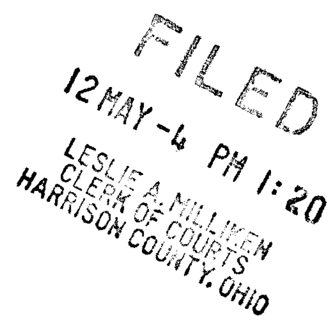

IN THE COURT OF COMMON PLEAS
HARRISON COUNTY, OHIO

KENNETH BUELL	)	
	)	CASE NO. CVH-2011-0113
Plaintiff,	)	
vs.	)	JUDGE MICHAEL K. NUNNER
	)	
CHESAPEAKE EXPLORATION, LLC, ET AL.,	)	
	)	
	)	
Defendants.	)	
	)	

PLAINTIFF'S MOTION FOR A PERMANENT INJUNCTION

Now comes Plaintiff, Kenneth Buell, by and through undersigned counsel, and hereby moves this Court contemporaneously with his motion to Intervene for a Permanent Injunction preventing Defendants, Chesapeake Exploration, LLC, Ohio Buckeye Energy, LLC and North American Coal Royalty Company from entering onto Plaintiff's Property, destroying the surface, and extracting oil, gas and other minerals from adjacent parcels without any legal right to do so. This Motion for Permanent Injunction is supported by the attached Memorandum in Support and the Complaint of Intervening Plaintiff Kenneth Buell filed contemporaneous herewith.

Respectfully submitted,

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Attorneys for Intervening Plaintiff Kenneth Buell

MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Plaintiff, Kenneth Buell (hereinafter "Plaintiff"), requests this Permanent Injunction because Defendants, Chesapeake Exploration, LLC, Ohio Buckeye Energy, LLC and/or North American Coal Royalty Company (hereinafter "Defendants") have unlawfully entered onto Plaintiff's Property, destroyed the surface, and extracted minerals from beneath the Property and adjacent properties without any legal right to do so. Upon information and belief, if the Defendants are not stopped by this Honorable Court, they will continue to trespass on the Property and engage in further uncompensated takings.

Buell's motion here merely asks this Court to apply its previous decision based upon the doctrines of collateral estoppel and stare decisis. The plain language of the deed to the Property does not permit the Plaintiff to use the surface of the Property to extract minerals from beneath adjacent parcels. This Court has already determined in the instant case upon which Kenneth Buell is now attempting to intervene (*Jewett Sportsmen & Farmers Club, Inc. v. Chesapeake Exploration, LLC*, Harrison County Case No. CVH-2011-0113), that the "through and under" language in the deed does not permit use of the surface estate to extract oil, gas and minerals from adjacent parcels. The Plaintiff is asking this Court to apply the doctrines of *stare decisis* and collateral estoppel/issue preclusion and immediately affirm its prior determination and grant a permanent injunction for intervening Plaintiff Kenneth Buell. (A copy of the decision and judgment entry is attached for ease of reference as Exhibit "B").

Wherefore, Plaintiff hereby requests that this Honorable Court grant a Permanent Injunction and order the Defendants to refrain from any further activity on the Property pending resolution of the claims in Plaintiff's Complaint.

II. FACTUAL BACKGROUND

On or about November 17, 1959, North American Coal Royalty Company ("NACRC") conveyed to Denzel Green and Helen V. Porter, Plaintiff's predecessors, certain real property amounting to approximately 243 acres of real property located in Archer Township, Harrison County, Ohio (hereinafter "the Property"). (See, Intervening Complaint, filed contemporaneous herewith attached to Motion to Intervene). Plaintiff became fee simple owner of the Property by virtue of a survivorship deed dated February 26, 1979. Id. Plaintiff became the sole owner of the Property on September 28, 2005 by virtue of a quit claim deed dated July 6, 2005. Id.

In October 2010, Defendant Chesapeake Exploration contacted Plaintiff and indicated their intention to begin construction and operation of a well head on Plaintiff's property to extract oil, gas and other minerals. Defendant Chesapeake presented Plaintiff with a boilerplate surface use agreement, the signing of which would give them permission to use the surface of the Property. Plaintiff refused to execute such agreement. Despite no agreement being reached, the Defendants have entered onto the Property and installed a permanent well head with pipelines, storage tanks and various other structures and have commenced horizontal drilling operations to extract the minerals from beneath the Property, as well as adjacent properties.

As set forth in the Motion to Intervene, the deed at issue is identical to the deed this Court construed in the Jewett case, and clearly demonstrates that Defendants do not possess any right to enter onto the Property in the manner in which they have. As noted above, Plaintiff's deed language reveals the use of the surface of the Property to extract minerals from beneath adjacent parcels is prohibited. The relevant deed language at issue is the same as the Jewett deed and reads as follows:

> Excepting and reserving from the above-described premises all the Pittsburgh No. Eight (8) vein of coal remaining on said premises, and all veins of coal below the Pittsburgh or No. Eight (8) vein of coal and all oil,

> gas or other minerals and land at such points and in such a manner as may be proper and necessary for the purpose of digging, mining, draining, ventilating and carrying away said coal, oil, gas or other minerals, hereby waiving all surface damages, or damages of any sort arising therefrom or through the removal of all of said coal, oil, gas or other minerals, together with the privileges of mining and removing ***through and under*** said described premises *other* coal, oil, gas or other minerals belonging to said Grantor or which may hereafter be acquired by said Grantor. ***Any surface required*** for the mining and removal of coal, oil, gas or other minerals may be acquired by the Grantor, its successors and assigns in a contiguous parcel containing not more than ten per cent (10%) of the total acres, within twenty-one (21) years after the date hereof. In such case the purchase price shall be Ten Dollar's ($10.00) per acre plus the fair market value of any improvements thereon and against

(See, Warranty Deed, attached to Intervening Complaint and filed contemporaneous herewith). (Emphasis added).

As is evident from a plain reading of the deed language, and as already determined by this Court, there was no permitted use of the surface of the Property for the mining and removal of minerals from adjacent properties ("through and under"). Id. Simply put, the Defendants to do not have any legal authority to conduct their current operations on the Property and a permanent injunction should be issued.

III. LAW AND ARGUMENT

There can be no doubt that based upon this Court's previous ruling, Plaintiff is entitled to a Permanent Injunction. Buell's action as set forth in the Motion to Intervene raises three issues before the Court: 1) Whether the reservation of the oil, gas and other minerals by NACRC has been abandoned and reunited with the surface estate by operation of law under the Ohio Dormant Mineral Act, as enacted on March 22, 1989; 2) Whether the deed language permits the use of the surface estate to extract oil, gas and minerals from adjacent parcels; and 3) whether the deed language permits the installation of permanent or semi-permanent structures on the Property after the lapse of the 21 year period to purchase surface rights as

prescribed in the deed ("use" does not equal "destruction" – *see, Skivolocki v. East Ohio Gas Co.* attached hereto as Exhibit "C"). This Court has already ruled on the second and third issues. Based upon this Court's ruling on the proper interpretation of "through and under," Buell is entitled to a permanent injunction identical to that issued to Jewett—an injunction preventing horizontal drilling on the property without his permission.

The deed in this case does not permit any use of the surface estate for the mining or extraction of minerals from adjacent parcels. Indeed, this Honorable Court need only apply the doctrine of *stare decisis, law of the case,* and/or collateral estoppel/issue preclusion from its previous determination in *Jewett Sportsmen & Farmers Club, Inc. v. Chesapeake Exploration, LLC*, Case No. CVH-2011-0013 to grant a permanent injunction in this case. The interpretation of the words "through and under" have been determined as a matter of law by this Honorable Court. The deed language in this case is identical to the deed language at issue in *Jewett*. (See, Exhibit B and Intervening Complaint). Accordingly, a permanent injunction is appropriate and should be granted.

IV. CONCLUSION

For these reasons, Intervening Plaintiff Kenneth Buell urges this Honorable Court to grant this request for a Permanent Injunction preventing Defendants, Chesapeake Exploration, LLC and Ohio Buckeye Energy, LLC and North American Coal Royalty Company from continuing its unlawful operations on Plaintiff's Property, including the destruction of the surface, and extraction minerals from beneath the Property and adjacent properties without any legal right to do so.

Respectfully submitted,

[signature]

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Attorneys for Plaintiff
Kenneth Buell

CERTIFICATE OF SERVICE

This is to certify that a copy of the **Motion for Permanent Injunction** was mailed on this 4th day of May, 2012 to:

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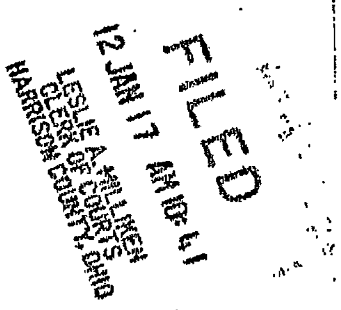

IN THE COURT OF COMMON PLEAS
HARRISON COUNTY, OHIO
GENERAL DIVISION

JEWETT SPORTSMEN & FARMERS CLUB, INC.,
Plaintiff,

Case No. CVH-2011-0113

vs.

CHESAPEAKE EXPLORATION, L.L.C., et al.,
Defendants.

JUDGMENT ENTRY

The matter is before the Court upon Plaintiff's prayer for injunctive relief to prevent Chesapeake Exploration, L.L.C. and Ohio Buckeye Energy, L.L.C. from engaging in activities upon the premises held by Plaintiff for the exploration and recovery of oil, gas, and other minerals. The Court has now considered all the evidence presented herein and the arguments submitted by Counsel.

The evidence has established that Chesapeake Exploration, L.L.C. and Ohio Buckeye Energy, L.L.C. are successors-in-interest to the mineral and other rights reserved in the subject premises by the North American Coal Company. The premises at issue are held by the Jewett Sportsmen & Farmers Club, Inc. subject to the rights reserved by the North American Coal Company. Defendants Chesapeake Exploration, L.L.C. and Ohio Buckeye Energy, L.L.C. have commenced operations on Plaintiff's premises to develop two drill pads for the purpose of drilling up to eight wellbores from each drill pad to use hydraulic fracturing and to recover oil, gas, water and other substances from the subject premises and from areas outside the subject premises through the use of vertical and horizontal drilling.

EXHIBIT
B

The Court has previously ruled that the deed conveying the property to the Jewett Sportsmen & Farmers Club, Inc. is not ambiguous and therefore extrinsic evidence was neither necessary nor appropriate. The Court has entered partial judgment in favor of Defendants finding that Chesapeake Exploration, L.L.C. and Ohio Buckeye Energy, L.L.C. may enter upon Plaintiff's property and may use a portion of Plaintiff's property for the purpose of accessing and removing coal, oil, gas and other minerals located within the geographic boundaries described in the deed from North American Coal Company to the Jewett Sportsmen & Farmers Club, Inc.

The premises in question were purchased by the Jewett Sportsmen & Farmers Club, Inc. from the North American Coal Company and the deed conveying such property was recorded on June 24, 1959 in the Deed Records of Harrison County, Ohio. The deed conveyed a fee simple interest to the property described therein, being approximately 177 acres in Archer Township, **subject only** to the rights reserved by the Grantor. The Jewett Sportsmen & Farmers Club, Inc. did not purchase only the right to use the surface, rather they purchased the entire bundle of rights held for said property **subject to** the rights reserved by the Grantor.

It is axiomatic that Defendants' rights in and to the subject premises are defined by the rights reserved by the North American Coal Company. Now it is time to review the language of the mineral reservation in said deed to determine whether such language authorizes Defendants to use the surface of property held by Plaintiff for the removal of oil and gas from premises beyond the real property held by Plaintiff. The reservation in the deed from the North American Coal Company to Plaintiff provides:

> EXCEPTING AND RESERVING from the above-described premises all the Pittsburgh No. Eight (8) vein of coal remaining on said

premises, and all veins of coal below the Pittsburgh or No. Eight (8) coal and all oil, gas or other minerals and land at such points and in such manner as may be proper and necessary for the purpose of digging, mining, draining, ventilating and carrying away said coal, oil, gas or other minerals, hereby waiving all surface damages, or damages of any sort arising therefrom or through the removal of all of said coal, oil, gas or other minerals, together with the privileges of mining and removing through and under said described premises other coal, oil, gas or other minerals belonging to said Grantor or which may hereafter be acquired by said Grantor. Any surface required for the mining and removal of coal, oil, gas or other minerals may be acquired by the Grantor, its successors and assigns in a contiguous parcel containing not more than ten per cent (10%) of the total acres, within twenty-one (21) years after the date hereof. In such case the purchase price shall be Ten Dollars ($10.00) per acre plus the fair market value of any improvements thereon and against such payment the owner shall deliver to the Grantor, its successors or assigns a warranty deed in fee for the same.

The aforesaid reservation is "built" of several distinct sentences, clauses and phrases. The first step in interpreting this reservation is to review each provision individually.

The first portion of the reservation provides:

> EXCEPTING AND RESERVING from the above-described premises all the Pittsburgh No. Eight (8) vein of coal remaining on said premises, and all veins of coal below the Pittsburgh or No. Eight (8) coal and all oil, gas or other minerals . . .

This is a straightforward reservation of all mineral interests located in and under the described premises. The meaning of this clause is perfectly clear—the North American Coal Company is retaining ownership of the coal, oil, gas, and other minerals located in or under the described premises.

The second portion of the reservation provides:

> EXCEPTING AND RESERVING from the above-described premises . . . land at such points and in such manner as may be proper and necessary for the purpose of digging, mining, draining, ventilating and carrying away **said** coal, oil, gas or other minerals . . . (**emphasis** added)

This is a reservation of the right to use the surface of said premises to the extent necessary to remove the mineral assets located in and under the described premises. The mineral assets which may be removed from the property using this reservation of surface rights is limited by the use of the word "said" to the mineral assets located in and under "the above-described premises."

The third portion of the reservation provides:

> hereby waiving all surface damages, or damages of any sort arising therefrom or through the removal of **all** of **said** coal, oil, gas or other minerals. . .(**emphasis** added)

Strictly speaking, this is not a waiver of damages given by Plaintiff but rather an additional limitation on the property rights conveyed to Plaintiff by the North American Coal Company. This language is specifically tied to the damages that might arise through the "digging, mining, draining, ventilating, and carrying away" or "through the removal" of "said coal, oil, gas, or other minerals" located in and under the described premises. The use of the word "said" ties the waiver of damages directly to the minerals previously reserved by the first clause.

The next portion of the reservation provides:

> ***together with*** the privileges of mining and removing *through and under* said described premises **other coal, oil, gas or other minerals belonging to said Grantor or which may hereafter be acquired by said Grantor.** (**emphasis** and *italics* added)

The introductory words "together with" clearly announce that these rights are in addition to the rights previously reserved by the North American Coal Company. This clause

clearly reserves to the Grantor the authority to use the premises described in the deed to mine and remove coal, oil, gas and other minerals which are not located in and under the described premises with the limitation that said activities be carried on "through and under" said premises. To go forward, the Court must determine the extent to which the term "through and under" restricts the use of the subject premises to mine and remove coal, oil, gas and other minerals from outside the subject premises. Simply speaking, the issue is properly reduced to the interpretation of "through and under" as inserted into this reservation of rights.

The Random House Webster's College Dictionary, 2nd Edition published in 1997 offers several related meanings for "through" for several different contexts which may be relevant here:

> **1.** in at one end, side, or surface and out at the other: *to pass through a tunnel.* **2.** past; beyond: *went through a red light.* **3.** from one to the other of: *swinging through the trees.* **4.** across the extent of: *traveled through several countries*. . . **8.** by the means of: *I found out through him.* . . . **20.** (of a road, route, etc.) permitting continuous or uninterrupted passage. . . .

When used in the context of passing through real property, "through" would seem to include the concept of under as well as over said property, but that cannot be the end of the inquiry because the phrase at issue is "through and under."

The same text offers several related meanings for "and" as follows:

> **1.** (used to connect grammatically coordinate words, phrases, or clauses) with; as well as; in addition to: *pens and pencils.* . . . **11.** an added condition, stipulation, or particular: *no ands and buts about it.* **12.** *Logic.* The connective used in conjunction. . . .

Obviously the use of the conjunction "and" rather than the conjunction "or" signals the drafter's intention. By comparison, "or" is defined in the aforesaid dictionary as:

> **1.** (used to connect words, phrases, or clauses representing alternatives): *to be or not to be*. . . . **6.** *Logic.* The connective used in disjunction. . . .

The Random House Webster's College Dictionary, 2nd Edition published in 1997 offers several related meanings for "under" which are relevant here:

> **1.** beneath and covered by: *under a tree.* **2.** below the surface of: *under water*. . . .

Clearly, "through and under" does not mean the same as the phrase "through or under" which was not used in said deed. If the Court construed "through and under" to mean "through" the Court would not be giving effect to the words "and under" specifically inserted into the deed. Relying on the aforesaid dictionary and common usage, the Court concludes that the plain meaning of the phrase "through and under" only authorizes the mining, transfer, and removal of coal, oil, gas, and other minerals found outside the described premises which takes place beneath the surface of the described premises. The Court concludes that this result is mandated not only by the plain and everyday meaning of the words selected, but by additional analyses as well.

It is absolutely clear here that the scrivener knew how to draft the instrument if the instrument was intended to permit the unrestricted use of the subject premises to mine and remove coal, oil, gas, and/or other minerals from adjacent properties. The drafter could have simply included those rights in the second portion of the reservation which protected very substantial rights for the holder of the severed mineral interest. Such clause could have read:

> EXCEPTING AND RESERVING from the above-described premises . . . land at such points and in such manner as may be proper and necessary for the purpose of digging, mining, draining, ventilating and carrying away said coal, oil, gas or other minerals ***and other coal, oil, gas or other minerals belonging to said Grantor or which may hereafter be acquired by said Grantor.***

or:

> EXCEPTING AND RESERVING from the above-described premises . . . land at such points and in such manner as may be proper and necessary for the purpose of digging, mining, draining, ventilating and carrying away said coal, oil, gas or other minerals ***and land at such points and in such manner as may be proper and necessary for the purpose of digging, mining, draining, ventilating and carrying away other coal, oil, gas or other minerals belonging to said Grantor or which may hereafter be acquired by said Grantor.***

However, the language that was chosen included the restrictions previously emphasized herein:

> ***together with*** the privileges of mining and removing *through and under* said described premises **other coal, oil, gas or other minerals belonging to said Grantor or which may hereafter be acquired by said Grantor. (emphasis** and *italics* added)

It is at this point, that Plaintiff's argument that the instrument should be construed against the drafter comes to fruition. The deed was most likely drafted on behalf of the grantor, the North American Coal Company, because it was reserving important mineral interests. The grantor had the opportunity to choose the language utilized in defining the rights it reserved. To the extent that the language used does not support rights claimed by Defendants, one can conclude that such rights were not intended to be reserved by the grantor.

Plaintiff has pointed out that the terminology in other deeds demonstrates that clear language was available if the North American Coal Company had intended to retain the rights now claimed by Defendants. The language of the 1906 deed at issue in *Quarto v. Litman* (1975), 42 Ohio St. 2d 73 provided in pertinent part:

> Also the exclusive rights of way for the purpose of mining, ventilating, draining and transporting coal of other lands through the mines and openings in, upon, and over the said lands of the grantor.

See also, the reservation clause used in the 1955 deed which is at issue in the case of *Graham v. Drydock Coal Company* (1996), 76 Ohio St. 3d 311.

In the context of an oil and gas play recently discovered approximately 8500 feet below Archer Township, the "through and under" language may seem unusual, trivial or unnecessary. In the context, though, of the cases cited herein and the potential for underground coal operations to extract the Pittsburgh No. Eight vein of coal or coal located below the Pittsburgh No. Eight, the purpose for the "through and under" limitation is clear. That limitation would allow an underground mine operator to "wheel" coal through the underground passages beneath the subject premises as may be necessary or convenient in mining operations which could encompass up to 3000 acres, but would prevent the subject premises from being used as the removal site for coal mined outside the subject premises. In this context, it is clear that the "through and under" limitation was significant, and that its inclusion in the reservation was purposeful.

The Court is satisfied that its methodology and conclusions herein are consistent with the decisions of the Ohio Supreme Court previously relied upon herein: *Skivolocki v. E. Ohio Gas Co.* (1974), 38 Ohio St.2d 244, and *Graham v. Drydock Coal Co.* (1996), 76 Ohio St.3d 311. The Ohio Supreme Court held in *Graham*, at 313.:

> The purpose of contract construction is to discover and effectuate the intent of the parties. *Skivolocki*, at paragraph one of the syllabus. The intent of the parties is presumed to reside in the language they chose to use in their agreement. *Kelly v. Med Life Ins. Co.* (1987), 31 Ohio St 3d 130 ... paragraph one of the syllabus. * * *

See also *Sunoco, Inc. (R&M) v. Toledo Edison Co.* (2011), 129 Ohio St.3d 397, and *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.* (1997), 78 Ohio St.3d 353.

Given the plain language of the reservation, and the opportunity to compare and contrast different rights protected by said reservation, the Court does not find that it is necessary to rely on the case law cited by Plaintiff from outside the jurisdiction of Ohio.

Before reaching this conclusion, the Court carefully considered the arguments and authority submitted by Defendants herein. The Court cannot accept the construction of the third portion of the reservation offered by Chesapeake Exploration, L.L.C. and Ohio Buckeye Energy, L.L.C. Although oil and gas accessed from properties adjoining the subject premises would travel by way of a horizontal wellbore and then come to the surface it would not meet the requirements of "through and under" because the oil and gas and water recovered would not stay under the surface. Rather, the oil, gas, water, and other elements would exit the wellhead above ground and then would be piped underground to the separator for each well and the oil and water would be stored above ground.

Much of the argument submitted by Chesapeake Exploration, L.L.C. and Ohio Buckeye Energy, L.L.C. rests upon cases interpreting coal leases and the theory of those cases is inapplicable here. The basic theory underlying the lease is that it is a temporary grant of broad authority to utilize certain property. That made it easy for the courts in those cases to reach sweeping conclusions that the rights of the lessees were extensive except as specifically restricted by the terms of the lease. That is not the situation that is before the Court at this time. Rather, this Court is occupied with the task of interpreting

which rights were permanently retained by the Defendants' predecessors in title. On that basis, *Coal Co. v. Mining Co.* (1884), 40 Ohio St. 559, *Consolidated Coal Co. v. Schmisseur*, 135 Ill. 371 (1890) and *Speak v. Cottonwood Coal Co.*, 116 F.2d 489 (9th Cir. 1940) are distinguished.

The case of *Bagley v. Republic Iron & Steel Co.*, 69 So. 17 (Ala. 1915) may also be distinguished. First, the case is from another jurisdiction and the holding therein is not binding on this Court. More importantly, the issue in that case was the scope of authority held by the owner of the mineral estate to carry out the mining of the mineral which was clearly the subject of the transaction. Furthermore, this case also demonstrates the concept that the landowner could have protected himself/herself from the activities pursued by the mine operator by better drafting of the instrument under which such rights were claimed. In this case, we have already seen that the North American Coal Company knew how to draft language which would have clearly and unequivocably reserved the rights now claimed by Defendants, yet the North American Coal Company chose not to use that language.

In *Realty Title & Inv. Co. v. Fairport, P & E. R. Co.*, 12 Ohio App. 73 (11th Dist. 1919) a right of access had clearly been provided. The Court found that instrument provided the right of travel to adjoining lot owners and ruled that a business who owned adjoining lots could install an underground pipeline underneath the area designated for access. In this case, the grant of authority reserved by the North American Coal Company provided access for specified activities but limited the access to "through and under" the subject premises. There is nothing in the decision by the Eleventh District

Court of Appeals which would authorize the Court to ignore the restrictions placed in the reservation in the subject deed.

The Court also finds the arguments and authorities submitted by the North American Coal Royalty Company to be unpersuasive.

The situation presented herein bears no practical resemblance to that presented to the Ohio Supreme Court in *Moore v. Indian Camp Company*, 75 Ohio St. 493 (1907). The subject premises were strip-mined, there are no mine voids to be utilized on this property.

The *Wells v. American Electric Power Co.*, 48 Ohio App.3d 95 (Vinton Co. 1988) must be distinguished due to the exact language used in the reservation herein. The heart of the *Wells* case is conclusion that the landowners' waiver of damages encompassed any damages that might arise from coal mine operations even if the longwall mining method was used to recover the coal the landowners sold. The specific language in that instrument provided:

> The undersigned Grantors hereby waive for themselves, their successors, heirs, and assigns all damages in any manner arising from the exercise of the rights hereinbefore granted.

In the instant case, the waiver language clearly applies only to the mining and removing of coal, oil, gas and other minerals found within the described premises, as previously noted:

> EXCEPTING AND RESERVING from the above-described premises all the Pittsburgh No. Eight (8) vein of coal remaining on said premises, and all veins of coal below the Pittsburgh or No. Eight (8) coal and all oil, gas or other minerals and land at such points and in such manner as may be proper and necessary for the purpose of digging, mining, draining, ventilating and carrying away said coal, oil, gas or other minerals, hereby waiving all surface damages, or damages of any sort arising therefrom or

through the removal of all of said coal, oil, gas or other minerals, ...(**emphasis** added)

Therefore, the Wells decision is not persuasive to the Court with respect to this case.

The *Creasey v. Pyramid Coal Corporation*, 116 Ind. App. 124(App. Ct. in banc) is similar to the *Bagley* case in that it is clearly concerned with the processes and equipment used to recover the mineral interest which was the nub of the agreement between the parties. The Court interpreted a very broad grant of authority which included the right to build tipples, shafts, barns and dwelling houses to permit the introduction of a power transmission line over the property. *Case v. Elk Horn Coal Corporation*, 210 Ky. 700 (Ky. Ct. App. 1925) may be characterized the same way. The Court noted: "The granting clause in that deed is very elaborate, filling five pages of typewritten matter . . ." the Court found that the activities undertaken by the mine operator to recover the coal that was the subject of the grant was authorized by the broad language contained in the grant. These cases are neither instructive nor helpful to the Court. In *Trivette v. Consolidation Coal Co.*, 296 Ky. 529 (Ky. Ct. App. 1944) the Court held, again, that the mine operator could place an electric transmission line to assist it in removing the coal under the subject property, but reserved ruling on whether the mine operator could continue to use the transmission line to power the removal of coal from outside the subject premises. The Court finds that these cases do not have any bearing on the issue at hand.

The Court also rejects the argument which analyzes the parties' respective legal rights on the basis of the additional burden which would be imposed upon the Plaintiff if Defendants were permitted to use the property as they desire. A discussion of such burden would be appropriate if the issue before the Court was the extent of the easement

held by Defendants to recover any minerals possible through the subject premises but that is not the issue. The Ohio authorities cited to the Court do not establish such a principle. Rather the cases of *Skivolocki v. E. Ohio Gas Co.* (1974), 38 Ohio St.2d 244, and *Graham v. Drydock Coal Co.* (1996), 76 Ohio St.3d 311 establish that the law itself may apply limitations which will effect the parties' agreement concerning mineral rights.

The Court concludes that the North American Coal Company reserved only limited rights to utilize the subject premises to access and remove coal, oil, gas, and other minerals from areas outside the subject premises. Specifically, it reserved the right to access and remove coal, oil, gas and other minerals recovered outside the subject premises only to the extent that such activities were carried on "through and under" the subject premises. The reservation does not authorize Defendants to use any portion of the premises held by the Jewett Sportsmen & Farmers Club, Inc. to access or to recover oil, gas or other substances from areas outside the subject premises.

The Court finds that Plaintiff is entitled to a permanent injunction to enjoin activities by Chesapeake Exploration, L.L.C. and Ohio Buckeye Energy, L.L.C. upon the premises held by the Jewett Sportsmen & Farmers Club, Inc. which exceed the rights reserved by the North American Coal Company. Plaintiff is entitled to have its rights protected and the public interest is served by protecting private rights. No party or third person can complain if the Court issues orders which enjoin a party or parties from engaging in activities which are contrary to the rights of other persons.

WHEREFORE, it is the ORDER and JUDGMENT of the Court that Defendants Chesapeake Exploration, L.L.C. and Ohio Buckeye Energy, L.L.C. are the successors-in-interests to the rights reserved by the North American Coal Company in real property

conveyed to the Plaintiff, Jewett Sportsmen & Farmers Club, Inc. by the deed recorded June 24, 1959 in the Deed Records of Harrison County, Ohio. Pursuant to such deed, Defendants Chesapeake Exploration, L.L.C. and Ohio Buckeye Energy, L.L.C. have the right to enter upon the premises held by Plaintiff to explore for and recover all oil, gas, and other constituents which is located in and under the subject premises, however, Defendants have no right to use the premises held by Plaintiff to access and recover oil, gas and other substances located outside the subject premises unless the entire operation and process is through and under the subject premises.

The following ORDERS are issued:

1. A permanent injunction is hereby issued to enjoin Defendants Chesapeake Exploration, L.L.C., Ohio Buckeye Energy, L.L.C., and North American Coal Royalty Company and any other person or entity claiming title or authority through them from engaging in any activities upon the premises of the Jewett Sportsmen & Farmers Club, Inc. (described in Exhibit A attached hereto) for the purpose of accessing and recovering oil, gas, or other substances from areas outside the premises described in Exhibit A.

2. These orders do not enjoin Defendants Chesapeake Exploration, L.L.C., Ohio Buckeye Energy, L.L.C., and North American Coal Royalty Company from engaging in any activities for the purposes of recovering oil, gas or other substances located in and under the premises described in Exhibit A or to remediate any activities previously undertaken by Defendants at the premises belonging to the Jewett Sportsmen & Farmers Club, Inc.

3. The Court shall schedule further proceedings as needed to address other issues raised herein.

SO ORDERED.

Judge Michael K. Nunner

Stamped copies:
Attorney Gregory D. Brunton
Attorney David R. Hudson
Attorney T. Owen Beetham
Attorney David W. Hardymon
Attorney Timothy B. McGranor
Attorney Charles H. Bean
Assignment Commissioner

EXHIBIT

A

#30246

WARRANTY DEED

The North American Coal Corporation To [illegible] Sportsmen & Farmers Club, Inc.

KNOW ALL MEN BY THESE PRESENTS: That THE NORTH AMERICAN COAL CORPORATION, 12000 [illegible] Boulevard, Cleveland 20, Ohio, the GRANTOR, in consideration of the sum of Ten Dollars ($10.00) and other valuable consideration, to it paid by [illegible] SPORTSMEN & FARMERS CLUB, INC., of [illegible], Ohio, the GRANTEE, the receipt whereof is hereby acknowledged, does hereby GRANT, BARGAIN, SELL AND CONVEY to the said GRANTEE, its successors and assigns forever, the following Real Estate situated in the State of Ohio, County of Harrison, and in the Township of Archer and bounded and described as follows:

TRACT NO. 1: Being a part of the North Side of the Southeast Quarter of Section No. [illegible], Township 11, Range 5 and more particularly described as follows:

Beginning for the same at the northeast corner of said quarter section and thence South 15 perches to a post; thence [illegible] 160 perches to the opposite line of said quarter to a post; thence North on said line 15 perches

to a post; thence east on the line of said quarter 140 perches to the place of beginning, containing 15 acres, more or less.

TRACT NO. 2: Being a part of the southeast quarter of section No. 4, Township 11, Range 5 and more particularly described as follows:

Beginning for the same at a stone at the northeast corner of said tract and on the east line of said section at a point which is 13 perches south of the northeast corner of the southeast quarter thereof; thence south 2 3/4° west 66.46 perches to a post in the road, from which a 24" black walnut bears north 7° west 64 links; thence north 74 3/4° west 49.4 perches; thence north 72½° west 26 perches; thence north 80½° west 33.84 perches to a post in the road; thence north 59½° west 18 perches to a post in the road; thence north 74½° west 10.72 perches to a post in the road; thence south 80° west 11.4 perches to a post in the road; thence south 66½° west 22 perches to a post in the road, from which a 8" black walnut bears north 34° east 74 links; thence north 3° east 51 perches to a stone; thence south 85 3/4° east 163.32 perches to the place of beginning, containing 52 acres, 2 roods and 22 perches, more or less.

The foregoing two tracts being the premises conveyed to The North American Coal Corporation by John D. Arbaugh and wife, Clara Olive Arbaugh, by Warranty Deed dated June 16, 1942 and recorded in volume 111, page 23, Harrison County Record of Deeds.

TRACT NO. 3: Being a part of the South half of Section No. 4, Township 11, Range 5 and more particularly described as follows:

Beginning for the same at a limestone at the Quarter post between Sections 3 and 4; thence south 86° west 35.9 rods, from which a 24" white oak stump bears North 40½° west 45 links; thence north 3° east 26.8 rods; thence south 86° east 46.24 rods; thence south 3° west 28.8 rods to the section line; thence south 86° east 80.58 rods to a stone; thence north 1¾° east 78.68 rods to a post in the road, from which a 24" black walnut bears north 7° west 67 links; thence north 74 3/4° west 49.4 rods to a post in the road; thence north 72½° west 26 rods to a post in the road; thence north 80½° west 33.84 rods to a post in the road; thence north 59½° west 18 rods to a post in the road; thence north 74½° west 10.72 rods to a post in the road; thence south 80° west 11.4 rods to a post in the road; thence south 66½° west 22 rods to a post in the road; from which a 8" black walnut bears north 34° east 74 links; thence south 3° west 51 rods to a post from which a 15" chestnut bears south 13 3/4° west 9 links; thence North 87½° west 25.4 rods; thence south 1 3/4° east 14.9 rods; thence south ½° west 21.72 rods; thence north 10½° west 17.68 rods; thence south 86° east 26.60 rods to the place of beginning, containing 96.70 acres, more or less.

TRACT No. 4: Being a part of the southwest quarter of Section No. 4, Township 11, Range 5 and more particularly described as follows:

Beginning for the same at a point in the Hopedale - Hanover road and on the quarter section line about 59.5 rods north of the southeast corner of said quarter section; thence south 3½° west 31 rods along the line and to the corner of the aforementioned tract No. 3; thence north 86 3/5° west 24.8 perches to a post in the road; thence north 14½° west 6.28 rods; thence north 9 3/4° east 7.6 rods to a post in the road; thence north 29 3/4° east 10.36 rods to a post in the road; thence north 53 3/4° east 2 rods; thence north 62° east 10.68 rods to the place of beginning, containing 5.19 acres, more or less.

TRACT NO. 5: Being a part of the Southwest quarter of Section No. 4, Township 11, Range 5 and more particularly described as follows:

Beginning for the same at a point in the south line of said Section No. 4, said point bears east 35.9 rods from a limestone at the southwest corner of said quarter section; thence north 3° east 28.8 rods; thence south 86° east 46.24 rods; thence south 3° west 28.8 rods to the section line; thence north 86° west 46.24 rods to the place of beginning, containing 8.32 acres, more or less.

Tracts Numbered 3, 4 and 5 being the [illegible] conveyed to The [illegible] Company by J. [illegible] Thompson and John M. Thompson by deed dated August [illegible], 1945 and recorded in volume [illegible], page [illegible], Harrison County Record of Deeds.

Said premises are subject to rights of way to oil, gas and telephone companies and also subject to all legal highways.
Excepting and reserving from the above-described premises all the Pittsburgh No. Eight (8) vein of coal remaining on said premises, and all veins of coal below the Pittsburgh or No. Eight (8) coal and all oil, gas or other minerals and land at such points and in such manner as may be proper and necessary for the purpose of digging, mining, draining, ventilating and carrying away said coal, oil, gas or other minerals, hereby waiving all surface damages, or damages of any sort arising therefrom or through the removal of all of said coal, oil, gas or other minerals, together with the privileges of mining and removing through and under said described premises other coal, oil, gas or other minerals belonging to said Grantor or which may hereafter be acquired by said Grantor.
Any surface required for the mining and removal of coal, oil, gas or other minerals may be acquired by the Grantor, its successors and assigns in a contiguous parcel containing not more than ten per cent (10%) of the total acres, within twenty-one (21) years after the date hereof. In such case the purchase price shall be Ten Dollars ($10.00) per acre plus the fair market value of any improvements thereon and against such payment the owner shall deliver to the Grantor, its successors or assigns a warranty deed in fee for the same.
TO HAVE AND TO HOLD said premises, with all the privileges and appurtenances thereunto belonging, to the said GRANTEE, its successors and assigns forever.
And the said GRANTOR, for itself and its successors, does hereby covenant with the said GRANTEE, its successors and assigns, that it is lawfully seized of the premises aforesaid; that the said premises are free and clear from all incumbrances whatsoever; and that it will forever warrant and defend the same, with the appurtenances, to the said GRANTEE, its successors and assigns, against the lawful claims of all persons whomsoever.
IN WITNESS WHEREOF, THE NORTH AMERICAN COAL CORPORATION has caused its corporate name to be subscribed to these presents by its Senior Vice President and Assistant Secretary, duly authorized in the premises, this 5th day of May, 1959.
Signed and acknowledged in the presence of:

Robert H. Hoffle
Violet Stark

THE NORTH AMERICAN COAL CORPORATION
By Frank E. Whitaker
Senior Vice President
By Walter K. Johnson
Assistant Secretary

STATE OF OHIO, CUYAHOGA COUNTY, ss:
Before me, a Notary Public, in and for said County, personally appeared Frank E. Whitaker, Senior Vice President, and Walter K. Johnson, Assistant Secretary, of The North American Coal Corporation, the corporation which executed the foregoing instrument and acknowledged that the seal affixed to said instrument is the corporate seal of said corporation; that they did sign and seal said instrument as such Senior Vice President and Assistant Secretary in behalf of said corporation and by authority of its Board of Directors and that said instrument is their free act and deed individually and as such Senior Vice President and Assistant Secretary and the free and corporate act and deed of said The North American Coal Corporation.
IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my seal at Cleveland, Ohio, this 5th day of May, 1959.

Violet Stark, Notary Public
My Commission Expires February 20, 1960.

This instrument was prepared by Dexter Thornburg, Attorney at Law, St. Clairsville, Ohio.

$2.75 U. S. Rev. stamps attached and cancelled.
STATE OF OHIO, HARRISON COUNTY, ss:
Transferred June 24, 1959
Received June 24, 1959 at 11:50 A. M.
Recorded June 24, 1959, Fee [illegible]
[illegible], Recorder

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Citation: **38 Ohio St. 2d 244**

*38 Ohio St. 2d 244, *; 313 N.E.2d 374, **;*
*1974 Ohio LEXIS 453, ***; 67 Ohio Op. 2d 321*

SKIVOLOCKI, APPELLANT and CROSS-APPELLEE, v. EAST OHIO GAS COMPANY, APPELLEE and CROSS-APPELLANT

No. 73-632

Supreme Court of Ohio

38 Ohio St. 2d 244; 313 N.E.2d 374; 1974 Ohio LEXIS 453; 67 Ohio Op. 2d 321

June 19, 1974, Decided

PRIOR HISTORY: **[***1]** APPEAL from the Court of Appeals for Guernsey County.

The facts in this case have been stipulated. In 1890, Joseph Hawes held the fee simple title to land in Guernsey County. By deed dated December 26, 1901, Hawes conveyed certain minerals, including the underlying coal, to The National Coal Company. R. J. Skivolocki, appellant herein, is the present owner of this estate originally deeded to National Coal. The balance of Hawes' fee came, through various parties, to Catherine E. Luczak on November 6, 1959.

On July 20, 1969, Catherine E. Luczak and her husband executed a pipe line right-of-way grant to appellee and cross-appellant, East Ohio Gas Company. Pursuant to this grant, a 12-inch gas line was constructed over a portion of the Luczak property.

Appellant filed a complaint in the Court of Common Pleas of Cuyahoga County on May 10, 1971, seeking damages for the taking of his coal by appellee. By that time appellant had, with the Luczaks' consent, moved his equipment onto the land and begun strip mining for coal. When the mining operations drew dangerously near the newly-constructed gas line, appellee sought and obtained a preliminary injunction, from the Common Pleas **[***2]** Court of Guernsey County, to prevent appellant from mining the land adjacent to its gas line. That injunction, made permanent on May 5, 1972, was not appealed.

The case pending in Cuyahoga County was subsequently transferred to Guernsey County for hearing. At pre-trial conference the parties agreed that "all issues of title and interests in the subject real estate shall be submitted to the court and determined by the court, together with any questions as to the right of either party to damages from the other and that the trial of these issues other than the amount of damages to be recovered, if at all, by either party against the other, shall be tried to the court on September 12, 1972. * * *"

The trial court found that the 1901 conveyance of a mineral estate by Hawes did not include a relinquishment of the right to subjacent support for his surface estate. Since appellee had

EXHIBIT C

demonstrated a legal right to subjacent support for its gas line, the court rejected appellant's claim for damages.

Upon appeal, the Court of Appeals held that appellant had not acquired the right to strip mine by virtue of the 1901 deed, but concluded that he had obtained surface rights pertaining to deep **[***3]** mining, and drilling for oil and gas. Because of the interference of the gas line with these rights, the court reversed the judgment of the Court of Common Pleas and remanded the cause "for the determination of damages caused plaintiff by the Gas Co. other than the consequences of the absence of any legal right to strip mine."

Appellant has appealed from that judgment insofar as it denies him recovery for damages occasioned by interference with his alleged right to strip mine coal. Appellee cross-appeals from that portion of the judgment which permits appellant to show damages unrelated to his alleged right to strip mine.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

DISPOSITION: *Judgment affirmed.*

CASE SUMMARY

PROCEDURAL POSTURE: Appellant mineral estate owner sought review of a judgment of the Court of Appeals for Guernsey County (Ohio), which reversed in part the ruling of the trial court and held that the mineral estate owner had not acquired the right to strip mine by virtue of the deed, but had obtained surface rights pertaining to deep mining and oil and gas drilling that were interfered with by appellee easement owner.

OVERVIEW: The mineral estate owner filed suit against the easement owner when his mining operations were interfered with by the easement owner's gas line that ran under the property. The mineral estate owner contended that the deed either granted him the unqualified right to use the surface in any manner or at least constituted a waiver of subjacent support for the surface owner. The court held that the right to strip mine was not incident to ownership of a mineral estate. Because strip mining was totally incompatible with the enjoyment of a surface estate, a heavy burden rested upon the mineral estate owner who sought to demonstrate that such right existed. The court found that the mineral estate owner failed to meet his burden of proof. The deed's language was peculiarly applicable to deep mining and the evidence showed that the technique of strip mining was not known in the area at that time. The court also found, however, that the easement owner's right-of-way unlawfully impinged upon the mineral estate owner's rights to use the surface incident to deep mining operations. As such, the mineral estate owner suffered an injury and was entitled to be heard on his damages.

OUTCOME: The court affirmed the judgment of the appellate court.

CORE TERMS: surface, coal, mineral, deed, strip mining, strip, mining, deep, right to use, subjacent support, mining operation, enjoyment, grantee, shaft, ownership, mineral deed, right to remove, surface owner, right-of-way, assignee, per se, per acre, suffered injury, convenient, peculiarly, negotiate, removing, servient, construe, mutually

LEXISNEXIS® HEADNOTES Hide

Commercial Law (UCC) > Sales (Article 2) > Form, Formation & Readjustment > General Overview

Contracts Law > Contract Interpretation > General Overview

HN1 Contracts are to be interpreted so as to carry out the intent of the parties, as that intent is evidenced by the contractual language. More Like This Headnote | *Shepardize:* Restrict By Headnote

Energy & Utilities Law > Oil, Gas & Mineral Interests > Surface Use Interests

Energy & Utilities Law > Transportation & Pipelines > Easements & Rights of Way

Real Property Law > Mining > Surface Rights

HN2 The right to strip mine for coal and the right to subjacent support for a surface estate cannot co-exist, but that does not necessarily imply that they are co-equal rights. In other words, while a waiver of subjacent support is prerequisite to finding a right to strip mine, it is not per se conclusive of such a right. More Like This Headnote | *Shepardize:* Restrict By Headnote

Energy & Utilities Law > Conveyances > Mineral Interests > Deed Interpretation

Energy & Utilities Law > Oil, Gas & Mineral Interests > Surface Use Interests

HN3 Unless the language of the conveyance by which the minerals are acquired repels such construction, the mineral estate carries with it the right to use as much of the surface as may be reasonably necessary to reach and remove the minerals. More Like This Headnote | *Shepardize:* Restrict By Headnote

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview

Contracts Law > Defenses > Ambiguity & Mistake > General Overview

HN4 Where the language of a contract is contradictory, obscure, or ambiguous, or where its meaning is doubtful, so that it is susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes a rational and probable agreement must be preferred. More Like This Headnote | *Shepardize:* Restrict By Headnote

Energy & Utilities Law > Conveyances > Mineral Interests > General Overview

Energy & Utilities Law > Mining Industry > Coal > General Overview

Energy & Utilities Law > Oil, Gas & Mineral Interests > Surface Use Interests

HN5 The right to strip mine is not incident to ownership of a mineral estate. Because strip mining is totally incompatible with the enjoyment of a surface estate, a heavy burden rests upon the party seeking to demonstrate that such a right exists. This is especially true when the deed relied upon was executed prior to the time strip mining techniques became widely employed. More Like This Headnote | *Shepardize:* Restrict By Headnote

HEADNOTES **Hide**

HEADNOTES

Deeds -- Conveyance of mineral rights -- Right to strip mine -- Not incident to ownership of mineral estate -- Burden of showing compatibility with enjoyment of surface estates -- Subsequent grant of right of way for pipeline -- By vendee of fee -- Action by assignee of mineral rights against pipeline operator.

SYLLABUS

1. Contracts are to be interpreted so as to carry out the intent of the parties, as that intent is evidenced by the **[***4]** contractual language.

2. The right to strip mine for coal is not implicit in the ownership of a severed, mineral estate.

3. A deed which severs a mineral estate from a surface estate, and which conveys the right to use the surface incident to mining coal, in language peculiarly applicable to deep mining techniques, does not grant the right to remove coal by strip mining methods.

COUNSEL: *Messrs. Sheppard & Agnew, Mr. John C. Sheppard* and *Mr. Alex J. Robertson*, for appellant and cross-appellee.

Messrs. Kincaid, Michell, Geyer & Ormond and *Mr. R. William Geyer*, for appellee and cross-appellant.

JUDGES: STERN, J. O'NEILL, C. J., HERBERT, CORRIGAN, CELEBREZZE and W. BROWN, JJ., concur. PAUL W. BROWN, J., concurring in part.

OPINION BY: STERN

OPINION

[*246] **[**376]** This dispute centers about the respective rights of the parties, as those rights are traced to and defined by the 1901 mineral deed from Hawes to The National Coal Company. That deed reads, in pertinent part:

"* * * [I convey] all the coal in and under the following real estate, situated in the County of Guernsey in the state of Ohio * * *.

[Description of property omitted.]

"* * * Together with all necessary **[***5]** rights of way under said premises and through the coal aforesaid for the purpose of removing and shipping said coal and coal from adjacent lands, and the right to construct and maintain all necessary air shafts (Reserving and excepting however one acre in a square from under each dwelling, and under the school house, now on said lands.) and the right to lease and operate for oil and gas. *Moreover it is agreed that for any and all surface used by the grantee, its successors and assigns, it or they shall pay at the rate of fifty dollars per acre.* Hereby granting also to the grantee, its successors and assigns the right to use the shaft now on said premises as an air-shaft or manway for the benefit of **[*247]** grantees coal workings in the coal fields of which said premises are a part." (Emphasis added.)

Appellant contends that the above-quoted language, and especially the emphasized portion

thereof, either grants him the unqualified right to use the surface (except for those portions specifically excluded) in any manner, for $ 50 an acre, or at least constitutes a waiver of subjacent support for the surface owner. It is a well-known principle that *HN1*contracts are to be interpreted [***6] so as to carry out the intent of the parties, as that intent is evidenced by the contractual language. *State, ex rel. Maher, v. Baker* (1913), 88 Ohio St. 165, 102 N. E. 732; *Travelers Ins. Co. v. Buck-eye Union Cas. Co.* (1961), 172 Ohio St. 507, 178 N. E. 2d 792; *Olmstead v. Lumbermens Mutl. Ins. Co.* (1970), 22 Ohio St. 2d 212, 259 N. E. 2d 123; 4 Williston on Contracts (3 Ed.), 303, Section 601.

Appellant suggests that we not be concerned with whether the right to employ strip mining, per se, is included in the deed, but rather direct our inquiry to the more general question of whether the parties intended the surface estate to be servient to the dominant mineral estate. This is the approach adopted by the Kentucky Court of Appeals in *Martin v. Kentucky Oak Mining Co.* (Ky. 1968), 429 S. W. 2d 395. There, the mineral grantee, under a 1905 "broad form" deed, had acquired the right to use the surface "as may be necessary or convenient to the exercise and enjoyment of the property rights and privileges hereby * * * conveyed." In addition, the grantor had explicitly waived any right to recover damages for injury to his surface estate caused by the grantee's [***7] coal mining operation. The Kentucky court, at page 397, stated:

"* * * Whether or not the parties actually contemplated strip or auger mining is not important -- the question is whether they intended that the mineral owner's rights to use the surface in removal of the minerals would be superior to any competing right of the surface owner."

After observing that even customary deep mining would be destructive of the surface land due to accumulation of [*248] slag and waste, and operation of tram roads, tipples and mine houses, the court concluded that the deed did show an intent that the mineral estate be dominant. The mineral grantee was judged to have acquired the right to strip mine for coal.

[**377] We are unable to accept the Kentucky court's approach. Instead of trying to ascertain the intent of the parties at the time the deed was drawn regarding the right to strip mine, our sister state has chosen to broaden the issue. It may well be true that thinking in terms of dominant and servient estates makes more manageable the inquiry into the right to strip mine. However, it is equally possible that such an approach will lead to a result which negates the real intent [***8] of the parties to the deed.

The trial court viewed the issue as whether "the defendant [East Ohio Gas] is entitled to the subjacent support for the surface use made of the land by it under its right-of-way." Although this approach comes much closer to dealing with the parties' actual intent, as expressed in the 1901 deed, it is not entirely satisfactory. *HN2*The right to strip mine for coal and the right to subjacent support for a surface estate cannot co-exist, but that does not necessarily imply that they are co-equal rights. In other words, while a waiver of subjacent support is prerequisite to finding a right to strip mine, it is not per se conclusive of such a right. See *Rochez Bros. v. Duricka* (1953), 374 Pa. 262, 97 A. 2d 825; Note, Construction of Deeds Granting the Right to Strip Mine, 40 Cin. L. Rev. 304, 313 (1971); Note, The Common Law Rights to Subjacent Support and Surface Preservation, 38 Mo. L. Rev. 234, 249 (1973).

Underlying both the position taken by the Kentucky court, and that of the trial court in this case, is a valid assumption that strip mining for coal is a more modern, technologically advanced method to provide the mineral estate owner a fuller [***9] enjoyment of his property. Yet we cannot ignore the additional fact that strip mining, although similar to deep mining insofar as both represent a means to a legitimate end, necessarily and unavoidably causes [*249] total disruption of the surface estate. Time-honored rules of law, meant to insure the mutual enjoyment of severed mineral and surface estates, cannot be blindly applied to resolve a question involving the right to strip mine. This is true, not because those rules lack present vitality, but because they are dependent upon presumptions wholly irrelevant to strip mining. [1]

FOOTNOTES

1 In addition to the example, previously alluded to, concerning the right to subjacent support, another legal principle which cannot be sensibly applied to strip mining is found in 54 American Jurisprudence 2d 389, Mines and Minerals, Section 210, as follows:

"* * * *HN3*unless the language of the conveyance by which the minerals are acquired repels such construction, the mineral estate carries with it the right to use as much of the surface as may be reasonably necessary to reach and remove the minerals." See, also, 37 Ohio Jurisprudence 2d 18, Mines and Minerals, Section 14.

This implied right of the mineral owner is best explained as a practical attempt to insure that both he, and the surface owner, can enjoy their respective estates. To construe the "right to use" as including the right to strip mine would be to pervert the basic purpose of a principle designed to *mutually* accommodate the owner of the mineral estate and the owner of the surface estate in the enjoyment of their separate properties. See *Barker* v. *Mintz* (1923), 73 Colo. 262, 215 P. 534.

[*10]** The highest courts in two other coal-producing states have had occasion to construe mineral deeds. In *Stewart* v. *Chernicky* (1970), 439 Pa. 43, 46, 266 A. 2d 259, the Pennsylvania court faced the issue of whether the defendant coal company had "the right to remove the coal under the land involved by the strip mining method without liability for injury to or destruction of the surface, regardless who owned that surface, or was such removal to be limited to shaft or deep mining?" The answer to that question was found in a 1902 deed which severed the surface and mineral estates; more specifically, the court was concerned with the language which granted "* * * the right of ingress, egress and regress over and through said lands for the purpose of mining, storing, manufacturing and removing said coal * * * also the right to drain and ventilate said mines by shafts or otherwise and **[**378]** to deposit the waste from said mines, and to build roads and structures * * * **[*250]** with a full release of and without liability for damages for injury to the surface, waters or otherwise arising from any of said operations."

Having determined that the deed contained no express intent **[***11]** concerning the method by which the coal might be mined, the Pennsylvania court, at page 49, quoted the following guidelines for construction which it had laid down in a previous decision:

HN4"'Where the language of a contract is contradictory, obscure, or ambiguous, or where its meaning is doubtful, so that it is susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, *while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes a rational and probable agreement must be preferred*' * * *."

Since strip mining involves serious disruption of the surface estate, the Pennsylvania court held that the burden was upon the coal company to affirmatively show that the parties intended that the coal might be removed by methods other than deep mining. A review of the language in the 1902 deed led the court to conclude, at page 52, that "the right to mine and remove coal by deeds conveying land *in language peculiarly applicable to under-ground mining* does not include the right to remove such coal by strip mining methods." (Emphasis added.) [2]

FOOTNOTES

2 The waiver of liability language in the deed was viewed as having reference only to such damage as might arise from deep mining.

[*12]** West Virginia has taken a similar stance. In *West Virginia-Pittsburgh Coal Co.* v. *Strong* (1947), 129 W. Va. 832, 42 S. E. 2d 46, plaintiff sought a judgment declaring that it had the right to strip mine for coal it owned. The 1904 deed relied upon was "broad form," and included a waiver of liability clause. After noting that mining rights were specifically granted in the deed, and that the express terms used served to restrict the rights given, the court, at page 836, stated:

"* * * We are of the opinion, arrived at by reading **[*251]** the instrument as a whole, that it was the manifest intention of the parties to preserve intact the surface of the entire tract, subject to the use of the owner of the coal 'at convenient point or points' in order 'to mine, dig, excavate and remove all of said coal' by the usual method at that time known and accepted as common practice in Brooke County. We do not believe that this included the practice known as strip mining."

The West Virginia court also explicitly rejected plaintiff's contention that ownership of the coal necessarily implies the right to remove it by strip mining, even though other methods may not be feasible.

In **[***13]** this case, the 1901 deed is coached in language peculiarly applicable to deep mining, and the evidence shows that the technique of strip mining was not known in Guernsey County until 1917. Appellant's argument concerning the effect of the $ 50 per acre charge for use of the surface estate is without merit. First, such a provision is not so novel as he implies in mineral deeds. See *Franklin* v. *Callicoat* (1954), 68 Ohio Law Abs. 67, 119 N. E. 2d 688; *West Virginia-Pittsburgh Coal Co.* v. *Strong, supra*. Second, and more important, the right to "use" the surface cannot be reasonably construed as the right to destroy it.

In sum, then, we hold that *HN5* the right to strip mine is not incident to ownership of a mineral estate. Because strip mining is totally incompatible with the enjoyment of a surface estate, a heavy burden rests upon the party seeking to demonstrate that such a right exists. This is especially true when the deed relied upon **[**379]** was executed prior to the time strip mining techniques became widely employed. Appellant has fallen short of meeting his burden of proof.

The second portion of the Court of Appeals' judgment permits appellant, on remand, **[***14]** to prove any damages arising out of appellee's interference with his surface rights (other than the right to strip mine). Appellee maintains that appellant has failed, at trial, to adduce any evidence of damage with regard to those surface rights, and concludes that a remand is unwarranted. Appellant replies **[*252]** that the clear intent of the pre-trial agreement was to defer the necessity of expert testimony as to the amount of damages, until the respective rights of the parties had been adjudicated.

In our view, the stipulated facts in evidence [3] show that appellee's right-of-way unlawfully impinges upon appellant's rights, as described in the 1901 deed, to use the surface incident to deep mining operations, and to recover any oil or gas deposits. Thus we find appellant has suffered injury, and is entitled to be heard on the extent of damages flowing therefrom.

FOOTNOTES

3 This evidence consisted of the various deeds held by the parties, and the 1901 deed with which we are primarily concerned. The conflict between appellee's right-of-way grant, and appellant's surface rights unrelated to strip mining, is apparent on the face of those instruments.

[*15]** For the foregoing reasons the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

CONCUR BY: BROWN (In Part)

CONCUR

PAUL W. BROWN, J., concurring in part.

I disagree that the appellant has suffered injury at this time by reason of appellee's pipe line and so conclude that a remand for trial of the damage question is unnecessary. Presently the evidence and stipulations show that only strip mining operations are contemplated. The sole issue before the trial judge was whether or not the inability to surface mine damaged the plaintiff. We agree with both the trial and appellate courts that East Ohio's claim to surface rights derives from the owner and is subservient only to such rights as plaintiff obtained as assignee of the National Coal Company under the 1901 deed from the owner. That deed expressly granted a right to use such surface as was necessary to remove the minerals granted, by deep mining. **[*253]** It set the price for such surface area, if needed, for shafts, air vents, access to transfer coal, and other concomitants of deep mining operations. It contemplated the use by the owner or his assignees of the surface as a separate estate until there was such **[***16]** a need. The ownership of the surface was absolute, subject only to the mineral owner's option to negotiate the necessity of dedicating a portion of the surface to his deep mining operation. This needed to be done in such a way as to be mutually accomodating to the owners of the mineral and surface estates, *Barker* v. *Mintz* (1923), 73 Colo. 262, 215 P. 534. Had a proper demand been made incidental to a deep mining operation, East Ohio may have had to fulfill this need for mutual accommodation, and with the owner of the fee might have had to negotiate the time and manner in which the theretofore legitimate use of the surface should terminate or be altered. No part of the language in the instrument justifies a conclusion that the optionee has an absolute right to enter and appropriate the surface without notice and negotiation with the owners of the surface of all matters other than acreage price, and payment of that price.

A claim for damages does not appear to me to have ripened, nor does it seem that this sort of damage action was contemplated by the parties at the trial of this cause.

[380]** The owners of the minerals made some showing at trial of damages such as **[***17]** the expense of a box cutting operation, of handling overburden twice, of cutting sluices under the gas line to properly drain the working area and of other such matters dealing with surface mining. Clearly this type of proof would be inconsistent with that part of the majority opinion with which I have specifically agreed.

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