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WHEN IS THE RIGHT TO SURFACE SUPPORT WAIVED?

Commonwealth of Pennsylvania v. D. E. Fisher in the March 1949 term of the Court of Common Pleas of Lycoming County is the latest case on this subject. The learned Judge's decision seems correct in view of existing Pennsylvania law.

The defendants, owners of the mining rights, were strip mining coal on Pennsylvania State Game lands. The Commonwealth secured an injunction and stripping operations ceased. However, the coal mining company contended that the Commonwealth never had the right of surface support as such right had been waived by implication in the mineral reservations of the deed of August 28, 1855. This mineral reservation reads as follows:

"Parties of the first part do hereby reserve to themselves, their heirs, executors, administrators, and assigns, forever, the full, entire, complete and exclusive ownership and right as though the present conveyance had not been made to all metals or minerals, coal mine, banks and deposits of ore, minerals or metals or coal which are or may be in or upon or which may at any time be discovered in or upon any part of the hereinbefore bargained, sold land and premises. And the said parties of the first part hereto do hereby reserve forever the full, free, absolute and exclusive right and authority, for themselves, their heirs, executors, administrators, or assigns, personally, or by their agents, workmen or servants, at all times whenever it may suit them, or any of their convenience, to enter into or upon and pass over any part or parts of the above described premises and to explore, search for, and excavate any and every kind of ore, mineral, metal or coal and to dig, excavate or penetrate any part of the said premises, and at all times, to have free ingress and egress for themselves, or their heirs, executors, administrators, or assigns, or their workmen or persons employed by them, or either of them, with or without horses, teams, ox, mules, carts, sleds or wagons, to dig, mine, raise and take, remove and carry away any and every kind of ore, mineral, metal or coal, which may be found or discovered in or upon any part or parts of the hereby granted, bargained and sold land, provided, always, that such digging, explorations, or searches, shall be conducted with as little injury or damage to the said Jacob G. Young, Jacob P. Findlay and William R. Young, their heirs and assigns, as shall be practicable consistently with the success of the same, and the said Jacob G. Young, Jacob P. Findlay and William R. Young, do hereby, for themselves, their heirs, executors, administrators and assigns, covenant, grant, promise and agree, to and with the said parties of the first part hereto, their heirs, executors, administrators and assigns, that neither of them shall or will at any time or times, or in any manner, impede, delay, or in anywise obstruct the full and free exercise of all, any and every the right and privileges herein reserved and conditioned, and that neither of them shall or will, at any time or times, in any manner, interfere with the property and ownership hereby reserved to the said parties of the first part, hereto, of all and every the mines, metal minerals, coal ore, or banks, in or upon the above described tracts or parcels of land by these presents bargained and sold to the said Jacob G. Young, Jacob P. Findlay and William R. Young, their heirs and assigns."

The first Pennsylvania case upon the question of surface support is *Jones v. Wagner*.¹ The owners of the mineral estate had the unrestricted right to take out all the coal underlying the surface. There were no limitations, conditions, or restrictions imposed on either estate in respect to the manner of mining and removing the coal, or to any other matter. Justice Thompson, relying upon English decisions, found that the owner of the coal could not remove it without leaving sufficient support for the surface.

The principle set forth in this case has remained unchanged and the law is established in Pennsylvania that when one person owns the surface and another the coal, the mineral estate owes a servitude of sufficient support to the upper or superincumbent estate.² However, the owner of the surface may part with the right to support, by his deed or covenant.³ The deed in *Coleman v. Chadwick* granted to the mineral estate,

" . . . all the privileges necessary for the convenient working, running and transportation of said coal, and deposition of excavated matter, and also all rights and privileges incident or usually appurtenant to the working and using of coal mines."

Although the grant was broad it did not constitute a release of surface support as destruction of the surface was not incidental to mining. On page 87 Judge Gordon said,

"Support is part and parcel of the reserved estate; it is of common right, and hence must pass if at all, by express grant and is not to be defeated by mere implication arising from language that does not import such an effect."

Then in 1880 the case of *Scranton v. Phillips*⁴ distinguished the above three cases and found an implied waiver of surface support. The exception in the deed contained the clause,

" . . . from *any liability*, for any injury that may result to the surface of the said premises from the mining and removal of the said coal. . . ." (Italics supplied)

The Court felt that such clear, express and distinct language should exempt the owner of the mineral rights from liability in their mining operations. Indeed, since the Court said such contracts for non-liability were not contrary to public policy and the reservation was not so large as to be totally destructive of the grant,⁵ the reasoning and decision seem correct.

¹ 66 Pa. 429 (1870).

² *Horner v. Watson*, 79 Pa. 242 (1875); *Robertson v. Youghioghny Coal Co.*, 172 Pa. 566, 33 A. 706 (1896).

³ *Coleman v. Chadwick*, 80 Pa. 8 (1875).

⁴ 94 Pa. 15 (1880).

⁵ Affirmed in *Graff Furnace Co. v. Scranton Coal Co.*, 244 Pa. 592, 91 A. 508 (1914).

The case of *Scranton v. Phillips* was the beginning of attempts to find a waiver by implication in the grant or reservation of a deed or conveyance. As a result of numerous cases the right of surface support was defined and whether or not it was waived depended on the express wording of the grant or reservation.

In a series of three cases this right of surface support was found to be a third estate.

- (1) A, owner in fee of surface and mineral estate, conveyed mineral estate to B. B conveyed mineral estate to C (defendant).

A sold parcels of surface to D (plaintiff) without mineral rights or surface support.

Held: Plaintiff never had right of surface support and thus apparently A still retains the third estate, namely, right of surface support.⁶

- (2) A, owner in fee of surface and mineral estates, conveyed surface to B without surface support. C (plaintiff) acquired B's estate by mesne conveyances. A conveyed mineral estate to D without waiver of surface support.

A conveyed all right, title and interest it had to E. E conveyed to C (plaintiff) the right of surface support.

Held: C has right of surface support.⁷

- (3) A conveyed to B the surface with surface support. B conveyed to C. C conveyed to D (plaintiff) without surface support. A conveyed minerals to E (defendant) with duty of surface support.

Held: Plaintiff cannot recover as surface support lodged in another.⁸

As to the waiver of this third estate a deed containing the following clause,

"Excepting and reserving, however, unto the said parties of the first part by such legal terms as shall be sufficient in law, all coal and minerals beneath the surface of said lot, with the sole right to mine and remove the same by any subterranean processes, *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." (Italics supplied).

was not deemed a waiver.⁹ It is to be noted that this clause contained very broad powers in mining and excavating *all* the coal. The absolute right to surface support is not to be taken away by a mere implication from language which does not necessarily import such result.¹⁰ Conveyance of minerals with "usual mining

⁶ *Graff Furnace Co. v. Scranton Coal Co.* 244 Pa. 592, 91 A. 508 (1914).

⁷ *Penman v. Jones*, 256 Pa. 416, 100 A. 1043 (1918).

⁸ *Charnetski v. Miners Mills Coal Mining Company*, 270 Pa. 459, 113 A. 682 (1921).

⁹ *Carlin v. Chappel*, 101 Pa. 348 (1882).

¹⁰ *Williams v. Hay*, 120 Pa. 485, 14 A. 379 (1888).

privileges" will not waive the right of surface support.¹¹ Nor is ". . . shall do as little damage to the surface as possible" sufficient to constitute a waiver.¹²

In *Dignan v. Altoona Coal and Coke Co.*¹³ the following grant of the minerals

"All the coal and other minerals, lying or being in, upon or under . . . Full and exclusive privileges, right and liberty of entering, raising, delivering, taking and carrying away said coal and other minerals, such mining operations however are not to interfere with the surface of said land, which the said party of the 1st part reserves and is not conveyed by these present, except the right privilege and liberty which is hereby granted to the said party of the 2nd part of sinking a shaft on said premises for an air passage . . . free ingress, egress, and regress through and underneath said premises for the purpose of mining, removing, shipping and transporting said coal and other minerals; and all of the said rights, liberties, and privileges to be used and exercised *without any liability for damages* arising or resulting from the use and exercise of the same . . ." (Italics supplied)

was not deemed a waiver of surface support. It is well to note that although there is a grant of *all* the coal and a release of damages they only refer to the proper exercise of mining rights and have no bearing on the release of the third estate. Also in *Weaver v. Berwind-White Coal Co.*¹⁴ a grant of "all the merchantable coal" did not waive the surface support.

However, there is a line of cases in which the grant of the coal together with mining rights is followed either by an express waiver of damages to the surface resulting from the removal of the coal, or by words importing such waiver.¹⁵ Each of these cases specifically state in the grant or reservation that the owner of the mineral estate shall be without liability for damages.

Thus it would seem that no matter how extensive or broad the mining grant is there is no waiver of surface support unless there is an express waiver of liability from which a waiver of surface support can be implied. In the 1949 case of *Commonwealth v. Fisher* no such waiver of liability for damages can be found. Though the reservation regarding mineral rights permits extensive freedom in mining this should not release the third estate. Nor has the learned judge so held.

Otho W. Vanderlin

¹¹ Allhouse's Estate, 23 Pa. Super. Ct. 146 (1902); *Hines v. Union Connelsville Coke Co.*, 271 Pa. 219, 114 A. 521 (1921).

¹² *Williams v. Hay*, 120 Pa. 485, 14 A. 379 (1888).

¹³ *Dignan v. Altoona Coal and Coke Co.*, 222 Pa. 390, 71 A. 845 (1909).

¹⁴ *Weaver v. Berwind-White Coal Co.*, 216 Pa. 195, 65 A. 545 (1907).

¹⁵ *Stilley v. Buffalo Co.*, 234 Pa. 492, 83 A. 478 (1912); *Madden v. Lehigh Valley Coal Co.*, 212 Pa. 63, 61 A. 509 (1905); *Atherton, Appellan, v. Clearview Coal Co.*, 267 Pa. 425, 110 A. 298 (1920); *Miles v. Pennsylvania Coal Co.*, 217 Pa. 449, 66 A. 764 (1907).