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THE COMMON LAW RIGHTS TO SUBJACENT SUPPORT AND SURFACE PRESERVATION

I. INTRODUCTION

One of the most precious property rights of the surface owner is his right to have his land preserved in its natural state. No one can fully enjoy his land when the surface is threatened with subsidence or destruction or has subsided or been destroyed. Public policy considerations are also involved in the right to surface preservation. Land will continue to increase in value as our population grows, because food, fiber, and recreational areas will be in greater demand. It is in the public interest to preserve the surface in order to be able to satisfy these future demands.

"[S]trip-mining methods pose a threat to the future utility and beauty of the land." The ever-increasing demand for fuel and for consumer goods has created a strong demand for fossil fuels and minerals, placing a greater emphasis on mining. With an increase in mining, there may also be an increase in deeds that sever the minerals from the surface estate. When a deed severs the mineral rights from the surface estate, the surface owner's right to the preservation of the surface may conflict with the mineral owner's right to mine.

This comment deals with two questions that arise from the relation between the surface owner's common law right to the preservation of the surface and the mineral owner's right to mine. First, does the surface owner have a right to support from a mine beneath his land? Second, when is the surface owner entitled to have his surface preserved in its natural state, undisturbed by surface mining?

In attempting to answer these questions, one must keep in mind the various estates affected by a conveyance severing the minerals from the surface. Before any conveyance severs the mineral rights, the fee owner owns the surface and the minerals below to the center of the earth. The fee owner may sell the mineral rights while retaining the right to the surface, or he may sell the surface with a reservation of the mineral rights.


Thus, property law recognizes three estates in the land: The surface estate; the mineral estate; and a "third estate"—the right to support. The grant or exception in the deed should limit and define the surface and mineral estates. When the grant or reservation does not define or limit those estates, a reasonable approach is to decide each case upon the language of the grant or reservation, the surrounding circumstances, and the grantor's intent. Usually, the surface estate includes the whole subsoil that lies above the minerals. The mineral estate includes every stone and rock deposit of metallic or nonmetallic substances. Generally, sand, gravel, and clay are not part of the mineral estate, because they are a part of the soil.

II. THE RIGHT TO SUBJACENT SUPPORT

A. In General

The right to subjacent support is the right to have the surface remain supported in its natural state by the underlying strata. Every stratum owes a duty of support to the overlying strata, and is entitled to support from the underlying strata.

This right to subjacent support becomes important to the surface owner when the mineral owner engages in underground mining. The access to underground mines may be by shaft, slope, or drift openings.


4. See Ramage v. South Penn Oil Co., 94 W. Va. 81, 118 S.E. 162 (1928). The court noted that the term "surface" is ambiguous when used as the subject of a conveyance.

5. Kinder v. La Salle County Carbon Coal Co., 310 Ill. 126, 141 N.E. 537 (1923); Ramage v. South Penn Oil Co., 94 W. Va. 81, 118 S.E. 162 (1928).


8. Farrell v. Sayre, 129 Colo. 358, 270 P.2d 190 (1954) (word minerals when found in a reservation does not include the ordinary soil); Kinder v. La Salle County Carbon Coal Co., 310 Ill. 126, 141 N.E. 537 (1923); Holloway Gravel Co. v. McKowen, 200 La. 917, 9 So. 2d 228 (1942) (parties' intent was not to include sand and gravel); Hendler v. Lehigh Valley R.R., 209 Pa. 256, 58 A. 488 (1904); Heimatz v. Allen, 147 Tex. 512, 217 S.W.2d 994 (1949); Guinn v. Acker, 451 S.W.2d 549 (Tex. Civ. App. 1970); Rock House Fork Land Co. v. Raleigh Brick & Tile Co., 93 W. Va. 20, 97 S.E. 684 (1918) (clay was not within grant because it could not be secured by ordinary mining processes of tunneling); see Elkhorn City Land Co. v. Elkhorn City, 459 S.W.2d 762 (Ky. 1970) (landfill materials do not constitute minerals, and sandy clay loam and sandy shale were not considered minerals); Little v. Carter, 408 S.W.2d 207 (Ky. 1966) (limestone was considered a part of the soil and was not included in a mineral reservation).


10. Marquette Cement Mining Co. v. Oglesby Coal Co., 253 F. 107, 111 (N.D. Ill. 1918) (right of support is vital to the owner of the overlying surface and strata); Lenox Coal Co. v. Duncan-Spangler Coal Co., 265 Pa. 572, 109 A. 282 (1920) (mining operations must be so conducted as to leave intact the superincumbent estate); 6A American Law of Property, § 28.36 (A. J. Casner ed. 1954; Comment, Subsidence Regulation, 6 Land & Water L. Rev. 543 (1971).
with some mines employing a combination of these. There are three methods of underground mining: Room and pillar mining; long wall mining; and bord and pillar mining. Of these, the room and pillar method is most frequently used in the United States. Under this method, coal is mined by driving a series of tunnels through the coal seam in two directions at right angles, dividing it into blocks. Then, rooms are worked off of these large tunnels that are driven in solid coal. Intervening pillars of coal are left to support the overlying rock. After the area has been mined to its limit, the pillars of coal may be removed. As a result of removing the pillars, the overlying rock strata may collapse; and the earth gradually subsides, creating cracks and breaks in the surface land. This will render the land unusable for agricultural purposes; moreover, it will cause damage to the buildings on the land and destroy sources of water.

The percentage of coal recovered from a minable seam depends on several factors. Where coal reserves are large, the percentage of coal to be extracted is primarily decided by consideration of the number and size of protective pillars of coal thought necessary to support the roof safely and the percentage of pillar recovery. In such instances, between 30 and 50 percent of the coal may be left behind in the form of pillars. Thus, a sizable percentage of coal cannot be mined. As an alternative, artificial supports, such as timber props or rock bolts, may be used to support the surface. But artificial support is limited, where possible, to permanent openings. Moreover, artificial supports can be expensive, and timber props may rot out after a period of years.

B. Historical Origins

The right to subjacent support originated in England. In Harris v. Ryding, the grantor conveyed the surface, reserving extensive powers to enter, and to search for and mine minerals. The court said the reservation entitled the grantor to withdraw minerals only if he left proper support for the surface. This was the beginning of the English view that the owner of the surface estate is entitled to support from the owner of strata below ex jure naturae. In his opinion, Baron Parke recognized that a reservation should be strictly construed, but he also said that the meaning and intent of the parties govern. He reasoned that because the grantor intended the surface to be fully held and enjoyed by the grantee, he also intended to leave reasonable support for the surface. If the grantor removed all the coal, the grantee would not have the proper enjoyment of

11. 5 Encyclopaedia Britannica, Coal & Coal Mining 965 (1973).
13. 5 Encyclopaedia Britannica, Coal & Coal Mining 966 (1973).
14. Id.
15. 7 Encyclopaedia Americana, Coal 143, 152 (1973).
16. Id. at 153.
18. Id.
his estate. However, the court decided the case upon a demurrer, so that it considered a declaration alleging careless, negligent, and improper workmanship to be admitted. Therefore, the court did not consider whether the right to support was absolute.

In the later case of Humphries v. Brodgen, no deed or evidence was available to determine the rights of the surface or mineral owners. The court held that the mineral owner has the duty to leave sufficient support for the surface so that it will remain in its natural state. The court used the principle of lateral support as an aid in determining that the right to subjacent support exists. The principle of lateral support says that an adjoining landowner may not dig his land so as to cause the land of another to subside. Furthermore, the right to lateral support from adjoining land is a right of property passing with the soil and not by grant. Thus, when the owner of adjoining lots conveys one away, the grantee is entitled to lateral support from the other lot, although there is no grant for that purpose. The basic reason for lateral support is that it is essential for the protection and enjoyment of property and is in accordance with the precept that one is not to use his land so as to injure another.

The court felt the same reasons were applicable where the conveyance separated the surface and the minerals. If the surface did not receive support analogous to lateral support, the surface owner could not securely enjoy his property. Moreover, the court found a right to support even in the absence of an allegation of negligence. The court was careful, however, to distinguish this case from one where the parties' rights had been varied by deeds.

Later cases accepted the subjacent support doctrine, but stated that the deed could vary the prima facie rights of the surface owner. Thus, the general English rule became that where the surface and mining rights were severed, the surface owner had a right to the subjacent support of his land, unless the deed effecting the severance contained an express provision to the contrary.

21. Id. at 31.
22. Id. at 33.
24. Id. at 1050.
27. Id. at 1050.
28. Id.
29. Id. at 1054.
30. Id.
31. See Dugdale v. Robertson, 69 Eng. Rep. 1289 (Ch. 1857); Smart v. Morton, 119 Eng. Rep. 393 (Q.B. 1855). Both cases recognized that the surface owner could waive his right to support by express stipulation. See Proud v. Bates, 13 L.T.R. (n.s.) 61 (Ch. 1865) (required a plain, clear, and distinct intent before the right to surface support will be waived in a lease).
32. See Love v. Bell, 9 App. Cas. 286 (H.L. 1885); Rowbotham v. Wilson, 11 Eng. Rep. 463 (H.L. 1869) (mine owner had the right to remove the support). Both cases were decided under the Private Inclosure Act of 1770, 9 Geo. 3, c. 29, § 3.

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C. The Development of the Right to Subjacent Support in the United States

When the surface has been severed from the mineral estate, the courts in the United States have followed the English rules on subjacent support. In Jones v. Wagner, one of the earliest cases in the United States to adopt the doctrine, the Pennsylvania Supreme Court emphasized the ability of the English courts and their experience in the practical aspects of mining. The court stated the English rule to be that where there is no contract to the contrary, the mining property is subservient to the surface to the extent of sufficient support to sustain the surface. In Marvin v. Brewster Iron Mining Co., the New York court recognized, as a right of property, the surface owner's right to have minerals left in place under the land in such a way as to support the surface in its natural state. The court compared the right of subjacent support to that of lateral support, and found them to be similar.

Thus, the general rule on subjacent support in the United States is that, when the surface and mineral estates have been severed, the surface owner has a right of support for his land, unless the conveyance or contract provides otherwise. Moreover, in the absence of a deed to the contrary, the right to subjacent support is absolute; it is no defense that the mineral owner has exercised the highest degree of care in removing the minerals.

33. 66 Pa. 429 (1870).
34. Id. at 434.
35. 55 N.Y. 538, 556 (1874). The court placed considerable reliance on English law in its discussion of the rights of the mineral owner to use the surface for mining operations.
36. Id. at 557.
38. Republic Iron & Steel Co. v. Barter, 218 Ala. 369, 113 So. 749 (1928); Corona Coal Co. v. Thomas, 212 Ala. 56, 101 So. 673 (1924); Lloyd v. Catlin Coal Co., 210 Ill. 460, 71 N.E. 335 (1904); Collins v. Gleason Coal Co., 140 Iowa 114, 115 N.W. 497 (1908); Audo v. Western Coal & Mining Co., 99 Kan. 454, 162 P. 344 (1917); Western Ky. Coal Co. v. Dilback, 219 Ky. 783, 294 S.W. 478 (Ct. App. 1927) (dictum); Southwest Missouri R.R. v. Big Three Mining Co., 138
The American cases, as they have developed, have used four theories to find a right of subjacent support. First, some courts say that the surface owner is entitled to receive support from the minerals below ex jure naturae. This right is similar to the landowner's right in a flowing stream, which entitles him, as against his neighbor, to have the water flow in its natural condition. Both rights are based on natural justice. Second, under the maxim of "so use your property as not to injure the rights of another," some courts hold that the owner of the mineral estate cannot use his property to interfere with the use of the surface. If removing all the minerals will injure the surface, then the mine owner must leave sufficient minerals to support the surface, or erect artificial supports. Third, some courts imply an easement in favor of subjacent support. The right to mine is subservient to the surface owner's right to have the surface perpetually sustained in its natural state. Thus, the right to mine can only be enjoyed to such an extent as will not cause injury to the dominant estate, the surface. Fourth, some courts say that the right to surface support is a part of the freehold and not an easement. The surface owner is entitled to surface support as a proprietary right. Surface support is a part of the realty, the same as the surface soil, the subsoil, the water, the rocks, and the minerals.

Usually, it is unimportant which theory a court uses to find the right for surface support.
of subjacent support. Rarely does the court rely exclusively on any one theory; most courts prefer to enumerate several of the theories as reasons for adopting the general rule on subjacent support. The theory the court adopts could make a difference, however, in determining whether the surface owner has parted with his right to subjacent support. For instance, the maxim of "so use your property as not to injure others" relates to the enjoyment of property, rather than absolute ownership. A court may require less evidence to find a waiver of support when a rule governing the enjoyment of property is involved than when a property right is involved.

Although the general subjacent support rule appears to protect the surface estate, it should be noted that this protection may be illusory in a state that follows the minority rule in determining when the surface owner's cause of action accrues and when the statute of limitations begins to run. The minority rule developed in Pennsylvania, where the courts hold that the cause of action accrues and the statute of limitations begins to run when the underlying support is removed. The practical effect of this holding may be to render the subjacent support rule ineffective. In Pennsylvania, for instance, if insufficient support causes the surface to subside six years after the mining occurred, the six-year statute of limitations will bar the surface owner from suing. This places an almost impossible burden on the surface owner, who has the burden of proving that the unmined portion of the mineral is insufficient to support his land. Under this rule, the court must decide whether or not the mineral owner has violated his duty of support before subsidence occurs. It is no defense that the surface owner was ignorant of the condition of insufficient support. This rule may not produce as much hardship as expected, however, because apparently most of the subsidence will occur within two or three years after removal of the minerals.

The majority rule is that a cause of action does not accrue and the statute of limitations does not begin to run until the surface has actually been damaged. Thus, the surface owner's cause of action arises when

47. See Burgner v. Humphrey, 41 Ohio St. 340, 353 (1884).
49. Id. This maxim applies equally to owners of all types of estates in land and has no special force when applied to surface and subjacent estates in land.
52. Id. at 122-23.
53. Comment, supra note 19, at 886.
54. Id.
the surface subsides, because that is when his enjoyment of the surface has been disturbed. The majority rule is consistent with general subjacent support rules and is the more equitable rule.

C. Waiver or Release of Subjacent Support

As with any other right, the owner of the surface may waive or release his right to subjacent support. Express waiver may occur in three manners. The simplest way is for the fee owner to convey his mineral rights to the grantee and expressly waive his right of support. Secondly, the fee owner may convey the surface, reserving the minerals and stipulating for a release of subjacent support in the conveyance. Finally, the surface owner may release or waive his right to support in an appropriate writing after the severance of the mineral estate. An express waiver of subjacent support will be enforced according to its terms, unless it is contrary to some law or public policy.

The surface owner may also waive his right to subjacent support by implication. The courts, however, are protective of the right to subjacent support, and carefully construe deeds to prevent the destruction of surface rights. For example, some courts have implied a covenant to protect the surface solely from the nature of the transaction, even though the


56. Comment, supra note 51, at 118.


59. Madden v. Lehigh Valley Coal Co., 212 Pa. 63, 61 A. 559 (1905); Comment, supra note 19, at 837.

60. Comment, supra note 19, at 837.


deed contained no words to that effect. Generally, the courts require that the language of the deed or conveyance be clear and distinct before they will find a waiver of the right to subjacent support.

In some cases, it may make a difference with respect to finding an implied waiver of subjacent support whether the grantor conveys the surface estate reserving the mineral estate, or whether he grants the minerals with a reservation of the surface. When the deed is ambiguous or the parties' intent unascertainable, a useful rule of construction is that the deed is to be construed more strongly against the grantor or the party drafting it. Where the grantor has drafted the deed and sold the surface without expressing a waiver of subjacent support, construing the deed most strongly against him would tend toward a finding of no waiver of subjacent support. Generally, the grantor may do nothing to injure the estate he conveys. To allow him to remove the subjacent support would be in derogation of his grant. So, when the grantor sells the surface and reserves the minerals in general terms, there may be an implied covenant to mine so as to avoid materially damaging the surface. On the other hand, when the grantor grants the minerals and reserves the surface in a deed that he drafted, there is a possible argument that he thereby waives subjacent support. Because the surface owner failed to reserve the right to subjacent support, the grant may be strictly construed against him to allow the owner of the mineral estate to remove all the minerals without leaving subjacent support. Some courts have refused to make this distinction, and hold it is immaterial whether the two interests have been created by a conveyance of the surface with a mineral reservation,

63. Catron v. South Butte Mining Co., 181 F. 941 (9th Cir. 1910); see Evans Fuel Co. v. Leyda, 77 Colo. 356, 236 P. 1023 (1925); Campbell v. Louisville Coal Mining Co., 39 Colo. 379, 89 P. 767 (1907); Mickle v. Douglas, 75 Iowa 78, 39 N.W. 198 (1888); Dignan v. Altoona Coal & Coke Co., 222 Pa. 390, 71 A. 845 (1909) (the court found a reservation of the right of subjacent support).


67. Id.
or by a grant of the minerals with a reservation of the surface. In either case, the presumption arises that the owner of the minerals is not to injure the owner of the soil above. The ordinary rule that the grant is to be more strongly construed against the grantor is reversed by the rigid requirement that a waiver be clearly expressed or necessarily implied.

In determining whether there has been an implied waiver of the right to subjacent support, the normal approach is that the parties' intention must govern. If the court finds the parties intended to waive subjacent support, it will effectuate that intent. The court will not, however, infer an intent to waive the right to surface support unless the language necessarily imports such a result.

An express reservation or grant of the usual mining rights and privileges will not support an inference of waiver of surface support. Usual mining rights include the following rights: To explore for minerals; to mine and remove the minerals; to enter and exit in order to get at the minerals; to construct a shaft; to erect roads; and to use a reasonable portion of the surface for mining facilities. These rights refer only to the right to get at the minerals and remove them; they have nothing to do with the right to subjacent support. Moreover, even if the parties fail to provide for these rights in the deed, a court will infer them on the principle that when a thing is granted, all the means to obtain it are also granted. Thus, the expression of mining rights, which would otherwise be implied, should not imply any intent to waive subjacent support.

Similarly, a grant or reservation to the mineral owner of the right to use the surface is insufficient to indicate an intent to waive subjacent support. The use of the surface gives certain rights that are indispensable to carrying on mining operations, such as the rights to explore the surface, sink shafts, and erect structures. Again, this may only show a right to get at the minerals, and not a waiver of subjacent support. Also, a compensation clause for damage to the surface is insufficient indicia of an intention to waive subjacent support. In England, a compensation clause for damages to the surface applies only to acts done on the surface and to damages done by underground workings. Further, a covenant that releases the

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68. Catron v. South Butte Mining Co., 181 F. 941 (9th Cir. 1910); Burgner v. Humphrey, 41 Ohio St. 340 (1884).
74. Porter v. Mack Mfg. Co., 65 W. Va. 656, 64 S.E. 553 (1909); see Williams v. Gibson, 84 Ala. 228, 4 So. 350 (1888); Marvin v. Brewster Iron Mining Co., 55 N.Y. 538 (1874); Squires v. Lafferty, 95 W. Va. 307, 121 S.E. 90 (1924). When a court infers mining rights, it will still require subjacent support. Williams v. Gibson, 84 Ala. 228, 4 So. 350 (1888).
76. Id.
right to damages resulting from the exercise of mining rights and privileges does not indicate a waiver of subjacent support. Such a covenant refers to the proper exercise of mining rights and privileges in the development and operation of mines, and thus has no relation to subjacent support.

A sale or grant of all the coal with the right to mine and remove does not show a clear intention to waive subjacent support. A sale of all the coal is ambiguous. It may mean the sale of so much of the coal as can be mined subject to a condition of leaving sufficient artificial or natural support, or it may allow removal of literally all the coal. At any rate, such a sale fails to meet the requirement of a clear waiver of subjacent support. Thus, the sale will convey the entire body of coal subject to absolute support of the surface.

Likewise, a sale of the surface that reserves the coal with a right to mine and remove is insufficient to find an intent to imply a waiver. For, when the surface is sold, the grantor knows that the grantee may use the surface for farming or other purposes. By making such a grant, the grantor consents to these uses. The grantor also knows that with all the coal removed the surface will subside. To reserve rights inconsistent with the grantee's full enjoyment of the surface, the grantor must use unequivocal language. Because there is no such unequivocal language in a mere conveyance of the surface with reservation of mining and removal rights, there is no waiver of subjacent support. Furthermore, it is difficult to suppose that the parties contemplated a reservation of a right that would enable the grantor to render the subject matter of the conveyance useless. It takes more to find an implied waiver of subjacent support than a mere finding that it is otherwise impossible to mine all the coal.

In West Virginia, however, the courts have held that a deed conveying "all" the coal with the right to mine and remove "all" the coal implies the surface owner's clear intent to waive the right to subjacent support. The rationale is that it is inconceivable that one who purchases or reserves the surface would deliberately covenant for the removal of all the coal, if he were expecting the surface to be undisturbed.

Although the doctrine of waiver of subjacent support by use of the

79. Id.
82. Id.
83. Id.
magic word "all" has become firmly established in West Virginia,\textsuperscript{88} those courts hold that a clause granting all the coal with the right to mine and remove the "said coal" implies no intent to waive subjacent support.\textsuperscript{89} The words "said coal" in the mining clause may mean only so much of the coal as can be removed without injury to the surface, rather than all the coal.\textsuperscript{90} Thus, because the meaning of the words is subject to doubt and uncertainty, there is no clear and distinct intent to waive subjacent support.\textsuperscript{91}

A grant of all the coal with the right to mine and remove it without liability for damage to the surface may waive subjacent support in Pennsylvania.\textsuperscript{92} The words "waiving all damages" show a manifest intent to waive damages resulting from mining and removing all the coal.\textsuperscript{93} Such damages include those arising from a removal of subjacent support. The object of such language is to secure the right to mine all the coal without liability for damages.\textsuperscript{94} Likewise, a deed containing an exception of all the coal and minerals with a right to mine, a release of damages to the surface, and a release and discharge from any damages to the premises expresses a clear intent to waive subjacent support.\textsuperscript{95} However, a covenant that gives the lessee the right to mine in the most economical method and in accordance with state law will not enlarge rights to include a waiver of subjacent support.\textsuperscript{96}

From this discussion, it is apparent that the cases involving implied waiver of subjacent support fall into three categories. First, there is a grant or reservation of the minerals without mentioning surface support or damages to the surface resulting from mining and removal of the minerals.\textsuperscript{97} No waiver of surface support occurs in this situation, as it falls under the general rule that subjacent support is waived only expressly or by necessary implication.\textsuperscript{98} Second, the deed may contain a grant or reservation of coal coupled with mining rights and a waiver of damages resulting from proper exercise of mining privileges.\textsuperscript{99} Most courts hold this waiver has no reference to the right of subjacent support.\textsuperscript{100} If one

\begin{itemize}
\item \textsuperscript{88} Stamp v. Windsor Power House Coal Co., \textsuperscript{177} W. Va. \textsuperscript{146} S.E.2d (1970).
\item \textsuperscript{90} Winnings v. Wilpen Coal Co., 134 W. Va. 387, 59 S.E.2d 655 (1950).
\item \textsuperscript{91} Id.
\item \textsuperscript{93} Stilley v. Pittsburgh-Buffalo Co., 234 Pa. 492, 83 A. 478 (1912).
\item \textsuperscript{94} Kellert v. Rochester & Pitt. Coal & Iron Co., 226 Pa. 27, 74 A. 789 (1909) (per curiam).
\item \textsuperscript{95} Graff Furnace Co. v. Scranton Coal Co., 244 Pa. 592, 91 A. 508 (1914).
\item \textsuperscript{96} Lenox Coal Co. v. Duncan-Spangler Coal Co., 265 Pa. 572, 109 A. 232 (1919).
\item \textsuperscript{97} Stilley v. Pittsburgh-Buffalo Co., 234 Pa. 492, 83 A. 478 (1912).
\item \textsuperscript{98} Id.
\item \textsuperscript{99} Id.
\item \textsuperscript{100} Id.
\end{itemize}
can show, however, that the parties intended that the waiver of damages clause include damages from subsidence, a court may find a waiver of subjacent support. Third, a deed containing a grant or reservation of minerals with mining rights followed by a waiver of damages to the surface resulting from the removal of minerals waives subjacent support by implication.\textsuperscript{101}

III. THE RIGHT TO HAVE THE SURFACE UNDISTURBED BY SURFACE MINING

A. Introduction to Surface Mining

A brief description of surface mining is necessary to an understanding of the importance of the right to have the surface preserved. Simply stated, surface mining consists of removing the topsoil, rock, and other strata that lie above the minerals in order to get at the minerals and remove them.\textsuperscript{102} Surface mining includes five types of mining: Open pit mining; strip mining; auger mining; dredging; and hydraulic mining.\textsuperscript{103} Of these, this comment is primarily concerned with the most common—open pit, strip, and auger mining. The end result of surface mining is a drastic reshaping of the surface, as the protective, vegetative covering is destroyed and the soil and rock overlying the mineral deposit are frequently left in giant piles cast onto adjoining land.\textsuperscript{104} A real eyesore remains unless some type of reclamation program is undertaken. In the past, the strip mining of 4.4 billion tons of coal has distributed 2,450 square miles of land.\textsuperscript{105} An estimated 128 billion tons of coal remain available for strip mining.\textsuperscript{106} Such mining could result in disturbing 71,000 square miles of land—an area larger than Pennsylvania and West Virginia combined.\textsuperscript{107} Thus, surface mining will continue to be a controversial subject.

When the grantor expressly reserves or grants the right to surface mine, the court will enforce the instrument according to its terms in the absence of statutory inhibition, fraud, or other vitiating circumstances.\textsuperscript{108} On the other hand, the court will not allow surface mining when the instrument prohibits it. The problem arises when the deed gives broad mining rights, but says nothing expressly about the right to surface mine. In this situation, the court must infer the intent of the parties. The questions then become: (1) What factors will the courts consider in determining whether surface mining is permissible; and (2) will the courts favor the surface owner against the destruction of his estate?

B. Applicability of Subjacent Support Rules to Surface Mining

The rules on subjacent support may be useful in determining whether the deed grants the right to surface mine. While both surface and deep

\textsuperscript{101} Id.
\textsuperscript{102} U.S. DEP'T OF INTERIOR, SURFACE MINING AND OUR ENVIRONMENT 33 (1967).
\textsuperscript{103} Id.
\textsuperscript{104} Id. at 51.
\textsuperscript{106} Id.
\textsuperscript{107} Id.
or shaft mining impair the surface estate, surface mining does so much more severely: it virtually destroys the surface, whereas deep mining only damages the surface.\textsuperscript{109} If the surface owner has a proprietary right to subjacent support, he should have at least an equal right to the preservation of the surface.\textsuperscript{110} Furthermore, the retention of the right to subjacent support conflicts with the right to strip mine.\textsuperscript{111} The policy reasons that favor subjacent support apply equally to the right of surface preservation and form an integral part of that right. No person can properly enjoy his property if the surface has been destroyed. Thus, some courts in cases involving surface mining apply a rule similar to the subjacent support rule; namely, the surface owner has a right to have his surface undisturbed unless the deed provides to the contrary.\textsuperscript{112} Waiver of the right to surface preservation generally requires clear expression or necessary implication.\textsuperscript{113}

C. Interpretation of the Deed to Determine Whether the Right to Surface Is Implicit

The determination of whether the right to surface mine is implicit will usually involve the proper interpretation or construction of the terms of the deed.\textsuperscript{114} The parties' intent governs in determining whether surface mining is permissible.\textsuperscript{115} Several principles aid in ascertaining the parties' intent. The intention of the parties at the time the contract is executed governs.\textsuperscript{116} Moreover, the entire deed or contract must be read

\textsuperscript{111} Note, Construction of Deeds Granting the Right to Strip Mine, 40 U. Cin. L. Rev. 304, 312 (1971).
and given a reasonable interpretation.\footnote{117} One standard of interpretation is to interpret the provisions of the deed as would a reasonably intelligent person, acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the contract.\footnote{118}

When the written instrument is ambiguous, the courts frequently construe it more strongly against the grantor\footnote{119} or the party drafting it.\footnote{120} When the deed uses the grantor's words, he should be responsible for the language.\footnote{121} Because the grantor usually has control over the drafting of the instrument, a doubtful reservation or exception in a deed will be construed most strongly against him and in favor of the grantee.\footnote{122} On the other hand, if the grantee of the mineral estate (usually a mining company) prepares the deed, it should be most strongly construed against the grantee for the same reason.

The courts sometimes refuse to construe an instrument more strongly against the drafting party where a policy reason appears for not doing so. Thus, one court refused to use the rule to enlarge the rights of the grantee when it would have meant resolving ambiguities in favor of permitting strip mining.\footnote{123} This court recognized that rules of construction are valuable aids of interpretation, but refused to make a contract that the parties did not intend.\footnote{124} Finally, of course, this rule of construction does not apply when the deed contains no ambiguity.\footnote{125}

2. Circumstances Surrounding the Execution of the Deed

One important factor in finding the parties' intent is the set of circumstances existing at the time the deed was executed.\footnote{126} If the deed is ambiguous, all the circumstances existing at the time of execution should aid in determining the intent of the parties.\footnote{127} For example, a court may refuse to imply the right to strip mine if strip mining was an unknown method of mining when the contract was made.\footnote{128} On the other


\footnote{119} Buchanan v. Watson, 290 S.W.2d 40 (Ky. 1956); McIntire v. Marian Coal Co., 190 Ky. 342, 227 S.W. 298 (1921); Comment, Broad Form Deed—Obstacle to Peaceful Co-existence Between Mineral and Surface Owners, 60 Ky. L.J. 742, 747 (1972).


\footnote{121} Kentucky Diamond Mining & Development Co. v. Kentucky Transvaal Diamond Co., 141 Ky. 97, 132 S.W. 397 (1910); Comment, supra note 119, at 747.

\footnote{122} Kentucky Diamond Mining & Developing Co. v. Kentucky Transvaal Diamond Co., 141 Ky. 97, 132 S.W. 397 (1910); Comment, supra note 119, at 747.


\footnote{124} Id.

\footnote{125} Comment, supra note 119, at 748.


hand, one court allowed open pit mining because the surface owner knew the character of the minerals recovered, manner of occurrence, and mode of mining in the locality.\textsuperscript{129} Other courts have implied the right to mine by the open pit method where surface mining was a known method of mining when the contract was made.\textsuperscript{130} The argument in favor of this result is that the broad mining clause gave the mineral owner the right to remove the minerals by any method of mining, and the parties' failure to exclude surface mining, a known method, indicates their intent to permit surface mining. A countervailing argument is that if surface mining was known in the locality and the parties intended it, they could easily have provided for this method of mining in the deed.\textsuperscript{131}

If both parties know that one is acquiring or reserving the surface for forestry or agricultural purposes, the circumstances show no intent to allow surface or strip mining.\textsuperscript{132} When both parties know the land has a high value for agricultural or recreational purposes, and they fail to make express provision for strip mining in the deed, strip mining should not be implied. It is unreasonable to infer that the surface owner would consent to the destruction of his valuable land. On the other hand, if the land has a low value or utility, the court may be more willing to infer that the parties intended the right to strip mine since the value of the minerals probably greatly outweighs the value of the land. Although the utility or quality of the land is a relevant factor, it will not by itself determine whether a court will infer the right to strip mine.\textsuperscript{133}

3. Effect of Waiver of Subjacent Support

Language that waives subjacent support shows no intent to permit strip mining.\textsuperscript{134} There is a substantial difference between damage resulting from the subsidence of the surface and the total destruction that strip mining inflicts. Furthermore, language allowing removal of subjacent support refers to tunnel or shaft mining and, without words of qualification, cannot be distorted into referring to strip mining.\textsuperscript{135} In Pennsylvania,

\textsuperscript{129} English v. Harris Clay Co., 255 N.C. 467, 35 S.E.2d 329 (1945).


\textsuperscript{131} Comment, supra note 119, at 749.


\textsuperscript{133} Comment, supra note 119, at 749.


\textsuperscript{135} Merrill v. Manufacturers Light and Heat Co., 409 Pa. 68, 185 A.2d 573 (1962) (release of the surface support was insufficient to imply an intent to strip mine).
however, a general waiver of surface support has been found to imply the right to strip mine.\textsuperscript{136}

4. Effect of Grant of Mining Rights

Language that conveys the right to mine and remove minerals by underground mining does not allow removal by strip mining.\textsuperscript{137} Moreover, language to the effect that mining rights are not to interfere with agricultural purposes may indicate an intent to deny strip mining.\textsuperscript{138} When the deed only gives the right to shaft or deep mine, the release of liability for injury to the surface refers only to deep mining and is inapplicable to damage caused by strip mining.\textsuperscript{139} Mining rights that, at the time of their creation, limit, regulate, and govern operations and methods that are engaged in chiefly beneath the surface do not allow the removal of the overlying surface.\textsuperscript{140} Again, there is a distinction between an imposition of a necessary burden on the surface of the land containing minerals and the destruction of that surface. Finally, it is insufficient that only the wording of the grant of mining rights supports a construction that strip mining is permissible; rather, the entire instrument must support that construction.\textsuperscript{141}

Frequently, the mineral owner argues that the right to strip mine is implicit where the deed gives comprehensive rights and privileges with the right to use the surface. Most deeds that sever the surface and mineral estates contain a “use” clause specifying what the mineral owner may do upon the land. Further, even if the deed lacks such a clause, courts will imply one.\textsuperscript{142} The miner will contend that the right to use the surface includes the right to scrape it off and get the minerals out.\textsuperscript{143} To strengthen his contention, the mineral owner will point out that the minerals can only be removed by strip mining. Without more, however, courts are reluctant to accept this argument. One court said that the “use” of the surface cannot mean destruction of the surface and, therefore, refused to imply strip mining.\textsuperscript{144} Moreover, “use” and comprehensive mining rights clauses usually contain technical verbiage that applies only to a particular type of mining. There is also a distinction between the ownership of minerals and the ownership of mining rights.\textsuperscript{145} The mineral owner may


\textsuperscript{137} Stewart v. Chernicky, 439 Pa. 43, 266 A.2d 259 (1970); Rochez v. Duricka, 374 Pa. 262, 268, 97 A.2d 825, 827 (1953) (“if they intended to speak about strip mining they would not use the language which applies peculiarly to underground mining”).


\textsuperscript{139} Stewart v. Chernicky, 439 Pa. 43, 266 A.2d 259 (1970) (concluding that a clause providing for ventilation in the mine referred to shaft or deep mining).


\textsuperscript{142} Cole v. Ross Coal Co., 150 F. Supp. 808 (S.D.W. Va.), affd, 249 F.2d 600 (4th Cir. 1957).

\textsuperscript{143} Barker v. Mintz, 73 Colo. 262, 215 P. 534 (1923).

\textsuperscript{144} Id.

own all the minerals and still be unable to remove them because of a limitation on the mining rights. Thus, the parties' intent in inserting a comprehensive mining rights clause in the deed may be to rule out such a limitation, rather than to permit strip mining. For these reasons, the right to use the surface does not display a clear and distinct intent to imply surface or strip mining.

But, absent limiting words or circumstances of the types just discussed, the right "to mine, excavate, and remove" may be broad enough to include any method of recovering the coal. Further, if the parties fail to mention deep mining and auger mining in the deed, the court may feel that their failure to mention strip mining is insignificant. Since the parties neither expressed nor excluded any method of mining, any method may be employed. In addition, circumstances at the time of execution of the deed may show that the parties had no intention of excluding strip mining as a method of mining.

Similarly, a conveyance or reservation of the full enjoyment of mineral rights with no restrictions as to the method of severing the coal may imply that the mineral owner has acquired the right to remove the minerals by any method. When the cumulative effect of the provisions of a deed is to give the mineral owner the right to excavate and remove all the coal anywhere on the surface by any method, old or new, the result is an implied release of the right to the preservation of the surface. Moreover, one court has inferred the reservation of the right to strip mine from a provision reserving all the coal in and under the surface of the land with the right to enter and mine without liability and a provision waiving surface support. In another case, a deed conveying the minerals in, on, and under the property with the right to mine them gave the mineral owner the right to quarry them. This language was not limited to shaft mining because little reason exists for sinking a shaft to obtain minerals found on the surface. Thus, the term "mine" may include methods of mining other than shaft mining.

Where a conveyance made before the development of the strip mining technology contains a grant of mining rights, there is an argument that such a grant is broad enough to allow use of an after-discovered, improved mining method. It is arguable, however, that strip mining is not an improved method because of its tremendously injurious effect.

Moreover, mining rights that were intended to limit, regulate, and govern methods of underground mining should not permit the removal and relocation of the overlying surface. Thus, when the parties contemplated only deep mining, a grant of mining rights should not be extended to include mining by an injurious, improved method such as strip mining. However, no rule of law precludes the mineral owner from using mining methods that modern machinery and inventions make possible.

5. Kentucky Broad Form Deeds

The Kentucky courts have been very liberal in permitting strip mining where the parties failed to mention it in the deed. They have developed a special rule for the interpretation and construction of broad form deeds, which were developed in the early 1900's for the acquisition of minerals. Broad form deeds, which are usually standard forms prepared by the mineral purchaser, give the mineral purchaser broad and comprehensive rights. First, he gets the right to remove all the coal in, on, and under the surface. Second, he gets the right to use the surface in any and every manner that may be necessary or convenient for mining. Finally, he receives the grantor's complete waiver of rights to any surface damages that the enjoyment of these mining rights might cause.

Although the broad form deed neither expressly excludes nor includes strip mining, the Kentucky courts construe it as giving the mineral owner the right to strip mine. By looking at all the provisions in the deed, the courts find that the parties intended the grantor's reserved estate in the surface to be subservient to the grantee's dominant estate. Thus, the mineral owner's right to use the surface is dominant. Furthermore, the courts consider the conveyance of all the coal to be the principal purpose.

In Buchanan v. Watson, 290 S.W.2d 40, 41, 42 (Ky. 1956), the broad form deed severed the minerals and conveyed:

[P]roperty, rights and privileges, in, of, to, on, under, concerning and appurtenant, ... [a]ll the coal, minerals and mineral products ... such of the standing timber as may be, or by the Grantee, his heirs or representatives, its successors, or assigns, be deemed necessary for mining purposes ... [The grantee may] use and operate the same and surface thereof ... in any and every manner that may be deemed necessary or convenient for mining, and therefrom removing ... and in the use of said land and surface thereof by the Grantee, his heirs or representatives, successors and assigns, shall be free from, and is, and are, hereby released from liability or claim of damage to the said Grantor ...

160. See Martin v. Kentucky Oak Mining Co., 429 S.W.2d 395 (Ky. 1968); Croley v. Round Mountain Coal Co., 374 S.W.2d 852 (Ky. 1964); Blue Diamond Coal Co. v. Campbell, 371 S.W.2d 483 (Ky. 1963); Wright v. Bethlehem Minerals Co., 368 S.W.2d 179 (Ky. 1963); Ritchie v. Midland Mining Co., 347 S.W.2d 549 (Ky. 1961); Kodak Coal Co. v. Smith, 338 S.W.2d 699 (Ky. 1960); Blue Diamond Coal Co. v. Neace, 337 S.W.2d 725 (Ky. 1960); Bevander Coal Co. v. Matney, 320 S.W.2d 301 (Ky. 1959).
161. Buchanan v. Watson, 290 S.W.2d 40 (Ky. 1956).
of the deed. Thus, if strip mining is the only feasible method for removing all the coal, the courts will permit it, even where the parties contemplated another method when they executed the deed. Thus, the Kentucky courts consider the mineral owner's right to use the surface paramount, unless he exercises that right oppressively, arbitrarily, wantonly, or maliciously. In the latter event, the surface owner may recover his damages.

In *Martin v. Kentucky Oak Mining Co.*, there was a strong dissent to the Kentucky rule. The dissent's major argument was the parties could not have intended the broad form deed to mean that the mineral owner could destroy the value of the surface for farming and other purposes. In answer to this contention, the majority pointed out that farmers and fields were few when the contracts were made. In addition, most of the landowners received nearly the full value of the land in exchange for the mineral rights. This indicated that the landowners chose to retain bare title simply for what little value, if any, it might have.

The dissent further pointed out that when most of these deeds were executed, strip mining was unknown. Because the parties never thought of strip mining and never dreamed of surface destruction, the grantee should have no right to strip mine. Moreover, shaft mining was the prevailing form of mining at the time the deeds were made. Thus, the parties arguably intended to give the grantee a right to use the surface for any purpose necessary or convenient in shaft or tunnel mining. Kentucky courts are wrong in failing to distinguish between shaft and strip mining, as well as in ignoring all surface owner rights.

Another possible way of reaching a result contrary to that reached by the Kentucky rule is to apply the normal rule of construction that a deed should be more strongly construed against the party drafting it. The Kentucky courts, however, fail to realize that the grantees' attorneys prepared many of these broad form deeds. Because the grantee's draftsman caused the uncertainty to exist, the deeds should be construed against the mineral owner. Further, it would be a simple matter to include the right to

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162. Id.
163. Id.
164. Id.
166. Id. (dissenting opinion).
167. Id.
168. Id.
169. Id. (dissenting opinion).
170. Id. (dissenting opinion). The dissent pointed out that before Buchanan v. Watson, 290 S.W.2d 40 (Ky. 1956), a long line of cases had held that grantees under similar broad form deeds had a right to use the surface for any purpose deemed necessary or convenient by the grantee. All these cases, however, involved deep mining, which was the method of mining contemplated by the parties in 1905.
171. Id. (dissenting opinion).
173. Id. at 749.
strip mine in the deed. Therefore, the burden of the failure to include such a provision should fall on the party who prepared the deed.

Ultimately, however, the most important factor supporting the Kentucky position may be one that is not based on the legal considerations mentioned above. Strip mining of bituminous coal is vital to the well-being of the coal industry. This economic consideration may be the real basis for the Kentucky decisions.

IV. SURFACE PRESERVATION V. STRIP MINING

A. Is the Judicial Attitude Toward Surface Preservation a Desirable Public Policy?

Strip mining causes many problems. It destroys the surface, leaving it useless for agricultural production. The spoil banks from strip mining present further economic and aesthetic problems. Their steepness creates a serious erosion problem. They may also initiate land slides and contribute excessive amounts of silt to streams. Many are high in chemicals that pollute streams after a rainfall. They ruin the aesthetic value of the land as deep pits and slag heaps are often left in view. Without natural vegetation, the area becomes a virtual desert for wildlife. Also, the value of adjoining property may decline. Finally, reclamation, if possible at all, will take many years.

These factors indicate that a desirable public policy supports the court's general refusal to imply a right to strip mine. Furthermore, because of "the annual increase in the rate of strip mining, the steady increase in the size and capacity of strip mining machinery, and the enormous amount of coal potentially recoverable by strip mining methods, strip mining methods pose a clear threat to the future utility and beauty of land throughout the country."

On the other hand, there are considerations favoring strip mining. The reality of a fuel shortage is one example. With the increased population and use of manufactured products and electrical appliances, there will be a strong demand for fuels and minerals of all types, especially coal. Also, strip mining is more economical than shaft mining. In strip mining, output per man-day is roughly 100 percent higher than in underground mining, and average recovery is 60 percent higher with 25-30 percent lower operating expenses. Usually, the value of the coal removed from most strip mining sites is many times the agricultural value of the land. Thus, the mineral owner may suffer severe financial consequences if he is unable to get what he bargained for.
B. Possible Solutions for the Conflict

The simplest solution would be to prohibit strip mining and surface mining. This is unrealistic, however, considering the nation's enormous mineral reserves and increasing demand for fuel. Another possibility would be to require an express waiver of subjacent support or an express grant of the right to strip mine before allowing damage to the surface. Although such a rule could not be retroactive, it could be applicable to future deeds. If the parties intend to give such destructive rights, they should do so expressly. It is a simple procedure to include such rights in the deed. If a provision to strip mine was accidentally left out, the injured party could seek reformation. Another solution would be to require the mineral owner to own the entire fee before allowing surface mining. This would only eliminate the harsh consequences to the surface owner, however. At the least, it is only fair that the surface owner receive fair compensation for the destruction of the surface unless he expressly waives that right. Subsidence regulations and reclamation acts may aid in solving these problems and may also change the common law rules.\(^{180}\)

V. CONCLUSION

In most jurisdictions, the surface owner has a right, unless waived, to subjacent support. For a waiver, the courts require clear expression or necessary implication. The right is absolute, and thus there is a presumption against its waiver. The parties' intent governs, and the burden is on the mineral owner to show that the parties intended to absolve him from any damages arising from the removal of the minerals. The common law right to subjacent support will remain one of the surface owner's important rights. In addition, some states may enact subsidence statutes codifying this right.

Similarly, courts will continue to protect the surface owner from destruction of the surface. Further, most modern courts will continue the strong presumption against surface mining. For practical purposes, the courts will allow strip mining only when it is expressly mentioned, because courts will construe grants, reservations, and circumstances surrounding the deed against the implication of strip mining. With the added emphasis on the environment and in view of a recent dissenting opinion, the Kentucky rule implying a right of surface mining from the language in broad form deeds may be qualified and limited in the future. Outside of

\(^{180}\) See, e.g., 444.500-755, .760-786, RSMo 1971 Supp. There is strong possibility that Congress will enact laws governing surface mining in the near future. The House of Representatives passed the Coal Mine Surface Area Protection Act of 1972, H.R. 6482, 92d Cong., 2d Sess. (1972), on October 11, 1972, by a 265 to 75 rolcall vote. This bill authorized the Secretary of Interior to approve or disapprove permit applications for surface mining. Furthermore, it required that the Secretary disapprove permits in areas with slopes greater than 20 degrees unless the operator shows that environmental damage will not result and that the land is reclaimable. It was said that this provision could shut down half the mines in the Appalachian Mountains. However, the Senate took no action on a related bill, Surface Mining Reclamation Act of 1972, S. 630, 92d Cong., 2d Sess. (1972), before adjournment. These bills could change the common law significantly.

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