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BUREAU OF MINES
VAN. H. MANNING, DIRECTOR

ABSTRACTS OF CURRENT DECISIONS

ON

MINES AND MINING

REPORTED FROM
OCTOBER TO DECEMBER, 1915

BY

J. W. THOMPSON

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PREFACE.

This bulletin is the sixth of its kind to be published by the Bureau of Mines, the five preceding being Bulletins 61, 79, 90, 101, and 113.

The wide demand for the information contained in these bulletins has led the bureau to decide to issue similar bulletins with sufficient frequency to keep reasonably current the records of decisions of Federal and State courts of last resort on questions relating to the mineral industry.

The bureau will gladly welcome and consider any suggestions looking to improvement in the matter contained in these bulletins or the manner in which it is presented. The purpose of the bulletins will continue to be to improve directly or indirectly mining conditions and to promote the health and safety of miners by the prompt publication of decisions, and to this end it is desired that the bulletins reach all persons who are interested.

VAN H. MANNING.

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By J. W. Thompson.

MINERALS AND MINERAL LANDS.

MINERALS.

CONTRACT OF SALE—CONSTRUCTION.

A contract stipulating for the delivery of quantities of phosphate rock "f. o. b. mines," and stipulating that "while this contract is in form an absolute sale for a fixed quantity in each year, it is mutually understood and agreed that the purchase is for the buyer's consumption and not for a sale; the buyer agreeing to give to seller the refusal of any surplus over and above the actual consumption. Buyer is at liberty to increase or diminish the quantity called for in any year, to the extent of not exceeding 10 per cent; provided that the quantity to be taken shall not be less than buyer's consumption; provided further that notice of such increased or diminished demand be given seller 12 months in advance of such change," is to be construed as a contract for the sale of stated quantities of rock, deliverable in approximately equal quantities during each year for the specified series of years, subject only to be increased or diminished after specified notice in any year, where the amount taken would not be less than the buyer's consumption, not exceeding 10 per cent, and the contract indicating that the rock was intended by both parties for consumption in the fertilizer plant of the buyer, but the quantity to be taken was not limited by the necessities of the plant.

Atlanta Oil & Fertilizer Co. *v.* Phosphate Mining Co. (Georgia), 86 Southeastern, 216, September, 1915.

DECREE QUIETING TITLE—EFFECT ON PERSONS NOT PARTIES.

A decree of court adjudicating and establishing title to mineral lands, "together with all the minerals thereon and therein contained," is in no way binding on persons who were not parties to the action in which the decree was rendered.

Demerse *v.* Mitchell (Michigan), 154 Northwestern, 22, p. 23, September, 1915.

PURCHASE INDUCED BY FRAUD—RIGHT TO RESCISSION.

A coal-mining company induced to purchase a coal lease together with property used in operating the mine is not entitled to a rescission of the contract on the ground of fraud where the bill for relief does not show that the property has been returned and does not offer to make restitution, or show sufficient reason for a failure so to do; or if it is impossible to restore the status quo and to put the seller in the condition existing before the contract was made, and in such case the remedy must be by abatement in price and not by rescission.

Consumers' Fuel & Coal Co. *v.* Yarbrough (Alabama), 69 Southern, 897, p. 900, October, 1915.

SALE AND CONVEYANCE.

CONTRACT OF SALE—FRAUD AND RESCISSION—RECOVERY OF MONEY PAID.

In an action by a purchaser of a mine to recover money paid by the purchaser to the seller upon a contract for the sale and purchase of the mine, where the plaintiff alleges that he was induced to agree to make the purchase by false and fraudulent representations made to him by the seller, to the effect that there was a certain vein in the mine at a certain place or level, and where the plaintiff had fully rescinded the contract before the commencement of the action, the defendant is not entitled to introduce evidence to prove the value of the mine, where there is no claim on the part of the defendant and no allegation in the plaintiff's complaint that the defendant either represented or misrepresented the value of the mine as a whole at the time of the alleged sale and purchase.

Cohen *v.* Stockton (California), 151 Pacific, 741, p. 742, August, 1915.

IMPLIED WARRANTY OF TITLE.

In the sale of a lease to mine the lands described therein, together with certain designated mining machinery and fixtures in the mine and other personal properties used in connection with the operation of the coal mined on the lands so leased, the law will imply a warranty of title, whether the vendor professed to be able to make a clear title, either by direct assertion to that effect or where he offers to make such a title by concealing the fact of his inability to do so, and his conduct in either case must be regarded as fraudulent, and if the property is encumbered by lien, the purchaser is entitled to his remedy by abatement in price.

Consumers' Fuel & Coal Co. *v.* Yarbrough (Alabama), 69 Southern, 897, p. 900, October, 1915.

PURCHASE OF LEASE INDUCED BY FRAUD—INJUNCTION.

A coal-mining company is entitled to a temporary injuction restraining a mortgagee from foreclosing his mortgage executed by it on the purchase of a mining lease, where the mortgagee induced the complainant to purchase the lease and execute its note and mortgage due in 18 months on the false and fraudulent representation of the mortgagee that he would cause all liens against the mining property to be satisfied, and fraudulently represented that certain bonds secured by a trust deed on the mining property matured in 18 months, the time the defendant's note and mortgage should mature, and that complainant could thereby protect itself, and where the defendant, as a further inducement to complainant to purchase the mining lease and execute to him its notes and mortgage, promised and agreed that the time on the note and mortgage held by him should in any event be extended until the date or after the date of the maturity of all indebtedness and liens against the mining property, and where it subsequently appeared that the bonds secured by the trust deed did not mature until two, three, and four years from the date of the note and mortgage executed by the complainant, and that the defendant refused to extend the time of the maturity thereof according to his promise, and was, in fact, proceeding to foreclose his mortgage by advertisement, the complainant is entitled, on the facts stated and the fraudulent representations contributing as an inducement to the execution of the note and mortgage maturing as they did, to a reformation of his note and mortgage in conformity with the defendant's promise of extension and an injunction restraining a premature foreclosure of such mortgage.

Consumers' Coal & Fuel Co. *v.* Yarbrough (Alabama), 69 Southern, 897, p. 899, October, 1915.

LAND HELD IN TRUST—DEATH OF TRUSTEES—RIGHT OF BENEFICIARY.

Where a deed for land was made to nine trustees for the benefit of a mining corporation, and where it appears that the trustees are all dead, the corporation may sue to have new trustees appointed in place of those whose names appear in the deed, and a court may grant such relief in order to prevent the failure of the trust, and the mining corporation may recover as against a wrongdoer on its equitable title.

Troy *v.* North Carolina Gold Mining Co. (North Carolina), 87 Southeastern, 40, p. 42, December, 1915.

SURFACE AND MINERALS—OWNERSHIP AND SEVERANCE.

RESERVATION OF MINERALS—ESTATES BY THE ENTIRETIES.

Where a wife has no interest other than an inchoate right of dower in mineral lands conveyed by deed in which she joins with her husband, and by which the minerals in the land were reserved to the

grantors, the presumption must be that she joined merely for the purpose of subjecting her dower, and the intention and effect of such a clause in a deed executed by the husband and wife is not to create in the minerals excepted any new right in the husband or wife, but to preserve in each the same rights each had therein before the execution of the deed; and if the estate was held by the entireties before the conveyance, no new estate by the entireties was created in the minerals by the reservation in the deed.

Demerse *v.* Mitchell (Michigan), 154 Northwestern, 22, p. 24, September, 1915.

COAL AND COAL LANDS.

RIGHT OF SURFACE OWNER TO DRILL ARTESIAN WELLS.

The owner of land who has conveyed to another the underlying coal is entitled to access to the strata beneath the coal, and on this principle the owner of the surface who has conveyed the coal has the right to sink an artesian well through the vein of coal for the purpose of obtaining water.

Pennsylvania Central Brewing Co. *v.* Lehigh Valley Coal Co. (Pennsylvania), 95 Atlantic, 471, July, 1915.

PIPE LINE—EASEMENT—RIGHT TO REPAIR.

The grant of an easement "to lay, maintain, operate, and remove" an oil and gas pipe line, the grantee to pay all damages that may accrue to the crops and fences, authorizes the grantee of the easement to enter on the right of way to make repairs and superadds no other liability, except for injuries resulting from the negligent or wanton exercise of the right thereby conferred; and the grant itself is competent evidence of the lawfulness of an entry thereunder and is admissible in evidence for such purpose.

Moore *v.* Hope Natural Gas Co. (West Virginia), 86 Southeastern, 564, September, 1915.

PIPE LINE—RECEIPT FOR DAMAGES.

A receipt and release by a landowner who had granted an easement to a natural gas company to lay and operate an oil and gas pipe line, the grantee to pay all damages to crops and fences, whereby the grantor acknowledged payment "in full for all damages on any and every account caused by or arising from laying, maintaining, and operating" such pipe line, does not when properly construed necessarily comprehend subsequent injuries and does not operate as a release, or accord any satisfaction for such subsequent injury, as the word "caused" is a perfect participle and imports acts already done, and the word "arising," while having a progressive and prospective meaning in some circumstances, usually signifies the present and generally denotes immediate present, and only occasionally implies future events or occurrences; and extrinsic evidence is admissible to show the circumstances surrounding parties at the date of the agreement or receipt, the nature of the transaction to which it was designed to apply, keeping in view the particular purposes to be effected, and giving to the terms employed their ordinary and usual meaning; but an accord and satisfaction does not operate as a bar as to matters unknown to the parties at the time of its execution.

Moore *v.* Hope Natural Gas Co. (West Virginia), 86 Southeastern, 564, p. 565, September, 1915.

PIPE LINE—INJURY TO CROPS AND FENCES.

Under a grant of an easement to lay and operate a pipe line, the grantee to pay all damages "to crops and fences," the term "crops,"

nothing appearing to the contrary, comprehends only such growths as are produced from the soil and severed or cropped by human instrumentalities, and it usually signifies and is generally understood to mean something cropped or severed from the land and garnered or saved by manual labor, as cereals, vegetables planted and cultivated, hay harvested from meadow land, corn grown and gathered in shocks, wheat in stacks or bins, or fodder and straw in shocks or ricks; but does not apply to grass on lands used for pasturage; and damages to crops, as so defined, is measured by their market value at the time and place of the injury, and a fence when readily repairable, is measured by the cost of material and labor, which will, when properly applied, restore the premises to their condition before the interference.

Moore *v.* Hope Natural Gas Co. (West Virginia), 86 Southeastern, 564, p. 567, September, 1915.

MINING TERMS.

BELL HOLES.

Bell holes are holes dug, or excavations made at the section joints of a pipe line for the purpose of repairs.

Moore *v.* Hope Natural Gas Co. (West Virginia), 86 Southeastern, 564, p. 565, September 1915.

MINING CORPORATIONS.

FRANCHISE TAX—UNCONSTITUTIONAL AS APPLIED TO RECEIVERS.

Under the constitution of Ohio the power of taxation of privileges and franchises is limited to the reasonable value of the privilege or franchise conferred originally or to its continued value from year to year; and these limitations prevent confiscation and oppression under the guise of taxation, and the power of such taxation can not extend beyond what is for the common or public welfare and the equal protection and benefit of the people; and where the property of a corporation has passed into the hands of a receiver and the corporation has ceased to do business, the franchise of such a corporation to be a corporation and to conduct its authorized business as such is of no value to the receiver and to the creditors whose property he holds and whom he represents, and the franchise tax imposed by the statutes of Ohio on such a receiver is, in its operation, confiscatory and oppressive, and to that extent unconstitutional.

Keeney *v.* Dominion Coal Co., 225 Federal, 625, p. 628.

FRANCHISE TAX—INSOLVENCY—FAILURE OF OFFICER TO DECLARE DISSOLUTION.

By section 5509 of the General Code of Ohio it is the mandatory duty of the secretary of state to cancel the articles of incorporation of a corporation that fails or neglects to make a report or to pay its franchise tax for 90 days after the statutory time, and thereupon its franchise would come to an end and the tax could not subsequently be imposed. And where a corporation becomes insolvent and passes into the hands of a receiver, the mere fact that the corporate officers did not begin proceedings for a dissolution does not enable the State to impose the franchise tax, where if the secretary of state had done his duty under the mandatory act the corporation would have been dissolved.

Keeney *v.* Dominion Coal Co. 225 Federal, 625, p. 629.

BANKRUPTCY—INSOLVENCY—PAYMENT AS A PREFERENCE.

Payments made by an insolvent mining corporation that amount to a preference constitute such acts of bankruptcy as will cause the corporation to be adjudged a bankrupt, where the corporation had reasonable cause to believe that the payments would effect a preference and such preferences are available.

Wise Coal Co. *v.* Small, 225 Federal, 524, p. 525.

BANKRUPTCY PROCEEDINGS—RIGHT OF STOCKHOLDERS TO INTERVENE.

In proceedings of creditors to have a mining corporation declared a bankrupt on the ground of the alleged indebtedness of the corporation to the petitioners, the stockholders of the corporation may intervene if the directors fraudulently fail and refuse to oppose the petition or interpose any defense, and where the petition to intervene shows that the directors are adversely interested and are permitting the property to be sold so that they may acquire it at less than its value; and in such case the stockholders are not required to take the ordinary preliminary steps before bringing suit.

Ogden *v.* Gilt Edge Consolidated Mines, 225 Federal, 723, p. 728.

PROPERTY IN HANDS OF RECEIVER ADMINISTERED FOR CREDITORS.

The assets of a corporation in the hands of a receiver do not belong to the corporation but to the creditors, and the court holds such assets for distribution to creditors as their respective interests may appear, under the rule that when a corporation becomes insolvent it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors.

Keeney *v.* Dominion Coal Co., 225 Federal, 625, p. 628.

CITIZENS' ORGANIZATION OF FOREIGN CORPORATION—COLLUSIVE JURISDICTION.

Citizens of California will not be permitted to organize a mining corporation in the State of Nevada and transfer to it the legal title to mining property in California for the purpose of conferring an apparent jurisdiction upon a Federal court on the ground of diversity of citizenship, which would not otherwise exist.

Phoenix-Buttes Gold Min. Co. *v.* Winstead, 226 Federal 855, p. 861.
See Phoenix-Buttes Gold Min. Co. *v.* Winstead, 226 Federal, 863.

OFFICER EMPLOYED AS AGENT—DISCHARGE.

The president of an oil and gas company who was also employed as field manager is not as such field manager an officer of the company, but only an employee, and in the absence of an agreement for employment for a specified time he may be discharged as such field manager at any time.

Badger Oil & Gas Co. *v.* Preston (Oklahoma), 152 Pacific, 383, p. 385, October, 1915.

TRUST RELATION OF PRESIDENT AND CORPORATION—SECRET PROFITS.

The president of an oil and gas company who purchased stock from one of its stockholders for $250 and thereupon resold the stock to the corporation for $2,850 on the false and fraudulent representation to the corporation and to the board of directors that the stock cost him that particular sum, is liable to the corporation for the difference between the sum paid by him for the stock and the sum received by him for the stock from the corporation, as the president, as an officer of the corporation, occupies a fiduciary relation toward it, and can not, either directly or indirectly, in his dealings on behalf of the corporation, or in any transaction in which it is his duty to guard the interest of the corporation, make any secret profits or acquire any benefit or advantage not enjoyed by other stockholders.

Badger Oil & Gas Co. *v.* Preston (Oklahoma), 152 Pacific, 383, p. 385, October, 1915.

VALIDITY OF CONTRACT—INTERLOCKING DIRECTORS.

A contract between a smelting company and a mining company by the terms of which the smelting company agreed to erect a copper matte smelting plant with a certain stated daily capacity and agreed to pay or secure the extension of an indebtedness of the mining company and to make certain advances to the mining company to be used in repairs and preparations about its mines and property to fit it for the resumption of mining and production of ores, the advances to be repaid out of the first net proceeds of the ores of the mining company which should be treated by the smelting company, is not invalid because two of the members of the board of directors of the smelting company were members of the board of directors of the mining company, where there was no claim that the smelting company's control of the mining company's board of directors was obtained by undue, unfair, or fraudulent means, and where the note originally given as evidence of the advances and indebtedness was subsequently renewed by the board of directors of the mining company at a time when none of its members was a member of the board of directors of the smelting company.

Gould Copper Mining Co. *v.* Walker (Arizona), 152 Pacific, 853, p. 854, November, 1915.

RIGHT TO QUESTION CONSTITUTIONALITY OF STATUTE.

A mining corporation is not a "citizen" within the protection of the "privileges and immunities" provisions of the Federal Constitution, and such a corporation can not question the constitutionality of the workmen's compensation act on the ground that it effects a wrongful breachment of the privileges and immunities of citizenship.

Hunter *v.* Colfax Consolidated Coal Co. (Iowa), 154 Northwestern, 1037, p. 1067, November, 1915.

INSOLVENCY—RIGHT OF BONDHOLDERS TO PRIORITY.

The owners of land who sold the same for a stated price to a mining corporation and received in payment therefor a part of an issue of bonds of the corporation at 80 cents on the dollar, which showed on their face a total issue of $100,000, and who accepted and held such bonds and received the interest thereon for two years, can not on the subsequent insolvency of the corporation maintain an action to have their deed to the land canceled and set aside on the ground of fraud on the part of the corporation in making an excessive issue of bonds, and thereby acquire a priority over other bondholders and creditors, but their rights under such circumstances are upon the bonds and their rights and remedies the same as other bondholders.

Yellow Chief Coal Co. *v.* Johnson (Kentucky), 179 Southwestern, 599, p. 601, November, 1915.

AUTHORITY OF OIL COMPANY TO OWN RAILROAD.

Under the amendatory statute of Texas a corporation formed for the establishment and maintenance of oil companies with the authority to contract for the lease and purchase of the right to prospect for, develop, and use coal and other minerals, petroleum and gas, and with the right to erect, build, and own the necessary oil tanks, cars, and pipes necessary for the operation of the business of the same, and giving corporations theretofore created similar rights, does not authorize a producing oil company organized in another State to own and operate a railroad to be used in connection with its business, nor does it authorize such a corporation through a receiver to operate a railroad.

Continental Trust Co. *v.* Brown (Texas Civil Appeals), 179 Southwestern, 939, p. 943, November, 1915.

MISTAKE IN NAME OF CORPORATION.

A corporation can legally have but one name and that must be the name given it in its articles of incorporation, and in that name it is authorized to do business and maintain suits, and when sued it should be sued by such name. But where an injured miner brought suit against the Imperial Coal Company charging it with negligence causing the injury complained of, when as a matter of fact the complainant at the time of his injury was an employee of the "Imperial Jellico Coal Company" and his cause of action was against that company and not against the Imperial Coal Company; and though summons on the petition against the Imperial Coal Company was executed on an authorized agent of the Imperial Jellico Coal Company, this furnished no aid in correcting the mistake of the complainant, as the Imperial Jellico Coal Company was not sued and was not before the court; but the mere omission from the petition of the word "Jellico" was not, in view of the admitted fact that

the Imperial Jellico Coal Company was the name of the corporation for which the complainant was working at the time of his injury, and the name of the corporation which he intended to sue, such a substantial omission or mistake as to affect the sufficiency of the petition as the commencement of an action against the Imperial Jellico Coal Company and the error is immaterial under the code pleading, and an amendment inserting the word "Jellico" subsequently filed relates back to and becomes a part of the original petition.

Imperial Jellico Coal Co. v. New (Kentucky); 179 Southwestern, 329, p. 830, November, 1915.

CONVEYANCE TO TRUSTEES—EFFECT.

A deed of land to nine persons named as trustees of a mining corporation does in effect convey the land to the trustees for the mining corporation and not to such trustees for their own benefit.

Troy *v.* North Carolina Gold Mining Co. (North Carolina), 87 Southeastern, 40, p 41, December, 1915.

DISSOLUTION ON ORDER OF COURT.

A mining corporation is properly dissolved by a court on application of a stockholder where by reason of the gross mismanagement of its affairs it was in imminent danger of insolvency and danger that the estate and effects would be wasted, and because it had ceased to do business.

Murphy *v.* Utah Mining, Milling & Transportation Co. (Maine), 95 Atlantic, 887, p. 888, December, 1915.

SALE OF PROPERTY—APPOINTMENT OF RECEIVER.

Where a corporation organized for the purpose of operating mining claims owned by it, sold and transferred all its mining claims and where it has ceased to do business and its property is liable to be wasted, a receiver is properly appointed to wind up the corporation.

Murphy *v.* Utah Mining, Milling & Transportation Co. (Maine), 95 Atlantic, 887, p. 888, December, 1915.

GENERAL FEATURES.

INSPECTION BY LAND OFFICERS—RIGHT OF LOCATOR TO INJUNCTION.

Where a register and receiver of a local land office have been ordered and directed by the Secretary of the Interior to examine and determine whether the land embraced within the boundaries of an unpatented mining claim is mineral or nonmineral, and whether or not a discovery of mineral bearing vein has been made with reference to lode and placer locations, and whether or not any such location has been made in good faith for mineral purposes or for speculative purposes and to be used in connection with trade and business, and where such register and receiver are proceeding to carry out such orders, a court has no jurisdiction to restrain such register and receiver from executing such orders of the Secretary of the Interior.

Cameron *v.* Weedin, 226 Federal, 44.

JURISDICTION OF LAND DEPARTMENT TO DETERMINE MINERAL CHARACTER.

The General Land Office is without jurisdiction to inspect and examine an unpatented mining claim, in the absence of an application for patent, to determine whether the land embraced within the boundaries is mineral or nonmineral, or whether a discovery of a mineral-bearing vein has been made, and whether or not the location has been made in good faith for mineral purposes.

Cameron *v.* Weedin, 226 Federal, 44, p. 48.

POSSESSORY RIGHTS.

ACTION TO QUIET TITLE.

Where an application for patent was filed for a group of mining claims, and an adverse claim was filed by which the adverse claimant asserted title to one of the group of claims, and where it was agreed that the applicant would not claim or obtain patent for such particular claim, and the adverse claim was withdrawn and the suit brought thereon dismissed, and where on failure to comply with the agreement the applicant claimed patent for all the claims in the group, and there-

upon the adverse claimant brought a separate action alleging generally the facts and history, such action was in its nature and under the averments of the petition of the complaint an action to quiet title and not an application to acquire a patent from the United States to the particular claim in controversy, nor was it a suit upon the adverse claim, and the plaintiff under the allegations of his pleading was entitled to be heard and have his rights determined.

Poncia *v.* Eagle (Idaho), 152 Pacific, 208, p. 209, October, 1915.

INVALID LOCATION—LOCATOR'S RIGHT AS AGAINST STRANGER.

The title of a locator under a mining location merely without discovery of minerals is totally invalid and of no effect only in a qualified sense, as such title by a location and possession is good as against every person contending against it, except the paramount owner, the Government of the United States. The possession of a person making such a location with the view of making a discovery of oil can not have such possession disturbed by strangers.

Hullinger *v.* Big Sespe Oil Co. (California), 151 Pacific, 369, August, 1915.

STATUTES RELATING TO MINING OPERATIONS.

CONSTRUCTION, VALIDITY, AND EFFECT.

LEGISLATIVE POWER—REGULATING COAL MINING.

The legislature of a State has power to pass laws regulating an extra hazardous business, such as coal mining, and to provide for benefits in case of injury or death, upon the ground that it involves an intention to reduce economic waste, to obviate breaches and dissensions between employers and employees, to raise the standard of citizenship, to lower the general burden of taxation, and to promote peace, order, and morals, as well as upon the ground that such an act is the proper exercise of the police power.

Hunter *v.* Colfax Consolidated Coal Co. (Iowa), 154 Northwestern, 1037, p. 1051, November, 1915.
See Cunningham *v.* Northwestern Improvement Co., 44 Montana, 180, 119 Pacific, 554.

MINERS' COMPENSATION ACT.

A law known as a miners' compensation act is held valid though it provides a summary method for the disposition of claims filed under the law, and such an act is not unconstitutional as conferring judicial power on a State officer having charge and oversight of its administration.

Hunter *v.* Colfax Consolidated Coal Co. (Iowa), 154 Northwestern, 1037, p. 1061, November, 1915.
See Cunningham *v.* Northwestern Improvement Co., 44 Montana, 180, 119 Pacific, 554.

WORKMEN'S COMPENSATION LAW.

The West Virginia workmen's compensation act is such a statute as it is in the power of the legislature to pass. The act does not make an employer liable except in cases of his own direct or indirect negligence or wrongful act, and the defenses of contributory negligence and assumption of risk which are inhibited or barred are such as the legislature has a clear right to eliminate for reasons of public policy.

De Francesco *v.* Piney Mining Co. (West Virginia), 86 Southeastern, 777, p. 778, October, 1915.

EFFECT ON RIGHT TO CONTRACT.

The Iowa workmen's compensation act as applied to mining and other corporations prohibits any contract, rule, or regulation that

shall operate to relieve an employer from any liability created by the act, except as the act itself provides; and it makes any device by which the employee is to pay an insurance premium against the compensation provided in the act null and void, and permits no wages to be withheld for the purpose of paying premiums, and prevents an employee from waiving any provisions of the act if the statutory compensation is thereby lessened. But another section provides that the fixed amount of compensation can not be reduced by contribution from employees. These are, however, in essence, guards against contracts to reduce liability for negligence; and instead of being an invasion of the right of contract they are precautions against allowing an employer to first accept the act and then avoid it by subterfuge, and thus what is taken away is not the right to bargain, but the right, by deviousness, to break the bargain made, and aside from this the right to contract is not infringed by the provisions aimed to insure compliance with contracts entered into.

Hunter .. Colfax Consolidated Coal Co (Iowa), 154 Northwestern 1037, p. 1049. November, 1915.

CONTRACTS TO THE DISADVANTAGE OF THE EMPLOYEE PROHIBITED—EFFECT ON VALIDITY.

The provision of section 3 of the Iowa workmen's compensation act as to the presumption arising when an employee rejects the benefit of the act and the provision of section 19 as to the presumption of fraud in a contract of settlement made by an injured miner can not be said to interfere with the right to contract, as the legislature having power to enact a valid compensation act always has power to make provisions against having the legislative intent as to such act thwarted, and to put the ban on such influences interferes with no right of contract, but simply heads off methods of evading and crippling the act. One underlying purpose of the act is to promote acceptance by the employee of the benefits of the act, and the provision of section 19 is an attempt to prevent fraud in dealing with an injured employee and is intended to guard against the nullification of the act through the employer's obtaining a contract to the disadvantage of the employee when he may be physically and financially in distress; but the act does not in fact prevent or make void the contract, but only makes it presumptively fraudulent, merely changing the burden of proof as to the validity of such contracts.

Hunter *v.* Colfax Consolidated Coal Co. (Iowa), 154 Northwestern, 1037, p 1050, November, 1915.

LIMITING POWER TO CONTRACT.

A statute preventing miners employed at quantity rates from contracting for wages upon the basis of screened coal, instead of the

weight of the coal as originally produced in the mine, is not invalid and unconstitutional because it limits or deprives persons of the right to contract.

Hunter *v.* Colfax Consolidated Coal Co. (Iowa), 154 Northwestern, 1037, p. 1051, November, 1915.

CLASSIFICATION AS TO MINING.

The workmen's compensation act of Iowa is not unconstitutional on the ground of class legislation and because it applies to coal mining and excepts from its operation domestic servants, farm or other laborers engaged in agricultural pursuits, and persons whose employment is of a casual nature, and those engaged in clerical labor, as the differentiation between coal mining and some or all of such excepted persons is not arbitrary but natural and justified, and strict equality is neither necessary nor practically obtainable; and accordingly the act is not subject to the charge of class legislation.

Hunter *v.* Colfax Consolidated Coal Co. (Iowa), 154 Northwestern, 1037, p. 1052, November, 1915

OUSTING JURISDICTION OF COURT.

The Iowa workmen's compensation act is not invalid on the ground that it ousts the courts of all jurisdiction to try controversies between employers and employees. Even if it did this, the acceptance of the act is elective and when rejected the full dispute between the parties may be submitted to a court by ordinary proceedings and tried in the usual manner; and while some rules of procedure are changed, some defenses are eliminated, and there is some change in the burden of proof, yet the objection is not sustained that on rejection of the act the courts no longer have jurisdiction to try suits for injury to an employee. It is true that when the statute is accepted it does operate to take from the courts so much of the controversy as is determined by applying the statutory schedules through the agency of the statutory arbitrators; but it does not constitute an agreement for complete ouster of jurisdiction of the courts to provide by contract for the arbitration of special matters, leaving ultimate liability or nonliability to be settled by the courts. But the very basis of power to award compensation under the act is that its provisions must first be accepted and that the claimant must be an employee and that he must have sustained personal injuries arising out of and in the course of the employment and that the compensation shall be at rates fixed by the statute; and arbitration is provided for only when the employer and employee fail to reach an agreement in regard to compensation under the act. The utmost the statute does is to provide administrative machinery for applying rates of compensation fixed by the legislature as between the parties who have agreed to have the amount of compensation thus determined.

Hunter *v.* Colfax Consolidated Coal Co. (Iowa), 154 Northwestern, 1037, p. 1063, November, 1915.

IOWA COMPENSATION ACT—DEFENSES TAKEN AWAY.

The workmen's compensation act of Iowa (Acts of 35th General Assembly, chap. 147) takes from the employer, if he accepts the provisions of the act, the following defenses: (1) That the employee assumed the risks inherent in, or incident to, or arising out of the employment; (2) that the employee assumed the risks arising from the failure of the employer to provide and maintain a reasonably safe place for the employee to work; (3) that the employee assumed the risks arising from the failure of the employer to furnish reasonably safe tools and appliances; (4) that the employer exercised reasonable care in selecting reasonably competent employees; and (5) that the injury was caused by the negligence of a fellow servant or coemployee.

Hunter *v.* Colfax Consolidated Coal Co. (Iowa), 154 Northwestern, 1037, p. 1040, November, 1915

PRESUMPTION AS TO NEGLIGENCE—BURDEN OF PROOF.

The workmen's compensation act of Iowa provides that in case of injury to an employee it shall be presumed: (1) That the injury was the direct result and grew out of the negligence of the employer; (2) that such negligence was the proximate cause of the injury, and in such case the burden of proof shall rest upon the employer to rebut the presumption of negligence. But this does not deprive the employer of the right to show he was wholly free from blame, but casts upon him the affirmative of showing that he is blameless, and in effect says that the employee need not prove the employer was at fault, but the latter must show that he was free from fault.

Hunter *v.* Colfax Consolidated Coal Co. (Iowa), 154 Northwestern, 1037, p. 1041, November, 1915.

LIABILITY IN ABSENCE OF NEGLIGENCE.

A law that attempts to make a mining company or other corporation liable for accidents which were not caused by its negligence, or by its disobedience of some law, but caused by the negligence of others, or by uncontrollable causes, or that does not give the mining company or corporation an opportunity to show such facts in its own defense, is void.

Hunter *v.* Colfax Consolidated Coal Co. (Iowa), 154 Northwestern, 1037, p. 1046, November, 1915.

BURDEN TO SHOW FREEDOM FROM NEGLIGENCE.

The Iowa workmen's compensation act provides that the only negligence of an injured employee which is available as a complete defense is negligence which is self-inflicted or injury which is the result of intoxication; but the employer is at liberty to prove that, either by reason of the negligence of the plaintiff, or for any other reason, he was

wholly free from fault. While under the act it was to be presumed that the proximate injury of the employee was the direct result of negligence on the part of the employer, and the burden of proof is cast upon the employer to rebut this presumption, and to show affirmatively that no negligence of his caused the injury, the rules as to presumptions and burden of proof are court made and can be changed or abrogated by the legislature; and if the court could place the burden on the injured employee to prove his freedom from contributory negligence, the legislature may abolish this rule and place the burden upon the employer to show that he was not negligent.

Hunter *v.* Colfax Consolidated Coal Co. (Iowa), 154 Northwestern, 1037, p. 1065, November, 1915.

INDUCING MINER TO REJECT BENEFIT OF STATUTE—EFFECT.

Section 3 of the Iowa workmen's compensation act provides that if by or on behalf of the employer any request, suggestion, or demand was made that an employee, or a person seeking employment, shall exercise his right to reject the act, there shall arise a conclusive presumption that such employee or applicant was unduly influenced to exercise this right and that the rejection made under such circumstances shall be conclusively presumed to have been procured through fraud and be null and void.

Hunter *v.* Colfax Consolidated Coal Co. (Iowa), 154 Northwestern, 1037, p. 1050, November, 1915.

ACCEPTANCE OF WORKMEN'S COMPENSATION ACT NOT COMPULSORY.

The Iowa workmen's compensation act is not subject to the charge of unconstitutionality on the ground that it compels an employer to accept its provisions and then deprives him of certain rights. The statute does not compel acceptance, but it does provide that the presumption that the employer has elected to accept its provisions prevails unless certain prescribed notices are given by him; but this does not compel him to accept the act, but is merely a provision as to what he must do to avoid a presumption that he has accepted it; and the claim is wholly immaterial where a complaining corporation concedes that it has rejected the provisions of the statute.

Hunter *v.* Colfax Consolidated Coal Co. (Iowa), 154 Northwestern, 1037, p. 1068, November, 1915.

RIGHT TO QUESTION VALIDITY OF STATUTE.

An attack upon the constitutionality of the Iowa workmen's compensation law by a mine operator will not be justified or permitted on the ground that it may be so construed as to invade private rights secured by the constitution, unless such mining corporation shows that in the case it presents the effect of applying the statute is to deprive it of a constitutional right. But if acceptance of the act is elective, then the claim of its invading constitutional rights will fail.

Hunter *v.* Colfax Consolidated Coal Co. (Iowa), 154 Northwestern, 1037, p. 1048, November 1915.

TRIAL BY JURY LIMITED BUT NOT DENIED.

The Iowa workmen's compensation act does not accomplish a denial of the right of trial by a jury, particularly in cases where the employer rejects the compensation statute; and the fact that the statute accomplishes giving the jury less to do than formerly, and changes the character of its work, in that a jury will no longer consider whether the employeee should be defeated because the evidence shows he assumed the risk of being injured as he was and can not consider the question as to whether the alleged injury was due to the negligence of a fellow servant nor whether the injured employee has proved that his injury is due to the negligence of the employer, but begins its inquiries by assuming the employer was negligent and then considers whether the employer has proved, notwithstanding this presumption, that he was wholly free from fault, does not amount to a denial of a trial by jury but merely changes the rules under which such trial shall proceed.

Hunter *v.* Colfax Consolidated Coal Co. (Iowa), 154 Northwestern, 1037, p. 1066, November, 1915.

CONSTRUCTION OF STATUTE—SPACE AT SIDE OF TRACKWAY.

Section 8582, Burns' Statutes of Indiana, makes it unlawful for an owner or operator of a coal mine to construct an entry or trackway in a coal mine without a space of at least 3 feet on one or both sides, so that drivers may get away from the car and track in event of collision, wreck, or accident; and the term entry or trackway applies to a place where a track is laid rather than to the track itself, and was intended to give sufficient room to provide a safe place for the car drivers in case of an accident, and the failure of an operator or owner to furnish such space may be the proximate cause of an injury to a driver injured after an accident produced by other causes, where he is unable to escape by reason of the operator's noncompliance.

Elder *v.* Erie Canal Coal Co. (Indiana Appellate), 109 Northeastern, 805, p. 806, October, 1915.

DUTIES IMPOSED ON OPERATOR.

FAILURE TO CONSTRUCT SHELTER HOLES—KNOWLEDGE OF CONDITION.

Under the statute of Pennsylvania the responsibility for the care of passageways in a mine rests upon the owner, and the fact that the owner has placed in the mine a competent certified mine foreman does not relieve the owner from the liability imposed by the statute. The duty to provide a proper passageway in a tunnel in a mine is a nondelegable duty imposed upon the mine owner and is not a statutory duty imposed upon the mine foreman. While the statute makes it the duty of a mine foreman to see that shelter holes are cut along

main hauling roads in a bituminous coal mine, yet this does not relieve the owner from liability for injury to a miner resulting from his failure to comply with such provision, and where such owner has knowledge that the requirement has not been complied with.

Barnes & Tucker Coal Co. *v.* Vozar, 227 Federal, 25, p. 29.

DUTY OF OPERATOR TO FURNISH PROPS—CUSTOM AS TO PROPPING ROOF.

Under the Kentucky statute of 1913 and before the amendments of 1914 it was the duty of a mine owner, after a miner had selected and marked them, to furnish to the miner a sufficient number of caps and props to be used by him in securing the roof in his room, and at such other working places where by law or custom of those usually engaged in such employment it was the duty of the miners to keep the roof propped; but this statute does not apply where, by custom or rule of the mine, the duty of propping or timbering does not devolve upon the miner himself, and where an injured miner in an action for damages shows that under the custom of the mine no duty of propping devolved upon him.

Carter Coal Co. *v.* Hill (Kentucky), 179 Southwestern, 2, p. 4, October, 1915.

SAFETY APPLIANCES—APPLICATION TO UNFINISHED MINES.

Section 28 of the Tennessee act of 1903 requires that the bucket shall be covered and there shall be certain structures inside of the shaft to make safe the ascent and descent of the miner, and this act applies to a mine incomplete. Thus where a shaft had been sunk to a depth of more than 250 feet, from the foot of which a drift was run to the location of an old shaft on the property with a view to drilling upward and reaching the bottom of such old shaft and thus connecting the two, and where men were taken up and down the new shaft for the purpose of working in the incompleted mine, and in such condition and in so using the shaft there was as much need to the miners of the protection required by the statute as there could be when the mine was completed and in active operation. The miners in thus using the shaft and in being lowered and raised in the bucket did not assume the risk of the operator's failure to comply with the statute, for the reason that to hold that miners did assume the risk would be equivalent to a repeal of the statute, as this would be a continuing invitation for the operator to forbear compliance with the statutory provision, and the very purpose of the statute was to protect those who were unable to protect themselves, occupying, as the miners necessarily do, a position much inferior in financial security to that of the mine operator.

American Zinc Co. *v.* Graham (Tennessee) 179 Southwestern 138 p. 139, October, 1915.

VIOLATION OF DUTY AS NEGLIGENCE PER SE.

The violation by a mine operator of the terms of the statute of Tennessee (Laws 1903, ch. 237, sec. 28) requiring certain structures to secure safety in mine shafts is negligence per se and renders the operator guilty of such conduct responsible for all injuries which may be suffered as a direct consequence thereof.

American Zinc Co. *v.* Graham (Tennessee), 179 Southwestern, 138, p. 139, October, 1915.

OPERATOR'S FAILURE TO ACCEPT WORKMEN'S COMPENSATION ACT.

The Iowa workmen's compensation act provides that where both the employer and employee reject its provisions the liability of the employer shall be the same as though the employee had not rejected it; but it contains another provision to the effect that if the employee rejects he must suffer, in his suit for damages for injuries, the employer's right to plead and rely upon any and all defenses, including those at common law, and the rules and defenses of contributory negligence and assumption of risk and fellow servant, with perhaps certain limitations; and it is further provided that compensation under the act is to be awarded only if both have done what amounts to acceptance of the act. Construed as a whole, the act does penalize the employee who rejects it, and while the penalties imposed upon the employer and employee may not be precisely the same, yet this is not vital and does not sustain a broad charge that an arbitrary difference is created as to the consequences of conduct which is, in substance, alike. But were it otherwise the police power may be invoked to sustain some differentiations in favor of the employee, on the theory that this is a method of protecting him for the public good against the actual inequality between him and his employer.

Hunter *v.* Colfax Consolidated Coal Co. (Iowa), 154 Northwestern, 1037, p. 1053, November, 1915.

DUTY TO INSULATE CABLE—LIABILITY FOR BREACH OF DUTY.

The fact that a mine owner failed to keep a cable properly insulated was a violation of the statute and was negligence per se, and while the rule might apply though the cable was operated in an unused air course, being but a rough passageway for the circulation of outer air and used only as a conduit for the cable, yet the mine owner's violation of the statute would be a breach of duty only to those persons who were, when injured thereby, rightfully present at the place of contact and danger and in the exercise of their legal rights.

Patterson *v.* Alabama Fuel & Iron Co. (Alabama), 69 Southern, 952, p. 954, November, 1915.

PROVIDING PLACE FOR STORING POWDER.

The statutes of Alabama (Gen. Sess. Acts, 1911, p. 530, secs. 84 and 85), require that powder in mines shall be kept in locked wooden boxes not nearer than 100 feet to any working place; and a

mine owner who prepares and keeps a proper box at the required distance for the use of a miner can not be held liable for the death of a miner who, without the knowledge or consent of the mine owner, kept and stored his powder in a different and dangerous place in the mine.

Patterson *v.* Alabama Fuel & Iron Co. (Alabama), 69 Southern, 952, p. 954, November, 1915.

DUTY TO INSTRUCT INEXPERIENCED MINER—EXTENT AND APPLICATION OF DOCTRINE.

Neither the statute of West Virginia nor the common law requires a master to instruct a miner as to dangers of which he has knowledge or as to means of avoidance fully known to him; but the statutory requirement proceeds upon the theory of lack of knowledge in the employee as it applies only to inexperienced miners. The common law imposes no duty to instruct a servant of full age and average intelligence as to elements of danger that are obvious to persons of his class, and a mine operator is under no duty to instruct as to acts and things commonly known to be dangerous. To exact such a duty, under the statute abrogating assumption of risk and contributory negligence, would be violative of the letter and spirit of that portion thereof which imposes liability only for negligence or other wrongful act causing injury and would make the employer a guarantor of the safety of the employee from the consequence of his own careless acts.

De Francesco *v.* Piney Mining Co. (West Virginia), 86 Southeastern, 777, p. 779, October, 1915.

DUTY TO FURNISH PROPS—STATUTORY ACTION NOT EXCLUSIVE.

Whether a petition in an action for the death of a miner caused by a fall of rock from the roof states a cause of action will not be determined by the provisions of section 8473, Missouri Revised Statutes of 1909, relating to the duty of a coal-mine operator to furnish props when requested, as the remedy given by this section is not exclusive, where it appears that the petition is based on the common-law liability.

Atwell *v.* Marceline Coal & Mining Co. (Missouri Appeals), 180 Southwestern, 400, p. 401, November, 1915.

DUTIES IMPOSED ON MINER.

MINER'S DUTY TO KEEP OUT OF DANGEROUS PLACE.

There can be no recovery for the death of a miner under the Virginia mining act of 1912 where the evidence shows that the deceased miner violated the statute in not staying out of the place where he was killed until he got sufficient props to make the place safe and violated the statute in undertaking to work in a place before he had made it safe.

Virginia Iron, Coal & Coke Co *v.* Asbury (Virginia), 86 Southeastern, 148, p. 151, September, 1915.
Huettel Coal & Coke Co. *v.* Lawrence (Virginia), 86 Southeastern, 151, September, 1915.

NEGLIGENCE OF MINE SUPERINTENDENT OR FOREMAN.

OPERATOR NOT LIABLE FOR NEGLIGENCE OF MINE FOREMAN.

The bituminous mining act of Pennsylvania of 1911 places the management of the inner workings of bituminous coal mines in the hands of a certified mine foreman, and neither he nor his assistants whom he appoints are agents of the mining company and the company is not responsible for their acts unless it has notice that an emergency or danger has arisen demanding immediate action and that the mine foreman and his assistants are not discharging their duties with regard thereto; but the mining company is responsible if it has failed to comply with the orders of the mine foreman.

Vagaszki *v.* Consolidated Coal Co., 225 Federal, 913, p. 915.

KNOWLEDGE OF DANGEROUS CONDITIONS—OPERATOR LIABLE FOR FOREMAN'S NEGLIGENCE.

The Pennsylvania mining act of 1891 does not relieve a mine operator from liability for his own neglect or failure of duty; and if through any neglect or failure of duty he causes injury to one of his employees the general rule applicable in such cases subjects the owner to damages for such default, and if there is a dangerous condition existing in the mine which is permitted by the negligence of a mine foreman resulting in injury to an employee, the mine owner will be responsible if he has knowledge of the fact and takes no steps to remove it, as the owner can not neglect his duty and escape liability, and the statute expressly provides that the owner shall use every precaution to insure the safety of the workmen in all cases whether provided for in the act or not.

McCollom *v.* Pennsylvania Coal Co. (Pennsylvania), 95 Atlantic, 380, p. 381, May, 1915.

KNOWLEDGE OF NEGLIGENCE OF MINE FOREMAN.

When a mine owner has knowledge of conditions in a mine which are hazardous to employees, or has knowledge of the failure of the mine foreman to properly perform his duty in safeguarding the lives of the miners, it is the operator's duty to remedy such dangerous condition; and a failure on his part to do so will give rise to liability which he can not avoid by a pleading that the danger arose through the act of the mine foreman, for whose negligence he is not responsible.

McCollom *v.* Pennsylvania Coal Co. (Pennsylvania), 95 Atlantic, 380, p. 381, May, 1915.

FAILURE OF OWNER TO PROVIDE ALARM FOR CARS—LIABILITY FOR NEGLIGENCE OF FOREMAN.

Rule 44 of the act of 1891 of Pennsylvania requires an efficient alarm to be provided and attached to the front end of every train of cars operated by locomotive in any mine or part of a mine; and this

applies not only to the main roadway of the mine, but extends to every siding in every heading of the mine; and the duty to provide the alarm is one which in its very nature devolves upon the mine owner in so far as providing the alarm is concerned, and the failure or the negligence of a mine foreman to perform this duty, if known to the operator, or if it had continued for so long a period that it should have been known to the operator or owner, will render him liable for injuries resulting from either his own or the foreman's negligence in this respect.

McCollom *v.* Pennsylvania Coal Co. (Pennsylvania), 95 Atlantic, 380, p. 381, May, 1915.

WORKMEN'S COMPENSATION ACT—EFFECT ON NEGLIGENCE OF STATUTORY MINE FOREMAN.

Section 26 of chapter 15 (Code Sec. 476) of the workmen's compensation act of West Virginia makes it the duty of a mine foreman or his assistant to see that every person employed to work in a mine shall before beginning work be instructed as to the particular danger incident to his work in the mine, and requires every inexperienced person to work under the direction of the mine foreman or some other experienced worker designated until he is familiar with the danger incident to his work. Under the law as it was before the enactment of the workmen's compensation act the mine operator was not liable for the result of the nonperformance of this duty, as the mine foreman was regarded as a fellow servant whose negligent acts were governed by the fellow-servant rule. But section 26 of the workmen's compensation act specifically takes away this right of defense and provides that an employer who neglects to take the benefit of the act "shall not avail himself of any defense that the negligence in question was that of some one whose duties are prescribed by statute." The effect of this provision, read in connection with another provision of the same section making the employer liable for the wrongful act, neglect, or default of any of his officers, agents, or employees, is to make the mine foreman virtually a vice principal.

De Francesco *v.* Piney Mining Co. (West Virginia), 86 Southeastern, 777, p. 778, October, 1915.

LIABILITY FOR NEGLIGENCE OF BANK BOSS.

A recovery for an injury to a miner is sufficiently sustained where the miner went into his room either at the direction or with the knowledge and consent of the bank boss, and where there was evidence from which the jury could infer that such bank boss knew of the existence of gas in the room, or negligently failed to ascertain the fact before ordering or permitting the miner to enter the room.

Woodward Iron Co. *v.* Lowther (Alabama), 69 Southern, 877, p. 878, October, 1915.

KNOWLEDGE OF DANGEROUS CONDITION—JOINT LIABILITY FOR INJURIES TO MINERS.

The mining act of Pennsylvania does not relieve the owner or operator from liability for his own neglect or failure of duty, and there may be cases in which both the mine foreman and the mine owner may be liable to an injured miner. Thus, if through any neglect or failure of duty the mine owner causes an injury to one of his employees, the general rule applicable in such case subjects the owner to damages for such default; or, if there is a dangerous condition existing in the mine which is permitted by the negligence of the mine foreman, resulting in injury to an employee, the mine owner will be responsible if he has knowledge of the fact and takes no steps to remove such dangerous condition, as the owner can not neglect this duty and escape responsibility, as the statute requires the owner to use every precaution to insure the safety of the workmen in all cases, whether provided for in the statute or not.

Barnes & Tucker Coal Co. *v.* Vozar, 227 Federal, 25, p. 29.

EFFECT ON CONTRIBUTORY NEGLIGENCE.

CONTRIBUTORY NEGLIGENCE OF MINER—VIOLATION OF STATUTORY DUTY.

The purpose of the Virginia statute of 1912, known as the Mining Act, was to promote the safety of miners and was not intended to relieve employees or miners in mining operations from exercising that degree of care and diligence for their own safety which the law required prior to the enactment, as it expressly provides that it shall be the duty of each miner to properly prop and secure his place in order to make the same secure for him to work therein, and prohibits a miner from working unless he has props and timbers sufficient to make the place secure, and if a miner's place becomes dangerous and is known so to him he is guilty of contributory negligence in not leaving his working place until sufficient props arrive to make the place secure, and the statute imposes the duty on him to leave his working place as soon as it becomes insecure from lack of props as well as upon the operator to furnish props, and the violation of this statutory duty by a miner will preclude a recovery either for an injury or death.

Virginia Iron, Coal & Coke Co. *v.* Asbury (Virginia), 86 Southeastern, 148, p. 149, September, 1915.

STATUTE ABOLISHING ASSUMPTION OF RISK.

Where a miner is guilty of contributory negligence which was the proximate cause of his death, it is wholly immaterial, so far as the instant case is concerned, whether the doctrine of assumed risk is abolished by the statute or not.

Virginia Iron, Coal & Coke Co. *v.* Asbury (Virginia), 86 Southeastern, 148, p. 151, September, 1915.

SUFFICIENCY OF ANSWER OF CONTRIBUTORY NEGLIGENCE AGAINST GENERAL CHARGE OF NEGLIGENCE.

In an action for the death of a miner caused by a fall of slate from the roof because of the negligence of certain employees who were entrusted with superintendence, under the statute of Alabama, an answer is sufficient which shows that the negligence of the intestate concurred with that of the employer to produce the negligence based upon the breach of duty on the part of the intestate to safely prop the roof of the mine at the dangerous place, or the failure to pull down loose slate or rock from the roof, or a failure to keep the roof in good condition, in allowing slate or loose rock to remain in the roof which should have been removed, or a failure to inspect the roof, as these acts constitute a good defense as against a general charge of negligence on the part of the defendant in failing to provide the intestate with a reasonably safe place in which to perform the duties of his employment.

Standard Steel Co. *v.* Clifton (Alabama), 69 Southern, 937, p. 938, October, 1915.

CONTRIBUTORY NEGLIGENCE AS PROXIMATE CAUSE OF DEATH—DEFENSE.

In an action for the death of a miner on the ground that the mine operator negligently failed to provide the miner with a reasonably safe place in which to perform the duties of employment, answers are sufficient where they show that the deceased miner was negligent and that such negligence proximately contributed to his death, as the effect of the statute is to make the mine operator liable to answer in damages to a miner the same as if he were a stranger and not engaged in the service or employment, and accordingly, if the intestate had been a stranger, and had been guilty of contributory negligence which proximately contributed to his death, this would have been a defense to the action stated, and must under the theory of the statute be a defense in an action for the death of the miner.

Standard Steel Co. *v.* Clifton (Alabama), 69 Southern, 937, p. 939, October, 1915.

DEFENSE OF CONTRIBUTORY NEGLIGENCE ABOLISHED.

The Iowa workmen's compensation act abolishes the doctrine that an injured miner can not recover because of contributory negligence on his part, however slight, though the negligence of the operator may be great or gross. But the statute has in fact added to the defense of contributory negligence rather than subtracted from it, and but for this statute all contributory negligence would be available in mitigation of damages, and under this statute there is a right to plead it in mitigation, plus the right to plead some contributory negligence in bar, and recovery may be defeated by showing the employee's willful

intention to injure himself or where the intoxication of the employee was the proximate cause of the injury. But in any event the statute abolishes such defenses as contributory negligence, assumption of risk, and the negligence of fellow servants, only where the employer is free to accept or reject the statute, and it violates no constitutional rights.

Hunter *v.* Colfax Consolidated Coal Co. (Iowa), 154 Northwestern, 1037, p. 1066, November, 1915.

DEFENSE OF CONTRIBUTORY NEGLIGENCE IN MITIGATING DAMAGES.

In an action under the Iowa workmen's compensation act by a miner for injuries alleged to have resulted from the negligence of a mine operator, the mine operator may plead and prove contributory negligence of the injured miner by way of mitigation of damages.

Hunter *v.* Colfax Consolidated Coal Co. (Iowa), 154 Northwestern, 1037, p. 1069, November, 1915.

DEFENSES AVAILABLE TO EMPLOYER.

The provision of the Iowa workmen's compensation act to the effect that willful negligence of an employee, with intent to cause his own injury, and negligence on his part, due to intoxication, remain defenses, deals with cases where both master and servant are, or may be, in varying degrees to blame, and limits the defense that the employer is not liable because the employee contributed to his own injury, either by willful self-infliction, or by negligence due to drunkenness; but the fact that the two specified acts of negligence on the part of the employee remain a defense does not prevent an employer from showing that whoever else was to blame or whoever contributed, or whatever the mental attitude or condition of the contributor may have been, the employer himself was in no manner to blame. Such a provision settles how far the negligence of the employee remains available as a defense, but does not touch the question whether the freedom of the employer from all blame remains a defense.

Hunter v. Colfax Consolidated Coal Co. (Iowa), 154 Northwestern, 1037, p. 1041, November, 1915.

EFFECT ON ASSUMPTION OF RISK.

MINER'S KNOWLEDGE OF DANGER—ASSUMPTION OF RISK.

Under the bituminous mining act of Pennsylvania there can be no recovery for the death of a miner who was a man of mature age and of extended experience as a miner and had knowledge and appreciation of his danger, and who knew that under the mining act he was required to quit work and vacate the place, where his working place was known to be unsafe, and where he knew of the presence of a dangerous rock in the roof that he could not himself remove, and where

without assistance he resumed work and apparently undertook to take down the dangerous rock that caused his death, as in such case the conclusion is that he assumed the risk.

Vagaszki *v.* Consolidated Coal Co., 225, Federal, 913, p. 922.

DANGER OBVIOUS.

There can be no recovery under the Virginia mining act of 1912 for the death of a miner who had had large experience as such where the roof of his working place was in an obviously dangerous condition and he had ordered timbers to make it safe, which had not been received, and where an ordinarily prudent man could have seen for himself the peril of remaining in the place where he was working, and where the deceased was, within an hour of the accident, repeatedly warned of the danger that confronted him and told that unless he came out he would be killed.

Huttel Coal & Coke Co. *v.* Lawrence (Virginia), 86 Southeastern, 151, p. 152, September, 1915.

NEGLIGENCE OF OPERATOR—CAUSAL RELATION TO INJURY.

The abolition of the doctrine of assumption of risk by the workmen's compensation act of West Virginia does not proscribe acts on the part of an employer, which by the common law were rightful and free from negligence, but its purpose is to forbid an application of the principle of waiver by which at common law the servant is made to assume the risk of known negligence on the part of the master, by reason of his continuing in the service with knowledge of such negligence; but in order to make a master or mine operator liable for an injury to a servant or to a miner, by reason of his omission of a duty imposed upon him by statute, in favor of the servant or miner, the existence of a causal relation between such omission and the injury is essential.

De Francesco *v.* Piney Mining Co. (West Virginia), 86 Southeastern, 777, p. 778, October, 1915.

MINER DOES NOT ASSUME RISK OF BREACH OF STATUTORY DUTY.

A miner with knowledge that a mine operator has not complied with a statute requiring certain structures to be placed in a shaft for the protection of miners can not be charged with assumption of risk to defeat a recovery for injuries caused by the failure of the operator to comply with the statute; and the rule applies though the statute fixes a penalty on the operator for its violation, where there is nothing in the act to indicate that the penalty was exclusive of the miner's right to maintain an action for damages.

American Zinc Co. *v.* Graham (Tennessee), 179 Southwestern, 138, p. 140, October, 1915.

ASSUMPTION OF RISK AND ABSENCE OF CONTRIBUTORY NEGLIGENCE.

The abolition of the doctrine of assumption of risk goes only to that portion of the statute which denies a right of recovery for negligence on the part of the master, to which the servant is deemed to have assented, because of his knowledge of the same and continuance in the service thereafter. It was not the purpose of the statute to proscribe acts on the part of the master which, by the common law, were rightful and free from negligence, but only to eliminate an application of the principle of waiver—assumption of risk of injury by known acts of negligence on the part of the master. An employer or mine operator who has not elected to bring himself within the provisions of the workmen's compensation act is not answerable for injuries sustained by an employee, in the absence of some negligence on the part of the employer or mine operator.

De Francesco *v.* Piney Mining Co. (West Virginia), 86 Southeastern, 777, p. 780, October, 1915.

DEFENSE ABOLISHED BY STATUTE.

Assumption of risk on the part of a miner is no defense to an action for the death of a miner under the second, third, and fifth clauses of section 3910 of the Alabama Code of 1907, for the reason that to permit it would be to emasculate the employers' liability act and to rehabilitate the common law doctrine of fellow servants as applicable to the cases provided for in these clauses, when the clear purpose of the act is to destroy the defense of assumption or risk, and under these clauses a miner does not assume the risk incident to the negligence of the operator or of a person to whom superintendence was entrusted.

Standard Steel Co. *v.* Clifton (Alabama), 69 Southern, 937, p. 938, October, 1915.

DEFENSE OF ASSUMPTION OF RISK ABOLISHED.

It is within the power of a legislature to eliminate by statute the various defenses resting on risks assumed by an employee on the ground that these rules have been evolved by the courts and may properly be abrogated by the legislature.

Hunter *v.* Colfax Consolidated Coal Co. (Iowa), 154 Northwestern, 1037, p. 1066, November, 1915.

ASSUMPTION OF RISK ABOLISHED—APPLICATION OF RULE.

Statutes which in terms abolish the doctrine of assumption of risk as a defense go no further than to abolish the defense where the servant is injured by reason of the employer's negligence, and do not abolish assumption of risk where the employer has not been negligent.

Hunter *v.* Colfax Consolidated Coal Co. (Iowa), 154 Northwestern, 1037, p. 1043, November, 1915.

EFFECT ON NEGLIGENCE OF FELLOW SERVANT.

DEFENSE OF CONTRIBUTORY NEGLIGENCE OF FELLOW SERVANT ABOLISHED.

The primary and general purpose of the Alabama statute is to abolish, in the specified cases, the rule which exempts mine operators from liability to answer in damages for an injury suffered by one miner by reason of the negligence of a fellow miner; but when a miner who is injured and a miner whose negligence caused the injury are of the same grade, and as to all employees or miners who do not come within either of the specified statutory classes, the common law rules apply. The statute gives an injured miner a right of action in the enumerated cases as if he were a stranger, rightfully and lawfully on the premises of the operator, and takes away the defense of common employment, and the purpose of the statute is to protect the miner against the special defenses growing out of, and incidental to, the relation of employer and employee; and the result is to take from a mine operator such special defenses, but to leave him all the defenses which he has by the common law against a stranger, not a trespasser, nor a bare licensee.

Standard Steel Co. *v.* Clifton (Alabama), 69 Southern, 937, p. 940, October, 1915.

STATUTORY ACTION FOR WRONGFUL DEATH.

ACTION IN UNITED STATES COURTS—CONSTRUCTION OF STATE LAW—JUDICIAL NOTICE.

Where an action is brought in a United States court to recover damages for the death of a miner under the Pennsylvania State statute, the Federal court will take judicial notice of the statutes and judicial opinions of that State and the Federal court is bound by the construction given to such act by the courts of Pennsylvania.

Vagaszki *v.* Consolidated Coal Co., 225 Federal, 913, p. 917.

ACTION BY ADMINISTRATOR—PLEADING.

An administrator suing for the wrongful death of a miner can not recover in the absence of an averment of the appointment and qualification of the plaintiff as administrator.

Byer *v.* Paint Creek Collieries Co. (West Virginia), 86 Southeastern, 476, September, 1915.

RIGHT OF WIDOW TO COMPROMISE CLAIM FOR DEATH OF HUSBAND.

A widow whose husband was killed in a mine because of the alleged negligence of the mine operator, and who waived the right to take out letters of administration and administer upon the estate of her husband and sue for the wrongful death, may after the appoint-

ment of a third person as administrator, compromise and settle the claim against the mine operator for damages because of the alleged negligence resulting in the death of her husband, and a receipt and release executed by her in payment, settlement, and compromise of such claim may be pleaded in bar of an action brought by the administrator. It is immaterial in such case that the administrator was appointed before the widow effected the compromise, and the result is not changed by the fact that she consented to the appointment of the administrator, as her superior right to control the claim by compromising it or by bringing suit on it herself, can be in no wise impaired by the qualification of the administrator, and her superiority continues until she in some manner waives it, and the waiver of her right to administer is not tantamount to a waiver to her right to sue or to settle, though this power may in fact be exercised to the detriment of her interests. The settlement made by the widow can not be impeached by the administrator on the ground that it was fraudulently procured, as the widow alone could take advantage of any alleged fraud.

Spitzer *v.* Knoxville Iron Co. (Tennessee), 180 Southwestern, 163, p. 164, November, 1915.

ACTIONS AGAINST PERSONS JOINTLY NEGLIGENT.

Under the constitution and statute of Kentucky an action to recover damages for the wrongful death of a miner may be maintained against the mine operator and a fellow miner who were both guilty of the negligence causing the death.

Carter Coal Co. *v.* Prichard (Kentucky), 179 Southwestern, 1038, p. 1041, November, 1915.

PROOF OF BENEFICIARIES AND FINANCIAL CIRCUMSTANCES.

In an action by an administrator for the wrongful death of an intestate the administrator must show that some person has suffered some pecuniary injury by the death, as the statute does not imply that damages and pecuniary losses necessarily flow from a negligent killing; and in order to meet this statute it is proper in an action against a mining corporation for the death of a minor son, to show the age, calling, and condition of the father, and also the age and condition of the mother, and to show in a general way the financial circumstances of the beneficiaries, and in specific instances the indebtedness or the reason of such.

Peklenk *v.* Isle Royale Copper Co. (Michigan), 153 Northwestern, 1068, p. 1070, September, 1915.

NEGLIGENCE OF OPERATOR—CARE REQUIRED.

NEGLIGENCE DEFINED.

Negligence may be defined to mean the failure to exercise ordinary care, or such care as is usually exercised by ordinarily careful and prudent persons under like or similar circumstances to those involved in the particular case.

Nebo Coal Co. *v* Barnett (Kentucky), 180 Southwestern, 79, p. 81, December, 1915.

GROSS NEGLIGENCE DEFINED.

Gross negligence may be defined as a failure to exercise slight care.

Nebo Coal Co. *v.* Barnett (Kentucky), 180 Southwestern, 79, p. 81, December, 1915.

DEGREE OF CARE REQUIRED—ORDINARY CARE.

Ordinary care may be defined to mean such care as is usually exercised by ordinarily careful and prudent persons under like or similar circumstances to those involved in a particular case.

Nebo Coal Co. *v.* Barnett (Kentucky), 180 Southwestern, 79, p. 81, December, 1915.

PROOF—CIRCUMSTANTIAL EVIDENCE.

In an action against a mine operator for the wrongful death of a miner caused by the alleged negligence of the operator, in order to make out a case it is not necessary to establish it by witnesses, but this may be done by circumstantial evidence.

Southern Mining Co. *v.* Lewis (Kentucky), 179 Southwestern, 1067, p. 1070, November, 1915.

NEGLIGENCE NOT PRESUMED FROM INJURY.

Negligence will not be presumed from the fact that a miner has been injured and one who alleges negligence must prove it; but in the case of death by wrongful act, the rule applies with equal force to one who alleges contributory negligence and where there is sufficient evidence to show that a mine operator was negligent in the manner in which he stopped empty cars on a track in and about an old entry and where he negligently operated the trains of cars whereby the cars standing on the track were released and permitted to run wild down the grade, and in this way the operator failed to exercise ordinary care to provide

a miner engaged in loading a car a reasonably safe place in which to work, and the operator, knowing such conditions, or in the exercise of ordinary care should have known of such conditions, and should have provided against them, and failing to do so is liable for the death of the miner.

Southern Mining Co. *v.* Lewis (Kenturcky), 179 Southwestern, 1067, p. 1070, November, 1915.

RIGHT TO DEFEND AGAINST CHARGE OF NEGLIGENCE.

The Iowa workmen's compensation act does not prevent a coal-mine operator, in an action against it by a miner for injuries due to the alleged negligence of the operator, from defending on the ground that the operator was in no wise at fault for the alleged injury charged to it.

Hunter *v.* Colfax Consolidated Coal Co. (Iowa), 154 Northwestern, 1037, p. 1069, November, 1915.

DESTRUCTION OF ARTESIAN WELL.

The owner of the underlying coal is liable for negligently destroying the pipe in an artesian well sunk through his strata of coal to the substrata by the owner of the surface.

Pennsylvania Central Brewing Co. *v.* Lehigh Valley Coal Co. (Pennsylvania), 95 Atlantic, 471, p. 472, July, 1915.

UNGUARDED EXCAVATION—CONSTRUCTIVE NOTICE.

A mining corporation is liable for the death of a 12-year old boy who lost his life by falling into an old excavation on the property of the corporation, and in an action for damages for the death of the boy it is not necessary to prove that the defendant corporation or its officers had actual notice or knowledge of the existence of the excavation nor is it sufficient to avoid liability for the defendant to show that none of its officers had any actual knowledge of the existence of the hole; but the proximity of the excavation to a much-traveled path and the knowledge of others in the vicinity of its existence, together with all the circumstances surrounding the situation, were sufficient to have the case submitted to the jury on the question whether the officers of the defendant corporation in the exercise of reasonable diligence ought not to have been aware of the excavation.

Peklenk *v.* Isle Royale Copper Co. (Michigan), 153 Northwestern, 1068, p. 1069, September, 1915.

REMOTE CAUSE OF INJURY.

Where it appeared that a mine operator was negligent in permitting a track in the mine to be laid and operated with cars dangerously near a rib without affording protection to employees, this is not sufficient to render the operator liable for the death of a miner caused by

being struck and run over by a trip of cars where it appears that the dangerous proximity of the track to the road had nothing whatever to do with producing the incident.

Clinchfield Coal Corporation *v.* Cruise (Virginia), 86 Southeastern, 135, p. 138, September, 1915.

PLEADING NEGLIGENCE—SUFFICIENCY OF PETITION.

In an action for damages by an injured miner whose injury was caused by a rock falling from the roof of a mine the sufficiency of the petition will not be determined by the provisions of section 8473 of the Revised Statutes of 1909 of Missouri, relating to the duty of a coal-mine operator to furnish props when requested, where the petition is not drawn under such section, as the remedy under that section is not exclusive and the common law remains open to the redress of an injured miner.

Atwell *v.* Marceline Coal & Mining Co. (Missouri Appeals), 180 Southwestern, 400, p. 401, November, 1915.

DEFECTIVE ROOF—FAILURE TO INSPECT AND REPAIR.

A complaint and petition for damages for injuries to a miner is sufficient after verdict where it alleges the defect in the roof and that the mine operator's boss knew of such defect and that the plaintiff requested him to build cribs for its support and thereupon such boss promised to do so but delayed for several days and until the roof fell and injured the plaintiff; and alleging also that although the plaintiff made such request, he thought he could continue to work in safety until the foreman complied with his promise to secure it, as every reasonable intendment will be indulged after verdict in favor of the petition stating a good cause of action.

Atwell *v.* Marceline Coal & Mining Co. (Missouri Appeals), 180 Southwestern, 400, p. 401, November, 1915.

DUTY TO FURNISH SAFE PLACE.

USE OF ORDINARY CARE TO FURNISH SAFE PLACE.

It is the duty of a coal company engaged in mining coal to exercise ordinary care to furnish a miner a reasonably safe place in which to work, and this duty carries with it the duty of inspection and the duty of supporting the roof with timbers in the event an inspection discloses the necessity for timbering; and where there was evidence tending to show that the roof where the miner was injured was unsafe and that this condition by the exercise of ordinary care could have been discovered in time to have protected the roof, if ordinary care had been exercised to adopt this method of safety after the attention of the company was called to the necessity for supporting the roof, under such circumstances the mine operator will be held liable for injuries resulting to a miner.

Carter Coal Co. *v.* Prichard (Kentucky), 179 Southwestern, 1038, p. 1043, November, 1915.

SAFE PLACE—EXCEPTIONS TO THE RULE.

The rule requiring a mine operator to furnish the miner a safe place in which to work does not generally apply when the miner himself is engaged in making the place and when the situation is constantly changing.

Calumet Fuel Co. *v.* Rossi, (Colorado), 151 Pacific, 935, p. 936, October, 1915.

EXCEPTION—MINER'S KNOWLEDGE OF CUSTOM.

In the absence of a positive rule of law imposing upon a mine operator the duty of safeguarding an entry or a traveling way through a miner's room there is no reason why a general custom, known to the miner, under which miners assume the duty of keeping safe the rooms and the ways, is not binding upon the miner; and in an action by a miner injured by a fall of rock from the roof, the mine operator is entitled to have the jury pass upon the matter of the custom and the miner's knowledge of it; and instructions by the court to the jury which prevent the mine operator from having his case thus presented are erroneous and sufficient to cause a reversal of the case.

Calumet Fuel Co. *v.* Rossi (Colorado), 151 Pacific, 935, p. 936, October, 1915.

MINER MAKING PLACE.

The rule that an employer must furnish an employee a reasonably safe place in which to work does not apply where the employee furnishes his own place or where the place is continually changing by reason of the work itself; and a miner as he removes the coal from his room makes a place in which he must work after the coal is removed and is continually changing the place by reason of the work being done.

Brooks *v.* Central Coal & Coke Co. (Oklahoma), 152 Pacific, 616, p. 617, November, 1915.
Van Hook *v.* Hamilton Coal & Mercantile Co. (Kansas), 152 Pacific, 640, November, 1915.

DISTINCTION BETWEEN FURNISHING AND MAINTAINING SAFE PLACE.

An action for the death of a miner caused by the negligent failure of a mine operator to provide the intestate with a reasonably safe place in which to work is not supported by evidence showing that the operator negligently failed to maintain a safe place, as the duty of maintaining a safe place in which to work is a delegable one, while the duty of providing such a place is not; and where the only negligence attempted to be shown was the failure to inspect the roof of the room in which the intestate was injured, or the failure to securely prop the same or to remove the loose rock or slate which fell upon the intestate, either of these, if considered a defect, was one which arose in the progress of the work, as there could be no roof until the ore

was removed, nor could it be inspected or propped, or the loose rock removed until the coal was mined and removed, and to maintain this kind of safety is a delegable duty and the proof shows that it was delegated, and if negligence occurred in the maintenance of such a place, it is that of the operator or its agent, and for such the statute alone makes the operator liable; and if the negligence of the mine operator was a failure to maintain a safe place for the miner, a recovery can not be had under the allegation that the mine operator was negligent in failing to provide the intestate with a reasonably safe place.

Standard Steel Co. *v.* Clifton (Alabama), 69 Southern, 937, p. 940, October, 1915.

INJURY TO INEXPERIENCED MINER—DUTY TO INSPECT.

A mine operator is liable to a miner for injuries caused from the fall of slate from the roof of an entry where the miner was working and where it appears that the miner could not speak English, and that he was nearsighted and not in the habit of doing any work about the mine that required skill or training, and where it was no part of his business or duty to look after the condition of the roof at the place where he was working, and where the company had other men employed to inspect the roof.

East Jellico Coal Co. *v.* Closterides (Kentucky), 178 Southwestern, 1152, October, 1915.

EVIDENCE AS TO DEFECTIVE CONDITION OF ROOF BEFORE AND AFTER ACCIDENT.

In an action by a miner for injuries caused by a fall of slate from the roof it is proper for miners who were not present at the time of the injury, but who were present the day and the night before and after the injury, to testify as to the condition of the roof and that they saw loose slate in the roof of the entry, or that some of the loose slate had fallen from the roof, and that they discovered after the injury that a part of such loose slate had fallen.

East Jellico Coal Co. *v.* Closterides (Kentucky), 178 Southwestern, 1152, p. 1153, October, 1915.

WILD CARS IN HAULAGE WAY.

A mine operator is not liable for the death of a miner caused by a trip of cars breaking out of a room, being insecurely scotched and running out and down the haulage way without lights or signals and running upon and over the miner who was using the haulage way as a walk way, where the operator had provided proper means for signaling the approach of cars to employees using the haulage way and where the usual thing was the use of the haulage way by a motor and cars, with a motorman and brakeman carrying lights and keeping the cars under control, as it is the probable and not the improbable danger which a

mine operator must foresee and guard against and he is not bound to foresee and provide against the unusual and improbable thing that occurs.

Clinchfield Coal Corporation *v.* Cruise (Virginia), 86 Southeastern, 135, p. 138, September, 1915.

EVIDENCE TO SUPPORT VERDICT AS AGAINST DEMURRER.

Where a mine owner and operator had mined out and completed according to his plan of work certain entries or rooms in its mine, the evidence of an injured miner to the effect that he was expressly directed to enter such abandoned part or room, without any knowledge on his part that it had been so abandoned and that there were no sufficient visible indications of its abandonment and was there injured in the course of his employment, is sufficient to sustain a verdict in his favor as against a demurrer to the evidence.

Osborn *v.* Darby Coal Mining Co. (Virginia), 86 Southeastern, 834, p. 835, November, 1915.

DUTY NOT DISCHARGED BY INSPECTION.

A mine owner and operator can not escape liability for an injury to a miner unless it appears that the duty of inspection was imposed upon the injured miner, or it is shown that the danger was so obvious as that a person of ordinary intelligence could, in the exercise of ordinary care, have discovered the peril; but the inspection of the roof is not conclusive evidence of the exercise of the required degree of care on the part of the coal-mine operator, and if the inspector decides that the roof is safe and supports are not necessary, this may not exonerate the mine owner or operator in the event an injury happens by the falling of the roof.

Carter Coal Co. *v.* Prichard (Kentucky), 179 Southwestern, 1038, p. 1043, November, 1915.

DUTY TO PROVIDE SAFE APPLIANCES.

INSTRUMENTS FOR SCOTCHING CARS.

A mine operator is not to be charged with negligence for failure to furnish the kind of instrumentalities commonly used and relied upon in a mine for scotching cars, where in the instant case it appears that if the instrumentalities were improperly and negligently used the fault lay with the fellow servant, for whose negligence the mine operator is not liable; but in any event the operator is not liable where the injured employee used the same scotch that had often been used in the same room and where he believed it would make the cars safe and secure at the time and where there were other props near by in abundance that he could have used if he believed the one used unsuited.

Clinchfield Coal Corporation *v.* Cruise (Virginia), 86 Southeastern, 135, p. 137, September, 1915.

INSUFFICIENT APPLIANCE—REMOTE CAUSE OF INJURY.

In an action by a miner for damages caused by the derailment of a motor due to a defect in the track it is error for a court to instruct the jury to the effect that the plaintiff is entitled to recover if the crab rope or cable was not of sufficient length to reach from the motor on the entry track to a loaded car in the miner's room, though the evidence tended to show the insufficient length of such crab rope and that this did make it necessary for the motor to come on to the room track, but where in fact the crab rope was not being used and no attempt had been made to use it at the time of the accident.

Consolidated Coal Co. *v.* Moore (Kentucky), 178 Southwestern, 1136, p. 1137, October, 1915.

DEFECTIVE CONDITION OF MACHINERY—QUESTION OF FACT.

In an action by a miner for injuries caused while cutting coal, and due to the alleged defective condition of the machine used, in that when the air was turned on it caused the machine to start with a jerk and such resulting jerk caused the injuries complained of, and where it was claimed that if the machine had been in good order it would have worked smoothly when the air was turned on, and the accident would not have occurred, the question, under such circumstances, as to whether or not the defective condition of the machine was the proximate cause of the injury is one of fact to be determined by the jury.

Stearns Coal & Lumber Co. *v.* Calhoun (Kentucky), 179 Southwestern, 590, November, 1915.

MINER'S KNOWLEDGE OF DEFECTIVE APPLIANCE—ASSURANCE OF SAFETY.

A miner in an action for personal injuries is entitled to have his case submitted to the jury where his injury was caused by the breaking of a jack pipe furnished him by the machine boss, where the miner knew the pipe was rusty and where he had objected to the use of the pipe, but was assured by the mine boss that it was good for two or three months, and that he, the boss, knew better than the miner, and where the superintendent assured the miner that the machine boss would see that a new pipe was furnished and directed him to go on with the work until a new pipe was furnished, though the testimony of the injured servant was contradicted by both the machine boss and the superintendent.

Keystone Coal & Coke Co. *v.* Petrovich, 227 Federal, 43, p. 45.

DUTY TO WARN OR INSTRUCT.

NEGLIGENCE OF FELLOW SERVANT—FAILURE TO WARN.

The duty to warn where timbermen are engaged in setting timbers and propping the roof of a mine in order to make a safe place is a

delegable duty and is fully performed when the mine owner or operator selects a suitable and competent fellow servant experienced in the work, and makes it his duty to give the warning; and such competent fellow workman does not stand in the relation of foreman or shift boss to the mine operator, but is simply a fellow miner of the timbermen, assisting him, and does not by reason of his seniority in the work at the place represent the owner or operator so as to make it liable for his negligence.

Aho *v.* Cleveland-Cliffs Iron Co. (Michigan), 154 Northwestern, 52, p. 55, September, 1915.

VICE PRINCIPAL—WARNING MINER OF DANGER—LIABILITY OF MASTER.

Where it was the duty of a mine operator to cross timber the rooms of a mine and the operator selected a person to perform the work and to do the work when the conditions required, it must be presumed that such person possessed superior knowledge of the danger, or lack of danger, growing out of the roof; and as the duty of cross timbering devolved upon the operator, and as the duty was intrusted to a person selected, he became a vice principal and took the place of the operator, and his assurance of safety to a miner was in effect an assurance by the master; but the rule operates both ways, and if the miner had the right to rely on the assurance of safety made by the vice principal, he should be required, on the other hand, to heed the warning of danger where such vice principal warned the miner of the dangerous condition of the roof and of the danger of working thereunder a sufficient length of time before the accident to enable the miner, by the exercise of ordinary care, to stop work and avoid the peril, and the operator can not be held liable where the miner continued in his working place as against such warning, and was injured.

Carter Coal Co. *v.* Hill (Kentucky), 179 Southwestern, 2, p. 4, October, 1915.

ABANDONED ROOMS—FAILURE TO WARN MINER.

A mine owner and operator has the right to abandon places in his mine which have been completed according to the plan of the work, and if a room in which a miner was directed to work had been abandoned, there being no sufficient visible indications of its abandonment, the mine owner would be liable for negligence to a miner entering such abandoned part or room and being injured in the course of his employment, if the mine operator failed to give due and timely warning of such abandoned part or room.

Osborn *v.* Darby Coal Mining Co. (Virginia), 86 Southeastern, 834, p. 835, November, 1915.

WARNING UNNECESSARY AS TO ORDINARY DANGERS.

The failure of a mine operator to warn an inexperienced coal miner of the danger incident to the taking from a drill hole of a stick of dynamite with an ignited fuse attached, almost immediately after discovery of lack of scintillation by the fuse, is not negligence, as any person of ordinary intelligence presumptively knows that a fuse will sometimes burn without scintillating; and the mine operator is not liable for an injury resulting from such an act. Under such circumstances there was nothing in the situation of the miner that might reasonably have induced the operator or his agents to anticipate the act of the miner where there was nothing to show that he lacked the intelligence ordinarily characteristic of a mature man and knew that dynamite would explode, and no one could have thought it necessary to advise him against taking up a stick of dynamite to which a lighted fuse was attached.

De Francesco *v.* Piney Mining Co. (West Virginia), 86 Southeastern, 777, p. 780, October, 1915.

LIABILITY FOR NEGLIGENCE OF FELLOW SERVANT.

WHO ARE FELLOW SERVANTS.

The rule is that all who serve the same master, work under the same control, derive authority and compensation from the same common source, and are engaged in the same general business, though it may be in different crews or departments of it, are fellow servants; but the employees need not be engaged in the same common work at the same time and the "con-association doctrine" does not apply, but it is sufficient if the servants are in the employment of the same master, engaged in the same common work and performing duties and services for the same general purpose. Under this rule a miner employed on a night shift engaged in the work of removing old timbers from a sublevel in a mine and replacing them with new ones is a fellow servant with a miner working on a day shift performing the same work.

Kangas *v.* Cleveland-Cliffs Iron Co. (Michigan), 154 Northwestern, 41 p. 42, September, 1915.
Aho *v.* Cleveland-Cliffs Iron Co. (Michigan), 154 Northwestern, 52 p. 54, September, 1915.

FELLOW SERVANT OF EQUAL GRADE.

A mine operator is not liable to a miner for injuries incurred by him on account of the negligence, either ordinary or gross, of a fellow servant in the same work and occupying the same situation as to authority as himself.

Nebo Coal Co. *v.* Barnett (Kentucky), 180 Southwestern, 79, p. 81, December, 1915.

LIABILITY FOR GROSS NEGLIGENCE OF SUPERIOR FELLOW SERVANT.

Where in making up trips or trains of cars it was the duty of a brakeman in a coal mine to couple or uncouple the coal cars and give to the

motorman proper signals to "go ahead" or "back up" and when the trip was ready the brakeman would get aboard, either on the car or on the motor, as the situation required, and the motorman would then take the trip to its destination; and while in making up the trip the motorman responded to the brakeman's signals, yet at all other times the motorman had sole charge and control of the train and in that regard was superior in authority to the brakeman; and while the two employees were in the manner described associated together in the same work, yet they were not in the same grade of employment, their relative duties were not unlike that of the ordinary railroad engineer and brakeman; but an engineer and brakeman are not fellow servants although employed on the same train; and in an action by the brakeman for damages caused by the alleged gross negligence of the motorman, the court properly instructed the jury that the brakeman was entitled to recover if his injuries resulted from the gross negligence of the motorman.

Consolidated Coal Co. *v.* Baldridge (Kentucky), 179 Southwestern, 18, October, 1915.

NEGLIGENCE OF SUPERIOR SERVANT NOT IMPUTED TO OPERATOR.

The ordinary negligence of a superior servant which results in an injury to a miner, which does not produce death, can not be imputed to the mine operator.

Nebo Coal Co. *v.* Barnett (Kentucky), 180 Southwestern, 79, p. 81, December, 1915.

RECKLESS OPERATION OF MOTOR.

In the operation of a motor and cars in a coal mine proof of a jerk that is violent, unusual, and unnecessary is evidence from which negligence on the part of the person operating the motor may be inferred.

Nebo Coal Co. *v.* Barnett (Kentucky), 180 Southwestern, 79, p. 80, December, 1915.

MINERS' WORKING PLACE—SAFE PLACE.

SAFE PLACE DOCTRINE—APPLICATION TO MINER'S WORKING PLACE.

The rule that an employer or a mine operator is required to furnish his employee or miner a safe place in which to work, and to see that the environment in which the employee or miner performs his duty is kept in a reasonably safe condition, is not applicable where such environment becomes unsafe solely through the fault of the employee or miner himself, or of his fellow employees, and the obligation of the employer or operator to protect his employees does not extend to protecting them from the transitory risks which are created by the negligence of the employees themselves in carrying out the details of the work.

Standard Steel Co. *v.* Clifton (Alabama), 69 Southern, 937, p. 940, October, 1915.

DUTY TO EXERCISE CARE—QUESTION OF FACT.

It is the duty of a miner working in a coal mine to exercise ordinary care for his own safety although he is not charged with the duty of inspecting, and if the unsafe condition of the roof at the place where he is working is so obvious that a person of ordinary intelligence, in the exercise of ordinary care for his own safety, could not have failed to discover it, this would amount to such contributory negligence as to defeat a recovery; but this was a question of fact to be submitted to and determined by a jury.

Carter Coal Co. *v.* Prichard (Kentucky), 179 Southwestern, 1038, p. 1042, November, 1915.

EXCEPTIONS TO RULE—MINER MAKING PLACE SAFE.

The rule as to the duty of a mine operator to furnish safe places for his miners and employees in which to work applies to a timberman whose duty it is to timber a stope or the roof of a room for the purpose of making the place safe; and the fact that a timber boss was employed to care for the safety of his crew does not make him a vice principal performing the nondelegable duty to furnish the timberman a safe place, and the duties of such timber boss in caring for the safety of his crew are not in their nature different in principle than those of timber bosses generally.

Kangas *v.* Cleveland-Cliffs Iron Co. (Michigan), 154 Northwestern, 41, p. 42, September, 1915.
Aho *v.* Cleveland-Cliffs Iron Co. (Michigan), 154 Northwestern, 52, p. 54, September, 1915.

EXERCISE OF CARE TO AVOID INJURY.

It is the duty of a miner to exercise care to avoid injuries, and he is under as great obligation to provide for his own safety from such dangers as are known to him, or are discernible by ordinary care on his part, as the master is to provide for him; and he must take ordinary care to learn the dangers which are likely to beset him in the service and must not go blindly to his work where there is danger. This rule applies both under the common law and under the statutory provisions prescribing the relative duties of the miner and operator.

Virginia Iron, Coal & Coke Co. *v.* Asbury (Virginia), 86 Southeastern, 148, p. 149, September, 1915.

VIOLATION OF RULES.

The violation by a miner of a rule of the mine operator, promulgated for the protection of the miner, will defeat a recovery by the miner for an injury when the observance of the rule would have prevented the injury complained of, as obedience to the rules of an employer can not be more obligatory upon an employee than his obedience to a statute enacted for his benefit, and it is the rule that a violation of the latter is negligence per se.

Virginia Iron, Coal & Coke Co. *v.* Asbury (Virginia), 86 Southeastern, 148, p. 151, September, 1915.

FAILURE TO INSPECT ROOF AFTER SHOTS—DUTY OF MINER.

It is the duty of a miner working in a coal mine where shot firers are provided to inspect his room and the place at which he is working after a shot has been fired, for the purpose of discovering anything that might be dangerous; and where a miner left his room with its props in proper and safe condition and found them down on his return after shots had been fired, he should then have inspected the roof of his room to ascertain its condition, and if defective he must act accordingly. It was not the duty nor was it necessary for the mine operator to inspect the miner's room after the shot was fired before the miner returned to his work in the room; and under such circumstances it is not actionable negligence on the part of the operator to fail to inspect the miner's room after the shot had been fired.

Brooks *v.* Central Coal & Coke Co. (Oklahoma), 152 Pacific, 616, p. 617, November, 1915.

MINER'S SCOPE OF EMPLOYMENT—INJURY AND LIABILITY.

SCOPE OF EMPLOYMENT—INJURY OUTSIDE OF EMPLOYMENT.

There can be no recovery for the death of an employee in a mine where his regular employment was in the capacity of assistant boss driver and where he gratuitously, or without proper authorization, undertook to aid in the work of repairing a trip wreck in the mine, and in so doing came in contact with an electric wire, thereby causing his death.

Republic Iron & Steel Co. *v.* Quinton (Alabama), 69 Southern, 604, p. 605, July, 1915.

DRIVER ASSISTING IN REMOVING WRECK.

A mine owner and operator is liable for the death of an employee whose regular employment was in the capacity of assistant boss driver, where the bank boss called upon the boss driver and his assistant to assist in removing a trip wreck and while so engaged the assistant boss driver, without any negligence on his part, came in contact with a live electric wire and was killed.

Republic Iron & Steel Co. *v.* Quinton (Alabama), 69 Southern, 604, p. 606, July, 1915.

MINER WAITING FOR WORK—SCOPE OF EMPLOYMENT.

Where a miner reports to the place or room for work as directed, and upon arrival he found that the room was not quite ready, in that the track, being laid by another employee, was not in proper position and that it was necessary to pull the track over to the side of the room, and the employee being unable to do this alone requested the miner to assist him, and after assisting in removing the track and while assisting the employee in setting some timbers, the miner

was injured from an explosion in an adjoining room and which broke through the connecting wall, causing the injury complained of, a recovery of damages is not to be denied him on the ground that he was not in the course of his employment and that he was a mere volunteer, or assisting the employee to discharge duties which such employee alone was under obligation to perform, as he was at the place where he had been ordered to report for work, and whether he sat down to watch the other employee make the place ready, or whether he voluntarily assisted such employee in doing so, the operator's duty to provide him a reasonably safe place obtained.

Moses. Proctor Coal Co. (Kentucky), 179 Southwestern, 1043, p. 1044, November, 1915.

MINER ENTERING DANGEROUS ROOM AFTER WORKING HOURS.

A miner who entered a room in a mine for the purpose of inspecting either upon the orders of the bank boss or with his knowledge and consent and where such bank boss knew of the existence of gas in the room, or negligently failed to ascertain the fact before ordering or permitting the miner to enter such room, is not to be denied the right to recover for injuries caused by the presence of the gas because he entered the room and the injury was sustained after he had finished his daily task, but where it also appears that he was due to remain in the mine beyond the time at which he received the injury; and if for some good reason he went to another part of the mine upon the order or with the consent of his superior he was still an employee entitled to the protection of the law governing such a relationship and answerable to the duties imposed upon him.

Woodward Iron Co. *v.* Lowther (Alabama), 69 Southern, 877, p. 879, October, 1915.

MINER WALKING BESIDE MOTOR.

A miner after a long delay on the part of the motor man in coming for his loaded car went to the entry and requested the motor man to get the car and returned walking by the side of the motor and while so doing the motor was derailed by reason of a defect in the track, and the miner's foot was caught between one of the rails and a gob of slate lying nearby and crushed and broken. Under such circumstances recovery can not be denied, on the ground that the miner was at a place where the duty of the master to use ordinary care to furnish him a safe place in which to work, or reasonably safe appliances for work, did not apply, as under the circumstances the miner was acting in the course of his employment.

Consolidated Coal Co. *v.* Moore (Kentucky), 178 Southwestern, 1136, October, 1915.

QUESTION OF FACT—SCOPE OF EMPLOYMENT.

Where a miner was working outside the mine and had just finished loading eight mine cars with timber and while the motor was hauling

them into the mine and he was walking behind the cars along the track toward his place of regular work, a wild empty mine car came down the grade from the rear and ran over him, in an action by his administrator for wrongful death, the question whether such death was due to the employing company's negligence was a question of fact for the jury.

Southern Mining Co. *v.* Lewis (Kentucky), 179 Southwestern, 1067, p. 1068, November, 1915.

CONTRIBUTORY NEGLIGENCE OF MINER.

VOLUNTARY SERVICE OUTSIDE OF EMPLOYMENT.

To entitle a miner to recover for injuries, the injuries must be received while rendering the service required by the particular employment or in obeying the orders of his superior to which the employee is bound to conform; but injuries received while doing other more hazardous service not pertaining to the employment, by way of accommodation or which are self-assumed, are not sufficient to justify a recovery against the mine operator.

Republic Iron & Steel Co. *v.* Quinton (Alabama), 69 Southern, 604, p. 606, July, 1915.

MINER GOING IN FRONT OF CAR.

A miner directed by a mine foreman to take an empty car from the drift mouth down a new entry to the face of the coal was directed to call another miner to assist him, and the two proceeded to let the car down the entries by walking behind it holding it with their hands; and when they arrived at a point about eight feet from the face of the coal the foreman called the assistant to return to the drift mouth, and as the assistant was leaving the miner inserted sprags in the wheels on the right-hand side of the car and brought it to a stop some three feet from the face of the coal and thereupon put a block or scotch under the front wheel, but fearing the car would roll over this on account of the grade, he went in front of the car for the purpose of blocking the wheel on the other side, and while in front, the car from some cause started, caught him against the face of the coal, and caused the injuries of which he complains. Under such circumstances the miner can not recover for the injury, as he undertook to exercise his own judgment as to the safety of going in front of the car instead of behind it and the withdrawal of the assistant at the direction of the mine foreman in no way contributed to the injury, and the injuries complained of were the direct result of his own want of care.

Riddle *v.* Wisconsin Steel Co. (Kentucky), 178 Southwestern, 1064, September, 1915.

FREEDOM FROM CONTRIBUTORY NEGLIGENCE.

EXERCISE OF DUE CARE PRESUMED—PRESUMPTION.

In an action against a mining corporation for the death of a boy caused by falling into an unguarded excavation, in the absence of

any proof as to the contributory negligence of the boy, it will be presumed that he was in the exercise of due care and the question of his contributory negligence or freedom from contributory negligence under the circumstances is a question of fact for the jury.

Peklenk *v.* Isle Royale Copper Co. (Michigan), 153 Northwestern, 1068, p. 1070, September, 1915.

BURDEN OF PROOF.

In an action for the death of a miner alleged to be caused by the negligence or wrongful act of the mine operator, the burden is upon the operator to show the contributory negligence of the deceased miner upon which it relies for a defense.

Southern Mining Co. *v.* Lewis (Kentucky), 179 Southwestern, 1067, p. 1069, November, 1915.

RISKS ASSUMED.

ASSUMPTION OF RISK AS A QUESTION OF LAW.

Ordinarily the question of whether a miner has assumed the risk of dangers incident to his employment is a question of fact for a jury to determine, but where the alleged causes of the dangers by which the miner was injured are so open and obvious, and the knowledge on the part of the miner so complete as to leave no doubt that he knew or ought to have known all about them, the question of the assumption of the risk becomes one of law and will bar a recovery for injuries under such circumstances.

Clinchfield Coal Corporation *v.* Cruise (Virginia), 86 Southeastern, 135, p. 138, September, 1915.

EMPLOYEE PERFORMING OUTSIDE SERVICES AT REQUEST OF FELLOW EMPLOYEE.

Where a miner employed in a mine is injured while acting outside of the scope of his regular employment, at the command or request of another employee, the employer is not liable, unless the latter employee is, either expressly or impliedly, authorized to make the command or request.

Republic Iron & Steel Co. *v.* Quinton (Alabama), 69 Southern, 604, p. 606, July, 1915.

RULES AS TO SCOTCHING MINE CARS.

There is no duty resting upon a mine operator to promulgate rules in so small a matter as the scotching of mine cars, but the lack of such rules and the uniform practice and method of doing the work in the mine are matters necessarily within the actual knowledge of an employee engaged in doing such work, and it must be assumed under such circumstances, where a miner made no protest whatever, that he assumed the risk of any dangers incident to such lack of rules and to such method of work.

Clinchfield Coal Corporation *v.* Cruise (Virginia), 86 Southeastern, 135, p. 137, September, 1915.

TIMBERMAN WORKING IN DANGEROUS PLACE.

An employee in a mine working as a timberman helping to make places safe for mining operations can not recover for injuries occasioned by a fall of rock, where the timber gang consisted of four men and the timber boss, and with them he was at work in the stope replacing timbers which had been knocked out in the night by blasting, and where, after an examination by the timber boss, the timberman with others commenced to shovel away dirt and broken rock from the footwall where timbers were to be set, and where after blasting a "block hole" the injured timberman, with the others, returned to the stope and began shoveling dirt and rock without instructions from the timber boss and before he had made an examination of the stope, and had not instructed the men to resume work nor given any assurance that the place was safe, but had given no warning of danger.

Vrelenich *v.* Calumet & Hecla Mining Co. (Michigan), 154 Northwestern, 39, September, 1915.

KNOWLEDGE OF LACK OF BRAKES ON CARS.

Where the lack of brakes on cars operated in a mine was a general and permanent condition prevailing throughout the mine and a well-known incident to the method in which the work was being done, a miner employed and working in the mine assumes the risk of danger incident to the absence of brakes on the cars, though the presence of brakes would have added an element of safety.

Clinchfield Coal Corporation *v.* Cruise (Virginia), 86 Southeastern, 135, p. 137, September, 1915.

KNOWLEDGE OF DANGER—RIB CLOSE TO TRACK.

Where a dangerous condition in a mine was caused by the proximity of a rib to the track in a haulageway on one side with a dangerous electric wire on the other side, and such dangerous condition resulted from the negligence of the mine owner and was prominent and perfectly open and obvious to an experienced miner who was injured and was actually known to the miner before the injury, and where with knowledge of such dangerous condition the injured miner had been using the haulageway as a walkway for several days previous to and on the day of the injury, he must be held under such circumstances to have assumed the risk of the danger arising from the known conditions.

Clinchfield Coal Corporation *v.* Cruise (Virginia), 86 Southeastern, 135, p. 137, September, 1915.

KNOWLEDGE OF DANGEROUS CONDITION OF ROOF.

An experienced miner engaged in robbing pillars left standing as a support to the roof of a mine, who had observed a piece of slate hanging from the roof and had tested the same with his pick and

found it "drummy," but who with his buddy thought the slate would stand until they could finish their work at that place, is not entitled to recover for an injury received from the falling slate, though he had properly requested props but the operator had failed to furnish them, where there was no assurance from the mine boss or other person representing the company that the place was safe.

Imperial Jellico Coal Co. *v.* Fox (Kentucky), 179 Southwestern, 1032, p. 1033, November, 1915.

DANGER OBVIOUS.

Where the danger from loose slate in the roof is so obvious to an experienced miner that no man of ordinary prudence would continue to work under such circumstances, a miner assumes the risk if he undertakes the work, and the operator is not liable if injury results; and this rule applies to an experienced miner who is engaged in robbing pillars in a mine and has knowledge of the dangerous condition of the roof and who knows that the cutting out of the pillars increases the danger, though the miner properly requested props which had not been furnished.

Imperial Jellico Coal Co. *v.* Fox (Kentucky), 179 Southwestern, 1032, p. 1033, November, 1915.

NEGLIGENCE OF FELLOW SERVANT.

A miner or other employee, when he undertakes employment, so far as the mine operator is affected, assumes all the risks from injuries to himself which are caused by the negligence, either ordinary or gross, of his fellow servants who are upon the same plane of equality as himself as to authority and engaged in the same work; and he likewise assumes all risks of injuries which may arise from the ordinary negligence of a superior employee in the same work as himself where the negligence does not result in death.

Nebo Coal Co. *v.* Barnett (Kentucky), 180 Southwestern, 79, p. 81, December, 1915.

RISKS NOT ASSUMED.

INCOMPETENCY OF FELLOW SERVANT.

An injured employee who was engaged in repairing the tracks in a mine under directions to do the work with the least possible obstruction to the cars passing in and out is not, as a matter of law, to be charged with assumption of risk of the incompetency of a motorman operating a motor and hauling cars over the track, where in the particular instance the motorman was signaled by another employee to stop before reaching the point where the repairs were being made and where the injured employee requested the other employee to signal the motorman to come ahead slowly and steadily, but instead of giving such signal the employee gave the signal to come ahead

and thereupon the motorman ran the motor and his trip of cars upon and over the place where the track was being repaired, causing a wreck and injuring the plaintiff; but the question of the assumption of the risk as well as the contributory negligence of the injured employee is one of fact to be determined by the jury.

Virginia Iron, Coal & Coke Co. *v.* Stanberry (Virginia), 86 Southeastern, 130, p. 131, September, 1915.

KNOWLEDGE OF INCOMPETENCY OF EMPLOYEE—LIABILITY—QUESTION OF FACT.

Where an employer knowingly employs an incompetent servant or keeps him in the employment after notice and knowledge of such incompetency, the doctrine of assumption of risk will not be applied as a matter of law to a fellow employee who also knew of such incompetency of the other employee, but the question of the assumption of risk or of the contributory negligence of the injured servant is a question of fact to be submitted to a jury for determination, rather than one of law to be determined by a court.

Virginia Iron, Coal & Coke Co. *v.* Stanberry (Virginia), 86 Southeastern, 130, p. 131, September, 1915.

DEFECTIVE CONDITION OF TRACK.

In an action by a miner for injuries due to the derailment of a motor caused by the defective condition of the track, it can not be said that the miner assumed the risk of the accident, as a miner does not assume the risk growing out of the operator's failure to use ordinary care to furnish him a reasonably safe place in which to work, or reasonably safe appliances, and it is only where the defect and the danger therefrom are known by the miner, or are so obvious that an ordinarily prudent person, under the circumstances, would have observed and appreciated them, that the miner can be said to have assumed the risk thereof; and in the absence of evidence tending to show that the miner knew of the defective condition of the track, or that the defect and danger were plainly observable, it must follow that he did not assume the risk.

Consolidated Coal Co. *v.* Moore (Kentucky), 178 Southwestern, 1136, p. 1137, October, 1915.

NEGLIGENCE OF OPERATOR.

A miner working in a mine does not assume an extraordinary risk caused by the operator's negligence.

Standard Steel Co. *v.* Clifton (Alabama), 69 Southern, 937, p. 938, October, 1915.

KNOWLEDGE OF DANGER.

A miner operating a punching machine for cutting coal is not to be charged with the assumption of the risk and his action for damages for injuries is not to be defeated on that ground because he knew

that the machine had stopped two or three times and its defective condition was known to him and with such knowledge he continued to work with the machine, as it is not sufficient to show merely that the miner knew of the defective condition or that it was clearly observable, but it must be made to appear that the danger from such condition was known or clearly observable and appreciated by him. The fact that he knew that the machine had stopped on two or three occasions on the morning of the injury is immaterial where it does not appear that when the machine was started it began to move with such violence that the danger therefrom was clearly observable and the miner was justified in continuing the use of the machine where the electrician, who repaired it, assured the miner that it was all right, and he had the right to rely on the assurance thus given and to continue to use the machine unless the danger was so obvious that an ordinarily prudent person would have refused to continue working with it.

Stearns & Lumber Co. *v.* Calhoun (Kentucky), 179 Southwestern, 590, p. 591, November, 1915.

GROSS NEGLIGENCE OF SUPERIOR SERVANT.

Under the Kentucky rule injuries which are caused to a miner or an inferior employee by the gross negligence of his superior employee are imputed to the employer or mine operator, and such an employee does not assume the risks of danger which arise from such gross negligence in an employee superior in authority to himself; but this rule is limited to cases where such superior employee has the immediate control of and supervision of the injured employee, and does not extend to cases where the superior employee's ordinary negligence causes injury to an inferior employee who is not immediately under his control and supervision.

Nebo Coal Co. *v.* Barnett (Kentucky), 180 Southwestern, 79, p. 81, December, 1915.

VIOLENT AND UNUSUAL JERKS OF MOTOR.

An injury received by an employee from an ordinary and necessary jerk in the operation of a motor and coal cars in a mine is the result of a risk assumed by the employee, but an injury from a violent and unusual and unnecessary jerk does not arise from such assumed risk, and proof of a jerk by a motor operating upon the coal cars which is violent, unusual, and unnecessary may be evidence of negligence on the part of the person operating the motor; and where a jolt received by a coal car, thereby causing the injury complained of, was unusual, violent, and unnecessary, a miner suing for an injury resulting therefrom is entitled to have his contention upon this subject submitted to and determined by a jury.

Nebo Coal Co. *v.* Barnett (Kentucky), 180 Southwestern, 79, p. 80, December, 1915.

DUTY AND LIABILITY TO TRESPASSER, LICENSEE, OR INVITEE.

VOLUNTARY WORK OUTSIDE OF SCOPE OF EMPLOYMENT.

Where an employee in a mine quits the work assigned to him by his employer and voluntarily undertakes to do work about which he has no duties to perform by virtue of the contractual relation existing between him and his employer, there is during such time and while such condition exists no duty on the part of the employer to use care for his safety.

Republic Iron & Steel Co. *v.* Quinton (Alabama), 69 Southern, 604, p. 606, July, 1915.

LIABILITY FOR OFFICER REMOVING TRESPASSER.

A coal-mine operator is not liable to a third person for an alleged assault on him by one of its officers in evicting and ejecting him from the premises of the company, where such officer used such force only as was reasonably necessary to evict the intruder, as it is the undoubted right of a lawful owner or of an occupant of premises to retain possession and to use such force as may be reasonably necessary to remove therefrom trespassers or intruders who conduct themselves in an improper manner and refuse to desist or leave on request.

Lunsford *v.* Hatfield Coal Co. (Kentucky), 178 Southwestern, 1166, p. 1167, October, 1915.

CARE TOWARD LICENSEE.

A miner who has been employed by and is working for a mine operator but who for sufficient reason was not working on the particular day but for his own purposes or in aiding a friend entered upon the premises of the mine operator is only a licensee, and the duty of the operator to him was simply not to wantonly or intentionally injure him, and the operator can not be held liable for the death of such miner who, while occupying the position of the licensee and while spending his time at the sand house, was killed by an explosion of powder in course of conveyance to the mines on one of the coal cars.

Westborne Coal Co. *v.* Willoughby (Tennessee), 180 Southwestern, 322, p. 323, November, 1915.

ACTIVE NEGLIGENCE—MEASURE OF LIABILITY TO LICENSEE.

The term "active negligence" is one of extensive meaning, obviously embracing many occurrences that would fall short of willful wrongdoing or of crass negligence and negligence of inadvertent acts causing injury to others resulting from the failure to exercise ordinary care as well as of acts the effects of which are misjudged or unforeseen, through want of proper attention or reflection, and it may cover acts of willful wrongdoing as well as those not of that character and is not a reliable term as a measure of right or duty for the purpose of determining liability for the death or injury of a licensee.

Westborne Coal Co. *v.* Willoughby (Tennessee), 180 Southwestern, 322, p. 325, November, 1915.

DUTY OF MINE OWNER TO INVITEE.

The duty of a mine owner to take proper precautions to provide a safe place for an invitee is coextensive with the premises to be used and is not limited to the immediate locality where the contemplated work is to be done, but extends to every part of the premises or mine and every instrumentality which may be visited or used by the workman for a purpose incidental and reasonably adapted to, or associated with, the accomplishment of the purpose for which the invitation was given; and a custom of a miner or an invitee to occupy a particular place in the mine may, if long continued and acquiesced in by the mine owner, amount to an implied invitation to do the act or be at the place in question, and this renders the mine owner liable for an injury to such invitee while at such place.

Patterson *v.* Alabama Fuel & Iron Co. (Alabama), 69 Southern, 952, p. 953, November, 1915.

INDEPENDENT CONTRACTOR.

LIABILITY OF MINE OWNER TO EMPLOYEE OF INDEPENDENT CONTRACTOR.

When a mine owner invites a second person to assist in driving an entry and in mining coal therein, and the latter is injured by reason of a dangerous condition existing at any place in the mine, the mine owner is liable if circumstances were such as to justify the inference that such second person had a legal right, derived from the mine owner, to occupy the place where his injury occurred, and if it was apparent to the mine owner, considered as a man of ordinary powers of observation, that the position likely to be assumed by such second person in the exercise of the right so acquired with respect to the owner himself or some physical agency which was under his control at the time, is such that such second person will be likely to suffer injury if the mine owner does not take precautions to prevent that injury which would occur to a prudent man as being appropriate.

Patterson *v.* Alabama Fuel & Iron Co. (Alabama), 69 Southern, 952, p. 953, November, 1915.

SERVANT'S USE OF DANGEROUS PLACE—LIABILITY OF MINE OWNER.

A mine owner can not be held liable for the death of a miner employed by an independent contractor, where the death was caused in an air course which was but a rough passageway for the circulation of outer air and was otherwise used only as a conduit for the power cable and was neither adapted nor designed for any other use, and this must have been clearly apparent to any man of even the least experience and intelligence, and its very use and condition was a sufficient warning to him not to enter, and the mine owner was under no duty to keep him out by guard rails or posted warning;

and his employment by a contractor to mine coal in a heading could not by any reasonable association of ideas suggest to the mine owner the likelihood of the intestate's entrance into the air course for any legitimate purpose incidental to his employment and where his presence at the place where he met his death was neither for convenience or by necessity, so far as work was concerned, and where the possible explanation was that he had stored his powder in the air course, in violation of law, and knowing that a mine inspector was inspecting the mine, he hurried into the air course to further conceal or remove the powder to prevent its discovery, and where there was nothing disclosed in the evidence to show that the mine owner knew that the air course was being used for such a purpose and did not by acquiescence impliedly invite him.

Patterson *v.* Alabama Fuel & Iron Co. (Alabama), 69 Southern, 952, p. 953, November, 1915.

CONTRACTS RELATING TO OPERATIONS.

MINING OUT PILLARS.

A coal lease demised all the coal and veins of coal upon the property and was to continue during such period and term as should be required to mine and carry away all the merchantable and marketable coal in, under, and upon the leased premises,, and bound the lessee to mine, take away, and pay for all the merchantable and marketable coal in and under the leased premises, and provided that the lessee should not be liable to the lessor for any injury to or falling in of the surface of the land in consequence of mining or removing the coal or of making tunnels or other openings into the same, unless damage should result from the willful misbehavior or gross negligence of the lessee. Under the terms of such a lease the owners in fee of the land which is the subject of the lease can not restrain the lessee from mining out and removing the pillars left during the course of mining operations to support the roof, and where such pillars are no longer needed to protect mining operations, as the intention of the lessors in entering into the lease was for the purpose of having the entire body of their coal mined and removed so they could realize upon it, and this was to be done without regard to the effect of the mining operations upon the surface, and the covenant against liability for injury to any part of the surface arising from the act of mining and removing all of the coal is conclusive against the lessors on the proposition that the lessee is not required under the lease to leave pillars or any part of the coal for the support of the surface, and this rule obtains although the lease provided that mining operations should be continued in a workmanlike manner and pillars should be left of such size and number as should be necessary to support the roof; and the mining and removing of the coal in such vein

should be so conducted as not to injure or interfere with the mining or removing of coal from any other vein either overhanging or underlying, so that at the expiration of the term of the lease the mines and improvements shall be left in as good order and condition for future mining as any prudent operator would leave the same were he entitled to continue mining for a series of years; but this stipulation referred only to such termination of the lease as might for some sufficient reason take place before all the coal upon the premises was mined, and it was the proper preservation of the colliery as a going concern during the course of mining that was intended to be safeguarded by this clause, so that ultimately the greatest quantity of coal could be won. And it is further observed that the pillars were to be left in the mine to support the roof and not the surface, as the support of the roof would be required in order to protect mining operations, and after the coal is exhausted such protection would no longer be necessary.

Miles *v.* New York & Susquehanna Western Coal Co. (Pennsylvania), 95 Atlantic, 397, p. 398, July, 1915.

CONTRACT TO PUMP WATER OUT OF MINE—DAMAGES FOR BREACH.

A judgment is sufficiently supported by the evidence where it appears that the plaintiff in an action was employed by the owner of a coal mine to pump the water out and keep it out of a certain entry in the mine, and for which he was to receive 9 cents a ton on the coal mined from the particular entry, and where the plaintiff claimed that the contract included the coal left in the pillars and stumps of the entry, and where it appeared that he could have made a clear profit of 6 cents a ton, and the verdict and judgment were based on the finding that there was 15,000 tons of coal he was entitled to have mined under his contract, but was prevented by the mine owner.

Trosper *v.* Rader (Kentucky), 179 Southwestern, 1023, November, 1915.

PARTNERSHIP AGREEMENT—GRUBSTAKE CONTRACT.

An agreement stipulated that one of the parties should be a full-fledged partner with the three other persons named, and have one-quarter undivided interest in all claims, lodes, and water rights acquired and owned by the parties, the agreement stating that the one person so made a partner was to furnish the above-mentioned parties with provisions from time to time up to a stated date. The consideration for the transaction was $30,000 and the agreement provided for the payment of $6,000 cash, the balance of $24,000 to be paid "of the first money taken out of the ground." In a controversy over the mining operations and in an action to dissolve the partnership the words "of the first money taken out of the ground" were held to mean the first money taken out of the ground to which the grantee was entitled, which would be one-fourth of the amount so taken, or the gross amount to which the grantee would be entitled and not the net proceeds, and where it appeared that the aggregate gross amount was $26,038.30, the grantee is entitled to have one-fourth thereof, or $6,509.57, applied to the $24,000 deferred payment. But as the business of the firm resulted in a deficit the adjustment had to be apportioned in the payment of the indebtedness of the firm, and where it appeared that the total indebtedness was $19,314.94 the original grantee was held liable to the amount of $10,628.76.

Lesamis *v.* Greenberg, 225 Federal, 449, p. 450, August, 1915.

RIGHTS OF PARTNERS ON DISSOLUTION.

On the sale of assets of a partnership the partners will share equally in the proceeds and be entitled to have the same applied in that proportion to their indebtedness to the firm and the adjustment in the end must be on the basis of an equal division of the partnership property; and mining claims held by three persons at the time of making an agreement with a fourth, by which he should become a partner with a one-fourth undivided interest in all the mining properties then owned or to be acquired, and pursuant to which agreement the three persons conveyed to the fourth the undivided one-fourth interest in the mining property, became partnership property, and they are subject to the partnership indebtedness as partnership assets.

Lesamis *v.* Greenberg, 225 Federal, 449, p. 452.

LEASES GENERALLY—CONSTRUCTION.

PRACTICAL CONSTRUCTION—INTENTION OF PARTIES.

When the terms of a coal lease are doubtful or capable of two different interpretations, the meaning put on the instrument by the parties themselves may be shown and will be enforced by the courts, as their interpretation of the instrument is strong evidence of being the correct one and expressive of the intention of the parties when executing the contract; but if the contract is not ambiguous or uncertain in its terms, and the intention of the parties as disclosed by its provisions is not doubtful, then the construction acted upon by the parties is not controlling and will not be enforced by the courts.

Tustin *v.* Philadelphia & Reading Coal & Iron Co. (Pennsylvania), 95 Atlantic, 595, p. 599, July, 1915.

INTEREST IN REAL ESTATE—SALE OF OIL WELL FOR TAXES.

An oil and gas lease or contract conveyed an interest in the land where the lessee had completed producing wells, and the wells so drilled, with the machinery attached, must be considered real estate and not personal property, and can not be sold for taxes as personal property. This proposition is on the theory that while oil and gas leases differ from ordinary leases and usually give the lessee the right only to explore the land for oil and gas (and until he finds either one or the other he has no interest in the land), but if the lessee finds oil and gas then his so-called lease has ripened into an interest in the land.

Johnson *v.* Sidney (Indiana Appeals), 109 Northeastern, 934, p. 935, October, 1915.

COAL LEASES.

LIABILITY UNDER LEASE—MISTAKE OF LAW.

A coal lessee accepting a lease of four small tracts to mine coal and pay a certain stipulated royalty per ton for all the merchantable coal mined and removed and a fixed minimum cash rental of a certain stated amount per annum during the continuance of the lease can not refuse to pay the stipulated royalty on the ground of a mistake in reliance upon the lessor's ownership of one of the four tracts, and that by reason thereof more coal had been paid for than

was under the other three tracts, where all the facts concerning the disputed title were of record when the lease was made, and the mistake, if there was a mistake, was a mistake of law and not of fact.

Clark *v.* Lehigh & Wilkes-Barre Coal Co. (Pennsylvania), 95 Atlantic, 462, July, 1915.

TITLE TO LEASED TRACTS—MISTAKE AS TO ONE TRACT.

A lease of coal lands granted to the lessee all the coal underlying four contiguous pieces of land separately described, the lessee to hold the premises until he should have mined and removed therefrom all the merchantable and mineable coal, and to pay a stipulated royalty per ton thereon with a fixed minimum cash rental, such cash rental to be paid by royalties. The lessee after operating the premises for 20 years and mining and removing coal from all four of the demised tracts, paid the lessor all fixed cash rentals and royalties as they accrued; and the lessee while continuing to mine coal from the premises, and while all the merchantable and mineable coal had not been mined, refused payment of royalties and of rentals on the ground that the title and ownership of the fourth tract described in the lease was not in the lessor, but was in fact in the lessee, and that the lessee, believing and relying on the title and ownership by the lessor, had through accident and mistake paid more for coal than was in the other three tracts of land and was therefore under no obligation to pay the lessor for additional coal mined, but the lessee was entitled to reimburse himself for such overpayments from those tracts which the lessor did in fact own. Granting that the title to the fourth tract was in the lessee at the time of the execution of the lease, yet the mere fact that the lessee took the lease is not sufficient of itself to show that there was any mistake as to the title at the time the contract was executed; and as the leased property consisted of four small contiguous pieces of coal claimed by the lessor, none or not more than one of which was large enough for a coal operation, the lessor manifestly would desire to let the coal under the four pieces if at all, as working the smaller tracts as a separate operation would not be practicable. The court must assume, in the absence of a showing, that it was more than probable that the question of the title was disclosed, and while the lessee may have asserted title yet he agreed to take the lease as a compromise of any conflicting claims because of the advantages that would accrue therefrom; and after the lapse of 20 years, during which time the lessee has operated the coal and paid the rental, direct and satisfactory proof of the alleged mistake must be produced before a court of equity would relieve the lessee from the payment of the stipulated royalties.

Clark *v.* Lehigh & Wilkes-Barre Coal Co. (Pennsylvania), 95 Atlantic, 462, July, 1915.

CONSTRUCTION—ROYALTIES—RIGHT OF WAY CHARGES.

A coal lease obligated the lessee to pay the lessor as rent a graduated rent beginning with a certain stated rate per ton for large and prepared sizes and down to a smaller stated sum for coal dirt, mined and carried away or shipped from the demised premises, the rent increasing after a certain stated date. The lease contained a further obligation to pay a rent or right of way of 5 cents per ton on all coal mined from adjoining lands and carried through the demised premises, to be paid at the same time and in the same manner as the payment of rents on the coal mined. The lease obligated the lessee to mine and ship at least a certain stated number of tons of coal each month, payment of rents thereon to be made on the 15th of each succeeding month, such sum of money when added to the rents accrued during such month to be equal to a certain stated sum, and providing that any excess of rents for any month may be applied to a deficit for a succeeding month. The word "rents," as used with reference to the coal mined and shipped is construed as including the rent or royalty on coal mined from the leased premises, and does not include the right of way charge as part of the minimum royalty payable each month; and the lessee was required to pay the right of way charge in addition to the minimum monthly royalty; and when the lessee failed to mine the stipulated number of tons in any month it was required to pay the difference between the royalties on the coal actually mined and the minimum royalty fixed by the lease, and also to pay the right of way charge for coal carried through the leased premises.

Tustin *v.* Philadelphia & Reading Coal & Iron Co. (Pennsylvania), 95 Atlantic, 595, p. 597, July, 1915.

PURCHASE OF LEASE INDUCED BY FRAUD—ABATEMENT IN PRICE.

A coal-mining company is entitled to an abatement of the purchase price to the extent of the actual value of the property, where it was induced to purchase a mining lease by the false and fraudulent representation of a person interested in the lease and who was to and did receive the consideration for such lease, and who falsely represented that the coal in the leased mine was very low in ash and guaranteed that it was 25 per cent better than certain coals well-known to the purchaser, and furnished the purchaser an analysis showing that the coal contained but a comparatively small percentage of ash, when in truth and in fact the coal contained from 2 to 2½ times as large a percentage of ash as the other named coals, and where the mining company relied upon the representations, purchased the coal lease, and thereafter operated the mine and mined and sold the coal, and where the representations as to the quality of the coal were false and the

coal was not of the quality represented, but was greatly inferior in grade and could not be sold in the market as coal of the quality as represented, and by reason of the high percentage of ash in the coal it was practically impossible to market the product of the mine, and the value of the property was greatly less on account of the quality of the coal and was not in fact worth half as much as it would be if the coal were as represented.

Consumers' Fuel & Coal Co. *v.* Yarbrough (Alabama), 69 Southern, 897, p. 899, October, 1915.

OIL AND GAS LEASES.

CONSTRUCTION OF LEASE—TIME AS ESSENCE OF CONTRACT.

The fact that the statute of Oklahoma provides that time is never considered as the essence of a contract, unless by its terms expressly so provided, does not mean that time is never the essence of a contract unless these particular words are used in it, but if it appears from the provisions contained in a contract that it was the intention of the parties that time should be of the essence thereof, then it is within the reason of the statute.

Mitchell *v.* Provost (Oklahoma), 152 Pacific, 597, p. 599, October, 1915

NATURE AND CONSTRUCTION.

An agreement in the form of a lease for a limited term of years granting the right to explore for oil and gas and to retain that found and extracted is of a peculiar class, and the interest acquired by the lessee is more in the nature of a license than an estate in the land itself.

Mitchell *v.* Provost (Oklahoma), 152 Pacific, 597, p. 599, October, 1915.

UNILATERAL CONTRACT.

Oil and gas leases usually lack the mutuality essential to their validity, and a unilateral executory contract is in law a nudum pactum and unenforceable; and where such a contract is left to one of the parties to choose whether he will proceed or abandon it, neither can specifically enforce its execution in equity. Generally such leases of land for the exploration and development of oil or gas or other minerals are executed by the lessor in the hope and upon the condition, either express or implied, that the lands shall be developed for the minerals contemplated; and it would be unjust and unreasonable and would contravene the nature and spirit of the lease to permit the lessee to continue to hold under it any considerable length of time without making any effort to develop the premises according to the express or implied purpose of the lease.

Soaper *v.* King (Kentucky), 180 Southwestern, 46, p. 47, November, 1915.

OPTIONAL PROVISION—CONSTRUCTION AND CANCELLATION.

An oil and gas lease containing a provision to the effect that if a well is not drilled on the leased premises in one year from date, then the lease and agreement shall be null and void, unless the lessee within each and every year in advance, after the drilling of a well, shall pay a certain stipulated rental per acre for the first year, amounts to an option only and gives the lessor the right to cancel the agreement unless the conditions are complied with and such optional agreements are strictly construed in favor of the party that is bound and against the party that is not bound.

Mitchell *v.* Provost (Oklahoma), 152 Pacific, 597, p. 599, October, 1915.

LEASE AS INTEREST IN LAND—ASSIGNMENT—STATUTE OF FRAUDS.

Oil and gas are minerals and are a part of the realty, and a lease giving to the lessee the right to explore certain lands and remove therefrom the oil and gas is a contract for the transfer and sale of an interest in land and is required to be in writing; and as the lease itself is required to be in writing, so the assignment thereof must also be in writing, and a parol assignment of such a lease is within the statute of frauds.

Beckett *v.* Iseman Oil Co. (Kentucky), 178 Southwestern, 1084, September, 1915.

ACTION TO RECOVER ROYALTIES—PARTIES.

In an action by a lessor against the lessee for an accounting of royalties on oils produced under an oil and gas lease and where it is averred that the lessee after the execution of the lease assigned one-half thereof to a named third person, it is necessary that such third person be made a party in order that all rights might be litigated in the one suit.

Gardner *v.* South Penn Oil Co. (West Virginia), 86 Southeastern, 560, September, 1915.

LEASE FOR OIL DOES NOT INCLUDE GAS.

An oil and gas lease executed upon a certain stated consideration provided further that the lessee was to pay to the lessor a certain stated sum within 90 days after a well for oil and gas is drilled and oil produced in a pipe line in paying quantities, and to pay a like sum within 90 days after each paying well thereafter is drilled until the payments amount in all to a certain stated sum, does not require the lessee to pay the stated sum where a well was drilled on the premises which produced gas only.

Ball *v.* Freeman (West Virginia), 87 Southeastern, 91, November, 1915.

DRAINING ADJOINING LANDS—RIGHT TO ACCOUNTING.

While oil wells drilled and operated may, by reason of their proximity to a division line, in fact drain oil from adjoining lands, yet

such operations, in the absence of special circumstances or relations between the parties, offer no basis for a claim to a share in or an accounting for the oil so produced, or for a receivership for the operation of the wells so drilled.

Gain *v.* South Penn Oil Co. (West Virginia), 86 Southeastern, 883, p. 885, October, 1915.
See Fairbanks *v.* Warrum (Indiana Appeals), 104 Northeastern, 983, p. 986.

DRILLING NEAR LINE—FRAUD NOT IMPUTABLE.

A lessee who obtained an oil and gas lease from the owner of land and who was unable to obtain a lease from the adjoining landowner, is not to be charged with fraud by the latter and is not liable to such adjoining landowner for any part of the oil produced by him from wells on the leased land, though located so near the line as to drain the oil from the adjoining premises, and the mere execution of such a lease causes no inference of a fraudulent intent and justifies no implication of a purpose on the part of the lessee to wrong the adjoining landowner.

Gain *v.* South Penn Oil Co. (West Virginia), 86 Southeastern, 883, p. 885, October, 1915.
See Fairbanks *v.* Warrum (Indiana Appeals), 104 Northeastern, 983, p. 986.

FORFEITURE OF OIL AND GAS LEASE FAVORED.

While the general rule is that forfeitures are not favored by the law, yet forfeitures on the part of lessees in oil and gas leases, which arise by reason of the neglect of the lessees to develop or operate the leased premises, are favored by the law because of the peculiar character of the product to be produced.

Mitchell *v.* Provost (Oklahoma), 152 Pacific, 597, p. 599, October, 1915.

Forfeitures generally are not favored by the law, but forfeitures which arise in gas and oil leases by reason of the neglect of the lessee to develop or operate the leased premises are rather favored because of the peculiar character of the product to be produced, and in such cases it is necessary to guard the rights of the landowner as well as public interests by numerous covenants, some of the most stringent kind, to prevent other lands from being drained by unexecuted and profitless leases incompatible with the rights of alienation and the use of the land; and so forfeiture for nondevelopment or delay is essential to profit and public interests in relation to the use and alienation of properties and prompt performance of contracts so essential to the rights of the parties, or delay by one party likely to prove so injurious to others, is perhaps found in no other business. However, if the lessor accepts the annual rentals the contract will be perpetuated, but he may at the end of any rental period decline to accept rent and require the lessee to begin operations for oil or gas.

Soaper *v.* King (Kentucky), 180 Southwestern, 46, p. 47, November, 1915.

RIGHT TO RENTALS—FORFEITURE.

Under an oil and gas lease the lessee agreed to commence a well on the premises within 90 days from the date or to pay the lessor 25 cents per acre at the end of each three months thereafter or forfeit the lease, but the completion of such well should be a full liquidation of all rentals during the remainder of the term; and it further provided that the lessee should at any time upon the payment of $1 reassign the lease to the lessor and be released from all conditions imposed, but if any rentals were due at the time the same should be paid to the date of reassignment, and upon the failure of the lessee to commence a well within the stated time, or pay the specified rents or reassign the lease according to its terms, the lessor may at his option declare the lease forfeited, or sue for the rentals under the lease.

Lamar *v.* Farmer (Indiana Appeals), 109 Northeastern, 791, October, 1915.

FAILURE TO DEVELOP—RIGHT OF LESSOR TO CANCEL.

An oil and gas lease covering a large tract of land for a nominal consideration and the further agreement of the lessee to pay the lessor one-eighth of all the net proceeds arising from the sale of oil and gas or other mineral, the lease further reciting that the rights and exclusive privileges were granted in consideration that the lessee should begin in good faith to drill one or more wells on some part of the land within two years from the date of the lease, and upon failure so to do the lease should be void, may be forfeited by the lessor after the expiration of the two years where the lessee did no more than drill a well upon the leased premises to a depth of about 200 feet, and found a vein of coal, but work in the development of the land ceased with the discovery of the coal, though the lessor never demanded or notified the lessee that the lessor desired or required that the coal and minerals underlying the leased lands should be mined and developed.

Soaper King (Kentucky), 180 Southwestern, 46, November, 1915.

EFFECT OF SURRENDER CLAUSE—SPECIFIC PERFORMANCE.

A surrender clause in an oil and gas lease which gives to the lessee the right at any time to surrender and terminate the lease, after which all payments or liabilities should cease and terminate, deprives the lessee of the right of specific performance, directly or indirectly, until he has performed the contract or placed himself in such a position that he might be compelled to perform it on his part.

Hill Oil & Gas Co. *v.* White (Oklahoma) 151 Pacific 1051 p. 1052 (October, 1915).

TAXATION.

CORPORATION TAX—CORPORATION IN HANDS OF RECEIVER.

Section 5506 of the General Code of Ohio refers to fees, taxes, and penalties required to be paid only by corporations doing business, and does not intend that a receiver shall pay such fees, taxes, and penalties, as the penalties are required to be paid only by corporations doing business, and the purpose of the statute is to fix a lien for the payment of the tax by the corporation required to pay it upon the property employed in the transaction of its business or in the hands of a receiver, or if the property has gone into the custody of a court of equity through its receiver, and the receiver must recognize the lien of the statutes upon the assets in his hands for the tax of a preceding year imposed upon the corporation when it was doing business; but this section of the statute does not impose a tax when the reason for the tax and its only justification no longer exist. This construction of this section reconciles it with the other sections of the statute on the same subject, which the court is bound to effect if possible, and brings about a result not only equitable, reasonable, and just, but also in consonance with the clear intention of the legislature to impose a tax upon the right granted by the State to be a corporation and to continue to do business as such.

Keeney *v.* Dominion Coal Co., 225 Federal, 625, p. 627.

METHODS OF DETERMINING VALUE.

Where in the valuation of coal lands by county commissioners for the purpose of taxation it appears that the rules applying to coal lands and improvements thereon were properly applied, the valuations as fixed by former assessors, commissioners, the coal tax commission, and the witnesses, will not be disturbed on appeal when considered in connection with the depreciation from exhaustion, as well as the enhancement from the advance in the price of coal and the general increase in value of coal lands as shown by the evidence.

Philadelphia & Reading Coal & Iron Co. *v.* Commissioners of Northumberland County (Pennsylvania), 95 Atlantic, 406. May, 1915.

METHOD OF FIXING VALUE—PRESUMPTION—EVIDENCE.

In the taxation of mining property the taxing authorities make out a prima facie case by the introduction in evidence of the assessment of record in the office of the county commissioners as provided by the board of revision, with such other books and data as may be on file relating to the valuation of the mining property in question. This method of procedure is based upon the presumption that public officers do their duty and have done so in fixing the valuation of mining property for taxation the same as in the performance of other official acts. But this presumption may be rebutted by evidence showing that the official acts complained of were not in compliance with what the law requires in the performance of a particular official duty; and if the evidence shows that the board of revision acted arbitrarily, or without sufficient reliable information and evidence, or without substantial bases to justify their decision, a prima facie case based upon such a presumption is rebutted, and should be so treated by the chancellor, who must determine questions in controversy in the light of the evidence offered and admitted at the hearing.

Lehigh Valley Coal Co. *v.* Northumberland County Commissioners (Pennsylvania), 95 Atlantic, 712, July, 1915.

VALUES DETERMINED ACCORDING TO EVIDENCE.

Tax assessment cases should be heard and decided as other cases of similar character brought before a judicial tribunal, and courts in fixing the value of mining properties can not ignore or disregard the rules of procedure and fix the valuation, not upon the weight of the evidence produced, but rather upon the general information of court and counsel. The weight of the evidence as to such values should be decisive with the court, and the burden is always on the litigants to introduce the evidence relied on to support their respective contentions, and it is not for the court to fix the valuation of such properties at what he as an individual might think them worth, but his conclusions should be based upon the evidence introduced by the parties, and it is the duty of a court to consider conflicting evidence and decide the issue involved, having due regard to the weight of the evidence.

Lehigh Valley Coal Co. *v.* Northumberland County Commissioners (Pennsylvania), 95 Atlantic, 712, p. 714, July 1915.

INDEPENDENT USE OF MINING CLAIM—SURFACE AND MINERALS.

Under the statute of Utah (Laws of 1907, section 2504) mining claims as such may be assessed at the specific valuation affixed by the statute, while the surface ground if used for other than mining

purposes, and if it has a value separate and independent from mining claims as such, may also be assessed separately and distinct from the mining claim; and if a person is in actual and adverse possession of the surface ground of a mining claim, for the period of time required by the statute and has during that time improved the surface under a claim of right, such person may be assessed with the surface area and the improvements thereon; and the payment of taxes by him will be sufficient to entitle him to make a claim of adverse possession to the surface thereof together with the improvements thereon, as against the owner of the mining claim, though the latter may have paid the taxes on the mining claim as such and in accordance with the fixed valuation thereof and may claim all the minerals beneath the surface.

Utah Copper Co. *v.* Eckman (Utah), 152 Pacific, 178, p. 180, October, 1915.

FINDING AS TO PAYMENT OF TAXES BY SURFACE AND MINERAL OWNER.

While under an allegation of general ownership a party, either plaintiff or defendant, may prove the character of such ownership by proving adverse possession and payment of taxes, yet however general the pleadings in that regard may be in case the surface ground of a mining claim is not questioned, the evidence and findings upon the question of payment of taxes should be direct and specific and it should be found whether merely surface possession together with improvements is claimed, or whether the title to the whole claim is asserted; and in either event the assessment and payment of taxes should be shown and found so that a court may determine the relative rights of the surface and mineral owners.

Utah Copper Co. *v.* Eckman (Utah), 152 Pacific, 178, p. 180, October, 1915.

ASSESSMENT OF OMITTED PROPERTY—DECISION OF JUDGE.

Proceedings of revenue agents to cause mining property in the nature of a mining lease to be listed for taxation, which has been omitted by the owners, the assessors, or the boards of supervisors, are special proceedings provided for by the statute and the judge of the county court acts in a ministerial capacity and as such is the only one of the agencies provided by law for assessing such property for taxation; but his judgment is the judgment of a court and to the extent of determining whether property has been assessed or omitted and its value, he acts judicially, and the same rule applies to the circuit court upon an appeal from a judgment of the county court.

Stearns Coal & Lumber Co. *v.* Commonwealth (Kentucky), 179 Southwestern, 1080, p. 1082, November, 1915.

ASSESSMENT OF OMITTED PROPERTY—TRIAL BY JURY.

In proceedings of revenue agents under the statute of Kentucky before the county court with the right to appeal to the circuit court, for the assessment and taxation of omitted mining property, a trial by jury is not contemplated, and the property owner is not entitled to such a trial.

Stearns Coal & Lumber Co. *v.* Commonwealth (Kentucky). 179 Southwestern, 1080, p. 1082, November, 1915.

STATUTORY LIENS.

ENFORCING MINER'S LIEN—PLEADING.

A complaint to foreclose a lien of a miner for services performed by him in a mine is sufficient where it alleges that he was employed by the duly authorized agent of the mining corporation and began work upon the property as an underground miner, with pick and shovel and other usual tools used in such work, and that he performed a certain stated number of days' labor at an agreed wage of a certain stated price per day, thereby earning a stated total sum and of which there was due him a certain stated amount from the mining company; that such labor and services were done and performed in the working, development, and operation of the mining property described and were for the benefit of such property; and on a certain stated day he did, for the purpose of securing and perfecting a lien for the money due him under his contract, file and cause to be recorded in the office of the county clerk his claim and notice of lien duly verified by him; that such claim and notice contained the name of the lien claimant, a true statement of his claim and demand after deducting all just credits, the name of the owner and reputed owner of the mining property, and the name of the person by whom the claimant was employed, a true statement of the contract under which such services were performed, a description of the property charged with the lien sufficient for identification, and which claim and lien were verified by the oath of the claimant; and that said claim of lien has not in any way been satisfied or discharged, and the same is now a valid subsisting lien upon such property.

Haines Commercial Co. *v.* Graville (Oregon) 152 Pacific, 877, p. 878, November, 1915.

MINER'S LIEN—SUFFICIENCY OF STATEMENT.

Under the statute of Oregon a miner in his notice of lien is not required to segregate his demand for overtime work from the amount due under his contract of employment; but he is required only to make a true statement of his demand after deducting all just credits and offsets.

Haines Commercial Co. *v.* Graville (Oregon), 152 Pacific, 877, p. 879, November, 1915.

MINER'S LIEN PRIOR TO MORTGAGE.

The amendatory act of 1907 of Oregon, providing for liens in favor of persons performing labor in or upon any mine or mining claim, gives such liens a priority over all other claims and liens, and is superior to mortgages; and a mortgagee accepting a mortgage subsequent to such amendatory act is not deprived of his property right without due process of law, because his lien would be postponed to the liens of such laborers.

Haines Commercial Co. *v.* Graville (Oregon), 152 Pacific, 877, p. 879, November 1915.

DAMAGES FOR INJURIES TO MINERS.

ELEMENTS OF DAMAGES.

FUTURE SUFFERINGS.

In an action by a miner for damages for injuries caused by the negligence of the mine operator, where it appears from the evidence that the miner will continue after the trial to endure sufferings from his injuries, he may recover therefor, regardless of whether there is permanent impairment of earning power pleaded or proved.

Moses *v.* Proctor Coal Co. (Kentucky), 179 Southwestern, 1043, p. 1044, November, 1915.

DAMAGES EXCESSIVE.

INSTANCE.

A verdict of $2,000 in favor of a miner who received a shock by coming in contact with an electric wire carrying 250 volts is grossly excessive where the miner was able to return to his work on the day on which he received the injury, and after being absent the next day returned and worked the two succeeding days, and was then confined to his bed about three weeks, but where the evidence showed that the injuries of which he complained were not attributable to the shock he received but to other causes.

Imperial Jellico Coal Co. *v.* Neff (Kentucky), 179 Southwestern, 829, p. 830, November, 1915.

TRANSPORTATION OF COAL—COMPETITION AND RATES.

Competition for carriage of the same anthracite coal does not usually exist, as each carrying company has its own tributary mines, and because of topographical conditions these are not reached by any other carrier. The coal is mined and brought to the surface and prepared for market at the mines, and is there loaded upon the cars of the carrier that serves the particular mine, and is then sent forward either to its ultimate destination or to barges that complete the carriage when water transportation is necessary or desirable. Accordingly, the competition is in the markets, and it would be idle for one carrier to attempt to interfere with the traffic of a rival. While carriers might combine to fix rates at an oppressive sum, yet in the absence of such a charge the question whether a rate is exorbitant is to be determined by the Interstate Commerce Commission and not by the courts.

United States *v.* Reading Co., 226 Federal, 229, p. 263.

LEASE AND LIMITATIONS ON SHIPMENT OF COAL—UNLAWFUL RESTRICTIONS.

A lease provided that a certain railroad should pay as rental one-third of the gross receipts of another railroad company and provided that all the coal mined by a certain-named mining company on its own lands should be sent to market over the roads of the two railroad companies named, "when destined to points or markets reached by said roads; and, when destined for markets not so reached, it shall be sent as far as practicable over the said road." But this covenant in the lease did not apply to one-fourth of the coal mined by the mining company in a particular-named region and this might be sent to any market not reached by railroad lines running in a certain direction and to certain markets. The provisions of the lease were subsequently modified to the effect that when one-third of the gross receipts should fall short of a certain stipulated amount, the lessee should make up the deficiency; but when one-third of such gross receipts should exceed another and a larger stated sum, then the coal company should relinquish any claim to the excess. Still later

another change was made permitting the one-fourth referred to in the lease to be sent to market over lines other than that of the railroad company mentioned and its branches, if by so doing the mining company could realize a larger profit than could be realized if coal were shipped over the railroad named. These provisions and covenants do not impose unlawful restrictions on the coal company's shipments as the covenants relate to the shipment of coal in the direction of the best markets for the particular coal named and the company has plenty of coal available for the market in other directions, but for reasons of economy it prefers to restrict its shipments in the one particular direction, and this restriction is voluntary, and is due to the fact that its coal can be sold elsewhere to better advantage. While the interests of the coal company are best advanced by shipping a large proportion of its coal to markets reached by the railroad named, the coal company does not regard itself as absolutely bound to ship three-fourths of its output over such road, and the coal company's production has not been diminished by reason of such restrictions, but has largely increased.

United States *v.* Reading Co. 226 Federal, 229, p. 264.

COMBINATION OF COAL COMPANY AND RAILROAD COMPANY NOT ILLEGAL.

The ownership of coal lands and the business of coal mining, and the use of a railroad to get coal to market, are all lawful. Under such circumstances the railroad company and the coal company are not competitors but each performs its own function in putting a useful article in the hands of consumers. The fact that a coal company is a large producer of coal, and therefore a large seller and shipper, is not in itself an offense against the Sherman antitrust statute; but in some aspects it may be regarded as a merit, for the more coal the company produces the more extensive would be its operation, thus benefiting labor and the merchants that furnish supplies to the mines, and the larger would be the quantity at the consumers' command; and under such circumstances a combination of the coal company and the railroad company, through the medium of a holding company owning the stock of both, is not necessarily a violation of the antitrust act, unless unlawful methods or practices are resorted to, which tend to restrain competition and create a monopoly.

United States *v.* Reading Co., 226 Federal, 229, p. 268.

MINING AND SELLING LARGE QUANTITIES OF COAL NOT AN OFFENSE.

The fact that the coal-land holdings of a coal company are large and that the coal company ships and sells the largest percentage of all the anthracite coal that reaches the market, is not alone sufficient

to constitute an offense against the Sherman antitrust act, in the absence of any showing of harm or injury. Under such circumstances but three classes of persons could be injured: (1) Rival producers on a large scale, who might be injured by unfair methods of competition; (2) smaller producers, who might suffer by similar methods; and (3) the consumer, who might suffer by extortionate prices. But in the absence of proof that either of these classes of persons has sustained injuries, the charge of unlawful competition or restraint necessarily fails.

United States *v.* Reading Co. 226 Federal, 229, p. 268.

COMBINATION OF COAL COMPANIES BY HOLDING COMPANY UNLAWFUL.

A combination by which a holding company, already the owner of the capital stock of a railroad company and of a coal company, purchased the majority stock in another railroad company which owned practically all the stock of another coal company, where it appears that the two railroads have been carrying anthracite coal of these two large producers to the same markets where the coal has been sold in competition and where it appears that these two carriers transport practically one-third of the total tonnage of anthracite coal carried by the railroads that reach the anthracite field, and the two coal companies dispose of more than 20 per cent of all the anthracite coal sold on the market, is a union of the two companies in the same ownership that creates a combination in restraint of interstate trade in violation of the Sherman Antitrust Act.

United States *v.* Reading Co., 226 Federal, 229, p. 271.

INTERSTATE CARRIAGE OF COAL—SINGLE OWNERSHIP OF RAILROAD AND COAL COMPANY.

The act of 1906 (34 Stat 585) does not forbid a railroad company holding stock in a coal-mining corporation, if such corporation be a bona fide organization; and coal mined and produced by such a corporation may be lawfully carried by a railroad company although such railroad company is a stockholder in the mining corporation; and this is true without regard to the extent of the railroad's stock ownership, whether a part or the whole; but under such circumstances the railroad company must not use the power given by such ownership to obliterate the distinction between the two organizations and must not exert its power so as to commingle indistinguishably the affairs of both and thus cause the two corporations to be one for all purposes and it must not destroy the entity of the producing or mining corporation and thus make the two virtually one; and if it actually do these forbidden things, then the commodities clause

applies and condemns as unlawful such abuse of a lawful right. The fact that the capital stock of a railroad company and of a coal company was owned by a holding company and the coal mined by the mining company was carried by the railroad company is not an offense against the commodity clause of the statute where it is made to appear that the railroad company did not mine or produce the coal transported for the coal company, and where the railroad company did not own or have any interest, direct or indirect, in the coal transported.

United States *v.* Reading Co., 226 Federal, 229, p. 273.

PUBLICATIONS ON MINING LAWS AND METHODS OF MINING.

Limited editions of the following Bureau of Mines publications are temporarily available for free distribution. Requests for all publications can not be granted, and applicants should select only those publications that are of especial interest to them. All requests for publications should be addressed to the Director, Bureau of Mines, Washington, D. C.

BULLETIN 17. A primer on explosives for coal miners, by C. E. Munroe and Clarence Hall. 61 pp., 10 pls., 12 figs. Reprint of United States Geological Survey Bulletin 423.

BULLETIN 45. Sand available for filling mine workings in the northern anthracite coal basin of Pennsylvania, by N. H. Darton. 1913. 33 pp., 8 pls., 5 figs.

BULLETIN 48. The selection of explosives used in engineering and mining operations, by Clarence Hall and S. P. Howell. 1913. 50 pp., 3 pls., 7 figs.

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