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By

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President Judge Conyngham, of the Luzerne County Court, delivered an opinion on December 21, 1865, in which was the following:

> "Tradition and history tell us that on the first day of January, 1808, there was but little knowledge of great coal veins and coal tracts of land, the coal forming the great item of value in such real estate as is now the case.
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> "Coal was then regarded as only capable of being used for ordinary manufacturing purposes by blacksmiths and others, the almost universal opinion being that it could not be used as a fuel from the want of bellows or strong artificial draft to make it burn; it was not until February 11, 1808, that old Judge Fell . . . succeeded in firing coal so as to prove that it would burn in a grate."[1]

Since 1808, coal has become an important item in the law of Pennsylvania, and during the past twenty years the appearance of large shovels for the removal of coal near the surface of the ground in what is commonly called "strip mining operations" has made important the rights of surface support.

This right has been called the "third estate".

At common law, if there was a division of the ownership of property into mineral rights and surface rights, the mining property was servient to the surface to the extent of sufficient support to sustain it.[2]

The surface owner, however, by express word or by necessary implication could waive this right of surface support.[3]

It has been held that if a waiver of this common law right of support is insisted on, the one so asserting has the burden of proving it.[4]

The waiver of surface support may be inferred from the terms of the grant or reservation of the minerals.

In nearly all of the instruments in which the mineral owner relies upon the implication of the instrument to sustain a waiver of this surface support, there has been a provision releasing all damages for destruction of the surface.

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1 Gloninger v. Franklin Coal Co., 55 Pa. 9 (1867).
2 Jones v. Wagner, 66 Pa. 429 (1870).
3 Stilley v. Buffalo Co., 234 Pa. 492 (1912).
4 Valley Smokeless Coal Co., v. Manufacturers' Water Co., 295 Pa. 40 (1928).

In *Madden v. Lehigh Valley Coal Co.*,[5] the reservation included the following clause: ". . . without making any compensation . . . for any . . . injury to the land . . . or surface thereof." In *Atherton v. Clearview Coal Co.*,[6] the reservation included the following: ". . . without liability under any circumstances whatever for damages done to the surface . . ."[7]

The reasoning of most of the authorities is that when a party sells or reserves the surface of the land he knows that the use of it for farming or other purposes is contemplated and assents thereto, and that he is presumed to know that when all of the coal is removed the underlying surface will sink unless supported, and that therefore if he desires to reserve rights inconsistent with the full enjoyment of the surface it is his duty to reserve these rights by clear and unequivocal language.[8]

The interpretations of the rights under the instruments in the earlier decisions have favored the surface owner. It is important to note, however, that most of the earlier cases as to the "third estate" were decided before the huge stripping operations became economically possible because of heavy equipment, and that the mining industry is important to Pennsylvania. It is true that open coal beds were mentioned in *Gloninger v. Franklin Coal Co.*, supra. Such beds, however, were made by a mere scratching of the surface and were not comparable to the trenches and canyons usually made by present day stripping. Also there appear to have been no open beds in the bituminous coal industry.

It is safe to conclude that in most cases a release of damages for destruction of the surface infers a waiver of surface support, but the absence of such a release is not necessary in an instrument for there to be an inference of such waiver. In addition, whether the surface is valuable or not is important.

In the important case of *Commonwealth v. Fisher*,[9] decided in 1950, the court in a divided opinion pointed out that in the instrument in that case there was no restriction limiting the method of severing the coal, and that the words "full, entire, complete and exclusive ownership" of the coal "in or upon any part of" the land with the right to "dig, excavate or penetrate any part of the premises" was sufficient to waive surface support. The subject matter of the *Fisher* opinion was ordinary Pennsylvania mountain land with no valuable timber thereon—Pennsylvania game land.

It has also been held that the reservation or deed must be construed in the light of the subject matter and conditions existing at the time of the deed's execution. Its provisions will not be extended to cover other conditions apparently not thought of or intended to be included.[10]

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5 212 Pa. 64 (1905).
6 267 Pa. 425 (1920).
7 See also: Miles v. Pennsylvania Coal Co., 217 Pa. 449 (1907); Charnetski, Adm., v. Miners Mills Coal Mining Co., 270 Pa. 459 (1921); Graff Furnace Company v. Scranton Coal Co., 244 Pa. 592 (1914); Stilley v. Buffalo Co., 234 Pa. 492 (1912); Miles v. Penna. Coal Co., 214 Pa. 544 (1906); Scranton v. Phillips, 94 Pa. 15 (1880).
8 Stonegap Colliery Co. v. Hamilton, 89 S.E. 305 (1916).
9 364 Pa. 422 (1950).
10 Satterwhite v. National Power Co., 362 Pa. 133 (1949).

In *Mt. Carmel R. R. Co. v. M. A. Hanna Co.*,[11] decided in 1952, the court held that it was the interpretation of the words of the document which determines whether the method of removal of the coal may be by strip mining or is required to be by deep mining. The document in question carried the words "mining, and taking away the same, at any time or times, or in any manner or by any method of mining". The coal company was allowed to take coal under a railroad right of way, although by statute the taking became a matter of damages.

In *Rochez Bros., Inc. v. Duricka*,[12] decided in 1953, a case involving farm land, the right to strip was refused. The instrument gave the right "to mine and carry away all said coal" together with "all mining rights and privileges necessary or convenient to such mining and removal" and provided that the grantor or his assignee should not be liable for *"injury to the surface"*. It was ruled in this decision that the words "draining and ventilating of the same", which words appeared in the instrument, pre-supposed underground mining and that the instrument was to be interpreted in the light of underground mining. The court suggested that in the *Fisher* case, supra, the land was mountain land whereas in the *Rochez* case the land was agricultural, fit for farming.

The legislature has tried to protect the surface under the police powers of the Commonwealth of Pennsylvania by making compliance with an *Open Pit Mining Conservation Act*[13] necessary. This Act does not settle the rights of the owners of the three estates. The burden rests upon him who seeks to assert the right to destroy or injure the surface and he must rely upon a construction of the words of the reservation in the deed. Words waiving damage to the surface generally indicate a waiver of support but not always.[14] Conditions existing at the time the words were employed are not always the criterion. (In the *Fisher* case, supra, concerning bituminous coal, strip mining was unknown in the bituminous field at the time the reservation was made in 1855). It is important as to whether or not the surface is valuable.

With strippers fast picking the bones of the mining lands, the third estate may soon again be relegated to the book cases.

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11 371 Pa. 232 (1952).
12 374 Pa. 262 (1953).
13 Act of May 31, 1945, P. L. 1198.
14 Rochez Bros., Inc. v. Duricka, 374 Pa. 262 (1953).