

ORIGINAL

In the  
Supreme Court of Ohio

RONALD M. SNYDER, <i>et al.</i> ,	:	Case No. 2012-1723
	:	
Plaintiffs-Appellants,	:	On Appeal from the
	:	Jefferson County Court of Appeals,
v.	:	Seventh Appellate District
	:	
OHIO DEPARTMENT OF NATURAL	:	Court of Appeals Case
RESOURCES, <i>et al.</i> ,	:	No. 11 JE 27
	:	
Defendants-Appellees.	:	

MERIT BRIEF OF APPELLEES  
OHIO DEPARTMENT OF NATURAL RESOURCES AND STATE OF OHIO

JOHN K. KELLER\* (0019957)  
*\*Counsel of Record*  
 PHILLIP F. DOWNEY (0040308)  
 WILLIAM A. SIECK (0071813)  
 Vorys, Sater, Seymour and Pease LLP  
 52 East Gay Street  
 P.O. Box 1008  
 Columbus, Ohio 43216-1008  
 614-464-6400  
 614-464-6350 fax  
 jkkeller@vorys.com

Counsel for Plaintiffs-Appellants  
 Ronald M. Snyder and Steven W. Neeley

MICHAEL DEWINE (0009181)  
 Ohio Attorney General  
 ALEXANDRA T. SCHIMMER\* (0075732)  
 Solicitor General  
*\*Counsel of Record*  
 MICHAEL J. HENDERSHOT (0081842)  
 Chief Deputy Solicitor  
 MEGAN DILLHOFF (0090227)  
 Deputy Solicitor  
 30 E. Broad Street, 17th Floor  
 Columbus, Ohio 43215  
 614-466-8980  
 614-466-5087 fax  
 alexandra.schimmer@ohioattorneygeneral.gov

Counsel for Appellees  
 Ohio Department of Natural Resources  
 and State of Ohio

FILED  
 JUN 18 2013  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

## TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	iii
INTRODUCTION.....	1
STATEMENT OF THE CASE AND FACTS.....	2
A.    The State of Ohio operates the Brush Creek Wildlife Area to promote local wildlife for the benefit of hunters and other citizens.....	2
B.    Ronald Snyder and Steven Neeley own the subsurface coal beneath a portion of the Brush Creek Wildlife Area.....	3
C.    Snyder and Neeley seek to remove their subsurface coal through surface- and auger-mining methods.....	3
D.    The lower courts denied Snyder and Neeley a declaratory judgment that would have permitted them to surface mine the State’s land.....	4
ARGUMENT.....	5
<b><u>Appellees’ Proposition of Law:</u></b>	
<i>A deed that gives the owner of a mineral estate “reasonable surface right privileges” does not grant the right to remove coal by strip-mining methods.</i> .....	5
A.    Because strip mining is totally incompatible with the enjoyment of a surface estate, “reasonable surface right privileges” do not include the right to strip mine.....	5
B.    Snyder and Neeley’s counterarguments are unavailing because neither precedent nor common sense justify reading “reasonable surface right privileges” to include strip mining.....	11
C.    Preserving the State’s ability to use its surface estate is consistent with the policies that underlie severed property rights in Ohio.....	16
D.    Denying Snyder and Neeley permission to proceed with this mining plan does not render their coal “inaccessible.”.....	17
E.    Summary judgment was appropriate here because, as a matter of law, the deed language precludes strip mining.....	18
1.    Even if the Court finds the deed ambiguous and considers extrinsic evidence, it does not help Snyder and Neeley.....	18

2.	If the Court considers extrinsic evidence and still concludes that the deed's reservation language is ambiguous, it should construe that language against Snyder and Neeley. ....	21
	CONCLUSION.....	22
	CERTIFICATE OF SERVICE .....	unnumbered
APPENDIX:		
	<i>Ohio Dep't of Nat'l Resources v. Baity</i> , No. 50354, Jefferson Court of Common Pleas (December 10, 1963) .....	Appx. A

## TABLE OF AUTHORITIES

CASES	PAGE(S)
<i>Am. Energy Corp. v. Datkuliak</i> , 174 Ohio App. 3d 398 (7th Dist. 2007) .....	21
<i>Burgner v. Humphries</i> , 41 Ohio St. 340 (1884).....	<i>passim</i>
<i>Campbell v. Johnson</i> , 87 Ohio App. 3d 543 (2nd Dist. 1993) .....	21
<i>Doss v. State</i> , 135 Ohio St. 3d 211 (2012).....	18
<i>E. Ohio Gas Co. v. James Bros. Coal Co.</i> , 85 N.E. 2d 816 (Ohio Ct. Com. Pleas, 1948).....	10
<i>Franklin v. Callicoat</i> , 119 N.E. 2d 688 (Ohio Ct. Com. Pleas, 1954).....	10
<i>Graham v. Drydock Coal Co.</i> , 76 Ohio St. 3d 311 (1996).....	<i>passim</i>
<i>Huff v. FirstEnergy Corp.</i> , 130 Ohio St. 3d 196 (2011).....	18
<i>Pure Oil Co. v. Kindall</i> , 116 Ohio St. 188 (1927).....	21
<i>Quarto Mining Co. v. Litman</i> , 42 Ohio St. 2d 73 (1975).....	7, 16
<i>Skivolocki v. East Ohio Gas Co.</i> , 38 Ohio St. 2d 244 (1974).....	<i>passim</i>
<i>State ex rel. Crabbe v. Middletown Hydraulic Co.</i> , 114 Ohio St. 437 (1926).....	21
<i>Stewart v. Chernicky</i> , 439 Pa. 43 (1970).....	9
<i>Tennessee Gas Transmission Co. v. Blackford</i> , 160 N.E. 2d 336 (Ohio Ct. App., 1958).....	10
<i>The Ohio Collieries Co. v. Cocke</i> , 107 Ohio St. 238 (1923).....	<i>passim</i>

*West Virginia-Pittsburgh Coal Co. v. Strong*,  
129 W. Va. 832 (1947) .....9

**STATUTES, RULES AND CONSTITUTIONAL PROVISIONS**

16 U.S.C. 669-669g .....2

Pittman-Robertson Wildlife Restoration Act of 1937 .....2, 15

R.C. 1513.16 .....13

**OTHER AUTHORITIES**

50 C.F.R. 80.50 .....2, 15

50 C.F.R. 80.90(f) .....3

50 C.F.R. 80.134(a).....3

50 C.F.R. 80.135(f) .....3

## INTRODUCTION

A simple principle governs this case: when “the surface of the land and the minerals beneath belong to different owners, ... [e]ach owner must so use his own, as not to injure the property of the other.” *Burgner v. Humphries*, 41 Ohio St. 340, 352 (1884).

Here, the appellants, Ronald Snyder and Steven Neeley, own the minerals beneath a parcel of land that belongs to the State. The State, as landowner, has chosen to use the land as a wildlife preserve for the benefit of Ohio’s citizens. Snyder and Neeley seek to obtain coal from beneath the wildlife preserve by strip mining sixty-five acres of the State’s land and auger mining some additional acreage beyond that. Strip mining removes coal from an underground seam, but only by first removing all of the land over the top of it. That type of mining, if allowed, would not merely injure the State’s surface right, but utterly destroy it. That is why a mineral owner seeking to strip mine “bears a heavy burden ... to demonstrate that such a right exists.” *Skivolocki v. East Ohio Gas Co.*, 38 Ohio St. 2d 244, 251 (1974).

Snyder and Neeley cannot meet that burden. Their mineral deed grants them “reasonable surface right privileges.” Strip mining, however, is not a reasonable privilege because it destroys one hundred percent of the area mined. Strip mining is incompatible with a surface owner’s (here, the State’s) right to maintain the integrity of the land’s surface. This Court should affirm the court of appeals and hold that the “reasonable surface right privileges” included in this deed do not include the right to strip mine.

## STATEMENT OF THE CASE AND FACTS

**A. The State of Ohio operates the Brush Creek Wildlife Area to promote local wildlife for the benefit of hunters and other citizens.**

The Brush Creek Wildlife Area is a diverse and dynamic natural habitat spanning 4,131 acres of southeastern Ohio. Appt. Supp. 230. The State of Ohio owns the wildlife area, which the Ohio Department of Natural Resources manages. The area supports a variety of fish including bluegills, bullheads, and largemouth bass, and game including cottontail rabbits, ruffed grouse, fox squirrels, groundhog, beaver, wild turkeys, and white-tailed deer. *Id.* Mature hardwoods occupy eighty percent of the area, and include oak, hickory, maple, beech, elm, ash, and tulip poplar. *Id.*

The State owns the land comprising the wildlife area just as any private landowner owns a piece of real property. Additionally, however, the State must use the land in a way that fulfills certain federal obligations because it purchased most of the wildlife area with the assistance of federal funding provided by the Pittman-Robertson Wildlife Restoration Act of 1937. That act allows the federal government to collect an excise tax on sales of firearms and ammunition and distribute the proceeds to each state for promoting wildlife habitat, hunting safety, and shooting ranges. 16 U.S.C. 669, 669a-c, 669g; 50 C.F.R. 80.50. To receive the money, states must propose qualifying projects and contribute one quarter of the necessary funding. 16 U.S.C. at 669e. Once approved, the federal government supplies a grant for the remaining three-fourths of each project's cost. *Id.* If a state uses the funds to purchase land for wildlife habitats, as Ohio has done in Brush Creek, the federal Fish and Wildlife Service will monitor the project and ensure that the land continues to be used for its approved purpose. If a state permits an unapproved use on Pittman-Robertson land, the state risks being diverted from the program

entirely. 50 C.F.R. 80.90(f); 80.134(a); 80.135(f). For Ohio, that means losing the millions of dollars it receives annually in Pittman-Robertson funding.

**B. Ronald Snyder and Steven Neeley own the subsurface coal beneath a portion of the Brush Creek Wildlife Area.**

In 1944, Ohio used Pittman-Robertson funds to acquire eight parcels of land totaling 1,674 acres to establish the Brush Creek Wildlife Area. The deed for one of those parcels is at issue here. That deed granted 651.43 acres to the State “to have and to hold ... with all the privileges and appurtenances thereunto.” Appt. Supp. 8-9. The grantors of the deed reserved to themselves, however, “all mineral rights, including rights of ingress and egress and reasonable surface right privileges.” *Id.* at 9.

Today, Ronald Snyder and Steven Neeley own the mineral rights reserved in the 1944 deed.

**C. Snyder and Neeley seek to remove their subsurface coal through surface- and auger-mining methods.**

Snyder and Neeley seek an injunction permitting them to remove the coal they own beneath the Brush Creek Wildlife Area using a combination of two surface-mining techniques: strip mining and auger mining. To obtain the coal in this way, Snyder and Neeley first propose to “strip” sixty-five acres of the wildlife area by removing the entire surface of the land overlaying the targeted coal seam. Appt. Supp. at 218. This method directly exposes the coal beneath for removal and sale, and it also creates a “highwall,” or vertical cliff face, to facilitate the next phase of mining proposed here. *Id.* That phase is called “auger mining,” where miners use large bits to drill horizontally into the highwall where the coal seam is exposed. *Id.* The drill bit extends eighty or more feet into the highwall, removing a lateral column of coal. *Id.* at 216-18. Then miners drill a new hole alongside the previous one, remove another lateral column of

coal, and proceed in that way along the entire length of the highwall. *Id.* at 218; *see also* Appt. Supp. at 243.

Snyder and Neeley currently seek to strip mine sixty-five acres of the wildlife area, with auger mining to extend an unspecified number of acres beyond that. Apt. Brief at 2 (citing affidavit of Appellants' expert at Appt. Supp. 115-16; *see also* Complaint, Appt. Supp. at 3-4 (seeking to "surface min[e]" ten to fifteen percent of the State's property and asserting that "[a]uger mining is not surface mining").

**D. The lower courts denied Snyder and Neeley a declaratory judgment that would have permitted them to surface mine the State's land.**

In 2003, Snyder and then-owner Ralph Six filed a complaint in the Jefferson County Court of Common Pleas, seeking a declaration authorizing them to strip and auger mine the State's wildlife area. The State moved for summary judgment, but Snyder and Six voluntarily dismissed the case before the court issued a ruling.

Snyder re-filed in 2009 seeking the same relief and substituted Neeley as his new co-owner. The court of common pleas granted summary judgment to the State because the proposed strip mining would destroy sixty-five acres of the wildlife area's existing surface and exceed the "reasonable surface right privileges" held by Snyder and Neeley under the 1944 deed. The Seventh District affirmed because the "grant of mineral rights with 'reasonable surface right privileges' [did] not clearly authorize strip mining." App. Op. at ¶ 26.

Snyder and Neeley then brought this appeal.

## ARGUMENT

### Appellees' Proposition of Law:

*A deed that gives the owner of a mineral estate "reasonable surface right privileges" does not grant the right to remove coal by strip-mining methods.*

Deciding this case requires no more than applying this Court's settled precedent: When "the surface of the land and the minerals beneath belong to different owners, ... [e]ach owner must so use his own, as not to injure the property of the other." *Burgner v. Humphries*, 41 Ohio St. 340, 352 (1884); *see also The Ohio Collieries Co. v. Cocke*, 107 Ohio St. 238, 254 (1923).

Snyder and Neeley seek not merely to injure the State's surface property, but to destroy it through strip-mining. The deed contains no language supporting that extraordinary violation of the State's surface rights. It merely reserves to Snyder and Neeley the ownership of the subsurface coal and attendant "reasonable surface right privileges." That language severs the mineral estate from the surface, but does not by itself permit strip mining the property, because "[t]he right to strip mine for coal is not implicit in the ownership of a severed, mineral estate." *Skivolocki v. East Ohio Gas Co.*, 38 Ohio St. 2d 244, syllabus (1974). Rather, "a heavy burden rests" on Snyder and Neeley to demonstrate that the deed conveys to them the right to destroy the surface of the property. *Id.* at 251; *Graham v. Drydock Coal Co.*, 76 Ohio St. 3d 311, 315 (1996). They cannot meet that burden, so this Court should affirm.

**A. Because strip mining is totally incompatible with the enjoyment of a surface estate, "reasonable surface right privileges" do not include the right to strip mine.**

Strip mining is incompatible with the enjoyment of a property's surface. *Skivolocki*, 38 Ohio St. 2d at 251. The point is common sense. Strip mining removes coal from an underground seam by first removing *all of the land over the top of it*. A surface owner cannot possibly continue to enjoy the surface property when miners have stripped it away. Here, Snyder and Neeley propose to obtain two-thirds of their targeted coal reserves through this strip-mining

technique. App'ee Supp. at S-20. All told, that strip mining will destroy sixty-five acres of the State's property—for context, that is more than forty-five football fields. It will “necessarily and unavoidably cause [the] total disruption of the surface estate.” *Skivolocki*, 38 Ohio St. 2d at 248-49.

That destruction of the State's property is irreconcilable with a fundamental principle long recognized by this Court: when different people own the surface and mineral rights of a property, “[e]ach owner must so use his own, as not to injure the property of the other.” *Burgner*, 41 Ohio St. at 352; *The Ohio Collieries Co. v. Cocke*, 107 Ohio St. 238, 254 (1923). This principle has a long lineage, and originated in two disputes over land subsidence.

In *Burgner*, a surface-rights owner sued miners who removed all the pillars and ribs of coal beneath his property, after which the ground “caved in, swagged, and fell in deep holes.” 41 Ohio St. 340 at 346. The subsidence affected sixteen acres of land and damaged the surface-owner's house and other buildings. *Id.* at 345. In *Ohio Collieries*, the situation was largely the same: miners removed all of the pillars of coal supporting the surface owner's property, causing her land to crack open deeply, her house to lean, and her barn to twist so that it was no longer safe for livestock. 107 Ohio St. at 240. In both cases, this Court concluded that the mineral-rights owners violated a fundamental right of the surface owners to enjoy their property. The surface owners had a right to use the land “in the situation in which it was placed by nature,” *Burgner*, 41 Ohio St. at 352, and although “[i]t was clearly the privilege of [the] coal company to remove the coal ... it was likewise equally its duty to remove the coal in such a manner as not to injure the property of the plaintiff.” *Ohio Collieries*, 107 Ohio St. at 247.

The principle at work in those subsidence cases applies with equal force in the context of strip mining. *Graham*, 76 Ohio St. 3d at 315. Strip mining is every bit as destructive as the loss

of subjacent (underground) support at issue in *Burgner* and *Ohio Collieries*. “The [mineral owner’s] right to strip mine for coal and the [surface owner’s] right to subjacent support for a surface estate cannot co-exist.” *Skivolocki*, 38 Ohio St. 2d at 377. Because strip mining is irreconcilable with the long-recognized rights of surface owners to maintain the integrity of their property, “a heavy burden rests upon the party seeking [to strip mine] to demonstrate that such a right exists.” *Skivolocki*, 38 Ohio St. 2d at 251. Courts rightly assume that purchasers of a surface estate are not likely to buy a tract of land if the mineral owner can destroy the land at any time. *Graham*, 76 Ohio St. 3d at 316. So, any such atypical waiver of the right to surface integrity “must appear by express grant, or the instrument conveying the estate [must] clearly import such release,” *Ohio Collieries*, 107 Ohio St. at syllabus. *See also Burgner*, 41 Ohio St. at 354, (“the intention to dispense with subjacent support, should be manifested by clear and unequivocal language in the deed or lease”); *Quarto Mining Co. v. Litman*, 42 Ohio St. 2d 73, 84-85 (1975) (the “owner of the land has the right to subjacent support, and any conveyance or waiver of this right must clearly appear in the instrument conveying the estate”).

No express grant exists here. Snyder and Neeley point only to the deed reserving their mineral estate, which simply states: “Grantors reserve all mineral rights, including rights of ingress and egress and reasonable surface right privileges.” Appt. Supp. at 9. Nothing in that reservation expressly (or even implicitly) grants Snyder and Neeley the extraordinary right to destroy the State’s land at any time.

Indeed, in *Burgner*, the lease provision was far more extensive than the reservation of “reasonable surface right privileges” here, yet the Court still held that it did not constitute a waiver of the surface owner’s surface support. There, the lease provision gave the mineral owner the right to enter the land, search and explore for minerals

and when found to exist on said lands, to dig, mine and remove the same therefrom, together with all and singular the rights, privileges, licenses and easements, necessary or incident, or in anywise appertaining to the proper prosecution of the business of mining and removing any or all minerals and substances aforesaid.

*Burgner*, 41 Ohio St. at 356. Despite such an extensive authorization, this Court concluded that “a clause of this kind cannot properly be construed into an enlargement of the power [to mine], so to deal with the mine as to let down the surface.” *Id.* In other words, the lease provision permitted mining, but did not enlarge that right beyond its ordinary boundary: that the mining cause no injury to the surface estate. The same is true here. The reservation of “reasonable surface right privileges” is a practical way of ensuring that both the mineral owner and the surface owner enjoy their respective estates. *See Skivolocki*, 38 Ohio St. 2d at 249, n.1. But construing “reasonable surface right privileges” to include strip mining would “pervert ... a principle designed to *mutually* accommodate” both owners “in the enjoyment of their separate properties.” *See id.* It would entirely substitute the mineral owner’s interests for the surface owner’s interests, instead of allowing both to coexist.

The context of the phrase “reasonable surface right privileges” supports this reading. The phrase appears in the deed immediately following the reservation of “rights of ingress and egress.” Appt. Supp. at 9. But rights of ingress and egress would need no special mention if “reasonable surface right privileges” described a right expansive enough to include strip mining. The fact that the deed separately specifies “rights of ingress and egress” shows that “reasonable surface right privileges” does not necessarily include the right to enter and leave the property, let alone the right to destroy it through strip mining.

Nor does the absence of deep-mining language indicate that this deed permits strip mining, as Snyder and Neeley argue. *See* Appt. Br. at 9-10. Although deep-mining language

was present in the deeds in both *Skivolocki* and *Graham*, it was not the essential fact determining the outcome of those cases.

In *Skivolocki*, the Court first cited favorably from two state supreme court cases concluding that the right to strip mine is not implied in a grant of mineral rights. 38 Ohio St. 2d at 249-51, citing *Stewart v. Chernicky*, 439 Pa. 43 (1970) and *West Virginia-Pittsburgh Coal Co. v. Strong*, 129 W. Va. 832 (1947). Then, it noted that the *Skivolocki* deed referenced deep mining and that strip mining was an unknown technique at the time. But it went on to say, “[s]econd, and more important, the right to ‘use’ the surface cannot be reasonably construed as the right to destroy it.” *Skivolocki*, 38 Ohio St. 2d at 251 (emphasis added). The references to deep mining were helpful to the Court, but not even the most important factor weighing against permitting strip mining under the deed.

The same is true in *Graham*. There the Court noted that deep-mining language was a helpful indication of the parties’ intent, but so too was the “patent incompatibility of strip mining with separate ownership of the surface of the land.” *Graham*, 76 Ohio St. 3d at 317. The Court went on to cite favorably six other state supreme courts, all of which held that strip mining was permissible only where some deed language clearly authorized it. *Id.* at 318.

The presence of deep-mining language in a deed is one useful indication that the parties contemplated only deep mining of the property when severing the surface and mineral rights, but it is not essential for concluding that a deed does not permit strip mining. Strip mining is incompatible with the enjoyment of a surface estate, and courts do not lightly presume that a surface owner has agreed to allow it. *Graham*, 76 Ohio St. 3d at 316, 318. Express language is required, and none exists here, so this deed does not permit strip mining whether it mentions deep mining or not.

But the Court need not take the State's word for it. Fifty years ago an Ohio court decided precisely this case and denied a mineral-rights holder the right to strip mine *this parcel*, under *this deed*. In 1963, the State won a judgment against Leroy Baity, who held an option granting him the exclusive right to mine the coal beneath the property at issue in this case. *Ohio Dep't of Nat'l Resources v. Baity*, No. 50354, Jefferson Court of Common Pleas (December 10, 1963) Appx. A. Baity had commenced strip mining of the land, and the State sued to enjoin him from mining. *Id.* at 3. The court held in the State's favor. *Id.* at 9. It concluded that "under no stretch of the imagination" could the words "reasonable surface right privileges" be "twisted to mean the right to destroy." *Id.* at 7. The Court should reach the same outcome here.

Nor were decisions like *Baity* uncommon in the 1940s and 50s. During that period, at least three other counties concluded that strip mining was incompatible with a surface owner's rights where the deed did not specifically allow it. *See, e.g., Franklin v. Callicoa*t, 119 N.E. 2d 688, 694 (Ohio Ct. Com. Pleas, 1954) (Lawrence County); *E. Ohio Gas Co. v. James Bros. Coal Co.*, 85 N.E. 2d 816, syllabus (Ohio Ct. Com. Pleas, 1948) (Tuscarawas County); *Tennessee Gas Transmission Co. v. Blackford*, 160 N.E. 2d 336, 341 (Ohio Ct. App., 1958) (affirming decision from Jackson County).

Snyder and Neeley own the coal beneath the State's wildlife area, but because the deed does not expressly state otherwise, they are entitled to remove the coal only in ways compatible with surface ownership. *Ohio Collieries*, 107 Ohio St. at 247. Strip mining destroys the surface of the property. Snyder and Neeley have no right to remove the coal in this way.

**B. Snyder and Neeley’s counterarguments are unavailing because neither precedent nor common sense justify reading “reasonable surface right privileges” to include strip mining.**

Snyder and Neeley’s counterarguments cannot surmount the precedent against them. They claim that their proposed strip- and auger-mining plan is reasonable because “[i]t involves only a small fraction of the property, which will be remediated when the mining is completed, and will not materially interfere with [the State’s] use of the property.” Appt. Br. at 9. These arguments fail both at both a general and a specific level.

These arguments fail generally because they proceed from a faulty premise: that strip mining is, in some circumstances, a reasonable intrusion on a surface owner’s estate. This Court’s precedent forecloses that possibility. Strip mining is not a reasonable intrusion because it is incompatible with the enjoyment of a surface estate. *Skivolocki*, 38 Ohio St. 2d at 251. The point is worth stating in full, from a case explicitly addressing strip mining and declining to allow it: “When the mineral and surface interests in a tract of land are severed so that use can be made of the same land by different parties, and the land is thereby rendered doubly productive, *the surface owner has an unequivocal right to the integrity of the surface.*” *Graham*, 76 Ohio St. 3d at 315. Unlike other incidental mining-related intrusions, such as those caused by deep mining, strip mining destroys the entire surface of the land where it occurs. That fact stalls Snyder and Neeley’s arguments before they even get off the ground.

Their arguments still fail, however, when considered specifically.

*First*, Snyder and Neeley say the Court should allow their strip mining plan to proceed because it involves “only a small fraction of the property”—ten percent of the parcel. Appt. Br. at 9. It is easy to be glib when that ten-percent fraction is someone else’s land. Snyder and Neeley point to no deed language and no precedent hinting that “reasonable” use of the surface

means destroying some percentage of the surface. Nor do Snyder and Neeley offer any principle for concluding that destroying ten percent of the parcel is, in fact, reasonable. That ten percent, recall, is large in absolute terms (equaling forty-five football fields). And few private landowners would agree that a ten-percent loss of their property is either “reasonable” or a “small fraction.” If the Court accepts this argument, it would logically follow that if the State partitioned its property into a sixty-five acre parcel incorporating the targeted area, the mining would no longer be “reasonable” because it would affect one-hundred percent of the property. Not only is this a silly suggestion, it is not likely one that Snyder and Neeley would support. Likewise, under Snyder and Neeley’s approach, if the State sold a sixty-five acre parcel to a private landowner, the proposed strip-mining plan would consume the entirety of the property and become “unreasonable” overnight. That result is similarly nonsensical.

Ultimately, even if destroying all of the surface that is mined could somehow be reasonable, Snyder and Neeley’s approach puts Ohio courts in the position of determining what percentage would, in fact, be “reasonable” for the destruction of a surface estate. If ten percent destruction is permissible here, what about fifteen percent in the next case? Should the line be drawn at twenty-five percent? Or is only thirty-seven percent “unreasonable” and therefore not allowed? And that will not merely be a decision for another day and another case—it likely could come up with regard to *this* parcel again. Snyder and Neeley own all of the mineral rights beneath the parcel and have not stated that this proposed mining plan is the only one they wish to pursue. They could return to the court with another ten-percent request, and then another. When would those requests become unreasonable? The point is that surface owners have an unequivocal right to the integrity of *all* of their land, not merely a percentage. *Graham*, 76 Ohio St. 3d at 315. No other rule makes sense.

*Second*, Snyder and Neeley say that the destruction of the State's property "will be remediated when the mining is completed." Appt. Br. at 9. They are referring to reclamation, which Ohio law requires. R.C. 1513.16. But reclamation does not make strip mining a "reasonable" intrusion of the State's property, for two reasons: reclamation cannot perfectly restore the land, and even if it could, it cannot replace the years of use the surface owner has lost.

Reclamation cannot restore property perfectly to its prior state. It is a means of redeeming property for future use, which is preferable to the prior practice of leaving behind a useless swath of deep, exposed rock. But reclamation only reclaims the land, it does not *restore* it, nor can it erase the destruction from strip mining. The code provision requiring reclamation recognizes as much. It requires miners to "[r]estore the land affected to a condition *capable of supporting* the uses that it was capable of supporting prior to any mining, or higher or better uses of which there is a reasonable likelihood." R.C. 1513.16 (emphasis added). Consider the fact that Brush Creek Wildlife Area is mostly covered in mature hardwoods. Reclamation can reestablish the land's topography, add topsoil, and plant new growth so that the parcel is once again *capable of supporting* a forest of mature hardwoods. But it cannot replace the mature hardwoods themselves, which take years and decades to recover, nor can it restore a complex ecosystem disrupted by the removal of sixty-five acres of land. And that is true even without accounting for the times that reclamation efforts fail. Appt. Supp. at 226 (describing trees planted during reclamation: "we had a lot that didn't make it"); and 207 (it is "hard to get any type of hardwood species to grow in these [reclaimed] areas again once they've been turned upside down").

The point may be clearer in this plausible, though hypothetical, example. Consider that another private landowner might have chosen to build a cottage on this parcel, perhaps adjacent

to Brush Creek with a view of the water and the forest, and precisely over the land Snyder and Neeley now propose to strip mine. Were this Court to find strip mining to be a “reasonable surface right privilege” granted by the deed, Snyder and Neeley could destroy the cottage and remove all of the land on which it sits, along with the sixty-five acres surrounding to it. This is no problem, in their view, because they would reclaim the land by replacing the topsoil and planting new growth, making it once again *capable of supporting* the landowner’s prior use. The cottage is gone, however, and the trees cleared away; the land is only *capable of supporting* the owner’s prior use. It is hard to imagine any landowner—or any court, for that matter—agreeing to the reasonableness of this approach.

And while the State owns some reclaimed land, including some in this wildlife area, mining took place on that land *before* the State owned it. Appt. Supp. at 226 (land in the area “has been reclaimed” but “before [the State] owned it”); 204-05 (nearby stripped areas were mined “before [the State] acquired the property”); and 206. The reclaimed land is usable, which would not have been true if reclamation had not taken place. But that does not mean the State’s preference is for land to be reclaimed rather than left in its natural state.

Furthermore, even if land could be perfectly reclaimed, it would not restore lost time to the property owner. During the years that strip mining is taking place, the surface owner is entirely displaced and prevented from enjoying the portion of land being destroyed. That temporally confined destruction is incompatible with a property owner’s “unequivocal right” to the integrity of the land’s surface. *Graham*, 76 Ohio St. 3d at 315. Snyder and Neeley are confident that destroying every acre that is strip mined is somehow reasonable, but imagine if the roles were reversed. Would Snyder and Neeley happily allow the State to invade and strip mine

their farmland or their private patch of Ohio wilderness because the invasion was (in some sense) temporary?

*Third*, Snyder and Neeley say that strip mining “will not materially interfere with [the State’s] use of the property.” Appt. Br. at 9. That statement assumes that protecting wildlife for the benefit of hunters and other recreational guests is not a “use” of the property. The assumption is inaccurate. The preservation and maintenance of natural resources for the benefit of the public is a duty entrusted to the State. Here, not only is the State using the property by preserving its natural topography and habitats, it is doing so actively, with numerous state employees and even federal employees overseeing the property’s management. Managing the property includes mowing around and maintaining signage, tending to habitats like wood duck nesting structures, and preserving habitat diversity by removing unwanted species and controlling open space. Appt. Supp. at 227; 201 (important to maintain variety of habitat and different stages of forest growth).

Indeed, the use of this land continues to be exactly as the State contemplated in 1944, when it used federal Pittman-Robertson funds to purchase the property. *See* 50 C.F.R. 80.50 (activities eligible for Pittman-Robertson funding include acquiring real property for use as wildlife habitat or for public hunting and wildlife-oriented recreation). Snyder and Neeley’s proposed strip-mining plan would destroy this use on sixty-five acres, and do an unknown amount of damage to other parts of the property, through disruptions to habitat and other secondary impacts. There is no doubt that strip mining will interfere with the State’s use of this property. What is more, that interference risks violating the State’s federal obligations under the Pittman-Robertson Act and thus losing a significant source of federal funding for wildlife protection and recreation in Ohio.

**C. Preserving the State's ability to use its surface estate is consistent with the policies that underlie severed property rights in Ohio.**

Public policy favors the State's view that severed property rights make a single piece of land doubly productive by allowing two owners to use the property simultaneously. But with that privilege comes the responsibility of both owners to mutually accommodate one another. Snyder and Neeley's arguments would make a surface estate subservient to a mineral estate, an outcome that public policy cannot countenance. And affirming the State's right to the integrity of its property will not render Snyder and Neeley's coal inaccessible. They can choose to access their coal in a different manner—or not—but, that remains their choice and should not burden the State.

Severed property rights increase land productivity by allowing different parties to make use of the same parcel simultaneously. *Graham*, 76 Ohio St. 3d at 316. The result Snyder and Neeley seek contradicts this policy goal. Under their view, the mineral estate should supersede the surface estate, destroying surface productivity in order to maximize mineral productivity. But in fact, the two estates must “mutually accommodate” each other so that both owners can enjoy their separate properties. *See Skivolocki*, 38 Ohio St. at 249, n.1; *see also Quarto Mining Co.*, 42 Ohio St. 2d at 84-85. Both sides make accommodations: a surface owner acquiesces to non-destructive incursions on the land while the mineral owner obtains minerals only in ways that do not injure the surface estate. This Court should not upset that established balance by permitting Snyder and Neeley to strip mine sixty-five acres of the State's property.

**D. Denying Snyder and Neeley permission to proceed with this mining plan does not render their coal “inaccessible.”**

Snyder and Neeley claim the lower court erred because it “rendered the coal estate inaccessible for all practical purposes.” Appt. Br. at 14-15. The key part of that statement is “for all practical purposes,” because preserving the State’s surface estate here, as the court of appeals did, does not render the coal estate “inaccessible.” In this litigation, Snyder and Neeley could as easily be suing a private landowner as they are suing the State (which is no more than a landowner in this case). A suit between two private citizens would place in even sharper relief what Snyder and Neeley request—a readjustment of the economic risks borne by each party to a severed estate that reserves to the mineral owner only reasonable surface rights.

Snyder and Neeley have alternative avenues for mineral extraction, and chief among them is deep mining, which is permissible under the deed. The problem for Snyder and Neeley is that, as their expert concluded, deep mining is a more expensive way of extracting this coal. Appt. Supp. at 215-216. In other words, Snyder and Neeley can retrieve their coal through the method of deep mining, they just do not want to do so because more of their earnings would be lost in the process. So be it. The existence and ownership of mineral rights does not require that such rights be economically viable. The courts have no responsibility to remedy whatever economic problem Snyder and Neeley may be facing, particularly not at the State’s expense by sacrificing the surface of the land for the benefit of Snyder and Neeley’s pocketbooks.

In fact, time itself may remedy the economic dilemma, as technology improves, costs decrease, and opportunities arise to profit from new minerals or higher coal prices. After all, Snyder and Neeley are not the first mineral speculators to be disappointed by a bad investment, and more than one such speculator has found a new way to make their fortune down the road.

Although Snyder and Neeley own the coal and it is their privilege to mine it, they may do so only by exercising the “reasonable” surface right privileges reserved in their deed and must do so “in such a way as not to injure the property” of the surface owner. *Ohio Collieries*, 107 Ohio St. at 247. Strip mining injures the surface owner’s property, so Snyder and Neeley may not mine the coal in this way absent an express grant of that authority, which they lack.

**E. Summary judgment was appropriate here because, as a matter of law, the deed language precludes strip mining.**

Whether this deed permits strip mining is a question of law, suitable for summary judgment. Strip mining is incompatible with the separate ownership of a surface estate, so a deed reserving mineral rights does not permit strip mining unless express language says otherwise. *See Ohio Collieries*, 107 Ohio St. at syllabus (severing a coal estate does not imply a “release of the right to surface support” unless such a waiver “appear[s] by express grant”). In this case, no express language waives the State’s right to maintain the integrity of its surface estate. The issue, then, is one of law and appropriate for summary judgment. *See Doss v. State*, 135 Ohio St. 3d 211, 216 (2012).

**1. Even if the Court finds the deed ambiguous and considers extrinsic evidence, it does not help Snyder and Neeley.**

Courts presume that the intent of the parties resides in the language of their agreement, *Graham*, 76 Ohio St. 3d at 313, so the Court should look no further than the unambiguous deed in deciding this case. But where a deed is ambiguous, a court may consider extrinsic evidence “in an effort to give effect to the parties’ intentions.” *Huff v. FirstEnergy Corp.*, 130 Ohio St. 3d 196, 200 (2011). Snyder and Neeley agree that the “plain language of the Deed” resolves this case, Appt. Br. at 12, but they offered extrinsic evidence to the trial court anyway. The trial court excluded it because “all of the extrinsic evidence presented and bearing upon the intent of

the actual grantors is inadmissible hearsay.” *Snyder v. ODNR*, No. 09-CV-243, at 3. They have not challenged that ruling here.

But even if the Court finds the deed ambiguous and chooses to consider several pieces of inadmissible extrinsic evidence Snyder and Neeley have offered, Appt. Br. at 13-14, it will not help their case.

Snyder and Neeley claim “surface mining was prevalent in Jefferson County, Ohio in 1944,” and reclamation was a “known practice.” *Id.* But those facts do not suggest the language of this deed permitted strip mining. In *Burgner*, the miners argued “that it was the approved method of mining coal [at the time] to mine and remove all the coal without leaving pillars, ribs or supports for the surface.” *Burgner*, 41 Ohio St. at 351. Yet this Court still held that the surface owner had a natural right to the integrity of his property and would not be presumed to have parted with that right “unless the language of the instrument clearly” stated that intention. *Id.* at syllabus. In *Graham*, this Court said the same thing even more forcefully.

[I]t does not follow that the right to strip-mine must be presumed if the reservation clause was drafted after development of the technology. Such reasoning could only be based on the untenable presumption that, despite the absence of explicit language, if strip mining was generally known at the time of drafting, it is probable that the parties intended the mining rights to include the right to strip-mine. To state the proposition, however, is to discredit it. We find it unlikely that any purchaser of a surface estate would buy the surface of a tract subject to the right of the mineral owner to destroy the surface at its pleasure.

*Graham*, 76 Ohio St. 3d at 316.

Snyder and Neeley cite an affidavit from a lawyer asserting that he is an expert in interpreting deed language and finds the language here permits surface mining. Appt. Br. at 13-14, citing Appt. Supp. 110-11. Even assuming the opinion is admissible—which it is not—it is nonetheless questionable, because the expert relies on the “prevalent practice of surface mining at the time [of the deed’s drafting],” the very type of evidence this Court found to be irrelevant in

*Burgner and Graham. Compare* Appt. Supp. at 110, ¶¶ 8, 10 *with discussion supra*, at 19. And in any event, this Court does not need a legal “expert” to help it interpret deed language any more than it needs a legal “expert” to help it interpret a statute.

Snyder and Neeley also claim to have evidence that the grantors originally “understood that they could continue to get the coal in any way they could after the Deed was signed.” Appt. Br. at 14, citing Appt. Supp. 92. The affidavit making that claim, however, is inadmissible and no court could consider it as extrinsic evidence at all. The statement comes from Ralph Six, a former co-owner of the property, but not himself one of the original grantors. Appt. Supp. at 91-92. Six says he spoke to an *heir* of one of the original grantors who claimed *he* knew the *grantors* believed that “reasonable surface right privileges” included the right to strip mine. *Id.* at 92. The statement is at least two layers of hearsay deep—Six repeats a statement from an heir who repeats what the grantors allegedly “thought” when reserving mineral rights in the deed. *Id.* The evidence is too speculative to carry any weight.

Finally, Snyder and Neeley claim to have evidence showing that strip mining “will not result in catastrophic disruption or destruction of the surface estate.” Appt. Br. at 14. That is simply not true, as previously shown, *supra* at 13-15. The proposed strip mining will entirely destroy the mined surface of the State’s property during the time it is taking place, and reclamation will not erase that damage or restore the property perfectly to its earlier state.

Extrinsic evidence is unnecessary in this case, since the language of the deed is unambiguous. But if the Court considers extrinsic evidence, it should still affirm the decision of the court of appeals and recognize that this deed does not permit strip mining of the State’s property.

**2. If the Court considers extrinsic evidence and still concludes that the deed's reservation language is ambiguous, it should construe that language against Snyder and Neeley.**

If the Court both considers extrinsic evidence and concludes that the deed remains ambiguous, it should do as Ohio law requires and construe the deed against Snyder and Neeley as the party reserving rights.

Snyder and Neeley claim the opposite presumption applies and the deed should be construed against the State as drafter. Appt. Br. at 8, citing *Graham*, 76 Ohio St. 3d at 313-14. Factually, however, they have not explained how they were able to conclude that the State drafted this deed. But even assuming the State drafted it, a special rule governs deed interpretation, as opposed to contract interpretation: ambiguous deed language should be “construed most strongly against the grantor and in favor of the grantee.” *Pure Oil Co. v. Kindall*, 116 Ohio St. 188, 203 (1927). Effectively, the words of a deed “are to be regarded as the words of the grantor.” *Am. Energy Corp. v. Datkuliak*, 174 Ohio App. 3d 398, 416 (7th Dist. 2007). Because a reservation in a deed serves only to benefit the grantor, the grantor has every incentive to choose the reservation language carefully and make it as clear as possible. *State ex rel. Crabbe v. Middletown Hydraulic Co.*, 114 Ohio St. 437, 472 (1926). That is why “in construing an ambiguous *reservation* it is to be taken most strongly against the grantor, since he is the person to avoid ambiguity by speaking out.” *Id.*

In 1944, the prior owners of this parcel granted the land to the State and reserved the mineral rights. That makes the State the grantee of the property, and the prior owners the grantors and the only beneficiaries of the reservation (now held by Snyder and Neeley). That fact requires any ambiguities in the deed to be construed in the State's favor. *Id.*; *see also Campbell v. Johnson*, 87 Ohio App. 3d 543, 547 (2nd Dist. 1993).

\* \* \*

This Court's established precedents hold that strip mining is incompatible with the separate ownership of the surface estate absent express language to the contrary. Resolving this case requires no more than applying those precedents. But even setting aside that existing caselaw, Snyder and Neeley offer nothing that transforms strip mining into a reasonable use of the surface under their deed instead of the complete destruction of every acre strip mined. That remains true whether the mining is confined to some portion of the surface, whether the land is eventually restored to pre-mining conditions (decades or centuries later), and whether the surface owner is the State or an individual landowner.

#### CONCLUSION

For these reasons, the Court should conclude that strip mining is impermissible under this deed and affirm.

Respectfully submitted,

MICHAEL DEWINE (0009181)  
Ohio Attorney General



ALEXANDRA T. SCHIMMER\* (0075732)  
Solicitor General

*\*Counsel of Record*

MICHAEL J. HENDERSHOT (0081842))

Chief Deputy Solicitor

MEGAN DILLHOFF (0090227)

Deputy Solicitor

30 E. Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

[alexandra.schimmer@ohioattorneygeneral.gov](mailto:alexandra.schimmer@ohioattorneygeneral.gov)

Counsel for Appellees

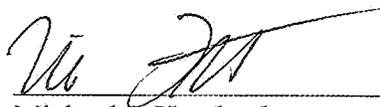
Ohio Department of Natural Resources  
and State of Ohio

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Appellees Ohio Department of Natural Resources and State of Ohio was served by regular U.S. mail this 18th day of June, 2013 upon the following:

John K. Keller  
Phillip F. Downey  
William A. Sieck  
Vorys, Sater, Seymour and Pease LLP  
52 East Gay Street  
P.O. Box 1008  
Columbus, Ohio 43216-1008

Counsel for Plaintiffs-Appellants  
Ronald M. Snyder and Steven W. Neeley



---

Michael J. Hendershot  
Chief Deputy Solicitor

# **APPENDIX**

FILED  
IN COMMON PLEAS COURT  
APPROPRIATE COUNTY CLERK  
DEC 10 1963  
WALTER MANCINI  
CLERK

THE STATE OF OHIO, JEFFERSON COUNTY, SS:

IN THE COMMON PLEAS COURT

SEPTEMBER TERM, to-wit: DEC. 10, 1963

STATE OF OHIO,  
DEPARTMENT OF NATURAL RESOURCES  
DIVISION OF WILDLIFE,

Plaintiff,

-vs-

LEROY BAITY, et al,

Defendants.

CASE NO. 50354

DOC. 88

PAGE 284

\*\*\*\*\*

O P I N I O N

Hon. John J. Griesinger, Judge

\*\*\*\*\*

APPEARANCES:-

DONALD A. DeCESSNA, Esq.  
Assistant Attorney General  
for the STATE of OHIO;

SAMUEL FREIFIELD, Esq.  
For the DEFENDANTS.

CAROLYN MALONE, Official Court Reporter

GRIESINGER, J:-

The evidence discloses that Lucy F. Davis, et al, on the 5th day of October, 1942, executed an option to one William E. Blackstone granting him the "exclusive right and option for a period extending to February 1st, 1943, to purchase all the strippable coal underlying a certain tract of real estate", (underscoring added) which was described in said option. Said option also provided that "time is the essence of this option and unless the second party (Blackstone) begins operations on the above described tract of land on or before February 1st, 1943, this option-lease agreement becomes null and void."

Subsequently, and after the expiration date of said option, to-wit, on the 6th day of April, 1944, these very same parties, or their successors in interest, conveyed said real estate by Warranty Deed to the State of Ohio. Following the description, the deed provided "the grantors reserve all mineral right, including rights of ingress or egress and reasonable surface right privileges." (Underscoring added)

Sometime later, in the year 1962, said grantors, by separate instruments, executed coal leases to the Excelsior Mines Division of United Lithia Corporation of America for said property, which conveyed to said grantee, "All the mineable and

merchantable coal which can be profitably mined in, under or upon" said real estate. Said coal lease further provided that "the grantor hereby further grants to the grantee, the right and license to remove coal under the above described property by any method of mining." (underscoring added) Said coal leases were, on the 16th day of November, 1962, assigned to the defendant Leroy Baity.

After receiving its deed, the State of Ohio, Department of Natural Resources, Division of Wildlife, proceeded to create a hunting preserve for the use of the public.

Said defendant, Leroy Baity, has commenced a strip mining operation on said real estate. This brought about the present action by the State of Ohio to enjoin said defendant, Leroy Baity, from any act of mining by the strip mining process and damages. After the filing of the action, said grantors were made parties-defendant in this case. This case came up for hearing on the plaintiff's motion for a temporary restraining order.

The pleadings and testimony raise the issue of whether said grantors, or their assignees of their coal rights, have the right to remove the coal underlying said property by the strip mining method by reason of said reservation in the deed to the

State of Ohio.

We are thus presented with the question of what is the meaning of the words contained in the deed "the grantors reserve all mineral rights, including rights of ingress and egress and reasonable surface right privileges." (underscoring added)

It is a basic rule of construction that we must look at the deed as a whole and the plain purport and purpose of an instrument as a whole controls the ordinary meaning of particular words. 17 O. Jur. 2d, Section 82, Page 189.

A deed is construed most strongly against the grantor and in favor of the grantee in order to derogate as little as possible from the grant. In case of doubt, the grantor is assumed to be at fault.

17 O. Jur. 2d, Page 193, Section 87

Pure Oil Company v Kindall, 116 O. S. 118, at page 203

It has long been recognized in Ohio that the surface owner is entitled to have his land preserved in its natural state as against the mining operation by the owner of the mineral rights. This rule is illustrated by the first two paragraphs of the syllabus in the case of Ohio Collieries Company v. Cocke, 107 O. S. 238, which reads as follows:-

1. "The right of subjacent support of the surface in its natural state is a right the owner has regardless of whether mining operations thereunder were conducted in a negligent manner or not.
2. A sale of all the coal under a tract of land is not, in terms or by necessary implication, a release of the right to surface support, but such waiver must appear by express grant, or the instrument conveying the estate clearly import such release."

The reciprocal rights of the owner of the surface and the owner of the underlying coal were recognized by our own Court of Appeals in the case of United States Coal v The Wayne Coal Company, 12 Ohio App. 1, Page 7, when the Court said as follows:-

"If the owner of the minerals has no right to injuriously affect the rights of the owner of the surface, the converse of the proposition must be equally true, that the owner of the surface cannot destroy it to the extent of seriously injuring and endangering the rights of the owner of the minerals."

There is much authority in Ohio and elsewhere, to the effect that a reservation of coal rights does not give the grantor the privilege of destroying the surface unless the language of the instrument clearly imports that it was the intention of the grantor to part with the right of subjacent support.

Transmission Company v Blackford, 108 Ohio Appeals, 19.

37 Ohio Jur 2d, Page 44 and 45, Section 34.

36 Am. Jur. Page 400, paragraph 174.

This principle was recognized in the case of Franklin v Callicot, 68 Ohio Abstract 67, wherein the syllabus reads as follows:-

1. "The owner of the surface of land, where the surface estate is by deed severed from the underlying mineral estate and the two owned by different parties, has a right to subjacent support of such surface, unless the reservation of the minerals contained in the deed expressly provide to the contrary.
2. Where it is clear from the wording of a reservation in a deed severing the surface estate from the underlying mineral estate that it was the intention of the grantor and the grantee that the mining rights should be exercised without interfering with the use of the land for agricultural purposes, the grantee has only the right to use the premises for the extraction of minerals in such manner as not to interfere with the owner of the surface in agricultural pursuits and the otherwise normal use of the surface of such land.
3. While normally persons holding mineral reservations can not be held to archaic and ancient mining methods which are no longer profitable, they cannot, unless such right is expressly reserved in the deed creating the reservation, conduct their operations in such a manner as to destroy the surface so that it can no longer be used for its normal purpose."

The following summarization is contained in an article in 32 ALR 2d, page 1315:-

"The fair construction of a deed conveying land but excepting and reserving the minerals, or 'all' of the same, in general terms, with rights of removal, is that, to say the least; the parties do not intend that the grantor, or his successors to the mineral interest, shall have the right to injure or destroy the surface structures as they exist at the time of the grant, especially in view of the general principle preventing one from derogating from his grant and the further rule that a deed is to be construed most strongly against the grantor." .....

If the defendants have the right to mine the coal under this real estate by the strip mining process, they could demolish and ravish the entire area and destroy it for any useful purpose. Surely, such a construction cannot be placed upon the words "reasonable surface right privileges". These words, under no stretch of the imagination, can be twisted to mean the right to destroy. These are words of limitation. Specific limitation. These are the words of the grantors themselves contained in their reservation of their deed and which, under the law, is to be construed against them. The grantors, if they intended to destroy the surface, they should have framed their reservation in such a way as to clearly show their intention as they did in their option to Blackstone and as they did in their lease to Excelsior, and not in such a way as to lead the grantee to believe they only reserved "reasonable surface right

privileges."

36 Am. Jur., Page 301, Section 29.

The emphasis have been laid by the defendants on the fact that there had been an option given to Blackstone for the purpose of stripping coal. In this option Blackstone had the right "to test, drill and survey the land". Said option was to be null and void if operations were not commenced before February 1st, 1943, which date had passed before the deed was given to the plaintiff. There is no testimony that Blackstone exercised his option or commenced any operations. As a matter of fact that reservation in the deed to the plaintiff would indicate that Blackstone had not exercised his option and surely the lease to Excelsior would be sufficient evidence that Blackstone had not exercised his option to strip mine the property.

Knowledge of this option by the State or the Attorney General would be immaterial. It could not put the State on notice, if this was the purpose of this evidence, that there was strip mine coal under the property, for it could just as well be assumed Blackstone's failure to exercise the option was for the reason in his explorations, he found none. It would be also immaterial because of the specific limitation of the grantors' rights as contained in their words in their reservation

in their deed.

The wording of the reservation, "reasonable surface right privileges", does not leave room for the writing into such words, by implication, the right to destroy the surface. This would be true regardless of the other problems which have been considered in this case.

A temporary restraining order will be granted as prayed for and bond will be fixed in the sum of \$1,000.00.

---

JOHN J. GRIESINGER, Judge