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fire which crosses the state line,²⁴ owning a vicious dog which strays over the state line,²⁵ or shipping a negligently manufactured coffee urn across the state line.²⁶ By the rule of conflicts of laws, the defendant Titan's liability is measured by the domestic laws of Illinois²⁷ to the same extent as if it had acted within the state.

Since Illinois law would be applied in the *Gray* case as a matter of choice of law it seems plausible that Illinois courts should have jurisdiction to make this application. The fact that Illinois law is the law applicable in the *Gray* case in and of itself provides the necessary minimum contact to permit Illinois to exercise judicial jurisdiction under the due process clause of the fourteenth amendment.

MALCOLM LASSMAN

MINERAL LESSEE'S RIGHT TO STRIP MINE

There are two general methods of mining: underground or deep mining¹ and surface or strip mining.² The use of strip mining has always been limited by the thickness and character of the overlying strata. However, the development of modern earth-moving equipment and new mining techniques permit the application of strip mining to mineral deposits which could previously be mined only by the more conventional underground method. While strip mining may severely damage the surface, it does not necessarily render it entirely useless. Deep mining may or may not cause damage to the overlying surface, depending upon whether a sufficient amount of the mineral deposit is left in place to maintain adequate support.

The different effects that deep mining and strip mining have upon the surface are of great importance in determining the rights of the parties to a mineral lease that severs the surface ownership and mineral rights. These effects become even more significant if the lease agree-

²⁴*Otey v. Midland Valley Ry.*, 108 Kan. 755, 197 Pac. 203 (1921).

²⁵*Le Forest v. Tolman*, 117 Mass. 109 (1875).

²⁶*Reed & Barton Corp. v. Maas*, 73 F.2d 359 (1st Cir. 1934).

²⁷See note 23 *supra*.

¹Deep mining involves the sinking of shafts or the driving of slopes or drifts from the surface into the mineral deposit and the underground development of entries or galleries from which the mineral is removed for transportation to the surface.

²"Strip mining is done from the surface of the earth. In general, it is performed by stripping off the earth, known as overburden, which lies over the [mineral] and then removing the [mineral] so uncovered." *Parsons v. Smith*, 359 U.S. 215, 216 (1959).

ment was executed at a time when one of the mining methods either was unknown or was not generally accepted in the locality. The problem most often arises when the mineral lessee finds that, due to economic conditions or technological improvements, it will be more profitable to strip mine the mineral than to employ deep mining. The surface owner is then faced with the possibility that he will be deprived of the use and enjoyment of his land.

In a recent Pennsylvania case, *Heidt v. Aughenbaugh Coal Co.*,³ the plaintiff sought to enjoin the mineral lessee from strip mining fire clay. The defendant coal company acquired mining rights under a 1915 mineral lease to its predecessor in title who had deep mined the fire clay between 1915 and 1926. The plaintiff obtained title to the surface through various devises and conveyances, each of which expressly excepted and reserved⁴ the minerals and mining rights by reference⁵ to the 1915 lease. When the plaintiff filed the complaint in 1960, he was using the surface for agricultural purposes⁶ and had posted the land with "No Trespass" signs. The defendant entered upon the land and began its strip mining operation. The trial court entered judgment for the defendant and the Supreme Court of Pennsylvania affirmed. Although strip mining of fire clay may have been unknown⁷ at the time the mineral lease was executed and although there may have been implications in the lease that deep mining was contemplated, a clause in the lease which provided the "right to mine to include all practical methods now in use, or which may hereafter be used . . . and

³406 Pa. 138, 176 A.2d 400 (1962).

⁴For the distinction between "exception" and "reservation," see *Lauderbach-Zerby Co. v. Lewis*, 283 Pa. 250, 129 Atl. 83 (1925).

⁵A description of the property transferred may be incorporated by reference to a prior conveyance. *Bland v. Kentucky Coal Corp.*, 306 Ky. 1, 206 S.W.2d 62 (1947).

⁶Although the plaintiff complained that strip mining would prevent him from using the land for agricultural purposes, the surface in question was, "in the relatively near future," to be inundated by the construction of a federal dam. However, the court said that this fact was "in no sense controlling." 176 A.2d at 404.

⁷"Stripping with power shovels really began in 1877 near Pittsburg, Kansas." *Sherwood, Development of Strip Mining*, *Mining Congress Journal* 31 (Nov. 1945).

"The present era of stripping can be said to have begun in about 1910 with the successful introduction . . . of large, full-revolving shovels in the midwestern United States." *Koenig, Economics and Technique of Strip Coal Mining*, *Colorado School of Mines Quarterly* 29 (April 1950).

Even though it is probable that mechanized stripping was not used to mine fire clay until after the lease was executed in 1915, "there is no rule of law which would preclude defendant, having the right to mine the [mineral], from using methods for that purpose made possible by modern machinery and inventions." *Commonwealth v. Fisher*, 364 Pa. 422, 72 A.2d 568, 570 (1950).

the right to strip the surface . . ." was sufficient to grant the mineral lessee the right to strip mine for fire clay.

The plaintiff argued that, with the exception of this one provision, virtually all the language in the lease implied that the parties intended the fire clay to be removed only by deep mining. However, the court said that the implications of deep mining were not strong enough to prevent the lessee from strip mining under the express covenants of the lease, and that to deny the lessee the right to strip mine would be to make a new contract.⁸ The *Heidt* decision illustrates the most obvious basis for determining the mineral lessee's right to strip mine; *i.e.*, by an express agreement in the lease.

Another basis for establishing the mineral lessee's right to strip mine is by construing the entire lease to determine the intention⁹ of the parties at the time the instrument was executed. When the language of a lease is contradictory, obscure or ambiguous, the most reasonable construction will be adopted.¹⁰ Fairness, custom and usage are considered to determine what is reasonable.¹¹ Even though the original parties to the lease are not available, parol evidence may be introduced to explain ambiguous terms and to give meaning to expressions by showing the custom and usage at the time the instrument was executed.¹² If the instrument is susceptible of two or more equally reasonable constructions, it will be construed most strongly against the lessor.¹³

One provision, commonly found in mineral leases, deserves special consideration. This provision relates to the surface owner's absolute right to subjacent support.¹⁴ Unless the surface owner has either ex-

⁸"The law will not imply a different contract from that which the parties themselves made." *Mount Carmel R.R. v. M. A. Hanna Co.*, 371 Pa. 232, 89 A.2d 508, 513 (1952).

⁹"[T]his intention must be deduced, not from specific provisions or fragmentary parts of the instrument, but from its entire context. . . ." *Uinta Tunnel, Mining & Transp. Co. v. Ajax Gold Mining Co.*, 141 Fed. 563, 566 (8th Cir. 1905).

¹⁰*Hempfield Township School Dist. v. Cavalier*, 309 Pa. 460, 164 Atl. 602 (1932); *Navarro Corp. v. School Dist. of Pittsburgh*, 344 Pa. 429, 25 A.2d 808 (1942); *Elliott-Lewis Corp. v. York-Shipley, Inc.*, 372 Pa. 346, 94 A.2d 47 (1953).

¹¹*Percy A. Brown & Co. v. Raub*, 357 Pa. 271, 54 A.2d 35 (1947).

¹²"Evidence to explain ambiguity, establish a custom, or show the meaning of technical terms, and the like, is not regarded as an exception to the [parol evidence] rule, because it does not contradict or vary the written instrument. . . ." *Thomas v. Scutt*, 127 N.Y. 133, 27 N.E. 961, 963 (1891).

¹³*Hunt v. Hunt*, 119 Ky. 39, 82 S.W. 998 (1904); *Eastham v. Church*, 310 Ky. 93, 219 S.W.2d 406 (1949).

¹⁴*Clinchfield Coal Corp. v. Compton*, 148 Va. 437, 139 S.E. 308 (1927); *Couch v. Clinchfield Coal Corp.*, 148 Va. 455, 139 S.E. 314 (1927).

pressly or impliedly waived his right to subjacent support,¹⁵ the mineral lessee must carry on his underground mining so as not to disturb the overlying surface. However, a conveyance that expressly releases the mineral lessee from liability for damage to the surface is a waiver of the lessor's right to have his land supported.¹⁶ It is also generally accepted that a grant of the right to mine *all* the mineral amounts to an implied waiver of the lessee's duty to maintain subjacent support.¹⁷ *All* the mineral cannot be removed without causing damage to the surface. Some form of temporary support may be left in place of the mineral, or the nature of the overlying strata may be such that subsidence will not take place immediately, but ultimately the mining of all the mineral will necessarily result in some disturbance of the surface. By this rationale, the lessor who conveys the right to mine all the mineral will be deemed to have waived his right to subjacent support, and the mineral lessee is released from liability for damage to the surface resulting from underground mining.

The courts have not extended this reasoning to the point of holding that either an express or an implied waiver, standing alone, is enough to establish the mineral lessee's right to strip mine.¹⁸ It seems that they have restrained from doing so by adopting a theory that the right to damage the surface is not the right to destroy the surface. Strip mining does not necessarily render the surface useless for its intended purpose.¹⁹ Many states have reclamation statutes²⁰ which re-

¹⁵"The modern decisions of both England and America recognize that the right of subjacent support may be waived either expressly or by necessary implication." *Simmers v. Star Coal & Coke Co.*, 113 W. Va. 309, 311, 167 S.E. 737 (1933).

¹⁶*Stelmack v. Glen Alden Coal Co.*, 339 Pa. 410, 14 A.2d 127 (1940); *Continental Coal Co. v. Connellsville By-Product Co.*, 104 W. Va. 44, 138 S.E. 737 (1927).

¹⁷*Kuhn v. Fairmont Coal Co.*, 179 Fed. 191 (4th Cir. 1910); *Simmers v. Star Coal & Coke Co.*, 113 W. Va. 309, 167 S.E. 737 (1933).

¹⁸One exception is *Commonwealth v. F. & W. Coal Co.*, 65 Dauph. 157 (Pa. C.P. 1953). The court held that an implied waiver of the right to subjacent support carried with it the right to conduct strip mining.

¹⁹"[I]t has been proven to the hilt that the [mineral] can be [strip] mined and that the land then can be put back into shape for satisfactory hay and pasture. . . . In fact, with proper handling, some land is even better after being turned over and plowed up." Brohard, *Strip Revegetation*, *Coal Age* 64, 65 (March 1962).

²⁰The usual reclamation statute requires the strip mine operator to post bond at a specified rate per acre. If he fails to regrade and replant the stripped area within the designated period after completion of the mining, the bond is forfeited.

In Pennsylvania, the proceeds from forfeited bonds go into the "Bituminous Coal Open Pit Mining Reclamation Fund" for the purpose of reclaiming stripped lands in the same county where the liability was charged. Pa. Stat. Ann. tit. 52, § 1396.18 (1954).

In West Virginia, the forfeitures are deposited in the "Surface Mining Reclamation Fund" and are expended upon the particular land upon which the permit was issued. W. Va. Code Ann. § 2312(35d) (1961).

quire the mineral lessee to regrade and replant the stripped area, thus minimizing the damage. If the land is restored so that it serves a useful purpose, it can hardly be said that the surface has been destroyed. Furthermore, it is possible that deep mining of all the mineral will render the surface just as useless as strip mining does.²¹ If both methods equally deprive the surface owner of the use and enjoyment of his land, it does not seem reasonable to deny the mineral lessee the right to choose the more practical method. It is therefore submitted that, when the land can be restored and used for its intended purpose or when either method would result in an equal amount of surface damage, either an express or an implied waiver of the mineral lessee's duty to maintain subjacent support should be sufficient to establish his right to strip mine.

Another provision in mineral leases which merits consideration is a grant of the right to *use* and *occupy* the surface. Here again, the courts have not interpreted such a provision to include the right to strip mine, by reasoning that the right to *use* and *occupy* the surface does not mean the right to destroy the surface.²² This reasoning was upheld in *West Virginia-Pittsburgh Coal Co. v. Strong*.²³ A majority of the court denied the mineral lessee the right to strip mine even though the lease expressly granted the right to mine all the mineral and strip mining was the only method by which all the mineral could be removed.²⁴ The one dissenting Judge²⁵ felt that the court was disregarding an express provision of the lease and thereby depriving the lessee of a valuable contract right. Although it is conceded that a grant of the right to use and occupy the surface may not, in itself, be sufficient to establish the mineral lessee's right to strip mine, it should add considerable weight to this position. This is especially true if the surface is rugged mountainous country or barren wasteland.²⁶

Every effort must be made to protect the surface owner's right to use and enjoy his land, but if he has conveyed away this right, he should not be protected at the expense of the mineral lessee. The

²¹Where deep mining is conducted without leaving proper subjacent support, subsidence of the surface may damage the land even more severely than strip mining.

²²*Barker v. Mintz*, 73 Colo. 262, 215 Pac. 534 (1923).

²³129 W. Va. 832, 42 S.E.2d 46 (1947).

²⁴Where the overburden is relatively thin and consists of loose, unconsolidated material, strip mining may be the only method by which the mineral can be recovered.

²⁵Fox, J., West Virginia Supreme Court of Appeals.

²⁶*Commonwealth v. Fisher*, 364 Pa. 422, 72 A.2d 568 (1950); *Commonwealth v. Fitzmartin*, 376 Pa. 390, 102 A.2d 893 (1954).