much more likely that a determination of the amount of support required will be based entirely upon past experience in similar situations. Even if the surface owner is granted an injunction, he may nevertheless suffer damage through subsidence because the expert opinion was not accurate and the estimated support was not in fact sufficient. If this subsidence occurs more than six years after the necessary support was removed, the surface owner in a Pennsylvania jurisdiction is left without a right of action.

An entirely different course of action is available to the surface owner if he believes the necessary support has already been removed. Since the Pennsylvania courts hold that a cause of action accrues immediately upon the mine owner's failure to maintain adequate support, the surface owner can thereupon bring an action to recover compensatory damages.[23] Here again, the question of what constitutes sufficient support is presented. Although this issue never arises in jurisdictions that follow the English view, the Pennsylvania surface owner has the burden of proving that the unmined portion of the mineral is not sufficient to support his overlying land. If the surface owner cannot prove this element of his cause of action, he fails to establish his case,[24] and under the principle of res judicata, the mine owner escapes all liability for future subsidence that occurs because the duty to support had in fact been violated.

On the other hand, assume that the surface owner convinces the jury that his right to support has been violated. If the surface has

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[20]It is interesting to note that this same opinion cites the Noonan v. Pardee doctrine with approval.

[21]Degenhart v. Gent, Adm'r, 97 Ill. App. 145 (1901).

[22]Dallas Land & Loan Co. v. Garrett, 276 S.W. 471 (Tex. Civ. App. 1925).

[23]Woods v. Pittsburgh Coal Co., 230 Pa. 197, 79 Atl. 499 (1911).

[24]Deep Vein Coal Co. v. Dowdle, 218 Ind. 495, 33 N.E.2d 981 (1941).

not yet subsided, what is the surface owner's measure of damages? It is generally accepted that recovery of more than nominal damages is not allowed where the question of actual damages can be resolved only through speculation.[25] Mr. Justice Willes, in the English case of *Bonomi v. Backhouse*,[26] said:

> "[The contention] on behalf of the defendant is, that the action must be brought within six years after the excavation is made, and that it is immaterial whether any actual damage has occurred or not. The jury, according to this view, would have therefore to decide upon the speculative question, Whether any damage was likely to arise; and it might well be that in many cases they would, upon the evidence of mineral surveyors and engineers, find that no damage was likely to occur, when the most serious injury afterwards might in fact occur, and in others find and give large sums of money for apprehended damage, which in point of fact never might arise. This is certainly not a state of the law to be desired."[27]

Other vertical support cases that have disallowed prospective damages for future subsidence are *Jackson Hill Coal & Coke Co. v. Bales*[28] and *Catlin Coal Co. v. Lloyd*.[29] Even the Pennsylvania court in the *Woods* case indicated that a judgment against the mine owner before the surface subsides is a mere vindication of the surface owner's right to support. It seems then, that when the duty to support has been violated but no subsidence has occurred, the Pennsylvania surface owner can at the most recover only nominal damages.[30] This is certainly an insufficient remedy for a later collapse of the surface.

Although no cases can be found directly on point,[31] it is apparent that once the Pennsylvania surface owner recovers nominal damages and thereby establishes a violation of his legal right to support, any further action by him may be barred by the doctrine of res judicata.[32] Pennsylvania regards the surface owner's cause of action to be founded upon removal of support and not upon damages to the surface. It fol-

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[25]Boyle v. Bay, 81 Colo. 125, 254 Pac. 156 (1927).

[26]E.B. & E. 646, 120 Eng. Rep. 652 (Ex. 1859). This decision in the Exchequer Chamber was later affirmed in the House of Lords case of Backhouse v. Bonomi, supra note 11.

[27]Id. at 657.

[28]183 Ind. 276, 108 N.E. 962 (1915).

[29]124 Ill. App. 394 (1906).

[30]Duggan v. Baltimore & O.R.R., 159 Pa. 248, 28 Atl. 182 (1893).

[31]Cf. Guzzi v. Delaware & Hudson Co., 256 Fed. 719 (M.D. Pa. 1919), aff'd 266 Fed. 513 (3d Cir. 1920).

[32]Harris v. Harris, 296 Ky. 41, 176 S.W.2d 98 (1943); Watkins v. Sorrento Restaurants, 296 Ky. 115, 176 S.W.2d 251 (1943).

lows that, unless additional support is removed subsequent to the first suit, a second suit will involve the identical cause of action and thus be barred.[33] This is an important consideration since the surface may subside between the date of the original judgment and the date of expiration of the statute of limitations. If the previous judgment is res judicata, the Pennsylvania surface owner is far better off not to bring an action for damages until immediately prior to the running of the statute. By so doing, he can at least recover compensatory damages for all subsidence that occurs within six years of the date the duty to support was violated.

In order to point out the unfortunate effects of the *Noonan* doctrine, the least favorable situation has been assumed. It must be admitted that, if the surface is ever going to subside, it is most likely to do so within six years of the failure to maintain adequate support. Nevertheless, it is possible for subsidence of the surface to be delayed for at least six years either through natural forces or by substituting some form of temporary support to supplement the remaining natural support, thereby permitting the miner to extract a greater portion of the mineral. This presents the problem of whether Pennsylvania would consider the cause of action to accrue at the time the temporary support is substituted for the mineral or at the time the temporary support fails.[34] The court did not disclose whether or not this problem was considered when deciding the *Noonan* case.

The result is that Pennsylvania has established a legal principle that completely disregards the basic rule that the surface owner is entitled to the undisturbed use and enjoyment of his land. It is therefore submitted that the English rule of *Blackstone v. Bonomi,* followed by a majority of the states which have decided this question, is by far the more desirable one. Under this rule, the surface owner's cause of action cannot be barred by the statute of limitations before his land subsides. It eliminates the necessity of deciding before subsidence oc-

[33]Long v. Stout, 305 Pa. 310, 157 Atl. 607 (1931); Bassis v. Rutenberg, 177 Pa. Super. 339, 110 A.2d 897 (1955). But cf. Lawlor v. National Screen Serv. Corp., 349 U.S. 322 (1955).

[34]It seems logical that, if the support is truly temporary and it is intended to be replaced with permanent support, there is an element of good faith and the duty has not been violated. On the other hand, if the temporary support is installed in a section of the mine that will be sebsequently abandoned and become inaccessible, there is obviously a showing of bad faith. In such a situation, the surface owner's cause of action should not accrue until the temporary support fails. This further complicates the problem since it may be impossible to determine when the temporary support fails. Note, however, that this issue can arise only in a Pennsylvania-type jurisdiction.